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On Priority Research Problems in the Scope of Public Finance Control in Poland

Abstract: This article presents ten priority research problems in the scope of public finance control in Poland with a synthetic discussion of their aims. Implementation of the proposed research should serve a harmonious development of a part of financial law - called control of public finance. The article is mainly based on the Author's own views and should encourage further scientific discussion on the mentioned topics.
Keywords: civil control, professional control, public finance control, public funds, public money, Supreme Audit Office (NIK)

Introduction

This article is another stage of scientific research on modern problems of public finance control in Poland. In 2000 a work, was published, regarding financial control in the public sector, treated in scientific circles as a kind of encyclopaedia in the scope of the above-mentioned problems[1]. Since then, the doctrine of finance and financial law has limited itself to discussing selected types of financial control[2], including special attempts to reform it[3]. There has also appeared an Anglo-Saxon understanding

1 L. Kurowski, E. Ruśkowski, H. Sochacka-Krysiak, Kontrola finansowa w sektorze publicznym, Warsaw 2000.
2 M. Stec (ed.), Regionalne izby obrachunkowe. Charakterystyka ustrojowa i komentarz do ustawy, Warsaw 2010.
3 A. Melezini, K. Teszner (eds.), Krajowa Administracja Skarbowa. Komentarz, Warsaw 2018.

of control deviating from the French model, whose carrier in the changing law system has been internal audit and management control. E. Ruśkowski tried to organise the new system of notions in a recently published work: *Control of public finance in Poland*[4]. In it, he suggests replacing the current notion of "financial control in the public sector" with "financial control in the narrow sense (so-called initial control)", "performance control" and "compliance control" in the understanding close to ISSAI 100 from 2013[5]. New understanding of control of public finance also includes particular aspects of management control and internal audit where they do not concern supervision and management, but they regard public finance.

Besides considerations on notions, the main part of the work has been devoted to the characteristics of the financial control system and its internal division in Poland. The Author has proposed numerous suggestions for further research concerning modern phenomena of public finance control. Other works also contain various suggestions in this scope[6]. Indicated materials have been the basis to determine in this article priority research problems (including their aims) in the scope of public finance control. These suggestions have not been further consulted and are individual ideas of the Author, based on his own research.

1. Are the Terms "Public Money" Management and "Public Funds" Management Synonyms, and on Further Attempts to Define the Term "Public Funds"

The terms "public money" management and "public funds" management are very often used interchangeably in journalism, and the doctrine has dealt with the latter many times, leaving the first one as obvious. However, they need to be considered as different terms. "Public money" management is a broader term in relation to "public funds" management due to also covering in its scope the activity of state and local-government legal personalities, which are not units of public finance sector, as well as the activity of other organisational units, and economic entities (typically private) in the scope in which they use state or municipal assets or resources and comply with their financial obligations to the state. Article 203(1) and (3) of the Constitution indicate NIK's control prerogatives and the fact that it is about auditing "public money" management by NIK[7] is beyond dispute. For these reasons, the terms

4 E. Ruśkowski, Kontrola finansów publicznych w Polsce, Białystok 2021.

5 INTOSAI, Standardy ISSAI 100. ISSAI 200. ISSAI 300. ISSAI 400. Najwyższa Izba Kontroli, Warsaw 2016.

6 E.g.: W. Misiąg, Jawność i przejrzystość a efektywność finansów publicznych, „Kontrola Państwowa" 2005, no. 2 (special issue).

7 See: Special meeting of the Council of NIK devoted to the problems of NIK's legal status in the light of the Constitution of the Republic of Poland and the EU standards "Kontrola Państwowa"

"public money" management and "public funds" management should be clearly distinguished.

While the term "public money" management is not present in the Polish legal system, but the notion of "public funds" management is of profound importance. Despite numerous publications on the above topic, there are still no answers to several key questions, what hinders not only logical functioning of the doctrine but also public administration bodies and the judiciary. These problems also appear at most in the processes of public finance control. One of the essential issues is the problem of the moment of losing public character of the funds in the situation when they leave public finance sector. The view that it happens when the funds are paid outside the public finance sector[8] is untenable, since it concerns only a part of public funds[9] and is contrary to the interpretation of the Act on Public Finance[10], as well as the intention of a reasonable legislator[11]. In Poland there is no concept of "public function", which connects funds with the aim or public function of their allocation[12], although Article 216(2) of the Constitution indicates "financial resources for public purposes"[13]. It should be verified in the research whether public funds maintain their character till the moment of their definitive settlement, and the degree of public character may be regarded as gradable (in the light of binding and proposed provisions)[14].

2. Is it a Crisis of Particular Types and Instruments of Classic Control of Public Finance?

Most types and forms (as well as instruments) of public finance control have a functional character, starting from NIK and ending with the Constitutional

2002, no. 2 (special issue) and Special meeting of the Council of NIK devoted to legal situation of entities subject to NIK audits "Kontrola Państwowa" 2002, no. 3 (special issue).

8 J.M. Salachna, Środki publiczne, ich formy prawne oraz zasady realizacji w sektorze finansów publicznych, (in:) E. Ruśkowski (ed.), System Prawa Finansowego, tom II, Prawo finansowe sektora finansów publicznych, Warsaw 2010, p. 81 ff. The Author of this article held a similar opinion but withdrew from it a few years ago.

9 At least it does not concern most of the funds from the EU budget and other foreign sources, which are non-refundable.

10 Interpretation (especially judicial and administrative) in this scope is consistent, starting with judgement by Provincial Administrative Court (WSA) in Warsaw of 5 September 2007, V SA/Wa 495/07, LEX nr 374351.

11 Z. Ofiarski (red.), Ustawa o finansach publicznych. Komentarz, Warsaw 2020 (wyd. 2), p. 90 ff.

12 P.M. Gaudemet, Finanse publiczne, Warsaw 1990, p. 45 ff.

13 The term public funds is the broadest and it constitutes an equivalent of "financial resources for public purposes" determined in Art.216(1) of the Constitution – T. Dębowska-Romanowska, Wydatki publiczne, ich formy prawne oraz zasady realizacji w sektorze finansów publicznych, (in:) E. Ruśkowski (ed.), System Prawa Finansowego, tom II, Prawo finansowe sektora finansów publicznych, Warsaw 2010, p. 123.

14 Similar suggestions might be found in: Z. Ofiarski (ed.), *op. cit.,* p. 91.

Tribunal. Therefore, they are of interest to many fields of legal sciences, with different intensity. For instance, NIK's activity is mainly researched by constitutional law but also by financial law, while the Constitutional Tribunal is the main focus of constitutional law and only additionally of financial law. Monitoring a part of classic types and forms of functional public finance control leads to a conclusion about their evolution and even the disappearance of some forms of activity. The confirmation and establishment of the causes should be the subject of interest of financial law. A few issues need to be emphasised, such as, e.g., some powers of control (especially tax) of the Commissioner for Human Rights have been limited[15], also the Constitutional Tribunal has reduced control of public finance in the recent years and there have been no clear arrangements from several Sejm Committees of Inquiry regarding public finance control.

3. Evaluation of the Novel Solutions (Reforms) in Public Finance Control

Having regard to the Polish reality during the last several years in the scope of public finance control, it may be stated that new types and forms have emerged, which include in the chronological order: management control[16], control in government administration (as a separate control system)[17], and National Revenue Administration (KAS)[18]. Despite their description in the subject literature, it should be stated that none of the mentioned types of control have been thoroughly evaluated by the science. From the point of view of public finance control, management control and audits within KAS deserve special attention. The evaluation of management control was to be positively influenced by the reform of the activity-based budget, which so far has not taken place, and will not happen in the nearest future. However, five years of KAS operation (and audits conducted by this institution) seem to provide sufficient grounds to assess this reform.

15 E. Ruśkowski, P. Woltanowski, Ograniczanie roli Rzecznika Praw Obywatelskich w systemie ochrony praw podatnika, (in:) P. Borszowski (ed.),Regulacje prawa finansów publicznych i prawa podatkowego. Podsumowanie stanu obecnego i dynamika zmian. Księga jubileuszowa dedykowana Profesor Wiesławie Miemiec, Warsaw 2020.

16 Implemented by the Act of 27 August 2009 on public finance (J of Laws of 2021, item 305).

17 Act of 15 July 2011 on control in public administration (J of Laws 2020, item 224).

18 Act of 16 November 2016 on National Revenue Administration (J of Laws of 2020, item 505, later amended).

4. Protection of the Independence and Prestige of the Supreme Audit Office (NIK)

The protection of "common good" by NIK is on the one hand universal (constitutional) and on the other hand of current (involved in the political game) value. NIK's experience from the period of transformation has indicated that especially its independence and prestige serve the protection of "common good", and the good reputation about its work is confirmed both in Poland and abroad[19]. Due to the above reasons, it seems urgent to start research whose aim would be to indicate the crucial factors of NIK's independence and high prestige as well as to eliminate threats in these fields. Interest of the science in the mentioned values, excluding current personal and political relations, would be a positive phenomenon and a sign of the protection of NIK's interests, since it is an important institution of the state. This could lead to a certain intellectual paradox, very positive for the society, when independent science (especially the science of financial and constitutional law), performing citizen control of public finance, defends constitutional rights of NIK as the main body of institutional control of public finance.

5. On the Need to Continue Research on the Broad Approach to the Openness of Public Finance

One of the key principles of public finance is the principle of public finance openness. It is of special importance to the control of public finance. Therefore, assumptions presented in the article "On the broad approach to the principle of openness of public finance"[20] seem important. E. Ruśkowski indicates in it the need to distinguish the principle of openness of public finance in the narrow sense, which is mentioned in Art. 33–38c of the Act on public finance as well as broad understanding of this principle (in the sense of Art 61 of the Constitution and the overall binding legislation). The current state of financial law science has correctly referred to the principle of openness of public finance in the narrow sense, which is evident in numerous scientific publications devoted to this subject[21]. On the other hand, the principle of openness of public finance in the broad sense has been ignored by legal and financial professional literature. Suggested research should verify the assumptions stated in the above-mentioned article and additionally, if they are

19 Special meeting of the Council of NIK devoted to the problem of NIK's legal status in the light of the Constitution of the Republic of Poland and EU standards, "Kontrola Państwowa" 2002, no. 2 (special issue).

20 E. Ruśkowski, W sprawie szerokiego ujęcia zasady jawności finansów publicznych„ Przegląd Ustawodawstwa Gospodarczego" 2021, no. 3.

21 See e.g.: Z. Ofiarski (ed.), *op. cit.,* p. 238 ff., and publications cited there.

confirmed, create a full list of instruments of the, broadly understood, principle of openness of public finance. The instruments provided in the article are examples and need to be supplemented.

6. Evaluation of the Development of New Directions of Citizen Control of Public Finance

At the beginning of transformation some researchers thought that social control would be rendered irrelevant in the new system[22]. However, it turned out that at least some of its forms have survived and have even developed[23]. In modern conditions it is called social or citizen control[24], or more consistently – citizen control[25]. While institutions of citizen control are often in conflict with public authorities (e.g., investigative journalism, auditing think-tanks, or citizens' networks), monitoring their activities and often replacing or complementing professional control; however, the model of cooperation between citizen control and public authorities is spreading, for the public good. An example of this tendency is solutions from the Act of 11 January 2018 on changes of certain laws in order to increase the participation of citizens in the process of electing, functioning, and controlling certain public bodies[26].This act provides among other things: dissemination of the participatory budget; presentation of the annual report on the condition of municipality by a commune head (mayor, president of the city), with the possibility to remove the mentioned bodies during a referendum if they do not win a vote of confidence in following years two years; the obligation of representative bodies of municipalities, districts and voivodships to appoint a complaint, motion, and petition commission, as well as to determine the principle of their activity in the statutes; citizens resolution initiatives at all levels of local government. The period of pandemic delayed achievement of some objectives of the reform. That is why citizens' reaction to innovative solutions and scientific evaluation of this direction of citizen control is so important.

22 E.g., writes about it: J. Jagielski, Kontrola administracji publicznej, writes about it. Warsaw 2018, p. 206 ff.

23 It especially relates to control through petition, complaint, motion, etc.. Investigative journalism and control though social organisations acquired a new dimension. New forms include, e.g., participatory budget or constantly developing local referendum.

24 J. Jagielski, *op. cit*., p. 209 ff.

25 E. Ruśkowski, Kontrola …,*op. cit.,* p. 126.

26 J of Laws of 2018, item 130, later amended.

7. The Impact of New Financing Rules of Civil Society Organisations on Professional and Citizen Control

Without funding, any activity, including activity in public finance control, loses its reasonable possibilities. A part of the funds for the activity of "the third sector", sometimes called the activity of the civil society, comes from public funds. A part of them concerns citizen control of public funds, implemented by this sector, and another part concerns professional control of allocation of funds to this sector. Science has been dealing with this phenomenon[27]for some time, but it has to include current results of the work of NIK and administrative judiciary. Novel solutions have been created in the discussed period, such as the Centre for the Development of Civil Society[28]. While principles of its organisation have been described in literature[29], their functioning and effects need additional research. They should include professional control of the Centre, as well as a degree of inspiration for the development of public finance control by civil society.

8. The Impact of the Current EU Solutions in Public Finance Control on Legal and Financial Research

On 1 July 2021, the European Public Prosecutor's Office started its activity in the EU and on 17 December 2021 the Member States should issue implementing legislation regarding whistleblowers[30]. In the first issue, Poland, with four other EU countries (Hungary, Sweden, Denmark, and Ireland) remains outside the structure of the European Public Prosecutor's Office. For Poland, it is an open matter whether to sign agreements on cooperation or to enter the structure of this body in the future. Further scientific observation of this phenomenon is therefore obvious. On the other hand, establishing domestic regulations regarding whistleblowers has been a subject of interest of both public authorities and some civil society organisations for many

27 S. Mazur, A. Pacut (eds.), System finansowania organizacji pozarządowych w Polsce, Cracow 2015, p. 120 ff.

28 It is regulated by the provision of the Act of 19 November 2009 on gambling games (J of Laws 2020, item 2094) and Regulation of the Chairman of the Public Benefit Committee of 8 November 2018 of conditions for obtaining subsidies for implementation of tasks in supporting the development of civil society, submitting applications, and transfer of funds from the Centre for the Development of Civil Society (J of Laws of 2018, item 2149).

29 See, e.g., M. Ofiarska, Normatywna koncepcja Funduszu Wspierania Rozwoju Społeczeństwa Obywatelskiego, (in:) P. Borszowski (ed.), Regulacje prawa finansów publicznych i prawa podatkowego. Podsumowanie stanu obecnego i dynamika zmian. Księga jubileuszowa dedykowana Profesor Wiesławie Miemiec, Warsaw 2020, p. 477 ff.

30 Directive (EU) 2019/1937 of the European Parliament and the Council of 23 October 2019 on the protection of persons who report breaches of Union law (OJ L 305/42 of 26.11.2019).

years[31]. Nowadays it is hard to tell what their impact on final legislative solution will be. That is why it is justified to start research on this topic.

Attention is drawn to the fact that both the European Public Prosecutor's Office and the institution of the whistleblower are socially complex phenomena, and their diverse aspects should be researched by different disciplines and scientific specialisations. Guided by the principle that, proportionally, the priority over the research on the European Public Prosecutor' Office is in criminal law science and the priority over the whistleblower is in labour and corporate law (of course including the EU law). Nevertheless, financial law science should also issue significant opinion on both institutions, which mainly serve public finance.

9. On the Need of Comparative Research in Public Finance Control

Despite the necessity to conduct comparative research in different fields of social and economic life, one may risk a claim that their development currently encounters various obstacles. It is similar with comparative research regarding public finance control. Besides comparative research on NIK (i.e., the highest bodies of control)[32], there are almost no such research in legal and financial science. That is why such initiatives should be supported, since they facilitate writing article and chapters in monographies as well as organising international conferences devoted to these problems[33].

10. The Impact of Pandemic on the Research on Public Finance Control

The period of pandemic declared in Poland in March 2021 still continues. It does not prevent conducting research, but only complicates it a bit. The above assumption seems right if it is considered that the pandemic has caused extraordinary solutions, which (at least in the majority) will disappear after the pandemic stops. The task of the science is to note them, but it is doubtful to make them a priority subject of research. Very often solutions and their application practice during the pandemic cause irrational results which are not worth serious research[34]. Exceptions prove the

31 I wrote about it in a work published in 2019: Nowe zjawiska i problemy do rozwiązania w kontroli finansów publicznych, (in:) A. Bitner (ed.), Księga jubileuszowa Profesor Elżbiety Chojna-Duch, Wrocław (during edition).

32 See, e.g., J. Mazur, Stosowanie międzynarodowych standardów dotyczących statusu prawnego najwyższego organu kontroli w krajach Unii Europejskiej i w Polsce, (in:) Specjalne posiedzenie Kolegium Najwyższej Izby Kontroli, poświęcone problemowi statusu prawnego Najwyższej Izby Kontroli w świetle Konstytucji Rzeczypospolitej Polskiej i standardów Unii Europejskiej, „Kontrola Państwowa" 2002, no. 2 (special issue).

33 For example, an international conference on basic problems of public finance control in the Countries of Central and Eastern Europe is planned for September 2022, in Bialystok.

34 A. Sowa, Pozamykani, „Polityka" no. 28 of 7.07. - 13.07. 2021, pp. 16–18.

rule[35]. Maintaining some temporary pandemic solutions after the pandemic stops and the durability of their application seems to be a worthwhile subject for research. A special role of financial law science in this scope will be necessary, especially regarding jurisprudence of administrative courts, and some instruments of citizen control of public finance.

Conclusion

The Author of this article, based on individual research on the control of public finance, has formulated ten basic problems of research in this field. They include:

- are the terms "public money" management and "public funds" management synonyms? and on further attempts to determine the term "public funds";
- is it a crisis of particular types and instruments of classic control of public finance?
- the evaluation of innovative solutions (reforms) in public finance control;
- protection of the independence and prestige of the Supreme Audit Office;
- on the need to continue research on the broad approach to the principle of public finance openness;
- the evaluation of the development of new directions of citizen control of public finance;
- the impact the new financing rules of civil society organisations on professional and citizen control;
- on the need of comparative research in the control of public finance
- the impact of pandemic on research on public finance control

Identification of topics is accompanied with synthetic determination of the aims of the suggested research. Their implementation, similarly to other research topics whose list will always be disputable and evolving[36], may creatively contribute to the further development of the science of public finance control.

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Gaudemet P.M., Finanse publiczne, Warsaw 1990.

35 Creative accounting of the state budget during the pandemic is definitely an exception which has to be researched by the science.

36 For example, important research topics such as computerisation and digitalisation of data and control procedures, connections between tax schemes and public finance control, etc., are not included in the mentioned list.

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On Evidence Preclusion in Tax and Control Procedures: a Comparative Legal Approach

Abstract: In the framework of tax collection procedures in different legal orders, various mechanisms may be introduced aiming at the implementation of the economy and the promptness of proceedings, which are aimed at observing the rule of evidence material concentration. One of the ways of securing it is the institution of so-called evidence preclusion, which constitutes a certain limitation on the possibility of referring to new evidence due to the stage of particular proceedings. The objective of the paper is to establish whether the institution of evidence preclusion in the tax procedure is necessary. One should search for the clues to answer the question presented through comparative legal studies. Implementing such a complex aim of research, we analysed legal regulations connected with the concentration of evidence material in selected states. So far, this question has not been a subject of a separate analysis. The results of the studies demonstrated that in the legal orders under analysis there are solutions, the aim of which is, to prevent lengthy proceedings and seeking that the resolution occur in the shortest possible time; if possible, without any harm for the actual and legal clarifying the matter. Evidence preclusion cannot be used by tax authorities as an instrument limiting the taxpayer's right to a fair tax process.
Keywords: comparative law research, evidence in tax proceedings, evidence preclusion, tax audits, tax proceedings

Introduction

As the subject literature suggests, comparative law research allow us to draw conclusions as to what solution is the most suitable for a particular problem, in particular social and economic circumstances[1]. In the framework of different branches of law, the need for comparative law studies raises no reservations. They are especially desired at the stage of making legal regulations. They often help to create a research platform to suggest solutions applicable in other countries which could become inspiration for solutions applied in the national legal order. The essence of comparative research in tax law raises no doubts. In order to learn more about tax issues in general, it is primarily necessary to have the knowledge of comparative law issues[2]. The literature also points at aims of comparative works, such as broadening perspectives, better understating of national law, and creating foundations to identify the ways of solving emerging problems[3]. "The comparative approach allows us to fully comprehend what the advantages and the weaknesses of native regulations of procedural law, as well as to determine the directions of desirable changes, and including foreign experience may, and should also, be an impulse to outline a program of the rationalization of the legal system"[4].

Quite surprising, was an idea in the draft of the law (hereinafter the Bill) of October 5, 2020 on the amendment of the Act on the National Revenue Administration and some other laws, which proposes adding to the provisions of the Act of August 29, 1997, Tax Ordinance (hereinafter TO)[5], Article 187a, which is nothing more than transferring onto the ground of tax issues the norm characteristic of contradictory proceedings connected with the rule of evidence material concentration.

In the framework of different procedures of tax collection in different legal orders, various mechanisms aimed at the implementation of economy and promptness of proceedings may be introduced, with a goal of realizing the rule of evidence material concentration, the aim of which is preventing lengthy proceedings and seeking the resolution to occur in the shortest possible time, if it is possible without any harm for the actual and legal clarification of the matter. One of the ways of securing it is the institution of so-called evidence preclusion, which constitutes a certain limitation on the possibility referring to new evidence due to the stage of particular proceedings. The objective of the paper is to establish whether the institution of evidence preclusion in the tax procedure is necessary. One should search for the clues to answer the

1 K. Zweigert, H. Kotz, Introduction to Comparative Law, New York 1998, p. 11.
2 V. Thuronyi, Comparative Tax Law, Hague 2003, p. 1.
3 R.N.J. Kamerling (ed.),The International Guide to Tax Auditing, t. 1, International Bureau of Fiscal Documentation 2011, p. 14.
4 Z. Kmieciak, Zarys teorii postępowania administracyjnego, Warsaw 2014.
5 Journal of Laws 2020, item 1325 with further amendments.

question presented through comparative legal studies. It is worth scrutinizing how these issues were regulated in selected states.

1. Comparative Law Research in the Area of Tax Procedure: Initial Assumptions

When commencing comparative law studies on the specific issue, which is the analysis of provisions connected with evidence proceedings in tax cases, it is important first to make certain observations setting things in order.

First, the European Union system does not provide for regulations unifying or harmonizing the provisions referring to tax proceedings in individual countries. In this matter, we can talk about a procedural autonomy occurring in the member-states[6]. The existing procedural autonomy is a kind of difficulty involving comparisons and analyses of particular regulations[7].

Second, it is important to recognise that there is a rich legacy of legal thought on the issue under scrutiny. Procedural regulations, including those regulating the rules of evidence proceedings or tax control in individual states, differ from one another, which is natural, due to the influence of factors such as culture, the tax system, traditions of law execution, and the history of public administration[8]. The differences may be a consequence of historical, ideological, and political circumstances, but basically in each of the presented systems of procedural law evidence proceedings are subject to certain legal control[9]. Discrepancies between the systems concern not only the form, but also the way of forming process regulations itself. We can see that in certain systems, procedural norms are the creation of judicial legislation and statutory law, whereas in others, it is the status that creates the fundamental standards of proceeding. In particular countries we may discover different scopes of unification and codification operations in terms of regulating the

6 Z. Kmieciak, A. Wróbel, S. Biernat, Przystąpienie Rzeczpospolitej Polskiej do Unii Europejskiej: Wyzwanie dla organów stosujących prawo, (in:) B. Dolnicki, J. Jagoda (ed.), Prawo polskie a prawo Unii Europejskiej, Warsaw 2003, p. 108; A. Wróbel, Wpływ prawa europejskiego na prawo o postępowaniu administracyjnym, (in:) Administracja pod wpływem prawa europejskiego, Bydgoszcz-Katowice 2006, p. 154; Z. Kmieciak, Zasada autonomii proceduralnej państw członkowskich Unii Europejskiej i jej konsekwencje dla procesu orzekania przez sądy administracyjne i organy administracji publicznej, „Zeszyty Naukowe Sądownictwa Administracyjnego" 2009, no. 2, p. 9 and further.

