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## **Current Problems of Financial Law in Poland and in the Czech Republic Including Effects of the COVID-19 Pandemic**

**Abstract:** It should be clearly stated that current pandemic of the COVID-19 virus has significantly impacted the public finances of many countries and considerably influenced the functioning of world's economy. Allocation of public resources to prevent, or counteract, negative effects of the pandemic has taken various forms. Regardless of the extraordinariness of this situation, the possibility to use aid instruments depends on legislative changes and, thus, on the prior passing of appropriate legal provisions, since they determine the rules based on which these instruments are implemented. Poland, and the Czech Republic, have taken proper actions to combat the COVID-19 pandemic. Referring to the experience of both of these countries, it should be noted that legal and financial solutions used to counteract the pandemic have not always been conducted in accordance with constitutional norms, established financial law rules, or principles of conducting financial economy in the public finance sector. The Authors of this article, while evaluating these solutions, have decided to indicate certain general trends happening in the current financial law, which, unfortunately, are not always positive.

**Keywords:** debudgetisation, financial law autonomy, grant, public debt, special purpose fund

### **Introduction**

It is a simple truism to say that the current pandemic of the COVID-19 virus has significantly strained the public finances of many countries, and considerably

influenced the functioning of world's economy. Allocation of public resources to prevent or counteract negative effects of the pandemic has taken various forms. On the one hand, there is direct expenditure from budgets and other public funds for particular tasks, e.g., healthcare, or support to entrepreneurs affected by the pandemic. On the other hand, the latter can also count on various types of reliefs (exemptions), lowering financial obligations towards the public sector in connection with losses incurred during economic lock-down.

It is worth mentioning that this help is not solely financed from the revenue obtained by the states, but includes debt funds, which has its consequences in terms of increasing debt. However, such actions seem justified in the current situation (although not without flaws), having regard to the issue of negative social and economic effects of the pandemic.

It should also be considered that the EU in the context of the management of economic and social claims caused by the Coronavirus pandemic, established the special Recovery and Resilience Facility<sup>1</sup> of total value amounting to EUR 672.5 bn. These funds will be allocated to the Member States: EUR 312 bn from this sum will constitute grants and EUR 360 bn will be in the form of loans.

Regardless of the extraordinariness of the current situation, the possibility to use aid instruments depends on legislative changes, and thus on the prior passing of legal provisions, since they determine the rules on which these implemented instruments are based. A part of these provisions, due to their subject which concerns public finance, in particular spending public funds, belongs to a, broadly understood, financial law.

Also, Poland, and the Czech Republic, have taken proper actions in the context of combating the COVID-19 pandemic. Referring to the experience of both of these countries, a thesis should be put forward, that legal and financial solutions used to counteract the pandemic have not always been conducted in accordance with constitutional norms, established financial law rules, or principles of conducting financial economy in the public finance sector. The Authors of this article, while evaluating these solutions, decided to indicate certain general trends happening in the current financial law, which, unfortunately, are not always positive. A part of these trends results from the problems connected with adopted legal regulations constituting the basis of public authorities' actions to counteract, and mitigate, negative effects of the pandemic; a part however had appeared before and "anti-Covid" legal and financial instruments emphasised them more.

Therefore, the aim of this article is to indicate and evaluate current trends taking place in the Polish, and the Czech, financial law, including problems arising from the changes in law made in connection with counteracting the COVID-19 pandemic.

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1 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility OJ L 57 of 18.2.2021, pp. 17–75.

The article uses the so-called non-reactive research methods, based on the analysis of the content and available source information, i.e., on theoretical and legal publications and legal regulations crucial from the point of view of the selected subject. The publication also has a practical value, especially where statistic data has been used.

Having regard to the structure of the text, the authors firstly focused on general trends in financial law. Then, the experiences of Poland, and the Czech Republic, in the scope of legislative actions of a financial nature taken in these countries to fight negative effects of the COVID-19 pandemic, were presented. The article closes with joint conclusions, some of which refer to taking the necessary actions in the public finance of Poland, and the Czech Republic.

## 1. General Trends in Current Financial Law

The enlargement of the European Union (EU), which took place on 1 May 2004, meant a type of “revolution” not only in the financial law, but generally in the legal systems of the Countries of Central and Eastern Europe. As a result of EU accession, they adopted the whole *acquis communautaire* into their legal orders. In relation to financial law this resulted not only in broadening its scope in the formal meaning (increase in the amount of legal and financial regulations as a result of unification and implementation of the Union legal provisions), but also in a quality change consisting in direct multi-dimensional impact of the *acquis communautaire* on national legal systems. This, on the one hand, happens in the field of making law, including financial law (obligation to include Union law in the national legislative process) and on the other hand – in the field of its validity through the obligation to respect determined rules of applying EU law: priority and full efficiency of EU law, direct application and direct result, and Member States liability. As a result, in Member States, next to national law Union law functions, but it is not possible to talk about two separate and autonomous legal orders, but rather, about one multi-centric with competence divided *quoad usum* (the so-called concept of the multi-centric legal system)<sup>2</sup>.

In the context of financial law transformation, having regard to its scope and structure, especially in the last period, i.e., after Polish accession to the EU, several phenomena (processes) happening within this area of law may be indicated.

First of all, representatives of the doctrine have emphasised the process of autonomy (emancipation) of financial law<sup>3</sup>. Its separation was influenced by several factors, such as: regulation method, specificity of norms constructed on the

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2 E. Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje*, „Państwo i Prawo” 2005, no. 4, p. 6.

