INVESTMENTS AND PUBLIC FINANCE

Errata

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The Impact of Changes in the Interpretation of Normative Acts on the Stimulating Function of the Tax on the Example of The Polish Real Estate Tax

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Introduction

On September 23–24, 2021 the 20th annual conference of the International Center of Public Finance and Tax Law Research was held in Kazahstan. Previous conference of the Center, formerly "Center for Information and Organization of Public Finance and Tax Law Research of the Countries of the Central and Eastern Europe" took place in Białystok (2002), Brno (2003), Vilnius (2004), Kosice (2005), Grodno (2006), Voronezh (2007), Paris (2008), Lviv (2009), Prague (2010), Gyor (2011), Białystok (2012), Omsk (2013), Mikulov (2014), Kosice (2015), Białystok (2016), Vilnius (2017), Prague (2018), Grodno (2019), Budapest (2020). More information on the Center and its scientific activity can be found at the website www.centeroffinance.org.

The conference in 2021 was co-organized by the Caspian University, Adilet Law School. Due to the COVID-19 reasons, the conference had a hybrid (traditional and online) character. This monograph comprises the papers presented during this conference.

The topic of the conference was public investments. Public investments constitute a significant part of public finance understood as processes of collecting public revenues and spending public expenditure. Public investments, understood broadly, cover road infrastructure, housing, agriculture, ecology, healthcare, defence, education, or employment support. Without public investment, there is no stable functioning of the state and its sustainable development. Public investments require appropriately shaped legal regulations. This book, being on the carrefour of the financial and civil law, contains articles on this subject.

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Improving the Procedures for Concluding Transfer Pricing Agreements in Russia and Kazakhstan: a Comparative-Legal Analysis

Abstract: The article provides a comparative analysis of the procedure for considering and concluding transfer pricing agreements in the countries of the Organization for Economic Cooperation and Development, the Russian Federation and the Republic of Kazakhstan. The issues of determining the parties to the transfer pricing agreement, introducing amendments and additions to them, the timing of the final decision on the application of entrepreneurs to conclude an agreement, as well as the list of documents required for its signing are to be investigated. The discussions of civil scientists regarding the interpretation of the nature of agreements on pricing, namely, referring them to one of the types of tax control or to a contractual form of regulation of relations in the field of taxation have been studied and reflected. The positive and negative aspects of transfer pricing agreements for the state and business have been identified. It is noted that pricing agreements can help achieve a balance of public and private interests, neutralize the negative aspects of the use of transfer prices, including reducing numerous disputes and litigation between entrepreneurs and government agencies. Proposals were made to amend and supplement the legislation on transfer pricing in Russia and Kazakhstan in terms of improving the procedure for concluding transfer pricing agreements for tax purposes.
Keywords: transfer price, transfer pricing, transfer pricing agreement, transaction, business and tax risks

Introduction

The latest world events related to the collapse of oil prices, the announcement of a pandemic, etc., should trigger the search for new solutions to the problems of the economy and trade. In these realities, attention should also be paid to the issues of transfer pricing, which is understood as the process of formining the price in state-controlled transactions. In addition, in recent years, this institution has increasingly attracted the attention of state bodies and the public, who tend to believe that it is used exclusively to minimize taxes.

It is believed that the statement about the use of transfer prices by companies solely for the purpose of tax evasion or minimization is erroneous. Sharing the opin-

ion of Grundel L.P., we believe that they (transfer prices) act as a tool for rational planning of the company's activities and their use is not a violation of the law [Grundel 2014, p. 160].

One of the ways to resolve conflicts of application of transfer prices are pricing agreements.

In this regard, we analyzed the legal norms governing the conclusion of transfer pricing agreements in Russia and Kazakhstan in order to identify conflicts and gaps in this area, as well as develop proposals for their improvement.

In the course of the study, general scientific (analysis, synthesis and a systematic approach) and special (formal legal, historical legal, comparative legal) methods of cognition were used.

The theoretical basis was the work of scientists in the field of civil, business, financial and other branches of law.

Research Results

It has been established that an agreement on the application of transfer pricing is concluded between the business entity and the tax authority on the procedure for formining prices in controlled transactions. Its essence lies in the fact that the parties reach an agreement on the methods and sources of pricing used in transactions, in connection with which the likelihood of disputes and penalties is reduced [Volvach 2014, pp. 6–7].

It is especially productive for businessmen to sign these agreements in the absence of the necessary information about market prices in open sources of information, the uniqueness of their products and services provided, as well as when setting prices in foreign trade transactions.

The latter is due to the fact that agreed prices for international transactions minimize disputes in two or more jurisdictions at once.

One of the advantages of pricing agreements is the ability of firms to forecast taxes, reduce the level of application of sanctions, and simplify tax and financial planning. In addition, the state budget has a guarantee for a certain amount of tax revenues and investment growth. An additional positive effect for business and government agencies is the savings in time and effort spent on providing a reasonable position on pricing.

However, there are certain difficulties for the state in the application of transfer pricing agreements. So, according to Grundel L.P., these difficulties include: the need to make decisions that are significant for the interests of the budget; establishing relations with tax authorities of other countries (in the case of bilateral agreements), etc. [Grundel 2013, pp. 48–54].

In turn, as noted by Goncharenko L.I. and Vishnevskaya N.G., there is a high degree of risk of errors by officials when signing pricing agreements, since the decision to conclude it is made on the basis of predicted data on the compliance of future prices with market levels and taxes that will be charged in subsequent years [Goncharenko and Vishnevskaya 2015, p. 118].

There is an ambiguous attitude towards this institution in the legal doctrine. One group of researchers explains the nature of the agreement as a contractual form of regulation of relations in the field of taxation (Mukhamadeeva G.A., Shestakova E.V., Starilov Y.N., Davydov K.V., Ershova I.V., Demin A.V., Barulin S.V. and others). Supporters of a different interpretation of the essence of the pricing agreement mechanism see in it one of the forms of (preliminary) tax control of transfer pricing, mediated through the concept of an agreement, which does not provide for the establishment of obligations through a contract and is unequal to it (Kopina A.A., Tyutin D.V. and etc.) [Cherezov 2019, pp. 109–110]. In general, a compromise point of view is not excluded, according to which the transfer pricing institution is complex, harmoniously combining the norms of private and public law. This point of view has a right to exist.

At the same time, in the countries of the Organization for Economic Cooperation and Development (hereinafter – OECD), the institution in question has been successfully functioning for a long time. For example, the legislative possibility of concluding pricing agreements has existed in the USA and Australia since 1991, in the UK since 1999, Poland since 2006 [Grundel and Pinskaya, 2012, p.112.], Hungary since 2007, etc. In OECD countries, the subject of a pricing agreement can be an enterprise (companies) of any category (small, medium or large business), including non-residents (Great Britain, Czech Republic, Poland), and the agreements themselves are divided into unilateral, bilateral and multilateral (in Hungary, Canada, Poland, The USA, Czech Republic they apply all 3 types of agreements). Moreover, a simplified procedure for concluding preliminary agreements on pricing is widely applied to small and medium-sized enterprises (in the USA since 1996, the Netherlands since 2004, Canada since 2005, Germany and France since 2006, Australia since 2011, South Korea since 2015, etc.). Typically, the documentation requirements are lower than those in the normal pricing agreement process, and the cost of entering them is also lower [Kornienko, Minina, Korolev, Mitrofanova and Pushkareva 2021].

In most of these countries, the maximum duration of pricing agreements is up to 5 years (Hungary, Germany, Israel, Canada, Poland, France, Sweden). In addition, some countries impose fees for considering applications from entrepreneurs to conclude pricing agreements and / or making changes to them, which depend on the taxpayer category (the USA, France), type of agreement (Hungary) or transaction value (Poland). However, it is also practiced to establish a fixed amount of fees (Germany, Canada, Mexico, Czech Republic, Sweden) [Grundel 2021].

Note that the first pricing agreement was signed almost 30 years ago, back in 1991 in the United States. It was concluded between the United States, Australia and the Apple computer concern with the aim of settling prices in relations with the Australian subsidiaries of the company. Subsequently, similar agreements were concluded with Canada (1993) and Singapore (1995). This program is called "Advanced Pricing Agreements" [Kostikova 2008, pp. 53–56].

In general, it should be especially noted that the issues of consideration and conclusion of pricing agreements in OECD countries are resolved in almost the same way, since this is provided for in the rules of the international organization themselves, as well as in international legal procedures [Kornienko, Minina, Korolev, Mitrofanova and Pushkareva 2021].

Another example: in the countries of the Eurasian Economic Union (hereinafter referred to as the EAEU), the practice of concluding pricing agreements is also gradually being introduced (in Kazakhstan since 2008, Russia since 2012, Belarus since 2019). Let's consider the experience of Russia and Kazakhstan on such agreements.

Kazakhstan was the first among the EAEU countries to provide for the possibility of concluding agreements on the application of transfer prices, which was enshrined in 2008 in the Law of the Republic of Kazakhstan "On Transfer Pricing" (hereinafter – the Law of the Republic of Kazakhstan No. 67–IV) [Kazakhstanskaya Pravda 2008]. Currently, the rules for concluding an agreement on the application of transfer pricing, adopted in 2011 [Kazakhstanskaya Pravda 2012], are also in force (hereinafter – the Rules of November 24, 2011).

In Russia, the practice of signing pricing agreements has been in effect for 9 years. So, from January 1, 2012, the Federal Law of July 18, 2011 No. 227-FL "On Amendments to Certain Legislative Acts of the Russian Federation in Connection with the Improvement of the Principles for Determining Prices for Tax Purposes". The specified act has supplemented the Tax Code of the Russian Federation (hereinafter – the Tax Code of the Russian Federation) with a special section V.1 "Interdependent Persons. General provisions on prices and taxation. Tax control in connection with transactions between related parties. Pricing Agreement" [Belykh 2011, pp. 2–10].

These innovations and the signing of the first pricing agreement between OJSC NK Rosneft and the Federal Tax Service of the Russian Federation in 2012 (hereinafter referred to as the Federal Tax Service of the Russian Federation) attracted close attention of foreign experts, who indicated the possibility of further development in Russia international principles of transfer pricing [Kostin 2013, pp. 67–68]. Nevertheless, today the rules for concluding pricing agreements in Russia and Kazakhstan do not allow considering them as a risk minimization tool available to a wide range of entrepreneurs. In particular, according to the Tax Code of the Russian Federation, only the largest Russian taxpayers are given the opportunity to conclude agreements on pricing (Article 105.19 of the Tax Code of the Russian Federation). According to Kuzmin D.V., this is due to the fact that "transfer pricing is used in most cases by

vertically integrated structures, and the total amount of taxes and proceeds from the sale of goods, works and services allows them to be classified as the largest taxpayers" [Kuzmin 2021] (by order of the Federal Tax Service of the Russian Federation of May 16, 2007 No. MM-3–06 / 308 approved the criteria for classifying organizations – legal entities as the largest taxpayers).

Representatives of foreign companies operating in Russia are also deprived of the right to conclude agreements on pricing following the example of Russian organizations. Moreover, in relation to permanent establishments of foreign companies, the amount thresholds that are in effect when controlled transactions of Russian companies are detected (Article 105.14 of the Tax Code of the Russian Federation) ["Collection of Legislation of the Russian Federation" 1998] are not formally applied. Consequently, all transactions made by them with all the ensuing consequences can fall under their control. This fact leads to the complication of doing business on the territory of the country and significant labor costs both within the representative offices themselves and within the Russian organizations cooperating with them. In short, the investment attractiveness of the country is decreasing.

In turn, in Kazakhstan, any entrepreneur potentially has the opportunity to conclude a pricing agreement for controlled transactions. This also applies to non-residents – permanent representative offices of foreign companies. This conclusion follows from the following norms.

According to Article 5 of the Law of the Republic of Kazakhstan No. 67–IV, the parties of the transaction or members of an international group have the right to conclude the agreements under consideration. In this case, a participant in a transaction means an individual or legal entity that has entered into a controlled transaction (clause 16 of Article 2 of the Law of the Republic of Kazakhstan No.67–IV). As you can see, the legislator does not endow the transaction participant with any additional features, including the presence of residency. Also, the right to conclude an agreement is granted to a member of an international group, which may include non-residents of Kazakhstan, but who carry out entrepreneurial activities in the state through a structural unit, a permanent establishment (clause 30–1 of Article 2 of the Law of the Republic of Kazakhstan No. 67–IV). Among other things, the authorized bodies do not have the right to refuse an entrepreneur to conclude an agreement due to the lack of residency or other characteristics of the business (clause 6 of the Rules of October 24, 2011).

It should be noted that in Russia there is a possibility of concluding unilateral and bilateral agreements. The difference between these agreements is that the executive authority of a foreign state participates in the "bilateral" ones [Kostin 2013, pp. 67–68]. However, in Kazakhstan it is still possible to conclude only unilateral agreements. The fact that Kazakhstan has not provided practical procedures for the application of the existing conventions on the elimination of double taxation and in terms of transfers also speaks against the Kazakh legislation on transfer pricing.

Also, according to Russian legislation, a pricing agreement is concluded only in relation to one transaction or a group of similar transactions (clause 1 of Article 105.21 of the Tax Code of the Russian Federation) ["Collection of Legislation of the Russian Federation", 1998]. But the legislator does not answer the question of what is meant by a transaction. At the same time, in the notification of controlled transactions, in order to apply the transfer price control rules, each delivery is reflected, drawn up in a separate primary document (consignment note or act). When applying this approach, it is obvious how significantly, in the presence of several heterogeneous transactions, the costs of the enterprise for the conclusion of these agreements can increase. In turn, in Kazakhstan, the legislator does not specify the number or types of transactions for which the considered agreements are concluded.

So, we can formulate the following conclusion: the procedure for concluding an agreement on pricing in Russia and Kazakhstan provides for the entrepreneur to provide a large package of documents.

Since 2021, in Russia, the list of documents that must be attached by the taxpayer to the pricing agreement has been reduced from 8 to 6 points (clause 1 of Article 105.22 of the Tax Code of the Russian Federation) ["Collection of Legislation of the Russian Federation" 1998]. So, according to the Federal Law "On Amendments to Part One of the Tax Code of the Russian Federation (in terms of improving tax control over prices and the procedure for concluding an agreement on pricing for tax purposes)" dated February 17, 2021 No. 6-FL, this list has been reduced to 6 points (copies of constituent documents and certificate of state registration of a taxpayer were excluded) ["Official Internet portal of legal information" 2021]. However, it still remains open, which actually gives the tax authority the opportunity to leave at its own discretion the decision on whether the documents were submitted in full (clause 1, clause 8, Article 105.22 of the Tax Code of the Russian Federation). As a result, this circumstance may serve as the basis for refusal to sign the agreement (clause 8 of Article 105.22 of the Tax Code of the Russian Federation).

In Kazakhstan, the list of documents to be submitted consists of 10 items, but it is closed (clause 3 of the Rules of October 24, 2011). However, some of the requested documents are in the possession of the tax authorities. This applies, in particular, to a certificate or certificate of state registration (re-registration) of a legal entity.

Further, we note that the legislation of Russia and Kazakhstan provides for the same period of validity of the pricing agreement equal to 3 years (Article 105.21 of the Tax Code of the Russian Federation; clause 5 of the Rules of October 24, 2011).

Unlike Kazakhstani legislation, in Russia, an entrepreneur, subject to all the conditions of the pricing agreement, has the right to apply to the authorized body with an application to extend the validity of the pricing agreement for no more than two years (Article 105.21 of the Tax Code of the Russian Federation). Considering the complexity and cost of the process of signing a pricing agreement, it is considered to be positive that there is a possibility of extending its validity period. By the way, in in-

ternational practice, the maximum duration of such agreements is usually 5 years (in the USA – 6 years).

At the same time, it is difficult to predict and take into account possible changes in the price structure and pricing policy, which are influenced by both internal and external factors. As noted by Olofinskaya Y.P., fluctuations in the market price level can be triggered by changes in the geopolitical situation, exchange rate, production conditions, and so on. Therefore, a fixed price for several years is too risky. In this connection, the law should provide for the conditions and circumstances of amending the pricing agreements [Olofinskaya 2014, p. 56]. The above is formulated in clause 12 of Article 105.22 of the Tax Code of the Russian Federation. However, there is no such rule of law in the legislation of Kazakhstan.

There are many questions regarding the timing of consideration of applications for signing agreements. In Russia, the tax authorities have the right to consider applications from entrepreneurs for concluding pricing agreements for up to 6 months (clause 4 of Article 105.22 of the Tax Code of the Russian Federation). In this case, the data period can be extended up to 27 months. In turn, in accordance with clause 3 of the Grounds and the procedure for extending the period for considering an application for concluding a pricing agreement for tax purposes and the documents attached to it (approved by order of the Federal Tax Service of Russia dated March 26, 2012 No. MMB-7–13 / 182 @) list the grounds for extending the time limit for the final decision is not limited. These terms are striking, as noted by Filonov A.O., since during this period the conditions of commercial activity, the economic situation in the country and more may change significantly [Filonov 2013 p. 184]. And not only!

In comparison with Russian legislation, in Kazakhstan the time frame for making a decision to conclude or refuse to sign an agreement is much shorter and amounts to 60 working days (clause 5 of the Rules of October 24, 2011). There are no grounds for extending this period.

Controversial is the issue of charging fees for considering applications for concluding pricing agreements and making changes to them. In Kazakhstan, there are no fees, including state duty, for considering an application for concluding a pricing agreement (Article 609 of the Tax Code of the Republic of Kazakhstan dated December 25, 2017) ["Kazakhstanskaya Pravda" 2017]. In Russia, the size of the state duty is 2 million rubles. (Clause 133) Clause 1 of Article 333.33 of the Tax Code of the Russian Federation) ["Collection of Legislation of the Russian Federation" 1998]. It is important to emphasize that if the Russian tax authority refuses to conclude an agreement, the amount of the previously paid state fee is not refundable, since it is paid for considering an application for concluding a pricing agreement, regardless of whether such an agreement is ultimately concluded or not.

Some scientists are sure of the inexpediency of this payment (Kuzmin D.V.) [Kuzmin 2021], others speak of its unreasonably high amount (Grundel L.P. [Grundelb and Pinskaya 2012, p.112], Shestakova E.V. [Shestakova 2016, pp. 195–201], Korn-

ienko N.Y., Minina E.E., Korolev G. A., Mitrofanova E.A., Pushkareva N.A. [Kornienko, Minina, Korolev, Mitrofanova and Pushkareva 2021] and others). It is believed that the establishment of a state duty in this case is quite admissible and expedient from the point of view of replenishing the country's budget. But it is necessary to consider the issue of reducing its size or differentiate it from the cost of transactions, the category of the payer (in the case of expanding the circle of subjects of agreements).

Conclusion

Summarizing the above, in order to eliminate the circumstances that complicate the process of concluding pricing agreements in Russia and Kazakhstan, we propose:

to expand the range of business entities entitled to conclude pricing agreements by making appropriate amendments to Article 105.19 of the Tax Code of the Russian Federation. At the same time, to reduce the time for consideration by the tax authority of the applications of entrepreneurs on the conclusion of the agreements under consideration (clause 4 of Article 105.22 of the Tax Code of the Russian Federation), excluding the possibility of their extension for "unilateral agreements". In addition, to provide for a closed list of grounds for extending the period for considering an application for concluding "bilateral agreements" (clause 3 of Appendix No. 1 to the order of the Federal Tax Service of the Russian Federation of March 26, 2012 No. MMB-7–13 / 182);

in the Law of the Republic of Kazakhstan "On Transfer Pricing" to fix the possibility of concluding "bilateral agreements", as well as the norms allowing to extend the validity period of agreements on the application of transfer prices and to amend them;

in the legislation of Russia, provide for a closed list of documents attached to the application for concluding a pricing agreement (clause 1 of Article 105.22 of the Tax Code of the Russian Federation), and in the legal acts of Kazakhstan, exclude from this list documents that are in information databases tax authority, namely: a certificate or certificate of state registration (re-registration) of a legal entity (clause 3 of the Rules of October 24, 2011);

consider the possibility of reducing the state duty rate for considering an application for concluding an agreement under Russian law and making adequate amendments to it (clause 133), clause 1 of Article 333.33 of the Tax Code of the Russian Federation).

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The Law of the Republic of Kazakhstan "On Transfer Pricing" dated 05.07.2008. No. 67–IV ("Kazakhstanskaya Pravda" dated July 19, 2008, No. 160, articles 2, 4, 5 with subsequent amendments).

Decree of the Government of the Republic of Kazakhstan "On approval of the Rules for concluding an Agreement on the use of transfer pricing" dated 24.11.2011. No. 1197 ("Kazakhstanskaya Pravda" dated January 10, 2012, No. 8–9, with subsequent amendments).

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Challenges for Democratic State Budget Organization

Abstract: This thought piece is to, at a high level, address modern challenges to the manner budgets are organized in democratic states. To my mind, those challenges are manyfold and interlinked. Therefore, addressing them is dependent on an understanding of all of them. Clearly, each of the mentioned challenges in itself is intricate and deserves detailed attention. In order for the mentioned interlinks and the need for a succinct reduction of complex issues to succinct metrics become plausible I have chosen to here address the mentioned challenges from a high level and risking to not give justice to detail relevant to every of them. I find this appropriate in particular because of the tendency of intricate issues to be detailed and thereby even more difficult to understand. The discussion below shall start with taking positions of two key moments in history which, I think, are characteristic for the formation of budget rules. This historical review is followed by a discussion on how to ensure the most fundamental of relevant metrics, namely the money value that is the most obvious fundament for a population to usefully budget issues given that a majority of which will not consist of specialists that can quickly detect what is relevant about issues, and discussions around the Euro will be reviewed. Further, the consequences of state commitments to combat n against climate change having added a new type of obligations to be dealt with by state will be discussed. Finally, the consequences of states having taken substantial commitments to support investments, be it in renewable energy, be it in innovation at large, and the need having emerged to address flexible of targets will be discussed, and a summary drawn.
Keywords: budget, democratic rights, budget procedure, economic policy

Articulating the Interrelation of Democratic Rights and Budget Approval Procedures

Whilst the principle "no taxation without representation" appears to summarize a fundamental principle of budget policy in a simple manner, the turmoil that arose in the context of the implementation of this principle seems to also be interrelated with the difficulty to determine the exact rationale and parameters of this principle.

Before the American Revolution, US-Americans, in what concerned their rights, seemed to have been taken guidance by the British constitutional system, "the best that ever existed among men". Only when US-Americans came to the conclusion that measures about revenue sources taken in London where one sided, such measures started to be seen as part of a conspiracy [Foner 1998, p. 13]. The dispute about the

adequacy of related measures developed into the American Independence War and the formation of the USA, with the "no taxation without representation" – principle in retrospect emerging as at least in public perception being the key driver for the formation of the United States of America [www.boston1775.blogspot.com/2009/04/who-coined-phrase-no-taxation-without.html, access as of 4 March 2022].

The controversy on how the right of parliament to approve the budget is to be implemented also stood at the outset of the multi-facetted process which led to the formation of the German Reich in 1871. Significantly, the failure, in the later 1860-ies, to clarify the outcome of a potential further conflict between the monarch and his cabinet on the one side and the Prussian parliament on the other side may have contributed to the weakness in construction of the German Reich as well as to the abruptness of the end of monarchy in Germany after World War I [Mann 2009, pp. 313, 393, 369]. More concretely, Hugo Preuß has convincingly argued that the very Bismarck, who had been appointed to deal with the constitutional crisis caused by the government implementing a military reform against the parliament, was instrumental in avoiding workable checks and balances from being introduced into the constitutional system of the German Reich, his main purpose apparently having been to always be able to influence this artificially protracted process [Preuß 2008, pp. 225, 322, 455].

To my mind, those two examples are characteristic for how difficult it turns out in practice to be to implement a democratically budget process with legitimacy, but also for the lack of the articulation of the ultimate rationale of the budget process. Tellingly, the process of American independence seems to have been quite protracted and not left an immediately evident legacy as far as budget processes are concerned, and the idiosyncrasies of the German-Prussian process actually seemed to have had some role in the backlashes democracy suffered in Germany.

Further evidence of the raw, unarticulated form of the positive rights every citizen is to be conferred to on the basis of this right is it being only briefly mentioned in a notable decision of the German Constitutional Court on the role of the ECB, which also will be a basis for the following discussion [BVerfG, 5 May 2020 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16, No. 99 – 101].

This background explains the aims and importance of the discussion of new challenges to the budgetary process and democracy which follows immediately.

Monetary Basis and Economic Policy

As in practice can be studied in countries with high inflation, the ability of the population and parliaments to effectively exercise participation rights can be put in question by money value fluctuations. Such money fluctuations or the state indebtedness that causes fluctuation are frequently accompanied by distortion of statistics

[O'Boyle 2016, Truman and Veron 2018]. Also, the danger that statistics are distorted by other practices appears to not be far fletched [www.rechnungshof.saarland.de/fileadmin/user_upload/Veroeffentlichungen/Pressemitteilungen/pressemitteilung_praesidentenkonferenz.pdf, access as of 8 March 2022].

As compared to such issues about the reliability of statistics, the bigger issues obviously are with money value itself. In order to ensure the stability of the money value, a reference to the independence of central banks in fundamental documents such as national constitutions apparently has become frequent[1]. Presumably, typically, the aim of such assurances being included into fundamental documents is to give the relevant central banks and bankers some basis for demanding their independence. As a general assessment, however, I suspect that this independence rather is the fundament of political debate as opposed to being cited in legal procedures and challenges. It may well be a consequence of this type of legal dynamics that science has not, up to now, had a chance to develop the concept of democratic budget control as referred to above. Rather to the opposite, the rationale, and the exact elements of the deferment of rights and obligations to central banks seems to not have been comprehensively discussed [Gutbrod 2010, Thye 2012]. Furthermore, the very fact that the ECB has been established, has also drawn attention to the institutional structure of the ECB.

As to its activities, the ECB seems to be involved into the shaping of economic policy to an extent that is not out of dispute [www.youtube.com/watch?v=Mza8p_iM2gE&list=OLAK5uy_kuPrlwr_zujDG1vYJhrkG5mU_rFRx4cVQ, access as of 3 March 2022] In addition, the ECB seems to paid attention to combatting climate change to an extent which is also not free of debate [Ilzetzki, Jia 2021]. On a minor note, activity of the ECB seems to also extend towards issues quite far from monetary policy such as beneficial concerts to the advantage of Ukraine [www.bruegel.org/publications/datasets/european-union-countries-recovery-and-resilience-plans/ access as of 3 March 2022]. On the internal structure of the ECB, whilst, different from other central banks, the positions taken by the directors of the ECB during voting remain confidential [Claes, Linta 2019], directors are likely to have interest independent from their European obligation given that they are appointed by national governments [www.econstor.eu/bitstream/10419/24077/1/dp0470.pdf, access as of 3 March 2022]. Finally, there seems to be more evidence of career after a position in the ECB than one would expect with central banks[2].

1 By way of example, Art. 88 German Fundamental Law (Grundgesetz) refers to the foundation of the German Central Bank, and even in earlier versions did not define independence in detail, let alone the remedies for the implementation of independence, see Tettinger, pp. 1844 ss

2 See the careers of Mario Draghi, who after having led the ECB became Italian Prime Minister, of Axel Weber, who after having lead the Bundesbank worked in the private industry, about the cooling off period after working at the ECB also see Dolan, C. (2012).

The multifaceted issues alluded to here and relevant to the internal and external independence of the ECB become relevant not only for monetary stability. Rather, other economical purposes are frequently given substantial importance. For instance, the stability of the whole of the economy is mentioned as guiding principle of state spending in Art 109 Section 2 of the German Constitution (Grundgesetz), and according to Art. 72 Section 2 it is a requirement for the Federation to have the competency to implement legislation in the German system that such legislation is needed to approximate living conditions throughout German territory. Importantly and regardless of which direct rights of citizens the mentioned provisions lead to, such rights seem to not immediately be available on an European or the basis of all countries of the Euro-zone. Going a bit further in economic policy, for financial aid for countries in distress it has been stated: "Given the inherent power imbalance between creditors and debtors and the strongly intergovernmental nature of the ESM, there is a striking lack of institutional means to hold the policy-makers accountable." [Crum, Merlo 2020]. Also, criticism of the actions taken seem to not have immediate consequences for those or the organizations in charge [Alumnia 2021, p. 9]. If, indeed, organizations and even policy makers are not held accountable, the ability of citizens to determine the course of related financial action seems to also be limited.

At the same time, even though financial assistance, as mentioned, does allow relatively uncontrolled executive action and does not seem to be subject to much control by citizens, the instrument for such financial aid, the ESM, does not to seem overly attractive, and therefore, if financial need arises [Alumnia 2021], is likely to be replaced by other instruments. Indeed, in the context of the EU COVID-response measures, new tools have been sought, and the plans that are to be a basis for EU funding have been evaluated as follows: "Comparing the national plans is challenging, because they present data in very different structures. The number and definition of headline categories and the availability of summary information about sub-categories varies from country to country. Nevertheless, the biggest challenge of cross-country comparison is the definition of non-overlapping spending categories, because a particular investment could support various purposes as defined by the Article 3 of the RRF Regulation – "the Recovery and Resilience Regulation adopted by the EU", – for example green, social and inclusive growth as well as policies for the next generation. In our reading, cross-country comparisons of recovery plans published so far by other researchers do not pay enough attention to the multiplicity of purposes. [www.bruegel.org/publications/datasets/european-union-countries-recovery-and-resilience-plans/ access as of 3 March 2022].

The additional instruments to prevent financial or health related crises, the general manner for which resources are to be spent by the EU seems difficult to summarize taking overarching principles such as economic stability or approximation of living conditions throughout the EU as a basis. Indeed, if reviewers like the me have difficulties to establish the bases for regional policies at a European level similar to the

ones mentioned for the national level, citizens are likely to have even bigger difficulties [Guttenberg 2021]. Accordingly, I will simply assume that the different long-term EU industrial [General principles of EU industrial policy [Fact Sheets on the European Union European Parliament, europa.eu], The common agricultural policy at a glance [European Commission, europa.eu, access as of 3 March 2022] or legal policies [www.curia.europa.eu/jcms/upload/docs/application/pdf/2022–02/cp220028en.pdf access as of 8 March 2022] have a rationale which may well be understandable to specialists, but not without further work to citizens.

There is a line of thought that, from the democratic legitimacy of relevant structures in member states, concludes the legitimacy of European authorities [Crum, Merlo 2020]. Accordingly, the actions of the ECB would need to be based on the deferral of rights by the respective member states at the time at which the ECB was founded. Indeed, action by the ECB as recently be considered *ultra vires* by the decision of the German Constitutional Court already mentioned under No. 1. For what is to be further discussed in this article, the conclusion of the German Constitutional Court of the activity of the ECB being *ultra vires* is of interest, namely that the German parliament was to review the action that the ECB took [BVerfG dated 5 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16]. When reviewing the implementation of its decision, the German Constitutional Court assessed both confidential and public material as well as controversial discussions by the German parliament, without focusing on the effect of action by the German parliament [BVerfG decision dated 29 April 2021 2 BvR 1651/15 and 2 BvR 2006/15].

When it came to the taking over more long-term obligations in the context of the Corona Fund, the German Constitutional Court gave the government substantial leverage both in substance and in determining the urgency of decision making [BVerfG decision dated 15 April 2021, 2 BvR 547/21].

In contrast, when it came to whether fundamental rights are protected by European Law, the German Constitutional Court focused on whether the standards applied under European law and in particular by the European Court of Justice were sufficient as benchmarked against national standards[3].

In comparison, I find a focus on what a citizens can achieve through the judicial or political systems in place in their respective countries similar to the ones mentioned that the German Constitutional Court has developed for fundamental rights desirable also for financial and budgetary rights. The approach proposed here would have the national governments regularly reporting about the existing and potential liabilities on a European and international level, and the usefulness of undertaking measures to achieve economic equilibrium and diminish differentials for instance of wealth, income and unemployment among countries of the European Union. Also,

3 The famous two "solange" ("as long as") decisions by the German Constitutional Court, last of them BVerfG dated 22.10.1986, BvR 197/83, No. 130.

whenever the ECB is seen to have exceeded its mandate, for instance by purchasing state obligations, the national government could propose that such purchase requires the consent of governments or the European Parliament. The related assessment would for instance consider the abilities existing and undertaken to influence processes at the level of governments, for instance by forming appropriate coalitions among governments of countries member of the relevant organization, or through the European Parliament, and in case of a solution not being satisfactory from a national level require national governments to lobby for the approach until implementing such an approach can be proven to not be viable. If all of those national attempts were unsuccessful, national law could be seen as demanding the country to leave the respective organization. Such an approach would potentially also be helpful to make the multitude of purposes for which money by European organizations are spend that have little own revenue.

If this approach were followed, a conflict between national and EU-law would not arise. Also, even if such conflict arose, it could be seen as concerning an organizational rather than a fundamental question, and therefore the conflict not being as fundamental. This approach is preferrable to taking the quality of making national decisions as a basis for determining whether the national decision can stand up to European law[4]. Also, this procedure would give more transparent manner of conflict resolution than hoping to, in a manner not clearly defined, that European institutions take the concerns of the European Constitutional Court into account, www.lto.de/recht/nachrichten/n/bverfg-huber-verteidigt-ezb-urteil-ultra-vires-eugh/, access as of 8 March 2022].

Climate Change

The importance given to action against climate change [www.europarl.europa.eu/news/en/press-room/20191121IPR67110/the-european-parliament-declares-climate-emergency#:~:text=The%20resolution%20on%20declaring%20a,votes%20against%20and%2034%20abstentions, access as of 6 March 2022] suggests to also give importance to completely novel metrics from which state action in an environmentally responsible world depends. Whilst regulations exist relating to different emissions and harmful materials [Briggs 2022], issues are best exemplified and will be discussed on the basis of the emissions of greenhouse gas which, under Art. 4 of the Paris Agreement, are to be limited by each country.

The consequences this comparatively new type of commitment has can be demonstrated by reference to a decision of the German Constitutional Court requiring the legislator to tighten parameters in a law dealing with the implementation of

4 This seems to be the case of Thiele (2021).

emission benchmarks set by European law [BVerfG 29 April 2021, 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20]. Whilst this decision is founded on what it finds are reasonable expectations of the individual citizen [BVerfG dated 29 April 2021, 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20][5], it does not actually review in how far what it mandates indeed increases transparency for the claimants or citizens at large. Maybe it took this approach assuming that limitations on emissions affect all citizens based on a national market of emission reductions existing in Germany which sets a price of emissions that is to be ultimately borne by all participants in economic dealings. However, if that were the case, it would also seem important to determine how different participants and the claimants are affected by the concrete additional provisions the Constitutional Court finds necessary.

More importantly, the German Constitutional Court, in its decision, in only taking a national perspective, has limited the potential paths of action by which emissions can be decreased without giving explanations for doing so. Maybe the Constitutional Court presupposed that the competency of the German Government is limited by the European Union, and therefore limited the examination of German legal acts as alluded to earlier, but the Constitutional Court has not made a statement in this regard. Furthermore, even in the past, Germany has committed substantial funds to support developing countries [www.germanclimatefinance.de/overview-climate finance/#:~:text=%24100%20billion%20commitment.,German%20climate%20finance,Cooperation%20and%20Development%20(BMZ), access as of 9 March 2022], and is planning to expand funding [www.dw.com/en/germanys-new-foreign-minister-puts-climate-high-up-on-diplomatic-agenda/a-60065408, access as of 9 March 2022]. Whilst, clearly, such funding of other countries is subject to the normal German budget process, the results to be achieved with the funding seem to not be subject to any benchmarking or democratic process, and the option to increase this funding, thereby decrease emissions in other countries and not having to decrease them as much as anticipated has not been discussed by the Constitutional Court. As to issues deserving transparent decision making, the question on whether support is to be granted to the poorer, the countries most affected by climate change or those countries where emissions can be reduced with the least cost come to mind.

Apart from being able to reduce emissions by funding countries, in taking the commitment of Germany under Art. 4 of the Paris Agreement as a basis, Germany could reduce the German reduction obligation by, under Art. 6 Section 2 of the Paris Agreement, agreeing to the purchase of emissions, which is also not dealt with by

5 Referring to the right to „a transparency required under the Constitution" and a „public exchange of views about how the burden of reduction of emissions after 2030 are to be allocated", No. 262, and that "clear horizons of plans" have to come into existance, No. 253, the "required pressure for planning" is to be caused", because only on its basie it "will become apparent which products and behaviour in a broader sense will need to be adapted very soon", No. 254 (own translations).

the Constitutional Court. Put differently, it may well be that it is better for citizens that Germany does not fulfill its commitments, rather purchase reductions from other countries and, like Switzerland [www.newclimate.org/2021/10/28/switzerlands-bilateral-agreements-to-offset-their-emissions-set-a-poor-precedent-for-ambition-ahead-of cop26/#:~:text=Switzerland%20has%20reached%20agreements%20with,target%20under%20the%20Paris%20Agreement access as of 3 March 2022], enter into contracts so to do.

Moreover, decisions on implementation of Art. 6 Section 2 of the Paris Agreement reached at the Glasgow conference could lead to an international market of emission reductions emerging. Also, scaling of voluntary carbon markets [www.dw.com/en/germanys-new-foreign-minister-puts-climate-high-up-on-diplomatic-agenda/a-60065408, access as of 9 March 2022] could contribute to such an international market. If such an international market were to emerge, it would allow the German government to calculate cost for the acquisition of carbon reductions, which could potentially lead to bigger transparency for citizens on the status of combatting climate change than a focus on national reduction benchmarks. However, following the approach of the German Constitutional Court, such transparency seems not relevant for decision making.

In addition, the Constitutional Court has not considered that there are no sanctions for non-compliance with obligations undertaken by countries, both for the many additional commitments such as those entered into during the Glasgow conference as well as the obligations under Art. 4 of the Paris Agreement [Gutbrod 2021], and that therefore, for a certain worldwide reduction target to be achieved, that either such sanctions among as many countries as possible, or the willing countries have to increase their reduction targets to compensate for a potential shortfall of other non-compliant countries. In addition to all those legal options, in order to increase clarity quickly emerging technological options would need to be considered.

All of the mentioned issues make the transparency the Constitutional Court has indeed mandated very relative. This could be improved if, similar to the approach suggested above for money policy under No. 2, transparency from the perspective of citizens is increased by the government being required to give comprehensive but also succinct report on efforts against climate change including the worldwide perspective and not limited to efforts under the national NDC, with the requirement being that it becomes possible to benchmark the efforts the respective government body undertakes. For countries like Germany, this would of course only be relevant for the part of climate policy for which the EU is not competent. But reporting would include action within the EU with a view to determine the manner in which the EU takes position internationally. If this approach were adopted, the Constitutional Court could review whether the reports by the Government are complete and succinct.

Investment Finance

It has seen as being a vital part of state action to encourage various types of investment behavior. The importance of state action in Europe for instance has been seen as a consequence of the weakness of capital markets [Demertyis, Guetta-Jeanrenaud 2022]. It indeed seems that support of venture capital is granted by many governments [www.thesmartcityjournal.com/en/articles/innovation-in-russia-gets-traction-with-state-support, www.medium.datadriveninvestor.com/what-kind-of-support-can-a-startup-receive-in-kazakhstan-3d60d843a3d9, access as of 8 March 2022].

Clearly, in particular venture capital investment can only be successful if an effective due diligence is possible [Demertyis, Guetta-Jeanrenaud 2022]. For due diligences to be effective, assurances given in the course of such due diligences need to be accurate, which in turn will be ensured by the consistency with which criminal law penalizes false statements. The quality of investments, in particular of venture capital investments, can only be assessed with a longer term in mind, be it by evaluating the quality of business plans, undertaking co-investments of relying on the individual judgements of investment managers or others involved. Indeed, it seems that the more strategic issues are, the more there is reliance on individual assessments [www.humiq.de/podcast-good-work/120-laguna-und-lotter/, www.sprind.org/en/, access as of 6 March 2022].

Whilst embezzlement will clearly not be the rule relating to whatever type of management such investment requires, consistent and reasoned implementation of criminal law rules against embezzlement will increase confidence.

A specific challenge in this context is to live up to the quickly emerging technical developments. In the past, management of investments would have largely consisted of supervision and discussions. With the acceleration of digitalization, however, management function would also for instance include to make platforms available to startups that facilitate programming [www.trood.com/scaling, access as of 8 March 2022]. Related management is challenging because professionals involved will have the high personal revenue expectations typical for investment managers, that will most likely exceed those of the rest of the population.

The challenge of adequate regulation of investment activity at large becomes evident when reviewing regulations that seem to be destined to improve management in former Soviet countries. Whilst, much further to what is mentioned above, such countries are quite active in investment activity, their approaches to regulate state management show old fashioned features that seem fraught with problems. Control of different companies for instance is to be exerted by different forms of ownership [Knieper 2006, p. 73, Chanturia 2010, p. 243] and forms of companies that have been specifically designed for such investment activity [Chanturia 2010, p. 105], without there being convincing evidence confirming that those approaches lead to desired re-

sults. Also, evidence as to the manner of implementation of criminal law as required to prevent embezzlement by investment managers and support due diligences, to the best of my knowledge, is not readily available.

As a result of all this, to ensure an assessment that allows the citizen to take a position on whether they are happy to take risks, the development of adequate long-term standards of success of such investment activity would be important.

Flexibility of Targets

Traditionally, budgeting has been focused on yearly expenses and revenues. Historically, even the extension of budgets to future years is relatively recent. In addition to the extension of the duration however dealing with uncertainty given intricate contractual conditions and volatility deserves attention.

Areas of applicability of the need to deal with uncertainty are many. A good illustration is a public body entering into an energy savings contract, in which the payment depends on the success of the energy savings to be implemented [www.kompetenzzentrum-contracting.de/anwendung/dena-praxisdatenbank-contracting/, access as of 8 March 2022], and the success of which also has a relation to the success in implementing emission reductions that has been discussed above in No. 3. Similarly, flexibility is required for private public partnership contracts. Not least, a specific type of uncertainty arises when aiming at implementing best possible technologies. Frequently, a combination of Agile and SCROLL contractual techniques with avoidance of a waterfall is best [www.egovernment-computing.de/cloudmodelle-fuer-behoerden-und-aemter-w-61f7f727a72c9/, access as of 3 March 2022], which in the terminology for instance of the Russian Civil Code would mean that a service contract and not a contract for work is concluded.

Issues of relevance for decision making can be inferred through decisions on criminal liability for responsible in public authorities concluding derivative contracts> Relevant know-how will in particular be important for designing the approval and procurement processes of the public bodies in an adequate manner [No. 19 at BGH Beschl. v 19 September 2018, Az. 1 StR 194/18], and also the determination of the various values important for decision making based on market practice [No. 20 of Beschl. v 19 September 2018, Az. 1 StR 194/18]. Both in order to assess the potential liabilities and successes in dealing with issues of this type of sophistication in a manner that is understandable to the citizen standard of reporting are required.

Succinct Standards Required for all Matters Mentioned Above

As overall conclusion, it is in the above argued that various parameters and reporting obligations in addition to the ones traditionally linked with budgets are im-

portant for citizens to have adequate influence in a modern world. However, I believe that it would be wrong to simply add requirements without at the same time considering the effect such requirements would have on the democratic process. It is here of course by no means intended to incite the type of heated and hostile debates that were linked to the budget approvals as mentioned above under No. 1. At the same time, for the voter to express an opinion, issues need to be simple, which, in a time of social media, can be underlined by the brevity of messages suited to catch attention of the voters, and the difficulty in avoiding misinterpretations. Accordingly, when devising reporting requirements, in order to support the democratic process, thought should also be given to summarizing information and following election cycles, to turn disclosure succinct.

Notably, in this context, the thought of new angles in reporting seems to gain importance from the point of view of macroeconomic management. Indeed, the discussion on additional parameters to growth has gained some attention with the Jahreswirtschaftsbericht 2022, the traditional manner of presenting the economic outlook of the German governments. In the very Jahreswirtschaftsbericht, a multitude of targets is mentioned with little prioritization or reference to interrelations [www.bmwi.de/Redaktion/DE/Publikationen/Wirtschaft/jahreswirtschaftsbericht-2022.html, www.bmwi.de/Redaktion/DE/Publikationen/Wirtschaft/jahreswirtschaftsbericht-2022.html, access as of 3 March 2022].

Further to the explanation above, I believe that such a number of targets is too broad, and by trial and error, a succinct reporting adequate to the context in which it is being used be developed.

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Public Financing of Restructuring

Abstract: The Restructuring Law of 15 May 2015 makes provision for enterprises who wish to seek restructuring in a crisis situation. Restructuring, understood as the totality of activities from the time that difficulties arise to the time that financial health is restored, can be carried out successfully when appropriate financial support is secured. An important problem in the context of insolvency law is what instruments are available and where to seek financial assistance. This article focuses on entities that can offer help to a business in crisis, presents the national aid program "New Opportunity Policy", designed to provide businesses with support from public funds, and discusses public aid instruments (rescue aid, temporary support and restructuring aid). It needs to be kept in mind that the company's financial situation will determine which public aid instruments can be chosen to provide funding. The paper also highlights significant difficulties in obtaining private (internal, external) financing for restructuring. With the public support offered under Guidelines [EFTA Surveillance Authority Decision No. 321/14/COL of 10 September 2014], the state can support an enterprise that is insolvent or endangered with insolvency in a difficult financial situation.
Keywords: restructuring, new financing, public aid, debtor, creditor

Introduction

In seeking to harmonise the rules governing corporate restructuring and insolvency within the European space, the rationale of Directive [No. 2019/1023 of the European Parliament and of the Council of 20 June 2019] is to minimise the restrictions on the free movement of capital and freedom of establishment, which arise from the widely differing regulations on the method of restructuring and declaring insolvency, and to provide a framework for the EU market to function properly in each individual European country.

The key issue is not only the scope of regulations under Directive [No. 2019/1023 of the European Parliament and of the Council of 20 June 2019], but also how the new provisions will bring individual legal systems of the Member States closer to-

gether [Klimas 2017, p. 105][1]. This is especially important since its provisions are to ensure greater freedom in the creation of national legislation or the remodelling of existing laws. Regulations across various legal systems must meet the minimum standards imposed by Directive [No. 2019/1023 of the European Parliament and of the Council of 20 June 2019], and Member States should take measures to achieve the objectives set out therein.

A noteworthy issue covered by Directive [No. 2019/1023 of the European Parliament and of the Council of 20 June 2019] is new financing in which emphasis is placed on the dependence of a successful remedial restructuring of a company upon the debtor's ability to obtain effective financial assistance. It will be important to answer how to provide new financing for companies (debtors) to cover operating costs at the stage of negotiating the restructuring (pre-restructuring) or for implementing the restructuring plan (during the restructuring process)[2]. The analysis must not overlook the financing entity which will not be willing to commit itself to supporting enterprises in financial crisis without adequate protection and legal guarantees. Therefore, the question arises as to how to guarantee adequate security for the new financing (*super-senior* position) without violating the interests of existing creditors? Under Article 17 and 18 of Directive [No. 2019/1023 of the European Parliament and of the Council of 20 June 2019], the national legislature is obliged to remove restrictions on obtaining new financing in corporate restructuring, thereby facilitating access to a wide range of financing sources. The idea is to allow continued operation only of those entities that will be able to survive on the market with a specific development potential [Adamus, Geromin, Groele, Miczek 2021, p. 157].

At this point, it is worth noting the national aid program "New Opportunity Policy", whose aim is to support struggling enterprises with public funds in line with the Rescue and Restructuring Aid Law of 16 July 2020.

The aid programme was entrusted for implementation to the Agency for Development and Industry (hereinafter ARP) [www.arp.pl., access as of 3 March 2022], which grants aid on behalf of the minister responsible for the economy, whereby the

1 Differences across legal systems have demonstrated the unfavourable trend of *forum shopping (*transfer of assets or legal proceedings from one Member State to another in order to obtain a more favourable legal position) whereas EU legislation tries to prevent this from happening in the relationship between the Member States of the European Union.

2 Directive 2019/1023 also does not ignore the obligation to protect other transactions related to restructuring in art. 18, pkt 4: a) the payment of fees for and costs of negotiating, adopting or confirming a restructuring plan; b) the payment of fees for and costs of seeking professional advice closely connected with the restructuring; c) the payment of workers' wages for work already carried out without prejudice to other protection provided in Union or national law; d) any payments and disbursements made in the ordinary course of business other than those referred to in points (a) to (c).

amount earmarked for public aid is specified in the Budget Law[3]. Pursuant to Article 13(6) of the Law, the ARP grants aid in favour of the minister responsible for economy, and the loan is then repaid to the minister's account designated in the administrative decision. Under the aforementioned Law, the granting of aid will be considered on the basis of the assumptions listed in Articles 3(7), 44 and 107 (due to social difficulties and market failures[4]) [EFTA Surveillance Authority Decision No. 321/14/COL of 10 September 2014, Leszek 2010, p. 17]. The study will adopt a dogmatic method supplemented with a comparative method, with information drawn from both domestic and foreign sources. Data obtained from the Central Economic Information Centre was also used.

National Legal Basis for New Financing

In order to provide protection for new financing in restructuring and other related transactions, the national legislature provides it through the Bankruptcy Law of 28 February 2003 (see Article 11)[5] and the Restructuring Law of 15 May 2015 (see Article 141(1)[6] and 141(2)[7]) [Witosz 2021, Article 11]. In addition, in order to implement the Guidelines [EFTA Surveillance Authority Decision No. 321/14/COL of 10 September 2014] and to comply with the requirement to implement the government's support programme for enterprises under the "New Opportunity Policy", the legislature envisioned the Rescue and Restructuring Aid Law of 16 July 2020[8].

3 The maximum expenditure limit for the implementation of tasks envisioned in the Law for the years 2020–2029 is PLN 1 billion 200 million; the European Commission's decision No. C (2020) 7937 of 12 November 2020 on state aid approved the extension of the "New Opportunity Policy" programme until 2026.

4 Sources of market failure include: the presence of a public good and externalities (costs and benefits), incomplete market information as well as transaction costs.

5 Reasons for insolvency: one of the following: 1) loss of the ability to pay (Article 11(1)-(2)), 2) predominance of liabilities over assets (Article 11(2)-(7)).

6 Rescue aid or temporary restructuring aid can be granted to micro-, small and medium enterprises in a difficult economic situation, which: 1) undertook business activity in the given sector at least 3 years before the date of submission of the restructuring application, 2) are not active in the steel, coal or financial sectors, 3) are not active in a market where there is or may be long-term structural overcapacity, 4) are not part of a capital group.

7 Public aid for restructuring may be granted to an enterprise at risk of insolvency: 1) where the enterprise, as a result of incurred losses, lost more than half of the capital, in particular where the sum of profit (loss) from previous years, net profit (loss) in a given financial year, supplementary capital, revaluation capital and other reserve capital (funds) is negative and its absolute value is greater than 50% of the basic capital (fund); 2) to an enterprise other than a small or medium-sized one when, in the last two years, the ratio of: a) debts to equity was higher than 7.5; b) operating profit plus depreciation to interest was lower than 1.

8 The Rescue and Restructuring Law dates back to the government programme already adopted by the resolution of the Council of Ministers of 22 July 2014 entitled: "New Opportunity Policy". The

The entry into force of the law in 2020 was forced by the COVID-19 pandemic. In the explanatory memorandum for the aforementioned law, it is emphasised that the national policy on entrepreneurship is not only about providing support for starting up or conducting an existing business, but also about providing assistance to those entities already operating on the market with specific development potential, which have fallen into a financial crisis and are therefore worth helping. Under the provisions of the Law, in the event of a crisis, companies can count on assistance with restoring the profitability of their operations, taking the form of financial aid, such as a loan. According to the Guidelines, enterprises are lent money for a specific purpose, which at all times remains public funds and has a refundable character. In addition, it allows capital entries, and relief in the repayment of certain public-law liabilities [Government programme The Rescue and Restructuring Aid Law. Explanatory Memorandum – form No. 300].

Data presented by the Central Economic Information Centre [www.coig.com.pl, access as of 3 February 2022] show that in 2020, 800 restructuring proceedings were initiated, of which, in the month of December 2020 alone, there were 144 proceedings. By comparison, in the preceding years – 2018 and 2019 – there were half as many (465). The latest data for the period of January-September 2021, which was published in the Judicial and Economic Gazette, shows that in about 1,400 cases an announcement was made about the commencement of restructuring proceedings. Thus, the large increase in the number of restructuring proceedings also translates into a crisis situation in connection with COVID-19.

Entities That Can Offer New Financing

An entity which may provide new financing may be a creditor of the debtor, a financial institution, including a bank, etc., however, in the majority of cases such financing is difficult to obtain (multiple conditions have to be met) and practically unavailable. Moreover, a public entity able to support enterprises in crisis by implementing appropriate mechanisms. The public support of new financing, which is necessary, stems from the Communication of the European Commission [EFTA Surveillance Authority Decision No. 321/14/COL of 10 September 2014], providing guidelines for the state, which can support an insolvent company or a company at risk of insolvency in financial difficulties.

Within the framework of permitted state aid [Ambroziak 2019, p. 74], a company in financial dire straits may avail itself of the following forms (instruments) of support: rescue aid and temporary restructuring support are designed for companies

programme, which covers the period 2014–2020, has created a method of operation for state policy on insolvency issues.

in the pre-restructuring phase, i.e., in the early stage of the crisis, while restructuring aid is available at the stage of implementation of the restructuring plan.

It is worth noting that under Article 26 [Restructuring Law Act of 15 May 2015 Journal of Laws of 2020, item 1228 later amended] regulations require restructuring advisors (administrators, supervisors) to support debtors in the search for effective sources of financing (e.g., obtaining public aid) of their business during the restructuring process [Janik 2019, p. 301]. In addition, an entity interested in the "New Opportunity Policy" programme has the opportunity to consult free-of-charge a restructuring advisor consultancy at one of the Business Service Centres throughout Poland, who will explain the procedure for application for aid[9].

Public Aid Instruments

Any decision concerning a company will depend on the situation in which it finds itself and what procedure is appropriate to implement certain rescue aid instruments (see Table 1).

Examples of securities include: mortgage together with assignment of receivables under an insurance contract, civil (registered) pledge together with assignment of receivables under an insurance contract, assignment of receivables, declaration on submission to execution directly under a notarial deed, blank promissory note together with a promissory note declaration, transfer of ownership for collateral, surety, guarantee (bank, insurance), etc. On the other hand, an equity contribution may consist of the enterprise's own funds (excluding depreciation and planned profits), resources coming from the owners or enterprises of the same capital group, resources provided by the enterprise's creditors or other resources, obtained on market conditions. The equity contribution must be actually delivered and cannot constitute public aid or restructuring aid akin to that referred to in Article 39(1) of the Law, in terms of impact on the enterprise's solvency or liquidity level.

9 Summary of applications issued as of December 8, 2021 (for the years 2020–2021): Rescue aid (6 applications, amount of applications: 28 965 240, 48 PLN), Temporary restructuring support (2 applications, amount of applications: 4 188 967, 36 PLN), Restructuring aid (6 applications, amount of applications: 234 713 000, 00 PLN). Scientific Conference – Restructuring Congress on December 9, 2021: Corporate Finance in Restructuring: Public Aid, M. Zalewska (Development and Industry).

Table 1. Categories of Public Aid According to the Rescue and Restructuring Law of 16 July 2020[10]

Rescue aid	Temporary restructuring support	Restructuring aid[1]
Beneficiary		
enterprises referred to in Article 141(1) of the Restructuring Law, provided they are at risk of insolvency and meet the conditions set out in Article 141(2) of the Restructuring Law, enterprises referred to in article 141(1) of the Restructuring Law, provided that they are insolvent within the meaning of Article 11 of the Bankruptcy Law.	micro-, small or medium enterprises referred to in Article 141(1) of the Restructuring Law, provided they are at risk of insolvency and meet the conditions set out in Article 141(2) of the Restructuring Law and meet the conditions set out in Article 11(2), micro-, small or medium enterprises referred to in Article 141(1) of the Restructuring Law, provided they are insolvent within the meaning of Article 11 of the Restructuring Law and meet the conditions set out in Article 11(2) of the Bankruptcy Law.	enterprises referred to in Article 141(1) of the Restructuring Law, provided they are at risk of insolvency and meet the conditions set out in Article 141(2) of the Restructuring Law, enterprises referred to in article 141(1) of the Restructuring Law, provided that they are insolvent within the meaning of Article 11 of the Bankruptcy Law.
Purpose of the aid		
To support the business in a crisis situation, so that it can – in the shortest possible time – maintain minimum financial liquidity and develop a further action plan, e.g., a restructuring plan.	To boost the restructuring process by creating the framework for the beneficiary to plan and implement an appropriate action to restore its viability in the long term (self-restructuring). This is conditional upon the implementation of a simplified restructuring plan.	To eliminate the negative social effects of the crisis and market distortions, and to prevent bankruptcy and liquidation of enterprises. The aid is designed to restore the business's ability to compete on the market; the objective is to eliminate the causes of the difficulties, and not just to compensate for losses suffered.
Support (time)		
Urgent (automatic), temporary (temporary)	Urgent and temporary, in the long term (as a continuation or a standalone instrument).	Long-term
Period and form of support		
Loan (6 months) with the possibility of extension. The aid received in the form of a loan with interest shall be repaid no later than on the date of repayment stated in the awarding decision. The aid is repaid to the account indicated in the awarding decision. Security may be required.	Loan (18 months) with the possibility of extension; the period of any previous rescue aid is included (this instrument is granted for a longer period rescue aid; it can be a continuation or standalone instrument. Security may be required.	Up to 10 years. For example: loans; taking up stocks or shares in the increased share capital or participation in the increase of the share capital by the adding face value of the existing shares or stocks and taking up bonds. Change in loan repayment dates towards the granting entity; Conversion of a loan, granted as rescue aid or as temporary restructuring support, to the enterprise's shares or stocks (Article 39 Aid) Security and equity contribution may be required[2].

10 It is worth stressing that rescue aid and – in the case of SMEs and smaller state-owned enterprises – also temporary restructuring support can be granted to enterprises who are not in a difficult economic situation within the meaning of points 19–20 of the Guidelines, but due to exceptional and unforeseen circumstances have urgent liquidity needs.

Maximum amount of financing		
An enterprise may make the grant of a loan in a higher amount more probable, based on a financial projection to define the enterprise's needs related to financial liquidity.		The amount of financing must result from the restructuring plan submitted by the enterprise, the implementation of which will enable the enterprise to restore the long-term ability to compete in the market.
Loan amounts		
Loan amounts – [Specimen from Appendix No. 1 of the Guidelines] i.e., value of negative cash flows from the enterprise's operating based on data for the last financial year.		
Form		
Decision after prior formal and substantive verification of the documents submitted by the enterprise (30 to 45 days).	Decision	Decision
Reporting and control of the aid provided		
Quarterly report within 45 days after the end of each quarter (expenses made).		
Final report within 90 days after the expiry of the period for which it was granted.	Final report within 120 days after the expiry of the period for which it was granted.	
Effect		
Restructuring plan (preliminary) (substantiated by financial forecasts of the financial situation entity) or a liquidation plan	Restructuring plan	Implementation of the restructuring plan

Sources: Government programme The Rescue and Restructuring Aid Law, Explanatory Memorandum – form No. 300, Sierakowski B., Zimmerman P. (eds.) (2020), Ustawa o udzielaniu pomocy publicznej. Komentarz, C.H. BECK, Warsaw.

Assessment of the Reasons for Providing Aid

With reference to Article 47 of the Public Aid Law, prior to granting restructuring aid the ARP assesses the justifiability of such a grant, with consideration given to the following:

1. the priorities set out in the government's restructuring programmes;
2. the expected economic effectiveness of the enterprise in a difficult economic situation after the restructuring process is complete;
3. the volume of employment at the enterprise in a difficult economic situation;
4. supply and demand forecasts regarding the market where the enterprise in a difficult economic situation operates;
5. the enterprise's place of business. The award of financing is conditional upon filing an application to the ARP with required information as specified at [www.arp.pl., access as of 3 March 2020].

An application submitted to the ARP is then evaluated formally and substantively, e.g., economic and financial analysis is carried out, based on the submitted financial statement (vertical, horizontal and indicator analysis). The ARP encourages the submission of applications for the funds available, with detailed information available at www.arp.pl.