7 B. Adamiak, Europeizacja prawa postępowania administracyjnego (in:) Z. Janku, Z. Leoński, M. Szewczyk, M. Waligórski, K. Wojtczak (eds.), Europeizacja polskiego prawa administracyjnego, Wrocław 2005, p. 19; Z. Kmieciak, Postępowanie administracyjne w świetle standardów europejskich, Warsaw 1997; Principles of Administrative Law Concerning the Relations Between Administrative Authorities and Private Persons, Strasburg 1996.

8 M. Alink, V. van Kommer, Handbook on Tax Administration, Amsterdam 2011, p. 314.

9 L. Morawski, Argumentacje, racjonalność prawa i postępowanie dowodowe, Toruń 1988, p. 130.

procedure applicable in taxes. Besides, in certain states, instruments guaranteeing the protection of taxpayers' rights, for instance in the form of the Charter of Taxpayer Rights, or a charter of the audited, also have an indirect influence. Rules referring to tax evidence proceedings are regulated differently in particular states. In certain countries the provisions referring to evidence proceedings are included in separate acts which contain procedural regulations, or in acts regulating general tax law. It also happens that evidence proceedings are regulated partly in the tax act, whereas in unregulated cases the provisions of general administrative procedure are applicable. Moreover, the range of auxiliary use of civil law regulations in tax cases may vary. Differences are also revealed in the available procedures allowing for the verification of taxpayers' settlements. There are states where tax control and tax assessment proper are distinguished, and also ones where the distinction between these procedures blur. In yet others, however, there may occur discrepancies in terms of available procedures themselves, which are applicable in various situations. Also, the model on which the tax procedure itself was based may be different. In certain countries it may be contradictory proceedings, especially as for the distribution of rules connected with the burden of proof, and in others it may be based on a model of inquisitional proceedings and the rule of substantive truth.

2. Selection of Legal Orders under Analysis

When beginning comparative research, it is advisable to identify the aim connected therewith, because it is the aim of research that should determine the selection of comparable legal systems[10]. A method of selection often used in comparative works is collating the states representative of different procedural models signalled in the subject literature, i.e. developed codification (traditional), assuming the existence of extended, substantively coherent codification, free from gaps; a concise framework regulation constituting a collection of rules allowing for flexibility; compound – combining different procedural solutions, along with the regulations of constitutional and substantive law, multi-layered and dispersed, a variation of an uncodified procedure, where only a few of the solutions are regulated in the statutory acts[11]. One may also compare the solutions characteristic of the common law system, through opposing them to continental legal orders of well-established traditions, as well as those of new states.

The aim of this analysis was to create a comparative platform for indicating solutions in force in other countries, which could become an inspiration for

10 Th.M. de Boer, Uitgangspunten van een rechtsvergelijkende theorieL een paradigma voor de lage landen, Nijmegen 1994, p. 43, after: R.N.J. Kamerling (ed.),The International Guide to Tax Auditing, p.14.

11 Z. Kmieciak (ed.), Postępowanie administracyjne w Europie, pp. 10–11.

solutions eliminating problems connected with evidence proceedings as well as with procedures of evidence material acquisition, and not model solutions[12]. In view of the above, it seems worthwhile to compare solutions from the states whose legal systems possess certain essential, also connected with their historical circumstances, common qualities. The aim outlined in this way determined the selection of the legal systems which have been covered in this paper.

In the classification of tax law systems prepared for the needs of comparative studies, V. Thuronyi counted Poland among a vast category of the countries which had undergone political transformation in the relatively recent past. He counted in this category both the states which emerged as a result of the decomposition of the USSR in 1992 (e.g., Estonia), and those which did not, in fact, belong to the USSR, but whose tax systems were adjusted to the central planned economy (e.g., the Czech Republic). Therefore, the analysis covered regulations in force in Czechia, Slovakia, Estonia, Bulgaria, and Slovenia. These countries are characterized by a high dynamic of transformations in terms of tax law. The common quality of the tax systems in these states is the fact that they built them over the last three decades, practically from scratch[13], which was accompanied by operations of creating new acts of law concerning the procedures. From the moment of abandoning the system of a centrally planned economy, they all experienced at least one "round" of fundamental transformations of their tax systems, including the tax procedure. An example of such significant changes is, for example, the transformations, presented in the further part of the chapter, which took place in Bulgaria, where in 2006 the framework act of law consisting of merely a few pages was replaced by an extensive act, which comprehensively, at times even casuistically, regulated the procedural aspects of tax

12 One of such solutions is the model of Tax Code of 29 September 2000 published by the International Monetary Fund (Tax Code of the Republic of Taxstan) https://www.imf.org/external/np/leg/tlaw/2000/eng/stan.html. The model, in the framework of a separate editorial unit dedicated to the taxpayer's rights, introduces, for example, a right of the taxpayer to produce evidence of documents and to submit explanations before the authorities referring to their settlements, tax payments and reports of inspections. (art. 32). The catalogue of the taxpayer's rights is not exhaustive, because certain rights are provided for also in specific provisions. Also, the powers of tax authorities are regulated separately (with the reservations of possible limits in specific provisions); however, the taxpayer and tax authorities' obligations were not distinguished in separate editorial units. The model also provides for a rule referring to the burden of proof, in accordance with which it is the taxpayer that is obliged to prove that the tax amount established by the tax authority is incorrect (art. 91). Another model of taxcode is the CIAT Tax Code Model of 1997 published by the organization CIAT associating tax administrations of both Americas., http://www.ciat.org/biblioteca/opac_css/doc_num.php?explnum_id=3126, which, in the title on the tax procedure includes a chapter on the burden of proof (Art. 106), and the rule of discretional assessment of evidence (Article 110). The model also contains the catalogue, separated, and described in detail, of the obligations and rights of the taxpayer, with which corresponds, also separated, the catalogue of competences and responsibilities of the tax administration.

13 V. Thuronyi, Comparative Tax…, *op. cit.,* p. 34.

law. This paper analyses the regulations of the post-communist countries with quite extensive tax procedures. Before discussing the regulations in force in the systems selected in this way, German solutions will be analysed. They were prototypes of the regulations introduced in the majority of the aforementioned countries.

3. Solutions for Concentrating Evidence Material in Selected European Union Member States

Germany is one of those countries with a long tradition of codified procedural provisions in the field of administrative proceedings. The first act containing regulations in this area was dated 1919[14]. Currently, the issues referring to proceedings in tax cases are normed by the Act of 1976 (*Abgabenordnung*)[15], which regulates, among other things, the specific kind of administrative procedure, and simultaneously one of the three pillars of the German administration, beside the general administrative procedure[16]. The model of tax procedure in Germany is based on an investigative rule, which means that the tax administration *ex officio* determines the circumstances, defining the scope of the investigation procedure; in this matter it is not bound by motions reported by the participants in the proceedings. The scope of the procedure and the obligation of explaining the actual state of affairs is shaped by the circumstances of the individual case. Moreover, the principle of inquisitiveness in this regard, and therefore, the obligation of establishing the facts concerning all the circumstances of the case rests with the tax authorities, no matter whether or not they are in favour the participant in the proceedings (§ 88). However, the principle was modified by the growing number of reporting, documentation, and declaration obligations imposed on taxpayers[17]. The participants in the procedure are obliged to cooperate with the authorities in order to establish the facts connected with the case, in particular through complete and truthful revealing the facts of importance for the taxation and through providing evidence to support them (§ 90). The scope of this obligation depends on the circumstances of a particular case, and the provisions make it more specific, in particular in reference to cross-border economic events. The method the taxpayer fulfils the obligation of cooperation affects the scope of the evidence assessment performed by the authorities. The less the tax authority knows about the particular tax case, the less are the grounds for the application of different

14 Reichsabgabenordnung of 13 December 1919, RGBl. 1919, 1993.
15 Abgabenordnung of 16 April 1976, BGBl. I 1976, item 613 with amendments.
16 A. Kubiak, (in:) Z. Kmieciak (ed.), Postępowanie administracyjne w Europie, p. 309.
17 E. Reimer, National Report on Taxpayer Protection in Germany (in:) W. Nykiel, M. Sęk (eds.), Protection of Taxpayer's Rights: European, International and Domestic, Warsaw 2009, p. 206.

means and accepting the circumstances as proved in favour of the taxpayer[18]. The tax authorities' resolutions are taken in the form of administrative acts, from which the participant has the right to appeal[19]. In order to accelerate the appeal procedure and secure its concentration, the authority may set a date for the taxpayer to present evidence and documents, which is decided in § 364b of the tax ordinance[20]. In the case of presenting the evidence after the date, it is not taken into consideration by the authority (of which the taxpayer should be instructed). In accordance with the view of a part of doctrine, it is not allowed to file a separate appeal from the deadline established by the authority[21]. K. Tipke and H.W. Kruse maintain than a separate appeal from the establishment of the deadline itself would be against the essence and purpose of the provision, and the only opportunity to appeal in this case is initiating judicial proceedings in order to (re)appeal the decision of the appeal[22]. However, there is an opposing view, according to which the establishment of the deadline is an administrative act, and thus it may be challenged individually[23]. Adopting this view leads to unnecessary prolonging of the proceedings on the case and is inconsistent with the rule of concentration in force under the German act[24]. It is worth noting that in accordance with §76 para 3 of the Act on Financial Courts[25], a financial court may reject testimonies and evidence which failed to be presented within the period established by the authority, on the basis of §364b AO[26]. This so-called facultative preclusion, for taking into account the evidence previously rejected by the authority depends on the court's discretion. Thus, it may potentially happen that the necessity of considering the actual circumstances is transferred from the tax authority to the court, which seems against the intention of introducing preclusion at the level of appealing procedure[27].

In Estonia tax proceedings and evidence questions connected therewith are regulated in a separate Act on Taxation (*Maksukorralduse seadus*) of 2002[28]. In

18 R. Seer, (in:) G. Meussen (ed.), The Burden of proof in tax law, 2011 EATLP Congress, Uppsala 2–3 June 2011, p. 127.

19 D.C. Dragos, B. Neamtu (eds.), Alternative Dispute Resolution in European Administrative Law, Berlin 2014, p. 9; H. Krabbe, Legal Remedies in the German Tax System, European Taxation 2009, nr 9, p. 306.

20 R. Seer, Durchführung des Rechtsbehelfsverfahrens, (in:) K. Tipke, J. Lang (eds.) Steuerrecht, Köln 2005, p. 951.

21 D. Birk, Tax Protection Procedure in Germany (in:) D. Albregtse, H. van Arendonk, Taxpayer Protection in the European Union, 1998, p. 57.

22 Ibidem.

23 R. Seer, Durchführung…, *op. cit.,* p. 952.

24 Ibidem.

25 Finanzgerichtordnung, BGBl. I 1965, item 1477 with further amendments.

26 F.Klein, B.Rätke, Abgabenordnung. Kommentar, 2020, side no. 19–22.

27 R. Seer, Durchführung…, *op. cit.,* p. 952.

28 Maksukorralduse seadus, RT I 2002, 26, 150 with further amendments.

the Estonian tax procedure, the influence of German solutions can be perceived, which were a point of reference both at creating the general part of the Estonian administrative procedure, as well as the fundamental law[29].

The tax authority conducts proceedings in a simple and effective way, with no delay, avoiding unnecessary expenses and inconveniences, in accordance with the general rules of administrative proceedings, as well as on the way securing the protection of the rights of the participants in the procedure (§ 10). In the tax procedure an important role is also played by the rule of proportionality, not explicitly formed in the law. It requires that all actions taken in the proceedings are connected with the subject of the proceedings. This means that the tax authority is not entitled to gather information which has no connection with the proceedings[30].

According to the principle of substantive truth included in § 11, the tax authority verifying the correctness of the tax payment and assessing the tax, should take into account all facts important for the case, including the facts increasing, and the facts reducing, the range of the financial burden. The procedure is based on the *ex officio* principle; the authority decides *ex officio* on the need for actions serving to verify the correctness of the tax payment as well as on the type and scope of actions which should be taken. For this purpose, it may gather evidence indispensable to issuing a decision on the case. The authority, being the host of the procedure, while establishing facts important from the taxation point of view, is not limited by demands and evidence provided by the participants. In the process of tax law application in Estonia it is assumed that the legal form of a given transaction should be ignored, and primarily one should determine its essence and economic consequences entailed for the parties, which is also an effect of the influence of German solutions[31].

The Estonian act does not include general regulations explicitly norming the issue of evidence burden. In this matter, the principle of substantive truth is in force, combined with the *ex officio* activity of the authority. Nevertheless, it is underscored that in the appeal procedure, the burden of proof rests by rule on the taxpayer who questions the tax assessment (§ 150). On the other hand, the burden of proof is transferred onto the tax authority, if it comes to evidence remaining only in the possession of the authority. Moreover, regulations referring to applications for overpayment return provide that if the claim is not sufficiently grounded, the tax authority may set a deadline for the applicant for producing additional evidence. If the evidence fails to be produced within the specified time, the tax authority

29 K. Merusk, Administrative Law Reform in Estonia: Legal Policy Choices and Their Implementation, "Juridica International" 2004, p. 61.

30 T. Albin, M. Herm, I. Klauson, E. Uustalu, (in:) M. Lang, P. Pistone, J. Schuch, C. Staringer (eds.), Procedural Rules…, *op. cit.*, p. 196.

31 L. Lehis, Means Ensuring Protection of Taxpayer's Right in Estonian Tax Law, "Juridica International" 1999, no. 4, p. 104.

refuses to return the overpayment (Art. 107). Simultaneously, following the German model, the regulations define the participants obligations to cooperate with the tax administration during the proceedings (§ 56). In particular, the taxable person is required to inform the tax authority about all facts they know which are or may be important for taxation purposes. The act of the administrative tax authority can be appealed against. Nevertheless, tax appeal proceedings are not an obligatory stage of the taxpayer's rights protection, because they may, at their discretion, decide about bringing an appeal directly to court (§ 151). In practice, however, which is noted in the literature, due to the less formal and time-consuming nature of the tax appeal procedure than the judicial procedure, in many cases taxpayers decide to use just this path[32]. In connection with lodging an appeal, the burden of proof rests by rule on the taxpayer who questions the tax assessment. The authority may also call the person lodging the appeal to present additional evidence.

In Czechia, the administrative procedure and its science have long and established tradition, for the legacy of Czechoslovakia places it them among the states with the earliest codifications of administrative proceedings[33]. In the Czech Republic, procedural issues are currently regulated in the separate Act on Tax Procedure (*Daňový* Řád), in force since January 1, 2011[34], which replaced the previous Act on Tax and Fee Management *(o správě daní a poplatků, ve znění pozdějších předpisů)*[35]. It provides for the procedure specific in terms of tax levies, complete and independent, in the framework of which there is no need for using the rules of the general administrative procedure[36].

§ 92 contains decisions important for the distribution of the burden of proof in the procedure, according to which the tax authority is obligated to make sure that all the facts have been identified in the proceedings in a complete way (as far as possible), and it is not bound by the taxpayer's applications. The taxpayer is obligated to prove the circumstances under the obligation of revealing in the tax declaration and other declarations and testimonies, whereas the tax authority is obligated to prove: facts arising from its documents, facts important for using presumptions and legal fictions; facts questioning credibility, importance, correctness, or completeness of the documentation kept by the taxpayer, accounting entries and other records, documents, or other evidence on which the taxpayer bases their case; facts important

32 T. Albin, M. Herm, I. Klauson, E. Uustalu, (in:) M. Lang, P. Pistone, J. Schuch, C. Staringer (eds.), Procedural Rules…, *op. cit.*,p. 189.

33 A. Skóra, (in:) Z. Kmieciak (ed.), Postępowanie administracyjne w Europie, p. 82.

34 Zákon č 280/2009 Sb., danovy rad.

35 Zákon č. 337/1992 Sb., o správě daní a poplatků.

36 D. Czudek, Nowa ustawa Ordynacja podatkowa w Republice Czeskiej z ukierunkowaniem na problematykę udzielania i dostępu do informacji w administracji podatkowej, (in:) A. Dobczyńska, E. Juchniewicz, T. Sowiński (ed.), Daniny Publiczne. Prawo finansowe wobec wyzwań XXI wieku, p. 90.

for establishing the real content of the legal action or another event; facts important for the authority to find the law violated. Simultaneously, the authority should indicate in writing which facts it found as proved, and which ones not, as well as to demonstrate the evidence on the basis of which it made this assessment.

The audited taxpayer has the right to participate in meetings with his employees, may produce evidence, and also submit evidence applications. He is also entitled to deny the statements of the authority carrying out the inspection and to prove the questions which the authority found dubious (§ 88). After the audit is over the authority carrying it out is obliged to prepare a report which should contain the results of the inspection, the assessment of the collected evidence material, as well as reference to the files gathered for the case (§ 88). The taxpayer is entitled to express himself on the gathered evidence material and the legal findings presented in the report. In accordance with § 89, the taxpayer has the right to express his doubts, to point out inconsistencies, to submit statements or explanations in reference to the authorities' findings, as well as to producing evidence to support his statements or in contentious issues. He may do it within 15 days, and the authority is obliged to instruct the taxpayer about the consequences of failing to meet the deadline.

If the taxpayer fails to fulfil the imposed tax obligations, the authority may determine the tax amount by decision, the detailed elements of which are specified in § 102. Within the period of 30 days of the day of its delivery, the taxpayer is entitled to appeal against the decision to a higher authority, through the authority which issued the decision. Within the framework of self-inspection, the authority which issued the decision may take into account the appeal in whole or in part (§ 113). If the case is passed to the appeal authority, the authority may take evidence in order to complement the evidence material or to remove procedural errors, or else to impose this obligation on the authority which issued the challenged decision, setting it an appropriate period of time (§ 115). The appeal authority may also set a period, not longer than 15 days, for the appellant to attach new evidence to the evidence material. Evidence presented after this period may be ignored (§ 115).

The tax procedure in Slovakia is regulated by the Act of December 1, 2009, on the general part of tax law *(zákon o správe daní (daňový poriadok)*[37]. It replaced the previous act, which had been in force since the day of the dissolution of Czechoslovakia, i.e. the Act on Tax and Fee Administration and Amendments in the System of Local Financial Authorities (*o správe daní a poplatkov a o zmenách v sústave* územných *finančných orgánov v znení neskor*šich *predpisov)*[38].The law currently in

37 Predpis č. 563/2009 z. z. Zákon o správe daní (daňový poriadok) a o zmene a doplnení niektorých zákonov.

38 Zb. 511/1992 Zb.

force, like the previous act (§ 101)[39], regulates the tax procedure in a comprehensive way, implying that in tax issues the provisions of the general administrative procedure are not applicable (art. 163). Before that, the tax procedure was treated as a kind of administrative procedure[40].

The taxpayer's basic rights in the tax procedure are protected with the general rules of proceeding, included in Article 3[41]. On the basis of the principle of legalism, the authorities are expected to act in compliance with the generally applicable provisions of law, including the protection of the interest of public legal unions, as well as respect for the rights and legitimate interests of taxpayers and other persons. The tax authority should also strictly cooperate with taxpayers and other entities, instructing them about their rights and responsibilities.

The provisions of the Slovak law include rules referring to the burden of proof. In accordance with them, the tax authority is obligated to collect evidence, with the assurance that all the facts necessary for the needs of taxation have been identified, as far as possible, completely. The tax authority should prove all the facts concerning the actions taken toward the taxpayer, which are of a decisive significance for the correct establishment of the tax amount. Besides, there is no obligation to prove notorious facts, i.e., commonly known and known to the authority *ex officio* (Art. 24). Simultaneously, the party is entitled to initiate evidence proceedings, but the authority is not bound by the conclusions of the party. The taxpayer should be active in reference to: facts which have an impact on the correct establishment of the tax amount; facts which the taxpayer is obligated to show in their tax declaration or another testimony (which they are obliged to submit on the basis of general provisions); facts, the proving of which was demanded from them by the tax authority during an audit or tax procedure, as well as in reference to credibility, correctness and completeness of the documentation which they are obligated to keep. Moreover, filing an appeal, the taxpayer is obligated to produce evidence which justifies it, unless they question only the compliance of the decision with the provisions of law (Art. 72, para 4 letter d).

During the tax inspection the taxpayer may report evidence confirming his statements, as well apply for taking evidence available to the tax authority, which the taxpayer could not present himself – not later than on the day of the end of the audit. After the inspection is over, if the tax established during it differs from the one which the taxpayer declared and was obligated to pay, the authority, sending the report, also sends a demand for the taxpayer to express himself on the arrangements in the

39 See: W. Chróścielewski, Słowacja, (in:) Z. Kmieciak (ed.), Postępowanie administracyjne w Europie, p. 349.

40 V. Babčák, Daňove právo procesne, Košice 2000, p. 69.

41 R. Blahova, M. Jakubec (in:) M. Lang, P. Pistone, J. Schuch, C. Starginger (eds.), Procedural Rules…, *op. cit.,* p. 575; V. Babčák, Slovenske daňove právo, Košice 2012, p. 386 and further.

report, setting the period not shorter than 15 working days of the date of the report delivery. Also, at the stage of commenting on the arrangements, the taxpayer should, if possible, produce evidence from the documents which he was not able to present during the audit.

The Bulgarian tax procedure is regulated by the Act on Insurance and Tax Procedure (Данъчно-осигурителенпроцесуаленкодекс), in force since January 1, 2006[42]. The currently applicable law is an expression of a completely different concept of procedural regulation, for it norms the tax procedure completely and uses references to the general administrative procedure only to a small degree (e.g., restoring deadlines: Art. 26). The regulations of importance in evidence procedure issues, beside a separate extensive chapter, could be found among provisions concerning the rights and responsibilities of participants in the procedure, as well as in provisions regulating general rules (Art. 1–6).

Evidence should be gathered *ex officio* by the authority or on initiative of the party, and all the collected evidence should be a subject of an objective assessment and analysis (Art. 37). The taxpayer has the right to report his own evidence. Nevertheless, specific rules applicable in reference to tax audit have also been provided for, which referred to the burden of proof and the taxpayer's responsibilities in the matter. Namely, if for the establishment of the obligation of the audited it is indispensable to establish facts and circumstances outside the territory of the country, it is the audited who is burdened with the obligation of presenting evidence explaining the actual state of affairs. Moreover, if it comes to relations or transactions between people mutually connected, as well as in the case of transfers between the facility of a foreign entity in Bulgaria and the other parts of the company abroad, it is assumed that the audited is able to produce evidence (Article 116). In the case of transactions with entities mutually connected, the burden of proof rests with the audited, also, in reference to the issue of market price and the reasons why the transaction price differs therefrom – the audited should present the whole evidence, including foreign documents. A special rule transferring the burden of proof on the audited refers to procedures connected with income not revealed for taxation (Art. 123 para 1).

The party to the procedure is obligated to present all data, information, documents, letters, information carriers and other evidence, which refer to their rights and responsibilities, facts, and circumstances under the proceedings, as well as to point at all persons, as well as state authorities and local government units, which may possess them (Art. 37). The authority may call a particular person or institution, including third parties indicated by the taxpayer, to produce evidence in writing within a set period[43]. Imposing the aforementioned obligation of presenting evidence

42 SG nr 105/29.12.2005.

43 R.N.J. Kamerling (ed.),The International Guide to Tax Auditing, p. 213.

in writing, the Bulgarian law is an example of a regulation which does not impose on the taxpayer an obligation to provide oral explanations at all[44].

If the person fails to produce evidence in compliance with the demand, the authority may assume that such evidence does not exist and assess only the evidence collected during the proceedings. The authority is also obligated to take into account the evidence presented before issuing the decision in the proceedings, and in the case of tax audit, within 14 days of the day of the delivery of the summons (Art. 37 and 117). This means that in audit we deal with a special kind of evidence preclusion, because the authority does not have to include the evidence reported by the party after the aforementioned period. At the demand of the authority, the audited, as well as the person registering him, are obliged to produce a written explanation referring to facts and circumstances of importance for the procedure in progress. If the explanation is not presented within the set period, the authority may assume the facts and circumstances unexplained in writing as being unproved. The authority informs the summoned persons about the consequences of failing to perform the obligation, as well as about the possibility of suing them to court in the mode provided for in the provisions of the Code of Civil Procedure. The audited may report reservations in writing and submit the evidence within 14 days of the delivery of the audit report. The deadline may be prolonged at the request of the audited, but it cannot exceed one month. The procedures are finished through issuing a decision, and the decision issued as a result of an audit may be challenged within 14 days (Art. 152). It is required that all types of appeals include presenting evidence which, in the taxpayer's opinion, should have been collected (Art. 145 para 1 point 3), and in reference to the appeal the taxpayer is entitled to appeal against the decision issued as a result of the audit. The law includes specific regulations indicating that regardless of the right of the appellant to present evidence which should have been collected, the authority which issued the decision in the first instance, may also present in writing the evidence which should have been collected. Within the period provided for issuing the decision by the appeal authority, the appellant and the authority which issued the decision after the audit may make a written arrangement referring to the evidence which is not in dispute. After written arrangements, it is not possible to allow for new evidence undermining the evidence under the arrangement, either in appeal proceedings or in judicial proceedings (Art. 154).