3 A. Drwiłło, *Prawo finansowe i jego zakres*, (in:) A. Drwiłło (ed.), *Podstawy finansów i prawa finansowego*, Warsaw 2018, p. 39; N. Gajl, *Finanse i prawo finansowe*, Warsaw 1992, p. 37;

basis of financial regulations, general rules regarding public funds management, original (specific) institutions and terms not appearing in other fields of law, e.g., the principle of unity of the budget, the principle of completeness of the budget, public finance sector, gross and net method, authorising officer of budget, budget reserve, etc. While the indicated phenomenon of financial law autonomy in the Countries of Central and Eastern Europe is not questioned as such, however, having regard to its limits (scope), which are determinants of this autonomy, it does not have a static character, which is not without impact on the whole field. Namely, currently there are two opposite trends, the basis of which are diverse factors, not always positive.

The first one is based on the phenomenon of expanding the area of financial law regulations, which is caused, on the one hand, by political, systemic, and economic factors and on the other hand by legal indicators. In relation to the first issue, despite appearances, broadly understood systemic transformation (also including economic context) in the European countries belonging to the socialist bloc and which started in Poland in 1989, the consequence of which was deregulation of many spheres of economic life, did not cause the boundaries of financial law to narrow. As E. Dębowska-Romanowska called it, the processes of “grabbing” by law newer and newer spheres of life started<sup>4</sup>, and in the socio-economic context it is expressed in the civilization development in which countries and international organisations invest public funds more, which causes expansion of the public sector.

The second factor having legal character, represents a phenomenon of the increase of legal and financial regulations, i.e., such whose subject is public finances. Of course, it is a consequence of the aforementioned political, systemic, and economic transformation, but additionally, the fact that the Member States adopted the *acquis* into their legal systems as a consequence of their EU accession, is significant. As a result, in the regulatory area of financial law new institutions have appeared, such as, e.g., the EU budget, which was introduced into the legal system pursuant to the Act on public finance of 2009.<sup>5</sup>

Moreover, a significant number of comprehensive legal regulations, creating, *de facto*, new areas in financial law, have appeared, such as the law of the single European market for finance. Currently, legal scholars are researching these issues<sup>6</sup>, but having regard to the subject of this law regulation, which includes

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C. Kosikowski, *Prawo finansowe. Część ogólna*, Warsaw 2003, pp. 33–36; C. Kosikowski, *Finanse publiczne i prawo finansowe. Zagadnienia seminaryjne i egzaminacyjne*, Warsaw 2013, pp. 46–50.

4 T. Dębowska-Romanowska, *Prawo finansowe po transformacji ustrojowej*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2011, z. 3, p. 89.

5 Act of 27 August 2009 on public finance (J of Laws of 2021, item 305, later amended).

6 A. Jurkowska-Zeidler, *EU Financial Market Law: From Minimal Harmonisation to Federalisation*, (in:) M. Radwan, J. Gliniecka, T. Sowiński, P. Mrkývka (eds.), *The financial Law Towards Challenges of the XXI Century: conference proceedings*, Masaryk University, Brno 2017, pp. 379–

both elements of public and private law, it may be doubtful whether, first of all, the law of the single European market for finance will fully fall within financial law, and secondly whether in connection with the above, and due to the specificity (originality) of the regulated institutions (credit institution, prudential supervision, financial conglomerates, capital adequacy, deposit guarantee scheme, etc.), it is not a separate branch of law. As a consequence, it would have to be stated that this area has been separated from the field of financial law, which the Author, however, does not prejudge.

The process of separating from the field of financial law its branches and consequently the process of autonomy of these branches<sup>7</sup>, which is indicted by the case of the law of the single European market for finance, belongs to the second trend. Classic examples of such a process of autonomy are tax law and customs law, previously recognised as belonging to financial law<sup>8</sup>, and currently another branch, which is grant law<sup>9</sup> is indicated. However, the concept of A. Mastalski seems to balance or even reconcile these autonomous processes, as he stated that, "(...) financial law constitutes, assuming a basic criterion of dividing law into branches, a loose federation of autonomous branches of law regulating social relations in the scope of accumulating and dividing public financial resources as well as influencing supply of money, classified as tax law, budgetary law and public banking law"<sup>10</sup>.

It seems, without going into further analysis of the described trends, that generally at their base lies, as previously mentioned, the phenomenon of an increase in legal and financial regulations. Summing up transformations occurring in contemporary financial law, it may be concluded that, on the one hand, the process of its growth is intensified, and on the other hand, that this process implies a kind of centrifugal trend, consisting in an increased autonomy of its particular branches. The total transformation may be described as a phenomenon of "autonomy in financial law", which is not just about its autonomy but also about emancipation of different branches of law from its scope.

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391; C. Kosikowski, *Finanse i prawo finansowe Unii Europejskiej*, Warsaw 2014, pp. 270–273; M. Fedorowicz, *Rola i zadania teorii prawa rynku finansowego UE*, „Bezpieczny Bank” 2016, no. 1(62), pp. 114–134.

7 A. Majchrzycka-Guzowska, *Finanse i prawo finansowe*, Warsaw 2016, p. 37.

8 A. Gomułowicz, J. Małecki, *Podatki i prawo podatkowe*, Poznań 2000, p. 102; L. Etel (ed.), *Prawo podatkowe. Zarys wykładu*, Warsaw 2013, p. 45.

