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SYSTEM OF FINANCIAL LAW
GENERAL PART

Conference Proceedings

Petr Mrkývka (ed.)

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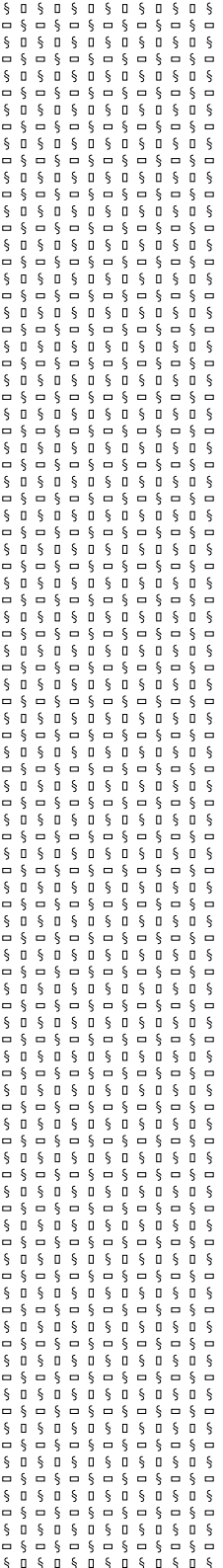

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Conference Proceedings

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Preface

The Information and Research Center of Public Finance and Tax Law of Central and Eastern European Countries is an association at the Law Faculty of the University of Bialystok, founded in 2002.

The main objectives of the Center are to gather information about scientific activities of its members, exchange information, introduce common research and conference initiatives, and to support the achievement of these goals. The Center develops exchange of information among research and university centers in CEE countries and around the world, initiates cooperation of institutions in CEE countries and cooperates with the government and non-governmental organizations. One of the crucial goals of its activity is to promote European standards in the fields of public finance and tax law in CEE countries, and to share experiences with other countries. The Center also focuses on publishing activity and the organization of workshops, seminars and conferences. The main aspect of the Center´s activity is the support of research exchange between scientific centers in Eastern and Western Europe. Among its members, the Center assembles distinguished scholars and academics specializing in public finance and tax law as well as in related fields from CEE and other countries.

So far, the Center has initiated and together with local institution organized several scientific international conferences:

- Methods and Instruments of Limiting Public Debt and Budget Deficit in Countries of Central and Eastern Europe, September 2002, Bialystok, Poland, with the University of Finance and Management in Bialystok;
- Tax and Local Fees Reforms – Polish and Selected European Countries Experiences, November 2002, Bialowieza, Poland, with the University of Bialystok;
- Problems of Public Finance and Tax Law in Central and Eastern European Countries before the Accession to the European Union, September 2003, Brno, Czech Republic, with Masaryk University;
- The Problems of Financial Law Evolution in Central and Eastern Europe within the Integration Processes, September 2004, Vilnius, Lithuania, with Mykolas Romeris University;

- Current Questions of the Efficiency of Public Finance, Financial Law and Tax Law in the Countries of Central and Eastern Europe, August 2005, Kosice, Slovakia, with Pavol Jozef Šafárik University in Košice;
- Establishing and Implementation of Financial Law in Central and Eastern European Countries, September 2006, Grodno, Belarus, with the State University in Grodno;
- The Modern Problems of Tax Law Theory, September 2007, Voronezh, Russia, with the State University in Voronezh;
- The Basic Problems of Public Finance Reforms in the 21st Century in Europe, September 2008, Paris, France, with the Polish Academy of Sciences;
- Public Finance and Financial Law in the Context of Financial Crises in the Eastern and Central Europe, September 2009, Lviv, Ukraine, with the State University of Lviv;
- Current Issues of Finance and Financial Law in Terms of Fiscal and Monetary Support of Economic Growth in The Countries of Central And Eastern Europe after 2010, September 2010, Prague, Czech Republic, with Charles University in Prague;
- Public Finances – Administrative Autonomies, September/October 2011, Gyor, Hungary, with Szechenyi Istvan University;
- Annual and Long-Term Public Finances in Central and Eastern European Countries, September 2012, Bialystok, Poland, with the University of Bialystok;
- Problems of Application of Tax Law in Central and Eastern European Countires, September 2013, Omsk, Russia, with Omsk F. M. Dostoevsky State University.

The materials from the conferences were published in a book-form after the events:

- Deficyt budżetowy i dług publiczny w wybranych krajach europejskich - The Budget Deficyt and the Public Debt in the Selected European Countries. Bialystok: Wyższa Szkoła Finansów i Zarządzania, 2003. ISBN-83-87256-5;
- Europejskie systemy opodatkowania nieruchomości - European Systems of Real Estate Taxation. Warszawa: Kancelaria Sejmu, 2003. ISBN 83-909381-6-2;
- Financování územní samosprávy ve sjednocující se Evropě - Funding of Local Government in Unifying Europe. Brno: Masarykova univerzita v Brně, 2005. ISBN 80-210-3677-X;

- The problems of the financial law evolution in Central and Eastern Europe within the integration processes. Bialystok-Vilnius: WP UwB & Talmida, 2004;
- Aktuálne otázky efektívnosti verejných financií, finančného práva a daňového práva v štátoch strednej a východnej Európy - Current Questions of the Efficiency of Public Finance, Financial Law and Tax Law in the countries of Central and Eastern Europe. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, 2005. ISBN 80-7097-604-7;
- Finansovoe pravotvorčestvo i pravoprimenenie v gosudarstvach centralnoj i vostočnoj Evropy - Establishing and Implementation of Financial Law in Central and Eastern European Countries. Grodno: Grodenskij gosudarstvennyj universitet imeni Janki Kupaly, 2006. ISBN 985-417-835-8;
- Sovremennye problemy teorii nalogovogo prava - The Modern Problems of Tax Law Theory. Voronež: Voronežskij gosudarstvennyj universitet, 2007. ISBN 978-5-9273-1340-2;
- Bialostockie Studia Prawnicze – Bialystok Legal Studies, Bialystok: Temida 2, 2009, 5. ISSN 1689-7404;
- Finanse publiczne i prawo finansowe w Europie Centralnej i Wschodniej w warunkach kryzysu finansowego - Public Finance and Financial Law in the Context od Financial Crisis in Central and Eastern Europe. Bialystok - Lwów: Temida 2, 2010. ISBN 978-83-89620-85-9;
- Aktuální otázky financí a finančního práva z hlediska fiskální a monetární podpory hospodářského růstu v zemích střední a východní Evropy po roce 2010 - Current Issues of Finance and Financial Law in Terms of Fiscal and Monetary Support of Economic Growth in The Countries of Central And Eastern Europe after 2010. Praha: Leges, 2010. ISBN 978-80-87212-57-8;
- Public Finances – Administrative Autonomies. Győr: Universitas-Győr Nonprofit Kft., 2012. ISBN 978-963-9819-87-0;
- Annual and Long Term Public Finances in Central and Eastern European Countries. Bialystok: Temida 2, 2013. ISBN: 978-83-62813-33-9;
- Problems of application of tax law in Central and Eastern European Countries. Omsk: Omsk F. M. Dostoevsky State University, 2013. ISBN 978-5-7779-1628-0.

In September 2014, the annual conference of the Center took place in Mikulov, Czech Republic. It was organized together with the Masaryk University. The conference topic was the system of financial law. Research papers that encompass the following areas were invited:

- Views on the definition of financial law as a branch of law in particular countries;
- Jurisprudence and financial law relationships to other branches of law;
- Approaches to jurisprudence systematization of financial law;
- Problems concerning constitutionalisation of financial law;
- European Union‘s impact on system of financial law;
- Atomization of financial law (diversification);
- System of didactics in financial law;
- Economic aspects of financial law.

As there were many participants with many contributions, organizers decided to publish three volumes of conference proceedings:

- System of Financial Law - General Part of Financial Law and Budget Law;
- System of Financial Law - System of Tax Law;
- System of Financial Law - Financial Markets in the System of Financial Law.

This first volume on General Part of Financial Law and Budget Law is dealing not only with the system of financial law itself, but it concerns a lot of issues connected with financial law. As it is obvious from books, articles, conference proceedings, textbooks, etc. published all over the world, there are many approaches to the system of financial law. Financial law generally includes a very broad area of law covering public finance, taxes, public budgets, the whole financial sector (banking, insurance, capital markets), currency and foreign exchange, accounting, etc. According to many experts from CEE countries, one of the most important parts of financial law is the budget law. That is why this volume of the conference proceedings is dealing with the position of the budget law in the system of financial law.

All contributions were double blind reviewed by experts in the area of financial law.

Petr Mrkývka, Michal Radvan

INTRODUCTION TO THE CONTEMPORARY ISSUES OF THE SYSTEM OF FINANCIAL KAW

Petr Mrkývka[1]

Abstract

Financial law is the most dynamically developing area of the legal orders in all the states throughout the world. It is also a set of the least stable legal norms. Financial law is a branch of law, which is not codified, i.e. not included in a single code, as it is rather based on incorporation of numerous legal norms. All these factors are very problematic for both legal science, and legal practice and didactics.

Trying to define and systemize financial law is a difficult challenge especially as for legal science in the geographical and political area of Central and Eastern Europe (Mrkývka, 2012). This work is intentionally aimed at enhancing the discussion on the construction of financial law *de lege lata* and, based on the findings and experience with foreign legal orders, it should also offer some solutions *de lege lata*.

Key words

Law; finance; public finance; tax law; Central Europe; Eastern Europe; system of law; system of financial law.

JEL Classification

K00, K19, K20, K34, K49

1 Together, We Can Go Forward

Identically to the other branches of law and to the entire legal systems, financial law is influenced by certain trends and it also draws inspiration from abroad. Sometimes it is up to the level of sovereignty of a particular

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state whether these trends are incorporated into the particular legal order voluntarily and whether they are accepted by legal theory. The abovementioned trends may, for instance, be the processes of "getting closer" to the legal order of a state that is – in that time – considered as the ideal model. All this may be influenced even by personal preference or experience of the drafter(s) of the particular laws. It may be a result of "an authoritative command" by a foreign power which the particular state follows. Finally, the goal may also be an overt attempt to achieve harmony and conformity with a particular legal order. Regardless of their relationship to the European Union, the states of the Central and Eastern Europe have in common that they have gone through the same historical and socio-political development; this have led to similar problems. Considering the fact that, over the last twenty years, all these states have adapted the market economy systems, their constitutions recognize the principles of democracy, they follow the rule of law and they are so-called open economies interested in joining the continental and global structures (organizations), it is obvious that they may find similar solutions to the problems on hand. Financial law, as regulation of public financial activities is not an exception to this rule. At many common forums aimed at the issues of financial law and public finance of the states of Central and Eastern Europe, we could hear the idea that a destruction of the single (uniform) approach to regulation of public finance would be a rollback leading to limitation of the possibilities to effectively deal with the economic crisis with the help of the tools of financial law. (Nechai, 2010: 31 et seq.) One of the arguments for keeping the uniform approach to financial law is the need to deal with the consequences of the global economic crisis in Europe, which have been strongly reflected in financial law. Germany and France played an important role in this respect, but Poland should be mentioned as well. Although Poland is not a member of the Eurozone, it does not want to remain passive in these processes. The solutions coming from Poland show that the country is getting closer to the approaches of the two abovementioned countries. This applies also to the adjustments of financial law. Though Poland knows how to protect its own interests and how to carry through the time-proven national solutions, it knows how to be an active participant in drafting the European legislation. It pushes through not only its own interests and views at the particular solution, but it also represents the approach of the states of our region. The respect for the

Polish science of financial law in the Central and Eastern Europe is not only caused by the number of the scientific research centers, but especially by their expertise, openness and quality of their work. Reviewing the projects dealt with by the Polish researches of financial law, we can identify an influence of French and German science, which is reflected in the approaches to systematization of financial law and its integrity.[2]

Central Europe has been (and is definitely going to be) always influenced by the external factors to a certain extent. These external factors also affect the process of drafting and applying the laws, and consequently also the legal science. Certain coalitions, geopolitical affiliation, cultural attachment and many other factors play an important role in this respect, too. Our experience has been repeatedly influenced by the Austrian and German law, but also by French law. Unfortunately, we may also see the ideas that some extraneous elements which do not correspond with the thousand-year old development of our continental European legal culture be embodied in the system of financial law, i.e. mainly the attempts to adapt some elements of American law although these elements are typical for a legal culture very different from our own.

It is not possible to disguise the influence of Soviet law and that the fact that some of modifications of its legal institutes and principles typical for the given political and economic model and the corresponding ideological, geopolitical and economic interdependence were adapted. It is not possible to eliminate immediately certain approaches to behavior, norms of behavior, interpretation of some legal concepts which were deep-rooted for some time although the ones who were supposed to follow these "influenced" rules did not identify with the given political and economic order.

As for law and the entire society, evolution brings more benefits than revolution, as revolutions, despite the original seeming of bringing positive changes, usually lead to uncertainty, experiments and chaos. Revolutions represent dysfunction of certain mechanisms, which often endangers the success of the revolution itself. Therefore, revolutions are not common

2 See, e.g. the findings of the project aimed at the reform of state budget published in Ruskowski, 2011.

in law. In the times of political changes in Europe, the changes in law were usually carried out via amendments to the existing laws and discontinuity was thus avoided.

Financial law, as one of the tools for carrying out financial politics, but also as the creator of its limits, is therefore the first target of the changes in the times of political changes. This even applies to the small after-election changes and the length of its continuity is much shorter than what is typical for other branches of law. Only the rules that have originated based on the broad political consensus have the potential to remain relatively stable. It is not possible to guarantee stability to the branches of law that have no codified fundamental frame based on their general rules and that have almost no roots directly embodied in constitution. Therefore, these branches of law are to be the most influenced by other more stable models from abroad.

The foreign models were also used in the new or restored states that were created in the territories with different legal regimes. As for Poland, after 1918 they had to deal with four legal orders: German (Prussian), Austrian (Silesian, Eastern Galician), Russian and also Hungarian in several Spis and Oravian villages (Kosman, 2011: 263). The way to unification (Pietrzak in Bardach, 1978: 562) could not avoid looking for a model which would not be affected by the historical consequences. The closest model with a long-lasting tradition reaching back to the time of Napoleon was a French model; the French models are still positively accepted nowadays.[3]

The Polish theory, identically to the Lithuanian, Romanian, Bulgarian, Russian or Ukrainian theory of financial law is often inspired by the French works. Today, we should mention mainly the works by Paul Marie Gaudemet, Joël Molinier, Marie-Christine Esclassan, Michel Bouvier and others. The German speaking writers are not so common, but we may also find some.

Nevertheless, unlike the abovementioned areas which understand financial law as a branch of law regulating public activities concerning finance and

3 As for financial law, it is obvious on the activities of the organization Centrum Informacji i Organizacji Badań Finansów Publicznych i Prawa Podatkowego Krajów Europy Środkowej i Wschodniej, in which there many lawyers and economists from most of the Polish universities and also from the Czech Republic (Charles University and Masaryk University) and Slovakia (UPJŠ), but also from Belarus, Croatia, Kazakhstan, Lithuania, Hungary, Russia, Ukraine and France.

their approach to financial law is relatively clear, the French legal theory more or less considers financial law as regulation of very strictly defined public finance and the other aspects are left either to banking law (see e.g. Rives-Lange, 1986) or other branches of law, such as public economic law - *droit public économique*.[4] It is, however, clear that whether it is *droit fiscal* or *finances publiques*, which cover both the economic and legal aspects, the branch unity of fiscal regulation is adhered to and the legal theory does not accept independence of tax law. The area of tax law is rather understood as an integral part of public finance, which belongs to public law.

Public finance is one of the areas over which public entities have authority and they are also considered as a part of public property. Aside from that, they are thought to be a tool for carrying out public duties. Regulation thereof shall ensure that the state has sufficient possibilities to "realize" public finance (Gaudemet, 2000: 18) and it should also prevent from misusing it.(Gaudemet, 2000: 18) This triad also serves as a ground for classification of this approach to financial law (Gaudemet, 2000: 19) by Gaudemet, i.e. it is classified as follows:

1. Regulation of public money and the operations with it;
2. Regulation of financial planning;
3. Regulation of public financial operations.

The first area of regulation covers both the material and formal regulation of creation and usage of funds, regardless of their form or regardless of their public law or private law origin but with respect to the nature of the financial means stored in these funds and considering the goal of their existence. This first area is based on the public nature of monetary consideration connected with their creation and the conditions of their use stated by public law. Gaudemet defines the public money (funds) as follows: "Public money is the means which the public or private entities have at their disposal when performing the tasks of public power." (Gaudemet, 2000: 43) Regulation of the operations with public money represents the limits to their mobility, which includes the organization and administration thereof. Both the operations and the regulation thereof may be divided into the operations concerning gathering of public money, i.e. the incoming payments, on the one side, and the usage thereof, on the other side (public expenses). (Gaudemet,

4 For example, A. de Laubadère or P. Delvolvé.

2000: 53) Thus, the first area spans regulation of public income, including taxes, (Gaudemet, 2000: 407 et seq) fees, but also the issuance of the state or municipal bonds, regulation of public expenditures including the mandatory expenses. It also covers the administrative and controlling mechanism, and the process (management) and accounting.

The second area is actually the classic budget law, i.e. regulation of budget operations. It covers the short-term, medium-term and long-term financial planning of obtaining and using public funds, the legislative process of the budget acts and the similar processes concerning other public budgets, ensuring of a financial balance, (Gaudemet, 2000: 173 et seq) the form, extent and process of authorization of public expenses, (Gaudemet, 2000: 188) public accounting, (Gaudemet, 2000: 280 et seq) and the administrative and accounting controls of budget. (Gaudemet, 2000: 287 et seq) Here, we should mention that this second area also covers the new category of acts, which are the acts on multi-year programming of public finance, which were established by the amendment to the French constitution of June 2008. The purpose thereof is to achieve a balance of the accounts of public administration. (Ruśkowski, 2011: 37) The norms of the third area cover the existence, statute and operations of the state treasury and operation and administration of public debt. (Gaudemet, 2000: 333 et seq)

The French theory of fiscal law and regulation of public finance have in common the principle of a uniform approach to this regulation and rejecting of branch atomization concerning both making and using public money. In the Polish science of financial law, there are some who believe that the French approach is an argument for destructive extraction of the fiscal part of financial law and creation of an independent branch of law of public finance, whereas others understand it as an argument against emancipation of tax law.

2 Atomization of Financial Law

Atomization of financial law leading to its destruction is a short-sighted approach which actually makes it harder to achieve quality regulation of the financial and other public activities of the state which could properly deal with the causes and consequences of the crisis. Ensuring stability of public finance is connected with the stability of currency and price stability.

It means that ensuring stability of the financial and monetary system on the one side and also ensuring that the functions of the state and of the entire public sector are carried out properly and that there are conditions for a permanent economic growth. Hence, from the teleological point of view, we can see that the purpose of public financial activities as a whole requires a uniform approach, i.e. from the origination of a legal norm to realization thereof. The traditional concept of financial law in the Central and Eastern Europe (to Vladivostok), which offers a comprehensive regulation of public financial activities, is a very beneficial concept. It would not be a good idea to abandon this approach when one can hear from the EU that this approach is needed for dealing with the crisis within the Stability Pact. Nevertheless, one cannot expect that the "old" Europe would look for inspiration in the approaches of the new members.

With respect to the broad subject of regulation and the diversity of environment in which the given social relationships realize which requires a specific modification of the method of regulation, it is important to understand financial law as a "federation". Each federation, however, requires sensitivity and detail-focused planning when "building" its construction; as for financial law, the attention should be paid also to realization of such construction. The science of financial law has to approach the branch of financial law as a "federal" science and thus research financial law as a whole.

Systematization of financial law is mainly outlined in the pieces of literature which promote the approach to diversification of financial law by means of legal theory. These books are mainly for didactic purposes. Although the approach is mainly outlined in the scientific books, there are some textbooks which could also be considered as scientific monographs. As an example, we mention the textbooks, such as *Financial Law* by the collective of the authors from the Department of financial law of the Prague's Charles University (Bakeš, 2012) or the book *Financial Law and Financial Administration* by the authors from Brno (Mrkývka, 2004). These publications clearly show the uniform approach to financial law and the tendencies to systematization of financial law primarily into two or three fundamental areas of financial law. The first area is fiscal law, which represents regulation of the system of public finance *sensu stricto*. It covers a classic budget law, tax law and customs and regulation of public expenditures. The second area – non-fiscal – does not

aim at creating and using public funds, but it rather targets realization of the monetary sovereignty and ensuring of the functioning of a financial system or financial market. The public law interference in the sphere of financial markets has started being shaped as an independent area of financial law. In Slovakia, the approaches to systematization of financial law are similar. (Babčák, Finančné, 2008) Nevertheless, there are strong emancipation tendencies concerning tax law, (Bačák, Dane, 2008) which is considered by the Slovakian legal theory usually as an independent branch of law. As for the Polish legal science, there is an opposite tendency, as the independent tax law is now more and more understood as a part of the abovementioned federation of financial law. This tendency is shown, for instance, in the cardinal work of the Polish legal science, in which many prominent scientists and researchers from most of the scientific centers of financial law participated, i.e. the four volumes of the System of Financial Law (Kosikowski, 2010; Ruśkowski, System, 2010; Etel, 2010; Głuchowski, 2010).

Twenty-five years of financial law's existence in the democratic legal state and market economy have shown its ability to transform from the era of the totalitarian state and the centrally planned economy to the contemporary needs of the public financial activities which fully respect the core fundamentals of functioning of a modern European state. The mutual exchange of the findings and expertise concerning regulation, laws, science and practice of financial law definitely belongs to the area of focus of the scientific research centers. If this mutual exchange of findings is properly presented, it will surely positively affect future of financial law and its position within the system of law and legal science of all the countries that participate in this exchange.

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CONSIDERATIONS ABOUT THE SYSTEM OF FINANCIAL LAW AND FINANCIAL SCIENCE

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Abstract

In this paper we deal with considerations about the system of Financial Law and Financial Science in the Czech Republic, particularly at the School of Law of the Charles University in Prague. The objective is to evaluate and propose changes to this system for the future. The hypothesis that we want to prove or disprove is the assertion that the system of Financial Law and Financial Science evolves dynamically as well as Financial Law and Financial Science due to the development of society and economy.

Key words

Financial Law; Financial Science; System.

JEL Classification

K40

1 Introduction

In this paper[3] we deal with considerations about the system of the Financial Law and Financial Science in the Czech Republic, particularly at the Faculty

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of Law of the Charles University in Prague. The objective is to evaluate and propose changes to the system for the future. The hypothesis that we want to prove or disprove is the assertion that the system of Financial Law and Financial Science evolves dynamically as well as Financial Law and Financial Science due to the development of society and economy.

First, we define the discipline of Financial Law and Financial Science itself, then using the descriptive method we describe its system as it is currently conceived at the Faculty of Law of the Charles University in Prague.

The main part of our paper is a treatise on the system of Financial Law and Financial Science *de lege ferenda*. Here are outlined options and ways that should be followed by the system of Financial Law and Financial Science in the near future, particularly at the Faculty of Law of the Charles University, especially during the preparation of new textbook of Financial Law and Financial Science by members of the Department of Financial Law and Financial Science.

2 About the legal branch Financial Law and Financial Science

Financial Law and Financial Science has been stable for several decades among branches of public law. Due to the fact, that financial law creates organizational legal preconditions for the functioning of the economy, its regulatory mechanism, as well as fulfilling of other functions, Financial Law and Financial Science helps to the transformation of our economy into a modern, functional and dynamically evolving system. Financial law in this sense seems to be a part of public law, a scientific and pedagogical discipline which has its stable position on the law faculties in the Czech Republic.

Nowadays no one doubts that the financial law is in the Czech Republic a separate legal branch forming an important part of the Czech legal order. It is also a traditional and generally accepted field of jurisprudence, which is reflected also in the pedagogical profession, where financial law as a distinct and separate subject taught as a compulsory part of the general basics of master degree of law at all four law faculties of public universities in the Czech Republic. This is supported by the fact that the mentioned law faculties have independent departments focused either only on the branch

of financial law, or also on its broader economic or administrative law scientific basis. At the Charles University in Prague, Faculty of Law, there is the Department of Financial Law and Financial Science.

Czech Financial Law and Financial Science has been developing for a relatively long time, stable and especially nowadays dynamically.[4] In connection with the definition of financial law it is first necessary to consider the definition of basic financial law institute, which is the institute of finances. Financial law as a separate legal branch (i. e. the set of financial law rules) regulates finances and the rights and obligations relating to them. Finances are the very object of financial law regulation. Finances are usually defined as a complex of financial relationships related to the creation, distribution and use of money supply, respectively of its parts (Bakeš, Karfíková, Kotáb, Marková, 2012: 5). If they create an object of financial law, such financial relationships become financial law relationships and the rights and obligations which are part of these relationships are enforceable by law. In addition to the rights and obligations that are included in financial law relationships, financial law also governs the rights and obligations that exist outside the financial law relationships (outside finances), but which are related with finances, either directly or indirectly.

From the above mentioned it is clear that the financial law is a set of legal rules governing financial relationships (finances), as well as the rights, obligations and facts that relate to finances. Financial law is being similarly defined in scientific publications (Bakeš, Karfíková, Kotáb, Marková, 2012: 12; Mrkývka, 2004: 35; Janošíková, Mrkývka, Tomažič, 2009: 47; Králik, 2004: 14).

Financial Law and Financial Science, as stated, is not only scientific, but also an important pedagogical discipline. Subject of financial science, including financial law was first taught at the Faculty of Law in Prague since the second half of the 18th century. Textbook from 1765 of prof. J. Sonnenfels defined the subject of Financial Science and Financial Law as follows: "*Financial sciences show us how state revenues may be conveniently increased and used*" (Sonnefels, 1764).[5]

4 The evidence is a number of scientific publications listed in the bibliography.

5 Josef Sonnenfels was the first one who used the term „Finanzwissenschaft" – financial science.

Financial Science and Financial Law were combined into one subject called "Financial science with special respect to the Austrian financial legislation" as part of the third, so-called politics state examination in 1893, according to the Regulation of 24th December 1893. Such system of legal studies was taken after the establishment of independent Czechoslovakia and lasted until 1949. Only the name of the subject was modified and was "Financial science with special respect to the Czechoslovak financial legislation."

In the economic and particularly in the financial and monetary policy after constitution of the Czechoslovakia they have notably promoted three ideological streams that were represented by excellent and strong personalities and were strongly reflected into the management of the state finances. It was mainly the school of dr. A. Rašín (Karfíková, 2009: 637-639) in the first half of the 20's of the previous century. Dr. A. Rašín was pronounced supporter of the neoliberal school. He demanded not only the balance of government revenues and expenditures, but also the minimum amount of budget revenues and expenditures. In addition there was the school of prof. K. Engliš (Karfíková, 2009: 576-582), based on his original theological economic theory that was used in the practice of the state finances since the second half of the 20's of the previous century. Finally it was the school of the Czech keynesians, especially J. Macek and J. Nebesář. In accordance with this direction the state budget has to be - as opposed to liberal views - one of the most important instruments for production start-up and it should replace the lack of private investment.

These theoretical approaches, however, got into a confrontation with the real economic situation, which created a very narrow space for their full implementation, when both the main representatives of the financial policies of the so-called first republic - dr. A. Rašín (as the Minister of Finance) and prof. K. Engliš (as the Minister of Finance and later as the Governor of the National Bank of Czechoslovakia), both prominent Czechoslovak lawyers, economists, politicians and financial scientists, were adamant in fiscal policy. They both played in practice an important role during the implementation of economic policy. Dr. A. Rašín, as the Minister of Finance, saved the Czechoslovak currency before (hyper)inflationary destiny of some currencies of neighboring countries when the republic was constituted. In 1919 it was realized so-called Rašín financial reform, which consisted

of stamping banknotes (Rašín, 1920: 53-60) and inventory of assets for purposes of imposing of one-time property tax. Prof. K. Engliš then partially implemented his theoretical considerations as the Minister of Finance during the implementation of the tax reform. The so-called Engliš tax reform of 1927 (Šouša in: Starý, 2009: 124 an.) was a major modernization of the tax system (Engliš, 1929) from the financial scientific perspectives.

Also further changes during the development of Czechoslovakia after 1949 were systematically and objectively fully reflected into the state finances, because they, as mentioned above, constitute every time a pillar of the state policy implementation. In the early 50's there was a monetary reform (Act No. 41/1953 Coll., on monetary reform) and it was presented the new tax system (Karfíková in: Starý, 2009: 172 an.) that was modified in the late 50's and early 60's, but in fact the basic features have retained until adoption of a new tax system on 1st January 1993. Establishment of a federal organization of our country in 1968 meant only the division of competences between the Federal Assembly and the national councils, but in terms of financial law did not bring much new.

An important theorist and teacher of that period was prof. B. Spáčil. Prof. B. Spáčil was a professor of Financial Law and Financial Science at the Faculty of Law of the Charles University in Prague and it is appropriate to mention his monograph "Theory of Financial Law in Czechoslovakia" published in 1970 (Spáčil, 1970).

Other important personalities and representatives of Financial Science and Financial Law in Czechoslovakia were and still are prof. M. Bakeš (in the Czech Republic) (Bakeš, 1979 or Bakeš et al, 1987) and prof. A. Slovinský and prof. J. Girášek (in the Slovak Republic) (Slovinský, Girášek, 1974 or Slovinský, 1985). The rich scientific and publishing activity of prof. M. Bakeš found acclaim not only in the Czech Republic, but especially abroad.

Change of social relations after 1989 soon showed itself in the economic sphere, which was also reflected by branches of Financial Law and Financial Science, whose subject has greatly expanded and its scientific and educational outcomes soon became very popular in the society. Development of Financial Science and Financial Law in the Czech Republic after 1989 was reflected not only by the new scientific approaches, but also in teaching of financial law, when Financial Law and Financial Science were

in 1993 - 2001 at the Faculty of Law of the Charles University again a part of a state examination, namely in the third final comprehensive state examination.

3 Current system of Financial Law and Financial Science

Every legal branch consists of a system of mutual relations of the individual institutes; this applies also to financial law (Bakeš, Karfíková, Kotáb, Marková, 2012: 12). Below is described a system of Financial Law and Financial Science as mentioned in a recent textbook from members of the Department of Financial Law and Financial Science of the Faculty of Law of the Charles University.

Financial Law is like the vast majority of other positive legal branches divided into two parts - a basic one and a special one.

In the basic part general knowledge about the legal branch is incorporated. The basic part of financial law includes the issue of financial activity and its organizational legal forms, the object and the system of financial law, including extensive issues dealing with implementation of financial law rules. Into the basic part there is also incorporated an issue of financial law relationships, subjects and objects and the rights and obligations of the parties. The basic part also deals with an issue of the sources of financial law, their constitutional basis, an issue of state supervision in the field of financial activities, financial control, and an issue of financial law institutes.

The special part of financial law is very comprehensive and is made up of a number of laws and regulations of lower legal force. In the special part is incorporated issue of the positive law itself. Although views on the classification of individual areas may be different, especially in terms of terminology, by the content affinity of individual rules can be the special part of financial law categorized as follows:

1. legislation on taxes, charges, customs and other similar financial considerations,
2. legislation on public budgets and state funds,
3. legislation on credit,
4. legislation on currency, monetary circulation and payment system,
5. legislation on foreign exchange economy and

6. legislation on financial market (Bakeš, Karfíková, Kotáb, Marková, 2012: 13).

Individual areas of special part of financial law are represented by substantive and procedural rules. Relatively youngest part of the financial law is section of the legislation dealing with financial market (financial market law). Here we incorporate legislation on capital and monetary transactions, public law regulation of subjects acting within the financial market and the regulation of certain financial market instruments and transactions with them, including securities and financial, commodity and other derivatives.

4 The system of Financial Law and Financial Science *de lege ferenda*

In this part we will try to outline possible future development of the system of Financial Law and Financial Science. Firstly, it is necessary to state that it is possible to completely agree with the statement that the financial law is like the vast majority of other positive law branches divided into two parts - a basic part and a special part.

4.1 Basic part

Which topics belong to the basic part of financial law at present according to the current Prague financial law textbook was mentioned above. We believe, however, that such a conception of basic part of financial law is too narrow and that financial law includes also other topics and themes. This extension is due to turbulent social and economic development at the turn of the millennium and also due to fixed establishment of Financial Law and Financial Science as a separate legal branch.

We can agree with the fact that in the basic part should be incorporated general terms and institutes, on which the legal branch is based. At the introduction of basic part therefore has its own place treatise on finances, financial relationships and financial activities.

Due to the proximity of the administrative law whose crucial concept is public administration, it should be in our opinion highlighted, within the basic part of financial law, the specifics of public administration in the field of financial law, i. e. financial administration.

Its position in the basic part of Financial Law and Financial Science has section dealing with financial science, including financial policy. Financial Law and Financial Science are very closely related so that they cannot be separated. It is a symbiosis of law and economics, the realization of correlation and conditionality of the legal and economic science.

To summarize the above mentioned, the introduction of the basic part should contain treatise on finances, financial relationships, financial activities, financial administration and financial science.

Other topics of the basic part are then related to financial law itself. First, it is necessary to define financial law, which is the reason why there is a part concerning the concept of financial law. It is also necessary to set financial law into the legal order and to present it as an integral part of public law.

In current publications on financial law is not usually mentioned part dealing with principles and fundamentals of financial law[6]. Such a situation is not appropriate and correct. For each legal branch or discipline we can generalize certain findings and deduce some principles and fundamentals on which such branch is based. Such principles and fundamentals should then be included in the basic part of financial law.

In the basic part is further usually discussed the object of financial law. However, our opinion is that a legal branch has also its subjects and content. Subjects of financial law are the recipients of rights and obligations set by financial law rules. These subjects may include subjects of financial law relationships and subjects to which financial law confers rights and obligations without participating on financial law relationships. The content of financial law consists of legal relationships, rights and obligations and certain facts and rules. Legal relationships which are content of financial law can be called as financial law relationships.

Within the discussion on the system of financial law in terms of its basic part the financial law is divided into a basic part and a special part. We can agree with the statement that the special part of financial law is further divided into a fiscal part and a non-fiscal part (Mrkývka et al, 2004), and this classification should be noted also in the Prague textbook of Financial Law and Financial Science.

6 The exception is the Brno textbook of financial law – see Mrkývka et al, 2004.

According to our opinion, however, in the basic part should be, within the discussion on the financial law, specified classification into substantive law and procedural law. From a theoretical and practical point of view, the distinction between substantive and procedural financial law is justified, especially taking into account the diversity of substantive and procedural rules and the consequences of their violation.

Due to the variety and diversity of the legal order should be part of the basic part of financial law also evaluation of the relationship of financial law to other legal branches. Also important is the relationship of financial law to international law and to European Union law.

Part of the basic part is also nowadays devoted to sources of financial law. The system of sources and their categories should be discussed. In particular, the concept of formal sources of law must be supplemented by the concept of material sources. Current (we can say conservative) understanding of financial law as a set of rules governing financial relationships (finances) should be supplemented by the rules contained in the internal normative regulations of administrative bodies. Furthermore it is extending the "legislation" of the Supreme Court, the Supreme Administrative Court and the Constitutional Court, which goes beyond explanation and unifying interpretation of the law, and recently also the „legislation" of supranational courts on the one hand and on the other hand during situations when the legislative process is accompanied by a number of regulations sometimes generally formulated, sometimes with excessive case interpretation, raises the need for comments and guidelines. The negative impact of these trends is enhanced by a policy of "duty may be imposed only by law", which was deprived of the original meaning and was extremely dogmatized.

It is entirely appropriate in the context of the basic part of financial law to discuss the financial law relationships by their definition and their elements (object, subjects, content and proprietary aspect).

In the current Prague textbook of financial law there is within the basic part a passage relating to financial control. However, within financial law exists a number of other controls (the Supreme Audit Office control, state control, tax control, etc.). Therefore it would be appropriate to include text

concerning control in financial law in general and not only a narrow financial control. It may be also considered to include a part dealing with the audit and the auditors as a specific form of control (in the broad sense).

From the control must be distinguished supervision. Also this institute should be, respectively is part of the basic part of financial law. General discussion of supervision in the area of financial law should not be missing part of the basic part of financial law.

We recommend including a new topic to the general part of financial law, which deals with consequences of violation of financial law. Sanctions constitute a relatively significant part of financial law, as it is a public law that must be enforced, even by the threat and imposition of sanctions. In the basic part of financial law should be also mentioned the relationship to the administrative punishment and to the criminal acts, alternatively to the money laundering and to the terrorism financing.

To summarize the above mentioned, the basic part of financial law would treatise on finances, financial relationships, financial activities, financial administration and financial science, but it should also include a part dealing with the concept and position of financial law in the legal order, principles and fundamentals of financial law, object, subjects and content of financial law, the system of financial law, relationship of financial law to the other branches of law, international law and European Union law, sources of financial law, financial law relationships, control and supervision in the field of financial law and consequences of a breach of financial law.

4.2 Special part

It was mentioned above that the special part of financial law is further divided into a fiscal and a non-fiscal part.

Regarding the fiscal part of financial law, it is understood that it includes budgetary law and tax law. At first sight, it seems as elementary and unconflicted statement, but the first impression can be deceiving. It is important to define their relationship.

Budgetary law is being defined as a set of rules which govern the system of public budgets, the content of public budgets, funds management, budgetary process and relationships arising from the creation, distribution

and use of money supply in these public budgets (Marková, Boháč, 2007). The content of public budgets is expenditures and revenues, i. e. including taxes. Relationship between budgetary and tax law is very close.

It can be said that in a broad sense budgetary law also includes tax law, because taxes as revenue of public budgets are contained therein. However, at present the budgetary law rather conceived in a narrow sense, i. e. without tax law. This has, in our opinion its justification, because budgetary law should deal only with issues such as what the revenue of public budgets is and not with the very detailed legislation of that revenue. If we admit this fact, then part of budgetary law in the broad sense would have also been a legislation of a contract of donation.

Tax law can be simply defined as a set of legal rules governing taxes (Bakeš, Boháč in: Šturma, Tomášek, 2009: 250-303). Tax law, as well as budgetary law, can be also conceived in the narrow and broad sense. Tax law in a narrower sense is a set of legal rules governing the taxation and tax law in a broader sense is a set of legal rules governing taxes, charges and other similar financial considerations (customs, public insurance contributions, levies, benefits, payments and contributions). Tax law in the broad sense includes not only legislation on taxes, but also legislation on charges, customs and on public insurance (social security premiums, public health insurance premiums and pension savings premiums) and legislation on levies, benefits, payments and contributions of a tax nature. Such a broad-based tax law[7] should be considered as a distinct part of the fiscal part of financial law.

It should be added that in recent decades there is a tendency to allocate tax law from financial law into independent legal branch. The concept of tax law as a separate branch of law is the tendency with which the Czech legal science will have to deal with in the future, after appropriate analysis. It does not seem right to a priori claim without a thorough examination that the concept of tax law as a separate legal branch is completely irrelevant. However, we believe that it is necessary to have a serious scientific discussion in order to unify the opinion of experts dealing with financial law and theory of law in the Czech Republic on the status of tax law as a part of financial law or as a separate branch of law.

7 Some authors call it archaically as „berní právo".

However, when tax law is considered as a substantive part of the fiscal part of financial law, there is a question whether some other distinct parts, for example **grant law or law on expenditures of social security** are not also such a substantive parts. From a theoretical point of view it is a similar relationship as the financial and tax law, however, not on the revenue side of public budgets, but on the expenditure side. These questions should be answered and clarified during formation of a new system of special part of financial law.

In a similar way budgetary law is related to **public law part of public procurement law** because expenditures are provided from public budgets. Regulation of the process, on basis of which these expenditures are spent, is an object of public procurement law. It is also possible that some part of public procurement law is part of a special (fiscal) part of financial law.

Some links to budgetary and tax law has also regulation on accounting. These rules can be called as **accounting (or balance) law**. First, there is a relationship to the state accounting, respectively to the central system of state accounting information, because it deals with monitoring of cash flows in the public sector and at the same time there is a link to the determination of the income tax base using the figures from the accounting records.

Regarding the **non-fiscal part of financial law**, there is a long-term agreement that it includes **monetary law** and **foreign exchange law**. Monetary law is defined as a set of rules dealing with currency, monetary circulation and payment system and foreign exchange law as a set of rules governing the disposition with values, which can be used to fulfill obligations to foreign countries (especially cash foreign currency), and with some other values associated with payment and credit relations with foreign countries (Bakeš, Karfíková, Kotáb, Marková, 2012: 14, 375). With regard to the continuous reduction of legislation on foreign exchange and also with regard to its close relation with monetary law[8] it is possible in the future to think about the integration of these rules into monetary law. This idea is also supported by development of legislation, when the provisions of the Foreign Exchange Act are abolished and new institutes of foreign exchange law are being governed in the Payment System Act, i. e. the rule of monetary law.

8 In the Prague textbook of financial law this connection is mentioned in two places.

Another separate part of the non-fiscal part of financial law is **financial market law** as a sub-sector of financial law and it was established after the social changes after 1989. Object of this law is, as the name suggests, regulating financial market and trading on it, particularly objecting of trade and financial market participants, especially so-called financial intermediaries. If the main activity of financial intermediary is an activity at the financial market, then the regulation falls within financial market law. However, as financial intermediaries they also appear subjects whose main activity is not an activity at the financial market. The regulation of such subjects is not a part of financial market law. These are especially banks, insurance companies, but also pension companies.

Legal rules governing banking are known as banking law, legal rules governing insurance industry are known as insurance law. Banking and insurance law stand on the border between public law and private law because they govern some public law issues (e. g. regulation and supervision of banks and insurance companies) as well as issues falling within the private law (e. g. typical contracts concluded by banks or insurance companies). The **public law part of banking and insurance law** should be part of the non-fiscal part of financial law.

In the Prague textbook of financial law there is also credit law within the special part of the financial law. In connection with credit law it is necessary to solve two basic issues, namely whether whole credit law is part of financial law or only its public law part. The second issue is whether credit law, respectively its public part belongs to the fiscal or non-fiscal part of financial law. Exact analysis of these issues is beyond the scope of this paper. It can thus only be stated that we tend to that only public law part of credit law is a part of financial law. Legal rules governing for example the credit contract would not be a part of financial law. In our opinion the answer to the question whether the **public part of credit law** belongs to the fiscal or non-fiscal part remains open. There can be found reasons to be part of the fiscal part (credit as income and expenditure of public budget) as well as of the non-fiscal part (credit as financial market instrument).

It is also necessary to consider whether gaming (lottery or gambling) law and price (value) law should be a part of fiscal or non-fiscal part of financial law.

Regulation of lotteries and other similar games is undoubtedly related to the money supply and it has a specific way of how they are taxed and subject to charages. These are the reasons that could lead to the conclusion that **lottery law** is part of financial law. However, significant part of gaming law consists of administrative law rules (authorization of lotteries and other similar games and supervision over enforcement of obligations), which rather suggests the conclusion that lottery law is part of administrative law.

Finally, it should be considered whether **price (value) law, i. e. public law regulation of price (value)** is part of the special part of financial law. Price (value) relationships are not financial relationships, i. e. relationships associated with creation, distribution and use of money supply, but may have influence on financial relationships because value enables us better to create, distribute and use money supply.

5 Conclusion

The aim of this paper was to evaluate and propose changes in the system of Financial Law and Financial Science for the future. This aim was achieved by formulating the following conclusions:

- financial law should be divided into a basic part and a special part,
- introduction of the basic part of financial law should be a treatise on finances, financial relationships, financial activities, financial administration and financial science,
- furthermore, the basic part of financial law should contain a part dealing with the concept and position of financial law in the legal order, principles and fundamentals of financial law, object, subject and content of financial law, the system of financial law, relationship of financial law to the other branches of law, international law and European Union law, sources of financial law, financial law relationships, control and supervision in the area of financial law and the consequences of a breach of financial law,
- the special part of financial law is further divided into a fiscal and a non-fiscal part,
- part of the fiscal part of financial law is undoubtedly budgetary law (in the narrow sense) and tax law (in the broad sense),

- it need to be clarified if the fiscal part of financial law includes grant law, law on expenditures of social security, public law part of public procurement law or accounting (or balance) law,
- the non-fiscal part of financial law includes monetary law, foreign exchange law and financial market law; we can discuss about integration of foreign exchange law into monetary law,
- the non-fiscal part of financial law should also include a public law part of banking law and insurance law,
- finally a public law part of credit law, lottery law and price (value) law may be a part of the fiscal or non-fiscal part of financial law.

The hypothesis that should have been proved or disproved is the statement that the system of Financial Law and Financial Science evolves dynamically as well as Financial Law and Financial Science develops due to the development of society and economy. In terms of the above mentioned, we believe that this hypothesis was proved.

It is a challenge for financial lawyers to modify the system of financial law so that it corresponds to current development of society and law within the area of finances.

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SYSTEMATIZATION OF FINANCIAL LAW – TAX LAW AS A BRANCH OF LAW?

Damian Czudek[1]

Abstract

This contribution deals with the question of place of the fax law in the system of financial law. The author shows and analyses different point of views of authors in the Central European region at the problem of systematization of financial law.

Key words

Systematization; Financial Law; Tax Law; Tax Procedure.

JEL Classification

K34, K40

1 Introduction

Reflections on how far the tax law is a separate branch, and is independent of the substantive law, and above all considerations such as what came first, the "chicken or egg" would leave aside, because in my opinion, these considerations are irrational. "Substantive law" without "process" would be a mere proclamation or wishful thinking towards the addressees of legal norms without the possibility of enforcement or instructions for use; as well as the procedural part of the law would be "protector" or instructions and rules to protect undefined right or anticipated process / procedure in certain cases, but that we would not know "legally".

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However, I will deal with the concepts of systematization of financial law and different views on independence of tax law (berní právo) as the legal sector as the opinions here differ significantly as in the Czech Republic and especially Poland and the Slovak Republic.

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2 Systematization of financial law and independence of tax law (berní právo)

2.1 Disintegration or federalization of financial law in Poland?

Some representatives of the science of financial law in Poland argue that tax law has become separated from law and finance and is already independent branch of law. One of the proponents of this view is Etel, who claims that the financial law exploded and collapsed on the sector, which were initially part of the complex (Etel, 2009). According to him, tax law has all the characteristics for it to be considered a separate branch of law. He states that the tax law has a characteristic method of legal regulation – administrative-legal method of regulation. There is also specific object of legal regulation, which sets it apart from administrative law. As he says, in order to divide the legal branch of the original complex, it is necessary to find the characteristic features of a particular group of laws under which it can be distinguished from other norms, and these specific characteristics also have an impact on the creation, application and interpretation of law. From this perspective, these are the characteristics of tax law:

- Substantive differences - there is a specific object of legal regulation; specific design of laws governing taxes; social relations that are govern by these rules are very specific as the way of their control and the reason why they have developed.
- Legislative differences - the rules of tax law are in special laws, there is a specific way how to create and publish them.
- Use specific principles of interpretation, which were introduced by the doctrine and case law.
- Differences in the process of applying the tax law - there is a different system of tax administration authorities and different tax process,

special professions dealing with taxes - tax advisors, specific international tax organization. (Etel, 2005: 48)

The concept of the collapse of financial law at its different sub-sectors in Poland is not accepted without reservation and views on the autonomy of tax law differs from author to author. Examples of unique in Central Europe can be "federal concept of" financial law by Mastalski, according to which *"the financial law is a complex of free federation of separate branches of the law regulating social relations in the collection and distribution of public money and influence of the formation of the money supply ..."* (Mastalski, 2011: 36). Mastalski within the federation distinguishes three relatively independent branches of law:

- Budgetary Law;
- Tax Law;
- Banking Law (but only public banking law). (Mastalski, 2011: 36-37)

2.2 System of financial law and tax law (berní právo) in Czech Republic

In this respect, Czech Republic rather belongs to conservative opinions and tax law (berní právo) is seen as an integral part of the financial law (Compare: Karfíková, Karfík in: Etel, Tyniewicki, 2012: 441)[2], since both Brno and Prague school adhere to traditional, the evolution of the concept of financial law. They rely on the public character of financial law. Furthermore, this concept also relies on the fact that *"subsystem of financial law is the legal regulation of behavior of subject involved in the financial activities of the State and other public bodies, with the purpose of the existence of this public financial activity and therefore legal regulation is to provide a basis for fulfilling the functions of the state, respectively public sector provision of public goods, and at the same time ensuring the existence, functioning and stability of the monetary system and financial markets"* (Mrkývka, 2012: 19). Karfíková also notes (Karfíková, 2012: 442), that in addition to looking at tax law as part of the financial law, there are also concepts that consider tax law as part of administrative law, which is in the Czech Republic regarded as financial law as a separate branch of law. The link is the fact that the object of administrative law is the legal norms that regulate social relations arising in the field of public administration,

2 Karfíková however, uses the concept of tax law, but where further explanation, it is clear that she discuss tax law sensu largo (berní právo).

part of which the tax administration is undoubtedly, as a specific place - legal action. This connection is most evident in the process of fiscal and administrative law, since both are public activities. However, the counter-argument is, in my opinion, its specificity, which is to ensure the material base of law, the specificity of the methods of legal regulation[3], a large autonomy of the tax administration process to administration process (Karfíková, Karfík in: Etel, Tyniewicki, 2012: 445).

Views of tax law (berní právo) independence in Slovakia

Otherwise, it is for example in Slovak Republic, which tends independence and autonomy of tax law. This approach takes Babčák that characterizes the tax law as non-codified legal branch that performs its task in the field of public administration, like administrative law, has its object of legal regulation, govern a special group of social relations and form a special set of legal norms of specific nature (Babčák, 2005: 29). However, there are also the concepts of tax law that do not accept its independence, for example the concept of financial law of Králik and Jakubovič (Mrkývka, 2012: 136 or Králík, Jakubovič, 2004: 19).

In my opinion, we can align with both concepts - the concept of the collapse of financial law and the concept of the unity of financial law. The fundamental problem which I see in the fourth, final, and perhaps most important but apparently the most vague criterion of law branches independence (Průcha, 2004: 34 and others)[4] - in social acceptance.

3 Tax law (berní právo) science and social acceptance

Independence or lack of independence of tax law (berní právo) as the legal sector should be viewed through the prism of probably the most important criteria - social acceptance. Although simply can be said that the legislation of tax law in Poland, the Czech Republic and Slovakia in general terms do not differ; on the contrary, in the Czech Republic there are perhaps more

3 ***In the tax law there is used modified administrative-legal method of regulation.*** – For more details see: Mrkývka et al, 2004: 36.

4 These are branch-forming criteria:
- Autonomy and specificity of legal regulation
- Method of legal regulation
- System-wide coherence of legal norms
- Social acceptance of branch

arguments for the independence of this sector; it can be seen that unlike the Czech Republic, in Poland and Slovakia there are some voices speaking about independence of tax law.

Unlike Poland, in the Czech Republic the taxes are domain of economists. Persons involved in the tax process, whether it is a tax advisor or tax administration employees are mostly economists. Until recently, a substantial number of employees within the appellate tax authorities were also economists, it is not substantive – technical issue, but mostly the interpretation. However, the situation is slowly changing, and this is how it is put increasing emphasis on the tax process and compliance of tax administration procedures with the law, as in the case of reviewing decisions in the second stage or even judicial review, it will appear to ensure all process rights and obligations of the parties as crucial.

There are even specialized publications dealing with tax law (berní právo) comprehensively. Tax law (berní právo) appears to be only part of the publications, whether of Prague (Bakeš, 2009), Brno (Mrkývka 2004) or Pilsen (Jánošiková, 2009). At least in Pilsen "tax law" appears in the name of their textbook. For complex publication could be considered the Brno publication „Finanční právo a finanční správa - Berní právo" (Financial Law and Financial Process – Tax Law) (Radvan, 2008), which is rather focused substantively and is more explanatory text for students, just like mostly all of the above publications. In addition, there are so called "legal guides" in the form of various comments, whether the Tax Code and other tax laws. But there is no general, theoretically based and because of this timeless[5] publication dedicated to tax law (berní právo) and in particular the rather neglected tax process.

Tax law (Berní právo or Daňové právo) in itself is not, moreover, neither the name of one of the departments in the Czech Republic dealing with this issue.

5 This is one of the problems of publication "Berní právo", the publication also goes to great details, which meant that at the moment of its issue became obsolete due to the rapidly changing legal system.

4 System of financial law in Czech Republic

Currently, in the Czech Republic, tax law as an integral part of the special part of financial law[6], respectively its fiscal part.

With a regard to better clarity and diversity of social relations that govern the norms of financial law, with a particular part of the financial law it is subdivided into these parts:

- Fiscal,
- Non-fiscal.

Fiscal part regulates the social relations associated with the flow of money, for example especially with the determination, collection and redistribution. This includes the tax law (berní právo) and budgetary law.

Regulation of **non-fiscal part** focuses on the regulation of the object of social relations - money, and also the monetary system. It is subdivided into the following sub-sectors: monetary law, exchange law, hallmarking law, public banking law and public insurance law.

The primary objective of **non-fiscal part of financial law** is to regulate the nature of money and the monetary system. In this section we find the following subsystems: the right of foreign currencies, public banking law, public law and Hallmarking The insurance law (Mrkývka et al, 2004: 55-60).

In addition to the above it is necessary to mention also the process norms, which do not form a separate branch of our legal system, but they can be defined as a subsystem of financial law standing at the border of administrative law and financial law - **the financial procedural law.**

It is also possible to specify financial administrative law, which would be a set of norms governing public administration in the field of public finance and

6 Financial Law is divided according to the degree of generality of knowledge on the parts - general and specific. The general part includes in particular the issue of financial activities and their organization - legal forms, object and system of regulation of financial law, financial relationships, for example the rights and obligations of these entities and relationships. This includes sources of financial law, the constitutional foundations, as well as issues related to the financial authorities as financial relationships, issues of state supervision in the field of financial activities and financial control. – compare with: Bakeš, 2003: 13.
However, even this part is unfortunately not codified what causes interpretation and use of the same terms in a different sense and breadth of the different finance law acts.

other financial activities – for example in particular the regulation of the **tax administration (berní správa)** (tax, customs), but also the area of **non-fiscal part of financial law** in matters of prudential supervision of financial activities.

Financial criminal law represents a complex of norms defining the foundations and consequences for violation of legal financial norms for example the issue of liability and sanctions (Mrkývka et al, 2004: 58-63).

5 Conclusion

As highly successful and in my opinion as to the future most likely I consider "federal concept" of Mastalski. Even so, in my opinion the new concept of financial law presented at the International Conference in Mikulov 2014 Department of Financial Law at the Law Faculty of Charles University in Prague can be considered. The general part of financial law can be seen as a common regulation for the entire federation and a special section presents then specific adjustments for the sub-branch - a member of the Federation; regulation which is more or less autonomous on the unit.

"Federal concept" of Mastalski underscores the specific nature of tax law in the strict sense and its relative autonomy (in my opinion it was even tighter if we were talking about the tax law as berní právo respectively prawo daninowe), on the other hand, this approach demonstrates not only the historical, but also the actual bond of tax law whether sensu largo (berní právo or prawo daninowe) or stricto sensu (právo daňové) to the financial law and public finance as such. His concept of finance law federation is in my opinion federation with great autonomy of their individual parts, and the autonomy of tax law. He deals whit this in his publication Prawo finansowe (2011) (Mastalski, 2011: 139 an.). He says that as an argument for the autonomy of tax law, among other things can be considered its relationship to other branches of the law and also the concept of financial law and the allocation of individual sub-branches.

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FUNCTIONAL-TARGET APPROACH TO CREATE THE SYSTEM OF FINANCIAL LAW

Vladimir Nazarov[1]

Abstract

This contribution deals with basics categories of Financial Law such as the Financial Activity of the State, the Subject of Financial Law and the System of Financial Law. The main aim of the contribution is to find a universal approach to construct a system of modern financial law and to explain some differences in the systems of financial law of each specific state. This contribution shows that a functional-target analysis of state activities in the sphere of finance combined with the traditional theory of law and state and the traditional concept of financial law are enough to identify the system of financial law of any state.

Key words

Activity of State; Financial Law; System of Financial Law; Subject of Financial Law; Functions of State; Aims of State Activity; Specific Part of Financial Law; Provision of State Activity; Budget Law; Tax Law; Provision of National Financial System; Monetary Law; Provision of a State Pension System; Accounting Regulatory.

JEL Classification

K40

1 Introduction

The first time the system of financial law was considered in Russia as a part of the science of financial law was by V. A. Lebedev.

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The general concept of a system of financial law was mostly developed during the Soviet period as a development of the branch and the science of financial law by academics such as M. A. Gurvich, E. A. Rovinsky and S. D. Tsipkin.

Recently, research into this area has been carried out by S. V. Zapolsky, I. A. Tsindeliani and G. G. Pilikin.

In addition, it is necessary to add that M. V. Karaseva's research, which was devoted to the financial/legal relationship, and E. D. Sokolova's research concerning the financial activity of the state were also very important forming the concept of the system of financial law.

The system of financial law is a very important researched object for the modern science of financial law.

An understanding of the system of financial law is closely connected with an understanding of the subject of financial law.

During the post-Soviet period attempts to revise the fundamentals of financial law were repeatedly undertaken, even reviews of the paradigm of financial law were attempted.

But deeper analysis shows that the traditional paradigm of financial law is still universally appropriate.

This contribution includes the some interim results of the research which the author has carried out since 2009.

This analysis is fair for the system of a national financial law of a sovereign state.

The conducted analysis concerns not every area of financial law, which consists of general and special parts, but only an analysis of the system of social relations regulated by financial law for the purpose of structuring the sections of the special part of financial law. At the same time the conducted research does not answer the question of the place of financial control in the system of financial law and to determine the place of financial control in this system demands separate research.

The methodological basis of this research is an analysis of historical facts, together with existing realities, from a logical basis and the theory of the state as a social institution which is necessary for the organisation of public life.

In this way financial law is the result of social development as well as the state's system of law..

In short, it is impossible to describe all the details of all the accomplished analysis and, therefore, only some important passages are included in this paper.

2 Functional-target analysis of state activity in the sphere of finance

2.1 General ideas

The first question that should be asked is; is the concept of financial law exclusively a creation of a socialist viewpoint concerning law and economics? This question is a valid one because the legal science of western countries does not have this as part of their national legal systems. To answer this question it can be said that, on the one hand, the western legal system has an understanding of budget law and tax law, which are the most important parts of financial law, and, on the other hand, we can classify some other pieces of legislation as financial legal institutions. Thus, it can certainly be argued that financial law is a part of the legal system of western countries.

As it has been stated before, the methodological basis of this research is an analysis of the existing realities and the historic facts from a logic basis and the theory of the state as a social institution which is necessary for the organisation of public life.

In this way, financial law is the result of social development as well as the state's legal system.

For example, the capitalist system assumes availability distinct from the socialist system in the area concerning the organisation of financial law.

So, for example, there is a basic distinction in the method of forming the state budget. In capitalist countries the budget is formed at the expense of taxes and, in socialist countries, it is formed at the expense of standard assignments, which can be assumed to be a violation of the principle of equality of tax burden.

The financial system of the state should also be taken into account, by which we mean the separate state, such as Russia, the Czech Republic or the USA, which is a result of the features of the historical way that the state reached its level of social development, together with social and policy guidelines.

2.2 The first section of the special part of the system of financial law

The inclusion in the subject of financial law of both budget law and tax law does not usually raise any problems. Supporters of the independence of tax law say that tax law should burden taxpayers no more that it is necessary for the provision of financing of state activity. This conclusion unequivocally determines the indissoluble tie between budget law and tax law. Therefore, they should be components of a uniform section (branch) of the legal system of a state. These two specified sub-branches of financial law form the first section of the system of the special part of financial law, which can be called the provision of the state's own needs.

2.3 The second section of the special part of the system of financial law

The second section of the specific part of the system of financial law is devoted to state activity which is aimed at stabilising the financial system of that state. Such activity includes two directions: 1) to provide stability of the monetary system and 2) to provide stability of some parts of the financial system, such as the banking system, the insurance system or financial markets.

In the Russian Federation, the state's obligation (on behalf of the central bank) is fixed in the Constitution of the Russian Federation.

In the USA up to the Great Depression, the financial system was not regulated by the government at all. But, in 1933, the government of the USA took control of the activity of the FRS.

Furthermore, since 2010, the Dodd — Frank Act has established a regulation for banks and some non-banking institutions. And now the second section of the special part of the system of financial law includes, as a minimum, two institutions which consist of the provisions concerning the financial activity of the USA in the area of finance.

The second section of the system of the special part of financial law can be called the provision of stability in the financial system.

2.4 The third section of the special part of the system of financial law

The most important institutions of the third section of the system of financial law are usually social funds, such as pension funds or the Russian Federation's Social Insurance Fund..

These funds capitalise through special payments and they are regulated by special legislation. But, in contrast to the usual institutions of budget, they are complex legal institutions that allow us to identify them as special financial legal institutions and to include these institutions in the third section of the system of financial law.

However, there is no state pension fund in China or in the Dominican Republic. This means that there is no institutional pension fund as a part of the third section of the system of financial law but only as a part of budget law.

In addition, there is an interesting situation concerning the unemployment fund in the Russian Federation as, before 2001, there was special unemployment fund whose payments were contributed by businesses. But, in 2001, these payments were cancelled and the unemployment fund became a part of the federal budget which means that legal regulation of an institution of the third section ceased to exist.

In the USA up to 1966 there was no social insurance fund as a part of the system of financial law of the United States. Since 1966 it is a budget program, which means it is currently a part of budget law.

But, in the future, if President Obama's project is realized, Medicare will become an independent legal institution which will be a part of the third section of the system of financial law because the Medicare fund will get money not only from the budget but also it will be capitalised directly by special payments.

Other traditional institution, which is a traditional part of the subject of financial law of the Russian Federation, is accounting standards.

At the same time, there is no uniform legislative adjustment of accounting in, for example, Great Britain. In Great Britain, the most widely used set of accounting principles are the standards issued by the professional organisation ACCA. This means that accounting standards are not within the sphere of exclusive activity of the British government and therefore they are not a part of the system of financial law, as they are not a part of the financial activity of the state.

However, it is impossible to say that regulation of accounting is absent, for example, in the USA. In this country there are rules which establish the obligations of companies, who regularly provide reporting according to GAAP requirements.

But, in this case, there is no basis to consider these accounting and reporting regulations as an independent institute of financial law and to include it in the third section of financial law. They should be included in the section of the second system of financial law as the rates are directed to provide stability in the financial system through adjustment of financial markets but not accounting as such.

3 Conclusion

The conducted research shows:

1. The traditional paradigm of financial law has a universal character, and this paradigm allows us to determine the subject and the system of financial law which is applicable to any historical period and to any form of societal organisation. At the heart of this paradigm is the assumption that the subject and the system of financial law are defined by the concept of the financial activity of a state.
2. A universal theoretical basis of financial law is the functional-target approach to determine the subject of financial law which is based on legal analysis of the functions and targets of state activity in the sphere of finance.
3. It is necessary to distinguish the term the financial activity of a state from the activity of a state, its institutions and officials in the sphere of finance. In terms of the activity of a state in the sphere of finance, this includes not only the public relationships, which are relationships settled by public law, but also private relationships settled by civil law.

4. The concept of the system of financial law is closely connected with the concept of the subject of financial law. Therefore, for the correct determination of the system of financial law, it is necessary to base it on an analysis of social relationships in the sphere of finance.
5. An analysis of publications concerning financial law shows that a determination of the subject of financial law does not cause problems when separating financial legal relationships from other public relationships which are regulated by other branches of public law (constitutional law, criminal law, administrative law). However, problems do arise when it is necessary to divide financial legal relationships from civil relationships.
6. In addition, a determination of the method of financial law is very important. The method of financial law is the exclusively imperative method of legal regulation on social relationships. Such an unequivocal determination of the method of financial law is a result of the determination of financial law as a part of public law. At the same time, such an understanding of the method of financial law does not exclude the provision that the state can use civil-law constructions such as agreements, liens or bank guarantees for the adjustment of financial legal relationships. The use of a civil-law construction does not mean the direct use of a non-mandatory (dispositive) method by itself, but only a civil-law construction as a part of a complete mechanism and as it is understood in civil law.
7. The practical legislative criteria of such division of social relationships as an accessory to financial or to a civil law are provisions of clause 124 of the Civil Code of the Russian Federation and the provision of clause 55 of the Constitution of the Russian Federation. From these provisions, it is possible to draw a conclusion that relationships which do not constitute an exclusive area of the state's jurisdiction in the sphere of finance, i. e. that are not an exclusive form of the activity of state in the sphere of finance, should not be included in the subject of financial law. Furthermore, provisions and institutions which regulate such relationships should not be included in the system of financial law.

From the conducted analysis it follows that, in the most general of cases, the special part of the system of financial law can include three sections: 1) provision of a state's own needs (e. g. budget law and tax law), 2) provision for the stability of the financial system of a state (e. g. monetary

rights, adjustment of separate parts or institutions of the financial system of a state), 3) provision for the functioning of institutions which are indentified as within the exclusive competence of the state under the constitution and/or legislation.

The system of financial law of a specific state is a result of its historical development, for example comparing Russia and the United States, the organisation of public life, whether through capitalism or socialism, and also as a result of participation in international agreements, for example the Eastern Caribbean Currency Union of the OECS, or organizations such as the European Union.

Finally, the system of financial law is dynamic not static and it changes as a social institution along with the changing functions and targets of the state in the sphere of finance.

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DEBATABLE QUESTIONS OF THE RUSSIAN SYSTEM OF FINANCIAL LAW

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Abstract

The author describes the evolution of the theoretical approaches to the comprehension of the subject and system of financial law. He examines theoretical approaches to the comprehension of the subject and system of financial law in prerevolutionary Russia (up to 1917), during the Soviet period and in the modern period of the development of the Russian Federation. The author notes that the formation of the criterions of the systematization of financial law rules into relevant structural elements of the financial law system hasn't gotten a significant theoretical development. The compositional elements of both general and special parts remains without significant theoretical highlighting in the most part of literature devoted to financial law. Institutions and sub-branches having a universal character for financial law and formation of its general part and institutions, sub-branches and criterions forming a special part of financial law have been highlighted episodically. The author affirms that the social relationships in the sphere of public and private finances are the subject of coordinating regulation by both public and civil branches of law. It entails the necessity of formation of inter-branch units particularly in the sphere of finance legal regulation. The author considers that the modern system of financial law is presented by the following some sub-branches: tax law, emission law, finance and control law containing a big number of financial law institutions.

Key words

The subject and system of financial law; financial law institutions; sub-branches of financial law; banking law; tax law; budgetary law; emission law; finance-control law.

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K40

1 Introduction

The evolution of such categories of financial law as its subject and system is a very important problem. The definition of the main evolution stages of these categories allows to define propositions which has left in modern content and will reflect the points which will help to realize these categories from the very beginning.

The author describes the evolution of the theoretical approaches to the comprehension of the subject and system of financial law. He examines theoretical approaches to the comprehension of the subject and system of financial law in prerevolutionary Russia (up to 1917), during the Soviet period and in the modern period of the development of the Russian Federation. The author notes that the formation of the criterions of the systematization of financial law rules into relevant structural elements of the financial law system hasn't gotten a significant theoretical development. The compositional elements of both general and special parts remains without significant theoretical highlighting in the most part of literature devoted to financial law. Institutions and sub-branches having a universal character for financial law and formation of its general part and institutions, sub-branches and criterions forming a special part of financial law have been highlighted episodically. The author affirms that the social relationships in the sphere of public and private finances are the subject of coordinating regulation by both public and civil branches of law. It entails the necessity of formation of inter-branch units particularly in the sphere of finance legal regulation. The author considers that the modern system of financial law is presented by the following some sub-branches: tax law, emission law, finance and control law containing a big number of financial law institutions.

2 Different approaches to the system of financial law

Different approaches to the determination of the subject of financial law and its system have touched prerevolutionary stage of the development financial.

V. A. Lebedev identified the borders of financial law as a law one and the theory. He defined them in the following way: "the rules of financial economy shaped in well-known legislative regulations will be financial regulation or financial law. The theoretical research of all these general definitions are finance, financial economy, financial law composes financial theory" (Lebedev, 2000: 36). He recognized that the subject of financial law and subject of financial theory were identical but they differed through a way of research. He related law-dogmatical research of financial regulation to the subject of financial law and political research of financial regulation to the subject of financial theory. It`s very important to stress that while V. A. Lebedev defining the role of financial theory, he said that it "outlines borders where in which the financial activity of the State should operate" (Lebedev, 2000: 41). The author didn`t make a deep difference between financial law and financial theory. As follows the determination of structural elements of the financial law and financial theory were considered as identical. The author particularly recognized the following component parts of financial law and financial theory:

- the review of state needs, the definition of financial economy and financial institutions;
- the review of state revenue (income) and duties;
- the description of the structure of local (zemstvo) and communal financial economy;
- the examination of ways of covering of extraordinary needs i. e. the theory of state credit (Lebedev, 2000: 144).

We can see that the author considered that financial law and financial theory were interrelated phenomena with common characteristics. In fact, these categories were considered by him as complex phenomenas which were the result of interaction of economy, politics and law.

Another author I. I. Yanzhul examined the correlation of financial law and financial theory and considered that "financial law researches on the base of the experience how the State really gets its material resources and financial theory on the base of financial law and laws of national economy draws up common rules how the State should get them" (Janzhul, 2002: 47). As follows he didn`t delimit the subject of financial law and financial theory,

but he pointed that the ways of examination were different. I. I. Yanzhul didn`t draw distinguishes between that categories directly. Sometimes he used the term "financial theory" and sometimes "financial positive law".

It was caused by the fact that financial law and financial theory were considered not only as a generation of political economy and the state law but there were no problems of branch identification in prerevolutionary Russia. The author`s approach to defining of elements of financial theory and the effect of financial law is interesting. I. I. Yanzhul supposed that the financial theory should be included only in theories about public income excepting theories of public expenses (Janzhul, 2002: 53). According to his opinion the system of public income consisted of ordinary and extraordinary public income, but the system of ordinary public income consisted of private-law sources; regalia, taxes and duties.

We should recognize that the researches by I. T. Tarasov are more complicated because he delimited financial theory and positive financial law (Tarasov, Isaev, 2004). In his opinion public income and expenses and their administration were the subject of financial theory, and the main purpose of the theory was a disclosure of phenomena's rules in the sphere of state economy in connection with the analyze of legal rules which regulated that economy (Tarasov, Isaev, 2004: 51). As follows, the author expanded borders of financial theory having included public expenses. Instead of previous authors who concentrated on only public income in the sphere of financial law, I. T. Tarasov included a systematic description of all rules and norms which dealt with public income and expenses and also their administration in compliance with the views of the State about political and civil freedom and the root conditions of the people (Tarasov, Isaev, 2004: 52-53). It is obvious that the theory of financial law in pre-revolutionary Russia covered wider scope than the modern imagination about financial theory. I. T. Tarasov especially emphasized "This theory teaches not only what it is and why it occurs but also what it is in this range according to economic laws, meaning and purpose of the State and concepts of good and justice" (Tarasov, Isaev, 2004: 53). Defining the financial law the author didn`t depart from propositions about it was the complex of provisions specified state-economy range of certain people in a certain age. It is rather interesting that the author considers the codification extremely difficult. I. T. Tarasov

outlined that the systematization was preceded by the proper classification which was fixed by the complex of meanings obtained in a certain subject and was distributed for comparison according to a number of rows, groups etc. (Tarasov, Isaev, 2004: 59).

As I. T. Tarasov considered that the system of financial law consisted of three parts: introduction, general and special parts. He divided the introduction of financial law into the subject of financial law and its definition, connections of financial law with other sciences, with other state bodies, method and system, history of financial institutions. He attracted organization of financial administration; power of financial bodies; measures providing order, correctness and regularity in the sphere of financial administration; cashkeeping, accounting, financial statement; control and revision institutions; responsibility (liability) to the general part of financial law. In the special part the author regarded three big sections which had a detailing subdivision namely natural economy, money economy and credit economy (Tarasov, Isaev, 2004: 60). It should be notice that I. T. Tarasov characterized money economy of State exclusively with the help of the category of duties (podati) by reason of predominance under the other of public income sources. Tarasov`s idea about the subject of regulation of financial law is the magnificent contribution to the development of the theory of financial laws and responsibility in the sphere of finances and is actual and important nowadays. First of all he considered financial laws as a way of restriction of the State treasury and taxpayers rights.

A. A. Nikitsky explained the definition of financial law in subjective and objective senses. He defines it in objective sense as the whole complex of rules regulating financial economy of State and local authorities. And in subjective sense it was authority under a law to person or public union on decision-making in the financial state economy (Nikitinskij, 1910: 11). There were such elements of financial state economy and structural elements of financial law respectively as budgetary law and state control.

The work by E. N. Berendts (Berendts, 1914) became a very important stage in the development of financial law theory. First of all he described the component of that theory in a systemati**c** manner. The author strictly differentiated such categories as "theory about finance", "theory about state economy", and "theory about financial law" (or financial law). He stated that

the subject of financial law was legal rules which were laid down in the basis of economic activity of State power and its bodies (Berendts, 1914: 10). It is characteristically that in the work mentioned above public powers in state economy and status of nationals in that sphere was described with a view to legal regularities and analyzed budgetary law and tax law and such institutions as the state control and financial government.

According to a lecture course of V. G. Jarockij financial law was a complex of legal rules regulating state financial activity (Jarockij, 1898: 4). He decided that state financial activity was identical to state financial economy. According to Jarockij it was necessary to delimit theory of financial law and financial law itself which was a complex of legal rules. He divided the course of financial law into the following parts:

- a financial economy order and its bodies
- state needs or purposes of public income
- ordinary public income
- financial economy of local authorities
- extraordinary state income (state credit) (Jarockij, 1898: 59).