In Slovenia, the tax procedure was regulated (even though incompletely; it contains numerous references to other legal acts) by the Act on Tax Procedure of November 16, 2006 (*Zakon* o *davčnem postopku*)[45]. In the investigation procedure the tax authority is obligated to identify all facts necessary to issue a lawful and correct decision, and the authority should act with due diligence establishing also facts

44 *Ibidem*, p. 173.

45 Uradni list RS 13/2011 of 28.02.2011 with further amendments.

favourable to the taxpayer, unless the law itself provides for an exception. Moreover, the object of taxation as well as the circumstances and facts, the establishment of which is indispensable for taxation purposes, should be assessed in accordance with their economic substance (Art. 5). Rules important in terms of gathering evidence material are included in Art. 10 of the law. It states that taxpayers should provide complete and correctly prepared information the tax authorities need for taxation purposes. They should also cooperate with tax authorities in establishing facts, both those favourable to them and those unfavourable, as well as present all the facts which are a basis of their action, and refer to evidence to support the facts.

The Slovenian law, regulating the issues connected with the burden of proof (Art. 76) states that the taxpayer should present evidence to support any statements he makes during the tax procedure. Nevertheless, it is the tax authority that is obligated to prove the facts which result, or do not result, in the emergence, increase, or reduction of the tax obligation. The rule provides for an exception in reference to any statements on the basis of which the tax obligation could be reduced; in such cases, unless the law does not provide for otherwise, the burden of proof rests with the taxpayer. The evidence produced by the taxpayer to support any statements, should be in the form of a written document or books or registers kept in accordance with tax regulations. The taxpayer, however, may also propose presenting the evidence in form of alternative evidence means (Art. 77). All evidence should be produced within the period set by the authority in decisions on initiating the audit or those issued during the tax audit. Before issuing the decision, the tax authority is obligated to carefully and thoroughly investigate each and every element of the evidence material separately, and all of them together. The authority should establish all the facts and circumstances of importance to issue a decision, taking into account the whole procedure as well as enable the parties to protect their rights and interests. The auditors sum up the findings of the audit in a report, the preparation of which is preceded, as a rule, by a meeting ending the inspection. During the meeting, it is important to note contentious facts which may affect the taxation, legal consequences of the audit findings and their tax consequences. The taxpayer is entitled to report objections to the audit report (Art. 140). If the taxpayer's reservations include additional facts which can affect the tax obligation established in the report, the tax authority should prepare an additional report within 30 days of the reception of the objections. Since 2014, reporting new evidence in objections to the report has been possible only when it has been demonstrated why it was impossible to report them earlier.

Conclusion

From the comparative legal perspective, as far as the way of rationing the gathering of evidence material in time is concerned, the countries under analysis provide for regulations limiting the taxpayer's opportunities to provide evidence material. This may happen through creating regulations granting the authority a right to appoint the taxpayer a deadline for producing evidence and presenting documents, simultaneously informing him about the consequences of the failure of their submission. Simultaneously, allowing for evidence preclusion, it is important to take care of its correct placement during the procedure, so that its introduction did not mean the weakening of the implementation of the substantive truth principle and the active participation of the party in the procedure.

However, despite introducing those solutions in the legal orders discussed, tax authorities are obligated to make efforts in order to acquire necessary information, including those in favour of the party, for the authority's job is to reach the substantive truth. Interesting is the issue of evidence distribution between the authority and the taxpayer in particular legislations, as for the obligation of explaining the actual state of affairs – sometimes reduced to the problem of the burden of proof. Certain legal orders introduced specific rules modifying the principles of proving, which refer to, for example: (a) regulations preventing tax abuse: the authority often has to demonstrate that the selected form is aimed at tax avoidance or tax evasion; in turn, the taxpayer should prove that the particular form was justified by economic reasons; (b) in the case of transactions with entities from tax havens, the burden of proof rests with the taxpayer, or else the burden of proof is split; (c) while investigating overpayments: the essential activity rests with the party; (d) in reference to lodging an appeal, usually on the appellant; (e) as for establishing facts and circumstances outside the territory of the country, the obligation of producing evidence explaining the actual state of affairs may rest with the taxpayer.

A commonly applied standard in all procedural solutions in the countries under analysis is providing the party with an active participation both in the procedure and in the audit, which should not, however, be reduced only to an opportunity to contest the tax authority's actions, but should also include the taking of constructive actions by the party – at an appropriate moment of the proceedings. The way of implementing the right may take different forms and manifest itself in: a right to provide evidence, information, a right to participate in particular activities of the evidence procedure, expressing an opinion on the evidence material before a decision is issued, or even by the tax authorities informing the party about their position and a right to demand from the party to respond to the arguments. The introduction of evidence preclusion is intended to mobilize the taxpayer to actively participate in the process of providing information on his tax situation.

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The Contemporary Significance of the Principle of Proportionality in Tax Law

Abstract: The principle of proportionality plays a key role in shaping the principles of the tax law system, as it is an important element in the protection of taxpayer's rights. The interpretation directive related to the principle of proportionality has a doctrinal, normative, and jurisprudential character. It is an EU and constitutional standard and should become a rule used on a daily basis in the practice of tax authorities. As a general principle of tax law, it is addressed to the legislative, executive, and judicial authorities. The article analyses the case law of the CJEU, the Constitutional Tribunal and the Supreme Administrative Court, which leads to the following conclusions. The CJEU quite often refers to the principle of proportionality in its jurisprudence and has developed a jurisprudence doctrine based on the doctrine of law. The Constitutional Tribunal, although in a limited scope, also employs the principle of proportionality. In disputes between tax authorities and taxpayers, Polish administrative courts apply the principle of proportionality using a pro-EU and pro-constitutional interpretation.
Keywords: Constitutional Tribunal, jurisprudence of the Court of Justice of the European Union, normative and doctrinal approach to the principle of proportionality, principle of proportionality, Supreme Administrative Court

Introduction

Principles of law play a key role in today's rapidly changing world. They map our paths in increasingly complex legal systems. With the growing inflation of legal regulations, they bring their authors and interpreters closer to achieving the desired results.

In legal theory, there are two concepts of legal principles. The first is based on the assumption that a principle is set directly on a norm contained in positive law or

logically derived from that law. The second conception indicates that principles of law are not only norms derived from legal texts, but also principles derived from the science of law[1].

One of the most important principles in the shaping of the tax law system is the principle of proportionality. This principle is related to measuring the activities of public authorities and minimizing their interference in the sphere of individual rights and freedoms. It is not without reason that the principle of proportionality is also referred to as the principle of restraint, or of adequacy[2].

The article aims to present the current role of the principle of proportionality in the system of tax law, taking into account that this principle can and should be considered in its various aspects, i.e., doctrinal, normative, and jurisprudence. The main research objective is to answer the question: what is the significance of the principle of proportionality in tax law?

The research problem in the field of tax law requires continual observation when considering the rapidly evolving views on the role of proportionality in this field of law. The study uses the dogmatic legal method as well as an analytical method, analysing both domestic and foreign literature on the subject as well as the jurisprudence of the Court of Justice of the European Union, the Constitutional Tribunal, and the Supreme Administrative Court. Because of limitations resulting from the nature of the publication, its primary focus is on presenting the main conclusions resulting from the conducted investigations.

1. The Principle of Proportionality in Tax Law Scholarship Literature

The origin of the principle of proportionality in its modern sense can be traced to the teachings of German law. As early as 1791, C.G. Svarez considered "the first principle of official state law to be that the state is entitled to restrict the freedom of the individual only to the extent that is necessary to preserve the freedom and security of others"[3]. At the end of the 19th century, C.G. Svarez introduced this principle into the German legal system through the jurisprudence of the Prussian Higher Administrative Court[4].

A. Barak, who considered the historical evolution of the notion of proportionality in the comparative law aspect, notes that it is commonly accepted in the doctrine,

1 B. Brzeziński, Prawo podatkowe. Zagadnienia teorii i praktyki, Toruń 2017, pp. 287–288.

2 L. Etel, P. Pietrasz, Niekompletność świadczeń o przeznaczeniu oleju opałowego a zastosowanie sankcji podatkowej, o której mowa w art. 89 ust. 16 u.p.a., „Zeszyty Naukowe Sądownictwa Administracyjnego"2012, no. 2(41), p. 27.

3 Cited after za J. Zakolska, Zasada proporcjonalności w orzecznictwie Trybunału Konstytucyjnego, Warsaw 2008, p. 12.

4 P. Mikuła, Obowiązki dokumentacyjne i formalne w prawie podatkowym. Granice formalizmu, Warsaw 2019, p. 105.

that in formulating the European principle of proportionality the Court of Justice employed the achievements of German legal science. This kind of phenomenon also concerns other legal systems, both of individual states, and supranational organisations.[5].

In the theory of law, R. Alexy points out that there is a direct link between the theory of principles and the principle of proportionality. According to German doctrine, the principle of proportionality is described as the relationship of the (applied) means to the (intended) end; this relationship should correspond to three subprinciples. These criteria, which can be regarded as a kind of test, include:

1) the criterion of usefulness,

2) the criterion of necessity,

3) proportionality *sensu stricto*.

The criterion of usefulness is met when a given measure is useful for the realization of a given goal, i.e., by means of this measure it is possible to achieve the set goal. However, this purpose must be legitimate - i.e., it must be within the framework of legally protected values.

The criterion of necessity is met when the measure in question is necessary to achieve the goal in question, i.e., there is no such measure which could achieve the goal assigned to it with equal effectiveness and which at the same time would be more amenable to the legally protected values, principles, goals.

The criterion of proportionality *sensu stricto*, on the other hand, is fulfilled when the number of benefits of a measure exceeds the number of disadvantages; when the result of the weighing between the protected good (value) and the sacrificed good is positive; when the means used are justified by the "importance and nature" of the aim they are to serve, when there is an adequate relation between the benefits derived from achieving the aim pursued and the harm caused to the constitutional right by the fact that the aim has been achieved[6].

It follows from the above considerations that the principle of proportionality was originally developed in the science of law.

The way the principle is defined indicates that it can and should be addressed to all three authorities, i.e., the legislature, the executive, and the judiciary.

5 A. Barak, Proportionality. Constitutional rights and their limitations, Cambridge University Press, 2012, pp. 175–210.

6 R. Alexy, A Theory of Constitution Rights, 2002, p. 66; M. Korycka-Zirk, Teorie zasad prawa a zasada proporcjonalności, Warsaw 2012, p. 130; P. Mikuła, Zasada proporcjonalności w orzecznictwie TSUE dotyczącym podatku od wartości dodanej, „Kwartalnik Prawa Podatkowego" 2014, no. 2, pp. 38–39.

2. The principle of proportionality in the normative aspect

In seeking the normative source of the principle of proportionality in tax law, one should refer to the Basic Law. It is generally accepted that the principle of proportionality is expressed in Article 31 Section 3 of the Constitution of the Republic of Poland of 2 April 1997[7]. This provision stipulates that limitations on the exercise of constitutional freedoms and rights may be established only by statute and only when they are necessary in a democratic state for its security or public order, or for the protection of the environment, health, or public morals, or of the freedoms and rights of others. Such limitations may not impair the essence of the freedoms and rights. The principle of proportionality adopted in the above-mentioned provision of the Constitution derives from the theory of law and from the earlier jurisprudence of the Constitutional Tribunal[8].

Proportionality is one of the basic criteria for ensuring the proper exercise (protection) of constitutional rights. As A. Barak points out, the contemporary understanding of human rights is based on the distinction between the scope of a constitutional right (defined in the Constitution) and the legal justification for its exercise or protection (resulting from the norms contained in lower-order acts of law). Additionally, most constitutional rights are relational, in the sense that there are legal justifications that limit the scope of their exercise as defined in the Constitution[9].

As reasonably argued by M. Klatt and M. Meister, numerous doubts about the proportionality test arise from the lack of clear identification and definition of what elements are subject to the weighting process. The authors see the reason for this state of affairs in the parallel operation of diverse theories that prioritize the concept of "rights" in relation to legal restrictions on their exercise[10].

According to A. Barak, the principle of proportionality has two basic functions. First, it provides an important criterion for resolving disputes related to the conflict of norms operating at various levels of the constitutional hierarchy. In other words, this criterion provides a mechanism for assessing the validity of lower-order norms that limit the full implementation of constitutional norms establishing human rights. Second, proportionality has an interpretative function. In this function, it provides a criterion for assigning meaning to a legal norm[11].

This permits the assumption that tax law, by definition interfering substantially in the sphere of individual freedoms and rights, should also take into account the indicated constitutional standard. The described state of affairs, i.e., normative

7 OJ L 78, item 483, hereinafter Constitution.
8 J. Zakolska, Zasada…, *op. cit.,* p. 35.
9 A. Barak, Proportionality…,*op. cit*., p. 131.
10 M. Klatt, M. Meister, The Constitutional Structure of Proportionality, Oxford University Press, 2012, pp. 15–44.
11 A. Barak, Proportionality…*op. cit.,* pp. 146–147.

anchoring of the principle of proportionality in the Constitution, should be considered favourable, if we take into account the hierarchy of sources of law. This does not mean, however, that in practice this state of affairs can be considered entirely satisfactory from the perspective of realising the protection of taxpayers' rights in disputes with the tax administration, which in the course of its activities primarily refers to the provisions of ordinary acts.

The principle of proportionality in normative terms can also be found in European law. Thus, this principle has the dimension of an EU standard, which is combined with the principle of subsidiarity. It is expressed in Article 5 (4) of the Treaty on European Union[12], replacing Article 5(4) and (5) of the Treaty on European Union. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, and can therefore, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

The CJEU case law on compliance with Art. 5 TEU is quite restrained. As the analysis of the judgments has shown, only in a few cases does the CJEU state that the tax authorities have violated the said principle, both when enacting legal acts addressed to the EU states and when implementing EU law.

It should also be kept in mind that the principle of proportionality is also expressed in Article 52(1) of the Charter of Fundamental Rights. This provision states that any limitations on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be imposed only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. It should be mentioned that the Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community, was of fundamental importance for the protection of human rights in the European Union.[13]. It added Article 6 TEU, in which the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, as adapted 12.12.2007 in Strasbourg, which has the same legal value as the Treaties.

12 Consolidated version 2016, Official Journal of the European Union, OJ L C 202,2016.

13 Made in Lisbon, 13.12.2007 (OJ L 2009 no. 203, item 1569).

The principle of proportionality is also present in Article 17 of the European Convention on Human Rights (hereinafter ECHR). This provision states that nothing in this Convention shall be construed as conferring on any State, group, or person the right to take any action or perform any act aimed at nullifying or impairing the rights and freedoms set forth in this Convention to a greater extent than is provided by the Convention. The aim is to ensure that the level of protected goods is proportionate from the point of view of the legislator, judicial decision, and doctrinal assessment. The proportionality directive protects against arbitrariness of the authorities (vertical influence). It is also the duty of the authorities to protect against abuse of fundamental human rights by others (horizontal impact)[14].

The implementation of Article 17 of the ECHR is complemented by the regulation contained in Article 18 of the ECHR, which provides that the limitations on the rights and freedoms permitted by this Convention shall not be applied for purposes other than those for which they were introduced. This provision sets limits on the application of restrictions on rights. This regulation protects against abuse by public authorities or their violation of the principle of good faith on which the whole structure of the Convention is based.

Recently, the European Court of Human Rights in Strasbourg has changed the direction of previous jurisprudence and increasingly acknowledges its cognition to examine tax cases. In this regard, the ECtHR in its adjudications assigns a greater role to the principle of proportionality, which it associates with "fair balance", equated with the test of proportionality *sensu stricto*.

From the perspective of the protection of individual rights in tax law, it is particularly noticeable, for the reason mentioned above, that the principle of proportionality is missing from the provisions of the current Tax Code in Poland.

The question arises of how this state of affairs affects the functioning of the principle of proportionality in terms of case law. Below I present a selection of examples of court rulings along with my own conclusions based on the analysis of the rulings.

3. The Principle of Proportionality in the Case Law of the Court of Justice of the European Union

Member States are obliged to undertake the timely and correct implementation (implementation, transposition) of EU regulations. The literature emphasizes that the totality of implementation consists of: 1) normative implementation, 2) administrative implementation and 3) judicial implementation. Judicial implementation refers to

14 E. Łętowska, Wprowadzenie do problematyki proporcjonalności, (in:) P. Szymaniec (ed.), Zasada proporcjonalności w ochrona praw podstawowych w państwach Europy, Wałbrzych 2015, pp. 18–19.

the role of national courts as the EU courts that apply the principles of EU law and impose sanctions for violation or non-application of EU law by individual entities.[15].

The recognition by the Court of Justice of the European Union (hereinafter: CJEU) that judicial application of law is an element of national implementation of a directive allows: 1) conferring on the courts the competence to assess whether a State has properly implemented Union law, 2) achieving in the judicial application of law the objective of Union law, including of a Directive (principle of effectiveness of Union law), 3) interpreting national law in accordance with Union law, 4) uniform application of Union law in all Member States[16] .

The CJEU has developed a jurisprudential principle of proportionality based on the doctrinal principle of proportionality, despite the lack of normative EU regulation in this regard. It should be emphasized that in tax cases the CJEU often uses the principle of proportionality alongside other EU principles to ensure the protection of taxpayers' rights.

Particularly important decisions concerning the principle of proportionality have been made in Polish cases. This is due to the high activity of Polish administrative courts in conducting dialogue with CJEU within the institution of preliminary questions submitted to it.

In Polish cases, the most far-reaching views were expressed in the judgments C-25/07 of 10.07.2008[17] and C-653/18 of 17.10.2019[18], where the Court found a violation of the principle of proportionality, which led to changes in Polish legislation. In other cases, i.e., in judgments C-188/09 of 29.07.2010[19], C-588/10 of 26.01.2012[20]; C-499/13 of 26.03.2015[21]; C-418/14 of 2.06.2016[22], only a partial violation of the principle of proportionality was found. An analysis of the CJEU's case law acquis allows us to indicate that, relatively often, the CJEU's rulings are interpretative in nature (i.e., if a certain situation occurs, only then can it be concluded that the principle of proportionality has been violated).

In addition, the in its case law CJEU repeatedly indicates that the final assessment of whether the principle in question has been violated is a matter for the national court. An analysis of numerous rulings of the CJEU concerning observance of the principle

15 A. Kunkiel-Kryńska, Metody harmonizacji prawa konsumenckiego w Unii Europejskiej i ich wpływ na procesy implementacyjne w państwach członkowskich, Warsaw 2013, p. 89.

16 See judgments of the CJEU of 10 April 1984, Case C 14/83, Sabine von Colson and Elisabeth Kamann v. Land Nordrhein Westfalen and of 9 December 2003, Case C 129/00, Commission v. Italian Republic.

17 Zbiór Orzecznictwa Trybunału Sprawiedliwości i Sądu Pierwszej Instancji 2009/3A s. I–1407

18 EU:C:2019:876

19 EU:C:2010:454

20 EU:C:2012:40

21 EU:C:2015:2001

22 EU:C:2016:400

of proportionality shows that it varies. The CJEU granted the most far-reaching protection in terms of compliance with the principle of proportionality in taxes that are subject to harmonization, i.e., value added tax and excise duty. The Court of Justice has quite often found that member states violated the principle of proportionality in cases involving these taxes. When interpreting VAT regulations, the CJEU very often refers to the principle of neutrality in addition to the principle of proportionality. Moreover, the CJEU judicature implies that the principle of proportionality is meant to prevent national legislators from applying any "automatisms" that make the tax regulations more stringent. Furthermore, the CJEU, while examining this category of cases, has indicated the necessity to take into account the so-called good faith of the taxpayer, i.e., before depriving it of the right to deduct input tax.

The CJEU reached somewhat different conclusions in the case of sanctions. In the judgments under review, the CJEU held that the regulation, and imposition, of sanctions falls within the competence of the Member States, who are free to regulate them as they see fit, provided that the regulation, and imposition, of sanctions does not infringe the principle of proportionality. In a situation where only formal conditions have not been fulfilled and taxes have not been lost, the imposition of sanctions may breach the principle of proportionality.

In cases concerning direct taxes, which are not subject to CJEU harmonization, any derogation from the freedom of the internal market, i.e., the free movement of goods, persons, services, and capital, must be justified by the interests of the Member State and must not violate the principle of proportionality.

In its case law, the CJEU examines the observance of the principle of proportionality understood as the doctrine of jurisprudence. Often, the CJEU does not directly indicate in the justification of its rulings which criteria it uses to evaluate compliance of given solutions with the principle of proportionality. Owing to the phenomenon of abuse of the law through the introduction of artificial constructions in cross-border transactions, the CJEU allows for the introduction of certain restrictions on the free flow of capital. In many cases, however, the CJEU's rulings take the interest of the taxpayer into account only partially, leaving the assessment of a violation of the principle of proportionality to the national court that made the preliminary reference. In certain cases, the CJEU provides quite detailed guidelines as to how the principle of proportionality should be understood, and sometimes even determines on its own that the principle has been violated or that there are no grounds to believe that it has been violated. Moreover, recently the CJEU, when interpreting legal regulations, has invoked Article 52(1) of the Charter of Fundamental Rights, which requires that the principle of proportionality be taken into account when applying the law. Analysis of the CJEU jurisprudence also shows that imposing negative consequences for taxpayers in the case of violations of formal conditions while fulfilling substantive requirements may violate the principle of proportionality.

The CJEU rulings draw attention to the necessity of admitting evidence that is lawful into tax proceedings.

In conclusion, it can be concluded that the CJEU, using the principle of proportionality, gives relatively broad protection to taxpayers.

4. The Principle of Proportionality in the Jurisprudence of the Constitutional Tribunal

As indicated above, the principle of proportionality finds its normative expression primarily in Article 31, Section 3, of the Constitution. In certain situations, when it is not possible to derive the principle of proportionality from the above-mentioned provision, against the background of the circumstances of a particular case, the principle of proportionality, in accordance with the jurisprudence of the Constitutional Tribunal, is derived from Article 2 of the Constitution.

For example, in judgment SK 7/15 of 6.01.2016, ref. [23], the Constitutional Tribunal took the position that Art. 65.1a.1 of the Excise Duty Act of 23 January 2004 (OJ L No 29, item 257 and No 68, item 623, of 2005. No. 160, item 1341, of 2006. No. 169, item 1199, of 2007. No. 99, item. 666, and 2008. No 118, item 745 and No 145, item 915) in connection with Article 2 of the Act of 28 July 2005 amending the Excise Duty Act (OJ L No 160, item 1341) to the extent in which it refers to tax obligations incurred prior to 15 September 2005, is inconsistent with Article 20, Article 22, Article 64 par. 1 and 3 in connection with Article 31 par. 3, Article 2 and Article 84 of the Constitution.

The analysis of the case law of the Constitutional Tribunal shows that it has evolved over the years. In the first period when the Constitution was in force, a violation of the principle of proportionality was ascertained on the basis of both Article 2 and Article 31 Section 3 of the Constitution. Later, only Article 31 Section 3 of the Constitution was applied, and the three-part test of proportionality, i.e., the test of usefulness, necessity, and proportionality *sensu stricto*, was carried out quite scrupulously. Subsequently, the jurisprudence of the Constitutional Tribunal evolved further still. It was assumed, that in tax cases the principle of proportionality resulting from Article 31 Section 3 of the Constitution would apply only in two cases. First, it cannot be ruled out that, under the guise of a levy regulation, the legislature will establish an instrument serving purposes other than fiscal; particularly nationalisation or repression. Secondly, it cannot be ruled out that one or both of the discussed models may be invoked with reference to other issues regulated by the provisions of tax law that do not concern the imposition of taxes, but are connected, for example, with the shaping of the conditions which must be met in order to take

23 OTK-A 2016/100.

advantage of an exemption from tax obligation or of a preferential (reduced) rate of taxation.