Conclusion

The issuance of the European Commission Guidelines on State Aid for Rescuing and Restructuring Non-financial Businesses the provided the impetus for the implementation of the APR-operated aid scheme. It is stressed that '*...the use of (aid) schemes contributes to distortions of competition related to potential abuse, by allowing the Member State to clearly define ex ante under what conditions it may decide to grant aid to companies in difficulty...*' [Government programme The Rescue and Restructuring Aid Law. Explanatory Memorandum – form No. 300]. The undertaken financial operations must meet the objectives pursued by enterprise owners and be consistent with the country's financial system. On the other hand, they need to fulfil one of the paradigms of restructuring law – allowing only those entities that are capable of surviving to continue operating. Therefore, the main assumption of the 'New Opportunity Policy' programme is to support enterprises so that they can continue their operations in line with the principles of rational management.

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The Impact of Changes in the Interpretation of Normative Acts on the Stimulating Function of the Tax on the Example of The Polish Real Estate Tax

Abstract: The article presents the issue of variability in the approach to the interpretation of tax law by courts. The author's goal is to determine how changes in the approach to the interpretation of regulations may affect the implementation of the tax stimulating function. The analysis was carried out on the example of Polish regulations governing real estate tax, in particular providing for two types of tax exemptions: for harbour infrastructure and for railway infrastructure. Since in Poland the real estate tax paid on infrastructure facilities is a significant burden for entrepreneurs, tax exemptions have a large stimulating function by encouraging taxpayers to build and maintain certain types of assets (e.g., harbours, railway lines). The author presents how the approach taken by the courts to the interpretation of the exemption for harbour infrastructure resulted in the exclusion of river harbours from the scope of the exemption. At the same time, contrary to this approach, the subsequent line of interpretation of the courts regarding the railway exemption enabled taxpayers to exempt railway sidings from tax. Despite this change, in the case of river harbours, the courts are still sticking to the old approach, as a result of which the stimulating function of the tax exemption for river harbours does not work.
Keywords: interpretation of law, jurisprudence, tax incentives, real estate tax, property tax

Introduction

The aim of the article is to present the problem of the impact that a change in the approach of courts to the interpretation of legal acts in the field of tax law may have on taxpayers' tax settlements. In particular, the article presents the problem of the impact that the changing approach of courts to the interpretation of provisions may have on the stimulating function of tax regulations. For the proper functioning of the tax system, it is necessary for taxpayers to be confident about their obligations and their rights (e.g., in the field of tax exemptions). By way of interpretation, courts may increase or reduce this certainty and, as a result, support or weaken the stimulating function of the tax provisions planned by the legislator. The analysis of the problem will be presented on the example of Polish tax regulations regulating the taxation of various types of infrastructure and the jurisprudence of Polish administrative courts.

In particular, the exemption for harbour infrastructure and the exemption for railway infrastructure will be examined.

The Specificity of the Polish Real Estate Tax

Real estate tax in Poland is a kind of property tax which is a local tax collected by municipalities. While the real estate tax paid by individuals is very low (the tax on a 50-meter apartment is about EUR 12 per year), for entrepreneurs the tax is a significant burden. Total real estate tax revenues in Poland amount to approximately EUR 6 billion per year, i.e., more than half of CIT revenues. The bulk of this amount falls on entrepreneurs.

The subject of taxation is land, buildings and structures (defined as a construction object that is not a building, Article 2(1) L.T.C.A.). The tax base is the area of land and buildings and the value of the structure (Article 4(1) L.T.C.A.). Importantly, in the case of structures, the tax base is determined as their initial value not reduced by depreciation charges, and the tax rate is 2% of this initial value. This means that the entrepreneur after 50 years of using the structure pays the full value of the investment in the form of tax (and pays on). Such regulations mean that the real estate tax is a significant cost that should be included in the business plan of any investment related to the construction of new buildings and structures. Particularly large amounts of tax are potentially associated with capital-intensive infrastructure investments. To mitigate this effect, the Polish legislator provided tax exemptions for various types of infrastructure, e.g., harbour or railway infrastructure.

The problem, however, is the vagueness of the regulations. Real estate tax is the source of an unusually large number of disputes in Poland, which is reflected in a disproportionate number of cases in the field of this seemingly niche tax, which are dealt with by administrative courts [statistics published by the Polish Supreme Administrative Court, www.nsa.gov.pl/statystyki-nsa.php, access as of 27 November 2021]. For this reason, a separate department has been separated in the Supreme Administrative Court since 1 January 2021, dealing mainly with real estate tax.

Also, the provisions regulating tax exemptions for infrastructure cause numerous disputes between taxpayers and tax authorities, and the problem in this case is the variability and inconsistency of the jurisprudence of administrative courts. This issue will be presented in the article on the example of exemptions for harbour and railway infrastructure. In each of these cases, the jurisprudence of administrative courts played an important role in determining the binding interpretation of the provisions, which had a major impact on the tax settlements of entrepreneurs.

The Stimulation Function of the Tax

The basic function of any tax is its fiscal function, consisting in providing the financial resources necessary to carry out various tasks of the state. However, what is important, taxes also perform other functions in addition to the fiscal function, in particular the redistributive function and the stimulating function, which is indicated in the doctrine of tax law [Gomułowicz 2016]. The stimulating function also plays an important role in the case of Polish real estate tax [Pahl 2017]. As indicated above, real estate tax is a significant burden for taxpayers who are entrepreneurs and its cost must be included in the business plan of each planned investment. Therefore, the appropriate shaping of real estate tax regulations when it comes to taxing individual types of assets can effectively encourage or discourage taxpayers to invest in a given area. At the same time, a noticeable trend in Poland is that tax authorities (i.e., municipalities) prefer the fiscal function of real estate tax over the stimulating function, which is manifested, for example, in the reluctance to introduce local tax incentives [Kałążny 2020a, pp. 318–320].

For this reason, the interpretation of the provisions by the administrative courts plays a special role in ensuring the proper implementation of the tax stimulating function. In principle, the role of the courts in this respect should be to restrain the fiscal impulses of tax authorities and ensure that the regulations provided for by the legislator to encourage taxpayers to invest in a given area have their effect. In particular, the stimulating function of tax regulations may be undermined by their narrow interpretation, which leads to the fact that the tax preferences provided for by the legislator may in practice benefit a very narrow circle of taxpayers.

A directive on the interpretation of tax law that ensures the protection of taxpayers' rights is the principle of the primacy of literal interpretation. A literal interpretation sets the limits of a tax ruling within the possible meaning of the words contained in its provisions [Mastalski 2007, pp. 7–12]. That does not, of course, preclude the use of other methods of interpretation, but only in the alternative where it is not possible to determine the meaning of the terms used in a legal act by means of a literal interpretation [Brolik 2014, p. 56]. Courts, by applying a literal interpretation in the first place, provide taxpayers with certainty regarding the tax law provisions applicable to them. At the same time, the primacy of a literal interpretation reduces the risk of a narrowing of taxpayers' rights (or an extension of their obligations) by means of a teleological interpretation that would justify an increase in the tax burden on more or less camouflaged fiscal considerations. As will be presented in the further part of the article, Polish courts declare that they adhere to the primacy of literal interpretation when interpreting tax regulations, but in practice they often depart from the linguistic meaning of the terms used in the regulations, which often leads to adverse effects for taxpayers. Moreover, the approach of the courts is characterized by instability and high volatility over the years, which only increases the uncertainty of taxpayers.

Exemption for Port Infrastructure

The infrastructure of harbours (both sea and river) is one of the pillars of the state's transport system. Maintaining harbours in a state that allows them to be properly operated requires large financial outlays, a significant part of which consists in modernizing existing assets and increasing their initial value. At the same time, water transport is considered to be the best fit into the policy of sustainable development due to the low degree of pollution emitted by it. For this reason, from the beginning of the L.T.C.A. (i.e., since 1991), it included an exemption for harbour infrastructure, according to which buildings used only for the needs of sea and river harbours were exempted from real estate tax. This exemption was abolished in 2001, which was motivated by the desire to increase the budget revenues of municipalities. Subsequently, after only one year, on 1 January 2002, a new provision was introduced under which harbour infrastructure structures, structures providing access to ports and marinas and land occupied for them are exempted from real estate tax (Article 7(1)(2) L.T.C.A.). The restoration of the tax exemption was motivated by the need to support the development of water transport [Kałążny 2020a, pp. 130–135].

As we see, "river harbours" have disappeared from the content of the recipe. It is difficult to find a justification for such treatment of river harbours, which are by no means distinguished by a better financial condition than sea harbours. On the contrary, river transport in Poland has been in a state of constant regression for the last 30 years.

This inconsistency in the treatment of sea harbours and river harbours in the legal situation in force since 1 January 2002 was attempted to be removed by an interpretation referring to the literal wording of the provisions. It should be noted that the provision provides for an exemption for 'harbour infrastructure structures', without specifying whether it is a river or sea harbour. According to the accepted principles of interpretation, the concept of "construction of harbour infrastructure" should be interpreted on the basis of the common language (since this concept is not defined in the tax act, nor does it refer to the definition from another act). Harbour infrastructure undoubtedly includes not only sea harbours facilities, but also river harbours.

However, in the jurisprudence of Polish administrative courts, a uniform line of jurisprudence has been established, according to which when defining the concept of "harbour infrastructure structure" one should refer to the provisions of the S.H.M.A. (Judgement of the Supreme Administrative Court of 14 May 2014 (II FSK 1222/12); Judgement of the Provincial Administrative Court in Wrocław of 19 October 2017 (I SA/Wr 577/17)). Thus, under the current jurisprudence, river harbour structures cannot benefit from a tax exemption on an equal footing with sea harbours.

This standpoint should be assessed unequivocally negatively. As indicated above, as a result of uncoordinated and insufficiently justified legislative action, river har-

bours were excluded from the scope of the tax exemption by the legislator. Subsequently, such a standpoint was sanctioned by the jurisprudence of administrative courts (despite strong arguments put forward by representatives of the tax law doctrine in favor of a different interpretation of the provisions allowing the release of river harbour structures [www.sip.lex.pl/#/commentary/587339571/137011, access as of 27 of November 2021]. As a result, the current regulations discriminate against one type of transport infrastructure (river harbours) in relation to all the others, and such a legal situation has not been justified both by the legislator and by administrative courts interpreting the provisions in question.

Moreover, the interpretation of the term 'harbour infrastructure' adopted by Polish courts by referring to the definition from the S.H.M.A. (despite the absence of such a reference in the L.T.C.A.) has another effect. The tax exemption may be used only by harbour infrastructure structures belonging to the so-called seaport authorities – state-owned companies (Judgement of the Supreme Administrative Court of 11 July 2013 (II FSK 678/13)). Meanwhile, private entrepreneurs who own identical harbour structures (e.g., quays) and perform identical services (e.g. consisting in unloading containers) must pay a very high real estate tax (2% per year from the initial value of the structure).

Exemption for Railway Infrastructure

Despite the similar subject matter of the regulation, the provisions providing for an exemption for railway infrastructure have been interpreted by Polish administrative courts in a completely different way than in the case of harbour infrastructure.

In the case of the exemption for railway infrastructure, the main doubt concerned its applicability to private infrastructure which is not part of publicly accessible railway lines, and in particular to railway sidings belonging to private entrepreneurs. Disputes between taxpayers and tax authorities in this respect arose both on the basis of the provisions of the L.T.C.A. in force in the period from 1 January 2007 to 31 December 2016, as well as on the basis of the provisions in force since 1 January 2017. This issue is directly related to the principle of the primacy of literal interpretation in tax law (as in the case of disputes over the scope of the exemption for harbour infrastructure).

Until the end of 2016, railway infrastructure structures within the meaning of the R.T.A. were exempted from real estate tax if the infrastructure operator was obliged to make them available to licensed railway carriers. Therefore, in order to determine whether a given building qualifies for exemption from real estate tax, it was necessary to determine whether it is railway infrastructure within the meaning of the R.T.A., and then whether the infrastructure operator is obliged to make it available to railway carriers.

With regard to the first of the above conditions, taxpayers most often argued that the railway infrastructure should also include sidings, but this opinion was not based on the provisions of the R.T.A. According to R.T.A., "railway infrastructure" was understood as a railway line. At the same time, the definition of 'railway line' indicated that it did not include 'railway sidings'. Thus, 'railway sidings' could not be regarded as 'railway infrastructure'.

The second condition, i.e., the question of how to understand the "obligation to make available" railway infrastructure to a licensed railway carrier, raised even more doubts. The interpretation of this concept on the basis of the provisions of the R.T.A. led to the conclusion that the tax exemption cannot be applied to sidings, because the regulations do not obliged operators to make them available to railway carriers.

The amendment introduced on 1 January 2017 significantly extended the scope of tax relief for railway infrastructure. In particular, according to the new version of R.T.A., the tax exemption covers land, buildings and structures forming part of the railway infrastructure within the meaning of R.T.A., which is made available to railway carriers (Article 7(1)(1) L.T.C.A.). The extension of the exemption to sidings was the result of both a reformulation of the provisions of the tax law and the provisions of the R.T.A. The new definition of railway infrastructure in the R.T.A. also includes sidings (Article 4(1) and Appendix 1 R.T.A.).

At the same time, as in the legal status in force until the end of 2016, two conditions must be met for the application of the exemption. First, the facility must be classified as a railway infrastructure in accordance with R.T.A. Secondly, the infrastructure must be made available to railway carriers. Importantly, in the version in force since 1 January 2017, the provision no longer provides that infrastructure must be made available to carriers on the basis of R.T.A., but only requires that the infrastructure be used by carriers.

Numerous disputes between taxpayers and tax authorities have arisen regarding the understanding of the premise of making railway infrastructure available on the basis of the regulations in force since 1 January 2017. According to some representatives of the doctrine, the condition "providing access to railway infrastructure" should be interpreted taking into account the provisions of the R.T.A. – both in the legal status in force until the end of 2016 and in the version in force since 1 January 2017 [Pahl 2017, pp. 39–52]. This approach entails serious tax consequences, as it de facto excludes the possibility of applying the exemption to sidings. It should be noted that the vast majority of railway sidings are so-called private infrastructure, used only for the own needs of the owner-entrepreneur. The provisions of R.T.A. regarding making the railway infrastructure available to the carriers shall not apply to private infrastructure.

This approach to the interpretation of the regulations was rejected in the jurisprudence of Polish administrative courts, which recognized the right of taxpayers

to exempt railway sidings constituting private infrastructure from real estate tax. In particular, according to the courts, the L.T.C.A. refers to the provisions of R.T.A. in a strictly defined area, i.e., only to determine what railway infrastructure is. Therefore, the condition of making the railway infrastructure available should be interpreted on the basis of the rules of everyday language, and not through the application of the provisions of R.T.A. If the taxpayer actually makes the railway infrastructure available to the railway carriers, the condition should be considered to be fulfilled even if it is not made according to the rules set in R.T.A.

Conclusion

A comparison of the approach of Polish administrative courts to the interpretation of the provisions on exemption from real estate tax for harbour and railway infrastructure leads to the conclusion that over the years the approach to the primacy of linguistic interpretation has changed.

In the line of jurisprudence concerning the interpretation of the provisions on the harbour exemption (formed in the years 2010–2014), it was assumed that in order to decode the term "harbour infrastructure" used by the legislator, it is necessary to refer to the provisions of the non-tax act (S.H.M.A.). It should be emphasized that the courts have come to this conclusion despite the fact that the provisions of L.T.C.A. do not contain such a reference. Moreover, the concept of harbour infrastructure is understandable in everyday language and, therefore, according to the approach adopted in tax law doctrine, concepts from other legal acts should not be used in such a case, since the addressees of a tax law cannot be required to have knowledge of legal language [Brzeziński 2013, p. 36]. The direct consequence of this approach of the courts is to exclude the possibility of applying the exemption for harbour infrastructure to river harbours.

At the same time, in the line of jurisprudence regarding the exemption for railway infrastructure, which was formed later (in 2017–2020), the courts adopted a different approach, adopting the primacy of literal interpretation as the applicable principle. Despite the doubts raised by the tax authorities reluctant to such a position, according to the courts, the reference to the provisions of the R.T.A. should be applied to the extent strictly indicated in L.T.C.A. This approach allowed railway sidings to be exempted from the real estate tax.

Applying the above comparison to the considerations on the implementation of the tax stimulating function, it should be noticed that the jurisprudence on the exemption for harbour infrastructure has eliminated the use of the tax incentive for the expansion and maintenance of river harbours in Poland. As a result, regulations that could and should become an important stimulus for the development of river harbours is not working, and river transport in Poland is practically not developing.

The approach of administrative courts to the principle of the primacy of literal interpretation, which could be observed in the case of the provisions on exemption for railway infrastructure, seems to suggest the emergence of understanding for the importance of the tax stimulating function. The approach of the courts opened the way for the use of the exemption by private entrepreneurs with railway sidings, and thus enabled the implementation of the stimulating function. Entrepreneurs encouraged by the tax exemption received an incentive to build and modernize railway sidings, and as a result to develop the use of rail transport (which, as more ecological than road transport, requires support by various methods, also through tax incentives).

Unfortunately, despite the emergence of a line of jurisprudence concerning railway infrastructure based on the primacy of a literal interpretation, contrary to expectations, so far administrative courts have not changed their approach to the interpretation of the provisions on the exemption for harbour infrastructure. The doctrine proposes to include in the harbour exemption the current position of the Supreme Administrative Court, according to which the reference to the provisions of another act should be applied in cases strictly provided for in the tax act [Kałążny 2020b, p. 55]. However, we still have to wait for its implementation.

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Organizational Legal Forms for Social Entrepreneurship in the Republic of Kazakhstan

Abstract: This article includes an analyzes of first steps taken in Kazakhstan to create a legal and organizational framework for social entrepreneurship. The expediency to distinguish a specific type of legal entities (along with commercial and non-commercial legal entities) in the Civil Code of the Republic of Kazakhstan, as well as to regulate special organizational and legal forms for conducting social entrepreneurship is substantiated. The absence (at least in most cases) of traditionally understood financial investment relations in the establishment and financing of the activities of social entrepreneurship entities (and Social Economy as a whole) is stressed out. The need for the State to declare (as its political task) its focus on the formation of Social and Solidarity economy in Kazakhstan as a special sector of the national economy, including with the obligatory development of constitutional foundations to ensure the common good, recognition and observance of public interest, is emphasized. The objective need to create an effective system of social finance to support and develop Social Economy in Kazakhstan is substantiated.
Keywords: Kazakhstan, social entrepreneurship, Social Economy, social finance, organizational and legal forms (of legal entities)

Introduction

In 2021 legal definitions of such new concepts for our legal reality as "social entrepreneurship" and "subject of social entrepreneurship", as well as legislative changes aimed at both registering social entrepreneurship entities and determining state support measures of social entrepreneurship, have been introduced into the legislation of the Republic of Kazakhstan.

These legislative and organizational novelties represent a very important step both to ensure conditions for more sustainable development of private business in our country, and to create a more inclusive, favorable and promising socio-economic environment for all categories of our fellow citizens (especially for those who are reasonably referred to and/or legally recognized as socially vulnerable groups of the population).

With such amendments in our legislation, the legal policy and practice of public administration in Kazakhstan has made notable progress towards harmonization with the activities of the European Union and many modern States to create conditions for the functioning of Social Economy.

At this stage we have based on the fact that at the level of the European Union the Social Economy is considered as a set of special organizations that conduct economic activities conditioned by the need to achieve socially significant goals and/or to solve socially significant problems [Daniela 2018, pp. 17–18], and such "mission-driven organizations are legally independent of the State" [Glänzel, Schmitz, Mildenberger 2012, p. 8].

Based on our comparative study research, which results are reflected in this article, it is also obvious to us that social entrepreneurship and Social Economy do not (at least, it should not) imply any inclusion in the circle of their organizations of those market-economy entities that are engaged in a regular entrepreneurial activity, even when they (as their one-off projects, charity or other similar form of socially beneficial projects) provide funding to, or offer other support of activities of, organizations of Social Economy.

In this regard, this article includes analysis and proposals for further development of Kazakhstani legislation to regulate organizational and legal forms for social entrepreneurship in our country. Certain necessary legislative amendments in this matter are proposed and explained.

About Those Who Are Engaged in the Social Entrepreneurship

Social entrepreneurship is carried out by people interested in the implementation of economically viable activities with its end result to be a solution of environmental problems, issues of fair trade, education, public health and health care, social justice, etc. [Ineza 2021, p. 1].

In the European Union, as a general definition, specially established private and social-mission-driven enterprises created with the freedom of membership in them and with their autonomy / independence from the State and other market participants have been proposed to be understood as the subjects (persons or entities) of Social Economy. And there two categories of such organizations which, by their respective regular activities, form Social Economy have been distinguished [Daniela 2018, p. 9].

As we understand, within the first category (Social Enterprises), they unite those corporate-type organizations that are created to meet needs of their members through participation of the organizations in market relations by way of production of goods, provision of services, offering guarantees or financing (to their members – *F.K.*).

The second category of social entrepreneurs (Social Business) seems to include those who provide non-market services [that is, those which, for various reasons, most often associated with insufficient profitability of the relevant activity, are not provided by ordinary entrepreneurs – *F.K.*] to, for instance, households, and whose income cannot be appropriated by those who created respective organizations established, control them or finance them (*i.e.* cannot be distributed in their favor) [Daniela 2018, pp. 9, 35, 39].

About the Concept of Social Finance

In the view of what Social Economy is as "a different way of doing business" [SESBA project partnership 2016, p. 12], organizations / subjects of Social Economy cannot be considered as objects of capital investment.

Those investment relations that take place in relations between any commercial enterprise and its founders / participants do not arise within Social Economy when the relevant organization is set up or a third party provides financing to it in other forms. Even in the case of a Social Enterprise, the legal status of which may allow some limited distribution of its net income among its participants, the return of capital investments made available to it does not seem to be at least somehow probable. And in the case of social entrepreneurship of the second type (*i.e.* Social Business), such a return on investment is generally impossible.

In this regard, it is reasonably noted that Social Enterprises are often viewed by ordinary private investors as unattractive investments, and therefore such enterprises are often forced to rely on government subsidies, which (in doing so) can create problems for their (the enterprises') autonomy [Glänzel, Schmitz, Mildenberger 2012, pp. 8, 11, 12]. In that context, there a variety of specific models of financing their activities that are acceptable for Social Enterprises to support their sustainability has been mentioned to exist [Fonteneau, Neamtan, Wanyama, Morais, de Poorter, Borzaga, Galera, Fox 2011, pp. 25–26].

In view of this fundamental circumstance, the essence of Social Economy pre-determines the development of a new concept and system of relationships called Social Finance, which would function to finance the Social Economy / Social Enterprises. The components of such a system are:

1. the subjects (persons) of Social Economy as objects or recipients of the financing, as well as
2. social investors and
3. special financing instruments, which instruments, as we believe, cannot be considered as means of capital investments [Glänzel, Schmitz, Mildenberger 2012, p. 8].

Within such a system, Social Enterprises and other entities of Social Economy (e.g. Social Business), their activities shall be considered as objects of social investments. To put it in other words, such entities shall act as recipients and users of various Social Finance instruments, or as beneficiaries of relevant social finance arrangements.

In turn, social investors (that is, sources of financing for Social Economy) are those who will not receive a direct financial return on their social investments and any gain in the form of money or other positive assets, but who aim to assist in obtaining a socially valuable effect from their social investments by meeting social needs of third parties, solutions of certain social problems [Glänzel, Schmitz, Mildenberger 2012, pp. 12–13].

At the same time, to qualify as instruments of Social Finance there can be any forms of financing Social Economy that support its sustainability, including membership in certain mutual financing organizations, operation of special funds, provision of special grants, equity and quasi-equity financing and other methods of financial support [Fonteneau, Neamtan, Wanyama, Morais, de Poorter, Borzaga, Galera, Fox 2011, pp. 25, 28].

About Organizational and Legal forms for Social Enterprises and Social Business

It has been recognized that there is no a single organizational and legal form for Social Enterprises and Social Business [European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs 2021]. Other jurisdictions offer separate organizational and legal forms for subjects of Social Economy [Fonteneau, Neamtan, Wanyama, Morais, de Poorter, Borzaga, Galera, Fox 2011, pp. 1–5]. At the same time, it is specified that all relevant organizations as subjects of Social Economy are characterized by the desire of the most vulnerable social groups to respond to their own needs through self-help (or mutual assistance / mutual support – *F.K.*) organizations [Daniela 2018, p. 15].

The need for regulation of separate legal and organizational forms for entities of Social Economy and Social Business is dictated by the fact that, though they can engage in entrepreneurial activity, they are restricted in the distribution of their net income among their founders / participants (or such distribution is generally inaccessible for them). That is why the organizational and legal forms of commercial (entrepreneurial) organizations may be unacceptable for social entrepreneurship.

Similarly, activities of organizations of Social Economy may be also impossible (or very limited) if they act in the form of non-profit organizations, which (although they are allowed to receive entrepreneurial income) cannot have profit-making as the main focus and the main purpose of their activities. At the same time, for subjects of

Social Economy, obtaining such income as a regular source of funding can be crucial. Therefore, at least, the development of legislation on non-profit organizations becomes relevant, including to ensure the efficiency of Social Economy.

In turn, in case when Social Economy allows individuals to act as its subjects, then, for the above reasons, the form of individual entrepreneurship (as the form has been regulated in Kazakhstan) may also be unacceptable. At the same time, in this case, it may be necessary to introduce a special form for the purpose, for example, of a social individual entrepreneur.

In any case, whatever the legislative decision regarding the classification of legal entities and regulation of organizational and legal forms for subjects of social entrepreneurship (in general, the such of Social Economy), when determining the organizational and legal forms for them, it is advisable to remember that their common characteristic is that: (1) the system of management and conduct of the business of each of such enterprises is determined by collective ownership and (2) such enterprises shall be managed, and their activities shall be run, based on the principles of participation of their members (participants, founders) in its management and the way of respective decision-making should be democratic [Fonteneau, Neamtan, Wanyama, Morais, de Poorter, Borzaga, Galera, Fox 2011, pp. 7–8].

Recognition of the Concept of Social Entrepreneurship in Kazakhstan

For Kazakhstan, the concept of social entrepreneurship is the new one. The solution of socially significant problems and tasks of social integration of vulnerable segments of the population was an important area of activity of the earlier existed Soviet Union. However, in the absence of entrepreneurship, moreover – with the legislative prohibition of entrepreneurship, during the Soviet era these tasks were solved in different ways. Nevertheless, the first steps have already been taken to form a legal and organizational basis for social entrepreneurship in the Republic of Kazakhstan.

In particular, the Law "On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on the Matter of Entrepreneurship, Social Entrepreneurship and Mandatory Social Health Insurance" (the "Law on Social Entrepreneurship") [The Law of the Republic of Kazakhstan of 24 June 2021 "On Amendments to Certain Legislative Acts of the Republic of Kazakhstan on Matters of Entrepreneurship, Social Entrepreneurship and Mandatory Social Medical Insurance" No. 52–VII] has been adopted in 2021, and respective changes and additions have been made to some of legislative acts of the Republic of Kazakhstan currently in effect.

An essential aspect is that it is planned to form and maintain a Register of social entrepreneurs. A draft of the Rules for maintaining such a Register has already been developed and placed for public discussions [Draft of the Rules 2021, p. 11].

In addition (according to local mass media), organizational measures are already being taken by the State to develop labor skills and stimulate jobs, ensure social integration of certain categories of citizens, an Atlas of new professions and competencies in Kazakhstan has been formed, and appropriate social services are being created.

The Concept of the Social Code of the Republic of Kazakhstan has been developed, which (although it does not have, and should not have, the purpose of regulating social entrepreneurship) will be based on (as one of the three basic principles for the Code) the principle of solidarity and responsibility of the State and citizens [A press release 2021 on: 12].

At the same time, it seems that (if not immediately, then in the foreseeable future) the Social Code will regulate the activities and instruments of financial support of the Social / Solidarity Economy. Such legal framework to be created by norms of the Social Code seems to be both justified and the most expedient.

As for the Law on Social Entrepreneurship, its adoption (no matter how imperfect or incomplete its content may be) corresponds to global trends in social development, reflects (to a certain extent) international and foreign experience. This is an important step towards the formation of Social Economy in Kazakhstan.

But this is only the first step towards the perception of the concept of social entrepreneurship by the legal system of Kazakhstan and of the implementation of the concept in the reality of Kazakhstan.

About the Main Tasks of Social Entrepreneurship in Kazakhstan

They have been defined in Article 79–2 of the Entrepreneurial Code [The Entrepreneurial Code of the Republic of Kazakhstan of 29 October 2015], www.online.zakon.kz] and include both: 1. ensuring participation of business entities (entrepreneurs) in solving social problems, promoting / facilitating their solution, and 2. in accordance with the understanding of Social Economy accepted in the developed jurisdictions, assistance in ensuring employment of socially vulnerable segments of the population, creating opportunities for them equal with other citizens to participate in socially useful activities, as well as promoting goods produced by social entrepreneurs, their works and services including those produced / performed / rendered with personal labor participation of socially vulnerable people. At the same time, these norms apply only to those who are classified as socially vulnerable groups of the population according to the instructions in Article 79–3 of the Entrepreneurial Code.

It should be noted that in Article 79–2 of the Entrepreneurial Code, one of the tasks of social entrepreneurship has been defined as "ensuring the participation of business entities in solving social problems, including through the introduction of social innovations and assistance in the provision of social services".

It seems that this provision of the Entrepreneurial Code incorrectly defines such a task specifically for social entrepreneurs, because it is the area of activity that is (or should be) a task for public administration in promoting social entrepreneurship.

In this case, it looks obvious that it is inexpedient to recognize the entrepreneurial activity itself as social entrepreneurship (even if the respective entrepreneurs "participate in solving social problems"). It seems that for such entrepreneurs it is possible to provide for (and they even should be provided) separate (other than for social entrepreneurship) measures of state encouragement, incentives or support in order to induce them to participate in solving social problems.

The introduction of such a legislative norm in the Entrepreneurial Code is seen as incorrect perception of foreign experience. For example, it is obvious that it was not considered while drafting the aforementioned amendments to the Entrepreneurial Code that in the EU countries the state policy for solving problems of social entrepreneurship is based on the following two pillars:

1. creation of eco-system for Social Economy to enhance multiplication of Social Enterprises; and
2. support citizens' ability to self-organize in creation and running Social Enterprises [Borzaga, Galera 2016, p. 19].

And those two pillars pre-determine specific formulation and/or content of relevant legislative provisions.

It means (apart from other important aspects) that those who a considered as external source of financing Social Enterprises, even if they are qualified as social investors, are not recognized as social entrepreneurs or Social Enterprises. However, they can be considered as significant components of an ecosystem for Social Economy.

About Significance of Social Innovations

As noted above, legal regime for social entrepreneurship in Kazakhstan provide for introduction of social innovations to solve social problems. In this regard, one should note that in accordance with the experience developed in foreign jurisdictions, the use of innovative approaches is manifested to exist in the management of the activities of a social entrepreneur.

In this context, innovation should primarily relate to the management activities of the social entrepreneurs themselves; innovations should contribute to the achievement of the goal of a Social Enterprise / organizations of social entrepreneurship, and not of a public administration [Ineza 2021, p. 5].

In connection with this, imperfection of the legal technique should be noted. Particularly, such shortage can be seen in that how the concept of "innovations" is defined in Article 79–1 of the Entrepreneurial Code. Such definition was introduced

"for the purposes of this Code" (that is, the Entrepreneurial Code – *F.K.*). But it can have a meaning only for those aspects which exist within the framework of the content of subparagraph 1 of Article 79–1 of the Entrepreneurial Code. The different focus of various norms of the Entrepreneurial Code (which Code does not regulate the social entrepreneurship only) shall also determine a different significance of innovations used in a particular area of application of the Code.

Taking into account the above, it seems appropriate not only to clarify the tasks of social entrepreneurship, but also to correct the definition of the legal term of "innovations" and clearly (at least, clearer) indicate the significance of innovations in the sphere of social entrepreneurship.

About Support Measures for Social Entrepreneurs Provided for in the Laws of Kazakhstan

As noted above, the recognition of a person as a subject of social entrepreneurship means the availability for the person of special measures of organizational, legal, methodological and financial support provided for in the law.

Particularly, Article 232–1 of the Entrepreneurial Code provides for the list of the types of state support for social entrepreneurship. An analysis of the content of that Article of the Entrepreneurial Code allows to conclude that many (if not most) of the envisaged (and others that will be developed in the future) measures to support social entrepreneurship (first of all, measures of a financial and other property nature) for ordinary entrepreneurs should not be available.

In any case, for such ordinary entrepreneurs, participation in the system of supporting measures for social entrepreneurship, including a Social Finance system, should be limited only to their role of social investors, and not of social investees.

About Legal Definition of Social Entrepreneurship in Kazakhstan

Article 79–1 of the Entrepreneurial Code provides for the following definition of social entrepreneurship in the Republic of Kazakhstan: "Social entrepreneurship is the entrepreneurial activity of subjects of social entrepreneurship, contributing to the solution of social problems of citizens and society, carried out in accordance with the conditions provided for in Article 79–3 of this Code (i.e. "Categories of subjects social entrepreneurship" – *F.K.*).

Such legal definition of social entrepreneurship seems to be too general. It does not contain clearly defined and legally significant criteria. Moreover, it allows its application even in relation to:

1. those entities that are not (conceptually or objectively cannot be considered) as subjects of social entrepreneurship, and

2. those activities that in their essence are not social entrepreneurship (in its generally accepted understanding in many other jurisdictions).

In order to avoid any ineffectiveness of the application of support measures to social entrepreneurship and formation of corrupt practices in implementing of such support, the legal definition of social entrepreneurship needs legislative clarification.

Here, it should be remembered that social entrepreneurship is not an ordinary entrepreneurship (as this term is defined in Article 2 of the Entrepreneurial Code and in Article 10 of Civil Code of the Republic of Kazakhstan [The Civil Code of the Republic of Kazakhstan (General Part) of 27 December 1994, as amended, www.online.zakon.kz]. Social entrepreneurship is a specific combination of an entrepreneurial activity and a focus on the implementation of a social mission, where the second component is predominant, and the possibility of distributing net income in money or other property, as well as any other return on monetary investments, is significantly limited or completely prohibited.

It should also be understood that social entrepreneurship is a business [SESBA project partnership 2016, p. 5]. That means, it is a regular and continuous implementation of appropriate economic activity on a systematic basis during a long time to achieve goals of such activity and to solve tasks within the framework of its social orientation.

In this regard, it is required to create an adequate legal basis for social entrepreneurship, including its adequate legislative definition, creation of new (special) organizational and legal forms for social entrepreneurship, development of effective models for financing social entrepreneurship and the formation of legal conditions for the functioning of the social finance system.

Taking into account the said above, a clear legislative separation of the concepts of entrepreneurship and social entrepreneurship is necessary. In addition, the tasks listed in Article 79–3 of the Entrepreneurial Code should be re-formulated, and the measures to support social entrepreneurs provided for in that Article should be separated from preferences for entrepreneurs who simply "participate in solving social problems".

Legal Definition of "a Subject of Social Entrepreneurship" in Kazakhstan

The legal definition of the term "a subject of social entrepreneurship" introduced into the legislation of Kazakhstan is also insufficient in its content to understand what social entrepreneurship is and which of the subjects of entrepreneurial activity can be viewed as a social entrepreneur.

According to Article 79–1 of the Entrepreneurial Code, individual entrepreneurs and legal entities (with the exception of large business entities) (and only they – *F.K.*) can be considered being social entrepreneurs, provided that they are:

1. recognized as such through registration in the Register of subjects of social entrepreneurship and
2. included in this Register in accordance with the requirements of Article 79–3 of the Entrepreneurial Code and the Rules for the formation and maintenance of the specified Register (as noted above, the draft of such Rules exists, but has not yet been approved).

Being combined with the legal definition of "social entrepreneurship", the legal term of social entrepreneur in current version of Article 79–1 of the Entrepreneurial Code means those persons:

1. simply indicates individual entrepreneurs and legal entities,
2. which are included in the Register of subjects of the social entrepreneurship, and
3. whose activities are aimed at solving social problems of citizens and society.

In addition, such individuals and organizations should maintain their compliance with criteria set forth in Article 79–3 of the Entrepreneurial Code to provide at least 50% of the jobs created by them for workers with social status and spend at least 25% of their total labor costs on remuneration of their labor, or to have income from the implementation of the stipulated socially significant activities in the amount of at least 50% of their total income and reinvest at least 50% of their net income in carrying out their activities in the framework of social entrepreneurship.

The Need for Legislative Clarifications

It seems that legal definitions of both social entrepreneurship and social entrepreneurs need to be essentially revised and clarified. In doing so, the following should be taken into account:

1. the possibility of conducting social entrepreneurship by an individual seems to be acceptable in the conditions of Kazakhstan; however, it seems that it would be more expedient for these purposes to avoid using the form of an individual entrepreneur, but specifically for the purposes of engaging in social entrepreneurship to regulate a special legal form of a social individual entrepreneur;
2. admitting participation of legal entities precisely as subjects of social entrepreneurship requires:

legislative recognition of another separate type of legal entities in Article 34 of the Civil Code of the Republic of Kazakhstan (in addition to commercial and non-commercial organizations)

regulation of special organizational and legal forms for such distinguished legal entities because organizational forms for social entrepreneurship that exist in other countries (in particular, a social cooperative, a mutual fund, etc.) are not provided for by Kazakhstani legislation (although, as a rule, all organizations of Social Economy operate in corporate forms, including acting as associations, or are funds).

Thus, it is advisable to amend the Civil Code (to the minimal extent, its Articles 34 and 35) regarding the legal status of legal entities, because:

1. social entrepreneurship is not the activity of commercial organizations, and
2. the forms of non-commercial organizations may not (at least, effectively) contribute to the expected social integration of vulnerable groups of the population and their motivation to participate in productive activities, and also do not provide for systematic economic activities aimed at generating entrepreneurial income, and impede or hinder the use of many financing models for social entrepreneurship.

Such legislative changes and additions should properly reflect the following fundamental points:

1. social entrepreneurship is a regular and purposeful economic activity; social entrepreneurship is not charitable projects of individual business entities conducting entrepreneurial activity or those functioning as non-profit organizations;
2. a social / socially significant mission is the primary and prevailing goal of the activity of any subject of social entrepreneurship / organizations of Social Economy; the concepts of the common good and public interest require significant theoretical development and legislative formulation in order for the legal and organizational basis of social entrepreneurship to be formed in the most expedient, reasonable and effective way;
3. the proper legal regulation of Social Enterprises is conditioned by the existence of an integral system of effective and diverse mechanisms that ensure inclusiveness and sufficient motivation for vulnerable and marginalized segments of the population with the aim of their social integration, which should be formed at the level of public policy using a systemic and integrated approach;
4. it is necessary to bear in mind the peculiarities of the organizational structure and management in Social Enterprises and other subjects of social entre-

preneurship: the management structure and business management system of such an enterprise / entity is determined by collective ownership and principles of participation of members (participants, founders) of the enterprise in its management, as well as by a democratic method of management and decision making;

5. the formation of a system of Social Finance is essential in order to create efficient and accessible sources of financing for social entrepreneurship for the relevant entities; at the same time, it should be remembered that in the overwhelming majority of cases, the establishment of Social Enterprises / social entrepreneurship entities, there is no investment relationship between the entity and its founders / participants.

Conclusion

Formation of Social and Solidarity Economy in Kazakhstan requires creation of an appropriate legislative and organizational framework for social entrepreneurship in our country, including implementation of significant changes and additions to the system of current legislation.

We believe that the concept of social entrepreneurship can receive an appropriate legal basis, provided that one of the declared and pursued goals of public policy in Kazakhstan is the formation of Social and / or Solidarity Economy.

Clarity and unambiguity in defining such a goal will make it possible to systematically reform legislation by defining the organizational forms of Social Economy, the system of state support for the subjects of Social Economy, as well as effective and very special mechanisms and instruments for financing their activities by the so-called social investors.

At the same time, the necessary clarity in the formulation of the relevant state policy and its consistent implementation will not only stimulate the development of Social Economy, but it will also help to create effective barriers to ineffective spending of the state budget funds in support of social entrepreneurs, to prevent formation of corrupt practices as well as to prevent a decrease in peoples' confidence in the State and discrediting the very idea of Ssocial Economy.

Finally, for Kazakhstan, the perception of the above mentioned two concepts ("social entrepreneurship" and "subjects of social entrepreneurship") should serve as an additional incentive for the development of the legal institution of private-law subjects in general and reforming the system of legal entities in particular.

Taking into account the approaches to understanding Social Economy in developed jurisdictions and the peculiarities of the civil-law regulation of legal entities in Kazakhstan, as the very next step in such legislative development it seems the most expedient to be as follows:

Social Economy organizations should be distinguished as a separate type of legal entities (in addition to their existing division for commercial and non-commercial organizations),

special organizational and legal forms for such social entrepreneurship entities should be regulated, also depending on the content of the activities of each respective entity.

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Financial and Legal Aspects of the Participation of Municipalities of the Russian Federation in the Implementation of National Projects

Abstract: Using a system analysis and a comparative legal method the author considers participation of municipalities in the implementation of project activities, including their role in the implementation of national projects in the Russian Federation. The paper provides examples of strategic investment projects implemented by the municipalities of the Moscow region, identifies current problems.
Keywords: Local self-government, financial law, national projects, investment

Project Approach in State and Municipal Management of Modern Russia

In the Russian Federation, due to external risks and threats, unstable socio-economic development in the context of the global crisis, effective methods are being sought at all levels of public administration to achieve national goals and solve priority tasks directly related to human well-being, society and the state, which are outlined in the Decree of the President of the Russian Federation dated May 7, 2018 No. 204 "On National goals and strategic objectives of the development of the Russian Federation for the period up to 2024" [Collection of Legislation of the Russian Federation. 2018. No. 20. Article 2817].

In recent years, the project approach has gained a significant role in state and municipal management. Its use in the public sector has become one of the results of the transition from process to result. As part of the ongoing administrative reform in Russia, one of the trends was the introduction of results-oriented management.

The project approach in public administration is based on the methodology and use of management tools, in which the basis is a project – a unique (new, original, inimitable) set of actions, processes and elements initiated and implemented over a

predetermined period of time, and aimed (through the use of limited resources) at achieving specific goals and final desired results [Charkina 2017, p. 54].

The very concept of "Project" comes from the Latin word "Projacere", which in translation into Russian means "to move something forward" (pro – in advance; jacere – to promote, to throw forward).

As a project, a set of directions, goals, tasks, resources, managerial actions, managers and performers are identified, which have such distinctive features as:

1. specific goals needed to achieve;
2. targets for understanding the quality of project implementation;
3. novelty;
4. resource base corresponding to the project activities;
5. project implementation period;
6. risk (the inevitability of various conflict situations around and within the project) [Rogova 2019, pp. 11–12].

In the Russian Federation, there is no definition of the concept of "project" at the legislative level, but there is a subordinate interpretation provided for by the government act [Decree of the Government of the Russian Federation No. 1288 of October 31, 2018], according to which "a project is a set of interrelated measures aimed at obtaining unique results under time and resource constraints" [Collection of Legislation of the Russian Federation. 2018. No. 45. Article 6947].

All projects have three important characteristics:

1. implementation period (each project has a beginning and an end, which distinguishes project activity from process (operational));
2. unique result;
3. goal.

The project approach includes two independent, but complementary directions:

1. design – initiation of a project that combines goals, objectives, planned indicators (results), resources, responsible persons;
2. project management is the creation of project management bodies that ensure its implementation and completion [Charkina 2017, p. 32].

As noted earlier, the project approach has moved from business to public administration. Having proven itself in corporate practice, the project approach is now widely and actively used in the activities of public authorities and officials at all levels.

National projects can be considered as one of the examples of the implementation of the project approach in the domestic public administration.

In official documents, the term "national project" was used in the annual Message of the President of the Russian Federation V.V. Putin to the Federal Assembly of the Russian Federation ("Rossiyskaya Gazeta", 26th April 2005). On April 25, 2005, the Head of the Russian state noted in his Message that "new opportunities and the need to implement a number of major national projects have already appeared." On September 5 of the same year, the Russian President in the speech at the meeting with the members of the Government, the leadership of the Federal Assembly and members of the Presidium of the State Council, made a statement about the beginning of the implementation of priority national projects in the country aimed at significantly improving the quality of life of Russians. V. V. Putin pointed out that attention should be focused on such areas as healthcare, education and housing, since they determine the standard of living of citizens and the social well-being of society [www.kremlin.ru].

In the Decree of the President of the Russian Federation dated May 7, 2018 No. 204 "On National goals and strategic objectives of the Development of the Russian Federation for the period up to 2024" (Collection of Legislation of the Russian Federation. 2018. No. 20. Article 2817) the mechanism for achieving national goals is defined. The solution of this problem is supposed to be through national projects developed by the Government of the Russian Federation taking into account the opinions of regional authorities.

It should be noted that local self-government bodies take part in the implementation of regional projects ensuring achievement of the goals of national projects, within the framework of the exercise of powers to resolve issues of local importance, as well as in the implementation of certain state powers transferred to local self-government bodies. In the annual monitoring of the Ministry of Finance of the Russian Federation on the results of the execution of local budgets and inter-budgetary relations in the subjects of the Russian Federation at the regional and municipal levels for 2020, it is noted that the participation of local governments in the national projects is of particular importance because local self-government is closest to the population of a particular territory and has the ability to ensure that citizens' opinions are taken into account while implementing the national projects. [www.minfin.gov.ru].

Regulatory Framework of Strategic Planning

The first attempt to implement the state policy through projects is associated with the launch of the next stage of administrative reform. In the concept of administrative reform for the period 2006–2010 (Collection of Legislation of the Russian Federation. 2005. No. 46. Article 4720) results management was designated as one of the 8 areas of reform, and among the measures planned for 2006; the implementation

of trial projects for the creation and implementation of results management procedures in the federal executive authorities was envisaged.

Within the framework of this direction, it was envisaged to create and implement a comprehensive system of departmental and interdepartmental planning and project management for the goals and results of activities, development of key measurable indicators of effectiveness and efficiency of the activities of executive authorities in the main areas of their activities in accordance with the strategic goals of the state.

To carry out project activities in the field of public administration on a systematic basis, a set of regulatory legal acts was developed, the main of which is Federal Law No. 172-FL of June 28, 2014 "On Strategic Planning in the Russian Federation" [Collection of Legislation of the Russian Federation. 2014. No. 26 (Part I), Article 3378].

The Law on Strategic Planning was initiated on October 1, 2012 by the Government of the Russian Federation. The draft law was developed in accordance with the Decree of the President of the Russian Federation dated May 7, 2012 No. 596 "On Long-term State Economic Policy" [Collection of Legislation of the Russian Federation. 2012. No. 19. Article 2333] in order to coordinate strategic management and budgetary policy measures.

The subordinate regulation of national projects, as it has already been indicated above, is based on:

1. Decree of the President of the Russian Federation No. 204 dated May 7, 2018 "On National Goals and Strategic Objectives of the Development of the Russian Federation for the period up to 2024";
2. Decree of the President of the Russian Federation dated July 19, 2018 No. 444 (ed. dated July 20, 2021) "On Streamlining the activities of Advisory and Advisory Bodies under the President of the Russian Federation" (together with the "Regulations on the Council under the President of the Russian Federation for Strategic Development and National Projects") [Collection of Legislation of the Russian Federation. 2018, No. 30, Article 4717];
3. Resolution of the Government of the Russian Federation No. 1288 of October 31, 2018 (as amended on June 24, 2021) "On the Organization of Project Activities in the Government of the Russian Federation".

Although the national projects are focused on the activities of State Authorities – Federal and Federation subjects, however, the Legislation of the Russian Federation regulates some issues of financial participation of municipalities in the implementation of national projects. For example, the Decree of the Government of the Russian Federation dated October 23, 2019 No. 1359 approved the Rules for the provision and distribution of other inter-budgetary transfers from the federal budget to the budg-

ets of the constituent entities of the Russian Federation for the renovation of regional and municipal cultural institutions within the framework of the federal project "Cultural Environment" of the national project "Culture" [Collection of Legislation of the Russian Federation. 2019. No. 44, Article 6201].

Issues of Implementation of National Projects in the Russian Federation

The implementation of priority national projects began in Russia on January 1, 2006, when the four projects were launched at once: "Health", "Affordable and comfortable housing for Russian citizens", "Education" and "Development of the agro-industrial complex (AIC)" [www.tass.ru/info/6101471, access as of 4 October 2021].

Describing the experience of project management in the Russian public administration sphere, S. S. Gorokhova identifies four stages of their development:

1. during the first stage (2005–2008), the use of project management elements was observed, but it was not possible to create a truly project-based system of work;
2. at the second stage (2009–2012), an interest in the project as a way of solving state tasks increased, which was reflected in an increase in the number of projects and compliance with a number of methodological requirements of project management in their execution;
3. the third stage (2012–2018) – popularization of project management was carried out, which is expressed in an increase in the number of megaprojects and the creation of the foundations of the methodological, legal and organizational basis for their implementation and use [Gorokhova 2020, No. 6];
4. the fourth stage (2018-present). It is conditioned by the adoption of the Decree of the President of Russia dated May 7, 2018 No. 204 "On national goals and strategic objectives of the development of the Russian Federation for the period up to 2024". In continuation of the implementation of the directions of the state socio-economic policy specified in this act, Decree of the President of the Russian Federation No. 474 dated July 21, 2020 "On National Development Goals of the Russian Federation for the period up to 2030" defines five national development goals: a) preservation of the population, health and well-being of people; b) opportunities for self-realization and talent development; c) comfortable and safe environment for life; d) decent, effective work and successful entrepreneurship; e) digital transformation. Within the framework of each national development goal, Decree No. 474 sets targets characterizing its achievement in 2030.

Let's take a closer look at the analysis of the implementation of national projects. According to the Accounts Chamber of the Russian Federation for the execution of the federal budget for 2019, "the volume of unfulfilled budget allocations amounted to 1.1 trillion rubles, almost half of the increase in balances was made up of unfulfilled budget allocations for the implementation of national projects".

The level of execution of expenditures for the implementation of national projects and a Comprehensive plan (91.4%) is 2.8 percentage points to a lower than the average level of execution of federal budget expenditures (94.2%). The volume of unfulfilled appointments amounted to 149.8 billion rubles, or 8.6%. Expenditures on 4 national projects ("Ecology", "Digital Economy of the Russian Federation", "Labor productivity and Employment support", "International cooperation and Export") and a Comprehensive plan were executed at a low level (less than 90%). Expenses for the purchase of goods (works, services) within the framework of national projects amounted to 87.5% of the consolidated list with changes, for the provision of inter-budget transfers to the budgets of the constituent entities of the Russian Federation – 89.2%. [audit.gov.ru]. Details of the execution of expenses, see Figure 1.

Figure 1. Level of Implementation of Expenditures on National Projects in 2019

	billion rubles	**%**
General performance level	1600.38	**91.45**
Science	37.62	99.14
Culture	14.03	99.02
Healthcare	157.14	98.01
Safe and high-quality highways	138.24	97.12
Demographics	498.34	95.47
Housing and urban environment	98.76	93.81
Small and medium-sized entrepreneurship, support of individual entrepreneurial initiative	56.42	93.14
Education	98.66	90.98
Comprehensive plan for the modernization and expansion of the backbone infrastructure	306.13	88.02
International cooperation and export	78.10	89.10
Labor productivity and employment support	6.22	87.11
Digital Economy of the Russian Federation	73.82	73.33
Ecology	36.90	66.32

The Federal Law "On the Federal Budget for 2020 and for the Planning Period of 2021 and 2022" in 2020 provides for financial support for the implementation of national projects in the amount of 2,129.6 billion rubles. In accordance with the indicators of the updated painting, the total amount of budget allocations of the federal budget for the implementation of national projects amounted to 2,206.7 billion rubles.

Figure 2. Budget Allocations of the Federal Budget for the Implementation of National Projects in 2020

31,9%	Demographics	703.8	billion rubles
1,8%	Healthcare	307.6	billion rubles
6,0%	Education	133.0	billion rubles
7,7%	Housing and urban environment	169.2	billion rubles
2,9%	Ecology	64.6	billion rubles
0,2%	Labor productivity	4.1	billion rubles
17,4	Comprehensive plan	385.0	billion rubles
1,8%	Science	40.7	billion rubles
4,0%	Digital Economy	89.0	billion rubles
0,7%	Culture	16.1	billion rubles
2,9%	Small and medium-sized entrepreneurship	63.7	billion rubles
13,9	Safe and high-quality highways	157.7	billion rubles
3,3%	International cooperation and export	72.2	billion rubles

The execution of national projects by the end of 2020 amounted to 2,149.1 billion rubles, or 97.4% of the specified data.

At the same time, the best performance indicator is 99.7% for the national project "Housing and urban Environment", the worst is 86.4% for the national project "Education". [minfin.gov.ru].

Basing on the analysis of the presented indicators, T.A. Vershilo concludes that "the problems of implementing national projects are not related to the lack of money from the state, but to existing problems in the field of legal regulation of national projects; with the national project management system." In her opinion, currently the Government of the Russian Federation needs to solve two main tasks related to the implementation of national projects:

1. to show the result in difficult both geopolitical and domestic conditions;
2. change the national project management system itself [Vershilo 2020, 21].

As noted earlier, municipalities participate in the implementation of national projects; let's consider the statistical data characterizing it.

According to the Ministry of Finance of the Russian Federation, in 2019, the total amount of local budget expenditures for the implementation of national projects amounted to 431.7 billion rubles.

If we take into account that the volume of expenditures of the consolidated budgets of the subjects of the Russian Federation as a whole on national projects amounts to 1,338.0 billion rubles, then, almost a third of regional projects are implemented by the local governments.

If we make the same assessment in the context of national projects, then the largest share of local budget expenditures in regional projects is formed in terms of national projects: "Housing and urban environment" – 72.1%; "Culture" – 55.0%; "Ecology" – 46.4%; "Education" – 42.5%.

The smallest share: "Small and medium-sized enterprises" – 3.7%; "International cooperation and export" – 0.8%, "Healthcare" – 0.1%, "Labor productivity and employment support" – 0.1%.

At the same time, the cash execution of local budgets in terms of expenditures on the implementation of regional projects lags behind the pace of execution of federal and regional budgets: as of January 01, 2020, the execution of local budgets amounts to 378.3 billion rubles, or 87.6% of the provided budget assignments (431.7 billion rubles). The cash execution on the same date for the federal budget – 91.4%, for the budgets of the subjects of the Russian Federation – 91.1%.

The most significant lag is noted for national projects "International cooperation and export" – 70.0%; "Ecology" – 82.1%. [www.minfin.gov.ru].

In 2020, the total amount of local budget expenditures for the implementation of national projects amounted to 514.0 billion rubles, which is almost a third of regional projects.

The largest share of local budget expenditures in regional projects consists of national projects: "Housing and urban environment" – 73.9%; "Culture" – 57.4%; "Ecology" – 50.7%; "Education" – 45.9%. The lowest share: "Digital economy of the Russian Federation" (6.1%), "Small and medium-sized enterprises" – 2.2%; "Labor productivity" – 0.01%, "International cooperation and export" (0.01%).

In general, the local governments take part in 12 national projects, they do not participate only in the Comprehensive Plan of Modernization and Expansion of the main infrastructure, and only a few participate in the national project "Science".

At the same time, the cash execution of local budgets in terms of expenditures on the implementation of regional projects is somewhat lagging behind the pace of execution of regional budgets: as of January 01, 2020, the execution of local budgets is 468.3 billion rubles, or 91.1% of the budgeted assignments (514.0 billion rubles). The cash execution on the same date for the budgets of the subjects of the Russian Federation – 93.2%.

The most significant lag is noted for national projects "Education" – 86.9%; "Housing and urban environment" – 89.3%. [www.minfin.gov.ru].

Investment Activity in Municipalities of the Russian Federation

Along with public investments carried out by financing the participation of municipalities in the implementation of national projects, classical mechanisms for attracting investments are used. Let us recall that an investment activity refers to a set of measures carried out by the state, individuals or enterprises aimed at generating profit, capital gains or other positive results [Ustinovich 2020, p. 51].

In accordance with the current legislation of the Russian Federation, an investment activity is allocation of investments and implementation of practical actions in order to make a profit and (or) achieve another beneficial effect (Article 1 of Federal Law No. 39-FL of February 25, 1999 (ed. of December 08, 2020) "On Investment activities in the Russian Federation carried out in the form of capital investments" [Collection of Legislation of the Russian Federation. 1999. No. 9. Article 1096].

According to E. S. Ustinovich, in the presence of various approaches existing in economics, most authors agree that an investment activity is an investment of resources (financial, material, intellectual, etc.) in the process of activity of an economic entity in order to obtain a positive effect of this very activity [Ustinovich 2020, p. 52]. As A.A. Starshov notes, "the ability of the state to manage investment processes is determined by the presence of a large number of legal mechanisms that allow the functions of the owner and regulator to be realized" [Starshov 2019, No. 2].

One of the new mechanisms that have appeared in the legislation of the Russian Federation is the "territory of advanced socio-economic development", which can be created by the decision of the Government of the Russian Federation on the territories of single-industry municipalities of the Russian Federation (single-industry towns) included in the list approved by the Government of the Russian Federation. In these territories, a special legal regime has been established for the implementation of entrepreneurial and other activities in order to create favorable conditions for attracting investment, ensuring accelerated socio-economic development and creating comfortable conditions for ensuring the vital activity of the population. Thus, special municipalities have appeared in Russia, the purpose of which is to attract investments.

On the basis of the "Rules for the creation of territories of advanced socio-economic development in the territories of single-industry municipalities of the Russian Federation (single-industry towns)" (Collection of Legislation of the Russian Federation, 2015, No. 27, Article 4063), while submitting an application for the creation of such territory in a municipality, information on the experience of implementing large investment projects in the subject of the Russian Federation and single-industry

towns is mandatory as well as the information about potential residents of the territory of advanced development who have confirmed (in writing) their readiness to implement investment projects in the territory of advanced development (with copies of framework agreements between the executive body of state power of the subject of the Russian Federation and residents on their intentions to implement investment projects, as well as the passports of investment projects).

The decision of the Government of the Russian Federation on granting the status of the territory of advanced development specifies the minimum amount of capital investments carried out as part of the implementation of investment projects by residents.

At the same time, the requirements for investment projects implemented by residents of the territories of advanced socio-economic development created in the territories of single-industry municipalities of the Russian Federation (single-industry towns) are normatively fixed, among which the following are established:

1. number of jobs created (must not be less than 10 units during the first year after the inclusion of a legal entity in the register);
2. volume of capital investments in accordance with the agreement must not be less than 2.5 million rubles during the first year after the inclusion of a legal entity in the register;
3. as a result of the implementation of the investment project, it is not envisaged to conclude contracts during the execution of which the proceeds from the sale of goods, performance of works and provision of services to the city-forming organization of a single-industry town exceed 50 percent of the total revenue received as a result of the implementation of the investment project by a resident;
4. implementation of the investment project does not involve attraction of foreign labor in an amount exceeding 25 percent of the total number of employees and others.

To attract investment in municipalities, Recommendations have been developed for the preparation of investment development strategies for municipalities and investment attractiveness passports [www.tpprf.ru], which contain a number of definitions, criteria and requirements for the investment project.

A strategic investment project of a municipality is a project that makes an important contribution to the achievement of established strategic goals and contributes to the solution of important strategic tasks for the development of the local territory.

A necessary condition for the recognition of an investment project as strategic is its compliance with the following criteria:

1. logical compliance with the established strategic goals of investment development, making an important contribution of the project to the solution of a certain strategic task or several tasks;
2. improvement of the socio-economic conditions of the local communities of the municipality as a result of the implementation of the investment project;
3. increasing the investment attractiveness of the municipality (concerns infrastructure projects);
4. development of one of the most important branches of the national economy on the territory of the municipality: agro-industrial complex, industry, tourism, science and education, information technology and innovation, financial industry, transport, transit and logistics industry, as well as other industries.

A strategic investment project must also meet a set of the following requirements:

1. availability of economic efficiency of a strategic investment project, taking into account its payback period and profitability;
2. ensuring the total volume of investment in the development of priority industry areas defined by strategic development goals in the amount of at least 100 million rubles (an exception may be innovative projects);
3. use of high-tech, energy-saving, resource-saving, as well as other highly economical technologies if a strategic investment project is associated with industrial production.

In addition to the actual strategy, municipalities should develop programs (roadmaps) for their implementation. The Program includes activities for the development of business plans, feasibility studies of investment projects, activities for geological exploration, implementation of investment projects, etc.

The program is being developed for the next three years with details of the first year, indicating the volume and sources of funding. The program of investment development measures is approved by the relevant regulatory legal act and becomes a program document that is taken into account while preparing the draft municipal budget. At the same time, the activities included in the Program enjoy priority while allocating funds from the municipal budget, as well as attracting regional and federal resources.

If we talk about the practice of developing such acts, we can analyze some examples of the Moscow Region as a subject of the Russian Federation.