According to the analyzes of the works by such classic authors as S. I. Ilovajskij, I. H. Ozerov, I. Patlaevskij, D. Lvov, the problems of financial law subject and its system were not the object of substantial attention. Recognizing a young age of not only theory of financial law but also financial law these scientists made ambiguity of these categories.

S. I. Ilovajskij considered that financial law was a state science and related it to financial state legislation (Ilovajskij, 1904).

I. Patlaevskij related financial law to financial state legislation and defined it as "more or less successful theory of finance supplement to conditions of a certain State in the form of a law" (Patlaevskij, 1885: 19). And the content was determined with three parts: theory about public income; theory about public expenses; theory about a balance between of receipts and expenditure and state credit (Patlaevskij, 1885: 23). D. Lvov had the same position and determined the subject of financial law as a supplement of common principles of financial science to positive legislative (Lvov, 1887: 6). He wrote that its content consisted of three parts: public expenses, public income, and public accountability. Local and imperial finances were considered as applied part. But I. H. Ozerov made a general accent on studying

of financial law institutions and stated that the finance theory belonged to both economic and legal sciences. He stated that "financial law is a result of struggle and it cannot strongly systematized" (Ozerov, 1911: 24, 40).

In prerevolutionary Russia theoretical backgrounds of financial law based on cameralistics, political economy, theory about state economy. As a result theory of finance and financial law were thickly filled with theoretical categories related neither to finance nor financial law. Cameralistic sciences influenced seriously the prerevolutionary finance law, another words, sciences about the best administration of state assets and public fields or a treasury in general. A major goal of cameralistic sciences was a build-up of financial state base in prerevolutionary Russia.

As a result prerevolutionary legal-financial literature didn`t represent strict definitions of matter and system of financial law. Ambiguity of the marked categories shows a weak legal readiness of theoretical propositions of financial law in prerevolutionary Russia. But it should be recognized that some institutions of financial law were deeply developed theoretically (institutions of public income, taxes and duties and public expenses). The intensity of their development was very deep and they have been actual till our days.

Nevertheless in prerevolutionary Russia there were no special legal designations of financial law parts in the works of many scientists.

But the finances of community of commons (zemstva and another forms of communal self-government existed in prerevolutionary Russia) were a component of theory about finance and financial law. Nowadays they are called municipal finances. And this fact emphasizes a right tendency according to institutions of local finance which are components of modern financial law.

In conclusion it should be noticed that the definition of the subject of financial law in prerevolutionary Russia had a complex character. It was defined as a symbiosis of economic and legal basis of state economy administration. It affected a determination of intensional structure of financial law. The structure of prerevolutionary financial law in Russia was represented by the following big divisions which were divided into sections and parts: state income; state expenses; financial administration backgrounds and financial bodies; sources of covering of extraordinary expenses; financial sources of commons (zemstva).

3 Financial law as a branch of law

The first textbook devoted to finance law (Gurvich, 1940) was published in 1940. In this textbook the subject was defined as legal relationships between the USSR higher state bodies and union republics in the sphere of draft, adoption and fulfillment of budget, legal relationship between different parts of financial system and between financial bodies and socialist factories and population.

In essence the characteristic of relationships related to the subject of financial law was considered in the light of class character and strong centralization of the whole process of financial system administration.

Financial law as a branch of law was regarded as a complex of rules which regulating:

- a drafting, adoption and fulfillment of budget process;
- factories` compulsory payments to budget;
- taxes and duties;
- state insurance;
- financing of national economy, social and cultural activity, the administration and the defense;
- short-term crediting and amounts;
- monetary circulation;
- financial control.

The structural elements the of branch were the following:

- budgetary law. It included rules concerned to the USSR rights and its bodies from the sphere of drafting, adoption and fulfillment of budget, budgetary structure, and distribution of income and expenses between parts of the budget system. There were a few groups of legal rules in budgetary law such as rules related to fulfillment of the budget; rules related to income part of the budget; rules regulating the direction and use of budget funds;
- state credit. It included rules related with state loans, rights and obligations of both the State and loan recipients;
- monetary circulation. This section consolidated rules related to emission rights of the State Bank, the emission of bank and treasury notes and small coins, a control of cash assets, cash and credit planning and rules related with the currency regulation of both foreign currency and precious metals.

Despite of some archaism of this textbook, the latter fixed the idea about separability of financial law. Neither this textbook nor textbook published in 1946 (Rovinskij, 1946) contained a detailed analyze of the subject and system of financial law. In the mentioned work the subject of financial law regulation was defined as social relations arising from accumulation and distribution of money assets by the State through financial system. Financial law was defined as a complex of legal rules regulating relations in the sphere of budget, taxes, state credit and savings business (sberegatelnoe delo), state insurance, state social insurance, short-term credit and amounts, monetary circulation organization and a financial control. But the definition of financial law was not given through generic features but by enumeration of types of relationships related to the financial system of that period.

There were no criterions of forming financial law as a branch of law in the textbook. But this textbook contains rules included in a system of financial law:

- the organization of financial state system;
- the composition, direction and sources of public expenses financing;
- the system of public income (tax and non-tax payments in the budget);
- the competence of bodies of state power and administration and its budget rights; distribution of the income and expenses between separate types of budgets; and fulfillment of budget order; budgetary financing of national economy order, administration and defense; cash fulfillment of budgets order; draft and adoption of financial statement about budget fulfillment order; control order of budget fulfillment;
- the organization of public credit and savings business; the issue and discharge of state loans order; interrelationships between state savings banks and budget and credit systems;
- the organization of public property and personal insurance and its relationships with budget and credit systems;
- the organization of state monetary system, an order of planning and regulation of monetary circulation and foreign currency circulation;
- the organization of short-term and long-term crediting and accounts in national economy; interrelationships between budget and credit systems in the process of budget fulfillment;
- the organization of public financial control and order of its execution.

The general criterion for the inclusion of legal rules to financial law was designated as a direct link with relations regulation arising from the process

of money funds accumulation and its planning distribution and using (Rovinskij, 1946: 15). It was recognized that there were relations in the process of financial state activity regulating not only rules of financial law but also of other branches of law.

In his tutorial E. Rovinskij determined the subject of financial law as financial relations arising in the process of financial state activity. He determined the branch of law as a complex of rules regulating financial relationships in a financial state activity in the view of provision of the fulfillment of state tasks and functions (Rovinskij, 1957). He considered the system of financial law was based on taking into account of relations specifics regulated by legal rules. The systematization of financial legal rules was made with highlighting of general and special parts. The general part included rules fixing the principles and legal forms of financial state activity, a competence of state bodies which carried out that activity constituting a single financial system, forms and methods of financial control. The legal financial institutions regulating certain homogeneous group of financial relation formed the special part. They were budgetary law, tax law, public loans and savings business, public insurance, rules relates to public expenses and budget financing and stated crediting and accounts basics, monetary system and currency planning (Rovinskij, 1957: 17-18).

The tutorial determined financial law strictly as a branch of law carrying out the form of financial state activity regulation by means of financial relations.

Significant influence on the development of financial law theory in relation to its subject and system had the article written by R. O. Halfina (Halfina, 1952: 182-213). Criticizing the definitions in the textbook published in 1946, R. O. Halfina stated out that a determination of the subject should point on substantial features distinguishing it from analogous phenomena but not homogeneous. But it had to reveal the common characteristics which united all kinds of that phenomenon. She also criticized a reckoning of relations occurring in the sphere of savings business, state insurance, state social insurance, short-term credit and accounts in financial law (Halfina, 1952: 190). She considered the subject of financial law included relations arising in the process of planned accumulation and distribution of money state assets. As a matter of fact R. O. Halfina suggested principles of the formation of financial system law. She outlined general and special parts but criterions

for its difference were specific. Since the general part had to characterized all legal specifics of financial law as an area of law and that`s why a general criterion was presented as legal specifics and legal principles of law area and only after economic content of rules and relations. Therefore the general part consisted of the following sections: sources of financial law; general principles of financial law; bodies exercised financial activity; financial acts; financial relations; financial control; provision of due course of financial law. She suggested to take the economic content of institutions determined the legal characteristics for forming of the special part. According to the composition of the special part she suggested to include budgetary law; tax and dues; duties; income from state assets; organization of credit; monetary system; financing of national economy, culture, administration and defense (Halfina, 1952: 210).

B. N. Ivanov (Ivanov, 1967: 34-67) differentiated the following main sections of the general part: legal basis of financial state activity; bodies running financial activity and financial control. The author suggested to put the rules stating the basics of finance and credit system and monetary system, rules delimiting rights of public authorities in financial sphere, rules defining the organization of financial activity public factories and state institutions and the basics of legal status of citizens in financial sphere to the general part. He considered that the special part of financial law should include the following institutions: budgetary law; compulsory payments of public factories and organizations in the budget and tax law; non-tax income; public credit; public property and personal insurance; public expenses; an organization of bank credit and non-cash payment an organization of currency and exchange operations (Ivanov, 1967: 66). Credit and amounts relations had to be considered as complex legal institutions because they were in the sphere of regulating both financial and civil law. The author paid a special attention to such the exclusive finance-law nature of those institutions as bank crediting, public credit and public property and personal insurance.

T. S. Ermakova gave a very interesting decision of determination of financial law system in her article (Ermakova, 1975: 72-80). She considers the base of the formation of the system is in the essence of financial relations themselves and accordingly chains of the financial system and she besides does not take into consideration the legal criterion. She presented the system

of financial law as a complex of the following stages: sub-branch of law – institute – sub-institute. The author defines the system of financial law through three sub-areas of law. Namely, rules system regulating finance relations of factories and sectors of economy; rules system regulating nationwide finance; rules system regulating credit relations.

She points out those two institutes in the first sub-branch of law. They are the following:

- institute regulating financial relations of industrial and economic organizations and its higher administrative and economic bodies (ministries);
- institute regulating financial relations of cooperative and public organizations in the economy.
- The second sub-area of law consists of the following institutes:
- budgetary law including rules devoted to regulation of tax and dues collection and rules regulating the order of the national economy financing;
- public and personal insurance.

At last the third sub-area of law consists of the two following institutes: public credit and bank credit (Ermakova, 1975: 79-80).

Cypkin`s approach to problems of forming of especial part financial law of system is rather interesting. First of all the author was the opponent to the division of sub-branch of law in law system. He also denied the use of such definitions like "super-institute", "large institute" and "large section". He structured a special part into three sections "rule – institute — branch of law". He said that "section of branch of law" had wider content and admitted less degree of homogeneity, typicalness of regulated relations than legal institute (Cypkin, 1983: 24). According to his position general sections, institutes of the special part were identified with general sections of financial system and a basis for a separation had specifics of finance and economic groups which defined specifics of certain methods and forms of both money assets accumulation and distribution (Cypkin, 1983: 25). That`s why he considered that the special part of financial law consisted of the following sections:

- budgetary law;
- legal regulation (or law regime) of factories, organizations and national economy sectors finance;

- public property and personal insurance (Cypkin, 1983: 30);
- rules regulating credit relations (Cypkin, 1983: 35).

Examine the problem of financial law construction, E. A. Rovinskij pointed out such feature of financial law as a presence of two legal institutions, regulating the whole complex of relations which were the object of finance legal influence and mixed (complex) institutions. In the sphere of those institutions the complex of financial relations was regulated by both financial law and other branches. Common function of money assets mobilization and expenditure by State and common source of law for branch of law were the criterion for the inclusion into the system of financial law of the mixed institutions. (Rovinskij, 1960: 93). Being agreed with a classification of rules of general and special parts he suggested to include the general part rules stating main principles and legal forms of financial state activity, competence of its bodies forming united financial system, forms and methods of financial control.

The special part of financial law was presented by a complex of the single institutions:

> budgetary law, compulsory payments of state factories and organizations, tax law, state loans and savings business, state insurance, state expenses, monetary and credit system (Rovinskij, 1960: 94). E. A. Rovinskij raised a question about creation of financial code containing legal rules which should regulate financial relations in succession (Rovinskij, 1960: 95).

Examine the system of financial law A. I. Hudjakov admitted reasonable the separation of general and special parts. He formed the general part of financial law consisting of the following institutions: law basics of financial state activity; law basics of monetary system; finance administration; law regulation of finance planning; financial control. The forming of the special part was referred to financial state structure, i. e. the special part of branch of law was formed of presence or absence of according finance legal institution in state structure. After that that`s why the author represented the special part consisting of the following sections: budgetary law, banking law, finance and insurance law, finance and economy law.

The further structurization of the special part supposed the separation of certain institutions (Hudjakov, 1988: 75-82). A. I. Hudjakov denied the possibility of existing of such institutions as legal regulation of state

credit and legal regulation of state social insurance as such institutions were absent in financial state system. He also denied such institutions as public income and public expenses, because any revenue and expenses were integral part of certain money fund (Hudjakov, 1988: 75-80).

Examine that scientific positions concerning the subject and system of financial law in the Soviet period of it development it is necessary to take into consideration that in was a historical stage of the state development which characterized the absolute priority of state interests over the interests of person and even society in the whole. The diversity of approaches to the structural elements of the branch of law helps to conclude the following:

- the absence of unified criterions of a separation of institutions and sub-institutions;
- some authors denied sub-branches of law in the structure and proposed the existence of sections and didn`t separated them from financial law branch;
- there were mutually exclusive conclusions about inclusion and non-inclusion of different institutions into financial law system;
- the most part of scientists denied possibility of existence of finance-and-legal institutions without existence analogous finance and economic ones.

We should admit the importance of the scientific discuss about subject and system of financial law. Practically during the Soviet period it was scientifically based and argued the existence of the separate branch of law in state law system (Pavljuchenko, 2008). This branch of law has its own subject and the method of regulation. The formulated basic financial categories have magnificent influence on the development of financial law theory and formulated the imagination about structural elements of financial law system. It has been adopted in the modern financial law literature. The existence of two big structural elements of the financial law system have been reasonably argued: the general and special parts consisted of sections or sub-area of law and they consist of finance and law institutions which unified the relevant financial legal rules. But there was a debatable question - what structural elements were forming general and special parts of financial law and what sub-area of law and institutions should be excluded or included into the system of financial law. Taking into account that principles of the Soviet economy and total State participation in all parts of existing Soviet financial

state system, the system of financial law and especially its special part had a scaled character. In fact all elements of financial state system were provided by the relevant finance and law institutions despite of some of them had the relevant institutions in other areas of law. Structural elements of financial law were sub-institutions - institutions – sections (sub-branches of law), but unified criterions of alignment and forming structural elements were absent. No doubt that there were vertical and horizontal links between financial legal rules which provided a forming of structural elements of financial law system. Those links helped to form not only relevant structural elements but ensured a close connection between structural elements guaranteying direct and reverse links between them and successful functioning. And it was the reason of the formation of complex units (complex of institutions) in the structure of financial law ensuring the regulation of the relevant public relations. Simultaneously the of creation of internal complex units facilitated to a construct of intersectoral units with administrative law, civil law, labor law and law of social maintenance and etc. But that there was no enough attention to the problems of financial during the Soviet period.

4 New concepts of financial law

Changes in political and economical state system have touched basics categories of financial law, particularly subject and system of financial law. A transformation of the previously existing elements of financial system, the appearance of new elements significantly influenced on the modern stage of financial law development. It is possible to point out two directions in the modern financial law literature dealing with the development of financial law and determination of subject regulation and institualization of branch of law. The first direction can be marked as traditional. It tends a modernization of wide theoretical heritage of the soviet finance-and-legal theory. The second one can be designated as revolutionary as it tends to full revision of the traditional approaches of examination of the fundamental categories of financial law. The attempt to review financial law in new politics and economic conditions has lead to the appearance of rather original directions of the financial law theory.

G. A. Tosunjan and A. Ju. Vikulin advanced a hypothesis about forming of new branch of law. Its subject is public and private (corporate) finances.

They consider that the relations arising from finances always have suggested strict public character. According to these authors a new financial law has a specific system. It is characterized by internal multipartiteness, differentiation on relative, independent (autonomous), but interrelated parts between them and links between structural elements have a stable character and provide integrity of branch of law (Tosunjan, Vikulin, 2003: 7-11). The system of new financial law has the following structural elements: budgetary law, tax law, banking law, insurance law, currency law, investment law, securities law, legislation of protection of competition on securities market, securities market legislation, legislation of financial control and auditing activities, legislation about counteraction on money laundering of the proceed from crime (Tosunjan, Vikulin, 2003: 11). But these authors consider that the system of new financial law supposes dividing into a special branch including two sub-branches - budgetary and tax law as, and complex branches of law - banking law, insurance law, legislation of protection of competition on securities market, securities market legislation, legislation of financial control and auditing activities, legislation about counteraction on money laundering of the proceed from crime (Tosunjan, Vikulin, 2003: 11).

A new concept of financial law was supposed by N. M. Kazancev. It is supposed to interpret financial law as law i. e. to do relevant in law actions with help finance and financial estimates being under a certain jurisdiction of a State or another subject with financial jurisdiction (Kazancev, 2009: 29). The author considers financial law both public and private law (Kazancev, 2009: 29). He determines the composition of financial law as a authority to acquisition real national assets at a certain size according to their value. The author`s idea about financial law system is very interesting. He considers that financial law structure cannot be structure in the form of a tree. Financial law system is a networking structure where number of various hierarchical subsystems can be outlined (Kazancev, 2009: 31). Another author A. N. Kostjukov states that financial law system is a complex of parts and elements of financial law characterizing its internal construction and isolating it from other branches of law. Financial law system itself represents a pool of unified by legal nature elements in structural and integral unity which has relative stability, autonomous functioning and interrelation with environment (Kostjukov, 2002: 27-28). The author gives a classification

of financial law system elements according to various basics. He characterized the horizontal structure of financial law branch by the following elements: financial law rules, financial law institutions forming sections and sub-branches united in the parts of financial law. The author outlines a horizontal division of the branch and a vertical construction based on the legal effect of financial law normative materials (Kostjukov, 2002: 30). On the basis of the analyze A. N. Kostjukov shows system of financial law consisting of general and special parts. The general part includes such institutions as financial law rules, finance and legal status of party to financial law, financial law relations, legal facts in financial law, financial control. The special one is represented by budgetary and tax sub-branches and the following sections:

- public (local) income;
- public (local) expenses;
- banking law;
- insurance activity;
- currency regulation;
- monetary circulation and amounts;
- auditing activities;
- public credit;
- legal regulation of factories finance(Kostjukov, 2002: 33-34).

N. M. Kazancev determines system of financial law as consisted one of the following sub-branches:

- extraction, production and rotation of precious metals and stones;
- emission (banknotes, securities, financial derivatives) activity;
- credit and bank regulation;
- currency regulation;
- accounting;
- insurance;
- finance and estimation;
- regulation of securities markets;
- collecting;
- supervisory and control(Kazancev, 2009: 33-34).

He states that institutional elements of financial law can be grouped with functions of finance and law administration. Each function is the secondary

from relevant rights of finance and law administration. The meaning of division of the sub-branch of law consists of provision of autonomous regulation of each law branches and its sub-branches between each other (Kazancev, 2009: 36-37).

Dealing with modern problems of construction of financial law system M. V. Karaseva (Karaseva, 2006: 94-99) and makes a conclusion that finance law regulation has turned into property and law regulation. She considers that the system of financial law should be constructed with a base of two criterions, economic and legal. The financial system and cash flows serving is the economic criterion of the formation of the financial law system. And the legal criterion is the classification of property relations (Karaseva, 2006: 97).

O. N. Gorbunova defines the subject of financial law (as a branch of law) as social relations forming in the process of financial state activity. And the system of financial law consists of finance law institutions and sub-branches (Gorbunova, 1998: 22-23).

Professor E. M. Ashmarina made a certain contribution into the expansion of the subject and its emergence into the system of new sub-branch (Ashmarina, 2009: 4-12; Ashmarina, 2004). She relates the following of social and financial relations:

- relations concerning formation, allocation and use of centralized state and municipal funds;
- relations concerning creation of optimal conditions for formation, allocation and use of private funds;
- relations facilitating to the abomentioned relations in currency circulation, currency regulation, control, accounting and etc.

She notices of the absence of unified scientist conception in relation to the structure of general and special parts of financial law system as a branch of law, and allocation financial legal rules into institutions, sub-branches and sections (complex sub-branches). In fact the structure of financial law is represented by the author in the following way: general and special parts in which financial legal rules are united into institutions, sub-branches and sections (complex sub-branches).

She considers that the subject of financial law is shown as two groups of social relations which realization is directly linked with forming, allocation and use of certain funds and relations mediated these processes.

Hence the author outputs branch units relating to general and special parts of financial law.

Such institutions as currency circulation, currency regulation, financial accounting, general principles, legal forms and methods of financial state activity, system of state bodies in finance area, its legal status, and legal status of party to financial relations are considered the general part of financial law by the author.

The special part is represented by the following branch units:

- budgetary law (sub-branch);
- goal centralized and extrabudgetary funds (institution);
- public and municipal credit (institution);
- banking activities (institution);
- insurance (institution);
- finance of public and municipal factories and profit-making organizations (institution).

E. M. Ashmarina suggests another scheme of restructuring of financial law institutions into complex sections or complex of sub-branches. She interprets tax law, compulsory insurance, accounting law, financial control and financial responsibility as a complex of sub-branches (Ashmarina, 2009: 4-12; Ashmarina, 2004).

Professor D. V. Vinnickij examines a modern condition of development of theory of financial law rather critically. He doesn`t recognize financial law not only as a branch of law effectively functioning system but theory or academic science (Vinnickij, 2009: 34-36). First of all he considered that a systemacy should be in the very law (in principles, terms, legal constructions and not in out it - in economic relations, scientists` doctrines and etc). His statement about the legal practice of financial law and financial law theory begins develop as two absolutely independent realities are considered reasonable (Vinnickij, 2009: 35).

Examine the meaning and a role of systematization of law rules E. Ju. Gracheva emphasizes that the main of systematization of financial law rules is the reflection of economic content of financial relations and the legal form. And it should be directed to effective influence on the social processes in financial sphere (Gracheva, 2009: 39-43). E. Ju. Gracheva shows

the special feature of following branch unit: the existence of complicated structure as it consists of financial law included both a general and special parts of financial law.

Examine of the content of modern financial law, S. V. Zapol'skij considers the priority of public tasks and interests before private property interest and subjective personal rights as the main defect of the previous financial law. Noticing a long discussion around the system of financial law, he emphasizes the following feature - "announcing finance sphere of property-power relations, we should exclude from finance law subject (i. e. its institutions from the system on facultative basis as insurance, savings business, banking credit, legal regime of investment from the subject of financial law and its system) (Zapol'skij, 2009: 59). He states that the "the practice leads as to the necessity of the creation of the universal concept of financial law regulation by the way of refusal of domination of the imperative means over dispositive ones" (Zapol'skij, 2009: 59). A. I. Hudjakov is a successive follower of public finance prevailing in financial law regulation (Hudjakov, 2009: 113-139: Hudjakov, 2010: 10-13; Hudjakov, 2009). He reasonably states that single backbone criterion should be based on the construction of any classification row. Accordingly, this author denies the possibility of inclusion in the system of financial law of such institutions: insurance, banking activity, activities at securities markets. He also denies a separation of certain branch units in sub-branches of financial law, for example tax law. He defined the subject of financial law solely in the scope of relations arising in the process of forming and distribution of public money funds which refers to financial relations by its economic nature (Hudjakov, 2009: 139).

The problem of expansion or reduction of the subject of finance law regulation and secondary branch structurization of its has undoubtedly radical vision.

According to his point of view S. V. Zapol'skij considers that internal structure of the general part of financial law has some clearness for a first approximation, the formation of the special part even has not been begun yet(Zapol'skij, 2008: 96). The considers the work of formation of modern financial law system should include a creation of the general part:

- unified principles of branch;
- subjects of financial law;

- general basics of finance and law responsibility;
- a legal regime of financial fund establishment, money assets accumulation in it and financial expenses;
- general basics of financial procedures regulation;
- legal basics of accounting and control in finance area.

The special part is suggested of the following:

- emission law;
- budgetary law;
- tax law;
- insurance law;
- public debt and public credit;
- savings law (Zapol'skij, 2008: 95).

D. V. Vinnickij, examine financial law as a complex law unit uniting independent law units, points out the active formation of two autonomous legal branches, tax and budgetary law, in scopes of financial law system regulation and the outcome of banking law, insurance law, currency law, amounts law regulation, securities market, finance of public and municipal factories from finance and law regulation lead to the revision of traditional approaches to financial law. According to his point of view, financial law has transformed into the complex branch including constitutional and legal institute - legal basics of monetary circulation and autonomous branches like budgetary and tax law (Vinnickij, 2002: 30-42: Vinnickij, 2003: 50-51).

Examine the problem of financial law system as a branch of law, system of science and system of teaching in the institutes, K. S. Bel'skij states that it is not true to mark out it that in the structure of the general and special parts. He divides a structure of financial law on sub-branches and institution and it is represented by the following way:

- sub-branches - emission law, budgetary law, tax law;
- public - banking law, finance and control law;
- institutions - public credit, lottery activity, securities market, different financial enterprises, accounting and other institutions (Bel'skij, 2009: 33-40).

We can determine the modern stage of development of financial law as the most impetuous development stage. But such categories of financial law as subject and financial law system have been staying the most discussion.

The Modern Russian financial law literature suggests the following conception attractions to the subject regulation of financial law:

- a traditional conception which has come from the soviet financial law and is based on the basic categories of financial state activity in the field on formation, distribution and use of monetary funds;
- a concept of financial law transformation into a complex branch of law and as a result the transformation of big sections (subbranches) into autonomous branches of law what leads to the explanation of the own subject, method and system by each of them;
- the concept of expansion of the subject of financial law at the expense of the inclusion of new market institutions into the sphere of regulation. They were absent in the Soviet period especially in the sphere of regulation not financial but other branches of law;
- the conception of forming of new branch of law which is a full contrast to all previous conceptions.

Nowadays the conception which is in the base of the public law subject definition with the help of financial law activity of public law units in the area of formation distribution and use of monetary funds cannot explain the whole potential of financial law. Being the heritage of the Soviet past it is does not allow to see that the financial law in the market conditions qualities and characteristics. The new characteristics of financial law are concluded in the fact that it has become the instrument of state influence on private finance. Despite of the fact that private finance function on the base of other principles instead of public finance the state has a magnificent on its functioning with the help of financial law rules.

The present condition of law theory with has rich Soviet traditions concerning branch specialization cannot overcome its deceleration. Unfortunately, traditional approaches of branch determination with the help of the subject and method of financial law regulation cannot give now explanation to many of phenomena of legal reality. The modern financial law having deep roots from the Soviet period of law development doesn`t explain many existing phenomena of law.

It`s important to give a point of view of the academician N. I. Himicheva who examine some institutional problems of financial law at the new period

of development. She states that the content and practical activity of financial law institutions not successive and doesn`t correspond to constitutional rules (Himicheva, 2006: 28).

The fear of transformation of financial law is not reasonable. In fact the place of the branch in legal system is determined by social need. There should be only priority of public units of the financial sphere. Private subjects in the financial sphere must obtain respectable tools of interaction and realization of their private interests in finance sphere too. The modern financial law is burdened by the priority of public interests over the interests of common wealth of everybody. It`s very well but according to the modern realities the interests of public law units is becoming absolute. For example, the situation in budgetary and tax area.

A presence of different concepts connected with the subject of financial law concerns with the financial law system. As a rule there is traditional approach to the structural elements of financial law system as branch of law in the most of researches. The appearance of new institutions of financial law has been designated. The authors suppose that the exclusion of traditional institutions from financial law system, explain the transformation of institutions and sub-branches into new autonomous branches of law or new complex sub-branches. However nowadays there is no magnificent theoretical development of systematization criterions of financial legal rules into relevant structural elements of financial law haven. There is no serious theoretical highlighting elements composition of both general and special parts of financial law in the most books devoted to financial law. Issues about universality of institutions and sub-branches and forming of financial law system are still in question. We consider that the whole special part of financial law consists of huge number of interindustry institutions united into sub-branches. In fact it can be recognized that the social relations in sphere of public and private finance are the subject of coordination regulation by both public and civil branches of law. As a result an inevitability of complex unit formation is particular in legal finance regulation.

In the obligatory introduction, please mention the aims of the article, the hypothesis, and used science methods. You should mention most important books and articles published in previous time.

5 Conclusion

We consider that the modern system of financial law is presented by the following some sub-branches: tax law, emission law, finance and control law containing a big number of financial law institutions.

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SOME METHODOLOGICAL APPROACHES TO THE SYSTEM OF FINANCIAL LAW

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Abstract

This article deals with the problem of systematization of financial law in the Russian federation and it legislation. The problem of system of the financial law is one of the most difficult in a of the financial law science of any state. Besides, the financial law is a very quickly developing and changing branch of law. And it complicates systematization of the special part of the financial law.

Key words

Systematization; Budget; Budget System; Tax; Law.

JEL Classification

H61

The problem of system of the financial law is one of the most difficult in a of the financial law science of any state. It is caused by the reason that the financial law is rather young branch of the law, that is why in it there is no enough legal material for logical creation of structure of this branch. As a result of that the financial law does not have of division on the general and special parts as system of legal institutes in any state. In other words, the financial law while has such level of development which does not allow

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to allocate system of legal institutes in the general part. Instead of that in the financial law allocate the general part only as a theoretical basis. In this sense the financial law cannot be compared with criminal and civil law

Besides, the financial law is a very quickly developing and changing branch of law. Therefore some legal institutes can appear and through any time to lose the urgency. And it complicates systematization of the special part of the financial law. For example, in Russia recently there were the payments which are not tax, so-called parafiscal fees which demand systematization within the special part of the financial law. Likewise, recently there was a specific regime of the public finance because of the creation of the state corporations. And therefore the finance of the state corporations has included as legal institute in system of the financial law.

The systematization of financial law cannot be carried out without deep judgments of a subject matter of the financial law. Today the subject matter of the financial law is defined as system of the relations making the public finance. Given that the problem about division of the financial and tax law in Russia is solved in favour of the financial law, the problem of systematization of the financial law solved together with the tax law as a component of the financial law. At the same time, the relation making a subject of the financial law has essentially changed the structure of the legal regulation in modern conditions. And this circumstance can be considered as the powerful factor of creation system of the financial law in Russia and other countries. Particularly, in structure of financial law regulation the segment of the property and legal regulation has essentially extended. It has extended on volume, and also because of the introduction of a great number of property construction in the financial law regulation. All it changes a paradigm of financial law thinking.

As a result of that the criterion of a property component of financial law regulation can be taken as a principle point of system of the financial law.

Thereupon, the system of the financial law can be constructed taking into account two criteria:

- the economic criteria,
- the legal criteria which is based on the property relations.

The economic criteria of the system of financial law are used today already.

In all states having the financial law in their legal systems the economic criterion of the creation of the financial law system is appeared through the using structure of financial system and money flows, its serving. Proceeding from this criterion in system of the financial law in different states allocate the budgetary law, the tax law, the legal institute of non- tax revenues of the budget, the legal institute of the expenditures of the budget and so on, which represent the legal form of money flows of a financial system. In the different states other financial law institutes are possible also. For instance, in Russia there are legal institute of finance of state and municipal enterprises, legal institute of state off-budget budgets and so on.

The classification of the property relations on the financial law can serve as a legal criterion of the financial law. It should be used along with systematization by economic criterion.

The financial law as it is established by a science of some the states, regulates property relations which are relations of the property right and obligations relations.

Taking into account noted, the budgetary law as sub-branch of the financial law could be systematized taking into account legal criterion, i. e. taking into account a property component. Ultimately in the general part it would be possible to allocate common structure legal institutes and in special part allocates property component. The general part of the budgetary law will include:

- Institute of budgetary system and its principles
- Institute of budgetary classification, institute of structure of revenues and expenditures of the budget,
- Institute of a budgeted deficit and sources of its covering

And the special part of the budgetary law can be created by using the criterion of a property component. And to include here;

- Institute of the budgetary property right,
- institute of the budgetary obligations,
- Institute of the budgetary process.

As to the legal institute of the budgetary property right it would be include the norms defining: a) legal subjects of the budgetary property, b) object of the budgetary property right, c) realization of the budgetary property right.

The institute of the budgetary obligation would be including the norms defining: a) the concept of the budgetary obligation, b) the system of budgetary obligations, c) performance of budgetary obligations (subjects, forms, ways, and so on.

Certainly, the above-named system of the budgetary law is almost possible only in the long term, in case of further development of the budgetary legislation in the area of the increasing display of a property component of budgetary-legal regulation.

The system of the special part of the tax law can include difficult institute of an obligation law. As for the Russian Federation it includes, in particular, the institute of obligations under federal taxes, institute of obligations under regional taxes, institute of obligations under local taxes. Thus, the system of the tax law just also is constructed on legal classification of property relations

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PUBLIC FINANCES AS INTEGRAL PART OF FINANCIAL LAW

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Abstract

This contribution deals with definition of public finances. The concept of public finances is intertwined across subsectors of financial law, it can be understood at several levels and public finances themselves are influenced by many aspects. Public finances can be understood in many ways. The main aim of the contribution is to confirm or disprove the hypothesis that public finances are also integral part of financial law. To achieve the main aim were used scientific methods, especially description, analysis and comparison.

Key words

Public finances; financial law; finances.

JEL Classification

K30, H62

1 Introduction

The concept of public finances is intertwined across subsectors of financial law, it can be understood at several levels and public finances themselves are influenced by many aspects. (Mastalski, Fójcik-Mastalska, 2013: 25) It may be, first understood as a scientific discipline which was clearly defined in recent years in the theory of financial law and in some states (e. g. Poland and Hungary) even form a separate legal subsector with a long tradition. Public finances can be a term used in the legislation of surveyed states, which may be different (and often coincide) with the first definition, since it is usually

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more narrowly conceived. Public finances can be understood as a social relationship with a specific subject (money), which is implemented by public law in connection with the implementation and use of public money funds. The public finances can also be viewed as an economic discipline and economic term. The last definition is quite imprecise definition used by laymen, who under the term public finances means not monetary relations, but the actual funds in the public sector. In some states, public finance are conceptualized very closely and essentially their definition coincides with the definition of the budget law, if they are not completely ignored. In others range of public finances is far wider with regard to the existence of separate legislation (Public Finances Act) and tradition.

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2 Public finance as social relations

In the introduction, it is useful to define the public finances first from the perspective of language. The term of public finances is made from separate terms – "public" and "finances". Finances can be understood by a law dictionary as *"financial relationships related to the creation, distribution, redistribution and use of money masses."* (Hendrych et al., 2003: 217) A somewhat different way Ostaszewski defines finances as a monetary phenomena that are associated with the creation and movement of real existing or in future activated money reserves. (Ostaszewski, 2013: 22) He does not mean the money itself, but the social relations whose have money as an object. However, even here there are exceptions, as not every relationship that involves money, can be understood as finances. (Mrkývka, 2012: 16; or Mrkývka et al., 2004: 15) The second part of the term public finances is formed by their connection with a public folder and give them a public character. This is a characteristic of public finances in the event of their approval process and implementation through public institutions. (Banaszak, 2012: 1043) Subsidiary definition of "public" can be found, for example in Council Regulation (EC) no. 479/2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community, which defines that *"the term 'public' means the sector of "government" (S. 13), that*

means "central government" (S. 1311), "national government" (S. 1312), "local government" (S. 1313) and 'social security funds' (S. 1314), with the exclusion of commercial operations." (Council Regulation no. 479/2009, Art. 1/2) This is not a precise definition, but the definition for purposes of the European Union because the theory can sort to public finances other subjects and areas. In a market economy, public finances are only a part of finances. In addition to public finances there are also private finances, e. g. finances of companies, banks and insurance companies. (Kosikowski, 2006: 21)

Czech financial law theory generally conceives the public finances as a group of social relations of its kind which have funds as their object. Mrkývka defines public finances as *"the social relations associated in particular with the creation and use of money funds"*. (Mrkývka et al., 2004: 15) Similarly, public finances are expressed by Bakeš as *"the sum of monetary relations associated with creation, distributing and using cash masses and their parts in bodies and public sector institutions."* (Bakeš, 2012: 7) For the public sector it is specific that subjects and public sector institutions are partially or fully financed from public funds. (Hamerníková, Maatyová, 2007: 22)

In somewhat different way and we can say more specifically from the previous two authors, public finances are defined by Slovak legal doctrine. For example Balko argues that *"the public finances represent the movement of money supply, which represents a state economy, its public institutions, state-owned enterprises, the territorial self-governments units, as well as different earmarked funds in the public sector."* (Balko, Králík, 2005: 15) In the spirit of the above definitions Sidak, states that *"the public finances are a summary of the monetary relations related to the creation, use and distribution of money funds in the public sector (state and local governments and public institutions)."* (Sidak, Duračinská, 2012: 2)

Sokolewicz defines public finances in line with their constitutional and statutory definition as *"a collection of commitments and claims of public authority to their nature and amount, which are used for securing the objectives and tasks of this authority, and especially to meet public needs."* (Sokolewicz, 2005: 5) It is possible to agree with this author also in the part that there is no equation between state finances and public finances, because public finances include also finances of local self-government units. Kosikowski combines public finance with the accumulation and distribution of money by public authorities in the performance of their functions. (Kosikowski, 2006: 21)

According to Ofiarski and Dzwonkowski in the public finance sector there are carried out operations associated with the accumulation and spending of public funds. (Ofiarski, 2007: 2-3; Dzwonkowski, 2013: 4-5) The definition of public funds can then be found in the act. (Polish act on Public Finances, Art. 5) The difficulty of defining the term of public finances is also awarded by Denek who stays that *"public finances include monetary mass of state, and especially fund called state budget, and funds accumulated and distributed by the state beyond state budget (the so-called extra-budgetary funds), funds (budgets) of territorial, interest and economics self-governments and financial resources of health insurance, foundations, religious associations, etc."* (Denek, 1995: 19) This is a broadly conceived understanding of public finances, as regards the definition of entities that belong here.

Among the states beyond Visegrad Four it is possible to mention for example the definition of French theorists Gaudemet and Molinier, who referred public finances simply as public financial resources and operations with them. (Gaudemet, Molinier, 2000: 17) In a similar way Dębowska-Romanowska adds that in addition to the above public finances are as well a summary of the legal institutions that form and govern whole mechanism of accumulation and distribution of public funds. She further adds that public finances are used for the allocation of assets originating from private entities realized by public entities. (Dębowska-Romanowska, 2009: 8)

From the above mentioned definitions it is possible to clearly deduce the basic features of public finances:

- public finances are social relations;
- these social relations are associated with creation, distribution and use of money funds;
- the money funds are in public sectors;
- usually public institution is one of the subjects (see Brzeziński, 2001: 22);
- the public interest is demonstrated, not the private one.

Dębowska-Romanowska then defines public finances even further when she summarizes current knowledge. Firstly she defines them as a set of legal institutions (public finance law), as well as the very mechanism of accumulation and use of public money, and finally as public money themselves. (See Dębowska-Romanowska, 2009: 8) Szołno-Koguc adds that modern

public finance include not only processes of accumulation and redistribution of public resources, but also their active management. (Szołno-Koguc, 2010: 32)

3 Definition of public finances in terms of economics

The purely legal definitions it is also possible to add economic definitions as they are inseparable in relation to examined issues. According to economic theorists, public finances are one of the most important instruments of public policy, which can be understood as theoretical and practical operations, by which the state intervenes in the economic environment. (Lajtkepová, 2013: 15) Hamerníková and Maaytová like their colleagues indicate public finances as specific financial relationships that take place *"within the economic system between the authorities and public bodies on the one hand, and other entities on the other side."* (Hamerníková, Maatyová, 2007: 11) The basic elements of public finances they subsequently rank public expenditures, public revenues and taxes. Peková even divides the concept of public finances in two levels. Firstly, the institutional approach, under which we understand the way in which institutions use different fiscal instruments - taxes and public spending to influence the behavior and decisions of individuals, households, private companies, NGOs, interest groups and other entities. Second, she also defines the concept of relationship that is based on the fact that public finances are relations of production, distribution and use of various cash funds based on principles of non-recovery, non-equivalence and involuntary. (For more see Peková, 2011: 72-73)

Matoušek further adds to the institutional approach that public financed can be considered as controlled organized system that is not for own profitable economic activities, but to *"create optimal conditions for profitable business private-economy entities and their development. It should create an environment with established rules of conduct, business, individual and collective freedom."* (Matoušek, 2012: 259) This definition opens new view for legal theorists, especially with regard to defined rules of behavior in the environment. Tomášková thinks

about the sense of existence of public finances and comes to the conclusion that the sense is to find the most efficient way of allocating resources, thus achieving with limited means maximum benefit. But she also discovers that there is no perfect system and existing systems are only close to the ideal. The subject of public finances by the same author is conceived very broadly and it includes public funding, the effectiveness of the use of instruments of state intervention, the effects of financial instruments and public expenditure on individual behavior and decision making, characteristics and typology of public revenue, characteristics and typology of public spending, deficit of public budgets and public debt. (Tomášková, 2006: 6 and following) In the same way economists consider the functions of public finances – redistributive, stabilizing and allocation function.

4 Public finances as legal sector

In the literature it is often possible to meet with concept of public finances law. In some cases, this term is used only in the sense of laws regulating issues related to public finances, respectively specific social relationships (see above). However, there are also tendencies (in some states already realized) in order to create a separate legal subsector of public finances in the financial law, or even its separation and the formation of a separate legal sector of public finances. In this case, it is possible under the concept of public finances law understand the law which is characterized by relative autonomy based on differing criteria. (Hendrych et al., 2003: 710) These criteria are defined by theory: object of legal regulation, method of regulation, internal systemic coherence of norms and social merits. (For example Průcha, 2007: 36-41; or Mrkývka, 2012: 29)

In the Czech Republic and the Slovak the concept of public finances is primarily used in connection with "public" nature of specific social relations in connection with the creation and use of money funds. Therefore, it is not possible to define public finances as a scientific discipline yet, as it is in Poland[2], or as a separate subsector, since the theory of financial law do not

2 See also Ostaszewski, who defines public finances as separate scientific discipline *„finanse publiczne są rozległą dziedziną, która traktuje o publicznych zásobách pieniężnych. Przedmiotem nauki o finansach publicznych są nie tylko reguły odnoszące się do publicznych zasobów pieniężnych, ale także procesy związane z ich gromadzeniem i rozdysponowaniem oraz skutki gospodarcze, społeczne i politycznebędoące następstwem operacji środkami publicznymi."* (Ostaszewski, 2013: 103).

make this conclusion. Czech economists are far ahead of colleagues from the Czech legal environment. These economists defines public finances as a separate scientific discipline, which is ranked in area of financial sciences. In this discipline they define its object of study, functions, concepts and methodology of a theoretical system construction. (Hamerníková, Maatyová, 2007: 20-22) Peková consider public finances as separate economic sub-discipline. (See Peková, 2011: 642) In view of the gradual penetration of economic concepts in legislation, issues according to legal regulation of economic phenomena categorized within public finances, take in importance and it can be assumed that there will be a tendency to grow progressively defining the law of public finances as a sub-finance law especially with regard to the peculiar subject of legal regulation, as is the case in Poland and Hungary.

In Hungary, the public finances law has a long tradition and regulation of public finances and also the use of this term can be found in the Hungarian legal system for many years.[3] Borsa for example defines public finances law as a part of financial law beyond accounting, monetary law, international finance law and income law. (Borsa, 2009: 1083-1089) In Poland, public finances have a separate legal sub-discipline and scientific discipline. (For more see also Ruśkowski, 2010; or Brzeziński, 2001) Both Hungary and Poland have a distinct advantage that for many years in their jurisdictions, there are separate laws on public finances that provide legal definition of public finances basis for further investigation. The existence of a special legal subsystem of public finances is also supported by the fact that in Poland since 1997 and in Hungary since 2012, public finances have separate chapter in their constitutions.

5 The public finance as a sum of money

The term "finance" is also often defined as mass or sum of money. Hence also the understanding of public finance as a means which public institutions manages. The distorted conception of public finances, contrary to what has been stated, has its reasons especially in confusing of terms (money and

3 Hungarians also have a separate act devoted to the issue of public finances already from 1992. Separate chapter is devoted to public finances in the Hungarian constitution, since 2012.

finance) in common parlance. In view of the above, it would seem that this conception is quite wrong, legal theorists are quite clearly agreed that this is a social relationship, and money are only the object of these relationships. However, if we look for example to the dictionary of foreign words, we find that finances can be defined as social relations and also as money. (Pallaidová, 2008: 203) Indeed, as will be seen below, neither the legislature use is widely. This conception cannot therefore be condemn, but from the perspective of legal theory the distinction of individual dimensions of public finances has major consequences and must be strictly fulfilled.

6 Legal definition of public finances

It is not so surprising that the legal definition of public finances contained in the law is different from the general understanding of the term and also from its theoretical definition. According to the law of the country, this difference may be greater or lesser. Perhaps the most precise legal definition of public finances, which is close to its general understanding, contains the Polish Act of 27th august 2009 on Public Finances. This Act stays that public finances include processes associated with the accumulation of public money and their redistribution, and especially the accumulation of public revenue[4], expenditure of public money, state budget financing loans, commitments associated with public money, public money management, management of public debt and commitments to the budget of the European Union. (Polish Act on Public Finances, Art. 3) The Act also specifies in detail what is meant by public money.

Previous Hungarian Act on Public Finance from 1992 defined system of public finances as a system of management of government functions and financing of the central government, separate state funds, local self-government units and social security system. (Hungarian Act on Public Finances, Art. 1/1) The same Act in Article 2 then defines that public finances in Hungary include the budget of the central government, separate state funds, self-government units and social security system. (Hungarian Act on Public Finances, Art. 2)

4 Polish jurisprudence distinguishes two terms – „dochody“ a „przychody“ – which can be broadly classified as revenue.

In Czech and Slovak legislation the current situation according to the definition of public finances is very similar, as they have almost no definition. Bright exception is the Czech Financial Control Act, which defines public finances in terms of sums of money as public revenue and public expenditure. Public income is defined as income of state or a legal entity (contribution organization, state fund, self-government unit, etc.), public expenditure under this Act means the expenditure incurred by the state budget, the budgets of self-government unit, other state funds, cash, or other of the above mentioned legal entities, money concentrated in the National Fund and other funds from abroad under international treaties or provided to the fulfillment of the public administration. (Act on Financial Control, Art. 2 letters f, h and i) Slovakia is even considerably worse, the concept of public finance appears only marginally in some legislation, and primary in the meaning of masses of money, with which named institutions operate, and not in wider meaning as mentioned above. In this sense, the public finances are used several times in other Czech legislation.[5]

Slightly better it is in the European law. It uses the term of public finance in the Treaty establishing the European Community, in the context of maintaining healthy public finances and avoid excessive government deficits. (Treaty, Art. 104/1-2) Regulation on the application of the Protocol on the excessive deficit even defines public deficit as net borrowing of general government (Council Regulation no. 479/2009, Art. 1/3), what makes the conceptualization of public finances de lege lata very clear. According to the above it is clear that European law defines public finances rather as a sum of money and not as social relations or a separate area of study.

7 Conclusion

There is no doubt that the term of public finances can be understood on several levels, which cannot be separated. Public finances more than any other area reflects the economic phenomena in society, on the contrary, without these economic phenomena we aware of any public finances could not speak. With the progressive codification of public finances this area can be seen not only from the economic point of view, but also from a legal

5 E.g. Act no. 365/2000 Sb., on public administration information systems, as amended.

point of view. Legal regulation of public finances was formed historically due to a political dispute between the legislative and executive power and its manifestations are the rules at different levels, which are the part of public finances. (Kosikowski, 2003: 108)

As mentioned above, the definition of public finances of theorists (economists and lawyers) is in many cases different from the legal definition of public finances contained in the legislation. If legislators define public finances, they have chosen the way of the narrow specifications of public finances, what is appropriate on one side but the other side the meaning of public finances is used incorrectly or in different ways, without further information which meaning is used. In addition to how the importance of this area is growing in modern states, the importance of public finances is gradually shifting, what should be responded smoothly by theory and practice. This is evident even today. In some areas public finances have narrow and inaccurate meaning as a sum of money, in other areas the definition is broad as all social relations associated with the creation and use of public money funds, the differences between the legal definitions of public finances mention. More accurate is undoubtedly broader definition of public finances as a specific social relations, with which we can agree, and in this sense the term is also used in this work.

If we examine the relationship between public finances and financial law, then the question must be viewed from two points of view. In that we use public finances only as an object of financial relationships, then they pervade the financial law and cannot be separated from it (public finances sensu largo). However, it is possible to consider public finances as a separate legal subsector. In this case public finances are the specified part of the financial law with the specific object of legal regulation (public finances sensu stricto). (See also Dębowska-Romanowska, 2009: 63-64)

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Treaty establishing the European Community.

THE DISCIPLINE OF PUBLIC FINANCE AND FINANCIAL LAW IN POLAND

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Abstract

The article presents the thesis proving that there is a separate financial discipline in Poland, the discipline of public finance and financial law, which has been developing relatively independently from financial law (a branch of legal sciences) and from economic science of public finance. It is characterised by a comprehensive approach to the phenomenon of public finance in all its complex legal, economic, socio-political, and organisational aspects. It has been taking its shape for nearly 40 years, meaning that it is a new discipline whose development often faces numerous objective and subjective barriers. Overcoming these barriers in the future determines its future development.

Key words

Public finance and financial law; public finance; financial law; public finance management; financial policy.

JEL Classification

K40

1 Introduction

Based on the abundance of literature it can be stated that Poland is the only country in Central Europe where the three branches of financial sciences: the discipline of public finance and financial law, the discipline of public finance, and the discipline of financial law develop simultaneously and side by side. At least it may seem so looking at the titles of monographs, textbooks, and scripts.

After the Second World War, Poland and other socialist states developed the discipline of financial law at the faculties of law, whereas the faculties of economic sciences developed the discipline of finance, which

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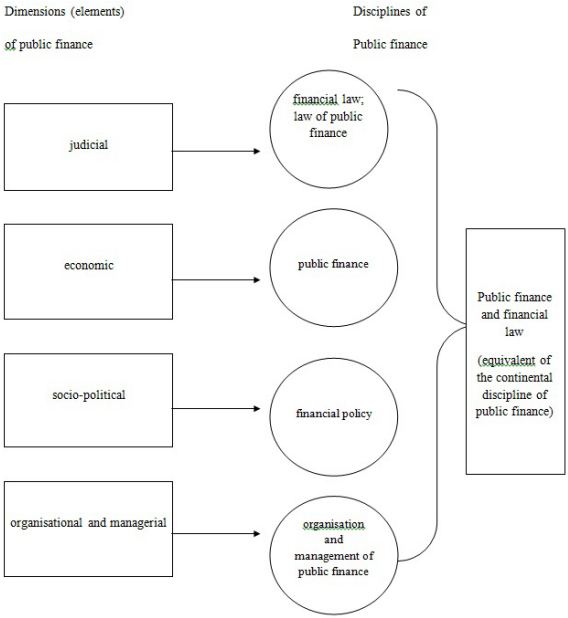
later produced the discipline of public finance. In general, the discipline of finance concentrated on economic aspects (dimensions), while the discipline of financial law focused on legal aspects (dimensions) of finance, and later of public finance. In Poland in the 1970s there was an identifiable need for joint, comprehensive discipline that would examine the phenomenon of finance (and later, of public finance) holistically in its legal (judicial), economic, and socio-political aspects, and today also in its organisational and administrative aspects. At that time, a comprehensive discipline of public finance was already well developed especially in France where it was a branch of public law. It was called the continental discipline of public finance or the discipline of public finance. Following this example, first textbooks titled "Finance and financial law" (later called "Public finance and financial law" due to the fact that the terms "Finance" and "Public Finance" had already been used in the domain of economic sciences) were produced in Poland. Such was the origin of the discipline of "Public finance and financial law" in Poland, which was the equivalent of the continental discipline of "Public Finance". The objective relationships between the disciplines are presented in Table 1.

Table 1: Public finance and the disciplines of public finance



Source: own elaboration

2 Public finance and the study of public finance and financial law in Poland

The subject of the discipline of public finance and financial law in Poland (corresponding to the continental science of public finance) is investigating all the phenomena involved in public finance. This last term can, of course, have numerous interpretations and definitions depending on views of their authors and on the historical time. The term itself has indeed evolved. From the mid-19th century up to the Great Depression it was mainly concerned with juridical aspects. Later its scope was expanded into economic aspects (a consequence of using economic instruments), and since the 1960s it has also involved sociological and socio-political issues. The proponents of this last movement rightly point out that little can be understood in the essence of public finance without the knowledge of socio-political conditions of making financial decisions (Lalumière, 1976: 7 onwards). This position prevailed in the western reference books (Duverger, 1965; Gaudemet, 1977), and some of those works were translated into the languages of socialist states (for example, P. M. Gaudamet's works were translated into Russian (1978) and Polish (1990)). Polish speaking scholars could also read P. M. Gaudemet, J. Moliner, Finansepubliczne [Public Finance], Warsaw 2000).

In Poland, public finance and financial law originated as a discipline of science in the 1970s. It is generally assumed that the first textbook in this scope was "FinanseiPrawofinansowe" by J. Harasimowicz [Finance and Financial Law] (Harasimowicz, 1977). Soon there was an abundance of works titled "FinansePubliczneiprawofinansowe" [Public finance and financial law] (Weralski, 1984), and this title remains in common use today. It is worth noting that from the 1990s the sphere of public finance has begun featuring aspects of rational organisation and management, reflected both in national legislations and in the doctrine. For example, Art. 3 of the Public Finance Law of 27 August 2009 (Journal of Laws of 2013, item no. 885 as amended) states that: "Public finance include the processes connected with the accumulation of public resources and their allocation, in particular:

1. accumulation of public income and revenue;
2. expenditure of public resources;
3. financing the State treasury borrowing requirements;

4. taking on commitments which engage public resources;
5. management of public resources;
6. management of public debt;
7. settlements with the EU budget."

3 General criteria for separating the discipline of public finance and financial law in Poland

If the discipline of public finance and financial law is treated as a synthetic discipline including specific areas pertaining to public finance (i. e. financial law, public finance, financial policy, organisation and management of public finance), it may be stated that there have been significant achievements in that field of law in Poland (except for, for example, financial policy) and it is gradually developing properly (Sochacka-Krysiak, 2006: 126-133; Ruśkowski, 2006: 134-141; Ruśkowski, Pomorska, 2010: 437-458). This standpoint may be accepted, likewise the opinion that the development of budgetary law or tax law is at the same time an element of financial law and strengthens the entirety of the discipline of financial law. The discipline of public finance and financial law would hence shape itself somewhat spontaneously, impulsively, without actually being a separate discipline.

Yet the essence of this discipline should rather lie in the distinctness of its subject of study, relating to the investigation of financial phenomena in various aspects (legal, economic, socio-political, managerial). It is different from specialised financial disciplines, which can be characterised by focus on a single aspect, by the duality of its approach. The methods exploited in public finance and financial law are also varied. Although they are not original in comparison to specialised disciplines, they cannot be limited solely to the methods used in a particular specialised discipline as it would simply duplicate that discipline.

The discipline of public finance and financial law, by focusing on several dimensions and applying different research methods, aims to achieve the "La Fontaine's Decanter" effect i. e. it is proved that observing colourful reflections of light in a crystal decanter from diverse angles different observers see only one particular colour. This experiment serves not only cognitive or analytical purposes, but also helps in the decision-making process in terms

of public finance. The dispute before the Polish Constitutional Tribunal about the maintaining judges' salaries at the 2012 level is an example provided by the Polish reference books. Even though the arguments presented by the First President of the Supreme Court (the author of the complaint) and the Minister of Finance referred to the same case, they were utterly different. It may therefore be concluded that one of the reasons is the lack of general subject i. e."public finance and financial law (public finance in continental terms)", which would replace detailed disciplines which are currently being taught i. e. financial law at law schools and public finance at economy schools (Ruśkowski, 2013: 368-376).

4 Assessment of the discipline of public finance and financial law in Poland

Although the discipline of public finance and financial law has been developing in Poland for nearly sixty years now, it is extremely difficult to assess its development and its achievements, mainly due to lack of precise criteria for separating it from other fields of study and diversity of its scientific achievements, being on the edges of particular traditional disciplines. Very often, publications on financial law feature additional elements pertaining to economic, socio-political, and managerial phenomena. It is therefore difficult to unequivocally determine when these works cease to be strictly legal and constitute outcomes of the discipline of public finance and financial law. Economic works (in the economic understanding of public finance) frequently include deliberations on the organisation and management of public finance. These aspects are also sometimes discussed in the works on financial law, just as the certain legal matters (usually relating to financial law) are featured in economic works. The attempts at making precise "preordained" findings or discerning universal assessment criteria are doomed to failure.

The assessment of the contributions that textbooks and scripts make to the overall body of the characterised field of study is also unclear. In the last 25 years, a dozen or so textbooks titled "Public finance and financial law" or directly referring to the two concepts ((Kosikowski, Ruśkowski, 1994; Majchrzycka-Guzowska, 1997; Ruśkowski, ed., 2000; Kosikowski, 2001; Chojna-Duch, 2010; Drwiłło, ed., 2011; Wójtowicz, ed., 2011; Nowak-Far, ed., 2011; Kosikowski, 2013) were produced in Poland. Being partially

involved in these works, I do not feel quite satisfied with the process. Generally, these are textbooks on the system of public finance (hence relating to financial law) with introductory chapters on economic and/or organisational issues concerning public finance. They may be exploited successfully in administration courses but their contributions in the field of public finance and financial law is, however, limited. There must be several reasons for that. One is surely the holistic character of most textbooks and the lack of specialisation among their co-authors in terms of economic, socio-political, and managerial aspects relating to public finance. In principle, it is grounded in the fact that textbooks are ranked low in the credit systems assessing publications; the system that recently has almost eliminated monographs and original works on the subject.

Despite the dissatisfaction expressed above, it is worth noting that some exceptional works, which surely belong to the discipline of "public finance and financial law", do appear on the market. One example is the 2001 work titled "Naprawafinansówpublicznych w Polsce" [Restoration of public finance in Poland] (Kosikowski, 2011).

5 Conclusion

It may be concluded that 40 years is a relatively short period for establishing a new scientific discipline, such as "public finance and financial law", in Poland, the more it is supposed to take over some of the spheres already occupied by specialised disciplines. We can surely discuss some specific achievements of this field of law like the development of the academic subject of "public finance and financial law" taught in administration courses, numerous textbooks and manuscripts, as well as monographs and specialised works. The lack of interest in the courses of administration in recent years could be compensated by the introduction of appropriate subject in courses of law and economy. The further development of the discipline "Public finance and financial law" is also conditioned by access to foreign and mostly non- English reference books. The aforementioned problem may also be solved by subsequent translations of classic textbooks on continental public finance into Polish, which would also contribute to the

development of the discipline. Moreover, creating a Polish textbook in that scope, which would feature a monograph or original work would also make a significant contribution.

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CURRENT ISSUES OF PUBLIC FINANCE FROM A LEGAL PERSPECTIVE[1]

Maria Bujnaková[2]

Abstract

Public finance can be defined as the sum of all monetary transactions in the public sector. It is necessary to give attention to the definition of finance in legal terms, not only from an economic perspective. Therefore, the article deals with some selected issues of public finance from a legal point of view with an emphasis on the budget of public administration and its parts.

Key words

Financial law; public finance; state budget.

JEL Classification

H61

1 Introduction

Generally speaking, the law is a guarantee of the required formation, the anticipated development and also the termination of every social relationship, which is guaranteed by a legal norm. In economically highly developed society are all social relations – the content of which is money - regulated by legal norms. The state is the subject of law-making and also state is the subject of maintaining of law through its bodies.

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Public finance is a concept we meet today, not only in day to day life, but it is a concept that resonates in economic and also legal environment. It should be noted that this concept is not a new phenomenon, and it had been known in the previous social period. But it must be emphasized, especially after 1989, that this concept is undergoing analysis and drawing individual findings and conclusions under market economy conditions.

In the concept of public finance particularly resonates the term public. Sufficient attention is given to the concept of finance what is proved by the quantity definitions of finance, its divisions and functions and its role in the state.[3]

2 Definitions of public finance

In the literature prevalent opinions on the definition of finance is economic perspective. But we believe that it is necessary to give attention to the definition of finance in legal terms, because law as an instrument of the functioning of the state is necessary during examining the concept of the finance.

Finance is the term used for a very long time. We agree with the opinion that this term originated simultaneously with the establishment of the state, though not in such form as is defined nowadays (Bakeš, 1979: 11; Spáčil, 1970: 17).

The term of finance current legal and also economic community have defined as a system of socio-economic relations, respectively monetary relations associated with the generation, distribution and use of monetary funds for the tasks and functions of the economic entities (Babčák, 2001: 8; Kubincová, 2006: 30).

By different theoretical views on the concept of finance, on its examination from different perspectives we could dedicate a special contribution which would analyze in detail various features and opinions on the definition. It is not the purpose of this contribution to give a specific part for its definitions. The aim of the paper is mainly public finance and its current valid

3 See in more detail opinions on the definition of finance, e. g. Háčik defines finance as "a system of monetary operations with real money and through them occurs a change in money supply of particular economic subjects in order to redistribute national income and ultimately realize the national gross domestic product" (Beňová, 2005).
Vybíhal emphasizes that "finance express monetary relations that arise and develop in acquiring, distributing and using the financial capital" (Vybíhal, 1995).

legal rules in the legal order of the Slovak Republic. Regarding the opinions for division of finance, these are more or less clear and finance divided into public and private. To be satisfied with such a division of finance, particularly in present time, would not be entirely correct also from the point of view that the market economy knows no boundaries, nor unambiguous classification of finance between the private sphere and the public sphere is not the same everywhere. From a broader perspective, we could define a public finance as financial relations arising in connection with the production, distribution and use of monetary funds back to the economic activities of public authorities (Petrenka, 1992: 5).[4]

Even considering defined public finance, there are many open questions of the definition of management of public finance, in particular regarding the management of public resources. The very structure of the public finance allows a different look in relation to its statistical reporting, where there are different approaches and mainly due to the different reflection of economic phenomena, but also links and overlaps of the public sector with the sector of public administration, public finance and economic role of the state.

From a national perspective in the conditions of the Slovak Republic, in my opinion, it is necessary to incorporate these public finances:

- state budget of the Slovak Republic
- state purpose funds and other public monetary funds
- finance of local government
- finance of state enterprises

3 Some issues regarding the budget

Special attention in this paper I want to address the state budget of the Slovak Republic. The state budget is perceived as an important part of public finance, as a strategic tool of economic management and it can be stated that it is a significant tool in the hands of the state to intervene in the economy. The state budget is an important instrument of the economy of each state. Its definition and determination is not always clear (Bakeš, 2006: 116;

4 In any case, if we perceive the public finance, we must take into account the fact that their perception is influenced by researching in the national sphere and in the international sphere, respectively in the international context.

as well as Chorváth, 1984; Musgrave, 1994; Kosikowski, 2005). There are several opinions on definition of the state budget. It must be seen as a tool of governance of the state, which has its legal aspects, but also has economic substance. These two aspects of the state budget should be seen in interconnectedness. Definition of the very concept of the state budget is especially important on its merits, but also its expression. The state budget is mainly characterized as a tool through which is realized financial policy of the state. It is a tool that the state uses to enforce their interests. It is tool in the hands of state /government/, which the government can assert its interests and objectives, and should serve as a means of carrying the election program of the government, especially in those areas that are directly financed from the state budget.

The state budget must be seen as a basic financial plan of the state, which is primarily used for the tasks of government, respectively those objectives that government power considers as a fundamental in exercising of its policies. Through the state budget is defined the fulfillment of government's tasks, whether there are a priority tasks, respectively tasks related to the fulfillment of state functions. In the perception of the state budget as a basic financial plan of the state is also noteworthy its definition as an economic category, which mainly relates to the collection and distribution of funds. This means that it is a monetary-economic category such as taxes, fees, duties, subsidies and so on. Thus highlights the close relationship between the state and its functions performed through the state budget.

In the introduction of this paper, we pointed out the legal aspects of the state budget and it is necessary these legal aspects perceived mainly in the context of the law. One of the fundamental attributes of the state budget is the fact that it is discussed annually in the highest legislative body, in a special way and always it has form of law. In the Slovak Republic has gradually acceded to some fundamental changes in relation to the negotiation of the State Budget Act. Gradually, the state budget is seen as a special law, which defines the basic financial attributes of the state. At present, there are adopted legal norms that define the basic rules of budgets either public service or local government. These rules are the part of the Act on Budget Rules of the Public Service and the Act on Budget Rules of the Regional Self-Administration (see: Act on Budget Rules of the Public Service).

The actual state budget for 2014 is adopted in a form of law as the Act No. 473/2013 Coll. on the State Budget for 2014.

The mere fact that the state budget has the form of law only highlights its legally binding, but also determines its limited validity. The budget period is clearly defined in the law and determined by one calendar year. The state budget is defined as an essential part of the public administration budget and provides funding of major functions of the state in the corresponding budget year. The state budget for the financial year includes budget revenues, budget expenses and financial transactions with the state financial assets and other operations that influence the state of state financial assets or state financial liabilities. Legal nature of the state budget is also reflected promulgating or publishing in the Collection of Laws of the Slovak Republic. Lawfully are also regulated the questions about budgetary provision - the period unless a government bill of the state budget for the following budget year is not approved by the National Council by December 31st of the current budget year, the budgetary management is administrated by the budgetary provision in the term from January 1st of the budget year to the time when the Act of State Budget for the corresponding budget year comes into force. Budgetary management of the Slovak Republic and the relationships between the state and other subjects are administrated by the Act of State Budget for the preceding budget year during the budgetary provision with the details contained in the Act directly (see: Act on Budget Rules of the Public Service).

The budgetary procedure of public administration is an important moment, which the government gives special attention through relevant ministries. Crucial role in the budgetary procedure itself plays the Ministry of Finance, which manages the works and regulates the drawing up of the proposal of the public administration budget, particularly the proposal of state budget on the basis of the initials of public administration budget approved by the government usually by the end of April of the current budget year. The Ministry of Finance draws up the proposal of public administration budget in cooperation with the competent subjects of public service. The Ministry of Finance acts as a coordinator of the budgetary procedure and it is required to comply with various provisions of the Act regarding the submission of such proposals that would increase the share of government budget deficit for gross domestic product.

Public funds may be used only for purposes that are in accordance with law as established in the relevant budget year. There are specific criteria for using public funds and their use are control by special authorities. Directly in the Act are also regulated financial relations with the European Union. Using funds from the European Union is under strict conditions controlled by the authorities of the European Union.

Management of public finance is under strict control not only by the state, but particularly by the public. When draft laws and other generally binding legal regulations, measures of central state administration bodies and other materials submitted to the Government and the National Council shall be stated and justified their anticipated financial impact on the public administration budget, not only for the current year, but also for three following budget years. Important document in drafting the proposal of public administration budget is the budget classification, which is the basic document determining mainly the correct categorization of various revenue and expenditure of the state budget.

Annual budgeting allows a better overview of the structure of revenue and expenditure for the respective calendar year. Also, in Slovakia the budget of public administration is a medium-term economic instrument of the financial policy of the state. It is drawn up every year for at least three budget years. The budget year is identical with the calendar year.

The budget of public administration consists of:

a) state budget for the corresponding budget year and the summary of budgets of other subjects of the public service for the corresponding budget year,
b) state budget for the year following the corresponding budget year and the summary of budgets of other subjects for the year following the corresponding budget year,
c) state budget following the second year of public administration budget and budgets of other subjects of the public service.

When we mentioned the medium-term economic instrument of financial policy, it must be noted that the indicators, respectively revenues and expenses, which are budgeted for future years, are not binding indices. Their height is determined indicative and takes into account the particular state

of the economy in the state. Directly in the Act is stipulated that the Ministry of Finance submits the public administration budget to the Government for approval. The Government submits the proposal of act on the state budget for the corresponding budget year and for information the budget of public administration to the National Council of the Slovak Republic (compare: Act on Budget Rules of the Public Service: Art 4). From the wording of the Act is clear that the decisive law for the respective calendar year is always the act on the state budget. Frequently approval of decisive act is also associated with discussions of confidence to the Government, as a body that ensures the functioning of the state as a whole.

In particular, it should be emphasized that the state budget is centralized monetary fund, which means that the amount of funds or financial resources are centralized at the national level through state financial institutions. If we defined the state budget as a centralized monetary fund, is important to note that in its creation and distribution is used non-refundable allocation method. That is what sets it apart from other monetary funds. However, it may use the relationships existing between the state budget as a centralized monetary fund and other monetary funds.

The essence of the state budget is also reflected in the functions arising from the nature of the tasks performed by the system of public budgets. Through the state budget public finance fulfil basic functions: allocation, distribution, regulation and information. These are only those features that we consider as essential functions of public finance. It is undisputed that in addition to these features there are also other features that are attributed to public finance. In our opinion, these basic functions take into account the basic role and purpose of public finance, as evolved over the process of definition of public finance.

If we want public finance considered in terms of public budgets, we must include budgets into this system, which are compiled in a particular state for a certain period of time. They must be seen as the funds that are generated, distributed and used for the principle of non-returnable and non-equivalence. The budget system in Slovakia consists of budgets of public administration which are divided into the budgets of central government, local government and funds of social insurance and funds of health insurance.

The budgets of central government are characterized as a central:

- state budget of the Slovak Republic
- state purpose funds
- state budgetary and contributory organizations
- National Property Fund of the Slovak Republic
- Slovak Estate Fund
- public universities
- other entities registered in the register of statistical organization of the public administration.

The budgets of local government:

- budget of the municipality budget of higher regional unit
- budgetary and contributory organizations established by local governments.

Funds of social and health insurance:

- Social Insurance Agency
- health insurance companies.

Public finance is defined as the sum of all monetary transactions of the authorities and public sector organizations, which leads to change in the money supply in this sector. Today, no one doubts about existence of the public sector. Rather, the debate is about whether it is the responsibility of the public sector to finance everything what is funded, respectively in simple words, what should be the size of the public sector and its relationship to other sectors of the economy. It seems that the public sector is indispensable, but it is needed to look for opportunities to clarify financing of the public sector and how to effective use public funds.

Public finance is used primarily to finance public goods, respectively those needs that state considers as public. It creates not only economic but also legal conditions for adopting such legislation, which addresses the problems of the public sector.

4 Conclusion

We have discussed, in more detail, issues of public finance in the context of the legal provisions in Slovakia. All types of finance that exist are relatively independent, but always there are relationships of interconnectivity and continuity. In the Slovak economy is necessary, such as in any market

economy, secure some public needs centrally, but also at the local level through budgets of municipalities and higher regional units. Current legislation takes into account the existing state after Slovakia's accession to the European Union and the reflection of the EU budgets to the conditions of the Slovak Republic and its laws governing the current budget system in Slovakia. Legislation is contained in several acts which respect territorial division of Slovakia and the economic potential of the state.

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SYSTEM OF FINANCIAL MANAGEMENT AND CONTROL[1]

Jana Kranecová[2]

Abstract

As a result of the mandatory implementation of European Union legislation into the Czech legal system is a significant change in the settings of the financial management and control in public administration. It is the acceptance of the principles of modern financial management and good governance. The aim of this paper is to point out the weaknesses of the current system of control of public resources management and state considerations de lege ferenda in order to increase the efficiency of financial control system.

Key words

Financial management and control; public resources; public administration; European Union.

JEL Classification

K40

1 Introduction

The aim of this paper is to define the outer and inner limits of the system of financial control in the Czech Republic. In view of the fact that financial control is not a favorite topic of Czech authors, I use the European legislation, which is the original cause of the basic law which regulates the system of financial control in the Czech Republic. I also try to define goals that

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system of financial control follow and that are important interpretative tool for the application of this rather brief but difficult law. In conclusion, I try to include financial control system into an existing system of financial law. In view of the fact that the existing act should be soon replaced by a completely new act, at least a brief reference to point out in what way the current problem can be solved in the future. In writing this paper methods of analysis and synthesis are mainly used.

The financial control system in the Czech Republic is defined by the provisions of article no. 3 of the Act no. 320/2001 Coll., on financial control in public administration and amending certain acts, as amended, and hereafter "Act on Financial Control".

2 System of financial control as a part of financial management system

The legislature first planted the system of financial control in the financial management system, what can be considered as the basis for a system-wide coherence of external financial control system. The financial management system is not defined in the Czech legislation. Its interpretation therefore in practice can make some problems, especially with regard to the need to define all its elements and therefore what create imaginary boundaries of financial control.

Some help and inspiration can be find in Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 and hereafter "Regulation on the financial rules". Financial management is expressly mentioned in the preamble of this Regulation. Paragraph two defines with regard to the abolition of the original Regulation no. 1605/2002 that the main principles, concepts and basic rules of budgetary and financial management to be retained even under the new legislation. The reason for their determination should be to ensure proper and efficient management, control and protection of the financial interests of the European Union. In a similar way, financial management in the context of individual state budgets can be defined.

The aim of setting up the rules of financial management is to protect the financial interests of the State, which are implemented by the system of public budgets. Objective of financial management but cannot be interpreted narrowly as protecting the interests of the state and the state budget. System of public budgets in the Czech Republic consists not only of the state budget but also the budgets of local government units, e. g. municipalities and counties, or voluntary associations of municipalities, or other budgets of public authorities such as state funds or regional councils of cohesion.

Financial rules defined in Regulation no. 966/2012 can be considered as financial management rules that can be applied by analogy for the management and control of public budgets in the framework of national legislation aiming to the protection of national financial interests.