In recent rulings the Constitutional Tribunal has applied the principle of proportionality reconstructed from Article 2 of the Constitution, terming it the prohibition on excessive interference by the legislator. Inconsistent with this principle, is such action by the legislator that, from the point of view of the principles of rationality, is excessive in relation to the declared objectives. The principle derived from the aforementioned provision of the Constitution, places particular emphasis on the very prohibition of excessive interference on the part of the legislator, which makes it unnecessary to refer to the values indicated in Article 31 par. 3 of the Constitution. Nor can the principle of the prohibition on excessive interference on the part of the legislator be understood in such a way that ascertaining whether it is exceeded requires a rigorous test of proportionality in accordance with the principle of utility, the principle of necessity, and the principle of proportionality *sensu stricto*. In light of the foregoing, what is inconsistent with the principle of the prohibition of excessive interference will therefore be such action on the part of the legislature which, from the point of view of current knowledge, is excessive in relation to the objectives pursued.

5. The Principle of Proportionality in the Case Law of Administrative Courts

Polish administrative courts (provincial administrative courts, and the Supreme Administrative Court) also invoke the principle of proportionality when resolving disputes between tax authorities and taxpayers. In this respect, administrative courts in their rulings refer to the acquis developed by CJEU and the Constitutional Tribunal. In the written justifications for court decisions, one can also find clear references to the criteria of proportionality developed in legal scholarship.

Again, it is useful to cite a specific example in this regard. Specifically, in verdict II FSK 3684/18 of 31.07.2019[24], the Supreme Administrative Court (hereinafter: SAC) ruled on behalf of the taxpayer with regard to the possibility to take advantage of residency relief, citing, among other things, the principle of proportionality developed in the science of law, and indications concerning this principle arising from the case law of the Constitutional Tribunal.

In the justification of the cited judgment, the SAC stated that the obligation for taxpayers to submit a statement on the conditions entitling them to apply the exemption, pursuant to art. 21 sec. 1 item 126 of the Personal Income Tax Act and pursuant to art. 8 sec. 3 of the Act amending this Act of 2008, did not meet

24 Central Database of Administrative Court Decisions CBOIS www.orzeczenia.nsa.gov.pl.

the requirements of the proportionality principle expressed in art. 31 sec. 3 of the Constitution.

The research undertaken on the case law of the SAC in tax cases allows for the conclusion that the principle of proportionality significantly influences the development of jurisprudence by administrative courts in this category of cases. In many cases, the SAC invokes the doctrine developed by the CJEU as well as the views of the Constitutional Tribunal based on the interpretation of Article 31 Section 3 of the Constitution itself, or this provision of the Fundamental Law in conjunction with its Article 2. Most often the principle of proportionality constitutes the basis for adjudication in cases concerning value added tax. Often the benchmark for granting protection to taxpayers is a CJEU judgment passed in another case. This means, therefore, that the judgments of the CJEU are carefully analysed by the SAC as a national court, and the general guidelines derived from them are applied in other cases. This also confirms the view expressed earlier, that there is an ongoing dialogue between the CJEU and SAC within the institution of questions for preliminary rulings.

In its rulings, the SAC takes into account the principle of proportionality to a much lesser extent in excise duty cases. However, in a situation where two divergent rulings were issued by the courts, namely, the Constitutional Tribunal found that there were no grounds to apply the principle of proportionality, while the CJEU, based on EU law, held that Polish legislation breached the principle of proportionality; the SAC, in the name of the principles of priority and effectiveness of EU law, followed the views of the CJEU. In input tax refund cases, the NSA, following the example of the CJEU, is required to examine whether the taxpayer acted in good faith and exercised due diligence. It is also agreed that formal defects should not restrict the right to tax refunds.

The tax case law of the SAC indicates that the principle of proportionality is also applied in taxes other than harmonized taxes. It was applied in cases concerning the so-called registration relief, i.e., on the grounds of the provisions of the Personal Income Tax Act. Here the court meticulously carried out the three-part proportionality test derived from R. Alexy's theory. On this occasion, the SAC applied a pro-constitutional interpretation. In certain situations, the SAC grants protection to the taxpayer citing a violation of the principle of proportionality when the tax authorities impose procedural obligations on a party that are impossible to fulfil in the prescribed time.

In conclusion, it should be stated that the principle of proportionality is an important element employed in the interpretation of tax law by the CJEU, the Constitutional Tribunal, and the SAC. However, legislative solutions adopted in tax matters do not always meet the EU and constitutional standards of proportionality. Therefore, it is worth monitoring whether the addressees of the principle of proportionality (i.e., the legislative, executive, and judicial authorities) are compliant

with it. The principle of proportionality is an important instrument for the protection of taxpayers' rights.

6. COVID-19 and the Principle of Proportionality

The international community was not prepared for a pandemic. As a result, millions of people around the world became infected, were hospitalised, and a large number of those affected died. During the first period of its appearance, isolation was basically the only means of preventing it. Only later did the possibility of vaccination against COVID 19 emerge. However, the number of vaccinated people in Poland, which is less than 50%, does not guarantee the so-called 'herd immunity'. As a result, the authorities of individual countries, including Poland, were forced to introduce numerous restrictions with regard to their citizens.

In view of the subject matter of the article, it is worth analysing whether the introduced restrictions do not contradict the principle of proportionality, of which the scope of application has been presented in the previous arguments contained in the publication. At this point, it is worth recalling that the principle of proportionality has two functions. It provides an important means of settling disputes related to the conflict of norms functioning at different levels of the constitutional hierarchy. Moreover, it plays an important interpretative function in the interpretation of the law.

Due to the size of the article, I have chosen for analysis the restrictions introduced in the SAC, in particular concerning Article 15zzs[4] of the Act of 2 March 2020 on special solutions related to the prevention, counteraction, and combating of Covid -19, other infectious diseases, and crisis situations caused by them (Journal of Laws 2020, item 374 as amended). At this point, it should be emphasised that this provision has evolved.

The epidemiological threat from the spread of the SARS-CoV–19 virus was not illusory. A judge of the SAC and a 34-year-old employee of the Judicial Information Department died on COVID -19. In addition, many judges and employees were hospitalised or quarantined due to the severity of the illness.

Due to the declaration, as of 14 March 2020, of a state of epidemiological emergency pursuant to the Ordinance of the Minister of Health of 13 March 2020. on the declaration of a state of epidemiological emergency in the territory of the Republic of Poland (Journal of Laws of 2020, item 433), the functioning of the Finance Chamber of the SAC dealing with the settlement of tax disputes has changed.

The cancellation of appointed hearings and the lack of possibility to appoint new ones resulted in the intensification of adjudicating in closed hearings in three-person groups. This mode of adjudication was used not only in cases in which the parties waived the hearing (Article 182 § 2 of the Law on Proceedings before Administrative

Courts), but also in cases so far awaiting the setting of a hearing, the adjudication of which in closed session was made possible by Article 15zzs[4](1) and (3) of the Act of 2 March 2020 on special solutions to prevent, counteract, and combat COVID -19, other infectious diseases, and crisis situations caused by them (Journal of Laws 2020, item 374, as amended).

In several cases, it was decided to hold a hearing remotely, with simultaneous direct transmission of images and sound, in which the parties engaged in, while staying in the buildings of the designated voivodeship administrative courts[25]. In a few cases, when a party objected to hearing the case in a closed session, the case was taken off the court docket and awaits hearing.

Currently, there is still a preference for deciding cases in closed session. The provision of Article 15zzs[4](1) stipulates that during the period in which the state of epidemic emergency or the state of epidemic declared due to COVID -19 is in force and within one year from the revocation of the last one, the SAC is not bound by the party's request for a hearing. If a case to be heard is referred to a closed hearing, the SAC shall decide in a panel of three judges.

Paragraph 2 of the analysed provision provides for a hearing in a different location in proceedings before the SAC. In the period when an epidemic emergency or a state of epidemics declared due to COVID - 19 is in force, as well as within one year from the cancellation of the last of them, provincial administrative courts, and the SAC, shall hold a hearing with the use of technical equipment making it possible to hold the hearing remotely with simultaneous direct broadcast of images and sounds, provided that the persons participating in the hearing do not have to be present in the court building.

However, the presiding judge may order a closed session if he or she considers it necessary to hear the case, and it is not possible to hear the case remotely with simultaneous direct transmission of images and sound. In a closed session in these cases, the court shall decide by a panel of three judges.

As a result, remote hearings, in which professional attorneys with appropriate Internet connections participate, are increasingly frequently organised at the SAC.

However, the question arises as to whether the examination of cassation appeals in closed sessions violates the principle of proportionality in terms of the right to a court, in particular the right to an open trial?

First of all, it should be noted that the possibility of limiting the right to an open trial was introduced by law, which meets the formal condition set out in Article 31(3) of the Constitution. Since the 2015 amendment to the Law on Proceedings before Administrative Courts, the catalogue of cases which the SAC may hear in closed session (Article 182 of the Law on Proceedings before Administrative Courts) in

25 Information on the activity of administrative courts in 2020, NSA Publishing House, Warsaw 2021, p. 30.

a three-member composition has been significantly expanded, and so far, such a solution has not been questioned. Moreover, in accordance with Article 183 § 1 of the Law on Proceedings before Administrative Courts, the SAC examines the case within the limits of the cassation complaint; however, it takes into account the invalidity of the proceedings *ex officio*. The parties may only cite new grounds for the cassation appeal. It follows from the presented regulations that proceedings before the SAC are primarily written, and new arguments may only be raised within the scope of cassation grounds, which may be raised by a party in a pleading before a closed hearing.

In my opinion, the possibility of considering cassation appeals by the SAC in a closed session during the pandemic period does not violate the principle of proportionality. By providing for a wider possibility of holding closed hearings, the criterion of usefulness was met, as it protected the parties, attorneys, judges, and court employees from contracting the COVID -19 virus. The adopted solution also met the criterion of necessity, as limiting direct contact between the parties was necessary, due to the epidemiological situation. Finally, the restriction of direct hearings was intended to protect the public health of the general population at the expense of the right of the parties to participate directly in the hearings. It should also be borne in mind that the epidemiological situation in Poland was, and is, serious, as it leads to numerous infections, loss of health of many people, and the death of many people.

Conclusion

The principle of proportionality in tax law is an important element in the protection of taxpayer rights. The interpretation directive related to the principle of proportionality has a doctrinal, normative, and case law character. It is both an EU and constitutional standard and should be employed as a rule on a daily basis in the practice of tax authorities.

As a general principle of tax law, it is addressed to the legislative, executive, and judicial authorities. The CJEU quite often refers to the principle of proportionality in its rulings and has developed a case law doctrine based on the relevant legal scholarship. The Constitutional Tribunal, although only to a limited extent, has also applied the principle of proportionality.

In disputes between tax administration authorities and taxpayers, Polish administrative courts apply the principle of proportionality, applying a pro-EU and pro-constitutional interpretation.

The possibility for the SAC to hear cassation appeals in tax cases in closed session during the pandemic period does not violate the principle of proportionality.

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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[1] 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.

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, tthe 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)[2].

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[3]. Its separation was influenced by several factors, such as: regulation method, specificity of norms constructed on the

2 E. Łętowska, Mutlicentryczność 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[4], 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.[5]

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[6], but having regard to the subject of this law regulation, which includes

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. Radvan, 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[7], 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[8], and currently another branch, which is grant law[9] 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"[10].

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 in not just about its autonomy but also about emancipation of different branches of law from its scope.

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. Amore 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[11], 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[12] (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[13] (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

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[14].

the Constitution of the Republic of Poland[15] 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%[16] to 47.8% of GDP[17] 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%[18].

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-zarzadzania-dlugiem (06.10.2021).

European Commission regarding Polish debt for 2021 and 2022 amounts to 57.1% and 55,1%, respectively[19].

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[20]. 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[21], 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[22]. 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.[23] 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

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 (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/kontrole/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[24]. 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"[25]. 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[26]. 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[27]. 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[28]. 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

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/artykul/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[29].

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[30].

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[31].

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[32] 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)		difference (1–2)		difference (1–2)		difference (1–2)		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.[33]

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)[34]. 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"[35].

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 2021https://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[36]. In comparison, in the past the highest deficit in the state budget in the amount of CZK 192 bn was in 2009[37], 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[38], 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[39].

The Act on budgetary responsibility rules[40] 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).[41] 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.[42] 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 (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[43], it was indicated that, *From the macroeconomic point of view all these funds*[44] *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*[45] *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*[46].

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%[47].

Similarly to the state budget, also local government budgets[48] 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 teritory of the Czech Republic, e.g., unemployment benefit, benefit during qarantine, benefit for entrepreneurs, posponing time limit for payment of certain taxes, compensation of salaries, supporitng 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-ctvrtleti-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 COVOD-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[49] 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.[50]

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

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)[51].

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.[52]

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.*"[53]

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

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 (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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Rethinking the Indirect Taxation of Trust in the Reform of the Italian Tax System

Abstract: In Italy, among the priorities of the National Recovery and Resilience Plan (PNRR), a strategic position is taken by the tax reform, which is part of the actions to remedy the structural weaknesses of the country's system and to stimulate economic recovery after the Covid-19 crisis. In this context, in order to design a new tax structure, in terms of economic growth and competitiveness, a legislative rethink of indirect taxation of trusts and other destination constraints is desirable. In fact, the current tax rules of these negotiation models, in addition to giving rise to numerous disputes, often discourage their use in regulating new interests and needs.
Keywords: indirect taxation, pandemic economic crisis, renewal of traditional taxation models, new taxation of trusts and other destination constraints

Introduction

Among the priorities pursued by the National Recovery and Resilience Plan (PNRR)[1], adopted in Italy to address the COVID-19 pandemic situation[2], a strategic

1 Available at the link: https://www.governo.it/sites/governo.it/files/PNRR.pdf (12.07.2021). On the topic, see V. Vacca, Guida al Piano Nazionale di Ripresa e Resilienza – PNRR, Pisa 2021, p. 9. ss.

2 On the tax measures adopted in Italy to deal with the Coronavirus emergency, see E.M. Bartolazzi Menchetti, Sospensione dei termini per "Covid-19" davvero inapplicabile al termine di impugnazione precedentemente sospeso?, "Rivista telematica di diritto tributario" 2020, no. 1, p. 41; M. Bellini, R. Iervolino, Transfer Pricing e Covid-19. Trattamento delle entità a rischio limitato nelle analisi di benchmark, "Rivista telematica di diritto tributario" 2020, no. 2, p. 591; S. Boffano, Brevi riflessioni sulle agevolazioni fiscali alle donazioni effettuate nel contesto della

position is taken by the reform of the tax system, aiming at the development of a "fair, simple, and transparent" tax system[3], in the context of a comprehensive remodelling

"emergenza coronavirus", "Rivista telematica di diritto tributario" 2020, no. 1, p. 57; S. Buttus, Brevi considerazioni sulle effettive possibilità di ripresa del processo tributario nella seconda fase dell'emergenza sanitaria, "Rivista telematica di diritto tributario" 2020, no. 1, p. 45; M. Clò, "Decreto liquidità": novità riguardanti il trattamento fiscale delle cessioni di farmaci ad uso compassionevole, "Tax News" 2020, no. 1, p. 113; D. Conte, Il contributo unificato di giustizia e l'intervento innovativo del D.L. n. 23/2020 tra dubbi di costituzionalità, interpretazioni necessarie ed effettiva utilità, "Tax News" 2020, no. 2, p. 243; A. Contrino, F. Farri, Emergenza coronavirus e finanziamento della spesa pubblica: è possibile trarre indicazioni per la futura politica fiscale italiana?, "Rivista telematica di diritto tributario" 2020, no. 1, p. 11; M. Di Sarli, Emergenza Covid-19 e inapplicabilità della presunzione di continuità ex art. 7, d.l. 23/2020 per i soli soggetti IAS-adopter: vi è una reale e irrazionale disparità di trattamento?, "Rivista telematica di diritto tributario" 2020, no. 2, p. 596; G. Ingrao, Crisi di liquidità da coronavirus e omesso versamento di tributi: quali conseguenze sanzionatorie amministrative e penali?, "Rivista telematica di diritto tributario" 2020, no. 1, p. 17; E. Marello, Sospensione dei termini per l'adesione, in versione pandemica, "Rivista telematica di diritto tributario" 2020, no. 1, p. 51; G. Marini, Fisco ed emergenza coronavirus. Quali soluzioni per superare la crisi?, "Tax News" 2020, no. 1, p. 129; R. Miceli, La disciplina degli aiuti di Stato fiscali nell'emergenza Covid-19, "Rivista telematica di diritto tributario" 2020, no. 1, p. 62; A. Orlandi, R. Iervolino, Covid-19 e transfer pricing su operazioni finanziarie. Analisi degli impatti del Covid-19 nelle analisi di benchmark, "Rivista telematica di diritto tributario" 2020, no. 2, p. 603; F. Pepe, L'emergenza Covid-19 nell'Unione europea: verso una solidarietà tributaria "strategica"?, "Rivista telematica di diritto tributario" 2020, no. 1, p. 22; A. Perrone, Emergenza coronavirus e prelievo fiscale, tra diritti "scontati", obbligo contributivo, solidarietà ed Europa: riflessioni a caldo, "Rivista telematica di diritto tributario" 2020, no. 1, p. 29; S.M. Ronco, Scenari di politica fiscale nell'emergenza Coronavirus: brevi riflessioni, "Rivista telematica di diritto tributario" 2020, no. 1, p. 35; G. Selicato, Decretazione d'urgenza vs. Regolamento governativo nella definizione di una disciplina generale di attuazione dell'imposta di soggiorno (Considerazioni a margine del D.L. 19 maggio 2020, n. 34), "Tax News" 2020, no. 1, p. 65; C. Silvani, La nuova disciplina di trasformazione in credito d'imposta delle DTA relative alle eccedenze ACE, "Rivista telematica di diritto tributario" 2020, no. 1, p. 67; L. Tosi, La conversione di DTA in crediti d'imposta, "Tax News" 2020, no. 2, p. 263; A. Vicini Ronchetti, La trasformazione delle DTA in crediti d'imposta prevista dal Decreto "Cura Italia": profili interpretativi a fronte di un legislatore impreciso, "Rivista telematica di diritto tributario" 2020, no. 2, p. 609; A. Viotto, Il contributo a favore di imprese e lavoratori autonomi di minori dimensioni, previsto dal c.d. decreto Rilancio: una misura in chiaroscuro, "Rivista telematica di diritto tributario" 2020, no. 2, p. 616; A. Viotto, Decreto legge "cura Italia": riflessioni sulla cumulabilità della sospensione "emergenziale" dei termini di proposizione del ricorso con quella stabilita in caso di presentazione dell'istanza di accertamento con adesione, "Tax News" 2020, no. 1, p. 175; A. Viotto, Criticità sullo svolgimento dei giudizi tributari nel periodo dell'emergenza sanitaria alla luce dell'art. 27 del "Decreto Ristori", "Tax News" 2020, no. 2, p. 273; T. Yang, Istituti di diritto tributario e ragioni fiscali a supporto del sistema produttivo, "Rivista telematica di diritto tributario" 2020, no. 1, p. 73; A. Orlandi, R. Iervolino, Ristrutturazioni aziendali e COVID-19. Analisi dei principali driver nei processi di riorganizzazione delle imprese multinazionali, "Rivista telematica di diritto tributario" 2021, no. 1, p. 607.

3 M. Leo, Il (possibile) Fisco di domani: dall'urgenza di un sistema più equo a un nuovo rapporto Fisco-contribuente, "Il fisco" 2020, no. 41, p. 3907; A. Giovannini, Proposte di riforma fiscale, "Rivista telematica di diritto tributario" 6 July 2021, p. 1 ss.; M. Leo, Le linee guida per la

of the direct and indirect taxation systems, of the architecture of tax litigation, and of the tax collection apparatus.

Indeed, tax reform is one of the key actions to address the structural weaknesses of the country's system and is an integral part of the economic recovery that is also to be triggered by European resources.

In this context, in order to design a new global tax structure, as also happened in the past in other domestic systems[4], to foster economic growth, competitiveness, and stimulate investment, and to comply with the requirements of modernity and certainty in the circulation of legal transactions, it would be desirable to rethink legislation on the indirect taxation of trusts and other destination constraints.

The current tax rules on these models, which are characterised by an approximate regulatory framework[5], as well as giving rise to numerous hermeneutical conflicts, being a source of protracted litigation, often discourage their use in regulating the new interests and needs created by the pandemic.

1. The Extension of Inheritance and Gift Tax to Destination Constraints: Uncertainty Regarding the Identification of the Tax Assumption

In the sources of Italian law, the reference provision is Article 2, paragraph 47 of Decree Law no. 262/2006, converted into Law no. 286/2006, which, in reintroducing the tax on inheritances and donations, repealed in 2001[6], has broadened its scope to include transfers of goods and rights free of charge, as well as the creation of destination constraints[7].

riforma fiscale fra proposte condivisibili e lacune da colmare, "Il fisco" 2021, no. 30, p. 2907 ss.; M. Versiglioni, Reddito liquido e Imposta Liquida. Riforma fiscale e Modello Logico dell'Imposta, "Rivista telematica di diritto tributario" 2021, no. 1, p. 49.

4 For the Polish legal system, see L. Etel, Real estate tax reform, "Białostockie Studia Prawnicze" 2008, vol. 4, p. 353. For the legal system of the Czech Republic, see M. Radvan, I. Pařízková, D. Šramková, Real estate in tax law, "Białostockie Studia Prawnicze" 2008, vol. 4, p. 229. Instead, for the Russian legal system, see M. Żukowski, H. Żukowska, Tax Reforms in Russia, "Białostockie Studia Prawnicze" 2009, vol. 5, p. 445.

5 G. Corasaniti, Vincoli di destinazione, trust e imposta sulle successioni e donazioni: la (criticabile) tesi interpretativa della Corte di Cassazione e le conseguenze applicative, "Diritto e pratica tributaria" 2015, no. 4, II, p. 706; R. Lupi, Necessità di un'interpretazione sistematica, limitata alle liberalità, (in:) G. Bizioli, M. De Nardi, R. Lupi, Vincoli di destinazione: modalità applicativa del tributo successorio o fantomatica imposta autonoma?, "Dialoghi tributari" 2015, no. 1, p. 116; A. Contrino, Contributo al completamento della teoria giurisprudenziale di tassazione dei trust ai fini delle imposte indirette sui trasferimenti (con uno sguardo all'indietro di tre lustri), "Diritto e pratica tributaria" 2021, no. 3, I, p. 1217.

6 P. Puri, Le imposte indirette sui trasferimenti, (in:) A. Fantozzi, Corso di Diritto Tributario, Torino 2005, p. 511; N. d'Amati, Istituzioni di diritto tributario, Bari 2006, p. 364.

7 A. Fedele, Destinazione patrimoniale: criteri interpretativi e prospettive di evoluzione del sistema tributario, (in:) Aa.Vv., Destinazione di beni allo scopo. Strumenti attuali e tecniche innovative,

Therefore, in the current set of rules, the taxation requirement is no longer limited to the transfer of assets and rights free of charge and in a "spirit of liberality"[8], but is extended to the broader *genus* of gratuitous acts of transfer, i.e., acts carried out in the absence of consideration, even if without *animus donandi*[9].

More complex is the reference to "destination constraints", a term generally referring to legal transactions through which certain assets, as an exception to the general rule of asset liability laid down in Article 2740 of the Italian Civil Code, are allocated to the realisation of interests worthy of protection by the system, with segregating and limiting effects on the availability of such assets.

In fact, by mentioning the category of "destination constraints", the tax legislator intended to refer to the "effects" resulting from a particular act, rather than to the act itself[10].

By way of example, such effects may derive from the constitution of assets in trust, from the conclusion of a fiduciary agreement, from the constitution of an estate fund or of destination constraints pursuant to Article 2645 *ter* of the Italian Civil Code.