Thus, the first example is the Agreement on the implementation of the strategic investment project "A general type boarding school with a neuropsychiatric department "Center for Active Longevity" in the territory of the Lyubertsy district of the

Moscow region" (Concluded in Krasnogorsk MR September 05, 2016 No. 92) (ed. from 4th September 2018). The total volume of investments for the implementation of the investment project is 802,835,637 (eight hundred two million eight hundred thirty-five thousand six hundred thirty-seven) rubles, including the volume of capital investments: 802,835,637 (eight hundred two million eight hundred thirty-five thousand six hundred thirty-seven) rubles. Under this agreement, the participant undertakes to make capital investments and put into operation the Objects of the investment project no later than 31st October 2017. The payback period of the investment project is 8 years and corresponds to the period from December 31, 2014 to December 31, 2022.

Another example is the Agreement on the implementation of the strategic investment project "Creation of an oncological outpatient diagnostic center (Center for Nuclear Medicine) on the territory of the Khimki city district of the Moscow Region" (Concluded in Krasnogorsk MR December 30, 2020 No. 133). The total volume of investments for the implementation of the Investment project is 8020000000 (eight billion twenty million) rubles excluding VAT, including the volume of capital investments: 6658434000 (six billion six hundred fifty-eight million four hundred thirty four thousand) rubles excluding VAT. The implementation of this Investment Project is designed for the period from January 1, 2018 to December 31, 2022. The payback period of the Investment Project in accordance with the Agreement is 9 years and corresponds to the period from December 31, 2018 to December 31, 2027.

The previous examples relate to such socially significant sphere as healthcare, but in the Moscow region there is a practice of developing cultural projects. In particular, on March 5, 2020, Agreement No. 7 was signed in Krasnogorsk, the Moscow Region, on the implementation of the strategic investment project "Hotel complex near the Timokhovo estate on the territory of the Leninsky City District of the Moscow Region". The total volume of investments for the implementation of the Investment project is 758,303,140 rubles, excluding VAT, including the volume of capital investments: 456,700,000 rubles. The commissioning of the investment project facility was scheduled for June 1, 2020. The payback period of the Investment Project is 15 years and corresponds to the period from June 1, 2020 to June 1, 2035.

The analysis of the investment climate in the regions of the Russian Federation shows that the current state of the regulatory framework for investment support and investment management requires refinement and improvement. To this end, it is necessary to identify the most successful regions and adopt their experience. According to E.S. Ustinovich, the most successful developments should be used to develop standard solutions [2020, p. 53].

Conclusion

Summing up the results of the analysis of the participation of municipalities in the implementation of national projects and the development of strategic investment projects within the territories of advanced socio-economic development, the following circumstances can be noted.

Municipalities play a significant role in the implementation of national projects within the framework of regional projects, since it is the local government that is as close as possible to the population – the main consumer of social services. According to the estimates of the Ministry of Finance of the Russian Federation in 2019 and 2020, almost a third of regional projects are implemented by local governments. If we compare the participation rates, then the largest share of local budget expenditures in regional projects is formed in terms of national projects: "Housing and urban environment", "Culture", "Ecology"; "Education" (from 46 to 75%), the smallest share is occupied by projects "Digital Economy of the Russian Federation", "Small and medium-sized entrepreneurship", "Labor productivity", "International cooperation and export" (from 0.01 to 6%);

Level of execution of expenditures on the implementation of national projects is below the average level of execution of federal budget expenditures, a similar picture exists with the cash execution of local budgets in terms of expenditures on the implementation of regional projects, which also lags slightly behind the pace of execution of regional budgets.

The reasons for this, according to experts (T. A. Vershilo), are in the project management system (a rather cumbersome structure that makes and corrects management decisions) and asynchrony of their actions with the cycles of the budget system. The allocated budget funds arrive too late to be disbursed by municipalities, hence, for a number of projects, the execution amounts to 86.9–89%, with a total indicator of the execution of local budgets of 91.1% of the budget assignments provided;

The proposed measures to adjust the budget legislation in terms of amendments and inclusion of norms on "National projects", responsibility for non-fulfillment of national projects, development of measures of state support for investments will begin to work when municipalities and citizens themselves, to whom the changes being implemented in the socio-economic sphere are ultimately addressed, will be active and interested in implementing various kinds and levels of projects. When certain activities come down "from above" and there is no interested team capable of carrying out project activities on the ground, the effectiveness of such work tends to zero.

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Innovative Fintech Projects as An Incentive for Development of Tax Legislation in Russia (Using the Example of Investment Platforms)

Abstract: Russia has come a long way in establishing an entrepreneurial culture. But, despite this, the short history of the country's market economy requires continuing the course of transformation of legislation related to the innovation economy. Recently, the number of projects in the financial and technological sphere operating at all levels of financial activity has been growing rapidly. The most striking examples include the creation of various services: banking, investment (including cryptoexchanges), and tax services that provide their functions through mobile applications and provide more opportunities to use them, thereby replacing outdated ways of interacting with customers. In this article, the author examines how the rapid development of new forms of economic relations has affected the legal regulation of financial technologies in the domestic legal system. The author used the method of content analysis to solve these problems, and as a subject considered local legislative gaps that arise in the activities of innovative financial intermediaries.
Keywords: fintech projects, investment platforms, tax regulation, crowdlending, tax agent

Introduction

For the state to achieve success in the development of the innovation environment, several fundamental factors are identified:

- efficient financing;
- appropriate infrastructure;
- demanda for innovation;
- necessary competencies and innovation cultures.

But it is important to note, that modern realities and constantly changing conditions are transforming the role of the state in this area. For example, if earlier it was enough for the state to effectively fulfill this task to create attractive investment conditions and develop scientific developments, now it has to respond more often and

with the help of various tools. This is due to the rapid changes in the situation and the growing mutual influence between the sphere of this activity.

A circumstance that can accelerate the speed of innovation progress in certain areas is the participation of the state. The state has the ability to control the development of industries and influence them through a competent policy for creating and implementing an innovative development strategy in the country. And not only in the military-industrial field and the field of science, as it was before, but in various financial and promising areas. The authorities have huge opportunities to provide comprehensive support to the relevant actors. From the position of a participant with legislative and executive competencies, the state can remove barriers, that hinder effective intersectoral cooperation, thereby creating conditions for synergistic interaction both between business participants from different fields of activity, and attracting the scientific community. In addition, in cooperation with economic entities in potentially promising sectors, it is able to find and eliminate other causes that hinder innovative progress in a timely manner.

Method

Due to the fact that the level of development of the crowdfunding market in the Russian Federation is at an initial level compared to European countries, we cannot neglect the necessary actions in this area. This implies an even greater relevance of the study of the activities and development of fintech projects for our country. We propose to use the content analysis method to solve these tasks, and as a subject to consider the main global proposals for changing the current legislation for the development of this area.

Results

We can see, how the financial sector has changed in recent years. This happened, among other things, due to the introduction of relevant changes in the legislation, regulating the provision of various financial services, and the regulation of the activities of entities, engaged in them. Such services will also include investment activities carried out through financial intermediaries in the form of banks, brokers, insurance companies and other professional participants. However, informatization and digitalization of all sphere of society, including financial activities, makes its own adjustments, creating additional tools for participation in investment, insurance and other areas of financial activity. This creates new areas of the financial market, that exclude traditional intermediaries and create more convenient, understandable and effective ways for various entities to participate in financial activities and receive credit, investment, payment and other services xLetter of the Department of Tax and Customs

Policy of the Ministry of Finance of the Russian Federation No. 03–04–05/71478 of 4th October 2018].

Of course, it is not news that today there are such forms of innovative intermediaries as cryptocurrency exchanges that work with digital financial instruments; Insuretech-companies that offer automated products; neobanks that replace classic banking products. But even more significant differences between traditional legal institutions in the financial sector and new ones that have undergone digitalization can be seen in the example of crowdlending. The origin of this term is associated with the English words crowd – crowd and lending – lending, providing a loan. This tool is used to attract borrowed funds by entities, belonging to the categories of small and medium-sized businesses. Interaction with potential lenders takes place through specialized online platforms. Despite its novelty for the Russian economy, in 2019 crowdlending was fully regulated at the legislative level by the adoption of No. 259-FL of 02.08.2019, and is now quite widespread [Federal Law No. 259-FZ of 2nd August 2019, On Attracting Investments using investment Platforms and on Introducing Changes to Certain Legislative Acts of the Russian Federation].

At the moment, more than 40 investment platform operators are already registered in Russia, and the market volume for 10 months of 2021 is 7 billion rubles. These figures cannot be compared with the volume of state support for large businesses, since for the small and medium segment, this is indeed a significant amount of money. At the same time, at the moment, many existing problems of legal regulation of loan relations arising in the activities of investment platform operators (hereinafter referred to as IPOs) have not yet been effectively solved. For example, such problems include a complex mechanism for implementing the duties of a tax agent in conditions of multiple lenders in crowdlending, which acts as a barrier to large-scale attraction of borrowed funds using this tool.

Clause 1 of Article 809 of the Civil Code of the Russian Federation establishes the lender's right to receive interest on the loan amount from the borrower in the amounts and in accordance with the procedure established by the agreement [The Civil Code of the Russian Federation of 30th November 1994 No. 51-FZ]. These percentages, i.e. income received for and by a taxpayer, are subject to personal income tax. 226 of the Tax Code of the Russian Federation obligations to calculate, withhold and transfer personal income tax from income (hereinafter referred to as personal income tax) in the form of interest received under the loan agreement, they are assigned to the organization or individual entrepreneur (hereinafter referred to as the "company"). Individual entrepreneurs from which or as a result of relations with which the taxpayer received income, i.e. to the borrower under the investment agreement. This provision has been repeatedly confirmed by Letters from the Ministry of Finance of the Russian Federation.

The fact is that this legislative structure is intended to regulate traditional loan relations, where one participant most often acts on the lender's side. From this point of

view, there is no reason to change the legislation and these norms are logically linked. However, if we project existing regulations on crowdlending, where a different situation most often occurs, and, conversely, there are multiple participants on the lender's side. Moreover, each of them has separate civil relations with the borrower.

There is a situation in which the borrower acts as a tax agent in relation to the income of a large number of taxpayers at the same time (in some cases, up to several hundred people) as a source of income payment. It is not difficult for large organizations to leave the relevant tax returns and perform other duties of a tax agent, but for micro-business it is obviously difficult, costly and burdensome.

The solution to the problem is possible when making changes to the legislation and redistributing the tax agent's duties from the borrower to the IPOs within the framework of crowdlending. In support of this idea, we can cite the following circumstances that contribute to its implementation. The first circumstance is related to the fact that the IPOs has at its disposal the capabilities and tools to obtain all the necessary data required for the calculation and payment of taxes and fees. In addition, many processes in their activities are automated, and in combination with the first circumstance, they do not have any difficulties in automatically fulfilling the obligation to form and pay the corresponding tax payments. Moreover, some IPOs already provide such services to borrowers. Another important factor will be the fact that, unlike IPOs borrowers, as a rule, they have large labor and financial resources, so performing the duty of a tax agent will not create additional problems for them, and the costs associated with it, will be insignificant in the total amount of expenses. Also, settlements between the borrower and the owners are made through a nominal account, which is managed and operated by the IPOs, which allows it not only to calculate, but also actually withhold and transfer personal income tax to the budget, as well as to draw up and send the relevant tax returns to the tax authorities.

There are two ways to solve the problem. The most obvious one is the introduction into the tax legislation of a special rule for establishing a tax agent in the crowdlending market, according to which the duties of a tax agent are assigned not to the borrower as a source of income payment, but to the IPOs as a person who promotes investment in accordance with Federal Law No. 259. This solution is the simplest, since there is no additional differentiation of the IPOs.

There is also another solution, such, as that proposed by the Association of Investment Platform Operators, which is to expand their powers in the framework of outgoing transactions on a nominal account, which are enshrined in the legislation regulating IPOs activities. This list is currently closed. It is proposed to add rules to it that allow IPOs to increase the types of relevant operations.

If the possibility of paying personal income tax from a nominal IPOs account is introduced, tax amounts will be withheld by the IPOs at the expense of the taxpayer's own funds, since the money in the nominal account belongs to beneficiaries, including individual investors. Thus, the IPOs will calculate and generate the necessary ac-

counting documents for paying taxes, and the borrower will submit them on its own behalf. The specified obligations of the IPOs will be formalized both in the agreement on assistance in attracting investments and in the agreement on assistance in investing.

Such an approach to solving the problem under study is fundamentally inconsistent with the general provisions of tax law, which is based on the principles of public law methods of regulating public relations. The use of this method will lead to a destabilization of law enforcement practice. Moreover, it is worth mentioning an increase in the burden on tax control authorities, which will be forced to additionally consider and differentiate crowdlending entities within the framework of paying the corresponding taxes. Summarizing all the above, we add that the application of private law norms in the field of distribution of tax responsibilities will lead to a negative result.

Conclusion

As long as small businesses that act as borrowers on investment platforms are tax agents when paying interest income in favor of numerous investors, their motivation and desire to use new ways to attract financing for their business, so actively spread abroad, will definitely be small. Such a legal structure contradicts the economic content, form and essence of legal relations that arise during the interaction of subjects on investment platforms. That is why it does not meet the modern challenges and needs of the developing digital economy, including in the field of crowdlending, and therefore requires further improvement and development of tax legislation in terms of determining the legal status of IPOs tax agent.

A sudden breakdown of the usual models of interaction of subjects in the financial market can lead to a change in the very paradigm of public regulation of economic relations. Innovative fintech projects encourage changing legislation, finding new ways to apply classical financial law institutions in the context of digitalization of the economy and the formation of completely new models of services provided on the market. The legislative gap with the tax agent presented in this article is just a demonstration example of how much modern legal regulation needs constant attention, change and addition.

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Features of Legal Regulation of Investment Activities in Russia

Abstract: The article considers some problems of legal regulation of investment activity in the Russian Federation. The issues of state regulation of investment activity are reflected, the actual problems of improving the forms and methods of state regulation in this area are considered. The effective development of the economy is directly related to the activation of investment activity. The transition to an innovative path of economic development has further actualized the importance of this factor. The solution to the problem of intensification of investment processes depends on many circumstances and involves the implementation of various measures in terms of content. Among them, an important place is occupied by the legal aspects of investment, improving the legal regulation of investment activities, which, in turn, necessitates a systematic and comprehensive study of the investment process as an economic and legal phenomenon, its essence and socio-economic significance, common properties and features generated by the diversity of investment spheres and types of investors, concretization of basic, basic concepts in this area of legal regulation, many of which do not meet the requirements of certainty and consistency.
Keywords: regulatory and legal regulation, investments, investment activity

Introduction

The purpose of the article is to consider certain theoretical and practical issues related to the peculiarities of the formation of the system of legal regulation of investment legal relations.

The research was based on the following general scientific methods of comparative, logical and statistical analysis, as well as by analyzing the structure and dynamics, graphical interpretation of information, methods of investment analysis.

Regulation of Investment Activities

In the system of legislative and regulatory legal regulation of the Russian Federation, the concepts of "investment" and "investment activity" have a specific meaning. According to Art. 1 of the federal law of 25.02.1999, No. 39-FZ "On investment activities in the Russian Federation carried out in the form of capital investments" invest-

ment activity is recognized as "investment and implementation of practical actions in order to obtain profit and (or) achieve other beneficial effect" [Federal'nyj zakon "Ob uchastii v dolevom stroitel'stve mnogokvartirnyh domov i inyh ob"ektov nedvizhimosti i o vnesenii izmenenij v nekotorye zakonodatel'nye akty Rossijskoj Federacii" ot 30.12.2004 No. 214-FZ].

Investments in the context of this law are cash, securities, other property, property and other rights that have a monetary value, invested in the course of investment activities. Since the first years of the formation of a market economy, support for investment activities has been one of the key priorities of the economic policy of the Russian Federation, which is reflected in land and tax legislation, in strategies for socio-economic development, scientific and technological development, economic security of the Russian Federation, in the distribution of federal and regional budget expenditures. etc.

In the process of investment activities, organizations find investments (financial and other resources), choose investment methods (instruments), form an investment program (or compose investment portfolios) and ensure its effective implementation. Investment activity is characterized by the following features:

1. the forms and methods of investment activities are less dependent on the industry characteristics of the organization than current activities;
2. investments provide an increase in the effectiveness of the organization's current activities by increasing income and reducing costs for ordinary activities;
3. investment volumes are unevenly distributed over individual periods, which is associated with both the long-term nature of the use of the results of investment activities, and the need to accumulate investment resources and use favorable conditions of the economic environment;
4. financial and other results of investment activities appear with a significant lag, usually in the form of profit and other results of current activities, and are often distributed over time;
5. investment activities are inherent in their own risks, called investment. In addition, the results of the investment are reflected in both the operational and financial risks of the organization.

Depending on the forms of ownership and organizational and legal forms of investor organizations, investment activities can be:

1. public investments, which are carried out:
– state authorities and administrations of various levels at the expense of the respective budgets;
– state and municipal institutions at the expense of their own and borrowed sources of financing;

2. investments of individuals, commercial and non-governmental non-profit organizations, other legal entities that do not belong to the public sector, and associations of these persons;
3. foreign investments carried out by foreign citizens, legal entities, states and international organizations;
4. joint investments, which are carried out jointly by investors belonging to several of the groups listed above.

The state regulation of investment activity is based on several federal laws:

– Federal Law of 25.02.1999 No. 39-FZ "On investment activities in the Russian Federation carried out in the form of capital investments" defines the concepts and principles of regulation of investments in fixed assets, including construction, acquisition and creation of fixed assets;
– Federal Law of October 29, 1998 No. 164-FZ "On Financial Lease (Leasing)" is the basis for the regulation of investment activities carried out using the financial lease mechanism;
– Federal Law No. 39-FZ of 22.04.1996 "On the Securities Market" creates a legal basis for regulating investments in securities and derivative financial instruments;
– Federal Law No. 48-FZ of 11.03.1997 "On Bills of Exchange and Promissory Note", together with international agreements on bill of exchange law, creates a regulatory framework for relevant investments that are not investments in financial instruments from the standpoint of Federal Law No. 39-FZ of 22.04.1996;
– The Civil Code of the Russian Federation is the basis for regulating certain types of investments that are not covered by the above federal laws, such as investments under a simple partnership agreement;
– The Land Code of the Russian Federation creates a legal basis for investments in land plots;
– investments in precious metals are regulated by the Federal Law of 26.03.1998 No. 41-FZ "On Precious Metals and Precious Stones", etc.

1. Federal Law of 25.02.1999 No. 39-FZ "On investment activities in the Russian Federation carried out in the form of capital investments", along with the Land and Urban Development Codes, is of particular importance for organizations conducting capital construction. In particular, it defines the concepts and relationships of the parties, called the subjects of investment activities. In Art. 4 of the federal law of February 25, 1999 No. 39-FZ, the following subjects of investment activity are distinguished [Federal'nyj zakon "Ob uchastii v dolevom stroitel'stve mnogokvartirnyh domov i inyh ob"ektov nedvizhi-

mosti i o vnesenii izmenenij v nekotorye zakonodatel'nye akty Rossijskoj Federacii" ot 30.12.2004 No. 214-FZ]: investors, customers, contractors, users of capital investment objects.

Table 1. Subjects of Investment Activity and Their Characteristics

Subject investment activities	Form of participation	Characterization of vested rights
1	2	3
Investor	individuals and legal entities created on the basis of an agreement on joint activities and not having the status of a legal entity, associations of legal entities, state bodies, local authorities, as well as foreign business entities (foreign investors)	implementation of investment activities in the form of capital investments, with the exceptions established by federal laws; independent determination of the volumes and directions of capital investments, as well as the conclusion of contracts with other subjects of investment activity in accordance with the Civil Code of the Russian Federation; possession, use and disposal of capital investment objects and the results of capital investments made; transfer, under an agreement and (or) a state contract, of their rights to make capital investments and to their results to individuals and legal entities, state bodies and local governments in accordance with the legislation of the Russian Federation; control over the targeted use of funds allocated for capital investments; pooling of own and borrowed funds with funds of other investors for the purpose of joint implementation of capital investments on the basis of an agreement and in accordance with the legislation of the Russian Federation; exercise of other rights stipulated by the agreement and (or) government contract in accordance with the legislation of the Russian Federation.
Customer	individuals and legal entities authorized by investors who implement investment projects. At the same time, they do not interfere in entrepreneurial and (or) other activities of other subjects of investment activity, unless otherwise provided by an agreement between them. Customers can be investors. A customer who is not an investor is endowed with the rights of ownership, use and disposal of capital investments for the period and within the powers that are established by the agreement and (or) government contract in accordance with the legislation of the Russian Federation.	carry out investment activities in accordance with international treaties of the Russian Federation, federal laws and other regulatory legal acts of the Russian Federation, the laws of the constituent entities of the Russian Federation and other regulatory legal acts of the constituent entities of the Russian Federation and local authorities, as well as with standards (norms and rules) approved in the prescribed manner; comply with the requirements of state bodies and their officials, which do not contradict the norms of the legislation of the Russian Federation; use funds allocated for capital investments for their intended purpose.

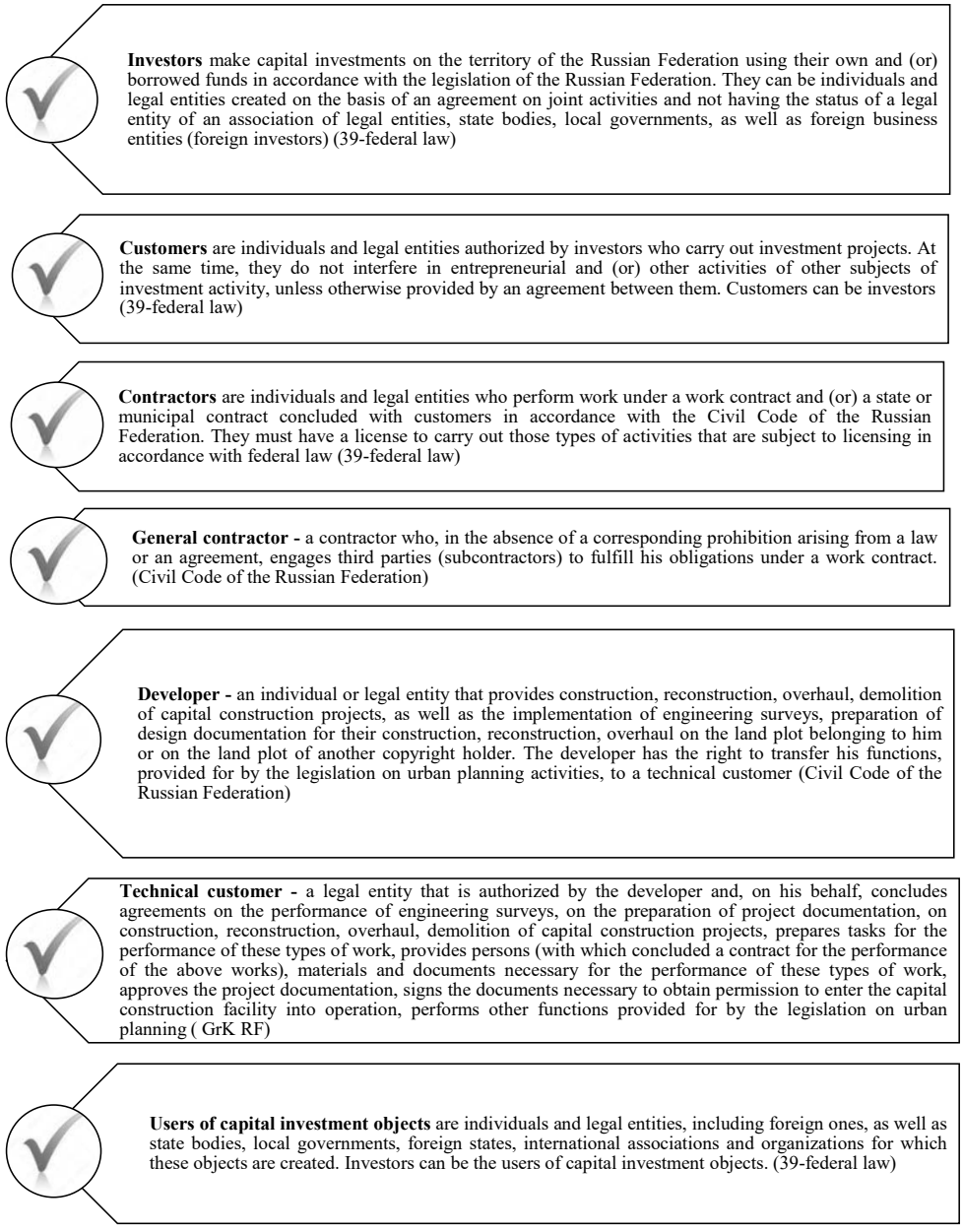
Contractor	individuals and legal entities who perform work under a work contract and (or) a state or municipal contract concluded with customers in accordance with the Civil Code of the Russian Federation. Contractors are required to have a license to carry out those types of activities that are subject to licensing in accordance with federal law.	carry out investment activities in accordance with international treaties of the Russian Federation, federal laws and other regulatory legal acts of the Russian Federation, the laws of the constituent entities of the Russian Federation and other regulatory legal acts of the constituent entities of the Russian Federation and local authorities, as well as with standards (norms and rules) approved in the prescribed manner; comply with the requirements of state bodies and their officials, which do not contradict the norms of the legislation of the Russian Federation; use funds allocated for capital investments for their intended purpose.
Capital investment user	individuals and legal entities, including foreign ones, as well as state bodies, local self-government bodies, foreign states, international associations and organizations for which these objects are created. Investors can be users of capital investment objects.	carry out investment activities in accordance with international treaties of the Russian Federation, federal laws and other regulatory legal acts of the Russian Federation, the laws of the constituent entities of the Russian Federation and other regulatory legal acts of the constituent entities of the Russian Federation and local authorities, as well as with standards (norms and rules) approved in the prescribed manner; comply with the requirements of state bodies and their officials, which do not contradict the norms of the legislation of the Russian Federation; use funds allocated for capital investments for their intended purpose.

One and the same person has the right to combine the functions of two or more subjects of investment activity. Listed in table 1. investors, customers, contractors, users of capital investment objects are the main participants in the investment process. In addition to them, minor participants, such as commercial banks, may be involved in investment activities, if they do not act as an investor or lender, but only carry out settlements on behalf of a customer or investor, suppliers, intermediaries, insurance, consulting, and audit organizations. In addition to the federal law of February 25, 1999 No. 39-FZ, the status of individual participants in capital construction is determined by the Urban Planning Code of the Russian Federation, as well as directly by the Civil Code of the Russian Federation (Figure 1.).

All participants in investment activities in accordance with Art. 7 of the Federal Law of February 25, 1999 No. 39-FZ are obliged to:

- comply with the requirements of international treaties of the Russian Federation, federal laws, laws of the constituent entities of the Russian Federation and other regulatory legal acts, including the current standards of the Russian Federation;
- comply with the requirements imposed by state bodies and their officials within the framework of the powers granted by the laws of the Russian Federation and the constituent entities of the Russian Federation;
- to use funds allocated for capital investments for their intended purpose.

Figure 1. Subjects of Investment in Objects of Capital Investment



Other obligations of participants in investment activities arise from their status established by the specified federal law, and are also determined by an agreement. In the practice of construction and investment activities, the most common are contracts that correspond to §§3–5 of Chapter 37 "Contract" and Chapter 52 "Agency" of the Civil Code of the Russian Federation. The created object usually becomes the property of investors (including equity). The operation of social, cultural and household facilities, such as shopping or office centers that are in shared ownership, is often transferred to a management company (Chapter 53 "Trust Management of Property" of the Civil Code of the Russian Federation).

When the customer of capital construction is the Russian Federation or a constituent entity of the Russian Federation represented by a state authority or a state institution, the agreement between the participants in investment activities is concluded in the form of a state contract. The issues of concluding and executing government contracts are governed by federal law dated 05.04.2013 No. 44-FZ "On the contract system in the procurement of goods, works, services to meet state and municipal needs."

When a developer attracts investments under a contract of equity participation in construction, a number of additional obligations are imposed on him in accordance with Federal Law No. 214-FZ of December 30, 2004 "On Participation in the Shared Construction of Apartment Buildings and Other Real Estate Objects and on Amendments to Certain Legislative Acts RF". The developer has the right to raise funds only after obtaining a building permit, publishing a project declaration and fulfilling a number of other requirements established by this federal law. Shared participation agreements in construction and an object of unfinished shared construction are subject to state registration, and investors are considered holders of collateral on the land plot and on the object of construction in progress. Investors' funds are deposited in special accounts with authorized banks (escrow accounts from which funds can be transferred to the developer only after they are given permission to put the facility into operation). The developer's current account transactions are also limited and monitored by an authorized bank. The law establishes obligations for the developer to disclose information, including the permits received by him, project declaration, reporting on the attraction and use of funds, annual and interim financial statements. The developer's annual financial statements are subject to mandatory audit. The listed requirements, obligations and restrictions are designed to protect the rights of participants in shared construction, prevent unfair actions by developers and create conditions to compensate for the consequences of such unfair actions, if they were not prevented in a timely manner. Despite the complexity and responsibility, equity participation agreements are widely used in the construction of not only residential buildings, but also commercial real estate.

State regulation of investment activities carried out in the form of capital investments is carried out by the state authorities of the Russian Federation and the con-

stituent entities of the Russian Federation in accordance with Art. 11 of the federal law of 25.02.1999 No. 39-FZ [Federal'nyj zakon "Ob uchastii v dolevom stroitel'stve mnogokvartirnyh domov i inyh ob"ektov nedvizhimosti i o vnesenii izmenenij v nekotorye zakonodatel'nye akty Rossijskoj Federacii" ot 30.12.2004 No. 214-FZ]. In this case, federal government bodies use the following forms and methods:

1) creation of favorable conditions for the development of investment activities carried out in the form of capital investments by:
– improving the tax system, the mechanism for calculating depreciation and the use of depreciation deductions;
– the establishment of special tax regimes for the subjects of investment activity, which are not of an individual nature;
– protecting the interests of investors;
– providing subjects of investment activity with preferential conditions for the use of land and other natural resources that do not contradict the legislation of the Russian Federation;
– expanding the use of funds of the population and other non-budgetary sources of financing for housing construction and the construction of social and cultural facilities;
– creation and development of a network of information and analytical centers carrying out regular ratings and publication of ratings of investment entities;
– taking anti-monopoly measures;
– expanding the possibilities of using collateral for lending;
– development of financial leasing;
– revaluation of fixed assets in accordance with the inflation rate;
– creating opportunities for the subjects of investment activities to form their own investment funds.

2) direct participation of the state in investment activities carried out in the form of capital investments by:
– development, approval and financing of investment projects carried out by the Russian Federation jointly with foreign states, as well as investment projects financed from the federal budget;
– formation of a list of construction projects and objects of technical re-equipment for federal state needs and their financing at the expense of the federal budget. The procedure for the formation of this list is determined by the Government of the Russian Federation;
– allocation of federal budget funds to finance investment projects in the manner prescribed by the legislation of the Russian Federation on placing orders for the supply of goods, performance of work, provision of services for state and municipal needs. The placement of these funds is carried out on a return-

able and urgent basis with payment of interest for their use in the amount determined by the federal law on the federal budget for the corresponding year, or on the condition of securing the state ownership of the corresponding part of the shares of the joint-stock company being created, which are sold after a certain period of time on the securities market. securities with the direction of proceeds from sales to the revenues of the respective budgets;

- examination of investment projects in accordance with the legislation of the Russian Federation;
- protection of Russian organizations from the supply of obsolete and material-intensive, energy-intensive and unscientific technologies, equipment, structures and materials;
- development and approval of standards (norms and rules) and control over their observance;
- issue of bond loans, guaranteed target loans;
- involvement in the investment process of temporarily suspended and mothballed construction projects and state-owned facilities;
- granting concessions to Russian and foreign investors based on the results of tenders (auctions and tenders).

Conclusion

Joint investments with the participation of foreign investors are regulated by the Federal Law of 09.07.1999 No. 160-FZ "On Foreign Investments in the Russian Federation" [O kontraktnoj sisteme…], which determines the conditions for entrepreneurial activities of foreign investors in the Russian Federation, guarantees of foreign investors' rights to investments and received from them income and profit.

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Information Support for the Analysis and Control of the Procurement of Goods, Works and Services of a Medical Organization

Abstract: In the public sector, the optimization of procurement is the most important lever to increase efficiency. The purchase of goods and services make up the bulk of government spending, that is, the optimization of procurement can significantly reduce budget expenditures. The effect of optimizing purchases is not limited to saving money. This tool is able to provide public institutions with a number of intangible advantages, one of which is transparency. Having accurate information about where and how much money is spent, as well as using simple standardized procedures for managing budget expenditures, managers can make more rational decisions. With balanced regulation of purchased goods through government orders, it can have a positive impact on pricing for certain types of products, giving it a certain flexibility. These circumstances determine the relevance of the study of the role of public procurement in the development of economic regulation of the economic system, the problems of forming theoretical, methodological and practical foundations of relevant qualitative changes in the field of public contracts.
Keywords: analysis and control, unified procurement information system, healthcare institutions

Introduction

The purpose of the study is to study and concretize theoretical and methodological issues of effective management of the public procurement system as a single methodological framework that meets the key principles of the state's economic policy and is focused on the formation of the main vectors of its development.

The research is based on the results of the study of the current regulatory legal acts in the field of procurement of goods, works and services, as well as scientific

works of modern authors. In the process of research, general scientific methods are used: modeling, comparison, methods of systematization, generalization of theoretical and aspects in the field under study.

Procurement information system

The main criterion for differentiating information when conducting economic analysis is the source of its occurrence in relation to a budgetary institution. On the basis of this criterion, external and internal information is distinguished. External information includes information characterizing:

- the general economic and political situation in the country;
- the healthcare industry and its development prospects;
- legal regulation of the contract procurement system;
- the state of the capital market;
- founders of a budgetary institution represented by the Department of Health;
- main contractors, suppliers (contractors) – executors of government contracts;
- the level of competition in the industry of production of goods, works, services for the needs of a budgetary institution, etc. [Alieva, Bahtiozina 2019, pp. 41–44].

For comprehensive information and analytical support of the subjects of the contractual procurement system represented by interested manufacturers (suppliers, contractors, executors) of the state order, customers of different levels, regulatory bodies in the field of compliance with the provisions of antimonopoly legislation in Russia, the Unified Procurement Information System (EIS) has been created, which is the main an external information source during analytical procedures.

The main goal of the EIS is to ensure transparency in the implementation of public procurement, exclusion of corruption components from the public procurement system. The main task of this information system is to reflect the complete life cycle of purchases in the system (planning – placement – conclusion of a contract – execution – control), as well as the publication of the results of completed tenders [www.bujet.ru/article/344063.php].

UIS is a single information space located on the Internet (www.zakupki.gov.ru), with the help of which budgetary institutions purchase goods, works, services (clause 9, part 1, article 3 of Federal Law No. 44-FZ).

It should be noted that starting from the date of creation, the UIS has been continuously developing and improving, accordingly, the possibilities of its use in the process of analyzing and monitoring the procurement of goods, works, services of

a medical organization are expanding. The stages of development of this automated system are reflected in table. one.

Table 1. Development Dynamics of the Unified Procurement Information System in Russia

Period	Direction of development of the ENI
1	2
2013	- Creation of the concept of the UIS by the staff of the Higher School of Economics; - The Ministry of Economic Development receives the authority to develop requirements for the creation, development, maintenance, maintenance of the system, determines the procedure for registration and use of the UIS;
2014	- transfer of powers from the RF Ministry of Economic Development to the RF Treasury; - using the software and hardware complex of the previously existing site; - formation of a single cycle of electronic procurement
2015	- a resolution was adopted on the introduction of the EIS from 01.01.2016; - conclusion of a state contract for the development and launch of a system for the creation, development and maintenance of the application software of the EIS;
2016	- completion of the EIS in terms of replacing foreign-made equipment with domestic; - the introduction of import substitution in the conditions of the functioning of Russia within the framework of the sanctions policy; - monitoring the work of the All-Russian Popular Front and identifying shortcomings, their elimination
2017	- formation of a monitoring and control system for the procurement of medicines in order to increase the efficiency and transparency of government orders; - development of a catalog of goods, works, services – the main tool for structuring information about purchased products, rationing, forecasting demand; - technological work to back up the system, improve information security; - introduction of a register of unscrupulous suppliers and a register of contracts for capital repairs; - creation of a mobile application for searching placed purchases; - ensuring the possibility of exchanging information with the Federal Tax Service in order to obtain information from the Unified Register of Small and Medium Business Entities;
2018	- Launch of the pilot project of the Unified Trade Aggregator “Berezka” for the purpose of conducting small-scale public procurement in a simplified form (mandatory use from November 1);
2019	- development of a mobile application for procurement participants; - development of the Analytics service for finding potential customers and analyzing their purchases;
2020	- transfer of the EIS to free software; - providing in the personal account of the supplier and the customer the function of creating acts of acceptance of goods and automatically generating information about the execution of the contract

Source: Chupandina, E.E., Ivanovskaja, N.P. (2018), Informacionnoe obespechenie jekonomicheskogo analiza zakupki lekarstvennyh preparatov, [in:] Sovremennaja jekonomika: problemy i reshenija vol. 4.

Currently, with the help of the EIS, the following purchases of a budgetary healthcare institution are carried out:

1. Purchases from a single supplier (contractor, performer) without competitive procedures. In connection with the creation of the EIS, such purchases are carried out in electronic format, and budgetary institutions have additional reserves for saving budget funds by receiving more favorable offers from suppliers.
2. Electronic auction is the most common type of procurement used in medical institutions. The application consists of two parts, which are submitted simultaneously. Before the auction, the customer considers the first application, and after the auction – the second. After admission to the first part, the supplier submits his price offer. Participants reduce the initial maximum contract price (NMCK) by a step from 0.5% to 5%. After the bidding, the customer, represented by the specialists of the contract service, checks the second parts of the bids and announces the winner, with whom the contract is subsequently concluded [Grazhdanskij kodeks Rossijskoj Federacii (chast' vtoraja) ot 26.01.1996 N 14-FZ].
3. Closed tender – a limited number of suppliers meeting certain requirements can take part in this purchase.
4. Open tender – the procurement commission examines the applications of the participants and compares prices, quality of goods, experience in performing work or rendering services, qualifications of performers, etc.
5. Request for proposals – a budgetary institution conducts a request in case of failed auctions or repeated tenders, as well as when purchasing for the treatment of Russian citizens abroad and in some other situations.
6. Competition with limited participation – a budgetary institution uses this method of procurement only for services that are approved in the Decree of the Government of the Russian Federation of February 4, 2015 No. 99. It also specifies additional requirements for participants.

When developing the EIS, the experience of the functioning of national procurement information systems of foreign countries was taken as a basis. In this regard, in table. 2, we compared the functional and analytical capabilities of the domestic EIS with similar systems in foreign countries (USA, Great Britain, Norway, Australia, Singapore) [Ignatova 2019, pp. 14–20].

Table 2. Comparison of the Functional and Analytical Capabilities of the Domestic EIS with Similar Systems of Foreign Countries [Ignatova 2019, pp. 14–20]

The country	Procurement planning	Library of basic shapes	Regulation and method of execution	Procurement Risk Assessment and Management	Monitoring the execution of contracts	Assessment of contract results
1	2	3	4	5	6	7
USA	+	+	+	+	+	+
Great Britain	+	+	+	+	+	+
Norway	-	-	-	+	-	-
Australia	+	+	-	-	+	-
Singapore	+	-	-	-	+	+
New Zealand	+	+	-	-	+/-	-
Russia	+	+	+	-	+	+

As can be seen from the comparison, the Russian EIS is second only to the United States and Great Britain in terms of its functional and analytical capabilities, where the possibility of assessing and managing procurement risks is provided.

In our country, this direction is only at the stage of formation, but even now the introduction of the EIS has made it possible to reduce the risk of corruption by regulating the process and introducing a public discussion procedure. In addition, the risk of improper execution of purchases of a budgetary institution is minimized due to the continuous maintenance of the Register of unfulfilled contracts and unscrupulous executors. Starting from 2020, all bank guarantees must be accepted in the system, which reduces the risk of fraudulent transactions with forged documents [Koroleva, Kondjukova, Dajneko, Vlasova 2020, p. 164].

In general, it can be said that in Russia, as in the United States and Great Britain, an integrated automated system for managing the life cycle of a state contract (planning-placement-execution) has been formed.

The place and role of the EIS within the framework of the analysis and control of the procurement of goods, works, services of a medical organization is determined by the fact that within the framework of its information content the following is carried out:

1. Formation, processing, storage and provision of data to participants in the contract system.
2. Automatic control and analysis of information:

- on the amount of financial support for the procurement, approved and communicated to the customer;
- included in the procurement schedules;
- contained in notices of procurement;
- the definition of suppliers contained in the protocols;
- on the terms of the draft contract sent in the form of an electronic document to the procurement participant with whom the contract is concluded, information contained in the protocol for determining the contractor;
- information about the contract included in the register of contracts concluded by customers, the terms of the contract.

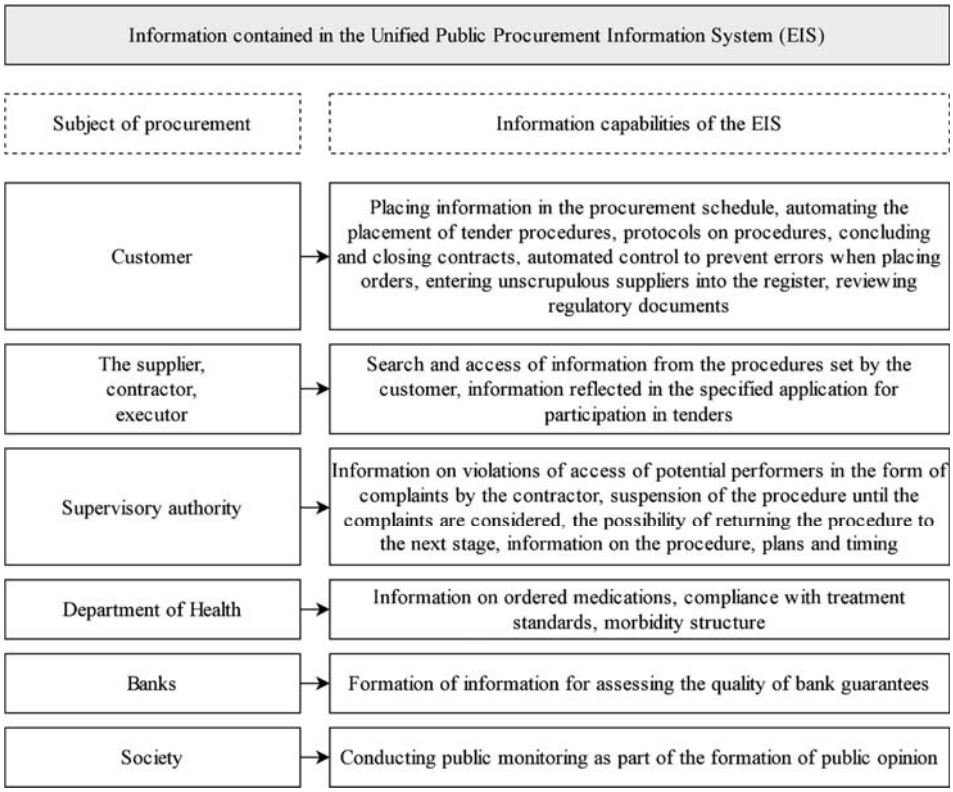
3. Legally significant turnover in the field of public procurement.
4. Submission of applications from suppliers in the form of an electronic document and their opening at a specified time.

In figure 1 presents the possibilities of information disclosure that the EIS provides for different subjects of procurement [Luk'janova 2019, pp. 230–235].

The customer is obliged to disclose information on procurement activities in the EIS by forming a procurement schedule, competitive procurement documentation, protocols, information on the specifics of concluding and executing contracts, reasons for their termination, and the conscientiousness of the execution of contracts by suppliers. Participants in the contractual procurement system represented by performers can use the EIS to quickly search for information within the framework of the procedures of interest to them. Information from the procurement schedule allows you to obtain information on prices, timing of procurement, the amount of contract security, etc. Information is disclosed to the regulatory authorities in full using all elements of the procurement system: publication of the plan of inspections and the results of inspections carried out, submission of information on submitted complaints, suspended procedures. Banks in the EIS form a register of bank guarantees [O kontraktnoj sisteme…].

Based on pic. 1 it follows that the data contained in the automated electronic reporting systems make it possible to generate aggregate reports on the number of issued procedures, contracts concluded, including with a single supplier, the number of contracts with representatives of small businesses and SONCO.

Figure 1. Possibilities of Information Disclosure that the EIS Provides



Within the complex of internal sources of information, three blocks should be distinguished:

- accounting and analytical unit;
- planning and regulatory block;
- block outside the accounting information.

In turn, the block of accounting and analytical information includes three components: accounting and reporting data, operational accounting and reporting data, analytical documentation.

The leading role in accounting and analytical information is occupied by accounting and reporting, which most fully reflects all the facts of the economic activities of the institution. In this case, the following features of the activities of institutions are taken into account:

1. The right to dispose of property. According to Art. 123.22 of the Civil Code, not all property can belong to a budgetary institution. This fact is reflected in the reporting, since all kinds of restrictions are imposed on real estate and

especially valuable movable property (such, without which a budgetary institution cannot function) [Organizacija i osushhestvlenie jekonomicheskim sub'ektom vnutrennego kontrolja sovershaemyh faktov hozjajstvennoj zhizni, vedenija buhgalterskogo ucheta i sostavlenija buhgalterskoj (finansovoj) otchetnosti: informacija Minfina Rossii No. PZ-11/2013].

2. Mandatory fulfillment of the state (municipal) assignment. Cash flows were divided into two parts: budgetary funds and revenues from extrabudgetary activities. This is reflected in the income statement.

State budgetary, treasury and autonomous institutions have their own accounting (financial) statements, approved by Order of the Ministry of Finance of the Russian Federation dated March 25, 2011 No. 33n "On approval of instructions on the procedure for drawing up, submitting annual, quarterly financial statements of state (municipal) budgetary and autonomous institutions" which is completely different from the reporting of commercial organizations [Samolysov, Bulgakova 2020, p. 302].

The most informative forms of financial statements of a budgetary institution for conducting internal control of procurement activities, in our opinion, are:

- Balance sheet of a state institution (f. 0503730);
- Report on the implementation by the institution of the plan of its financial and economic activities (f. 0503737);
- Report on the financial results of the institution (f. 0503721);
- Statement of cash flows of the institution (f. 0503723).

The balance sheet of a budgetary institution, like the balance sheet of commercial organizations, is divided into assets and liabilities. Liabilities in the structure of the balance sheet perform the same function as in the reporting of commercial organizations – they show the amount of attracted resources. With regard to assets, institutions are required to disclose their nature in detail, while indicating both the historical and residual values of the assets. Indicators are reflected in the balance sheet in the context of: types of financial support (activities) of the institution; indicators at the beginning of the year, at the end of the reporting period and final indicators at the beginning and end of the reporting period [Endovickij 2019, p. 155].

The indicators of the Report on the implementation of the plan of its financial and economic activities by the institution (f. 0503737) are reflected without taking into account the result of the final operations to close accounts at the end of the financial year, conducted on December 31 of the reporting period. Indicators of plan execution are reflected on the basis of analytical data of the institution's accounting in the context of analytical codes:

- the type of income (other receipts, including from borrowings (sources of financing the deficit of the institution's funds (receipts));

– type of expenses (other payments, including repayment of borrowing (disposal)).

As part of the reporting forms of a budgetary institution, the Report on the financial results of the institution's activities (f. 0503721) is important, which reflects information on the results of the activities of a state institution in the context of analytical codes of income (receipts), expenses (payments) as of January 1 of the year following for the reporting, in accordance with paragraphs. 50–55 of Instruction No. 33n [Endovickij 2019, p. 155].

The cash flow statement (f. 0503723) discloses the provision of a budget institution with cash and the direction of their use during the year. These are funds received within the framework of financial support (subsidies) for the fulfillment of state (municipal) tasks, subsidies for other purposes, targeted subsidies, as well as from paid activities of the institution.

The main requirement for financial statements is that it must give a reliable and complete picture of the property and financial position of the organization, its changes, as well as the financial performance.

Management accounting data form the information base of management decisions. First of all, this concerns decisions in the field of formation and use of financial results, planning and budgetary regulation of the main financial indicators. Statistical accounting and reporting data are used in financial analysis to identify trends in the behavior of key indicators and the degree of risk uncertainty.

The establishment of operational accounting also contributes to an increase in the efficiency of analytical procedures. Such information includes operational information on the availability and flow of funds, the status of accounts receivable, and other information, which are mandatory for cash flow management. Selected credentials are the basis for an in-depth analysis of specific aspects of the institution's current and future financial condition. Such information is presented by data from episodic samples, observations, and thematic checks.

The block of analytical information includes secondary information, that is, the one that has undergone preliminary processing, has undergone ranking procedures, compilation, bringing it into the form necessary for use in the economic analysis of purchases of a budgetary institution.

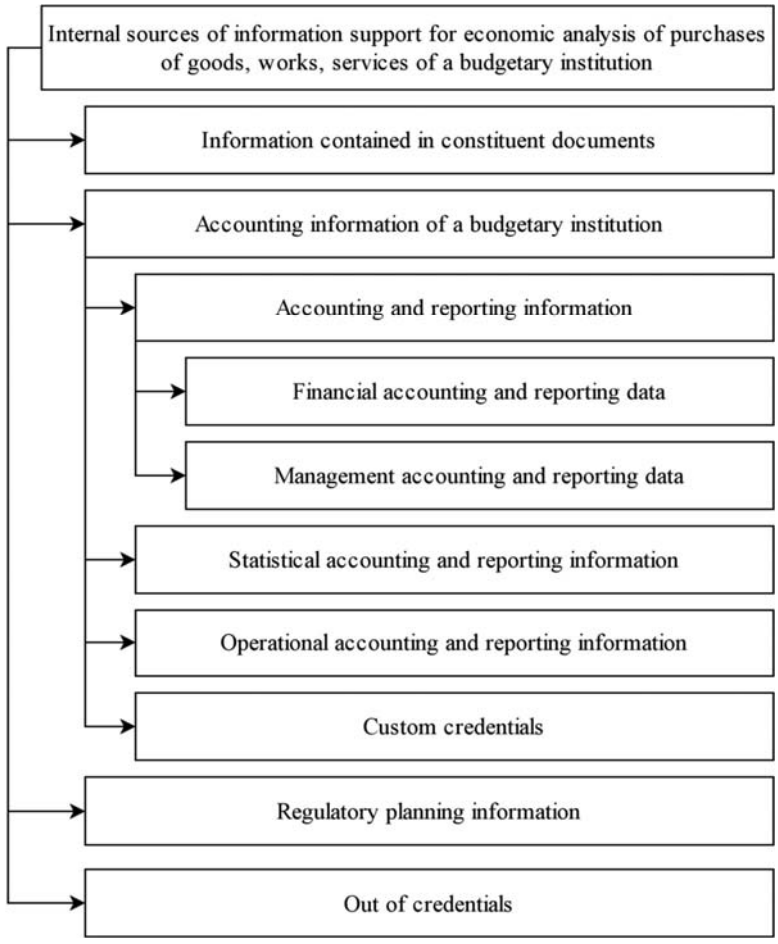
As part of the planning and regulatory information, first of all, it is necessary to highlight the procurement schedule and the procurement budget. This block of information support also includes all other plans (long-term, current, operational), and the internal administrative documentation (decisions, orders, orders, acts of work performed, decisions, regulations, provisions) accepted for the customer's procurement activities, estimates, price tags, design tasks.

Off-record information is an extremely important component of information support for the economic analysis of procurement, it includes:

– technical documentation;
– special examinations, materials, acts;
– concluded contracts and additional agreements to them, documents confirming the termination of contracts (if any);
– reports on the results of the execution of the contract or a separate stage of the execution of the contract;
– conclusions of internal audit.

The scheme for the formation of internal sources of information support for the economic analysis of purchases of goods, works, services of a budgetary institution is shown in figure 2.

Figure 2. Scheme of the Formation of Internal Sources of Information Support for the Economic Analysis of Purchases of a Budgetary Institution



Thus, the main criterion for differentiating information when conducting economic analysis is the source of its occurrence in relation to a budgetary institution. On the basis of this criterion, external and internal information is distinguished.

The Unified Procurement Information System (UIS) is the main external information source for analytical procedures. The main task of this information system is to reflect the complete life cycle of purchases in the system (planning – placement – conclusion of a contract – execution – control), as well as publication of the results of completed tenders. In this system, all available information is divided into information blocks. The degree of openness of access to information differs depending on the consumer of the disclosed information, whether it is a customer, participants in an order placement, or controlling organizations.

Comparison of the functional and analytical capabilities of the domestic EIS with similar systems of foreign countries made it possible to conclude that in Russia, as in the USA and Great Britain, an integrated automated system for managing the life cycle of a state contract (planning-placement-execution) has been formed. In terms of its functional and analytical capabilities, the Russian EIS is second only to the United States and Great Britain, where the possibility of assessing and managing procurement risks is provided.

Within the complex of internal sources of information, three blocks should be distinguished: accounting and analytical block; planning and regulatory block; block of off-account information. In turn, the block of accounting and analytical information includes three components: accounting and reporting data, operational accounting and reporting data, analytical documentation.

The planning and regulatory information includes a procurement schedule and a procurement budget, other plans (long-term, current, operational), internal administrative documents accepted for the customer's procurement activities, estimates, price tags, project assignments. Outside accounting information is an extremely important component of information support for the economic analysis of purchases, it includes: technical documentation; special examinations, materials, acts; concluded contracts and additional agreements to them, documents confirming the termination of contracts (if any); reports on the results of the execution of the contract or a separate stage of the execution of the contract; internal audit conclusions.

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Method of Incurring Public Expenditure in Relation to New Public Procurement Legislation in Poland

Abstract: The aim of this paper is to discuss new legal solutions whose implementation may contribute to spending public funds in a targeted and cost-effective manner, obtaining the best effects from the given outlay. This article tries to answer the question whether the new Public procurement law facilitates effective spending of public funds. The conducted analysis includes legal provisions, work of the doctrine as well as data published by the Polish Public Procurement Office. A legal-dogmatic method is the main research method in this paper. The analysis conducted here allows to state that the principle of efficiency under Public procurement law should guarantee spending funds in a targeted and cost-effective manner with maintaining rules arising from the Act on public finance. Therefore, the actions of the legislator connected with the implementation of the new legal legislation on awarding public procurement which promotes greater care for efficient use of public funds should be assessed positively.
Keywords: efficiency, public expenditure, principles of spending public funds, public procurement

Introduction

Art. 44(3) of the Act of 27 August 2009 on public finance (Journal of Laws of 2021, item 305, later amended) includes provisions from which arises the way in which public expenditure should be incurred. Pursuant to this provision, expenditure should be made considering the principles of purpose, economy as well as efficiency, effectiveness and timeliness. Importantly, to maintain the correctness of spending of public funds all these principles should be jointly fulfilled [Cilak 2020, p. 333].

A significant part of public expenditure is implemented by the public procurement system and therefore determined by provisions of the public procurement law. The value of the public procurement market in Poland is estimated at ca. PLN 281 bn (for comparison, in 2019 it was PLN 289 bn). On the other hand, the value of awarded public procurement in 2020 was PLN 183.5 bn accounting for 7.9% of GDP [Sprawozdanie, p. 7].

A public contracting authority that spends public money is obliged to manage funds in such a way that this spending is correct, i.e. desired from the point of view of

proper financial management. Expenditure should be incurred considering the principles of purpose, economy, efficiency and effectiveness. To respect the above principles connected with spending public funds is to serve a new Act binding as of 1 January 2021 on public procurement law (Journal of Laws item 2019, later amended), which included solutions facilitating efficiency and transparency of awarded procurements, considering at the same time the role of procurement in spending public money according to the principles of their spending.

The aim of this paper is to discuss new legal solutions whose implementation may contribute to spending public funds in a targeted and cost-efficient manner, obtaining the best effects from the given outlay. This article intends to answer the question whether new public procurement law facilitates efficient public spending. The conducted analysis includes legal provisions, work of the doctrine and data published by the Polish Public Procurement Office. A legal-dogmatic method is the main research method in this paper. Due to the limited volume of the text, this elaboration focuses on selected legal institutions which, according to the Author, are the most significant in the context of enhancing the efficiency of spending public funds.

Method of Spending Public Funds

Spending public funds is based on the principles arising from the Act on public finance. Pursuant to these principles, expenditures should be made in such a way as to allow their targeted and cost-effective execution while ensuring the best effects from the given outlay, optimal selection of methods and resources serving to achieve assumed objectives, in a manner allowing timely realisation of tasks, within amounts and deadlines arising from previously incurred liabilities. To achieve the purpose and cost-effectiveness connected with public spending it is necessary to jointly fulfil the above principles. Every public expenditure should strive to achieve the best effect with due account of given expenses, which are often financially limited, therefore a special role in spending public funds should be given to the principle of efficiency.

The principle of efficiency in spending public funds is expressed in Art. 44(3)(a) (b) of the Act on public finance and in a way repeated and at the same time strengthened in Art. 17(1) of the Act on public procurement law. Thus, the legislator directly referred to the obligation of effective awarding of procurements and gave efficiency the rank of a principle of awarding public procurements.

In the light of Art. 17(1) of the Act on public procurement law, the contracting authority is obliged to award procurement, i.e. to make public spending in a manner ensuring the best quality of the subject of procurement within the means it may allot to its implementation. Additionally, the way of awarding procurement in relation to the outlay is to ensure obtaining the best effects of the procurement, including social, environmental and economic effects (of course if they are possible to achieve).

The principle of efficiency is mainly to serve the implementation of a strategic approach in awarding procurements / spending public funds. It means that awarding procurements should be an economic process in which the role of planning will be enhanced [Nowak, Winiarz 2021, p. 159]. When constructing this provision, the legislator pointed out two circumstances. Firstly, the contracting authority should strive to achieve the best quality of the procurement in relation to the financial resources it has. This emphasises the planning stage of the procedure, during which the decisions are made regarding financial, organisational and personnel means that the contracting authority may allocate to implement the task. Secondly, the contracting authority should strive to achieve the best effects (including social, environmental and economic) of the awarded procurement. Therefore, every time the contracting authority is obliged to answer three questions:

- is it possible to lower the costs, if yes then how;
- is it possible to take into consideration the best quality and effects of the procurement;
- is it possible to balance costs with maintaining the desired quality and effects.

The above analysis should be made considering both the character of the procurement as well as its complexity and the needs of the contracting authority. Basically, the implementation of the principle of efficiency leads to the analysis of costs and benefits, which as a result is aimed at obtaining the best effects from the borne expenses. Additionally, another significant factor is the awareness that the awarded procurement is a tool to achieve objectives in social, economic and environmental dimensions, besides obtaining the subject of procurement [Jaworska 2021a, Granecki, Granecka 2021a].

The Principle of Efficiency in the Context of Value for Money

When considering public spending in the context of efficiency of public procurement, it needs to be indicated that expenditure has both legal as well as economic dimension. Decisions of the contracting authority and the contractor made at every stage of the procurement are regulated by legal norms, but their consequences are economic. Therefore, it is the economic situation of the contracting authority, the state of its financial resources which is usually limited, and well-defined needs that shape the decision on the implementation of the procurement and spending of public funds [Nowicki 2013, p. 9]. Due to the fact that public funds are allotted to implement public tasks which satisfy the needs of a wide range of receivers, their spending should be effective, i.e. which prohibits wasting taxpayers' money [Nowak, Winiarz 2021, p. 159]. Following M. Winiarz [2018, p. 167 and following pages], efficiency may be discussed in the economic aspect as a relation between results and expendi-

tures expressed by productivity, effectiveness, and profitability; in the purposive aspect as evaluation of the degree of compliance with organisational aims including economic aspect; in the systemic aspect as evaluation of the degree of using organisational resources and creating certain relation with the surroundings as well as in the comprehensive aspect as an ability of an organisation to achieve its operational goals. However, in the context of targeted and cost-effective spending of public funds, it needs to be indisputably assumed that efficiency is an economic category and should be analysed from this perspective [Winiarz 2018, p. 167]. Efficiency as an economic category is also supported by its dictionary definition, according to which "efficient" means "effective, giving good results" [Dunaj 1999, p. 124]. It is therefore assumed that efficient public procurements are such which implement the Value for Money principle. According to this concept, procurement efficiently fulfils aims set by the contracting authority and at the same time, it is implemented under possibly best terms, including direct savings and maintaining the best quality within allocated resources [Nowicki 2013, p. 10]. Quality in the context of public procurement is understood as "fulfilling or exceeding client's requirements" [Dolecki 2020].