Systematics of Regulation of financial rules then suggests which areas are covered by the concept of financial management. This is a vast area of budgets that include budgetary principles, through the establishment, composition and execution of the budget. Another important issue is the definition of the responsibilities of financial actors and rules relating to the implementation of these operations. Although under Regulation European legislator these rules are covered by the implementation of the budget, they compose a separate area of financial management. Classification under budget implementation can in my opinion, justify the effort of chronological capture of all aspects of the budget process, which is the core of the whole document. Autonomy of this area can be justified by the nature of the rules that make up its contents. Regard to the rules relating to the preparation and subsequent approval of financial transactions. These rules are already inherently different from those which characterize the legislation of budgetary process. In the same way Czech legislature interpret it. The procedure is governed by separate acts[3] and the rules of preparation and approval of financial transactions are fragmented into several acts or in subordinate legislation. Basic rules for approval that should ensure the fulfilment of the objectives of financial management is Financial Control Act and its subordinate regulations. It may also be in the Act no. 128/2000 Coll., on municipalities, as amended, and Act no. 129/2000 Coll., on regions, as amended,

3 Especially the Acts no. 218/2000 Coll., on budgetary rules, as amended, which regulates the process for the state budget and Act no. 250/2000 Coll., on budgetary rules of regional budgets, amended.

which provides, for example, partial rules for the preparation and approval of property operations, which also have a significant impact on the finances of the relevant self-territorial units and thus either of the side of revenue or expenditures of public budgets.

Further regulation of the financial rules also regulates other areas that affect the budget only indirectly. It is the public procurement law, the provision of grants and accounting. The entire system is enclosed by legislation of internal and external audit as a prerequisite for providing assurance that the set financial management system fulfils the goals defined by the regulation.

Financial management can be defined as a set of principles, rules, tools and measures which it is to should ensure the protection of the financial interests of the State or the Union as a community of states. The financial management system thus consists of a single relatively independent subsystems, which can guarantee meeting of financial management objectives only in the interdependence. These subsystems are:

- decision-making system,
- budgeting,
- accounting,
- reporting,
- internal control.

Decision-making system includes the above mentioned rules regarding the preparation and approval of particular financial operations, including property operations, which have implications for the public budget on its both sides - revenue and expenditure. An important role is also played by the rules governing the jurisdiction and responsibility of the wide range of authorities that the preparation and approval of financial or property transactions involved. This area can also include public procurement regulation and regulation of grants[4]. The rules that govern public procurement contracts or grants de facto establish the terms and conditions of financial or property transactions, which has an impact on the expenditure side of the public budget. It is obvious that spending operations must be given more attention.

4 In Czech law, defined as public financial support.

Budgeting is an information system that provides information about financial planning of public organizations. Budget subsequently as a financial plan is an essential tool for achieving the goals of public administration. The budget will reflect all revenue and expenditure operations. View rate of this projection depends on national legislation. The Czech Republic is due to budget structure (Decree no. 323/2002 Coll., on the budget structure, as amended). An important part of budgeting is the law of the budgetary process. In the Czech Republic there are special rules for different types of public budgets - Act no. 218/2000 Coll., on budgetary rules, as amended, which provides a process for the state budget and Act no. 250/2000 Coll., on budget rules of regional budgets, as amended.

Accounting is an information system that displays information on the status and movement of property and other assets, liabilities, including debts and other liabilities, the costs, revenues and profit (Act on Accounting, Art. 2). The purpose of accounting is to provide information about the financial position of the organization (Act on Accounting, Art. 7). Accounting as an information system that previews the facts, which are captured in it. Modern approaches to accounting are intended to provide such information as faithful picture of the financial situation. This is to be achieved through the introduction of accrual principle - methods that allow to capture the financial reality of their mutual temporal and material context.

Reporting is an information system whose source is budgeting and accounting. Information from these two systems are compared, evaluated and interpreted to information about the financial position of the organization in complex. As mentioned above, budgeting and accounting information systems are important, they provide information about the financial situation of the organization from two different angles. Accounting methods through accrual basis is based on a qualified estimate of the relevant facts and future accounting captures reality. The qualifier "accounting" stresses the need for data interpretation recognized in the accounting. The added value of this interpretation is then compared with the financial plan - for public authorities with the budget. The budget is based on the principle of capturing cash flows, which show the same fact in another way, and it is again required extensive interpretation. The basic prerequisite for successful

management and hence financial management of public budgets is knowledge of information. Reporting is a system that provides this information and it has been redrafted so as to be easily usable for decision-making.[5]

Internal control is a system that closes the entire cycle of financial management. Regulation of the financial rules defines it as "any action taken to provide adequate safeguards effectiveness, efficiency and economy of operations, reliability of reporting, asset protection and information to prevent fraud and irregularities, detection and correction and subsequent measures to respond to these frauds and irregularities as well as proper management of risks relating to the legality and regularity of the underlying transactions, taking into account the multiannual character of programs as well as the nature of the payments. Internal controls may include a variety of verification, as well as the implementation of any strategies and procedures to achieve the objectives set out in the first sentence." In the Czech legal order, internal control is regulated by the Act on financial control. Existing Act already do not satisfy the requirements of the European Union, and therefore completely new Act is being prepared. It will regulate the control system in accordance with European legislation and requirements that were in existence during the Financial Control Act and identified existing law insufficiently regulated.

3 Internal arrangement of financial control system

The provisions of article no. 3 paragraph 1 of the Act on Financial Control also analyzes internal systematics of financial control, which is the primary prerequisite for the internal cohesion of the entire system of financial control. Similarly, as defined goal of financial management is defined, article 4 para. 1 of the Act on Financial Control defines the so-called main objectives of financial control:

a) "compliance with legislation and measures taken by public authorities within the limits of these regulations in the management of public funds to ensure the tasks set by these authorities,
b) protection of public funds against risks, irregularities or other shortcomings, particularly caused by the violation of legal regulations, inefficient, ineffective and inefficient use of public funds or crime,

5 Also for the preparation and approval of financial or property transactions.

c) timely and reliable information of the public authorities on the use of public funds on the operations executed, of their probative accounting treatment for the effective guidance of public administration in accordance with the tasks,

d) economic, effective and efficient public administration."

Defining of the objectives of the legislation is an important aid in its interpretation. The legislature during preparing of this legislation fails to regulate all the possible variants of action and application of the relevant regulation. Therefore, in case of doubt, it is necessary to combine both systematic and teleological interpretation.

From the aspect of financial control system the financial control objectives are expressed in article no. 4 are major connecting point. Under the letter d) appears so called 3E principle. Its general definition is very difficult to specify, but their practical application is essential to fulfilling the objectives of not only financial controls but the entire financial management. This principle, which is in Czech Republic called principle 3E spread to other legislation governing the management of public funds e. g. in the Public Procurement Act. The Regulation on the financial rules hides this principle in an article titled "The principle of financial management ". It is an important link and confirm that for the definition and description of the system of financial control is necessary to deal with not only the internal system but also external action and spilling over into other areas of law.

Internal financial control system is clearly defined in the Act on Financial Control and consists of three subsystems:

a) the system of financial control performed by supervisory authorities pursuant to articles 7 - 11 of the Act on Financial Control, and hereinafter referred to as public administration control,

b) financial control system carried by international agreements pursuant to article 24 of the Act on Financial Control,

c) the internal control system in public administrations under articles 25-31 of the Act on financial control.

The public administration control is defined as "financial control of facts relevant to the management of public funds especially public spending, including public financial support at the controlled persons prior to their provision, their use during and after their use, including an audit by the

directly applicable regulation of European Communities'." Here, in my opinion, there is a first terminological inaccuracies. The control subsystem, which bears the public administration control, does not include only control but also audit, as is clear from the above statutory definition. It is therefore a combination of two already inherently different subsystems. Disclosure of controls and audit differs considerably from what is given by the difference between the two procedural arrangements. What led the legislature to this connection cannot now be determined. One can only assume that the purpose was to be a certain degree of simplification.

The essence of public administration control is that it is the control of a single entity by other. Although at first glance it seems that it is not the internal control term that is used by both Regulation on the financial rules, as well as European and international framework for the setting of financial control (PIFC, FM&C), the opposite is true. When we look at the public budget as a comprehensive unified complex of public funds obtained primarily from taxpayers, public administration control can also be considered as part of internal control. Especially in the Czech Republic, where public budgets are more or less only managed the money that is collected at the state level and redistributed (shared or vested taxes). Public revenues, which come from other sources, on a national scale are negligible. In addition, many of these "other money" comes from European funds, so that the system of public budgets extends to the budget of the European Union. We can thus conclude that the public administration control, though not entirely well-defined in the Act on Financial Control, is an important part of internal control.

The second subsystem named in article 4 para. 1 point b) of Act on Financial Control cannot in my opinion be considered as a real financial control subsystem. It is just a reference to the supervision conducted according to international treaties, which, in my opinion, the nature of control that really stands outside the framework of the so-called internal control. In addition, if the sole purpose of the provision is to provide a link to an international agreement, this provision is superfluous. Pursuing their own goal, have their own rules and organizational apparatus that ensures these controls. In my opinion, it can control the contrary, according to international treaties like the financial management system to include in the external operating limits

of financial control. Controls carried out according to international treaties have no direct connection to the remaining part of the system of financial control. Although they involve national authorities (e. g. some departments of the Ministry of Finance), do not proceed during these inspections under the Act on Financial Control - proceed according to international agreements and de facto or do not meet the fundamental objective of financial control in terms of protecting national or European funds.

The third subsystem is already on its name and nature, form part of internal control. It is an internal control system, although there name again is not true. The internal control system as is defined by the Act on financial control and as apparent as well as from international and European regulations or non-legal documents include control (within the meaning of management) control in the meaning of check and internal audit. As already indicated above, the internal audit is not a control. This terminological imprecision established here because of inconsistent translation of European Union law by drafting of Act on financial control. In my opinion it is an unimportant part of financial control, because there is the utmost implementing preventive function of internal control. Management control has three stages - preliminary, interim and subsequent. Similarly, the legislature drafted the public administration control system, although in practice there is in most cases of follow-up control. This is due to the large amount of subjects that stand in the position of the controlled person and an insufficient amount of inspectors who are authorized to perform public administration controls. Disclosure of management control based on the preventative control mechanisms, especially before making public spending, respectively before the commitment by which the public expenditure will be effected. To increase the effectiveness of the system of management control contributes internal audit, if appointed. Objective and purpose of internal audit would be an object of a separate contribution, however, for the purposes of this paper it can be said that its goal is to provide management of a public authority assurance that set control mechanisms, including management control contribute to the objectives not only financial controls but also financial management.

Similarly as public administration control, subject to management control and internal audit of public funds is not only national budgets, but also

the funds provided from various funds and programs of the European Union. Management control must be carried out according to the law at the sources of the state budget, county budget, municipality budget, or funds from the EU.

4 Financial control as a part of financial law

In the Czech Republic, the dominant opinion is that financial control is part of the fiscal part of financial law, specifically the sub-branch of budgetary law. Budgetary law is defined as a set of legal norms that regulate the system of public money funds, the principles of their organization, principles of compilation, approval and their control. (Mrkývka, 2004: 59)

The most fundamental problem in understanding and defining of financial control in Czech Republic is that it is often identified with the monitoring of the implementation of public budgets. With that in principle I cannot agree. Yes, a significant portion of financial control is the control of the performance of public budgets, but if this were the only identification, largely implemented controls would remain outside the system of financial control. Financial control in addition to financial operations, reflected in public budgets also affects contributory organizations that do not manage a budget, nor does it compile. Furthermore, according to the definition of financial control system (Act on Financial Control, Art. 3/1), the financial control impacts on of public funds, which the law defines in article 2 letter g) as public finance (according to the letter i) public revenue and public expenditure, which are part of the public budget, aside from the mentioned governmental organizations as well as things, property rights and other assets belonging to the State or to organizations that law includes under the concept of public authorities. An integral part of the financial control system is therefore control of property operations. And in my opinion, they cannot be simply subsumed under the definition offered by the definition of the budgetary law.

In this spirit carries the forthcoming new act, which will replace the current Financial Control Act. To highlight the fact that financial control does not apply only to financial transactions, but for operations related to public funds, which cannot be identified solely with public revenue and public expenditure.

In my opinion, the question remains but requires further scientific investigation before allowing scope of this paper, whether financial control is part of the budgetary law with significant overlaps or whether it is a separate sub-branch of fiscal part of financial law.

5 Conclusion

The current system of financial control in the Czech Republic has an inner and outer limits of its system-wide coherence. The outer limits are determined by defining and action of

a) financial management system, which consist of subsystems od decision-making, budgeting, accounting, reporting and internal control,
b) control conducted according to international treaties.

Internally, the existing system of financial control is divided into public administration control and internal control system, which includes management control and internal audit.

The aim of the current set of financial control in the Czech Republic is not only a means of protecting of national public budgets, but also the protection of funds provided from the budget of the European Union and their funds. Since the effectiveness of Act on Financial Control, the evolution has progressed. In recent years, the pressure of the European Union to strengthen control mechanisms increases the pressure, in order to strengthen the protection of European Union funds. Therefore, the Czech legislators are forced to strengthen these control mechanisms that can no longer be regarded as sufficient. Currently articulated version of new act which should replace the current Act on Financial control is being prepared. The basic objective of this act is to strengthen control mechanisms so that the objectives of financial management are met. Therefore, the law provides an interference with the internal structure of the current financial control system.

In the current state of scientific research is a system of financial control subsumed under budgetary law, as part of the fiscal part of financial law. In view of the fact that financial control does not apply only to transactions related to the implementation of the budget but for public funds, whose definition includes in particular a significant part of the implementation of property

operations is an extended discussion and analysis, whether financial control should be independent sub-branch of the fiscal part of financial law next to budgetary law.

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SYSTEM OF PARADIGM CONSTANTS OF FINANCIAL LAW OF STATE AS THE BASIS OF ITS PHILOSOPHIC-METHODOLOGICAL UNITY

Ruslana Havrylyuk [1]

Abstract

The article reveals the nature of paradigm constants of etatist doctrine of financial law and the system of these constants from philosophic-methodological perspective of anthropo-socio-cultural approach. It is shown, that creating or authorizing financial-legal norms, the state actually acts not chaotically, but absolutely purposively, that it constructs these norms in strict accordance with some ideal theoretical model, the philosophic-methodological basis of which is the etatist doctrine of financial law. It is proved that specifically this doctrine sets in practice the system attributes to financial law of the state, and the doctrine in itself is the system of paradigm constants of this law. It is substantiated that a key system-forming role belongs to paradigm constant of *financial-legal sovereignty of the state*.

Key words

Paradigm constant of financial law; system attributes of financial law; etatist doctrine of financial law.

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1 Introduction

Positivist cognitive tradition, from philosophic-methodological perspectives, by which financial law is mainly researched, proceeds from the axiom that financial law of state – is a *mechanical aggregate* of legal norms, created or authorized by the state. Thus, it usually seeks system-building factors outside of this positive law, as a rule, in financial system of the state or other *material* phenomena, in full agreement with the classic standards of scientific character. Precisely these are the overwhelming majority of the investigations of legal and financial scholars considering the problems of financial law system in a positivist way, intentionally or indirectly. That establishes the substitution of an original object of cognition and the subject of research, which in point of fact, should be both, norms of positive financial law and paradigm directives of the state on a given law, but not any other phenomena concerning the problem, as it occurs nowadays. Nevertheless, in this capacity neither positive financial law of the state, nor its paradigm directives on a given law have been researched in the science of financial law yet.

The degree of a scientific development of the problem can be defined as *initial, adjusting one*, *as there are no special works* dedicated to it. Separate paradigm constants of etatist doctrine of financial law of state were considered in general or institutional formulation by a number of Ukrainian legal scholars – L. K. Voronova (Voronova, 2006), N. P. Kucheryavenko (Kucheryavenko, 2004), E. P. Orlyuk (Orlyuk, 2010), and Russian scholars – N. A. Sheveleva (Sheveleva, 2004), M. V. Karaseva (Karaseva, 2006), Yu. A. Krokhina (Krokhina, 2007), N. M. Kazantsev (Kazantsev, 2009), S. V. Zapolskiy (Zapolskiy, 2012), E. Yu. Gracheva (Gracheva, 2012), and academics of other post-soviet countries – A. A. Pilipenko (Pilipenko, 2007), A. I. Khudyakov (Khudyakov, 2010), A. T. Shaukenov (Shaukenov, 2009) and others. Though, if summarizing generally, their consideration of paradigm constants was, *firstly*, absolutely **chaotic**, *secondly*, performed from the philosophic-methodological perspectives of **elementarist approach** to their cognition, *thirdly*, methodologically mistaken at the initial formulation of the problems of given constants cognition – *as the consequences* of action of some objective, external in relation to positive financial law

of the states, their phenomena, but **not as predetermining the systematization of this law from the interior of it, on the level of nature and attributes of a given law.**

The object of the article is *to reveal the nature of each paradigm constants (substantial and functional)* of etatist doctrine of financial law of state and *the system of these constants.*

2 The concept of *paradigm constant*

The concept of *paradigm constant* indisputably ranks among the commonly known axiomatic truths for the scientist cognizing the object in paradigm terms, and it could be possible to proceed in further investigation of the abovementioned problem from its interpretation, universally accepted by a given paradigm. Nevertheless, there are also a lot of such paradigms of cognitive process, and several standards of scientific cognition exist too, therefore, it is necessary to remind that the positivist G. Bergman, characterizing the *normalization of methodology,* introduced the concept "paradigm" into philosophy of science. This notion acquired wide prevalence as the result of its successful application in the number of scientific works, first of all, in the monograph "Structure of Scientific Revolutions" by American Physics historian *Thomas Kun.* He comprehended *paradigm* as a recognized by a corresponding scientific society "*model* of problems statement and of their solutions" (Kun, 1975: 11). Later, he specified that the concept *paradigm* involves "the theory recognized by scientific society, rules and standards of scientific practice, standard system of methods of cognition" and denoted this new conception of *paradigm* by the conception of *disciplinary matrix* (Griaznov, 1976: 12-14). Eventually, by the conception *paradigm* there was fixed only the definition of "*theory*, *recognized by corresponding scientific association*" (Ritzer, 1975: 77), i. e., conceptual core of this theory. In this research we also will comprehend *paradigm* in exactly the same way.

Contrary to the concept *paradigm,* the concept *constant* for many centuries has been interpreted uniformly, taking into account its clearly identified Roman origin: constant (constantis) – *steady.* In modern Ukrainian and Russian it is explained uniformly – as "invariable in a series of variables". Therefore, *paradigm constants* of etatist doctrine of tax law should be comprehended as steady for this doctrine, i. e., invariable in their social sense during

the whole period of active existence of this theory, basic postulates, expressing the same fundamental characteristics of this doctrine. Thus, *paradigm constants* of etatist doctrine of tax law are seven substantial constants and one of functional character: 1) *attribution of tax to the state (*public character of tax); 2) *tax sovereignty of* state; 3) *legal establishment (*establishment by law) of tax; 4) *coercive* character of taxpayer's *liability*; 5) *fiscal* nature of tax; 6) *asymmetry* of tax law of state; 7) special, *punitiv*e on the part of the state and *sacrificial,* on the part of taxpayers, character of responsibility for violation of tax sovereignty of state; 8) tax-legal *paternalism* as *functional constant.*

2.1 Nature of paradigm constants of financial law of state

Etatist doctrine of financial law refers its emergence exclusively to the requirements of substantial state. **But what is substantial state?** It**,** in the context of doctrine grounding it, is an *entirely all-contained structure* possessing all necessary for its development and not requiring an equivalent dialogue with another driving forces in the society, not to speak of a individual. Substantial state regards people as a *mass, a crowd* requiring a *guide.* At this essential (substantial) approach of etatist doctrine of taxation to cognition of the nature of state, it becomes *ontological, opposed with the society and praised over it*. *Needs of the state for territory, population and power* are proclaimed of the same *priority,* compared with other needs of socium and its groups. Moreover, if from philosophic-methodological perspectives of etatism *territory* – is a real property of the state, then the *population* – is its movable property. *Power* and *law,* by this doctrine, are the leverages, means of the state to satisfy its needs. That is why financial law within its meaning is nothing less than the law of the state. This doctrine proceeds on the imperative implementation of the following paradigm constants in financial law of state:

Financial law is attributive to state

The initial paradigm constant of etatist doctrine of financial law is the comprehension of it as an *attribute of the state* and thereby, explanation of its *public character*. This is the kernel idea of all regulatory or doctrinally expressed provisions and policies of financial law of the state. *Public character of finance* in terms of etatist doctrine of financial law is also the consequence of their *legitimization by the state* and *assignation for state needs and purposes.* In other words,

according to the above-mentioned doctrine *public finance are generated by the state and consumed by it.* That is, *philosophic-methodological key to understanding the nature of financial law on the whole and of its separate properties is hidden,* according to paradigm postulates of etatist doctrine of the latter, *in nature and attributes of exceptionally substantive state.*

Herewith, the **society as a phenomenon in general is not taken into consideration and its cardinal interests are disregarded. Nor are taken into consideration or considered basic needs, common for the majority or even for all individuals.** Only, if some of them could come at the same time to the sphere of the requirements of substantial state, especially its public officials'. That is, the **social basis** interested in the support of advancement of etatist doctrine of financial law is **extremely narrow,** which does not make it a socio-code of the whole society and each of its members separately. Only substantial state with the bayonets of its law enforcement authorities, not comfortable for sitting solemnly, is a social basis of etatist doctrine of financial law.

In positivist tradition of law cognition nature and characteristics of substantial state, in their turn, are defined by its attributes. *Absolute political power; population; territory; taxes* belong to them. This state is unconceivable without even one of these attributes, in other words, without its fundamental intrinsic properties constituting its nature. Its fundamental extrinsic property – sovereignty of state – arises **from these intrinsic properties,** forming the nature of substantial state. It is subdivided into the components related to inherent attributes of state, such as: power (political) sovereignty of state; public sovereignty of state; territorial sovereignty of state; tax sovereignty of state. That is, intrinsic attributes of state externalize as its corresponding sovereignties and, in their turn, feed on these corresponding sovereignties of state, and exist due to them, simultaneously supporting these sovereignties. In other words, there exists a dialectic relationship between corresponding intrinsic attributes of substantial state and its exterior sovereignties.

In this context our concern is not the wealth of relationship – direct, conjugated and cross – the whole set of intrinsic attributes of substantial state with all qualitatively separated manifestations of its exterior sovereignty, but mere **dialectical pair** *attribution of tax to state – tax sovereignty of state.* In the overwhelming majority of the works of scholars this pair is not subjected

to special philosophic-legal analysis, the nature and character of cooperation and mutual interaction of *tax attribution to state* and *tax sovereignty of state* are not revealed. The authors, by no means all, *confine themselves to the statement of fact* of presence of abovementioned phenomena in tax law of state, and frequently – only of one of them. It testifies, along with many other analogous facts, to **insufficient scientific validation** of *etatist doctrine of tax law,* and confirms merely its *dogmatic investigation.* That is, in reality the attributes of the state compose both, its internal content and its inner form, in other words, they formalize this content and, taken in their unity, constitute the substance of the state. Internal properties forming the nature of a substantial state generate its **fundamental external property – sovereignty of the state.**

Financial-legal sovereignty of the state

Crucial, system-building paradigm constant of etatist doctrine of tax law is **financial-legal sovereignty of the state.** Legal scholars-positivists – fathers of that theoretical construction reveal the content and the essence of a given category by means of the category *state.* They came to the final conclusion that, in accordance with its dominant place in the system of subjects of financial legal relations the substantial state possesses absolute public-financial legal personality, which is manifested: at the establishment, by this state, of public financial payments system, of rights and duties of the subjects of public financial legal relations; at the regulation of public-financial systems functioning; at international treaty-making in this sphere, etc. Being a bearer of sovereignty, they affirm that the substantial state itself determines the sphere of relations, a direct participant of which it is, and plays a role of one and a single owner of accumulated centralized funds by means of financial law. That is why in etatist paradigm of financial law the category **financial-legal sovereignty of the state** is a *system-building category of financial law of state*, its *fundamental constant,* from which all other *constants* of etatist doctrine of financial law are derived. *Financial-legal sovereignty of the state,* by this doctrine, determines the sense, content and tendency of the whole system of public-financial legal relations in the society. To the society on the whole and to some subjects of financial-legal relations this sovereign substantial state assigns only a role of counterparties of the state in financial legal relations, only the status of addressee of financial will of the state.

Sometimes legal scholars-financiers – adherents of etatist doctrine of financial law try to represent the state and its counterparties as equal partners. It really takes place, but not in the post-soviet substantive states.

Legitimate establishment of financial-legal instructions

The constant of **legitimate establishment of financial-legal instructions,** derivative from the constant of *financial-legal sovereignty of the state*, also testifies to a system character of etatist doctrine of financial law. Its accentuation as one of the basic paradigm constants of above-mentioned doctrine is officially explained by the necessity to provide corresponding guarantees of rights and legitimate interests of state's counterparties against the arbitrary and unauthorized interference in public-financial legal relations of executive power. They assert that only the law in virtue of its certainty, stability, and special method of adoption can give the subject of financial-legal relations with the state true information for his execution of financial-legal duty. If the essential elements of a given duty are established by the executive power, the given paradigm constant postulates, than the principle of the determination of financial-legal duties of counterparties of the state is threatened, since these liabilities can be changed for the worse in the simplified procedure. In reality the legislature also can worsen these duties of the counterparties by formally more complex procedure. In practice both variants are not of great difficulty to the state power.

Nevertheless, partially sharing the abovementioned argument of founders and apologists of etatist doctrine of financial law, especially in the part concerning differences in the procedures of setting financial-legal payments on the whole or some their elements by executive or legislative powers, we at the same time, consider it necessary to accentuate that the **basic motives of constitutional claim of the states of substantial type for setting financial-legal payments *only and exclusively legislatively,* in fact have diametrically opposite causality and motivation to aforesaid,** though they are consciously and intentionally camouflaged.

This true objective of a *paradigm constant of legislative setting (establishment by law)* of financial-legal payments is a desire to realize financial-legal sovereignty of the state in the most complete and consecutive manner, to provide deeply and ensure the discharge

of financial-legal duty in the most guaranteed, unavoidable for the latter and secured for the state, way with the purpose, first of all and mostly, to meet the state's requirements of public financial resources. Taxpayer or other liable subject in a given case – state realization of its financial-legal sovereignty – is **not the aim, but the means** with all unavoidably ensuing consequences. Though, indeed, under current political-legal conditions **the state** is also **compelled to regard** not only itself, but its counterparties in financial legal relations, first of all, the taxpayers, because today's taxpayers in the future become the electors of the executives of central institutes of state power, and if they are driven to Mexican standoff – they become even *potential rebels,* as minimum, *protest voters.*

Coercive character of Financial Law

Well-known modern classic of etatist cognitive tradition of financial law P.-M. Godme characterizing coercive character of the main of all financial-legal duties – tax duty of a taxpayer, – summarized: "The element of coercion is so important in the concept of tax, that it entails the exclusion of the revenues of not coercive nature from tax sphere" (Godme, 1978: 373). Substantial **state** in legal construction of financial-legal payment **embodies its *right*** of levying the state counterparties, and the latter in the same construction **obtain in exchange exclusively *the obligation* to contribute financial-legal payment to the state.** In other words, in the legal construction of financial-legal payment there is embodied not just a different, but ***opposite, antagonistic character* of financial-legal statuses of the state, its financial bodies on the one hand, and counterparties of the state in financial legal relations, on the other hand: the state obtains** money resources **into ownership,** and their **payers loose** an adequate value of their own money resources without consideration.

It generates unavoidable *conflict* of these financial legal relations, *inherent,* in the system of etatist paradigm of financial law, *confrontation* of the state and also, of its respective bodies on the one hand, and all counterparties of the state for financial law, on the other hand. Under these conditions, as an enormous historical experience of realization of etatist financial-legal doctrine, and also its contemporary practice in all post-soviet and other states of the world persuades, *voluntary discharge of financial-legal duty by the counterparty of the state is problematic* and **the state calls on a state coercion**

as the instrument *providing legal regulations, guaranteeing their execution, and directed to the formation of the mechanism of uninterrupted receipt of funds into revenues of the state budgets.*

Fiscal nature of Financial Law

One more **paradigm constant** of etatist doctrine of financial law is its postulate on ***alienation of*** **provided by financial legislation part of taxpayer's property in monetary form for benefit of state,** moreover, the declaration of the part of his monetary assets as public property a fortiori, before execution of the payment by a taxpayer. In other words, it concerns **fiscal nature of state financial law.** Especially clearly, in pure form, it becomes apparent at the institute of tax law of financial law of state. It was more complete and frankly said about by Russian scholar S. G. Pepelyaev, one of the modern post-soviet theorists of tax law, giving the following **legal definition of the category of tax:** it is "the only legal (established by law) form of alienation of property of natural and legal persons on the principles of obligation, individual non-compensation, provided by state coercion, not having the nature of penalty or contribution, with the purpose to provide solvency to the subjects of public power" (Pepelyaev, 2000: 31).

Fiscal state revenues, as a special category of etatist doctrine of financial law draw attention of the adherents of the doctrine not from the point of view of origin, legal basis or purposiveness of the expenditure of means obtained by the state, but first of all and mostly, in the words of a famous German political scientist P. Kirhhof, in the focus of their attention is the ***question of the state freedom degree relating to obtained financial resources.*** To their considered opinion, the substantial state is entitled to specify its own measure of a given freedom. The identical weighty problem, real superproblem of etatist doctrine of financial law is the question of *definition of the measure of withdrawal* of the subjects-payers' private property in profit of the state. Finally, the apologists of this doctrine speak in the sense, that this ***measure is defined by the requirements of state.*** The latter always incomparably exceed the capabilities of payers of legal-financial payments. In consequence of it, financial legal relations in substantial state are remarkable for unavoidable social strain, conflict, mass illegal subjects-payers' avoidance of financial-legal payments, which still more reveals, makes obvious the instrumental scarcity of etatist doctrine of financial law.

Financial Law of state has asymmetric character

Paradigm constant of *asymmetry* of financial law of state is also in a system link with the constant of financial-legal sovereignty of the state. As is known, *symmetric* property represents structural peculiarity of the construction and functioning of all equilibrate, normal system objects of the world. The phenomenon of asymmetry is traditionally considered in philosophy and science as a total symmetry breaking, absence of all its known elements. First of all and mostly, the *asymmetry of financial law* of state is manifested by the categorical pair *financial law of state – coercive financial-legal obligation of state counterparty* to financial legal relation. Between these categories occurs only *opposition conjugation,* but dialectic interaction is absent. It is obviously and persuasively manifested in the main *attributes* of the state and its counterparty for financial-legal relation, they uniquely point to the absence of mutual character of their interaction. Thus, the basic legal attribute of substantial state is retention, extension and perpetuation of its sovereignty. Basic legal qualities of state counterparty for financial law are the following: a) state motivation of financial-legal liability of the counterparty; b) its financial-legal liability is characterized with one-sidedness; c) origin of financial-legal liability of the state counterparty is linked exclusively with the imperative dictate of the state; d) quintessence of the scope of financial-legal liability of the state counterparty reduces to cash proceeds from the counterparty to the state.

From the above, it follows that the single **radically common** to financial law of the state and to coercive financial-legal liability of the state counterparty of this law is, formally, a *financial-legal payment* of the counterparty to the state. Really, it does not create any unity, because in the course of it there takes place an alienation of the part of the payer's property and its transition to the state. Nothing more pairs, even formally, either these categories of legal science or the phenomena being in everyday life by these categories.

From the perspective of anthropo-socio-cultural approach to law cognition a human is an original, system-building, main subject of law. Though, the positivist tradition of law cognition denies these qualities of him. According to the last tradition in the pair of categories *financial law of state – coercive financial-legal duty of a state counterparty,* only the state is vested the right

and its counterparty is practically imposed only **coercive duty to pay financial contribution to the state.** In fact, the latter in etatist doctrine of financial law is deleted of the list of the subjects of law, turned into the object of financial state.

Special, *punitive* on the part of the state and *sacrificial* on the part of its counterparties in financial-legal relations, character of legal responsibility for violation of financial law of state

It completes the set of substantial paradigm constants of financial law of the state. Etatist doctrine of financial law actually proceeds from the *presumption of guilty of the state counterparty to financial legal relations* in virtue of the objective reality of the latter as it. According to paradigm of etatist doctrine of financial law *punitive function* takes the central place in the system of functions of financial-legal responsibility. From a position of philosophy of etatist legal cognition there is hidden a strong sense, a quintessence of legal responsibility as such – that counterparties of state in financial legal relations with the state henceforth *should be afraid*[2] to commit any legal wrongs of financial sovereignty of the state.

As in-depth study of the problem of *punitive* responsibility for commitment of wrongdoings in the field of financial legal relations, its extension and character depends not only on the social danger level of unlawful act, but on the time of offence commitment – the state, in fact, annually groundlessly tighten this responsibility. *Steady tendency of penalty enhancement character of legal responsibility for financial delinquency takes place* not only in the post-soviet states but in the most of other substantial states in the world. **Legal responsibility for commitment of delinquencies of financial law in terms of etatist doctrine of financial law along with recovery, preventive and education measures really has a peculiar – punitive, *retributive* nature on the part of the state, and *sacrificial* one on the part of its counterparties to financial legal relations.** As a rule, general legal principle of legal responsibility: *one delinquency – one measure of responsibility,* even if having in mind penalties of different kind, does not work here. *General rule* of legal responsibility measures for state financial violation is **multiple**

2 Both, who violated before and those who never violated the established order of things.

sentences for every financial law offense. It is one of instrumental scarcity of etatist doctrine of financial law, evidence of incapability of this doctrine to achieve a lawful **result** by general legal means.

Paternalism as functional paradigm constant of Financial Law of state

Philosophic-legal nature of *paternalism* with a view of etatist doctrine of financial law reduces to the **ability of etatist state** to act in financial legal relations with its counterparties from the specific *patronage, trustee, protective perspectives*. **Ability, not duty** of substantial state to act in the given qualities is, because by its very nature the state, either by the right or by the law does not have to do it and is under no obligation. The analysis of numerous philosophic-legal and other literature of etatist directionality on a given problem in which, in either case, the theory and practice of paternalism are considered, persuades that according to the concept of philosophy of etatism the **substantial state does not serve and is not aimed to serve people and society in general, it did not have in the past, does not have in the present and, in principle, cannot have in the future any direct *duty* to them.** At the same time this state feels its *dependence* of them, moreover, realizes it, that is why it *graciously, fatherlike provides services to them.* State does this not when those under the care of it, in other words, *natives*, (its citizens in etatist sense of this word) are badly in need of services, but when it itself sees fit doing this in the forms and sizes it considers acceptable. In pair with the special constant, multiple, r*etributive* on the part of the state and *sacrificial* on the part of taxpayers of legal responsibility for financial violation, *paternalism* means realization of the *stick and carrot policy in financial field.*

Paternalism is **included into the system of vertical, hierarchic social binds organizing society,** in other words, it is **installed** into the *system of public power and domination*, and plays irreplaceable role in practices of the states of substantial type whose relations with the socium are built on *antagonism* to the latter. That is, **paternalism –** is not a general universal of political power, it is only a specific variant of power relations, inherent mainly to the states of substantial type unable to provide oodles of its requirements for financial resources even by means of its absolute financial-legal sovereignty.

3 Conclusions

Thus, from philosophic-methodological perspectives of anthropo-socio-cultural approach, the article reveals the *nature* of paradigm constants of etatist doctrine of financial law and the *system* of these constants: A) **substantial:** 1) financial law is attributive to the state (just so it explains the public character of financial law); 2) the state possesses financial-legal sovereignty; 3) financial-legal relations of the counterparties of the state with the state itself are established by the laws of the state; 4) coercive character of financial law of the state; 5) fiscal nature is inherent to financial law of state; 6) financial law of state is of asymmetry character; 7) special character of legal responsibility for financial violation, r*etributive* on the part of the state and *sacrificial* on the part of taxpayers, is applied; B) paternalism as **functional** paradigm constant of financial law of state.

Creating or sanctioning financial-legal norms, the state actually acts not chaotically but absolutely purposively. It constructs them in strict accordance with some ideal theoretical *model*, philosophic-methodological basis of which is etatist doctrine of financial law. **This very doctrine sets in practice the system properties to financial law of state as to a qualitatively separate part of objective social reality.** In its turn**,** it in itself is the system of paradigm constants of this law. The key system-building role belongs to substantial paradigm constant of *financial-legal sovereignty of state*.

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POST-SOVIET CONCEPTIONS OF THE SYSTEM OF FINANCIAL LAW: PHILOSOPHIC-METHODOLOGICAL ANALYSIS

Petro Patsurkivskyy [1]

Abstract

The article deals with the analysis of a scientific research status of the problem in the science of financial law from the perspective of system approach. It is shown that the post-soviet science of financial law still understands this law as, a determined by the environment, mechanical aggregate of legal norms created or authorized by the state. It is proved that in post-soviet financial law there remained all three basic conceptions of financial law formulated by soviet legal scholars: fund conception, institutional conception, subject conception. It is substantiated that the system philosophic-methodological approach should be applied for true scientific cognition of the system of financial law as a procedural reality.

Key words

System of financial law; fund conception of the system of financial law; institutional conception of the system of financial law; subject conception of the system of financial law; system philosophic-methodological approach.

JEL Classification

K40

1 Introduction

The most important characteristic of the whole post-soviet science of financial law still remains its traditional commitment to the positivist tradition

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of legal studies. It found its most concentrated expression in etatist doctrine of financial law which associates the emergence of financial law exclusively with substantial state, with its requirements. That is why financial law, according to a given doctrine, is nothing but **state financial law,** with the following inherent *substantial characteristics*: a) *attribution* of financial law to the state (*public character of financial law* is explained this way by a given cognitive tradition); b) financial-legal *sovereignty of state*; c) *lawful issue* (establishment by operation of law) of financial-legal norms; d) *coercive character* of financial-legal duty; e) *asymmetry* of financial law; f) special, punitive on the part of state, and *sacrificial* on the part of its counterparty to financial-legal relation, character of responsibility for violation of finance-legal sovereignty of the state; g) *paternalism* as a *functional* characteristic of state financial law.

In other words, financial law of a substantial state – is the whole world of its substantive values, in the light of criterion requirements of which, state counterparties to financial-legal relations are not of inherent value, being for the state a *means*, *not a purpose* to achieve its own objectives. It is a concerted, more over – a unified position of the adherents of all the conceptions of etatist doctrine of financial law. And only in approaches to the systematization of positive financial law of the substantial state their positions are traditionally divided into several separate viewpoints on a given problem.

The level of scientific development of the problem in the post-soviet science of financial law can be defined as an initial, establishing one, since for a quarter of a century there has been a related publication of a special monograph by E. D. Sokolova (Sokolova, 2006) in the Russian Federation, and in Ukraine A. A. Lukashev (Lukashev, 2011) defended respective doctoral thesis. Not considering the research material renewal, the philosophic-methodological approaches applied to them remained soviet (elementarist approach to the research of the system), and the conclusions – also, paradigm Marxist ones.

They gave neither renewal of philosophic-methodological approaches to the problem investigation, nor essential increase in new scientific knowledge on the cognoscible subject.

The objective of a present publication is the research, from philosophic-methodological perspectives of system approach, of basic conceptual

concepts, their nature and distinctive features, investigation of their relationship and divergence, and also, the reasons of their emergence and persistence.

2 Fund conception of the system of financial law

Fund conception of the system of financial law was historically the first to emerge. Its author is commonly thought to be Efim Abramovich Rovinskiy (Rovinskiy, 1940: 29-48), though many soviet academics in the field of financial law suggested the similar ideas long before him. In the context of that time it was a natural phenomenon for the soviet legal scholars, since a general methodological directive for them was a postulate that "economic structure of a society" and "law" correlated with each other as a "real basis" and "juridical superstructure" (Marks, Engels, 1958: 6).

Fund conception of the system of financial law was finally formed in the course of the first All-Union discussion of legal scholars on the problems of the system of soviet law in general. In the context of the system of financial law the following conclusion of E. A. Rovinskiy proved to be the key one: "The principle of planned accumulation and planned distribution of **state funds** is *in our concept* (emphasis added – P. P.) crucial also in the establishment of internal system … of financial law of the USSR" (Rovinskiy, 1940: 34). The most obvious and, at the same time, fundamental disadvantage of a given philosophic-methodological approach to the systematization of a positive financial law of the state was the fact that, in this case, the *criterion of systematization* of legal norms turned out to be extralegal, in essence occasional, which was in outmost contradiction in requirements of *general systems theory*. That is why, the list of the institutions of financial law defined by the above mentioned methodological approach, was not only unlike that of its adherents' but, very often contradictory and even mutually exclusive.

Nevertheless, in the post-soviet period of financial law development by virtue of both, *thinking inertia*, influence of *established tradition of law cognition,* and many other reasons and factors, the given approach to the systematization of positive financial law of the state was preserved and its sympathizers retain a hold on above mentioned criterion without any its essential changes. Among a large number of these legal scholars the brightest and

the most consequential successor of *fund conception* of the systematization of financial law is the founder of Kazakhstan post-soviet scientific school of financial law Alexey Ivanovich Khudyakov. A. I. Khudyakov's reflections on *philosophic-methodological grounds*, *criterions of formation* of the system of positive financial law of post-soviet states are the most logical and reasoned, conceptually consistent, but like the soviet fund conception, they are *doctrinally doomed*, because *he seeks the criterion of systematization of positive financial law of state out of the law domain*. Particularly, in one of his works at the beginning of XX c. A. I. Khudyakov speaks, as the matter of fact, that in the context to the system of *special part of financial law* in legal science there has been formed a conviction, according to which financial system of state is embodied in the system of financial law as objectively existing economic phenomenon. And, in his opinion, it should be taken as proved.

Nevertheless, L. I. Khudyakov stipulates that there arise two problems as minimum. Firstly, the structure of financial system, though it is a real "objectively existing economic category" (and not merely "category", but also a phenomenon of objective reality), is not revealed to a full degree with certainty and without controversy, neither by economic nor by legal sciences. As a result, A. I. Khudyakov notes, in different literature sources there is presented a wide range of institutes included into this system. Secondly, the concept "financial system", continues he, has essentially different meaning depending on what it covers: *only state financ*e or *finance in total* (i. e., both state and private). And it again brings us back to the central question, what is the very object of financial law: finance in total or state finance only? Financial-legal science, writes A. I. Khudyakov, is likely to incline to the last variant, but once looking at the lists of institutions of special part of financial law available in legal literature, it is not difficult to notice that many of them mediate specifically private finance. Moreover, among the numerous works on financial law there are no even two, summarizes he, adhering to the same list. That is, the question of the structure of special part of financial law refers to controversial ones (Khudyakov, 2001: 101).

Special scientific literature on financial law in most cases really points out its following institutes: budget law; tax law; non-budget funds; finance of state enterprises; state revenues; state credit; property and personal insurance

(sometimes only its organization is formed); public expenditures; bank credit; monetary circulation and payments; currency regulation (Voronova, 1998: 53-56).

A. I. Khudyakov criticizes the abovementioned, typical for post-soviet science of financial law, classification of norms of positive financial law as one that "sins by grave disadvantages", specifically, in his opinion, both state and private finance are denoted as the object of finance law[2]. That is why, A. I. Khudyakov considers their integration in financial law in the function of institutes of its special part to be incorrect, since only government finance can be the object of financial activity of the state (Khudyakov, 2001: 101-102).

Moreover, A. I. Khudyakov notices, that the system investigated is characterized by the fact that while constructing it, there was defied one of the basic methodological principles of systematization, according to which phenomena grouping in forming classified series must be performed on the basis of a uniform criterion. In the above case financial-legal institutes are formed by various criterions. Thus, some of them are selected on grounds of corresponding monetary assets fund availability (budget law, non-budget funds, finance of state enterprises), the characteristic of cash flow as revenues or expenditures (public revenue, public expenditures) is taken as the basis of others, selection criterion for the third is the method of financial activity of state (tax law, state credit), the forth represent type of entrepreneurial activity (insurance, bank credit), the fifth – terms of cash flow and currency circulation (monetary circulation and payments, currency regulation). A. I. Khudyakov summarizes: "It is the same as dividing people into the women, the tall, the blond and the snub-nosed in one classification series" (Khudyakov, 2001: 102). As a result of chaotic use of system-building criterions of the system, the system proper does not exist, numerous inconsistencies, stratifications and doublings emerge, then it is impossible to determine the subject of what legal institute this or that social relation is.

At last A. I. Khudyakov asserts that the existence of any legal institute included in special part of financial law means the availability of a specific

[2] Herewith he points at the examples of property and personal insurance, bank credit which in terms of market economy represent, as a rule, variety of private enterprise activity and are exercised generally by public bodies – private insurance companies and banks – and based on privately owned funds.

group of social relations relatively separated from other social relations and distinguishing from others by something essential. This group of social relations, according to the approach of A. I. Khudykov, forms this or that legal institute acting as the subject of its legal regulation. Thus, the question of types of the institutes of special part of financial law, concludes he, is the *question of systematization of social relations* which are the subject of financial law. Herewith, it is obvious that one and the same financial relation, logically notes A. I. Khudyakov, can not be the subject of different legal institutes at the same time (Khudyakov, 2001: 102). But the best criterion of positive financial law norms systematization, in his opinion, is the availability of a corresponding fund of monetary assets: the fund is – the financial institute is, the financial institute is – there is a corresponding financial-legal institute. This is A. I. Khudyakov hypothesis. But the given criterion did not help even him to create a scientific system of financial law: in the textbook on Special part of financial law he highlights *not the institutes* of positive financial law but *chapters,* without giving explanation whether given notions are identical in their sense or not, and if not, then how they interrelate with each other (Khudyakov, 2001: 101, 102, et al.).

A. A. Mamedov (Mamedov, 2005), G. F. Ruchkina (Ruchkina, 2003), A. A. Nechai (Nechai, 2006) and many other post-soviet legal scholars share this approach to the systematization of positive financial law of the state. Though, during the post-soviet period, neither they nor other post-soviet scientists – their sympathizers – enriched *fund conception* of the system of positive financial law of the state with anything essentially new and significant. Since its emergence and till nowadays it has been beneath any scientific criticism in the quality required.

3 Institutional conception

Institutional conception of the system of positive financial law of the state emerged in the final period of the USSR existence. It was produced by the same E. A. Rovinskiy, being definitely disappointed in the decline of his years in a system-building potential of *fund conception.* Developing his approach to the comprehension of the system of positive financial law of the state E. A. Rovinskiy came to the conclusion that true systematization of financial-legal norms is associated with their classification "in

terms of specific peculiarities of uniform financial relations" (Rovinskiy, 1960: 78). Nevertheless, he does not provide even separate examples of the so-called specific peculiarities, moreover, any *qualitative, substantial differences* of uniform financial-legal institutions either in a given work or any other researches. More then twenty years after E. A. Rovinskiy, a special attempt of a theoretic-methodological grounding of institutional conception of the system of positive financial law was undertaken by S. D. Tsypkin. He was an opponent to identification of financial system of the state with the system of the state funds of monetary assets and understood it exclusively as an "aggregate and interrelation of just **financial** (economic) **relations**" and affirmed that the propriety of that very perception of financial system is undoubted (Tsypkin, 1983: 4, 5, 6, 9). Analyzing financial system of the USSR at the turn of 70s – 80s of XX c. S. D. Tsypkin summarizes, that in the country there has been worked out the five-link model of this system (Tsypkin, 1983: 18).

What is the nature of a given link – essence and phenomenon (internal and external), cause and effect, substance and form or any other? The science of financial law can consider any answer to this question as a true one, depending on the approach of the researcher to understanding public nature of the institution of financial law. In other words, choosing any of the variants of the answer the legal scholar-financier in this way reveals the core of his approach to a given problem. As a result, not only the pluralism but a broad disperse of scientists' opinions on the structure of the institutes of financial law is unavoidable, from several institutes as by S. D. Tsypkin, to many dozens and even hundreds of institutes of financial law (Patsurkivskyy, Havrylyuk, Hohulyak, 2006: 35-44). But the main disadvantage of the *institutional conception* of the system of positive law of the state is even not in it, it lacks precision, qualitative determinacy and unity of the *criterion of systematization of financial-legal norms* much more than the *fund conception*. Consequently, it loses true scientific character and practical significance, and transforms into the conversation of the *blind* with the *deaf*.

The brightest and the most consecutive representative of the *institutional conception* of the system of financial law in the post-soviet science of financial law is *M. V. Karaseva*. She permanently considers the subject of legal regulation in the sense of corresponding public relations to be the criterion

of financial-legal institutions construction (Karaseva, 2000: 52). Sharing traditional position of S. S. Alekseev (Alekseev, 1972: 140) to a given problem, she notes, that financial-legal institution should be understood as a **legislatively selected** body of legal rules providing complex regulation of a certain group of public relations (Karaseva, 2000: 142). M. V. Karaseva consistently and with reason criticizes fund conception of the institutes of financial law. She shows that several institutes of financial law are determined by some funds of public financial resources simultaneously, and at the same time some funds of public resources cause the emergence of several institutions of financial law (Karaseva, 2000: 55). Also, M. V. Karaseva was not able to give an exhaustive list of the institutes of financial law in the Russian Federation.

Besides M. V. Karaseva, the institutional conception of the system of positive financial law of state is supported by the following well-known post-soviet legal scholars, as Yu. A. Krokhina (Krokhina, 2007), G. V. Petrova (Petrova, 2004), E. M. Ashmarina (Ashmarina, 2004), A. A. Yalbulganov (Yalbulganov, 2007: 38-39), et al in the Russian Federation, L. K. Voronova (Voronova, 2006), N. P. Kucheryavenko (Kucheryavenko, 2004), E. P. Orlyuk (Orlyuk, 2010), N. Yu. Prishva (Prishva, 2003), L. A. Savchenko (Savchenko, 2001), E. A. Alisov (Alisov, 2006), I. B. Zaveruha (Zaveruha, 2006) et al in Ukraine, most scientists in the Republic of Belarus, Kazakhstan and other post-soviet states. They all adhere to one and the same philosophic-methodological approach to the systematization of positive financial law of state, and at the same time each of them separately gives the list of institutes of financial law, not repeating others. Even before the conventional truth, here is dominating a fairly impressive distance which has not been reduced for the last decade.

4 Subject conception

Subject conception of the system of positive financial law emerged much later than two previous and became a natural response of the part of scholars in the field of financial law to the impossibility of an adequate solution of acute practical and theoretical problems of systematization of financial law of state. Thus, the transformation of understanding the financial law of state has taken place among the part of soviet academics till the mid

of 70s of XX century. They started identifying the financial system of state not with different funds of state financial resources (fund conception), or the institutes of financial public relations (institutional conception), but with *bodies* and *institutions* exercising financial activity of the state (Ruvkina, 1974).

This phenomenon caused a corresponding reaction among legal scholars. In particular, E. A. Rovinskiy, mentioned above for several times, yet again changed his previous comprehension of the determining factors of the system of financial law and their nature. In the textbook on financial law of that period he wrote, that "**financial system as an aggregate of state bodies and institutions** (emphasis added – P. P.) – is a branching network of financial bodies and credit institutions which perform a direct management of financial activity of the state. System of financial bodies is headed by Union-Republic Ministry of Finance of the USSR" (Rovinskiy, 1978: 9).

That is, at the end of his scientific life E. A. Rovinskiy identified the notion of *financial system and systems of financial bodies*, reduced the first to the second, both in content and in a logic volume, which is, by all means, methodologically wrong.

At that time L. K. Voronova shared this approach (Voronova, 1988: 14).

From above mentioned it is obvious that active adherents of subject conception of the system of financial law E. A. Rovinskiy and L. K. Voronova in the end of 70s – beginning of 80s of XX c. did not propose new philosophic-methodological solutions of the system of financial law, but a direct borrowing of the public finance scholars' approaches and the attempts of mechanical adjusting them to the systematization of financial law. They, also, did not have evident supporters of subject conception of systematization of financial law in the science of financial law.

In post-soviet science of financial law the active attempts to reanimate subject conception of the system of financial law were undertaken at the level of doctoral dissertations by A. D. Selyukov (Selyukov, 2003) and N. A. Sheveleva (Sheveleva, 2005) in the Russian Federation, and A. T. Kovalchuk (Kovalchuk, 2007) in Ukraine. Nevertheless, they did not propose any new scientific solutions of this problem. It is clearly demonstrated, for example, by the last of mentioned authors A. T. Kovalchuk. His philosophic-methodological constructions actually copy L. K. Voronova's approach to the

problem, which she asserted at the turn of 70s-80s of the last century though, they are "wrapped" in the clothes of a "new word in the science of financial law". In particular, in the conclusions to the subchapter "Object and Subject of Financial Law" in his monograph he writes that "financial law is a determining "supervisor" of abovementioned relations [distributive and redistributive – P. P.] not directly, but by the **system of corresponding financial-legal institutions** (emphasis added – P. P.) – Ministry of Justice, Ministry of Economy, Central Bank, State Tax Administration, State Echequer Chamber, State Finance Monitoring Service, Accounting Chamber, Control and Revision Office and others" (Kovalchuk, 2007: 130).

Thus, post-soviet *fund, institutional* and *subject* conceptions of the nature of institutes of financial law and the criterions of their separations, i. e., systematization of positive financial law of state emerged and were entirely formed still in the soviet science of financial law. As philosophic-methodological analysis of given conceptions persuades, they are based on etatist understanding the nature of financial law as the right of the state only, and also proceed from pure Marxist, low, their authors' perception of the correlation of objective and subjective in the law. *Fund, institutional* and *subject* conception of the system of financial law are imbued with understanding the law as some *external superstructure* over *internal economic basis of the society*, and not as the relation of the form and the content. General for all three abovementioned conceptions is the absolute priority given to this or that, but unitary and, more over, extralegal factor as a criterion of the systematization of positive norms of financial law. The given criterion has been required **to be qualitatively defined, obviously different on the given grounds from all other consistent phenomena.** As consequence, the number of "institutes" of financial law grew unusually large and still keeps on increasing to infinity, and the number of "systems" of financial law is almost the same as of legal authors writing about it. (Patsurkivskyy, Havrylyuk, Hohulyak, 2006: 41).

5 Alternative approaches to the search of criterions of systematization of financial law

Philosophic-methodological barrenness of *fund, institutional* and *subject* conceptions of the system of financial law is recognized nowadays by a growing

number of post-soviet scholars though, only some of them made constructive actions logically subsequent of it. To this group I subsume first of all, an original post-soviet theorist of financial law of Yuriy Fedkovych Chernivtsi National University R. O. Havrylyuk, well-known author from Ural Academy of Law (Ekaterinburg) D. V. Vinnitskiy and myself, P. P. Patsurkivskyy.

R. O. Havrylyuk reasonably contributes the most "revolutionary" suggestions, side stepping them – means to foredoom the science of financial law to prolongation of its wasteland and stagnation. First of all, taking into account the problem discussed at this conference, it should be acceded to her conclusion, that financial law as the law on the whole, is not a mechanical aggregate of positive legal norms of the state, but a **procedural constructive reality**, that cannot be scientifically cognized on the basis of *classic* standards of scientific approach. For true scientific cognition of financial law, she asserts, only *non-classic* or *post-non-classic* standards of the scientific rigor are applicable. R. O. Havrylyuk substantiates that financial law in particular, as law on the whole, has *anthropo-socio-cultural nature*, thus, for its true cognition *instrumentally-based on needs philosophic-methodological approach* is required. R. O. Havrylyuk suggests to cognize the system organization of financial law by its fundamental attribute of *constructivity* (Havrylyuk, 2012: 281-295, 437-455, 633-654, 737-756; Havrylyuk, 2012: 165-173; Havrylyuk, 2012: 94-105). That is, the approach of R. O. Havrylyuk at paradigm level is different from *fund, institutional* and *subject* conception of the system of financial law. Also, a paradigm new, legal is the approach of D. V. Vinnitskiy to understanding the criterions of financial law systematization. In particular, he came to the conclusion that: "The separation of tax law in legal system as an independent branch is the result of *differentiation of legal substance* (Vinnitskiy, 2003: 128), both by *functional* and *objective* criterions". He also asserts that "the segregation of legal commonalities in either case is caused by the peculiarity of *functions* realized by a certain branch of legal system" (Vinnitskiy, 2003: 119). In its turn, D. V. Vinnitskiy subdivides functions of tax law into *substantial* and *instrumental* (Vinnitskiy, 2003: 120-127).

The author of these lines also drew attention to the necessity of the reconstruction of legal understanding and legal cognition on paradigm different fundamentals. In particular, we noted that in "post-soviet legal science

on the whole and in the science of financial law in particular, there was formed the situation, the same to the one in Newtonian physics of the end of XIX c., in cybernetics and genetics of 40s XX c., when an adequate apprehension of a new objective reality unavoidably requires a qualitative change of a research context, introducing principally new methods of cognition, distinctive by paradigm character" (Patsurkivskyy, 2006: 10).

Anew I enunciate and solve the basic question of the science of financial law: what is financial law in reality, whether it is a creation of socium or state, and if of the both, then what is the role of socium and what is the role of the state in the existence of financial law? Our answer is that law is objective in its nature, it is created by the society and the state creates only its legal form which in our case is called financial legislation (Patsurkivskyy, 2003: 91-102). Thus, the criterions of systematization of financial law, an the law on the whole, should be searched not outside of law but in it, relying on the general systems theory of N. Luman and philosophic-legal conceptions of underlying form of law by G. Spencer-Brown and R. M. Unger (Patsurkivskyy, 2010: 52-60; Unger, 1976; Spencer Brown, 1972; Luman, 2007; Luman, 2007).

6 Conclusions

Nowadays' domination of fund, institutional and subjective conceptions of financial law system throughout the post-soviet area convinces that post-soviet science of financial law, both Ukrainian and foreign, on the whole remains at Marxist philosophic-methodological positions of understanding law and its system-building factors. It comprehends law as *a mechanical body of legal rules,* created or authorized by the state, appealed to regulate this medium, in our case, public financial reality, which is nonsense in itself. In the systematization of positive financial law there is overemphasized the elementarist approach, the nature of which is adjusted to solve absolutely another tasks. Notwithstanding that financial law, as well as the law on the whole, presents procedural reality, it insistently remains to be cognized from perspectives of classical (mechanical) standards of scientific approach, destined for achievement of another purposes. Philosophic-legal conceptions of underlying legal form by R. M. Unger, G. Spencer-Brown

and system theory by N. Luman can and must be adequate and efficient approaches to the system nature and properties cognition of financial law and also, its system on the whole.

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THE FINANCIAL LAW SYSTEM IN SPAIN

Jarosław Marczak [1]

Abstract

The soundness of economic relations depends on several factors. The most important of them is the shape of the financial system which consists of financial rules and institutions and legal norms. Compared with financial rules and institutions which are determined by real monetary processes, legal norms are set by the state and reflect the level of development of law, particularly of financial law. Financial systems and financial law systems can be differently connected with each other and vary between countries. To find similarities and differences between them, comparative studies are necessary. This article provides an analysis of financial systems and financial law systems in Spain and Poland.

Key words

Financial law system in Spain; financial system.

JEL Classification

K40

1 Introduction

The financial law system of the state cannot be analysed separately from its financial system, because of the omnipresence of laws governing all aspects of human life and activity. Since the emergence of the modern form of money, laws regulating its use have gained special importance.

Financial systems of countries can converge, but their financial law systems cannot. Financial systems are closely connected with economic processes

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and are more homogenous than the systems of laws which are determined by historic, social, religious, cultural, and civilization circumstances, etc. A good illustration is the marked differences between legal systems operated in countries in continental Europe and in Anglo-Saxon countries and the relative similarity of their economies and financial systems. How particular countries apply their laws is also important.

Despite the similarities between financial systems and financial law systems established in different countries, the type of relations between them is worth analysing. The relations can be logically assumed to be very strong (although exceptions are possible) at least within the same country. In simple terms, a financial system should be covered by a system of financial laws. In the real world this may not be so, the main reason being the autonomy of law and finance (economy).

This article discusses Spain's financial law system and financial systems and compares them with their Polish counterparts. However, this comparison must be preceded by a methodological discussion to sort out the presented issues, particularly that they border on law and finances (economy).

First and foremost, the meaning of the term "system" must be clarified. Different sciences define it in different ways which is of consequence for all types of studies, including comparative analyses. Słownik Wyrazów Obcych PWN (The Dictionary of Foreign Words published by PWN) defines 'a system' as: „1. A coordinated set of elements, a set forming a whole determined by a fixed, logical organization of its elements, the concept of such a whole; (…) 2. Rules of organization; a body of rules, obligatory rules applied in various fields; a form of the system of the state." (Słownik Wyrazów Obcych PWN, 1980). In organization and management sciences the definition reads as follows: „1. a set of physical or abstract elements that are internally connected with each other but separate from their setting, and considered, from a certain perspective, to form a whole." (Encyklopedia Organizacji i Zarządzania: 1981). Still another definition is used in praxeology. In this case a system is „elements (at least two) that are connected with each other by certain relations and make up a whole that is qualitatively different from the sum of the elements; a set of elements that has a certain structure and forms a whole the features of which are different from the features of its elements (synergy)." (Pszczołowski, 1978). These

definitions need a word of comment. All definitions but the second definition provided in the dictionary use notions such as elements or sets of elements and lay stress on the creation of new quality which is different from the quality of particular elements, and on the internal cohesion or logic of the connections. Because some general definitions of a system are readily available, it is worth asking whether they offer the right context for examining a financial law system or whether a "dedicated" definition is necessary.

It is very obvious that the elements of a system must be complete and internally cohesive as required by systems theory. A lack of cohesion always casts doubts on how smoothly a system can work. A financial law system, too, must be complete, i. e. it must have all necessary, internally cohesive and logically connected elements if its goals are to be achieved. It is not easy, however, to establish what components a financial law system should be made of, as they incessantly change and new ones appear. Additionally, the maze of usually specific laws makes inner cohesion of the system difficult to achieve. The logic of connections between the inner elements may also leave much to be desired. The best approach to the financial law system has probably been formulated by the authors of the following statement „From the perspective of the science of law, definitions of finances conveying their meaning appear to be sufficiently precise; the delimitation function of a definition is not so important in this case."[2] (Brzeziński, 2001: 18).

The above doubts lead to a question about the degree to which a financial law system regulates a financial system.

2 A financial system

Despite financial systems being basically similar, there are many reasons for which they differ between countries. The systems can be considered in general terms or with respect to a country and the level of its development.

For instance, the financial system of Poland can be studied from the perspective of the stage in the country's economic development, its political system and economic ideology. In the central command economy, the system was secondary to plans drawn by the state. It was defined as „The whole of (…)

2 The authors consider a definition of finances from the legal perspective. This approach seems to capture well the differences in how the same matter is treated by finances (economics) and law.

organizational forms, legal norms and planning facilities used for the purposes of financial policy and management (…)" (Bolland, 1972: 69) or more widely as „(…) the whole of organizational structures, methods of operation, legal norms and planning facilities governing the course of financial processes and setting a framework for activity called economy and financial policy." (Bolland, 1979: 72).

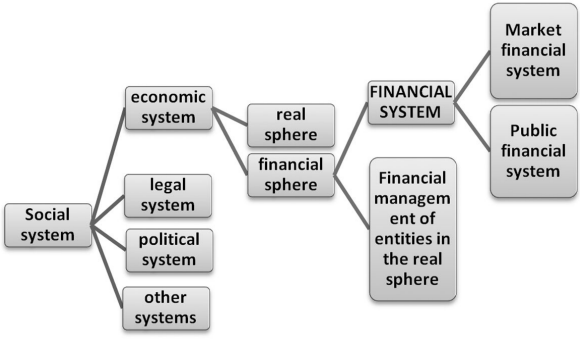
If the financial system is to remain compatible with the real sphere of the economy it must follow the dynamics of economic changes. This implies that a financial system is an arbitrary construction: countries with similar economic circumstances may have different financial systems because of their different approach to GDP distribution, the government's financial policy, or legal norms established to ensure that financial management complies with this policy.

In present-day Poland with her market economy and a limited role of the public sector a financial system is defined as „(…) a set of logically connected organizational forms, laws, financial institutions and other elements that enable entities to enter into financial relations in the real and financial sectors. As such, the financial system sets a framework for the activity of all entities that use money." (Owsiak, 2002: 234). This definition omits planning facilities, but this does not mean that financial management can be spontaneous. It is not so, because even though particular entities are free to choose their economic and financial policies, there are certain limitations that the state imposes and controls through appropriate institutions. The focus of the above definition is on the completeness of elements („a set"). Another definition of a financial system found in the Polish literature has been built around the functional approach („a mechanism"): „The financial system in a market economy is a mechanism that enables the creation and flows of purchasing power between non-financial economic entities; the system consists of financial instruments, markets, institutions and of the rules governing their functioning." (Pietrzak, 2008: 15). In this definition a financial system is a sort of "an equalizer" that balances purchasing power by managing money flowing between non-financial economic entities.

To better understand how a financial system relates to a financial law system, it is necessary to establish the position of the latter not only in the economic

system, but also in the broadly defined social system. The relationship between the social system and the financial system is shown in fig. 1. Instead of dividing the economic system into subsystems (or systems) according to systems theory, the authors of the diagram chose spheres, because „(…) despite their terminological similarity, the notions of „a financial system" and of „a financial sphere" do not coincide. (Pietrzak, 2008: 16). As shown by the diagram, „the creation and flows of money (purchasing power)" are driven by entities that belong to the financial system as well as to the real sphere (enterprises and households). Let us note here that a financial system consists of a market financial system and a public financial system. This fact is crucial to understanding the financial system and the financial law system. It is also interesting that the authors of the diagram placed financial management of the real sphere (households and enterprises) in the financial sphere and not in the financial system.

Fig. 1: The financial system as related to the social system (Pietrzak, 2008: 16).



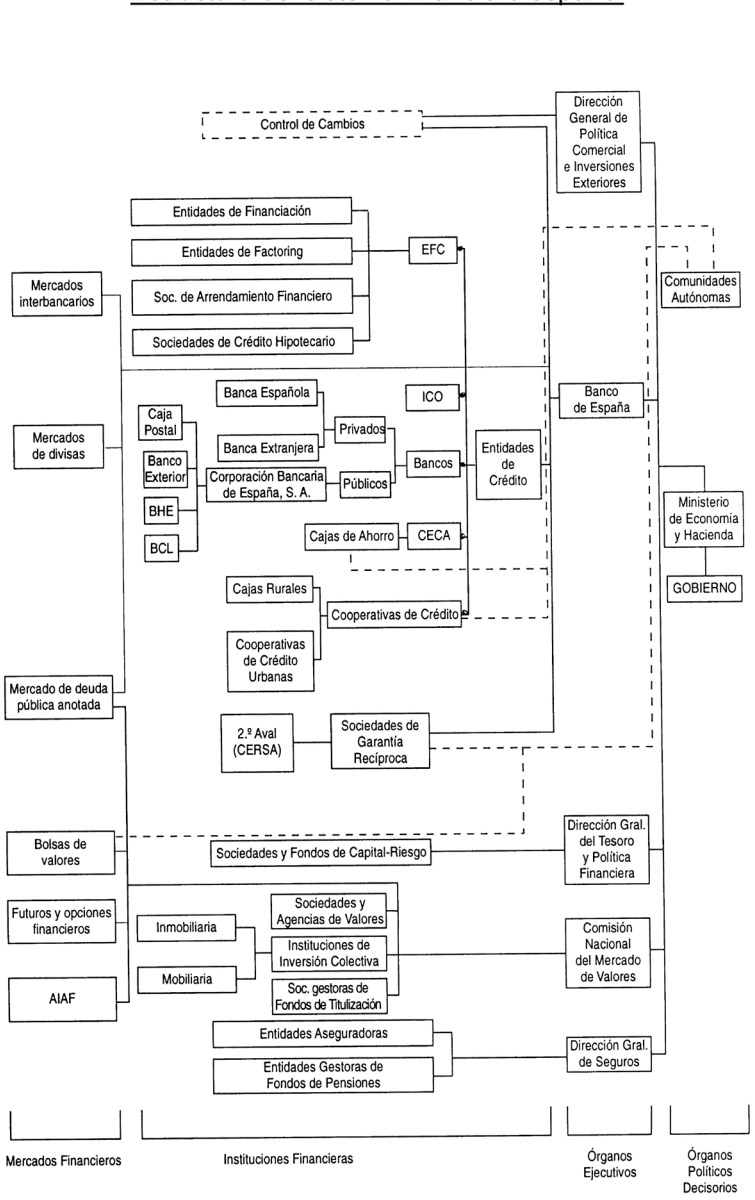
The Polish solutions can be rightly expected to be similar to those developed in other countries, particularly that they do not have an innovative character. To find out whether it is really so, comparative studies and analyses are necessary. As mentioned earlier, a good point of reference for Poland is Spain. The impacts of the crisis of 2008 that hit hard the Spanish financial system are felt still today in the country. The crisis is described as financial so a question arises whether it was so severe that even the best-designed financial system would not have been able to cope with it, or whether the impacts of the crisis have been so painful for such a long time because of the country's financial system being the weakest link in the economy.

Or, perhaps, it was the economy (the real sphere) to which the financial system (the monetary sphere) must be adapted that was weak and susceptible to crisis-generating factors. The view that the monetary sphere adjusts to the real sphere automatically, in a decentralised manner, does not seem correct. If it were so, the very idea of a financial system would be challenged.

The Spanish definition of the financial system is very similar to that adopted in Poland: „The financial system of the state is generally formed of all institutions, means and markets the main purpose of which is to receive (canalizar) savings from the surplus entities to transfer them to borrowers or the deficit entities. The financial system is therefore understood to be composed of financial instruments or assets, as well as of institutions/intermediaries and financial markets (intermediaries that buy and sell assets in financial markets)." (Parejo Gámir, 2004: 1). The main difference between the Polish and Spanish definitions is that the latter makes no mention of laws, which might imply that regulations do not exist. The authors of the Spanish definition have chosen a dynamic approach to describe the financial system and enumerate institutions in charge of regulating the financial market. The most important among them are the Ministry of Economy and Finance that supervises the Bank of Spain, the National Securities Market Commission and the General Directorate of Insurance and Pension Funds. (Parejo Gámir, 2004: 25 – 44). Figure 2 (from before 2004) presents the Spanish financial system whose main structures and institutions have not changed to date.[3] The system is divided into four areas: the decision-making political bodies such as the Ministry of Finance and, to some degree, also autonomous communities (Spanish regions); the executive bodies (with supervisory and control functions); financial institutions; and financial markets. The public sector has been omitted from the diagram, because in Spain it is considered a separate area. In the Spanish language and in practice public finances are called hacienda pública, which also translates as public economy. The other part of finances is called finanzas. The probable explanation of why the term "a financial system" – un sistema financiero – only applies to the part of finances called finanzas may lie in the adoption by Spain of divisions used in western science and literature.

3 In Spain, ministries are reorganised by every new government. The government formed by the socialist party, PSOE, merged the Ministry of Economy and the Ministry of Finance, while the peasant party, PP, separated them. In 2014 the financial market was supervised by two separate ministries – the Ministry of Finance and Public Administration and the Ministry of Economy and Competition. These reorganizations are effected without major changes in the Spanish legislation.

Figure 2: The structure of the present financial system in Spain (Parejo Gámir, 2004: 26).



The construction a financial system and the rules governing its functioning are arbitrary and the system allows the possibility of creating different solutions and variants. From the practical perspective, the type of a financial system chosen is important. Sound financial relations and monetary processes, i. e. the correct functioning of money and finances in economic processes, largely depend on the correct design and efficient operation of solutions comprising a financial system. A financial system must be stable and predictable rather than being a tool for ad hoc actions the result of which may be deregulation instead of regulation. The arbitrariness of a financial system stems from the fact that every government can shape financial relations in the country as it wishes them to be and as it has promised in its electoral programme. A financial system may also change or receive new solutions following the enactment of various laws. As mentioned earlier, a financial system is regulated by different laws that can be amended because of current needs or new political or economic events; this also shows that the state acts as a regulator overseeing the functioning of money and the whole economy.

The heterogeneity of financial processes and of activities performed by various groups of entities involved in the processes cause functional and organizational diversity of the financial system. How important it is for a system to be complete and to have all necessary elements has already been mentioned, but constructing a financial system having these qualities is not easy, because financial systems are complex by nature. This fact should not be used as an excuse for not taking action, though.

In modelling a financial system one has to be aware that its efficiency and effectiveness do not depend exclusively on its completeness, cohesion and a good fit to the real sphere of the economy: the legislation in force is important too. At the same time the legislation on the institutions, instruments and other components of the financial system may be unclear, opposing, or may not exist at all, which is not always advantageous.[4] In other words, the financial system is determined by the financial law system.

3 The Spanish system of financial law

The discussion above has showed how the term "a financial system" is understood in Spain and Poland. In the Spanish concept, the system

4 Law does not always catch up with real life. In Poland leasing contracts were unregulated for a long time.

consists of financial institutions and markets, so the whole sector of public finances is left outside of it. In contrast, in Poland the public sector is recognised as part of the financial system. A discussion on the issue of regulation of the financial system brings up two questions: 1) does the law sets a framework for the financial system to function within or merely organize it by means of regulations? 2) does the financial law system correspond to the financial system? Regarding question one, the financial system and the financial law system are known to be closely connected with each other, however which of these two has primacy over the other must be established. As far as question two is concerned, the financial system covers only a specific part of finances that is only partially regulated by the financial law.