In the light of the law, it is doubtful whether the mere creation of the destination constraints or the transfer of an asset (free of charge, or in a spirit of liberality) as a result of the creation of the restriction is subject to taxation, given that the gift tax, by taxing the advantage obtained by a person without a counter-performance, presupposes an immediate decrease in the donor's assets and a corresponding

Milano 2003, p. 295; N. d'Amati, A. Uricchio, Corso di diritto tributario, Padova 2008, p. 231–232; S. Ghinassi, La fattispecie impositiva del tributo successorio, Pisa 2014, p. 90; F. Russo, La differente "abilità fiscale" nell'imposta di successione e donazione, "Rivista trimestrale di diritto tributario" 2015, no. 3, p. 701; A.F. Uricchio, Percorsi di diritto tributario, Bari 2017, p. 282; A.F. Uricchio, Il vigente sistema impositivo erariale, (in:) A. Uricchio, V. Peragine, M. Aulenta, Manuale di scienza delle finanze, diritto finanziario e contabilità pubblica, Molfetta (BA) 2017, p. 297; M. Gaballo, Le imposte sui trasferimenti di ricchezza, (in:) G. Tinelli, Istituzioni di diritto tributario. Il sistema dei tributi, Milano 2018, p. 393; F. Tesauro, Istituzioni di diritto tributario. 2 – Parte speciale, XII ed., Milanofiori Assago (MI) 2019, p. 312; A.F. Uricchio, Manuale di diritto tributario, Bari 2020, p. 322.

8 Liberality is nothing more than a kind of gratuitous act; donation, on the other hand, is the principal liberality. On this point, see A. Uricchio, Commento all'art. 1, d.lgs. n. 346/1990, (in:) N. d'Amati (a cura di), Commento al testo unico delle imposte sulle successioni e donazioni, Padova 1996, p. 11.

9 G. Corasaniti, Vincoli di destinazione, trust e imposta sulle successioni e donazioni…, *op. cit.*, p. 707; L. Sabbi, Riflessioni sulla figura del beneficiario finale dei trust nelle imposte sui trasferimenti a margine di una discutibile proposta di legge, "Rassegna tributaria" 2018, no. 1, p. 34, nt. 12.

10 A. Busani, Imposta di donazione su vincoli di destinazione e trust, "Corriere tributario" 2007, no. 5, p. 361; G. Gaffuri, L'imposta sulle successioni e donazioni. Trust e patti di famiglia, Padova 2008, p. 163; D. Stevanato, Vincoli di destinazione sulle intestazioni fiduciarie di titoli ed immobili, "Corriere tributario" 2008, no. 20, p. 1639; G. Corasaniti, Vincoli di destinazione, trust e imposta sulle successioni e donazioni…, *op. cit.*, p. 707.

increase in the assets of the donee, so that, where such an increase does not exist, it seems difficult to imagine the application of the tax[11].

The question has arisen, above all, with respect to the trust[12], which originated in common law countries[13] (in particular, in the equity jurisdiction) and are currently governed by the Aja Convention of 1 July 1985, ratified in Italy by Law no. 364/1989: in this case, a person (the so-called settlor) transfers, *inter vivos* or *mortis causa*, to another person (the so-called trustee) the ownership of one or more assets, entrusting him with the task of using such assets for the benefit of a beneficiary or for the pursuit of a specific purpose.

2. The Antithesis Between the Immobility of the Financial Administration and the Dynamism of Jurisprudence in the Hermeneutics of Sources

In the case outlined above, in the face of the immobility of the financial administration, there has been a diachronic dynamism of the jurisprudence of merit and legitimacy.

Hence, the need for an adequate regulatory intervention with which to overcome the hermeneutical contrasts, defining in a clear manner, in compliance with the principles that govern tax matters, the regime of the trust for the purposes of indirect taxation, with specific regard to the tax on inheritances and donations.

In fact, the financial administration, with a now granitic orientation (which goes back to the Circular Revenue Agency, 6 August 2007, no. 48/E and the Circular Revenue Agency, 22 January 2008, no. 3/E), considers the gift tax applicable only to the destination constraints constituted by the transfer of assets, assumptions in which the effect of destination turns out to be "functional" to the (subsequent) transfer of ownership of the assets "bound"[14].

The same Revenue Agency[15], without distinguishing the hypothesis of the trust "liberal" from that of the trust "non-liberal", applies the gift tax indiscriminately, resulting in an overlap between the object of the tax on inheritances and gifts and the scope of the registration tax.

11 A. Busani, Imposta di successione e donazione, Milano 2020, p. 1167.

12 C. Buccico (a cura di), Gli aspetti civilistici e fiscali del trust, Torino 2015.

13 D.J. Hayton, The law of trusts, II ed., London 1992; P. Baxendale Walker, Purpose trusts, London 1999; A. Duchworth, The new frontier of purpose trust, "Trusts" 2000, II, p. 185.

14 S. Zagà, L'applicabilità ai vincoli di destinazione ed ai trust della re(istituita) imposta sulle successioni e donazioni, "Diritto e pratica tributaria" 2010, no. 5, I, p. 848.

15 Circolare Agenzia delle Entrate, 22 January 2008, no. 3/E, https://www.agenziaentrate.gov.it (12.07.2021).

With an interpretative approach that is not without exceptions[16], the moment of taxation is made to coincide with the creation of the destination constraint (and the correlated attribution of assets to the trustee)[17], taking into account, for the purposes of determining the rates and exemptions, the relationship between the settlor and the beneficiary: in this perspective, the subsequent transfer of the property in favour of the beneficiary would become a neutral moment for the purposes of gift tax[18].

According to this orientation, which adheres to a literal interpretation of the provision introduced by the law converting Law Decree no. 262/2006, the trust is a complex legal relationship with a single fiduciary cause that characterizes all its events (from the establishment until the pursuit of the purpose), so that the devolution to the beneficiaries would not realize a further assumption of the gift tax, since the assets have already discounted the tax at the time of the constitution of the bond, a tax relevant moment as it is functional to the realization of the interest of the beneficiaries.

16 In fact, a timid opening to the traditional approach seems to be found in a recent response to a request for a ruling [Agenzia delle Entrate – Response to ruling no. 106 of 15 February 2021, "Trusts" 2021, no. 3, p. 350, on which see A. Contrino, I trust c.d. "di ritorno" in senso stretto (blind trust, resulting trust e simili) e in senso lato (trust interposti e simili) al cospetto del tributo successorio: la prassi amministrativa e la recentissima giurisprudenza di legittimità convincono solo a metà, "Rivista di diritto tributario – Supplemento online" 2 April 2021, p. 1 ss.; F. Nicolosi, Trust e imposizione in uscita: nuovo orientamento e nuove questioni, "Rivista telematica di diritto tributario" 2021, no. 1, p. 471 ss.], with which the financial administration, recalling the orientation of the prevailing jurisprudence of legitimacy (Cassazione civile, section V, ord. 29 May 2020, no. 10256, "GT – Rivista di giurisprudenza tributaria" 2020, no. 11, p. 893 ss., with a note by T. Tassani, Conferme giurisprudenziali e nuove problematiche interpretative in tema di tassazione dei trust), which identifies in the attribution of assets and/or rights to the beneficiary of a trust the fact susceptible to manifest the assumption of the tax on the transfer of wealth limited the application of the tax on inheritances and donations to the existence of the conditions set out in Legislative Decree no. 346/1990. On the topic, see A. Busani, Tassato il trasferimento dal trustee al beneficiario, "Il Sole 24 Ore" 16 February 2021, no. 45, p. 26; A. Busani, Trust, l'imposta di donazione scatta con il trasferimento ai beneficiari, "Il Sole 24 Ore" 6 April 2021, no. 93, p. 36. An implicit confirmation in this sense was finally obtained in two further responses to requests for rulings [see Agenzia delle Entrate – Response to ruling no. 351 of 18 May 2021, https://www.agenziaentrate.gov.it (12.07.2021); Agenzia delle Entrate – Response to ruling no. 352 of 18 May 2021, https://www.agenziaentrate.gov.it (12.07.2021)] and in a draft circular of the Revenue Agency regarding the tax discipline of the trust, subject to public consultation on 11 August 2021, https://www.agenziaentrate.gov.it (12.08.2021) [on which, see M. Antonini, R.A. Papotti, Chiarimenti (da integrare e ripensare) su trust opachi esteri e trasferimenti patrimoniali dei trust, "Il fisco" 2021, no. 36, p. 3440 ss.; S. Massarotto, Trust e nuovi obblighi di monitoraggio fiscale alla luce della Bozza di Circolare sul trust, "Il fisco" 2021, no. 37, p. 3553].

17 In the literature, see G. Gaffuri, L'imposta sulle successioni e donazioni…, *op. cit*., p. 484, which favours the taxability of the mere segregation of assets and rights in trusts.

18 S. Zagà, L'applicabilità ai vincoli di destinazione ed ai trust…, *op. cit.*, p. 839.

From this point of view, the trust would become the taxable person for gift tax, as the immediate recipient of the assets subject to the segregation arrangement[19].

The reconstruction is likely to undermine the principle of ability to pay and create obstacles in order to make the exact determination of the tax base, also presenting critical issues in relation to the passive subjectivity tax[20].

3. Indirect Taxation and the Relevance of the Distinction Between "Liberal" and "Non-liberal" Trusts. The Difficulty of Identifying the Moment of Taxation

The solutions proposed by the courts of merit and legitimacy are more varied, but sometimes asystematic.

A part of the merit's case law[21], taking up the distinction, made in doctrine[22], between the "liberal" trust and the "non-liberal" trust, has excluded the application of the tax on inheritances and donations when the trust is of an onerous nature, being designed to fulfil pre-existing obligations[23].

Again in the jurisprudence of merit, the orientation[24] that, adhering to the thesis supported by the tax authorities, makes the taxable moment coincide with

19 S. Lanzillotti, G. Morano, Atti di destinazione e interessi meritevoli di tutela, Roma 2010, p. 143. In a critical sense, see Studio n. 58–2010/T (est. S. Cannizzaro, T. Tassani), La tassazione degli atti di destinazione e dei trust nelle imposte indirette, https://www.notariato.it/sites/default/files/58–10-t.pdf (12.07.2021); P. Laroma Jezzi, La costituzione di trust di scopo sconta l'imposta sulle successioni e donazioni?, "Corriere tributario" 2014, no. 19, p. 1477; L. Sabbi, Riflessioni sulla figura del beneficiario finale dei trust…, *op. cit.*, p. 43.

20 A. Busani, Imposta di successione…, *op. cit*., p. 1171, nt. 218.

21 Commissione tributaria provinciale Macerata, 26 September 2012, no. 207, "Notariato" 2013, no. 4, p. 474 (on a "guarantee" trust), on which, see G. Corasaniti, Brevi note sull'(in)applicabilità dell'imposta sulle successioni e donazioni al trust di garanzia, "GT – Rivista di giurisprudenza tributaria" 2013, no. 5, p. 428. Previously, the same jurisprudence of merit (Commissione tributaria provinciale Lodi, 8 January 2009, n. 120, "Banca Dati BIG Suite Ipsoa", regarding a "liquidating" trust), with a motivation not really agreeable, had excluded the recurrence of a restriction of destination in the presence of a trust with a purely liquidation function, since the trustee is recognized wide decision-making autonomy, with consequent inapplicability of the tax on inheritances and gifts. On this point, see D. Muritano, A. Pischetola, Prime decisioni in materia di imposizione indiretta del trust, "Notariato" 2009, no. 5, p. 505.

22 G. Gaffuri, L'imposta sulle successioni e donazioni…, *op. cit*., p. 473.

23 G. Corasaniti, Vincoli di destinazione, trust e imposta sulle successioni e donazioni…, *op. cit*., p. 715.

24 Commissione tributaria provinciale Bergamo, 13 January 2010, no. 4, "Trusts" 2011, no. 1, p. 38; Commissione tributaria regionale Liguria, 26 September 2012, no. 81,"Trusts" 2013, no. 3, p. 284; Commissione tributaria regionale Toscana, 8 July 2013, no. 111, "Trusts" 2014, no. 2, p. 202; Commissione tributaria regionale Campania, 16 December 2013, no. 367, "Trusts" 2014, no. 4, p. 445; Commissione tributaria regionale Toscana, 22 September 2014, no. 1702, "Il fisco" 2014, no. 41, p. 4098; Commissione tributaria provinciale Milano, 25 March 2015, "Trusts"

the establishment of the destination constraint, is opposed by the reconstruction[25] that, disallowing the establishment of the trust and the subsequent act of endowment of assets to express taxable capacity, has excluded the plausibility of an "advance withdrawal", by configuring the transfer of wealth carried out through the trust as a "suspensively conditional transfer", so as to postpone the taxation event to the moment when the final beneficiary has an "incontrovertible right" to claim from the trustee the allocation of the restricted assets, the beneficiary having previously held a mere "legal expectation".

2016, no. 5, p. 302; Commissione tributaria regionale Lombardia, 14 November 2016, "Trusts" 2017, no. 4, p. 437; Commissione tributaria regionale Lazio, 21 March 2017, "Trusts" 2017, no. 5, p. 539; Commissione tributaria regionale Lombardia, 9 May 2018, "Trusts" 2019, no. 1, p. 89; Commissione tributaria regionale Lombardia, 21 September 2018, "Banca Dati BIG Suite Ipsoa".

25 Commissione tributaria provinciale Treviso, 30 April 2009, no. 47, "Banca Dati BIG Suite Ipsoa"; Commissione tributaria provinciale Firenze, 12 February 2009, no. 30, "Banca Dati BIG Suite Ipsoa"; Commissione tributaria provinciale Caserta, 11 June 2009, no. 481, "Banca Dati BIG Suite Ipsoa"; Commissione tributaria provinciale Pesaro, 9 August 2010, no. 287, "Trusts" 2011, no. 2, p. 148; Commissione tributaria provinciale Genova, 7 October 2010, no. 280, "Trusts" 2011, no. 3, p. 283; Commissione tributaria regionale Lombardia, 26 October 2010, no. 88, "Trusts" 2011, no. 2, p. 155; Commissione tributaria regionale Emilia Romagna, 4 February 2011, no. 16, "Trusts" 2011, no. 3, p. 290; Commissione tributaria regionale Veneto, 21 February 2012, "Banca Dati BIG Suite Ipsoa"; Commissione tributaria regionale Lombardia, 4 July 2012, no. 73, "Notariato" 2013, no. 2, p. 232; Commissione tributaria provinciale Salerno, 18 December 2012, no. 507,"Notariato" 2013, no. 5, p. 557; Commissione tributaria regionale Lombardia, 5 February 2013, no. 168, "Notariato" 2013, no. 2, p. 232; Commissione tributaria provinciale Napoli, 2 October 2013, no. 571,"Trusts" 2014, no. 3, p. 315; Commissione tributaria provinciale Venezia, 27 November 2013, no. 90, "Banca Dati BIG Suite Ipsoa"; Commissione tributaria provinciale Padova, 19 December 2013, no. 252, "Trusts" 2014, no. 4, p. 443; Commissione tributaria provinciale Reggio Emilia, 26 September 2014, no. 418, "Banca Dati BIG Suite Ipsoa"; Commissione tributaria provinciale Como, 30 September 2014, no. 438, "GT – Rivista di giurisprudenza tributaria" 2015, no. 3, p. 256; Commissione tributaria provinciale Milano, 11 March 2015, no. 2300, "Trusts" 2015, no. 4, p. 363, with a note by F. Schiavoni, CTP Milano e imposizione indiretta sulla segregazione in trust; Commissione tributaria provinciale Lucca, section III, 17 November 2015, no. 728, "Banca Dati BIG Suite Ipsoa"; Commissione tributaria provinciale Milano, section XLVI, 8 February 2016, no. 1109, "Banca Dati BIG Suite Ipsoa"; Commissione tributaria provinciale Lodi, 19 February 2016, "Trusts" 2016, no. 7, p. 399; Commissione tributaria regionale Lombardia, 13 May 2016, "Il fisco" 2016, no. 26, p. 2597; Commissione tributaria provinciale Bologna, 24 February 2017, "Trusts" 2017, no. 5, p. 543; Commissione tributaria regionale Lombardia, 11 January 2018, "Trusts" 2018, no. 3, p. 336; Commissione tributaria regionale Toscana, 22 March 2018, "Trusts" 2018, no. 6, p. 655; Commissione tributaria regionale Lombardia, 11 July 2018, "Trusts" 2019, no. 1, p. 95; Commissione tributaria regionale Lazio, 10 September 2018, "Trusts" 2019, no. 5, p. 576.

4. The Debate in the Jurisprudence of Legitimacy: the Thesis of the Institution of a "New" Tax and the Declination of Taxable Cases. The Risk of Generating a Duplication of Taxation

The debate has also developed in a lively manner within the jurisprudence of legitimacy, with diversified, and not always coherent, positions.

A first orientation[26] – widely criticized in the doctrine[27] – has seen in Article 2, paragraph 47 of the Decree Law no. 262/2006, converted by Law no. 286/2006, the institution of a "new" tax, united only by a resemblance to the gratuitousness of the liberal attributions, but autonomous from the "traditional" form of tax on inheritances and donations because of peculiar and inconsistent features.

The "new" tax would be based not on the transfer of assets and rights resulting from a restriction of use, but on the mere act of creating the restriction[28], regardless of a spirit of generosity on the part of the transferor, of an enrichment of the legal sphere of others and of a possible free transfer effect in favour of a specific person, for which

26 Cassazione civile, section VI – T, ord. 24 February 2015, no. 3735, "Diritto e pratica tributaria" 2015, no. 4, II, p. 688, with a note by G. Corasaniti, Vincoli di destinazione, trust e imposta sulle successioni e donazioni: la (criticabile) tesi interpretativa della Corte di Cassazione e le conseguenze applicative, and of T. Tassani, La "nuova" imposizione fiscale sui vincoli di destinazione, "Giurisprudenza commerciale" 2015, no. 6, p. 1026; Cassazione civile, section VI – T, ord. 24 February 2015, no. 3737, "Foro italiano" 2015, I, c. 1215; Cassazione civile, section VI – T, ord. 25 February 2015, no. 3886, "Trusts" 2015, no. 4, p. 351 ss.; Cassazione civile, section VI – T, ord. 18 March 2015, no. 5322, "Notariato" 2015, no. 4, p. 443; Cassazione civile, section VI – T, 7 March 2016, no. 4482, "GT – Rivista di giurisprudenza tributaria" 2016, no. 5, p. 396, with a note by D. Stevanato, Imposta sui vincoli di destinazione e giudice-legislatore: errare è umano, perseverare diabolico, and of T. Tassani, La Cassazione torna sull'imposta sui vincoli di destinazione, "Trusts" 2016, no. 4, p. 341 ss. e di D. Muritano, La Cassazione ribadisce che l'imposta sui vincoli di destinazione è una "nuova imposta" (osservazioni a Cass. 7 marzo 2016, n. 4482), http://www.dirittobancario.it/trust-e-dintorni/fiscalita/la-cassazione-ribadisce-che-l-imposta-sui-vincoli-di-destinazione-e-una-nuova-imposta-osservazioni (12.07.2021).

27 G. Bizioli, M. De Nardi, R. Lupi, Vincoli di destinazione: modalità applicativa del tributo successorio…, *op. cit*., p. 108; A. Busani, R.A. Papotti, L'imposizione indiretta dei trust: luci e ombre delle recenti pronunce della Corte di cassazione, "Corriere tributario" 2015, no. 16, p. 1203; G. Corasaniti, Vincoli di destinazione, trust e imposta sulle successioni e donazioni…, *op. cit*., p. 720; D. Stevanato, La "nuova" imposta su trust e vincoli di destinazione nell'interpretazione creativa della Cassazione, "GT – Rivista di giurisprudenza tributaria" 2015, no. 5, p. 400; T. Tassani, Sono sempre applicabili le imposte di successione e donazione sui vincoli di destinazione?, "Il fisco" 2015, no. 20, p. 1957; C. Buccico, Problematiche fiscali per l'imposizione indiretta dei trust, "Diritto e pratica tributaria" 2016, no. 6, I, p. 2346; B. Denora, Un "nuovo" tributo per i vincoli di destinazione, "Rivista di diritto tributario – Supplemento online" 16 March 2016, p. 1–2; A. Contrino, Sulla nuova (ma in realtà inesistente) imposta sui vincoli di destinazione "creata" dalla Suprema Corte: osservazioni critiche, "Rassegna tributaria" 2016, no. 1, p. 30.

28 M. De Nardi, Una possibile lettura «riparatrice» per i vincoli di destinazione «liberali», (in:) G. Bizioli, M. De Nardi, R. Lupi, Vincoli di destinazione: modalità applicativa del tributo successorio o fantomatica imposta autonoma?, "Dialoghi tributari" 2015, no. 1, p. 116.

reason the act by which assets are placed in trust, even if "self-declared" or carried out in the absence of a specific beneficiary, as a *species* of the broader *genus* "destination restrictions", would become *ex se* an autonomous prerequisite of the tax, the taxable amount of which would be the value of the restricted assets.

In the view of the Supreme Court, the expression "destination constraints" would designate "the legal effect of destination, through which is disposed, namely an asset it is placed outside of oneself (and not necessarily in favour of others), directing the dominant rights to the pursuit of the desired objectives": the disposition would not be coessential to the allocation to third parties[29].

The intrinsically patrimonial importance of the deed of destination would be, in itself, expressive of the ability to pay, producing the anticipation of the levy at the time of the segregation of the assets, without the need to wait for the beneficiary's enrichment[30].

The taxation requirement would thus be linked to the preparation of the programme for functionalising the right in pursuit of the objectives desired by the settlor, who, by withdrawing the tied assets from the ordinary exercise of his own dominical faculties, in order to allow them to be managed for the benefit of third parties, would cause a decrease in his own assets, which would ultimately lead to impoverishment[31].

On the basis of this approach, the "new" tax has been deemed applicable to rather heterogeneous cases, submitted to the attention of the Supreme Court, such as those of the "self-declared" trust with a guarantee function, the "self-declared" trust with the purpose of generation-skipping and the "transferee" trust, aimed at financing public infrastructure[32].

The risk of such a reconstruction, at least in the hypothesis of a liberal or gratuitous trust (namely, in situations where the institution is used to convey an indirect donation, or is characterised by gratuity[33]), is that of generating a duplication of taxation[34], since the subsequent allocation to the beneficiary constitutes a further

29 D. Stevanato, La "nuova" imposta su trust e vincoli di destinazione…, *op. cit*., pp. 401–403.

30 In a critical sense, see G. Corasaniti, Vincoli di destinazione, trust e imposta sulle successioni e donazioni…, *op. cit*., p.728.

31 Cassazione civile, section VI – T, ord. 18 March 2015, n. 5322…, *op. cit*., p. 443.

32 G. Bizioli, La creazione, irrazionalmente estensiva, di un tributo autonomo, (in:) G. Bizioli, M. De Nardi, R. Lupi, Vincoli di destinazione: modalità applicativa del tributo successorio o fantomatica imposta autonoma?, "Dialoghi tributari" 2015, no. 1, p. 110.

33 D. Stevanato, Donazioni e liberalità indirette nel tributo successorio, Padova 2000, p. 166; F. Pistolesi, La rilevanza impositiva delle attribuzioni liberali realizzate nel contesto dei trusts, "Rivista di diritto finanziario e scienza delle finanze" 2001, no. 1, I, p. 153; A. Contrino, Trusts liberali e imposizione indiretta dopo le modifiche (L. n. 383/2001) al tributo sulle donazioni, "Rassegna tributaria" 2004, p. 434. In case law, see Cassazione civile, section V, 18 December 2015, no. 25478…, *op. cit*., p. 685.

34 G. Bizioli, La creazione, irrazionalmente estensiva…, *op. cit.*, p. 113.

manifestation of wealth – in addition to that subject to a restriction and, as such, already taxed – capable of integrating, independently, the assumption of the tax on inheritances and gifts[35].

5. The Theorisation of a Form of Levy on Impoverishment: Criticism

As pointed out in doctrine[36], the anomaly of such a reconstruction is that it gives rise, through the hermeneutics of case law (and, therefore, contrary to the reservation of law enshrined in Article 23 of the Constitution), to a tax without an economic premise compatible with Article 53 of the Constitution[37], with taxable persons not precisely identified, and with application problems as regards the determination of the taxable base and the rate.

Nor can the rules relating to the tax liability and to the determination of the taxable amount, the exemptions, and the rates of the tax on inheritance and gifts be of any assistance, since they were designed for a tax applicable to enrichment (stable and definitive) resulting from a transfer of property *mortis causa*, free of charge or made with *animus donandi*[38].