9 A. Ostrowska, *Samorządowe prawo dotacyjne. Dotacje jako wydatki jednostek samorządu terytorialnego*, Warsaw 2018, s. 34–93.

10 R. Mastalski, *Finanse publiczne a prawo finansowe*, (in:) R. Mastalski, E. Fojcik-Mastalska (eds.), *Prawo finansowe*, Warsaw 2013, p. 37.

## 2. Alarming Phenomena in the Polish Public Finances

### 2.1. The Problem of Hidden Public Debt

As has been mentioned before, the increase in expenditure incurred by the authorities to fight the negative effects of the COVID-19 pandemic is undisputed. At the same time, it generates a negative balance in the budgets, which consequently leads to an increase in public debt. However, such a situation should not be evaluated only negatively, i.e., through economic effects. From the social point of view, the actions protecting the health and lives of citizens are justified. A more important task now, will be servicing of this accrued debt and balancing budgets as a form of public finances recovery.

The rise in the deficit and debt also has consequences in the legal context, especially in those countries which introduced regulations limiting the level of these two issues into their legal systems. The EU itself in the Treaty on the functioning of the European Union<sup>11</sup>, and more precisely in Art. 126(2) and in Protocol 12, determines the so-called reference values of the deficit and debt of the *general government* sector in the Member States, according to which they should not exceed 3% and 60% of GDP, respectively. Breaching these levels, and as practice shows especially the deficit-to-GDP ratio, results in triggering the excessive debt procedure. Pursuant to Art. 126(2a) of the Treaty, in the situation of exceeding the reference value of the deficit of the *general government* sector, the European Commission and the EU Council examine whether the excess is only exceptional, and temporary, and whether it remains close to the reference value. Additionally, in the Stability and Growth Pack, which *de facto* develops the excessive debt procedure, a general escape clause is included, which is precisely regulated by Art. 5(1), Art. 6(3), Art. 9(1), and Art. 10(3) of the Council Regulation (EC) No 1466/97<sup>12</sup> (the so-called preventive part of the Pact) as well as Art. 3(5) and Art. 5(2) of the Council Regulation (EC) No 1467/97<sup>13</sup> (the so-called preventive part of the Pact).

First of all, this clause allows to introduce temporary derogation from the adjustment path leading to a medium-term budgetary objective in case of an event which is extraordinary and independent from the state, and which has significant impact on the balance of government and local government institutions or in the periods of significant deterioration of economic situation. Secondly, in the times of significant deterioration of economic situation in the Eurozone, or in the whole EU, the Council on the basis of Commission's recommendation, may decide to change

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11 Treaty on the functioning of the European Union (OJ C 202, 7.6.2016, pp. 1–388).

12 Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ L 209 of 2.08.1997, p. 1).

13 Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 209 of 2.08.1997, p. 6).

the direction of fiscal policy. Generally, it is about mitigating restrictions arising from keeping a proper level of public expenditure, which entails maintaining the deficit within the reference value.

The general “escape clause” was applied on a motion of the Commission, as a result of the worsening of the economic situation which followed the Coronavirus pandemic. It is important that it did not suspend the excessive debt procedure, but it will allow to make a coordinated budget policy within the Stability and Growth Pact and will allow to omit budget commitments which would be applied to a given Member State in a normal situation<sup>14</sup>.

the Constitution of the Republic of Poland<sup>15</sup> gives rise to the norm limiting the amount of Polish public debt (the amount of deficit was not limited by constitutional norms). According to Art. 216(5) of the Basic Law, the amount of public debt may not exceed 3/5 of GDP. Having regard to this proportion, in Poland the increase in general debt partially caused by negative effects of the pandemic is also noticeable. In 2019–2020 it increased from the level of 43.6%<sup>16</sup> to 47.8% of GDP<sup>17</sup> and in absolute amounts it reached to PLN 990,9 bn and PLN 1 111,8 bn, respectively. However according to the estimation of the Ministry of Finance, in 2021 it will amount to 45,4% and in 2022 it should decrease to 43,8%<sup>18</sup>.

When analysing the above data, it should be noted that the calculations of the amount of debt were conducted according to domestic methodology, regulated in the provisions, especially in the Act on public finance (so-called public debt). However, Polish debt is also established on the basis of the EU methodology of the *general government* sector, among other things, to fulfil duties resulting from the Stability and Growth Pact, which is not binding in the context of limitations arising from Art. 216(5) of the Constitution. According to this methodology, general Polish debt in relation to GDP in 2019 amounted to 45.6% and in 2020 it increased up to 57.5%, which better presents the results of financing aid instruments, including the so-called “anti-crisis shields” connected with fighting the pandemic. The estimation of the

14 Communication from the Commission to the Council, on the activation of the general escape clause of the Stability and Growth Pact (COM/2020/123 final of 20.03.2020).

15 Constitution of the Republic of Poland of 2 April 1997 (J of Laws of 1997, no. 78, item 483, later amended).

16 Notice of the Minister of Finance of 22 May 2020 on the amounts referred to in Art. 38 and Art 38a of the Act on public finance (Monitor Polski of 2020, item 456).

17 Notice of the Minister of Finance, Development Funds and Regional Policy of 24 May 2021 on the amounts referred to in Art. 38 and Art. 38a of the Act on public finance (Monitor Polski of 2021, item 492)

18 The Ministry of Finance, The public finance sector debt management strategy in the years 2022–2025, Warsaw, September 2021, <https://www.gov.pl/web/finanse/strategie-zaradzania-dlugiem> (06.10.2021).