Laws regulating finances are a field of financial law that belongs to the legal system. „A legal system is an organized set of mandatory legal norms. The organization consists in that the set of legal norms comprising the legal system is at least hierarchically differentiated and internally cohesive. For the legal system to be internally cohesive the legal norms must be consistent. The legal system is sometimes expected to be complete. A complete legal system is one where every legal problem can be considered through its norms. A complete legal system is a system without loopholes." (Encyklopedia prawa, 2000). It must be asked, however, how can we identify the part of the legal system known as the financial law system? The answer to the question is not straightforward. „The wide scope of direct activity of the state and of other public entities causes many problems with determining the scope of the discipline of financial law." (Gajl, 1992: 35). According to an earlier opinion (Brzeziński, 2001: 18) there is no need for the scope to be determined. The opinion is rather ungrounded, because some relations between finances and financial law (or actually between the financial system and financial law) must be defined if the economy is to run smoothly. When such definitions are not available, a wrong view may develop that there is an equality sign between the financial system and the financial law system. This misleading opinion is well illustrated by the following quotation: „The most advanced form of complex financial institutions is well-fitted *financial systems* acting in the same area (purpose-defined). These general systems are a budget system, a tax system, a system of enterprises, a credit system, an insurance system, etc. The financial system of the state composed of all these systems is the widest notion […] that encompasses all financial institutions

in the country. It is therefore the whole of legal norms [my underlining – J. M] that regulate in a hierarchical manner the rules and legal structure of public finances in the state. The purpose-defined systems are understood as homogenous, well-fitted financial systems using the same instruments." (Gajl, 1992: 28).

According to the quotation, the financial system is made of norms governing public finances in the state. The prevalence of this approach in the Polish literature on law means that the financial system (financial law) is understood in Poland exclusively in terms of public finances. (see: Chojna-Duch, 2006). The roots of the approach may date back, though, as far as medieval times (after money came into common use). „The appearance of money had a greater influence on the emergence and development of public law than of private law, because it was the ruler (and then the state) that held the exclusive right to issue money. It was also the ruler (the state) that used money to denominate subjects' obligations to the ruler (the state) and the privileges they were granted. As regards commercial relations (trade, insurance, banking), the use of money was for long regulated by customary norms unsanctioned by the state (the ruler). Laws regulating the functioning of credit money and commercial banks took some time to appear after the institutions came into being." (see: Kosikowski, 2003: 55). The quotation indicates that the genesis of financial law in its part applying to financial management of the state (the public financial system) is earlier and different than of other components of financial law the emergence of which is largely attributable to market mechanisms (the financial system). In some studies on this subject the „differentiation and autonomization" of the branches of financial law are also frequently mentioned. (see: Brzeziński, 2000: 359-360).

Spain and Poland are similar regarding discussions and doubts about the uniformity, scope, and independence of the branches of law and about the connections among them. (Molina: 42). In Spain, too, financial law is understood to apply only to public finances and not to whole of finances.

„As a scientific (academic) discipline, financial law is a branch of the science of law that deals with the functioning of public finances." (Molina: 9). In Spain, this definition of financial law encompasses the budget law and

the public expenditure law (*derecho presupuestario y del gasto público*), the tax law (*derecho tributario*), the public credit law (*derecho del credito público*), the (financial) property law (*derecho financiero patrimonial*). (Molina: 79 - 120)

4 Conclusion

The role of the financial law is to regulate processes involving the use of real and virtual money. For this reason, it must extend beyond the public component of the financial system (public finances) to cover also financial institutions and markets comprising the market financial system that needs regulation too. Solutions adopted in the Spanish and Polish practice cause "incompatibility" between the financial system and the financial law system, as the latter (financial law) is only applied to the public component of the financial system. This should not be understood that law fails to regulate other areas of the financial system. The Polish banking law is one proof to the contrary. Let us add that laws applying, respectively, to the public financial system and to the market financial system must be coordinated, so that money flows (or more broadly financial relations) they determine are as smooth as possible.

The discussion shows that the financial system and the financial law system are not connected symmetrically. The financial system does not address the whole of financial issues and the scope of the financial law system is limited to an even narrower matter of public finances. To ensure transparency of solutions and effective application of laws the two systems should move towards each other. The degree to which this is achievable can be established based on joint investigations and discussions about finances and financial law.

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SOURCES OF THE FINANCIAL LAW

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Abstract

Financial law sources characterize financial law as the law branch. They are formed the system of finance legislation which is regulating social relations connected with the finance state activity. The constitution principles are determines the organization and structure of the finance legislation. Belarusian finance legislation including the Constitution – the Republic of Belarus Basic Law, international agreements, legal acts of the President, Government, central and local organs of state. Belarusian finance legislation has to decide many problems. This will develop Belarusian finance legislation and will make the regulation of the social relations in finance sphere more effective.

Key words

Legal System; Financial Law; Tax Law; Budget Law.

JEL Classification

K40

Financial law sources characterize financial law as the law branch. They are formed the system of finance legislation which is regulating social relations connected with the finance state activity. The constitution principles are determines the organization and structure of the finance legislation. Belarusian finance legislation including the Constitution – the Republic of Belarus Basic Law, international agreements, legal acts of the President, Government, central and local organs of state. Belarusian finance legislation has to decide many problems. This will develop Belarusian finance legislation and will make the regulation of the social relations in finance sphere more effective.

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The branch of the law represents system of the rules of law governing the uniform social relations. The criteria characterizing branch of the law and having backbone value are subject of legal regulation, method of legal regulation and sources of branch of the law.

Concerning definition of a source of the law in scientific literature the numerous points of view are expressing. At the same time, the most widespread is the position, according to which sources of the law are external means, forms of expression and fixing of rules of law existing in this or that legal system (Korkunov, 1909: 66), (Kechekyan, 1946: 3-4), (Alekseev, 1981: 315).

Use of the specified approach allows formulating a definition of sources of the financial law. Sources of the financial law are the legal acts of public authorities and the local governments, containing norms of the financial law.

The system of sources of the financial law in the basis has the constitutional principles of its functioning.

It is necessary to refer the following fundamental, basic ideas put by the Belarusian Basic Law - The Constitution of Republic of Belarus - to the constitutional principles of system of the sources of the Belorussian financial law: unity, rule of law, social orientation, democratism, and division of the authorities.

The principle of unity of the sources of the financial law means existence of their certain system. The legal acts containing norms of the financial law are interconnected and have the strict subordination determined by a place of government body, them accepting, in the state mechanism. In the conditions of the unitary Belarusian state the system of the sources of the financial law includes the legal acts extending the action to all territory of the state and legal acts, adopted by local bodies of authority and management, which regulate the social relations on certain parts of the territory of the Belarusian state.

The rule of law means the regulation of the social relations connected with financial activity of the state only by the rules of law containing in legal acts; the existence of the hierarchy of legal acts; the priority of norms of international law in the field of financial regulation over national rules of law which is shown in case when the international agreements containing financial

norms are coordinated in the order established by the legislation. In this case the international agreements of Republic of Belarus become components of system of the sources of the financial law of Belarus.

Republic of Belarus is proclaimed itself as the social state. Therefore orientation of the sources of the financial law to regulate the social relations taking into account interests of the personality, uniform distribution of financial resources between various social groups and individuals is the natural principle of analysing system of legal acts.

Democratism of the sources of the financial law is shown in acceptance by their bodies, part in which formation is taken by the Belarusian people, or the bodies which activity is controlled by the population.

The legal acts which are the sources of the financial law are accepted in Republic of Belarus by various government bodies. The National Assembly of Republic of Belarus – the Belarusian Parliament - adopts laws and their special version – codes. The President of Republic of Belarus regulates the financial sphere of the social relations by means of edicts and decrees adopted by him. The Government of Belarus – Council of Ministers of Republic of Belarus – within the powers conferred to it issues resolutions. Each of branches of the power governs the social relations entering into subject of legal regulation of the financial law, within the powers conferred to them and in the forms established by the legislation.

In the sources of the financial law, as well as in the sources of law as a whole, the will of the legislator concerning volume, order, procedure of regulation of a certain sphere of the social relations is expressed.

As it is correctly noted in scientific literature, the financial legislation regulates the budgetary, tax, settlement and credit, currency and monetary relations, the sphere of the public expenditures, the relations connected with a public debt, insurance funds (fund), securities market, and financial control.

The financial legislation mediates financial activity of the state which tools are the budget, taxes, collecting, financing. The monetary system, currency regulation, price policy, and also the accounting report, tax coercion are necessary for existence of the last, etc. The last also are included in the subject of legal regulation by the legal acts relating to the financial legislation.

According to the subject of legal regulation in the financial law as the branch of the law it is possible to allocate the following subsectors and right institutes:

- the budgetary law which cover with its regulation the budgetary system, the budgetary process, procedure of the budgetary expenses, rules of budget performance;
- the tax law is consisting from the standard rules regulating the relationships between execution creditor and the taxpayer, and also an order of charge and collection of different types of taxes;
- rules of law about state (external and internal) debt and obligatory insurance, and also rules regulating the order of state entering in the civil relations as the borrower (debtor);
- rules of law about crediting and the calculations regulating the state's organizational activity in the sphere of implementation of mainly equivalent and paid economic relations developing during a monetary turn;
- the rules of law defining currency regulation, currency control and the cash monetary circulation reflecting specific state monopoly, providing unity of monetary system;
- the rules of law regulating the organization and management of securities market.

The main source of the financial law in Republic of Belarus is the Constitution of Republic of Belarus accepted on March 15, 1994, and existing in edition of republican referenda on November 24, 1996, and on October 17, 2004.

The Constitution of Republic of Belarus, as it was specified earlier, contains the norms defining the principles of the Belarusian state, and, respectively, the principles of the sources of the financial law. The Basic law of the Belarusian state defines also the system of the sources of the financial law, their hierarchy, bases of a legal status of the personality in Republic of Belarus, including those which are connected with the financial sphere of state and society, competence of government bodies and local governments in this sphere of the social relations.

The international agreements are the following major source of the financial law in Republic of Belarus. The standard basis of international agreements in Belarus is made by the Constitution of Republic of Belarus and the Law of Republic of Belarus of July 23, 2008, No. 421-Z as amended.

About International Agreements of Republic of Belarus. The main feature of the Belarusian legislation connected with action of international agreements in the territory of Belarus is that according to Art. 27 of the specified law the international agreement comes into force for Republic of Belarus after expression the consent of Republic of Belarus about obligation for it the international agreement according to the present Law in an order and the terms provided by the international agreement or otherwise coordinated between contracting parties (http://www.nalog.gov.by/ru/nalog-kodeks-2013-ru/). Among the international agreements of Belarus which are the sources of the financial law, it is possible to call, for example, the Agreement between Republic of Belarus and the Federative Republic of Germany about avoidance of the double taxation concerning taxes on the income and property from 30. 09. 2005.

The following levels of the sources of the financial legislation are the laws adopted by Parliament, and acts of the President of Republic of Belarus – decrees and edicts.

The best form of the law regarding system regulation of a certain sphere of the social relations is the code. The code is a summary act in which the rules of law regulating the similar among themselves, uniform social relations united and systematized. In the codified regulatory legal act all standard material is given in complete system, coordinated and divided according to heads and sections. Therefore codes represent the higher level of the legal acts. Each code legally regulates these or those groups of the relations, having thus the general principles, law-enforcement norms, regulatory institutes for settlement of various relations.

At the same time, in Belarus, as well as in other states of the former Soviet Union, there is no uniform Financial code. It is represented that it is explained by various reasons. Plurality of the social relations regulated by financial rules of law, and their extremely various characters, concern to them, first of all.

For a regulation of the social relations included in a subject of the financial law, in Republic of Belarus it is accepted a number of the codified acts containing financial rules of law. Among existing Belarusian codes – the Tax Code of Republic of Belarus, the Budgetary Code of Republic of Belarus, and the Bank Code of Republic of Belarus.

The Tax Code of Republic of Belarus is the main regulatory legal act which defines structure of tax system of Republic of Belarus. It includes the General and Special Part rapidly. The General part of the Tax Code (The law of Republic of Belarus of December 19, 2002 No. 166-Z), operating since January 1, 2004, establishes the concept of the tax obligation, payers of taxes, object of the taxation, the provision on tax accounting and control, an order of the appeal of decisions of tax authorities. The Special part of the Tax Code (The law of Republic of Belarus of December 29, 2009 No. 71-Z), come into force since January 1, 2010, regulates separate taxes, collecting, (duties), defines payers, objects of the taxation, a rate, an order of calculation and payment of the corresponding taxes, collecting (duty) (http://www.nalog.gov.by/ru/nalog-kodeks-2013-ru/).

The Budgetary Code of Republic of Belarus registered in the National Register of legal acts of Republic of Belarus on July 23, 2008 by No. 2/1509, regulates the sphere of the budgetary relations. The budgetary relations are the relations between participants of the budgetary process, arising by drawing up, consideration, the statement, performance of the republican budget, local budgets and budgets of the state off-budget funds, drawing up, consideration and the approval of reports on their execution, definition of the rights and duties of participants of the budgetary process, implementation of loans in budgets, in the interbudgetary relations, and also control of performance of budgets and application of responsibility for violation of the budgetary legislation (http://www.pravo.by/main.aspx?guid=3871&p0=h10800421&p2=%7bNRPA%7d).

The Bank Code of Republic of Belarus as a source of the financial law governs the social relations connected with mobilization and use of temporarily free money. The Bank Code of Republic of Belarus, according to its article 2, is included into system of the regulations governing the relations, arising at implementation of bank activity, and establishing the rights, duties and responsibility of subjects and participants of bank legal relationship (http://etalonline.by/?type=text&regnum=HK0000441#/?type=text&regnum=HK0000441#load_text_none_1_).

The called regulatory legal act defines the principles of bank activity, a legal status of subjects of bank legal relationship, governs the relations between them, and also establishes an order of creation, activity, reorganization

and liquidation of banks and the non-bank credit and financial organizations. The property relations and the related non-property relations arising at implementation of bank activity, are regulated by also civil legislation taking into account the features provided by the present Code.

An important role among sources of the financial right is played by such laws as the Law of Republic of Belarus On the State Budget, adopted annually for calendar year, the Law of Republic of Belarus On the President of Republic of Belarus, the Law of Republic of Belarus On National Assembly of Republic of Belarus, the Law of Republic of Belarus On Council of Ministers of Republic of Belarus. These acts define differentiation of powers of the supreme government bodies in the sphere of the financial legislation. So, for example, according to the Art. 28 of The Law of Republic of Belarus on the President of Republic of Belarus the Head of state accept decrees and edicts. According to the Art. 11 of Law of Republic of Belarus on National Assembly of Republic of Belarus, Belarusian Parliament adopts laws. The big role in regulation of the social relations connected with finance is allocated also for the Law of Republic of Belarus On Local Management and Self-Government.

For regulation of the financial sphere the Council of Ministers of Republic of Belarus within its power adopts resolutions. The specified sources of the law provide carrying out uniform financial policy, a regulation of an internal and external public debt of Republic of Belarus, attraction, use and repayment of the external state loans (credits) forming an external public debt of Republic of Belarus, ensuring balance of the monetary income and population expenses, improvement of a financial condition of branches of economy and use of credit resources.

As a whole it is necessary to recognize a wide regulation of financial relations as the advantage of the Belarusian national legal system. Emergence of the increasing number of laws among acts of the financial legislation – a tendency of development of the analyzed sphere of the public relations.

Among sources of the financial law it is necessary to call also joint resolutions of the government of Republic of Belarus and National Bank Republic of Belarus regulating questions of the budgetary relations and accepted on the basis and in pursuance of the Budgetary Code.

The following levels of sources of the financial law of Republic of Belarus are the legal acts of republican state bodies – the ministries and departments. They include the legal acts issued by the Ministry of Finance or the Ministry of Finance and National Bank of Republic of Belarus, or other republican state bodies together with the Ministry of Finance in cases and the limits provided by the legislation.

A certain part of the social relations connected with financial activity of the state is regulating by the legal acts of local authorities and self-government, i. e. local Councils of deputies and executive administrative organs.

Development of the financial legislation in Republic of Belarus is characterized in recent years by a primary orientation on elimination of gaps in legal regulation of this sphere of economy. The Budgetary, Tax and Customs Codes are adopted. Codification of the banking and currency legislation, other standard instructions is carried out. One more tendency of development of the financial legislation – deepening of interrelation and harmonization of regulation of the economic relations by methods of various branches of the legislation. At last, one more common feature of development of the financial legislation is some reduction of the sphere of regulation because a number of the institutes which were traditionally reckoning as financial and legal, with adoption of new acts gets mainly or completely other branch accessory. So, for example, it happened to the institute of the insurance which has become entirely part of the civil legislation.

At the same time, before the regulations relating to the financial legislation, the certain problems which decision is connected with further improvement of the financial legislation are standing.

It is possible to carry the following to their number:

- The existing tax legislation in details regulates duties of taxpayers, establishing unfairly high sanctions for their violation. At the same time, the government tax authorities don't bear any responsibility for untimely return of means from the budget, for incorrectly collected taxes, damage to the taxpayer isn't compensated on norms of civil law taking into account the missed benefit and losses.
- The fundamental act defining the principles of implementation of currency transactions in Belarus, powers and functions of bodies of currency control, the right and a duty of legal entities and individuals concerning possession, using and orders the currency values, establishing responsibility for violation of the currency legislation,

the Law of Republic of Belarus On Currency Regulation and Currency Control is. It is aimed at establishment in Belarus the monetary system promoting an exchange of goods, works, services and to capital movement between the countries; ensuring stability of currency, guarantees of foreign investments; protection of economic security, maintenance of sustained economic growth and development of the international cooperation of Belarus in the monetary sphere. However questions of currency regulation and currency control in the legislative plan still up to the end aren't solved.

- The budgetary financial legal relationship is regulating, first of all by the Budgetary Code of Republic of Belarus. However the Budgetary Code of Republic of Belarus doesn't solve a number of questions of the legal regulation of the state financial control. In particular, in the Budgetary Code of Republic of Belarus definition of "the budgetary control" isn't formulated. The code doesn't establish substantial, volume, quantitative parameters of the budgetary control.
- One more possible direction development of the financial legislation - development and acceptance of the Bases of the Financial Legislation of Republic of Belarus.

Thus, the system of the sources of the law, being cornerstone of the regulation of financial activity of the state, characterizes the financial law as the branch of the law and is defining factor of development of the sphere of the social relations, it regulated..

In the obligatory introduction, please mention the aims of the article, the hypothesis, and used science methods. You should mention most important books and articles published in previous time.

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ISSUES OF PROCESS IN THE FINANCIAL LAW

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Abstract

This contribution deals with the classification of the Financial law especially into two parts – common part and special part. The main aim of the contribution is to confirm or disprove the hypothesis that the Financial law has also process part besides material-law part. There is analysis used as the scientific method in this contribution.

Key words

Law; Financial law; Classification of the financial law; Process.

JEL Classification

K40

1 Introduction

Financial law includes a wide range of legal norms of different legal forces that govern many areas as a separate public law industry.

This means tens of laws and hundreds sub-statutory laws. Financial law (without any further detailed controversy) is divided into two basic parts: general part and special part. Such a classification can be found in the accessible textbooks. Thought it is not mentioned anywhere that the essential parts of financial law are the substantive and procedural part.

The aim of this contribution is to confirm or confute hypothesis: **Financial law contains self-reliant procedural part.**

To achieve this aim it is necessary to analyse individual subsystems of the special part of financial law in order to state unambiguous conclusion at the end.

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The aim of this paper is not an analysis of what the scope of each subsystem of financial law is, but to point out that if they contain their own procedural part. Due to this fact it will be possible, in our opinion, to assess the stated hypothesis. To delineate the individual parts of the financial law, we come out from the Prague textbook Bakeš, M., Karfíková, M., Kotáb, P., Marková, H. et al. Financial law 6th recasting edition, Prague: C. H. Beck. 2012. We will analyze:

a) budgetary law,
b) tax, fee and customs law,
c) area of loans,
d) currency law,
e) foreign exchange law and
f) law of financial market.

The financial law relationships, i. e. those monetary relationships which are related to the creation, distribution, redistribution and use of money mass (Bakeš, 2012: 5), are the essence of entire financial law. The role, the nature and the purpose of the relevant money mass is the main criterion for the division of the financial law norms (Bakeš, 2012: 12).

2 Process within individual subsystems of financial law

2.1 Budgetary law

According to Boháč, it is a set of rules which govern the system of public budgets, the content of public budgets, funds management, budgetary process and the relationships which are related to the creation, distribution, redistribution and the use of money mass in those public budgets (http://www.radimbohac.cz/letni-semestr-2014/prednasky-rozpoctove-pravo).

This area is the most extensive part of financial law. It comprises both the substantive and the procedural norms. If we focus on procedural part of the budgetary law, we can say that the budgetary process, i. e. proceedings concerning the preparation approval and implementation of the budget fall into this area (Bakeš, 2012: 13).

Within the state budget the legislation of the budgetary process can be clearly defined there. On the framework provisions contained in the Constitution, (Constitution, Art. 42/1)[3] there is an Act no. 90/1995 Coll., on the rules of procedure of the Chamber of Deputies, as amended, following up.

Particular provisions of the Act no. 218/2000 Coll., on budgetary rules, as amended, cannot be forgotten, for example provision § 8 (Preparation of a bill on the state budget) and § 8b (Terms of some works…).

Without a doubt it is possible to continue, what is clearly identifiable process part concerned, with local government budgets as well. It is given the whole third part of the Act no. 250/2000 Coll., on budgetary rules of territorial budgets, as amended, to it. It is necessary to add certain provisions of the Act no. 128/2000 Coll., on municipalities, as amended. The point is that municipal authorities manage their own budget for the relevant financial year within its separate scope.

As it can be observed, the budget process is a special type of procedure, in which there are the following phases: drawing up, approval, publication, management according to the budget, control and evaluation of the budget.

It is a sui generis process which cannot be compared with other types of proceedings within the financial law scope, for example tax proceedings. With other process parts of the financial law subsystems, there is a main thing in common:

In the context of the budgetary process it regards the creation, distribution and use of money mass, though the real money flows and operations do not occur directly. Money mass is being planned, projected and its flows and operations are envisaged within the budgetary process or budgets creation respectively. It can be stated that the budget law can be divided into two parts, namely on the substantive and the procedural part.

2.2 Tax law

The tax law is a set of laws governing tax legal relationships and establishing rights and obligations under these relationships. The tax law is a logical part of public law, because taxes are a significant source of the state public financing. The tax law is a subsystem of the financial law. The tax

[3] The government submits a bill on the state budget to the Chamber of Deputies.

law is implemented by means of proceeding procedures which ensure that the taxes are determinated and gauged, collected and that they are paid in accordance with the law in the event of failure along with sanctioning of subjects who fail to meet their duties. The tax law process is legally enshrined on two fundamental levels, namely at the level of „lex generalis" and the „lex specialis" whereby between these two levels there is a linkage on the principle of „lex specialis derogat legi generali". The level of the procedural tax law level of lex generali is embodied by the Act. no. 280/2009 Coll., the tax code, as amended. The „lex generali" level, containing procedural matter as well, in tax law is embodied by particular tax laws of the Czech Republic´s tax system:

- Act no. 586/1992 Coll., on income taxes,
- Act no. 338/1992 Coll., on realty tax,
- Legal measure of the Senate no. 340/2013 Coll., on realty acquisition tax,
- Act no. 16/1993 Coll., on road tax,
- Act no. 235/2004 Coll., on value added tax,
- Act no. 353/2003 Coll., on excise taxes,
- Act no. 261/2007 Coll., on public budgets stabilization (energy taxes)…all as amended.

Besides the above mentioned legislation which enact tax proceedings in the tax law there are other, publicly non-binding forms of norms such as "Guidelines of the Ministry of Finance", where the tax law process is realized by state officials´ practice and execution for whom these methodological guidelines of the Ministry of Finance are binding. Furthermore, similar instruments are "Communication of Ministry of Finance" "Guidelines of Ministry of Finance" and "Guidelines of General Financial Directorate" and finally, "the Directorate General Financial Information. In the case of procedural tax law, there is enacted priority of the tax code, Act no. 208/2009 Coll., provisions while the administrative code's scope is excluded. This exclusion is based on the fact that the tax law relationships have characteristically entirely different substantive norms in comparison with legal relationships which are governed by administrative law. Despite what is mentioned above, this exclusion is not absolute because of the possibility of analogical use of the Supreme Administrative Court decision ref 8 Afs 59/2005-83 dated 20. 7. 2007, although it was ruled for the Act no.

337/1992 Coll., on the administration of taxes and fees, we can say, it is of general validity. Out of this decision it is implied that the administrative law provision is applicable in procedural tax law, despite its formal exclusion, in the event that particular issue in question is not covered by the tax code (formerly the Act on the administration of taxes and fees – no. 337/1992 Coll., now the tax code - Act no. 280/2009 Coll.) provisions.

2.3 Customs law

Customs law, as the file of legislation governing the customs-legal relationships, is the subsystem of financial law, thereupon it is the integral part of public law, which results from the legislation subject – duty, which is the income of the public budgets, at presents it is the income particularly of the European Union budget.

It can be said that the customs law has the significant specificity in financial law, comparing with all the other subsystems of financial law, namely with the high degree of communitarization of legislation, i. e. in customs law there is great number of directly usable legal regulations of the European Union modifying the customs problems uniformly within the whole European Union, in all EU member states. This is due to the fact that the EU single market and free movement of goods within the EU is designed with respect to the third countries, i. e. the countries outside the EU, on the principles of the Customs Union, which requires unconditionally a single customs territory that is governed uniformly by the customs regulations, the single common customs tariffs and there from resulting uniform duties which are collected from the given goods during import only once throughout the whole customs territory of the European Union.

The own performance of the customs - the process in customs law runs in the form of the proceeding before the customs authorities, where the customs regulations are applied in the practice through the customs supervision, customs control, customs examinations, the risks assessment, collection of statistical data and other actions up to the issue of decision. The proceeding before the customs authorities, that means area of the process in customs law, even further increases the mentioned particularly specific character of customs law, namely due to the fact, that several types of proceedings can be running continuously and next to each other before the customs

authorities. The customs authorities can in the course of the process implementation and in the framework of customs law perform:

- customs proceeding – in the matters that are entirely governed by directly applicable EU (Act no. 13/1993 Coll. § 320, par. 1) customs regulations, i. e. mainly by the Council Regulation (EHS) no. 2913/92 – Community Customs Code and Regulation of the European Parliament and the Council (EU) no. 952/2013 – revised EU Customs Code of from the substantive-legal aspect as well as the procedural-legal aspect,
- tax proceeding – in this proceeding before the customs authority there are decided all matters which are not processed neither within the customs proceeding, as stated above, nor within the administrative and infringement proceedings as stated hereinafter and this tax proceeding is regulated by the tax code – Act no. 280/2009 Coll.,
- administrative proceeding – which is subjected to the process legally adjusted by the administrative code – Act no. 500/2004 Coll., namely in the selected things exactly specified in § 320, par. 1, letter b), items 1-20, of the customs Act no. 13/1993 Coll., in wording of all amending acts.
- infringement proceeding – where in the general level the process is regulated by the Act on misdemeanors no. 200/1990 Coll., in wording of all the amending acts concerning infringements.

In the course of proceeding before the customs authority the stated individual proceedings are executed procedurally in mutual continuity and with except for the latter offense proceeding, without significant separation one proceeding from the other. To be able to distinguish them it is necessary to use the provision § 320 of the customs Act no. 13/1993 Coll., in wording of all amending acts, which divides the process legislation into individual types of the management groups under the customs authority.

Apart from the process problems in the customs area concerning the problems of infringement, the process problems of the customs matters, modified directly usable EU customs regulation from the procedural-legal aspect and the substantive- legal aspect, the process legal adjustment insist in the customs Act in the tax code - Act no. 280/2009 Coll., and in the administrative code – Act no. 500/2004 Coll., whereas the process area with use of the legal adjustment by the administrative code is exhaustively defined

by § 320, par. 1, letter b), items 1-20, of the customs Act no. 13/1993 Coll., concerning the matters, namely:

- administrative infringements,
- detention of goods and things for proceedings concerning infringements and minor offenses,
- authorization and withdrawal of authorization to be a guarantor and issue the customs and guaranteeing documents according to international contract,
- exclusion of persons from the transport under the TIR procedure,
- authorization or withdrawal of authorization to cover any customs debt,
- authorization or withdrawal of authorization not to cover any customs debt,
- issue of certificate of origin and permission of approved exporter in the course of issuing of the certificate of origin and cancelation of these permissions and certificates,
- issue of binding information and reversion of the validity,
- permission or cancellation of permission for the procedure with economic effects and for operation of bonded warehouse, permission of changes in the given permissions and extension of their validity,
- approval of temporary warehouse and specification of the conditions for temporary goods storage,
- permission of simplified procedure including the local proceeding and reversion of this permission,
- issue of the Certificate of the Authorized Economic Operator (AEO),
- proceeding in the matter of free zones problems and free warehouses,
- determining of the customs area,
- permission of the centralized customs clearance,
- permission of electronic communication with the customs authorities,
- permission and allocation of approved customs specification,
- issue of the Certificate of AEO,
- verification of the certificate on draught in case of marine fisheries

In case of all the other customs problems, which have not been named above, the process is governed by the provisions of the tax code – Act no. 280/2009 Coll.

The whole issue of the process specificity in customs law – in the process implemented by the customs authorities , it is further increased by the fact, that at present the customs authorities in the Czech Republic are not the authorities with the closely determined special competency only on the customs problems, but actually they are national control and supervision authorities of universal over – defensive character, which are entrusted with the performance of specialized activities, for instance in following areas:

- inspection in cooperation with other national authorities over the transportation of nuclear materials and radioactive substances, the risk biologic agents, toxins and other hazardous substances,
- supervision over the product technical safety during import,
- inspection of the toll and charges payment for using motorways and expressways,
- check of the time of the vehicle driving, safety breaks and the rest time for drivers.
- check of the vehicles transported dangerous goods, check of compliance with Agreement ADR.
- check of the compliance with the limit of maximum permitted load and maximum permissible weight of truck or trailer,
- check of the proof of entitlement to international road transport,
- check of national heritage and the national cultural monuments return after their lending abroad,
- execution of the state debts recovery – collection and recovery of unpaid penalty payments imposed by the state administration bodies within the framework of divided administration,
- data collection and check of the statistics data on the foreign trade and statistics of the intracommunitary trade of the European Union in the extent of the Czech Republic.

And in the issue of the process connected with these activities in the framework of the process-legal adjustment there is executed the extension of legislation created with general laws (lex generali) – tax code – and administrative code – Act no. 500/2004 Coll., in wording of latter amending acts, by the adjustment of special legislation (lex specialis) related to the problems of individual specialized activities, for instance:

- Act no. 191/1999 Coll., on measures concerning import, exports and re-export of goods infringing certain of the property rights,
- Act no. 61/1997 Coll., on alcohol

- Act no. 676/2004 Coll., on the compulsory labelling of spirits,
- Act no. 219/2000 Coll., on the Czech Republic´s property and its representation within the legal relationships,
- Act no. 13/1997 Coll., on road infrastructure,
- Act No. 78/2004 Sb. on handling with genetically modified organisms and genetic products,
- Act no. 185/2001 Coll. on Waste…all as amended.

2.4 Fee law

The fee law is another subsystem of the financial law as a set of legal norms governing the relationships arising from the determination, assessment and collection of the fee, which are an additional source of income for the state budget or local budgets and that are meant to partially replace overhead costs associated with the activities of state and local governments in proceedings in favour of parties.

The fee law regulates relationships arising from the scope of the fee system in the Czech Republic, which is not neither in terms of substantive law, nor the procedural law regulated by a separate code, but it is governed by different laws governing different parts of the fee system, each specific types of fees by which are in the Czech Republic meant:

- court fees,
- administrative fees,
- local fees,
- other fees (the fee payments character).

Process part of the fee law is regulated by the general level (lex generali) tax code with a very wide and extensive procedural modifications in comparison with the special level of individual types of taxes (lex specialis), namely:

- for court fees Act no. 549/1991 Coll., on court fees,
- for administrative fees Act no. 634 / 2004 Coll., on administrative fees,
- for local fees Act no. 565/1990 Coll., on local fees
- for other fees. for example Act no. 201/2012 Coll., on the protection of air, Act no. 348/2005 Coll., on radio and television fees, Act no. 173/2002 Coll., on fees for maintenance of patents and supplementary protection certificates for medicinal and plant protection

products, Act no. 254/2001 Coll., on water, Act no. 185/2001 Coll., on Waste, Act no. 13/1997 Coll., on road…all as amended.

2.5 Currency law

Currency law is also a subsystem of financial law and a summary of law standards, which specify and govern currency over particular country, especially by definition of local currency, currency system, its relationship with other currencies, its emission and circulation in that country, including amendments to monetary and legal relationships, which are formed as a result of currency itself and its circulation.

In terms of the currency law, the procedural legal regulations depend on the position and activities of a subject having the status of the central organ of the state administration responsible for certain area of activities. In this particular case the supreme monetary institution in the Czech Republic is the Czech National Bank - ČNB. ČNB is the corporate body responsible for public administration based on specific delegation as defined by special acts (Jemelka, 2013: 77).

Based on what was mentioned above, the legal regulations in the process of currency law can be characterized, as within financial law itself, as multilevel, namely general legal regulations (lex generali) and special legal regulations (lex specialis). These are mainly formed by the following legal standards:

- on the general level by administration code,
- on the special level by for example Act no. 6/1993 Coll., on Czech National Bank (ČNB), Act no. 136/2011 Coll., on circulation of bank notes and coins, furthermore by Act no. 284/2009 Coll., on system of payment and Act no. 229/2002 Coll., on financial arbitrator … all as amended.

2.6 Foreign exchange law

The foreign exchange law is a subsystem of financial law closely related to currency law. It is a collection of legal regulations governing the disposition with values, using which we can pay foreign obligations as well as values relating to international payment and loans. Its aim is to create tools and ensure certain conditions are met for positive impact on a country´s balance of payments and for stable and stabilised economics. The foreign exchange

law also governs laws and obligations of subjects within foreign exchange law relations, which are created together with foreign exchange and international financial transactions.

Similarly as with currency law, also within foreign exchange law the process legal regulations differ based on position and activities of a subject acting as a central organ of state administration responsible for certain area governed by foreign exchange law. In the Czech Republic these are called foreign exchange organs, which are legally defined by the Act no. 219/1995 Coll.. These are Ministry of Finance of the Czech Republic and the Czech National Bank. Both these foreign exchange organs have more or less the same powers, namely these:

- Ministry of Finance of the Czech Republic acts as a central organ of state administration in the foreign exchange area, dealing with country´s organizational institutions, municipalities, state funds and with people involved in loans either drawn or advanced by the Czech Republic.
- The Czech National Bank acts as a central organ of state administration in the foreign exchange area and deals with all other domestic or international bodies outside of the Ministry of Finance´s field of action.

The legal regulations governing the process within the foreign exchange law is again divided into two levels, a general one and a special one. These legal regulations are mainly formed by the following legal documents:

- the general level of legal regulations is governed by administrative code, whereas
- the special level as follows: Act no. 219/1995 Coll., on foreign exchange, Act. no. 277/2013 Coll. on Bureau-de-change activities and comparison with the prior legal source governing this area of law, public decree issued by the Czech National Bank no. 183/2002 Coll., on the procedures for the foreign exchange offices when it comes to payments to and from abroad…all as amended.

2.7 Loans and financial market area

In our opinion, both, for the purposes of this contribution, related areas are special in their own way in the context of financial law. Put simply, it is not only because they are non-fiscal parts of financial law (not the only ones) but we think that mainly because of that, neither loans nor financial market

cannot be considered as the financial law subsystem purely. In them, there are reflected both private and public-law institutes. Because of the mentioned above, it is important to be prudent while dealing with them. Since the loan is defined as a relationship where one person is committed to provide financial means to a certain amount to another at his request and benefit, while the other is committed to repay the provided financial means and interest incurred, it is apparent the following:

- relationships within the loan are characterized by the contractual autonomy of the parties involved,
- relationships, which arise from organized financial market loans provisions, are mainly based on mandatory norms, as typical for public law, which financial law undoubtedly is.

Moving on to the second area, we tried to look up the "law of the financial market" definition. We have failed. Even though Kotáb and Kohajda deal in detail with the particular parts of the financial market in the renowned financial law textbook, the financial market law definition is not provided (Kotáb, Kohajda, 2012: 419). It has to be stated that it is missing in order to make better theoretical backgrounds, as for example the financial market law characteristics and its divisions, as it is common in other financial law parts. According to Boháč (Boháč: 2014), financial market is a market where the redistribution of free money means on the contractual basis takes place, namely from offering subjects to the demanders. According to Seknička the financial market than maybe described as a system of institutions and instruments providing flow of money and capital in all forms among different economic subjects based on supply and demand.

Of terms such as „redistribution" and „flow…among" we can imply a process or procedure. Nevertheless we believe that such a process has rather a private law character since it is based on supply and demand which is in the final effect captured in a contract.

But the public-law character of the financial market is immanent to for example: the authorization and approval management, capital market regulation and supervision. Given that this area is very extensive we choose the capital market regulation and supervision only. From our point of view it is the most interesting topic related to this contribution. It is due to the following statement.

According to the Act on CNB, the capital market supervision comprises of making decisions on applications for licenses, permits, registrations and prior authorizations according to special laws, control of compliance with the conditions stipulated in licenses and permits, with laws, to control of which the CNB is empowered by act or special legislation, with regulations and measures issued by the CNB, obtaining information necessary for supervision and its enforcement and verifying truthfulness, completeness and topicality of this information, imposition of remedial measures and sanctions and to administrative offenses and misdemeanors proceeding.

The capital market regulation establishes the framework for entrepreneurship of capital market services provider. The activities of the capital market participants are governed particularly by the Act no. 256/2004 Coll., on the capital market entrepreneurship, as amended, and Act no. 189/2004 Coll., on the collective investment, as amended. On the basis of the delegation in these laws CNB enacts decrees providing detailed conditions for entry into the capital market, prudential rules, rules dealing with investors and clients and market transparency rules (legislative base) (https://www.cnb.cz/cs/dohled_financni_trh/vykon_dohledu/postaveni_dohledu/kapitalovy_trh/index.html) in particular.

From the written above, there is definitely a process/proceeding within the loans and the financial law area, though not separate, as it is for example in the budgetary or tax law. Legislation of such a process is independent then and it cannot be, as we believe, separate from other parts so it could be defined separately.

3 Conclusion

The contribution has focused on individual special areas of financial law. The purpose was to confirm the hypothesis, that financial law contains separate procedural part. We have come to the conclusion that financial law as the whole does not contain the separate procedural part. In other words we can say that financial law subsystems are adjusted in legal way both by the substantive-legal and procedural-legal standards.

But not everywhere there can be defined separate part of the respective subsystems, because the separate procedural regulations do not exist here.

As the classic example of the unambiguous procedural part adjusted with the procedural precept we can chose the tax administration (fees, duties and other payments imposed by law) adjusted by the tax code.

Where, however such a difference cannot be found, is for instance the area of loan. (Process) Provision of the funds in the form of loans is grounded in a contract according to the civil code, which does not even fall into financial law. If we take into consideration another example – for instance granting the bank license, nothing another can be done then to agree that the proceeding concerning the bank license granting is also running. We even agree that it is the proceeding of the public-legal character. The legal form can be found in the banking Act (provision § 4 at seq.). In the provision § 4 par. 2 of the banking act there is specified that ČNB decides on the license granting. According to the provision § 1 par. 3 of the Act on the Czech National Bank, the Czech National Bank is entrusted with competencies of the administration authority in the extent to be specified by this Act and other legislation (Act on Banking, Art. 4 at seq.). Based on the above stated it is impossible, in our opinion, to state unambiguously, that it concerns the procedural part falling into the financial law.

If we summarize briefly the findings, we deduce that the procedural part of final law as a whole does not exist, but its subsystems have to be assessed separately. Some of them can be demonstrably divided into substantive-legal and procedural ones for instance (tax, charges, or budgetary law), while by another ones cannot be divided.[4]

In addition, based on the above stated, let us note two other findings concerning those parts of the financial law where we can trace the procedural part:

1. The specific sign of the process legal form, within the framework of financial law through which it differs completely from the other legal branches, is the existence of two kinds of general process legal form. Their utilization is determined exhaustively by law, namely for individual legal subsystems of financial law. At the same time both these general legal processes are mutually excluded.
2. Next specific sign of the process legislation within the financial law framework, is a multilevel legal form, that means adjustment on the

4 For instance the area of loans, currency, foreign currency and financial market.

general form of the level (lex generali) always together with the special legal form (lex specialis), which results from the problems concerning the financial law complexity.

We will be glad, when our contribution will be useful for the next discussion, which seems to be, as it is shown, still needed.

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USING ANALOGY IN THE UNCODIFIED GENERAL AREA OF FINANCIAL LAW

Jan Neckář[1]

Abstract

In this paper, the author deals with using of analogy for filling in legal gaps in financial law. He also focuses on the limits of analogy in a situation where financial law has no codified general area. Based on analogy, the author verifies the hypothesis that limits on using of analogy do not depend on the area of financial law where it is applied. In the paper, pointing out that there is no codified area of financial law, the author concentrated on using of analogy within application of norms of financial law and, in particular, on the limits of analogy.

Key words

Analogy; limits; system; financial law; application; taxes.

JEL Classification

K30

1 Introduction

Financial law plays an important role in the system of law. It may be argued that no state could exist without financial law. Imposing tax obligations ("taxes" in a broad sense), the states ensure a permanent and periodical inflow of funds into public budgets, and the future distribution of the funds among the particular public budgets and other relating rules. On the other hand, financial law also governs finance, i. e. legal relations concerning money, which is mainly carried out by setting control mechanisms in banking, insurance industry and on capital markets. It also regulates cash and cashless transfers and further legal relations which are crucial for a proper functioning of society.

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The issue of the system of financial law may seem to be a 'mere' theoretical problem, but it is crucial for practical application of the financial law norms. In this respect, I may refer to interpretation of legal norms; they are always interpreted in the light of the closes particle of the entire system of financial law. The goal of this paper is to point out , using the method of analysis, the issue of using analogy when filling in the legal gaps in financial law and the limits of analogy in a situation where there is no codified general area of financial law. The hypothesis to be verified is that limits to using analogy do not depend on the particular area of financial law where they are applied.

2 General Area of Financial Law

Financial law is an independent branch of law which meets all the criteria for independent branches of law. Aside from its own object of regulation, method of regulation and social recognition of its independence on other branches of law, the criterion requiring systematic coherence of the norms of financial law is also met. This criterion considers the mutual proximity and intensity of the mutual links and the manner in which the norms of financial law are intertwined with the norms of other branches of law. The systematic coherence shall be considered both external, i. e. the research is aimed at the relationship with the norms of other branches of law, and internal, which considers the relationships among the norms of financial law.

"The purpose of researching the mutual relations of legal norms both within the particular sector of law and in connection with the other sectors is indirectly proportionate to the degree of codification of the particular branch. If a branch is "incorporated" by norms of numerous laws with no basic law which would set forth general norms of that branch, the delimitation of inner and outer systematic features of that branch is broadly speaking the fundamental question of its existence and future development." (Mrkývka, 2012: 127).

Financial law may be described as an uncodified branch of law which includes a set of legal norms of many different laws, i. e. norms which often belong to other branches. "In the countries where there is a traditional approach to financial law, i. e. the countries of Central and Eastern Europe, the situation is similar and broadly speaking most of the codification efforts fell on deaf ears. At the beginning of 1980s, there was a vivid

idea of codification of financial law in Poland. The principles thereof were formed by C. Kosikowski, who still focuses on that issue. The main obstacle to codification is the difficult content of public financial activities and the diversity and relating social relationships; aside from that there is also a conflict in the view at the role of law as for regulation of the public financial activities by economists and lawyers and underestimating of the need of financial law for functioning of state and fulfillment of the state's functions." (Mrkývka, 2012: 127).

Owing to a lack of a codified general area of financial law, there are not basic principles of the entire branch set forth in one particular law, i. e. principles which could be applied throughout the application of the particular legal norms. It may be argued that in some of the sub-branches, there is a general codified area, e. g. customs law, which, however is rather an exception. Not even tax law, which is an important sub-branch of financial law, does not have a codified general area, which makes imposition of taxes more difficult and both tax authorities and taxpayers have to deal repeatedly with the differences between the particular laws.[2] Europeanisation of financial law does not lead to delimitation and codification of the general area of financial law, with the abovementioned exception of the general area of customs law. It may be even argued that in some cases, the harmonization efforts of the European Union undermine the national legal systems; the obligation to transpose the directives and other documents disturbs the existing interpretation of the concepts, institutes and the legal norms.

The general area comprises the fundamental principles, legal concepts, institutes and terms which are later used throughout the entire branch within the scope of the particular sub-branches. The norms of the special area of a particular branch have to be in accord with these principles and cannot significantly disrupt the general area. As for the financial-law theory, it is debatable whether the general area of financial law may exist or not.

Although there is no codified general area of financial law, there are certain general principles and concepts of this sector of law, i. e. in positive law. Based on this, it is necessary to arrange the special area of financial law

2 For example, we may mention the challenges arisen during the process of assessing consideration in the light of the income tax and VAT tax where a particular consideration may be understood in a completely different way.

into a logical system considering the similarities, common general concepts and other elements. This should lead to determination of the general area of financial law (Mrkývka, 2012: 131).

3 Using Analogy during Application of Legal Norms

From the point of view of both legal theory and practice, using of analogy is a highly discussed topic, though not fully solved. Analogy may help to fill in some of the legal gaps. As for dealing with the legal gaps, I point out the difference between the legal gaps de lege lata and de lege ferenda; it is also important to differentiate between the gaps in law and gaps in a statute.

"Contemplation de lege ferenda is contemplation about what law should be like and what should (or should not) be regulated by law according to the contemplator. A de lege ferenda legal gap in law is actually not a gap in law, but rather a subjective idea about what should be regulated by law and what is not. Contemplation de lege lata is contemplation about what law is, what shall be. A gap in law may, therefore, be understood only de lege lata" (Knapp, 1995: 66). There is however a question whether a gap in law applies to a situation when a statute does not expressly deal with a particular problem (a gap in a statute) or a situation in which solving of a particular legal problem is not possible under the law because of a lack of regulation thereof by law (a gap in law).

To a certain extent, legal norms abstract the anticipated behavior of the addressees of the norms; the laws cannot anticipate all situations and set forth the particular orders and bans. Solution then depends on the system of legal order – in the Anglo-American system, judges are entitled to deal with new cases and "make" law by creating precedents. On the other side, the continental Europe is grounded on the principles of Roman law and while a gap in law is detected, denegatio iustitiae, i. e. denial of justice has to be avoided.[3] In a situation where a law (statute) does not set forth a rule for a particular legal matter, the solution thereof is possible based on analogy, i. e. interpretation of legal norms which may help achieve solution to the legal issue in question.

3 For example, this has been dealt with since 1804 by the Article 4 of the French Code Civil: a judge must not reject making a decision in situations where the law does not deal with a particular problem, because it could be understood as 'refusal of justice'.

While applying analogy, the following procedure applies: after finding out about a situation not regulated by law, which however is challenged by a party, one has to contemplate whether there is a similar regulation and whether the gap is relevant. Application of analogy may not be carried out in the situations where it is banned (Gerloch, 2004: 210).

4 Analogie legis, analogie iuris

With respect to application of analogy, it is crucial to differentiate between analogy of a statute and analogy of law. As for analogy of a statute, in situations which are not openly regulated by a law (statute), another statute concerning similar situation or concept shall be used. On the other side, application of analogy iuris is very difficult in legal practice, because there is not even a similar norm which would apply to a situation similar to the one in question. In such a case, it is necessary to employ the general principles of the particular sub-branch, branch or the entire legal order, which may help to reach the requested goal, i. e. elimination of the gap.

5 Limits on Using of Analogy in Financial Law

Although the frontiers between public law and private law are not clear, and these two areas overlap, financial law is usually considered to belong to private law; some relationships and regulation thereof may be hybrid, i. e. they are in the border strip of disputable legal nature (Mrkývka, 2004: 43). Based on this, an application of analogy in financial law is less common than in the private-law branches.

The reason why there are more distinct limits on using of analogy is the inequality of the subjects (parties) of a legal relationship; an entitled party (usually the state or municipality) has more significant stance, as opposed to an obliged party (usually a physical or legal person). This means that there is different level of admissibility of analogy in the different sub-branches of financial law – from a relatively trouble-free application in, for instance, bank law, insurance law or assay law to a strictly limited admissibility in tax law.

With respect to the object of regulation of financial law, it is important to emphasize that analogy may not establish new obligations and thus disadvantage the addressees of a norm. This limitation shall be underlined

in the fiscal part of financial law, especially the tax law. Determination of a tax obligation is subject to the requirements based on the principle of the rule of law according to the Article 1 of Constitution which apply to lawmaking in general, i. e. especially the requirements of clarity and predictability of law and principles of legal certainty and prohibition of retroactivity. Emphasizing the requirement that a statutory definition of a tax of a fee should be certain and clear may be explained byreferring to a protection of an individual whose property rights are to be interfered with in this form. The primary purpose of a tax or a fee is to ensure inflow of funds into a state budget, which, nonetheless, is such a general objective that, in principle, any tax or fee could be justified in such a way. Due to the fact that the requirements of the taxes and fees cannot be deduced, but they are rather stated, they may be imposed only by the legislators; their decision on the matter cannot be ambiguous so that it would allow several interpretations, which would lead to the taxpayer's not being able to learn whether he has some tax obligations and in what amount. One can hardly imagine that such requisites be shaped by the court or an administrative body, because it could result in a situation that the particular taxpayers could be punished for not complying with their tax obligations just because they took a different stance regarding interpretation of an unclear statutory provision than the existing practice. In other words, "it is inadmissible that an interpretation of a statute considers something that is not object of taxation under the statute to be an object of taxation" (Constitution Court Pl. ÚS 31/13).

As for an application of analogy iuris, the steps within the system of financial law progress from the lowest levels to the highest ones. Thus, first analogy would be used within a particular sub-branch, or if not possible within the particular par of financial law, i. e. whether the fiscal part or non-fiscal part (Mrkývka, 2004: 58). If the problem would not be solved even at this stage, analogy covering the entire branch of financial law may be practiced.

One should not, however, forget the principles of financial law which may be identified even if there is not codified the general area of financial law and which shall be taken into consideration in the process of application of analogy regardless of the level at which the application is carried out. The fundamental principles are influenced also by non-legal principles that apply to the particular economic model, the principles of financial policies, etc. The principles of financial law consist of both the general principles

of formation of financial law and the principles necessary for the respective application, or interpretation of the norms of financial law. Both of these levels are intertwined; they supplement and overlap each other. Just as it is in other branches of law, we should distinguish the general principles which are general principles that apply to the entire legal order, the public-law principles and the special inter-branch principles (Mrkývka, 2004: 47).

6 Conclusion

Although financial law does not have a codified general area which would apply to the entire branch of law, based on what was mentioned above, one can use analogy in order to deal with the situations not governed by law. Such an application, however, cannot be automatic. Using of analogy depends on the principles and goals of the laws of a particular sub-branch of financial law; this also forms the limits to using analogy. Analogy cannot be applied in the same way throughout the entire branch of financial law. The hypothesis which was introduced in the introduction of this paper has to be rejected. It may be argued that the limits on using analogy depend on which subsystem an analogy is applied in.

From the legal point of view, the system of financial law is a determining criterion for the proportion of using of analogy and the consequence it has on the addressees of the norms of financial law.

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THE INTERACTION OF FINANCIAL LAW AND CONSTITUTIONAL LAW

Alexander Kostukov[1]

Abstract

The issues of interaction between financial law and constitutional law are considered in the article. The author analyses the common characteristics and main branches of interaction between financial law and constitutional law. The author concludes that the priority of the mechanisms of the constitutional-legal regulation in this interaction is predetermined by nature of regulated social relations.

Key words

Financial law; constitutional law; interaction; legal regulation.

JEL Classification

K30

Constitutional law is a basic branch for all other branches of law. That is why constitutional legal provisions define the principles of and general model of financial regulation in any country. Financial and constitutional law are closely interrelated and interact in the following areas.

Financial law is highly politicized area of law (Karaseva, 2005). The constitutional law is politicized even more. Thus financial law (along, perhaps, from the civil law) helps constitutional model to adapt to the changing social relations without changing the essence of this model. It is possible to give China as the example, where market mechanisms of management and taxation coexist with political power of the Communist party and its

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organizational and management structures due to skillfully built financial legislation. Mechanisms of financial regulation[2] in the short term are able to extinguish the fire of public discontent without change of structure of political government.

However, financial and legal regulation must meet the constitutional significant values; otherwise, it is not viable. The constitutional law in a certain degree acts as the limiter of financial and legal regulation. For example, taxation may not be arbitrary, and must meet the constitutionally predefined framework of restrictions on the right of private property, because the taxation significantly impact on the implementation of this constitutional right.

Constitutional legal science and practice determine the content of the basic financial legal categories and their implementation in public financial activity. Budget and taxes are essential elements of state sovereignty. Budget relations are the economic expression of the sovereignty of the state, the material base for the implementation of public functions, powers of the Russian Federation, regions and municipal entities, because due p. 1 Art. 1, p. 2 Art. 4, p. p. 1 and 2 Art. 15, p. p. 1 and 2 Art. 66, p. p. 1, 2 and 5 Art. 76 of the Constitution of the Russian Federation budget relations shall be carried out exclusively on legal grounds and within the limits permitted by the Constitution and the current legislation (The decision of the Constitutional Court of the Russian Federation N 12-P, June 17, 2004). Thus financial-legal characteristics of the budget and taxes supplement the constitutional-legal characteristics of these phenomena and cannot contradict them.

The extreme importance of the budget and taxes in constitutional and legal reality predetermines a special role of the financial law among other branches. A detailed analysis of the nature of the Federal budget and Federal laws on the Federal budget was given by the Constitutional Court of the Russian Federation in its Decision of April 23, 2004 N 9-P.

In many respects legal positions of the Constitutional Court of the Russian Federation eventually defined the basic principles of the organization of the interbudgetary relations, fixed by the federal legislator. In general, the Constitutional Court of the Russian Federation adopted more than three hundred of decisions related to the constitutional principles of formation

2 For example, the redistribution of budget revenues in the next period, a change of priorities in budget expenditures.

and use of centralized public monetary funds. The considerable part of this decisions is devoted to the constitutional-legal analysis of issues related to the nature of the state budget and budget laws (Bondar, 2011). This fact additionally shows a serious impact of constitutional and legal elements for the concept of financial regulation. The efficiency of such regulation largely depends on the development of constitutional-legal methodology of optimization of the financial system on the basis of the harmonious interaction of constitutional rules (with its leading role) and financial rules.

Money is another financial-legal category that is guaranteed by the Constitution of the Russian Federation. Money and monetary circulation within the state are one of the most important elements of state sovereignty and, at the same time, are the subject of financial regulation. M. V. Karaseva offers a definition of money on the basis of the analysis of Art. 75 of the Russian Constitution: ... money in the Russian Federation are the units emitted by the Central Bank of the Russian Federation nominated in ruble as monetary unit which are protected and which stability is provided with Bank of Russia" (Karaseva, 2008).

Constitutional and legal norms influence the content not only of the general principles of financial regulation, but specific financial and legal requirements. So, the legislator while determining parameters of the annual budget laws cannot ignore the provisions of Art. 7 of the Constitution of the Russian Federation about the social state, in which work and human health are protected, the guaranteed minimum wage is established, support of family, motherhood, paternity and the childhood, disabled people and elderly citizens is provided, the system of social services develops, the state pensions, grants and other guarantees of social protection are established.

Constitutions of many states of the world contain requirements to a legal form of the budget. According to experts in constitutional economics, the budget should contain only general indicators of state revenues and expenditures, and shouldn't include any other norms. This requirement is intended to avoid burdening the budget by rules that have no relationship to it. The Constitution of the Federal Republic of Germany requires the law on budget to contain only provisions related to income and expenses (German Constitution, Art. 110/4). The Spanish Constitution stipulates that the laws on budget may not establish new taxes. They can be established only

on the basis of a special law on taxes (Spanish Constitution, Art. 134/7). A similar rule is contained in the Constitution of Italy (Italian Constitution, Art. 81) (Sattarova, 2012: 8 - 11).

The mechanism of establishing the most important financial and legal norms is provided by the existence of rules of constitutional law. The adoption of laws on taxes and fees, the budgets of different levels directly depends on the existence and effective work of the constitutional and legal norms, regulating activity of representative bodies of state and their interaction with the head of state and executive authorities. The constitutional and legal reality considerably influences the life cycle of financial rules of law. For example, the necessity of the adoption of laws that reduce budget spending and raise taxes, became one of the factors that led to the collapse of the ruling coalition and the termination of the Parliament in Ukraine this July.

There is a number of the legal institutes, which branch accessory is unevident, on crossing of a financial and constitutional law. As O. E. Kutafin wrote, "there is no doubt that the constitutional stipulation of the economic and social bases, and even of the foundations of the social system, ... testifies the importance that is attached by the government to these issues; and the relations developing in this sphere can be a component of a subject of a constitutional law" (Kutafin, 2001). It cannot be denied that the relations arising in the process of public financial activities belong to the subject of financial law too. Differentiation of institutes becomes complicated because of priority using of the common - imperative – method of legal regulation in both branches of law.

The budget process and the establishment of taxes are among the institutes with unobvious branch accessory. We believe that the norms of these institutes belong to the constitutional law when they regulate the interaction of the supreme bodies of government in the country.[3] The financial-legal possession of relevant standards is obvious in the rest part - for example, when such rules of law regulate the relationships among managers of budgetary funds with financial authorities and recipients.

Thus, interaction of financial and constitutional law takes place on many fronts. The priority of the mechanisms of the constitutional-legal regulation

3 In Russia – the authorities of the Federation and of the subjects of the Federation.

in this interaction is predetermined by the nature of regulated social relations. Understanding of the regularities how the constitutional measures influence on financial relationships (and also feedback) is the condition for the development of financial-legal science and improvement of financial regulation.

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CONSTITUTIONALIZATION OF FINANCIAL LAW SELECTED ASPECTS OF CONSTITUTIONALITY REVIEW OF FINANCIAL LAW

Michal Liška[1]

Abstract

This article contains introduction into whole-society problem of proportionality analysis of financial law acts and deals with issue of clearly too succinct reasoning in constitutional review of financial law cases especially concerning field of political questioning and doctrine of self-restraint in opposition to borders of entropy in a legislative process. Contribution primarily elaborates one of the main subbranch of financial law, tax law. The main aim of the paper is to show de lege lata condition of limits and options of constitutionality review of financial law acts and to assess using of special proportionality analysis in that specific area of law.

Key words

Constitutionalization of Financial Law; Constitutionality Review; Financial Law; Tax Law; Budget; Proporcionality Analysis; Limits of Taxation.

JEL Classification

K30

Only the achievement of a weightier good for the whole can justify the state in demanding from an individual the sacrifice of a less substantial good. So long as the difference in weights is not obvious, the natural freedom must prevail .... The [social] hardship, which is to be averted through the restriction of the freedom of the individual, has to be more substantial by a wide margin than the disadvantage to the individual or the whole that results from the infringement.[2]

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2 Embryonic version of proporcionality analisys formulated by C. G. Svarez (Svarez, 1960: 62).

1 Introduction

Mrkývka is dividing the constitutionalization of financial law into three sections (Mrkývka, 2012: 112), namely:

a) Constitutionalization of public finance sensu stricto
b) Constitutionalization of public budgets revenues
c) Constitutionalization of monetary law and public section of banking law

The issue of the constitutionality review of financial law is mentioned in several judgments of Constitutional Court of Czech Republic (hereinafter referred to as the "Court"). The most scrutinized section of the reviewing is tax law[3], where the modified version of the principle of proportionality is in use. The modification of aforementioned test is caused by the doctrine of the separation of powers. Concerning this doctrine Court uttered the following: "*The constitutional principle of the separation of powers… gives the legislative relatively wide discretion to decide on the subject matter, degree and scope of taxes…*" (Constitutional Court: Pl. ÚS 24/07). The review of Court is narrowed to review two substantive aspects, namely non-accessory and accessory principle of equality and existence of strangulatory (suffocating) effect (extreme disproportionality). The question of an adequacy of the protection of property rights arises in example where two opposite solutions are having place. Imagine a situation of global rate of taxation of income tax at 75%, without opportunity to consider rationality and legitimacy of the tax legislature enshrining this regulation Court would be forced to decide whether the law is constitutional or not only based on the occurrence of the principle of equality and the non-extincted the very core of the property rights (the essence of property). Firstly, the rate is only exceptional and has been caused by the long-term economic crisis and existence of bankruptcy of the state would be possible without this "savage" intervention. Secondly, the rate has been a strategy of social equality policy and would be aimed to redistribute financial sources as result of social policy of the state. More detailed analysis, synthesis, literature review and methods of comparison dealing with problem of constitutional limits of taxation and related institutes will follow.

3 What is associated with enshrinement of taxes in Art. 11of the Charter of Fundamental Rights and Freedoms.

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2 Constitutionalization of Financial Law

Fragmentation of acts and "hardly creatable" general part of the section of law are typical reasons for requirement of constitutionalization of the section of law (Mrkývka, 2012: 111). The system of checks and balances is standardizing execution of powers as model for democratic rule of law state wherein taxation and generally financial institutes and rules are almost exclusively attached to legislative powers, which are bearing political responsibilities for its choices. The constitutionalization may consist of constitutionalization of institutions, procedural rules, substantive rules and other form of techniques of legislation. In the book of conference papers dealing with problem of constitutional enshrining of so called "Finance Constitution" in the Czech constitutional order specific point of view has been mentioned: "Nowadays Constitutions and legal orders are not containing any visions determining direction(s)..." (Šimíček, 2013: 51). Despite aforesaid the contribution will follow common idea of public welfare as a very vague and unclear aim of the society.

2.1 Tax law

The original concept of taxation as accidental and purposeful contribution to the monarch treasury (budget) has been changed by increasing need to create the modern social states. After adoption of one of the prime taxation rules "no taxation without representation" settled on basics of rules adopted in Magna Carta Libertatum, the Declaration of the Rights of Man and the Citizen stabilized two articles related to taxes:

XIII. A general tax is indispensable for the maintenance of the public force and for the expenses of administration; it ought to be equally apportioned among all citizens according to their means.

XIV. All the citizens have a right to decide, either personally or by their representatives, as to the necessity of the public contribution; to grant this freely; to know to what uses it is put; and to fix the proportion, the mode of assessment and of collection and the duration of the taxes.[4]

4 Http://avalon.law.yale.edu/18th_century/rightsof.asp

As seen the taxes are indispensable for the very existence of the social state (Vyhnánek, 2014: 31), although differences in the limitation of property rights must be depended on the kind of the interference, whether tax measure interfere or other measure is the causation of the limitation of property rights. In the case of limitation of property rights by tax measures, the public interest is balancing/testing on the "Scales of Justice" with opposite burden of limitation of the fundamental human right. We can therefore conclude that "conflict" of public interest represented by general financial purposes of the state, *for purposes connected with fulfilling the function of state* **(**Constitutional Court: Pl. ÚS 24/07**)** and fundamental property rights in the form of tax as general burden, the balance is solved by providing the modified version of the principle of proportionality, deciding that discretion of the legislature prevails, with addition concerning limits set by the principle of equality and prevention reviewing of occurrence of confiscatory nature of taxation. Court also supports its decisions, concerning financial law acts, with the doctrine of political questions (Constitutional Court: Pl. ÚS 50/06).[5] Arguments justifying rejection of Supreme Administrative Court of Czech Republic (hereinafter referred to as the "SAC") proposition to add another aspect to review, namely, *the legitimacy of the tax obligation imposed* (Highest Administrative Court: 5 Afs 7/2005) are based on the separation of powers doctrine, that includes the modified political questions doctrine.

On the one hand Court states aforementioned, but on the other hand justice generally interprets laws and it's called for protection of rule of law, therefore:

1. Who is called to check compliance and fulfilment of the purpose of imposed taxes?

   Court refers to the separation of powers doctrine without considering the problem of checks and balances doctrine and in addition Court asserted that, *the legislature may also take irrational steps in the tax sphere, but that is not yet a reason for the Constitutional Court to intervene* (Constitutional Court: Pl. ÚS. 24/07). Article 9 of Rules of Procedure

5 The modified „European" version of the doctrine of political questions differs from "American" so that a case isn't dismissed (like in USA) but during reviewing Court applies self-restraining doctrine to not intervene into discretion zone of the legislature. The main reason for this difference is seemed in different attitude to social welfare secured by state.

of the Government and likewise article 86 of Rules of Procedure of the House of Deputies impose various duties for bills, inter alia duty of explanatory report.[6] The procedural rules of the constitutional reviewing contain duty to send petition to the body that issued the statute, and a request to submit the petition. Teleological interpretation of laws and many other arguments indicate actual "need/requirement" of courts to check rationality of issued statute, moreover Court itself do not denies overlapping of the modified version of principle of proportionality at least in aiming to preventing *obvious willfulness by the legislature* (Constitutional Court: Pl. ÚS. 24/07). The overlapping is stated in constitutional review of Law on Finances for 2013 by the Constitutuinal Council of French Republic as follows *Considering that Article 13 of the 1789 Declaration provides: "A common contribution is essential for the maintenance of the public forces and for the cost of administration. This should be equitably distributed among all the citizens in proportion to their means"; that this requirement will not be respected if the tax is confiscatory in nature or imposes an excessive burden on a category of taxpayers, taking account of their capacity to pay tax; that pursuant to Article 34 of the Constitution, it is for Parliament to determine, in accordance with constitutional principles and taking account of the characteristics of each tax, the rules according to which the capacity to pay tax must be assessed; that in particular, in order to ensure that the principle of equality is respected, it must base its assessment on objective and rational criteria intended to further the goals it proposes; that this assessment may not however result in any inequality in relation to public charges.*(Constitutional Council: 2012-662 DC) Polish Constitutional Tribunal gave following decision, *In evaluating the constitutionality of tax legislation, the starting assumption is the legislator's relative freedom in shaping the State's income and expenditure. Such freedom is balanced and restrained by the obligation, incumbent upon the legislator, to respect the procedural aspects of the rule of law principle...* (Constitutional Court of Poland: K 48/04). Polish Constitutional Tribunal is guarantor of constitutionality of taxes (Kosikowski 261). We can summarize that only the legislature itself can check compliance and fulfilment of the purpose of imposed taxes in situation when only the legislature is the creator of public interest to which purpose of taxation is attached.

6 Despite that fact exemptions occurs (Constitutional Court: Pl.ÚS 52/13 and Pl.ÚS 24/04)

2. If Declaration of the Rights of Man and the Citizen expected possibility of personal discharge of an office instead of representatives, are there any consequences in other social and democratic states?

   Possibility of personal discharge of an office of lawmaker in scope of tax statutes is not clear. In history of mankind tax resistance had its place primarily as a tool of defiance or resistance to the government and its policy as for an American colonists it was concept of tax policy or as for example for M. Ghandí resistance against imposed tax was a tool to protest against certain actions of the government, to protest against a war. Poland, Hungary and Slovakia, as states of the Visegrad Group, constitutional orders concerning issue of referendum as direct thus personal discharge of an office of lawmaker have its limits (Mrkývka, 2013: 124-125). Taxation extra sensu and mostly public finance are excluded from option to be subject matter of referendum. These limits/exclusions are state's defence against derogation of its possibilities to function. The right to resistance of the state[7] which legitimacy is rising from personal discharge of an office of the creator of state power, is thus praxeological inconsistency of the constitutional legal order, therefore the legislature maybe wanted to follow the old rule of Magna Charta and commonly respected "the principle of sovereignty" of the legislature in financial issues of the state. To paraphrase one of the well-known critics of parliament democracy Carl Schmitt, *sometimes it is stated that neither the people/the citizens nor its deputies are called to issue drafts of financial measures of the state, because of theirs lack of an expertise* (Šimíček, 2012: 55). Another argument of the state can be seen in the existence of the right to resistance of the voters of an opposition. Legitimacy is given for a certain account of years and its performance shouldn't be disturbed by the minority in situation when majority has to take unpopular but necessary steps. Non-equivalence of taxes brings safeguard to the legislature, however indirect tax resistance can be seemed in possibility to put into question specific tool imposed by legislature by abrogating it in referendum with possible consequences of hidden circumvent of the constitutional legal order. We can generally conclude that if similar constitutional legal orders created and are executing the exclusion of possibility of legitimate civil disobedience

7 In form of aforementioned exclusions.

by resistance to pay imposed taxes according to unconstitiunality of this action (Romanowska-Dębowska, 2009: 108), Czech limits of performance of direct democracy should be the same. In Czech legal order the "legitimacymaker" has no factual capacity to change imposed taxes by the right of resistance or by another way attached to it, by referendum etc. The conclusion slightly undetermines the foundations of democracy.

3. In situation of non-existence of general part of financial law, is there any possibility to enforce respect of legislature of the principles ruling financial law and especially principles of tax law?

   As aforementioned procedural rules for lawmakers and "draftmakers" contain contemporary aspects like explanatory report, they also declare "duty" to explain the principles of new statutes (Procedural Rules of House of Deputies, Art 86/3) although these rules are only pro forma, e. g. duty to *specify the impact of draft of the statute on public budget* (Klíma, 2009: 353). The duty is only unenforceable assumption of the lawmaker. The principles of financial law can be divided into three groups (cf. Mrkývka, 2004: 46):

   a) General principles of financial law

   General principles as principle of democracy, principle of legality, principle of legitimacy and principle of priority of international and EU law are just transposed constitutional rules, as such they are "under scrutiny" of Court, although they also include question of substantive review.

   b) Principles of creation of financial law[8]

   The creation of financial laws is sui generis process among legislative processes in specific branches. Special aspect occurs in two ways. Firstly, the existence of "judicial deference" in the area of substantive financial law, wherein the judiciary does not impede explicit constitutional authority of the legislature. Secondly, direct impact especially of tax statutes on public finance that making from purpose of the statute quasi-explanatory report of the statute in section

8 Principles are following, *Respecting of economical rule of chosen economy model, Predictability of short-term and long-term consequences of financial law regulation, Comparison of legal regulations of the related public financial activities, Fluency of changes of financial benefits and levies, Respecting of uniform terminology of financial law, Observation of legal and economical conscience of addressee* and others (Mrkývka, 2004: 48)

of financial impact of the statute. *The principles derived from rationality and from the purpose of financial law. They are just doctrines in position of declaration of certain postulate* (Mrkývka, 2004: 48), although there are even principles arisen from necessity of respecting aforementioned general principles as principle of democracy that contain specific requirements for the legislative process, especially the principle of correct legislation. *This requirement is functionally tied with the principles of legal certainty, legal security and protection of trust in the State and its laws. These principles have particular significance in the sphere of human and civil rights and freedoms* (Constitutional Court of Poland: K4/03*)*. Public finance and especially taxation are based on obtaining certain benefit from addressee. Bodies called for this purpose are public authorities tied by following rule, *State authority may be asserted only in cases and within the bounds provided for by law and only in the manner prescribed by law* (Charter of Fundamental Rights and Freedoms, Art. 2/2). In contrast, the rule binding addresses is: *Everyone may do that which is not prohibited by law; and nobody may be compelled to do that which is not imposed upon him by law (*Charter of Fundamental Rights and Freedoms, Art. 2/3*)*. The freedom provided to lawmaker concerning substantive of tax law is compensate by very strict requirements attached to the tax legislature, even question of tax evasion is questioned if not challenged by constitutional courts, thus, for example Polish Constitutional Tribunal claims: *The constitutional obligation to pay taxes specified by statute (Article 84) does not constitute an obligation for taxpayers to pay the maximum amount of tax, nor a prohibition on taxpayers seeking to take advantage of various lawful methods of tax optimisation. There is a fundamental difference between unlawful tax evasion, constituting an infringement of law, and the avoidance of tax as a result of lawful transactions concluded for this purpose* (Constitutional Court of Poland: K 4/03). Court in addition almost "provides guidance on how to avoid the imposed tax obligation" in its Decision no. 31/13, when synthesising content of the last and the penultimate sentence of point 39 of Decision in conjunction with content of the last sentence of point 52 of Decision stems sentence would be worded as follow: Avoidance of the tax is possible by one day suspension of payment of old-age pension on 1st of the January

to fixed the tax year.[9] However principles of creation of financial law are just a guidebook for the lawmaker that should be considered when creating every financial act, respecting these principles is actually one of the factors of principle of protection of trust in the state and its law in connection with principle of legitimacy sets not only limits of objectivity and rationality of criteria on tax legislation (Constitutional Court: Pl ÚS 22/92) and as well provide the basis for the reviewing of the meaning and purpose of the law (Constitutional Court: V. ÚS. 275/96) and therefore disobeying of those principles can lead to unjustifiable violation of the principle of equality (Constitutional Court: Pl. ÚS. 31/13). The principle of legitimacy itself has a very important role in constitutional review. Government legitimate in elections has the right to rule in periodic elections with certain limits. All decision given by lawmakers shall respect its legitimacy and a fact that their mandate is effective only for certain period of time, in comparison with deference of other powers on the field of tax law; they should pinpoint taken actions by long-term legitimizing institute the constitutional order. Pre-election campaigns and programs are unenforceable promises and punishment for quasi-ultra vires governing can be sentenced only ex post.

c) Specific sectoral principles of financial law

Those principles are more attached to legal norms of sub-constitutional power. Consideration of their position in constitutional reviewing will be very close to aforementioned.

4. Is the rule enshrined in the last sentence of the Article 4 par. 4[10] of the Charter obeying by the legislature in lawmaking process of taxes judicially reviewable?

The tax assessed may not limit the taxpayer's property rights in a manner that would conflict with Art. 4 par. 4 of the Charter. (point 53) The conflict occurs in situation when strangulatory effect puts in question when imposed taxes are reviewed.

9 This is a very extreme interpretation by modifying argument ad absurdum on certain sentence and its background, also personal note in dissent of the Decision of the Judge Kůrka is worth mentioning.

10 In employing the provisions concerning limitations upon the fundamental rights and basic freedoms, the essence and significance of these rights and freedoms must be preserved. Such limitations are not to be misused for purposes other than those for which they were laid down.