The Supreme Court, by referring to the "value of the utility of which the settlor" ends up "impoverished", seems to theorise a form of levy not on enrichment but on impoverishment resulting from the limitation of the freedom to dispose of one's assets following the constitution of the bond[39], thus affecting a mere "negative" index of economic capacity[40].

35 B. Denora, Un "nuovo" tributo…, *op. cit.*, p. 1; D. Stevanato, Imposta sui vincoli di destinazione e giudice-legislatore: errare è umano, perseverare diabolico, "GT – Rivista di giurisprudenza tributaria" 2016, no. 5, p. 401; D. Stevanato, La "nuova" imposta su trust e vincoli di destinazione…, *op. cit.*, p. 411.

36 G. Corasaniti, Vincoli di destinazione, trust e imposta sulle successioni e donazioni…, *op. cit.*, p. 720–721; D. Stevanato, La "nuova" imposta su trust e vincoli di destinazione…, *op. cit.*, p. 406; D. Stevanato, Imposta sui vincoli di destinazione e giudice-legislatore…, *op. cit.*, p. 399–401; D. Stevanato, Il "new deal" della Suprema Corte sull'imposizione indiretta del trust: giù il sipario sull'imposta sui vincoli di destinazione?, "GT – Rivista di giurisprudenza tributaria" 2017, no. 1, pp. 35–36.

37 D. Stevanato, Fondamenti di diritto tributario, Firenze 2019, p. 96; A. Carinci, T. Tassani, Manuale di diritto tributario, IV ed., Torino 2021, p. 55.

38 G. Corasaniti, Vincoli di destinazione, trust e imposta sulle successioni e donazioni…, *op. cit.*, p. 721.

39 A. Busani, R.A. Papotti, L'imposizione indiretta dei trust…, *op. cit.*, p. 1203; G. Corasaniti, Vincoli di destinazione, trust e imposta sulle successioni e donazioni…, *op. cit.*, p. 722–723.

40 G. Bizioli, La creazione, irrazionalmente estensiva…, *op. cit.*, p. 112; D. Stevanato, Imposta sui vincoli di destinazione e giudice-legislatore…, *op. cit.*, p. 400. In the opposite direction, see G. Salanitro, Imposta principale postuma e registrazione di atto istitutivo di trust, "Diritto e pratica tributaria" 2019, no. 3, II, p. 1255.

6. The Extension of the Scope of the "Old" Gift Tax to the Phenomenon of Destination Constraints

Faced with these critical issues, a coherent solution could be to consider that the legislator of 2006, rather than establishing a "new" tax, has limited itself to extending the scope of the "old" tax (on the donation) to the new phenomenon of destination constraints, provided that through the establishment of such constraints and their subsequent implementation achieves the same legal result resulting from the use of "old" models of negotiation (namely, the traditional acts of liberality) for which the gift tax was originally conceived.

The tax would thus also be applied to the increase in assets by way of donation or gratuitousness indirectly realised in the legal sphere of others through a segregation of assets, on a taxable base consisting of the value of the assets assigned to the beneficiary[41], with rates and exemptions determined on the basis of the relationship between the beneficiary and the settlor[42].

This interpretation, endorsed by a second orientation consolidated within the Supreme Court[43], would allow the reference to destination bonds to be harmonised

41 Like what happens in the US tax system, which, at the federal level, provides for the "federal gift tax", also applicable to the contribution to a trust, assimilated to a donation having as its object the beneficial interest, the tax base of which is constituted by the value of the asset being disposed of (on the topic, see C. Monaco, Trust: fattispecie ad effetti fiscalmente rilevanti, "Rivista di diritto finanziario e scienza delle finanze" 2002, no. 4, I, p. 647)

42 D. Stevanato, Il "new deal" della Suprema Corte sull'imposizione indiretta del trust…, *op. cit*., p. 36.

43 Cassazione civile, section V, 26 October 2016, no. 21614, "GT – Rivista di giurisprudenza tributaria" 2017, no. 1, p. 31, with a note by D. Stevanato, Il "new deal" della Suprema Corte sull'imposizione indiretta del trust: giù il sipario sull'imposta sui vincoli di destinazione?, and of S. Cannizzaro, Addio all'imposta proporzionale per la costituzione di trust?, "Rivista di diritto tributario – Supplemento online" 21 November 2016, p. 1, of S. Carunchio, Imposte ipotecaria e catastale in misura fissa sul trust autodichiarato, "Il fisco" 2016, no. 46, p. 4476, of M. Moretti, Trust liberali e imposizione indiretta: la Sezione Tributaria della Corte di Cassazione destituisce di ogni fondamento l'evanescente imposta autonoma sui vincoli di destinazione, "Bollettino tributario d'informazione" 2017, no. 3, p. 234, of P.P. Muià, Le imposte indirette nella costituzione del trust: in misura fissa o proporzionale? La soluzione (si spera) definitiva della Cassazione, "Diritto e pratica tributaria" 2017, no. 5, II, p. 2232, of C. Scalinci, Dalla "pigra macchina" legislativa al dietrofront della Cassazione sull'esistenza di un'imposta «sulla costituzione dei vincoli di destinazione», "Rivista di diritto tributario" 2017, no. 1, p. 63, and of T. Tassani, Trust e imposte sui trasferimenti: il "nuovo corso" della Corte di cassazione, "Trusts" 2017, no. 1, p. 28; Cassazione civile, section V, ord. 17 January 2019, no. 1131, "Trusts" 2019, no. 3, p. 330 (on which, see A. Busani, La Cassazione ci ripensa: il trust si tassa alla fine, "Il Sole 24 Ore" 18 January 2019, no. 17, p. 23; E.M. Bartolazzi Menchetti, La dotazione di trust di scopo non è soggetta ad imposta sulle successioni e donazioni, "Tax News" 2019, no. 1, p. 101; A. Busani A., R.A. Papotti, Ulteriormente frammentati in Cassazione gli orientamenti sulla tassazione del trust, "GT – Rivista di giurisprudenza tributaria" 2019, no. 2, p. 115; E. Manoni, Imposizione indiretta e trust autodichiarato: il contrasto interpretativo della Suprema Corte, "Il fisco" 2019, no. 8, p.

with the structure of the tax[44], making acts of destination irrelevant without transferable effects, or such as not to produce an enrichment in the sphere of other people's assets[45].

From this viewpoint, the genetic moment of the segmentation of assets (together with the related allocation of assets to the trustee) would be tax neutral, since the trustee is the owner of a property aimed at performing the task he is called upon to carry out, functional to the realisation of the final subsequent effect, which is determined with the final allocation of the asset to the beneficiary, a prerequisite for wealth transfer tax[46].

Conclusions

In short, in relation to the trust, in light of the recent orientation of the Supreme Court[47], the proportional tax should not be paid either at the time of the deed of

771 ss.); Cassazione civile, section V, ord. 29 May 2020, no. 10256…, *op. cit*., p. 893; Cassazione civile, section V, ord. 7 December 2020, no. 27995, "DeJure Giuffrè"; Cassazione civile, section VI – T, ord. 16 December 2020, no. 28839, "CED Cassazione"; Cassazione civile, section VI – T, ord. 16 December 2020, no. 28796, "CED Cassazione"; Cassazione civile, section VI – T, ord. 21 December 2020, no. 29199, "CED Cassazione"; Cassazione civile, section V, 24 December 2020, no. 29505, "CED Cassazione"; Cassazione civile, section V, 24 December 2020, no. 29507, "CED Cassazione".

44 D. Stevanato, La "nuova" imposta su trust e vincoli di destinazione…, *op. cit*., p. 401.

45 D. Stevanato, Il "new deal" della Suprema Corte sull'imposizione indiretta del trust…, *op. cit*., pp. 39–40.

46 D. Stevanato, Trust liberali e imposizione indiretta, uno sguardo al passato rivolto al futuro?, "Corriere tributario" 2016, no. 9, p. 679.

47 Cassazione civile, section V, 7 June 2019, no. 15453, "Trusts" 2019, no. 6, p. 697; Cassazione civile, section V, 7 June 2019, no. 15455, "Trusts" 2019, no. 6, p. 694; Cassazione civile, section V, 7 June 2019, no. 15456, "Trusts" 2019, no. 6, p. 696; Cassazione civile, section V, 21 June 2019, no. 16699, "Corriere tributario" 2019, no. 10, p. 865 ss., with a note by T. Tassani, Consolidamento giurisprudenziale e nuove prospettive interpretative per trust e vincoli di destinazione; Cassazione civile, section V, 21 June 2019, no. 16700, "GT – Rivista di giurisprudenza tributaria" 2019, no. 7, p. 590, with a note by A. Busani, La Cassazione si stabilizza: imposte in misura fissa per l'atto di dotazione di qualsiasi tipologia di trust; Cassazione civile, section V, 21 June 2019, no. 16701, "Notariato" 2019, no. 5, p. 559, with a note by A. Fedele, Finalmente una bella sentenza della Cassazione sul regime fiscale dei trusts, "Rivista telematica di diritto tributario" 2019, no. 1, p. 142; Cassazione civile, section V, 21 June 2019, no. 16702, "Banca dati BIG Suite IPSOA"; Cassazione civile, section V, 21 June 2019, no. 16703, "Banca dati BIG Suite IPSOA"; Cassazione civile, section V, 21 June 2019, no. 16704, "Banca dati BIG Suite IPSOA"; Cassazione civile, section V, 21 June 2019, no. 16705, "Banca dati BIG Suite IPSOA"; Cassazione civile, section V, 17 July 2019, no. 19167, "Notariato" 2019, no. 5, p. 559; Cassazione civile, section V, ord. 18 July 2019, no. 19310, "Banca dati BIG Suite IPSOA"; Cassazione civile, section V, 18 July 2019, no. 19319, "Banca dati BIG Suite IPSOA"; Cassazione civile, section V, 12 September 2019, no. 22754, "Trusts" 2020, no. 3, pp. 327–328, with a note by A. Albano, Note a margine della recente giurisprudenza di legittimità in tema d'irrilevanza degli atti di trasferimento dei beni in trust ai fini delle imposte

trust or at the time of the deed of endowment of assets (since the compression of the dominant position of the trustee and the obligation to manage the assets bound to him are clear evidence of the lack of increase in the assets of his legal sphere[48]), having instead to be applied only at the time of the final transfer to the beneficiary, at the completion of the program dictated by the settlor.

In this case, where the allocations to the beneficiaries of the trust are free of charge or in the nature of "donations", the gift tax will be applied on a proportional basis, taking into account, for the purposes of the exemption, and rates, the relationship between the settlor and the beneficiary; on the other hand, in the case of allocations that are not gratuitous, the taxation will concern the individual acts of disposition carried out by the trustee, relating to the restricted assets, in order to implement the trust[49].

By virtue of the foregoing, partially taking up the proposal of law no. 4675, entitled "Rules on the application of indirect taxes to trusts", submitted to the Chamber of Deputies on 3 October 2017[50], in the context of the overall reform of the tax system, one could think of resolving the hermeneutical conflict on trusts through

indirette, "Rivista telematica di diritto tributario" 2019, no. 2, p. 542 ss.; Cassazione civile, section V, 12 September 2019, no. 22755, "Banca dati BIG Suite IPSOA"; Cassazione civile, section V, 12 September 2019, no. 22756, "Banca dati BIG Suite IPSOA"; Cassazione civile, section V, 12 September 2019, no. 22757, "Banca dati BIG Suite IPSOA"; Cassazione civile, section V, 12 September 2019, no. 22758, "Banca dati BIG Suite IPSOA"; Cassazione civile, section V, 14 November 2019, no. 29642, "Banca dati BIG Suite IPSOA"; Cassazione civile, section VI–5, ord., 26 November 2019, no. 30821, "Banca dati BIG Suite IPSOA"; Cassazione civile, section VI–5, ord., 7 February 2020, no. 2897, "Banca dati BIG Suite IPSOA"; Cassazione civile, section VI–5, ord., 3 March 2020, no. 5766, "Banca dati BIG Suite IPSOA"; Cassazione civile, section VI – T, ord., 11 March 2020, no. 7003, "Banca dati BIG Suite IPSOA"; Cassazione civile, section V, 23 April 2020, no. 8082, "Banca dati BIG Suite IPSOA"; Cassazione civile, section VI, ord. 4 January 2021, no. 13, "Banca dati BIG Suite IPSOA"; Cassazione civile, section V, 12 January 2021, no. 224, "Banca dati BIG Suite IPSOA". For a commentary on the recent trend of the Supreme Court, see P. Mastellone, Tributi indiretti sugli apporti in trust e ultime "scosse di assestamento" della Cassazione, "Diritto e pratica tributaria" 2019, no. 2, I, p. 620; L. Sabbi, Il punto sugli orientamenti tributari della Corte di Cassazione, "Trusts" 2019, no. 6, p. 631; A. Busani, Rassegna ragionata e ricostruzione critica (alla luce di dottrina, prassi e giurisprudenza) della "terza stagione" della corte di cassazione in tema di tassazione dell'atto di dotazione del trust, "Rivista di diritto tributario" 2020, no. 2, II, p. 12; B. Izzo, La tassazione "in uscita" dei trust ai fini dell'imposta sulle donazioni nella giurisprudenza di legittimità: lux (quasi) facta est, "Rivista di diritto tributario" 2020, no. 4, II, p. 190; F. Montanari, Trust e imposizione indiretta tra incertezze civilistiche e conferme sul regime tributario, "Trusts" 2021, no. 6, p. 688.

48 A. Contrino, Prefazione, (in:) A. Busani (ed.), Imposta di successione e donazione, Milano 2020, p. VII.

49 G. Bizioli, La creazione, irrazionalmente estensiva…, *op. cit*., p. 109; A. Busani, Imposta di successione…, *op. cit*., p. 1200.

50 Available at the link: https://www.camera.it/leg17/126?idDocumento=4675 (access 12.07.2021). For a critical commentary, see L. Sabbi, Riflessioni sulla figura del beneficiario finale dei trust…, *op. cit*., p. 29.

a legislative amendment that limits the scope of application of the tax on inheritances and donations to destination constraints and "liberal" trusts, provided that they are functional to the transfer of ownership of the assets bound, clarifying the moment of taxation (to be limited to the liberal or gratuitous increase in assets realised in the legal sphere of others through the asset allocation), identifying the taxable persons in the beneficiaries of the acts of asset segregation, and defining the rules relating to the determination of the taxable base (equal to the value of the assets assigned to the beneficiary), of the rates and of the exemption deductible (measured on the basis of the relationship between the settlor and the beneficiary).

In view of the purpose pursued, the exemption from inheritance and gift tax would remain unchanged for the trusts referred to in the law on "after us" (art. 6, Law no. 112 of 22 June 2016), whose exclusive purpose is the social inclusion, care, and assistance of persons with serious disabilities.

This reading key acquires a systematic and axiological[51] value in the dynamics of the pandemic experience because it allows also to face the new economic and social challenges through the renewal of traditional taxation models.

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The German-Polish Tax Problems of Cross-Border Workers in the COVID-19 Pandemic – When the Remedy is Worse than the Problem[1]

Abstract: The article pertains to the tax issues arising from the COVID-19 pandemic in respect of cross-border workers. The main issue is the impact of the restriction in cross-border movements during the pandemic on the determination of the place of work. The authors refer to two situations. The first is when a Polish worker employed by a Polish employer and working abroad cannot return to Poland. The second is when he or she performs work at home in Poland instead of at the normal place of work abroad. The authors consider the legal fiction of carrying out work in the place where it would have been done before the pandemic as a rational solution. However, they are strongly critical of the introduction of such solution via the Mutual Agreement.
Keywords: COVID-19, double taxation, employment income, mutual agreement procedure (MAP)

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Introduction

The actions taken by the Polish authorities in order to fight against the COVID-19 pandemic did not differ significantly from the actions taken by other European Union (EU) member states. However, during the first stage of the pandemic, the Polish authorities appear to have responded faster and more sharply than other EU member states. The radical measures included a practical closure of the country.

They led to a situation whereby cross-border employees, usually Poles working in Germany, had to choose whether to work in Germany or stay with their families in Poland. The restrictions on mobility were onerous, even when crossing the border was not fully prohibited, and they included a requirement to remain in quarantine or to have a negative COVID-19 test following one's return to their state of residence. Consequently, it was more convenient for many employees and employers to switch to remote working systems rather than to maintain traditional methods. There was thus a transition to remote working that was forced by circumstances beyond the control of employers and employees, i.e., the pandemic. This was distinct from remote working transitions typical of so-called digital nomads that were performed with the mutual consent of employees and employers.[2]

In this article, we aim to analyse an international (Polish-German) solution of overarching tax questions that arise in respect of the cross-border workers forced to work remotely during the pandemic.

The solution was introduced by these member states inter alia via the "Mutual Agreement between the Competent Authorities of Germany and Poland according to paragraph 3 of Article 26 of the Agreement between the Federal Republic of Germany and the Republic of Poland for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital, signed in Berlin on 14 May 2003, with respect to the application of paragraph 1 of Article 15 on cross-border workers and of paragraph 1 of Article 19 on government officials working cross-border"[3] (hereinafter the 'Polish–German Mutual Agreement').

1. Types of Problems Faced by the Polish Cross-border Workers in Germany

Poland and Germany are linked very closely by economic and social ties, including the free movement of people. The circumstances are favourable for such

2 See more T. Makimoto, D. Manners, Digital Nomad, Wiley, 1997; S.V. Kostić, In Search of the Digital Nomad: Rethinking the Taxation of Employment Income under Tax Treaties, "World Tax Journal" 2019, no. 5, pp. 189–225.

3 This document is available at: https://www.podatki.gov.pl/media/6433/agreement-ca-niemcy.pdf (1.06.2021).

movement as there are major cities on both sides of the Polish–German border. A considerable difference between the level of earnings in Poland and the level of earnings in Germany leads many Poles to seek work in Germany. From a cross-border tax perspective, this situation is regulated by the Agreement Between the Federal Republic of Germany and the Republic of Poland for the Avoidance of Double Taxation With Respect to Taxes on Income and on Capital.[4] This treaty is quite faithfully based on the Organisation for Economic Co-operation and Development (hereinafter the 'OECD') Model Tax Convention on Income and on Capital (hereinafter the 'OECD MTC').[5] According to Article 15(1) of the treaty, an employee's remuneration is taxable only in the individual's state of residence, unless the employment is performed in the other contracting state. If the work is so performed, the remuneration received for it may be taxed in this second state, the so-called source state. Article 15(2) of the Polish-German Tax Treaty, however, indicates that notwithstanding the above provision, remuneration that a person resident in a contracting state receives from employment carried out in the other contracting state shall be taxable only in the first state if:

a) the recipient resides in the other state for a period or periods not exceeding 183 days in total during the 12-month period beginning or ending in the relevant tax year,
b) the remuneration is paid by or on behalf of an employer who is not a resident of the other state and
c) the remuneration is not borne by an establishment or permanent establishment that the employer has in the other state.

Taxpayers who worked in states other than their state of residence could find themselves in either of two situations that caused tax problems. Such taxpayers were often Polish employees who worked for German or Polish employers in Germany due to the aforementioned difference in earnings between the countries.

The first situation (hereinafter: "Case One") pertains to a Polish employee who worked in Germany for a Polish employer based on the assumption that Article 15(2) of the Polish–German Tax Treaty would apply to this employee and thus the employee would be taxed only in their country of tax residence, i.e., Poland. In such a situation, it would be the state of tax residence for both the employee and

4 The Agreement between the Federal Republic of Germany and the Republic of Poland for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital signed at Berlin on 14 May 2003, entered into force on 1 January 2015, Journal of Laws [*Dziennik Ustaw*] 2005, item 90, hereinafter the 'Polish–German Tax Treaty', https://www.podatki.gov.pl/media/1836/niemcy-konwencja-tekst-polski-niemiecki.pdf.

5 OECD, Model Tax Convention on Income and on Capital (Full Version), https://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-full-version_9a5b369e-en (1.06.2021).

the employer. However, due to pandemic-related restrictions, the employee became 'stuck' in their country of work (i.e., Germany) and exceeded the 183-day period of stay, which would have normally resulted in taxation in the source country (i.e., Germany).[6]

The second situation (hereinafter: "Case Two") is germane to a Polish employee usually commuted to their place of work in the employer's source state (Germany) but remained a resident of the other state (i.e., Poland). As the individual worked for an employer in the source state (Germany), the Polish–German Tax Treaty indicated that the employee's income was to be taxed both in the state of work (i.e., the source state, Germany) and in the individual's state of residence (i.e., Poland).[7] A problem arose when, due to the pandemic response's mobility constraints, the employee could not travel to his or her usual place of work (i.e., Germany) and agreed to work remotely. This meant that taxation in the state where the employee was staying was required because the individual performed their work there, i.e., in Poland, their state of tax residence.

This caused practical problems, particularly in relation to taxation in the source state. The employer, who usually made advance income tax payments to the tax authority, was not a resident of the state where the tax authorities relevant for the taxation of employment income operate, so the employee was required to make the settlements on their own. A problem also arose in which an employee's remuneration was to be taxed in Poland *and* deducted from the employer's income in Germany. Yet, Article 15 of the Polish-German Tax Treaty was based on the principle that an employee's income should be taxed in the state in which the remuneration was deductible from the employer's income, i.e.., in Poland.

2. Case One: the Assistance From the Commentary on Article 15 of the OECD MTC and the OECD COVID-19 Pandemic Guidance

The Polish–German Mutual Agreement does not apply to the Case One, i.e., when a Polish employee worked in Germany for a Polish employer. This is most likely due to the fact that the problem can be solved by applying § 5 of the Commentary to Article 15 of the MTC, as suggested by the OECD COVID-19 Pandemic Guidance (1/2021), i.e., if the days of sickness 'prevent the individual from leaving and he would

6 See Article 15(2)(a) of the Polish-German Tax Treaty. The OECD defines such employees as 'stranded workers'. See OECD, The Updated Guidance on Tax Treaties and Impact of the COVID-19 Pandemic, 15 (21 January 2020), https://www.oecd.org/tax/treaties/guidance-tax-treaties-and-the-impact-of-the-covid-19-crisis.htm (hereinafter the 'OECD COVID-19 Pandemic Guidance (1/2021)').

7 See Article 15(1) of the Polish German Tax Treaty.

have otherwise qualified for the exemption', they *exceptionally* do not count towards the days of presence test in Article 15(2)(a).

The OECD argued that this exception may cover many situations driven by the COVID-19 pandemic, such as governments banning travelling, and cases where it is, in practice, impossible to travel due, for example, to cancellation of flights. The OECD concluded that 'where an employee is prevented from travelling because of COVID-19 public health measures of one of the governments involved and remains in a jurisdiction, it would be reasonable for a jurisdiction to disregard the additional days spent in that jurisdiction under such circumstances for the purposes of the 183 day test in Article 15(2)(a) of the OECD Model.'[8]

Thus, a period of 183 days spent in Germany by a Polish employee in order to perform work there does not include the days the employee has to spend in Germany due to a ban on travel to, *inter alia*, Poland, imposed by both or one of the states in response to the COVID-19 pandemic.

Unfortunately, it is difficult to find grounds for such a statement in the content of the Polish–German Tax Treaty and in Article 15 of the OECD MTC. The excerpt from the Commentary on Article 15 in the OECD MTC that is referred to above[9] is an example of the OECD position going beyond the clear wording of the MTC. This extension appears to violate the general rule for the interpretation of international treaties in Article 31(1) of the Vienna Convention on the Law of Treaties[10] (hereinafter the 'VCLT') under which a dominant role is attributed to linguistic interpretation, in the sense that contextual and purposive interpretation cannot alter a clear understanding of the text resulting from linguistic interpretation.[11] Likewise, the principles of specificity and exclusivity for the statutory rank of tax regulations in Article 217 of the Constitution of the Republic of Poland, dated 2 April 1997[12] (hereinafter 'the Constitution') were compromised by such an extensive interpretation.