European Commission regarding Polish debt for 2021 and 2022 amounts to 57.1% and 55.1%, respectively<sup>19</sup>.

It is therefore clear that the differences between domestic, and EU, amounts of the Polish debt in relation to GDP are of a few percent, so they are quite significant. As an example, it may be indicated that in 2020 the amount of debt of the *general government* sector was higher by PLN 224 289.7 m from public debt, which corresponded to 9.7% of Polish GDP<sup>20</sup>. This is a consequence of differences in the adopted methodologies of establishing debt, and more precisely divergences arising from the components which are included in them. Without going into details of these differences<sup>21</sup>, EU methodology is basically more oriented on the character of the funds (liabilities) which serve implementation of public task, and Poland, on the other hand, conditions the amount of debt on the so-called public finance sector units. In other words, pursuant to Arts. 72 and 73 in connection with Art. 9 of the Act on public finance, liabilities of these units after consolidation (i.e., after excluding mutual liabilities) are taken into consideration to establish public debt. As a result, what is not considered as a liability of the sector unit (but may serve to implement public tasks), will not have impact on the amount of debt. Having regard to this rule, significant concern needs to be presented, also of a constitutional character, regarding actions taken by the government, but also the Polish parliament, which by statutory changes contributes to these actions.

Namely, even before the pandemic, Polish authorities, for different reasons, and also due to constitutional limitations, increasingly often had made exemptions of particular public liabilities (serving implementation of public tasks) from the mentioned sector<sup>22</sup>. A classic example of this is the creation of funds in Bank Gospodarstwa Krajowego (BGK), which does not belong to the public finance sector, but implements public tasks from these funds and incurs liabilities whose guarantor is the State Treasury. This process began long before the pandemic of the COVID-19 virus, as early as the 1990s.<sup>23</sup> As a result, these liabilities do not formally impact the amount of public debt. Such questionable practice, from the point of view of public finance consolidation, and also having regard to the scale of these funds from the

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19 European Commission, European Economic Forecast. Spring 2021, European Economy Institutional Paper 149/2021, p. 111, [https://ec.europa.eu/info/publications/european-economic-forecast-spring-2021\\_en](https://ec.europa.eu/info/publications/european-economic-forecast-spring-2021_en) (31.07.2021).

20 Supreme Audit Office, The Analysis of execution of the state budget and monetary policy assumptions in 2020, Warsaw 2021, p. 297, <https://www.nik.gov.pl/kontrola/analiza-budzetu-panstwa/> (31.07.2021).

21 Detailed differences are indicated in: the Ministry of Finance, The public finance sector debt management strategy... *op. cit.*, pp. 52–54.

22 On the causes of debudgetisation, see more in: J. Stankiewicz, *Debudżetyzacja finansów państwa*, Białystok 2007, pp. 31–36.

23 See also E. Malinowska-Misiąg, W. Misiąg, *Finanse publiczne w Polsce*, Warsaw-Rzeszów 2006, pp. 357–369.

point of view of Art. 216(5) of the Constitution of the Republic of Poland, contributes to the creation of hidden public debt, and the problem lies not in the fact that it is not registered, but in the fact that is excluded from the public finance sector and consequently is not covered by constitutional limit of public debt. This phenomenon may be described as a kind of “external debudgetisation”, consisting in the transfer of public funds not only outside the state budget but outside the whole sector of public finance.

What is more, the above practice has intensified due to applying instruments fighting negative effects of the Coronavirus pandemic. The public finance sector has been issued bonds to the total value of PLN 166 147.40 m, whose guarantor is the State Treasury. This topic will be discussed in another point. In fact, the amount of public debt, which is related to the constitutional limit of 60%, should be enlarged by this value. It should also be indicated that in Art. 86(1) of the Act on public finance sanative procedures were established which are to limit the size of public debt so that its amount does not exceed the threshold included in Art. 216(5) of the Constitution. These procedures, after exceeding certain levels of debt-to-GDP ratio, provide for, e.g., the obligation to take restrictive austerity measures in the state budget. The first procedure is applied when the above ratio exceeds 55%; however, as the Supreme Audit Office (Najwyższa Izba Kontroli – NIK) has indicated, it would not happen even if the mentioned amount of liabilities from bonds was added<sup>24</sup>. But it would take place when the *general government* methodology was binding.

Having regard to the abovementioned, as well as in the face of constitutional debt limitation, it needs be decided how the government financing anti-Covid actions and programmes should act when citizens’ lives and health are at threat, moreso that many countries have covered the costs of anti-crisis instruments by increased issuance of debt.

Generally, the provision of Art. 216(5) of the Constitution should be considered very restrictive, and its breaching should “(...) be treated as ‘constitutional tort’ – regardless of whether particular persons are subject to constitutional responsibility or not”<sup>25</sup>. It should, however, be noted that, it was introduced to limit incurring liabilities (and indirectly making public expenditure) by authorities in normal conditions of fiscal policy. However, it should be perceived differently in extraordinary situations, when certain general goods (values) are at threat, e.g., sovereignty, internal security, life, and health of citizens. It is about circumstances which, in the Polish legal system, are classified as states of emergency. Then, setting aside interpretation of Art. 216(5) of the Constitution and only acting in accordance with rational (logical) way of thinking, due to these extraordinary circumstances, the state needs to have

24 Supreme Audit Office, The analysis of execution..., *op. cit.*, p. 293.

25 T. Dębowska-Romanowska, Prawo finansowe. Część konstytucyjna wraz z częścią ogólną, Warsaw 2010, p. 119.

the possibility to obtain additional financial resources by increased issuance of debt, regardless constitutional limitations. Absolute compliance with constitutional limits of public debt would expose the State Treasury, local government, and citizens to disproportionate losses in relation to the effects of increased public debt<sup>26</sup>. Despite breaching constitutional norms in the analysed situation, potential responsibility for this issue would be excluded due to a kind of force majeure.