The aim of the Value for Money is to select an offer which will ensure the contracting authority to obtain possibly the best relation between the quality of acquired deliveries, services or construction works and the price paid or costs incurred. This rule should be applied as a comprehensive approach at every step of the procurement, i.e. from the process of planning, awarding, and supervision over its implementation till its evaluation. Obtaining the best results in relation to incurred costs should mean not only striving to obtain the optimal quality of the procurement in relation to the price but should also demonstrate care for the enforcement of the contract and its evaluation during implementation, sometimes also (if the nature of the procurement allows) should strive to obtain the best results connected with implementation of public objectives without profit-making nature [Nowak, Winiarz 2021, p. 160].

Instruments Implementing the Principle of Efficiency of Spending Public Funds

In order for the public funds to be spent in a targeted and cost-effective manner, obtaining the best effects from the given outlay, the public procurement system should be equipped with legal instruments allowing such spending. This is to be achieved by the principle of efficiency, whose implementation in the procurement procedure should be applied during reliable preparation of the procedure, setting a certain standard of legal actions of the contracting authority [Czyżewska 2020, p. 144].

The first action aiming at efficient public spending is to conduct an analysis of own needs. It is mandatory for procurements whose value equals or exceeds the so-

called EU thresholds, however, there is no reason not to make such an analysis for procurements with lower values. This requirement determined in Art. 83 of the Act on public procurement law demonstrates the increase of the role of the preparatory stage and, as the legislator indicated in the explanatory memorandum to the draft act, directly impacts subsequent stages of the procurement procedure [Druk No. 3624, p. 27]. When conducting the analysis of needs and requirements, the contracting authority should take into account both the type and the value of the procurement which should be tailored due to the need which is to be satisfied, requirements connected with, implementation risks and specific needs of the contracting authority [Nowak, Winiarz 2021, p. 288]. Therefore for the contracting authority to obtain information necessary to make the decision whether public procurement is the right tool to make public expenditure, such an analysis should indicate that the possibilities to meet the identified needs from own resources have been checked as well as that an insight into the market has been conducted. Such insight into the market should be carried out in two options: in the aspect of using alternative funds to satisfy the identified needs as well as in the aspect of possible options of procurement implementation. It may happen as a result of the insight into the market that the measure assumed by the contracting authority to meet the needs is not the only one and thus it is not necessary the right one. Insight into the market is also conducted to check possible options of the procurement implementation unless the contracting party indicates that there is only one possibility to implement the procurement [Matusiak 2021]. When conducting the analysis of needs, the contracting authority is obliged to consider whether it has the possibility to meet its needs on its own, using its own resources, or it has to order the implementation of the procurement to an external party. The analysis preceding the execution of public funds is to guarantee to spend them in a purposeful manner, i.e. justifying the need to incur certain expenses, and in a cost-effective way, i.e. ensuring the performance of a public task on a proper level of quality and with a minimal financial contribution. Moreover, to maintain the principles of purpose and cost-effectiveness of public expenditures, within the analysis the contracting authority should indicate: the estimated value for every indicated option of procurement implementation, i.e. initially estimate the value of every option of the procurement implementation; the possibility to divide the procurement into parts, i.e. to consider, within the conducted analysis, the possibility and validity of such division; estimated procedure for awarding the procurement[1]; the possibility to include social, environmental or innovative aspects of the procurement as well as risks connected with the procedure for awarding and implementing the procurement.

1 At the preparatory stage the contracting authority should already know whether it has proper resources and knowledge allowing to describe the subject of the procurement in details as well as whether it is advised to select a mode which will allow to identify an optimal way to meet the needs and prepare a description of the subject of procurement during a dialogue with contractors.

To realize the purpose and cost-efficiency of public spending connected with awarding public procurement, the legislator introduced preliminary market consultation[2] before initiating the procurement award procedure. In the legislator's intention, there are at least two main objectives of such consultations. Firstly, it may be to prepare the procedure in every possible option and aspect. Secondly, it is to inform the contractors about plans and requirements regarding the procurement. Importantly, during market consultations, the contracting authority has the opportunity to get expertise and help of experts as well as public administration bodies, who are specialists in particular industries and may provide necessary information about the most advanced and best technological and organisational solutions which are the subject of the procurement [Granecki, Granecka 2021b]. It is essential that the consultations do not distort competition or do not infringe equal treatment of contractors and transparency of conducted procedure, therefore the contracting authority is obliged to inform on its Internet site about the intention to conduct preliminary market consultations as well as about their subject.

From the point of view of implementing the principle of efficiency, changes in the procurement award procedures are significant. The legislator resigned from the dominance of tenders. For the procurements below the EU threshold, Art. 275 of the Act on public procurement law introduced a new solution regarding a basic procedure. In two out of three options in this procedure (i.e. in the second and third procedure), the contracting authority may use negotiations as a tool to formulate its own expectations optimally and then to implement the contract. It was indicated in the explanatory memorandum to the Act that this regulation is to increase the role of dialogue between the contracting authority and the contractors as well as to deformalize the procurement award procedure [Druk No. 3624, p. 70]. On the other hand, in the procurements above the EU thresholds, this solution should give the contracting authorities greater flexibility in selecting the award procedure, targeted at, e.g. competitive dialogue or innovative partnership[3]. Such procedures based on dialogue and negotia-

2 Market consultations are a response of the legislator to an unpopular among the contractors technical dialogue, rooted in the previous Act on public procurement law. According to the data published by Public Procurement Office arises that in 2019 the contracting authorities informed about applying technical dialogue in 159 procurement notices in the Public Procurement Bulletin, what constituted 0.14% of the total notices. For comparison, in 2018 technical dialogue made 0.18% of the total notices, in 2017 – 0.35%, and in 2016 – 0.18%. More on this subject: Public Procurement Office (2020). A Report of the President of the Public Procurement Office on the functioning of the public procurement system in 2019. Warsaw: Public Procurement Office. www.uzp.gov.pl (21.01.2021).

3 From the data in the Report of the President of the Public Procurement Office on the functioning of the public procurement system in 2020 arises that for the procurements above the EU thresholds in 2020 90.86% were awarded in open tenders. In 2017–2019 this percentage was 91.00%, 92.22% and 90.94%, respectively. In the case of direct agreement contracts it was 7.49% (in 2017–2019 it was 7.0%, 6.52% and 7.76%, respectively). Restricted procurement, negotiations with

tions bring better results from the point of view of efficiency. They give the possibility of direct contact between a contractor and a contracting authority, and thus ensure optimal flow of important information about market possibilities and meeting the contracting authority's needs [Pieróg 2020, p. 3]. Apart from that, the legislator's actions to relax the criteria to apply procedures other than tenders should facilitate the cooperation of the public and private sectors, a result of which may be the access to expertise on the available solutions including pro-innovative and pro-environmental aspects [Kania 2020, p. 6].

This Act also introduced new solutions regarding the implementation of contracts on public procurements, which should enhance efficiency. Pursuant to Art. 431 of the Act on public procurement law there is an obligation of the contracting authority to cooperate during the implementation of the public procurement contract. Cooperation and balancing the position of the parties to the procedure, mandatory indexation or abusive clauses are to ensure security during the implementation of the procurement [Pieróg 2020, p. 4] as well as to secure its proper fulfilment and mutual respect of both parties [Druk No. 3624, p. 83]. Another legal instrument impacting the execution of the principle of efficiency of public spending is the obligation put on the contracting authority to prepare an implementation report. According to Art. 446(1) of the Act on public procurement law, the obligation to evaluate is mandatory in the situations provided in the Act, namely when during the procurement implementation arise difficulties such as: the amount spent on the implementation of the procurement is at least by 10% higher than the offer price; a contractual penalty in the amount of at least 10% of the offer price value is imposed on the contractor; there are delays in the implementation of the procurement[4] or the contracting authority or the contractor renounces the contract in part or completely, or terminates the contract in part or completely. The above obligation to evaluate should be considered right, since it allows to look at the process as a whole, from making a first decision about the preparation of the procedure, up to its implementation and assessment. The obligation to evaluate may have a preventive character since its conclusions should increase the chance to avoid similar difficulties in the future. Moreover, if public procurements are to be really effective, this efficiency should be analysed

an announcement, competitive dialog and negotiations without an announcement represented 1.65% of all procurements. The data indicate that the least applied procedures were the ones which may bring the biggest benefits connected with insight into the market and increased competition.

4 Delays of at least 90 days, in the case of procurement on construction works of the value equal to or exceeding the equivalent expressed in PLN for the construction works – EUR 20 000 000, and for the supplies or services – EUR 10 000 000, and delays of at least 30 days in the case of procurements of the value smaller than the equivalent expressed in PLN for the construction works – EUR 20 000 000, and for supplies or services – EUR 10 000 000.

both prior to as well as after the procurement is awarded. Then the diagnosis regarding the appropriateness of the decisions will be possible [Borowicz 2021, p. 6].

Conclusion

The analysis conducted in this elaboration leads to the following conclusions.

Firstly, public procurements are an essential form of public sector participation in the economy and a significant part of public expenditure is implemented through the public procurement system, therefore it is determined by the provisions of public procurement law.

Secondly, pursuant to the Act on public finance, public funds should be spent in a targeted and cost-effective manner, obtaining the best effects from the given outlay. Therefore, the public procurement system should be equipped with legal instruments allowing such spending.

Thirdly, due to the fact that every public spending should be made in a manner targeted at achieving the best effects considering limited resources, a special significance in spending public funds should be given to the principle of efficiency.

Fourthly, the principle of efficiency, expressed in the Act on public procurement law, relates to the method of spending public funds based on the Act on public finance, joining the way of spending public funds with obtaining the best results from the given financial outlays. Thus, a strategic approach has been applied when awarding procurements / spending public funds, which has made procurement an economic process, in which the role of planning during the whole process of procurement has been strengthened.

Fifthly, the implementation of the principle of efficiency should be mainly manifested in proper preparation and planning of the procedure, setting a certain standard of legal actions of the contracting authorities, which impact the manner of public spending. The principle of efficiency expressed on the basis of public procurement law should guarantee the execution of public funds in a targeted and cost-effective manner, maintaining at the same time principles arising from the Act on public finance. Therefore, the action of the legislator to introduce new legal legislation in awarding public procurement which facilitates greater care for efficient spending of public funds should be evaluated positively.

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Фактическое Право на Доход в Налоговом Праве России: Основные Этапы Развития

Beneficial Ownership on Income in Russian Tax Law: Main Evolution Stages

Abstract: The concept of the beneficial ownership on income has been contained in Russian international tax treaties for more than 30 years. During this time, the tax authorities of Russia have formed practical approaches to the implementation of this concept, issuing instructions, recommendations and clarifications of the provisions of international tax treaties. The concept has experienced the first serious test in relation to the taxation of interest income paid on commercial Eurobonds of Russian issuers. But the active practice of applying this concept began in 2015, when the Tax Code of the Russian Federation included special provisions on the actual right to income and on the procedure for applying this concept. Judicial practice in Russia has shown numerous significant disagreements between the positions of tax authorities, taxpayers and tax agents. The legislative consolidation of the concept of the actual right to income and numerous legal disputes regarding the application of this concept in specific circumstances stimulated to its serious doctrinal understanding in Russia.
Keywords: actual right to income, international tax treaties, OECD, tax authorities, OECD Commentaries
Ключевые слова: фактическое право на доход, международные налоговые соглашения, ОЭСР, налоговые органы, Комментарии ОЭСР

Введение

В 2014 году обсуждение законопроекта о налоговой деофшоризации и принятие соответствующих дополнений к Налоговому кодексу РФ (далее – НК) привело к активному обсуждению правил о фактическом праве на доходы (далее – ФПД), понятия, которое содержится в международных договорах об избежании двойного налогообложения (далее – МНД) в качестве обязательного условия для применении некоторых положений МНД. Появилось много судебных решений, разъяснений фискальных органов, научные разработки о

концепции ФПД в целом и его отдельных сторон. В настоящей статье автор поставил перед собой задачу исследовать развитие концепции фактического права на доход в российском налоговом праве, правоприменении и доктрине.

Гипотеза и метод

Согласно выдвигаемой в настоящей статье гипотезе, концепция фактического права на доход в налоговом праве России появилась в российских налоговых соглашениях без сложившегося понимания данной концепции. Развитие данной концепции происходило постепенно, фискальные органы старались представить последовательную концепцию ФПД, однако широкое понимание концепции сложилось только после того, как появилось ее законодательное закрепление и судебная практика применения положений Налогового кодекса РФ о ФПД. Для доказательства гипотезы и формулирования выводов исследования используются диалектический, формально-логический, исторический, формально-юридический методы познания, метод толкования права, анализ материалов регуляторной практики.

Читая многие исследования о ФПД в России, можно прийти к выводу, что до налоговой деофшоризации этой темы в налоговой жизни страны практически не было. Это совсем не так.

В текстах российских (ранее – советских) МНД термин «лицо, имеющее фактическое право на проценты» встречается с 1985 г., как правило, в тех статьях, которые посвящены налогообложению дивидендов, процентов и доходов от авторских прав и лицензий. Так, в *Конвенции СССР об избежании двойного налогообложения с Испанией (1985)* в статье «Проценты» указывается, что необходимость обладания фактическим правом на доход. На обладание фактическим правом на дивиденды в качестве обязательного требования указывается в Типовом соглашении Российской Федерации об избежании двойного налогообложения доходов и имущества, утвержденном *Постановлением Правительства РФ (1992) N 352 «О заключении межправительственных соглашений об избежании двойного налогообложения доходов и имущества»* и *Постановлением Правительства РФ (2010) N 84 «О заключении межгосударственных соглашений об избежании двойного налогообложения и о предотвращении уклонения от уплаты налогов на доходы и имущество»* и в аналогичном Типовом соглашении СНГ, утвержденном *Протоколом об унификации подхода и заключения соглашений об избежании двойного налогообложения доходов и имущества (1992).* В налоговых соглашения РФ можно встретить несколько близких по звучанию формулировок, включая «фактический собственник», «фактический получатель», «фактически имеет право», «владеющий правом

собственности» [Мачехин 2011, сс. 17–25]. В настоящей работе все подобные формулировки включены в понятие фактический получатель дохода.

Применительно к правилам международного налогообложения десятилетиями вопрос того, кто является налогоплательщиком при выплате дохода за пределы РФ оставался без ответа. Правила исчисления налога на прибыль и налога на доходы физических лиц в НК РФ не содержали ответа на вопрос о том, как поступать, если иностранный получатель дохода (нерезидент) по различным причинам должен передать полностью или частично полученный доход иным лицам. Правила работали механически: если российская организация выплачивала доход иностранной организации, считалось, что применяется ставка налога, установленная для доходов, выплачиваемых на основании главы 25 НК РФ. Представители Минфина РФ существенно позже некоторых зарубежных коллег обратили внимание на этот аспект применения преференций налоговых соглашений [Соболев 2014, с. 37].

Налоговые органы в *Инструкции Госналогслужбы РФ (1995) N 34 «О налогообложении прибыли и доходов иностранных юридических лиц" установили* процедуру, по которой при применении налоговых соглашений иностранная компания должна была в письменном виде подтверждать ФПД, ей надо было подписаться под заявлением следующего содержания:

«Заявляю, что: …. имелось фактическое право на получение этих доходов (I declare that ….. recipient of the above income has being the beneficial owner)». Да, правило, по которому иностранная организация должна представить налоговому агенту, выплачивающему доход, для применения положений международных договоров Российской Федерации, подтверждение, что эта организация имеет фактическое право на получение соответствующего дохода, недавно добавленное в п. 1 ст 312 НК, уже существовало в отечественной практике более 20 лет назад! Так же, как и сейчас, это требование применялось ко всем налоговым соглашениями и вне зависимости от того, предусмотрена ли в тексте соответствующей статьи соглашения оговорка о ФПД или нет. Были и существенные отличия от сегодняшних правил: раньше данная процедура была установлена не законом, а инструкцией Госналогслужбы и документ о ФПД, прежде чем поступал налоговому агенту, рассматривался налоговым органом. Аналогичное заявление наличии ФПД требовалось и от иностранных лиц, которые обращались за возвратом удержанного налога.

Ранее действовавшая аналогичная *Инструкция Госналогслужбы РФ (1992) N 13 «О налогообложении прибыли и доходов иностранных юридических лиц»* и *Инструкция Госналогслужбы (1993) No. 20 «О налогообложении прибыли и доходов иностранных юридических лиц»* не содержали положений о ФПД.

В конце 90х – начале нулевых годов фискальные органы издали несколько документов, касающихся налогообложения отечественных суверенных облигаций, что было сигналом важности вопросов ФПД и о необходимости реше-

ния возникающих практических вопросов. Так, Министерство по налогам и сборам РФ (предшественник Федеральной налоговой службы) неоднократно давало разъяснения о том, как понимать указанный термин в случае, когда доход выплачивается по долговым обязательствам Российской Федерации, выпускаемым для иностранных кредиторов. *Письмо Минфина РФ и Госналогслужбы РФ (1997) N 01–31/37, ВЕ-6–05/166 «О некоторых вопросах налогообложения, связанных с облигациями внешних облигационных займов 1997 года»* стало первым документом, в котором указанные министерства определили, как необходимо понимать фактическое право на доход при налогообложении в конкретной ситуации. Согласно п.4 указанного письма клиринговая или депозитарная организация считается резидентом, пользующимся режимом, установленным международным договором, и фактически имеет право собственности на проценты по облигациям для целей указанного международного договора, если:

– выпуск облигаций оформлен в виде глобального сертификата, держателем которого является клиринговая или депозитарная организация,
– резидент государства, с которой у Российской Федерации имеется международный договор об избежании двойного налогообложения, и такой международный договор предусматривает в Российской Федерации (государстве-источнике выплаты доходов) освобождение от налога на доходы в виде процентов, получаемых резидентами этого другого государства.

В целом указанное письмо имеет весьма ограниченное применение – только для облигаций Российской Федерации, выпущенных в 1997 г., и субъектов Российской Федерации. Действие данного письма на субъекты РФ, выпускающие облигации внешнеэкономических займов, было распространено *письмом Госналогслужбы РФ (1998) N ВЕ-6–36/353 «О налогообложении доходов, полученных от операций с облигациями внешних облигационных займов органов исполнительной власти субъектов Российской Федерации»*. Обязательное требование для применения письма – наличие в условиях выпуска облигаций, представленных глобальным сертификатом, держателем которого является клиринговая или депозитная организация, положений, устанавливающих, что получателями процентов не могут быть резиденты Российской Федерации (кроме физических лиц), в какой бы форме (получение полного или частичного, прямого или опосредованного права собственности на доходы в виде процентов по облигациям) ни происходило получение таких процентов.

В Положении Минфина РФ и Госналогслужбы РФ (1997) N 70н, ВГ-606/707 «О некоторых вопросах налогообложения, связанных с урегулированием задолженности бывшего СССР иностранным коммерческим банкам и финансовым институтам, объединенным в Лондонский клуб кредиторов», к числу лиц,

обладающих фактическим правом на проценты, наряду с клиринговой и депозитарной организацией, отнесены также отдельные доверительные управляющие, действующие от имени кредиторов. В аналогичном Положении, изданном в 2000 г., из числа лиц, обладающих фактическим правом на проценты, исключены отдельные доверительные управляющие, действующие от имени кредиторов, и оставлены клиринговая и депозитарная организации.

Можно ли распространять правила определения иностранных лиц, обладающих правом собственности на доход, предусмотренные Минфином РФ и Госналогслужбой РФ для участников Лондонского клуба кредиторов и лиц, получающих доходы по облигациям внешних экономических займов Российской Федерации, на иные лица? Исходя из названий и текстов этих писем следует, что их действие ограничено специально указанными случаями, а существующая концепция российского законодательства о налогах не предусматривает применение правил по аналогии.

На наш взгляд, указанные письма скорее отражают определенные экономические обстоятельства обслуживания внешнего государственного долга, нежели развивают российскую концепцию применения термина «фактическое право на доход» и международную практику его понимания, включая позицию Комментария к Модельной конвенции ОЭСР. Что касается конкретной иностранной компании, заполняющей форму, установленную налоговым органом, для получения предварительного налогового освобождения или возврата удержанного налога, то она вынуждена оценивать наличие у нее фактического права на получение дохода, исходя из собственного понимания этого термина. Практика пошла по пути признания такого подхода, который не стал автоматически применимым для коммерческих (несуверенных) выпусков еврооблигаций.

В начале нулевых этого века появляются и первые научные публикации, касающиеся ФПД[1].

В 2003 году появился *Приказ МНС РФ (2003) N БГ-3–23/150 «Об утверждении Методических рекомендаций налоговым органам по применению отдельных положений главы 25 Налогового кодекса Российской Федерации, касающихся особенностей налогообложения прибыли (доходов) иностранных организаций»* в которых среди нескольких интересных положений о ФПД было четко подтверждено, что «лица, к которым применяются положения статей соглашения об избежании двойного налогообложения, устанавливающих порядок налого-

1 Victor Matchekhin (2001), Russian uncertainty on beneficial ownership. International Tax Review, London, Мачехин В.А., Аракелов С.А. (2001), *Фактическое право на получение дохода в международных налоговых договорах Российской Федерации,* Коннов О. (2004), *Понятие права на получение дохода в налоговом праве.*

обложения определенных видов доходов, должны иметь фактическое право на получение соответствующего дохода».

В этом документе впервые была предпринята попытка концептуально подойти к понятию ФПД. Так, в частности, было сказано, что иностранная организация имеет фактическое право на доход при наличии правовых оснований для получения дохода, которым является факт заключения ею договора. Была впервые высказана исключительно важная позиция о том, что «если фактическое право на получение дохода имеет российское лицо, а платежи производятся иностранной организации (например, в счет взаимозачетов), то положения международного договора не применяются».

Одновременно с предпринятой попыткой представить единую концепцию ФНД фискальные органы давали разъяснения по отдельным структурам, для которых очевидного ответа о фактическом собственнике дохода в Методических разъяснениях 2003 года не было. В 2005 году в *Письме Министерства финансов РФ (2005) N 03–08–05* появилась важная позиция о том, кто является налогоплательщиком по дивидендам российских эмитентов, выплачиваемым держателям американских депозитарных расписок. Банки-депозитарии, депозитарно-клиринговые организации, а также номинальные держатели ценных бумаг не могут рассматриваться как собственники ценных бумаг клиентов и, соответственно, доходов, получаемых по этим ценным бумагам. Фактическими получателями дохода в виде дивидендов по депонированным акциям являются держатели депозитарных расписок. В случае, если держателем американских депозитарных расписок является российская организации, то с указанного дохода налог на прибыль взимается по ставке 9 процентов. Интересно, что Минфин использует понятие «фактический получатель дохода» в ситуации, которая не связана напрямую с применением какого-либо конкретного или абстрактного налогового соглашения, оно применено для российского получателя дохода.

Методические рекомендации были отменены *Приказом ФНС России (2012) N ММВ-7–3/980@ «Об отмене приказа МНС России от 28.03.2003 N БГ-3–23/150»* в 2012 году без замены аналогичным по содержанию документом.

В 2006 году Минфин дальше развивает концепцию, высказывается по ФПД, связывая историю появления ФПД с модельными конвенциями об избежании двойного налогообложения ОЭСР и ООН и обращаясь к Комментарию ОЭСР к модельной конвенции и обращая внимание на положения комментария: «государство – источник дохода не должно предоставлять освобождение от налогообложения (или налогообложение по пониженным ставкам) данного дохода лишь на том основании, что доход был получен резидентом государства-партнера по договору». Кроме признания того, что получатель дохода может не обладать ФПД, Минфин в *Письме Департамента налоговой и таможенно-тарифной политики Минфина РФ (2006) N 03–08–02* продолжает

дальше цитировать и развивать идею ОЭСР: «термин «фактический получатель дохода» не должен пониматься в узком «техническом» смысле, его следует трактовать исходя из целей и задач международных договоров об избежании двойного налогообложения, как, например, «избежание двойного налогообложения и уклонения от уплаты налогов», и с учетом таких основных принципов договоров как «предотвращение злоупотребления положениями договора» и «преобладание сущности над формой… для признания лица в качестве «фактического получателя дохода» данное лицо должно обладать не только правом на получение дохода, но и быть непосредственным выгодоприобретателем, т.е. лицом, определяющим дальнейшую «экономическую судьбу» полученного дохода.

В 2007 году Минфин РФ в *Письме Департамента налоговой и таможенно-тарифной политики Минфина РФ (2007) N 03–08–05* делает специальный акцент на положения о ФПД: «для целей налогообложения и, соответственно, применения межправительственных соглашений об избежании двойного налогообложения, заключаемых Российской Федерацией с иностранными государствами, *определяющим фактором* (выделено мной – В.М.) является наличие фактического права на доход». К этому добавляется дополнительная мотивировка позиции и разъяснение для случая с договором доверительного управления: «иностранная организация имеет фактическое право на доход при наличии правовых оснований для получения дохода, а именно, при условии заключения гражданско-правового договора … для признания лица в качестве фактического получателя дохода данное лицо должно обладать не только правом на получение дохода, но и, как следует из международной практики применения соглашений об избежании двойного налогообложения, быть лицом, определяющим дальнейшую «экономическую судьбу» полученного дохода. Учитывая вышеизложенное, при налогообложении доходов, перечисляемых иностранной организации в рамках договора доверительного управления, в случае если учредитель и выгодоприобретатель являются резидентами различных юрисдикций, следует применять соответствующие положения межправительственного соглашения об избежании двойного налогообложения, заключенного Российской Федерацией с иностранным государством, резидентом которого является выгодоприобретатель по договору доверительного управления.

Эти и другие письма фискальных органов однозначно свидетельствуют о том, что они очень давно признали и начали применять концепцию ФПД в достаточно широком ее понимании. Однако данные органы проявляли определенную нерешительность в том, чтобы на конкретных примерах продемонстрировать налогоплательщикам и налоговым агентам, как концепция ФПД должна применяется в реальности.

Такая демонстрация состоялась в конце 2011 года, когда появилось *Письмо Департамента налоговой и таможенно-тарифной политики Минфина РФ (2011) N 03–08–13/1* о налогообложении еврооблигаций, серьезно изменившее отношение налоговых агентов к ФПД, при этом использовалась ранее заявленная мотивировка, основанная на обращении к позиции ОЭСР.

В связи с возражениями бизнес-сообщества в дальнейшем в качестве компромиссного решения было предложено дополнить НК РФ положениями, согласно которым российские налогоплательщики освобождаются от обязанностей налогового агента в отношении процентных доходов, выплачиваемых иностранным организациям:

- по государственным ценным бумагам РФ, субъектов РФ и муниципальным ценным бумагам;
- по обращающимся облигациям, выпущенным российским налоговым агентом в соответствии с законодательством иностранных государств;
- по долговым обязательствам, возникшим у российской организации в связи с размещением иностранными организациями обращающихся облигаций, при соблюдении следующих условий: облигации соответствуют установленным НК РФ критериям обращающихся облигаций, а российской организации предоставлено подтверждение постоянного местонахождения иностранных организаций, получающих доходы, в государствах, с которыми имеется действующее соглашение об избежании двойного налогообложения.

Законодатель лишь освобождает в этой ситуации налогового агента от обязанности удержать налог у источника выплаты, тем самым соглашаясь с позицией Министерства финансов РФ, что сама выплата процентного дохода в рассматриваемой ситуации является объектом обложения налогом на прибыль и льгота, предусмотренная соглашением об избежании двойного налогообложения, может использоваться только бенефициарным собственником такого дохода [Винницкий 2017, с. 142].

В 2014 году российский законодатель закрепил в НК РФ в статья 7 и 312 понятие и порядок подтверждения фактического права на доход, за чем последовало большое количество судебных споров по законности применения налоговых соглашений, в которых налоговые органы отказывали в применении льгот по соглашениям, основываясь на отсутствии у получателей дохода ФПД. М.В. Карасева (Сенцова) отмечает, что российский законодатель ввел в НК РФ термины «фактический получатель дохода» и «иностранная организация, имеющая фактическое право на доход», ориентируясь на положения МК ОЭСР и имея собственную позицию [Карасева, Сенцова 2016 с. 92]. К. Тасалов отмечает, что за последние годы российская судебная практика серьезно изменила концепцию ФПД [Tasalov 2020, с. 234].

В 2013–15 годах Россия оказалась вовлечена в процесс борьбы с размыванием налоговой базы и переносом прибыли (BEPS), в котором фактическое право на доход было упомянуто, но не играло ключевой роли.

Закрепление в НК понятия «фактического права на доход» и появление многочисленных судебных споров о применении данного понятия стимулировало научный интерес к данной проблематике в РФ. Фундаментальное диссертационное исследование подготовлено З.В.Балакиной[2], глубоко данная тема исследована М.Котляровым[3], значительное внимание этой теме уделено в исследованиях В.А.Гидирима[4], И.А.Хавановой[5], Л.В.Полежаровой[6]. Интересен труд А.В.Кириллова, исследующего вопросы применения ФПД в Швейцарии[7]. А.В.Демин и А.В.Николаев вплотную подошли к ключевым проблемам применения ФПД, рассматривая вопросы налогообложения холдингов, отмечая, что вряд ли стоит ставить знак равенства между холдинговой деятельностью и кондуитностью, к чему зачастую подталкивает логика, декларируемая налоговыми органами. В качестве решения для многочисленных конфликтов они предлагают, например, что компании нельзя отказать в признании бенефициарным собственником дивидендов лишь потому, что ей не хватает каких-то типичных характеристик операционной компании или смешанной холдинговой компании [Демин, Николаев 2020, с. 48].

Развитие российской концепции ФПД со стороны фискальных органов прошло несколько этапов: изначально заявленная в 90х годах позиция о широком понимании ФПД, не привязанная непосредственно к тому, что говорится в конкретном МНД и не мотивированная, в дальнейшем эволюционировала, основываясь на тексте Комментария ОЭСР. Данный документ, в свою очередь, тему ФПД развивал в связи с положениями налоговых соглашений, в которых говорилось о наличии фактического права на доход у лица, «которому упла-

2 Балакина З.В. (2018), Налогово-правовые аспекты применения концепции бенефициарного собственника («beneficial owner») дохода в Российской Федерации: проблемы и решения, Диссертация на соискание степени кандидата юридических наук, Екатеринбург.

3 Maxim Kotlyaorov. The Concept of Beneficial Ownership in the OECD Model Tax Convention 2010: A Critical Analysis, Yekaterinburg, 2015, www.kotlyarov.org/files/Kotlyarov_Beneficial_Ownership_protected.pdf

4 Гидирим В.А. (2018), *Основы международного корпоративного налогообложения*.

5 Хаванова И.А. (2016), Избежание двойного налогообложения и предотвращение уклонения от налогообложения в условиях взаимодействия национального и международного права, Диссертация на соискание ученой степени доктора юридических наук.

6 Полежарова Л.В. (2020), Методология налогообложения и налогового администрирования транснациональных компаний и бенефициаров, Диссертация на соискание степени доктора экономических наук.

7 Кириллов А.В. (2014), *Швейцарская практика применения соглашений об избежании двойного налогообложения: проблема толкования понятия beneficial ownership*, „Налоговед" 2014, No. 1.

чивался доход». Обращение к тексту Комментариев ОЭСР помогло во многих случаях российским фискальным органам сформулировать и обосновать практические позиции по конкретным спорам с налогоплательщиками и налоговыми агентами. Затем мы стали свидетелями того, что при принятии деофшоризационных поправок понятие ФПД закрепилось в НК. Сначала такое закрепление было сделано для целей налоговых соглашений, а затем изменения в тексте НК привели к тому, что понятие ФПД оказалось сформулированным для целей НК. Одновременно на уровне НК был закреплен так называемый «сквозной подход», в которым важно отметить возможность признания лицом, обладающим фактическим правом на доход, российское лицо.

Можно ли встретить аналогичные вопросы о связи понятий ФПД и правил отнесения дохода к налогоплательщикам в трансграничных ситуациях? В практике применения налоговых соглашений зарубежными странами вопросы соотношения ФПД и правил относимости доходов выявлены и исследуются достаточно давно. ОЭСР неоднократно сталкивалась с проблемами того, что страны (страна выплаты дохода и страна резидентства) страна в схожих ситуациях по-разному определяют, к кому относится выплачиваемый доход и какое налоговое соглашение подлежит применению, а какое соглашение – не подлежит применению (но какого-либо универсального решения предложено не было).

Проведенный краткий анализ динамики развития концепции ФПД в России ФПД иллюстрирует сложность и необычность вопросов, которые приходится рассматривать правоприменительным органам и отсутствие по многим отдельным вопросам ФПД всеобъемлющего концептуального понимания.

России пришлось потратить почти 30 лет после появления термина ФПД в своих международных налоговых соглашениях, чтобы закрепить в своем законодательстве понятие ФПД и начать концептуальное практическое и доктринальное осознание данного термина на основе такого законодательства. Развитие данной концепции происходило постепенно, фискальные органы старались представить последовательную концепцию ФПД, однако понимание концепции начало складываться только после того, как появилось ее законодательное закрепление и судебная практика применения положений Налогового кодекса РФ о ФПД.

Отечественная концепция ФПД изначально, задолго до закрепления данного понятия в законе, развивалась как широкая, применяемая вне зависимости от того, упомянуты ли положения о ФПД в налоговом соглашении или нет.

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Kazakhstan's Investment Legislation: Past, Present and Future

Abstract: This article is devoted to the study of the formation and development of investment legislation in the Republic of Kazakhstan. The author identifies five stages of the formation of Kazakhstan's investment legislation from 1990 to the present. The author describes each stage of the development of investment legislation, analyzes all the enacted legislative acts and reforms that have been implemented to attract investors to the country's economy. It is noted that the Republic of Kazakhstan since its independence has taken serious steps to create a favorable investment climate, and certain results in this direction have been achieved, but there are also problems. It is emphasized that cardinal changes in the country's investment policy, constant reforms in the public administration system, the creation of various state bodies to regulate investors' activities have a negative impact on Kazakhstan's investment attractiveness.

In this regard, the author concludes that it is necessary to change the investment policy in the field of granting tax preferences, improve the investment and tax legislation of Kazakhstan to ensure proper protection of investors' rights.

Keywords: investment legislation, Kazakhstan's legislation, investor, investment climate

Investment legislation of the Republic of Kazakhstan has passed five main stages in its formation and development.

The first stage is the forming stage of investment legislation, initially, as legislation on foreign investments. The beginning of this was the enactment of the Law of the Kazakh SSR "On Foreign Investment in the Kazakh SSR" dated December 7, 1990 [Bulletin of the Supreme Council of the Republic of Kazakhstan, 1990, No. 50], which aimed to attract foreign investment, advanced technology and management experience, assuming that the necessary guarantees to foreign capital are provided. Despite the fact that the main provisions of the Law of the Kazakh SSR on foreign investments were more declarative in nature, there were positive aspects in its enactment: firstly, it was the first act that legally established the already existed investment relations in the Republic; secondly, this legislative act determined the procedure for attracting foreign investment in our country economy for four years, and, in general, it contributed to foreign capital inflows; thirdly, for the first time foreign investors were

provided with guarantees of their activities, so the inclusion of a section on guarantees for foreign investments increased the interest of potential investors and significantly affected their activity.

It is noteworthy that the formation of investment legislation almost coincided with the formation of the Republic of Kazakhstan as an independent state, which was initiated by the Declaration on State Sovereignty of the Kazakh SSR dated October 25, 1990 [Bulletin of the Supreme Council of the Republic of Kazakhstan, 1990, No. 44]. The Constitutional Law on State Independence of the Republic of Kazakhstan was preceded by the Law on Investment Activity, enacted during Kazakhstan's existence as a Soviet Socialist Republic on June 10, 1991 [Bulletin of the Supreme Council of the Republic of Kazakhstan, 1991, No. 24], which was in force for the longest period of time compared to all the other acts in that time regulating investment relations, since it was canceled only in 1997. And in this, in our opinion, its only dignity – in all other respects, it has had virtually no impact on investment relations, as it has become inapplicable from the moment of its publication.

The second stage in the development of investment legislation begins with the enactment of the Law of the Republic of Kazakhstan "On Foreign Investment" on December 27, 1994 [Bulletin of the Supreme Council of the Republic of Kazakhstan, 1994, No. 23–24], which abolished the former Law of the Kazakh SSR "On Foreign Investment in the Kazakh SSR" dated December 7, 1990. This law determined the basis for attracting foreign investments into the economy of the Republic of Kazakhstan, fixed state guarantees provided to foreign investments, established the main organizational and legal forms of their implementation, and also determined the procedure for resolving disputes involving foreign investors. It is noteworthy that the Civil Code of the Republic of Kazakhstan (General Part) was adopted on the same day as the Law on Foreign Investment, which once again shows how important it was for Kazakhstan to attract new foreign investments, since there were no national ones at that time.

A distinctive feature of the second stage in the development of investment legislation is that a significant part of the legislative and regulatory acts adopted at that time was temporary and had no long-term prospects.

The beginning of *the third stage* in the development and improvement of investment legislation was the enactment of the Law "On State Support for Direct Investment" on February 28, 1997 [The Law of the Republic of Kazakhstan "On State Support for Direct Investment" of 28 February 1997], which defined such main tasks as: introduction of new technologies, advanced equipment and know-how; saturation of the domestic market with high-quality goods and services; state support and stimulation of domestic producers; development of export-oriented and import-substituting industries; creation of new jobs; improvement of the natural environment; etc.

The significance of the Law "On State Support for Direct Investment" is that with its enactment, firstly, the formation of Kazakhstan's special legislation on direct investment began; and, secondly, the investment legislation of Kazakhstan has moved to a qualitatively new stage in its development. Prior to the enactment of the Law on Direct Investment, the country's investment policy was aimed at increasing foreign investment and creating a legal regime more than the most favorable for them. Ultimately, the effectiveness of foreign investments was minimal, due to the fact that they were mainly invested in subsoil use, which could not have a tangible impact on the development of the country's economy and led only to increased subsoil expansion by foreign investors. As a result, a large part of foreign investments was speculative in that period. As a consequence, along with the enactment of the Law on Direct Investment, serious amendments and additions were made to the Law on Foreign Investment. Among the reasons that led to this, we can mention the multi-million losses incurred by the state, under contracts concluded between national investors and foreign investors under government guarantees due to the violation of contractual obligations by the Kazakh party at that time. The Foreign Investors' Council under the President of the Republic of Kazakhstan was established in 1997.

The fourth stage began with the enactment of the Law of the Republic of Kazakhstan "On Investment" dated January 8, 2003 ["Kazakhstanskaya Pravda" of 11 January 2003, No. 9–11 (23948–23950)], which combined the rules regulating relations related to investments and established a general legal regime for foreign and national investments, providing guarantees to investors operating in Kazakhstan. In particular, guarantees for the legal protection of investors' activities in Kazakhstan (full and unconditional protection of the rights and interests of investors by laws and other normative acts of Kazakhstan, as well as international treaties ratified by Kazakhstan; the right to recover damages caused to an investor as a result of issuing an act of a state body that does not comply with the legislation, and also as a result of action (inaction) of officials of these bodies, according to the civil legislation); guarantees for the use of income; guarantees for the rights of investors during the nationalization and requisition.

An analysis of the main provisions of the Law on Investments allows us to conclude that the generally positive idea of establishing a single legal regime for foreign and national investments was not fully realized in practice: instead of raising the legal status of national investors to the level of foreign investors, the legal status of foreign investors was equated with the legal status of national investors. Accordingly, no one benefits from this approach to the problem of creating equal conditions for carrying out investment activities in the Republic: national investors – because their legal status has not changed; foreign investors – because their legal situation has worsened.

In order to improve the investment climate in the country, after numerous reforms in the field of public administration, in 2014 the Ministry for Investments and Development of the Republic of Kazakhstan, the National Investors' Council under

the President of the Republic of Kazakhstan were established, and a new institution of the Investment Ombudsman was created, which is an official appointed by the Government of Kazakhstan to perform the following functions: 1) consideration of investors' appeals on issues arising in the course of investment activities, and making recommendations for their resolution, including interacting with state bodies; 2) assisting investors in resolving emerging issues in out-of-court and pre-trial procedures; 3) developing and submitting recommendations to the Government to improve the legislation of the Republic of Kazakhstan.

The fifth stage in the development of Kazakhstan's investment legislation begins on January 1, 2016 with the entry into force of the Entrepreneurial Code of the Republic of Kazakhstan dated October 29, 2015 No. 375–VZRK (hereinafter – RoK Entrepreneurial Code) ["Kazakhstanskaya Pravda" of 3rd November 2015, No. 210 (28086)]. Since the same date, the following laws have lost their force: the Law of the RK dated January 31, 2006 "On Private Entrepreneurship" [Bulletin of the Parliament of the Republic of Kazakhstan, 2006. No. 3]; the Law of the RK dated March 31, 1998 "On Peasant or Husbandry Farms" [Bulletin of the Parliament of the Republic of Kazakhstan, 1998, No. 2–3]; the Law of the RK dated January 8, 2003 "On Investment" ["Kazakhstanskaya Pravda" of 11 January 2003, No. 9–11 (23948–23950)]; the Law of the RK dated December 25, 2008 "On Competition" [Bulletin of the Parliament of the Republic of Kazakhstan, 2008, No. 24]; the Law of the RK dated January 6, 2011 "On State Control and Supervision in the Republic of Kazakhstan" [Bulletin of the Parliament of the Republic of Kazakhstan, 2011, No. 1]; the Law of the RK dated January 9, 2012 "On Government Support for Industrial and Innovation Activity" [Bulletin of the Parliament of the Republic of Kazakhstan, 2012, No. 2].

Without going into details, we only note that when developing the RoK Entrepreneurial Code, one of the most priority tasks was set – the systematization of norms regulating entrepreneurial activity and their unification in a single legislative act, so that one legislative act was enacted to replace the numerous acts regulating entrepreneurial relations, which would establish the general principles of entrepreneurship in the Republic of Kazakhstan. However, this task has not been solved.

Chapter 25 of the RoK Entrepreneurial Code "State Support for Investment Activities" is the previously valid Law of the RK dated January 8, 2003 "On Investment" (initially both of them consisted of 24 articles, but later Chapter 25 of the RoK Entrepreneurial Code was supplemented with Article 295–1 "Conclusion and Termination of a Special Investment Contract", Article 295–2 "Agreement on Investment", Article 296–1 "Forms of Control over Compliance with the Terms of Investment Contracts", Article 296–2 "Procedure for Organizing and Monitoring Compliance with the Terms of Investment Contracts", and Article 291 "Investment Subsidy" was excluded). We believe that this legislator's approach to the regulation of investment activity does not meet the demands of contemporary practice, and in theory it is very doubtful. Firstly, all investors were automatically recognized as entrepreneurs, which,

of course, is not the case. Secondly, all the shortcomings and miscalculations of the Law on Investment gradually "migrated" to the RoK Entrepreneurial Code. Thirdly, they significantly reduced the scope of the RoK Entrepreneurial Code in the field of investment activities, limiting it only to issues of state support.

In general, the legislative innovations are aimed at ensuring that investors comply with the terms of contracts on preferences, and, accordingly, to tighten control over their activities. On the one hand, it is questionable whether it is appropriate to establish new administrative barriers for investors, but on the other hand, it is impossible not to support the legislator's desire to streamline investment relations and to ensure proper protection of public interests. It should be noted that with the adoption of the Entrepreneurial Code, the problems of improving investment legislation have not been resolved, but on the contrary have become more complicated, since the investor regularly encounters new changes in legislation, and the system of state bodies is constantly changing. Therefore, the fifth stage in the development of investment legislation can be characterized as the absorption stage of investment legislation by entrepreneurial legislation.

This period can also be described as a stage of searching for new ways to boost investment activity in the Republic of Kazakhstan, especially with the participation of foreign investors. We are talking, in particular, about the Constitutional Statute dated December 7, 2015 "On the Astana International Financial Centre" [Bulletin of the Parliament of the Republic of Kazakhstan, 2015, No. 24]. The AIFC is a financial hub for the countries of Central Asia, the republics of Transcaucasia, the EAEU, the countries of the Middle East, the territory of Western China, Mongolia and Europe. The legal regime of the AIFC is based on the principles, norms and precedents of the law of England and Wales and standards of leading global financial centres.

Kazakhstani legislation will be applied on a subsidiary basis, in part to matters not governed by AIFC Acts. At the same time, the official language of the AIFC is English. Office work and court proceedings are conducted in English. All transactions are concluded in English. The Astana International Financial Centre has an independent AIFC Court, separate from the judicial system of the Republic of Kazakhstan, with the involvement of judges of the international level and the International Arbitration Centre, which will consider disputes if there is an arbitration agreement between the parties [www.aifc.kz/tseli/, access as of 20 September 2021].

In order to encourage potential investors and increase their confidence in our judicial system, the Civil Procedure Code of the Republic of Kazakhstan dated October 31, 2015 (hereinafter referred to as the RoK Civil Procedure Code) [Bulletin of the Parliament of the Republic of Kazakhstan, 2015, No. 20–VI], explicitly stipulates that the Specialized Interdistrict Economic Court of Nur-Sultan considers civil cases regarding investment disputes, except for cases within the jurisdiction of the Specialized Interdistrict Administrative Court of Nur-Sultan, as well as claims of state bodies against investors related to the investor's investment activities, with the participation

of: 1) a foreign legal entity (its branch, representative office) carrying out entrepreneurial activity in the Republic Kazakhstan; 2) a legal entity created with foreign participation in the manner prescribed by the legislation of the Republic of Kazakhstan, fifty or more percent of voting shares (participation shares in the authorized capital) of which belong to a foreign investor; 3) investors in the presence of a concluded contract with the country for investment. The Specialized Interdistrict Administrative Court of Nur-Sultan considers investors' claims regarding the appeals against administrative issuances, actions or inactions by administrative authorities, officials (paragraph 3 of Article 102 of the Administrative Procedure Code of the Republic of Kazakhstan dated June 29, 2020 (hereinafter – the RoK Administrative Procedure Code) [Bulletin of the Parliament of the Republic of Kazakhstan, 2020, No. 13].

In 2018, the Ministry for Investments and Development of the Republic of Kazakhstan was reorganized by transforming into the Ministry of Industry and Infrastructural Development of the Republic of Kazakhstan, and the functions and powers in the field of forming the state policy on attracting investment were transferred to the Ministry of National Economy of the Republic of Kazakhstan, and the functions in the field of implementing the state policy on attracting investment were transferred to the Ministry of Foreign Affairs of the Republic of Kazakhstan. In our opinion, this is absolutely unacceptable – it is impossible to artificially separate the functions of republican state institutions in the field of investment – one ministry is responsible for the formation of investment policy, and the other – for its implementation.

In this regard, first of all, it is necessary to revise the investment policy. Today, the standard set of investment preferences includes exemption from customs duties and state in-kind grants, previously the number of investment preferences included tax benefits. Initially, since 1997, tax benefits consisted in full or partial tax exemption for up to 10 years (including lowering the income tax, land tax and property tax rates to 100% of the basic rate for up to 5 years from the date of conclusion of the contract, as well as for a subsequent period of up to 5 years, lowering the rate of income tax, land tax and property tax within no more than 50% of the basic rate in accordance with the second subparagraph of Article 7(1) of the Law of the RK "On State Support for Direct Investment" [The Law of the Republic of Kazakhstan "On State Support for Direct Investment" of 28 February 1997]; then, since 1999, the period for granting tax benefits has been reduced to 5 years (including exemption from land tax and property tax for up to 5 years from the date of conclusion of the contract, as well as exemption from income tax for up to 5 years from the date of receipt of taxable income, but not more than 8 years from the date of conclusion of the contract in accordance with the second subparagraph of Article 7(1) of the Law of the RK "On State Support for Direct Investment" ["Kazakhstanskaya Pravda" of 05 August 1999, No. 187–188]. Since 2003, investment tax preferences have been granted for a period determined depending on the volume of investments in fixed assets, but not more than 5 years (in accordance with paragraph 1 of Article 16 of the Law of the RK

"On Investment" ["Kazakhstanskaya Pravda" of 11 January 2003, No. 9–11 (23948–23950)]). Since 2014, tax preferences and investment subsidies have been provided only for investment priority projects [Bulletin of the Parliament of the Republic of Kazakhstan 2014, No. 11]. Since 2016, tax exemptions have been granted for a special investment project (including exemption of imports of raw materials and (or) materials under a special investment contract from value added tax in accordance with the third subparagraph of Article 290(2) of the RoK Entrepreneurial Code ["Kazakhstanskaya Pravda" of 3rd November 2015, No. 210 (28086)], and tax preferences have been granted for a priority investment project (including a reduction in the amount of calculated corporate income tax by 100 percent; application of a coefficient of 0 to land tax rates; calculation of property tax at the rate of 0 percent to the tax base in accordance with the first subparagraph of Article 290(2) of the RoK Entrepreneurial Code).

It is clear that the legislator first widened the list of investment preferences as much as possible and then shortened it by excluding tax preferences, but subsequently abandoned the complete exclusion of tax preferences, replacing the term "tax preferences" with the term "preferences on taxes". In our view, the complete rejection of tax preferences was a major mistake, the consequences of which we are still overcoming, because there is still a selective approach to their granting – not to all investment projects, but only strategic and special ones.

Of course, we should not return to the policy of attracting an investor "at any cost"[1], which was practiced in the early and mid-1990s. But the policy of strengthening and tightening state control over the investor's activities, which began at the dawn of the 2000s and continues to this day, must also change.

Thus, we can come to the disappointing conclusion that all those positive and very important steps that the legislator previously took to ensure proper protection of investors' rights have been destroyed today – there is no special investment legislation, there are no new breakthrough investment projects. It is possible that Kazakhstan has strengthened its position in international ratings, but this, unfortunately, does not have any significant effect on the increase of investment activity in our country, both from national and from foreign investors. We need real steps to improve the current legislation, and, first of all, the tax legislation of the Republic of Kazakhstan. Along with this, it is necessary to reconsider the legislator's position regarding the investment legislation of the Republic of Kazakhstan, because without creating a favorable investment climate we will not be able to overcome the crisis.

1 At that time, it was only about foreign investors, since there were no national investors yet, since the initial accumulation of capital had not yet occurred.

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Legal Nature of Smart Contracts

Abstract: Lately, more and more attention has been paid to the phenomenon of smart-contracts (SC) in legal research. The SCs have already found their application in many aspects of society life and are particularly common in the regulation of legal relations in the area of automated financial services, which may include lending, mortgages, insurance, etc., as well as in public services, including various types of voting, elections, document management, supply and storage. The practical dissemination of SCs is carried out without a conceptual approach in the legal regulation of this object, but also without a unified terminology. The science begins developing approaches to study of the legal nature of SCs and offers options for their legal regulation have been proposed, each of those, of course, has its benefits and disadvantages, which is explained by the multifaceted nature of this phenomenon. First of all, it means a qualitatively new level of functioning of a smart-contract where the technical component overlays on traditional types of legal relations. Both authors of the article used scientific methods such as analysis, synthesis, comparison, induction and deduction. Special attention is paid to different options for understanding the legal nature of smart contracts, proposed by European and domestic scientists.
Keywords: smart contracts, law, blockchain, contract law.

Introduction

There is no uniform approach to understanding both the nature of SCs themselves and their legal regulation in global practice. For example, French legal regulation framework does not define the concept of a smart contract, but this does not exclude using SCs for the purposes of transactions entering into and fulfilment.

Definition of Smart Contract

There is no unified approach among French lawyers to the smart-contract comprehension, but the French legal doctrine analysis suggests two main approaches. It is

believed that a smart-contract enables drafting a contract directly in the blockchain software with no contracts in the "physical world". [Giusti].

Advocates of the other approach argue that the smart-contract is not a contract, a an agreement. In their view, a smart-contract is a software purpose of that is to automatically formalize, perform and terminate a contract. [Guerlin 2017, p. 512].

As M. Mekki [2018, p. 410] highlights, a SC is not an agreement/contract but a software product that automatize certain circumstances on the basis of the algorithm "if…then". A smart-contract "overlaps" a traditional contract ensuring its entering into, execution, and termination, i.e. it provides stewardship for the contract entered into in the real world. Thus, the "software-based" approach to SCs prevails over real civil contracts in French legal philosophy.

Regulations of smart contracts in various countries

The United States' experience in regulating the SC relationship is particularly interesting. The areas of SC application in the USA are the sale of digital assets; the issuance of digital bond papers; the continuous supply chain of raw materials up to distribution; the document and business accounting system for government, real estate (land) registration; identity and security management in personal data management). Since there is no federal contract law in the USA, as well as a federal act establishing general provisions for blockchain and smart contract regulation, blockchain related issues are defined at the level of the state legislation [Khadeeva 2019, pp. 182–186].

Some US states have opted for recognizing a smart-contract as an ordinary contract. For example, the Blockchain Technology Act (Illinois) defines a smart-contract as a contract recorded as an electronic document that can be verified using blockchain. Commentators on this definition note that, in this interpretation, a SC is a traditional contract recorded and enforced through a blockchain[1] [Herian 2018, p. 16].

Other States refuse to recognize smart-contracts as contracts, defining them as ordinary software programs. For example, Louisiana Code of Statutes chapter 26, section 44–7061, section 5 defines a smart-contract as an occasion-driven software program that operates based on a distributed, decentralized, shared and reproducible registry and allows assets to be stored and transacted through an appropriate registry.

1 Contrast traditional definitions with one found in a new blockchain Act presently working its way through the Illinois General Assembly, in which a smart contract is defined as, 'a contract stored as an electronic record which is verified by the use of a blockchain'45, a definition which at first blush suggests that a smart contract is nothing more or less than a traditional contract written to and executed on a blockchain. In other words, the blockchain transforms or translates the traditional into the smart through a process of hybridity.

A similar position is expressed in the Italian legislation, a leader in digital legal regulation. According to the Italian Chamber of Deputies adopted the Distributed Registry Law on 07.02.2019, transactions performed by means of distributed ledger technology (DLT) become legally valid at the moment of registration and without subsequent notarization. F. Sarzana, blockchain expert at the recently established working group of Italian Ministry of Economic Development believes that Italy is trying to legalize transactions using distributed registry technology to exclude intermediaries or centralized certification institutions. Thus, it defines distributed registry technologies as technologies and information protocols that use divided, distributed, reproducible and simultaneously accessible registries, decentralized and encrypted, which allow to register, certify, update and store data, whether encrypted or not, and which cannot be changed or tampered with [Yurasov 2017].

Considering the CIS legislation, the definition of a smart-contract contained in para. 9 in Annex 1 to Decree of the Republic of Belarus No. 8 dated December 21, 2017 "On Digital Economy Development" is of interest. According to this legal regulation, a smart-contract is understood to be a software code designed to function in a transaction block register (blockchain) or other distributed information system for the purpose of automated fulfilment and/or performance of transactions or other legally significant actions. The digital assets related legislation of other CIS countries contains no definition for a smart contract.

Researches that suggest that a smart-contract can constitute a full-fledged civil law contract, as well as a mode of contract formation and contract performance could be interesting, too.

German jurisprudence believes that the programming code is the language of the contract terms entered into by the parties. In such a case, the will of the parties is expressed in another language. Since the German Civil Code guarantees the freedom to choose the language in which the terms of the contract will be expressed, this way of contracting is legitimate. In litigation it is necessary to mobilize an expert to review of the case. The German researchers were supported by French authors. The smart-contract is a legal transaction translated into an informational language [Godefroy 2018, pp. 713–792].

Models of Smart Contracts' Integration

There is a mindset that a SC can be integrated into a transaction in one of the following ways:

1) entirely in a programming language – the contract is written entirely in software code, without a copy in natural language (this method is least suitable for complete transactions, because they will always contain conditions for

which automation is not required – choice of dispute venue, assurances of circumstances, etc.);

2) duplication – the contract is written in software code and has a copy in natural language;
3) mixed model – the contract is written in natural language, with part of its provisions written in software code. The most logical model today is the mixed model, where a part of the contract is written in natural language and the other part is in the form of a smart contract. For example, in the algorithm, the parties fix the procedure for determining the price and the triggers that release the payment. The rest of the provisions (including dispute resolution procedure, assurances about circumstances, description of goods or actions in case of force majeure, etc.) are written in natural language in the contract [Vashkevich 2018, p. 89].

A.I. Savelyev sees the smart-contract as a contract that exists in the form of software code. It should be implemented on a blockchain platform, should provide autonomy and self-execution of the contract terms upon the occurrence of predetermined in it circumstances [Savelyev 2016, pp. 32–60]. Similar position belongs to A. A. Volos who defines a SC as a special form of a contract, as well as a set of special procedures and ways of contract entering, rights enjoyment and parties' obligations fulfilment, termination of contractual relations [Volos 2018, pp. 5–7].

A series of studies refer to the smart-contract as evidence of a contract and a technical procedure for its performance. In the latter case, it would be the automatic performance of the contract or some of its provisions [Zolynski 2017, p. 3].

The Italian Law on Urgent Provisions Concerning the Support and Facilitation of Business and Public Administration, provides that the storage of electronic documents using distributed ledger technologies become legally effective from the moment of the electronic timestamp, as provided by Article 41 of EU Regulation No. 910/2014 on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market and can therefore be used as evidence in court [Krysenkova].

The use of a smart-contract ensures that the parties' obligations are automatically enforced exactly in line with their original intentions and allows the same automatic mode to respond effectively to breaches of contract by the parties. Rather than simply relying on the honesty of our counterparties, technological systems are now being implemented with features that will provide the necessary guarantees if even the parties of smart contracts behave dishonestly [Mogaillard 2018, p. 10].

However, the smart-contract cannot completely eliminate disputes. It is well noted that the application of the principles of contract law, including dispute resolution, does not disappear with the emergence of SCs. But even in such a situation, the work of the court or arbitrator is greatly facilitated because all transactions are confirmed by the system. The parties do not need to submit additional evidence – judges

or arbitrators can directly access smart-contract performance records and immediately understand both the chronology of events and at what stage, by whom and what breach happened. In addition, even in such situations, a multi-stage system of contract enforcement can be envisaged. For example, the contract can be made conditional upon the discovery of, for example, faulty goods and the entry of documentary evidence of this in the smart contract system, the corresponding amount of money in the seller's bank account will be blocked. The next step is to specify an automatic algorithm for resolving disagreements using a system of intelligent hints. By building several stages of contract enforcement, the interests of the parties of the contract can be protected, which, although will not eliminate, but significantly reduce the number of disputes and appeals to court or arbitration. If disputes do arise, a smart-contract can resolve them quickly and easily.

In addition to newly developing legal framework in some countries of the world, such as the USA, court practice is also beginning to develop in relation to SCs and self-protection legal relations, which some researchers recognize as a legal precursor of smart contracts [Savelyev 2017, pp. 94–117].

According to some authors, a smart-contract should be considered a twofold phenomenon with both technical and legal components. They are never merged into a single entity. For example, according to one French researcher, a distinction should be made between an algorithmic program (smart-contract) that operates on a blockchain platform and a traditional contract. The purpose of the software is to enable the entering into, performance and automatic termination of a traditional contract on such a platform. In its turn, the contract can be anything: an insurance contract, a property lease, etc. Thus, a smart-contract layers on a traditional civil contract [Guerlin 2017, p. 512].

The argument seems reasonable, as neither legal nor technical aspects of the smart-contract can be ignored. We believe that we should distinguish between the SC as a computer code and the smart contract as a civil law contract (legal relationship). The place of the smart-contract shall be among special non-autonomous contractual constructions reflecting particularities of contract entering into or special legal consequences of any civil-law contract, provided that they meet the characteristics indicated by the law. Such contractual constructions include, for example, a contract of adhesion, a public contract, an option contract, a contract in favour of a third party, etc., which cannot be concluded separately from the relevant contract type. Consequently, it is not possible to conclude a SC as such, but it is possible to conclude a supply contract in the form of a SC.

A smart-contract is a contract that must be recognized as such by the legal system of a particular state. Therefore, the independence of smart contracts from a state's legal and judicial system mentioned in the literature is seen as a consequence of a shallow understanding of the legal nature of contracts and an over-idealization of technology. There cannot be a contract outside the law because legal enforcement of a

contract, and especially its enforcement, depends on legal mechanisms, including enforcement. The desire to automate contract enforcement should not be confused with the desire to cut the link between the contract and the legal system of the state. While the first is possible and desirable, the second is a consequence of a misunderstanding of capacities and role of the state in influencing the emergence and development of property relations. [Kaldybaev].