Moreover, the statement of the OECD COVID-19 Pandemic Guidance (1/2021) constitutes an over-expansive interpretation of the Commentary on Article 15(1) in the MTC, as it goes beyond the wording of that provision. The fact that such an extensive interpretation is arguably quite reasonable in the context of the COVID-19 pandemic does little to alter its negative assessment from a legal perspective. Furthermore, it should be noted that the OECD position does not constitute a supplement for the Commentary to the OECD MTC. The OECD COVID-19 Pandemic Guidance (1/2021) is a document that has not been adopted in the course

8 See the OECD COVID-19 Pandemic Guidance (1/2021), §§ 54–56.
9 That is, the Commentary to Article 15 of the OECD MTC 2017, §5.
10 Introduced in Vienna, Austria on 23 May 1969. Journal of Laws, No. 74, item 439 (1990).
11 R. Gardiner, Treaty Interpretation, Oxford University Press 2008, p. 190.
12 Journal of Laws, No. 78, item 483.

of amending Commentaries to the MTC. It is merely 'advice' from the OECD's Secretariat concerning how to address problems related to the application of tax treaties during the COVID-19 pandemic based on the MTC.[13]

3. Case Two: The Polish–German Mutual Agreement

As mentioned in the Introduction, German and Poland decided to provide specific solutions for some of problems of cross-border workers related to the COVID-19 by means of the Polish–German Mutual Agreement. This agreement introduced a legal fiction of performing work in the previous country of employment in order to maintain the taxation rules that were in force before the outbreak of the COVID-19 pandemic. The adopted rules were applied for the purpose of Article 15(1) and Article 19(1) in the Polish–German Tax Treaty.

The OECD COVID-19 Pandemic Guidance (1/2021) recommends the use of solutions such as the Polish–German Mutual Agreements to solve tax issues concerning the COVID-19 pandemic.[14] There is no doubt that in this new situation, it is worth working out bilateral solutions to avoid problems, and this is the path the German government has broadly decided to follow. It has entered into negotiations with all its neighbouring countries (Austria, Belgium, France, Luxembourg, the Netherlands, Poland, and Switzerland), apart from the Czech Republic, to create the legal fiction of carrying out work where it would have been carried out had the COVID-19 impediment not arisen[15] on the basis of Mutual Agreements concluded with these countries. This solution corresponds to the logic of rules for the taxation of workers' income, i.e., a remuneration should be taxed in the state in which it constitutes a deductible tax cost and therefore reduces the tax base of the employer.[16] If a Polish resident were to perform work for a German resident while residing in Poland, the employee's salary would be taxed in Poland and deducted by the employer in Germany.

The Polish–German Mutual Agreement stipulated that for purposes of Article 15(1)of the Polish-German Tax Treaty, 'days of work for which wages are received and during which the employment was exercised at home (home-office-day) solely due to the measures taken to combat the COVID-19 pandemic by the German or Polish Government or their local subdivisions, may be deemed as day of work spent in the Contracting State where the cross-border worker would have exercised the employment without the measures taken to combat the COVID-19 pandemic'. The use

13 See the OECD COVID-19 Pandemic Guidance (1/2021) § 4.
14 See the OECD COVID-19 Pandemic Guidance (1/2021), § 62.
15 Ibid. § 63.
16 See L. Oats, A. Miller, E. Mulligan, Principles of International Taxation, Bloomsbury 2017, pp. 175–176.

of the words '*may be deemed*' means that this Mutual Agreements introduces a legal fiction, which is explicitly articulated in its wording: '*[t]his fiction* does not apply to working days that would have been spent either as home-office-days or in a third State, independent from these measures'. This legal fiction does not automatically apply to all cross-border workers under the Polish-German Tax treaty, but only if the worker (taxpayer) decides to use it. Once he or she does so, they are then obliged to apply this fiction consistently in Poland and Germany and to prepare and keep 'written confirmation of the employer which part of the home-day-office was solely due to the COVID-19 pandemic related measures'. Finally, the MAP specifies that this fiction applies only 'to the extent that the respective wages for the days spent working at home are usually taxed by the Contracting State in which cross-border worker would have exercised the employment without the measures taken to combat the COVID-19 pandemic'.

The scope of the Polish–German Mutual Agreement solves only the Case Two, i.e., when the taxpayer actually stays in a state other than his or her normal place of work and works remotely from their state of residence due to the restrictions caused by the COVID-19 pandemic. Considering the practical impact of that MAP, it will used most often be by a Polish employee working remotely for a German employer. When considering the fiscal interests of both states, the Polish–German Mutual Agreement is advantageous for Germany because Polish workers are usually employed in Germany there rather than vice versa.

Of course, the main benefit that should result from the Polish–German Mutual Agreement is the avoidance of tax related administrative problems by employees and employers. However, the real effects of the agreement are unlikely to be significant. It applies only to employees who can carry out their work remotely, whereas the majority of Polish cross-border workers conduct manual work that require their physical presence in Germany. Moreover, even the intended effect of the Polish–German Mutual Agreement, which is to simplify the tax treatment of cross-border workers between Poland and Germany, may not be easy to achieve in practice.

The Polish–German Mutual Agreement in fact complicates tax settlements for a significant number of Polish employees. This may pertain, for example, to employees who have partially worked remotely from the territory of another country so far, and now have to determine which days spent outside the territory of the country of usual employment (Germany) are taxable under the new rule that introduced the legal fiction. Remembering that this Mutual Agreements entered into force close to the end of the year (27 November), there are significant doubts as to whether it accounted for monthly advance payments on personal income taxes by persons who performed remote work from the territory of another state during the

year and whether, with respect to this work, it accounted for advances on personal income taxes in accordance with the principles of the Polish–German Tax Treaty.[17]

It should be noted that, from the perspective of employers, it is necessary to prepare appropriate documentation that enables the application of the new, special taxation rules for cross-border employees in accordance with the Polish–German Mutual Agreement. Furthermore, this Mutual Agreements imposes a requirement on employees to have written confirmations from their employers about the impossibility of performing work in the employer's state of residence due to the COVID-19 pandemic.[18] Concerns are alleviated somewhat by the fact that it is up to the taxpayer to decide whether or not to make use of the legal fiction provided for in the Polish–German Mutual Agreement. However, it forces employers to be vigilant, as they must consider the decisions of employees when settling with tax authorities. Also, it is worth remembering that the taxpayer should retain a favourable position under the mutual agreement on the basis of the principle of protection of legitimate expectations, which is generally accepted in various legal systems,[19] even though this agreement is legally doubtful (as the Polish-German Mutual Agreement).

4. Legal Basis for the Polish-German Mutual Agreement

In the Polish–German Mutual Agreement, the competent authorities refer to the first sentence of Article 26(3) of the Polish–German Tax Treaty which says that (emphasis added) 'the competent authorities of the contracting states [Poland and Germany] shall endeavour by mutual agreement to *remove any difficulties or doubts [that] may arise in the interpretation or application* of the [Polish-German Tax Treaty]'. Indeed, in Poland, as a rule, the place at which work is performed will determine the place of employment income taxation. The Commentary to Article 15(1) of the OECD MTC in § 1clearly indicates that 'work is exercised in the place where the employee is physically present when performing the activities for which the employment income is paid'. Hence, the Commentary adds that a resident of a contracting state who derives remuneration, in respect to the individual's employment, from sources in the other state cannot be taxed in that other state in regard to that remuneration merely because the results of this work were exploited in that other state.

17 See J. Chorążka, K. Rzeźnicka, Nowe Polsko-Niemieckie Porozumienie Wpływa na Opodatkowanie Pracy Zdalnej Pracowników Transgranicznych, https://studio.pwc.pl/aktualnosci/alerty/polsko-niemieckie-porozumienie-wplywa-na-opodatkowanie-pracy-zdalnej-pracownikow-transgranicznych (4.12.2020).

18 Ibid.

19 See, for example, G. Barrett, Protecting Legitimate Expectations in European Community Law and in Domestic Irish Law, (in:) 20 Yearbook of European Law, 2001, pp. 191–243, S. Schønberg, Legitimate expectation in administrative law, Oxford 2000.

This approach is consistent with the rules applicable under domestic tax law, as they indicate that the performance of work generally involves the physical presence of an employee at their place of work[20]. That is to say, in the absence of a physical presence in Germany, no work is considered to be conducted there by the Polish employers. A deviation from this principle would require the change in domestic tax law.

Although there have been some hesitations in case law, the prevailing view of courts is also consistent with the principle mentioned above according to which the taxation of employment income may take place only in the country in which the work is actually performed. For example, in a judgment of 22 December 2006 (Case No. BNB 2007/97), the Dutch Supreme Court held that, in relation to stand-by fees, the place of work performance is the place where the employee is present during the period for which the individual is paid – not the place where the employee would potentially perform the work. Interestingly, for the specific case this judgment concerned (i.e., editorial and TV presentation activities), this meant splitting taxation of remunerations between two countries as the taxpayer in question was in the Netherlands for a few days and in their place of residence (Mexico) for a few days.[21]

This position was also taken by the *Naczelny Sąd Administracyjny* (NSA) [Polish Supreme Administrative Court], even against the background of the Polish–German Tax Treaty. In a judgment made by the NSA on 13 May 2011 (II FSK 2165/09), it was stated (emphasis added): 'The right to tax income in N. is not determined, as a rule, by the place where the employer is established, nor by the place where the results of the work are used, nor by the place where the remuneration is paid, nor by the place where the entity paying the remuneration is established. *The only criterion is the place where the work is performed.* Thus, the Court of First Instance correctly interpreted Article 15(1) of the Tax Treaty by assuming that the place of taxation of salary, wages[,] and similar remuneration from paid employment depends on the place where the work is performed. Converging views can be found in the Polish tax law literature.[22]

Accordingly, although the assertions of competent authorities imply that the Polish-German Mutual Agreement removes difficulties or doubts in the interpretation or application of the Polish–German Tax Treaty, this does not appear to

20 Art. 3 (2b) (1) Personal Income Tax Act of 26 July 1991, Journal of Laws of 2021, item 1128.

21 See F. Pötgens, Stand-By Fee Taxable in Residence State Under Art. 15 of the OECD Model, "European Taxation" 2008, no. 2, pp. 85–89 and the Decision of the Netherlands Supreme Court BNB 2007/97 (22 December 2006), see: F. Pötgens, Income from International Private Employment, IBFD 2007, pp. 304–322.

22 W. Morawski, Opodatkowanie Dochodów z Pracy Najemnej w Świetle Umów o Unikaniu Podwójnego Opodatkowania (Cz. 1), "Przegląd Podatkowy" 2006, no. 9, pp. 7–8, K. Kaczor, (in:) M. Jamroży, A. Cloer (eds.), Umowa o unikaniu podwójnego opodatkowania z Niemcami, Warsaw 2007, p. 316.

be true. In fact, this Mutual Agreements even fails to confirm a certain understanding of the Treaty by providing a completely different interpretation of the provisions of Article 15 in the Polish–German Tax Treaty than that reasonably following from the Commentary to Article 15 of the OECD MTC and the prevailing case law on the tax issue in question. Most importantly, the view presented by the competent authorities is contrary to the clear wording of the Polish-German Tax Treaty. It is therefore *de facto* a change in its wording.

In the case law of the German courts, the view has been expressed that a mutual agreement may not amend a tax treaty[23]. We agree with opinion of A. Rust that 'a mutual agreement that goes beyond the possible wording of the treaty and which would change the content of the treaty is against the principle of primacy of law over administrative guidance and has to be disregard'.[24] Thus, even if mutual agreements are nothing unusual in the treaty practice of the OECD member states,[25] the Polish-German Mutual Agreement is definitely not usual insofar as it appears to have a shaky legal basis considering the situations that it purported to regulate and the method of regulation.

5. Revising the Polish–German Tax Treaty Instead of Interpreting It?

The first sentence of its Article 31(1) indicates that in order to enter an amendment of this Treaty into force, ratification is required. According to internal Polish and German legislations,[26] the same procedure – ratification – is required to amend each and every international treaty, including, of course, the Polish–German Tax Treaty. This Treaty itself does not introduce any separate regulations that would derogate from the principle of ratification in relation to any of its provisions. In particular, no such provisions are contained in Article 26 of the Polish–German Tax Treaty that served as a legal basis for the Polish–German Mutual Agreement.

Pursuant to Article 91(1) of the Polish Constitution, a ratified international agreement, following its promulgation in the Journal of Laws, constitutes part of the

23 BFG 10 June 2015, I R 79/13, IStR 2015, 785, quoted after: A. Rust, Germany: Taxing Right for a Golden Handshake and the Effect of a Mutual Agreement between the Competent Authorities, (in:) E.C.C.M. Kemmeren et al. (eds.), Tax Case Law Around the Globe 2016, pp. 219–226.

24 A. Rust, Germany: Taxing Right…, *op. cit.,* pp. 224–225.

25 See Q. Cai, P. Zhang, A Theoretical Reflection on the OECD's New Statistics Reporting Framework for the Mutual Agreement Procedure: Isolating, Measuring, and Monitoring, "Journal of International Economic Law" 2018, no. 21, pp. 867–884; H. Ault, Improving the Resolution of International Tax Disputes, "Florida Tax Review" 2005–2006, no. 7, pp. 137–151.

26 See: Parliament's Role in International Treaties, Bundestag, https://www.bundestag.de/resource/blob/509982/1316a1c42f1a8ee8a04cc65640d8af40/WD-2–038-17-pdf-data.pdf. (12.05.2021), Cf. J.Abr. Frowein, M.J. Hahn, The Participation of Parliament in the Treaty Process in the Federal Republic of Germany-Europe, "Chicago-Kent Law Review" 1991, vol. 67, Issue 2, available online: https://core.ac.uk/download/pdf/217423164.pdf (12.05.2021).

domestic legal order and is directly applicable, unless its application depends on the enactment of a statute. Furthermore, pursuant to Article 91(2) of the Constitution, an international agreement ratified with prior consent expressed in a statute takes precedence over a statute, if that statute cannot be reconciled with the agreement. International agreements on taxation require ratification with the consent of parliament *per* Article 89(1–5) of the Constitution, according to which 'ratification of an international agreement and its denunciation [by the Republic of Poland] requires prior consent expressed by law if the agreement concerns ... matters regulated by law or in which the Constitution requires a law'.

Additionally, Article 217 of the Constitution states that 'the imposition of taxes, other public tributes, the determination of entities, subjects of taxation and tax rates, [and] the principles of granting reliefs and remissions and categories of entities exempted from taxes shall be made by way of a law'. This leads to the conclusion that the entirety of tax regulation – including the provisions of tax treaties on the cross-border taxation of employees – must in fact be found in a law, and thus in an international agreement ratified with a parliamentary approval in the form of a statute and signed by the president of the Republic of Poland. It follows that the principle concerning the statutory levying of taxes leads to the effect that parliament also retains control over international agreements on tax issues, even if such agreements (tax treaties) do not impose taxes but rather limit tax burdens by means of various reliefs (e.g., reduced tax rates, exemptions from taxation).

The Polish constitutional provisions therefore treat an amendment to an international treaty, such as the Polish–German Tax Treaty, as the conclusion of another treaty to the extent of such amendment. To date, there has been no doubt that amendments to an international treaty must be ratified by the President with the consent of Parliament, as is the case with the conclusion of a treaty. Many tax treaties ratified by Poland have already been amended under this procedure. In fact, this procedure is regulated in Polish law in a separate act that was made on 14 April 2000, concerning international agreements.[27]

Unfortunately, regarding the Polish–German Mutual Agreement, the legal requirements were circumvented, including those of constitutional rank, by taking 'shortcuts'.[28] Bypassing the procedures provided for in the Constitution, the Polish–German Tax Treaty ratified by the President of the Republic of Poland with the consent of Parliament was amended (on the Polish side) by a deputy director of

27 Journal of Laws of 2020, item 127.

28 Although the authors are not experts on German law, it seems that similar doubts may be raised concerning the Polish–German Mutual agreement in light of the German legislative procedures accompanying the introduction and amendment of international agreements in Germany.

a department of the Ministry of Finance,[29] who, it should be assumed, acted under the authority of the Government. It seems that the Polish and German competent authorities took the OECD's encouragement that '[e]xceptional circumstances call for an exceptional level of coordination between jurisdictions to mitigate the compliance and administrative costs for employees and employers associated with an involuntary and temporary change of the place where employment is performed'[30] too literally. It does not seem correct to understand this idea as an incentive to violate the constitutional standards of any country.

Perhaps the vigilance of the authors of the Polish–German Mutual Agreement was impaired by the fact that the issue concerned only the right, not the obligation, of the taxpayer to make use of the legal fiction of performing work in the place where the individual performed it before the COVID-19 pandemic. This is, however, a weak argument for ignoring the constitutional and international requirements for changing the Polish–German Tax Treaty. The fact that the intention of the Polish–German Mutual Agreement was to introduce solutions favourable to the taxpayer (although it was not entirely successful) is irrelevant. The mechanism of tax treaties is the fact that, as a rule, they only make life easier for taxpayers and are more beneficial to them than no treaties at all. Despite this, to date, no one has considered the idea of disregarding legal principles stemming from the supreme law in Poland (the Constitution) and from international law (the VCLT) under the justification of the alleged good of the taxpayer.

The standard procedure for amending a tax treaty cannot be replaced by the use of the Mutual Agreement, as this procedure is not for amending a treaty. It is merely for resolving difficulties and ambiguities in the understanding and application of tax treaties. The provisions of the tax treaties governing it, including the first sentence of Article 26(3) of the Polish–German Tax Treaty, are subject to the same rules of interpretation, codified primarily in Articles 31–33 of the VCLT, as are any other provisions of the tax treaty in question.

The decision by the Polish and German competent authorities has consequences that can contribute to legal chaos. The Polish–German Tax Treaty was published in the appropriate manner in the official journal of promulgation, which in Poland is the Journals of Laws. To every tax lawyer and taxpayer in Poland, it is clear that what is published in the official promulgating texts, such as the Journal of Laws, is law. Mutual Agreements are not published in Poland in the Journal of Laws [or in any

29 This concerns the Pole, Filip Majdowski, and the German, Silke Bruns, Oberregierungsrätin [Senior Councillor] for the Federal Ministry of Finance in Germany, as seen in the signatures under the Polish–German Mutual Agreement, https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Laender_A_Z/Polen/2020–12-08-Konsultationsvereinbarung-DE-PL-Covid-19-Besteuerung-Grenzpendler.html (20.05.2021).

30 The OECD COVID-19 Pandemic Guidance (1/2021), § 62.

official promulgating journal. To prove it, the Polish–German Mutual Agreement was published only on the website for Poland's Ministry of Finance.[31]

Moreover, Article 6 of the Polish Language Act of 7 October 1999[32] provides that 'international agreements concluded by the Republic of Poland should have the Polish language version as the basis for their interpretation, unless specific provisions provide otherwise'. Similarly, Article 27 of the Constitution indicates that '[i]n the Republic of Poland, the official language is Polish'. However, the Polish–German Mutual Agreement was drafted and published on the website for Poland's Ministry of Finance in English exclusively (sic!). No version of the Polish–German Tax Treaty was ever drafted in English (it was drafted solely in Polish and German).[33] In comparison, the German government's website published information on the Polish–German Mutual Agreement, including the content of the agreement, in the official language of Germany, which is German.[34] This shows far-reaching negligence by the Polish competent authority.

The contents of the Polish–German Mutual Agreement raise further doubts as to its validity: "(5) This mutual Agreement shall apply to days in the period from 11th March 2020 until 31st December 2020. From 31st December 2020 onwards, the application of this Mutual agreement will automatically be extended, unless it is terminated by either Competent Authority of a Contracting State.

6) This Mutual Agreement shall enter into force on the day following its signature. It can be terminated unilaterally by the Competent Authority of the Contracting States by giving notice to the competent Authority of the other Contracting state at least one week prior to the need of a calendar month. This Mutual Agreement shall remain applicable the following calendar month after being terminated by either Competent Authority of a contracting State."

How can taxpayers determine whether a contract has been renewed? If the Polish-German Mutual Agreement was the law, an individual would learn about it in the Journal of Laws. However, in relation to the Polish–German Mutual Agreement, the individual must search for it on the website of the Poland's Ministry of Finance and attempt to interpret and understand rules written in a language that is neither official in Poland nor it is a language of law in that country.

31 https://www.podatki.gov.pl/media/6433/agreement-ca-niemcy.pdf (1.06.2021).

32 Journal of Laws 2019, item. 1480.

33 https://www.podatki.gov.pl/media/1836/niemcy-konwencja-tekst-polski-niemiecki.pdf (1.06.2021).

34 https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Laender_A_Z/Polen/2020–12-08-Konsultationsvereinbarung-DE-PL-Covid-19-Besteuerung-Grenzpendler.html (1.06.2021).

Conclusions

The solution to the Case One (when a Polish employee works in Germany for a Polish employer) says that a period of 183 days spent in Germany by a Polish employee in order to perform work there does not include the days the employee has to spend in Germany due to the restriction to crossing borders, for example with Poland, under the COVID-19 pandemic. This solution triggers doubts, as it constitutes a very extensive interpretation of Article 15 of the Polish–German Tax Treaty and Article 15 of the OECD MTC, going way beyond their wording.

The Case Two is much more interesting, however. Here, a new solution relies on introducing a legal fiction of carrying out work in the place where it would have been done before the pandemic as a rational solution. This solution has been found under the MAP procedure; a procedure which is essentially interpretative rather than legislative and takes place exclusively between the tax authorities of the two countries, completely beyond the interreference of taxpayers and the purview of the courts or legislative bodies.

The legal solution is not intrinsically bad. The representatives of both countries' Ministries of Finance were certainly guided by good intentions. The Polish–German Mutual Agreement aimed to make life easier for taxpayers in a difficult pandemic period. However, values that are just as (or perhaps even more) important must not be forgotten to make life easier for some groups of taxpayers. These values are the standards of the rule of law that stem from the constitutional principles as well as principles of international public law.[35] Even in very difficult situations, such as pandemic,[36] the analysed infringement of fundamental principles of law should not be accepted quietly, e.g., cases in which a deputy director in a department of the Ministry of Finance in Poland contributes to amendment of a tax treaty that is ultimately an expression of the will of the President of the Republic of Poland, elected

35 In respect of taxation *See* J. Hattingh, The Multilateral Instrument from a Legal Perspective: What May Be the Challenges?, "Bulletin International Taxation" 2017, vol. 71, no. 5. *See* more generally: T. Bingham, The Rule of Law, Penguin 2010.

36 Although the competent authorities stated that COVID-19 pandemic 'is a situation of force majeure', this statement was not supported by them with any authority or any other source or explanation, as if it was obvious. Moreover, neither Polish law nor German law nor the Polish–German Tax Treaty defines 'force majeure'. There is therefore no legal basis to claim that COVID-19 pandemic constitutes force majeure for the purposes of interpretation and application of the Polish-German Tax Treaty or any other tax treaty. Although a pandemic is an event that is not, from a human point of view, something ordinary and routine, there is absolutely no consensus in legal circles, both nationally and internationally, as to whether the COVID-19 pandemic can be considered a force majeure in every case and for every subject (i.e. erga omnes and in abstracto) *See* C.B. Casady, D. Baxter, Pandemics, public-private partnerships (PPPs), and force majeure | COVID-19 expectations and implications, "Construction Management and Economics" 2020, no. 38, pp. 1077–1085; Ş.E. Kiraz, E.Y. Üstün, COVID-19 and force majeure clauses: an examination of arbitral tribunal's awards, "Uniform Law Review" 2020, no. 437–465.

in Poland in direct elections, when this act requires the consent of Parliament. This leads to the destruction of the legal system and uncertainty for taxpayers as to the extents of their rights and obligations. This is a disproportionate and negligent action. A response to an extraordinary state, such as the COVID-19 pandemic, should not be so extraordinary itself as to violate constitutional and international law.

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Electronic Signature of the Taxpayer in Times of COVID-19

Abstract: The aim of the article is to present the legal provisions used to identify taxpayers (and similarly other entities) using electronic communication in the times of COVID-19, in the light of the construction of public ICT systems for submitting declarations and applications. The COVID-19 pandemic accelerated the IT transformation, including the benefits of switching to digital tools, unless the legislator had already imposed an obligation to use electronic communication. For tax purposes, the range of possible signatures has not been limited to a qualified electronic signature, a trusted signature, a personal signature, and possibly a simple identity verification mechanism using an account in an ICT system secured only with a password. It is often used to sign the so-called "authorization data" ("tax data"). The new facilitations in the field of creating a trusted profile should translate into the popularization of the trusted signature, especially as there are more and more non-tax online services provided by public entities.
Key words: COVID-19, electronic signature, e-sign, law, tax

Introduction

The aim of the article is to present the legal provisions used to identify taxpayers using electronic communication in the times of COVID-19 in the light of the construction of public ICT systems for submitting declarations and applications. In Polish law, the issue of identity verification in electronic contacts focuses on the use of an electronic signature. The situation is, therefore, the same as in the case of the paper circulation of documents, where the handwritten signature is the key.