Of course, excluding such responsibility should be subject to proper conditions, from which two are essential. Firstly, is a formal declaration of the state of emergency on the territory of the whole country. It should be noted that the Polish government did not decide to declare one of such states, i.e., the state of natural disaster<sup>27</sup>. Secondly, those liabilities, which serve financing direct actions taken to counteract and eliminate negative effects of the declared state of emergency, should be excluded from the limit of debt. Specifying such liabilities could be conducted by introducing proper changes on the statutory level, in particular in the Act on public finance, and would not require changes of the Constitution. It arises from the fact that Art. 216(5) of the Constitution refers to legislative provisions regarding the method for calculation of public debt.

The practice of shifting expenditure (liabilities) connected with counteracting negative effects of the pandemic outside the public finance sector, which was mentioned before, should be evaluated as negative in effects. In the economic context, and which has been indicated by NIK, this leads to an increase in the costs burdening the state and citizens, since there is a risk that the redemption of such liabilities will become an element of borrowing needs of the State Treasury<sup>28</sup>. On the other hand, in the legal context such actions are questionable from the point of view of the norm arising from Art. 216(5) of the Constitution, because it leads to a kind of fiction in which it is assumed that a part of public debt does not exist, which raises doubts about the validity of this norm.

## **2.2. Increasing Processes of Debudgetisation of Public Funds and their Consequences**

The pandemic of Coronavirus has emphasised debudgetisation processes of Polish public finance, i.e., excluding funds which serve financing public tasks from the state budget, as well as local government units (LGUs). Of course, this process

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26 E. Ruśkowski, J.M. Salachna (eds.), *Finanse publiczne. Komentarz praktyczny*, Gdańsk 2014, pp. 415–416.

27 See also: P. Tuleja, *Pandemia COVID-19 a konstytucyjne stany nadzwyczajne*, „Palestra” 2020, no. 9, <https://palestra.pl/pl/czasopismo/wydanie/9-2020/artukul/pandemia-covid-19-a-konstytucyjne-stany-nadzwyczajne> (31.07.2021).

28 Supreme Audit Office, *The analysis of execution...*, *op. cit.*, pp. 292–293.

had taken place before the pandemic, which was mentioned before, and cannot be evaluated only negatively<sup>29</sup>.

An example of the phenomenon of excluding public funds outside the budget is, e.g., creation of state specific purpose funds, which remain within the sector of public finance. After the changes of power in 2015 in Poland, which also had an impact on conducted fiscal policy, 11 such institutions were created<sup>30</sup>.

The indicated manner of public funds transfer may be described as “internal debudgetisation”, since the funds are outside the state budget and local government budgets, but they are covered by the limits of the public finance sector. Much more extensive debudgetisation, in particular due to its scope, is the so-called external debudgetisation, which takes place when the means are totally outside the public finance sector, but they still serve implementation of public tasks. An example of this process is the creation of funds in the state BGK, as previously mentioned, or the creation of capital companies whose owner is the State Treasury. Such debudgetisation does not serve consolidation of public finance, but results in a lack of transparency – it distorts data in the scope of public finance, or it decreases parliamentary control. Aforementioned differences in the method of establishing public debt according to Polish, and EU methodology, may constitute a kind of example of the scale of external debudgetisation, since pursuant to the methodology of the *general government* sector, the scope of public debt covers liabilities of the funds in the BGK, or certain public enterprises which do not conduct market activity<sup>31</sup>.

Differences in figures between the amount of Polish public debt established according to domestic, and EU, regulations are presented in the Table below.

The above data demonstrates that the difference in the amount of debt increased sharply in 2020, which was directly caused by the adopted method of financing “anti-Covid” aid instruments. Two basic sources of this financing were: the COVID-19 Counteracting Fund, specially created in BGK<sup>32</sup> as well as Polish Development Fund (Polski Fundusz Rozwoju – PFR) which is a joint-stock company, whose main owner is the State Treasury, and which implemented aid activities for entrepreneurs in the form of “financial shields”.

29 On the effects of debudgetisation see more in: J. Stankiewicz, *Debudżetyzacja...*, *op. cit.*, pp. 37–40.

30 The number established on the basis of the Budget Act for 2015 (J of Laws of 2015, item 153) and the Budget Act for 2021 (J of Laws of 2021, item 190) as well as on the basis of acts establishing particular funds. It needs to be indicated that some of the funds was closed after 2015 and some changed their names.