... if the measure [of legality] is only necessity [i. e., the least restrictive means test], then a quite negligible public interest could lead to a severe right infringement, without being unlawful (Vyhnánek, 2014: 15). Court supports the idea that he will only intervene in case of suffocation of the property rights or if principle of equality is violated, it brings us to the question: May the legislature impose taxes without examine criteria of existence of the strangulatory effect or violation of equality, thus also examine non-violation of Art. 4 par. 4 of the Charter? As aforementioned, purpose of taxes is to ensure sources for the preservation of functions of the state or similar public interest. Any interference with almost all other fundamental rights like *guarantee of the freedom of the press* (Minneapolis Star v. Minnesota Comm'r 460 U. S. 575 (1983)) would be subject of the principle of proportionality. Main exceptions are steering taxes and social rights. Steering taxes are not primarily aimed to increase tax revenue, but to change behaviour of addressee. Classical example of steering taxes is Pigovian tax, which is avoiding negative externality as pollution. Social rights and related to them economical rights can be interfered as "attached rights" to intervention to the sphere of the property rights by imposed taxes. If the limits of constitutional review by the principle of proportionality are set for core right as the property rights it is not surprising that positive rights are primarily outer/external limits of the principle of proportionality (cf. Vyhnánek, 2014). Despite all aforementioned facts adequate reasoning should be given in every action, that can leading to application of any version of the principle of proportionality,

5. What happens in case of interference of the substratum of property rights?

   In history of existence of Court the strangulatory effect has not been recognized, therefore it is not clear if principle of proportionality will be used and where is the actual limit to pronounce its presence in certain case. The legislature *may not interfere in property rights so much that the property relationships of the affected taxpayer fundamentally change so much that it would lead to "defeating the very essence of property," i. e. to "destroying the property base" of the taxpayer (cf. judgment Pl. ÚS 3/02, promulgated as no. 405/2002 Coll.), or so that "the limit of mandatory public law financial performance by the individual vis-à-vis the state would reach strangulatory, suffocating levels" (Pl. ÚS 7/03, promulgated as no. 512/2004 Coll.)* (Constitutional

> Court: Pl. ÚS. 29/08). German Constitutional Court *pointed out the need to observe the imperative that property tax may not lead to creeping confiscation of property* (Constitutional Court: Pl. ÚS. 29/08). Imposed Taxes cannot lead to expropriation of the property of taxpayer from level of interference of very essence of property rights, exclusion or resignation on economical activity of taxpayer (Gomulowicz, 2005: 32).

According to the SAC this tax would be unconstitutional only if it made the disposition of property, as an inseparable part of the property right, impossible, or at least limited. (Constitutional Court: Pl. ÚS. 29/08). The Ministry of Finance also believes that guaranteeing the elimination of a strangulatory (suffocating) effect of taxes is ensured by the low rate of the tax (Constitutional Court: Pl. ÚS. 29/08). These two statements are assessing tax rate as factor of possible existence of extreme disproportionality. Another clue has been found in *the existence of the basic minimum living income arises from fundamental law, and at the same fundamental objective constitutional values in the form of human dignity, which obligates the state to leave, or ensure for, each citizen the basic needs for dignified human existence* (Constitutional Court: Pl. ÚS. 29/08), but this standard of living has been denied later by claiming that *the basic minimum living to area of social security law* (Constitutional Court: Pl. ÚS. 31/13), thus the problem of the existence of possibility that tax may cause indignity of human existence is transferred to the sphere of aforementioned branch of law. SAC alerts on issue of chaining of taxes that can lead to suffocating effect. (Constitutional Court: Pl. ÚS. 29/08).

In the case of Halbteilungsgrundsatz the limit of non-strangulatory taxation has been set on tax rate of 50 % that was overcome by later judgements (cf. Vyhnánek, 2014: 128). At the end of year 2012 French Constitutional Council faced to the reviewing of "millionaire tax", therefore confiscatory nature has been claimed (cf. Constitutional Council: 2012-662 DC). More interesting is fact that sufficient justification of its existence is missing. The Council based its justification particularly on inequality of the imposed taxes.

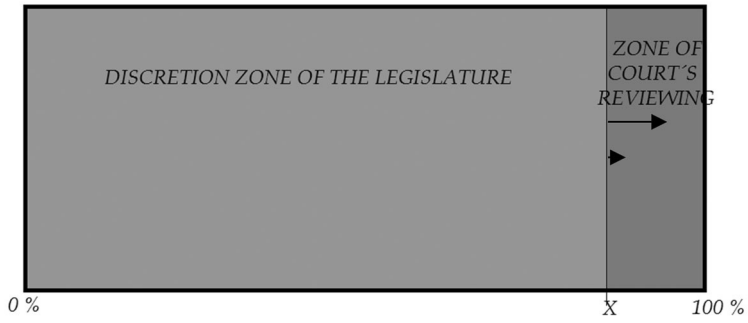
And now is the time for answering question laid out in Introduction.

To the extent that greater importance is attached to preventing the marginal limit to a human right and to the extent that the probability of the right being limited is higher, the marginal benefit to the public interest brought about by the limitation must be of greater importance, of greater urgency, and possessing a greater probability

of materializing. (Barak, 2012: 484)The ascertained test of Court considering taxes can be summarized as:

1. *Are imposed taxes in coherence with the principles of rule of law?* (Vyhnánek, 2014: 138)
   YES – unconstitutionality NO – assessment of another step
2. *Are imposed taxes in coherence with the principles of equality?* (Vyhnánek, 2014: 138)
   YES – unconstitutionality NO – assessment of another step
3. *Do imposed taxes have suffocating effect?*(Vyhnánek, 2014: 138)
   YES – proportionality test NO – imposed taxes are constitutional

Graphic summarizing will be following:



0 % and 100 % are tax rates.
X is the tax rate founded as strangulatory.

Discretion zone of the legislature is zone where only first two NOs can be expressed.

Zone of Court's reviewing is area where the principle of proportionality will be used to balance confiscatory nature of imposed tax rate and public interest and its specific objective, legitimate, rational criteria and purpose.

After analysis of collected information we can balance on one side public interest and on the other side preservation the core of property law. The state is imposing really high taxes because of unforeseeable and unpredictable situation that occurred in first case and in second, the reason is its policy. The protection of core of property rights in jurisprudence seems absolute, thus crossing the line of core of the right is not justifiable.

3 Conclusion

To summarize the limits of the review of Court in case of interference of article 11 par. 5 of the Charter, the substratum of property rights is not protected by classical proportionality analysis.

The protection of the property rights is extremely unbalanced. On the one hand the modified test is in use, irrationality of the legislature is not forbidden, referendum cannot deal with public finance and the level of human dignity is in "hands" of the legislature who creates social security law and on the other hand is limit of the core of the property rights really vague and only Court can decide, despite the fact that in taxation matters it defers the legislature, if the property will be protected fully or not at all.

Another problem is increase of political interest on taxes which are higher and of particularly urgent need, but once assigned to forbidden sphere of core, unjustifiable, no matter if the taxes are only one-off or part of plan to achieve long-term goal.[11]

We can imagine situation like this: In the queue in scout cafeteria, where cooks on behalf of legitimately chosen chiefs are dispensing specified amount of food[12], but the food is spoiled. Supervisor can only check if everyone got the same portion, has specified amount of the food, fairly rotates in queue, and has enough food to survive... but supervisor do not have medical education...

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CONSTITUALIZATION OF PUBLIC FINANCES: UKRAINIAN MODEL

Andrii Khudyk[1]

Abstract

The author tries to prove the hypothesis that since the constitutional system formation public finances have become the object of not only financial, but also the constitutional lawmaking. During the research it was shown that in modern European constitutional practice there is a tendency to expand the constitutional regulation of public finances.

The author affirms that the Constitution of Ukraine, unlike the most modern European constitutions, pays a little heed to public finances. To a considerable extant it is a reflection of the previous domestic (Soviet) experience. The peculiarity of the current Constitution of Ukraine lies in the fact that constitutional basis (foundations) of the legal regulation of public finance are mostly limited to general legal constitutional provisions and constitutional regulations dedicated to the fundamental rights and freedoms of man and citizen.

Key words

Constitution; constitutionalization; constitutional basis (foundations); general legal regulations; regulations dedicated to the rights and freedoms of man and citizen; financial law; public finance; tax; state budget.

JEL Classification

K30

1 Introduction

Socio-economic transformations should be adequately consolidated in legislation in the process of legal reform. There are objective conditions for that

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in terms of new constitutional system formation and the market economy, where liberty and property as elements of civil society exist and are manifested in the legal unity. The constitutional regulation of financial relations has the crucial importance. It is caused by the role of public finance in the process of formation and implementation of the state socio-economic policy.

Basic foundations of the legal regulation of public finance need to be consolidated in the constitution. It is justified primarily by the special importance of these public relations to the society, state and to the individual. This significance is determined primarily by the need of income to the government treasury that is assigned to meet the interests of the society, state and individuals. As well it is determined by the role of the state in the process of the financial system regulation. Public finances (directly or indirectly) affect all spheres of human activity and ultimately affect the very foundations of the state constitutional system, and the whole system of rights and freedoms of man and citizen.

The nature of the legal regulation of public finance is an indicator of the achieved level of democracy and existing social justice in the state and society. The state can actively influence almost all economic relations in the state through the legal regulation of public finance. This fact determines the increasing role of the constitutional regulation of public finances.

The author set a goal to examine the evolution of normative approaches to the constitualization of public finance; analyze modern European constitutional practice of the legal regulation of public finance; examine the level of constitutional regulation of public finances in the Constitution of Ukraine; to analyze the basic constitutional requirements to the regulation of public finance (explain constitutional basis (foundations) of the legal regulation of public finance in Ukraine).

2 Chapter 1

Constitualization of a public finances is an extremely complex and multifold phenomenon of a legal reality, which has a long history. Even M. Ameller in his time, when was putting into practice a comparative study of the structure and activities of the representative bodies of 55 countries, said: "it is typical for the history of the Parliament to struggle for the exercising

of authority in the field of [public] finance; they were the main body around which modern constitutional systems were gradually formed. The legislative authorities of the Parliament, which are now considered as one of the foundations of a democratic society, were obtained by the parliament after it had obtained authorities in the field of [public] finance. People first demanded and eventually gained the right to establish (or do not establish) taxes. That was gained before people achieved an opportunity to participate in legislature. That very case in conjunction with the right for a petition had provided the British House of Commons with its authority in the field of legislation. When royal authority was forced to come to understanding with the House of Commons as a condition for tax policy approval in accordance with a known principle "complaints always precede accomplishment of the requirements", the House of Commons gradually achieved the right to present the bill and later the right to pass the bill. Also the right to control law enforcement was achieved by it in all areas of administration, as well as in the field of [public] finance" (Ameller, 1967: 368).

Emelianov A. S. affirms that since the moment of "public finance emergence" and constitutional system formation, these relations "became an object of not only financial lawmaking but constitutional either" (Emelianov, 2005: 27). History strongly suggests that once the issue of taxes and overall issue of financial system "has become the object of constitutional regulation, the creators of the constitutions have never ever ceased interest in these issues. Instead, with every next historical stage, these issues have been becoming more and more relevant, and were exposed to diligent constitutional regulation..." (Havryliuk, 2007: 729).

Historically, first constitutions (constitutions from XVIII-XIX centuries) included a significant interest in the legal regulation of the financial aspects of the state economic system. In fact, we can ascertain that since the moment of the constitutional system formation democratic principles of legal regulation of public finances were established. (Emelianov, 2005: 55). Historically, first constitutions were imbued with democratic principles of the financial system. They have absorbed progressive ideas generated at that time. There were ideas of legal regulation of taxes, public debt, budgeting, financial control and more. They contained significant group of prohibitive and negative types of regulations regarding the former economic and social relations

(Andreev, 2006: 67). These rules have formed the main body of the constitutional regulation of public finances.

V. E. Chirkin who was researching the history of the constitutional system (model) formation draws attention to the fact that the majority of economic and social relations has remained outside of the legal regulations of the first constitutions. But it has the case for "property relations and relations linked to the financial system of the state" (Chirkin, 1996: 82).

The research of the modern European constitutional practice makes it possible to conclude that practically all moden constitutions contain provisions that are directly involved in the legal regulation of public finance (laying the foundation (basis) of such regulation). However, their share is unequal. Thus, constitutions of some states include only very general provisions related to the financial and economic system, other constitutions include many regulations related to the legal regulation of public finances, and they determine the financial system structure, its social purpose and principles of regulation. It can be explained by national and historical features of these social relations in a specific state. Also it can be explained by the originality of the constitutional regulation logic, and by an individual approach to the degree of individual freedom in economics and public finance, etc. (Bondar, 2005: 28).

Temirzhanov M. K. affirms that in the modern "foreign constitutions regulations that reflect financial and economical operation of the state increase their share" (Temirzhanov, 2004: 22), they lay the foundation of the financial, economic and social policy. Basically these are regulations related to the tax system, the state budget, financial control etc. They regulate the procedure of the state budget adopting (which is very procedurally different from other laws), the imposition of the state and local taxes, they lay the constitutional foundations (principles) of realization of financial and economic parliamentary control, etc. (Chirkin, 1996: 344).

These constitutional provisions related to the relatively independent area of legal regulation (public finance) and together form so-called constitutional financial law (Patsiurkivskyi, 2004: 9; Georgitsa, 2003: 190; Gavryliuk, 2007: 727), which is defined as leading foundations that are based on the perception of the objective laws of the financial system functioning. These leading foundations are determined in the constitution and follows from

the systematic analysis of its provisions. The leading provisions present the highest degree of generalization and significance of the legal requirements for the regulation of public finances and determine the main directions and tendencies of the legal regulation of the financial system, lawmaking and enforcement. As well they provide legal guarantee of observance and implementation of the constitutional rights and freedoms of men and citizens. The leading foundations form the reality of the constitutional system.

According to K. Fogel, constitutional financial law is a totality of the "financial law regulations that formally belong to the constitutional law. Or it can be explained as the provisions of the constitutional law that belong to the sphere of state [public] finances." The author emphasizes that the postulation of constitutional financial law does not demand an existence of the "special constitution, along with the general constitution; provisions of the Constitution relating to the [public] finance, united only by a common theme, they are not privileged part of the constitution. However, we should recognize a constitutional financial law as an independent sphere of the constitutional law" (Fogel, 1994: 112).

According to O. N. Gorbunova, we can definitely affirm that "in general, the constitutions adopted in the second half of the XX century regulate financial relationships in more detailed way than previously adopted Constitutions" (Gorbunova, 2000: 81). There is a tendency to increase the scope of the constitutional regulation of public finances, "a relatively coherent regulation of social relations in the field of public finance is sometimes defined as the current trend of global constitutionalism" (Treschetenkova, 1997: 167). In practice legal financial regulation of foreign countries was generally recognized that some constitutional provisions and principles are parts of tax and financial law (Temirzhanov, 2004: 19).

G. N. Andrieva affirms that the tradition to distinguish financial aspects of the state economic activities was started in the first constitutions and largely is preserved today. The study of modern European constitutions makes it possible to identify that their structure is relatively isolated and interconnected logically. It creates the system of legal regulations and principles, which provides a constitutional basis (foundation) of the regulation of public finance (Popov, 2005: 35; Avakian, 2000: 39). For some countries, including Belgium, Germany, Spain, Portugal, Romania, Japan,

Lithuania, it is not only the evidence of good knowledge of the "achievements of modern constitutionalism", but also the expression of constitutional development, recognition of their own constitutional experience, because previous constitutions of these countries contained similar chapters (Treschetenkova, 1997: 167).

Constitution of Ukraine, like constitutions of the most post-socialist states, pays a little attention to public finances, which is largely a reflection of the previous domestic (Soviet) experience and socialist heritage.

Semantic analysis of the current Constitution of Ukraine shows that it directly sets only some important principles and regulations that directly put into practice of legal regulations of public finances. Many of these regulations are formulated in a rather general and abstract form, in many cases with the use of evaluating categories. The Constitution of Ukraine is limited to guarantees of freedom of economic activity and business protection, protection of all forms of property. It includes the proclamation of social orientation of the economy and the obligation to pay legally established taxes and fees. It is limited to the determination of competence of the legislative and executive branches of government in the budget process (Constitution of Ukraine, Art. 13, 41, 42, 67, 85, 92, 95, 96, 97, 116). However, a number of key problems of legal regulation of public finances remain outside of the scope of Constitution.

In our opinion, the absence of clear constitutional basis (foundation) of legal regulation of public finances in the Constitution of Ukraine can be explained in particular by the fact that at the time of its adoption the adequate economic conditions were not created for the formation of the new market model of the financial system. The economic system of Ukraine at the time of the adoption of the Constitution of Ukraine was in a stage of formation, in conditions of the scientific and theoretical controversies regarding the directions of its further reformation. Considering the very real possibility of changing political and economic situation, in particular as a result of the revival of socialist relations (returning to the socialistic economic and financial system (Andreeva, 2006: 247)), it seemed appropriate to avoid unnecessary constitutional "overregulation" of the financial system (Temirzhanov, 2004 : 20). As a result, a number of key issues of legal regulation of public finances have not found a clear reflection in the

Constitution of Ukraine. These issues received the name of "problems with deferred status" that can not be resolved till the moment when definite and unambiguous theoretical positions will be formed.

The peculiarity of the current Constitution of Ukraine is that its constitutional basis (foundation) of the legal regulation of public finance is mostly limited to general legal provisions of the Constitution of Ukraine and to the constitutional provisions dedicated to fundamental rights and freedoms of man and citizen. There are not so many constitutional regulations and principles that directly affect the legal regulation of public finances in the Constitution of Ukraine (besides, most of them deals with competence or functions of state authorities in the area of public finance).

However, it would be wrong to assume that the Constitution of Ukraine does not include norms dedicated to the legal regulation of public finances. Thus, among the most important, doctrinal constitutional provisions dedicated to legal regulation of public finances firstly has to be distinguished Part 1 of Art. 67 of the Constitution of Ukraine: "Everyone shall be obliged to pay taxes and levies in accordance with the procedure and to the extent established by law" (The Constitution of Ukraine, Art. 67).

It follows from this constitutional provision that taxes in Ukraine shall not be levied but paid. Tax, according to the article. 67 of the Constitution of Ukraine is a payment, an active operation of a payer, that manifests his will. The very same term "levy", according to V. A. Vdovichen, has a different legal nature and number of meanings: first, forced transfer or confiscation of unpaid sums of levies within the prescribed period; secondly, sometimes levy can be defined as a certain amount of money that has to be paid for damages. In the third case, the term "levy" can be used to determine penalties for the illegal activities. So, on the one hand, the levy is a payment, active operation of the payer, that manifests its will; on the other hand it is a penalty, an active operation of a public entity that manifests its will to the private entity. But the payment and collection of the same money at the same time can not occur. If payment is made according to a will of the private entity, why this money has to be collected? Conversely, if the collection was made, there is no need for payment (Vdovichen, 2007: 873).

However, in the modern Ukrainian literature still exists an approach that explains the taxation process as a forced or coerced by the government but

not an obligatory one. It is explained by the nature of public finances and specific method of legal financial regulation of these relations – the method of governmental regulations (Pylypenko, 2004: 31). V. A. Soloviev affirms that private entities have a persistent idea till these days that taxes are not paid but are charged by the state while the state owes them nothing (Soloviev, 2002: 74).

According to A. A. Pilipenko, and we agree with him, this position is not well-founded and contradicts the Constitution of Ukraine. But the possibility of using coercion is typical for any social relations which are regulated and protected by the law. However, the concept of possibility of legal coercion and concept of obligation in financial law are not similar with compulsion. Because until all the subjects of public relations stay within the scope of the lawful behavior, there is no reason to use coercive measures (Pilipenko, 2004: 31). The Constitution of Ukraine in fact establishes a presumption of good faith of the taxpayer, which includes voluntary tax payment (Constitution of Ukraine, Art. 67).

The Constitution of Ukraine in Art. 3; part 4, Art. 13; Art. 24 enshrines the equality of all citizens in property status, it determines that "the human being, his or her life and health, honour and dignity, personal immunity and security are recognised in Ukraine as the highest social value". In regard with this, it is difficult to agree with the statement that the equality between the state and the taxpayer can not be achieved just because the financial relationship are built on the power, where the state dictates its will, and taxpayers are submitted to it (Dyomin, 1998: 98).

According to T. L. Komarova, the tax law regulations that are reflecting the freedom of the state and other public entities in the tax legal relations contain requirements for other obligated parties (taxpayers) on the carrying out of the tax obligations. According to it the obliged party is under the functional obligation to the government only and is not subordinated to it. It is fair described in relationships between tax authorities and taxpayers in the course of tax control, collection of arrears, surcharges and fines (Komarova, 2002: 138). This functional subordination should not interpret taxpayer as "secondary" party in these relations and declare state self-will (Smirnikova, 2002: 134).

According to D. V. Vinnitskii, tax relationships consist in the following: authorized party (public territorial entity) has the right to demand (the right to demand tax or fees payment); "Obligated party is not subordinated to the authorized party, but only functionally related to it through obligations" (Vinnitskii, 2003: 110).

Among the constitutional regulations dedicated to public finance can be distinguished part 1 of Art. 95 of the Constitution of Ukraine, "The budgetary system of Ukraine is built on the principles of just and impartial distribution of social wealth among citizens and territorial communities." (Constitution of Ukraine, Art. 95).

By this constitutional provision for the first time in independent Ukraine it was declared that the Ukrainian state has no proprietary rights for the state budget (because they are defined as "social or public wealth"). State on behalf of the society only manages it. Moreover, Art. 95 of the Constitution of Ukraine declare, that the state in the concept of "social (public) wealth" is obligated party that is authorized by the society. That is why, according to the current Constitution of Ukraine the state is not the real owner of the State Budget of Ukraine, but only put into practice his rights on behalf of the true owner – Ukrainian People. And it realizes them "only on the basis and within the limits and in the manner provided in the Constitution of Ukraine and in Ukrainian laws".

The understanding of "social wealth" is established in the Constitution of Ukraine and is explained as a limitation for the government in public finances regulations. Taxes, like any other income to the state budget can not be used for anything, but only to public needs. Analysis of the Constitution of Ukraine demonstrates that this measure put limitations on the fiscal expropriation from the private segment of economic. The reason of it is to ensure that the highest efficiency is achieved in using GDP and national income (Havryliuk, 2006: 163).

However, it is necessary to affirm that the constitutional recognition of the status of the State budget as a "social wealth" unfortunately has only declarative features today. However, the existence of the public levers to manage inseparable "national wealth" in society is one of the most important and objective conditions to overcome the systemic crisis in politics and economy.

It should also be noted that in a relatively limited legal financial "specialization" of the Constitution of Ukraine, dimensional and, most importantly, the qualitative characteristics of the constitutional regulation of public finance are basically determined not by the number of constitutional provisions and articles directly dealing with this issue. Constitutional characteristic of legal regulation of public finances, in our opinion, is not quite right. It is not limited only to those provisions (principles and regulations) of the Constitution of Ukraine, which are directly related to the scope of legal regulation of public finances. According to R. O. Havryliuk, it would be not enough nor for understanding of the constitutional nature of finance, neither for the specific analysis of the legal regulation of public finances and the forms of its realization. Multilevel nature of the legal regulation of public finance respectively determines the complex nature of its legal (including constitutional) adoption. (Bondar, 2008: 520).

R. O. Havryliuk affirms that today in conditions of a free market, constitutional financial law can not be limited to constitutional provisions directly involved in the legal regulation of public finances. As a result we would lose "the most important, we would distort the essence of the constitution, ignore its spirit and methodological potential "(Havryliuk, 2003: 158).

Practice shows that the legal regulation of public finance as one of the major problems of modern legal science should not just come to accumulation of the legal regulations that manage public finances. The legal regulation of public finances should come to the systematic implementation of the existing constitutional principles in the legal regulation of public finance (Bondar, 2006: 27), identification of the main idea of the constitutional regulation of public finance. This idea has to receive content and internal configuration of the constitutional foundations of the financial law. Elaboration and legal implementation of these foundations will provide financial law features of internal consistency. Also it will provide indisputable character to the process of its entry into the legal system."Financial law in general should be considered in a unity with the Constitution as the main legal mechanism of the civil society and law-based state in the area of public finance movement" (Patsurkivskyi, 2007: 974).

The Constitution of Ukraine provides general foundations that should be applied in any area of law (Gadzhiev, Pepeliaev, 1998: 186). As correctly

noted K. Fogel, "to the financial system from the existing [legal] regulation can be made specific conclusions and they are relate to the existence of the financial law. Along with the written regulations, broader unwritten financial law exists" (Fogel, 1994: 113).

Legal regulation of public finance has to be based on a constitutional basis, without exception, considering all the constitutional values and requirements. Its meaning, content and implementation have to be evaluated in the light of the basic principles of the constitutional system and constitutional provisions on the rights and freedoms of man and citizen. By nature they are quite flexible and meaningful in the interpretation (Gadzhiev, 2004: 6).

Thus, primarily general provisions of the Constitution of Ukraine have significant impact on the legal regulation of public finances, which "have to be implemented in every legislative or law enforcement field" (Havryliuk, 2003: 158). The legislator has to put into practice the legal regulation of public finances not only on the basis of constitutional provisions that directly relate to the financial system, but also based on the principles of the law-based state that are enshrined in the constitution. Including principles of social and law-based state, legal equality, determination of human rights and freedoms as the main social value, equality before the law, guarantee and protection of the rights and freedoms of man and citizen, the principle of separation of powers, principle of the highest legal force of the Constitution, principle of the direct effect of the constitutional norms (Constitution of Ukraine, Art. 1, 3, 6, 8, 24) and others. These constitutional principles in a specific way are reflected in the financial sector and contribute to the principles of the financial system, determine the meaning, content and enforcement of the financial law (Gadzhiev, 1998: 186).

They have the highest degree of normative generalization; they define the content of constitutional rights, the legal status of a person in public finance, the character and nature of the financial system. They are universal and therefore thy affect all types of public finances. Compulsory of these principles consist of their priority over other legal provisions, and of their influence spread on all subjects of law (Gadzhiev, 2001: 105). Compared to the legal regulations that correspond to a particular era, historical period, these constitutional principles are more stable, they have been remained unchanged for a long time (Popov, 2005: 45).

Constitutional provisions that define the fundamental rights and freedoms of person have significant impact on the legal regulation of public finance (Popov, 2005: 3). Group of constitutional regulations dedicated to fundamental rights and freedoms of man and citizen, is a kind of constitutional barrier that cannot be overcome in a democratic society by the legislative, executive or judicial power. It is the foundation of modern legal philosophy (Priakhina, 2004: 97-98).

Positive consolidation of basic human rights resulted in significant changes in positive law (Nersesiants, 1999: 387)."Human rights as the law phenomena received direct powers. Their penetration into the very fabric of the legal matter was not only the most significant legal phenomenon of the modern era, but the irresistible imperative legal financial reality" (Patsurkivskyi, 2008: 723). The Constitution of Ukraine sets a "hugely powerful system-changing multiplier of legal and factual changes in relations between the state and people". It has defined conditions for the transformation of state controlled and state oriented society into the democratic, human oriented society (Patsurkivskyy, 2007: 968). A clear indication of this process is in Art. 3 of the Ukrainian Constitution. According to it "Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State. The State is answerable to the individual for its activity. To affirm and ensure human rights and freedoms is the main duty of the State." (Constitution of Ukraine, Art. 3).

According to A. S. Emelianov "the effectiveness of public finances can not be regarded as the ultimate goal. The efficiency of public finance is one of the basic conditions for the realization of constitutional rights and freedoms of citizens, their safety and welfare of their life. Public finance can not be considered effective if the interests of citizens are not protected if their income does not allow you to meet their minimum needs, if the state is unable to guarantee respect for their rights and freedoms "(Emelianov, 2005: 4). As a result, the state controlled financial law, its nature, content and its enforcement has to be evaluated in terms of the rights and freedoms of man and citizen (Gadzhiev, Pepeliaev, 1998: 186). Such rights and freedoms of man and citizen has to be discussed as: equality of constitutional rights and freedoms and their equality before the law, prohibition of their limitation except of the cases provided by the Constitution of Ukraine,

the right to own, use and dispose of his or her property, the right to labour, including the possibility to earn one's living by labour that he or she freely chooses or to which he or she freely agrees, the right to social protection and social security, right to a standard of living sufficient for himself or herself and his or her family that includes adequate nutrition, clothing and housing, right to health protection (Constitution of Ukraine, Art. 24, 41, 43, 46, 48, 49) and others. These provisions of the Constitution of Ukraine on their own or in conjunction with other constitutional norms form a foundation. Based on this foundation several decisions of the Constitutional Court of Ukraine were adopted, which contain constitutional requirements to the legal regulation of public finances. These requirements were identified by the Constitutional Court of Ukraine during interpretation process.

It should be noted that not only a recognition of natural rights and freedoms as positive rights has to be discussed, but also the need for its compliance with all positive laws, including financial (Nersesiants, 1999: 387). Getting legal consolidation in the Constitution, fundamental rights and freedoms of man and citizen acquire features of the constitutional principles, values and guarantees of the constitutional system and in that capacity they are actively involved in the legal regulation of public finances.

3 Conclusion

Thus, the study of the evolution of the normative approaches to the public finance constitualization showed that in modern constitutionalism we can observed a clear tendency to the increasing of the constitutional regulation of public finances.

Constitution of Ukraine directly establishes only a few principles and regulations that directly realize the legal regulation of public finances. Many of them are formulated in a rather general and abstract form. Meanwhile, in Ukraine the constitutional regulation of public finances can not be limited to constitutional provisions (regulations and principles) which carry direct legal regulation of public finances. Legal regulation of public finance, its content and enforcement can be evaluated in the light of the basic principles of the constitutional system and constitutional provisions on the rights and freedoms of man and citizen.

Considering the special importance of public finance for the society, government and individuals the basic foundations of its regulation should be fixed at the constitutional level, at the law that has the highest legal force. Public finance (directly or indirectly) affects all spheres of human activity and ultimately affects the very foundations of the constitutional system, the entire system of rights and freedoms of a man and a citizen. The mechanism of the formation and implementation of public finance is an objective reflection of the real constitutional system of the state. Sustainable functioning of the constitutional system cannot be exercised without public finances and their legal regulation. Constitutionalization of the public finance is caused by their relationship with constitutional system and by the mutual influence on the constitutional order and its elements such as public and social order.

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ACCOUNTING AND FINANCIAL LAW

Dana Bárková [1]

Abstract

This contribution deals with the problem of legislation and case law related to accounting in the Czech Republic. These connections can be found in different areas of both public and private law. The question is whether we can speak about "accounting law" as a sub-area of law. The author has started a project aimed to searching court findings related to accounting. The main part of the project is to be done in following two years with participation of student research group. The hypothesis is that an important part of court findings will be in the area of tax law. Findings gathered so far seem to prove this hypothesis. Some findings are presented in the contribution.

Key words

Accounting; tax; law; court findings; education.

JEL Classification

M48, K30

1 Introduction

The author has been teaching accounting for quite a long time, both on secondary and tertiary level, both to students of faculty of economics and to students of faculty of law. Until last year, even the course of accounting for law students was "just" a basic course of financial accounting. It was just slightly adapted for this group of students (and did not go into too much

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detail as to "mechanics" of more complicated transactions). This year, a new course called "Accounting Law" was introduced. To prepare that, research was made in legislation of relevant areas and relevant court findings. It is still carried on, and a project was started to analyse court findings related to accounting more thoroughly. The article shows parts of these efforts.

2 "Accounting Law"

2.1 Accounting regulation in the Czech Republic, "Accounting Law"

The Czech Republic is a typical continental country, as to accounting regulation. There is a "pyramid" of (written) legal acts that regulate accounting in a narrow sense:

- Act on Accounting, where basic rules and principles are given;
- Decree implementing the Act on Accounting, where rules for structure and content of financial reports can be found; [2]
- Czech Accounting Standards.[3]

Originally, the main purpose of accounting was to provide business information to the entrepreneur himself; from this point of view, it was a part of commercial law. Even now, one of the important purposes of accounting is to provide information to stockholders of the company, who are in many systems viewed as defining group of users of financial reports. Two important EU accounting directives (4th [4] and 7th [5]) are considered to be part of EU company law, as a part of common market harmonisation.

Requirements for using IAS/IFRS[6] to be used for European companies since 2005 was a result of negotiations between European Commission and

2 There are 6 different decrees, and 6 corresponding sets of Czech Accounting Standards for different types of accounting entities (e. g. for businesses, banks, insurance houses, non-for profit organisations, public administration). In the contribution, the decree for business entities is used.

3 Accounting standards in the Czech Republic are set in a more formal way than in countries with Anglo-American tradition. They are issued in Financial Journal (Finanční zpravodaj) issued by the Ministry of Finance of the Czech Republic.

4 Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies

5 Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts; both directives are now replaced by the Accounting Directive 2013/34/EU which has to be implemented into national legislations until 20 July 2015.

6 International Accounting Standards (until 2000), International Financial Reporting Standards (after 2001).

IOSCO,[7] and its main purpose was to harmonize condition for European stock exchanges, as a part of free movement of capital. By the fact that IFRSs (endorsed by EU) took the form of EC Regulations, they are directly applicable, and are, in the wording they are published, legally enforceable not only at national courts, but also at the ECJ. Both law and accounting students should be prepared for dealing with this issue (for companies where it applies).

From this point of view, it is important that accounting provide objective and correct information about the business entity. This requirement is traditionally called "true and fair view", and is a part of many accounting systems. The purpose of accounting is a part of conceptual framework of accounting. In the Czech Republic, there is no written conceptual framework, but main concepts are part of Act on Accounting.

The main objective – to provide true and fair view of the company – is enshrined mainly in Art. 7 and 8 of Czech Act on Accounting. Article 7 states that accounting record should be kept in such a way to provide true and fair view;[8] article 8 adds that they should be kept correctly, in a complete and conclusive manner, in a comprehensive and clearly-organized way and in a manner ensuring durability of the accounting records.

Continental tradition makes accounting closer to public law. Accounting serves mainly as a source of information for public bodies, especially for tax authorities. For this purpose, it is important that accounting provide data compliant to tax requirements.

Czech accounting system is rather a continental one, but the development after 1989 also leads to harmonisation with trends of accounting regulation in the world. Accounting regulation is focused on financial reports, which can enable comparison of different entities or time periods. Czech accounting tries to get as close to IFRS[9] as possible, and, at the same time, to correspond the real economic situation as faithfully as possible.

Accounting is used as a source of information for tax purposes – definitely it is so for VAT purposes. As to income taxes, many adjustments have to be made before an accounting profit becomes a tax base.

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7 International Organization of Securities Commissions.

8 In Czech translation "věrný a poctivý obraz" (in this article, translations of terminology by TradeLinks Czech Republic are used).

9 International Financial Reporting Standards.

As many authors state (e. g. Děrgel, 2014), concise, correct accounting books of the entity constitute a basic condition for correct calculation of income tax liability. He states that as one of the "Tax Decalogue". Taxes serve fiscal purpose, they have their important role as a source of public finances to finance public services.

From both theoretical and practical points of view, the question is, whether we should include "accounting law" among public law areas or private law ones. From both theoretical and pedagogical points of view, there is a question, whether it should be related more closely to financial law or to commercial law (although it IS related to both of those areas).

2.2 Accounting Law – the subject and the project

In almost every course of accounting, students are taught that accounting could serve, among other purposes, as an evidence for courts. Accounting is not only the system of recording transaction of a company, but also a very important source of information that can provide important data, and even help to detect a crime.

In most faculties of law, a course of financial accounting is offered as an elective subject. University of West Bohemia is not an exception. As Faculty of Economics is a part of the university, the students have a possibility to choose among wide range of courses offered by this faculty, including accounting. The Financial Accounting[10] course offered by faculty of law is a one-semester course designed for students of law; it gives them basic understanding of double-entry system of keeping records in main areas connected with assets and liabilities of a business. As the area of accounting is totally new for many students of the course, there is not much time to deal with legal issues in this course.

In the last (2013/14) academic year, a new course was introduced. It is focused on legal aspects, not the mechanics, of accounting. That is why the course is called "Accounting Law."[11] The course "Accounting Law" currently covers these areas:

- The Act on Accounting (No. 563/1991 Coll.), implementing decrees, Czech Accounting Standards, court findings law connected with the act;

10 Finanční účetnictví, in a database of subjects of the university, it has a code KFP/FAU.
11 Bilanční právo, in a database of subjects of the university, it has a code KFP/BIP.

- Tax law and accounting law rapport (with focus on income tax act and value added tax act), related court findings;
- Financial reports, their binding form and content, relation to accounting and commercial law;
- Accounting profession - certified accountants, auditors, tax advisors - legal environment, professional conduct, accountability, related case-law;
- Accounting harmonisation, main differences between Czech accounting rules and IAS/IFRS, tax implications of using IAS/IFRS;
- Accounting and criminal law; creative accounting; forensic auditing;
- Accounting and private (civil and commercial) law (including effects of re-codification of civil law).

The course was taught for the first time, it can be expected that it will further develop.

It is important to be prepared for changes in terminology it can bring both to the accounting practice, and to the educational process in the area of accounting. For law students, it is important to understand all those legal consequences – both relations among areas of law, and relations to European law. It is also important for them to understand at least on basic level the system and mechanics of accounting.

During the course, students work with accounting (and related) legislation and courts findings. As a course requirement, students are required to analyse a selected court finding related to accounting area, and present the results in front of the class. If the student does not have a sufficient accounting background, he/she might not fully understand the case. On the other hand, students with insufficient legal background (beginning law students, bachelor degree students) have problems with searching for court findings and their format (some of them had problems to distinguish which parts are relevant to the subject). In spite of this, students in general managed this task quite successfully, and some of them found very interesting cases (and their presentations were very good).

A three year project was started to examine court finding related to accounting more thoroughly. The project will be solved by a group students and academic staff. Selected students who completed the Accounting Law course form an important part of the team. The project has begun recently, its results are to come later.

3 "Accounting law" and other areas of law

3.1 Overview

There definitely is a strong link to **tax law.** As was already stated before, Czech accounting is being standardized, its main objective is to provide true and fair view of the financial position of the company. As there are numerous attempts to "optimise" tax liability, and taxes are main source of public budget income in the country, Act on Taxes is rather complicated, there are many exceptions and amendments, which makes adoption of accounting profit to income tax base quite complicated, but necessary for tax administrator. Income tax from legal entities represents the third highest income of tax revenue (in 2013, 113, 052 mil. CZK). It reached its highest point in 2008 (173, 590). After that, the total amount declined.[12]

In the Czech Republic, accounting is not purely "tax accounting", but accounting profit/loss is used to calculate income tax base. For business and rental activities, it is possible to deduct expenses (costs) to generate, assure and maintain the income.[13] It explicitly says that for taxpayers using double-entry accounting, accounting costs and revenues are used in a sense of income and expenses the Act refers to.

It is necessary to make many, often quite complicated, adjustments. They are connected especially with numerous non-cash transactions, where accounting entities might be tempted to manipulate the data. That´s why Act on Income Taxes limits the possibility and amount of tax deductibility for items like deficiencies, damages, depreciation, provisions, reserves.

Accounting thus serves as an important source of information for tax purposes – especially for income tax and VAT. While for VAT purposes, the "accounting" part of the problem is usually quite straightforward (records are either kept properly or are not), cases related to Act on Income Taxes can be more complicated.

Non-compliance with the main true and fair view principle of accounting might have both tax and penal consequences. Although this paper should stress financial law, **criminal law** should be mentioned here as well.

12 Both because of the crisis and because of the tax rate fell (from 21 to 19%).

13 In Czech: výdaje (náklady) vynaložené na dosažení, zajištění a udržení příjmů, defined in Art. 24 of Act on Income Taxes.

In his recent book, Kocina (2014) analyses tax crimes. The book focuses on crimes that Czech Criminal Code labels as tax crimes (Art. 240-243), such as

- Curtailment of Taxes, Fees and Similar Mandatory Dues (Art. 240);
- Failure to Transfer Taxes and Statutory Social Insurance and Health Insurance Contributions (Art. 241); or
- Non-Compliance with Reporting Duty in Tax Procedures (Art. 243).

There can be some relevance of these crimes to accounting, as accounting provides data for assessment whether the crime was completed, but there are criminal acts more linked to accounting. In Czech Criminal Code,[14] there is a crime under Art. 254 "Misrepresentation of Data Relating to Economic Results and Assets."[15] It is accomplished when the subject deliberately does not follow true and fair view principle, and wants to present a biased view of assets and liabilities of the unit. Deliberate misrepresentation might also be classified as Fraud under Art. 209.[16]

Accounting law is also related to commercial law, especially **corporate law**. Annual reports of corporations are based on financial reports that provide the most concise accounting information. If those reports are not presented or misrepresented, the corporation breaches its obligations and might be penalized for it. There are legal requirements that have to be followed (e. g. appropriate recording of amount and changes of the corporation´s "base" share capital[17]).

Other areas of law were involved as well. Commercial law was already mentioned. During recent re-codification of Czech private law, many general provision were "transferred" from Commercial Code to Civil Code, which strengthened links of accounting to **civil law** (including definitions of entrepreneurship, or obligation of legal persons to keep records of their property and prepare financial reports). Also relation to **labour law** can be found (accounting records represent a very important evidence of labour-law relations).

14 Zákon č. 40/2009, trestní zákoník.

15 Zkreslování údajů o stavu hospodaření a jmění, in previous Criminal Code, the same crime was described in Art. 125.

16 Podvod (formerly Art. 250, 248).

17 The part of share capital that is entered in commercial register (of corporations); in accounting records, this part has to be recorded separately.

3.2 Examples of court findings – from tax to criminal law

From sources that were already gathered, several cases were selected to demonstrate the relation of accounting and legal consequences of not keeping records properly.

As it was already stated, the Act on Accounting (especially in articles 7 and 8) defines how the accounting records should properly be kept, and also suggests administrative sanctions (fines) for not keeping the records at all or not keeping them properly (in its article 37). If it is found that this "non-keeping the books properly" is a deliberate attempt to misrepresent the data, and if property rights of another person or tax collection is threatened by this, criminal act can be committed.

In all cases, the final finding is cited (the case was originally solved by courts of lower level, the defendant appealed, the original finding was confirmed in some cases and disapproved in others). The findings usually dealt with multiple and often complicated issues. The part related to the problem monitored here (keeping accounting records) is summarized below.

- The Highest Administrative Court solved an appeal of a case (1 Afs 26/2006 – 58) where the plaintiff tried to "**reconstruct**" (correct) **accounting records** during the time the case was solved, and based his appeal on the fact that he intended to supplement missing data to his records, according to Art. 35 of Accounting Act.[18] Originally, he presented only incomplete accounting records. The court did not accept his reasoning, and he was punished. He appealed and based his appeal on the fact that he found out that his records are incomplete and wanted to correct it. The appeal finally got to the Highest Administrative Court and was found irrelevant.
- In another case (5 Tdo 388/2008), the Highest Administrative Court confirmed the decision of Regional court in České Budějovice (3 To 292/2007), that was arbitrating in an appeal of a case from Jindřichův Hradec. The suit was against a participant of the association who was responsible for keeping its records, recorded several **false transactions** (such as shares of participants, advance payments), and attempted to alter the books of the association after the accounting period in question was over. By doing that, he caused a considerable damage to the association, and accounting records were considerable biased (over 1 million CZK).

18 "corrections made to accounting records cannot result in them being incomplete, inconsistent, incorrect, incomprehensible or unclearly arranged."

- A case solved by Prague Municipal Court (38Ca 142/2001) was dealing with articles 35 and 39 of the Act on Accounting. The issue in question was whether accounting records are **complete and conclusive**. The accounting unit was not able to prove the amount and method of measurement of its inventory, as **inventory taking** was not performed in a provable way. Because of this, the entity was fined.
- Negligent inventory taking could even lead to the crime of "misinterpretation"; this was a case for 5 Tdo 1313/2008: a headmaster and an economist of a secondary school were found guilty of this act, as obligatory annual inventory takings were performed only formally for several years (they just filled in the forms without proving the physical state of inventory), and, when inventory taking was finally made properly (after a new headmaster took his office), deficiencies worth millions were found.[19]
- In the Highest Administrative Court´s finding 5 Tdo 536/2008, another issue was dealt with: **lost or damaged accounting records**. In this particular case, accounting records were stolen in 2003, but the responsible manager did not do anything to restore the records for another two years, which can represent a crime of misrepresentation of the accounting results. According to Art. 35, par. 6 of the Act on Accounting, the accounting entity is obliged to take steps to restore the records in cases like that.
- In Supreme Court finding 5 Tdo 315/2011, the plaintiff was accused of issuing numerous **counterfeit invoices** (total value almost 6 million CZK[20] over two years) and entering them into accounting records of the firm. In this particular case, curtailment of taxes was in question – but it was discovered through accounting records.
- In another case (Supreme Court resolution 5 Tdo 493/2012), the defendant was accused of Misrepresentation of Data Relating to Economic Results and Assets, and found guilty. He authorized another person (with appropriate expertise for keeping accounting books) and relied on her professional behaviour. The accountant recorded all the documents she was presented by the defendant. The fact that records were **incomplete** was not caused by the accountant (but by the defendant who did not supply all the relevant documents to be recorded).

19 Fixed assets: CZK 5,671,042.85 deficit; teaching aids: CZK 1,851,493.63 surplus; student workshop supplies: CZK 178,032.23 deficit; other current assets: CZK 4441,603.79 deficit.

20 5,940,876 CZK exactly.

- If accounting records are not kept at all (or are not kept properly), tax administrator is entitled to use their own materials for **determining tax liability** of the taxpayer. This happened, for example, in a case that was later solved as 5 Tdo 1165/2008 by the Supreme Court. In this particular situation, additional tax liability of CZK 264, 263 was determined, as accounting records for certain period were missing and not presented (the executive director of the company was changed two times, and the records were not passed on properly, for some periods, they were not kept at all). The defendant was found guilty of committing the crime ("misrepresentation"), and additional tax liability was confirmed.

These were just several examples of court finding in a selected area. The aim of the project is to develop a broader base of court findings, systemize them and provide source data both for further research and for pedagogic purposes. Next time, when an accounting teacher will claim that accounting serves also as evidence for court procedures, he/she can select some of many real cases to illustrate this statement.

4 Conclusion

The first question posed in this contribution was, whether there is anything like "accounting law". Accounting, as an important source of information and evidence, supports important data important for different areas of both public and private law. Financial Accounting and Accounting Law course described in the contribution are taught at the department of Financial Law. They could be quite logically included into commercial law department as well. No matter which area is stressed more, it is clear that both areas have to be covered.

The original hypothesis (link of accounting and tax law) was proved, there is sufficient number of cases related to tax law. On the other hand, they are not the only ones involving accounting records. For evaluating representation of these areas, more research has to be done. It will be one of the outputs of the project that has just started and is described in the contribution.

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Supreme Court: 5 Tdo 1313/2008.

Supreme Court: 5 Tdo 315/2011.

Supreme Court: 5 Tdo 493/2012.

FISCAL RULES IN POLISH LAW AND THE EUROPEAN UNION

Jolanta Maria Ciak[1]

Abstract

The basic objective of fiscal rules is the enhancement of public finance discipline. Nowadays, these rules match the characteristics of the transparent fiscal policy. However, it is worth emphasising that attaching normative nature to fiscal rules does not always result in the desired outcomes. Reduction of the effectiveness of fiscal rules may arise out of numerous reasons. The fiscal rules that are functioning both at the domestic and the supranational level should constitute an element that supports the implementation of the fiscal policy of particular governments.

The main objective of this paper is the presentation of fiscal rules, which function at both the domestic and the supranational level within the EU member states, and the discussion on selected domestic fiscal rules operating in the Polish legal system.

Key words

Budget deficit; fiscal rules; public debt.

JEL Classification

H61, H62

1 Introduction

The reference books points to, in the 80s, fiscal policy based on certain rules became an alternative for discretionary actions of public authorities

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undertaken at that time in politics. Fiscal rules may exert influence on the stabilisation of the economies of particular countries in various ways. Such issues have been subject to intense research (Bayoumi, Eichengreen, 1995; Fatas, Mihov, 2006; Andres, Domenech, 2006). The tendencies of change in contemporary public finances are supplemented through the introduction of fiscal rules or through the enhancement of their role, as well as the establishment of independent fiscal institutions. The basic objective of fiscal rules is the increase of public finance discipline of the member states. However, as it is reflected in the literature on the subject in question, they do not always bring the expected results (Milesi-Ferretti, 2004, von Hagen, Wolff, 2006). These rules function both at the supranational level - the provisions of the Maastricht Treaty and the Stability and Growth Pact constitute their basis - and they are supplemented at the level of particular countries. Fiscal rules may also be characterised by different efficiency. Additionally, in the reference books in question indicates particular characteristics of various types of fiscal rules (Budina, Schaechter, Weber, Kinda, 2012), or the features of an ideal fiscal rule (Kopits, Symanski, 1996).

The main objective of this paper is the presentation of fiscal rules, which function at both the domestic and the supranational level within the EU member states, and the discussion on selected domestic fiscal rules implemented in Poland.

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2 The fiscal rules and their role in fiscal policy

Fiscal rules introduced in many countries are treated as a useful tool in the fight against public finance crisis (Cilak, 2013: 40). They can be defined with the use of both a broad approach and a narrow one. In the case of the broad approach, fiscal rules constitute the whole of the regulations that affect the final shape of fiscal policy (Poterba, 1996). This definition encompasses formal institutional solutions that determine the so-called budget process. In the case of the narrow approach, a fiscal rule is usually understood as a quantitative limitation of the level of the deficit, the public debt or the government spending (Wajda-Lichy, 2004: 87).

G. Kopits and S. Symanski treat the fiscal rule as a permanent limitation of fiscal policy reflected in the budget ratios that indicate the progress of such policy (Kopits, Symanski, 1996: 2).

The reference books in question indicates various classifications of fiscal rules. The most commonly mentioned criterion is the criterion of the character of the adopted institutional solutions, while distinguishing quantitative and qualitative rules. The first ones, also referred to as numerical, take up the form of quantitative limits of selected budget categories (Wójtowicz, 2011: 138). The qualitative rules, in turn, impose some limitations on the amount of expenditures, taxes, deficit or public debt (Wajda-Lichy, 2004: 88). Another division of fiscal rules refers to their subject, thus we can talk about rules connected with activities undertaken by governmental and local-government sector. There are also rules that refer to the whole public finance sector.

Due to the legal basis that sanctions a particular rule, we can distinguish the following: constitutional rules, statutory rules and rules resulting out of strategies or programmes adopted by public authorities.

Taking into consideration the time factor, we can distinguish rules that refer to a short period of time, i. e. yearly or long-term rules (Wójtowicz, 2011: 139). Nowadays, an important criterion of the division of rules is the territorial range criterion which enables the separation of supranational and domestic rules (Marchewka-Bartkowiak, 2012: 48).

G. Kopits and S. Symański, while presenting the general characteristics of the fiscal policy rules, indicated the features of an ideal rule. According to them, ideal fiscal rules are characterised by the fact of being strictly defined and consequently perceived as a restricting ratio, which is connected with the existence of detailed clauses preventing from omitting a particular rule. Moreover, fiscal rules should be transparent, which is expressed in an open activities of public authorities in the area of accountancy, forecasting and management of public institutions. Other features of an ideal rule are the following: its flexibility (enabling a reaction to external shocks), adequacy (reflecting the intended objective), enforceability (the given rule should be protected by statutory law and burdened with penal sanctions) and cohesion (compliance with other types of economic policy and the current macroeconomic situation). Additionally, the above-mentioned authors

depicted two features, namely: Fiscal rules should be effective, i. e. guaranteed only in the case of being supported by political actions, reforms guaranteeing stability, and they should be uncomplicated – intelligible both to the public authorities and to the society (Kopits, Symanski, 1996).

The above-mentioned features are quite general, thus it is difficult to translate them to specific rules. Nevertheless, they can constitute some kind of an indicator by the assessment of currently functioning rules, both at the domestic and the supranational level, and show the direction of their modification (Budina, Schaechter, Kinda, Weber, 2012: 8).

Fiscal rules become tools which inscribe in the characteristics of the transparent fiscal policy. Importance is ascribed mostly to the increase of the predictability of the activities undertaken within the public finance sector, which restrict the possibility of irresponsible actions of politicians. Indirectly, the functioning of the rules may compel the implementation of necessary system reforms (Piwowarski, 2011). Therefore, such rules may play a certain role for the financial situation of the State, especially the policy that relates to the future. Their significance consists in the preventive character, thus their goals is to prevent negative phenomena in the sphere of public finance. The rules become some kind of an obstacle for the prospective irresponsible fiscal expansion of public authorities, in particular the one referring to expenditures, which might lead to excessively deep imbalance between the liabilities of the State, and the sources of their coverage. As depicted by S. Owsiak, the aim of fiscal rules is also the protection of the society against excessive burdens of the handling of the public debt, which constitute unproductive expense of the State. These burdens constitute the cost of the on-going budget imbalance (Owsiak, 2013: 7).

Nowadays, there are no doubts as to the necessity of effective management of public funds. It can be stated that there is common consent, especially after the latest financial crisis, as to the care for the condition of public finance. The established fiscal rules should enable the implementation of the economic programme of the government, with pre-designed framework that ensure the maintenance of macroeconomic stability (Postuła, 2011: 42).

Taking into account the significance and the meaning of fiscal rules, it is crucial to realise that public finance constitutes a political category. It means

that the main subjects of the political system may, in connection with the narrowly and extemporaneously understood political interest (retention of power or political takeover), initiate unfavourable changes in public finance. (Owsiak, 2013: 7).

3 Fiscal rules in the European Union.

The use of fiscal rules is to serve well-balanced fiscal policy (von Hagen, 2004: 7). It constitutes an essential condition for the obtainment of well-balanced economic growth in a long-term perspective.

According to the Stability and Growth Pact, there are two supranational numerical rules – those referring to the budget deficit ratio at the level of 3% of GDP, and to the public debt ratio at the level of 60% of GDP. The directions set forth in the Pact intensify the necessity to respect the criteria through the requirement of obtaining a close balance of the budget or the budget surplus in the public finance sector in a medium-term perspective. It arises out of the fact that the countries applying for the Euro zone have undertaken actions (in the period of fulfilling the convergence criteria) to decrease fiscal parameters (Italy, Belgium). The experience gained by the application of the original version of the Stability and Growth Pact revealed the effectiveness of the Community authorities in implementing explicitly formulated reorganizational procedures (including sanctions of a financial character). The procedure of imposing fines on the Euro zone countries, in connection with the existence of excessive deficit and the lack of undertaking effective actions in order to reduce such deficit, remains purely theoretical (Ciak, 2011a: 18).

Thus, supranational fiscal rules do not constitute an effective solution for the disciplinary activity of the fiscal authorities in particular countries. This may result from an improper perception of fiscal rules and their role, as well as from the lack of any sanctions for their violation. The currently functioning system of penalties and obligations should constitute a tool ensuring proper functioning of a certain rule.

National fiscal rules, in turn, should be treated as a complementary tool for obligations imposed by the above-mentioned Pact. Fiscal rules at the national level become an element that facilitates the pursuance of fiscal policy in accordance with the most important prerequisites that constitute

the basis of the reform of Stability and Growth Pact. This has been confirmed in the European Commission announcement of 12 May 2010 (Reinforcing economic, 2010: 4).

Undoubtedly, the oldest and most commonly used fiscal rules are the balanced budget rule and the so-called golden fiscal rule. Both of them are ranked in the group of rules referring to the budget balance. Balancing the state budget, i. e. preventing excessive expenditure in relation to income possibilities of the budget is a classical principle of public finance. Nowadays, it takes up the form of a limited imbalance of public finance (Lubińska, 2013) and the assumptions in the scope of a mid-term budget objective within the framework of the Stability and Growth Pact that refer to the structural balance (Skiba, 201: 125). The concept based on structural balance (Owsiak, 2013: 14, Moździerz, 2009) enables the pursuance of an anti-cyclical budget policy. The said concept was introduced in 2005 at the EU level within the framework of the reform of the Stability and Growth Pact and enforced by another reform of the said Pact in 2009. In the context of the above-mentioned changes, several EU countries also applied domestic rules based on this concept (Franek, 2010: 71)[2].

According to the golden fiscal rule it is possible to fund only current expenditures, not the investment-related ones from current income. It is possible to incur public debt in order to fund the investment-related expenditures. As depicted in the literature on the subject in question, this rule conforms the budget to the changes of the economic cycle much better when it enables automatic reduction of investment expenditures in the period of recession.

4 Fiscal rules in the Polish legal system

The currently applicable principles of the functioning of the fiscal rules are set forth, in particular, in the Act of 27 August 2009 *on Public Finance*[3] and in the Constitution of the Republic of Poland of 2 April 1997[4].

2 A good example may be Sweden and Germany. In Sweden, apart from the expenditure rule, the obligation of obtaining the structural surplus of the public sector at the level of 1% of the GDP is in force. In Germany, a constitutional provision has been introduced requiring the federal government to maintain the structural balance of the budget deficit at a maximum level of 0,35% of the GDP. This rule is to be in force until 2016.

3 Journal of Laws of 2013, item 885 and 938.

4 Journal of Laws No. 78, item 483, as amended.

From among the currently existing rules, the following are the most important ones:

- The constitutional limit of indebtedness complemented by the prudence thresholds in the Act on Public Finance;
- The rule restricting the rate of increase of expenditures other than those legally determined (as well as new legally determined expenditures) for the forecasted inflation rate increased by one percentage point (so-called disciplined expenditure rule);
- Stabilising expenditure rule, included in the provisions of the Act on Public Finance;
- In relation to local government units, at least the rule of balanced current result, as well as the individual debt indicators in force from 2014.

The solutions effective since the end of 2013 had limited subjective scope – those included only a part of the public finance sector (for instance, the regulations concerning local government units, disciplined expenditure rule – directly determining only a part of the state budget spending) or concern a single subject (e. g. the requirement of a balanced financial plan in the area of revenue and costs, as well as minimal level of the costs of the National Health Fund). The public debt rule, although it encompasses the whole public finance sector, gives some directions in the area of the pursuance of fiscal policy only in the case of exceeding the prudence threshold by state public debt in relation to the GDP. It does not indicate any activities that would make it possible to avoid excessive public debt. It compels the reduction of the imbalance of public finance in the case of a significant deterioration of its condition, which usually occurs in the periods of bad economic situation.

The new expenditure rule, the so-called stabilising expenditure rule which starts functioning as of 2014, may constitute an instrument that assures a long-term stability of state finance in Poland. This rule is of an anticyclical character. The functioning of the stabilising rule should increase the public finance discipline. The effects of using this rule will be apparent in a few years time.

5 Summing up

One of the conditions of assuring the stability of public finance may be the application of fiscal rules which will refer to the process of managing

the public finance, both at the domestic and the supranational level. One may think that fiscal rules may constitute an essential element of pursuing disciplined fiscal policy, but their efficiency depends on numerous factors. They are connected not only with the selection of an appropriate fiscal aggregate, but, inter alia, with their legal authorisation and with the principles of observing or enforcing sanctions for any violation of such rules.

Fiscal rules included in the Maastricht Treaty along with the EU regulations of a reorganizational character, included in the Stability and Growth Pact, turned out to be ineffective. The literature on the subject in question indicates that the inefficiency may be explained by the financial crisis, however, analysing the fiscal situation of EU countries one can pay attention to the fact that difficulties with keeping the public finance discipline occurred in many EU countries prior to the crisis (Ciak, 2011b: 75-76). It is also indicated that the aggravation of the budget balances of European countries was caused by two factors, namely, extraordinary anti-crisis support programmes – fiscal impulses (Skiba, 2010: 36) adopted by the member states, which caused the increase of budget deficits. Secondly, in the conditions of a weakened growth and recession, the tax revenues of particular countries dropped and the expenses connected with the growth of unemployment increased[5].

In the case of Polish for strong fiscal rule can be public debt rule which is set forth in the Constitution of the Republic of Poland of 1997 (the admissible ceiling of the public debt in Poland amounts to 3/5 of the yearly GDP accounted for the previous year) and the prudence procedures included in Article 86 and Article 87 of the Act on Public Finance of 2009.

Summing up, it should be ascertained that conferring a normative character on fiscal rules does not always bring the desired results. Reduction of the effectiveness of fiscal rules may ensue, inter alia, from the type of the applied rule, the limited subjective and objective scope encompassed by the particular rule, excessively broad and sizable catalogue of exceptions, excessively flexible principles of the application of such exceptions, as well as the lack of actual sanctions for the non-observance of the rules.

5 In the second instance, the so-called automatic economic stabilisers worked, which means that the worsening of the budget balances was of an independent character from the decision of the Minister of Finance.

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CONSTITUTIONAL STANDARDS OF FINANCIAL AUTONOMY OF LOCAL GOVERNMENT UNITS IN POLAND AND STATUTORY REGULATIONS OF SOURCES OF THEIR OWN REVENUES

Małgorzata Ofiarska [1]

Abstract

Art. 67 paragraph 2 of the Constitution of the Republic of Poland lists categories of revenues of local government units, which are: their own revenues as well as general subsidies and special grants from the state budget, and therefore the criterion of source of revenue (own and external) was applied. The system used in this provision has a framework nature, but at the same time decisive on the absence of full financial autonomy of local government units. At the same time the origin of these revenues, highlighting own revenues and general subsidies and special grants granted from the state budget, was shown.

Municipalities have been equipped the fullest with tax sources of their own revenue, while poviats and voivodeships, which were created in Poland only in 1999, have been equipped with such sources only symbolically. In this way, they got deprived of the power to exercise tax sovereignty as an important attribute of not only financial independence, but also the shaping of a local and regional policy in the sphere of public tribute burdens.

Key words

Law; local government; financial autonomy; constitutional standards.

JEL Classification

H71, K30

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1 Introduction

The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws, No. 78, item 483, as amended, hereinafter the Constitution) contains provisions forming the system base of local government in Poland, including those defining limits of its autonomy in the organizational, financial, property-economic and task–competence scope. Thus, universal standards whose specification takes place at the level of statutory regulations were introduced by this, for example in relation to:

- principles and methods of distribution of public tasks between the government and local government administration,
- rules for selection and development of specific organizational structures necessary for daily functioning of local government units (LGUs), and management of municipal economy,
- distribution of sources of revenues and income between the state and local government,
- acceptable forms of cooperation between LGUs and between government administration and LGUs.

Local government in Poland is an important component of the political system and cannot be contrasted with the institution of the state. Limits of its autonomy are thus a function of tasks and possibilities for their implementation by a uniform (unitary) state, which the Republic of Poland presents. This means that none of the units of territorial division in Poland has the independence of the state or is sovereign. The unity of the state is not threatened by decentralization of public administration also implemented through local government. Decentralization enhances efficiency and flexibility of governing the country and ensures the maintenance of bonds between local communities and the national organization as a common good of all citizens. It cannot exceed certain limits though, because it could lead to the disintegration of the state and threaten its uniformity (Winczorek, 2008: 21-22). A paradigm of democracy was adopted in the Constitution, one (democracy) based inter alia on the unquestioned role of local government, on its substantial autonomy in the rule of law and its clear contrast with government administration (Brzeziński, 2006: 22). However, independence of LGUs, which is a value protected and guaranteed constitutionally, cannot be absolutized (Judgement of the Constitutional Tribunal

of 9 April 2002: K. 21/01; Judgement of the Constitutional Tribunal of 4 May 1998: K. 38/97), because local government performs public tasks „within the law". Self-reliance of local government is therefore relative, because every LGU operates within the law and is subject to this law (Łętowski, 1995: 20). The scope, level and content of this independence are defined by law. Self-reliance of local government is limited by the generally applicable law, constituting legal basis for its operation and laws defining the limits of its operation. Independence of action is neither freedom of action nor liberty of operation, but it is always linked to the generally applicable law (Błaś, 2005: 20; Błaś, 2002: 99 – 106).

It can therefore be concluded that the independence of local government is determined by the legal system in force in the country, as well as the systemic model adopted. Defined influence on the limits of this independence of local self-government is also held by democratic traditions and concepts of the division of tasks between the state and the public, and particular levels of local government. The basis for functioning of the local government is not only its legal subjectivity, but also being equipped in appropriate assets and efficient sources of income. Art. 167 of the Constitution provided LGUs with a share in public funds according to their tasks, and also listed the three main categories of sources of this revenue (own revenues, general subsidies and special grants from the state budget). This constitutional standard, couched in very universal and general manner, is detailed by way of statute (Banaszak, 2008: 735).

2 Financial autonomy of local government as a constitutional standard

One of the manifestations of autonomy of local government is its financial autonomy understood as providing LGUs with income to enable the implementation of public tasks assigned to them by the legislature. At the same time they should be given freedom, determined by law, in shaping their spending. The legislator should introduce in this field appropriate formal and procedural safeguards to enable effective exercise by the LGUs of their rights (Judgement of the Constitutional Tribunal of 24 March 1998: K. 40/97). LGUs financial autonomy is not absolute as it may be restricted by way of statute, provided that those restrictions are justified by the constitutionally

specified purposes and protected values (Jagoda, 2014: 14). The legislator also enjoys freedom to determine the sources of revenue of LGUs and the level of that revenue (Judgement of the Constitutional Tribunal of 18 September 2006: K. 27/05; Judgement of the Constitutional Tribunal of 31 May 2005: K. 27/04; Judgement of the Constitutional Tribunal of 3 November 1998: K. 12/98; Judgement of the Constitutional Tribunal of 15 December 1997: K. 13/97).

The basic standard of financial independence of LGUs was expressed in the provisions of Art. 167 of the Constitution, in particular its paragraphs 1 and 4 introducing appropriateness (adequacy) of the share in public revenues of LGUs in terms of financing their own tasks. Art. 167 paragraph 1 of the Constitution expresses it in a positive way by providing LGUs with the share in public revenues adequate to tasks assigned to them. The principle of adequacy was expressed in a negative way in Art. 167 paragraph 4 of the Constitution, requiring that changes in the scope of tasks and powers of LGUs follow along corresponding changes in the division of public revenues. This means that LGUs' revenues in terms of both their structure as well as fiscal efficiency should be tailored to the nature, quality and quantity of tasks. This requires a certain precision in the statutory definition of tasks and their boundaries. It is also necessary to introduce methods for measuring the cost of carrying out these tasks. It is therefore a warrant directed to the legislature, according to which it should equip the LGUs in revenues at a level that allows efficient execution of the duties assigned to them (Dębowska – Romanowska, 2010: 238-239). Violation of financial autonomy of LGUs would be, contrary to Art. 167 paragraph 1 of the Constitution, inadequacy of the share in public revenues to assigned tasks (Olechno, 2013: 27).

Adequacy of participation should therefore relate not only to the appropriate efficiency of the source the revenues are collected from, but also adequacy of legal forms which these revenues take in relation to the nature of duties entrusted to the LGUs. The nature of own tasks implies that the funding of them must be independent and creative in nature, that is, LGUs' authorities must be guaranteed the right to decide in a certain extent on the

scope and method of implementation of a task defined by law, or at least on the manner of its implementation and funding sources (Judgement of the Constitutional Tribunal of 28 June 2001: U. 8/00).

The principle of financial autonomy of LGUs was also expressed in Art. 167 paragraph 2 of the Constitution. The wording of this provision, in particular the order of the listing of basic categories of sources of revenues of LGUs, clearly indicates that the idea of financial independence should be the main structural component of LGUs' revenue system. As first own revenues were listed, and only then general subsidies. As the last source specific grants were listed, which should be complementary and exceptional, because the manner of their allocation, transfer and accounting is certainly not conducive to financial autonomy of LGUs.

The provision of Art. 167 of the Constitution does not explicitly provide that LGUs' public rights to revenues are subject to judicial protection. This does not mean, however, that searching for legal basis for this protection in this provision is without grounds. On the contrary, the guarantee nature of this regulation supports it, especially in relation to other provisions of the Constitution. The realization of LGUs' rights to revenues is to serve providing funding of public duties performed by the LGUs in their own name and on their own responsibility, that is, independently, as results from Art. 16 paragraph 2 of the Constitution. In turn, judicial protection of the independence of LGUs is introduced in Art. 165 paragraph 2 of the Constitution. Consequently, LGUs have the right to a claim for such formation of own revenues through the ordinary legislator that will take account of their constituent features. This claim can only be brought before the Constitutional Tribunal, controlling compliance of law provisions with the Constitution (Bogucka – Felczak, 2012: 8-9).

In accordance with Art. 167 paragraph 3 of the Constitution, sources of LGUs' revenues are defined in the statute. In this way it is intended to achieve a state of relative stability and transparency of legal solutions concerning sources of revenue of LGUs. This warranty is not complete though, because it only refers to the sources of revenues. Financial management of LGUs may not be seen in a unilateral way, i. e. only through the prism of revenues (their categories, legal structure, productivity); its other significant side is spending (its type, amount, obligatory and facultative

nature, the way of generating new spending). Unfortunately, this important issue has been omitted in the construction of Art. 167 paragraph of the Constitution and the mere emphasis in Art. 167 paragraphs 1 and 4 of the Constitution on adequacy of public revenues available to LGUs for the duties assigned to them does not solve many important issues relating to the expenditure of LGUs. One must agree with the view that the solution adopted in Art. 167 paragraph 3 of the Constitution involving reference to ordinary laws regulating the revenues of LGUs in detail, is not a real guarantee of stability of LGUs' revenues since the regulation of these issues in specific acts does not preclude ad hoc changes in the system of LGUs' financing (Storczyński, 2002: 133).

Limits of financial autonomy of LGUs are also a subject of Art. 168 of the Constitution which equipped with all LGUs in the ability to exercise the so-called income sovereignty, in particular fiscal sovereignty. It is one of the forms of financial sovereignty. Its second form is sovereignty over spending (Kornberger – Sokołowska, 2005: 69 – 79; Kornberger – Sokołowska, 2001: 99 – 116). In the light of the constitutional standard, fiscal sovereignty is granted to all LGUs (municipalities, poviats (counties) and voivodeships (provinces)), which are entitled to determine the level of local taxes and charges to the extent specified in the statute. This provision, therefore, authorizes the legislature to referring for regulation in the form of local laws those elements of a tax relationship that determine the level of taxes, provided that the law designates precisely the limits of competence of LGUs' authorities. Acts of local law can in particular specify the rates of taxes and other charges. The legislature must, however, define the scope of regulatory discretion afforded to authorized authorities (Justification of the judgement of the Constitutional Tribunal of 2 April 2007: SK 19/06). Art. 168 of the Constitution settles the issue of the scope of LGUs' independence in relation to deciding on the level of local taxes and charges. This means that LGUs are not entirely autonomous in setting tax burdens. This applies to both the introduction (and revoking) of tax burdens, as well as deciding on the amount of burdens already in place - tax rates, tax exemptions (Kotulski, 2004: 123).

The provision of Art. 168 of the Constitution, however, has not been fully implemented by the legislature. In fact, attributes of tax sovereignty were

only granted to municipalities, which were entrusted with the administration of some taxes and local charges. From individual laws governing the structure of taxes and local charges it appears that municipalities can determine the amount of these public contributions on the basis of and within statutory authorization. These regulations mean that the power of taxation transferred to municipalities does not cover the possibility of imposing new taxes, since these can only be introduced by the Parliament, in accordance with Art. 217 of the Constitution. Nevertheless, it is an expression of financial independence of municipalities and allows them to satisfy local needs in a manner relatively independent of the central government (Kunysz, 2012: 60).

The doctrine assumes that when analyzing the content of Art. 168 of the Constitution one should always combine it with Art. 84 and Art. 217 of the Constitution which require that all relevant elements of a tax or a charge are defined explicitly in the statute. Therefore, Art. 168 should be qualified as an exception to the rules for determining in the statute the total of legal and tax state of facts (Krzywoń, 2011: 228). Acknowledging the potential of LGUs' operation in terms of power to impose levies, the state does not give up its empire, but only creates a legal possibility of its use by another entity (Krzywoń, 2011: 15). The state remains the primary authority of financial sovereignty and shares said financial sovereignty with other public entities (Dębowska-Romanowska, 2010, 29). The provision of Art. 168 of the Constitution, then, defines the standards of LGUs power to administer levies and thus requirements on acts of local law relating to public contributions. However, it needs to be remembered that the LGUs are entitled to determine the level of local taxes and charges to the extent specified in the statute. LGUs' competence is regimented therefore by the legislature, indicating the types of taxes and charges classified as local taxes and charges, for which it is permissible for their level to be determined by LGUs.

In conclusion, the power to administer levies in a unitary state which the Republic of Poland is, has an indivisible character and its constitutional basis is Art. 217 of the Constitution, sometimes referred to in the jurisprudence of the Constitutional Tribunal as „a direct source of tax law" (Judgement of the Constitutional Tribunal of 9 November 1999: K 28/98).

The power to administer levies, in particular to impose taxes and other public contributions as well as to determine reliefs, waivers and categories of entities exempt from taxation, is a competence reserved for the legislative authority, a competence which without special constitutional authority cannot be delegated by way of conventional operation onto other entities. On the basis of the existing constitutional regulation this sovereignty is an attribute of the legislature and may be exercised only in the form of an act of law, pursuant to Art. 84 and Art. 217 in connection with Art. 10 paragraph 2 and Art. 3 of the Constitution. Neither the provision of Art. 168 of the Constitution, nor any other provision of Chapter VII of the Constitution "Local government", nor the well-established in the constitutional jurisprudence understanding of the principle of decentralization of public authority, give rise to the recognition of the autonomy of LGUs in terms of the power to administer levies.

Due to the categorical wording of Art. 217 of the Constitution, the guarantee function of Art. 84 of the Constitution and no other regulation than Art. 168 of the Constitution relating to the implementation of the power to administer levies by the LGUs, it is assumed that the legislative authority shall decide on the establishment of taxes and charges, on granting them the local nature and on the limits within which LGUs can realize the right to determine the level of these taxes and charges. Within the limits set by the principle of decentralization, the reservation on the constitutional level of LGUs' jurisdiction to rule on the level of local taxes or charges is to be construed as granting, not transferring, of exercise of legislative competence of a particular content. The granting must meet the requirements set by the constitutional concept of sources of law formulated in Art. 87 paragraph 2, Art. 88 paragraph 1 and Art. 94 of the Constitution (Cf.: justification of judgement of the Constitutional Tribunal of 28 November 2013: K 17/12).