Advantages of Smart Contracts

Globally, smart contracts are about reducing the transaction costs associated with servicing any calculation. An example would be the calculation of a lease. A lease is a continuing legal relationship that often involves the same transaction at a certain period of time: the transfer of rental payments. Such monthly payment can be automatized – a SC will initiate the payment at a fixed time throughout the duration of the lease, if no claims are made by the parties. In the future, a smart rental contract could also interact with the Internet of Things (e.g., automatically grant or deny access to the leased space depending on meeting the payment conditions). A SC could be used in supply where the smart-contract software mentions that the money for the goods is automatically debited from the buyer's account after the algorithm receives data that the goods are in stock and have passed the initial inspection (acceptance). A smart-contract can debit the required amount in the agenting and franchising process within a specified period of time before the contract expires. In the future, when using a decentralized file storage, the parties can lay down in the software algorithm certain conditions to access various business-related documents that are provided along with the franchise. With the help of SCs the process related to security mechanisms in biddings can be automated. The algorithm will be able to return the security provided by a bidder if he/she failed the tender, or debit a security provided by a successful bidder who won the tender but avoids the contract signing. Looking ahead, a smart-contract could cover the entire bidder selection process and make the procedure faster and more transparent. It is potentially possible to use the SC to block rogue suppliers and monitor the cost effective use of funds.

Conclusion

Hence, having analyzed different approaches to understanding the legal nature of smart contracts, we conclude that smart-contracts cannot be considered only from the perspective of civil law regulation without taking into account the technical features of the object reviewed.

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Government Support For Commune Housing Investments in Poland During the Covid-19 Pandemic

Abstract: One of the effects of the COVID-19 pandemic may be a reduction in investment expenditure of communes, including those allocated for the implementation of tasks in the field of commune housing. Taking this risk into account, the Government Housing Development Fund (Rządowy Fundusz Rozwoju Mieszkalnictwa – RFRM) was established in 2020. It is a temporary, i.e. a 3-year mechanism of financial support for communes with the aim of strengthening their share in the share capitals of social housing initiatives (SIMs), which function in the form of limited liability companies, joint stock companies or cooperatives of legal entities. Support is provided at the request of the interested communes. Once an application is positively verified by the competent minister, the amount of support is transferred to the commune by Bank Gospodarstwa Krajowego, which serves the RFRM, supported by contributions from the COVID-19 Counteracting Fund. In this study, an analysis and assessment of the applicable legal provisions was carried out in order to establish the legal status of the RFRM and the essence of the support provided to communes. The thesis about the public status of this fund as well as the temporary and purposeful nature of the support provided therefrom has been verified as true. Support provided by the RFRM may not be used for any purposes other than the acquisition of shares or stocks in SIMs by the commune. The study uses the legal-dogmatic method and, additionally, the analytical method, to present specific numerical values reflecting the importance of the RFRM support.
Keywords: commune, housing, Government Housing Development Fund, social housing initiatives, financial support for communes

Preliminary Remarks

The effects of the COVID-19 pandemic resulted in a decrease in the rate of economic growth and revenues to the state budget and the budgets of local government units, as well as an increase in current expenditure conditioned by the need to protect entrepreneurs and consumers in this extraordinary situation. This generates the risk of asset expenditure being limited, including investment expenditure, the implementation of which may be of significant importance for satisfying various basic social needs. This category includes e.g. housing needs, as they condition the proper functioning of the family and integrate the household. Local government units, in particular communes, should also play an important role in this respect.

In the statutory catalogue of the commune's own tasks, the main structural element of which is to meet the collective needs of the community, the issues of commune housing are listed (cf. Art. 7 sec. 1 point 7 of the Act on the Commune Local Government of 8 March 1990, Journal of Laws of 2021, item 1372 as amended). The task of the commune has been defined by the legislator quite generally, therefore it can either play the role of a direct investor in the field of housing, or only create conditions to enable the satisfaction of the housing needs of members of the community (Judgement of the Supreme Administrative Court of 18 July 2012, I OSK 968/12, LEX No. 1264986). The implementation of tasks in each of these areas is associated with incurring specific expenses from the commune budget.

The months-long period of restrictions in running businesses and various forms of social activity, justified by the need to minimise the effects of the COVID-19 pandemic, has had a negative impact on the income side of commune budgets. The structure of budget expenditures will be determined in the coming years by the decreasing budget revenues. Therefore, a decrease in asset expenditure can be expected due to the objective increase in current expenditure. In consideration of the aforementioned risks, various forms of external support for local government units have been introduced, enabling the continuation of investment tasks. One of those forms is the Government Housing Development Fund (RFRM).

The aim of the study is to analyse and evaluate the applicable legal regulations regarding the Government Housing Development Fund, including those that determine its legal status, the manner of its financial separation and the procedure for granting support. The thesis verified herein concerns the legislator's creation of a temporary (i.e. lasting a few years) mechanism of financial support for communes in the form of a centrally separated financial resource. The main motive for the establishment of the RFRM was the threat to the continuity of the communes' implementation of projects in the field of housing, which condition the satisfaction of the needs of local communities. Simultaneously, an attempt was made to prove that the separated financial resource is purposeful in terms of its subject and is dedicated only to communes. The study uses the legal-dogmatic method and, additionally, the analytical method. The effects of the COVID-19 pandemic may be long-term, but the period of application of the RFRM support mechanism has been limited by the legislator to the next three years. According to the legislator, after this period, communes should regain their ability to independently implement their obligatory own tasks in the field of housing. Nevertheless, it cannot be ruled out that there will be changes to the legislation in the future aimed at extending the period of financial support by the state for various initiatives related to commune housing.

Legal Status and the Manner of Separating the Government Housing Development Fund

Pursuant to Art. 30 of the Act of 10 December 2020 amending certain acts supporting the development of housing (Journal of Laws of 2021, item 11 as amended), the Government Housing Development Fund was established at Bank Gospodarstwa Krajowego (BGK). It is one of the initiatives included in the catalogue of legal solutions aimed at minimising the negative social and economic effects of the COVID-19 pandemic. The aim pursued by the RFRM is to support the development of communal housing and social rental housing. The legal solutions introduced in this area are consistent with the basic direction of the housing policy implemented, as defined in the National Housing Program. It is also emphasised that the initiative related to the establishment of the RFRM is an *ad hoc* state intervention determined by the COVID-19 pandemic, which negatively affects the level of communes' budgetary revenues (Substantiation of the draft act amending certain acts supporting the development of housing, Form No. 534 of the Sejm of the 9th term, pp. 1 and 55).

The provisions of the Act imply that the RFRM is not a state special-purpose fund within the meaning of Art. 29 of the Act on Public Finance of 27 August 2009 (Journal of Laws of 2021, item 305 as amended), hence it is not formally covered by the subjective and objective scope of the public finance sector [Ruśkowski 2018, pp. 118–119]. The reservation concerning the lack of formal grounds for including the RFRM in the public finance sector requires clarification, as its specific features could suggest a different interpretation. The fund was established by way of an act, the purpose of its operation and the direction of expenditure were clearly defined, and it was supported with public funds. However, in the act establishing this fund, it was not referred to as a state special-purpose fund. This is not an exceptional situation, as this term was also not used in relation to over twenty other funds operating in Poland in 2021. In the doctrine, such a category of funds is called special-purpose funds which are not covered by the rules of the Public Finance Act [Kosikowski 2008, pp. 428–429] but function in the sphere of public law [Lenio 2020, p. 117]. Such funds are public due to the status of tasks carried out with their participation as well as the wide use of funds from public resources [Szołno-Koguc 2007, p. 179].

One may conclude that the essential criterion for delimiting typical and atypical special-purpose funds is incorporating or not incorporating their annual financial plans, in the form of attachments, into the budget act. According to the legal status in force in 2021, there were 35 typical state special-purpose funds and 20 other public funds served by BGK. Substantially, the RFRM does not have its own sources of revenue, and it is financed with payments made from the COVID-19 Counteracting Fund, which was established in 2020 to finance or subsidise the implementation of tasks related to the counteracting of COVID-19 (Substantiation of the draft act amending certain acts supporting the development of housing, Form No. 534 of the

Sejm of the 9th term, pp. 1 and 55). Originally, it was a state special-purpose fund, but on 18 April 2020, its status was changed to "other public fund entrusted by the legislator to be managed by BGK" (Act on specific support instruments in connection with the spread of SARS-COV–2 virus of 16 April 2020, Journal of Laws of 2021, item 737 as amended). The amount of PLN 1,500,000,000 will be transferred to the RFRM from the COVID-19 Counteraction Fund, but in the following three tranches: PLN 300,000,000 in 2020, PLN 900,000,000 in 2021, and PLN 300,000,000 in 2022. The remaining revenues of the RFRM may come from interest on the fund's periodically free resources deposited with banks, and from other contributions. Formally, the RFRM is not a sub-fund of the COVID-19 Counteracting Fund, but taking into account its relations with this fund, one may conclude that it could not function without the financial support from the COVID-19 Counteracting Fund, in which public funds are collected.

The RFRM's periodically free funds may be deposited by BGK on the terms stipulated in Art. 78b sec. 2 of the Act on Public Finance of 27 August 2009. Pursuant to this provision, free funds of entities which are not entities of the public finance sector and are included in the government and local government institutions sector within the meaning of Regulation (EU) No. 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European national and regional accounts in the European Union (Official Journal of the EU L 174 of 26 June 2013, p. 1 as amended.), may be accepted in deposit by the Minister of Finance, on contractual terms. In the event this option of investing free funds is utilised, the party to the contract concluded with the Minister of Finance is the entity managing the fund in question [Bożek 2020, p. 547], i.e. BGK. The RFRM's free funds transferred to the deposit are used by the Minister of Finance for periodic financing of the loaning needs of the state budget [Kucia-Guściora 2019, p. 33]. The costs (expenses) of the RFRM are primarily payments for the support provided to communes, as well as various fees incurred in connection with the handling of these payments and other expenses resulting from the operation of the fund.

Legal regulations were also introduced to enable the management of unused funds from the RFRM in the event of the lack of adequate interest of communes in obtaining support for their initiatives on the housing market. The minister responsible for construction, spatial planning & development and housing may transfer some of such funds to the Subsidy Fund (Act of 5 December 2002 on interest subsidies for housing loans with a fixed interest rate, Journal of Laws of 2019, item 1454 as amended), which is also operated by BGK. Funds transferred in this manner may only be used for financial support granted on the basis of the Act on financial support for the creation of residential premises for rent, sheltered housing, night shelters, shelters for the homeless, warming-up shelters, and temporary accommodation of 8 December 2006 (Journal of Laws of 2020, item 508 as amended). The aforementioned minister may also transfer part of the unused funds from the RFRM to the Ther-

mal Efficiency Improvement and Renovation Fund run with BGK. Such funds may then be allocated solely to thermal efficiency improvement, renovation and compensation bonuses granted on the basis of the Act on supporting thermal efficiency improvement and renovation and on the central register of emissivity of buildings of 21 November 2008 (Journal of Laws of 2021, item 554 as amended). Thus, the unused RFRM funds will be used to finance other projects related to housing resources owned not only by communes, but also by other entities, including natural persons.

In the provisions of Articles 33l–33s of the Act on certain forms of support for housing of 26 October 1995 (Journal of Laws of 2021, item 2224), the rules of supporting communes from the funds of the RFRM were regulated. The fund is run by BGK, but its resources are managed by the minister responsible for construction, spatial planning & development and housing. Similarly to other public funds entrusted by the legislator to be administered by BGK, the RFRM should also be run by the bank as part of a separate balance sheet and profit and loss account.

The legislator established the principles, forms and scope of cooperation between BGK and the minister responsible for construction, spatial planning & development and housing in relation to the RFRM. The minister has been authorised to conclude an agreement with BGK specifying the rules of handling the RFRM, including the amount of remuneration due to the bank. The basis for conducting financial activities by the RFRM is its annual financial plan. The draft of this plan for the following year is approved by the minister responsible for construction, spatial planning & development and housing in consultation with the minister responsible for public finance by 31 October of each year. The first financial plan for 2020 was developed by BGK, in consultation with the above-mentioned ministers, by 25 January 2021, i.e. after the end of the calendar year it related to. The purpose of this legal regulation was to enable support for communes that submitted applications in 2020.

The provisions of the Act also stipulate reporting and information obligations of BGK. By 15 April of a given year, BGK is obliged to submit to the above-mentioned ministers a report on the implementation of the RFRM financial plan as well as the balance sheet and profit and loss account for the previous year, and by 30 September of a given year – a draft RFRM annual financial plan for the following year. A procedure for the ongoing monitoring of the use of RFRM funds was also introduced. The responsibilities of BGK include providing the ministers with quarterly information on the implementation of the RFRM financial plan by the end of the month following a given quarter. Information provided should enable the monitoring of the support granted to communes from the RFRM funds.

Subjective & Objective Scope and Amounts of Support Granted from the Government Housing Development Fund

When referring to the legal form of transferring funds from the RFRM, the legislator uses the general term "support". This form has been widely used in Poland during the COVID-19 pandemic to provide financial aid to various entities, e.g. local government units, medical facilities, educational organisational units, universities, and entrepreneurs. The essence and features of "support" from the RFRM are stipulated by the provisions of the Act on certain forms of support for housing. In the normative concept of this support, attention should be paid primarily to the closed catalogue of beneficiaries and the narrowly defined purpose of the support.

Only communes can be the beneficiaries of the support granted from the RFRM. According to the legal status as of 1 July 2021, there were 2,477 communes in Poland (302 urban communes, including 66 cities with poviat status, 652 urban-rural communes, and 1,523 rural communes). Any commune may potentially receive support from the RFRM, but it is necessary for the commune to fulfil the statutory support objective. Pursuant to Art. 33l of the Act on certain forms of support for housing, support from the RFRM may only be granted to a commune for financing part or all of an activity consisting in taking up shares or stocks in a newly created or already existing social housing initiative (SIM).

Legal forms, tasks and the manner of operation of social housing initiatives are regulated in Articles 23–33 of the Act on certain forms of support for housing. They can be created in the following forms: limited liability companies, joint-stock companies, or cooperatives of legal entities. The term "społeczna inicjatywa mieszkaniowa" (social housing initiative) as well as its abbreviation (SIM) are proprietary and may be used only to designate an activity or advertising exclusively in relation to the social housing initiative within the meaning of the provisions of the cited act. This is intended to highlight the status of entities whose activities focus on creating housing resources in the social housing segment [Żelazna 2021a, p. 8]. It is emphasised in the literature that in Poland, social housing is part of the housing sector, but separated out of the commercial market. With regard to this segment, various forms of co-financing are used for investments as well as for the maintenance and use of apartments. As a result, lower fees to be paid by households are set in the resources covered by social housing [Rataj, Iwański, Bugajska 2018, p. 294].

In each SIM, a supervisory board is appointed. The communes within which SIMs operate are entitled to introduce their representatives to the supervisory board of the SIM, in the number specified in the SIM statute. The basic scope of SIMs' activities includes the construction of residential houses and their operation on the basis of lease. Additional activities of SIMs may include:

- purchase of residential premises and residential and non-residential buildings for the purpose of outward extension, upward extension and reconstruction to establish residential premises,
- renovation and modernisation of facilities intended for fulfilling the housing needs on the basis of lease,
- renting commercial premises located in SIM buildings,
- management, on a contractual basis, of residential and non-residential real estate not owned by the SIM,
- management of joint real estate, partially owned by the SIM,
- other activities related to housing and associated infrastructure, including the construction or purchase of buildings for the purpose of selling residential premises or premises for other purposes located in these buildings,
- lease of residential premises of social rental agencies[1] in order to rent these premises to natural persons designated by the commune.

Support for communes from the RFRM may be granted for financing part or all of an activity consisting in taking up shares or stocks in a SIM by this commune. There is no minimum amount of support determined, but the maximum amount of support for a given commune has been specified in Art. 33n of the Act on certain forms of support for housing. Two limits for the support are established, depending on the specific objective pursued by the commune. If a commune intends to acquire shares or stocks in a newly created SIM, the amount of support may not exceed PLN 3 million, and it is stipulated that the support may be granted to this commune only once. This means that even in a case where support has been granted for such purposes in an amount lower than the maximum, it is not allowed to grant further support amounting to the difference between the amount of support granted and the maximum limit of financial aid from the RFRM. If a commune intends to acquire shares or stocks in an already existing SIM, the support may not exceed 10% of the value of the project costs, but such support may be granted to a given commune more than once, provided that each activity is related to the implementation of a different investment and construction project.

1 From 23 July 2021, social rental agencies may operate in Poland, i.e. entities which, in order to create conditions for satisfying the housing needs of a local government community, carry out activities consisting in the lease of residential premises or single-family residential buildings from their owners and the renting of these premises or buildings to natural persons designated by the commune. Social rental agencies may be established in the form of: a limited liability company or a joint stock company in which the commune or communes hold over 50% of votes at the shareholders' meeting or the general meeting, respectively; a foundation; an association; or a social cooperative.

Taking up shares or stocks in a SIM with the use of support from the RFRM constitutes a compensation granted to that SIM for the provision of a public service within the meaning of the provisions of European Union law concerning public aid for the provision of services of general economic interest. Housing is classified in the catalogue of public services under the category of social services [Lissowski 2017, pp. 10–11]. A commune which acquires shares or stocks of a SIM with the use of support from the RFRM should specify in its contract with the SIM the type and duration of the public service compensated by this action.

The discussed support for communes from the RFRM resources is project-oriented and in this respect is similar to a specific-purpose subsidy, although the legislator does not use this term. Support granted is essentially non-returnable, but if it is not utilised by the commune within 6 months from the date it was provided, the amount paid is returned to the RFRM account with statutory interest accrued from the date of receipt of the payment to the date of return. The analysis of the statutory provisions shows that financial support from the RFRM is granted specifically for a project that the commune intends to implement. This means that support cannot be provided to reimburse expenses already incurred by the commune for taking up shares or stocks in a SIM.

Procedure for Granting Support from the Government Housing Development Fund

Financial support from the RFRM is granted to a commune upon an application of the commune head, mayor or city president, approved by the commune council by way of a resolution. In Art. 33m sec. 2–4 of the Act on certain forms of support for housing, indispensable elements of the application for support have been indicated [Żelazna 2021b, p. 15], i.e.: determination of the amount of the planned financial contribution of the commune related to the implementation of the activity for which the support is requested; determination of the amount of the requested support; information on the planned date of implementation of the activity; account number to which the support is to be paid. If a commune submits an application for support for taking up shares or stocks in an existing SIM, it should also include a cost estimate for the investment and construction project for the purpose of which the shares or stocks are going to be acquired, and the estimated number of apartments planned to be created under this project. There is a noticeable difference in the terms on which support from the RFRM is provided. In the cases where a SIM is being created, it is not required to provide information on planned investment and construction projects that will be implemented by the SIM, while in a situation where the commune intends to acquire shares or stocks in an already existing SIM, the provision of such information is a condition for the support to be granted. The application must be accompanied by

a resolution of the commune council approving the commune executive body's application for support.

The content of this resolution is limited to the essential elements consistent with the standards set out in the provisions of the Act on certain forms of support for housing. In its main part, the type of project (acquisition of shares or stocks) and the legal form of the SIM are indicated. The application for support prepared by the executive body of the commune is included in the form of an attachment to the resolution[2]. The commune council, while creating the SIM, indicates that the funds necessary to cover its share capital will come from funds received from the RFRM[3]. The funds from the RFRM are treated by the communes as additional funds and thus it is possible for them to acquire shares or stocks above the expenditure limits set out in the commune budget resolution[4].

The application accepted by the commune council, formally addressed to the minister responsible for construction, spatial development and housing, is submitted through the President of the National Real Estate Resources (Krajowy Zasób Nieruchomości – KZN), and the minister may commission the KZN President – on an contractual basis – to consider applications for the RFRM support. Their contract should specify, in particular: the period of its validity, reporting obligations of the KZN President, reasons and conditions for termination of the contract, detailed scope of duties and principles of liability for the processing of personal data, terms of the KZN's remuneration for covering the payment handling costs, the KZN's liability for the performance of the contract, and method of controlling the performance of the contract.

Communes' applications for support are considered within 60 days of their submission. If the total amount of support resulting from the submitted pending applications for support is higher than the amount of funds accumulated on the RFRM account, these applications are considered in the order in which they were submitted, until the funds are exhausted. After a positive assessment of a given application, support from the RFRM is paid by BGK on a one-off basis to the account specified in the application.

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2 For example, Resolution No. XXI/144/2021 of the Sokoły Commune Council of 30 March 2021 on the approval of the application for support from the Government Housing Development Fund for financing the acquisition of shares in the Social Housing Initiative "KZN-Podlaskie" sp. z o.o. (Official Journal of the Podlaskie Province 2021, item 1521).

3 For example, Resolution No. XXIII/193/2021 of the Wielgie Commune Council of 30 April 2021 on the consent to the creation of the Social Housing Initiative "KZN-Toruński" sp. z o.o. (Official Journal of the Kujawy-Pomerania Province 2021, item 2376).

4 For example, Resolution No. XXXVII/266/21 of the City Council in Pyrzyce of 27 May 2021 on the principles of contributing, withdrawing and selling shares by the Mayor of Pyrzyce (Official Journal of the West Pomeranian Province 2021, item 2777).

Conclusion

The support granted to communes from the RFRM funds is *ad hoc* and short-term in nature [Doliwa 2021, p. 1037]. The main source of revenue for this fund are contributions in the total amount of PLN 1,500,000,000 from the COVID-19 Counteracting Fund. It was assumed that the eligible communes would apply for the maximum amount of support and that this would enable non-returnable financial aid to create 120 new SIMs (PLN 3,000,000 x 120 = PLN 360,000,000). The remaining funds from the RFRM will be allocated to communes in order to support the already operating social housing associations (there are approximately 250 of them), which after the amendment to the Act on certain forms of support for housing have obtained the legal status of SIM (support may not exceed 10% of the value of the planned project). As a result, the total number of SIMs should increase by approx. 48% compared to the state before the amendment to the Act.

About 50 apartments with an average usable floor space of 50 m^2 are planned to be created as part of each supported project, and taking into account the 2020 cost levels, the average price of 1 m^2 of a residential premises should be approx. PLN 6,000. Assuming the implementation of one investment project by each of the already existing SIMs, their total cost would amount to PLN 3,750,000,000, while support from the RFRM may not exceed 10% of the costs, i.e. PLN 375,000,000. Taking into account the expected effects of the functioning of the RFRM indicated by the project initiator in the assessment of the effects of the regulations attached to the amending act, this would lead to the utilisation of only PLN 735,000,000, i.e. 49% of the fund's resources. Within this amount, PLN 360,000,000 would provide support for communes taking up shares or stocks in the created SIMs, and PLN 375,000,000 – support for investment projects carried out by the already existing SIMs. However, it should be pointed out that a given commune may receive support more than once in the case of implementing a separate investment and construction project and only in such cases will it be likely for the remaining amount of the RFRM funds to be used. If one investment project includes 50 residential premises with a usable area of 50 m^2, the total cost of the project will be: 50 apartments x 50 m^2 x PLN 6,000 = PLN 15,000,000. The subsidy from the RFRM will be 10%, i.e. PLN 1,500,000. This means that the existing SIMs would have to implement 740 investment projects with a value of PLN 15,000,000 each so that all the planned financial support from the RFRM is utilised (90% of funds for the implementation of a given investment project must come from other sources, e.g. the commune's own funds, credits or loans). On average, each already existing SIM should carry out 3 investment projects. Another solution leading to the full utilisation of the RFRM would be a further increase in costs on the housing market, leading in fact to an increase in the value of implemented investment projects and, in consequence, to an increase in the amount of support constitut-

ing 10% of the price of these projects. However, there are numerous negative effects to this solution.

Due to the fact that the RFRM should function for a three-year period, its funds are planned to be used in the following three tranches: 20% in 2020, 60% in 2021, and 20% in 2022. Remuneration resulting from concluded contracts for the National Real Estate Resources and Bank Gospodarstwa Krajowego for the operational management of the RFRM and the performance of activities related to the receipt and consideration of applications from communes may not exceed 1.6% of the total value of the support provided) Assessment of the effects of the regulation of the draft act amending certain acts supporting the development of housing, Form No. 534 of the Sejm of the 9th term, p. 43).

The conducted analysis and evaluation of the changes introduced to the Act on certain forms of support for housing has allowed for a positive verification of the thesis about the adoption by the legislator of a mechanism of temporary financial support for specific initiatives of communes in the area of satisfying the housing needs of members of local government communities. The formal and legal form of this mechanism is the Government Housing Development Fund, which is a separate public fund financed with public funds from the COVID-19 Counteracting Fund. The temporary nature of this support is mainly due to the predetermined period of functioning of the RFRM and the limited financial resources put at the disposal of the fund's managing entities. It has also been shown that the RFRM is another public fund with a clearly defined purpose. However, it is not a state special-purpose fund that could be included in the public finance sector.

The main motive for the establishment of the RFRM was the expected threat to the continuity of the communes' implementation of projects in the field of housing, determined by a decrease in investment outlays during the COVID-19 pandemic. The presented support mechanism cannot be treated as one capable of solving all problems of communes in terms of the implementation of their own tasks in the area of commune housing. It is only one part of the package of solutions minimising the negative social and economic effects of COVID-19, relating to support for communal housing and social rental housing.

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Principles of Taxation of Interest Income or Discount on Covered Bonds Issued in Poland

Abstract: The rules of taxation of revenues or income from covered bonds issued in Poland may become a significant barrier to the demand for this category of debt securities and, as a result, considerably limit the capabilities of mortgage banks to grant long-term loans for investment purposes. The present study has analysed and assessed the legislation in force in Poland regarding the scope and methods of taxation of interest and discount on covered bonds as a form of revenue or income earned by their holders. The aim of the study is to present various methods of taxation of these revenues or income, determined by the legal status of taxpayers. The thesis verified herein assumes the excessive privileging of non-residents with revenues or income from covered bonds, leading to unequal treatment of the taxpayers who are Polish tax residents. Furthermore, the study demonstrates that the legislator has led to a situation where corporate income tax payers are treated more favourably than personal income tax payers as regards the taxation of interest and discount on covered bonds. The formulated *de lege ferenda* postulates are intended to significantly reduce these differences in the taxation of revenues or income obtained from the same source. The study uses the legal-dogmatic method and, additionally, the analytical method.
Keywords: banks, investment in covered bonds, interest and discount, income tax, tax privileges

Preliminary remarks

Covered bond issue rights were formally restored in Poland on 1 January 1998, after nearly 50 years of their non-functioning. The entities initially provided with the capacity to issue covered bonds were exclusively mortgage banks (Act on covered bonds and mortgage banks of 29 August 1997, Journal of Laws 2020, item 415), i.e., specialised banks whose main activity is granting long-term loans. The issue of covered bonds is also included in the category of basic activities of mortgage banks. As of 23 February 2011, Bank Gospodarstwa Krajowego, BGK (Act amending the Act on Bank Gospodarstwa Krajowego and certain other acts of 5 January 2011, Journal of Laws No. 28, item 143), which is not a mortgage bank, also became authorised to issue covered bonds.

In the light of Polish legislation, investing in covered bonds is in fact unlimited in the subjective aspect. The right to purchase covered bonds is enjoyed by nat-

ural persons, legal persons and organisational units without legal personality. The above-mentioned entities may be purchasers of covered bonds issued in Poland regardless of whether they are Polish tax residents or do not have this tax and legal status. On the other hand, certain restrictions were introduced regarding the value of covered bonds purchased by some types of financial institutions, e.g., open and closed investment funds, pension funds, or cooperative savings and credit unions. The aforementioned financial institutions may purchase covered bonds only up to a certain value of their free assets. This is due to the statutory limits motivated by maintaining a safe concentration of investments in a specific type of financial instruments. Moreover, temporarily deposited in covered bonds may be free cash held on the accounts of some public funds entrusted to be administered by BGK, e.g., the Railway Fund, or the Subsidy Fund. Banks running a financially separate business in the form of the so-called building societies are entitled to invest free funds from this business in covered bonds. It should also be pointed out that the funds obtained by banks (mortgage banks and BGK) from the sale of covered bonds are not included in the basis for calculating the amount of those banks' mandatory reserves. No fund for the protection of guaranteed sums is created with the assets from the issue of covered bonds.

Legal regulations concerning the issue of covered bonds, investing funds in such securities and earning income from them are included in many legal acts in the field of financial market law, tax law, and public finance law. The aim of this study is to analyse and evaluate the applicable legal regulations relating only to the principles and forms of taxation of income earned by purchasers of covered bonds issued in Poland. The thesis verified herein assumes that the preferences in taxing such income applied to non-residents are not substantively justified. Comparison of those rules with the rules of taxation of tax residents who earn income from covered bonds indicates unequal treatment of taxpayers with the same source of revenue, while the application of tax preferences is not made conditional upon meeting any other requirements apart from being a non-resident. The study uses the legal-dogmatic method and, additionally, the analytical method.

Essence and Objectives of the Issue of Covered Bonds

Pursuant to the statutory definition of a covered bond [Dzierzbicki 2018, p. 13], as formulated in Art. 3 of the Act on covered bonds and mortgage banks, it is a registered security or bearer security, issued by a mortgage bank, which undertakes to provide certain cash benefits to the entitled party. The legislator distinguishes between mortgage covered bonds and public covered bonds, and their classification is the result of adopting one of the two permissible grounds for issue. In the case of mortgage covered bonds, these are the mortgage bank's claims secured by mortgages.

As regards public covered bonds, in turn, the grounds for their issue are the mortgage bank's claims for:

- loans – in their secured part, together with interest due, a guarantee or surety of the National Bank of Poland, the European Central Bank, governments or central banks of the Member States of the European Union, the Organisation for Economic Cooperation and Development, with the exception of countries that are restructuring or restructured their foreign debt in the last 5 years, and a guarantee or surety of the State Treasury, or
- loans granted to entities listed in point 1), or
- loans – in their secured part, together with interest due, a guarantee or surety of local government units, as well as loans granted to local government units.

Contrary to mortgage covered bonds, the basis for the issue of public covered bonds is not the entire receivable due to the mortgage bank for the established mortgage security, but only the part of this sum that is covered by a guarantee or surety of another entity [Wudarski 2003, p. 84].

Covered bonds are included in the category of debt securities. Their basic function is the mobilisation of external loan capital [Michalski 2000, p. 2]. Their issuer borrows certain funds from the purchasers of the covered bonds on terms offered by the issuer. The funds thus obtained are used to finance the issuer's activities. In the case of mortgage banks, the funds obtained from the issue of covered bonds are allocated to loaning activities. Covered bonds may be issued by BGK primarily in order to implement government programs supporting the development of housing, in particular the construction of residential premises for rent. When submitting the draft amendment to the Act on BGK in 2011, it was emphasised that a significant part of the bank's activity is already focused on granting loans related to real estate financing. It was found that BGK's authorisation to issue covered bonds could constitute an important refinancing tool for this area of the bank's operations, which would simultaneously create the possibility of utilising other sources to finance its remaining activities (Substantiation of the draft Act amending the Act on Bank Gospodarstwa Krajowego and certain other acts – Form No. 3479 of the Sejm of the 7th term, p. 7). Covered bonds issued by BGK are subject to the provisions of the Act on covered bonds and mortgage banks.

Until mid-2016, the authorised banks in Poland made very moderate use of the option to issue covered bonds. 20 issues were carried out for a total amount of PLN 6.9 billion, and the issuers were three banks: HypoVereinsbank Bank Hipoteczny (currently PEKAO Bank Hipoteczny), mBank Hipoteczny, and PKO Bank Hipoteczny. The bonds issued were mainly bearer covered bonds, with various redemption periods, i.e., from 5 to 15 years. Both floating and fixed rates were applied. The nominal value of the covered bonds was predominantly expressed in Polish currency, and only four times in EUR [Dżuryk 2017, pp. 92–95]. The first international issue of

Polish covered bonds was carried out on 24 October 2016 by PKO Bank Hipoteczny. The issue program was arranged by the Société Générale bank. Covered bonds with a value of EUR 500 million and a maturity of 5 years and 8 months were issued. The offer of PKO Bank Hipoteczny met with great interest of foreign investors. More than 90 investors submitted purchase declarations for a total amount of about EUR 1.5 billion, making the demand three times the amount of the supply [Dżuryk 2017, pp. 100–101].

Due to the very high demand for long-term housing loans in the last few years in Poland, mortgage banks have been using covered bonds increasingly more often. Since 2017, mBank Hipoteczny has completed 9 issues of covered bonds, including 5 issues of covered bonds denominated in Polish currency with a total value of PLN 1.9 billion and 4 issues of covered bonds issued in EUR with a total value of EUR 724.9 million (the information comes from the website of mBank Hipoteczny SA). In the same period, PKO Bank Hipoteczny carried out 10 issues of covered bonds on the domestic market with a total value of PLN 3.4 billion and 8 issues of covered bonds addressed to the international market with a total value of EUR 2.3 billion (the information comes from the website of PKO Bank Hipoteczny SA). Only in the first half of 2021, PEKAO Bank Hipoteczny completed three issues of covered bonds with a total value of PLN 580 million (the information comes from the website of PEKAO Bank Hipoteczny SA).

Pursuant to Art. 4 of the Act on covered bonds and mortgage banks, the cash benefits to be provided by the issuer for the benefit of the entitled party consist in the payment of interest and redemption of covered bonds in the manner and within the time limits specified in the terms of issue, taking into account the standards adopted in the Act. Income for the holder of a covered bond is primarily the amount of interest paid. According to the legislator, the catalogue of the essential elements of a covered bond includes, *inter alia*, designation of its nominal value and the date from which interest is accrued, as well as the amount of interest, dates of interest payment, covered bond redemption date, place of payment, and terms of its redemption.

Pursuant to Art. 5 of the Act on covered bonds and mortgage banks, a covered bond may be denominated either in Polish zlotys or in a foreign currency. The expression of the bank's liability for the issuance of covered bonds in a foreign currency means that the subject of the benefit provision will be a cash amount denominated in that currency, and not a cash amount expressed in Polish zlotys, the amount of which is determined at the conversion rate. Furthermore, the designation of a covered bond benefit in a foreign currency means that interest must also be charged in that currency [Michalski 2000, p. 37]. The amount of the nominal value of the covered bond, expressed in Polish currency or a foreign currency, is neither the holder's income nor loss. Regardless of a possible change in the exchange rate of Polish currency to the foreign currency between the date of purchase and the date of redemption of the covered bond, its holder receives a refund of the amount of the foreign currency in which

the nominal value of the covered bond was expressed. The subsequent sale of this foreign currency at a favourable price by the hitherto holder of the covered bond is not an event justifying the emergence of income (within the meaning of tax law) on their side. Likewise, selling that foreign currency at an unfavourable price is not a tax loss. The holder's income, however, is the interest accrued on the nominal value of the covered bond, both in Polish currency and in a foreign currency.

Methods of Taxation of Income Earned from Covered Bonds

Income taxes are charged to income earned from interest or discount[1] on covered bonds by Polish tax residents, i.e., taxpayers who have their place of residence, seat or management board in the territory of the Republic of Poland (Act of 26 July 1991 on Personal Income Tax (Journal of Laws 2021, item 1128, later amended) and the Act of 15 February 1992 on Corporate Income Tax, Journal of Laws 2021, item 1800, as amended). Pursuant to Art. 5a point 12 of the Personal Income Tax Act, discount is the difference between the amount obtained from the redemption of a security by the issuer and the expenses incurred to purchase the security on the primary or secondary market, and in the case of a security acquired by inheritance or donation – the difference between the amount obtained from the redemption and the expenses incurred by the testator or donor for the acquisition of that security. In order to determine the amount of discount, the purchase price is compared with the redemption price of the securities. The statutory definition implies that a discount is a form of interest income. Discount is the interest that the purchaser obtains when redeeming a security and receiving a nominal value for it, while they previously purchased it at a lower price. The definition of discount contained in art. 5a point 12 of the Personal Income Tax Act should be analysed in combination with the provisions of Art. 17 sec. 1 point 3 of the Personal Income Tax Act, which clearly stipulates that the income from cash capitals is the discount (interest) on securities. As a result, when the issuer sells securities at a discount, it is not possible to separately calculate tax deductible costs and tax income after their redemption (repurchase), because the income from the securities is the discount (Judgement of the Supreme Administrative Court of 14 February 2017, II FSK 79/15, LEX No. 2273722). Defined in this way, discount is subject to taxation, while constituting the basis for the assessment of income tax (Judgement of the Provincial Administrative Court of 12 January 2011, III SA/Wa 3012/10, LEX No. 953869).

The fact that an entity other than the one who acquired the securities participates in the redemption transaction is, pursuant to Art. 5a point 12 of the Personal Income Tax Act, irrelevant for the arising of the income tax obligation. The taxpayer will be

1 In the economic literature, discount is defined as a method of interest on securities assuming their purchase below their nominal value and redemption at their nominal value.

the donation recipient or the heir who presents the securities for redemption, and not their predecessor, i.e., the donor or the testator, who did not receive the income from discount but paid the price for the purchased securities (Judgement of the Supreme Administrative Court of 24 November 2009, II FSK 968/08, LEX No. 589002; judgement of the Provincial Administrative Court in Warsaw of 16 April 2008, III SA/Wa 14/08, LEX No. 483258).

In Art. 17 sec. 1 point 3 of the Personal Income Tax Act, it is indicated that the income from capital is interest (discount) on the securities. The legislator subjected the types of benefits mentioned in that provision to the same legal qualification. They are also taxed according to the same rules [Sekita 2011, p. 133], i.e., Art. 30a of the Personal Income Tax Act is applied, specifying the method of calculating the flat-rate income tax. The application of the flat-rate tax means that the income from covered bonds is not combined with any other income of the holder. Income from covered bonds is taxed at the rate of 19%, and the flat-rate tax is collected without reducing the income by tax deductible costs. As a rule, covered bonds do not have the form of a materially existing document[2]. Their purchase is connected with the obligation to open a securities account used to record the holdings of these securities. Fees for maintaining such an account by a brokerage house or other authorised entity, as well as fees paid to intermediaries for the implementation of transactions in regulated secondary trading in covered bonds, are not recognised as tax deductible costs. As a result, the entire amount of income earned on covered bonds, in the form of interest or discount, is qualified as income and subject to flat-rate income tax.

Pursuant to Art. 41 sec. 4 of the Personal Income Tax Act, the flat-rate income tax on income from interest and discount on securities should be collected from the taxpayer by the payer, meaning that the amount of income less the collected income tax is provided to the taxpayer's disposal. As of 1 January 2019, the provision of Art. 41 sec. 24 of the Personal Income Tax Act was introduced, according to which payers are not obliged to collect tax on interest or discount on covered bonds. This means that the taxpayer should independently calculate the amount of the flat-rate income tax on interest or discount on covered bonds in a separate annual tax return (PIT-38) and pay the tax to the account of the competent tax office no later than by 30 April of the year following the year in which they obtained income from this source.

The method of taxing income from interest or discount on covered bonds with corporate income tax is regulated in a different manner. Pursuant to Art. 7b sec. 1 point 6 of the Corporate Income Tax Act, income from securities is classified as capital gains income, but is not subject to flat-rate income tax. Interest or discount on securities, including covered bonds, are subject to the general principles of taxation.

2 An exception is introduced by Art. 5a sec. 2 of the Act on covered bonds and mortgage banks, according to which a covered bond with a unit nominal value exceeding the amount equivalent to EUR 100,000 may have the form of a document.

This means that this income is added to other income earned by a legal person or an organisational unit without legal personality, except for income taxed with a flat-rate tax.

Contrary to the method of taxation with corporate income tax, where the tax on interest or discount on covered bonds is in fact charged to revenue and the costs of obtaining it are not taken into account, the corporate income tax in such a situation is determined on the basis of the income. This means that a legal person or an organisational unit without legal personality, being a taxpayer of corporate income tax, may take into account the incurred expenses constituting the costs of obtaining the revenues from covered bonds. Pursuant to Art. 15 sec. 1 of the Corporate Income Tax Act, tax deductible costs are expenses incurred in order to achieve revenues from a source of revenue or to maintain or secure this source of revenue, with the exception of the costs referred to in Art. 16 sec. 1 of the Corporate Income Tax Act. A specific expense may be considered a tax-deductible cost only when there is a cause-and-effect relationship between the expense and the achievement of income, where the incurring of the expense has or at least may have an impact on the creation or increase of income and securing the source of income [Radzikowski 2009, p. 72]. By formulating this statutory standard to be met by tax deductible costs, the legislator does not impose an unconditional obligation on the taxpayer to obtain income or to maintain or secure the source of income as a result of expenses incurred, but instructs the taxpayer to act rationally, with the aim of obtaining income or maintaining or securing the source of income [Gomułowicz 2016, p. 25].

A taxpayer of corporate income tax may deduct, from their revenues obtained from interest or discount on covered bonds, the expenses that had to be incurred in order to achieve the aforementioned revenues, e.g., expenses related to maintaining a securities account on which the holdings of the covered bonds in a non-document form are recorded. The application of the rules regulated in Art. 18 of the Corporate Income Tax Act relating to the determination of the tax base means that the expenses incurred by the taxpayer (tax base deductions) can be deducted from the income obtained from interest or discount on covered bonds. Income from interest or discount on covered bonds is taxed at a rate of 19%. The taxpayer is obliged to independently (without the participation of the payer) calculate and pay the income tax to the account of the competent tax office. Pursuant on Art. 26 sec. 1aa of the Corporate Income Tax Act, taxpayers are exempted from the obligation to collect tax on interest or discount on covered bonds from taxpayers. This provision, similarly to Art. 41 sec. 24 of the Personal Income Tax Act, introduces a general exemption from the obligation to collect tax by the payer, without distinguishing whether the taxpayer is a Polish tax resident or not, and whether they take advantage of the exemption from taxation of the income from interest or discount on covered bonds (Letter of the Director of the National Tax Information of 11 March 2021, 0114-KDIP2–1.4010.12.2021.1. OK, LEX No. 580521). Taxpayers should report the income earned on covered bonds in

their annual tax returns and pay the tax due on this account by 31 March of the year following the tax year for which they submit the tax return.

Tax Exemption on Income Earned from Covered Bonds

Exemption from taxation of the income from covered bonds earned by natural persons was introduced from 1 January 2016 (Act amending the Act amending the Act on covered bonds and mortgage banks and certain other acts of 24 July 2015, Journal of Laws 2015, item 1259) by adding point 130a to Art. 21 sec. 1 of the Personal Income Tax Act. Pursuant to this provision, interest or discount on covered bonds obtained by natural persons who do not reside in the territory of the Republic of Poland (non-residents) are not subject to income tax. A similar exemption was introduced from 1 January 2016 in the Corporate Income Tax Act. Based on Art. 17 sec. 1-point 50a of the Corporate Income Tax Act, interest or discount on covered bonds obtained by taxpayers who do not have their registered office or management board in the territory of the Republic of Poland, i.e. are non-residents, are not subject to corporate income tax. According to Art. 8 sec. 1 of the Act of 24 July 2015 amending the Act on Income Taxes, the exemptions could be applied for the first time in relation to income generated from covered bonds in 2015. It could also be income from covered bonds issued earlier. Therefore, income earned from covered bonds up until 2014 was taxable, while in the following years it was exempt from tax.

Before tax exemptions for non-residents investing in Polish covered bonds were introduced into the Polish laws regulating the taxation of income, most bilateral treaties on the avoidance of double taxation already contained provisions on the application of such exemptions. As of 1 January 2016, every non-resident became entitled to tax exemption, regardless of whether the Republic of Poland had concluded such an agreement with their home state and whether it included provisions on the exemption from taxation of income from covered bonds. More favourable, the provision of the Polish tax act would be applied even if a given bilateral agreement on the avoidance of double taxation did not introduce the said tax exemption.

The amendment to tax laws in this respect was justified by the need to strengthen the incentives for the development of the covered bond market, while assessing that these long-term debt securities are characterised by a high level of security and low investment risk. The increased demand for covered bonds should positively contribute to changing the mortgage loan financing model. In mid-2015, negative phenomena were identified in the Polish mortgage banking, including long maturities of bank assets, and their financing with short-term liabilities (deposits). This posed a considerable threat to the stability of the Polish banking sector, which had relatively high short-term liquidity, but long-term liquidity was significantly limited. During this period, the Polish banking sector demonstrated a 0.7% coverage in issued cover-

age bonds in relation to the value of loans granted for housing purposes, which posed a threat to the adequate long-term liquidity of the sector. In the Czech Republic, in this period, the level of refinancing of loans for housing purposes with covered bonds was 42%.

The purpose of exempting income from covered bonds issued in Poland from taxation is to maximise the demand for these securities (Substantiation of the draft Act amending the Act on covered bonds and mortgage banks and certain other acts – Form No. 3517 of the Sejm of the 9th term, pp. 1 and 10). The tax exemption is objective and subjective in nature. Its scope covers only interest or discount on covered bonds. Regardless of the amount of income earned on covered bonds by their holder, it is fully exempt from income tax. The exemption covers both incomes earned in Polish currency and in foreign currencies. The legislator does not make the tax exemption dependent on the allocation of the income for a specific purpose. In the objective aspect, the exemption from taxation of income from covered bonds is not conditioned in any way.

The subjective scope of the tax exemption in question is limited only to non-residents. Pursuant to Art. 3 sec. 2a of the Personal Income Tax Act, in relation to natural persons, non-residents are individuals who do not have their place of residence in the territory of the Republic of Poland. This provision should be analysed in combination with Art. 3 sec. 1a of the Personal Income Tax Act, i.e., a non-resident is a natural person who does not have their centre of personal or economic interests in the territory of the Republic of Poland or stays in the territory of the Republic of Poland for no more than 183 days in a tax year. When determining whether a given natural person has created their centre of interests in Poland, what should be primarily considered are their personal and economic ties with the state, including family and social ties, employment, political activity, cultural activity and any other activities, place of economic activity, sources of income, possessed investments, immovable and movable property, loans taken, bank accounts, the place from which they manage their property, etc. This is a very broad approach to the condition that determines tax residence or non-residence (Judgement of the Provincial Administrative Court in Szczecin of 15 February 2018, I SA/Sz 1063/17, Legalis No. 1731485). In practice, the maintenance of any economic ties with Poland may be considered by the tax authorities as a circumstance that confirms having one's centre of interests in Poland [Sidorowicz 2016, p. 14].

As regards the second condition determining one's tax residence or non-residence, it should be noted that the tax act does not specify the method of calculating the period of a natural person's stay in the territory of Poland. According to the Commentary on the OECD Model Convention on Income and Property Tax, the calculation of this period is based on the method determining the number of days of physical presence. This means that every part of a day, even a very short one, of the taxpayer's presence in a given country must be taken into account. The day of arrival

and the day of departure are also included in the number of days of presence (Judgement of the Provincial Administrative Court in Lublin of 7 February 2018, I SA/Lu 1035/17, Legalis No. 1787974).

The tax non-residence of a legal person or an organisational unit without legal personality, which are subject to the provisions of the Corporate Income Tax Act, should be determined in accordance with Art. 3 sec. 2 of the Corporate Income Tax Act. Stating that a given entity does not have a registered office or management board in the territory of the Republic of Poland means that there is no Polish tax residence and is a premise justifying the exemption of such a taxpayer from income tax on their income obtained from covered bonds.

Due to the very narrow scope of the discussed exemption, which applies only to strictly defined interest income and is dedicated only to non-residents, it can be classified as a specific tax privilege [Sekita 2017, p. 185]. Not all interest is exempt from taxation with income tax – only interest that has been expressly indicated by the legislator. Thus, tax exemptions are created for goods that, in the legislator's opinion, deserve special protection (Judgement of the Supreme Administrative Court of 30 January 2020, II FSK 434/18, LEX No. 2848035; judgement of the Provincial Administrative Court in Gliwice of 1 October 2019, I SA/Gl 639/19, LEX No. 2729728).

Conclusion

The situation of taxpayers holding covered bonds issued in Poland has been significantly diversified in the tax law aspect. The conducted study of the legislation in force in this area justifies the distinction of as many as three different tax law states. The first one concerns natural persons with the status of Polish tax residents who pay a flat-rate income tax, and the income from interest or discount on covered bonds is not combined with their other income. Due to the fact that natural persons have been deprived of the possibility of deducting expenses incurred to obtain the revenues, the 19% flat-rate income tax is charged to the entire amount of income earned from interest or discount on these securities.

The second state concerns Polish tax residents who are legal persons or organisational units without legal personality. Income from interest or discount on covered bonds obtained by these entities is reduced by the expenses incurred to obtain the revenues, and then accumulated with other income of such taxpayers. Certain expenses (tax credits) may be deducted from the tax base determined in this way, e.g., expenses for donations made for socially useful purposes. As a result, the income in question is taxed according to the general principles, at the 19% tax rate.

The third state applies to tax non-residents, regardless of whether they are natural persons, legal persons or organisational units without legal personality. Revenue or income obtained by such entities from interest and discounts on their covered

bonds is fully exempt from taxation. This tax exemption is not subject to any other additional conditions. This means that the tax exemption is applied regardless of the amount or frequency of revenue or income. It covers both non-residents from countries with which the Republic of Poland has concluded bilateral agreements on the avoidance of double taxation, as well as non-residents from other countries, and even those from the so-called tax havens.

The conducted study has confirmed the thesis that the application of tax preferences only to income from interest and discount on covered bonds earned by non-residents leads to unequal treatment of other entities investing in covered bonds. The purpose of the tax exemptions introduced from 1 January 2016 was to accelerate the development of the Polish covered bond market, and above all, to increase the demand for such securities. The increase in the value of covered bond issues in Poland after 2016 is noticeable, but the number of issues, and especially their value, remain low compared to other countries. In Germany, in 2018, there were 50 new issues of covered bonds with a total value of EUR 50.4 billion, while 369 issues of covered bonds with a total value of EUR 369.1 billion remained in the market circulation [Lepczyński, Gostomski 2020, pp. 77–78]. As at the end of 2019, there were covered bonds with a total value of EUR 26.6 billion on the market in Poland, while in Denmark this value was EUR 419 billion, in Germany EUR 354 billion, in France EUR 334 billion, and in Spain EUR 242 billion [www.parkiet.com/Analizy/306099920-Miedzynarodowe-rynki-listow-zastawnych-znacznie-bardziej-rozwiniete-od-naszego.html, access as of 28 July 2021]. Against this background, the Polish covered bond market appears to be at a very early stage of development.

The high 19% tax rate and the long-term nature of covered bonds render them a rather unattractive form of investing free capital, especially for natural persons [Reksa 2002, p. 41]. The taxation of income from capital investments applied in Poland does not facilitate the financial stabilisation of households in the first place. Compared to other European countries, Poland performs quite poorly in terms of the amounts of household savings in relation to income earned. The highest gross savings rates are recorded in Switzerland (22.85%), Luxembourg (20.44%), Sweden (18.08%), Germany (17.11%), France (13.51%), Austria (13.38%), Norway (13.17%), Slovenia (12.83%), and the Netherlands (12.69%). The gross savings rate of households in Poland is only 4.36% [www.fxmag.pl/artykul/kto-jeszcze-placi-podatek-belki-kraje-ktore-karza-ludzi-za-inwestowanie, access as of 28 July 2021].

So far, the purchasers of covered bonds in Poland have been mainly various financial institutions. On the other hand, the profitability of covered bonds is high, which is a function of credit quality: type of assets, issuer, and country of issue. The low level of credit risk of these instruments supports the statutory obligation of the issuer to provide multi-stage security for their issue and trading. The double recourse mechanism, as well as the entire regulatory and procedural framework, make the covered bond an instrument with the highest level of investment security, which is

empirically confirmed by itsF credit history. In more than 200 years of these financial instruments existing, no refusal to redeem them has ever taken place [Dżuryk 2018, p. 69].

Several *de lege ferenda* postulates can be put forward, the possible implementation of which could positively affect the development of the Polish covered bond market. With regard to natural persons, it is necessary to introduce the possibility of deducting the expenses constituting the costs of obtaining their revenues from interest or discount on covered bonds. With this possibility, income (as opposed to revenue) would be subject to taxation – in the same way as in the case of corporate income tax payers. Furthermore, it is necessary to unify the method of taxation of such income earned by natural persons, legal persons, and organisational units without legal personality. In each case, either a flat-rate income tax should be introduced, or the use of the so-called general principles of taxation which assume the accumulation of income from covered bonds with other income of the taxpayer.

The very low interest rates on bank deposits used in Poland in the recent years and the growing inflation mean that income from various forms of capital investments is becoming increasingly lower, or even bring real losses to their holders. In these circumstances, it is reasonable to lower the tax rate on such income. However, this postulate does not apply to all types of income. Consideration could be given to introducing differentiated tax rates for income from short-term (speculative) and long-term investments. The latter category includes investments in covered bonds, and income from interest or discount should be taxed at a rate no higher than 5%. The application of the 19% rate in Poland to the taxation of all types of income from both short-term and long-term investments is not rational in the situation of an unstable financial market. In other countries, tax rates in this respect are lower, e.g., in the Czech Republic (15%), Hungary (15%), and Russia (13%). Another solution could be to introduce a certain tax-free amount for long-term capital investments; in the cases where it is exceeded, only the excess would be taxed. The limit of the tax-free amount could be renewed from time to time, e.g., every 3 or 5 years. It is also necessary to clarify the limits of the exemption of income from interest and discount on covered bonds earned by non-residents. It cannot apply to all of them. The tax exemption should not be enjoyed by non-residents from the so-called tax havens.

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Astana International Financial Center: Features of the Tax Regime and Legal Regulation of Cryptocurrency Turnover

Abstract: In its desire to encourage some individuals the State should not infringe the rights and legitimate interests of others. The investment policy of the State should not be discriminatory and should always, first of all, take into account the national (public) interests. However, the State is not always consistent, reasonable and fair in its investment policy in relation to the entire society. The state through public authorities and public officials is the spokesman of the public interests. In this case, the State must take these public interests into account when carrying out activities, in particular, when establishing preferential tax regimes, when attracting foreign investment by establishing a special investment tax residence for foreigners, when limiting the turnover of certain objects of legal relationship. In addition, the private interests of a certain circle of persons should not replace the public interests. The policy pursued by any State (tax, legal, social, economic) should be aimed at improving the standard of living of the entire society within a State. But not at the expense of the established constitutional and sectoral principles and values, as well as the rules of the international cooperation established in international agreements. The article discusses the problems of establishing a special preferential tax regimes on a territorial basis within a unitary State and the problems of legal regulation of cryptocurrency turnover in the territory of the Republic of Kazakhstan.
Keywords: international financial center, tax regime, cryptocurrency.

Introduction

In recent years our attention has been increasingly attracted by contradictory legal acts adopted by legislative or authorized public authorities in certain areas. Sometimes in pursuit of current trends, the successes of foreign states and international organizations, we blindly copy their path, forgetting to compare it with the direction of development chosen by our state.

The AIFC (Astana International Financial Center) of the Republic of Kazakhstan was established following the example of other financial centers existing around the world such as the International Financial Center in Dubai, which united several hundred large companies operating in the field of finance (banking, insurance, financial companies, asset management companies, etc.). IFC in Dubai members have a wide arrange of privileges, in particular, exemption from the payment of income tax. How-

ever, no matter how the experience of Dubai is attractive, we depend on our mentality, culture, values, principles and legislation (in the most positive sense). We should carefully analyze the pros and cons before adopting the experience of other states.

The most important factors in the formation of the International Financial Center include:

1. stable financial system and stable currency with a stable exchange rate;
2. political and social stability in the state;
3. liberal attitude towards the business and economic freedom;
4. human capital with professional skills and etc. [Aslanyan 2019].

In other words, before forming an International Financial Center on the territory of the state, this state must already have the above resources and factors at a significantly high level of their development. Why a special zone with the special legal and tax regime, with different legislation, with a different judicial system, with the privileges in relation to foreign labour was created in the Republic of Kazakhstan? Because the national and foreign investors do not trust the national judicial system, because the level of education doesn't allow offer highly qualified specialists to domestic and international market, because the national currency isn't stable and doesn't inspire confidence when making large international transactions.

At the same time, we are convinced, that there is no need for the formation of special zones within the state, if the state and society are developing steadily and confidently in the right direction. First of all it is necessary to create and apply effective mechanisms within the state for all its citizens and organizations, reduce the overall tax burden, stabilize the national currency, create an educational foundation for national competitive specialists. If the state creates a favourable climate for national business and national investors, without regard to foreign capital and investments, develops steadily, stabilizes the political and social spheres, forms a truly fair and independent judicial system, then such a state itself becomes attractive to foreign investors and there is no need to create special privileged zones and territories.

Taking into account the fact that the AIFC in the Republic of Kazakhstan was created in the absence of an appropriate economic, political, judicial and social foundation, it can hardly be said that the functioning of the AIFC has born fruit for the entire Kazakh society. During the period of functioning of the AIFC the number of new workplaces for the national personnel did not increase, the level of education in state educational institutions did not increase, did not create new manufactures thanks to which the Republic of Kazakhstan could become not only a state rich in minerals, but also a state capable of exporting finished products. There were no positive changes in monetary system (national currency is still not stable, loan rates and conditions and indebtedness of the society have not been reduced). Small businesses are still suffocating. The judicial system leave something to be desired. All of this al-

lows to say that it is necessary to change the intrastate approach to entire society and economy as a whole, and not to individual territories and zones.

It must be noted, that in history of Kazakhstan there have already been unsuccessful attempts to create such centers and institutions serving them: Regional Financial Center of Almaty (RFCA) and Specialized Financial Court of Almaty (SFCA).

On June 5, 2006 the Law of the Republic of Kazakhstan "On the Regional Financial Center of Almaty" was adopted (the Law of the Republic of Kazakhstan "On regional financial center of Almaty", the act was repealed). RFCA was created for the purpose of developing the securities market and attracting foreign investments into the economy of the Kazakhstan using securities. The goals and objectives were similar to the current AIFC. SFCA was created for the purpose of resolving disputes if at least one party of this dispute was an RFCA participant. A strong feeling of déjà vu should arise here: seems that history to be repeating itself, but we did not learned the lessons.

9 years after the creation of the RFCA the President of the Republic of Kazakhstan claimed that the process of creating the RFCA was delayed. He also gave instructions to give a special status to this territory by analogy with Dubai and other states. In other words, 9 years after the adoption the Law of the Republic of Kazakhstan "On the Regional Financial Center of Almaty" the necessary infrastructure was not even created. And even later it was never formed, as evidenced by the termination of the RFCA project by the adoption in 2005 of the Constitutional Law of the AIFC and by the termination of the Law of the Republic of Kazakhstan "On the Regional Financial Center of Almaty". We simply suddenly decided the RFCA project did not bring the desired results, allegedly, due to the mistake with the chosen region, and not because of the lack of a foundation for its realization and problems with diligence on the part of the public authorities.

In particular, it is noted, that the RFCA project failed for a number of reasons: irresponsibility of executors for the realization of the project, lack of confidence in the national currency, etc. [Temirkhanov 2015]. Since then, nothing has changed in the policy pursued by the state, but we decided to create the AIFC in another region.

As for the AIFC in the Republic of Kazakhstan, literally every rule of law, contained in the Constitutional Law of the AIFC or in the AIFC acts, encourages a legal analysis for its compliance with the Constitution of the Republic of Kazakhstan, the current legislation of the Republic of Kazakhstan and its basic, including constitutional, principles and values. Two important exceptions that are in force on the territory of the AIFC for its participants, are discussed in current article: a special tax regime and features of the legal regulation of cryptocurrency turnover.

Tax Regime on the Territory of the AIFC

A special tax regime has been established for the AIFC authorities, their organizations and the AIFC participants [Article 6 of the Constitutional Law of the AIFC]. Literally the rule of law states that the tax regime in AIFC "is determined in the Tax Code of the Republic of Kazakhstan, unless otherwise provided by this article". But we should understand the following: any exemptions from the tax regime, that is defined and established by the Tax Code of the Republic of Kazakhstan, is the creation of an independent new preferential tax regime in the Constitutional Law of the AIFC.

Constitutional Law on the AIFC defines a non-exhaustive list of types of activities exempted from payment of certain taxes. A complete list of financial services, provided by the AIFC participants and exempted from corporate income tax (CIT), individual income tax (IIT) and value added tax (VAT), approved by the Joint Order of the AIFC Governor dated May 5, 2020 No.126, the Minister of Finance of the Republic of Kazakhstan dated May 29 No.547, 2020 and the Minister of the National Economy of the Republic of Kazakhstan dated June 12, 2020 No. 118.

In particular, since the enactment of Constitutional Law of the AIFC until January 1, 2066 (for 50 years) the following are exempted from paying:

1. CIT – the AIFC authorities and their organizations under conditions established by the AIFC acts;
2. CIT – the AIFC participants (on income received from the provision of financial services on the territory of the AIFC, the list of which is established by the Constitutional Law of the AIFC);
3. IIT – the foreign workers of the AIFC participant or AIFC authority;
4. IIT and CIT – individuals and legal entities on income, the types of which also directly are established in the Constitutional Law of the AIFC;
5. Property tax and land tax – the AIFC participants and AIFC authorities (on objects located on the territory of the AIFC);
6. VAT – the AIFC participants (on services established in the Constitutional Law of the AIFC).