31 The Ministry of Finance, *Public finance sector debt management strategy...*, *op. cit.*, pp. 52–54.

32 See Art. 65 of the Act of 31 March 2020 on amending the Act on specific solutions related to the prevention, counteracting, and combating of COVID-19, other infectious diseases, and crisis situations caused by them, as well as some other acts (J of Laws, item 568, later amended)

Table 1. Differences between the amount of national public debt (NPD) and debt of *general government* sector (GG) in 2016–2020 (in PLN millions)

	2016		2017		2018		2019		2020	
		difference (1–2)								
1. PND	965 199		961 841		984 313		990 948		1 111 273	
2. GG	1 006 585	-41 386	1 005 722	-43 881	1 035 703	-51 390	1 045 646	-54 698	1 335 569	-224 296

Source: On the basis of data provided by Polish Central Statistical Office (GUS) included in *Concise Statistical Yearbook of Poland 2018–2021*.<sup>33</sup>

Both these institutions, in part and in the debt manner, financed aid by issuing bonds whose guarantor was the State Treasury for the total value of PLN 166 147.70 m (the COVID-19 Counteracting Fund – PLN 100 747.4 m, PFR – PLN 65 400 m)<sup>34</sup>. Due to the fact that both BGK and PFR are not included in the public finance sector, the indicated amount of the incurred liabilities was not officially included in this sector, which also influenced the lower amounts of the public debt indicated above.

The Ministry of Finance, in relation to the NIK's allegations regarding the adopted manner of anti-crisis funds transfer outside public finance sector, stated that, "(...) aid was easier to implement and could have been provided instantly, without unnecessary bureaucracy and excess of procedures"<sup>35</sup>.

Such a position needs to be criticised, especially having regard to the scale of the conducted transfer of funds outside the public finance sector. The arguments about easier and faster aid may not lead to downgrading the meaning of basic management rules adopted in this sector, as well as may not lead to the situation in which binding constitutional and statutory regulations are a fiction. Such a fiction may be considered in relation to the norm limiting the amount of public debt included in the Art. 216(5) of the Constitution, as well as in relation to Art. 86 of the Act on public finance which provides launching sanative procedures in connection with the increase of debt-to-GDP ratio.

### 3. Problems of Financial Law in the Czech Republic

#### 3.1. Problems of Increasing Public Debt

In the Czech Republic, similarly as in Poland, new negative phenomena related to public finance may be noticed. One such problem is hidden public debt, which

33 Polish Central Statistical Office (GUS), *Concise Statistical Yearbook of Poland*, <https://stat.gov.pl/obszary-tematyczne/roczniki-statystyczne/roczniki-statystyczne/> (31.07.2021).

34 Supreme Audit Office, *Analysis of Budget Execution ...*, *op. cit.*, pp. 292–293.

35 Position of the Ministry of Finance to the report of NIK of 8 July 2021 <https://www.gov.pl/web/finanse/stanowisko-mf-do-raportu-nik> (31.07.2021).

includes liabilities of the state, or local government units, for liabilities of other entities, and which poses a serious threat to the financial stability of state and local government units. Negative phenomena which impact the amount of debt have intensified due to the COVID-19 pandemic, when the government, to an incredible degree, increased public expenditure. All this resulted in the deficit in this year's budget, which was planned in the Budget Act No 600/2020 Sb. on the state budget of the Czech Republic for 2021 in the amount CZK 500 bn, with revenue amounting to CZK 1 385 613 029 790 and expenditure CZK 1 885 613 029 790<sup>36</sup>. In comparison, in the past the highest deficit in the state budget in the amount of CZK 192 bn was in 2009<sup>37</sup>, i.e., after the economic crisis. In the recent years there has even been a budgetary surplus (2016- CZK 61.8 bn, 2018 – CZK 2.9 bn)

However, having regard to the debt of the Czech Republic<sup>38</sup>, in the years 2012–2019, the public debt-to-GDP ratio decreased from 44.2% in 2012 to 30.3% in 2019. The increase of this number in the previous year to 38.1% of GDP, i.e., by 7.8 percentage points, is alarming<sup>39</sup>.

The Act on budgetary responsibility rules<sup>40</sup> was introduced in 2017. This act, drawing on the example of the Constitution of the Republic of Poland, and including EU regulations, introduced prudential thresholds and public expenditure frameworks. Also, a new institution was established – the Czech Fiscal Council (Národní rozpočtová rada).<sup>41</sup> This Council, during the pandemic, was speaking against various fiscal actions of the government, e.g., by criticising adopted acts or in annual reports. However, the mentioned act was not adopted as a constitutional act, but, rather, as an ordinary act.<sup>42</sup> This led to a situation in which in 2020–2021, the Parliament from the initiative of the government, fundamentally amended it twice during the state of emergency, when the procedure of adopting acts was significantly

36 Zákon o státním rozpočtu České republiky for 2021 (Zákon č. 600/2020 Sb.), <https://www.zakonyprolidi.cz/cs/2020-600> (31.07.2021).

37 The Ministry of Finance of the Czech Republic, <https://www.mfcr.cz/cs/aktualne/v-mediich/2010/2010-01-04-vmediich-4681-4681> (31.07.2021).

38 For public debt in The Czech Republic see more: M. Karfíková, *Teorie finančního práva a finanční vědy*, Praha 2017, pp. 117–141 or B. Hamerníková, *Veřejné finance: vybrané problémy*, Praha 2017, pp. 82–97.

39 Eurostat, European Statistics, [https://ec.europa.eu/eurostat/databrowser/view/sdg\\_17\\_40/default/table?lang=en](https://ec.europa.eu/eurostat/databrowser/view/sdg_17_40/default/table?lang=en) (31.07.2021).