3 Statutory regulations on LGUs' own sources of revenues

Sources of LGUs' revenues and their legal structure are regulated by a number of legal acts. In a marginal way they are currently regulated in the so-called constitutional local government laws (Law of 8 March 1990. The Local Government Act, hereinafter LGA; Act of 5 June 1998 on poviat

self-government; Act of 5 June 1998 on voivodeship self-government). It is the result of subsequent amendments to those laws, involving, among others, successive revocation of provisions governing the principles of financial management of municipalities, poviats and voivodeships, and at the same time placing of such provisions in other laws regulating in a comprehensive manner the issue of financial management, including the revenues of LGUs (e. g. in the Act of 13 November 2003 on revenues of local government units).

Art. 54 paragraph 1 of the Local Government Act (hereinafter LGA) refers to separate acts defining revenues of municipalities. These include but are not limited to:

- Act of 12 January 1991 on local taxes and charges (regulating elements of the legal construction of the tax on immovable property, tax on transport means, market dues, local charges, health resort fees and dog ownership charges);
- Act of 30 October 2002 on forest tax;
- Act of 15 November 1984 on agricultural tax;
- Act of 9 September 2000 on tax in civil law transactions;
- Act of 28 July 1983 on inheritance and gift tax;
- Act of 20 November 1998 on flat-rate income tax on certain incomes of natural persons (the source of revenue of municipalities are incomes from the so-called tax card, that is from the flat-rate taxation of individuals with revenues from non-agricultural economic activity).

Municipalities are also entitled to proceeds from other titles e. g. service charges (Imposed and collected on the basis of provisions of the Act of 9 June 2011. Geological and Mining Law), fees on failing to comply with the obligation of compulsory insurance of buildings making up an agricultural farm against fire and other accidents (paid to the municipality competent on account of the location of the farm; cf.: Art. 88 paragraph 8 of the Act of 22 May 2003 on compulsory insurance, insurance guarantee fund and Polish Motor Insurers' Bureau), from one-off charges set out in the local plan of spatial development (Czaja – Hliniak, 2007: 16) in connection with the increase in property values (cf.: Art. 36 paragraph 4 of the Act of 27 March 2003 on spatial planning and development) , from fines for non-compliance with the obligation to submit tariffs for collective water supply and

collective sewage disposal for the municipal council's approval (Kaczocha, 2013: 184) and for inflating prices or charge rates in approved or verified tariffs (cf.: Art. 29 paragraph 3 of the Act of 7 June 2001 on collective water supply and collective sewage disposal). All of the aforementioned charges and fines constitute sources of own revenues of municipalities. In accordance with Art. 54 paragraph 2 LGA municipalities' revenues may also be proceeds from self-taxation of residents for public purposes within the scope of the tasks and competences of municipal authorities (Rytel – Warzocha, 2011: 29 et seq.), which can only occur by way of a municipal referendum (Act of 15 September 2000 on local referendum).

The Law of the poviat self-government and the Law on voivideship self-government do not include any provisions directly relating to sources of own revenues. They are limited to formulating a general rule according to which transferring new tasks to a poviat (voivodeship) by way of a statute requires the provision of financial resources necessary for their implementation in the form of increased revenues.

Critical evaluation should cover both the title and the wording of the content of one of most important laws governing the basis of financial management of LGUs, namely the Law on revenues of local government units. It does not regulate exhaustively the issues of LGUs' revenues, as implied by its title, but it basically defines rules for establishment and transfer of subsidies and, partly, of special grants, while it only manes other public law revenues, including in particular those form sources of tax and charges, whereas their detailed regulation has been presented in a number of separate tax laws.

The Law on the revenues of LGUs introduced regulations that raise serious questions from the point of view of the acquis of the doctrine relating to the characteristics of the sources of LGUs' own revenues. Shares in the proceeds from income taxes (of natural persons and legal persons) were directly classified to the income category of own revenues of municipalities, poviats and voivodeships. However, the percentage share of LGUs in these proceeds is different (the largest share is granted to municipalities, and the smallest to voivodeships).

Unlike revenues from local taxes and charges, set and collected in principle by municipal tax authorities, shares in the proceeds from income taxes cannot constitute an instrument of conduct of an active fiscal policy by LGUs.

Proceeds from income taxes are collected entirely by heads of tax offices and then, in the part referred to in the law on revenues of LGUs, are transferred to the budgetary accounts of municipalities, poviats and voivodeships. This source is therefore not a typical source of LGUs' own revenues, it is not at the sole disposal of LGUs and it is not relevantly separate or independent (Miemiec, 2005: 96 – 97). It is not permanently connected with the budgets of LGUs either, and the state is the beneficiary of a substantial part of the proceeds from such a source (Gliniecka, 2001: 33). With regard to own revenues a local self-government holds the effective subjective right erga omnes, subject to judicial protection, both in the sphere of private law and public law (Dębowska – Romanowska, 1997: 139), and such a feature cannot be prescribed to shares in the proceeds from income taxes.

Moreover, it should also be stressed that LGUs participate in the actual, and not in the planned, proceeds from said income taxes. It is estimated that they constitute a special legal structure of the distribution of revenues from one tax source, common to the state and the local government. Characterizing this source from the point of view of LGUs, it can be assumed that it is devoid of qualities of locality because LGUs have not been equipped with any possibility to influence the amount of revenue on this account (Ruśkowski, 2004: 201).

Shares in the proceeds from state taxes as a source of LGUs' revenues were not mentioned in the provisions of the Constitution. This source cannot be qualified as special subsidies or special grants that are transferred to LGUs from the state budget either. In the doctrine the shares in the proceeds from state taxes are treated as a flexible form of compensation revenues which should be passed on to LGUs because of their diversified income potential (Gajl, 1993: 267 – 268). The procedure of redistribution of means coming from this source is burdened with certain flaws. These means are collected by state tax authorities and recorded in their current accounts, then gathered in the central current account of the state budget and from there transferred to budget accounts of relevant LGUs in accordance with the agreed share percentage. If they are transferred in time, it is the total of the amount which was collected by the state tax authority. Only in the case of exceeding the time limit specified in the law on LGUs' revenues must such means be transferred together with the interest at the rate fixed for tax arrears.

The scope of fiscal sovereignty of municipalities with regard to the various sources of revenue from local taxes and charges is diversified. In respect of taxes: on immovable property, means of transport, forestry and agriculture, municipality councils are granted competence in respect of: determining the tax rate (however, these cannot exceed the rates above maximum rates established in tax laws), introducing additional subject-matter exemptions from taxation, shaping the tax base (only in the agricultural tax), management of tax collection by encashment, appointing tax collectors and determining their remuneration, determining sample tax return forms and tax information. Similar powers are held by municipality councils in relation to certain local fees (market dues, local charges, health resort fees and dog ownership charges). In relation to stamp duty, the municipal council can only order its collection by encashment, appoint collectors and determine the amount of remuneration for the collection (Act of 16 November 2006 on stamp duty). The municipal council is not authorized to place additional provisions relating to tax collectors in the resolution, for example imposing on them reporting or accounting obligations or those relating to principles of liability for failure to collect taxes. This type of decisions can be regulated in the civil law agreement concluded with the tax collector. Imposition of additional obligations on the tax collector in relation to the regulations contained in the Law requires the consent of the collector himself, which means that the implementation of these additional duties can only be secured by an agreement (Sędkowska et al, 2007: 39).

The municipal council was not equipped in any attributes of fiscal sovereignty with regard to the following taxes: on inheritance and gift, on civil law transactions and the flat-rate income tax levied in the form of the so-called tax card. Municipal tax authorities are not competent to deal with any matters relating to these taxes either. Assessment and collection of these taxes is taken care of by state tax authorities who transfer the proceeds collected from these sources to the budgetary accounts of municipalities. The above-mentioned taxes do not have all the necessary characteristics of a source of LGUs' own revenues. Depriving municipalities of the possibility to exercise attributes of fiscal sovereignty in respect of those taxes is an important deviation from the constitutional standard under Art. 168 of the Constitution.

The legislator does not implement this standard in relation to poviats, that are not equipped with sources of own revenues in the form of local taxes either. Poviats are only equipped with charges, such as for the removal from the road (Kociński, 2013: 13) of vehicles left in places where it is prohibited (Cf.: Art. 130a of the Act of 20 June 1997. The Road Traffic Act). The poviat council decides annually, by way of resolution, on the level of these charges, except that the Law sets the maximum amount of pecuniary rates for charges. Deprivation of poviats of sources in the form of their own local taxes is contrary to the provisions of Art. 9 of the European Charter of Local Self-Government (European Charter of Local Self-Government drawn up in Strasbourg on 15 October 1985), according to which at least some part of financial resources of local communities should derive from local taxes and charges, the amount of which the communities have the right to determine to the extent specified by law.

A voivodeship has not been equipped with sources of own revenues in the form of taxes and charges. This role is not met in the form of shares in the proceeds from income taxes. In this case, therefore, the legislature does not realize the constitutional standards under Art. 168 of the Constitution, in which all categories of LGUs, and therefore also a voivodeships, are equipped with the power to exercise fiscal sovereignty within the limits set by the provisions of the Tax Act.

4 Conclusion

The system of sources of own revenues, defined by statutory provisions, does not meet the full range of standards under the provisions of the Constitution. Closest to the model established in the provisions of the Constitution is the system of a municipality, while furthest from the model must be placed the model of own revenues of a voivodeship. Current state of legislature in force in this respect can hardly be considered satisfactory. In part this is due to the fact of implementation of individual acts of law in different periods, which meant that the resulting regulations are not consistent with each other. The laws governing the structure and duties of particular categories of LGUs were left to include fragmentary legal regulations relating to the financial management of municipalities, poviats and voivodeships.

The order of naming sources of revenues in Art. 167 paragraph 2 of the Constitution is not incidental. As first own revenues are listed, revenues which should be the primary source of funding of LGUs' tasks. General subsidies and specific grants should in turn provide a supplementary source of revenues. The provision of the Constitution is not clear, however, on what the proportions between own revenues and general subsidies and special grants should be. The doctrine emphasizes that the order of naming of these revenues in the Constitution cannot constitute a directive which sets the ratio between these revenues, but there is no doubt that the dominance of subsidies and special grants over own revenues in poviats and voivodeships has a negative impact on the scope of financial autonomy of these categories of LGUs (Kosikowski, 2004: 225). Symbolic equipment of poviats in sources of own revenues in the form of local taxes and charges and the omission of the source in relation to voivodeships is also the result of introducing two distant, in terms of time, stages of the reform of territorial division of the state. Municipal self-government was reactivated in Poland already in 1990, while that of poviat and voivodeship not until 1999. To avoid depletion of sources of own revenues of municipalities and the state budget, the proper equipment of poviats and voivodeships in tax sources of own revenues was abandoned.

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PLACE OF BUDGETARY LAW IN LEGAL SYSTEM[1]

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Abstract

This paper concentrates on a place of the budgetary law in the legal system. The author defines the budgetary law as a part of the financial law at the beginning, later she analyses a relationship between the budgetary law and the constitutional law, the author emphasizes the distinctions between the budgetary law and the constitutional law legal relations in this part. Particular aspects of this relationship are interpreted in the context of the harmonization concerning the European Union legislation level in which the perceptible shift of harmonizing processes into the budgetary law field shall be expected. The main aim of the paper is to confirm the hypothesis that the budgetary law is one of the essential theoretical parts of the financial law in the Czech legal system even when the constitutional aspects can be found in the budgetary law legal relations as well. Author worked this paper out using scientific methods of analysis, synthesis and description.

Key words

Budgetary Law; Harmonization; Financial Law; Constitutional Law.

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K40, H61

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1 The position of financial law in the legal system

Law as one of the social system is unamimous as such, but internally differentiated. If we talk about the legal system, it means organization of legislation into certain groups, often according to the object, methods and purpose of legal regulation (Gerloch, 2013: 115 and following). In the classic division of legal systems - according to the subject-matter – the importance of a specific position of constitutional law is emphasized. This is particularly so with regard to the constitutional standards governing - in the form of legal rules of the highest legal force - the most important social relations. It could be said that budgetary law has close relationship to constitutional law - see below.

Financial law from the perspective of methods of legal regulation that is applied in legal relations governed by this field of law, is considered an area of law in which we encounter mostly the method of public regulation. It is sort of a method that is associated with the use of mandatory legal norms, the unequal status of certain entities and the application of principle of necessity and the principle of legality. I believe that at present this characterization does not apply completely in all parts of the financial law and that some relations included in the financial law, have a number of private law elements. However, the predominance of public law characteristics is still typical for the financial law.

From what could be concluded from the knowledge of legal theorists, there is a growing tendency to fragmentation of existing areas of law in recent years, the emergence of new areas, notably as regards public law, including financial law. Along with that, there is a blending of legal elements typical for particulat fields of law (Gerloch, 2013: 116). From these principles of law-making it is possible to conclude that also in the case of budgetary law it is a branch of public law, where the public law regulation method applies, a section which is closely connected with functioning of constitutional institutions, but which also must respond to the economic processes in society as well.

2 Budgetary law and financial law

The basis for understanding of financial law is a tight bond of the fields of finance and law. Legal regulation of public finances is linked to the

existence of financial law including budgetary law, which is within the legal theory of financial law defined as a subsector of financial law.

The financial law is therefore a legal field closely associated with the economic need to secure sufficient funds to fulfill the functions of a state, its public sector and thereby enabling the provision of public goods to subjects in the state. More than in other parts of the financial law it should be emphasized that, in considerations in field of budgetary law, the relations of public law nature are considered, in which European and transnational issues are reflected too.

Under budgetary law in the broad sense we may include both legal regulation of budgetary law in the strict sense of the word - (the budget and its contents, the budgetary systems and budgetary process) as well as tax law - substantive and procedural in the broad sense (regulation of mandatory payments, which constitute income of each part of the system of public budgets, including the process of its saving and enforcement). This group of broad budgetary rules would logically also include the legal norms governing the expenditure side of public budgets. Budgetary expenditures are the field of law which is not described that much as budgetary revenues. Individual expenses from public budgets are based on the legal rules governing various areas of public administration (especially mandatory expenditures) and respond to the priorities of the government, based on the policy statement of the government. Their systematics is however very difficult to be executed.[3]

In some countries[4], especially where there is no understanding of the financial law as a separate legal branch, budgetary law is usually included in administrative law or constitutional law. But even in countries where legal science recognizes the existence of financial law as a separate legal branch,

3 It would also be possible to proceed according to one example of the breakdown of revenues and expenditures within the budget structure, but the theoretical elaboration of such a procedure has not yet been implemented. see e.g. Marková, 2009.

4 Eastern and Central Europe accepts financial law as a separate legal branch, however some countries in Western Europe have a different approach. In the Czech Republic, works of Engliš or Drachovský in the beginng of 20th century were already dealing with financial science. Subsequently V. Funk adds a supplement to the treatise of the financial science - with regard to the Czechoslovak financial legislation - and in fact forms the basis of financial law as is understood in our country In the 60's of 20th cent. The work of B. Spáčil appears: Československé finanční právo (1959) and is followed by other works that are already based on a unified concept of financial law.

it earmarks and grants autonomy usually only to tax law (or banking law) and budgetary law remains part of financial law in broader sense[5]. A justification for this approach might be the coherence and breadth of tax law issues, which has many specifics, but the specifics - especially with the rise of European law - can also be found in budgetary law.

Assuming a uniform approach to financial law, we can perceive its internal system especially with regard to the common characteristics of relations governed. I believe that the existence of unanimous financial law while maintaining a certain amount of independence of tax law or other subsystem can be solved through the concept of division of the internal structure of financial law at fiscal and non-fiscal area, where the logical connection of budgetary and tax law remains in the context of the fiscal. The preservation of the unity of the field of financial law should be that what allows generalization of individual elements, strengthening of legal principles, the principles on which this part of the legal system stands and what should be shared by the social relations. That what creates the legal branch, are the legal relationships that have some character, that have something in common and that should be crucial in systemization of social relations, which are classified into particular legal branches.

It is also necessary to take into account the fact that in the case of financial law it is not only a legal branch, but also a branch of jurisprudence, where the aim is to help to improve the legal regulation of relations which are closely linked with financial science. Understanding the linkages, compliance, but also defining differences in methods of regulation may contribute to the development of both disciplines. As a legal branch, financial law is a complex of legal rules which regulate behavior in social relations associated with the process of creation, distribution and use of financial funds in public money funds, as well as in relations realized in connection with the functioning of the monetary system of the state and finally in relationships, within the framework of oversight over financial market[6]. Financial

5 Autonomy of tax law next to the financial law where all the remaining parts of financial law are classified, appears at the Pavel Jozef Šafárik University Law School in Košice, where this approach appears e.g. at work of Babčák, 2008: 32 and following.

6 Method of legal regulation in the area of financial law has its origins in the administrative legal method of regulation. However, this method, which has gradually detached itself in its current form (different from the legal methods of administrative law), has its own forms, which are not applicable elsewhere in the public administration.

law has its general part and a special part, and these parts can be found not only in the legal field as a whole, but also in their subsystems - and therefore the general and the special part could also be found in budgetary law.[7]

The above mentioned principles apply also to monitoring of the process of harmonization and 'Europeanisation' of the laws of the Member States of the EU, where some subsystems are closer to each other, whilst others remain in greater autonomy and thus the preference for self-regulation in individual states. If the creation of a European system of financial law and in its framework creation of tax law and budgetary law shall be discussed, one could speak of a conglomerate of EU regulation and legal legislation in the individual - the national - the legal systems of the EU Member States. It can be said that the financial law is strongly influenced by the integration processes, in all its subsystems. Outer, community financial law includes legal regulation specifically aimed at harmonizing national and community law in order to establish common principles of functioning of the common market.

It is a process of harmonization of these spheres of financial law:

- the financial management of the public sector and especially the public funds sector,
- a system of national and regional accounts
- the calculation of GDP and GNI
- Budget Rules of convergence
- measures against excessive increase of the budget deficit,
- indirect taxes
- cooperation between tax administrations,
- credit institutions
- financial institutions
- financial market supervision,
- customs law,
- foreign exchange law (Kosikowski, 2008: 31).

The purpose of unifying legislation of EU Member States is, inter alia, the removal of customs and tax barriers within the internal market. It is not yet a unified legal regulation of all areas of disposal of financial funds within the EU, because it can not yet be regarded as a single fiscal territory.

7 For more details see first textbooks devoted to budgetary law – Marková, 2001 and Marková - Boháč, 2007.

The first steps to form a single fiscal territory lead through tax harmonization, establishing uniform rules of budget management. Unification of the rules in sections closely associated with the budget management responds to the instability of the budget management of some countries, the growth of debt etc. Economic growth, prevension of excessive deficits, convergence rules and further steps will be one of the basic rules that will be promoted in Member States in next years (Marková - Boháč, 2007: 26).

In accordance with the harmonization in this area, the budgetary law, for instance, has gone through adjustment of budgetary rules - enshrining certain principles of planning in budget management (medium-term budgetary projections) and will continue in this direction by adjusting mechanisms to prevent the occurrence of an excessive deficit and to increase accountability for public finances. The necessity of avoiding an excessive budgetary deficit, on the other hand, significantly reduces possibility of discretion in financial policy of the particular state. Free disposal of the revenues and expenditures of public budgets is corrected by other restrictions such as in the field of state aid and public procurement. Within the EU - in the absence of a single fiscal territory, while separate national budgets and diversity of tax systems are present - all leads to the fact that the states are looking for ways to converge national legislations as much as possible to a functioning single market, the free movement of labor and capital. It is also definitely worth mentioning that the fact whether the single currency was adopted or not in a particular Member State interferes with the budgetary process at the level of EU. The governments of the EU Member States are obliged to prepare a draft of the national budget in accordance with the stabilization or convergence programs of the EU, which the fiscal outlook in the medium term is projected.

Due to the growing range of issues that are addressed in budgetary law, this could also cause independence of this subsystem of financial law, which would be manifestation of the above-mentioned tendency of fragmentation of law. The legislation also in the field of budgetary law gets into more and more detail, which is a problem for the stability of the system. Budgetary rules and convergence measures against excessive increase in the budget deficit which are to be addressed within the EU, are the rules that should apply in an extended period of time and therefore the legislation covering

these areas can not be changed annually. The annual law on the state budget has a different character than the budgetary rules, and these differences should be reflected also in the legal relations that are associated with them.

It is therefore possible to ask a question - what is the status of budgetary legal relations - could be considered different from other legal relations so much that they can be summarily identified as a separate section of law or it is more accurate to describe it as a relatively independent part of the financial law? Are there specific principles and methods in this area of law which would be capable to earmark budgetary relations into a separate part or not, or are they just differences within the group of financial law relations and what are their connections with other areas of law - these are just some of the issues that are waiting for an answer.

A try to comparison of definitions of financial law and budgetary law in textbooks of Czech and Slovak universities is carried out, for example, in publication of R. Boháč, who finished his comparison by its own definition of what he means by budgetary law, namely, that "budgetary law can be defined as a set of legislation governing the system of public budgets, funds management, budgetary process and relationships arising from the production, distribution and use of cash masses in these public budgets" (Boháč, 2009: 67).

3 Budgetary law and constitutional context

The question of the relation of budgetary law to constitutional law has become an important issue for further assessment of the independence of this section of financial law. It is necessary to assess to what extent these two fields overlap and whether there is, in some parts, prevalence of principles rather typical for constitutional law and vice versa in other parts those typical for financial law - especially budgetary law. A related question is whether in these cases there is relationship of constitutional law to the entire financial law or just to bidgetary law.[8]

P. Holländer raised the question of mutual influence of constitutional principles and financial processes, i. e. whether we can formulate an effective

8 Questions of contitualization of financial law are discussed among others in publication: Mrkývka, 2012: 109 ff.

constitutional control tools of fiscal policy, control of public finance deficits, etc. (Holländer in Mlsna, 2011: 45-67). As an example of this effort at the European level, he states in its publication the Maastricht criteria. With their adoption, the EU Member States undertake to avoid excessive public funds deficits while monitoring the development of the budgetary situation and the level of public debt in particular Member States in order to identify gross errors and examines compliance with budgetary discipline. Constitution or constitutional laws in particular EU Member States shall limit opportunities for violations of the adopted rules of budgetary discipline, limit budgetary deficits, limit expenditures, national debts. The author concludes in his publication that *"as the Constitution itself, without the readiness of the public, especially the elites, respects the fundamental values on which it is built, is not able to guarantee freedom, analogically the constitutional regulation of state debt without any further cannot guarantee the intended purposes - stable public framework for the functioning of a market economy. It does not imply that we should not discuss substantive and procedural contitutional tools aimed at these objectives. Their constitutional fixation would have symbolic significance, it would become a controllable scale, orientation for voters, public opinion, it would create a real pressure - certainly, in practice, would have to be accompanied by will to accept it*" (Holländer in Mlsna, 2011: 45-67).

A fundamental change in the approval process of financing of the EU was brought in by Lisbon Treaty, when the equalization of the position of the European Parliament and the Council in relation to the annual budgetary procedure was introduced. At the same time the multiannual financial frameworks were incorporated into European primary law. The approved changes strengthen the position of the European Parliament, both the legal basis for the EU's own resources, but also financial rules for budget preparation and execution and control of financial operations are newly regulated. Another change then brings the Financial compact - an agreement that further clarifies and one can say it tightens the oversight over the budgetary management of the states - in this case, particularly those that have adopted the euro as their currency.[9]

9 The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, is commonly known as the Fiscal pact. The main objective of this intergovernmental agreement is to ensure the stability of the Eurozone. In the Czech Republic, the acceptance of this Agreement is being discussed in 2014, while most Member States adopted it in 2012 entering into force by 1 January 2013.

The state budget in our country is, as elsewhere in the world, passed as a law and is subject to the normal approval procedure generally applicable to the adoption of the law. Some rules for the adoption of the state budget are different - for example, adoption of the law on the state budget is done by only one chamber of the Parliament. The character of the budget law is different also in that aspect that the law has a different structure than other laws. It is the Government's plan, which gets its binding form by approval as a law when Parliament actually passes the right to collect taxes to the Government, but also gives it the opportunity to distribute the money - these rules are specified more in detail the special laws.[10]

Preparation and discussion of the state budget combines the constitutional law level with the financial law level. This connection appears not only at the level of the state budget, but also in local government budgets. On the one hand, there is definition of the constitutional rights of deputies, i. e. elected representatives of the citizens in a representative body (the Chamber of Deputies, municipal or regional council) to decide on changes in the proposed budget, on the other hand, it is a proposal for a comprehensive document that is to be developed for a considerable amount of time to come, with knowledge and respect for current economic situation, but also the knowledge of the legal framework resulting from the already adopted laws. The preparation of the state budget is in the hands of the Government of the Czech Republic, discussion over the bill is a procedure that is regulated by the Act on the Rules of Procedure of the Chamber of Deputies (Act No 90/1995 Coll, on the Rules of Procedure of the Chamber of Deputies, as amended) and consists of both a general debate on the budget as a whole, the assessment of his structure and also the definition of the rights to make proposals on changes in the draft budget. Adoption of the state budget is just one of the competencies of Chamber of Deputies, competence which is associated with the possibility to check the performance of the government as the executive body. In most European countries as well as in our country, the State Budget Act does not confer any rights to citizens or other entities which would require their inclusion or legislation in the form of constitutional norms.

10 However it is to ponder why the final state account is not treated equally in our country.

Other activities in the area of budget management are already taking place on the field of executive power. Budgetary procedures are set out in the laws governing budgetary rules for both the state budget and budgets of local governments. The rights and obligations associated with the implementation of the budget and its spending, are also laws and other regulations that relate to the financial management. I do not think, therefore, that the inclusion of legal rules governing the particular sections of the adoption of the budget for the budgetary control should be seen as part of constitutional law (although it is might be some countries).

Questions of budgetary law that directly affect competencies of individual articles of the constitutional system will certainly remain part of constitutional law. In cases of the system of budget management, the content of public budgets, ways to address budget deficits, etc., it is assessment of the relationships in which mostly financial legal elements are prevailing. If there is no fragmentation of the legal branch of financial law and emancipation of budgetary law as a legal branch, it is necessary that this remains a subsystem of financial law, and not constitutional law or administrative law.

4 Conclusion

In the last few years, it appears that the process of certain unification of legislation on European level in terms of financial law is likely to increasingly shift - in addition to the area of currency and taxes - into the area of budgetary law. It will be necessary to pay increasing attention to the issues of public finances, national budgets, the common budget, the national debts and the related problems that appear, and seeking of a solution shall require, to a certain extent, a common approach in the financial science. At the moment, it is difficult to assess how this process would reflect in the national legislation, but it is clear that if this leads into deepening of integration processes, the creation of what most of the EU Member States still prevents, i. e. a certain common fiscal territory with common currency or budget in the broad sense - not only including its tax revenue, but also the principles of budget management, are not to be excluded for the future.

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PATRIOTIC ELEMENTS IN FISCALISM

Jan Głuchowski[1]

Abstract

This contribution presents mainly patriotic elements in fiscalism. Patriotism is not only a sentiment but the readiness to sacrifice oneself for the homeland and (which is especially important in the context of this article) putting the country's welfare over the one's own interests or the interests of own group. The main aim of the contribution is to confirm or disprove the hypothesis that paying taxes is consistent with the interests of a country, which means patriotic. This contribution deals with the notion of patriotism and the definition of tax at first, then with the issue of civic tax obligation, and finally with tax optimalisation of companies.

Key words

Patriotism; tax; civic tax obligation; tax optimalisation; fiscalism.

JEL Classification

K34, H20

1 Introduction

An encyclopedic entry (Wielka Encyklopedia PWN, 2004) of patriotism defines it as the feeling of loving your country as the place of the origin and residence. However, patriotism is not only a sentiment but the readiness to sacrifice oneself for the homeland and (which is especially important in the context of this article) putting the country's welfare over the one's own interests or the interests of own group (Patriotyzm, 2004). In a broader

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perspective, the complexity of this concept is worth discussing. Three categories of elements which constitute the concept can be distinguished:

> The first group comprises public spirit, the feeling of loving the country and nation, being ready to sacrifices and contributions as well as to serve one's own nation. The second category includes devotion to tradition, reinforcing the feeling of security, comprehensive development, solidarity with one's own nation, fulfilling one's duties and obligations as well as disinterested activity for the common good. Finally, the last grouping consists of good and solid work, the knowledge of the homeland i. e. its history and culture, the thorough study of the country, not only taking into consideration historical and geographical issues but also deepened ecological awareness (Patriotyzm – cóż to takiego, 2014).

Both interpretations refer to the elements such as putting own country's welfare over one's own interests and disinterested activity for the common good. In fact, the aforementioned elements become a part of the essence of tax. Among numerous definitions of tax the definition that describes tax as an individual contribution for collective objective has gained particular popularity.

2 The issue of civic tax obligation

Global discussion over increasing taxes concerns the wealthiest citizens. The issue has been hotly debated since mid-2011 when one of the richest people in the world publicly formulated the thesis about the necessity to increase taxes for American millionaires and billionaires. In his publication, the legendary stock exchange investor Warren Buffet, the promoter and the head of Berkshire Hathaway company called on the Congress to increase taxes for people, whose income exceeds million dollars a year, and who, in the USA, amount to approximately 250, 000 people. He also proposed to burden the people whose annual income exceeds 10 million dollars (there are 9, 000 of them) with even a higher tax.

According to Buffet, the burden of budgetary deficit should be lightened as the budgetary deficit covers expenditures both for welfare and state security. He claimed that this burden should be apportioned fairly in cases when greater discrepancies in income in the United States arise and the wealthiest people benefit from numerous tax reliefs.

He also revealed that in 2010 he paid his taxes in the amount of 6, 938, 744 dollars, which might seem a significant sum, but it merely constituted 17. 4% of his last year's income. Simultaneously, his employees, on average, paid taxes, which amounted to 36% of their incomes. He stated that in the 80s and 90s of the previous century the tax rates for the wealthiest Americans were significantly higher than in 2011 and still almost 40 million jobs were created.

However, in the past decade (2000-2010), when thanks to the initiative of the then President George W. Bush and the Republican Congress, the taxes were lowered, the economy almost ceased to create new vacancies. In Buffett's opinion, it refutes the theory which is popular in the conservative circles that higher taxes retard the economic growth. He also added that his super-rich friends would not protest against the changes. It is worth highlighting that during Barack Obama's election campaign in 2008 Buffett played the role of one of unofficial economic advisors. Being the president, Obama made an attempt to increase taxes paid by the wealthiest citizens but resigned from the idea under the pressure of the Republicans in the Congress.

The negation of the American practice in the western countries is taxation of the wealthiest citizens in France (the case of Bernard Arnault or Gerard Depardieu). According to the published information (Studniarz, 2012), Bernard Arnault, the head of *Luis Vuitton Moet Hennessy* concern, whose property the *Forbes* magazine estimated for 41 billion dollars, confirmed that he has applied for Belgian citizenship. However, he did not admit that it is due the 75% wealth tax which was being introduced. According the *Forbes* magazine, he takes the fourth place in the ranking list of the wealthiest people in the world. Arnault is the head of the concern, which produces luxurious goods like alcohol, clothes, cosmetics, watches and jewellery with brands like *Christian Dior, Guerlain, Louis Vuitton* or *TAG Heuer.*

The press informed that Bernard Arnault wishes to acquire the Belgian citizenship, inter alia, due to the fact that the French Socialist government plan to introduce 75% tax on income exceeding one million euro. Arnault confirmed that he has applied for the Belgian citizenship but denied that it is grounded in tax reasons and that he is and will still be a French taxpayer. The potential granting the dual French- Belgian citizenship does not change anything to this situation and he is still determined to sustain the development of the LVMH group and to consistently create new jobs in France.

Although French taxes are one of the highest in Europe, and the recent increase was introduced last year, President Francois Hollande wants to fulfill his pre-election promises. 'Fiscal revolution', which 75% income tax for the wealthiest is an element of, is one of those promises. The President announced that the aforementioned tax would be introduced only for a two-year term.

Nevertheless, French people do not believe in these plans and this novelty in taxation was called "Exil fiscal' i. e. exile tax. The issue of tax refugees has been taken up on the public forum again and evoked a rough and tumble discussion as regards the case of the famous (and rich) actor Gerard Depardieu who informed that he intended to give up French citizenship and then bought a property in the village Nechin at the French and Belgian border. The scandal developed and the French Prime Minister J. M. Ayrault criticized those fleeing from tax authorities and found the actor's decision pathetic. The star's proponents say that such a behaviour is not "compatible with the dignity of statesman". The actor himself in an open letter to the Prime Minister wrote that he feels insulted by this media 'witch-hunt' as he is not a criminal. This dispute has divided the French public opinion. According to *OpinionWay* survey, 47% respondents supports the government, whereas 46% shares Depardieu's point of view. Vladimir Putin himself offered Gerard Depardieu a Russian citizenship, and Russia is another tax haven *„paradis fiscaux"*.

Why Belgium? Emigrants usually choose French-speaking countries or close destinations, and the choice is dependent on tax objectives and conditions of receiving countries. Belgium is chosen by owners of capital and the retired due to lack of ISF (the French tax on the property acquired), the closeness to Paris and the atmosphere of international city i. e. Brussels. The conditions to acquire the citizenship seem to be easy to satisfy. The requirement of three-year residence in Belgium can be waived if the candidate has close connection with the country and the Belgian authorities find granting a citizenship to that particular candidate beneficial. The Belgian Minister of Foreign Affairs, Didier stated that his country would accept anybody, who like the actor Gerard Depardieu, would like to avoid paying 75% tax on the rich. Moreover, Belgium refused President Hollande's request to harmonise their own tax regulations with the French ones, and the highest rate in Belgium merely amounts to 50%.

Move means the risk of legislative differences in receiving states, administrative complexity and peculiarity, therefore, it is not supported by the society. The French do not care about the fate of tax exiles (69%). The Mulliez family (the owners of *Auchan* and *Leroy Merlin*), Hallet and Defforey (*Carrefour*), singers like P. Kaas and M. Loforet or sportsmen like Alain Prost and J. C. Killy are examples of tax fugitives. Approximately 1, 500 people were to pay a new tax, which would increase budgetary income by 210 million euro a year. It is worth mentioning that the French Supreme Court found the introduction of 75% tax by the Socialist president illegal. Also the French Constitutional Council on 29 December 2013 rejected this tax. Depardieu has not changed his mind. Therefore, discussing the issue of patriotism, one of the ministries stated that the actor's only homeland is his bank account (Nowicki, 2013).

Not all of the richest people in France share Arnault and Depardieu's opinion. The appeal was made in the weekly magazine „ *La Nouvel observateur"* to introduce the new tax which would burden the wealthiest. It was signed by heads of sixteen companies like *L'Oréal, Accor, Total, Danone* or *Orange*. They stated that when deficit of finances jeopardizes the future of France and Europe, and when the solidarity is needed, all should make their contributions.

What is the situation like in Poland? (Ciak, Głuchowski, 2014). Jan Kulczyk lives in Switzerland and pays his personal income tax there. His main company *Kulczyk Investments* is located in Luxembourg. He conducts almost 70% of business outside Poland.

It is difficult to estimate how much Kulczyk leaves in Poland as taxes as these are frequently the companies (inter alia, *Kulczyk Holding, PEKAES, Polenergia, Autostrada Wielkopolska, Kompania Piwowarska*) in which Kulczyk possesses only some shares. Several thousand people are employed there.

Zygmunt Solorz-Żak is the owner of *Cyfrowy Polsat* but controls it through *TiVi Foundation* in Vaduz in Lichtenstein. He also owns *Polkomtel*, operator of Plus – wireless telephone service, where he has shares through the company *Metelem Holding Company LTD* with its registered office in Cyprus. How does Poland benefit from that? There are at least 5, 300 people employed in Solorz-Żak's companies, which paid about 300 million zloty of income tax for the year 2012. The number is just an estimation because officially *Polkomtel* refuses to provide such information.

Michał Sołowow owns *FTF Galleon* in Luxembourg *Barcocapital Investments Ltd* in Cyprus. The companies like *Synthos, Rovse*, *Echo Investments* and *Barlinek*, which are listed on the Warsaw stock exchange, belong to the aforesaid companies. Sołowow employs about 12, 300 workers there. The last year's company stock reports reveal that the aforementioned companies paid approximately 57 million of income tax.

Leszek Czarnecki, the owner of the companies listed on the Warsaw Stock Exchange such as *Getin Noble Bank, Getin Holding* and the property developer *LC Corp*, supervises them through the company *LC Corp B. V* incorporated in Amsterdam. The information available reveals that over 10, 000 people are employed there. According to the reports, the companies paid income taxes of over 244 million zloty for the year 2012.

The people concerned express their negative opinion on the tax on the income of the wealthiest. This opinion is presented on the basis of the reports produced by journalists like M. Bojanowski, A. Dziadykiewicz and A. Lichnerowicz in TOK FM, gazeta, biz. pl. Z. Solorz-Żak believes that additional tax on the wealthiest will not change anything, and the systemic solutions are more needed. The President of *PKN Orlen* D. Krawiec, in his press release sent to Gazeta Wyborcza, stated that management of the biggest companies is more important than taxes on the heads' income. For a well-known stock exchange investor Z. Jakubaszek, increasing taxes may cause that people will stop paying taxes and start to seek new solutions. The aforementioned Michał Sołowow when asked "What would you say to people who claim that an economic patriot should pay taxes in Poland?" said that it is possible under the condition that the fiscal system would not go beyond the borders which will make it grossly unfair. He also added that within this patriotism he pays multitude of taxes – about 1. 2 billion a year, including PIT, social security, CIT, VAT covered by his firms. All of these constitute tributes for the country. New solutions are desired.

3 Tax optimization of companies

"Optimal tax structure" is one of the main solutions, which may be adopted as far as companies are concerned. The expression implies the exploitation of tax havens. To prevent such practices a variety of anti-havens actions are taken e. g. making a list of such tax havens (Głuchowski, 1996).

The Polish law stipulates that the cooperation with companies operating in one of the enlisted countries leads to some particular consequences for taxpayers. Such companies are obliged to prepare the tax documentation of transactions of value exceeding 20, 000 euro if the balance due is paid to a company operating or registered in a tax haven.

LPP is one of such companies. The value of its share now amounts to over 8, 000 PLN, while in 2001 a share was worth 50 PLN. The concern owns 1, 325 shops, including 440 ones in 11 European countries (the highest number of shops is in Russia - 226). At the beginning of 2014 this largest clothing chain store informed about transferring its brands *House, Mohito* and *Sinsay* to a partnership in Cyprus. The official announcement included the statement that this action is aimed at "retaining an optimal tax structure". It was believed to be a sign of lack of patriotism and a tax fraud. A Facebook page was created which exhorted people to boycott the company. Moreover, the association of Young Socialists notified the Prosecutor's Office in Gdańsk (the company's registered office is located there) that LPP might have committed the crime under Art. 55 of Penal and Fiscal Code which also stipulates the punishment for a taxpayer who "to conceal the actual scope of economic activity uses the name and surname, brand name or company of another business entity and thus reduces the tax due".

The company is the sixth biggest income taxpayer among Polish enterprises, and in 2012 it paid the corporate income tax in the amount of 70 million zloty plus VAT and customs duties. The company issuing a press release astonishingly stated that similar transfers made as regards its other brands like *Reserved* and *Cropp* did not provoke as strong reaction as this one. The reason might be the fact that after just 3 years LPP is much bigger and recognizable than before. In addition, it is well known now what a tax optimization is and what Cyprus is famous for in this context. It is striking that LPP has become a symbol of success and simultaneously is not willing to participate to a reasonable extent in public budgetary revenues. Meanwhile LPP may become even bigger when it gets into another large market, or a foreigner aiming to develop the business finds his/her way into the board of directors. Concurrently, it is believed that the fact that the economic patriotism is not too strong among Poles yet is of great benefit to LPP (Kaczmarczyk, 2014).

Bearing in mind fiscal burdens of both national and global companies it is worth indicating that five biggest foreign IT concerns operating in Poland collectively paid in 2012 half as much tax as *Asseco*, the largest Polish company. Simultaneously, the company president expressed his opinion, which seems dissenting when compared to already mentioned ones, that "the basic indicator of patriotism is where one pays taxes. Since you are in Poland... you should do it here." (Matys, Góral, 2014).

However, such negative conduct is widely and commonly practised in Europe. Recently, similar accusations were addressed to the best known British brand *Marks & Spencer*. The aforesaid company sells its products from English warehouses to France, Germany and other countries via an Irish website. The company states that it pays the taxes in England, which is true only for sales in the UK, not overseas deliveries. As a result, the Internet transactions are taxed in Ireland, where the CIT rate equals 12.5%, not in the UK (23%). In contrast, *Google*, an another global company, in 2011 paid an amount of 3.4 million GBP as taxes in the UK, at the same time earning 3.2 billion GBP. A gigantic *Amazon*, for six years, paid 9 million GBP in the UK having a revenue of 23 billion USD. In 2011 *Apple* earned 22 billion USD, yet it paid just 10 million USD in taxes in Ireland, due to the fact that it employs a few thousands of people there and has a special agreement with the government. The concern established as many as five companies in Ireland under the same address in Cork and with the same members of management board. The ingenuity of the solution lies in the fact that only two of the companies pay taxes. It is possible due to the legal differences between the American and Irish tax systems. In the former system the company is obliged to pay taxes in the country where it is registered, whereas in the latter where it is operated and controlled. *Apple* declares that its three companies are registered in Ireland, but they are operated and controlled from the territory of the United States. Thus, they are not bound by the regulations of either country (Czarnecki, 2013). This issue was also examined by the American Congress.

It was agreed that fighting against tax evasion will be one of the main subjects during the G8 summit. According to the Brussels office of Oxfam, a non-governmental organisation combating the poverty around the world, the losses in public budgetary revenues resulted from the money transfer to European or Europe-related tax havens amount to total 100 billion euro per annum.

A question may be posed. May natural and legal persons be made to act patriotically while conducting their business? In the debate "Taxes as the indicator of patriotism" in Gazeta Wyborcza of 10 May 2013, it was stated, inter alia, that "the richest Poles should give an example because wealth means greater responsibility and obligation" (prof. H. Domański, the Institute of Philosophy and Sociology of the Polish Academy of Sciences)."In Poland taxes are not the most important, and the system is rather just. I would not connect the place of residence with patriotism" (W. Fibak, a businessman and art collector)."If a businessperson wants her/his company develop and operate in stable conditions and hence s/he sets up the company abroad, for that reason s/he cannot be find unpatriotic" (J. Steinhoff, the former minister of economy and the chairman of the Council of the Polish Chamber of Commerce).

4 Conclusion

A question arises whether paying taxes in one's own country is desirable and patriotic. It should be stated while considering this issue that patriotism means a positive attitude to or a liking for one's own nation and country which induces to act in accordance with their interests. In a broader understanding these are the actions which reflect these attitudes. In extreme cases like during a war, people are ready to sacrifice their own lives. It is obvious that paying taxes is consistent with the interests of a country.

In Poland, the business elite is slowly evolving into the upper class. People accept it and consider its wealth as natural and right. Yet, by definition, it should serve the society. It should e. g. support culture or education, as it is right to do and this elite can afford to do so.

The business elite should pay taxes in its own country. A predatory like country may be an exceptional case here. It might have been the reason for the film director Ingmar Bergman, who, due to taxes, emigrated from Sweden to Switzerland in the 1970s; or for Gerard Depardieu, a French actor, who moved to Russia in 2013. It is however tantamount to renouncing one's own nationality.

But we all live in times where a class of global capitalists is being shaped, the class which does not identify itself with any specific country. These

capitalists conduct business in the network of transnational corporations. They choose the countries which offer the best conditions for their companies and capital. In general, their economic interests dominate over the national interests. Nevertheless, when the criteria of economic rationality are concerned, they should not be criticized for that.

We live in the age of globalization, we are members of the European Union. Entrepreneurs register their companies in countries which offer lower taxes and better conditions for conducting business. Their place of work does not have to be identical to the place of their residence - the country or city they are fond of. Accusing somebody of not being a patriot on these grounds is not fair.

If they prefer to set up companies abroad it is rather Poland that should draw conclusions from that fact and create a more entrepreneur-friendly and stable tax system.

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THE ECONOMIC ANALYSIS OF BUDGETARY IMBALANCE

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Abstract

The paper "Economic Analysis of Budgetary Imbalance" describes the issue of budgetary imbalance in broad historical context. The crucial factor of deficit financing of modern states may be traced back to the Great Depression of 1929-1933. Another significant factor is the economic theories of J. M. Keynes.

This paper emphasizes that deficit financing has become reality in most of the countries of the world since 1950s. Referring to the statistics, the author has shown that this has been taking place regardless of the political orientation of the governments and of the economic situation in which the particular countries were. Finally, the author highlighted the necessity of systematic changes, i. e. political, economic, legal, and changes in functioning of the states.

Key words

Budget Constitution; budget deficits; public finance; public budget; budget imbalance; J. M. Keynes; economic analysis.

JEL Classification

H64

The aim of this paper is to present the issue of budgetary imbalance in a broader temporal context, to describe its genesis and outline the basic theoretical economic bases. The vast majority of authors dealing with the public budget usually finds out that the public budget imbalance occurs

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in the economy of the country only during the 20th century. Until then as if the problem had not existed which creates a false impression that the governments and the sovereign were much more responsible and thriftier in the past than it is nowadays. This conclusion does not correspond to historical reality.

During the 18th and 19th century the public expenditure were reduced mostly to the (often very expensive) Court and funding the wars. A high indebtedness of the country as a result of the war adventures was transferred to the country´s monetary policy, which led to a devaluation of the currency and consequently often ended in financial bankruptcy of the country. A typical example of the above mentioned situation is the past of Austria-Hungary Empire. The empress's Maria Theresia´s high war expenditure led to the publication of first paper banknotes – so called "bankcetels" in 1761. In 1800 the convertibility of these bankcetels for metal coins was cancelled and these were given a forced financial flow (and thus the money turned into state banknotes).

As a consequence of the Austrian participation in the Napoleon's wars was an ongoing degradation of (already degraded) banknote-currency. The Austrian government had faced to this degradation by a repetitive currency reforms as for example the Wallis reform in 1811, Stadion reform in 1816 etc. This destructive monetary development was the main reason for creating a strong, state- and sovereign independent monetary authority – the central bank.

The emergence of the Austrian National Bank, founded in 1816, is a direct result of this development. But even the foundation of the Austrian National Bank did not prevent a dramatic drop in savings and reserves of the National Bank during the revolutionary events in 1848. The only solution to the new debt was cancellation of banknote´s convertibility.

The re-inflationary issue of state banknotes and a re-destabilization of the currency were caused by the wars with Italy (1859) and Prussia (1866). The last of the monetary reform of the Austrian Empire before the World War I. was conducted in 1892 which was an even more interesting fact for us because of the introduction of a new monetary unit to the world – a crown.

The twentieth century wrote a new chapter in the function and position of the government in relation with a new role and importance of public finances. There was a significant increase of the state as an organizer and regulator of socio-economical processes.

During the World War I., the decision-making role of central authorities increased not only in military strategic decisions but also in the field of supply, transport, foreign trade, agricultural production, etc.

The World War I. was unique because for the first time in history the result of the war was not decided on the war fronts and battlefields, but by the organization and economic background of the countries. Lack of resources (especially energetic), food, long supply lines to the war fronts and the associated logistical problems, lack of transportation and many others were the main reason for the collapse of the economy, the subsequent military defeat and final capitulation of the Austro-Hungarian Empire and the kingdom of Germany. Huge war debts and unbearable reparation duties had let to the disruption of public finances. Defeated countries tried to alleviate the pressure on public finance issues by hyperinflationary of the currency. In practice, most European countries had undergone a hyperinflationary development followed by the collapse of the national currency.

The phenomenon of the economic crises in the thirties deepened the ongoing process of the growing main role of government which implemented even new elements into it. The liberal conception of government as it was known by the English classical economics of the 19th century had been eradicated. As a result of dramatic decrease in macro-economic variables in most countries of the world, the governments started to enter such activities that were up until that time just a matter of the private sector, such as financial markets, construction, agriculture, industry, labour market, etc.

The extent of destruction forced the governments of the countries affected by the crisis spontaneously seek out new solutions to problems that arose. Most governments (regardless of political orientation) saw the solution in the expansion of government regulation, state intervention in the economy and in strengthening the importance of state budget as a tool for influencing the course of the economic cycle.

In this context it has to be mentioned that it is not only about the income of state budget and the consequent role of taxes, duties, etc., but also about the new application of the expenditure side role of the national budget as a stimulator of declining demand.

For example, the rising administration of the new American president F. D. Roosevelt during 1932 accepted a comprehensive integrated program of anti-crisis plan so called New Deal.

Federal authorities were considerably involved in areas that had previously been the responsibility of local authorities or were fully regulated by the market or were not the subject of government control at all.

Besides the above mentioned areas (labour market, financial market etc.) there were added also new ones, for example the protection of the environment (establishment of national parks), antigrowth law, consumer protection and many more.

The Czechoslovak state also accepted a series of anti-crisis plans during the thirties. Despite some differences from the New Deal plan, the main ideological concepts remained the same, such as a significant involvement of state in regulation of economic processes. In the Czech Republic, the domestic market is under protection against the foreign competition (by increasing import duties), grants for the agricultural sector, state regulation of prices, etc. The government acquired extraordinary powers to intervene in the public sector, in the relations of production, of consumption, credit policy and also newly to the labour market and social policy (there are introduced the unemployment benefits, etc.).

The role of state budget as a tool of economic regulation significantly increased, especially acquired a substance of its fiscal role. The requirement of budget balance declines.

In 1931 prof. Karel Englis (Minister of Finance of Czechoslovakia at that time) wrote: "…. state budget deficit may not be such evil for what it is usually considered, provided that it is effectively and meaningfully used to support economic efforts of the government."

This historical view shows that the principles laissez-faire, as they were formulated by an English classical economics, had declined in the long term.

There is a permanent increase of government influence over the management of economic processes. This trend was just strengthened and legitimized by the war disasters and economic crisis. The associated increase in government expenditure has a long-term character, regardless of the political orientation of government representation. Some authors link these phenomena clearly with the rise of economic teachings of J. M. Keynes. In extreme form, such opinions were formulated by for example Richard Ebeling, the president of Foundation for Economic Education: "....tragedy of nowadays is that between the ideas that lead to corrupt everything they touch, dominates the views of J. M. Keynese."

It is not possible to entirely agree with the critical views on Keynes' because these view are just partly right. These processes had started long before Keynes published his famous General Theory of Employment, Interest and Money (1936).

The remaining fact is, that the crisis of the thirties brought a huge worldwide loss of material wealth. Social devastation reached such depths that shook the very confidence of a large part of the population in the developed world of capitalism. During this situation Keynes comes with his original views on solving current problems. The core argument is that contemporary capitalism is a really unstable system. Its stability is possible only with prudent economic policies of the government. In order to achieve full utilization of resources (especially employment), there are necessary expenses even at the cost of the total national debt.

Keynes was not the only one who suggested a greater involvement of the state in economic anti-crisis programs. The already mentioned American New Deal out of Roosevelt´s brain trust workshop carries similar element solution, but five years before the release of Keynes General Theory.

In the historical literature there is the evidence that Keynes and Roosevelt had never found their way to each other. Roosevelt was not interested in Keynese´s views. Also the quoted statement of Karel Englis about a larger national debt in times of crisis bears the seal of only Englis´ original thinking. Moreover, it is known that Englis had refused the earlier Keynese´s views.

I therefore believe that to consider Keynes as a spiritual father of budget deficits and government debts is inaccurate and simplistic. Keynes' theory was one of many contemporary responses to specific economic problems

then. Nothing more, nothing less. The fact that after the World War II., his views became very popular and was brought up by many of post-war-generation economists and even politicians and the original view of Keynes in these post-keynes´and neo-keynes´ models disappeared, was not because of Keynes himself (Keynes died in 1946).

The development after World War II, however, carries many different characteristics from the crisis of the thirties. Persistent and even the growth of post-war national debt can't be only blamed on the war debts arose from loans and post-war reconstruction. There appeared a particularly new phenomenon - the so-called Welfare state.

In principle, it is possible to divide the total state expenditures into two main groups from the mid-20th century:

- *Government purchases* (foreign literature – so-called Exhaustive expenditure) (Bailey, 2004). It is about the government purchases of goods, services, investment, etc.
- *Transfer expenditures* (payments). This is the resources that are redistributed by the state from taxpayers to their beneficiaries.

So called "Transfer payments" are items that are most involved in increasing indebtedness of most countries in the second half of the 20th century. The increase of transfer payments is a feature of developed countries. Even at the beginning of the 20th century transfer payments were accounted for a fifth of government expenditures. At the end of the century it is already half of all expenditures. The growth of transfer expenditure is not satisfactorily explained by any of existing theories, there is lack of reliable research. It is generally considered that the growth of transfer expenditure is mainly due to the following factors:

- Demographic structure. The increase of life expectancy due to improved health care is reflected in the growth of retirement pensions, expenditure on services for the elderly (eg. Care service) etc.
- Changes in the household structure. The increase of divorces leads to the growth of single-parent families. As a result of this development, there become a growing number of applicants for state housing allowances and other social benefits.
- The economic causes. Recurring recession and consequent rise of unemployment leads to an increase in payments of unemployment benefits, etc.

- Psychological and sociological factors. Mostly, the foreign literature mentions the so-called Aversion to inequality of the incomes, caused mainly by once recognized equal suffrage which releases the democratic pressure on governments. As a result of this, there is a general requirement that every government should deal with the worst social and economic inequalities. This makes even bigger pressure on the payment of various social aid benefits and payments.

These tendencies are general in nature, regardless of the government administration (left-wing or right-wing government). Constant increase of transfer payments is a major cause of deficit budgets and ultimately of the rise of public debt.

The following table clearly testifies the above mentioned:

Number of years in which government debt was reduced or increased (Tomšík, 2011: 57)

Country	Time period	Debt decrease (in years)	Debt increase (in years)
Belgium	1981-2009	1	28
Czech republic	1994-2009	2	14
France	1994-2009	0	17
Ireland	1981-2009	5	23
Island	1981-2008	6	23
Italy	1981-2009	0	29
Japan	1981-2009	1	27
Korea	1981-2009	0	29
Hungary	1991-2009	0	19
Mexico	1981-2009	1	28
Germany	1981-2009	0	29
Netherlands	1981-2009	4	25
Poland	1993-2009	0	17
Portugal	1981-2009	0	29
Austria	1981-2009	0	29
Greece	1994-2009	0	16
Slovakia	1994-2009	2	14
Switzerland	1987-2009	7	16
Turkey	1986-2009	1	23

US	1981-2009	4	25
Sweden	1981-2009	10	19
Norway	1983-2009	11	16
Denmark	1982-2009	10	19
Finland	1991-2009	8	11

The above mentioned factors suggest several conclusions:

- In the last twenty years, the absolute tendency is that the public budgets of developed countries end in deficit.
- Balanced budgets or ending surplus are mainly exception.
- This development is ongoing no matter what stage of the economic cycle is the country located in.
- The development also takes place regardless on political parties form the government.
- Only the Nordic countries (Sweden, Denmark, Norway and Finland) noticeably differ from the above written which paradoxically are considered as representatives of the so-called politics of "Welfare state" (ie,. Countries with strong social expenditures).
- From what has been said, it is clear that this is not a unique, exceptional case, but a systemic problem.

The present (and to my knowledge, no other social) theory is unable to satisfactorily explain the causes of these long-term trends in the enforcement of public finances in democratic countries.

Some authors, such as Vladimir Tomšík, see the cause of chronic state budget deficit in the functioning of representative democracy: "... there are evident tendencies to a certain ideological vacuity. Elections cease to be a contest of ideas and values. Today´s elections are more of a fight of media images." (Tomšík, 2011: 57).

Václav Klaus (Klaus, 2009) explains this problem in the sense that a significant role in such trends may also play a proportional electoral system that generates non-homogenized ideologically mushy coalition in the government. But what is the connection between these political aspects and the fundamental problem of deficit of public budgets? Tomšík sees a connection in the general principles (fundamental ideas) that currently loses on the importance and on the other hand, critical importance is attributed to the immediate, recent results. Transferred to described topic, it practically

is about the general principle (essentially correct principle about the impossibility of having higher long-term costs than revenue, therefore it can not possible to live permanently in debt) that can't compete with the immediate effects resulting from high state expenditures. The effects´ recipient is also the government's political representation.

In addition to the reasons given by the already mentioned authors I believe that for the stability of public finances there might be played a significant role in the very nature of the legislative process (lawmaking). The decision making by the main participants of the legislative process (deputies and senators) is increasingly influenced by formal and informal institutions. These are eg. Unions, various employers' associations, professional associations, lobby groups and individuals who follow their personal or group interests.

These interests may be (and usually are) in stark contrast to the general societal values and needs. The most commonly shared values may be unquestionably healthy (balanced) public finance. As an example of such asserted, closely oriented group interest which is in sharp contrast with the need of public resource savings, is passing of the law on alternative energy sources (and I do not want to speculate about the corrupt practices of members of parliament, despite the fact that many Members operates directly in this business).

Tens of billions[2] that were paid as grants to producers of alternative energy sources for many years are going to affect the level of public budgets.

To some extent it is possible a comparison with the banking sector where there is a similar behaviour of the banking sector known as "moral hazard". Similarly, even here it is possible to say that in this case, the main participants do not assume any responsibility for their decisions (in addition, their actions are protected by parliamentary immunity). The negative consequences of these decisions are long-term and they often need to be solved by the following political representation.

There is no serious analysis in this respect which would examine the effect of the legislative process (of its quality) on the stability of public finances, or rather the impact of the legislative measures on public budgets. In this

2 In form of grants for renewable resources of energy there is going to be paid roughly an astrological amount of 1 500 billions CZK. It is an amount of money that exceeds the church restitution.

context, it is good to remember the statement of an outstanding economist and long-time Minister of Finance of the Czechoslavakia, prof. Karel Englis: "... every badly written sentence in the law costs us millions of crowns ...". (Právnická ročenka, 1932). Due to the fact that most of the developed countries are accompanied by the budget deficits in the long term, it gives the impression that it is a completely natural state of public finances. Therefore in this context, there comes a provocative question to minds, whether the long-term budget deficits are really such great evil to be dealt with.

This question is appropriate especially when we quite often hear opinions (from politicians, but also economic journalists)[3] that the budget deficit is not as serious a problem as it claims the professional literature.

This gives the impression that what appears to us in terms of household managements (I mean household debt) unsustainable not even impossible in the long term, for the state management seems not only permissible, but perhaps even desirable, for example for the reasons of revival the faltering demand or reduction of unemployment etc.

There is still being valid the true long-time knowledge of economic theory that only those budget deficit are economically acceptable that are caused by the war, postwar chaos, major natural disasters, deep economic crises etc. These cases of budget deficits are politically defendable. Primarily, each state has to try to achieve a balanced budget, at least. The economic theory often justifies the requirement of a balanced budget like this:

- The state borrows for its expenditures from banks. These loans are granted as almost risk-free operations for banks (unlike loans to private entities). This leads to the so-called crowdingeffect. There is the hard way to investments for private entities, then.
- The state have to repay not only loans, but also the interests on these loans. Taking in consideration the growth of the budget deficits, their economic consequences (not just the repayment) are usually transmitted to other political representation. The point is that governments that did not cause the debt, usually carry on not only economical, but often also social and political consequences of the decisions of previous governments.

3 I. e. Dvořák, 2002; Ševčík, 2002, and others.

- It is clear for these and many other reasons that it is very important to deal with the long-term budget deficits. Being this goal included in the long-term priorities of the government, it can be considered as an element of political accountability of the government. In proportion to how budget deficits become in most countries a chronic phenomenon (see previous table), there are much more intensive debates and discussions on how to pretend this undesirable trend effectively.

In professional discussions there often occur the term "debt brake". Most of the suggested solutions are based on the assumption that the emergence of budget deficits is self-evident reality. In these solutions "The Debt brake" is used as an ex post economic tool. This is for example the suggestion to introduce the so-called Tax debt.

From the same thought workshop come the suggestions so-called Budget Constitution, specifically, these are about the fiscal responsibility of government. I do not want to elaborate on the various shortcomings of this solution. I will limit myself to only two critical remarks concerning more of systemic approach:

1. There is an attempt to solve the problem „ex post", ie. deal with the consequences rather than deal with „ex ante cause" of these deficits. For example, I could imagine a mandatory analysis of the upcoming draft with respect to the future budgetary impact. Taking into consideration would be also composition of some form of personal liability in the event of unambiguously negative budgetary impact.
2. I feel distrustfully towards the institutional solution in the form of the National budget council. Aside from the paradox that because of the observance of the budgetary discipline law there is created a new supervisory body that would cost the state at least 50 million CZK (estimated cost). It might be assumed that the establishment and functioning will be under intense political pressure, the nomination of each member becomes the subject to political lobbying (as, after all, it is the nominations of constitutional judges, members of the Supreme Audit Office, the Bank Board of the Czech National Bank, etc..). That is why there are serious doubts about the objectivity in functioning of such a supervisory body. Under these circumstances, there would be established only another expensive, inefficient bureaucratic authority.

The unhealthy state of public finances is the result of a number of long-term effects (as described throughout this paper). It is a systemic distortion (the function of public administration and the political system as a whole) of a chronic nature. It is therefore necessary, if it is to be achieved fundamental qualitative changes, to remove the cause first, ie. to act to change the behaviour of the system, which repeatedly generates deficient conduct of public finances. For this reason it is necessary to redefine the priority objectives of economic policy.

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ECONOMIC CONSEQUENCES OF THE POLISH PUBLIC FINANCE ACT

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Abstract

The article focuses on the Polish public finance act that has been in force since 2009. It discusses the aspects of its articles that bring about economic consequences, mainly financial. Most attention is given to the Multiannual Financial Plan of the State, which is analysed in the framework of the annual budget law, traditional and performance budgeting, changes in the budget classification system, the expenditure of EU funds and the connections between public finance management and the functions of the State.

Key words

Public finance; multiannual budget forecasting and planning.

JEL Classification

K30, H60

1 Introduction

With the introduction of the public finance act in 2009 Poland's public finance system changed considerably. The discussion below concentrates on selected elements of the act that significantly influence the economic aspect of financial management. Accordingly, an analysis is provided of the basics of budget planning. Special attention is given to multiannual budget planning, with the indication of barriers to stable fiscal policy of the State. This general presentation is followed by an analysis of the identified problems, mainly those impeding accurate identification of the demand for budget funds, caused by the public finance act of 2009.

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2 The nature of multiannual budget forecasting and planning – the legal and economic perspective

For public resources, or actually budget funds, to be discussed, the temporal scope of the analysis must be selected, but most of all it is necessary to understand how forecasting and planning differ from each other.

„Forecasting is about predicting the future by analysing the circumstances and indicating the course a phenomenon or phenomena may take in the next periods. Therefore, a forecast has an informative and auxiliary function, rather than authoritative or obligatory. (…) Planning consists in designing an activity in order to accomplish one's objectives with a certain amount of resources that can be obtained in the selected period (Piotrkowska – Marczak, Uryszek, 2009: 125). When planning accuracy is sufficiently high, the difference between what has been planned and the actual performance is likely to be small.

Both planning and forecasting are part of the first stage of public fund distribution.

One recommendation in the literature is that revenues should be projected as precisely as possible. In fact, it is necessary ensure that the amount of revenues is consistent with their projections, so that financial balance prescribed by the budget law is effectively maintained (Gaudemet, Moliner, 2000: 177).

It is crucial that the method adopted to estimate the amounts of future revenues is appropriate for the purpose.

The present-day methods used for [revenue] estimation are tied to economic forecasting methods. The point of departure is the financial statements of the State or, to be more precise, economic budget plans that try to predict the whole of operations economic agents may carry out (Gaudemet, Moliner, 2000: 179). Some of the most important data on the country's economy include the GDP growth rate, export, import, production, consumption and investments, and price increases.

The real-life circumstances have abolished the dogma of budget balance, replacing it by a deficit reduction theory.

To estimate the likely amount of budget deficit, a detailed analysis of the values of economic factors determining the demand for public funds must be performed.

„The problem therefore comes down to providing forecasts with solid foundations and making them produce realistic results." (See Flejterski, Świecka, 2006: 406).

Accurate forecasts directly contribute to accurate planning, mainly of budget revenues, which makes them an appropriate instrument for the unbiased distribution of public resources.

„The very nature of budget forecasting causes that it cannot do without an efficient information system. It is the quality of information that determines the appropriateness of budget decisions (…)." (Kosikowski, 2001: 135).

In planning for budget revenues many factors have to be considered, including changes in legal, demographic, social and economic circumstances.

The development of the state budget must take into account the projected values of:

- the rate of economic growth,
- the rate of unemployment,
- the rate of inflation;
- money supply,
- basic interest rates;
- exchange rates,
- the balance of trade,
- the balance of payments,
- the average wage,
- the average pension,
- the number of disability pensioners,
- the proportion of youths in education (Owsiak, 2008: 321).

A thorough analysis of these indicators allows multi-annual budget planning to improve the efficiency with which public funds are managed. In the literature, the following functions of multiannual planning are mentioned (See Owsiak, 2005: 406, 407):

- projection (prediction of revenues and expenditures),
- optimisation (goals versus resources),
- coordination (harmonisation of the sources of finance),
- information (ensuring transparency of public finance management) (Owsiak, 2008: 54, 55).

In many countries, multiannual planning is viewed as a tool of control and a source of information for authorities to make decisions.

Special role is assigned to medium-term financial planning that is expected to indicate:

- the amount of revenues,
- the amount of expenditures,
- the values of macroeconomic indicators (Owsiak, 2008: 57, 58).

The question that needs to be asked is why budget revenue planning lacks precision. Some explanations given in the literature are the following:

- tax rate changes,
- delayed secondary legislation,
- inconsistent interpretations of laws (See Moździerz, 2009: 234).

An important document that Poland has adopted is the National Long-term Development Strategy 2030. While the need for having this kind of a document is unchallenged, it would be interesting to know whether and to what degree the document is credible, and whether the realities it is founded on have been correctly identified using data obtained with the adequate methodology.

Poland is an EU member, which means that it must fit its multiannual public finance planning into the Community framework.

In Poland, "(…) strategic objectives pursued by the State are described in many strategic documents. This fact considerably hinders the smooth implementation of development policies. At the end of March 2010, the total number of obligatory strategic documents amounted to 215 (…)." (Kosikowski, 2011: 421). This number speaks for itself.

An important enhancement of national public finances is EU funds, which require of beneficiaries to contribute at least 15% of the value of the intended project from their own resources (Drwiło, 2007: 176).

„An important financial facility enabling the use of funds from the EU budget and the implementation of specific projects is the co-financing of programmes and projects supported by such funds with grants paid to the beneficiaries from the state budget. […] A statement of amounts earmarked for the co-financing of programmes and projects is part of the annual budget law." (Drwiło, 2007: 170).

Although European funds are an item in the budget, they are distributed among its different parts and so they have many administrators. Moreover, the list of items they can be spent on is longer than the list of their sources (Art. 185 of the public finance act).

There is little doubt that the ESA '95 methodology is the best approach Poland can use to calculate its GDP. Other methodologies result in unreliable comparisons with EU Member States and fail to generate the necessary information.

„The Polish law does not require the overall financial plan for the public finance sector to be developed and used. It only requires (…) that the Multiannual Financial Plan of the State incorporates a forecast of the consolidated financial statement of the public finance sector." (Kosikowski, 2011: 421). According to the same author: „One manifestation of the conservative character of the Polish budget is that its revenues and expenditures are not directly and specifically tied to the responsibilities of budget administrators (…). Another manifestation is the use of an outdated budget classification." (Kosikowski, 2011: 427).

The above criticism is of fundamental nature. Once the decision has been made to adopt the performance budget, it should not be viewed as merely „an attachment" to the budget law, and the budget classification should be thoroughly revised. As stressed before, multiannual planning is also necessary, as well as taking account of the restrictions arising from the public finance act of 2009.

3 Economic barriers to multiannual planning in Poland created by the public finance act of 2009

Article 5 of the public finance act names the category of public resources that public revenues are part of.

Public resources consist of:

- public revenues,
- financial transfers from the EU budget,
- non-repayable funds from foreign sources,
- revenues of the state budget, of local government entities, and of other public finance sector entities from:
- the sale of securities,

- privatisation of property held by the Treasury and local government entities,
- the repayment of loans and credits granted from public funds,
- loans and credits taken out,
- other financial transactions,
- revenues of public finance sector entities derived from their activities and other sources.

As far as public revenues are concerned, these consist of:

- public levies such as:
- taxes,
- premiums,
- fees,
- contributions from the profits of state-owned enterprises and sole-shareholder companies of the State Treasury and other benefits in cash,
- the revenues of appropriated funds and other public finance sector entities,
- other revenues of the state budget and of local government entities,
- revenues from the sale of products and services delivered by the public finance sector entities,
- revenues from property held by public finance sector entities,
- inheritances, bequests and donations in cash on behalf of the public finance sector entities,
- damages,
- amounts received due to pledges and guarantees,
- revenues from the sale of property.

Public revenues have various sources. Some of them are collected under legal compulsion (taxes), while others come from market transactions (sale of services).

The public finance act is selective in its treatment of funds transferred from the EU budget and does not provide their full catalogue.

It has already been mentioned that the category of public resources includes funds obtained from the EU budget, as well as aid funds received via the European Free Trade Agreement (EFTA) from:

- structural funds
  - the Cohesion Fund,
  - the European Fisheries Fund,

- assistance granted by the EFTA:
  - the Norwegian Financial Mechanism,
  - the European Economic Area Financial Mechanism
  - the Swiss-Polish Cooperation Programme.
- funds allocated to pre-accession programmes and the Transition Facility,
- funds allocated to the Common Agricultural Policy including:
  - „the Guarantee Section" of the European Agricultural Guidance and Guarantee Funds,
  - the European Agricultural Guarantee Fund,
  - the European Agricultural Fund for Rural Development.
- other sources.

Important for determining the likely demand for public funds is the 4-year Multiannual Financial Plan of the State (MAFPS) instituted in article 103 of the public finance act. This is a rolling plan that „(…) is annually added (extended) another year so that each plan covers the budget year plus three successive years." (Karlikowska, Miemiec, Ofiarski, Rawicka, 2010: 281). This approach allows reconciling the requirement of national budgets being enacted on an annual basis with medium-term public finance planning, but it also gives rise to many practical problems that prevent the full synchronisation of both systems of public finance planning.

The MAFPS that contains a forecast of budget revenues and expenditures functions as a directive for budget law preparation in each calendar year. The document is the most rigorous about budget deficit. It is absolutely required that in individual years the amounts of funds are maintained within the limits prescribed by the MAFPS. This approach gives priority to the „final result" (deficit) at the cost of its components (revenues and expenditures) which are viewed as secondary. The good side of it is that both sides of the budget can be adjusted as circumstances require, and that the risk of manipulations arising from political contracts negotiated in the government and Parliament can be at least partially reduced. The downside is that it makes budget execution dependent on the accuracy of MAFPS' projections.

The fact that article 107 of the public finance act empowers the Council of Ministers to update the MAFPS by adopting a pertinent resolution

is another factor that may put rational and effective management of public funds at risk. The question one might ask is what will remain of the original MAFPS after multiple corrections have been made and whether this facility is not contrary to the very idea of multiannual planning which is intended to ensure:

„(…) – rational management (more effective allocation) of public finances, a relationship between expenditures and the medium- and long-term priorities of the government, easier absorption of EU funds, and activities focused on the medium-term stability of public finances; coordination with planning at the Community level (…)." (Karlikowska, Miemiec, Ofiarski, Rawicka, 2010: 280).

There are many reasons why all these objectives, although theoretically justified**,** may not be achievable in practice. These are an incompletely implemented system of planning from scratch which is at the heart of performance budgeting and barriers created by an unproven budget classification system. A change of the government and of the parties that form it, as well as political reconfiguration of the parliament, is also of importance.

All these factors may considerably reduce the transparency and predictability of fiscal policy.

Problems in reconciling multiannual planning with the preparation of annual budgets arise from variations in economic factors influencing the amounts of budget revenues and expenditures. The factors include the structure of prices and their changes that are partly driven by the situation on the global market, the level of inflation, and interest rate adjustments made by the central bank. The fact that the ruling elite tends to win voters by making changes to the tax system, etc., and methodological weaknesses impairing the accuracy of multiannual planning must also be taken into account.

The primary tool with which budget resources are distributed is the budget classification that in a traditional budgeting system consists of elements designed and carried out by the primary budget administrators.

With the introduction of performance budgeting in 2013, things became more complicated, because now the responsibility for the fulfilment of particular tasks can be stretched over several administrators named in the traditional budget, who have to coordinate their activities as a result.

Another problem to budget execution is the limits imposed on expenditures that apply to individual budget years and multiannual programmes (Art. 136).

The management of the European funds is still another issue. Two different systems are employed to settle funds depending on their source (Art. 184): one concerns funds that the beneficiary receives directly from the donor and the other is applied to co-financing grants from the state budget. This approach is not used, however in the case of the Norwegian Financial Mechanism and the European Economic Area Mechanism. The fact that expenditures from European funds are classified in the same way as those from a traditional budget has an adverse effect on its economic clarity.

Another factor that makes the handling of amounts paid directly to beneficiaries more difficult is that the entity in charge is the Minister of Finance, but the financial operator is the state-the owned Bank Gospodarstwa Krajowego (BGK).