In other words, the Constitutional Law of the AIFC and Joint Acts of the AIFC authorities and public authorities of the Republic of Kazakhstan determine the types of taxable activities of a certain category of entities exempted from paying the CIT, IIT, VAD, property tax and land tax.

It proceeds from the foregoing that on the territory of the AIFC is little left of the tax regime, established by the Tax Code of the Republic of Kazakhstan, and such exceptions can hardly to be named *some* exemptions. The establishment in the Constitutional Law of the AIFC of the features of legal regulation of tax legal relationships

may contradict the basic principles of tax law determined in the Tax Code of the Republic of Kazakhstan.

The establishment and termination of state taxes and fees, as well as exemption from their payment belongs to the exclusive competence of the Parliament of the Republic of Kazakhstan [Subparagraph 2) of paragraph 1 of article 54 of the Constitution of the Republic of Kazakhstan], and this authority can not be assigned by another public authorities or persons.

In addition, the rules of law governing tax legal relations can be established exclusively in the tax legislation of the Republic of Kazakhstan. The inclusion of rules of law governing tax legal relations included into the non-tax legislation of the Republic of Kazakhstan should be directly provided by the Tax Code of the Republic of Kazakhstan [Paragraph 4 of article 2 of the Tax Code of the Republic of Kazakhstan].

"A distinctive feature of the Tax Code as the central integral part of the tax legislation of the Republic of Kazakhstan is that only in Tax Code the taxes and fees can be established, enacted, changed and canceled" [Commentary on the Tax Code of the Republic of Kazakhstan, p. 44]

The current tax legislation of the Republic of Kazakhstan consist of the Constitution of the Republic of Kazakhstan, the Tax Code of the Republic of Kazakhstan and other normative legal acts the adoption of which is provided by the Tax Code of the Republic of Kazakhstan [Paragraph 1 of article 2 of the Tax Code of the Republic of Kazakhstan].

The Constitutional Law of the AIFC is neither the Constitution of the Republic of Kazakhstan, nor the Tax Code of the Republic of Kazakhstan. In the Tax Code of the Republic of Kazakhstan, there are no any rules of law indicating the need to adopt a special act on the AIFC and a special tax regime for its participants.

This means that the Constitutional Law of the AIFC is not a part of a current tax legislation of the Republic of Kazakhstan and can not include the rules of tax law governing tax relations including tax exemptions.

The taxation principle of certainty clearly establishes that the grounds and procedures for the emergence of a tax obligation, as well as all significant provisions of its fulfillment (place, time, method of tax calculating and tax payment) must be determined in *tax legislation*. If the Constitutional Law of the AIFC is not a part of a current tax legislation, then the rules of law that change the significant provisions for the fulfillment of the tax obligations are included into the Constitutional Law of the AIFC unlawfully.

The establishment on the territory of the AIFC of a special tax regime for the AIFC participants also contradicts another basic constitutional and tax law principles.

The Constitution of the Republic of Kazakhstan establishes that Republic of Kazakhstan is a unitary state, and this means that the tax legislation of the Republic of Kazakhstan applies throughout the territory of the Republic of Kazakhstan.

According to the Tax Code of the Republic of Kazakhstan, the tax system in the Republic of Kazakhstan is unified throughout the territory of the Republic of Kazakhstan in relation to all of the taxpayers [Article 9 of the Tax Code of the Republic of Kazakhstan].

Therefore, based on constitutional and tax law principles the creation of special preferential tax regimes in any specific territory is not allowed in the Republic of Kazakhstan (geographic zone, region, city or district) except for the special economic and industrial zones and the park of the innovative technologies provided for in the Tax Code of the Republic of Kazakhstan (the Law of the Republic of Kazakhstan dated April 3, 2019 No. 242–VI "On special economic and industrial zones"; The Law of the Republic of Kazakhstan dated June 10, 2014 No. 207–V "On innovation cluster Park of the innovative technologies"; chapter 79 of the Tax Code of the Republic of Kazakhstan).

However, from January 1, 2021 the amendments to the Tax Code of the Republic of Kazakhstan were enacted by the Law of the Republic of Kazakhstan dated December 10, 2020. According to these amendments, AIFC participants (foreign persons, stateless persons) can obtain a special "investment tax residence of the AIFC" under the provision of a mandatory payment to the Republic of Kazakhstan budget for issuing a document which confirms the investment residence of the AIFC (The Constitutional Law of the Republic of Kazakhstan dated December 30, 2019 No. 296–VI "On amendments and additions to some constitutional laws of the Republic of Kazakhstan"; The Law of the Republic of Kazakhstan dated December 10, 2020 No. 382–VI "On amendments and additions to the Tax Code of the Republic of Kazakhstan and the Law of the Republic of Kazakhstan "On the enactment of the Tax Code of the Republic of Kazakhstan"). At the same time the period of stay of an individual – an investment resident of the AIFC for recognition as a tax resident of the Republic of Kazakhstan in order to obtain tax benefits in the AIFC has been reduced by 2 times compared to the period of stay in the territory of the Republic of Kazakhstan for all other foreign individuals in order to be recognized as tax residents of the Republic of Kazakhstan (from 183 up to 90 years per year) [Paragraph 2 and 2–1 of article 217 of the Tax Code of the Republic of Kazakhstan]. For a "symbolic" payment to the budget of the Republic of Kazakhstan – 7 000 monthly calculation index (which is 20 419 000 tenge for 2021) an investment resident of the AIFC will be exempted from paying IIT on income received from sources outside the Republic of Kazakhstan. Is this not the creation of an offshore with the efforts of the state and at the same time a pay off to the state for the release of an income, received from another countries, from paying taxes to its budget? This approach means not only the creation by the state of a special preferential tax regime based on a regional sign, but also the formation specific city-state within Republic of Kazakhstan. In addition, we are trying to attract foreign investors to the Republic of Kazakhstan at the expense of other states and encourage their unwillingness to pay taxes for legal pay off. However, the Repub-

lic of Kazakhstan itself hardly approves when another states with similar benefits lure away its taxpayers using this method.

M.K. Suleymenov and A.E. Duysenova in one of their work critically note that the legal system of the AIFC "…contradicts all the traditions and customs of this state (*the Republic of Kazakhstan – author*). (…) The Constitutional Law of the AIFC was adopted in violation of the Constitution of the Republic of Kazakhstan, in which the law of the Republic of Kazakhstan enshrined as a current law and in which strictly limited cases when constitutional laws can be adopted are enshrined (President, Government, Parliament, Constitutional Council, judicial system). The creation of a financial center does not fall under these cases" [Suleymenov, Duysenova 2020, pp. 42–49].

Since in accordance with the Constitution of the Republic of Kazakhstan everyone is equal before the law [Paragraph 1 of article14 of the Constitution of the Republic of Kazakhstan] and in accordance with the principle of fairness of taxation taxation is universal [Paragraph 1 of article 7 of the Tax Code of the Republic of Kazakhstan], the introduction of tax benefits for financial sector entities should refer to such entities on the entire territory of the Republic of Kazakhstan. For example, how banks, dealers, brokers, portfolio managers throughout the territory of the Republic of Kazakhstan and their workers differ from exactly the same entities in the AIFC? Why they are deprived of all the privileges, geographically provided only to the AIFC participants?

Among other things, through the creation of the AIFC the state, presenting its good intentions in the form of the development of the financial industry, created a legal offshore zone, where part of the unified and equal tax system of the Republic of Kazakhstan does not work.

The creation of such offshore zones within the state is controversial. On the one hand, it can be understood when the state creates the investment attractive zones in remote and poorly developed region of the state (which we have a lot) for the development of this region, its production forces and for the purpose of money infusion into infrastructure of this region providing investment tax preferences to investors. At the same time, such public or private investment should be implemented not only in the financial sector, but also in a real (production) field of the economy, which will increase the economic and political independence of the state, as well as its attractiveness in the international market.

But in the case of the AIFC the zone was created in the capital of the state which can hardly be called "a poorly developed region". Moreover, the AIFC is financed from the state budget for the money of all taxpayers of the Republic of Kazakhstan, even those who have nothing to do with the AIFC and to whom the state, under normal conditions, will not provide such benefits.

So why this special territory, which has been granted a separate and independent status, in that case, does not serve and support itself at the expense of its own income?

The answer is quite simple: the AIFC does not have its own taxpayers who bring it income. There are only beneficiaries. For some reasons we have created a separate and independent investment territory, which undoubtedly requires administration, but has no income even for its own maintenance.

On the other hand, in economic terms, the creation of "tax havens" or "offshore zones" has a negative influence on the development of the state's economy as a whole. Any introduction of such offshore zones may eventually lead to the creation of inequality between initially equal. If the state establishes the constitutional principle of equality of all its individuals and legal entities before the law[1], then this state must strictly follow this principle and not create by its own acts zones and territories where this principle may be broken.

States around the world, not excluding the Republic of Kazakhstan, with enormous zeal seek to restrict a capital flight to offshore zones and strictly condemn the business for this. For example, heads of states and governments of the G20 approved the Action Plan on Base Erosion and Profit Shifting [www.dx.doi.org/10.1787/9789264202719-en, access as of 19 September 2021] and this plan is currently being implemented. Anti-offshore legislation is adopted everywhere. And at the same time the Republic of Kazakhstan by its own acts on its territory legalizes one of these zones. Economic researches note that the creation of offshore zones reduces the effectiveness of government economic management and states seek to develop effective anti-tax haven legislation [Katasonov 2014, p. 412].

Nowadays there is a situation in Kazakhstan which is similar to the one that was in the country 25–30 years ago with the attraction of foreign investments by providing with enormous tax benefits only foreign investors. Foreign investors were almost completely exempt from taxation, carried out an investment activity in our territory, and subsequently we imported finished products from our raw materials at exorbitant prices. An all because neither then nor now there is an industrial infrastructure and its own internal market for the production of goods in Kazakhstan. Today the situation is the same: with the inflow of foreign capital to the AIFC, with its full exemption from the taxation, the state does not receive either funding for important industries or taxes from highly profitable financial activities carried out by foreign investors.

There are a lot of illustrative examples of the state's adherence to a "double standards" policy. For example, money transaction are subject to financial monitoring carried out by banks if the amount exceeds 3 (5, 7, 10) million tenge (Article 4 of the Law of the Republic of Kazakhstan "On Counteraction of legitimization (laundering) of

1 According to the paragraph 1 and 2 of 14 of the Constitution of the Republic of Kazakhstan, everyone shall be equal before the law and court. No one shall be subject to any discrimination for reasons of origin, social, property status, occupation, sex, race, nationality, language, attitude towards religion, convictions, place of residence or any other circumstances.

incomes received by illegal means, and financing of terrorism). So, let's imagine that an individual received an income in his bank account in the amount of 15 million tenge from the sale of an apartment. He came to the bank to withdraw cash from his bank account. In that case, if an individual refuses to provide the bank with accurate information about what the purposes for which an individual *intends* to spend cash, the bank refuses the individual to withdraw cash from his bank account. It would seem that if this money is my property, then I can do everything I want with it within the law. But the state decides differently and establishes strict control over citizens and organizations. At the same time, in the considered example, an individual had to pay property tax, pay the bank interest for cash money and after all remain a person suspected of financing terrorism (sometimes managers of the banks present their client with the phrases "what if you are financing terrorist!"). The state condemns common citizens and organizations for only intentions, *which are sometimes imputed by the state itself*.

Simultaneously, the state decided to create an official offshore zone on its own separate territory, to exempt AIFC participants from taxation, to allow them to erode the previous history of their receipt of money, not to clarify for what purposes the income from investments will be spent in the future and to finance this non-transparent circulation.

In is unlikely that an investor in the AIFC will be asked, in order not to frighten him, how he previously received money he invested in the AIFC and where the future investment income is going to be spent. This is good example of the fact that the state does not have equal treatment of individuals and organizations. Accordingly, the decision to create an international financial center was ill-considered and hasty.

We suppose, that the most correct, from a legal point of view, would be the approach of the legislator to decide on refuse of the special zones called "tax havens" or offshore. At the same time, it is necessary to reduce the overall tax burden on society, create attractive investment provisions and benefits in taxation for investing in truly social and economic important sectors (more industrial, than financial sector) regardless of the investment territory and encourage such investments in poorly developed regions. Nowadays this seems to be very relevant, especially in connection with regular restrictions on the import/export of goods due to the COVID-19, an increase the prices for imported goods (work, services), a decrease in the world stock of certain resources, materials and production forces.

Negotiability of the Cryptocurrency

The cryptocurrency and national digital currency theme is very relevant at the present time. The problems with the legal regulation of these objects have already been repeatedly discussed and continue to be discussed over the last years at the

global and regional levels. As is well known, according to the criterion of legislative legalization of cryptocurrency the states are divided into 3 groups: the states that have legalized cryptocurrency fully or partially; the states that have prohibited cryptocurrency and its circulation on the state's territory; the states that have not decided on the legal regime of cryptocurrency or deliberately ignore it.

For example, in Russian Federation the issue and circulation of digital currency (cryptocurrency), its use as *a means of payment* is allowed, albeit with certain restrictions. Kazakhstan distinguished itself again by choosing a dual path: a general ban on the cryptocurrency circulation throughout the territory of the Republic of Kazakhstan with its simultaneous legalization on a separate territory.

With the adoption and enactment of the Law of the Republic of Kazakhstan dated June 25, 2020 No. 347–VI "On amendments and additions to some legislative acts of the Republic of Kazakhstan on the regulation of digital technologies" digital assets are included in the list of objects of civil rights.

Before these changes in legislation of the Republic of Kazakhstan, cryptocurrency could be used as unnamed type of property by individuals and legal entities in any deals and transactions not prohibited by the legislation of the Republic of Kazakhstan. Now digital assets directly are included in the list of objects of civil rights as an independent element with a separate regulation of its legal regime in special legislation.

A digital asset at the present time can be an object of civil-law relations [Paragraph 2 of article115 of the Civil Code of the Republic of Kazakhstan]. However this does not mean that every digital asset is a negotiable object of civil rights in the Republic of Kazakhstan. The features of the cryptocurrency turnover are established by the Law of the Republic of Kazakhstan "On informatization" and by AIFC acts [Paragraph 3–1 of article 115 of the Civil Code of the Republic of Kazakhstan].

The Law of the Republic of Kazakhstan "On informatization" establishes a definition of the "digital asset", as well as establishes that the digital assets can be secured and unsecured. The cryptocurrency is called an "unsecured digital asset".

Prohibition of the Issuance and Turnover of Cryptocurrency

As a general rule, the issuance and turnover of cryptocurrency (unsecured digital asset) is prohibited in the territory of the Republic of Kazakhstan, except for cases provided by the laws of the Republic of Kazakhstan. However, article 115 of the Civil Code of the Republic of Kazakhstan provides that the features of the cryptocurrency turnover (unsecured digital assets) can be established in the AIFC.

In AIFC Glossary cryptocurrency is called as "Private E-currency" (Private Electronic Currency, Private E-money) – a digital representation of value that

1. can be digitally traded and functions as (a) a medium of exchange; or (b) a unit of account; or (c) a store of value;
2. can be exchanged back-and-forth for Fiat Currency, but is neither issued nor guaranteed by the government of any jurisdiction, and
3. fulfils the above functions only by agreement within the community of users of the Private E-currency; and accordingly;
4. is to be distinguished from Fiat Currency and E-money [AIFC Glossary. AIFC Act No. FR0017 of 2018].

Cryptocurrency in the AIFC is recognized as an investment. Consequently, any investment activity carried out in the AIFC can be carried out in relation to cryptocurrency. This means that cryptocurrency in the AIFC can be bought, sold, exchanged for fiat currency or for another cryptocurrency [AIFC general rules. AIFC rules No. FR0001 of 2017].

It should be noted, that in the legislation of the Republic of Kazakhstan, on the one hand, and in the AIFC acts, on the other hand, cryptocurrency is called by different concepts and has different legal nature.

Several questions follow from this:

1. Is the same object of legal relations regulated by the AIFC acts and the legislation of the Republic of Kazakhstan?
2. If according to the Civil Code of the Republic of Kazakhstan the AIFC acts can establish exceptionally negotiability of the cryptocurrency, then is it acceptable for the AIFC acts to establish a different conceptual framework and legal regime of the cryptocurrency which is differ from the legislation of the Republic of Kazakhstan?

In our opinion, according to the paragraph 3–1 of article 115 of the Civil Code of the Republic of Kazakhstan and paragraph 3 of article 33–1 of the Law of the Republic of Kazakhstan "On informatization" AIFC acts should been established that on the territory of the AIFC, unlike the rest of territory of the Republic of Kazakhstan, the turnover of unsecured digital assets is allowed and the unsecured digital asset (cryptocurrency) can be used in transaction without restrictions as an object or means of payment, as well as investment or investment object. In fact it turned out that the AIFC acts seemingly regulate a completely different object of legal relations and establish its independent legal regime.

If, nevertheless, an unsecured digital asset and a private electronic currency are the same, then how justified is the establishment of a limited negotiability of an object on the basis of the specific territory? As a rule, the limited negotiability is established for rare, cultural significant or dangerous objects, not in a specific territory, but on

the basis of the subjects entitled to use these objects, or on the basis of the types of operations or transactions carried out with these objects.

So for what purpose does the state prohibit a cryptocurrency turnover: in order to protect society, individuals and organization from, allegedly, unstable, unsecured, unreliable and dangerous object of their investments or transactions or in order to ensure availability of this highly profitable financial product only for a separate group of society on a regional basis?

And legislator's logic would be understandable, if such division of opportunities was presented as a pilot project, as an approbation of the legal regulation of cryptocurrency in a small limited area in order to form perfect legislation in the future throughout the territory of the Republic of Kazakhstan. However, the cryptocurrency circulated and continues to circulate in the Republic of Kazakhstan only within the territory of the AIFC as some particularly attractive and unavailable financial product for everyone else.

In this case, the state's policy looks indefinite and dual: partial legalization of cryptocurrency exceptionally to keep up with more advanced countries and to please AIFC investors, on the one hand, and a general prohibition on cryptocurrency turnover throughout the rest territory of the Republic of Kazakhstan for all other citizens and organizations, on the other hand.

Attention is drawn to the obvious contradiction between the legal norms of the Civil Code of the Republic of Kazakhstan and the legal norms of the Law of the Republic of Kazakhstan "On informatization".

According to the paragraph 3–1 of article 115 of the Civil Code of the Republic of Kazakhstan, *the features of digital assets turnover* are determined by the legislation of the Republic of Kazakhstan, the AIFC acts.

The quoted article refers us, on the one hand, to the legislation of the Republic of Kazakhstan, and, on the other hand, to the AIFC acts.

According to the paragraph 3 of article 33–1 of the Law of the Republic of Kazakhstan "On informatization", the issuance and turnover of unsecured digital assets in the territory of the Republic of Kazakhstan is prohibited, except for the cases provided by the laws of the Republic of Kazakhstan.

In other words, the Law of the Republic of Kazakhstan "On informatization" allows exceptions, related to the establishment of the negotiability of unsecured digital assets, only in the *laws of the Republic of Kazakhstan*.

The AIFC acts are not the laws of the Republic of Kazakhstan, which is directly stated by both the Law of the Republic of Kazakhstan "On legal acts" and the Constitutional Law of the AIFC

In this case, taking into account the Law of the Republic of Kazakhstan "On informatization", the AIFC acts, which are not the laws of the Republic of Kazakhstan, can not determine the negotiability of the cryptocurrency other than that established in the Law of the Republic of Kazakhstan "On informatization".

The above argument can be objected by referring to paragraph 3–1 of article 115 of the Civil Code of the Republic of Kazakhstan, which establishes the possibility of direct reference to the AIFC acts in order to determine the negotiability of cryptocurrency in the territory of the AIFC. At the same time, the legislator still needs to determine a unified approach to which acts are capable to establish the negotiability of the cryptocurrency.

If in the future the state suddenly changes its position in its policy towards the AIFC and begins to claim that the regulation of cryptocurrency by the AIFC acts in the manner different from the manner established by the legislation of the Republic of Kazakhstan is unreasonable, then investors who have invested large amount of money in cryptocurrency as an investment object will suffer.

The inconsistent approach of the Kazakh legislator to the issue of legalizing certain objects only in a separate territory of the Republic of Kazakhstan or for an exceptional group of persons in this territory can lead to an imbalance in the rights and legitimate interests of citizens and organizations.

The state should think about and objectively determine what benefits the AIFC brings to the entire Kazakh society, which finances the existence and administration of the AIFC through taxes.

The investments should be carried out not only for the purpose of generating income for the investor, but also in the purpose of creating a public good, serving the public interests and obtaining other positive social effect by the recipient state. It is clear, that investments in the financial sector are designed to generate quick, not labour-intensive income, unlike the investments in the manufacturing sector. However, for the recipient state, as a spokesman of public interests, investments only in the financial sector will not bring any significant benefit in the long term.

If the existence and functioning of the AIFC objectively is necessary and useful for the state, which expresses the public interest of the whole society, then the legal norms on taxation of participants and authorities of the AIFC, firstly, should be rethought, and, secondly, should be enshrined in the appropriate normative legal act, which establishes taxes and cases of exemptions from their payment – in the Tax Code of the Republic of Kazakhstan.

If the AIFC is recognized as an independent and special territory, then its existence, administration and activities should be financed not from the state budget, but from the revenues to the AIFC budget in the form of taxes, fees and, possibly, revenues from the legal activities of the AIFC authorities and their organizations.

Finally, if the state prohibits the turnover of any object or asset, then this must be the reasonable and motivated prohibition. If cryptocurrency, in state's opinion, is dangerous, unstable, artificially overestimated, which entails negative financial consequences for society, then the state has no right to expose its separate territory and its citizens and organizations to such a risk. If, on the contrary, the cryptocurrency is an attractive investment object or can be used as an investment, then its use should be

allowed throughout the state, providing legal regulation and protection of the rights and legitimate interests of all persons carrying out transactions with cryptocurrency.

Conclusion

Summing up, we believe, that the main task of the state is to pursue a unify consistent policy (legal, social, economic, tax) both in relation to its residents and non-residents. That country is most attractive to the international community for mutually beneficial cooperation and investing, which has managed to build a steadily developing society, instill in it certain values and principles, ensure its own independent industry and economy, education, medicine, and, as a result, is able of offer the international market demanded and competitive goods, services, financial products and the same time preserve its political and economic independence and national identity.

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Taxation of Investment Apartments and Dwelling Houses

Abstract: The article deals with the property taxation of investment apartments and dwelling houses. This paper's main aim is to verify the hypothesis that to increase tax on investment apartments and investment dwelling houses, it is necessary to amend the Immovable Property Tax Act. To confirm or disprove the hypothesis, the investment property was defined as the second home if used for long-term or short-term rent or not used at all. The article briefly focuses on other taxes connected with the acquisition of immovable property, analyses de lege lata regulation of recurrent property tax on investment apartments and investment dwelling houses in the Czech Republic, and briefly introduces two main systems of property taxation (based on values and area). The hypothesis was disproved. If the property is used as the first home, the taxation is, in line with the policy at the national and local level, lower. These rules apply to the property, both taxpayer-owned and long-term rented, as the criteria are the usage of the property. Concerning the dwelling houses and apartments used for short-term rents (typically Airbnb type of accommodation) or other businesses, they should be taxed at a higher rate. However, the tax administration must strictly follow the legal text as the crucial for taxation is how the property is actually used. It is also necessary to check the periodicity of the contracts and who the tenants are, the service provided for the guests, the purpose of accommodation, who is responsible for routine maintenance and minor repairs, etc.
Keywords: tax, property tax, tax on immovable property, investment apartment, investment dwelling houses

Introduction

During and after the Covid-19 crises, we can see that the inflation in many countries is rising. One of the tools how to protect the value of money is property investment. As many investors believe in this solution, demand for flats or other properties has significantly exceeded supply, the property prices are rising, and so does mortgage rates. For many families, it is impossible to buy their own house or flat because of their low incomes and high market values. The number of social apartments owned

by the municipalities is not adequate to the demand. Many politicians, not only in the Czech Republic, believe that the way how to solve the housing crisis and discourage investors from buying properties not to be used for living and to lower the market prices is to set a higher tax on investment properties, namely dwelling (family) houses and flats. For this purpose, they want to amend the Immovable Property Tax Act (Act No. 338/1992 Sb., on Tax on Immovable Property, as amended). At this place, it must be stated that the property tax generally in the Czech Republic is one of the lowest in the world [Radvan, Franzsen, McCluskey, Plimmer 2021, pp. 1081–1082].

This paper's main aim is to verify the hypothesis that to increase tax on investment apartments and investment dwelling houses, it is necessary to amend the Immovable Property Tax Act. To confirm or disprove the hypothesis, it will be necessary to define investment property. As there might be other taxes connected with the acquisition of immovable property, we will briefly focus on these issues. We will focus on the analyses of de lege lata regulation of recurrent property tax on investment apartments and investment dwelling houses in the Czech Republic. Additionally, we will briefly introduce two main systems of property taxation (based on values and area) so that we can confirm or disprove thy hypothesis and offer solutions de lege ferenda in the area of our research.

To reach the aim of our contribution, the classical research methods and techniques developed within the framework of legal sciences were used. An important value of legal knowledge is determining the meaning of norms (rules of behavior) contained in the legislation. Therefore, the formal dogmatic method was used as a primal method. To analyze, interpret and assess the existing tax legislation, it was necessary to apply the rules of legal linguistic interpretation. Later on, it was possible to describe and systemize tax law provisions applicable to the investment dwelling houses and investment apartments taxation. Partially, the comparative method was used to compare the legal regulation of individual property types' taxation. The synthesis of arguments allowed to formulate the conclusions, confirm or disprove the hypothesis, and possibly offer improvements for the de lege ferenda regulation.

This research is innovative and original. There are no books, scientific articles, or conference proceedings contributions dealing with the investment dwelling houses and investment apartments taxation issues in the Czech Republic.

Investment Property

It could be said that at the moment, the big trend is to acquire another property for subsequent investment. First, it is necessary to define the term investment property (investment dwelling houses and investment apartments) as this term is not defined by law.

We have decided to create two groups of properties used for housing. The first home is a family house or an apartment used for primary housing. The second home is a cottage, a weekend house, and also the second family house or the second apartment. The second home might be used for recreation or housing if the owner or user works at one municipality and works in another. In all these cases, we do not consider the second home an investment property. However, if the second home is used for long-term or short-term rent or not used at all (the owner speculates on price increases), we consider it the investment property. The investment property is used solely for investment purposes.

Taxes Connected with the Acquisition of Immovable Property

Generally, there are tax transaction costs associated with the acquisition of investment property. The most important is usually the property transfer tax. However, in the Czech Republic, the tax on the acquisition of immovable property was abolished on 26 September 2020.

Property transfer tax was originally paid by the seller, while the buyer was the surety. Adopting the tax on acquisition of immovable property effective since 1 January 2014, the taxpayer was still the seller, even if the tax title included the word "acquisition" and the object was defined as the acquisition of immovable property. The object of taxation was an acquisition of property right on immovable property (land, structure/building, unit (flat, non-residential premise), the right of construction burdening the land, and shares on the immovable property) located in the territory of the Czech Republic for consideration.

Generally, the tax base was the acquisition value reduced by the eligible expenses (costs of the expert's report). It was necessary to compare the contract price and 75 % of the comparative tax value to get the acquisition value. The comparative tax value might have been the indicative value self-assessed by the taxpayer using the bylaw or the price determined by an expert. In the Czech Republic, the tax rate was linear at 4%.

One of the reasons mentioned in the explanatory report to the Act abolishing the tax on the acquisition of immovable property was that the abolition deals with the effects of Covid-19 on society. It is really important to discuss whether the abolition of the tax was the cause of the Covid-19 (economic) crises or simply a political move before the elections. Moreover, there are impacts on the state budget. And as the abolition of the tax on acquisition of immovable property is retroactive (if the cadastre deposit has been made in December 2019 and later), the taxpayers who have already filed their tax returns and paid the tax may ask the tax office to send the paid tax back.

In our opinion, abolishing the tax on the acquisition of immovable property was not a wrong move. Many families may be more motivated by this cancellation to pur-

chase real estate; however, it also stimulates the demand. The less administrative burden could also be an advantage. Then the question remains whether the cancellation should not have come earlier or later. Given the current Covid-19 crisis and the burden on the state budget, the decision could end up being more of a negative than a positive move.

In the context of any change in the ownership of immovable property, an entry in the register of immovable property (the cadastre) must be made, including the amendment or cessation of those rights. From 1 January 2020, fees for a land registry deposit doubled from the original 1,000 CZK to 2,000 CZK. The fee increase relates to deposit proposals submitted from 1 January 2020.

Legal Regulation de Lege Lata

Czech Immovable Property Tax Act provides for two taxes on immovable property: the land tax and the tax on structures and units, including houses, flats/apartments, and non-residential premises (non-dwelling units). Primarily, the unit/area-based system (in terms of square meters) is used. Only in the case of agricultural land is the ad valorem system partially used (the land area is multiplied by the local coefficient to provide the average price per square meter of the land as laid down by decree issued by the Ministry of Agriculture).

For the structures and units, the area-based system is used. As many factors might influence the tax rate structure, it is possible to state that the modified area-based system is being used. The following text deals only with houses and flats used for dwelling. It will be focused on family houses, summer houses (cottages), and dwelling units (flats/apartments).

Generally, the taxpayer for the immovable property tax is the owner of the property. The objects of taxation are buildings connected to the land with fixed foundations. Concerning units, only flats registered in the cadastre are liable to the tax. Apartment block buildings, in respect of which the tax is payable on the individual apartments/flats, are not liable to the building tax. There are several reasons and many conditions under which property may be exempt from taxation. The most common condition is where the property is not used for profit-making purposes. In several cases, a tax return does not have to be even filed. The exemptions can be categorized into permanent or temporary exemptions. From the perspective of this contribution, there is an exemption for dwelling houses, apartments, and buildings for family recreation owned by disabled persons. Besides the exemptions set directly in the act, municipalities may grant temporary exemptions for buildings affected by a natural disaster and for buildings in special industrial zones.

The basis of the tax is the same for all buildings and is defined as the built-up area (in square meters) as of 1 January of the taxable period. In the case of apartments,

the tax base is the adjusted floor area, which refers to the total floor area of the flat or non-residential property in square meters as of 1 January of the taxable period, multiplied by a coefficient of 1.20 (or 1.22, if there is any land used together with the unit).

The main difference between analyzed property types' taxation lies in rates. The standard tax rate for dwelling houses and for flats is 2 CZK per square meter of built-on area. In the case of dwelling houses, this rate is increased by 0.75 CZK per each additional floor above ground level. This standard or increased rate is multiplied by the location rent (btw. 1.0 – 5.0 depending on the number of inhabitants; the municipality can increase or reduce the basic coefficient set in the act by a generally binding ordinance). The standard tax rate for houses and family houses used for family recreation (summer cottages) is 6 CZK per square meter of the built-on area. This rate is increased by a tax rate of 0.75 CZK for each additional floor above ground level and by the so-called municipal coefficient (1.5; assessed by a generally binding ordinance issued by the municipality). If such houses are located in national parks or first-category protected countryside zones, an additional coefficient of 2.0 is applied. The standard tax rate for houses and flats used for business activities depends on the type of business activity; if used for accommodation, it is 10 CZK per square meter of the built-on land area. The standard tax rate is increased by an additional tax rate (0.75 CZK per each additional floor above ground level for houses) and by the municipal coefficient (1.5).

For all the above-mentioned types of property, the municipality may, by generally binding ordinance, set the local coefficient at a level between 1.1 and 5, whereby the coefficient must be set to one decimal place. This coefficient is multiplying the property tax. The coefficient can be set either for all immovable property in the territory of the entire municipality or for all immovable property in the territory of an individual part of the municipality. It is, therefore, necessary to beware of possible conflicts with the standards governing public aid. The fundamental shortcoming is the impossibility of applying the local coefficient only to individual types of land, buildings, or units or setting different local coefficient levels for different types of land, buildings, and units. According to the de lege lata situation, many officials fear losing voters by increasing the property tax. They would welcome the option of not applying the local coefficient to residential buildings and apartments, as well as the option of introducing a local coefficient for, for example, only buildings used for business activities and for recreational buildings, i.e., in those cases where they would not need to overtax local residents.

Obviously, the classification of immovable property for tax purposes has nothing to do with the classification mentioned above in chapter 2. Dwelling houses and apartments may be used as the first home or the second home or be rented on a long-term basis but still taxed at the lowest tax rates. The lowest rate is to be used even if the property is unused. Houses and family houses used for family recreation are the typical second homes. Short-term rents of immovable properties are to be taxed at a

higher rate. However, in practice, the taxpayers believe that the tax office is unaware of these short-term rentals. Some taxpayers even do not know that they are running a business with short-term rentals and are liable to income tax. These are the reasons why the investment apartments and houses are, in practice, taxed in the same way as any other apartment or dwelling house.

Possible Solutions de Lege Ferenda

According to the most respected author in the field of property tax legal regulation [Youngman 2016, Franzsen, McCluskey 2017, Radvan, Franzsen, McCluskey, Plimmer 2021], there are two basic models how to annually tax property: a value-based system and an area-based system. Both models allow specific modifications to reach the economic and political aims.

Value-Based Taxation

A value-based system of property taxation is possible if regular re-evaluations are introduced and the tax value is determined as close to the asset's real value as possible. However, this has proved to be a problem in many countries that have opted for ad valorem taxation. Such a system must be viewed from two sides, both by the taxpayer and by the tax authority – the State. Like any change, there would be upsides and downsides to any change to the value system.

The very existence of real estate taxation is absolutely necessary and tax-equitable. The Czech Republic has long had some of the lowest real estate tax revenues in the entire European Union. I see one of the main problems with the transition to ad valorem taxation in the established tax base. Despite the fact that the Czech Republic is trying to move to a value-based method for its determination in the case of soil, no change is yet planned in the area of buildings. In the case of land, each year, its creditworthiness is determined by the relevant decree of the Ministry of Agriculture for each land registry.

As the percentage linear rate of tax is determined to calculate the tax instead of the fixed rate in the case of buildings, we see some issues in the transition. The tax base should always be determined by the value of the assets identified from the contracts that form an annex to, for example, a land registry deposit. If the amount could not be ascertained, it would be determined by the price of similar properties in the locality. The transition to ad valorem taxation itself, regardless of the fact that it would currently be more favorable, is far from simple, especially for the divergence between Czech and European legal regulation, which differs significantly in many ways.

The value-based system of taxation of immovable property currently has a significant presence and is worldwide. Such a system is, for example, common to the

US. Efforts to choose an ad valorem system were already made within the Czech Republic in 2012. The draft law, drafted by the Ministry of Finance of the Czech Republic, provided for ad valorem taxation only for land in areas that are or could be built up [Radvan 2012].

Whether or not the transition to the ad valorem method occurs in the future, it will entail a significant proportion of administrative changes and some burdens, including administrative cost increases. However, in the long term, the method of value taxation is certainly fairer and more revenue-friendly. If such a transition occurs, it should mean benefits in the first place. I consider it absolutely important for the value-based system to choose the correct method of valuation of real estate [Radvan 2012].

Modified Area-Based System

As evident from the international literature sum up in Franzsen's presentation [2016], the area-based system is used primarily in developing countries, in Europe, especially in Central and Eastern European Countries. In the case of buildings and apartments, it might be based on the built-up area or carpet (habitable) area. Most countries modify the original area-based system according to their economic and political needs or with regard to the regulation in related legal areas. E.g., the Czech tax base for apartments is the adjusted floor area, which covers not only the total floor area of the flat but the related common areas of the house and land related to the house. Most of the modifications in the Czech property tax regulation are hidden in the tax rate structure. E.g., the location rent following the number of inhabitants (at least partially) reflects the value as the property situated in big cities usually has a higher value than the property in the rural area. The business property generally has a higher value than the residential property, so the basic tax rate is higher for houses and apartments used for business.

The area-based system, especially if modified reasonably, might be a perfect solution for countries where the political will to substantially increase the property tax is missing. This system is pretty cheap, especially if the cadaster (property register) is complete and accurate. Having direct access to the cadaster, the tax office can assess the tax without asking the taxpayer to file the tax return. Only in case of uncertainty, there must be a possibility to make the situation clear: the tax office may use online tools (geographic maps, online maps, street view, etc., or contact the taxpayer).

Conclusion

Unfortunately, in the Czech Republic, there is no political will to increase the recurrent property tax. That is why it is better to stick to using the area-based system of

property taxation. Dealing specifically with the investment apartments and dwelling houses, there is almost no need to change the legal regulation to tax them properly. If the property is used as the first home, the taxation is, in line with the policy at the national and local level, lower. As well the second homes (second house or apartment if the taxpayer works in another city, houses and family houses used for family recreation) might be taxes in an existing way. These rules apply to the property, both taxpayer-owned and long-term rented, as the criteria are the usage of the property.

Concerning the dwelling houses and apartments used for short-term rents (typically Airbnb type of accommodation) or other businesses, they should be taxed at a higher rate. To define the short time, it is formally possible to use the period of sixty days as defined for the local charge on stay. However, the tax administration must strictly follow the legal text as the crucial for taxation is how the property is actually used. To decide if the rent is long-term or short term (i.e., it is a business), it is also necessary to check the periodicity of the contracts and who are the tenants (more guests for a short time evokes the business), what is the service provided for the guests (breakfast, cleaning, linen change, soap, towels, toilet paper, etc. looks like business), what is the purpose of accommodation (providing housing needs or recreation), who is responsible for routine maintenance and minor repairs, etc. To sum up, the tax office should investigate what type of contract de facto is concluded. Tax officials may use advertisement screenings, they may interview witnesses, perform local investigations, check the Airbnb web pages, etc. [Radvan, Kolářová 2020]. This approach was confirmed in several decisions of the Court of Justice of the European Union dealing with the definition of rent (C-326/99 Goed Wonen, C-409/98 Mirror Group, C-346/95 Blasi, etc.) and Czech courts (Municipal Court in Prague: 6 Af 20/2020–28).

The hypothesis stated in the introduction was disproved: to increase tax on investment apartments and investment dwelling houses, it is not necessary to amend the Immovable Property Tax Act. The condition sine qua non to follow the legal rules is the proper functioning of tax administration.

However, the discussion about the recurrent property tax with connection to the investment dwelling houses and apartments has not finished yet. As stated above, many politicians not only in the Czech Republic believe that higher property tax on an investment property may solve the housing crises. There are several examples proving that such a solution does not lead to the desired result. E.g., in Vancouver, the higher taxation of investment property has brought additional money to the local budget but has not affected the market at all [Štuková 2021]. Many cities worldwide tend to have higher property taxes on empty apartments (e.g., Los Angeles, Honk Kong [Štuková 2021]). This is not the case in the Czech Republic, as the number of actually long-term empty apartments is extremely low. That is why it is unnecessary to deal with any specific (higher) taxation of empty (unused) apartments or dwelling houses.

The property tax in the Czech Republic must be amended generally and not with regard to the investment property only. The most important issue is extremely low property tax revenue. A very easy step might be the amendment of the local coefficient. It is helpful that from 2021 the coefficient can be set either for all immovable property in the territory of the entire municipality or for all immovable property in the territory of an individual part of the municipality. However, it is still impossible to apply the local coefficient only to individual types of land, buildings, or units or set different local coefficient levels for different types of land, buildings, and units. As well from the perspectives of investment property, it would be useful if there is an option to introduce a local coefficient for only buildings used for business activities (i.e., investment property, too) or for recreational buildings. Such a solution would not affect local residents – local voters. Yes, property tax is a politicum.

The long-term solution for the Czech property tax is a system similar to local charges: the tax should be much more influenced by the municipalities, but it should be obligatory local tax. The area-based system should be retained. There should be one maximum tax rate in the legislation for every type of property. Municipalities should have the right to introduce their own specific tax rates below that level. As there are more than 6,250 municipalities in the Czech Republic, and many of them are extremely small with a very low number of inhabitants, there should be another rate (standard rate) in the legislation for those municipalities that do not set their own specific tax rates [Radvan, Kranecová 2021, p. 76].

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Role of Leasing in Financing Business Activity of Enterprises in Poland

Abstract: The development of enterprises requires permanent investment and searching for sources of effective support for business activity. Therefore, when entrepreneurs create new development opportunities, they look for appropriate sources of support for the activities of enterprises. In the opinion of entrepreneurs, such an attractive source of financial support is leasing. Due to the benefits of leasing business activities, more and more business entities in Poland have decided to use this form of obtaining capital. The aim of the study is an attempt to define the significance and role of leasing in financing economic activity of enterprises in Poland. Firstly, based on the literature review, the essence, types, advantages and disadvantages of leasing were presented, and an attempt was made to evaluate the current market of leasing services in Poland and the prospects for its development. Secondly, based on the results of a survey of a representative sample of entrepreneurs in Podlasie Province (North-west Poland) their opinion on the importance of leasing as a form of enterprise support was presented. The conducted research has shown that leasing is a willingly chosen source of financing business activity. According to entrepreneurs, favorable financing conditions as well as understandable and easy procedures turned out to be important properties, characteristic of leasing. The results of the conducted research provide knowledge about the advantages, disadvantages, availability and profitability of leasing, noticed by entrepreneurs in the studied region. They are of pure scientific and application significance, making it possible to predict the nature of the leasing market in Poland in the near future.
Keywords: enterprise, financial support, leasing, leasing market

Introduction

The development of enterprises requires permanent investment and searching for sources of effective support for business activity, regardless of whether the enterprise is just entering the market or has been operating on it for many years. Therefore, entrepreneurs considering new development opportunities look for appropriate sources of support for the activities of their enterprises. One of the sources of finan-

cial support for enterprises is leasing. This service first appeared in the 1950s in the United States. Its name comes from the English word *lease*, meaning rent, but unlike them, this service is inherently related to the credit function. There are many different definitions of this method of financing in the literature, they differ slightly, leaving the main assumptions unchanged [Grzywacz 2020, pp. 14–18].

In European countries, the use of leasing developed in the 1960s, and the first company dealing with this activity was established in 1962 in the Federal Republic of Germany. In Poland, the first enterprises of this type began to appear only at the beginning of the 1990s, the first was the European Leasing Fund established in 1991. Initially, the subjects of renting these companies were mainly passenger cars, but after a few years it became unprofitable due to the changes introduced in 1993 in tax law. Later, leasing gained popularity mainly in construction industry. However, nowadays more and more business entities in Poland decide to use this form of obtaining capital and it is widely used in almost all industries [Grzywacz 2020, pp. 14–18].

The aim of the study is an attempt to define the significance and role of leasing in financing economic activity of enterprises in Poland. Firstly, on the basis of the literature review, the essence, types, advantages and disadvantages of leasing were presented, and an attempt was made to assess the current market of leasing services in Poland and the prospects for its development. Secondly, based on the results of a survey of a representative sample of entrepreneurs in Podlasie Province (North-west Poland) their opinion on the importance of leasing as a form of enterprise support was presented. The main hypothesis was formulated in the study, which presents a presumed nature of the problem under consideration. It is as follows: Leasing is an important source of financing for enterprises and is considered by a predominant part of entrepreneurs as a satisfactory form of financial support for business activity. The conducted research is theoretical and empirical in nature and aims to verify the hypothesis. In the research the hypothetical-deductive and inductive methods were used.

Leasing as a Source of Financing Enterprises

Presenting one typical definition of leasing is rather difficult. The reason for this is the existence of many forms of leasing, as well as often different legal norms regarding the discussed source of financing enterprises. However, leasing typically refers to a contract concluded for a fixed period of time during which one of the entities, by paying the required fees, can use the fixed assets that are made available to it by the other entity. Moreover, when analyzing various definitions of leasing presented in the literature, its main property can be noticed. It concerns the fact that there is an opportunity to use the leased object against payment, but there is no obligation to purchase it [Cicirko, Russel 2008, pp. 13–15].

In economic practice, there are two forms of leasing, financial and operational. When choosing the form of leasing, companies most often take into account the duration of the leasing transaction, the amount of leasing fees and the nature of the financial burdens on the parties to the leasing contract. Financial leasing, often referred to as capital leasing, is a contract whose duration is similar to the depreciation time of the item, i.e., time of the economic use of the item. Amortization write-offs, as in the case of a loan, are made by the user, and the costs of obtaining income are the interest part for him. Most often, after the expiry of the financial lease agreement, ownership is transferred to the lease taker. This form applies to medium and long-term contracts [Starzyński 2021, pp. 785–794].

Another form is operational leasing, also known as current or operating leasing. It consists in putting a given transaction entity into use, usually for a period shorter than its economic use. Thus, it may be leased multiple times, which usually means the short-term nature of the lease agreement. This has an impact on an increase in costs of obtaining income, which reduces the tax base by the costs of lease installments paid [Panfil 2008, p. 253]. Leasing can also be classified according to the type of leased item. A distinction is made between the leasing of movable property, real estate, unique goods and consumer goods [Panfil 2008, pp. 39, 41].

Economic practice has created an additional solution, which is leaseback. It can apply to both operating leasing and financial leasing. Its objectives are mainly to improve the company's financial liquidity, convert the company's assets and release the frozen capital without losing control over the subject of the contract. Leaseback can be used when the user is also the original owner of the subject of the contract. The first part of this transaction consists in the fact that the user sells the item to the financing party under a contract of sale. The next stage is the conclusion of a leasing contract, on the basis of which the lessee (user) uses a given item [Kalińska 2018]. There is also direct and indirect leasing. In direct leasing, the producer of a given good personally provides leasing services. In other words, the manufacturer, in addition to offering customers to buy their goods, also allows the option of leasing them. Indirect leasing is based on the fact that the good produced by the producer is purchased by the company that provides leasing services and only transferred to the lessee by it. Interestingly, there may be three or four entities in it. When there is a fourth entity providing funds for the purchase of the leased asset, we can talk about the so-called leverage lease [Cicirko, Russel 2008, pp. 18–20].

Leasing, like other forms of supporting enterprises, has both advantages and disadvantages. The most frequently indicated advantages that leasing gives the user is the increase in the liquidity of the company's funds, achieved thanks to the fact that leasing investments are fully financed from the lessor's funds, i.e., from external funds. Therefore, part of the company's working capital may be allocated for other purposes. In addition, leasing also saves time for the lessee, because all the formalities related to this contract are arranged by the lessor [Cicirko, Karmańska, Russel 2014,

p. 30]. Panfil [2008, p. 253] lists the advantages of leasing for entrepreneurs in connection with the reduction of the tax base by the costs of paid leasing installments. The main advantage of leasing for Biernat, Gronek [Biernat, Gronek 2018, p. 154] are tax benefits, ease of entering into transactions and a higher probability of obtaining a source of financing compared to a loan. The literature also indicates the benefits that the state obtains from leasing transactions, which affects the intensity of economic processes. They include [Snopczyński 2000, p. 25]:

- stimulating the investment boom, which in turn has a positive impact on growth economic,
- involvement of financial institutions (e.g., banks) in economic activities gives greater guarantees of security and control of the destination of funds spent,
- controlling the process of accelerating the recovery of companies' property and lifting technological level through easier access to technical novelties, which affects the competitiveness of companies on global markets.

A leasing transaction, like any other financial operation, has disadvantages. The negative features for the user include [Cicirko, Karmańska, Russel 2014, p. 32]:

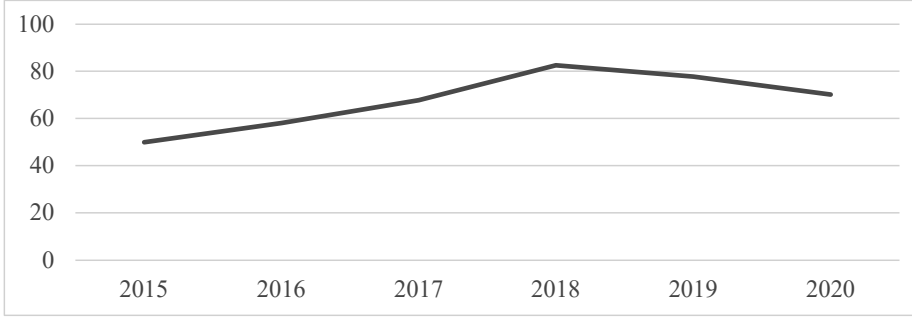
- unstable state tax system, which makes the profitability of the leasing service dependent on the interpretation of regulations by tax authorities and court decisions;
- high cost of leasing, resulting from the necessity to cover all costs of the lessor related to the given contract and ensuring a responsible profit rate;
- depriving the lessee of the ownership of a property that bears full risk, both in terms of price and in property, and the breach of the leasing contract has serious consequences, even the lessor's right to terminate the contract.

Development and significance of leasing in enterprise financing

Leasing in the Polish economy appeared in the early 1990s and began to develop rapidly, as evidenced by the amounts of lease agreements concluded [Kowalska, Baran, Kowalski 2014, pp. 15–20]. Several factors contributed to the rapid development of leasing in Poland. The main ones include the clarification of the leasing contract in the Civil Code in 2000, the inclusion in 2002 in the Accounting Act of the rules for including leasing in the accounting books, as well as information on the possibility of reducing leasing fees by VAT [Grzywacz 2020, p. 148]. In the first years of using leasing, nearly 600 leasing companies operated in Poland. Over time, this number began to decline. For example, it is estimated that in 2005 leasing services were offered by 40 entities. The decrease in the number of leasing companies was due to the growing concentration of the leasing industry. Currently, there are over 100 entities on the Polish market offering the discussed method of financing. The main ones in-

clude "PKO Leasing SA", "Idea Getin Leasing Group" or "Europejski Fundusz Leasingowy SA". Interestingly, in 2018 the ten largest companies providing leasing services in Poland covered investment costs amounting to PLN 55 billion. For comparison, amount granted to companies for loans in the same year was equal to PLN 340 billion [Kowalska, Baran, Kowalski 2014, pp. 15–20]. When analyzing the development and significance of leasing in Poland, one should mention the investment costs covered by this form of financing over the years. As indicated by the data of the Polish Leasing Association, from 2003 the leasing market in Poland clearly began to develop [www.leasing.org.pl, access as of 15 January 2022]. This was largely due to the accession of Poland to the European Union in 2004 and the availability of EU capital at the same time. The results of the leasing industry visibly worsened with the onset of the global economic crisis in 2008, which significantly slowed down the market and caused a slowdown in investments. The years 2013–2014 [Nesterowicz, Nesterowicz 2020, p. 254] are considered to be the moment when leasing returns to the development path. According to the data of the Polish Leasing Association, in 2015 the leasing industry financed investments amounting to nearly PLN 50 billion, which indicates their increase in relation to the previous year by PLN 7 billion. In the following years, as illustrated in Graph 1, this tendency was maintained. In 2019, the amount of new leasing contracts decreased compared to the previous year. The amount of financing was PLN 77.8 billion, which was a decrease by PLN 4.8 billion, i.e., 5.8% compared to the previous year. The reason for this situation can be found in the economic slowdown caused by the financial crisis. In 2020, this trend continued, which should be attributed to the emergence of the COVID-19 pandemic [www.leasing.org.pl/pl/aktualności/2020/leasing-hamuje-odpoczatku-roku, access as of 5 December 2020].

Graph 1 The amount of investments financed by the leasing industry in Poland in 2015–2020 (in PLN billion)



Source: Own study based on data from the website: Polish Leasing Association (2020, May 10)

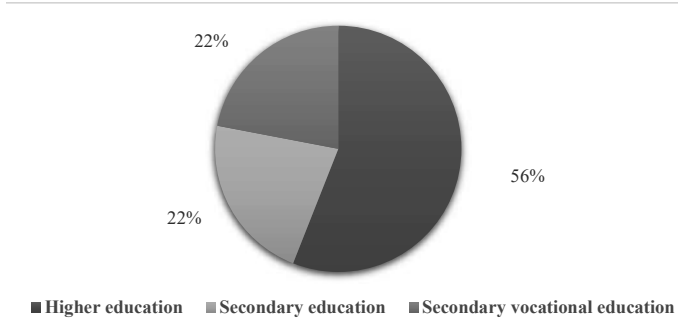
It should also be added that the largest part (47.5%) of products financed by leasing companies in 2020 were light vehicles. Machines and other devices were ranked second – accounting for 29.1%. The third position was taken by heavy vehicles, accounting for 17.8% of the discussed structure. The smallest share in the financed items had other products, such as airplanes – 4.4%, and real estate – 1.2% [Polish Leasing Association 2021, 15 February]. Based on the results of numerous studies, it can be concluded that leasing stimulates investment by making funds available to entities that are unable to obtain them otherwise, and therefore significantly supports the economy. According to the data of the Polish Leasing Association, in 2020 enterprises from the SME sector were the most numerous among the users of leasing services. Their share totaled 73.5% (including 53.6% micro and 19.9% small enterprises). The share of entities with a turnover higher than 20 million (medium-sized companies, large and some small) was 26% [www.leasing.org.pl/pl/aktualnosci/2021/w-2021r-rynek, access as of 18 June 2021]. In the opinion of the European Commission, leasing remains the most important source of financing for Polish companies from the SME sector, this source indicates nearly 50% of Polish entrepreneurs. Leasing is a mechanism that can be easily adapted to a given company by concluding a suitably flexible contract. Moreover, its use drives technological development, and therefore it contributes to the creation of new jobs [www.leasing.org.pl/files/uploaded/ZPL%20Raport_Final.pdf, access as of 10 December 2021]. The second most frequently indicated support instrument is the credit line, and the third – subsidies. The most important problems that entrepreneurs are currently struggling with in accessing support include HR, regulatory and other problems – including problems related to the effects of the COVID-19 pandemic. Currently, despite the difficult economic situation and fewer investments, 63 percent of Polish entrepreneurs consider leasing to be the most important source of financing and consider using it in the future. Entrepreneurs operating in Finland (63%) and Estonia (62%) think similarly, with a positive assessment of this instrument throughout Europe [www.leasing.org.pl/files/uploaded/ZPL_Leasing%20najbardziej%20istotny,%20ros%CC%81nie%20znaczenie%20dotacji, access as of 10 November 2021].

Entrepreneurs' Opinion on Leasing

In order to obtain entrepreneurs' opinions on the importance of leasing in financial support for economic activity, a survey was carried out on a representative research sample of entrepreneurs from Podlasie Province (North-west Poland). The research was conducted in May 2021. The survey questionnaire consisted of two parts. The first concerned the general characteristics of the surveyed entities, and the second contained questions related to the assessment of leasing companies' financing. The questions included in the survey were both single and multiple choice. The selection of the

research sample was random, the questionnaire was anonymous and sent to respondents via e-mail. The research sample consisted of 50 respondents, all of them were entities managing the enterprise. The only criterion for selecting the respondents was their origin from the Podlasie Province. Among the respondents, the largest group were people with higher education (56% of all respondents). People with secondary (22%) and secondary vocational education (also 22%) were slightly less frequent.

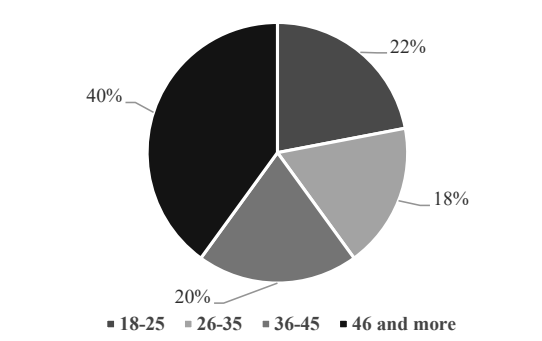
Graph 2. Structure of the surveyed enterprises in terms of education of their owners



Source: Research results

The age of 40% of entrepreneurs participating in the survey was between 46 and more. The respondents aged 18 to 25 accounted for 22% of the research sample. The third place was taken by the respondents aged 36–45 and their number was 20%. The smallest group (18% of respondents) in terms of age were people aged 26 to 35 years.

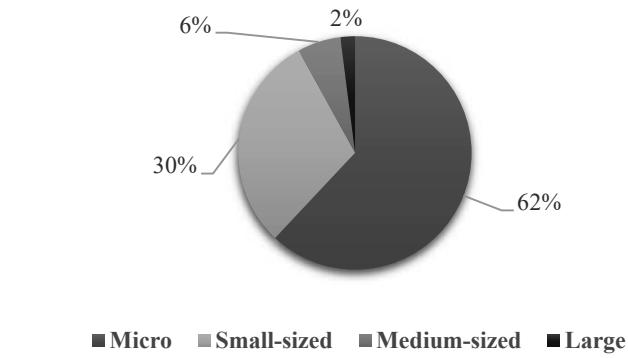
Graph 3. Structure of the surveyed enterprises in terms of age of their owners



Source: Research results

Most of the respondents run micro enterprises (62%). Small enterprises were run by 30% of the respondents. The smallest group of respondents were owners of medium-sized (6% of the respondents) and large (2% of the respondents) enterprises.

Graph 4. The structure of the surveyed enterprises in terms of their size



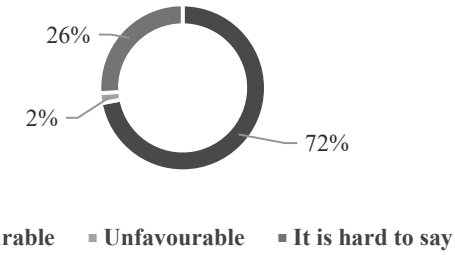
Source: Research results

The largest proportion (64%) of respondents' enterprises are located in urban areas. Enterprises located in the urban-rural area accounted for 22%, and in the rural area – 14% of all surveyed entities. Moreover, in the structure of the surveyed enterprises, 54% of them operated on the market for over 10 years, and 22% of them operated on the market for less than 2 years. The smallest group of 12% were enterprises operating on the market for 2 to 5 years.

Results

The results of the conducted research showed that the overwhelming majority of the surveyed entrepreneurs (72%) considered them an attractive (beneficial) source of supporting business activity. 26% of the respondents could not answer in the affirmative to this question, 2% of the respondents assessed this support instrument negatively (Graph 5). Moreover, it was found that entrepreneurs with higher education more often appreciated this source of financing than entrepreneurs with secondary or secondary vocational education. Nearly 79% of respondents with higher education assessed leasing very positively as a source of support for their activities. On the other hand, among the respondents with secondary or secondary vocational education, this view was expressed by almost 64% of the surveyed entrepreneurs.

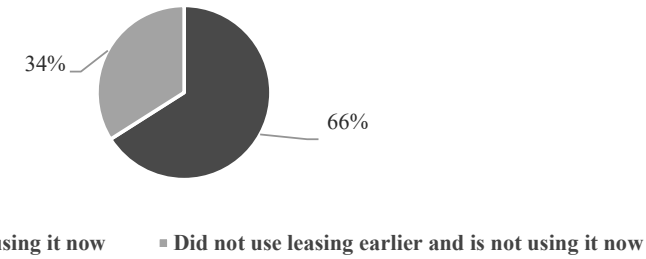
Graph 5. Assessment of the attractiveness of leasing in the opinion of the surveyed entrepreneurs



Source: Research results

The conducted research has shown that leasing is very popular among the studied entrepreneurs. It was found that in the structure of the answers obtained from the surveyed respondents, 66% of them currently use or have used leasing in the past. Such opinions were expressed by about 75% of the entrepreneurs in various age groups, except for the oldest entrepreneurs in the 36–45 age group. In this age group, only 40% of the respondents gave a positive answer about the use of leasing.

Graph 6. The frequency of using leasing by the surveyed entrepreneurs



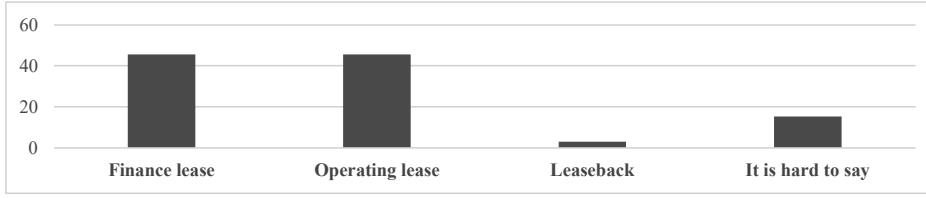
Source: Research results

Moreover, an affirmative answer to the question whether leasing is or has been used in a given company was most often recorded in the group of respondents whose company has been operating on the market for 2 to 5 years (83% of the answers), as well as in 70% of young enterprises (up to 2 years) and entering the market. The use of leasing was indicated slightly less frequently by the surveyed entrepreneurs operating on the market for 5 to 10 years (67%) and 10 years and more (63%). The results of the research also allow to determine the impact of the location of the enterprise (type

of area: urban, rural, urban-rural) on the perception by entrepreneurs of the attractiveness of leasing as a source of supporting business activity. It has been shown that leasing is more often used in enterprises located in urban areas (75% of the surveyed entities) than in urban-rural (55%) or rural areas (43% of entities. Among the surveyed respondents, 79% of those who had experience in financing a company with leasing declared that they intend to use this source of financing also in the future. The remaining 18% could not answer this question, while 3% of the respondents definitely replied that they did not intend to use this source of support in the future.