40 Zákon o pravidlech rozpočtové odpovědnosti (Zákon č. 23/2017 Sb.), <https://www.zakonyprolidi.cz/cs/2017-23/> (31.07.2021).

41 See more in: P. Mrkývka, J. Blažek, E. Tomášková, J. Schweigl et al., *Vybrané právní otázky fiskální odpovědnosti státu*, Brno 2020, pp. 59–63, or Karfíková M., *Teorie finančního práva a finanční vědy*, Praha 2017, pp. 111–113.

42 See more in: M. Kozieł, *Nowe metody ograniczania długu publicznego w Republice Czeskiej*, (in:) W. Miemiec, K. Sawicka, *Instytucje prawnofinansowe w warunkach kryzysu gospodarczego*, Warsaw 2014, pp. 352–362 or P. Mrkývka, *Determinace a diverzifikace finančního práva*, Brno 2012.

shorter, and in the justification to the draft amendment adopted on 27 April 2020<sup>43</sup>, it was indicated that, *From the macroeconomic point of view all these funds<sup>44</sup> go far beyond automatic stabilisers. They are not sufficient for the scale and range of the current crisis not only due to their concentration, but mainly due to their potential size. Current frameworks of fiscal policy in the Czech Republic are determined by the Act No 23/2017 Sb. on budgetary responsibility rules, later amended by the Act No 277/2019 Sb. It determines rules for expenditure frameworks of the state budget and public funds for the following three years<sup>45</sup> on such a level that the whole balance of the public sector in the current methodology of the European system of national and regional accounts in the Community adjusted for the business cycle, one-off and other temporary measures would reach medium-term budgetary objectives of the Czech Republic determined in accordance with the Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies as well as implementing rules. Medium-term budgetary objective was established in at -0.75% of GDP for 2020 and following years. Although the Act on budgetary responsibility rules and the above-mentioned Regulation take into account extraordinary events, which temporarily loosen fiscal rule, in this case it is applied only till 2020. However, current crisis is so unprecedented that strict fiscal frameworks imply limitation of CZK 150 bn. Such strong fiscal consolidation in the times when public finance tries to restore the whole economy and maintain it in a good condition, allowing fast economic growth without significant macroeconomic and social losses, would probably cause another recession<sup>46</sup>.*

Current economic forecasts indicate that if the present state is maintained, i.e., the current level of public debt continues, the Czech Republic will reach debt in the amount of 60% of GDP in the next few years. The Ministry of Finance estimates that in 2024 this ratio will reach 55%<sup>47</sup>.

Similarly to the state budget, also local government budgets<sup>48</sup> sanative encountered the lack of financial means and a deepening deficit connected with the COVID-19 pandemic. This led to the passing of extraordinary transfers from the

43 Zákon č. 207/2017 Sb.

44 I.e., funds with which the Czech government supports their citizens and entities conducting economic activity on the territory of the Czech Republic, e.g., unemployment benefit, benefit during quarantine, benefit for entrepreneurs, postponing time limit for payment of certain taxes, compensation of salaries, supporting loans, etc.

45 Expenditure frameworks are adopted by the government.

46 Justification to the draft act on the amendment of act on budgetary responsibility rules,

47 Česká tisková kancelář, Czeska Agencja Prasowa, <https://www.ceskenoviny.cz/zpravy/vladni-dluh-cr-v-1-ctvrtletí-rostl-po-kypru-nejrychleji-ze-zemi-eu/2069470> (31.07.2021).

48 For local government budgets in the Czech Republic see: P. Hrubá Smržová, P. Mrkývka et al., *Finanční a daňové právo*, Plzeň 2020, pp. 98–111.

state budget to budgets of local government units. These mainly consisted of grants and loans which are to compensate for losses in taxes.

### **3.2. Financial Effects of “anti-Covid” Instruments in the Czech Republic**

In connection with the COVID-19 pandemic, and similarly as in other countries in the Czech Republic special programmes, which are mainly to help entrepreneurs and employees survive the time of crisis, have been introduced. However, this caused an extraordinary increase in the expenditure of the state budget. For example: changes in the childcare benefit for parents who had to stay at home because schools and kindergartens were closed<sup>49</sup> cost CZK 49 bn; “antivirus A/A Plus”, and “Antivirus B” grant programmes, cost CZK 25.5 bn; other different types of benefits and grants (benefit for the loss of earnings, COVID lease, COVID accommodation, COVID bus, COVID culture, etc.) amounted to CZK 12.2 bn in total.

Additionally, in 2020 entrepreneurs could have applied for the so-called compensatory bonus („kompenzační bonus”), which cost the state budget CZK 26.3 bn in total. Besides this, the pensions, and salaries of state employees were raised, but it was single action, and it was about extraordinary expenses connected with the COVID-19 pandemic, and its aim was to counteract a deeper recession. It is doubtful whether these expenditures were really necessary.