4 Conclusion

1. There are problems with coordinating multiannual planning with annual budget planning.
2. Performance budgeting that Poland adopted in 2013 does not make fully utilise the planning-from-scratch approach.
3. In the Multiannual Financial Plan of the State more attention is given to the „final result" (deficit) than to its components (revenues and expenditures).
4. Art. 107 of the public finance act allows adjustments to the Multiannual Financial Plan of the State, so its new versions may differ from the original one.
5. Traditional budgeting is based on the traditional budget classification that is inappropriate for performance budgeting and makes it more difficult for the administrators of budget parts to coordinate their cooperation.
6. In the Polish financial system, the state budget is drawn up, unlike the overall financial plan of the public finance sector.

7. European funds do not constitute a single item in the state budget and have many administrators.
8. The expenditure side of European funds is more complex than the revenue side.
9. The excessive number of strategic documents prevents the implementation of consistent, stable and coordinated measures enabling the country to develop towards its objectives (Kosikowski, 2011: 421).
10. The ESA'95 methodology is inconsistently used to calculate the amount of GDP.

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THE MUNICIPAL AUTHONOMY IN THE CZECH REPUBLIC

Kristýna Müllerová [1]

Abstract

This contribution deals with municipal autonomy in the Czech Republic. The main aim of the contribution is to confirm or disprove the hypothesis that in the Czech Republic municipality are not enough autonomous and especially financial autonomous. The author analyzes a legal regulation of municipalities and self-government in the Czech Republic and looks for a base for financial autonomy, which is one of the fundamentals of self-government. On the basis of the fair value of the budgetary revenues of municipalities and their origin the author assesses the degree of financial autonomy of municipalities and identifies opportunities for improvement. Author uses scientific methods such as analysis, synthesis, deduction or induction.

Key words

Municipality; financial autonomy; autonomy; self-government.

JEL Classification

H77, K34

1 Introduction

In my contribution I will deal with the municipal government in terms of its legal and economic base, because I believe that without these two conditions cannot exist sufficiently separate municipal government, and thus if exist will not function correctly. This paper is worked with the assumption that the Czech Republic in the field of local government still have significant

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gaps, therefore the hypothesis: Municipalities in the Czech Republic are not financially independent and therefore not sufficiently autonomous. To verify my hypothesis I initially focus on the history and I will seek the roots of self-government in the Czech Republic and its gradual development. After that I will focus on current legal basis for the functioning of local self-government by analyzing the legal system and its individual laws, then I will deal with the economic base of communities and issues related to their funding. In the conclusion, I will outline possible solutions and evaluate confirmation or proof of the hypothesis.

2 A brief historical development of local government in the Czech Republic

The actual development of self-government in our country occurred after the 1848 by introduction of constitutionality. Autonomy is then the most developed in the period of "first republic". In 1918 all the Austro - Hungarian authorities and local government authorities were taken in to state law by a special act. All laws, however, were gradually repealed or amended. Communities were mostly affected by the amendment of municipal system (Act No. 76/1919 Coll.). According to this, among other things, municipal authorities were changes. In the head of authority there mayor remained. Municipal committee changed on municipal assembly and board changed on municipal council. Furthermore, there were also deputies and commissions. Commissions were facultative and advisory bodies. Only the Financial Commission and Chronicler Commission had to be compulsory established. (Schelle, 2009: 98-103).

Even after 1918, the financial situation of municipalities did not significantly improve. At the same time the territory of Czechoslovakia since the beginning of the apparent threat from Germany (Hladíková, 2007: 376), which did not want to put up with the appearance of Czechoslovakia and tried to secession territory with its population during the year of 1918 (Kadlecová, 1992: 20). Although these attempts failed, there was still a threat (Schelle, 2009: 96). There was a real threat, therefore, that in the west the Germany tried to assert its influence through the municipal government. A suitable way to solve both problems then clearly appeared to limit any possibility, including self-government, the powers of municipalities (Hladíková,

2007: 376). In addition, there grew louder voices against government duplicity in the new state, because the municipalities by the demise of the Austro - Hungarian Empire and the creation of Czechoslovakia, fell the most important task of the defense of national interests ahead of centrally managed policy of Vienna (Kadlecová, 1992: 61). In Czechoslovakia there was therefore a gradual process of curtailing government.

One of the first steps undertaken by the state were the restrictions under delegated powers. The activities of police and care of the communication was so newly transferred to the state. This, however, did not lead to improvement of the financial situation of municipalities (Hladíková, 2007: 378). Thus the first financial amendment was established (Act No. 329/1921 Coll.), which since 1921 has added to municipal revenue share in the proceeds of certain state taxes (property tax and sales). Municipalities were also forced to force large companies located in their territory, contributing to the general release (Čmejrek, 2010: 28-29). The law allowed municipalities to raise revenue to implement a variety of fees and surcharges for state taxes. Municipalities have the opportunity to introduce a surcharge on direct taxes up to 100% arbitrarily, or even higher, but they are subject to the consent of a special office, or deciding on the amount of the surcharge government - Unless the community with that authority. With the agreement could then be 300% mark-up and the municipality also had the opportunity to apply for permission 10% surcharge on the real estate transfer tax (Act No. 329/1921 Coll., § 30-33). In addition, some of the municipality means inherited or received as a gift a very widely used in various lending institutions. First municipal debt was not restricted in any way, then another loan subject to approval by the District or Provincial Committee. Municipalities and during this period the bulk of its revenue gaining by themselves, state appropriations accounted for a smaller portion was among them as house tax (Flögel, 1931: 146).

When the first amendment did not bring financial success, was released in 1927, the other financial amendment (Act No. 77/1927 Coll.), Which tied the municipality more to the state office, which continued to directly intervene in all economic matters, for example by limiting taxes and surcharges approval of the disposition of municipal property (Čmejrek, 2010: 28-29). At the same time, however, the increased possibility of price increases

up to 200% for communities without permit, as the permit office to over 300%. Here, however, the municipality had to meet the conditions, and collect on its territory, appropriate and practical duties and charges ", the first use of its possibilities to raise funds some other way. In addition, countries fixed regular annual allocation of tax revenue from beer sales taxes and taxes fancy, which were allowed under certain conditions be subdivided into municipalities (Act No. 77/1927 Coll., § § 1 and 10). The foregoing limitations but in communities met with huge criticism, partly because it had mitigated the third amendment to the financial year 1930 (Act No. 169/1930 Coll.). This act mainly increased the possibility of extra charges without approval by the Authority. A further increase in markups brought a fourth and final financial amendment (Act No. 69/1935 Coll.).

It should be also noted that due to amendments in First Republic there was expanded understanding of municipal property. According to the legal wording municipal assets was not only movable and immovable property but also all property rights. While the distinction between administrative worth (served administrative purposes), financial worth (income serving public purposes) and the public good in the strict sense (things used by the public, such as roads) (Havlan, 2013: 16-17).

At this time, however there was the height of the financial crisis and thus subsequent establishment of provincial aid funds that have assumed amortization of debt for the worst-affected units did not help municipalities. Funds were therefore later repealed and replaced by allocations from state taxes (Flögel, 1931: 144). Surcharges for municipal taxes to the municipality at this time to introduce their territories, ranging up to about 350% (Hladíková, 2007: 378-379). It was however not valid and the government has gradually found themselves at the bottom and complete dependence on government (Schelle, 2009: 148).

After Munich diktat all the hopes for democracy turned off. Any interference with the government (Mates, 1988: 86) and local government were now down to the winding nature. Provincial and district council was completely dissolved in the bodies of municipalities replace the left-leaning members of the right-wing representatives. In 1939 in the municipalities the position of Secretary was established. Secretary performed the delegated powers and in the case of the instruction from the Ministry he could carry out the tasks

of self-government. He did not need any municipal assembly approval. In the case of protection of state interests he could intervene in the activities of all municipal bodies and interfere with their decision. In the Protectorate of Bohemia, the self-government did not exist, all autonomous tendencies were harshly repressed. In addition, the municipality still subjected to state power exercised through nationalization districts (Schelle, 2009: 149-153). According Kovarik (Kovarik, 1967: 108) However, at this time the municipality completely get rid of your debt and because the government ceased all its activities in a municipality were continue to be managed centrally, to which was related to the central government redistribution of income taxes.

After the war, during the communist self-government was not renewed because on the local level there exist national committees, which were the authorities. They could not own property. The property they had only in their administration, because all assets were state-owned. Local government therefore had to wait for their revival.

3 Constitutional and legal foundation of local self-government

Basics for of municipality ownership autonomy were considered before the emergence of the Czech Republic - in the amended Constitution of 1960. Yet it was only theoretical foundations, in reality, none of this happened. The situation changed due to the change of regime after the Velvet Revolution. In the early 90s the law on national committees (Act No. 69/1967 Coll.) and the national committees abolished by the Act on Municipalities (Act No. 367/1990 Coll.) The date of the first elections to the municipal assembly of 24 November 1990 (Čopík, 2010: 36), which were made on the basis of the Law on Elections to Municipal Councils Act (Act No. 368/1990 Coll.). Three-stage national committees have replaced municipal and district authorities. Under the new constitutional law (Act No. 294/1990 Coll.) became the foundation of the municipality government and the new Constitution (Act No. 1/1993 Coll.) set out the basic principles and the economic base of local governments.

According to Article 8 was in the Czech Republic since its inception guaranteed autonomy of local governments (Act No. 1/1993 Coll., Article 8).

The Constitution defined the basic territorial authorities – municipalities and higher territorial administrative units of the country or region. Over time, however, the land division was abandoned and regional administration has been established. So now enshrined in the Constitution, only the region as a higher territorial self-governing units. (Act No. 1/1993 Coll., Article 99). In chapter seven, then further Constitution established local government units as a community of citizens, enshrined their right to self-government and the council has identified as a self-governing body. To be decided according to the Constitution in matters of government and within the limits of their jurisdiction, issue generally binding regulations. The department has identified the manner of its provision and term of office and allowed to entrust power to local government and state government, but only under the law. The Constitution than define conditions of state interference in the activities of self-governing municipality. These are only possible within the protection of the law and in prescribed manner.

Very important with regard to financial autonomy is the constitutional framework of the right of municipality on their own property and income. Under the Constitution, the municipality is a public corporation that may own property and manage their own budget (Act No. 1/1993 Coll., Article 101, paragraph 3). However, this Constitution with financial autonomy of municipalities in the Czech Republic ends. It is not, nor is there has never been any further mention of its state support

As already indicated above, after the Velvet Revolution the state administration and local government apart were again separated. Newly range of independent and delegated powers had to be also established. It the autonomous jurisdiction there were, and still, are all matters relating to the community and its citizens, unless they are directly subject to the county or performed within the scope of the delegated power.

To enter local self-government into life, it was necessary to prepare necessary conditions. On the basis the new legislation was prepared with the aim to return property to municipalities. First it was land and buildings of the municipality later other assets, such as shares in companies (Hladíková, 2007: 482-483). Management in municipalities was adjusted at the beginning of the budgetary rules Republic (Act No. 576/1990 Coll.), These rules apply until the end of 2000, when it replaced the law on budgetary rules

of territorial budgets (Act No. 250/2000 Coll.). Legal and economic status of communities then influenced other laws, these include e. g. Regions Act (Act No. 129/2000 Coll.), Related law on the transfer of certain rights and obligations of things from the Czech Republic to the Regions (Law No. 157/2000 Coll.) or the law on budgetary tax (Act No. 243/2000 Coll.).

The municipality managed matters again belonged from the beginning and the implementation of local taxes. Number of taxes since First Republic, however, decreased significantly. Now municipalities can implement only the local charges, which are listed exhaustively in the law (Act No. 565/1990 Coll.). Another possibility to actively influence their revenue, the introduction of a local tax rate of immovable property, with the proceeds also goes to the entire municipal budget. However, this option should only municipality since 2008, after amendment (Act No. 261/2007 Coll.) of Tax Act of immovable property (if the Law of Property) Act (Act No. 338/1992 Coll.).

As I have mentioned above, even at a Constitution establishment the legislator considered the later establishment of intermediate steps between the districts and the state. On the basis of the Constitutional Act (Act no. 347/1997 Sb.) the creation of higher territorial units was finally decided on the establishment of regions, and so the first novel that touched Constitution, docked as higher territorial self-governing units, only the region, countries have been amendment of Article 99 deleted (Constitutional Act No. 347/1997 Coll.). This was followed by the abolition of districts (Hladíková, 2007: 480-484).

4 The economic basis of financial autonomy of municipalities

Municipalities now have income basically from three sources. The first is the income from taxes. These include the above-mentioned revenue from local taxes, as well as tax revenue from the state budget, where the bulk of revenues tied to the number of inhabitants in the municipality and cannot be directly influenced. Among the tax revenue that the municipality can influence, and includes only income from fees and partly by the revenue from the tax on immovable property. They form in the budgets of municipalities amounts to a maximum of 10% of total revenue.

The second type of revenue are the revenues from its own property management, but most communities have a minimum income of their rapid increase can cause an exception. The municipality can raise funds such as the sale of municipal property, which is indeed profitable in the short term but in the long run has to municipalities disposing of assets rather negative impacts. They are prepared by the other management options.

The third type of income are the subsidies, whether it is direct state subsidies or subsidies from the regional budget, or European Union funds. This only kind of income offers to communities many ways to increase their income substantially, and so most of them concentrated on the acquisition of various types of subsidies. (Bernard, 2011: 84). These revenues, however, are short-term, or just a single and community often has no assurance that receives a subsidy.

This brief overview shows that the actual impact on the revenue that would be stable at the same time, the municipality has only about 10% of total revenues. The rest is not capable on its own merits to ensure and must therefore rely on the state or European subsidies. For this reason, the municipality has long striven, to increase the share of own revenues. Quite clearly municipalities do not want to be so heavily dependent on subsidies. Because proper and independent functioning of self-government can be only guaranteed by sufficient and autonomous financial base municipality.

The problem is not just lack of municipal autonomy in the area of taxes but there is also another problem with financing which is closely linked to the huge number of municipalities that are located in the Czech Republic, in proportion to their population. Because of this fact municipal autonomy do not really work well financially. Czech Republic has over 6000 communities. In 80% live less than 1, 000 inhabitants and 60% even less than 500 while subsidies are tied to population (Čmejrek, 2010: 38).

The problem of the low number of inhabitants in the municipality and then binds directly to the municipality's own revenue. Even if the municipality have the possibility of introducing its own surcharge to state taxes to raise more funds on their own, be collected from the population of such sum of money, which would cover all the expenses of the municipality. And this is the reason why the municipality today are faced with financial problems (Čmejrek, 2010: 38).

In 2008, the long-term poor financial situation of municipalities responded to a change of state shared tax redistribution system. Smaller communities that helped their capacity of local government was still very low (Čmejrek, 2010: 38).

Therefore, subsequently from 2013 again increased percentages of municipalities on the revenue from state taxes (Diary of Public Administration). By this municipalitys better of as fast as before in terms of financial area and according to preliminary statistics began their incomes finally sufficient. Their budgets at long last stopped creating deficits. The move away from the indebtedness of municipalities is certainly very positive, but still the state has not contributed to the financial autonomy of municipalities. Municipalities are constantly fixed, in terms of their income to the state, and because of this I would like to questioned their real independence and self-government.

4.1 Options to strengthen self-governing status of municipalities and their financial autonomy

Self-government is very important for development of the municipality. Due to the fact that the municipality can decide its own affairs alone, is able to address important and current issues. Management from a remote municipality centers could never be so effective. But here we come to the problem of their size. Small municipalities because they can, in terms of its development, affect only a few things. Above all things related to economic development, are beyond their power, because they go beyond the local rinks. They have a kind of non-local character. That the municipalities affected by these elements would help them merge into larger units (Bernard, 2011: 25).

Fears of merging municipalities is engaged in the publication of Bernard (Bernard, 2011), within which were found interesting findings. The book, however, does not provide a clear unambiguous solution. There are only highlighted two points of view, and the fact that the issue is actually far more complex. The survey found that in terms of quality of life in the municipality of concern before merging is not necessary. According to statistics showed that small community without government are doing in their development, almost identical as those with local government and they have more opportunities to influence the economic side of things.

The second view, however, stresses the importance of close contact with local issues, organizations, local civic initiatives and associations. Members of these bodies often occupying positions in the council are closely linked. They can thus more appealing to current problems in the municipality. When connecting more communities in one unit would be broken by these bonds lost by direct informal contact with people with the municipality and they would be alienated from the operation of public administration (Bernard, 2011: 204-205).

Hence, the solution is not clear if a decision whether to join or not to join municipalities into larger units, it will be appropriate to each municipality decided individually. Each such step is then important to properly consider and prior to any decision to try to avoid negative influences.

A partial solution to the situation is the cooperation between municipalities and functional merging some agendas. However, this happens only in the Czech Republic least (Bernard, 2011: 25). If the state began to promote and encourage this activity, this would bring fruit. The question is whether it would be worth considering re-creation of districts, or other types of unions that would not limit the community in decision-making as much as its possible merger with another municipality, but would also help to secure a matter in which a small town is not enough capacity or financially.

The fact that the municipalities within their area agree among themselves while staying within the volume of assets available more resources could help its further development without limitation contact with their populations.

Of course, I realize that the issue is much more complex and I do not dare her to elaborate on this point in more detail. In any case, this option is worth considering and I will deal with it further in my dissertation thesis.

5 Conclusion

As I mentioned in the introduction, I am convinced that without sufficient legal and economic basis no municipal government can properly function and prosper. In my work I deal with as a legal basis for self-government and economic and have come to this conclusion. The legal basis for the self-government of the Czech Republic is sufficient. There are constitution

basis of the most important principles which are complemented by other laws. Although I would like to emphasize that there was no legal anchoring of financial autonomy of the municipality, I find that this condition is met.

However, with the economic basis of self-government is concerned, I see there are considerable reserves. It should be noted that in the last ten years there has been a gradual improvement in terms of the amount of income that community (and especially small municipalities) get into their budgets. I see it as a positive phenomenon.

On the other hand, the state do not advanced even in a single step in the direction of financial independence. Municipalities are financially dependent on the state equally stale and the state, according to his demeanor, probably is not going to change any time soon. So I ask myself the question: Why?

When current income of municipalities are compared with the period of the First Republic, when the municipalities were financially independent in almost 100% of their income, I cannot forgive the assumption that the current Czech state does not want this power over municipalities give up. This is not a good signal outside. The local government is saying is that it is a kind of litmus test of democracy. When blooming democracy, self-government is doing. If you are experiencing but it was not limiting, is rapidly reduced and then abolished the autonomy. Our state should empower municipalities and does not have much to worry about because the release of these relationships is lost. In contrast, gains in self-administration of a strong partner who will be able to successfully and responsibly perform tasks that would otherwise be tasks of state.

My hypothesis was thus confirmed. Municipalities that can actively affect only 10% of their income does not seem to be financially independent and therefore not sufficiently autonomous. Local governments whose financial security hangs almost entirely on the state government can never be in the true sense, because of the lacks of independence.

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SELECTED ASPECTS OF FINANCIAL LAW

Tomáš Hulkó [1]

Abstract

The main aim of the submitted contribution is to demonstrate that the financial and legal aspects created the basis of economic development of the regions from the early beginnings of human society. Social relations constituting the subject-matter of the financial law had been developing, changing, and had become established before the financial law itself has been constituted. These relations seem to have been present from the very beginning of the existence of the human society. Regulatory acts associated with regulation of these relationships embodied solidarity and methodological specificities. The specificity of the subject-matter of regulation, solidarity and methodological specificities of the financial and legal standards sufficiently define superstructure with a natural law character. The superstructure is based on constitutional system of national states and now, after the EU integration has been completed, on the EU law.

Key words

Financial law; public finances, history; development; economy.

JEL Classification

B52

1 Introduction

The events of World War II have had an extraordinarily significant influence on the theoretical legal thinking. The change mainly occurred in awareness of non-human nature of positive law. A theoretical concept has been

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formulated which forces, in certain circumstances, the law to be considered a non-law (Holländer 2012). The Radbruch Formula[2] found its way to the judicature of the Federal Constitutional Court of Germany through philosophical and legal debate.

Historians believe the disgusting behaviour of Nazis is linked to the Great Depression that occurred in the 1930s of the 20th century. Europe is currently recovering from an unprecedented crisis shock. The crisis showed that the positions of the positive law and justice in the economic area have drawn apart from each other. EU new financial regime is supposed to bring a solution to this. It is mainly focused on economic development of the Union´s regions and the EU[3] region on the globalised market. The strategy Europe 2020 and European semester is supposed to bring qualitative changes in the co-operation of nations.

Injustice and inequality between "persons" has increased enormously in the EU member countries of the 21st century. Exclusion of a significant part of inhabitants occurred. People become slaves who are forced to pay lifelong mortgages to secure their basic needs. Real salaries hardly achieve the level from the end of the 80th of the last century though banks and financial institutions make use of the most extensive forms of debt recovery. The interests of the creditors are secured harshly through relentless exercise of mortgage rights or through "voluntary" auction sales. Significant legal aspects, such as the interest of minor children, become irrelevant for the public exactors of bank usurers. On the other hand, the same banks are uncapable of meeting their obligations. They beg the State not only to forgive them their debts but to provide them with financial packages with

2 In reaction to the crimes of National Socialism, Radbruch formulated his thesis that later on became famous as the "Radbruch formula": *"The conflict between justice and the reliability of the law should be solved in favour of the positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered "erroneous law"("unrichtigesRecht")."* CF: RADBRUCH, G.: Der Mensch imRecht (Man in Law), 3rd ed., Göttingen: Vandenhoeck&Ruprecht, 1957, as referenced in: Holländer 2012.

3 The EU constitutes a so-called "centre of the world economy ". The concept of a global economy's centre comprises a group of economically advanced regions promoting innovations in science and technology. A significant part of world economic potential is concentrated in these centres. The development of global economy after the World War II resulted in the formation of three major centres: the USA, Japan and the European Union. Cf.: Cihelková, 2007.

a view to prevent their collapse as well.[4] Where does the problem lie? What's happened which caused the living standards in the EU regions to de facto stagnate and the debts of inhabitants and those of the public sector continually increase?

Question of choice of either revolutionary or legislative (evolutionary) method in carrying out fundamental reforms in the society re-emerges at present in an effort to cope with the persisting recession of the financial crisis. Enforced choice between the positivistic or natural methods application occurs again like many times before (Holländer 2012). However, other questions emerge:

Is it really impossible to find social interaction patters which would allow building a crisis-proof regulatory system? Can the economic development be predicted at least to such a degree that we would be able to resist crisis shocks? Answers can be found in Engliš´s thoughts:

"All sciences are beautiful regardless of their practical use. The thought control of own forms of thought and the outside world brings satisfaction and uplifting. Some sciences are proud to have beautiful subject-matters, such as astronomy. What can be said about national economy as a science? It is not an instruction, like it is sometimes presented. It is not an instruction for people how to get rich, but discovers the laws of human behaviour which are no less surprising and interesting than the laws describing circulation of suns. Wealth of nations, however, is not its only subject-matter, as Adam Smith said in the header of his book, but their hardship, poverty, work and self-denial." (Engliš, 1924).

Engliš compares the science that studies the national economy to astronomy. Celestial mechanics patterns are still valid. It is impossible to hinder the sun from rising in the morning or the seasons of the year from alternating. Nevertheless, we can adjust our behaviour or social structures to periodically recurring cyclical phenomena which are caught using scientific tools.

The paper´s hypothesis is based on such notion. The outcomes of scientific exploration suggest that the financial and legal aspects have been present during the entire period of development of human society have set the limites for economic development of the historical regions. In this

[4] Whereas they take "rank and file" citizens and their savings hostage in the negotiations."The Slovak Banking Association believes that the draft on bank levy of 0.4% not only endangers the stability of the Slovak banking industry, but will also result in more expensive products and services for the clients" said Monika Kuhajdová from the Slovak Banking Association.

respect, the pronouncements, which will be verified through the historical example method, can be summarised as follows:

1.1 Hypothesis

Social relations constituting the subject-matter of the financial law were developing, changing, and became established before the financial law has been constituted. These relations seem to have been present from the very beginning of the existence of the human civilisation. Regulatory acts associated with regulation of these relationships embodied solidarity and methodological specificities. The specificity of the subject-matter of regulation, solidarity and methodological specificities of the financial and legal standards sufficiently define superstructure which has the nature of natural law. The superstructure is based on constitutional system of national states.

1.2 Scientific Method

Facilitating the transition from the unknown to known constitutes a fundamental purpose of the scientific exploration. In other words, to predict the unknown based on known facts. The transition is usually classified as prediction. For the sake of simplicity, it can be said that the fundamental purpose of the science consists in creation of such pieces of knowledge which enable explanation of processes and phenomena that occur in the world. To be able to predict something we need to know necessary correlations between facts. The term for such proceedings in the scientific exploration terminology is explanation. Apart from the ability to predict phenomena, the nature of science consists in providing us with instructions how to successfully bring one´s intentions to life, whether it is a matter of invoking desired phenomena or managing them. In order that the scientific exploration would make sense, it should fulfil the following functions:

1. Description – consists in description and classification of processes and phenomena
2. Explanation – consists in explanation of occurrence of matters, processes and phenomena
3. Prediction – or forecasting of occurrence of matters, processes and phenomena
4. Comprehension – of the context of the occurrence of matters, processes and phenomena, and

5. Providing the possibility – management of the occurrence of matters, processes and phenomena.

It must be noted that, in this respect, the ancient states had a vast knowledge of market economy based on which they could not only predict the occurrence of financial phenomena, but invoke and manage them. The artificially invoked allocation waves, that is, through declaration of amagi (general debt cancellation) were an analogy with artificially invoked contraction of economy during the economic cycle.

Ostracism which was applied in Greek city-states served similar purposes. Voting was held about who is the enemy of the state (city). In January or February, the Greek Popular Assembly decided whether or not such voting should be held, on an annual basis.[5]

2 Aspects of financial law

"Divinarum atque humanarum rerum notitia, iusti atque iniusti scientia"[6]

Financial law as a branch of science strives to describe the reality at issue as closely as possible through the tools at its disposal. The problem of the general part of the financial law would ideally be solved by formulating universal pronouncements related to time- and space– free boundless and unlimited fields and infinite number of cases (Černík and Viceník, 2005).

Popper says that social laws must be structured differently from mere uniform-based generalisations. The actual social laws must "universally" be valid which, however, can only mean that they cover the entire history of mankind being present in all historical phases of mankind's history (Popper, 2000).

5 If the decision was positive, ostracism would be held two months later, upon which every citizen could write a name of the person they deemed to be the highest danger to the community on a pottery shard (ostrakon). The shards would be deposited into vessels prepared in a reserved section of the agora. In the first round, the number of voting shards would be counted and if it exceeded the quorum of 6,000, the voting would be valid. In the second round, votes for individual names on the shards would be counted and the citizen whose name was mentioned the most frequently would have to leave Athens within 2 days for 10 years. They could not return under the threat of death. Ostracism was adopted as protection against tyranny and it was a means used in political fighting. It was not a penalty, the property of the ostracised citizen was not confiscated and they could find an intermediary to manage the property. After 10 years, they were allowed to return without prejudice. Cf.: (Bleicken, 2002).

6 Ancient definition of jurisprudence "the knowledge of matters divine and human, and the comprehension of what is just and what is unjust".

The natural law theory suggests that the positive law origin was preceded by the existence of super-positive natural law. The positive law as a certain type of derivate should therefore be consistent with the natural law. In this sense, the iusnaturalists have been trying to get to know the natural law from ancient times. On this understanding of law or legal science, in a way it is a tool for knowing the facts of natural law.

As far as financial law is concerned it holds that theoretical attempts to define it, as an independent branch of law, or attempts toward definition of its institutions, positive legal approach prevails over the natural law one. Theoretical considerations about the natural and legal character of the financial law cannot be found in professional literature sufficiently, like it deserves.

Of course, financial law institutions exist which do not admit such efforts. It is a matter, for example, of the Law on the state budget; it hardly can be considered to be "super-positive" and constant if new law is established on an annual basis based on a social consensus. This, however, does not mean that the financial and legal regulation method per se cannot have a natural legal origin.

Nowadays, when analysing particular legal standards, it is completely impossible to specify whether it is a matter of:

1. initial effort to discover some natural legal patterns,
2. or it is a matter of a standard set forth on the basis of – or through modification of – a legal standard (or positive legal phenomenon) existing beforehand.

If it is a matter of initial attempts to create law and legal system, the latter is practically out of the question. If there was no standard which could inspire the legislator in creating standards, then it must be a matter of initial (sincere) endeavour to discover a natural legal pattern.

If people living at the end of the Neolithic period, in the pre-state social system, unaffected by legal knowledge or knowledge of law, were attempting to create a legal system, then it must have been a whole bunch of sincere attempts to discover something natural. In all likelihood, they were based on ethical and religious regulatory systems.

On this view, it can be eye-opening to search into the oldest law codes. It can be said that if an institute appeared in those laws, it is more likely

of the nature of natural law. Vice versa, if an institute does not appear in the oldest codes of law, it more likely has a positive legal origin.

In an effort to discover strictly universal declarations on general part of financial law, all stages of human development are being examined. From ancient times the legal science is an attempt to get to know the natural law. Given this, law or legal science is in a way a tool for getting to know the natural legal facts. The endeavour to discover so-far-unknown generally valid patterns can result in development of new legal techniques[7].

The financial and legal regulatory system is not only an artificial system purposefully created by people, but something natural which is essential for the existence of the society. Quite a number of non ommitable patterns, whereby the financial and legal regulatory system is managed, is independent from people and existed without the necessity to be discovered by people and not depending on that. This can be substantiated by the fact that state systems were created and successfully continued at various places of the ancient word, isolated from each other, approximately in the same period. The whole point is that it is a system whose internal patterns are given (by God) or can be known.

Finding solution to the issue of general part of the financial law must build on strictly general social laws. The presence of financial and legal regulation method of human society in various historical forms is a general and strictly universal phenomenon.

The fact that the financial and legal relations are not established and changed and do not cease to exist exclusively based on acts done by public authorities, but sooner – through fulfilling the legally set conditions which are decisive for the origination, changeover, or disappearance of the particular relationship (Mrkývka, 2004). The above-said implies that the financial and legal facts have a special meaning in the financial law conception and in comprehending of those patterns which manage the financial and legal relationships.

7 Physics can be used as an analogy. Physics is a science that involves the laws of structure, qualities and movement of non-living forms of the matter. Based on observation and quantity measurements, it leads to discovery, mathematical formulation and practical technical application of basic laws of nature. In this respect, the research on the rules of natural law in law or legal science results in practical "technical" application of these relations. (Open Encyclopaedia of Philosophy: *The Subject-matter of Physics (online).*

The financial and legal regulation method is characterised by special perceivable specificities which have to be taken into account when the financial and legal relations are being established. The financial and legal system of the region[8] is to be set in such a manner that the specificities could become apparent concurrently and at one time.

2.1 Financial Law as a Regulatory System

"Egoists cannot voluntarily create collective economic system. If it is requisite necessary and if it lasts, then it is only if there is no other alternative. Egoists must be member compelled to solidarity through a legal standard. Public economy is then a compelled economy. Management of public relations falls under financial science. Standards regulating financial economy are subject-matter of legal science" (Engliš, 1929).

Engliš, a great thinker and theoretician, went down in history as a man pushing through his own special teleological and national and economic theory. Engliš's theory is built on the resolution that economic phenomena can only be completely known and comprehended if we will follow certain purpose and aim in the behaviour of subjects of economy which the individual subjects want to achieve. The subject-matter of investigation of the teleological method are motives of all subjects of economy inclusive of the state itself, companies, banks, individuals and households. Engliš criticised Marxist theory; he held an opinion that economic laws are given just like the physical laws (Zemánek, 2010).

The idea of a natural status of the society was formulated by several thinkers[9]. Their ideas are now harmonised based on knowledge from biology in the effort to achieve the most precise idea of the natural status of the society possible (Graham and Haidt, 2006).

Graham and Haidt say many research works have confirmed that despite of apparent cultural variability of standards and practices, a small group of ethical intuitions exists which can easily be found in all societies and even in other animal kinds. It namely is a matter of emotional reactions or answers which are automatically "launched" in situation associated with:

1. harm/care (such as sensibility and/or dislike towards signs of pain and hardship of others, mainly those young and vulnerable),

8 In the broadest sense of the term.
9 For example: Hobbes, T., Rousseau, J. and Locke, J.

2. fairness/reciprocity (for example negative reactions to those who fail to reciprocate goodness), and
3. authority/respect (for example anger toward those who fail to show due signs of respect and esteem)

Along with these three universal intuitions, two further intuitions are mentioned by them, widely spread, which span:

a) Purity (holiness (for example disgust toward spoiled food, some sexual acts, menses) and
b) Interest in/fears for one´s group (for example mutual help when attacked by a predator).

The fundamental existential problems which all human societies must cope with are solved through human culture. The specific human method of cultural behaviour stems from certain predispositions, but it has solely changed into a form of a cultural system in case of human beings and thus it has become a reliable distinguishing sign of all human races compared with other animal kinds. Keller believes these are the most significant elements of human culture:

a) Ability of symbolical communication
b) Ability to institutionise one´s behaviour
c) Ability to create legitimate structures of organised authority (Graham and Haidt, 2006).

All abilities mentioned above help people find solutions to a number of problems and enable a group to live collectively in certain environment in a cultural way. Ritualism of human communication, ritualism of organisation and ritualism of human behaviour significantly reduces the rate of rationality in behaviour of homo sapiens (Keller, 2005).

Ritualism was a milestone in the development of human society. The human culture which was formed step-by-step embodied the stems of regulatory systems. Regulatory systems of ethics, law and religion have gradually been split from this entity of regulatory and ritualised behaviour.

Let´s imagine the life before the Neolithic revolution. The main source of nourishment in the hunter-gatherer society were commodities that required mutual cooperation to secure.

This can be exemplified by the fact that hunting was participated by more hunters and women were keeping the home fires burning in the meantime. It goes without saying that the food supply gained by hunting had to be split in an admissible manner among the group members. Hence, something similar to "social consensus" had to be created.

It most likely happened in the similar form like one can witness in the animal realm. The catch mostly has to be divided at the presence of the group members in order to prevent controversies and violence in the group. A dominant individual divided the catch in a high place or in a big and well visible stone according to the needs and merits of the individual group members.

The ceremonies, social functions and ethical conceptions have their origin in the early phase of the development of the society.

It is noticeable that the development happened in a number of remote locations of the world at one time and independently from each other, whereas the individual groups came to very similar method of organisation of the society: the state. The reasons why the state forms were similar lie in the basic physiological and psychological presumptions of man as a biological creature (Popper, 2010).

2.2 Inspiration from Ancient times

"Financial administration as an enlivening mechanism of the state must necessarily not only strive for "keeping the state alive", but – like the efforts of man are not targeted to mere existence – the state must advance and satisfy thereby the needs of its inhabitants" (Mrkývka, 2012)

The ancient Egyptians believed that the human soul consists of three components. The first component "KA" represented vital essence distinguishing the living substance from the dead one. Vital functions which we are not able to directly control were attributed to this component. It includes the digestion process, heart beating and activities of glands and passive nervous system. The "KA" maintenance requires that men´s physiological needs would be satisfied.

"BA" is another component of the human soul; it corresponds to today´s notion of personality. This component represented an active part of the soul. Human body activities which we are able to directly control,

or control by our mind, were attributed to this component. It comprehends the activities of striated muscles, eye control, and the ability to think. Active presentation of the individuals in the world was the main function of "BA".

"ACH" is the third component. It came to existence as a result of connection of "KA" and "BA". Now it could be intellect. The task of "ACH" was to maintain "KA", which in fact meant gaining of physiological needs to maintain life through "BA"."ACH" was further to provide opportunities for reproduction (gaining of partner´s favour, education and protection of children, and the like).

The Egyptians applied their ideas of human soul to state organisation. They perceived their state as a living organism having metaphysical attributes of living creatures. Based on the above-said, "KA" represented working people (unprivileged layer of the society) constituting, as a passive element of the state, its basis."BA", able to perform activities aimed at protecting or ensuring stability of special situation, represented state apparatus inclusive of army, scribes and clergymen. Pharaoh represented "ACH" of the state which interconnected "KA" and "BA". In other words, pharaoh was a link which coordinated the activities done by the state administration for the sake of maintaining the status when the people are able to advance. It thereby created conditions for the society not only to survive from day to day, but conditions for extended reproduction.

The inspiring example of people who have established the longest existing realm in human history simply requires analogy in today´s world. The financial and legal regulatory activities including financial administration represent an enlivening mechanism of the state which had and continues to have potential, along with establishing conditions of supporting the society, to provide opportunities for extended reproduction of the society.

Financial administration has a broader meaning than the public administration of public financial means. From the aspect of subject-matter it spans administrative control (administration) of public finance and financial system. From the aspect of organisation the financial administration means a conglomeration of institutions empowered to carry out the financial administration (Mrkývka, 2008).

Wiener, author of the modern definition of cybernetics defined it as the scientific study of control and communication in the animal and the machine.

The word "cybernetics" comes from the Greek word "kybernetes", that is, helmsman. The word "cybernetics" corresponds to Plato´s classic idea of governance and governor - a helmsman taking out a ship (municipality) from tempestuous waters to a safe place (Meyers, 2002).

In fact many of the belief systems of different cultures and civilizatioms shove an interesseting similiarity regarding the nouns, with which they describe the parts of the soul. The hebrew contains a similiar teaching regarding the three parts of the soul. According to hebrew scholars the soul of a living person consists of three parts. Rabbi Aryeh Kaplan summarizes the teaching in the Handboock of jewish thought followingly: „The *neshama* is affected only by thought, the *ruach* by speech, and the *nefesh* by action." (Aryeh, 1992). Plato expresses a similiar wiew, by chategorizing the parts of the soul. The parts are located in different regions of the body the *logos* is located in the head, the *thymos is* located near the chest region and the *eros* is located in the stomach. In Platos works the three parts of soul represent the castes of the society. Ech part of the whole has to work together to form a complete society.

BA „soul"	Neshama „thought"	Thymos „emotion"
ACH „mind"	Ruach „speech"	Logos „reason"
KA „spirit"	Nefesh „action"	Eros „apetite"
Egyptian names of the parts of the (living) soul	Hebrew names of the parts of (human) soul	Greek names of the parts of the soul (Platonic)

What matters most in case the systems are created intentionally is that the unit at issue would show desirable behaviour. In this respect it is important to achieve the target behaviour of the individual elements of the system. The target behaviour of the individual elements of the system must be in compliance with the total arrangement of links and relationships among them so as to ensure the desirable target behaviour of the system as a whole (Grúň, 2009).

From the aspect of systems theory, given the ambient area, the system is a relatively closed unit consisting of elements. The system is further defined by its structure and functions of its elements. It works based on patterns

which differ from the patterns pertaining to the work of the single elements of the system. Structure means interrelated network of links and relations between the elements (Grúň, 2009).

The public financial activities, in a larger sense, comprehend financial and legal standards modulating the social relations associated with generating, redistribution and use of public goods. The financial and legal regulation is to first of all ensure sources for functioning of the state apparatus. In principle, the state cannot exist without having such a component.

On the other hand, the public financial activities encompass mechanisms regulating the fundamentals of the monetary system existence and provision of functioning of the financial market (Mrkývka, 2012).

Basic categories appearing in the public financial activities area are: public authority, public interest, and public finance. The up-to-date results of social sciences and historical and empiric approach outline the origin and development of these fundamental national-economy-related terms.

2.3 Public Values and Public Finance

"The conception of values is also capable of unifying (under standard circumstances) obviously different interests of scientific disciplines dealing with human behaviour." (Rokeach, 1973)

It can be said that people "were longing" for the existence of public finance and fulfilment of its functions. In case of lack of these assumptions, state could not be established, or overcome the poor time periods as a group. Given these facts, it is interesting to compare the factual reasons why the scripts originated and counting in general.

The notion "public finance" has two basic meanings: practical activity of the public administration and theory (Hamerníková and Kubátová, 2004). The duo Hamerníková and Kubátová has elaborated a definition which will further serve as a theoretical basis:

"The term "public finance" denotes specific financial relations and operations running in the economic system between the public administration authorities and institutions on one hand and the other entities on the other hand (that is, citizens, households, companies, not-for-profit organisations and the like) (Hamerníková and Kubátová, 2004)."

The above-mentioned definition assumes knowledge of terms, such as public administration, financial relations, and economic system. At first glance, it seems to be obvious that it is a matter of an abstract global term, artificially originated as a theoretic instrument or a scientific discipline. However, just the opposite is true. The term public finance is now used to denote system which in a manner was a prerequisite of establishment of society along with patterns regulating the relationships existing inside it; the patterns works strictly logically being subject to physical-like patterns.

Functions of public finance are as follows:

a) allocation function
b) redistribution function
c) stabilisation function

Allocation function represents an effort to secure material needs necessary for the individuals of the society to survive. Redistribution function means an effort to reduce social inequalities and to increase solidarity in the society. Stabilisation function represents an effort to conserve the status of the society and an effort for a status quo, which means preservation of the society in general.

"Writing and counting have identical origin. The symbol whereby things were fixed and number whereby their amounts were stated are close to each other. This, of course, means that culture was based on economic thinking. Those who consider materiality to be an enemy of culture in general will not like this sentence. The inscribed, clay, Sumerian tablets prove just the opposite. Many of the earliest texts are sales and purchase agreements, delivery notes and accounts." (Uhlig, 1992)

Economic thinking was most likely necessary in order to overcome the poor or unfavourable time periods. Those periods (seasons of the year) occurred in various parts of the country at irregular time intervals, duration and probability, but repeatedly, which is typical for nature.

Awareness of those repetition patterns of nature was the first step of mankind towards colonisation of territories which are not equally favourable for human body during the entire year. Knowledge of duration of the poor season of the year (winter) and quantification of supplies made people possible to manage the supplies (goods) in such a manner that the group would survive until the next favourable time period.

Man as a creature has not in fact changed since the beginning of human history, which means that our genetic structure in principle is the same like that of Neolithic people or before the Neolithic revolution happened. For our physical welfare we need quite small amount of food and can bear, or even need – from today´s point of view – extremely much physical movement so as to remain healthy.

Welfare-related psychological needs have not probably changed markedly either in the course of history though it can seem that the opposite is true. Despite ideological struggles occur, the basic psychical values, typical for people, have remained more or less unchanged. Schwarz says about "universal conditions of human existence" which include:

a) needs of persons as biological organisms,
b) conditions unavoidably necessary for coordinated social interaction, and
c) survival and welfare of the society.

Schwarz derived ten types of values from three universal conditions of human existence different from the aspect of motivation. The three basic assumptions of human existence, however, apparently correspond with the functions of public finance.

It is hence possible that aside from the stable physical needs man also has more or less stable psychological needs. In order to ensure continuous development of the society, it is necessary to secure that not only the economic goods, but mental values, described by psychology experts, would be made subject to the public finance system.

3 Conclusion

Shortly, stable systems existed in the antiquity to eliminate the contradiction between justice and positive law. Before the system would became unbearable, the leaders made changes which reduced the inhabitants´ dissatisfaction level. The aim and contents of the power and regulation system is to ensure the material basis of existence of the society. The power superstructure depends in the condition of the economic basis in society. The existence of specialized rulers ruling in full time just like the existence of the professional administrative and military or coercive apparatus, respectively is not possible without producing the surplus product which economically ensures

these strata. The public power requests to pay due payments from the economically active majority of population.

The investigation of the world´s historical regions shows that independently on the degree of development of productive forces and technologies, the successful development in various periods and localities was based on certain more or less similar organizatory principles. In the introductory parts, in the context of the life of historical regions and advanced results of social and economic sciences, there is offered an analysis of financial and legal aspects of development of these regions as well as the development of various historical forms of financial and legal regulation. Here is an enumeration of elementary organizatory and financial and legal regulations from Ancient Egypt, Old Babylonian Empire, Old and New Testament as well as from The Middle Ages. The three entities of individual and collective being of KA-BA-ACH in Ancient Egypt, contracts of purchase and sale, delivery notes and accounts on clay tables of the Sumerian Empire, the creation of economic cycles abolishing debts (Jubilea) in each seventh year of the Sabbath – all this shows the elementary financial and legal instruments of constituting prosperity of the said region in the early phase of development of human civilization. The development through medieval forms of public finances gradually led to the constitution of a complex system of financial law.

Table 1[10]

Needs of individuals as biological organisms. (Securing of material needs necessary for the goods producers to be able to work)	Allocation function	Satisfaction of needs of the whole society	Social needs and their satisfaction	Functionalism (Zweckmäßigkei)	Efficiency support

10 The first column contains basic preconditions of human existence, the second column contains the functions of public finance, the third column contains the extension functions "Államháztartás", the fourth column contains categories associated with the term "Skarbowość", the fifth column contains the purposes of the existence of law and the sixth column contains the role of the government. In lines 1-3, categories and notions from various scientific disciplines that are associated with the same social phenomenon are stated and distinguished by colour.

Conditions unavoidably necessary for coordinated social interaction	Re-distributional	Ensuring treasury income	Gathering, administration and use of material basis of public sector	Justice (Gerechtigkeit)	Support to justice
Survival and welfare of the society	Stabilisation function	Tesaurition of a part of income	Public finance and public economy	Legal certainty (Rechtssicherheit)	Supporting stability
Basic assumptions of human existence (Schwartz, 1994)	Public finance functions (Tomášková, 2006)	Functions of superstructure "Államháztartás" (Hóman, 1921)	Categories associated with the term "Skarbowść" (Mrkývka, 2012)	Radbruch - Purpose of law (Radbruch, 1957)	Samuelson - Functions of government (Samuelson, 1995)

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BUDGET LAW IN THE SYSTEM OF RUSSIAN LAW

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Abstract

The main aim of the paper is to define place of budget law in the system of Russian law as well as boundaries of budget law legal scope. Author tries to justify that budget law is a sub-branch of financial law. It regulates just some groups of relations concerning collecting of budget revenues and implementation of budget expenditures. Conclusions of the paper are based on researches of soviet and modern scientists; court practice is used as well.

Key words

Budget law; financial law; scope of legal regulation; budget; revenue; expenditure obligations.

JEL Classification

K30, H60

1 Introduction

Last time in Russian financial law science there are a discussion about a place and boundaries of budget law in the system of Russian law. Some authors consider budget law as an independent branch of law; other includes it in the system of financial law. It this paper there is an attempt to find additional arguments for estimation of the budget law as a sub-branch of financial law. Furthermore, author proves that budget law regulates just distribution of budget revenues within the Russian budget system and arrangement of budget expenditure administration.

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2 Chapter 1

Budget law is traditionally considered as a sub-branch of financial law in the Russian Federation.

Financial law is an independent branch of law that regulates relations arising in the sphere of public finance activity, i. e. in the sphere of planned collecting of financial resources to public financial funds, their distribution and a use. Budget law regulates the same relations but concerning budget funds (federal, regional and local).

At the same time, some scientists assert that budget law is independent legal branch. In their opinion budget law has its own scope of legal regulation, its own codifying act (the Russian Budget Code).

However, majority of financiers in the Russian Federation do not support separating of budget law, tax law and another sub-branches of financial law. In some cases the Constitutional Court of the Russian Federation takes up the same position. For example, in 2001, it invalidated Federal law on sales tax; however, the Constitutional Court took into account that the sales tax was a source of regional and local budget revenues. Therefore, it reserved entry of the decision into the legal force until the end of fiscal year (until 2002) (Constitutional Court of the Russian Federation: Decision no. 2-P (2001). This decision of the Constitutional Court confirmed that it was impossible to solve tax law problems in insolation from budget law and that budget law and tax law were part of holistic financial law.

As a rule, the scope of budget law regulation is defined as relations concerning collecting, distribution and a use of federal, regional and local budget funds. However, such definition lets include in the scope of budget law regulation relations that belong to another sub-branches of financial law or even to another branches of law. For example, relations concerning collecting of budget funds are regulated by tax law as well; a use of budget resources could be scope of civil law or social security law regulation.

For that reason, it is necessary to set boundaries of budget law regulation especially with regard to collecting and a use of budget funds.

3 Chapter 2

The first group of relations concerning budget funds is collecting of budget revenues. In the Russian Federation there are a sufficient number of studies that discuss the question of the boundary between the budget law and tax law (law of non-tax revenues). Many authors hold the opinion that the budget law regulates relations arising in the process of revenue distribution (Bescherevnykh, 1960: 15); sets a list of revenues and an order of their distribution between budgets (Tsipkin, 1973: 17); determines a legal nature, a list, and an amount of state budget revenues as well as an order their coming to budget (Piskotin, 1971: 51). Budget law does not regulate the relations arising in the process of collecting of money resources transferring to budget funds. These relations are regulated by other branches of financial law (Bescherevnykh, 1960: 16–17).

Mentioned conclusions were drawn in Soviet time. However, they have still kept their relevance. Authors write that budget legislation does not regulate the relations directly connected with the mobilization of money resources in budget. Their regulation is carried out by the tax legislation, which is closely interacted with the budget legislation (Konyukhova, 2009: 55); analysis of the tax law and budget law interaction allows to conclude that the administration of budget revenues goes through two stages: 1) the activity of tax authorities that collect revenue in budget, which is regulated by tax law; 2) the activity of the Federal Treasury that distributes received revenues in accordance with the adopted budget that is regulated by the budget legislation (Kuzmina, 2004).

There is confirmation of that approach in modern Russian legislation and in legal practice. For example, the Constitutional Court of the Russian Federation in one of its decision held that tax relations between taxpayers and banks concerning execution of remittance order for tax payment were regulated by tax legislation; relations concerning credit of the money resources to budget accounts were a scope for budget law regulation (Constitutional Court of the Russian Federation: Decision no. 24-P (1998). This court decision confirmed that the budget law does not regulate the mobilization of money resources to the budget system. According to the mentioned decision, budget law comes into effect only when the money resources have been credited to the special budget accounts intended for distribution

of revenues between federal, regional and local budget accounts. In other words, the main task of budget law is to distribute received revenues between specific budgets of the Russian budgetary system.

In Russian financial law science there is a debatable question about relations concerning return of overpaid (overcharged) taxes and another revenues from budget system. Some rules of Russian financial legislation testify about budget law legal nature of these relations. For example, the Russian Budget Code includes return of overpaid (overcharged) revenues and interest for delay of such return and interest on the overcharged sums in relations concerning budget revenue administration (the Russian Budget Code, Art. 218). Tax legislation has similar rules. The Russian Tax Code contains norms confirming the budget law nature of the relations. For example, it prescribes that a remittance order for a return of overpaid taxes issued by tax authority shall be submitted to the Federal Treasury for the return the taxes to taxpayer in accordance with the budget legislation of the Russian Federation (the Russian Tax Code, Art. 78, 79).

At the same time, there is an opposite point of view. Some scientists pay attention to Art. 152 of the Russian Budget Code and insist that a payer is a subject of neither budget process nor budget relations; legal nature of property relations concerning revenue return with participation of payer should be defined by the nature of returned payment (Koustova, 2011: 350). In court practice there are precedents when courts have stated that the Federal Treasury does not bear the budget responsibility to taxpayers (the Russian Budget Code, Art. 167).

On the ground of mentioned points of view it is possible to draw a conclusion that budget law should regulate only relations connected with transferring of money resources from federal, regional or local budget accounts to a special budget accounts of the Federal Treasury for the return of overpaid (overcharged) budget revenues. The purpose of these relations is to provide for further return of overpaid (overcharged) sums to payers. At the same time return of the overpaid (overcharged) budget revenues from the special budget accounts of the Federal Treasury to payers is a scope for tax law (or law of non-tax revenues).

The practical consequence of the drawn conclusion about scope of budget law regulation of relation concerning budget revenues reflects in financial legislation and in practice.

For example, tax legislation regulates paying of taxes and fees by payers (the Russian Tax Code, Art. 45) as well as transaction of the paid taxes and fees by banks to the budget system of the Russian Federation (the Russian Tax Code, Art. 60). The Russian Tax Code enacts legal responsibility for violation of the payers and bank duties (the Russian Tax Code, Art. 122, 133, 135). At the same time budget legislation provides for norms of budget revenues distribution (in per cent) between federal, regional and local budgets (the Russian Budget Code, Chap. 7, 8, 9).

4 Chapter 3

The second group of budget relations is relations connected with budget expenditures, with using of budget resources.

The boundaries of relations connected with budget expenditures have stirred up debate for a long time. In Soviet period scientists wrote that it was advisable to refer to the budget law just norms that set the total amount of public expenditure and budget appropriations for certain directions, regulated an order of expenditure distribution between different budgets as well as an order of additional revenue spending, norms regulating the procedure of budget appropriations implementation and cash administration of budget expenditures. Other legal norms regulating budget resources spending were advisable to refer to sub-branch of public expenditure (Ivanov, 1967: 51).

In some papers there is an opinion that relations concerning a use of monetary funds ... are not financial-economic, are not the product of public financial activity and are not included in financial relation. However, at the same time, the relations concerning arranging of the use are included in scope of financial law (Khudyakov, 2010: 73).

Actually, budget law regulates the procedure of budgets expenditure administration as well as inter-budget relations providing the distribution of the total sum of budgetary system expenditures between different budget levels. In addition, the budget law provides for the allocation of budget

appropriations for budget expenditures implementation by specifying them in laws on budget. At the same time, legal grounds of the expenditures are defined in special laws, other statutory acts, contracts and agreements that sources of other branches of law (not financial law).

The aforementioned correspondence of budget law and other branches and institutions of law is reflected in current Russian legislation. The Russian Budget Code gives the concept of expenditure obligation (the Russian Budget Code, Art. 6). In framework of expenditure obligation the Russian Federation, its subjects or municipal units are obliged to pay money resources to another subject. The legal grounds of the expenditure obligations are defined in special laws, other statutory acts, contracts and agreements. It is obvious that these laws, other statutory acts, contracts and agreements can belong to different branches of law. For example, they can be based on the social security law, civil law contracts, etc. The legal nature of the laws, other statutory acts, contracts and agreements determines legal branch belonging of expenditure obligations.

It appears that the majority of expenditure obligations are not scope of budget law (financial law). The Constitutional Court of the Russian Federation pointed out that federal law on federal budget created appropriate financial conditions for the implementation of the norms fixed in other earlier adopted federal laws that provided financial obligations of the state, i. e. envisaging for granting money resources as well as necessary expenditures. At the same federal law on federal budget neither created nor repealed rights and obligations (Constitutional Court of the Russian Federation: Decision no. 9-P (2004). That is why budget law should not create expenditure obligations as a rule. An exception to this rule is expenditure obligations concerning inter-budget transfers. Their bases are the norms of the Russian Budget Code, laws of subjects of the Russian Federation on inter-budget relations and the laws on budget. As a result, the expenditure obligations concerning inter-budget transfers are included in scope of budget law.

The practical consequence of the drawn conclusion about scope of budget law regulation is that the court decisions concerning enforce of money resources from budgets should be relied not on budget legislation but on the norms of those branches of law that are the legal ground of the expenditure obligation.

For example, the Supreme Commercial Court of the Russian Federation explains that public institutions that are budget funds recipients must take financial obligations by negotiating contracts (agreements) within the limits of their budget estimates. However, this rule cannot be considered as grounds for dismissal an action concerning enforcement the debts if they exceed the budget estimate limits (Supreme Commercial Court of the Russian Federation: Resolution of the Plenum no. 23 (2006). In other words, courts should implement legislation that is a ground of negotiated contracts (agreements) not budget law.

In another case the Supreme Commercial Court of the Russian Federation was solving problems concerning return of budget loans. Debtor alluded to expiration of imitation period. The Russian Ministry of Finance (state representative) paid attention that budget law did not prescribe any imitation period. The Supreme Commercial Court explained that when litigation was connected with budget resources extended on returnable and reimbursable basis these relations were civil because they did not based on administrative or other power subordination (Supreme Commercial Court of the Russian Federation: Resolution of the Plenum no. 23 (2006). In other words, the Court estimated legal nature of the relation and recognized civil law belonging of the relations in spite of their connection with budget funds.

5 Conclusion

It is possible to draw a conclusion that budget law is a sub-branch of financial law. The budget law regulates just some relations concerning budget revenues and expenditures, i. e. distribution of budget revenues within budget system (between federal, regional and local budgets) and arrangement of budget expenditure implementation.

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THE MUNICIPAL BUDGET IN A RELATION TO THE PUBLIC CONTRACTS

Michal Šilhánek[1]

Abstract

This contribution deals with municipal budget in relation to the public contracts especially in case of loss of funds for realization of public contracts due to reduction of subsidy. This contribution deals with options to implement project with new resources as well.

Key words

Public contract; budget; municipality; budgetary rules; subsidy; law.

JEL Classification

H70, K12

1 Introduction

In accordance to an Act no. 128/2000 Coll. on Municipalities Act, as amended (hereinafter referred to as "ZO"), the municipality is "public corporation and has its own property. The municipality acts in legal obligations in its own name and held responsibility arises from those legal obligations."

Simultaneously the municipality is obliged under the relevant provisions of Act no. 250/2000 Coll., on Budgetary rules of territorial budgets, as amended (hereinafter referred to as "RPÚR"), on the basis of the assembled manage annual budgets and financial perspective.

According to par. 3 section 1 RPÚR is "budget perspective an auxiliary tool of municipalities or union of municipalities used for middle-term financial planning of development of its economy."

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According to par. 4 section 1 RPÚR is "budget of municipality and of union of municipalities the financial plan guiding the financing of activities carried out by municipality or union of municipalities."

Awarding of the public contracts by the municipalities is regulated particularly by the Act no. 137/2006 Coll. on Public Contracts, as amended (hereinafter referred to as "ZVZ"). In the awarding process subsequently enter other regulations, which more or less influence the awarding of the public contract.

These regulations are mainly internal rules of the municipality which regulates the procedure of awarding the public contract, especially in the case of small-scale public contract which are excluded of the regime of ZVZ. Other documents significantly affecting the above mentioned process are then the rules of individual providers of grants funded by the European Union.

Legal obligations established as an result of the awarding procedure are usually a major expenditure item in each of municipality´s budget and in context of budget planning for the next financial period (the calendar year) is therefore a crucial point to create a high-quality plan of expenditures undertaken on the basis of contracts concluded as a result of the award of public contracts.

The aim of this text is not primarily to dismantle the planning and approval process in relation to the planned expenditure on the basis of the underlying tenders for the public contracts relating to a financial period.

The issue worthy of particular attention are situations in which on the basis of certain circumstances there is either the shortage of income of the municipality or conversely, there are an unexpected expenditures beyond the budget.

This issue is then highly relevant in relation to public contracts co-financed by the European Union and the possible penalties for breaching of the conditions for granting subsidies, especially in relation to breach of awarding procedure rules.

The municipality is obliged in accordance to par 15 RPÚR to manage according to the approved budget and in accordance with legal regulations throughout the financial year and carry its own internal control of financing based

on the approved budget. The municipality is afterwards obliged to subject to control by external authorities. This kind of external control is extended by the other authorities which control the management of the subsidies.

During the fulfilment of the duties based on the approved budget usually occurs, on the basis of objective causes, to changes in the income or expenditure part of the budget.

If we focus on the performance of public contracts, we can identify following moments in which occur the need to solve the change of already approved budget (in this article we don´t take into account the not-realised projects which were reflected in the budget and cause the surplus):

1. The need of realization of the other investment projects which were not taken in account in the process of budgeting (e. g. repair in case of emergency)
2. Loss of funds for realization of public contracts due to reduction of subsidy (already provided or promised).

In such a situation there logically appears a change of approved budget because the municipality has to ensure reimbursement of expenses which are not included in approved budget or there is a loss of revenue assigned to a specific project.

In my opinion, par. 16 section 1 RPÚR provides the possibilities in which the changes of budget are allowed. These change I consider to be substantive because that are changes which influence fulfilment of the incomes and expenditures. To these changes then occur on the basis of the budget measures provided in same paragraph.

Unplanned capital expenditures are relatively common and can be incorporated into a municipality´s budget and municipalities usually create a budget reserve.

The evidence capable of having major impact on the fulfilment of approved budget is the decision to reduce either promised or already paid subsidy. In this period, then will occur especially grants which are co-financed by the European Union.

In view of the fact that in this period ends the programming period 2007-2013 (based on additional challenges still takes place in the year 2014 the administration and processing of requests grant funds allocated to the

above mentioned period) and are still not clear conditions for the next programming period (2014-2020), is expected the increase of the intensity of ex post controls of individual grant projects, especially in relation to public procurement being co-financed by the European Union.

The issue of controls of procurement of public contracts and the reduction of subsidies is actual and is intensively discussed, particularly in relation with par 14e act. no. 218/2000, On Budget rules, as amended. Under this provision is the provider of the subsidy entitled not to pay the whole amount of subsidy if he considers that there is a breach of awarding procedure rules. Essential parts of this provisions are the facts, that is sufficient to constitute an infringement of public procurement rules (not the breach of law or disrespect of case law, what is highly debatable in Czech law system as well); is possible to find an infringement without any legal backing (e. g. the referring to the basic principles).

Simultaneously, the same provision states that the decision of the provider of the subsidy is not taken in an administrative procedure (Administrative Code) which means that the judicial review is excluded. The question is whether such a provision is in accordance with the constitutional order of the Czech Republic.

Although the above mentioned paragraph is not the primary subject of this article, in my opinion, was necessary to mention it, as well as with regard to this provision can be expected (and in practice, such cases have already appeared) reductions of subsidies on the basis of this provision, the recipient of subsidy is fundamentally limited in ability to effectively defend against this practice.

Afterwards is the proceeding about breach of budgeting discipline against the recipient opened by financial authority; if already paid subsidy is recovered by the proportional part or the whole entire. If the subsidy has not already been paid, the provider will not pay the corresponding part of the subsidy.

Above mentioned process is significantly liable to effect the fulfilment of approved budget of the municipality because such occurrence is not usually reflected in budget reserve and is expectable that in financially substantial investments can cause the situation that the budget loss is so high that the reserve would not cover even in a part.

The question is how to replace the budget loss for certain project. There are several alternatives:

1. Loan, gift, subsidy paid by county or state;
2. Usage of budget reserve or reallocation within the approved budget;
3. Commercial loan;
4. Interruption of the realization of the investment project and preservation

The least costly option which occurs is the loan, the gift or the subsidy from the county or the state; this alternative is more or less theoretical and according to my experiences can be expected within the relation between city district Prague and Prague City hall, especially because of that existence of city district Prague is derived of the Prague City hall.

With regard to the above mentioned can be expected that using the budget reserve is very unlikely or can be expected to amortize only the part of the budget loss. Reallocation means to stop other projects which have been planned for the budget period. This alternative can be considered as one of the most likely.

Another options is, as is mentioned above, ensure the financing within the commercial loan. Providing of such a loan is, of course, connected with paying a fee what means the obligation of the municipality to make a security for loan through the procurement of public contract. This process is especially in terms of time rather difficult and in some point of view is capable of create a complication in the realization of the project.

One of the last alternative, which is used as an ultimate solution, is the complete cessation of the realization of the project. In such a case there is wasted cost on a preparation and partial realization of the project. It would be possible to consider whether it was prepared with due care and whether real possibilities of a municipality for financing the project were considered.

2 Conclusion

To summarize above mentioned, the creation of the separate budget, and even in the connection to investments based on procurement of public contracts, is more or less administrative process which is based on the political decision-making of the municipality.

On the other side, loss of financial resources for the special investments is based on circumstances which political representation, meaning the municipality leadership or even administrative of the municipality, cannot more or less affect. The municipality is often not able to develop effective vindication in such a case, when is consider, that loss of financial resources is not in accordance with law.

Simultaneously there are ways to ensure sufficient financing for projects which financing is significantly compromised. It is necessary to submit that it depends on the abilities, especially management abilities of the representatives of the municipality and it´s dealing with the loss of financial resources.

The most ideal alternative is replacing of the loss of financial resources through subsidies or other similar means which do not imply indebtedness of the municipality or reallocation within the budget which concurrently means no-realization of the other projects.

To municipalities, which intensively receive subsidies from EU, is possible to recommend the creation of sufficiently budget reserve for unforeseen loss of financial resources caused by proceeding about breach of budgeting discipline.

It is obvious that this procedure means the reduction of certain investment projects, on the other side sufficient reserve can be in a critical situation the essential emergency brake when occur the problems with receiving the subsidies.

References

Act no. 128/2000 Coll. on Municipalities Act, as amended.

Act no. 250/2000 Coll., on Budgetary rules of territorial budgets, as amended.

Act no. 137/2006 Coll. on Public Contracts, as amended.

Act. no. 218/2000, On Budget rules, as amended.

ACCOUNTABILITY OF THE DIRECTOR AND EMPLOYEES FOR THE INFRINGEMENT OF PUBLIC FINANCE DISCIPLINE IN CONNECTION WITH AWARDING PUBLIC PROCUREMENT

Wiesława Miemiec[1]

Abstract

The article presents legal issues in the matter of awarding procurement and its implementation which result in the accountability stipulated by the regulations of the Act of 29 January 2004 – Law of public procurement and the accountability stipulated by the regulations of the Act of 17 December 2004 on the accountability for the infringement of public finances discipline. Supervision of special character concerning public procurement is exercised by the commissions competent in the matters of accountability for the infringement of public finances discipline. It follows mainly from the Art. 4 and 4a of the Act on accountability stipulates the subjects who may be held accountable for the infringement of public finances discipline as well as from the provisions of Art. 17, 17a and 18c of the Act on accountability that not only the persons who awarded public procurement but also the persons involved in preparing and executing the procedures, those active after the procurement was awarded will be held accountable in connection with the procedures of awarding public procurement. The paper focuses on the accountability of the director for the infringement of public finance discipline in connection with awarding public procurement in addition to director's direct accountability. The idea of an accountability concerning managerial supervision and accountability of employees and other persons are also discussed.

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Key words

Accountability; director; infringement of public finance discipline; awarding public procurement; Law of public procurement.

JEL Classification

K12, K31

1 Introductory remarks

Supervision of special character concerning public procurement is exercised by the commissions competent in the matters of accountability for the infringement of public finances discipline. Awarding procurement and its implementation result in the accountability stipulated by the regulations of the Law of public procurement [Art. 199-203 of an act of 29 January 2004 Law of public procurement, uniform text from 2010, Dz. U. (Journal of Laws of the Republic of Poland) No. 119, pos. 177 with amendments]. and the accountability stipulated by the regulations of the Act of 17 December 2004 on the accountability for the infringement of public finances discipline (Act of 17 December 204 on the accountability for the infringement of public finances discipline, uniform txt from 2013, Dz. U. from 2013, pos. 168, further on in the text referred to as the Act on accountability).

Basic premises determining the possibility of being held accountable for the infringement of public finances discipline are regulated by chapter two of the Act on accountability. They will not be presented here due to the subject of this discussion, but a few basic principles can not be ignored. The subject accountable for the infringement of public finances discipline is a physical person who committed an act meeting the features stipulated by Art. 17. 17a and Art. 18c of the Act on accountability, and stipulated by the legislation in force at the time of its commitment (Art. 19(1) of the Act on accountability – the principle of nullum crimen sine lege). In the subsequent section of this regulation the Act requires that the accountability for the infringement of the discussed public finances discipline may be imputed solely to the person who may be attributed with guilt while committing the infringement. Thus, indicating a formal infringement of legal provision is not sufficient for imputation of accountability – it is necessary to prove the perpetrator's guilt [Ruling of the Main Adjudicating Committee (MAC)

of 23 November 2006, DF/GKO-4900-83/103/06/2564, unpublished]. Guilt constitutes the subjective grounds for accountability. However, a person can not be declared guilty if the infringement could not be avoided even though all necessary procedures were followed appropriately by the person responsible for performing the duty, which – if neglected or performed inappropriately – constitutes an act infringing public finances discipline (there are circumstances excluding accountability in question, Art. 17 and 28 Act on accountability). In the currently binding legal system it is immaterial whether the act was committed with intentional or unintentional guilt.

Art. 4 and 4a of the Act on accountability stipulates the subjects who may be held accountable for the infringement of public finances discipline.

The specific character of the procedures for application for public procurement restricts the circle of persons who may be held accountable for the infringement of pubic finances discipline. It follows from the provisions of Art. 17, 17a and 18c of the Act on accountability that not only the persons who awarded public procurement but also the persons involved in preparing and executing the procedures as well as those active after the procurement was awarded will be held accountable in connection with the procedures of awarding public procurement.

In accordance with Art. 4 of the Act on accountability, accountability for the infringement of public finances discipline will be imputed to the persons constituting the body executing the budget or financial plan of a entity of public finances sector or the managing body of a subject outside the public finances sector awarded public means to use or manage, or managing the property of these entities or subjects, directors of entities of public finances sector, employees of entities of public finances sector or other persons who were entrusted with the performance of duties in such a entity, which – if neglected or performed inappropriately – constitutes an act infringing public finances discipline according to a separate legal act or on the basis of its provisions. The accountability is also imputed to the persons performing the activities connected with the use or management of these means in the name of the subjects from outside the public finances sector awarded public means to use or manage. However, a procedure of awarding public procurement has its specific character and the circle of these subjects is not exactly the same. It comprises directors of the entities awarding

procurement, employees of these entities who were entrusted with performing the activities concerning preparation and executing the procedure, persons performing the activities in the name of the subjects from outside the public finances sector awarded public means to use or manage if they are obliged to apply the regulation of the Law of public procurement (Act of 29 January 2004 the Law of public procurement, Dz. U. 2013. 907 uniform text with subsequent amendments) and the so-called representative of the ordering party (Miemiec, 2013: 217). The most important role among all these subjects is played by the director of the entity awarding procurement, who will be held accountable in the widest scope; therefore I will begin the discussion with presenting this subject matter.

2 Accountability of the director for the infringement of public finance discipline in connection with awarding public procurement

In each entity from the public finances sector, independently from its legal form or the area of activity, the superior role is played by its director (Bojkowski, Przybylska, 2012: 27). Regulations and the special role to perform render him or her responsible for the whole management of the entity, stipulating a number of sanctions for each infringement of the regulations describing his or her duties, including the accountability for the infringement of public finances discipline discussed here.

In common usage a director is associated with a manager performing an important function within the structure of a given subject, organising and supervising work of a given institution. Legal acts provide several definitions of a director of an entity. In accordance with the regulations of the Act of 29 September 1994 on accounting (Dz. U. from 1994, No. 121, pos. 591 with subsequent amendments), the director is a member of the board or another managing body, and if it is a multiperson body – members of this body (excluding the representatives nominated by this entity). Art. 53 of the Act on public finances (Act of 27 August 2009 on public finances, Dz. U. 2013. 885 uniform text with subsequent amendments) states only that an entity's director is responsible for the whole financial management of this entity. This act, as well as the Act on the accountability for the infringement of public finances discipline, do not stipulate a legal definition of the director.

Such a definition was formulated by the regulations of the Law of public procurement. In accordance with its Art. 2(3), whenever a legal act mentions the director of an ordering party (i. e. the director of an entity from the public finances sector awarding a public procurement), it is a person or body who – in accordance with the binding regulations, statute or contract – is authorised to manage the ordering party, excluding the representatives nominated by the ordering party. In the literature and case-law a specific model of a director has emerged – a person whose educational background is appropriate for the occupied post, who has professional qualifications, personal predispositions and the experience enabling generating and spending public means and managing the entity's property in accordance with the existing regulations in an appropriate, economical way respecting the principle of achieving the best results from the executed investment (Lipiec-Warzecha, 2008: 1). This notion was introduced into the legal circulation relatively recently as a result of doubts and interpretation difficulties in the case-law (Stachowiak, Jerzykowski, Dzierżanowski, 2012: 30).

In order to establish who in each case will perform the function of the director it is necessary to refer to relevant legal regulations. Usually the director of an entity features under various names, such as "chief", "president", "mayor", etc. Sometimes it is necessary to refer to the systemic regulation or the regulations of the internal law, such as a statute. A director's position may also be determined by the contract of employment, which defines his or her responsibilities. Therefore, when determining the accountability of an entity's director, the most important is the type of performed function rather than its name (Bojkowski, Przybylska, 2012: 28). Moreover, a director may be accountable in two ways. Firstly, he or she may be accountable for the acts committed directly in connection with performing his or her duties; secondly, the director is accountable for failing in his or her duties in the scope of managerial supervision. In the latter case, the director will be accountable for the act which he or she did not commit directly.

3 Director's direct accountability

The director's role is very important and involves a wide scope of responsibilities. He or she is authorised to make decisions concerning on-going functioning of an entity, but, primarily, the director is a person authorised

to represent his or her entity in external relations, including concluding contracts concerning public procurement in the entity's name (Miemiec, 2013*:* 223).

The Act on accountability for the infringement of public finances discipline refers to the director's accountability at several levels. Firstly, the director is accountable for the whole financial management of an entity. Unfortunately, the regulations do not stipulate the definition of financial management. It is thus assumed that the notion should be interpreted in its possibly widest scope, i. e. as a process comprising not only generating and spending public means by the subjects of public law but also other legal and organisational activities serving this purpose (Bojkowski, Przybylska, 2012: 34). Within this scope the decisions are made independently or together with the chief accountant. It is also the director's responsibility to delegate duties to the employees, though delegating duties does not absolve the director of his or her accountability (Bojkowski, Przybylska, 2012: 35).

Secondly, the director is accountable for failing to perform his of her duties concerning accountancy imposed on him or her by law. In accordance with Art. 4(5) of the Act on accountancy, an entity's director is held accountable for performing the duties concerning accountancy as determined by law, including supervision, also in the case when certain duties concerning accountancy – excluding the accountability for inventory by stock-taking – have been delegated to another person. However, this does not result in the situations requiring the director to be qualified in very specialised areas. According to the case-law of the Main Adjudication Committee: "delegating duties (…) does not automatically absolve the director of his or her accountability. The director who delegates certain duties to an employee does not lose his or her right to act within the delegated scope" (Ruling of MAC of 13 October 2005, DF/GKO/Odw.-44/60/RN-16/2005/353, Lex no. 156344).