Two types of leasing, i.e., financial and operational ones, were used by the respondents similarly often, i.e., in about 50% of the surveyed group of entrepreneurs (Graph 7). Leaseback was used by 3% of entities, and 15.2% of respondents were unable to give a specific answer to this question.

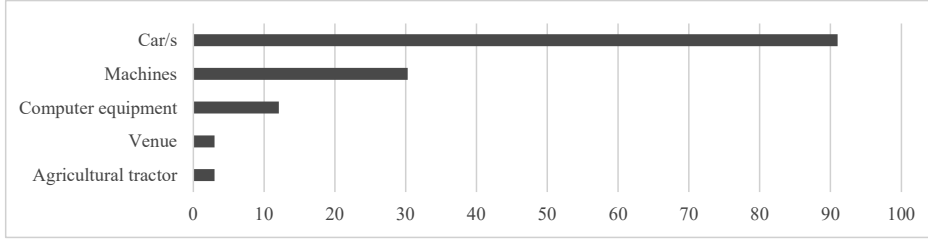
Graph 7. Frequency distribution (%) of the types of leasing selected by the surveyed entrepreneurs



Source: Research results

It was shown (Graph 8) that entrepreneurs who use or have used leasing indicated a car as the leased product most often (90%), while only 30% of them leased machines and devices, even less (12.1%) leased computer equipment, and only 3% of them leased premises (3%) or agricultural tractors.

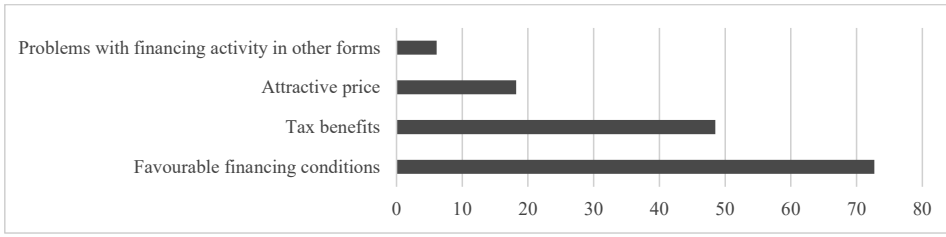
Graph 8. Frequency distribution (%) of leased products by the surveyed entrepreneurs



Source: Research results

The most frequently recognized reason for choosing leasing by the surveyed entrepreneurs was the favorable financing conditions with this source of support (Graph 9). Nearly 73% of respondents who use or have used leasing provided such an answer. Tax benefits as the reason for choosing leasing were indicated by 48.5% of the respondents, and the leasing prices were indicated by 18.2%. The least numerous group (6%) were respondents for whom the reason for choosing leasing was the unavailability of other forms of financial support.

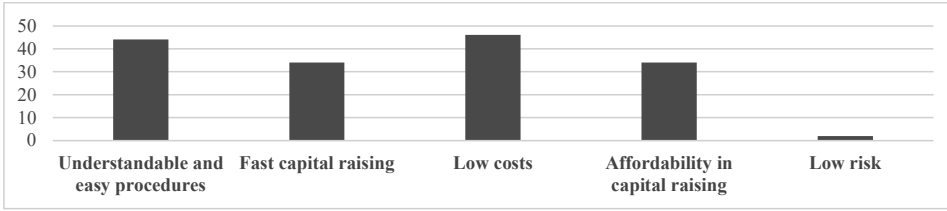
Graph 9. Frequency distribution (%) of the reasons for choosing leasing as a source of financing for enterprises by the surveyed entrepreneurs



Source: Research results

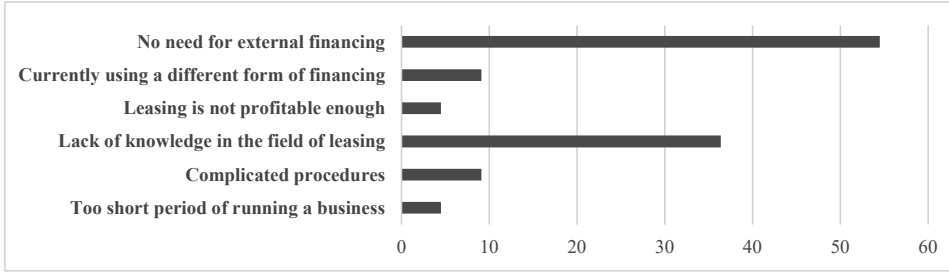
About 46% of the surveyed entrepreneurs indicated that an important facilitation for them when choosing leasing as a source of business support is the low cost of this form of support (Graph 10). Understandable and easy procedures were indicated by 44% of the respondents. For 34% of entrepreneurs, speed and affordability in obtaining capital were important (both facilities were indicated by 34% of respondents). In the answer "other", low risk was indicated as an important feature distinguishing leasing financing from other forms of financing with this form of support.

Graph 10. Frequencies (%) of important facilities in financing enterprises through leasing indicated by the surveyed entrepreneurs



Source: Research results

Graph 11. The frequency (%) of reasons for not using leasing indicated by the surveyed entrepreneurs



Source: Research results

The study results showed (Graph 11) that the main reasons for the lack of interest in leasing among entrepreneurs who participated in the study were the lack of need for external financing and little knowledge about this source of support: this answer was indicated by 55% and 36.4% of respondents, respectively. The surveyed entrepreneurs rarely indicated the currant use of any other form of financing and the complicated procedures related to access to this source as the reason for not using leasing (both reasons were indicated by 9.1% of the respondents). The reason for not using leasing was too short period of running a business for only 4.5% of the surveyed entrepreneurs.

Graph 12. The frequency (%) of leasing financing barriers indicated by the surveyed entrepreneurs

Source: Research results

The most frequently indicated barriers in leasing financing noticed by entrepreneurs in Podlasie Province included: little knowledge about leasing (34% of indications), fear of difficulties with repayment (24% of indications) and the fact that leasing does not provide the user with ownership (22%). Slightly fewer respondents indicated rigid contract terms (20%), complicated procedures related to leasing (18%) and high leasing costs (12%) as the barriers to financing with this source of support (Graph 12). Only 2% of the respondents indicated the low profitability of leasing and

the long period in obtaining this source of financing as the main barrier in financing business activities by leasing. On the other hand, among the surveyed entrepreneurs, 24% did not see any barriers in financing economic activity by leasing.

Conclusion

The results of the study showed that leasing is an important source of financing for enterprises. The frequency of using leasing is quite high, as evidenced by the results of the survey conducted among entrepreneurs in Podlasie Province. The main reason why entrepreneurs choose this source of support are favorable financing conditions. The vast majority of surveyed entrepreneurs who use or have used leasing in the past intend to do so in the future. This indicates full acceptance of leasing by entrepreneurs and recognizing it as a satisfactory form of financial support for business activity. Thus, the research hypothesis put forward in the introduction to the paper has been positively verified.

The study also shows that the location of the enterprise influences the attractiveness of the perception of leasing by entrepreneurs. Entrepreneurs running a business in urban areas saw the attractiveness of leasing more often than in rural and urban-rural areas. The reasons for this are lower access of entrepreneurs in rural areas to information and knowledge about leasing as compared to urban areas. Important properties characteristic of leasing turns out to be: low costs resulting from the use of this form of financing, as well as understandable and easy procedures. An important issue, often indicated by entrepreneurs, is their low level of knowledge about this source of business support. This fact is a serious barrier to leasing financing. Therefore, there is a permanent need to broaden the knowledge and raise public awareness about the available sources of financing, as well as the possible benefits or threats of their use in the enterprise. An attempt to broaden the awareness of available solutions in this matter has a chance to significantly affect the development and increase in the competitiveness of enterprises in Poland, and thus – the entire economy.

The essential problem related to the above-mentioned topics is therefore the permanent need to deepen the knowledge of traditional and alternative financing options. An attempt to broaden the awareness of entrepreneurs about the available solutions in this sphere of the economy has a chance to significantly affect the activity of the SME sector, and thus – the entire economy.

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Subjects of Analysis and Users of Information on the Environmental Sustainability of the Corporation

Abstract: The issues of developing an organizational mechanism for analyzing the environmental sustainability of a corporation have not been given due attention so far. A logically complete, systematic approach to understanding the essence and content of environmental sustainability analysis as an independent block analysis, based on private and generalizing indicators within the framework of a comprehensive economic analysis, was not formulated. To a greater extent the authors described certain organizational and methodological issues of analyzing the environmental sustainability of a corporation as part of the analysis of the financial state of organizations, technical and economic analysis. We have undertaken an attempt to fill the existing gap in this block of economic analysis, to identify the subjects and users of the results of the analysis of the environmental sustainability of the corporation. Interested users of information on environmental sustainability analysis study environmental strategy and policy in the field of environmental protection, environmental management and ensuring environmental safety, evaluate the effectiveness of environmental decisions on the introduction of the best available and environmentally friendly technologies, evaluate investments in environmental protection measures.
Keywords: environmental sustainability, analysis, subjects of analysis

Introduction

The aim of the study is to develop theoretical, organizational and methodological representatives of the economic analysis of the environmental sustainability of corporations, aimed at substantiating solutions to applied problems in the field of environmental safety management of corporations, the broadest development of corporations and sustainable states in the field of environmental protection.

The solution of the tasks set in the work was carried out on the basis of the application of general scientific research methods within the framework of comparative, logical and statistical analysis, as well as through the analysis of structure and dynamics, graphical interpretation of information, methods of investment analysis.

Information on the Environmental Sustainability of the Corporation

A special place among the factors of environmental sustainability is occupied by the presence of an environmental service and the relationship with other divisions of the corporation. According to the Federal Law "On Environmental Protection", any planned and implemented economic and other activity carries a potential environmental hazard, in this regard, the organization should create a department or service responsible for environmental safety. Each industrial enterprise has established an environmental service with the following powers [Fedoseev 1978, pp. 23–26, 163]:

- implementation of industrial environmental control;
- Carrying out measures for the protection and improvement of the environment, rational use of natural resources;
- Ensuring compliance with environmental quality standards and compliance with the requirements of legislation in the field of environmental protection [Tomakova 2016, pp. 69–78].

The existing trends persist in the economic activity of the Voronezh region, as well as in the country as a whole. We analyzed the influence of factors in the Central Black Earth region, within which our research objects operate.

On the territory of the Voronezh region in 2017, 1,079 types of waste of I–V hazard classes were formed with a total volume of 8105.034 thousand tons, which is 1413.236 thousand tons or 17.4% more than in 2016. 94.4% of the generated waste is practically non-hazardous and low-waste waste - 7653379.527 tons [Strakhova 2012, pp. 113–118].

The problem of analyzing environmental sustainability in the field of waste management can unite the efforts of scientists and specialists in various fields for many years, since a serious situation has developed in Russia both in various areas of industry and in everyday life. Currently, there are no necessary capacities, technologies, financial resources, legal support for the mechanism for ensuring environmental safety, as well as a mechanism for state regulation. As a result, there are significant costs in environmental protection activities, deterioration of the environmental situation.

Since in terms of the structure of economic activity the Voronezh Region is an industrial-agrarian one, the main supplier of industrial waste in the Voronezh Region is the enterprises of mechanical engineering, power engineering, the chemical industry, animal husbandry and the processing of agricultural raw materials. They account for 4/5 of the total industrial output.

The obligation for corporations to introduce low-waste technologies based on the use of the latest scientific and technological advances is limited by the declarative provisions of the legislation.

In the Voronezh Region, the State Program of the Voronezh Region "Environmental Protection" has been approved (Resolution of the Government of the Voronezh Region No. 1182 dated December 30, 2013). By order of the Department of Natural Resources and Ecology of the Voronezh Region dated April 20, 2014 No. 49, a comprehensive waste management scheme was approved on the territory of the Voronezh Region for the period until December 31, 2020.

The implementation of a comprehensive scheme will allow, within 8 years, to ensure 100% coverage of the population with a planned-regular system for collecting solid household waste, the gradual elimination of landfills, land reclamation, the involvement of waste into economic circulation as secondary material resources, the disposal of hazardous waste, as well as the preservation of favorable the environment to meet the needs of the population of the Voronezh region and ensure the environmental sustainability of corporations.

The approval by Order of the Government of the Russian Federation of September 24, 2015 No. 1886-r of the list of finished goods, including packaging, to be disposed of after they lose consumer and other regulatory legal acts governing waste management from the use of finished goods, as well as the adoption of the procedure for collecting environmental fees will allow In the near future, to solve the problem of a low percentage of waste recycling in the region by targeted spending of funds received by the budget as a result of the payment of environmental fees by corporations, on the creation of specialized entities in the region for the disposal of goods and packaging that are not utilized by manufacturers and their financing. This measure will reduce the fines and penalties charged by business entities for waste management, which will allow corporations to save money.

In 2020, the Office of the Federal Service for Supervision of Natural Resource Use (Rosprirodnadzor) in the Voronezh Region conducted 23 planned, 25 comprehensive and 72 unscheduled inspections, 96 raids.

Table 1. The Number of Checks and the Amount of Fines Collected

Verification activities carried out			Violations identified / violations eliminated legal entity faces	Prescriptions issued / Prescriptions fulfilled should. faces	Fines imposed pcs.			Amount of fines mposed, thousand rubles.	Fines collected, thousand rubles	Claims filed / damages reimbursed, thousand rubles
Total	including checks				physical faces	should faces	physical faces			
	plan -ned	unplan -ned								
2019 year										
366	31	118	202 / 190	85 / 84	288			5390,5	4239,6	135350,3
					42	174	72			
2020 year										
216	23	73	204 / 139	65 / 45	199			3392,1	3740,7	126624,2
					43	104	49			

As a result of verification measures, 204 violations of environmental legislation were revealed, of which 139 were eliminated, 61 orders were issued on their implementation. To administrative responsibility in the form of fines in the total amount of 3392.1 thousand rubles. involved 43 legal entities, 104 officials, 49 individuals, 153 fines were collected in the amount of 3740.7 thousand rubles [Tomakova 2016, pp. 69–78].

Analyzing the data in the table. 1, we can say that the number, and, accordingly, the amount of fines is decreasing, nature users are becoming more conscious every year.

The priority area of the Office in 2020 is the prevention of administrative offenses. For 2020, the Department plans to conduct large seminars with nature users, lectures for students and senior schoolchildren to form a worldview and understanding of the principles of environmental protection.

Economic regulation in the field of environmental protection is carried out with the aim of creating an interest among corporations in compliance with environmental requirements established by law. Over the past 5 years, payments for negative impact on the environment have been received in the amount of more than 802.5 million rubles. So, in 2016–141.2 million rubles were received, in 2017–153.6 million rubles, in 2018–178.6 million rubles, in 2019–172.4 million rubles, and in 2020–156.7 million rubles. The decrease in the received payment for the negative impact on the environment in 2017 compared to previous years is due to the fact that small and medium-sized businesses will pay for the negative impact on the environment at the

end of the year in 2020. The register of payers of payments for negative impact on the environment is constantly expanding. As of 01.01.2021, 7908 economic entities are registered with the Department.

Since 2016, manufacturers and importers of certain types of goods and packaging are obliged to pay an environmental fee, which was introduced as a new non-tax payment by the Federal Law of December 29, 2014 No. 458-FZ "On Amendments to the Federal Law On Production and Consumption Waste". This measure gives positive results, as a result of its adoption, the development of facilities for the disposal and disposal of waste, the creation of facilities for the processing of goods and packaging, the development of the market for secondary raw materials, as well as the saving of land and resources will take place.

Currently, there is a need for a comprehensive methodology for analyzing the results of economic activities of corporations, understood not only from the side of obtaining a certain amount of profit, but also increasing the environmental sustainability of an economic entity, including taking into account the influence of environmental-oriented factors. The peculiarity and difficulty of assessing the environmental sustainability of corporations is that it is multifaceted. Consequently, the complexity of the analysis will be determined by studying it as a complex category that combines economic, environmental, technical and social aspects. Factors that have a significant impact on the impact of the corporation on the environment, set the level of environmental sustainability of the economic entity and serve as sources of reserves to reduce the cost, and as a result, improve the financial results of the economic entity. Since environmental sustainability is not an independent component, but refers to the sustainability of a corporation, the analysis of environmental sustainability is based on the main indicators of economic analysis, but taking into account the environmental factor.

The subjects of the analysis of the environmental sustainability of the corporation are the environmental, economic and social services of the organization, as well as the supervising, judicial, environmental and controlling federal bodies and bodies of the subjects of the Federation in accordance with the current legislation of the Russian Federation. As part of optimizing the activities of structural divisions in order to manage the environmental sustainability of the corporation, we propose the following structure for building document flow between divisions.

As a result of the study of the relationship between the elements of the workflow of the environmental protection department with other divisions, it is possible to present a scheme of interaction between the structural divisions of the corporation in order to ensure environmental sustainability. The successful implementation of the corporation's activities in the field of environmental sustainability is impossible without the formation of a scheme for the interaction of structural divisions of the organization, since it allows you to build hierarchical subordination and determine the relationship between its employees. The principle of constructing this scheme of

interaction is based on assigning responsibility for the implementation of activities in the field of environmental protection to an official - deputy director - chief engineer, which will ensure the effective combination of achieving production and environmental goals of the corporation, while simultaneously implementing cost-effective environmental protection activities.

The main goals and objectives to be achieved by these structural units are:

– development and implementation of environmental policy, determination of priority environmental aspects of activities;
– implementation of the planned environmental protection measures;
– development and maintenance of internal reporting in the field of environmental protection;
– development of incentives for personnel in order to involve them in the implementation of environmental activities;
– implementation of industrial environmental control in the corporation.

Table 2. Interrelation of Document Flow Elements of the Environmental Protectio Department (OOOP) with Other Divisions of the Corporation

Subdivision Corporations	Receives from the given subdivisions	Transfers to the given subdivision
1	2	3
Financial department	Copies of documents on payments made for the services of third-party organizations under contracts concluded by the environmental protection department	Monthly payment plans for contract works
Department of Labor Organization and Wages	Approved staffing table and changes to it; regulations and other documents on bonuses, payment of remuneration, the establishment of allowances and surcharges; certificates, clarifications on labor and wages; control copies of the regulations on the department, job descriptions	– Time sheet; – proposals for the regulation and other documents on bonuses, payment of remuneration, the establishment of allowances and surcharges; – proposals for changing the number of staff and the structure of the department; – report on the performance of bonus indicators
Planning and Economic Department	Limits for materials, travel expenses, etc.	Payment plan for contractual works

Management System Department	Updated external regulatory documents (GOST, OST, TU); program for conducting internal audits; plans for conducting internal audits; acts based on the results of internal and external audits; plan for the development and revision of the documents of the integrated management system; organization standards, instructions, methods and other documents of the integrated management system; minutes of the meeting of the commission for the analysis of the integrated management system; minutes of the meeting of the commission for the analysis of the integrated management system	– Applications for the purchase of regulatory documents; – reports on the implementation of corrective actions to acts of internal and external audits; – draft standards, instructions, methods of the integrated management system and changes to them (for departments); – objectives in the field of quality and ecology and a report on their achievement; – data for assessing the effectiveness of the functioning of the integrated management system
Department of industrial safety and labor protection	Internal regulations governing the procedure for work in the field of industrial safety and labor protection; prescriptions; lists for medical examination; - minutes of meetings on industrial safety	– Information on the results of sanitary and hygienic control of work places of departments; – a report (up to the 5th day of the month) on the ongoing preventive – work to ensure compliance with the rules of industrial safety and labor protection; – notifications about the fulfillment of prescriptions
Personnel training department	Plans, technical training and professional development programs cadres	Applications for the organization of a professional training of workers, advanced training of managers, specialists of the department
Accounting department	Information about the consumption of raw materials, materials and production; material reports; personal accounts for wages	– Calculation of payments for environmental pollution; – documents on the work performed under the contracts concluded by the department; – Documents for accounting for the receipt and consumption of inventory items
Legal service	Conclusions, written and oral information on practical activities	– Draft orders, instructions, regulations, contracts and other documents to verify their compliance with the laws of the Russian Federation; – originals of contracts concluded by the department
Logistics Department	Copies of primary reporting documents confirming waste disposal activities	– Approved applications for the purchase of inventory items; – general information about waste intended for transfer for use or disposal to third parties

Transport Bureau	Copies of primary reporting documents confirming waste disposal activities	– General information about waste intended for transfer for use or disposal by third-party organizations; – applications for the provision of transport
Production and technical department	Proposals (plans) to reduce the harmful effects of production on the environment; rates of consumption of raw materials, materials, waste generation; drafts of technological regulations, instructions and other normative and technical documentation for approval; information on the operating time of sources of atmospheric pollution, production output, consumption of raw materials and materials, generation and disposal of waste;	– Information on violations of environmental management norms (in technological units); – approved plans for environmental protection measures; – conclusions (reviews) on drafts of technological regulations and other materials; – applications for the purchase of external regulatory documents (JV, SanPiN, etc.) used in the implementation of activities in the field of environmental protection
	other information within the competence of the department, necessary to perform the tasks and functions assigned to the department of nature protection	Wednesday
Center for technical development	Pre-design and design materials for the development, reconstruction, technical re-equipment of production (including those carried out by the corporation); plans for technical re-equipment, other plans for organizational and technical measures; other information within the competence of the department, necessary to perform the tasks and functions assigned to the PLO	– Proposals for inclusion in the organization's technical development plans; – conclusions (reviews) on pre-design and design materials; – initial data for design within their competence
Chief Power Engineer Department	Proposals (plans) to reduce the harmful effects on the environment; drafts of technological regulations, instructions and other normative and technical documentation for approval; water use limits and information on water consumption, waste treatment; a list of control wells for industrial storm and industrial sewage systems; other information within the competence of the department, necessary to perform the tasks and functions assigned to the department of nature protection	– Reports on the results of laboratory control of wastewater from hydraulic structures, river and artesian water from the water intake facilities of the enterprise, the quality of groundwater in the zone of influence of hydraulic structures; – conclusion of technological regulations and other materials

Production divisions of the corporation	Proposals (plans) to reduce the harmful effects of production on the environment; reports on the elimination of violations of environmental norms and rules, on the implementation of environmental measures, on the operation of dust and gas cleaning equipment, on the generation and disposal of waste, on the costs of environmental protection, information provided by the corporation's standards; a list of work areas and hazardous substances that can be released into the air of the working area; a list of environmental aspects by division and a card of their assessment;	– Prescriptions on violations of environmental norms and rules; – standards for maximum permissible – emissions (WAS), VAT (WSS); – general information about the waste generated in the unit. The results of monitoring the standards for maximum permissible emissions (WAS), VAT (WSS), the efficiency of combined cycle plants; – control results – sanitary and hygienic indicators at workplaces; – register of significant environmental aspects and measures to reduce them
	other information within the competence of the department, necessary to perform the tasks and functions assigned to the department of nature protection	

The main goals and objectives to be achieved by these structural units are:

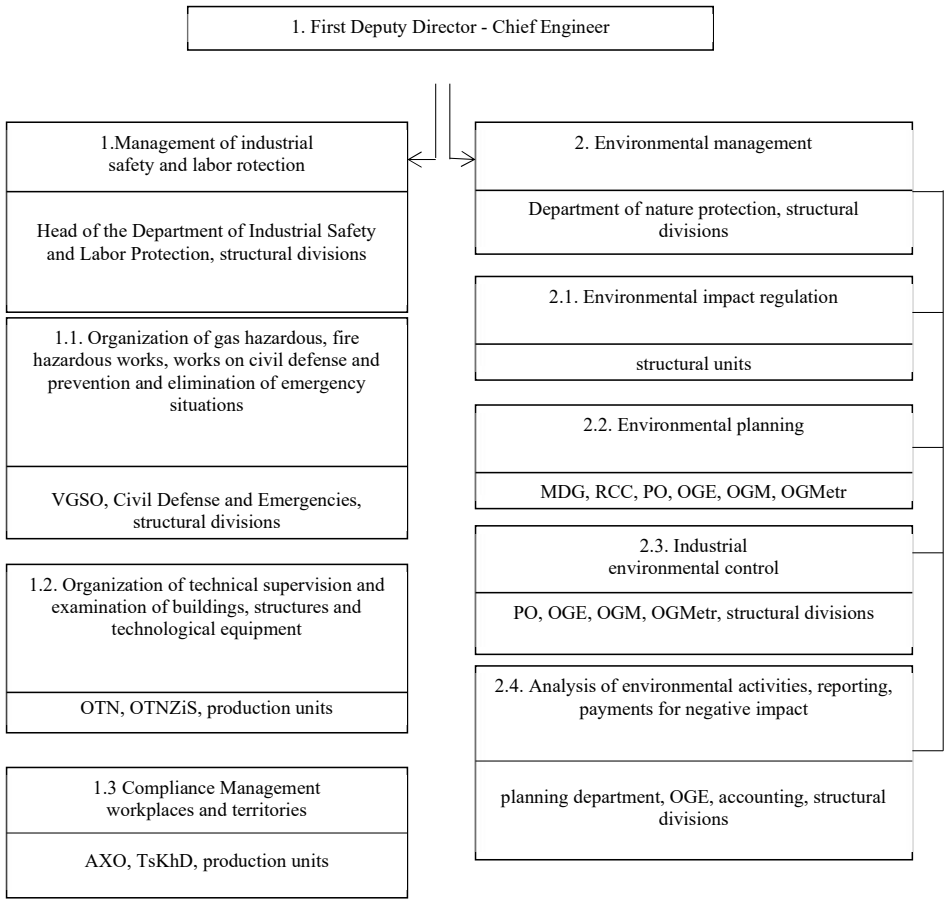
– development and implementation of environmental policy, determination of priority environmental aspects of activities;
– implementation of the planned environmental protection measures;
– development and maintenance of internal reporting in the field of environmental protection;
– development of incentives for personnel in order to involve them in the implementation of environmental activities;
– implementation of industrial environmental control in the corporation.

In order to ensure the developed workflow and the scheme of interaction of structural units, each department is assigned a measure of responsibility for fulfilling its functions in their regulations and job descriptions, which will allow achieving an effective result from environmental activities.

To increase the interest of the corporation's employees in ensuring environmental sustainability, it is necessary to introduce additional payments for the development of proposals as part of the implementation of environmental activities. Identification of these proposals is possible in the process of conducting internal industrial environmental control when drawing up reports for each structural unit.

As a result of the considered interaction of structural units in forecasting and drawing up an action plan within the framework of industrial environmental control in order to ensure the environmental sustainability of the corporation, it is possible to determine the degree of responsibility of each department and its employees, which will allow to ensure full control over their activities in the field of environmental protection.

Figure 1. Scheme of Interaction of Structural Divisions of Management the Production and Environment of the Organization in the Process of Ensuring the Environmental Sustainability of the Corporation



Conclusion

Interested users of information on the analysis of environmental sustainability study environmental strategies and policies in the field of environmental protection, rational use of natural resources and ensuring environmental safety, assess the effectiveness of environmental decisions on the implementation of the best available and environmentally friendly technologies, evaluate investments in environmental protection measures.

The work defines the circle of interested users of the results of the analysis of environmental sustainability and reflects the area of their economic interests. As part of the dissertation research, the interrelation of the elements of the workflow of the

environmental protection department within the corporation is shown, as well as the scheme of interaction between the structural divisions of the industrial and environmental management of the organization in the process of ensuring the environmental sustainability of the corporation.

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The Eu Economic Policy Coordination in the Context of Mitigating the Effects of Covid-19 Pandemic

Abstract: Economic policy of the European Union demonstrates significant specificity in relation to the classic understanding of economic policy implemented by a state. It results from the fact that in the EU economic policy participate states which at the same time retained competences to implement their own policies, however in specific areas these competences are limited, sometimes significantly. This complex structure means that the EU policy requires coordination.
EU economic policy coordination was significant during the fight against COVID-19 pandemic and mitigating its effects. In this scope, the European Commission suggested several solutions (financial instruments).
The subject of this paper is, on the one hand, the analysis of a theoretical model of the EU economic policy coordination resulting from the Treaty provisions, and on the other hand, legal evaluation of financial actions proposed by the EU and aimed at combating the effects of COVID-19 pandemic. This assessment is not unequivocally positive, because the Author has made a thesis that a part of the initiatives raises doubt regarding their compliance with the provisions of the Treaties.
Keywords: EU budget, economic policy, public debt, European Union Recovery Instrument

Introduction

When analysing the substance and the content of the EU economic policy it needs to be stated that it shows significant specificity in relation to the classic understanding of economic policy implemented by a state. This specificity is mainly determined by two elements. Firstly, the EU as an autonomous international organisation, having a legal personality and its own institutions, accumulating financial resources, among others, in its general budget, makes specific financial actions (decisions). This also proves its financial autonomy, despite the fact that it is the Member States who transfer to the EU budget the major part of the means accumulated in it. Secondly, the Member States still implement their own economic policies, however, in particular fields their competences have been limited, sometimes significantly, e.g. in the scope of monetary or customs policies.

This complex structure means that the economic policy requires coordination, i.e. proper management with the participation of the Member States. It will allow achieving assumed objectives, and the lack of such coordination will make the EU economic policy ineffective and taking a colliding course with the Member States' policies. Coordination actions should stay adequate to the defined economic objectives and should include the division of competences in the implementation jointly with the Member States, and this, in turn, requires selecting proper financial instruments.

COVID-19 pandemic has negatively impacted the economic situation of the Member States (and not only their situation). The need to dedicate significant public means within the aid effort, in particular to public health or by allocating the public support to entrepreneurs affected by lock-down, also strained public finance of these states, what has also impacted the whole Union economy. At the same time, severe effects of the pandemic have forced the EU to make particular actions aimed at enhancing their public finance or at introducing investment programmes (instruments) in particular fields of life, which may, on the one hand, encourage socio-economic development, and on the other hand, strengthen against the effects of possible future pandemics.

In this context, the aim of this paper is to determine what is the specificity of the EU economic policy coordination, and on the other hand, to make a legal assessment of the financial solutions suggested by the EU and aimed at combating the effects of COVID-19 pandemic. Despite important actions of the EU in this scope, the evaluation is not unambiguously positive. A thesis needs to be made that a part of these actions raises doubts regarding their compliance with the provisions of the Treaties.

This paper uses the so-called nonreactive research based on the analysis of publications and legal regulations key from the perspective of the problem and the objectives of the article.

Economic aims of the EU and the division of the competences in their implementation between the EU and the Member States

When addressing the problem of the EU economic policy coordination, firstly general EU aims in this sphere should be discussed. In the light of the whole Art. 3 of the Treaty on European Union (TEU) they include in particular: 1) establishing an internal market implemented by the free movement of goods, persons and capital; 2) obtaining permanent development of Europe based on sustainable economic growth, price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment; 3) monetary integration within the economic and monetary union. However, it does not mean that these aims are only assigned to the

Union itself as a separate organisation but their implementation is also conducted by the Member States. Thereby, they are also actors of the economic policy of the whole EU, what thus requires applying coordination mechanisms.

Such communitarisation of aims determines the need to set certain rules for the allocation of competences, which have been determined in the Treaties. In this scope, there is a competence dichotomy, according to with there are conferred and not conferred competences. The former indicate the fields and scope in which the EU has the right to act, what is specified in the principle of conferral of powers arising from Art. 5 of TEU. On its basis, the Union has the right to act only within the limits of competences conferred upon it by the Member States in the Treaties and necessary to achieve objectives defined in these Treaties, in particular in the aforementioned Art. 3 of TEU. However, powers not conferred remain with the Member States pursuant to art. 4(1) and Art. 5(2) of the Treaty. Such duality of competence is described as a vertical division of competence between the Union and the Member States[1] [Barcz, Górka, Wyrozumska 2012, p. 81].

Even within the conferred powers, the Union does not have full freedom in taking initiatives excluding Member States, for two reasons. Firstly, from the Treaties, and directly from Art. 2 of the Treaty on the Functioning of the European Union (TFEU) arises the division of competences granted to the Union, which is made differently in the literature and what will be discussed below. However, it may be assumed for certain generalisation that there are exclusive and non-exclusive competences [Mik 2000, p. 280; Schutze 2012, pp. 162–163][2]. The latter are exercised jointly with the Member States or with their participation. Also in the case of exclusive competences the Member States may show initiative - on the one hand, by issuing binding acts, if the EU authorises them to do so, and on the other hand, they may adopt legal acts to execute acts established by the Union.

Secondly, freedom in implementing the EU actions based on the principle of conferral of powers has been limited by the principle of proportionality and the principle of subsidiarity which result from the principle of conferral. The first one, set forth in Art. 5(4) of TEU, is applied to all competences conferred to the Union (exclusive and non-exclusive) [Barcz, Górka, Wyrozumska 2012, p. 95]. It states that the scope and form of the EU action do not exceed what is necessary to attain the objectives under the Treaties.

1 However, horizontal division of competences defines the way in which the Union is to use its competences, i.e. through which institution, instrument, procedure.

2 Such division was in the doctrine and was formulated in the context of historical development of the Union and on the basis of the content of the Treaties in the versions before changes made by the Lisbon Treaty. However, the duality of competences was not stated there *expressis verbis* but, what is more important, appeared in judicial rulings.

The second principle – the principle of subsidiarity, whose legal basis is Art. 5(3) of TEU, is applied in the fields in which the Union has non-exclusive competences jointly with the Member States [Barcz, Górka, Wyrozumska 2012, p. 91]. Pursuant to this rule, the Union can act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can rather, due to the scale or effects of the proposed action, be better achieved by the Union level.

Overall, according to the principle of conferral of competences, there are competences conferred to the Union, and other competences are not conferred competences and remain with the Member States. Within the conferred competences, the provisions of the Treaties specify which fields of action (also economic) are implemented by the EU alone (exclusive competences – Art. 2(1) and Art. 3 of TFEU) and which jointly with the Member States (non-exclusive competences).

Non-exclusive competences are differently classified, depending on the views of the doctrine and on the basis of the indicated regulations of the Treaties. For example, within this category are distinguished: shared competence (Art. 2(2) and Art. 4 of TFEU), coordination competences in relation to economy and employment (Art. 2(3) and Art. 5 of TFEU), complementary competences (Art. 2(5) and Art. 6 of TFEU) and additionally a separate type of competence in the scope of common foreign policy and security (Art. 2(4) of the TFEU) [Schutze 2012, pp. 162–168]. According to a different view, there are two types of competences – shared and complementary. In this case, the group of shared competences covers the indicated fields of coordination as well as common foreign policy and security, because they are not included in the regulation of Art. 3 and Art. 6 of TFEU [Lenaerts, Van Nuffel, 2011, p. 128].

Moreover, the need to coordinate economic and employment policies may be interpreted from the Art. 4 of TFEU, which determines the fields in which shared competences appear. A part of these fields concerns economic and employment policies and the fact of the division of competences needs coordination.

Besides the abovementioned generic groups of competences, the TFEU specifies fields that one of these groups covers. Pursuant to Art. 3, the Union has exclusive competence in such fields as e.g., customs union, competition on the internal market, monetary policy, common commercial policy. Next, in the light of Art.4, shared competences are in the fields such as: internal market, social policy (but only in relation to the aspects included in the Treaty), economic, social and territorial cohesion, environment, consumer protection, and transportation. According to Art. 6 complementary competence in particular refers to: protection and improvement of life, industry, culture, tourism, education and vocational training.

Forms and nature of the EU economic policy coordination

The fact of categorisation of competence, and in particular specifying the competences shared between the Union and the Member States to achieve the objectives under the Treaties, enforces taking coordination actions so that the implemented economic policy (and within it -financial policy) of the Union as an organisation of 27 members could be characterised by coherence. Moreover, decision-making centres should be designated and they will be responsible for conducting such coordination.

It should be noted that two notions need to be made distinct, and they will appear further in this paper, i.e. economic policy and financial policy, which are connected with each other but cannot be equated. The former is defined as deliberate impact of state authorities as well as institutions and international organisations on the economy – its dynamics, structure, functioning and economic relations [Winiarski, Polityka gospodarcza 2006, p. 19]. On the other hand, financial policy means deliberate actions of people and institutions consisting in setting objectives and financial means of their implementation [Ruskowski 2018, p. 41], in which case, if the actors of this policy are public authorities then a more precise term should be public financial policy.

On the basis of the abovementioned definitions, it seems clear that as far as the economic policy focuses on all actions regarding the economic sphere, financial policy emphasises more financial character of the used instruments. However, economic policy cannot be implemented without financial instruments (moves) and even in this scope, there is a connection between these policies.

Returning to the EU economic policy coordination, its character and forms mainly arise from the Treaties. Not without significance is the historical context of economic integration, also monetary, taking place within European Economic Community and then European Community and the Union itself [Lenaerts, Van Nuffel 2011, pp. 379–381]. In fact, historical processes have determined the currently binding legal solutions, not only of a Treaty nature.

The forms of the EU economic policy coordination are indirectly determined by the mentioned principle of conferral of powers and separation of exclusive and shared competences in particular fields. The consequences of such division are the Treaty regulations which directly indicate the obligation to coordinate the EU economic policy.

Firstly, attention should be given to Art. 5, Art. 120–121 and Art. 175 of TFEU which determine general frameworks of the economic policy coordination of the Member States within the Council, having regard to the objectives stated in Art. 3 of the Treaty.

In turn, Art. 119 of TFEU refers to specific forms of coordination, in particular:

– Art. 119(1) provides close coordination of the Member States' economic policies having regard to the objectives set out in Art. 3 of the Treaty,
– Art. 119(2) introduces the obligation of coordination in relation to monetary policy and exchange-rate policy, which are to be implemented in a unified manner, i.e. as a single monetary policy and a single exchange-rate policy.

The mentioned provisions indicate the fields of the EU and the Member States' coordination actions. However, on the basis of the general obligation to coordinate economic policies, a special focus is on monetary integration within one currency – the Euro. Coordination actions in this field are more intensive than in other fields, as a result of which monetary policy and exchange-rate policy are unified for all Member States[3], and their main aim is to sustain the stability of prices. An additional objective of these policies is to support overall economic policies in the Union but without prejudice to the stability of prices, which is the priority. Such wording of Art. 119(2) of TFEU corresponds to Art. 127(1) determining the overriding objective of the European System of Central Banks which is to maintain the stability of prices, as well as the complementary objective – supporting economic policies in the EU but without the prejudice to the overriding objective.

Regardless of the separation of the monetary policy and exchange-rate policy subjected to tougher coordination from the overall EU economic policies, all policies should be implemented with the application of the following rules: open economic policy with free competition, stability of prices, sound public finance and monetary condition as well as sustainable balance of payments.

Having regard to the abovementioned regulations of the Treaties, economic policy coordination in the EU takes place in three forms: single policy, close coordination and weak coordination [European Commission 2002, p.4; Szeląg 2003, pp. 16–18][4].

Within a single policy, the Union has exclusive competences, which means that it acts autonomously and independently. The decision-making centre of the policy implemented in this form has been placed on the supranational level. A specially designated EU body (institution) is responsible for the directions of this policy and the manner of their execution. The role of the Member States is mainly to adopt the directions and participate in the implementation of the policy on the established rules. As a single policy are also implemented other policies, namely: monetary, currency, customs, competition and budgetary, whose main instrument is the general budget

3 The Member States with derogation, i.e. which are in the second stage of the economic and monetary union, are not subject to a single monetary and exchange-rate policy (See Art. 139–144 of TFEU).

4 The presented division includes fields which involve pubic finance and regulations which are classified as financial law (the law of public finance). In the quoted literature also other fields are indicated, e.g. labour market, commodity market, capital market.

of the EU. The provisions of the Treaty directly indicate that this form is proper for monetary and currency policies but on the basis of other provisions of the Treaties and secondary legislation it may be considered that also other policies are coordinated as single policies.

Close coordination is based on the division of competences between the Union and the Member States. The basic objectives which are to be achieved are determined by the Union, and the Member States are free to select instruments used to achieve these aims. Examples of policies coordinated in this form are: tax policy (by tax harmonisation), structural policy connected with the functioning of internal market, policy in the scope of a single financial market, budgetary policy regarding budget balance and public debt of the Member States as well as in the scope of exercising budget supervision in relation to them.

Weak coordination has a very general and broad nature, however, it is non-legally binding. Therefore, it is implemented by soft instruments such as guidelines, opinions or recommendations, and the Member States exercise them on a voluntary basis, e.g. budgetary policy with respect to the quality of public finance.

Selected instruments of the EU financial policy helping mitigate the effects of COVID-19 pandemic

Due to the negative effects of the pandemic in the form of increased public expenditure from the budgets of the Member States dedicated to public healthcare as well as the decrease in revenues caused by lockdown, the EU has decided to apply a general escape clause within the excessive deficit procedure. Generally, this procedure is initiated towards a Member State which exceeds referential values of the deficit and the debt of the general government sector in relation to GDP, amounting to 3% and 60%, respectively, as was determined in Art. 126(1) and the Protocol 12 of TFEU. Pursuant to Art. 126(1)(a) of the Treaty, in the situation of exceeding the reference value of the deficit of the general government sector, European Commission and the EU Council examine whether the excess is only exceptional and temporary and whether it remains close to the reference value. Additionally, in the Stability and Growth Pact, which develops excessive debt procedure, the general escape clause, mentioned above, is included and is precisely regulated by Art. 5(1), Art. 6(3), Art. 9(1) and Art. 10(3) of the Council Regulation (EC) No. 1466/97 (the so-called preventive part of the Pact) and Art. 3(5) and Art. 5(2) of the Council Regulation (EC) No. 1467/97 (the co-called preventive part of the Pact).

The indicated Treaty provisions regarding the reference values and excessive debt procedure as well as provisions regulating the Stability and Growth Pact are only aimed at the Member States. Therefore, there is close coordination of budgetary policy.

First of all, this clause allows a temporary derogation of a Member State from the adjustment path leading to the medium-term budgetary objective in case of an event which is extraordinary and independent from the state and which has a significant impact on the balance of government and local government institutions or in the periods of significant deterioration of the economic situation. Secondly, in the times of significant deterioration of the economic situation in the Eurozone or in the whole EU, the Council on the basis of the Commission's recommendation may decide to change the direction of fiscal policy. Generally, it is about mitigating restrictions arising from keeping a proper level of public expenditure which conditions maintaining deficit within the reference value.

General escape clause was applied on a motion of the European Commission (EC) as a result of the worsening of the economic situation which follows COVID-19 pandemic. It is important that it does not suspend the excessive debt procedure but it will allow making a coordinated budgetary policy within the Stability and Growth Pact and will allow omitting budget commitments which would be applied to a Member State in a normal situation[5]. With this regard, the application of the escape clause should be assessed positively. Although it decreases budget discipline of the Member States in the scope of deficit and debt but due to the negative effects of the pandemic on public finance in the form of increased budget expenditure, which could not have been avoided, strict application of the excessive debt procedure would be pointless and would further burden the finance of the Member States.

Having regard to the fact of mitigating the effects of COVID-19 pandemic, two key programmes need to be indicated, namely Multiannual Financial Frameworks (MFFs) and European Union Recovery Instrument (EURI). Both are instruments of a single budgetary policy, what means that the funds are obtained by European institutions, in this case by the EC, and are allocated by them to particular fields of the EU activity. Basically, it may be stated that these funds have budgetary nature but in the case of the second instrument it is not quite correct, what will be discussed later in this paper.

When describing in detail the first instrument, it is worth noticing that MFFs in its substance are not *sensu stricto* targeted at combating the effects of COVID-19 pandemic but in the case of the framework for 2021–2027 they will serve this purpose due to the extraordinary post-pandemic economic situation.

In the current legal and factual state, MFFs are a medium-term financial planning instrument. They are also a medium-term – seven-year financial plan of the EU, which is to ensure making the EU expenditure in an organised manner and within the limits of its resources pursuant to Art. 312(1) of TFEU [Tyniewicki 2014, p. 35]. This plan includes essential and key objectives (tasks) which will be financed in the

5 See more: Communication from the Commission to the Council on the activation of the general escape clause of the Stability and Growth Pact (COM/2020/123 final of 20.03.2020).

projection period. It is presented in the form of a table which is divided into seven subsequent years with ceilings (amounts) assigned to particular objectives and which is an attachment to the Council Regulation adopted according to a special legislative procedure (Art. 312(2) of TFEU).

Therefore, MFFs have a cyclical nature – they are adopted every seven years (although TFEU sets a minimal 5-year period) and the EU objectives and tasks which are to be financed are determined depending on the key priorities for the functioning of the Union in the projection period. It is important that the frameworks do not replace the Union's subsequent annual budgets, since the latter specify general amounts included in multiannual frameworks and at the same time allow making real expenditure. Therefore, every year a budgetary procedure must be started to adopt the annual EU budget, which is made by the Council and the European Parliament [Tyniewicki 2014, pp. 40–41]. Because of this reason, the funds included in the MFFs have a budgetary character.

Due to the fact that the effects of COVID-19 for the Member States have been significant and diverse, in 2020 EC presented an amendment to the MFF draft for 2021–2027 and precisely to its priorities. It was justified by presenting by the Commission a kind of recovery plan for Europe after the pandemic, and it generally concerned recovery and strengthening of the Union's economy. At the same time, the Commission proposed establishing EURI, also called "Next Generation EU", as an additional and temporary instrument[6]. Its role is to financially strengthen the EU budget by obtaining debt funds on financial markets which then will be allocated to the Member States, similarly as budgetary funds, to implement particular projects within priorities resulting from MFFs. As the Commission indicated, it was about creating a financial package to eliminate the effects of the pandemic and to restore the economy of total value EUR 1 824 bn in 2018 prices (EUR 2 018 bn in 2021 prices), and within MFF the financial envelope amounts to EUR 1 1074 bn in 2018 prices (EUR 1 211 bn in 2021 prices) and from EURI is to be obtained EUR 750 bn in 2018 prices (EUR 806, 9 bn in 2021 prices)[7].

The above proposals were accepted by the Council by adopting Regulation No. 2020/2093 of 17 December 2020 laying down Multiannual Financial Framework for the years 2021–2027 and Regulation N.o 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis.

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6 See more: Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions (COM/2020/442 final of 27.05.2020).

7 See more: European Commission, Directorate-General for Budget (2021), *The EU's 2021–2027 long-term budget and NextGenerationEU: facts and figures*, Publications Office of the European Union, Luxembourg, https://data.europa.eu/doi/10.2761/808559, p. 6. Amounts arising from MFF and EURI are subject to annual growth according to deflator of 2% per year.

Having regard to the legal and financial context, EURI in comparison to MFFs and EU annual budgets has a special nature. The financial structure of this instrument was precisely regulated in the Council Decision No. 2020/2053 of 14 December 2020 on the system of own resources of the EU. Pursuant to Art. 5(1) of this decision the Commission is empowered on behalf of the Union to borrow funds on the capital market, especially by issuing bonds, up to the amount of EUR 750 bn. It needs to be indicated here that the Recovery and Resilience Facility (RRF) is the biggest component of EURI and according to the Regulation of the European Parliament and the Council No. 2021/241 of 12 February 2021 its role is to finance six fields of the EU policy: green transition; digital transformation; smart, sustainable and inclusive economic growth; social and territorial cohesion; health, and economic, social and institutional resilience; policies for the next generation, children and the youth. Under RRF will be accumulated EUR 672.5 bn in 2018 prices (EUR 723.8 bn in 2021 prices).

The manner of obtaining funds to EURI undoubtedly indicates that they will mainly be of debt nature, provided that they will be used "solely to address the consequences of COVID-19 crisis", and the Commission will manage the borrowing till 2026. Next, the borrowing will be transformed to the Member States to implement particular programmes, where EUR 360 bn will be in the form of loans (the loan part of EURI), and EUR 390 bn as grants (the grant part of EURI). In the quoted provision of Art. 5 of the Council Decision No. 2020/2053 also the repayment rules of the funds borrowed by the EC were regulated. Namely, the funds transferred as grants and the related interest will be repaid by the Union expenditure and the part of the borrowing which will be transferred as loans will be repaid from the reimbursement of these loans made by the Member States. At the same time, Art. 6 of the Council Decision introduces security to repay the borrowing made by the Commission. In particular, it consists in increasing by 0.6% the ceiling of own resources, and thus the value of the revenues transferred by the Member States to the EU budget. Therefore, it is they who will bear the real burden of the liabilities incurred by the EU. Of course, these additional resources may not be used to cover any other liabilities of the Union.

Despite the important aims which may be financed from the EURI funds, its legal structure raises two key questions of legal nature.

Firstly, the funds obtained from the borrowing do supplement the financing of tasks and programmes determined in MFF for 2021–2027, and thus in the EU annual budgets, however as revenues they are outside the structure of these frameworks and budgets. They will not be strictly budgetary and therefore they will not be subject to the annual budgetary procedure implemented jointly by the European Parliament and the Council on the basis of Art. 314 of TFEU. The grant part of the Instrument, discussed above, will be subject to this procedure when it will be repaid as budget expenditure.

The above manner of financial transfers within EURI causes a situation in which there is, at least at the time of borrowing by the Commission, a kind of debudgetisa-

tion, which means that funds earmarked to finance the Union's tasks and programmes remain outside MFF and the Union's budget. This raises doubts in the context of compliance with Art. 311 and Art. 312 of TFEU which indicate the principle of concentration of revenue obtained by the Union within multiannual frameworks and annual budgets. Moreover, in the light of Art. 311 of TFEU, the EU objectives and policies should be wholly financed from own resources, i.e. from the revenues allocated by the Member States. These legal doubts may be justified by the extraordinary character of the EURI funds, which are obtained to support the recovery in the aftermath of COVID-19 pandemic and they do not constitute budgetary revenues. However, it must not be forgotten that they serve to finance EU policies.

Second concern relates to the issue of the possibility to incur debt by the EU to implement its tasks. Art. 311 of TFEU, quoted above, introduced the principle of the total funding of the Union's budget from the obtained revenues, i.e. by the system of own resources. The consequence of this regulation is the obligation to balance revenues and expenditure sides of the Union's budget in such a sense that the existence of a budget deficit and its financing from debt instruments is prohibited. This thesis is justified in Art. 17(1) of the Regulation of the European Parliament and the Council No. 2018/1046 of 18 July 2018. From the provisions of Art. 17(1) arises the principle of balance, and from Art. 17(2) – prohibition to raise loans within the budget by the Union or its bodies.

When relating the above regulations to EURI funds it may be stated that directly they do not constitute neither budgetary revenues, nor are they included in the Union's budget when they are obtained. Therefore, it may appear that there is no violation of the principle of balance and financing expenditure with debt. It is not so obvious when taking into consideration the fact that debt generated and constituting a grant part of EURI will be financed from the budget expenditure. This mechanism raises suspicion about indirect debt reimbursement of the EU expenses but without an official nominal budget deficit. If it is assumed that the tasks connected with mitigating COVID-19 are to be financed directly from the budget, i.e. are on the expenditure side, what relates to the grant part of EURI, then, in such a case, would not there be a negative balance in the budget which is legally inadmissible? Taking into consideration all these doubts, one basic question may be formulated: does the presented mechanism of obtaining and repaying borrowings within EURI lead to the violation of Art. 311 and Art. 312 of TFEU, and in particular does it indirectly and covertly allow the financing of the EU budget expenditure from debt sources? This problem needs deeper legal analysis, exceeding the aims and framework of this paper, and will certainly be a subject matter of a separate elaboration.

Conclusion

On the basis of the content of this paper, it needs to be stated that the Union economic policy is characterised by a specific nature in relation to a classic form of economic policy implemented by the states. This specific nature consists mainly in the need to coordinate the economic policy of the Union, since many "actors" participate in it., i.e. the Union as an autonomous international organisation and its Member States. This also expresses its complicated nature, because it requires managing contradictory interests and achieving compromise. This causes situations when particular decisions cannot be made quickly in order to be more effective and efficient.

Having regard to this nature of the EU economic policy, the initiative proposed by the EC to eliminate the effects of COVID-19 should be assessed positively, the more so that the Member States achieved compromise in this scope. As a result, particular investment programmes to develop the EU and strengthen its economy have been covered by the EU legal regulations and therefore may be implemented. However, not all adopted solutions may be unambiguously evaluated positively in the legal context. The mechanism of obtaining loans and their repayment within EURI raises doubts regarding their compliance with the Treaty provisions. This especially concerns the situation in which a part of the obtained funds remains outside MFF and the EU budget as well as the issue of debt financing of the Union activity, which should not take place in the light of the TFEU regulations.

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Can Democracy Harm Public Finance? Some Evidences from Europe

Abstract: James Buchanan and Richard Wagner in their famous book "Democracy in Deficit" note that democracy has not enough fiscal discipline because the citizens' representatives are chosen in the election and they take the budgetary decisions seeking the re-election. Their theory of public choice may suggest the existence of a positive relationship between the democracy's quality and the public debt level reflecting the long-lasting consequences of the budgetary decisions of policy-makers. Thus, we formulate the following research question: Is democratic system harmful for public finance? To operationalize the democratic system, we use five democracy indices (i.e., electoral, liberal, participatory, deliberative, and egalitarian), and the public debt to operationalize the threat for public finance. Conclusions put in a new light the theory, as first the study confirmed that there are statistically significant relationships between democracy's quality and public debt and, however not in case of every democracy index and every European country.
Keywords: democracy, debt, Europe, fiscal discipline

Introduction

The contemporary democracies struggle with the excessive public deficits, that, if not recompensed by the surpluses in the following years, leads in consequence to the extensive public debt accumulation. James Buchanan and Richard Wagner have already described this phenomenon in their book with a perfectly ambiguous title Democracy in Deficit [Buchanan, Wagner 1997], as they note that democracy has not enough fiscal discipline because the citizens' representatives are chosen in the election and they take the budgetary decisions seeking the re-election. The fiscal illusion theory, developed in this way may thus suggest the existence of a positive relationship

between the democracy's quality and the public debt level reflecting the long-lasting consequences of budgetary decisions of policy-makers.

Even if the scholars have explored the question of the influence of the democracy on the public debt, none of them analyzed five dimensions of democracy, i.e., electoral, liberal, participatory, deliberative, and egalitarian, especially in the European, comparative context.

The studies makes a scientific bridge between the public management, more precisely the public financial management as it concentrates on the ways of ensuring public finance sustainability going beyond traditional economic or legal analysis, and the public administration focusing on the consequences of functioning of the democratic systems.

Although the issues of public debt are on the borderline of economic and political sciences, the analysis presented in the article are crucial for the functioning of political system as it allows to determine the impact of the democratic system on public finances, as the stability and security of each country depends on the sustainability of the public finance.

The article comprises five sections. The first section provides a theoretical and empirical background for understanding the reasons of the public debt and strategies to public debt reduction. Second, we present the research design, i.e., the research hypothesis, the variables' operationalization, and data. Third, we present empirical results of the impact the democracy indices on the public debt. Fourth, we interpret and discuss the linear regression models. Our conclusion provides some general policy implications and set the direction of the further research.

Public Debt – Reasons of Public Debt and Strategies to Public Debt Reduction

In the literature among the most classic reasons of public debt scholars mention: the occurrence in subsequent periods of the budget deficit, which is covered by state borrowing; increase in public expenditures as a result of wars, natural disasters or major economic crises; implementation of state policy consisting in increasing public expenditures in order to stimulate prosperity; falling into the debt trap; achieving policy goals through increased redistribution of citizens' incomes without limiting other state spending [Daniłowska 2008]. Especially serious consequences results from the financial and economic crises, the last one started in 2007 in United States and progressively have spread all over the world. Financial crisis in an uncontrolled way result in declining revenues due to weaker economic conditions and higher expenditures associated with bailout costs [Furceri, Zdzienicka 2013]. Moreover, recent research show that also the corruption of public officials constitutes important source

the excessive public expenditure and in consequence of the public debt [Liu, Mikesell 2014, pp. 346–59].

On the other hand, scholars try to find the reasons of public debt in the democratic system nature. The link between democracy and public debt has begun to be recognized in the seventeenth century [Macdonald 2003]. James Buchanan and Richard Wagner [1977] has also noted that democracies find it difficult to maintain financial discipline, even if technically the reduction of deficit and the public debt is not difficult. The lack of political will in this regard is linked to the essence of a democratic system. The policy-makers are chosen by citizens, so aspiring to take or maintain power they make expensive political promises and then they pass the laws allowing them to be re-elected, what often is harmful to the public debt level. Hannesson [2015] argues that democracy is better at distributing wealth widely than in generating it in the first place and he is wondering if it carries within itself the seeds of its own destruction. This is supported by the public choice theory, espoused by James Buchanan and Richard Wagner [1977]. According to this theory, called also the fiscal illusion theory, the politicians, as vote maximizers, tend to propose new government programs to attract new voters as much as possible, which makes public sector bigger. They are motivated to fool citizens so that they may attract individuals' votes without being blamed for the increase in government spending. By designing and manipulating the fiscal system, the politicians try to make the public underestimate the costs of public sector goods and services. The greater the extent of these illusion-inducing characteristics of a fiscal system, the greater the size of the government. In this sense, the fiscal illusion theory transmutes into the theory of democratic failure [Streeck, Wolfgang 2013]. The above is strictly related to the political business cycles theory that implies that governments, in order to be re-elected try harder to please voters immediately before election day [Breton 1974]. As Rögnvaldur Hannesson argues elites are voted into power, or kept in power, by a mostly uninformed electorate that votes for them in the expectation that they will govern well, which mostly means high and rising standards of living. When the elites fail to deliver, they are voted out. But raising taxes is not popular. The temptation to finance an expanding government sector by increasing debt is therefore strong [Hannesson 2015].

There are different strategies to public debt reduction, having the budgetary and extra-budgetary character. Starting from the budgetary measures, on the one hand the financial austerity policy may turn out effective, even if in some situations reduction of public expenditure, especially of the investment ones may give the contractionary effect [International Monetary Fund 2012]. Next, the optimal taxation increases and the appropriate trade-off between minimization of the expected cost of debt servicing and minimization of budgetary risk seem to be effective [Missale 2002, pp. 235–265]. Moreover, ensuring balance over the cycle or eliminating foreign public debt are considered as effective strategies to public debt reduction [Makin, Pearce 2016, pp. 424–440]. To achieve the satisfactory results in the above fields different

types of fiscal rules are introduced all over the world. Fiscal rules typically are defined as the numerical or procedural restrictions on the preparation, approval, and implementation of public budgets [Corbacho, Ter-Minssian 2013]. These rules cover summary fiscal indicators, such as the government budget deficit, borrowing, debt, or major components thereof – expressed as a numerical ceiling or target, in proportion to the gross domestic product, GDP or being procedural limitations [Kopits, Symansky 1998, Corbacho, Ter-Minassian 2013]. As it results from the research conducted by the International Monetary Fund, the majority of countries in the world has introduced some kind of fiscal rules [www.imf.org., access as of 10 September 2021], however only in some of them the fiscal rules are effective. The analysis shows that these formal constraints on fiscal policy, even at the constitutional level, do not prevent the excessive debt [Ayuso-i-Casals et al. 2009] or encourage politicians to go around these regulations [Hagen 1991].

On the other hand, the democracy itself may be seen as a solution to the excessive public debt accumulation. The relations between public debt and the level of democracy are widely analyzed in the literature, even if some of the results stay ambiguous [Feld, Kirchgässner, 2001, Holland 2016, Stallings, Kaufman 1988, Frieden 1985, Cheru 1989], in some articles being restricted to precious legal analysis but not supported by quantitative proofs [Schragger 2012], in other scholarships being limited to single-case analysis [Lindholm 1946, pp. 87–93]; [Chossudovsky, Ladouceur 1994]. Also, contributions based on the statistical methods give ambiguous results, thus still require more attention. For instance, Gary Anderson [1988] using a simple model supports the thesis that the external public debt levels will be higher in dictatorship. Next, Balkan and Greene [1990] denying the Anderson's contribution and using larger, but still limited, sample of countries and the statistical analysis found little empirical support for the thesis that democracy or autocracy influence foreign debt [Balkan, Greene 1990] On the other hand, Oatley [2010] provides the statistical evidences that the autocratic governments accumulated substantially larger foreign debt relative to their national income than democratic governments. Moreover, the studies have shown that the direct democracy (financial referendum) contributes to a reduction of public debt in Switzerland [Feld, Kirchgässner 2001, pp. 347–370]. It has also been proven that the financial referendum in Switzerland contributes to reduction of public debt by limiting by the citizens the growth of social spending, as citizens deciding on public money (in fact on taxes that they pay) are much more economical in that regard than the political elites [Kriesi, Trechsel 2008]. In contrast to these Swiss experiences, the evidences from German municipalities suggest that that direct democracy causes an expansion of local government expenditure [Asatryan 2016].