### **3.3. Key Changes in the Czech Tax Law**

The Czech Republic introduced into the public finances, instruments not related to the pandemic, especially in tax law, which significantly impacted the state of these finances. On 1 January 2021 a change in the way personal income tax was calculated was introduced. Until the end of 2020, personal income tax was calculated in such a way that the tax base included a charge whereby the employer paid for social and health insurance for a given employee. Thus, the tax base was artificially raised by 34%, which caused an increase in tax. However, from this year, the tax base is established on the basis of gross remuneration (without the above encumbrance) which will transfer into lower tax.<sup>50</sup>

Besides this, from 2021 the tax-free amount in the personal income tax was raised from CZK 24.840 to CZK 27.840 and from 2022 it is to increase up to CZK 30.840. The cost of these changes (including the change in the principle of establishing tax base) in 2021, has been estimated in the amount of CZK 99 bn: state revenue will decrease by CZK 87.5 bn, municipalities revenue by CZK 8.1 bn, voivodships revenue by CZK 2.6 bn and the State Fund for Transport Infrastructure by CZK 0.5 bn. On the other hand, in 2022 it is estimated that the revenues will be lower by CZK 121 bn

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49 It needs to be emphasised that the Czech schools remained closed for the longest in Europe.

50 See M. Radvan, T. Svobodová, Tax Law Reforms in (Dis)Connection with COVID-19, “Studia Iuridica Cassoviensia” 2021, no. 2, pp. 74–75.

(102.3 bn of the state budget, 13.5 bn of municipalities budgets, 4.5 bn of voivodships budgets and 0.5 bn of the State Fund for Transport Infrastructure)<sup>51</sup>.

Although the government, which introduced the above changes, argued that, during the crisis people need to be motivated to spend money, the majority of economists evaluated them negatively, especially due to the fact that they will have a long-term negative impact on the condition of public finances in the Czech Republic. What is worse, it will be very difficult later to implement changes which would lead to increase taxes, since such actions are always unpopular.

The change in personal income tax was not the only one on the revenue side of the budget. Real estate transfer tax was also abolished, but this has been a good change.<sup>52</sup>

Besides the abovementioned actions, also other factors of fundamental importance influenced the state of public finance in the Czech Republic, e.g.: an ageing population, and related to it, necessary pension reform, which have not yet been introduced. The Czech Fiscal Council, in its Report on the long-term sustainability of public finance of June 2020 indicates that, *“Without a significant change in the configuration of the pension system, the share of pension expenditure in GDP will increase from the current 7.5% to 12% over the next 40 years. Another generation waiting for a pension will be not only more numerous but also will live longer, which will significantly impact the pension system. The demographic changes are reflected in other areas of public finances besides pension system expenditure, most notably in healthcare, education, and the system of cash benefits. To compensate higher expenditure, there will not be sufficient economic growth, which will be reflected in higher remuneration and consequently higher revenue from income taxes and social security contributions.”*<sup>53</sup>

## Conclusions

Financial law, besides its established position as a field of law, is constantly transforming, and one key factor in this process is increased legal and financial regulations, which cannot always be evaluated positively. This process has intensified in connection with the need to counteract, and combat, negative effects of the

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51 The Ministry of Finance of the Czech Republic, <https://www.mfcr.cz/cs/aktualne/tiskove-zpravy/2020/danova-revoluce-se-blizi-40169> (31.07.2021).

52 M. Radvan, T. Svobodová, Tax Law Reforms in (Dis)Connection with COVID-19, *“Studia Iuridica Cassoviensia”* 2021, pp. 74–75.

53 Národní rozpočtová rada, Zpráva o dlouhodobé udržitelnosti veřejných financí, červen 2020, [https://unrr.cz/wp-content/uploads/2020/06/Zpráva-o-dlouhodobé-udržitelnosti-veřejných-financí\\_2020\\_A.pdf](https://unrr.cz/wp-content/uploads/2020/06/Zpráva-o-dlouhodobé-udržitelnosti-veřejných-financí_2020_A.pdf) (31.07.2021).

COVID-19 pandemic, when states had to take fast and broad legislative measures introducing aid instruments.

It seems that a current and fundamental problem in public finance is the increase in public debt, which is the result of anti-crisis actions taken by the state. This is also the case in Poland, and in the Czech Republic, while in Poland, due to constitutional limitations, increasing debt also caused a rise in the scale of public finance debudgetisation. However, the increase in public debt should not be evaluated only negatively in the face of extraordinary circumstances connected with the pandemic, and reactions which had to follow from the governments in order to protect the lives, and health of citizens, as well as to rescue economies. Undoubtedly, support measures taken were priorities.

Currently, assuming that the situation will stabilise, and the COVID-19 pandemic will be controlled, authorities should strive to balance budgets and ensure servicing of accumulated debt. In Poland, attention should be drawn to the need to consolidate public finances; but not without significance is the problem of adhering to the constitutional limit of public debt.

The issue of public debt servicing may be of key importance in the future. Due to low interest rates of central banks, or rates on the interbank market, expenditure in this title does not seem to be a threat to budget balance, but what needs to be considered is the quite clear phenomenon of increasing inflation in EU countries, and in particular in Poland. This may meet with a response of central banks which will rise interest rates, which the Czech central bank already did in June this year. The Polish central bank has not yet taken such actions.

Moreover, last and but not least, the challenge from the legal point of view, especially for the Polish legislator, should be to take legislative and organising actions in the Polish legal system. Anti-crisis actions, which have been mentioned above, forced the introduction of several legal and financial regulations, not always coherent with each other. However, this problem, despite the fact that it seems uncomplicated from the technical point of view, may prove a difficult barrier to overcome, due to the process of reconstruction of the economy after the pandemic, which has already begun. In the EU it has been conventionally started by adopting a new seven-year financial framework (2021–2027) and introducing “Next Generation EU” recovery instrument. The Member States, to implement them, have to make deep changes in their legal systems, which is connected with adopting new legal regulations; thus, it might be assumed that the process of their increase will continue.

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