Thirdly, the director is accountable for concluding contracts of concession infringing public finances discipline contradicting respective regulations. It was added to the catalogue of acts for which a director is accountable when the Act of 9 January on the concession for construction work and

services came into force. It regulated the issue of granting concessions, principles and manner of appointing a concessionaire, the content and regulations of concluding a contract (Bojkowski, Przybylska, 2012: 37).

The director is also accountable for failing to conduct internal audit in an entity of public finances sector which is obliged to do this. The accountability mainly refers to the situations when the director abandoned to employ an internal auditor or to conclude a contract with a provider of such services. To be punished for an act infringing public finances discipline three premises must be met simultaneously. Firstly, internal audit was not conducted; secondly, an internal auditor was not employed in the entity or a contract with a provider of such services was not concluded and, thirdly, a cause-effect relation between them must exist (Bojkowski, Przybylska, 2012: 38). The director is accountable for the delict mentioned above, because this results from his or her scope of duties and the performed function. It is immaterial whether he or she personally committed an act infringing respective regulations. The director's position in the entity's structure results in the fact that he or she is expected to demonstrate proper care in performing his or her duties (Bojkowski, Przybylska, 2012: 38).

However, from the point of view of this work the director's accountability for preparing and conducting procedures of awarding public procurement is the most important. In accordance with Art. 18(1) of the Law of public procurement, the director of an ordering party is responsible for preparing and conducting the procedures for awarding public procurement. Performing the function of the director is indispensable but also sufficient grounds for being held accountable for inappropriate application of the Law of public procurement (Winiarz, 2012: 356). It is the director's sole responsibility to e. g. appoint a tender committee, who are his or her auxiliary body, and executing changes in its composition. Appointing such a committee is the director's responsibility when the value of the procurement's object exceeds threshold sums. The director also decides on the selection of a public procurement procedure. His or her correct assessment and interpretation is crucial for the selection of special procedure, whose implementation depends on meeting a number of requirements. Their correct application and interpretation is the responsibility of an entity's director. It is immaterial whether he or she has an appropriate background in the area in question.

According to the case-law of the Main Adjudication Committee, irrespectively of his or her education, the director should be highly aware of legal matters and his or her knowledge of the regulations should be better than basic (Ruling of MAC of 21 March 2011, BDF 1/4900/12/13/11/507, Lex no. 798192).

Apart from the examples of the activities conducted by a director mentioned above, his or her duties also include an exclusion of a contractor, selection of the most advantageous offer, rejection of an offer, annulment of the procedures of awarding a procurement, endorsement of specification of the essential conditions of the order and the announcement of the tender procedure. In most cases the activities mentioned above may be delegated to the employees of the ordering party. In principle the regulations of the Law of public procurement do not impose substantial restrictions as to the scope of activities delegated to the employees. It should be noted, however, that signing a contract of awarding public procurement requires personal authorisation to take on financial obligations in the name of and for the benefit of the entity. It also has to have a countersignature of the chief accountant (treasurer), which in this case excludes the possibility of delegating the authorisation to an employee (Miemiec, 2013: 214).

The director thus is held accountable for numerous delicts listed in the catalogue of acts infringing public finances discipline. Some of them, such as failing to conduct internal audit in an entity from the public finances sector may be committed solely by the director of an entity. The so-called model of the director has been created for the needs of the doctrine and case-law, which is used when examining a concrete case to determine whether in actual circumstances "an educated, experienced and economical director could make a mistake and infringe the legal order" (Ruling of MAC of 19 June 2006, DF/GKO/4900-47/60/06. 1353, unpublished). Thus, the scope of director's accountability is very wide. The persons who voluntarily apply for and subsequently undertake to perform managerial functions thus become accountable for public finances. If they fail to fulfil their obligations, they must be aware they will be held accountable to the full extent stipulated by law (Ruling of MAC of 16 January 2003, DF/GKO? odw.-114/148/2002).

4 Accountability concerning managerial supervision

The binding Act on public finances introduced elements of the so-called managerial supervision into the process of managing entities of public finances sector (Dylewski, 2013: 99). It was defined as the whole of activities undertaken to ensure achievement of aims and performance of tasks legally, effectively, economically and punctually (Art. 68, Act on public finances). The result of the manner of phrasing the definition is that assessment of effectiveness of the system of supervision depends on the criterion of effectiveness of the system's functioning concerning the aims of an entity of public finances sector (Sawicka, 2013: 268). It assumes the character of internal inspection as it is mainly concerned with the management of the structure of a given entity. In accordance with Art. 68, Act on public finances, the aim of managerial supervision primarily consists in ensuring the congruence of the activity with legal regulations and internal procedures, effectiveness and efficiency of the activity, credibility of reports, protection of resources of observing and promoting the principles of ethical conduct, effectiveness and efficiency of information flow and risk management. The aims thus formulated had their effect on how accountability concerning the infringement of public finances discipline was formulated (Dylewski, 2013: 102). Art. 69, section 1, point 3 of the Act on public finances distinctly stipulates that the duties of an entity's director include introducing the measures ensuring effective and efficient functioning of managerial supervision in a given unit.

In accordance with Art. 18c of the Act on accountability, an entity's director is held accountable for the infringement of public finances discipline in the scope of managerial supervision only when he or she fails to perform or performs inappropriately the duties within the scope in question if it affects:

- awarding public procurement to the contractor who was not selected in the procedure determined by the regulations of public procurement,
- concluding a contract concerning public procurement infringing the regulations of public procurement concerning the written form of the contract, the period of time which the contract comprises or if an appeal is submitted – the date when the contract was concluded,

- failing to exclude from the procedure of public procurement a person subject to exclusion from such a procedure on the basis of the regulations of public procurement,
- annulment of the procedure of awarding public procurement infringing the regulations of public procurement determining the premises for the annulment of the procedure in question,
- concluding a contract of concession for construction work or services with a concessionaire who was not selected in accordance with the regulations of the concession for construction work or services,
- concluding a contract of concession for construction work or services infringing the regulations of the concession for construction work or services concerning the written form of the contract, the period of time which the contract comprises or if an appeal is submitted concerning the selection of the most advantageous offer – the date when the contract was concluded,
- annulment of the procedure of concluding a contract for construction work or services infringing the regulations of the concession for construction work or services,
- performing an activity infringing public finances discipline by a person not authorised to perform such an activity concerning financial management or during the procedure of awarding public procurement or during the preparation of this procedure or during the procedure of concluding contract of concession for construction work or services,
- activity or abandonment of activity resulting in a penalty, fine or charge constituting a financial sanction paid from public finances, which are subject to regulations concerning executive proceedings in administration.

In this case the role of the director consists in being subjected to the regime of accountability for the infringement of public finances discipline also when the infringement was committed by an entity's employee who was entrusted with the duties concerning financial management (Bojkowski, Przybylska, 2012: 39). It is thus independent of the fact whether the infringement was committed directly by the director. In order to impute accountability to the director for the infringement within the scope of managerial supervision, it is necessary to prove that failing to perform or performing inappropriately the duties within this scope affected the achievement of aims and performance of tasks in the entity (Miemiec, 2012: 213-214).

Completing the catalogue of delicts infringing public finances discipline with the accountability for managerial supervision aimed at preventive disciplining directors, who should undertake to clarify principles, instructions and procedures."Managerial supervision is to be a proof that the director has his or her entity's matters under control. It is also to be the best guarantee of attaining the aims through implementation of tasks" (Kot, 2013: 188).

5 Accountability of employees and other persons

Apart from the director, in some cases accountability is imputed to the employees of an entity of public finances sector and the people other than the employees performing determined activities connected with awarding of public procurement. These activities may be delegated pursuant to a statute (ex lege) or as a result of delegating duties in the form of a legal action (Lipiec-Warzecha, 2008: 65). Duties may only be delegated by the director and failure to perform them involves accountability for the infringement of public finances discipline. If the director does not delegate duties to the employees or if they are delegated infringing respective regulations, only the director is held accountable for it (Ruling of MAC of 21 May 2009, BDF/4900/14/14/RN-2/09/534). To be effective, duties must be delegated explicitly and not only implied. It should be in the form of a separate, personal authorisation or a reference to the internal regulations. The employee must familiarise himself or herself with the duties and sign with date the document determining the scope of duties in question. If public finances discipline is infringed by an unauthorised employee, the director is held accountable (Kościńska-Paszkowska, Borowska, Bolek, 2012: 34).

While discussing the accountability of employees, it is necessary to focus on the chief accountant, who enjoys special status. He or she is entrusted by the director with the duties comprising the management of the entity's accountancy, observance of instructions concerning public finances and preliminary checking whether undertaken activities are congruent with the financial plan (Kościńska-Paszkowska, Borowska, Bolek, 2012: 34). The chief accountant's signature on documents is especially important as it signifies that no reservations have been made concerning the correctness and legality of a given activity and it confirms that a given obligation does not exceed the entity's financial potential as outlined in the financial plan.

The amendment of 2011 introduced a possibility for chief accountants to be accountable independently, without delegation of duties by the director. In such a case it is sufficient if the director entrusts a given person with the functions of the chief accountant. The chief accountant is accountable also when he or she fails to perform or performs inappropriately the preliminary check of congruence of an economic or financial operation with the financial plan as well as the check of completeness of documents concerning such an operation, when this situation results in expenditure exceeding the sum of expenditure determined in the entity's financial plan or a debt not determined in the financial plan (Kościńska-Paszkowska, Borowska, Bolek, 2012: 34).

The Act on accountability does not regulate separately the activities undertaken by employees in connection with awarding public procurement. In this respect Art. 18(2) of the Law of public procurement should be applied. In accordance with its provisions, if the director of the ordering party delegates in writing the activities reserved for him or her to the entity's employees, the latter also are accountable for preparing and conducting the proceedings (Granecki, 2014). Delegating duties must be in writing, because only in this way the scope of an employee's duties can be determined and consequently the scope of his or her accountability. In this scope an employee is accountable for the preparation of conducting the proceedings, which means that the persons who conducted or failed to conduct activities before the preparation and after the proceeding are not held accountable, irrespectively of the fact to what extent they affected the result of the proceedings (Winiarz, 2013: 359). The consequence of this construction is that in principle an entity's employees are accountable for infringing the duties entrusted to them on the basis of the Law of public procurement.

The persons from outside public finances sector are also accountable for the infringement of the regulations concerning public finances discipline if they manage (individually or collectively) entrusted public means in the name of an entity which is not an entity from public finances sector (Kościńska-Paszkowska, 2012: 36). This regulation caused certain controversy, yet it seems justified that transfer of public means for implementation of aims by the subjects from outside the public finances sector is not tantamount to the fact that the means lose the status of public means, because

their transfer and settlement takes place on the basis of the regulations concerning public finances.

As it was mentioned earlier, if the director of the ordering party entrusts duties concerning preparation and conducting proceedings to a person from outside the entity, the latter is accountable if the duties were entrusted in the form of authorisation. In accordance with Art. 15(2) of the Law of public procurement, the ordering party may entrust preparation or conducting the proceedings for awarding procurement to own organisational unit or to a third party. The use of "or" denotes that the ordering party has a choice whether only the preparation or only conducting, or both preparation and conducting of proceedings are entrusted to a third party (Granecki, 2014). If the ordering party decides to entrust the duties connected with preparation or awarding public procurement to own organisational unit, they will all the time be the entity conducting the proceedings but their own organisational unit will act in their name.

Entrusting the preparation or conducting the proceedings to a third party has a different character (Granecki, 2014). Duties are usually entrusted to a third party on the basis of a civil law contract, usually involving payment. The subject who concludes such a contract with the ordering party will feature in the proceedings as the plenipotentiary of the ordering party and consequently all undertaken activities will be conducted in the name and for the benefit of the ordering party. This institution was introduced into the Polish legal order relatively recently. It enables transferring part of the accountability for the infringement of public finances discipline onto a third party, who undertook to conduct activities connected with preparation or conducting proceedings for awarding public procurement. As the National Chamber of Appeal stated in its ruling of 10 July 2009 "if on the basis of Art. 15(2) of the Law of public procurement the ordering party entrusted the proceedings to a third party, the latter subject is entitled to perform all factual and legal activities during the procedure of public procurement, also to perform all the activities connected with depositing a tender bond by the contractor, including the activity of retaining the tender bond. In the case of entrusting the preparation and conducting the proceedings to a third party, the latter acts in the name of and directly for the benefit of the ordering party, while the undertaken activities are binding for the ordering party and are treated as the activity conducted by the ordering

party itself" (Ruling of the National Chamber of Appeal of 10 July 2009, KIO/UZP 703/09, Legalis no. 3).

6 Conclusion

The work presents the extent to which the director of an entity and its employees are accountable for the infringement of public finances discipline in connection with awarding public procurement. It discusses in detail the premises and principles of the accountability of the entity's director, distinguishing direct accountability and the accountability resulting from managerial supervision. In the case of employees the work presents the issues of authorisation to perform such activities, which each employee should be granted and should accept. It also discusses the situations which result from the accountability in question for the persons who are not the entity's employees.

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LOCAL INITIATIVE AS A FINANCIAL FORM OF COOPERATION BETWEEN LOCAL GOVERNMENT UNITS AND NON-GOVERNMENTAL ORGANISATIONS

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Abstract

The legislator has formulated a normative basis for the cooperation of local government units and non-governmental organisations. It identified areas in which this cooperation is permissible and clarified its rules, forms and responsibilities of cooperating actors involved. The directory of forms of cooperation, having an open character, includes forms of financial cooperation and forms of non-financial cooperation. The forms of financial cooperation include a local initiative, the essence of which is the cooperation of local government units with their residents for the purpose of jointly carrying out a public task for the benefit of a local community.

Key words

Local self-government units; NGOs; cooperation.

JEL Classification

H77, H79

1 Introduction

The effectiveness of implementation of public tasks by local government units is determined by a number of factors. One of them is the possibility of obtaining an active and reliable partner interested in cooperation with

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local communities' authorities. These partners can be NGOs as the legislature has formulated normative basis for their cooperation with local government units. At the same time it pointed out areas in which this cooperation is permissible and clarified its rules, forms and responsibilities of cooperating actors involved. An act defining a framework for cooperation between public administration, including local government bodies, with non-governmental organizations is the Act on Public Benefit and Volunteer Work (Act of 24 April 2003 on public benefit and volunteer work, Consolidated text, Journal of Laws of 2010, No. 234, item 1536 as amended). Under its provisions, public administration authorities were given the opportunity (Pakuła, 2005: 93, Płażek, 2012: 135) of cooperation with non-governmental organizations and entities mentioned in Art. 3 para. 3 of the Act, i. e. corporate entities and entities acting pursuant to provisions on relations between the State and the Catholic Church in the Republic of Poland, on relations between the State and other churches and religious unions, and on the guaranteed freedom of conscience and religion, should their statutory objectives encompass public benefit work; unions of local self-government units; social co-operatives; joint stock companies, limited liability companies, and sport clubs operating as companies under the provisions of the Act on Physical Culture which do not operate for profit and allocate all of their profit to perform their statutory objectives, and they do not allocate the profit for distribution between their members, shareholders, stockholders or employees, carrying out - relevant to the territorial scope of operation of public authorities - a public benefit activity to the extent corresponding to the tasks of those authorities.

2 The essence and forms of cooperation of local self-government units with NGOs

It should be noted that the concept of co-operation on the basis of the Polish language is defined as work performed jointly with someone, activity carried out jointly by several people or state institutions (Dubisz, 2003: 526). It is treated as a synonym for joint action (Bańka, 2005: 898). Joint action, in turn, in one of the adopted meanings is construed as an activity, working together with someone, helping someone in a certain activity (Dubisz, 2003: 525). The terms "cooperation" and "joint action" are sometimes used

interchangeably. In praxeology, when characterizing joint action between people it was associated with collective action. It was pointed out at the same time that it was cooperation between different stakeholders involving homogeneous operation, where the actions of each entity make up a collective act. Also, it was allowed for cooperation to engage a common or shared primary objective, where individual goals may be different (Pszczołowski, 1976: 192). In the social sciences cooperation and joint action are considered separate types of social processes. Cooperation is a type of social process aimed at achieving a common goal. Taking up this type of activity is often associated with the division of labour within a given community. It assumes the achievement of a mutual benefit and identification with the objective pursued by cooperating individuals and social groups. In turn, joint action is given a wider range of meaning than cooperation. This is a category of social process including both, interactions as well as factors influencing these activities (Ofiarska, 2008: 7). Based on the results of the analysis of provisions of the Act on public benefit and volunteer work it is reasonable to say that the legislature used the term "cooperation" in the generally accepted sense, without reference to the terminology findings established on the basis of individual fields of science. Thus, statutory regulations allow one to assume that the cooperation of local government units with NGOs and entities mentioned in Art. 3 para. 3 of the Act shall be construed as activities carried out jointly, aimed at achieving the same goal, which is the realization of a task belonging to the sphere of public tasks specified in Art. 4 para. 1 of the Act.

The right to cooperate with non-governmental organizations and entities mentioned in Art. 3 para. 3 of the Act granted under the provisions of Art. 5 para. 1 of the Act to the authorities of local government units operating an activity in the field of public tasks may be implemented in the forms specified by the legislature. The directory of forms of cooperation, formulated in Art. 5 para. 2 of the Act, is open in nature, which is confirmed by the use of the expression "in particular".

It includes forms of financial cooperation and forms of non-financial cooperation. The following should be classified as forms of financial cooperation: entrusting non-governmental organisations and other entities specified in Article 3 para. 3 with the performance of public tasks, which can

take the form of entrusting the implementation of public tasks along with the granting of subsidies to finance their implementation, or assistance in the performance of public tasks, along with granting subsidies to finance their implementation. Forms of financial cooperation also include a partnership agreement and a local initiative. In turn, the circle of forms of non-financial cooperation covers: reciprocal feedback concerning planned directions of activity; consulting non-governmental organisations and other entities specified in Article 3 para. 3 on draft normative acts in areas relating to the statutory activity of these organisations; consulting draft normative acts concerning public tasks with Councils for Public Benefit Work; setting up joint advisory and initiative teams composed of representatives of non-governmental organisations, entities listed in Article 3 para. 3 of the Act and of representatives of relevant public administration authorities. Due to the fact that the forms of cooperation specified in the directory have an exemplary character, it is believed that cooperating entities are not obliged, by taking up a joint activity, to use each of these forms listed by the legislature. In addition, the literature shows that taking up cooperation which does not involve an element of a financial flow does not require, in principle, the application of specific procedures. However, special treatment is reserved to institutions for which a particular mode of their realization has been established, such as a local initiative, local law consultation and the consultation and creation of cooperation programs, the appointment of councils for public benefit work (Żołędowska, 2011: 18-19).

3 Local initiative

As already indicated, one form of financial cooperation of local government units with NGOs and entities mentioned in Art. 3 para. 3 of the Act is a local initiative. This form was added to the catalogue of previously existing forms of cooperation as a result of amendments to the Law on Public Benefit and Volunteer Work of 2010 (Act of 22 January 2010 amending the law on public benefit and volunteer work and certain other laws, Journal of Laws of 2010, No. 28, item 146). The legislator formulated the legal definition of a local initiative in Art. 2 point 4 of the Act, which states that it is a form of cooperation of local self-government units with their inhabitants to jointly execute a public task to the benefit of the local community.

Stressing the discussed elements of the quoted definition it should be noted that the essence of a local initiative is a joint activity of partners interested in cooperation, focused on performing a public task. In contrast, the personal angle indicates that the addressees of the legal regulation in question are first residents of a local self-government community that have been awarded the right to initiate a given action or project in the local interest. This view is supported by Art. 19b para. 1 of the Act, according to which, under a local initiative, residents of the local self-government unit may submit, either directly or through non-governmental organizations or entities referred to in Art. 3 para. 3 of the Act, an offer to the local government unit in which they are resident for the performance of a public task. It is worth emphasizing here that a resident of a local self-government unit is a natural person who is domiciled in the territory of this local self-government unit (Szewc, 2005: 27). In accordance with Art. 25 of the Civil Code (Act of 23 April 1964. The Civil Code, Consolidated text, Journal of Laws of 2014, item 121), the place of residence of an individual is the place where the person resides with the intention of permanent residence. The literature presents a position according to which the essence of a local self-government unit is a strong degree of integration within the community, therefore the community is composed of people permanently affiliated with it, thus permanently residing in the given unit of local government (Olejniczak-Szałowska, 1996: 4-5). At the same, a person's permanent residence in a particular place is not measured solely by its registered permanent residence, but on the basis of facts evidencing his constant presence in a given place. Thus, registered permanent residence should be regarded only as one piece of evidence pointing to a given person's presence in the territory of a given municipality with the intention of permanent residence (Dolnicki, 2010: 22-23). Therefore, if the legislature granted the right to submit offers for the implementation of a public task to inhabitants of a local government unit, the acceptance by the municipal council of the fact that entities entitled to submission are adult residents of the municipality, is a significant violation of Art. 19b para. 1 of the Act (Judgement of the Provincial Administrative Court of 15 December 2011, III SA/Wr 570/11, www.orzeczenia.nsa.gov.pl.).

The second addressee, in addition to local community residents, of the regulation on a local initiative is the executive body of a relevant local

self-government unit. With the date of submission of an offer by the residents it will become obliged to deal with the request in a manner corresponding to specified statutory formal requirements. In addition, it is required to assess the offer, taking into account procedures and criteria specified by the decision-making authority of the local self-government.

The subject matter of local initiative is the implementation of public tasks belonging to individual units of local government. At the same time, not every proposal for the performance of a task submitted by residents of a local community may be realized using this form of cooperation. The directory of tasks covered by the material scope of the local initiative, formulated in Art. 19b para. 1 points 1-6 of the Act, has a closed nature. It covers: construction, development or repairs of roads, sewage systems, water supply networks, buildings and architectural objects owned by local self-government units; charity work; supporting and promoting national traditions; preserving national traditions; sustaining Polish identity and developing national, civic, and cultural awareness; work to support national and ethnic minorities and regional languages; culture, art, protection of culture and national heritage; promoting and organising volunteer work; education, coaching, and upbringing; work in the sphere of physical culture and sports; environmental protection, including municipal and rural green areas; public order and security. The specified tasks are carried out by local government units of every level. Therefore, the financial resources allocated for their implementation should be secured in the budget of a given local self-government community. The literature emphasizes that the practice of co-operation with the use of a local initiative highlights two approaches of local government units to funding it. The first approach involves the separation of funds from the unit's budget and allocating them to co-financing of activities implemented under the local initiative. In turn, the second approach involves the inclusion of projects related to the implementation of local initiatives into the budget and tasks of organizational units of the local government as a form of realization of a public task carried out by a given self-governing community (Czarkowska, Domagała, Jachimowicz, Makuch, Waszak, Wejcman, 2013: 19-20). The implementation of the first method of financing a local initiative entails most often the necessity of allocating funds to a local initiative and creating earmarked reserves in the budget

of the local self-government unit. These funds are activated by the executive body of a local government authority in each case at the request of the competent organisational unit that decides to co-implement the tasks within the local initiative. Whereas financing of a local initiative in the second way out of the two mentioned requires proper preparation of the local community to implement projects together with its residents, because the budget of a given local government authority and its organizational units is planned for the year preceding the year of implementation (Czarkowska, Domagała, Jachimowicz, Makuch, Waszak, Wejcman, 2013: 19-20). Both presented approaches as to the manner of financing local initiatives have their advantages and shortcomings but their presentation is beyond the scope of this paper.

Analysing the material scope of the local initiative it should be noted that within its framework residents bring forward an offer aimed at initiating a particular project. They should also at the same time declare their commitment. The declared contribution may consist of cash or in-kind performances or providing voluntary work, which is confirmed by the provisions of Art. 19e of the Act. The literature emphasizes that cash contributions involve depositing a sum of money into the bank account of competent local authorities; in turn, the subject-matter of in-kind contributions are non-pecuniary performances. The possibility of declaring several types of performances along with a proposal for a local initiative is not excluded (Staszczyk, 2013: 71-72).

The implementation of a local initiative requires the fulfilment by the decision-making body of a local self-government community of the disposition contained in Art. 19c para. 1 of the Act. According to its content, the decision-making body defines the procedure and detailed criteria for evaluation of offers of performance of public tasks of a local initiative. Detailed evaluation criteria should take into account, above all, the contribution of social work. In view of the categorical wording of that provision it can be assumed that the adoption by a council or an assembly of a relevant resolution is its duty. Failure to fulfil it will result in considering the admissibility of cooperation in the form of a local initiative by actors interested in this cooperation as questionable. It is difficult to imagine proceeding with regard to the offer in the absence of clarification of the procedure and measures

for the evaluation of this offer. Art. 19c para. 1 of the Act is treated in the court and administration jurisprudence as a provision containing a delegation to issue an implementing act. Therefore, the decision-making body of a local self-government unit, when exercising legislative competence contained in the statutory authorization, is bound to act strictly within the limits of this authorization. Therefore, it is not authorized either to regulate what is already statutorily regulated, or to go beyond the scope of the statutory authorization (Judgement of the Provincial Administrative Court of 15 December 2011, III SA/Wr 570/1, www. orzeczenia. nsa. gov. pl.).

A resolution of the decision-making body of a local self-government unit should specify the procedure for submitting offers for the implementation of a local initiative and the specific criteria for evaluating the offers. In addition, it may include: information on deadlines for offers (it can take the form of continuous intake where the offers are examined all year long on an ongoing basis, or of a competition, in which there is one or more deadlines in a year) or information on who the offer should be submitted to. It is arguable, however, whether a resolution of the decision-making authority may specify elements of the offer, or even standard forms and model offers. The literature permits for the resolution to specify the form of the offer (Staszczyk, 2013: 74, Czarkowska, Domagała, Jachimowicz, Makuch, Waszak, Wejcman, 2013: 27). A different view was expressed in the case law of the administration, according to which the conjunction of the authorization contained by the legislature in Art. 19c para. 1 of the Act applies only to the procedure and specific criteria for evaluating offers. Hence, authorisation to define the model for an offer and its components cannot be inferred from it. A model offer for the execution of a public task may be developed by the executive body; however, this model should be regarded only as an aid tool for those interested in using it (Supervisory Decision of the Voivode of Lublin of 21 December 2012, NK-II. 4131. 341. 2012, Official Journal of the Voivodeship of Lublin of 2012, item 4547). In addition, a resolution of a council or an assembly cannot establish a deadline for dealing with the offer different than the one set out in the Code of Administrative Procedure (Act of 14 June 1960. Code of Administrative Procedure, Consolidated text, Journal of Laws of 2013, item 267 as amended); dividing the procedure into stages in such a case cannot be administered either

(Supervisory Decision of the Voivode of Lublin of 15 March 2012, NK-II. 4131. 62. 2012, Official Journal of the Voivodeship of Lublin of 2012, item 1260, judgement of the Provincial Administrative Court of 15 December 2011, III SA/Wr 570/1, www. orzecznia. nsa. gov. pl.). In turn, according to the will of the legislature, a resolution should specify requirements for applicants' contribution of social work in the implementation of a local initiative. It should also be assumed that a resolution could indicate the types of performances accepted in a community as own contribution.

A resolution adopted by the decision-making authority of a local self-government unit pursuant to the authorization formulated in Art. 19c para. 1 of the Act is an act of local law (Judgement of the Provincial Administrative Court of 29 November 2012, II SA/Op 452/12, LEX nr 1234445), which entails a number of consequences.

It is imperative that it contains in its content standards of general and abstract character. General nature is held by those standards which specify the addressee by demonstrating their characteristics, and not through personal naming. The abstract nature of a standard is expressed in the fact that an ordered, forbidden or allowed action is to take place under certain repeatable circumstances, and not in one particular situation (Dąbek, 2003: 73). Consequently, confirmation of the general nature of a resolution is the fact that its provisions may be invoked in particular by residents of a local government unit and non-governmental organizations acting in this local community, through which residents can submit an offer for the execution of a public task. In turn, the abstract nature of a resolution comes down to the possibility of multiple application of its provisions (Supervisory Decision of the Voivode of Lublin of 15 March 2012, NK-II. 4131. 62. 2012, Official Journal of the Voivodeship of Lublin of 2012, item 1260).

The classification of a resolution specifying the procedure and detailed criteria for assessing offers to the category of local law also results in a requirement to submit them for consultation in the form and manner specified in a separate resolution which regulates consultation of local law acts. In fact it should be noted that under the provisions of Art. 5 para. 5 of the Act, the decision-making body of a local government unit is obliged to determine, by resolution, a detailed manner of consulting public benefit advisory teams or non-governmental organizations and entities referred to in

Art. 3 para. 3 of the Act on draft local law in the areas relating to statutory activities of these organizations. It is important here that the consultations are not only of an informational nature, but allow the exchange of views on a draft resolution and the submission of comments and own proposals. They should consist of the following steps: transfer of the project proposal, gathering feedback and developing an after-feedback version while referring to it (Czarkowska, Domagała, Jachimowicz, Makuch, Waszak, Wejcman, 2013: 28).

A resolution of the decision-making organ of the local community to determine the procedures and detailed evaluation criteria for offers must be announced in a manner corresponding to the regulations of the Act on publishing normative acts and certain other legal acts. Pursuant to the provisions of Art. 13 para. 2 of said Act, acts of local law constituted by a voivodeship (province) council, a poviat (county) authority or a municipal authority shall be published in the official gazette of the voivodeship. They shall enter into force on the expiry of fourteen days from the date of the announcement, unless the given normative act defines a later date.

An offer of the performance of a public task, according to Art. 19b para. 1 of the Act, may be submitted by the residents either directly or through NGOs. It constitutes an application within the meaning of the Code of Administrative Procedure, therefore, the provisions of the Code will apply to it. There is therefore no basis for adopting a detailed regulation in this regard by the decision-making body. Such a regulation issued without a legal basis materially violates the law (Supervisory Decision of the Voivode of Lower Silesia of 14 February 2012, NK-N13. 4131. 91. 2012. JT1-1, Official Journal of the Voivodeship of Lower Silesia of 2012, item 705).

Pursuant to the provisions of Art. 241 of the Code, the subject-matter of a proposal may be in particular cases of improving the organization, strengthening the rule of law, improving work and preventing abuse, protecting property, meeting the needs of the population better. The implementation of a public task within the material scope of a local initiative falls within the areas of matters relating to meeting of the needs of the population better. Therefore, the proposal of local community residents should indicate the public task precisely, justifying the need for its implementation

and procedure for the performance thereof. One should also consider as a desired element the determination of residents' own contribution and the expected contribution of the local self-government unit.

The offer is submitted to the executive body of a local self-government unit, which - pursuant to Art. 19c para. 2 of the Act – assesses it, taking into account the detailed criteria for evaluating the offer and its relevance in terms of the needs of the local community. An offer for the execution of a public task under a local initiative should be examined without undue delay, but no later than within one month (Supervisory Decision of the Voivode of Lower Silesia of 9 June 2011, NK-N. 4131. 362. 2011. DC, Official Journal of the Voivodeship of Lower Silesia of 2011, No. 125, item 2036). In the event of the executive body issuing a negative decision, the implementation of a public task under a local initiative should be considered not possible. Although the Code of Administrative Procedure in Art. 246 § 1 provides the entity submitting the offer with the right to bring an action on the manner of processing the proposal, it is nevertheless difficult to imagine a further joint cooperation after prior use of the mode of a complaint. In turn, the acceptance of the proposal by the executive unit of a local self-government authority initiates detailed planning of the project to implement a public task.

Under the provisions of Art. 19g of the Act, the executive body of a local self-government unit together with the entity submitting the offer prepares documents necessary to carry out the local initiative, including its schedule and cost estimate. At this stage of preparations for the implementation of the intended project all details relating to the practical implementation of the public task under the local initiative should be agreed. The result of arrangements made is the conclusion of a contract for carrying out of a local initiative, as long as none of the parties interested in cooperation does not withdraw from the intention of its implementation. The conclusion of the contract for the implementation of an initiative with the entity submitting the offer lies with the executive body of the local self-government unit. In accordance with Art. 19d of the Act, the contract is concluded for a definite period. It creates a relationship between the residents of the local community and the local self-government unit, formed under the provisions of the Civil Code. The legislature did not prescribe a requirement

to introduce a standard contract, however local self-government units may establish such a model. Its provisions should clearly specify the obligations of entities submitting the offer and local self-government units. The obligations of the entity submitting the offer may in particular be manifested in specific financial performances, in-kind or in social work. On the other hand, the obligation of the local self-government unit may entail making available to the entity submitting the offer for the duration of the contract things necessary for the implementation of the local initiative, for example, infrastructure or equipment (Staszczyk, 2013: 74-75). It should be emphasized that in implementing a local initiative, the local self-government unit does not provide grants to the requesting residents or their organizations. However, if the role of the unit is to secure a financial contribution, it will not go directly to the entities submitting the offer, but it will be disbursed directly by the executive body in accordance with the public procurement law. However, this means that local authorities must secure in their budget funds for the implementation of such tasks (Blicharz, 2012, LEX/el.).

Due to the fact that local initiative is understood as a form of cooperation of local government units with residents in order to jointly carry out a public task for the benefit of a local community, joint final settlement of such a task seems necessary The cooperating partners should prepare a final report on the implementation of their part of the local initiative, on the basis of which the final version of the report on the local initiative shall be drawn up (Czarkowska, Domagała, Jachimowicz, Makuch, Waszak, Wejcman, 2013: 64).

4 Conclusion

Local initiative is an instrument allowing for engaging local community residents in the development of their communities. However, it should be seen primarily as a tool for activating local communities to participate in the performance of public tasks promoting the fulfilment of collective needs of the residents. Its significant feature is the division of roles and tasks in the implementation of a specific project, and yet allows local authorities to integrate with the local residents for the purposes of cooperation. The indicated benefits of local initiative have not proven persuasive for potential partners interested in joint execution of tasks in the area of public benefit.

The results of research conducted by the Department of Public Benefit in 2010-2011 (Ministry of Labour and Social Policy. Department of Public Benefit, 2012: 124-125) indicate a relatively low proportion of local government authorities working with residents, non-governmental organizations or other public benefit entities under the local initiative. In addition, there is a noticeable downward trend in the use of this form of cooperation.

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LEGAL CONDITIONS CONCERNING THE DRAFTING OF FINANCIAL STATEMENTS FOR SMALL AND MEDIUM-SIZED LISTED COMPANIES IN POLAND

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Abstract

This paper presents the most important regulations referring to the reporting of Polish enterprises. The main piece of legislation concerning the issue in question is the Accounting Act of 29 September 1994. Additional provisions in the Polish and the European legislation are introduced for listed companies. Changes in this respect occurring in the Polish and the European legislation have also been indicated. Such solutions are of particular importance where new financial markets are established, as in the case of NewCnnect market established in 2007 for the trading in stocks of small and medium-sized companies. They significantly influence the transparency of companies, as well as the security of the dealings and the decisions of investors. These solutions create an appropriate shape of investors' relations. Promptness and reliability of the presented data included in the periodical reports, both current and annual, determine the quality of the appraisals conducted by investors. The increase of the number and weight of the penalties imposed on companies shows the emerging problems. Therefore, we think that the reduction of the scope and promptness of the significant information rendered in the company's current reports may be decisive for the increase of the risk of investment in equities of small and medium-sized enterprises in Poland.

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Key words

Financial statement reporting rules; listed companies.

JEL Classification

G32

1 Introduction

Polish regulations concerning the drafting of financial statements, and consequently the provision of information to external users on the property related and financial sanding, as well as on the business activity results, are included in Article 45 of the Accounting Act (the Accounting Act of 29 September 1994, Article 45). However, not all business entities operating on the Polish market draft financial statements in the light of the abovementioned Act. Business entities listed on the Warsaw Stock Exchange are obliged to present financial statements according to the principles provided for listed companies and they concurrently make use of the International Financial Reporting Standards. At the same time, the European Union introduced new legal solutions for the Small and Medium Enterprises Sector. On 6 November, Directive 2013/50/EU of the European Parliament and the Council of the European Union of 22 October 2012 on the harmonisation of periodical reporting was published, amending Directive 2003/71/EC on the prospectus. The Directive introduces a ban on imposing any obligations on issuers to present periodic reports other than annual reports and interim reports. This solution may significantly influence the transparency of the published data, as well as the security of dealings and of shareholders.

The variety of the legal conditions on the Polish market raises anxiety as to the harmonisation and standarisation of financial information included in general-purpose financial statements. It should be pointed out that the objectives of the Management Board and of the current and future owners may be different and they may vary from the information-related expectations of the remaining users of financial statements. Therefore, such

a statement must have explicitly determined principles of drafting because it may be analysed through two aspects (Cebrowska, 2005, p. 363):

- in the dynamic approach, as the process of continuous transformation of information of different profiles characterising the results and the certain situation of an economic unit,
- in the static approach, as a set of compilations drafted periodically and prepared in the form of strictly determined forms.

The aim of this article is to present the legal conditions in the area of financial accounting that are effective in Poland in light of the provisions of the law in force.

The basic methods used in the process of drafting this article have been the following: an analysis and a critical evaluation of certain pieces of legislation, the literature on the subject in question and available research conducted by other authors that refers to the analysed area; the method of deduction has been used by the construction of a series of the presented postulates and remarks.

2 The Accounting Act – drafting financial statements

Pursuant to Article 45 of the Accounting Act of 29 September 1994, the financial statement is prepared as at the day of the closing of the account books referred to in Article 12 paragraph 2, and as at another balance sheet date, applying respectively, subject to paragraph 1a and 1b, the principles of the valuation of assets and liabilities, as well as the principles of assessing the financial result set forth in Chapter 4 of the said Accounting Act.

It is drafted in the Polish language and in the Polish currency and the numerical data may be rounded to full thousands of Polish zloty, unless it deforms the image of the particular entity presented in the financial statement an in the business report.

However, in the case of financial statements of approved issuers of securities, of issuers applying or those willing to apply for being approved for trading in securities on one of the regulated markets of the European Economic Area, such statements can be drafted in accordance with the IAS/IFRS (International Accounting Standards/International Financial Reporting Standards).

The financial statement consists of:

- balance sheet;
- profit and loss account;
- additional information encompassing the introduction to the financial statement, as well as additional facts and explanations.

For entities referred to in Article 64 paragraph 1 which are subject to annual analysis, the financial statement has been extended by the list of changes in the shareholders' equity and the cash flow statement. The annual financial statement is appended with the business report of the given entity, if the obligation to draft such a report arises out of the Accounting Act or separate provisions (the Code of Commercial Companies and Partnerships). Moreover, the provisions on public trading in securities are additionally taken into consideration as far as issuers are concerned.

The composition and the scope of the disclosed information have been determined by the legislators in Appendix No. 1 – for entities other than banks, insurance institutions and reinsurance institutions; in Appendix No. 2 for banks and in Appendix No. 3 for insurance institutions and reinsurance institutions. The information included in the statement are presented as at the last day of the current and the previous financial year and in the case of the profit and loss account and the cash flow statement, the head of the particular entity makes the decision as to what option (out of the two options proposed by the legislator) will be taken into account while drafting the particular account.

The business report of a particular entity should include important information on the financial standing, including the appraisal of the achieved results and the indication of risk factors, as well as the description of perils, inter alia, information concerning:

- events considerably affecting the entity's operations, which occurred during and after the financial year,
- the anticipated development of the entity, as well as significant achievements in the field of research and development,
- the current and the anticipated financial standing,
- the acquisition (and the purpose for acquiring) of own shares (stocks), the number and the face value thereof, with an indication as to what part of the share capital they represent, the purchase price and the sale price of those shares (stocks) in the event of the sale thereof,

- the given entity's branches (establishments);
- financial instruments in the area of:
  a) risk: of the change of prices, credit risk, significant disturbances of cash flows and the loss of financial liquidity the entity is threatened with,
  b) the objectives and methods of financial risk management adopted by the entity, including the methods of securing essential types of planned transactions for which the hedge accounting is being applied.

The Act requires that the business report include information on the evaluation of the entity's situation based on financial and non-financial indicators, as well as information referring to issues connected with the environment and the employment.

In light of the Accounting Act, each of the entities, according to their needs and the specificity of their operations, is entitled to present information with greater particularity than the one described in the Appendices to the Act.

3 International Accounting Standards 1 – Presentation of Financial Statements

The aim of IAS 1 is to regulate the principles of the presentation of general purpose financial statements. The introduced principles aim at ensuring comparability of data in time and space, i. e. enabling the comparison of the entity's financial statements with the data of previous periods and with the data of other entities. Moreover, the financial statement constitutes an ordered presentation of the financial standing and financial results of an entity. Its aim is to provide information on the financial standing, financial results and cash flows. In light of IAS 1, the financial statement should provide information on (IAS, 2014, p. 580):

- assets,
- liabilities,
- shareholders' equity,
- income and costs, including profit and loss,
- inward payments made by the owners and outward payments made for the benefit of the owners,
- cash flows of the entity.

The above-mentioned information is included in the full financial statements which consist of:

- statements of the financial standing at the end of the year,
- statements of the result and the remaining total income for the given period,
- statements of the changes in the equity capital for the given year,
- statements of cash flows for the given period,
- additional information including the recapitulation of significant accounting principles and other explanatory information,
- comparative information concerning the previous period.

4 Legal solutions in the area of alternative trading system ASO NewConnect

Legal solutions in the area of alternative trading system ASO NewConnect are enacted by the Management Board of the Warsaw Stock Exchange joint-stock company (Regulations of the Alternative Trading System § 1 subparagraph 1). Since the moment of its establishment until today there have been many modifications of the provisions regulating Alternative Trading System. Some of them evolved and some underwent a great revolution (Kołosowska, Voss, 2014, volume 3).

The information-related obligations for issuers start at the moment of submitting the application for the introduction of the financial instruments into the turnover. For this purpose, the entities have to draft an information document in the case of a private placement or the issuing prospectus in the case of a public placement (IPO).

Initially, information documents had a considerably narrower scope, but their aim was and still is to provide the most genuine, reliable and complete information to potential investors so that they can evaluate the financial situation and the possibilities of further development of the issuer (Appendix No. 1 to the Regulations of the Alternative Trading System).

The most important changes in this area was the extension of the catalogue of information the Companies are obliged to publish. The information encompasses: more detailed information concerning personal, financial and organisational relations between the issuer and the persons acting as members of the managing and supervisory bodies of the issuer, as well

as its significant stockholders and the Authorised Advisor. In the case of issuers who do not secure regular profits it involves a general description of the planned actions and investments along with a schedule, detailed track records of the persons managing and supervising the issuer, as well as data concerning the shareholding structure.

A huge simplification is the exclusion of the obligation to prepare the information document, where subsequent series of stocks of an issuer's who is already listed on NewConnect are admitted to public trading, as long as the application for admission encompasses stocks that constitute less than 5% of all of the issuer's stocks of the same class introduced to the Alternative Trading System (Huczek, 2012).

In the beginning companies listed on NewConnect were obliged to deliver interim reports and annual reports which did not fully meet the information-related needs. Therefore, in response to the expectations of the participants of the market, in the third quarter of 2009 the obligation to publish quarterly reports was introduced (Góral, 2012). Those reports were to include real and reliable financial information reflecting the specificity of the situation of a particular entity, so that the investor could estimate the financial and economic status of the issuer.

The fundamental modification, which was introduced in March 2010 in order to strengthen the standards of the participants of the market was connected with appending documents characterising "Good Practice of Companies Listed on NewConnect" to the Regulations of the Alternative Trading System. The aim of all good practices in economic activity is to promote corporate governance and improve communication between companies and investors.

Beginning with January 2010, another change concerning quarterly reports took place. It referred to the comparison of forecasts included in previous reports in the light of current results. Pursuant to the Regulations of the Alternative Trading System – the minimum scope encompassed, firstly: selected entries from financial statements, inter alia, shareholders' equity, receivables, long-term and short-term liabilities, pecuniary means and other money assets, amortisation, net sales revenue, profit / loss: from sales, from operating activities, gross and net; secondly: comments of company's officers on events that influenced the results; thirdly, information

on activities performed within the scope of the conducted business activity; fourthly, data comparable to the previous period concerning the forecasts and the financial results.

Beginning with the interim statements submitted for the third quarter of 2013 (prepared after 30 September 2013), the issuers were obliged to present more detailed information (the Regulations of the Alternative Trading System). They included the quarterly condensed financial statements encompassing: balance sheet, profit and loss account, list of changes in the shareholders' equity and cash flow statement, within the scope of Roman numerals in the case of the Polish standards, and in the case of international standards – obligatory condensed financial statements. Additionally, the following must be presented: information on the rules adopted by the drafting of the report, commentary to the quarterly results (i. e. so-called "concise characteristic of the issuer's significant achievements or failures"), commentary to the forecasts – if they have been published by the issuer (in the case of issuers who do not make regular revenue from business activity [start-up] – the description of the level of the implementation of the investment and the schedule), activity within innovations, description of the organisation of the corporate group, indication of the reasons for the lack of consolidation (if the issuer establishes a group without conducting any consolidation), information on the structure of the shareholding (shareholders holding at least 5%), information on the number of persons employed by the Issuer - full-time equivalent (the Regulations of the Alternative Trading System).

Moreover, companies were obliged to publish current reports, however only in the case of the occurrence of significant agreements and events in the company which might have impacted the financial or economic situation (Kłosowska, 2013, p. 121), in particular reports on: significant operations on assets, such as the loss of control over assets, pledge or other limited property rights; the granting of credits or loans; court proceedings; submitted applications for the declaration of bankruptcy or for the dismissal of such applications for the declaration of bankruptcy; any changes in capital structures. The revision of the Regulations of the Alternative Trading System of 2012 introduced the definition of "significant agreements", indicating that these are agreements whose determined value or estimated value amounts to at least 20% of the ownership of the shareholders' equity

of the issuer or 20% of the sales revenue (for the last four quarters), where the value of shareholders' equity does not constitute the evaluation criterion. Moreover, the revision established an obligation to inform of long-term agreements, whose value amounts to the aggregate value of the considerations, established or estimated, arising out of the particular agreement for the period of five years. We can distinguish that the market in the phase of creation certainly required such solutions and the occurring worsening of the financial situation of numerous companies listed on NewConnect constituted a threat for the investors contributing their capital.

5 Regulations of Directive 2013/50/UE of the European Parliament and the Council of European Union

The Directive 2013/50/UE liberalising the information requirements of issuers of securities on the regulated market, published at the end of 2013, raised huge controversy (DIRECTIVE 2013/50/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL). The date of the implementation of the above-mentioned regulations was initially set for 26 November 2015, however it was shifted for 2018 as a result of protests (eur-lex. europa. eu). The published regulations put emphasis on the fact that the current solutions concerning the publishing of interim or quarterly financial statements are a significant burden for small and medium issuers and do not constitute an effective protection for the investors. It was also indicated that more frequent reporting fosters the process of focusing on short-term results and discourages long-term investments.

In the estimation of the European Commission the obligation to publish, inter alia, quarterly reports constitutes a significant burden for small and medium companies whose securities are in circulation on regulated markets, and the obligation is not necessary for the protection of investors, discouraging long-term investments. The Polish analysts of the NewConnect market paying attention to the arguments that refer to the costs of the drafting and the publishing of such reports point out that they are not too much of a burden for our issuers (NewConnect Bulletin 4/2014). The protection of the market and the establishment (maintenance) of appropriate investors' relations become much more important. One can see the weaknesses of our Alternative Trading System, which is still

in the development phase, and the companies issuing their stocks here are still learning to establish such relations. There should be no surprise about the previously presented solutions introduced in 2013 in Poland which imposed greater information obligations on companies, as well as solutions aiming at disciplining enterprises to observe these obligations.

6 Adherence to information obligations by companies listed on the NewConnect market

From the very beginning of the functioning of the securities market dealing with stocks of companies of the small and medium enterprises sector, a significant increase in the number of penalties imposed by the Warsaw Stock Exchange on the issuers of Alternative Trading System NewConnect has been perceived. The year 2013 has become a decisive one, in which various types of sanctions were imposed on 156 issuers, including the suspension of the dealings of 93 companies. This fact has been presented in Table 1.

Table 1: List of sanctions imposed by the organiser of Alternative Trading System NewConnect on issuers

Type of sanction	2009	2010	2011	2012	2013	25 April 2014
Suspension of stocks turnover	X	X	2	26	93	20
Reprimand	1	14	X	5	35	22
Fine	X	X	X	14	25	5
Exclusion	X	X	1	7	3	1
Total	1	14	3	52	156	48

Source: http://www.newconnect.pl/pub/dokumenty_do_pobrania/kary/NEWCONNECT_zestawienie_SPOLKI_22_04_14.pdf (2014. 06. 20).

Looking at the reasons for the imposition of sanctions on companies we can notice that the main occurrence that impacts not only the numbers but also the types of imposed penalties is the failure to publish the report for the given year in the course and under conditions applicable in the alternative trading system. A very frequent occurrence is the violation of information obligations through the failure to provide significant information in current reports of the Company, e. g. those concerning the new composition of an

authority entitled to represent the Company, the data concerning the issue of bonds, the acquisition of shares in dependent companies and the termination of agreements for the acquisition of shares in dependent companies. Numerous other infringements have been observed, mostly those concerning the adherence to information obligations, including the publishing of incoherent, conflicting and very often incomplete current and interim reports. Companies have been punished for failure to publish opinions concerning the analysis of the financial statement for a given period within three months from the date set forth in the provisions of the Regulations of the Alternative Trading System. Occasionally, there has been a lack of any agreement, important from the point of view of the security of the stocks turnover, concluded with an Authorised Advisor within the period required by the provisions of the Regulations of the Alternative Trading System, or lack of any agreement concluded with the Market Maker.

The introduction of more severe regulations concerning the information obligations resulted in the occurrence of serious problems connected with the implementation of those obligations. This has been proved by the conducted research on the promptness and completeness of the submitted data included in the quarterly statements (Quarterly Reports – NewConnect). While submitting reports for the third quarter of 2013, nearly 51% of companies made mistakes. In the next quarter, 43% of the reports were improperly prepared. Fewer companies prepare the report in accordance with old regulations (1, 83 %), 2, 97 % of the companies delivered their reports delayed, 13, 27 % did not include data concerning the cash flow account. One can notice a systematic improvement of the quality of the quarterly reports prepared by entities listed on NewConnect. Companies and their accounting departments learn and adjust their systems of the data collection and presentation, which seems to be very optimistic.

7 Conclusion

The creation of the Polish capital market directed to small and medium enterprises required the implementation of appropriate regulations. Basic legal requirements included in the Accounting Act and in the IAS 1 became insufficient legal conditions for the described business entities. It is worth noticing that the above-mentioned regulations aim at the presentation

of the financial statements which allow all users to utilise the information included therein for the process of decision making. It is not hard to notice, though, the significant differences which concern, inter alia:

- the names of particular elements of the statement,
- the scope and particularity of the included information and the form of their presentation,
- particular periods of time they refer to,
- special emphasis on the cash flows set forth in the International Accounting Standards,
- description of the qualitative features of the statement.

However, as it has been proved by examples of the international alternative markets, the introduction of considerable simplifications within the scope of information obligations concerning the issuance or the turnover of stocks turned out to be necessary. It is aimed at the creation of solutions which make it easier for small and medium enterprises that show some innovation to search for capital to finance their investment needs.

However, such a liberal approach brings about some threats. Especially in Poland, where the low liquidity of the market has been accompanied by the worsening financial standing of numerous issuers. Thus, the risk of investments has increased, bringing about the necessity of introducing appropriate legal changes. It has become essential to elaborate appropriate solutions imposing additional information obligations on issuers, which would guarantee proper investors' relations.

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HOW DID CONSTITUTIONAL COURT DEAL WITH JUDGING PAYBACK PERIOD OF INVESTMENT TO SOLAR POWER PLANTS

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Abstract

This contribution deals with approach of Constitutional Court to assessing payback period of investment to solar power plant projects in Czech Republic. The main aim of the article is to confirm the hypothesis that Constitutional Court of Czech Republic failed when judging payback period of investment, because it based his verdict on incorrect evidence provided by Energy Regulatory Office. This contribution will explain the circumstances of implementing solar tax and emphasize individual mistakes in Constitutional Court´s and Energy Regulatory Office´s actions. To confirm the hypothesis stated above methods of comparison, synthesis and analysis and literature review were used.

Key word

Solar Tax; Discounted Payback Period; Weighted Average Cost of Capital.

JEL Classification

K39

1 Introduction

Generous legislative conditions and significant decrease in initial costs of solar panels in 2009 created very favourable environment for investment to solar energy industry. Many investors exploited this opportunity which ended up with so called solar boom. In order to stop this massive phenomenon and protect national budget, solar tax was implemented. The article

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focuses on indentifying reasons for implementation of "solar tax" and aims to evaluate approach of Czech Constitutional Court to assess the investment payback period to solar power plant projects. Constitutional Court judged the payback period only according to evidence provided by Energy Regulatory Office, which causes high level of doubts. This contribution will pinpoint the imperfections related to selected investment evaluation methods and refer to correct technique of setting the payback period of investment to solar power plants. In the article hypothesis that Constitutional Court of Czech Republic failed when judging payback period of investment, because it based his verdict on incorrect evidence provided by Energy Regulatory Office will be verified using methods of comparison, synthesis and analysis and literature review.

2 Solar Tax

On January 1st 2011 Act no. 420/2010 Coll. came into force, which changed Act no. 180/2005 Coll, on subsidizing use of renewable sources of energy. This amendment completely transformed terms of providing governmental subsidy and imposed tax on revenues from power generated using renewable sources - solar tax. Although legislator uses term levy, strictly speaking it is tax, because of its characteristic features – obligatory payment, repetitive payment (albeit only for defined time period), relation to public budgets and its object is cash payment. As well from budgetary allocation point of view, the levy is income of national budget (Vondráčková, 2011). For purposes of this contribution are terms solar tax and levy used as synonyms.

Object of levy for generated solar power is electricity produced from solar energy between 1st of January 2011 and 31st of December 2013 in device installed between 1st of January 2009 and 31st of December 2010. Levy base differs according to type of subsidy used by solar power producer. Supposing producer sells all generated power to mandatorily buy up subject (ČEZ), in that case guaranteed purchase price[2] is liable to taxation 26%. Provided that producer decided to consume the power generated or sell it to

2 Producer can choose either to sell all generated power to specified mandatorily buy up subject for fixed purchase price (purchase price regime) or he can consume produced electricity or sell the unconsumed surplus for price agreed with his business partner (green bonus regime).

different subject than to mandatorily obliged to buy it up, tax base is so called green bonus, which producer receives for power generated. Green bonus is liable to 28% tax (Act no. 180/2005 Coll., on subsidizing use of renewable sources of energy, Art. 7a-7h).

Although official reason for introducing temporary taxation on revenues from power generation from solar energy was to return payback period of investment to solar power plants back to 15 years, Parliament of Czech Republic passed the Act no. 165/2012 Coll. on subsidized sources of energy which reintroduced the levy for generated solar power. This time object of taxation is electricity produced from 1st of January 2014 in device installed during year 2010. Tax rates decreased on 10% for guaranteed purchase price and 11% for green bonus (Radvan, 2014: 95).

3 Reasons for additional taxation

The main cause for additional taxation imposed on revenues from power generation from solar energy was stated by Czech government as "solar boom". Given the significant decline in initial investment costs of solar panels in 2009 and favourable Czech crown exchange rate, positive business environment was created and number of solar power plants greatly increased. Such fast development in solar energy production caused cost rise for its financing and furthermore negative social-economic impacts, which became evident especially on consumers electricity bills as a fee for renewable sources. With regard to delegation such a great part of financing duty on households and national budget, there existed a real danger that financing costs of former solar power generation subsidy were disproportionate to legally declared objectives so that it was essential to reconsider former subsidy policy. Ministry of Industry and Trade of Czech Republic stated that it is absolutely necessary to weight meticulously all instruments which are needed for population and economy protection, specifically to respect principle of rationality, proportionality and public interest. The levy was implied on electricity produced from solar energy between 1st of January 2009 and 31st of December 2010, which is period when initial costs for solar power plants dropped sharply so that solar investors became advantaged against investors who made their investments before 2009. Solar tax

of 26% from revenues was precisely calculated in order to guarantee 15 years payback period of investment which was legislator´s original intention (Constitutional Court: Pl. ÚS 17/11).

Even though implementation of solar tax was initially interpreted as compensatory action working against rising price of electricity for final consumer, the law clearly says that levy is income of national budget. It is natural to conclude that existence of levy does not provide consumers any guarantee of keeping the electricity prices low, because it depends only on Czech government how much money does it allocate in favour of distributional companies which are obliged to buy up solar electricity.

Germany already faced the problem with electricity price rise. Local average household pays next to its ordinary energy bill extra 260€ per year for renewable sources of energy. Latest McKinsey study shows that cutting subsidies by 15% would reduce an average household´s annual electricity bill by only a cent. Even if Germany decided to stop supporting renewable energy completely (which is unimaginable) the surcharge on consumers´ monthly bills would hardly decrease (The Economist, 2014: 2). It is obvious that any restrictions or even complete stop for supporting renewable sources of energy would hardly show any decrease on households´ electricity bills.

4 Constitutional complaint dismissal

With regard to great volume of investment to solar industry and former very generous investment conditions, solar tax implementation and simultaneous cancellation of income tax exemption started very harsh criticism especially from investors. The main argument rejecting solar tax was its seeming retroactivity and freedom of enterprise intervention. Many argued that solar tax is liquidating tool for many businesses, because they cannot bear such tax burden. In March 2011 group of senators filed a complaint to Constitutional Court justified with all reasons mentioned above, asking to assess constitutional conformity of implemented actions.

Constitutional Court dismissed the complaint for its unfoundedness. Regarding to retroactivity objection, Constitutional Court provided very extensive explanation where it judged in detail individual retroactivity

features and stated that implementation of solar tax is not retroactive measure. It was declared as retrospective arrangement which is generally acceptable in Czech law.

Unfortunately, Constitutional Court was not that detailed when judging impact of solar tax on payback period of investment to solar power plants. Constitutional Court fully accepted calculations provided by Energy Regulatory Office showing revenues (Internal Rate of Return) and regular payback period of investment to recently installed solar power plants. From evidence presented, Energy Regulatory Office concluded that even after including solar tax, Internal Rate of Return (hereinafter as IRR) exceeds Weighted Average Cost of Capital (hereinafter as WACC) and payback period of investment does not go beyond legally guaranteed 15 years. Including solar tax, IRR in 2009 and 2010 stays between 6, 94% and 10, 22% and regular payback period is between 10 and 12 years (Constitutional Court: Pl. ÚS 17/11).

Constitutional Court accepted evidence presented by Energy Regulatory Office, which at first glance seems to describe a great opportunity for investment. However, when more thoroughly inspected, interpretation of Energy Regulatory Office shows several important mistakes. Firstly, choice of investment evaluation method is wrong. Energy Regulatory Office selected regular payback period as criterion for investment evaluation. Regular payback period says when non-discounted incomes cover overall investment costs (Matuška, 2010: 121). This method does not reflect time value of money so that its predictive power is very limited. As a result it distorts view on investment and it is recommended to use it only as an additional criterion for investment decision. On the other hand, there exists discounted payback period which modifies determination of payback period by reflecting time factor when quantifying expected capital costs and incomes from project (Valach, 2013: 8). This issue was discussed at University of Economics at Prague and it was stated that regular payback period is neither suitable method to evaluate investment to solar power plant projects nor to determine guaranteed purchase price of energy (Valach, 2013: 8). The value of money acquired by investor in future falls every year which is caused on one hand by inflation and on the other by risk that he will not obtain money at all. To sum it up, regular payback period which does not reflect change in money value in time

is naturally shorter that discounted payback period. Here may be identified possible reasons of Energy Regulatory Office for selecting regular payback period in his calculations. This method shows investment to solar power plant projects as more profitable than it really is. The question is if it was legislator´s intention. In the Act no. 180/2005 Coll., about subsidizing use of renewable sources of energy, there is no specification of payback period whatsoever. Regular payback period was first mentioned in 2010 with regard to implementation of additional solar tax and after in evidence presented in front of Constitutional Court. By this time, all negative consequences of excessively high purchase price were already known and there was no one else to blame than Energy Regulatory Office. It became clear why regular payback period was chosen. Considering the statements of respected experts in the area of investment decision that selected regular payback period is absolutely unsuitable for evaluation of investments to solar power plants and circumstances mentioned above, it is possible to conclude that Energy Regulatory Office selected regular payback period for its calculations deliberately to justify solar tax implementation, although its predictive power does not reflect reality. We can only assume that legislator intended to respect common investment practise as well as time value of money. It is highly improbable that any rational investor would put his money into project which in 15 years returns only initially amount invested moreover devalued by inflation.

Secondly, there is another issue with Energy Regulatory Office´s evidence. Presented calculations combine so called static investment evaluation methods with methods dynamic. Typical static method is already explained regular payback period which ignores time value of money. Contrarily dynamic methods as discounted payback period, IRR, etc. reflect time factor. It is noteworthy that Energy Regulatory Office bases its calculation methodically correctly on IRR or WACC, however for evaluation payback period of investment to solar power plant projects leaves dynamic methods and uses regular payback period which means static method. This procedure has to undoubtedly distort results of calculations.

Energy Regulatory Office stated that even after including additional solar tax, IRR exceeds WACC regardless of financing methods. Calculated IRR for 2009 and 2010 is between 6, 94% and 10, 22%. The essential condition

of investment project acceptability is higher value of IRR than WACC. Considering these calculations one can say that investment to solar power plant is profitable even after including solar tax. However, to determine value of WACC is not an easy task. The result of Energy Regulation Offices´ calculations depends on procedure of quantifying WACC. The WACC is sum of cost of each capital component (cost of equity, cost of debt) multiplied by its proportional weight. Cost of debt calculation is reasonably effortless, because credit interest rate and income tax rate are known. On the other hand, cost of equity quantification might be in Czech conditions a serious problem. Cost of equity is not standard expression in Czech Republic. Management of many companies vastly ignore existence of cost of equity, although it is usually very significant amount of money (Mařík, 2011: 215). With regard to massive ignorance of cost of equity in Czech business environment we can only speculate whether Energy Regulation Office did the same in their calculations. It is necessary to emphasize that WACC depends directly on financing method of investment project. Generally speaking, cost of equity is higher than cost of debt. Investors naturally choose debt financing of their projects. Nevertheless the most important bank requirement when applying for credit is possession of certain level of equity which in case of solar power plant projects is usually between 20% and 30%. Thus bank requirements increase WACC.

To sum it up, selection of investment evaluation method and consequent interpretation of results make a real difference when evaluating investment projects. Different methods and approaches provide different results about project acceptability, so that selection of correct method is absolutely crucial. Although academic public rejects approach of Energy Regulatory Office, Constitutional Court did not even consider evidence review and literally copied argumentation of Energy Regulatory Office – administrative body which could not have been impartial in this proceedings. Wrong determining of Payback Period of investment to solar projects was one of the main objections in constitutional complaint, and its correct quantification was essential for final verdict. Payback Period assessment deserved at least the same attention as retroactivity issue. Remaining question is why Constitutional Court did not review presented evidence and calculations.

It might not have fully understood the importance of correct selection of investment evaluation method or it may have deliberately avoided quantifying payback period correctly with regard to public interests.

5 Investors reactions

As a reaction on constitutional complaint dismissal and unsuccessful negotiation with Czech government, International PhotoVoltaic Investors Club (IPVIC) representing foreign investors to Czech solar power projects, initiated arbitration against Czech Republic (Horáček, 2013). After almost a year of proceedings, Ministry of Finance of Czech Republic succeeded in splitting one arbitration with IPVIC into seven individual disputes. This step is being seen as a success of Czech Republic, because situation of foreign investors became more complicated. Individual proceeding is much more expensive than common arbitration which works as a deterrence for many foreign subjects (Brož, 2014).

Although it might seem to be a victory for Czech Republic, there are still serious arguments in favour of arbitration. Solar tax was supposed to be imposed only for three years to move payback period of investment back to 15 years. However Parliament passed an Act which prolonged validity of solar tax for electricity produced from 1st of January 2014 in devices installed in 2010. Czech Republic broke its promise twice – firstly with implementation of solar tax which violated legitimate expectation of investors and secondly when it cancelled temporariness of solar tax (Žižka, 2013).

Beside solar tax investors complain about general destabilization of business environment in area of renewable energy sources. They mean specifically recycling fees for solar panels and compensations cancellation for emergency disconnection of solar power plants by operator. There is an European system called PV Cycle which is financed by solar panels producers and distributors and is endowed with money for panels recycling. Thus investors already paid for solar panels recycling in their initial price. Furthermore these additional costs were not included to calculations of Energy Regulatory Office presented in front of Constitutional Court.

Act no. 185/2001 Coll., on waste introduces obligation for solar power plants operators to close contract with specialized subjects in order to ensure solar

panels recycling. Operators are obliged to pay instalments to specialized subject so that finance for recycling is fully paid until 2019. Nevertheless there might be conflict of Czech and European legislation. European directive 2012/19/EU, on electrical and electronic device waste, clearly stems from principle: Polluter (producer) pays. Article 13 says that EU members guarantee financing of collection, processing and environmentally friendly disposal of electrical and electronic device waste by their producers. Directive clearly imposes the obligation on producers of solar panels, not on their users. Czech legislator explain this conflict by easier collectability of finance from registered solar power plant operators. Otherwise there is danger of future environmental burden for state. However there is still direct conflict of legislation. Czech Republic was liable to change its legislation in harmony with European directive till 14th of February 2014. If Czech Republic fails to do so, solar power plants operators have opportunity to claim compensation, because of European directive on electrical and electronic device waste incorrect implementation. It is probable that pressure will be put on Czech Republic from investors and also from European Union. The consequences may prove to be very expensive for Czech Republic and its tax payers (Vosol, Potrubský, 2013).

All arguments mentioned above provide certain chance for foreign investors to stake their claims for compensation. However Czech investors do not have all this options. Beside the compensation for incorrect European directive implementation the only way how to gain the compensation is to prove that solar tax has liquidating effect on individual company. Although Constitutional Court declared constitutional character of solar tax, it did not exclude liquidating effect on company in exceptional cases (Dostálová, 2014). According to finding of Highest Administrative Court the most suitable and only possible way of taking into account the liquidating impact on individual company is the institute of tax exemption. Article 260 of Act no. 280/2009 Coll., on Tax regulations, gives to minister of finance the power to exempt from solar tax duty in case of exceptional circumstances. Highest Administrative Court stated that decision on solar tax exemption is the only institute that can be used by executive power to fulfil duty of individual approach to solar producers who find themselves in finding defined conditions (Highest Administrative Court: 1 Afs 76/2013).

Currently there is not much anyone can do, but wait for investors reaction. We can just hope that claimed compensation will not ruin national budget and will not cost tax payers other billion crowns (EuroZpravy. cz, 2014).

6 Conclusion

Very generous initial conditions for investment to solar power plant projects in Czech Republic caused so called "solar boom". Government decided to stop overinvestment by additional solar tax imposed on revenues from power generation from solar energy. Revenues obtained between 1st of January 2011 and 31st of December 2013 in device installed between 1st of January 2009 and 31st of December 2010 were liable to tax of 26% in case of guaranteed purchase price and 28% in case of green bonus. For electricity produced from 1st of January 2014 in device installed during year 2010 was solar tax rate decreased on 10% for guaranteed purchase price and 11% for green bonus. This measure brought very harsh criticism from investors which led to constitutional complaint. Constitutional Court had to deal with assessment of financial figures as payback period of investment. In spite of numerous mistakes made by Energy Regulatory Office in their presented calculations, Constitutional Court did not feel a need to review the evidence and verify correctness of calculated payback period and selection of right investment evaluation method. On contrary Constitutional Court literally copied argumentation of biased Energy Regulatory Office and decided on its basis. The approach of Constitutional Court to this case is absolutely unacceptable which confirms the hypothesis that Constitutional Court failed in assessment of payback period of investment to solar power plant projects in Czech Republic.

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THE RIGHTNESS IN POOLING AND ALLOCATION OF PUBLIC HEALTH RESOURCES, IN TIMES OF CRISES

Jitka Loskotová [1]

Abstract

This paper is principally about the importance of the rightness in national legal and financial system giving the appropriate frame for collection and subsequent allocation of public health funds.

The aim of this contribution is to answer the question how to manage public finances in this domain and what´s is generally changing in their pooling and allocation in time of economic crisis.

Applicable ideas, comments and results from surveys are available from Kutzin publications and OECD esp..

Methodologically, I used analyses dealing this topic collected esp. from OECD, WHO and Oxford publications written by Joumard, Kutzin and Kaplan. Also reviewing legal (health, demographic and socioeconomic measures explained on WHO and OECD variables (graphics) or presentations, working papers (Joumard) dealing with related topics. Retrospective comparison.

Key words

Health financing; law policy; Pooling; Allocation; Reform of public finances; economic crisis; OECD; WHO.

JEL Classification

E61, K32

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1 Introduction

The decision about the right pooling and allocating of public health finances for covering the costs of health care cannot be made easily. Even renowned and respectful economists don´t know the best working system for that issue. Most probably, it´s mainly because national policies and legislation are too complex and linked to other domains that we are not able to choose the best way how to appropriately collect, divide and fund the public health system. It can be even more complicated in the time of financial crisis as it has already happened in 2008 and the years after.

To set up the right financial policy and system for public health financial flows means to manage them as effectively as possible, especially on the level of collection and subsequent pooling while respecting the public financial system, legal and political constraints. To go further it´s also advisable to put up the system not only on general taxes but also on out-of-pocket payments (as a patient compliance). But the question is what should be the best, in which proportion, and especially how to manage it? For the huge diversity in national approaches and public finance management, it´s impossible to summarise the answer in one recommendation as a unique help for each country.

But in time of crisis, the strategy of national public health policy and its implementation is extremely important for the possible after-affects. In this case, it´s advisable to state one unique warning. All national policies in time of crises may impose a very negative impact on the lives of citizens who can due to e. g. tax changes have prolonged financial hardship, lose their job. In case of need of a change in national health policy and related law regulation it´s necessary to be aware of their possible not only short-term but also long term contribution to the health system´s productivity and efficiency[2], there may also be negative impacts. Let´s see what the rightness in financial health policy making is and what the aspects are in the time of financial crisis.

2 20% to 40% of all health spending is currently wasted through inefficiency". (WHO, The World Health Report, 2010).

2 Health policy making and pooling

Pooling[3] can be easily understood as an accumulation of prepaid health revenues (Kutzin, 2001: 171-204). Most often it´s a complusory or voluntary insurance on behalf of a population for eventual transfer to providers. Not only empirically it´s the best solution for gathering public funds because individual insurance leads to individual coverage that is not linked to Bismarkian idea of solidarity and common funds. Within this individual coverage in many cases it is not sufficient and lacks the possibility of expensive treatment[4]. For some individuals and their access to health care it´s inequitable: poor people would not be able to save enough and most common effect of financial crisis is that they are more hit than middle class. If we are concerned also about financial protection it´s not an ideal approach due to fact that individual savings is a very inefficient instrument for achieving financial protection, as compared to pooling (a kind of universal financial protection[5]). To summarize it, the distribution doesn´t go from healthy to sick. Anyway this system of individual medical savings accounts is still prevalent in Singapore[6] (in the form of compulsory "Medical saving accounts"), in part of China or USA. Based on experience of many states the voluntary (individual) health insurance is not the right way of coverage while the mandatory (universal) coverage is more protective.

2.1 Financial crisis time

Every policy making in health sector imposes many changes in the public sphere also as in the personal one. It can be even more sensitive in the time of financial crisis. From the past we know that at first place it´s the government that introduce austerity measures to reduce public deficits and it´s usually health sector that witness an extensive spending cuts. During this time, mental health deteriorates and the prevalence of communicable diseases appears to rise.

3 Generic definition used by WHO based on Kutzin theory.

4 Prooved also on Kyrgystan: a case study in efficiency gains through comprehensive reform leading to "Hybrid single payer systém poole dat the national level".

5 Promoting and protecting health is essential to human welfare and sustained economic and social development (WHO, The World Health Report, 2010)

6 In Singapore, Medical saving accounts i some component of a coordinated mix of mechanisms including tax-funded universal catastrophic coverage.

It´s exactly the moment when the health care spending indeed needs to become more effective. It should push us to do necessary steps via reform making on the political level influencing public financing. If not, there is a real threat that the demand for this special kind of services undermines public finances[7]. As a result of run-up in outlays, total spending on health care now absorbs on average 9% of GDP in OECD countries, though with a wide cross-country variation.

Of course, there is no doubt that healthier populations are important for thriving economies. But the fact is that after some analyses we can find out that the OECD countries with the highest amounts spending on health care are not the ones that fare best in terms of health outcomes. Medical treatment should be first effective which doesn´t mean costly. As shows results of one research: "Life expectancy is highly correlated with other indicators of health status, including infant and premature mortality and better quality of life due to improved medical treatment". (Joumard et al., 2008).

3 Conclusion

For the right pooling, especially in time of crisis, every solution is possible if respective institutions (Ministry of Health and Finance) are aligned and come with the reforms focused on: 1. appropriate pooling and 2. subsequent allocation of public health funds to reduce financial burden unless the right reform go ahead doesn´t provoke negative effects on population (elimination of preventive programmes). Suggested appropriate policy making reform and the approach of people-patients are un-avoidable for the right cost-effectiveness in public health spending. There is no one unique way[8] "one-size-fits-all" how to pool and allocate most effectively to give the guidelines for all countries, at least for differences in policy instruments: recommendations are clearly system-dependent. What´s more, countries have different approaches to priority settings.

The only common thing that should be respected world-wide is to be aware of negative effects in cutting health funds.

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7 Public spending on health care i sone of the largest government spending items – on average (OECD data, 2010) it absorbed 15% of general government spending in 2007.

8 E. g. Finland and France comparaisons shows that increasing consistency in policy settings may evokes different, and even seemingly opposite, approaches.

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