Research Design

The theoretical considerations presented above lead us to formulate the following research question: Is democratic system harmful for public finance? To formulate the hypothesis, we need to operationalize the democratic system and the threat for public finance.

Democracy is often identified with the representative (electoral) democracy that is a form of rule by professional politicians and government officials over the citizens, in which some of those rulers are periodically changed by the mechanism of election [Hirst 1988]. To prevent popular tyranny, the rule by the majority should be moderated and checked by special mechanisms and institutions of the liberal democracy [Nieuwenburg 2014, pp. 374–82]. However, dissatisfied with the limits of representative democracy, scholars have pursued democratizing reforms in a host of extra-electoral realms such as public budgeting, service provision, planning, and policy implementation [Fischer 2009]. These claims result in the participatory and deliberative forms of democracy. Moreover, as Carole Pateman, clarified in 2012 in American Political Science Association Presidential Address deliberative and participatory forums can deepen an already democratic process, but they are unlikely to democratize a broader polity defined by profound inequalities of power [Dahl, Soss 2014]. Thus, the egalitarian democracy should also be in mind.

These theoretical considerations are coherent with the V-Dem data[1], as they compose of 5 democracy indices. As it results from table 1, each democracy indices comprises apart the component resulting from its name (i.e., electoral, liberal, participatory, deliberative, and egalitarian) also the electoral democracy index. This is doubly important for our research, as first, none of political system should be considered as democratic if the electoral mechanisms were not implemented, second these democracy indices enable to analyze the relationships between the public debt and the democracy variables with emphasis placed on its various aspects.

In consequence as electoral citizens' rights are the core of the democracy and the theory of democratic failure directly refers to them to operationalize the democratic system, we use the electoral democracy as the basis democracy variable. Moreover, in order to not lose sight from the variety of democracy, our research uses 4 supplementary democracy variables, i.e., liberal, participatory, deliberative, and egalitarian democracy indices.

Next, to operationalize the threat for public finance, let's note that there are four basic parameters characterizing the state of public finances of each country, i.e., public revenue, public expenditure, public balance (surplus or deficit), and public debt. All these parameters can be expressed in the national currency of a given country,

1 In our analysis, we do not use The Economist Intelligence Unit (2016) data, as they cover smaller number of countries and years than V-Dem data.

or for comparative purposes, in relation to the GDP of a given country. All these parameters are interrelated, as the public balance is defined as the negative difference between the public revenue and the public expenditure in a given year, and the accumulation of public deficits of consecutive years leads to the public debt. The level of public revenue and expenditure, analyzed independently do not pose a threat to the public finance, but they indicate the quality of citizen's life of a given country. Only the negative difference between public revenue and public expenditure, recorded at the end of the budget year, results in public deficit, that may be harmful to public finance, but it is not always a case. The public deficit does not automatically threaten the safety and sustainability of public finances, because in the subsequent year(s) it may be compensated by the public surplus, provided that the government plans or/and actually it executes the surplus. Only deficits which have not been repaid regularly, accumulated over many years, result in the formation of the public debt that is one of the crucial determinants of the public finance sustainability, understood as the capacity to incur future financial burdens arising from the current debt [European Commission 2012]. Even if current generations of citizens (and voters) may be pleased by the public debt accumulation used to finance public services, the excessive indebtedness may be dangerous for future generations. In extreme cases the excessive level of public debt decides about the undisturbed existence of states. Significant public debt was one of the reasons for the bankruptcy of Argentina, the problems thereof are being compared with the current situation of Greece. Hence, to operationalize the threat for public finance, we have chosen the public debt variable.

The theory of public choice, transmutes to the theory of democratic failure, suggests that the politicians in democratic systems are not interested in cutting public expenditure, and in consequence to limit the level of public debt, as they strive to convince the voters (the citizens) using public funds to re-elect them. That leads us to treat the particular types of democracy as the independent variables, whereas the level of public debt as dependent variable.

Taking into consideration that the theory of democratic failure seems to suggest that the increase of democracy's quality lead to the increase of public debt level, we hypothesize as follows:

- H1: In EU and EFTA countries, the public debt level is positively related to the electoral democracy' quality;
- H2: In EU and EFTA countries, the public debt level is positively related to the liberal democracy' quality;
- H3: In EU and EFTA countries, the public debt level is positively related to the participatory democracy' quality;
- H4: In EU and EFTA countries, the public debt level is positively related to the deliberative democracy' quality;

– H5: In EU and EFTA countries, the public debt level is positively related to the egalitarian democracy' quality.

For the democracy's variables, we use V-Dem indexes, version 7.1, being the result of the international research project Variety of Democracy, collected by more than 2800 experts from all over the world [Coppedge et al. 2017], available at www.v-dem.net. The V-Dem conceptual scheme recognizes several levels of aggregation: democracy indices (electoral, liberal, participatory, deliberative, and egalitarian; two, democracy components (5), subcomponents, and related concepts (46) and indicators (ca. 350). The complementary variables of democracy (i.e., liberal, participatory, deliberative, and egalitarian democracy) include in its construction the electoral component of democracy [Coppedge et al. 2017] because a state without the electoral citizens' right would not be considered as a democratic one. The level of particular types of democracy was established on the basis of values of particular indices and indicators (cf. table 1).

Table 1. Variables of Democracies as Used in V-Dem, v. 7.1

Democracy's Index	The Main Indices and the Indices' Indicators
Electoral democracy index	1. Additive electoral index; 2. Multiplicative electoral index: a) Expanded freedom of expression index (government censorship effort – media, harassment of journalists, media self-censorship, media bias, print/broadcast media critical, print/broadcast media perspectives, freedom of discussion for men, freedom of discussion for women, freedom of academic and cultural expression); b) Freedom of association index (party ban, barriers to parties, opposition parties autonomy, elections multiparty, civil society organizations (CSO) entry and exit, CSO repression); c) Share of population with suffrage (percent of population with suffrage); d) clean elections index (election management body (EMB) autonomy, EMB capacity, election voter registry, election vote buying, election other voting irregularities, election government intimidation, election other electoral violence, election free and fair); e) Elected officials index (legislature bicameral, lower chamber elected, upper chamber elected, legislature dominant chamber, head of state (HOS) selection by legislature in practice, HOS appointment in practice, head of government (HOG) selection by legislature in practice, HOG appointment in practice, HOS appoints cabinet in practice, HOG appoints cabinet in practice, HOS dismisses ministers in practice, HOG dismisses ministers in practice, HOS = HOG?, Chief executive appointment by upper chamber, chief executive appointment by upper chamber explicit approval).
Liberal democracy index	1. Electoral democracy index; 2. Liberal component index: a) Equality before the law and individual liberty index (rigorous and impartial public administration, transparent laws with predictable enforcement, access to justice for men, access to justice for women, property rights for men, property rights for women, freedom from torture, freedom from political killings, freedom from forced labor for men, freedom from forced labor for women, freedom of religion, freedom of foreign movement, freedom of domestic movement for men, freedom of domestic movement for women); b) Judicial constraints on the executive index (executive respects constitution, compliance with judiciary, compliance with high court, high court independence, lower court independence); c) Legislative constraints on the executive index (legislature questions officials in practice, executive oversight, legislature investigates in practice, legislature opposition parties).

Participatory democracy index	1. Electoral democracy index; 2. Participatory component index: a) Civil society participation index (candidate selection national/local, CSO consultation, CSO participatory environment, CSO women's participation); b) Direct popular vote index (Initiatives permitted, Initiatives signatures %, initiatives signature-gathering time limit, initiatives signature-gathering period, initiatives level, initiatives participation threshold, initiatives approval threshold, initiatives administrative threshold, initiatives supermajority, occurrence of citizen-initiative this year, referendums permitted, referendums signatures, referendums signature-gathering period, referendums participation threshold, referendums approval threshold, referendums supermajority, referendums administrative threshold, occurrence of referendum this year, plebiscite permitted, plebiscite participation threshold, plebiscite approval threshold, plebiscite supermajority, plebiscite administrative threshold, occurrence of plebiscite this year, constitutional changes popular vote, obligatory referendum participation threshold, obligatory referendum approval threshold, obligatory referendum supermajority, obligatory referendum administrative threshold, occurrence of obligatory referendum this year, obligatory referendum credible threat, popular referendum credible threat, plebiscite credible threat); c) Local government index (local government elected, local offices relative power, local government exists); d) Regional government index (regional government elected, regional offices relative power, regional government exists).
Deliberative democracy index	1. Electoral democracy index; 2. Deliberative component index (reasoned justification, common good, respect counterarguments, range of consultation, engaged society).
Egalitarian democracy index	1. Electoral democracy index; 2. Egalitarian component index: a) Equal protection index (social class equality in respect for civil liberties, social group equality in respect for civil liberties, weaker civil liberties population); b) Equal access index (power distributed by gender, power distributed by socioeconomic position, power distributed by the social group); c) Equal distribution of resources (means-tested vs. universalistic, encompassingness, educational equality, health equality).

Source: For the public debt variable, the article uses the data of the International Monetary Fund [www.imf.org., access as of 10 September 2021] available at www.imf.org. The public debt level is presented in the relation to gross domestic product (GDP) of each country.

As, in the literature, as far as we know, there is no comparative research concerning Europe in the selected research area and the research problem refers to the democratic countries, whereas some European countries are not democratic, our research covers only European Union (EU) and European Free Trade Association (EFTA) countries. All of them adhere to relatively coherent, even if not uniform, system of democratic and economic values, as the economic cooperation has been at the core of both international organizations. Some of the countries currently belonging to the EU previously were members of EFTA but with time they have withdrawn from EFTA, selecting membership in a competitive organization aiming at far greater economic integration, i.e., European Economic Community (ECC) that with time evolved into the EU. Our analysis covers 29 countries, as 3 smallest members of these organizations were excluded from the analysis because of non-availability of the public data (cf. table 2).

Table 2. EU and EFTA Countries analyzed in the Article

International Organization		Member States
European Union (EU)	EU Members of Eurozone (€)	Austria (AT), Belgium (BE), Cyprus (CY), Estonia (EE), Finland (FI), France (FR), Germany (DE), Greece (EL), Ireland ((IE), Italy (IT), Latvia (LV), Lithuania (LT), Netherlands (NL), Portugal (PT), Slovakia (SK), Slovenia (SI), Spain (ES). The last Eurozone country, i.e., Malta (MA) were excluded from the analysis.
	EU Members outside of Eurozone	Bulgaria (BG), Czech Republic (CZ), Denmark (DK), Croatia (HR), Hungary (HU), Poland (PL), Romania (RO), Sweden (SE), and United Kingdom (UK). The last country of EU, i.e., Luxemburg (LU) was excluded from the analysis.*
European Free Trade Association countries (EFTA)		Switzerland (CH), IS (Island), and NO (Norway). the last EFTA country, i.e., Lichtenstein (LI) was excluded from the analysis.

** DE and UK, when adhered to EU have negotiated the opt-out clause that enables them not to enter to Eurozone; UK as a result of referendum from 2016 is currently in the process of leaving EU (Brexit). The remaining countries, when signing their adhesion treaties have taken responsibility to meet the Maastricht (convergence) criteria required to adopt common currency (Euro) even if in Czech Republic, Hungary, and Poland, are 3 out of 10 countries that adhered to EU in 2004 and still the national governments have not taken sufficient actions to realize the commitment.*

The analysis generally covers the period 1990–2015 with the exception of single missing data (tables 3–5 indicates the information on number of observations N). Even if some of the EU and EFTA countries are classified not as full democracies but as "flawed democracies" [Economist Intelligence Unit 2016], the data on the quality of particular types of democracy (i.e., electoral, liberal, participatory, deliberative, egalitarian) are not differentiated significantly, although some outliers exist (cf. figures 1 to 5).

Figure 1. Electoral Democracy in EU and EFTA Countries

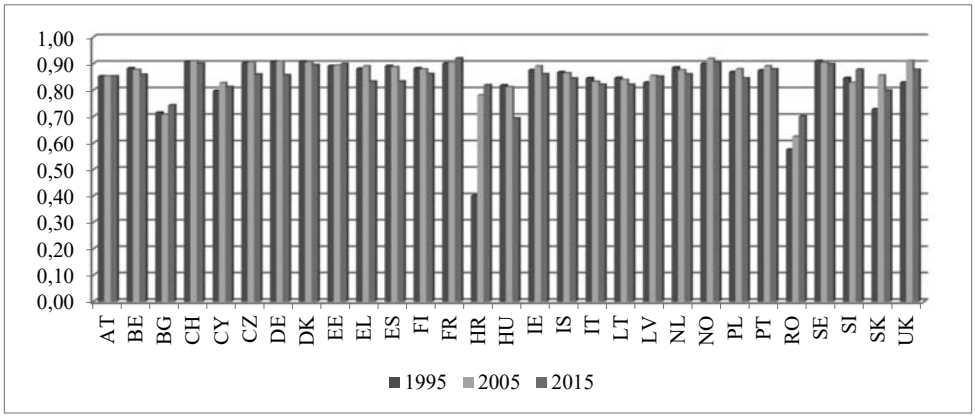


Figure 2. Liberal Democracy in EU and EFTA Countries

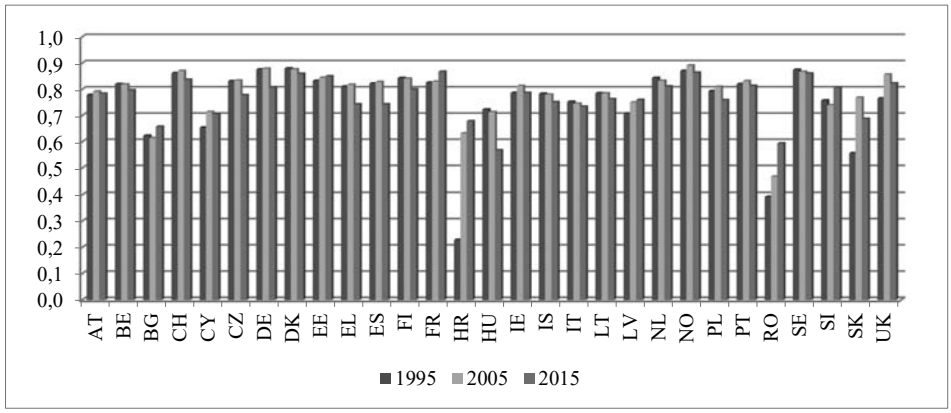


Figure 3. Participatory Democracy in EU and EFTA Countries

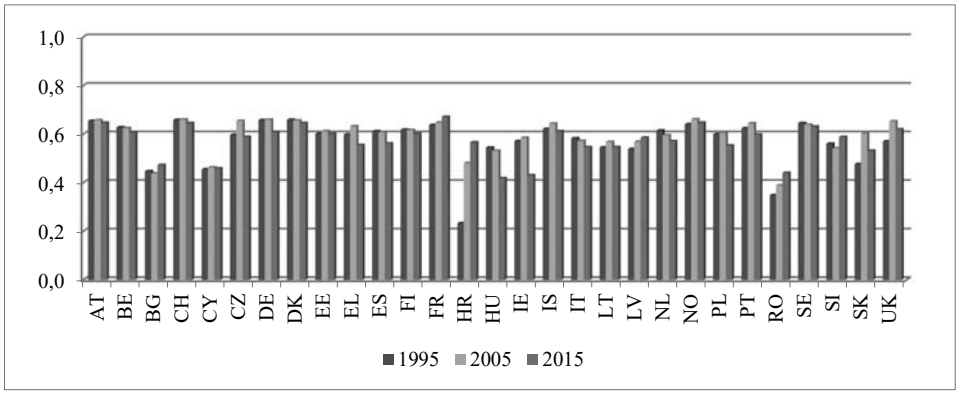


Figure 4. Deliberative Democracy in EU and EFTA Countries

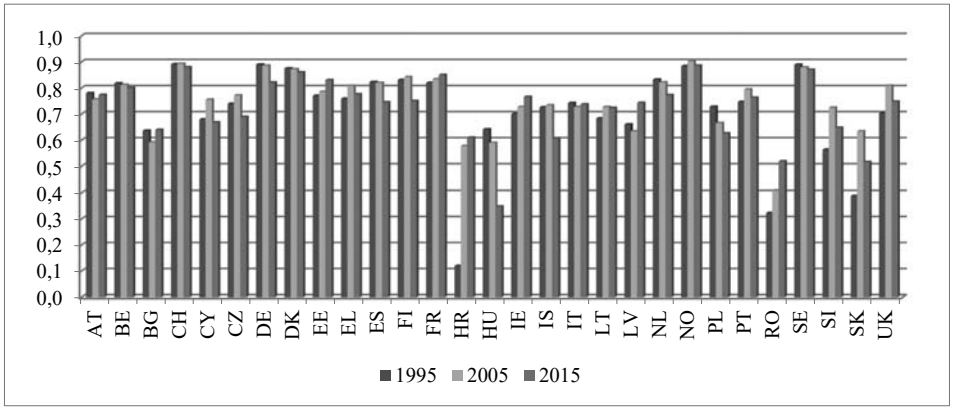
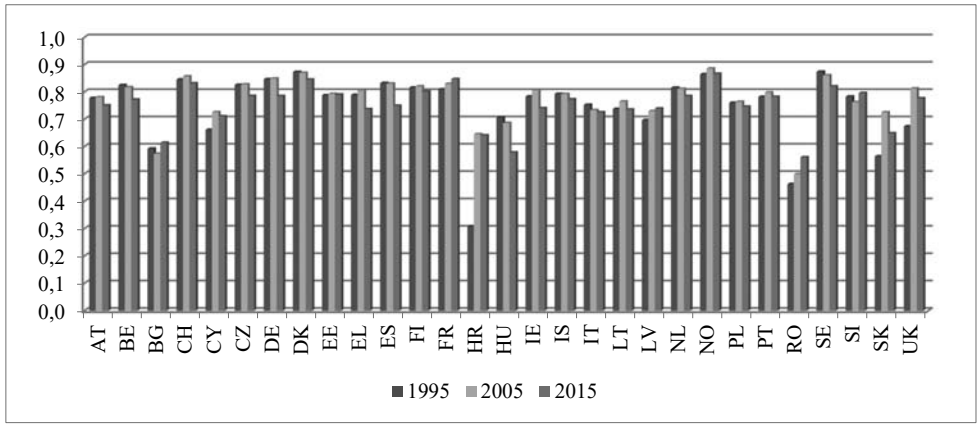
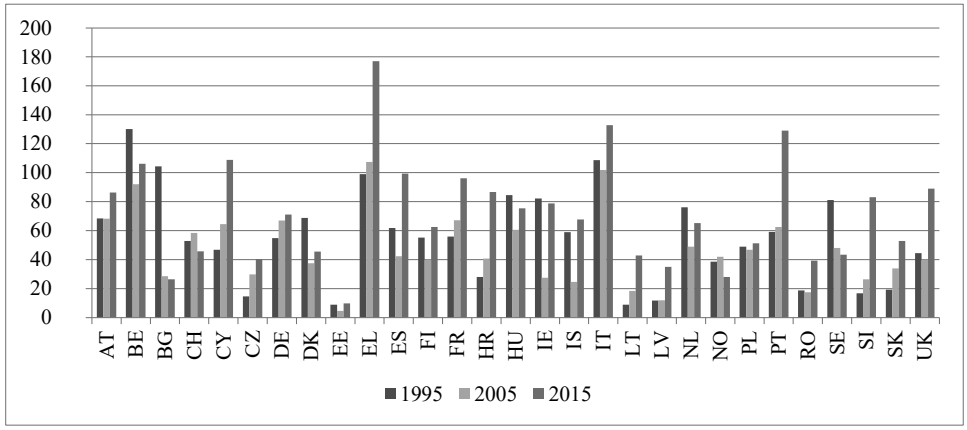


Figure 5. Egalitarian Democracy in EU and EFTA Countries



In contrast to the democracy quality, the public debt level varies importantly in particular countries and years. For illustration we present (cf. figure 6) the public debt levels in 1995, i.e., in normal economic times, in 2005, i.e., just before the last financial crisis, and in 2015, when, although the crisis has ended, its influence on public finance is perceptible, especially in countries that were not able to introduce the effective fiscal rules to make reduce the public debt level.

Figure 6. Public Debt in EU and EFTA Countries



Results

As it results from the Table 2, presenting the descriptive statistics of the independent and dependent variables, among the particular types of democracy, the electoral democracy has the highest mean, whereas the participatory democracy has the lowest one, that suggests that the EU and EFTA countries have better achievements in the representative (indirect) democracy than in the participatory (direct) one.

Table 3. Descriptive Statistics: Democracy' Indices and Public Debt, 1990–2015

Variable	Mean	SD	Min.	Max.
Independent Variables				
Electoral	.854	.076	.393	.947
Liberal	.780	.106	.219	.916
Participatory	.586	.078	.207	.814
Deliberative	.748	.132	.118	.913
Egalitarian	.767	.096	.306	.890
Dependent Variable				
Public Debt	56.406	32.583	1.027	289.554

Concerning the minimal and maximal values, among the analyzed countries, on the one hand, the lowest level of the electoral democracy and of the liberal democracy was in HR (1994), the highest one in UK (2012), regarding the participatory democracy the lowest one was in RO (1990), the highest one was in PT (2009), regarding the deliberative democracy the lowest was in HR (1994), the highest one was in CH (2011), regarding the egalitarian democracy the lowest one was in Romania (1990), the highest one was in DE (2012). On the other hand, the public debt was the lowest in RO (1990) and the highest one in BG (1993).

To test the hypothesis on the impact of the democracy's indices on the public debt we have constructed the linear regression models. In the table 4, presenting the results, the statistically significant results are bold. The analysis of the significance of the structural parameters of the models was aimed at determining which variables significantly differ from zero, and thus significantly affect the dependent variable. Next, four null hypothesis were tested to check the assumptions of the classical ordinary least squares theory (OLS).

Table 4. Impact of Democracy's Indices on the Public Debt in EU and EFTA Countries, 1990–2015

	AT (€)	BE (€)	BG	CH	CY (€)	CZ	DE (€)	DK	EE (€)	EL (€)
Electoral Democracy	**-1141.48 * (-2.053)**	**4172.02 ** (2.224)**	**-5430.14 ** (-2.353)**	**2308.70 *** (4.271)**	-707.18 (-.913)	533.63 (.654)	-711.74 (-.404)	-3798.56 (-.994)	**613.48 *** (3.528)**	103.99 (.065)
Liberal Democracy	**683.23 *** (3.846)**	**-5085.69 *** (5.360)**	-720.95 (-.378)	**743.59 ** (2.442)**	574.40 (1.269)	-436.3 (-.853)	**-2531.41 *** (-2.937)**	2451.67 (.687)	-200.02 (-1.134)	491.05 (.456)
Participatory Democracy	**192.96 ** (2.169)**	1479.60 (1.086)	-574.43 (-.315)	-194.96 (-1.060)	-364.20 (-1.065)	**363.22 *** (7.199)**	3570.01 (1.469)	2193.61 (.573)	**-61.18* (-1.766)**	165.17 (.838)
Deliberative Democracy	**178.62 *** (3.203)**	-356.94 (-.239)	**2511.69 *** (3.122)**	**-3177.40 *** (-5.991)**	**-591.26 *** (-3.984)**	-100.48 (-1.649)	**-1539.01 *** (-5.667)**	-108.08 (-.144)	15.49 (.475)	**887.20 *** (3.914)**
Egalitarian Democracy	-181.51 (-.713)	210.75 (.693)	3214.49 (1.075)	283.49 (1.097)	821.91 (1.656)	-509.50 (-.985)	**2148.80 *** (4.666)**	-1012.17 (-.435)	-182.35 (-1.663)	**-2094.65 * (-1,997)**
R^2	.8242	.7720	.6890	.9117	.8289	.8357	.8371	.1352	.6753	.8788
H0: heteroscedasticity does not occur	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected
H0: linearity of the model	Not-rejected	Not-rejected	Not-rejected	Rejected	Not-rejected	Rejected	Rejected	Not-rejected	Not-rejected	Rejected
H0: normal distribution	Not-rejected	Not-rejected	Rejected	Not-rejected	Not-rejected	Rejected	Not-rejected	Not-rejected	Not-rejected	Rejected
H0: autocorrelation of the first order does not occur	Rejected	Not-rejected	Not-rejected	Rejected	Rejected	Not-rejected	Not-rejected	Rejected	Not-rejected	Not-rejected
H0: arch effect does not occur	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Rejected	Not-rejected	Rejected	Not-rejected	Not-rejected
N	26	26	23	22	26	23	26	25	21	26

*t-statistics in parentheses *p < .05; **p < .01; ***p < .001.*

Table 4. Impact of Democracy Indices on the Public Debt in EU and EFTA Countries, 1990–2015 (Continuation)

	ES (€)	FI (€)	FR (€)	HR	HU	IE (€)	IS	IT (€)	LT (€)	LV (€)
Electoral Democracy	**2864.31 *** (3.041)**	-230.82 (-..121)	**-1909.37 ** (-2.417)**	-216.27 (-1.024)	**-2264.91 * (-1.866)**	**5980.11 *** (3.043)**	3697.47 (.783)	-2916.86 (-1.442)	-1479.44 (-1.222)	**-355.92 ** (-2.331)**
Liberal Democracy	-443.49 (-1.207)	-232.60 (-.243)	**1212.53 *** (3.206)**	244.03 (.902)	-653.93 (-.865)	**-2657.02 ** (-2.329)**	-5196.32 (-1.303)	1302.24 (1.536)	868.85 (.725)	99.48 (.630)
Participatory Democracy	-1386.95 (-.925)	963.93 (.535)	-13.71 (-.041)	**432.71 ** (2.517)**	**1394.05 * (1.896)**	398.88 (1.166)	-190.59 (-.653)	-723.70 (-1.420)	754.01 (1.468)	**547.44 * (1.932)**

Deliberative Democracy	-234.24 (-1.005)	-285.51 (-1.428)	-101.63 (-0.424)	86.37 (1.290)	185.31 (1.125)	**538.83 * (1.813)**	-117.49 (-.355)	1.77 (.007)	-171.55 (-1.038)	**112.07 ** (2.730)**
Egalitarian Democracy	**-870.27 * (-1.757)**	85.99 (.228)	**597.61 *** (3.545)**	**-457.38 *** (-3.363)**	1215.42 (1.707)	**-3081.35 *** (-3.516)**	**3042.49 *** (3.053)**	**2205.14 ** (2.410)**	-296.91 (-.836)	-158.24 (-.473)
R^2	.7034	.4517	.8578	.9117	.5134	.7307	.6494	.2949	.3808	.8838
H0: heteroscedasticity does not occur	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected
H0: linearity of the model	Rejected	Rejected	Rejected	Rejected	Not-rejected	Rejected	Rejected	Rejected	Rejected	Rejected
H0: normal distribution	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected
H0: autocorrelation of the first order does not occur	Rejected	Rejected	Rejected	Not-rejected	Rejected	Rejected	Rejected	Rejected	Rejected	Rejected
H0: arch effect does not occur	Rejected	Rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected
N	26	26	26	22	24	26	26	26	22	22

*t-statistics in parentheses *p < .05; **p < .01; ***p < .001.*

Table 4. Impact of Democracy Indices on the Public Debt in EU and EFTA Countries, 1990–2015 (Continuation)

	NL (€)	NO	PL	PT (€)	RO	SE	SI (€)	SK (€)	UK
Electoral Democracy	**3836.83 *** (4.191)**	-4836.74 (-.606)	1007.80 (.734)	**8679.59 ** (2.604)**	**-708.15 ** (-2.594)**	2689.42 (.891)	**1774.59 * (1.769)**	-341.78 (-.483)	-342.75 (-.2746)
Liberal Democracy	-878.00 (-1.217)	-90.86 (-.030)	**-713.51 * (-1.749)**	-2363.07 (-1.443)	-37.24 (-.384)	-3056.45 (-1.501)	21.13 (.043)	244.60 (.765)	**1926.86 ** (2.176)**
Participatory Democracy	-289.59 (-1.455)	-597.98 (-.308)	-63.68 (-.131)	-5.71 (-.050)	182.84 (1.556)	**-1731.38 * (-1.980)**	-17.52 (-.031)	**-546.81 ** (-2.136)**	-797.42 (-1.598)
Deliberative Democracy	357.03 (1.213)	7532.24 (1.183)	173.42 (1.642)	**899.81 *** (3.710)**	32.24 (.354)	-1093.86 (-1.700)	**175.27 * (1.833)**	8.92 (.080)	**-541.49 *** (-3.804)**

Egalitarian Democracy	**-2253.53 *** (-4.266)**	-1402.12 (-.126)	-432.62 (-.436)	**-6352.14 *** (-3.497)**	**985.53 ** (2.393)**	**1687.22 *** (4.417)**	**-1825.61 *** (-3.651)**	**453.97 ** (2.215)**	-148.58 (-.576)
R^2	.7928	.1663	.3667	.6895	.7341	.6723	.7614	.5559	.6727
H0: heteroscedasticity does not occur	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected
H0: linearity of the model	Not-rejected	Not-rejected	Rejected	Rejected	Not-rejected	Rejected	Not-rejected	Rejected	Rejected
H0: normal distribution	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Not-rejected	Rejected	Not-rejected	Not-rejected
H0: autocorrelation of the first order does not occur	Not-rejected	Rejected	Rejected	Rejected	Rejected	Rejected	Rejected	Not-rejected	Rejected
H0: arch effect does not occur	Not-rejected	Rejected	Rejected	Rejected	Not-rejected	Rejected	Not-rejected	Not-rejected	Not-rejected
N	26	26	26	26	26	25	23	22	26

*t-statistics in parentheses *p < .05; **p < .01; ***p < .001.*

Discussion of the results

Discussing the analysis of the linear regression models, first, let's note the average value of the coefficient of determination (R^2) that assesses the degree of explanation of the variance of the model's explanatory variable (the public debt variable) in 29 countries is 0.6552. It means that 65.52% of the total variance of the debt variable in the 29 examined countries was explained by the democracy variables. However, there are some countries (AT, CH, CY, CZ, DE, EL, FR, HR, LV) where the results are even more satisfying, as R^2 is above 0.8.

Second, analyzing the significance of the individual democracy's parameters explaining the variance of public debt level, we observe that the parameters have the positive or the negative sign. The positive sign suggests that with the increase of the democracy quality the public debt increases and with the decrease of the democracy quality the public debt decreases, that is coherent with the democratic failure theory. In turn, the negative sign means that with the increase of the democracy quality the public debt decreases and with the decrease of the democracy quality the public debt increases. As it results from table 5, the study revealed twice more positively statistically significant relationships than the negative ones.

Table 5. The EU and EFTA Countries with Statistically Significant Positive and Negative Relationship between Public Debt and Democracy's Indices

Democracy Indices	Positive relationship	Negative relationship
Electoral	7 countries: BE, CH, EE, ES, IE, SI, NL	6 countries: AT, BG, FR, HU, LV, RO.
Liberal	4 countries: AT, CH, FR, UK	4 countries: BE, DE, IE, PL
Participatory	5 countries: AT, CZ, HR, HU, LV	3 countries: EE, SE, SK
Deliberative	9 countries: AT, BG, EL, IE, LV, SI, PT, UK	3 countries: CH, CY, DE
Egalitarian	7 countries: DE, FR, IS, IT, RO, SE, SK	7 countries : EL, ES, HR, IE, NL, PT, SI
Total	**39**	**20**

Discussing the results of testing the null hypothesis, first let's note that in any country in the analyzed time frame there was no ground to reject the hypothesis about the non-existence of heteroscedasticity of models, what means that the variance of the random component is homogenous (there are no outliers), the random component is homoscedastic and meets the assumptions of the classical ordinary least squares theory (OLS).

Second, in the analyzed period, the null hypothesis concerning linearity of the model based on squares of explanatory variables was rejected at the significance level of 5% (0.05) in favor of non-linearity in 18 out of 29 countries (in 62.1% of cases) what can be argued by the high dynamics of phenomena in particular countries (changes in the public deficit, type of economy, fiscal and monetary policies, etc.). On the other hand, the use of the linear analytical form of the model, which is proposed by OLS, may be a cause of its weakness for use on real data.

Third, in the case of testing the normal distribution, only in 4 countries (in 2 countries from the Eurozone and 2 from outside the zone), the null hypothesis of the normality of the random component was rejected, what is consistent with the assumptions of the OLS.

Fourth, when studying the occurrence of the autocorrelation of the random component of the first order, the relationship between long-term observations (in our study for one year) was checked. In the case of 19 countries (i.e., in 65.5% of countries, of which 11 from the Eurozone), the hypothesis of the lack of autocorrelation was rejected, which means that in these states there is a connection between observations about one year away. This result is logically consistent as the political and financial situation in a particular time is not shaped each year anew but partially results from the previous year.

Fifth, the heterogeneity of the residual variance can result from many reasons. One of them is the emergence of a sub-period in the examined period with a clearly increased variability of the process, so the causes appearing in the model may not accurately describe this variability. Such a variation of the residual process can be described by an additional equation called the model or the effect of autoregressive conditional heteroscedasticity (ARCH). The obtained results indicate that in 8 countries (including 3 from the Eurozone), the hypothesis that the ARCH effect was rejected. This means that there is the autoregressive variability of conditional variance and there is a need to estimate parameters of the model using a method other than classic OLS (e.g., weighted ordinary least squares). The future research may also be extended to the study of the autocorrelation of higher order and the study of the parameter stability and the order of model integration.

Conclusion

The study confirmed that there is a relation between the democracy quality and the public debt and, however not always, not in case of every democracy indices, and not in every EU and EFTA state. These results lead to the following final observations related to the public choice theory, where it transmutes into the democratic failure theory.

First, there are countries where the change of the democracy quality is related to the change of the public debt level but also there are countries where these relationships do not appear that may suggest that in these cases the theory of democratic failure may not apply. The other explanation may be that the nature itself and the existence of the democratic system influences on the public debt accumulation, however, the increase or the decrease of democracy level not necessarily must be statistically significant related to the change of public debt level.

Second, if our research seems to confirm the democratic failure theory in cases of countries where, in the regression model at least 1 out of 5 democracy indices has statistically significant results with the positive sign, it is not the cases of has statistically significant results with the negative sign. As in the second case, the research provide evidences that the democratic systems are not doomed to be harmful to public finance, as the fiscal illusion theory may suggest, as in particular situations the public debt may decrease with the increase of democracy.

In consequence, the democratic system is capable to ensure the stability and sustainability of public finance, as the public debt level depends not only from the democratic institutions and mechanism but also on the responsible attitude of the political decision-makers (government and parliament) for the public finance, and the mechanisms of horizontal, vertical, and societal accountability, that in the context of the public debt takes form of the financial accountability.

The scholarship, contrary to the existing literature, indicates the concrete European countries, where the financial accountability effectively is shaped by the characteristics of the democratic system, indicating the components thereof that have the special role in that. The adopted research design can be applied to the other continents, also taking into consideration the non-democratic countries.

Furthermore, the determination of the concrete factors shaping the financial accountability requires the particular countries' context analysis. However, as the achieved results refer to the particular period of time, and not only the current countries' situation, thus the profound explanation of the achieved results require the further econometric and even machine learning methods. For this deeper analysis of the democracy variables, the V-Dem data of the lower level of aggregation (ca. 350 variables) can be used. That constitutes the most interesting limitation of the study being simultaneously the most challenging task for the future research of our study, as it should enable to indicate the ways of using the democratic institutions and mechanism to shape the financial accountability of the political decision-makers towards citizens (voters) for sound public financial management that should be based on the democratic values.

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Agricultural tax incentives to stimulate economic investment in Poland

Abstract: To induce a taxpayer to act in a manner consistent with the objectives of the tax policy of the state, it is necessary to apply appropriate tax instruments, which are measures for the implementation of the incentive function of agricultural tax. These primarily include tax exemptions and reliefs. The subject of this study includes issues related to the use of tax instruments to stimulate the economic investments of agricultural taxpayers. The author's research intention is to demonstrate the truthfulness of the thesis that the effectiveness of these incentives is not optimal and can be increased by eliminating legal measures not adapted to the needs of fiscal stimulation. To achieve this objective, it is necessary to determine in the first place what is characteristic of each preference aimed at increasing economic investment in the farm. On this basis, in the second place, further groups of stimuli may be distinguished following the analysis of their features, both common and separate. Thanks to this, the disadvantages of the legal provisions applicable to stimulation preferences in the strict and largo sense are presented in separate chapters of this study.
Keywords: agricultural tax, relief, exemption, stimulation, incentive.

Preliminary remarks

Agriculture is an important branch of the national economy in Poland. This thesis is not only valid[1] but has historical justification. During the period of Poland's membership in the camp of socialist countries and its conduct of a planned economy, tax instruments were used, treating the state and cooperative economic units in a privileged way in comparison to other entities.[2]. In contrast, private operators were

1 In Poland, the share of agriculture in GDP creation is 3%, and in employment in the agri-food sector about 10%. By contrast the share of agriculture in the creation of GDP and employment in economically highly developed countries decreased to 1.4% [Instytut Ekonomiki Rolnictwa i Gospodarki Żywnościowej 2019, p. 12; Miniszewski 2021, p. 11].

2 The basis of the social and economic system of the People's Republic of Poland was the socialist economic system, based on socialised means of production and socialist production relations. See Article 11 (1) of The Constitution of The Polish People's Republic adopted by the Legislative Sejm

subjected to de facto discrimination, which was contrary to the then constitutional standard[3]. Such a practice was intended to encourage them to participate in the collectivisation of agriculture [Luszniewicz 2002]. Despite the application of systemic tax inequality[4], Polish agriculture was unique among the countries of the Soviet bloc[5]. Individual farms were and are still numerous, which creates social and economic implications[6].

The Polish Act on Agricultural Tax was adopted in 1984[7]. It is undoubtedly an act of socialist tax law. Poland's systemic transformation consisted, inter alia, in replacing a centrally managed planned economy with a dominant role of state ownership with rules typical of a capitalist market economy based on private property[8]. It was also important to establish the principle of equality of entrepreneurs[9] and freedom to conduct business[10]. Despite the change in the economic, social and political system, the regulations governing the agricultural tax did not have to be repealed in their entirety but only partially modified[11]. Firstly, it confirms the thesis that farm taxation was not a typical solution, adapting Soviet standards to the conditions of individual socialist countries. Secondly, on this basis, the conclusion can be drawn that the incentives resulting from the provisions on agricultural tax are rooted in the tax law of the Polish

on July 22, 1952, Dz.U. 1952 no. 33 item 232, as amended, hereinafter referred to as the Constitution of the PPR.

3 Under Article 15 of the Constitution of the PPR, the state was to take care of individual farms, provide support and assistance to collective farms, develop and strengthen state farms.

4 The principle of tax inequality was typical of socialist tax law. It took into account the concept of the class nature of society [Brzeziński, Jezierski 1987].

5 Only in Poland and Yugoslavia was there no widespread collectivisation of private farms [Poczta 2013, p.25].

6 In 2020, out of a total population of 38,265,000 in Poland, as many as 15,360,000 people lived in rural areas. The registered agricultural producers are 2.423.423. The dominant part are natural persons in the number of 2.406.859. On the other hand, legal persons are 14,012, organisational entities without legal personality- 1.910, and the least are civil law partnerships – only 575. See Statistical Yearbook of Agriculture, Statistics Poland, [online], stat.gov.pl, access as of 11 May 2022. On the total number of 1.309.924 farms, most of them -848.661are geared towards selling their production. See Powszechny Spis Rolny 2020 – Charakterystyka gospodarstw rolnych w 2020 r. – część tabelaryczna. Tablice (część 1) w formacie XLSX, [online], stat.gov.pl, access as of 11 May 2022.

7 Act of 15 November 1984 on Agricultural Tax, consolidated text, Journal of Laws of 2020, item 333, amended, hereinafter referred to as the AAT.

8 In accordance with Article 22 of The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, amended), hereinafter referred to as the Constitution RP, a social market economy is based, inter alia, on private ownership.

9 See Article 32 of the Constitution RP.

10 See Article 22 of the Constitution RP.

11 Particularly important was the amendment to the Act, which, which extended the scope of the agricultural tax to non-farm agricultural land from 1 January 2003. Until now, these had been subject to real estate tax.

People's Republic. Thirdly, the legal instruments that trigger the stimulus are universal in the sense that they are used in different economic and political systems.

This study aims to identify which preferences are of a nature to stimulate taxpayers of agricultural tax to economic activity and what are the barriers to their application. The initial thesis is adopted that the effectiveness of these incentives is not optimal and can be increased by eliminating legal solutions that are not appropriate to the needs of tax stimulation. The author's inference aimed at demonstrating the truthfulness of this statement required, above all, the use of dogmatic and economic methods of legal analysis. The historical method was less important, as it was used to describe the origins and essence of the Polish agricultural tax. In turn, the method of legal semiotics made it possible to draw additional conclusions from the analysis of the relatively limited number of designations used in the nomenclature of tax preferences.

The essence of tax preferences used to motivate taxpayers

Undoubtedly, taxes should not be viewed solely in fiscal categories. They are also used in the processes of redistributing Gross Domestic Product, stimulation of taxpayers to induce economic, social and political outcomes desired by the state and units of local self-government, as well as their control and collection of tax information[12]. So many functions are carried out through taxes. However, this does not mean that they are all equally important. The basic function is of a fiscal nature[13]. From the point of view of designing tax incentives, it is important that they do not cause distortions in the management of public funds. Tax preferences tend to harm the fiscal function, as they reduce budgetary revenues. A body governed by public law waives part of its budget revenue and expects other non-fiscal benefits in return. Tax incentives should be applied in such a way as to maximise their economic, social and political results. This is required by the rules of managing public funds, whose limited resources should not be wasted. It follows that the preferences in the agricultural tax should be regulated in such a way that they can be used to fulfil all non-fiscal functions in the most coordinated way. It is not reasonable to perceive them only in a context limited to tax stimulation.

12 For this reason, the doctrine of financial law distinguishes four tax functions: fiscal, stimulating, redistributive, information and control [Wójtowicz 2021, pp.27–28]. The functions of the agricultural tax were examined by Ryta Dziemianowicz and Renata Przygodzka [Dziemianowicz, Przygodzka 2011].

13 Taxes are public impost, which are the main instruments for providing money into the budget.

Tax preferences are mainly exemptions from taxation and reliefs[14]. In general tax laws, they are jointly defined for the purposes of applying the Tax Ordinance[15]. The definition of this tax credit in a broad sense does not apply to the provisions of the agricultural tax which are specific in nature. The statutory catalogue of preferences for this tax is contained in Chapter 4 entitled 'Exemptions and Reliefs'. It is interesting to note that this part of the legal act does not contain solutions common to both groups of instruments. This leads to a casuistic, normatively extensive description of individual reliefs and exemptions. The Polish Constitution allows the use of subjective preferences only on the basis of statutory provisions[16]. For this reason, their specification in the Act on Agricultural Tax is of a closed nature. On the other hand, objective preferences can be introduced by both statutory and executive tax regulations[17]. This means that in Poland, municipal councils have the opportunity to create incentives to stimulate investments in agriculture. This issue falls within the content of the tax authority, which is constitutionally guaranteed to be exercised by units of local self-government[18].

Agricultural tax preferences can be divided into two categories according to whether their primary objective is fiscal stimulation or adjustment of the tax burden to reduce the capacity of the taxpayer to pay. The group of stimulus reliefs and exemptions is used primarily to persuade the taxpayer to maintain the behaviour that is desirable for a public law entity. On the other hand, the compensatory preferences[19] have a different application as they are not aimed at fiscal stimulation. In their case, the reduction of the tax burden has a redistributive reason. This solution refers to social justice and the principle of tax convenience. A characteristic feature of stimulus preferences is the limited temporal scope of their application. By contrast, compensatory exemptions and reliefs are applied in principle indefinitely. It should be emphasized that the terms 'stimulative' and 'compensatory' do not appear in the text of any

14 The delimitation of the meaningful scope of tax reliefs and exemptions is a research dilemma for representatives of the Polish tax law doctrine [Durczyńska 2016, pp. 436–455]. This issue was the subject of research conducted by W. Nykiel, who perceives reliefs and exemptions as elements of the tax structure [Nykiel 2002, pp. 14–19, 22–30]. However, it should be emphasised that they are primarily tax policy measures. They are therefore not a technical element of the tax. On the other hand, W. Morawski aptly points out the lack of legitimacy of including other tax institutions as tax reliefs [Morawski 2009, pp. 249–264].

15 See Article 3 point 6 of the Act of 29 August 1997 – Tax Ordinance Act, consolidated text, Journal of Laws of 2020 item 1325, amended, hereinafter referred to as the T.O.A.

16 See Article 217 of the Constitution RP.

17 Under Article 94 of the Constitution RP, these resolutions are local legal enactments and may be introduced on the basis of and within the limits of the authorizations specified by statute.

18 See Article 168 of the Constitution RP. Agricultural tax and other local self-government taxes occur only in the budget of the municipality. This means that the tax authority in this respect is vested in the municipal bodies.

19 Sometimes they are called corrective exemptions [Burzec 2021, pp. 431–432].

legal act. For this reason, they are the concepts of lawyer's language, not the legal language used to make regulations. Therefore, they did not require the determination of their meaning through statutory definitions. However, from a doctrinal point of view, it is reasonable to define them, because thanks to this, it is possible to determine the presence of functionally and structurally different tax incentives in the agricultural tax, as well as to indicate the characteristics of both categories of preferences.

Incentives can take the form of both tax exemptions and relief. In this case, therefore, there is an accumulation of formally separate tax policy instruments. This solution is beneficial for the taxpayer, as it is longer covered by preferences that remove the burden of agricultural tax or reduce the amount of tax obligation. The same circumstances are prerequisites for both the exemption and the relief. Therefore, the taxpayer does not have to incur further expenses to acquire the right to apply another preference. It should be emphasised that, in a typical situation, the application of the exemption renders the use of the relief pointless. It is no coincidence that the Agricultural Tax Act regulates exemptions in the first place. They may result in agricultural land not being taxed in general terms. Conversely, the reliefs are applied by way of deduction from the agricultural tax. Therefore, they primarily serve to reduce the amount paid by the taxpayer in the performance of the tax obligation. It follows that stimulus relief can only be used consecutively to the exemptions available for the same legal title. The identity of the premises and purposes of the use of preferences of different structures justifies their classification into the same group of tax incentives and the application of the same nomenclature to them[20]. They can be described as stimulation preferences in the strict sense. In contrast, the second group consists of exemptions and reliefs used for incentive purposes, which have separate premises, constructions and purposes of use. This justifies their assignment to the group of stimulation preferences of largo sense. For obvious reasons, these incentives must be identified by their names and not by a collective nomenclature.

Controversies over the regulation of stimulus preferences in the strict sense

To stimulate economic activity carried out in the field of agriculture, preferences related to the creation of a farm, increasing its area, merging agricultural land or the management of useless land are used[21]. From a formal point of view, they are differentiated into separate exemptions and reliefs. In reality, however, they are functionally linked. Their use is sequential, which is a solution that strengthens the effectiveness of these stimuli. Reliefs in respect of the same titles shall apply after exemptions from

20 For example, P. Smoleń uses the term 'exemption with stimulus objectives' [Smoleń 2002, pp. 299–300]. The redundancy of this name takes the form of the term 'stimulus exemption'.

21 Compare Article 12 (1) and Article 12 (6) of the A.A.T.

the taxation. They reduce the amount of tax in the first year from 75%, and in the second year by half[22].

It is controversial that area limits have been introduced on the area of land eligible for the exemptions for the acquisition or extension of a farm. These preferences are aimed at taxpayers farming up to 100 ha of land[23]. An area limitation is not economically justified, as increasing the area of the agricultural farm contributes to reducing the efficiency, specialisation and innovation of agricultural production. Once the statutory area ceiling is reached, the taxpayer ceases to react to the incentive linked to the exemption, which ceases to be an instrument of the incentive function of the agricultural tax. Undoubtedly, the analysed preference is needed to achieve the objectives of agricultural transformation and to enable Polish farmers to compete on the common EU market. According to a study carried out by W. Poczta, in 2003, the average farm in Poland occupied an area of 6.6 ha, which in 2010 increased to 9.6 ha [Poczta 2013, p. 23]. In contrast, the area of such a farm in the United Kingdom increased from 57.4 ha to 70.8 ha, in the Czech Republic from 79.3 ha to 152.4 ha, and in Denmark from 54.7 ha to 59.7 ha.

The application of the area limit of the farm, which is a prerequisite for the incentive exemption, is justified by important social considerations. The Constitution RP protects family farms, which are the basis of Poland's agricultural system[24]. The vast majority of them have an area not exceeding the statutory ceiling. Family farms are run jointly by the farmer and his family. Undoubtedly, their privilege in constitutional terms is also the pro-family solution. The family is a basic social cell, protected by the state, which also takes care of it[25]. The Constitutional Standard is directly applicable and has a higher legal force than the Tax Act[26]. From this point of view, it should be considered that it is controversial to deprive a farmer of the right to exemption when he acquires land to establish or enlarge a farm from his spouse and other family members[27]. As a result of such a transaction, family farms may be created.

It is also worth noting that in the European Union agricultural production is regulated under the Common Agricultural Policy[28]. Maximising the surplus of agricultural products is not desirable. The market mechanism and the operation of the law of supply and demand may result in price decreases that translate into a reduction in farmers' incomes. For this reason, EU law stimulates the reduction of the area culti-

22 See Article 12 (6) of the A.A.T.
23 See Article 12 (4) of the A.A.T.
24 See Article 23 of the Constitution RP.
25 See Article 18 of the Constitution RP.
26 See Article 8 of the Constitution RP.
27 See Article 12 (5) of the A.A.T.
28 Common agricultural policy [online], https://www.consilium.europa.eu/en/policies/cap-introduction/, access as of 11 May 2022.

vated[29], for example by changing their use for forest land, meadows and pastures. The Set-Aside Land Option scheme has been applied in European Union since the late 1980s as part of the Common Agricultural Policy[30]. It finds justification in the need to reduce agricultural surpluses and strive to balance prices on the world food market [Sotherton 1998], [Firbank 2003].

There is an inconsistency between the incentives triggered by the agricultural tax legislation and Union law. The release of the land of the farm resulting from the sustainable management of the wasteland[31] has counterproductive outcomes to the expected effects of the Set-Aside Land Option. It is worth noting that this tax incentive is not strong, as it does not cover all agricultural land created by this development. This is due to the existence of two maximum area limits. The first is a 20 per cent norm, which is applied to the area of agricultural land created from the development of wasteland. This means that in practice only a fifth of the land area can be covered by the stimulus preference. The second limit is set at 10 ha of farmland. This results in the fact that the larger the area of developed wasteland and thus the larger the area of the agricultural holding, the smaller the financial benefits for the taxpayer. Therefore, it should be emphasised that the analysed preference is constructed on the basis of the regressivity of its motivational impact.

Controversies over the regulation of stimulus preferences in the largo sense

A separate instrument to stimulate investment in the farm is investment relief[32]. It is not functionally linked to the prior application of any exemption from agricultural tax. This incentive aims to stimulate investment in utility buildings and equipment used in agricultural activities. The tax reduction is granted both for the construction and renovation of livestock or environmental buildings. Fiscal stimulation is also aimed at improving farm access to water resources. In this case, the investments shall take the form of the purchase and installation of rainwater treatment plants, drainage facilities or water supplies for the farm. Increasing the use of renewa-

29 The common agricultural policy – instruments and reforms: Fact Sheets on the European Union [online], https://www.europarl.europa.eu/factsheets/en/sheet/107/instrumenty-wpr-i-ich-reformy, access as of 11 May 2022.

30 Set-aside field should not be confused with fallows and abandoned crop fields [Orłowski, Nowak, 2004].

31 According to geodetic data, the wasteland in Poland covered 458.614 ha in 2021, and 459.800 ha in 2020. It follows from these data that there is a weak trend in the development of of this land. See Statistical Yearbook of Agriculture [online], https://stat.gov.pl/obszary-tematyczne/roczniki-statystyczne/roczniki-statystyczne/rocznik-statystyczny-rolnictwa-2021,6,15.html, access as of 11 May 2022.

32 See Article 13 of the A.A.T.

ble energy sources in agricultural production activities is also an important objective of applying the reduction. Expenditure on the purchase and installation of equipment powered by wind, biogas, sun, and falling water is eligible for the agricultural tax reduction. It is controversial to omit from this statutory catalogue other unconventional energy sources that can be produced on the farm. Biomass and biofuels are eloquent examples. Stimulating their economic use through investment relief would have a positive impact on reducing the costs of the taxpayer's agricultural activity, increasing its profitability, environmental protection and energy security of the state.

The incurrence of investment expenses is a necessary condition for the application of investment relief[33]. The taxpayer should prove the fulfilment of this condition and document the amount and number of expenses incurred. It is worth noting that the act restricts evidence[34]. It requires the taking of evidence from an account, i.e. from a private document[35]. This leads to an excessive formalization of the proceedings conducted by the tax authority regarding the granting of investment relief. It also undermines the effectiveness of this stimulus. The taxpayer should attach to the request to initiate proceedings a list of expenses incurred and receipts documenting such an event. The lack of an attachment prevents the substantive consideration of the tax case. Then the tax authority is obliged to notify the applicant of this formal defect and call him to remove it within 7 days[36]. Failure to comply with the summons has negative consequences for the taxpayer, as its petition does not cause any legal implications. In this situation, the tax authority issues a ruling on leaving an application form without examination[37].

The essence of investment is the incurring of monetary or non-monetary expenditures for the creation or replacement of fixed assets of an agricultural taxpayer. The components of these assets are tangible assets and intangible fixed assets[38]. The fact that the tax law omits the possibility of deducting expenses incurred by the taxpayer for the purchase of computer software, petitioners and other property rights on intangible assets as part of the application of the investment relief raises doubts. The assessment of the investment effects should not be limited to establishing that they have resulted in the acquisition or production of a tangible asset. It is also important for the taxpayer to use this item economically for farming. Devices are useless when they cannot be put into operation with intangible fixed assets. The economic analysis of tax law justifies the view of a comprehensive, functional perception of the components of fixed assets used in agricultural activity.

33 See Article 13 (1) of the A.A.T.
34 See Article 13 (2) of the A.A.T.
35 This excludes the use of other evidence, e.g. from witness testimony, hearing the party.
36 See Article 169 (1) of the T.O.A.
37 See Article 169 (4) of the T.O.A.
38 Compare Article 3 (15) and Article 3 (14) of the Act of 29 September 1994 on Accounting, consolidated text, Journal of Laws of 2021 item 217, amended.

The term 'expenses incurred' used in the Tax Act undermines the effectiveness of the investment relief and limits its use for incentive purposes. It excludes the granting of this preference before the start of the investment. Instead of pre-financing, the formula for the subsequent reimbursement of part of the money spent by the agricultural taxpayer was adopted. The investment relief may be granted only after the completion of the investment. The effectiveness of this stimulus is undermined by the ban on public funding or co-financing of investments with public funds. It would undoubtedly be broken if investment expenditure were pre-financed. From the taxpayer's point of view, the inability to finance the investment during its implementation is an obstacle to achieving a stimulating result. Acquisition or production of tangible assets requires depletion of the investor's resources or incurring additional external financing costs. It can also lead to an extended deadline for the completion of the investment process. Therefore, there is no economic and pragmatic justification for prohibiting the financing of expenditure by public funds[39].

The name of the investment relief is misleading as it suggests that it is aimed only at carrying out the investment. However, this stimulus also takes into account the economic use of the object or device. Relief for the same investment is in time. It must not be used for more than 15 years[40]. The taxpayer loses the right to the investment relief if he or she sells the building object or device and changes its use for purposes other than those covered by the tax stimulation during this period. The effects of these events are *ex nunc*. This means that the taxpayer does not have to reimburse part of the amount of the preference used before the date of the loss of the right to use it. Such regulation should be considered controversial, as public funds should be spent effectively[41]. In the case of investment relief, this principle of public finance is not implemented when the purpose of stimulation is achieved initially and not definitively.

An unlimited stimulus is more effective than a limited incentive. For this reason, the introduction of a maximum period for the application of the investment relief should be considered as praxeologically unjustified. However, from the point of view of the need to perform the fiscal function of agricultural tax, it is a regulation that deserves approval. There is also an amount limit in the Tax Act. The taxpayer may deduct only 25% of documented investment expenses from the agricultural tax[42]. The reimbursement of expenses incurred is not full or even predominant in terms

39 A positive assessment of the ban on the use of relief, when the investment was financed or co-financed by public funds, has also been formulated in the literature. This was justified by the need to remove legal doubts related to the application of the provisions on investment relief. [Pahl 2009; Bursztynowicz 2014]. However, this argument is not convincing.

40 See Article 13 (3) of the A.A.T.

41 See Article 44 (3) of the Act of 27 August 2009 on Public Finances, consolidated text, Journal of Laws of 2021 item 305, amended.

42 See Article 13 (2) of the A.A.T.

of amount. An investment relief is a form of public aid that is granted in a too small amount. The agricultural tax shall be proportionate to the specific tax rate and tax base which, in the case of a farm, is the number of equivalent hectares[43]. Typically, the amount of investment is so significant and the amount of tax obligation for a given year is so small that, the taxpayer is not able to take full advantage of the investment relief within a maximum period of 15 years.

Conclusions

Incentives used to stimulate the growth of economic investments in agricultural holdings are regulated by tax law. The shortcomings in the content of these provisions are a major factor undermining the effectiveness of the reliefs and exemptions from agricultural tax. They have further adverse consequences in the process of applying tax law. The agricultural taxpayer should be assured that the provisions governing stimulus incentives will be interpreted and applied in a predictable, uniform manner by tax authorities and administrative courts. This issue is particularly important, because tax stimulation takes place voluntarily, and is not using authoritative forms of public administration. The addressee of the incentive ceases to respond to the financial benefit when it is not certain that it will receive it for the expected amount.

The group of instruments used to stimulate economic investment on the farm is intrinsically diversified in terms of quantity and quality. It covers both exemptions from the tax and reliefs. Each of these incentives should be applied in a coordinated manner with the other fiscal stimulus instruments. A group of preferences should have features typical of the system, not a set of separate elements. An optimal tax policy must not lead to distortions in the use of incentives and requires their axiological and pragmatic harmonisation. Undoubtedly, this condition is met in the group of stimulation preferences in the strict sense. Stimulus reliefs are applied after exemptions, extending the time of tax stimulation. All these instruments are used to achieve the same social, economic and political objectives. It is worth noting that the tax act does not directly regulate the conditions for the use of incentive reliefs in the strict sense. This solution should be assessed positively. The taxpayer is sure that it will also receive a monetary advantage in the form of a relief after the conditions of applying the exemption are met. Stimulation preferences in the strict sense can be considered as a model for systemic solutions. This positive overall assessment does not preclude criticism of the specific provisions governing stimulus exemptions. The conducted research shows that there is an inconsistency between the objectives of the Polish tax policy and The Set-Aside Land Option scheme. For this reason, the exemption of land resulting from the management of wasteland is controversial. The effectiveness

43 Compare See Article 4 (1) and Article 6 (1) of the A.A.T.

of the incentive is also weakened by the area standard of the farm, which entitles to its application, and by restrictions on the acquisition of agricultural land in the context of transactions between members of the same family.

The investment relief is not correlated axiologically and praxisologically with the preferences of the strict sense. It is a separate instrument of tax stimulation. For this reason, its level of regulation is more advanced. Excessive regulation of tax law stimulus incentives is not conducive to their effectiveness. This applies in particular to the investment relief, the application of which is conditioned by numerous material and procedural prerequisites. It should be emphasized that tax law has a protective function for the taxpayer. It eliminates the freedom of action of the tax authority and binds its decisions with legal provisions. However, too casuistic regulation of the mechanism of application of the investment relief may discourage the taxpayer from reacting to the benefits resulting from it. The limitation of the possibility to obtain a monetary benefit from the completion of the investment, the prohibition of financing or co-financing the expenditure with public funds, the too narrow catalogue of building objects and devices covered by the scope of the preference and the obligation to document the outlay with receipts should be considered as disadvantages. The incentive power is also weakened by the time and amount constraints of the application of the relief and the uncertainty that the financial support received is definitive.

Summing up these considerations, it should be stated that the research thesis has been fully confirmed. The effectiveness of incentives for agricultural taxpayers to make economic investments is not optimal. The effectiveness of exemptions from the tax and reliefs can be increased by eliminating legal solutions not adapted to the needs of tax stimulation.

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