The use of an electronic signature requires many technical steps – thus unlike in the case of a relatively simple handwritten signature. In the case of an electronic

signature, the activities to be performed are described in detail in the law. There is often a phenomenon of including technical standards in universally binding law[1]. They are more like operating instructions than legal standards. Signing data with electronic signature may also require the use of electronic means of communication in the form of a trusted or personal profile.

The legal aspects of taxpayers' electronic signatures are also unclear as the practice of functioning of computerized public entities is not always fully consistent with the regulations. As an example, a circumstance related to the nomenclature may be of relatively little importance in law. Namely, in some ICT systems, "e-dowód" ("e-ID") is indicated as the method of logging in, and it would be more accurate to refer to the personal profile (a concept defined in law; in Polish "profil osobisty"). On the one hand, there is therefore a considerable number of legal provisions describing electronic identification means, and on the other hand, in practice, there is a different nomenclature.

Basically, when analysing an electronic signature, it is limited to the characteristics of fundamental legal acts in this field (EU regulation on electronic identification and trust services in relation to electronic transactions in the internal market[2] – hereinafter "eIDAS Regulation", the act on computerization of the activities of entities performing public tasks[3] – hereinafter "u.i.", the act on identity cards[4] – hereinafter referred to as "u.d.o.", as well as the act on trust services and electronic identification[5]). Legal acts regulating the functioning of specific areas only refer to these acts, most often indirectly by only indicating the type of electronic signature (this is the case, for example, in the Code of Administrative Procedure[6]). In the case of tax regulations, the situation is much more complicated. The Tax Ordinance

1 See G. Sibiga, Stosowanie technik informatycznych w postępowaniu administracyjnym ogólnym, Warsaw 2019, pp. 47–80.

2 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (O.J. L 257, 28.8.2014, pp. 73–114).

3 Act of 17 February 2005 on computerization of the activities of entities performing public tasks, consolidated text (Journal of Laws of 2021, item 670, as amended).

4 Act of 6 August 2010 on identity cards, consolidated text (Journal of Laws of 2021, item 816, as amended).

5 Act of 5 September 2016 on trust services and electronic identification, consolidated text (Journal of Laws of 2021, item 1797).

6 Act of 14 June 1960 – Code of Administrative Procedure, consolidated text (Journal of Laws of 2021, item 735, as amended). See G. Sibiga, Stosowanie technik informatycznych w postępowaniu administracyjnym ogólnym, Warsaw 2019, pp. 104–119; G. Sibiga, Paperless czy odwrót od cyfryzacji? Kierunki zmian w proceduralnych przepisach prawa administracyjnego w stanie zagrożenia epidemicznego i w stanie epidemii z powodu COVID-19, „Monitor Prawniczy" 2020, no. 20 (supplement), Legalis, pp. 163–170; G. Sibiga, Odwrócona cyfryzacja w postępowaniu administracyjnym ogólnym po nowelizacji Kodeksu postępowania administracyjnego z 16.04.2020 r., „Monitor Prawniczy" 2020, no. 18, pp. 956–962.

Act[7] (hereinafter referred to as "o.p.") extensively regulates the matter in question (especially in Articles 3a, 3b, 3f, 126, 168 and 193a of o.p.), including implementing acts[8]. This is a consequence of the fact that the tax law allows the use of "ordinary" electronic signatures to a large extent.

When carrying out a formal and dogmatic analysis of the taxpayer's electronic signature in the times of COVID-19, it is necessary to consider the practical aspects of the functioning of "Portal podatkowy" ("Tax Portal")[9] and "e-Urząd Skarbowy" ("e-Tax Office") project, which is at the initial stage of implementation. The former solution is expressed in legal regulations ("Portal podatkowy" is defined in Article 3 (14) of o.p.). On the other hand, "e-Urząd Skarbowy" is not a solution described in generally applicable law. The "e-Urząd Skarbowy" launched on the 1st of February 2021[10], currently mainly integrates already operating services such as "Twój e-PIT" (Your e-PIT) or "e-mikrofirma" ("e-microcompany").

The year 2021 is significant for the computerization of the tax administration as its end will mark the disabling of the "e-Deklaracje Deskop" (e-Tax Declarations Deskop) application, i.e., software installed on personal computers that allows individuals to submit electronic forms without the need to have a qualified electronic signature. The emergence of this solution was crucial. It should be mentioned that the discontinuation of the "e-Deklaracje Deskop" application does not mean the end of declarations in the form of interactive PDFs, submitted via a web browser, i.e., the "e-Deklaracje" (e-Tax Declarations) module.

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7 Act of 29 August 1997 – Tax Ordinance, consolidated text (Journal of Laws of 2021, item 1540, as amended).

8 Regulation of the Minister of Finance of 24 June 2016 on the method of sending tax books by electronic means of communication and technical requirements for IT data carriers on which these books can be saved and transferred, consolidated text (Journal of Laws of 2020, item 175) – "r.s.p.k."; Regulation of the Minister of Development and Finance of 19 September 2017 on the method of sending declarations and applications and the types of electronic signatures that should be attached, consolidated text (Journal of Laws of 2021, item 52, as amended) – "r.s.p.d."; Regulation of the Minister of Finance of 28 December 2015 on the scope and conditions of using the tax portal, consolidated text (Journal of Laws of 2021, item 1673) – "r.z.w.k."; Regulation of the Minister of Finance of 28 December 2015 on the determination of the types of cases that can be handled using the tax portal, consolidated text (Journal of Laws of 2017, item 1323).

9 See J. Zając-Wysocka, Praktyczne aspekty „elektronicznej" nowelizacji ordynacji podatkowej, „Przegląd Podatkowy" 2014, no. 5, pp. 10–15; J. Koronkiewicz, (in:) B. Brzeziński, K. Lasiński-Sulecki, W. Morawski (eds.), Nowe narzędzia kontrolne, dokumentacyjne i informatyczne w prawie podatkowym. Poprawa efektywności systemu podatkowego, Warsaw 2018, pp. 227–250; M. Faryna, Selected Problems of the Effectiveness of Administrative Enforcement and Ways of Solving them in Poland, „Białostockie Studia Prawnicze" 2009, no. 5, pp. 324–326.

10 See P. Szymanek, Wpływ uruchomienia e-Urzędu Skarbowego na zwiększenie nadzoru nad podatnikami, „Doradztwo Podatkowe – Biuletyn Instytutu Studiów Podatkowych" 2021, vol. 3, pp. 21–27.

1. Formula with Three Alternative Electronic Signatures

Before the COVID-19 pandemic, the Polish IT law developed a triad of electronic signatures – a qualified electronic signature (as defined in Article 3 Point 12 of the eIDAS Regulation[11]), a trusted signature (as defined in Article 3 Point 14a of u.i.) and a personal signature (as defined in Article 2 Paragraph 1 Point 9 of u.d.o.[12]) The formula indicating these three types of electronic signature appears in several legal acts regulating the functioning of public entities. A trusted and personal signature is associated with an electronic identification means in the form of a trusted and personal profile (defined respectively in Article 3 Point 14 of u.i. and Article 3 Point 14b of u.i., as well as Article 2.1 Point 10 of u.d.o.). As mentioned above, in tax law the situation is more complicated, mainly due to the wide admission of other methods of identity verification. Tax law also most often does not have a full choice of methods of identity verification, but a specific type of activity is assigned predetermined identification methods.

It should also be clarified that the specific legal effect of equivalence to a handwritten signature is generally attributed to a qualified electronic signature (Article 25.2 of the eIDAS Regulation). A personal signature in the context of the typology of the eIDAS Regulation is an advanced electronic signature (as defined in Article 3 Point 11 and Article 26 of the eIDAS Regulation), and a trusted signature, like the other types of signatures referred to below, is an "ordinary" electronic signature (as defined in Article 3 Point 10 of the eIDAS Regulation). However, the equivalence between the electronic form and the written (paper) form also results in Article 20ae.2 of u.i., as well as Article 12d.1 Point 10 of u.d.o.[13].

Numerous changes in the field of electronic communication were introduced by the law on electronic delivery[14]. From the 5th of October 2021, applies Article 126 § 1 Sentence 1 of o.p. stating that tax matters are dealt with in writing in a hard copy or electronic form, unless specific provisions provide otherwise. As such, this regulation contains a norm like the formerly applied Article 126 of o.p. (this provision did not have paragraphs at the time), and the changes concern the issue of nomenclature in terms of determining the form. However, the new content is contained in Article 126 § 1 Sentence 2 and 3 of o.p., pursuant to which letters recorded in electronic form are provided with a qualified electronic signature, a trusted signature or a personal

11 See Ł. Goździaszek, Identyfikacja elektroniczna i usługi zaufania w odniesieniu do transakcji elektronicznych na rynku wewnętrznym Unii Europejskiej. Komentarz, Warsaw 2019, pp. 44–49, 196–224.

12 See G.P. Kubalski, (in:) G.P. Kubalski, M. Małowiecka (eds.), Ustawa o informatyzacji działalności podmiotów realizujących zadania publiczne. Komentarz, Warsaw 2019, pp. 34–35, 129–133

13 See A. Mariański, Komentarz do art. 126, (in:) A. Mariański (ed.), Ordynacja podatkowa. Komentarz, Warsaw 2021, Legalis.

14 Act of 18 November 2020 on electronic delivery (Journal of Laws of 2020, item 2320, as amended).

signature or a qualified electronic seal of the tax authority with an indication in the content of the letter of the person affixing the letter with the seal. Most importantly for the subject of this article, in accordance with Article 126 § 4 of o.p., letters addressed to the tax authorities may be made in hard copy or in electronic form. To affix their signatures and seals the provisions of Article 126 § 1 of o.p. (especially sentences 2 and 3 of this provision) are applied.

The above-mentioned changes correspond to the changes under Article 168 of o.p. New Article 168 § 1 Sentence 2 o.p. says that letters recorded in electronic form are submitted to the address for electronic delivery or through a tax portal. Article 168 § 3a of o.p. has also been significantly revised. Pursuant to this article, an application submitted to an electronic service address or via a tax portal should contain the data in the agreed format included in the application template specified in separate regulations, if these regulations require the submission of applications according to a specific template. Article 168 § 3a Point 1 of o.p no longer applies, already saying that an application submitted in the form of an electronic document should be signed with a qualified electronic signature, a trusted signature, or a personal signature[15]. However, the Act on electronic deliveries did not change Article 3b of o.p., including § 1.2 (stating that the declaration submitted by means of electronic communication should contain one electronic signature) and § 2.3 (being a delegation for the minister responsible for public finance to be determined, in consultation with the minister competent for computerization, by way of a regulation, types of electronic signatures that should be attached to individual types of declarations or applications).

2. Signing Declarations, Applications, and Books

Pursuant to § 4 Points 1–5 of r.s.p.d. declarations and applications may bear:

- qualified electronic signature;
- the user's electronic signature on the tax portal ensuring the authenticity of declarations and applications, if they are sent through this tax portal;
- with an electronic signature verified with a customs certificate;
- with a trusted signature or a personal signature, if they are sent via the tax portal, the Central Register and Information on Economic Activity or the Electronic Tax and Customs Services Platform, or
- another electronic signature ensuring the authenticity of declarations and applications.

15 See Ł. Porada, Komentarz do art. 168, (in:) A. Mariański (ed.), Ordynacja podatkowa. Komentarz, Warsaw 2021, Legalis; T. Szymański, Komentarz do art. 3a, (in:) A. Mariański (ed.), Ordynacja podatkowa. Komentarz, Warsaw 2021, Legalis.

Only a qualified electronic signature is a universal type of electronic signature, however, because pursuant to § 5.1 of r.s.p.d. all types of declarations and applications can be signed with this signature (except for those specified in § 5.2 of r.s.p.d.). The scope of the use of other identification methods is determined by the provisions of § 6–11 and § 15 of r.s.p.d. It is worth noting that in accordance with § 11 r.s.p.d. an electronic signature referred to in § 4 Point 5 r.s.p.d. (signing the so-called "authorization data") may only be used by the taxpayer, payer or entity being a natural person. The main authorization data (next to the tax identification number (NIP), PESEL number, first name and surnames, as well as date of birth) is the amount of revenue for the tax year two years earlier than the year of submitting declarations or applications, or the value "0", when for the tax year none of the statements or calculations listed was submitted.

On the other hand, tax books, parts of these books and accounting vouchers in electronic form[16], sent by means of special interface software, should be provided with a qualified electronic signature or a trusted signature (§ 2.2 of r.s.p.k.). Therefore, there is no indication of a personal signature in this case. Similarly to the situation indicated in the previous paragraph, a taxpayer who is a natural person may only use the so-called the authorization data specified in § 2.2a of r.s.p.k. Originally, exemption of natural persons from the necessity to have the indicated electronic signatures was supposed to be a temporary solution (§ 3a r.s.p.k.), but ultimately it is valid indefinitely. This does not mean, however, that the solution has not changed recently. From the 30th of September 2020, it is not possible to submit a JPK ("Jednolity Plik Kontrolny" – "Standard Audit File")[17] by the so-called "Bramka JPK" ("JPK Gate").

16 See A. Bartosiewicz, M. Smaga, E-kontrola podatkowa i jednolity plik kontrolny, Warsaw 2021, pp. 13–38, 266–269; A. Ćwiąkała-Małys, I. Piotrowska, Jednolity Plik Kontrolny i Centralny Rejestr Faktur jako elektroniczne narzędzia wspierające skuteczność administracji skarbowej, „Przedsiębiorczość i Zarządzanie" 2017, no. 7(II), pp. 81–100; J. Fornalik, J. Ziętek, Rewolucja technologiczna w podatkach, „Krytyka Prawa" 2019, no. 2, pp. 62–74; G. Voss, Jednolity Plik Kontrolny – koszty i korzyści cyfryzacji, „Finanse, Rynki Finansowe, Ubezpieczenia" 2017, no. 4 (2), pp. 185–195; M. Korbas, (in:) P. Grzanka, M. Sidelnik (eds.), Jednolity Plik Kontrolny. Obowiązki e-raportowania danych podatkowych w 2018 roku, Warsaw 2018, pp. 105–129; P. Szymanek, Ewolucja analizy danych nadsyłanych przez podatników organom w podatku od towarów i usług oraz podatkach dochodowych, „Doradztwo Podatkowe – Biuletyn Instytutu Studiów Podatkowych" 2021, vol. 4, pp. 21–26.

17 M. Jendraszczyk, Likwidacja VAT-7 i VAT-7K oraz wprowadzenie nowej, rozbudowanej wersji JPK_VAT – skutki dla podatników, „Doradztwo Podatkowe – Biuletyn Instytutu Studiów Podatkowych" 2020, vol. 2, pp. 19–22; A. Bartosiewicz, Tarcza antykryzysowa. Szczególne rozwiązania w prawie podatkowym, rozliczeniach ZUS i wybranych aspektach prawa pracy związane z COVID-19, Warsaw 2020, p. 60–61.

3. Temporary Trusted Profile

At the time of the pandemic, the legislator aptly recognized that the trusted profile and signature are the most accessible methods of identity verification. A qualified electronic signature as a paid solution, and the profile and personal signature as related to the production of a new ID card could not become a quick remedy for the pandemic lockdown and other limitations in interpersonal contacts. It turned out that establishing a trusted profile could be even easier, although the existing solutions made it possible to create it without having to visit the office, as had previously been the case.

Already at the beginning of the COVID-19 pandemic, the "temporary trusted profile" ("tymczasowy profil zaufany") was established. Article 20ca of u.i., that sets forth this solution, entered into force on the 31st of March 2020. This profile had a three-month validity period (with the possibility of extending this period) and a videoconference method of confirming the identity of the person requesting confirmation of a trusted profile. The course of video identification was defined in Article 20ca.5 of u.i.

Although the "temporary trusted profile" as a separate legal and IT solution no longer exists (Article 20ca of u.i. was repealed on the 16th of June 2021), the concept remained. New Article 20cb u.i. (entered into force on the 17th of June 2021) adapts the video identification for the purposes of confirming the "regular" trusted profile. A trusted profile confirmed in this way no longer has a reduced validity period. However, the minister responsible for computerization may suspend or stop providing the video identification service in the event of circumstances that could affect the security of the method of confirming identity. The actual extension of "temporary trusted profile" (which is reflected in the above-mentioned repeal of Article 20ca of u.i. and the establishment of a new Article 20cb of u.i.) resulted from its popularity – by the end of 2020, almost 38,000 trusted profiles were confirmed in this way[18].

4. Tax Portal and e-Tax Office

In IT solutions intended for taxpayers, the most extensive scope of application is a qualified electronic signature and (although to a lesser extent) signing the so-called "dane autoryzacyjne" ("authorization data") or "dane podatkowe" ("tax data"). When using the "e-Deklaracje" module, the use of the trusted profile is generally impossible. The usefulness of the trusted profile appears when submitting documents through the "Portal podatkowy" ("Tax Portal"), "Centralna Ewidencja I Informacja o Działalności Gospodarczej" ("Central Register and Information on Economic

18 Sejm RP- 9th term, Druk No. 1073 of 9 April 2021, p. 40.

Activity") or "Platforma Usług Elektronicznych Skarbowo-Celnych" ("Platform of Electronic Services for Treasury and Customs"). You can also sign "JPK_VAT z deklaracją" ("JPK_VAT with declaration") with a trusted profile.

It should be noted that signing documents is a different activity than logging in to IT tools. And so, the issue of having the user status and user profile on "Portal podatkowy" is specified in particular in § 2 of r.z.w.k. However, in the case of the "e-Urząd Skarbowy", the login methods indicated were "login.gov.pl (profil zaufany – trusted profile, e-dowód – e-ID, bankowość elektroniczna – electronic banking)", "dane podatkowe" ("tax data") and "aplikacja mObywatel" (mObywatel application). However, the functionality of "e-Urząd Skarbowy" is limited when logging in using "tax data". In turn, when it comes to signing letters under "e-Urząd Skarbowy", it was indicated that you did not need to have a qualified electronic signature, and each letter sent by a logged-in user of the e-Tax Office would be stamped on their behalf with the qualified seal of the Head of KAS (an identifier will be added to the seal and the user's first and last name).

It is worth mentioning that the use of the "aplikacja e-mikrofirma" is conditional on the use of "login.gov.pl" or "aplikacja mObywatel". The use of authorization data is not possible. It seems, however, that the "Klient JPK WEB" ("JPK WEB Client"), which replaced the above-mentioned "Bramka JPK" ("JPK Gate"), may be popular. Currently, the "aplikacja e-mikrofirma" has also been integrated with "e-Urząd Skarbowy".

Conclusions

Currently, two trends related to the use of electronic communication for tax purposes should be distinguished. First of all, this communication is used more and more often, and to a large extent it is the only acceptable one. The COVID-19 pandemic accelerated the IT transformation, including the benefits of switching to digital tools, unless the legislator had already imposed the obligation to use electronic communication. Second, the scale of cyber threats is increasing. In this respect, the direction of development is opposite to the previously indicated tendency. The pursuit of communication security limits the rapid technological development, and in particular, basing the digital transformation on simple solutions for identity verification.

The system of functioning of the electronic signature in tax matters is inconsistent with the regulations related to the electronic signature outside the tax administration. It is not limited to a qualified electronic signature, trusted signature, personal signature, and possibly a simple mechanism of identity verification using an account in an ICT system secured only with a password. The multitude of solutions may raise some doubts, but it is justified by the pursuit of the widest and fastest

possible availability of online services for tax purposes. However, the aim would be to limit electronic signatures to the three most important ones – a qualified electronic signature, a trusted signature, and a personal signature. It should be noted that the indication of the types of electronic signatures appropriate for a given activity occurs not only in o.p., but also (to a considerable extent) in executive acts.

The current state of digital transformation, and in particular the implementation of "e-Urząd Skarbowy" project, means that the structure of the ICT system is more important for the taxpayer and other entities than the legal regulations. The ICT system tells you what type of electronic signature is appropriate and how to apply it. However, the leading role of "Portal podatkowy" as a comprehensive and legally binding solution is becoming less and less clear. Only specific solutions are expressive, in particular, such as "E-Deklaracje", "aplikacja e-mikrofirma" or "Twój ePIT".

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New Income Tax Reliefs for Donations Made by Taxpayers for Purposes Related to Combating the Effects of the COVID-19 Pandemic

Abstract: In an effort to limit the effects of the COVID-19 epidemic determined by restrictions in economic activity and various areas of social activity, the catalogue of preventive actions was expanded by tax and legal instruments in the form of income tax reliefs inclining taxpayers to certain behaviours. The reliefs entitle taxpayers to deduct the value of donations made for the purposes of counteracting COVID-19 from the tax base. Two types of such donations have been distinguished, i.e., donations for entities participating in the treatment of infected persons and donations for educational institutions providing remote education. The aim of this article is to establish the premises justifying the claim that the tax reliefs for donations made by income tax payers are autonomous in relation to other tax preferences available to taxpayers making donations for other socially useful purposes. The hypothesis about the ad hoc and temporary nature of these tax reliefs has been verified as true, and the dominance of the motivating and stimulating function over their fiscal function has been demonstrated. Symmetrical solutions have been identified in the legal structure of the subject tax reliefs, as the donor uses a deduction from the tax base, while the recipient does not include the accepted donation in their income. The study uses the legal-dogmatic method and, in addition, the empirical analytical method to present the jurisprudence of courts in the field of applying tax reliefs due to donations made by income tax payers.
Key words: COVID-19 epidemic, educational institutions, healthcare entities, income tax, tax reliefs for donations

Introduction

The use of tax preferences, including those in the form of tax reliefs, is aimed at shaping the behaviour of taxpayers in order for it to be consistent with the specific objectives of the state tax policy. Especially in emergency situations, certain forms

of taxpayers' activity may be of significant importance for the state and the public finance. There is no doubt that the period of the COVID-19 pandemic required extraordinary measures. The nature of such measures can also be assigned to the changes in three acts regulating income taxation. They consist in extending the objective scope of donations made by taxpayers entitling them to reduce the tax base, and thus ultimately the amount of income tax imposed. The legislator's intention was to include taxpayers, or rather part of their financial and material resources, in the process of combating the effects of the COVID-19 pandemic, carried out by statutorily designated institutions or organisational units.

The aim of this study is to analyse and evaluate the solutions shaped by the provisions of tax law that regulate the principles and procedure of applying new tax reliefs entitling to an appropriate reduction of the income tax base due to cash and in-kind donations intended for reducing the negative effects caused by the COVID-19 pandemic. The hypothesis subject to verification was that the Polish tax legislator set the objective and subjective boundaries of these tax reliefs in an ad hoc and gradual manner, depending on the development of the epidemic in the country. As a result, in only one year since they were introduced, as many as three significant changes were made to the legal structure of these reliefs. The legal structure of the tax reliefs includes a strong incentive and promotional mechanism, the essence of which boils down to the application of increased – in relation to the value of donations – limits for deduction from the income tax base. Examination of the aforementioned changes and the project initiator's motives justifying subsequent amendments to the law enabled the identification of the main directions of evolution of the structure of the tax reliefs for donations made for the most desirable purposes in view of the needs arising in this extraordinary situation. The addressees of the legal regulations specifying the principles and procedure for applying the tax reliefs are natural persons, legal persons, and organisational units without legal personality, as taxpayers of income taxes relating to revenues from the sources indicated by the legislator.

The study uses the legal-dogmatic method and the empirical method (in order to identify, on the basis of the jurisprudence of courts, the main issues related to the application of legal provisions regulating the essence of tax reliefs for donations made for socially useful purposes).

1. Tax Reliefs as Tax Policy Instruments

Within the meaning of Art. 3 point 6 of the Tax Ordinance Act of 29 August 1997[1], the term "tax relief" refers to exemptions, deductions, reductions or decreases provided for in the provisions of tax law, the application of which results in

1 Consolidated text: Journal of Laws of 2020 item 1325 as amended.

a reduction of the tax base or the amount of tax, with the exception of the reduction of the amount of tax due by the amount of input tax in the field of tax on goods and services and other deductions constituting an element of the structure of this tax. In the quoted provision of the Act, the concept of tax relief is treated quite broadly and covers all kinds of deductions and reductions, the application of which in practice reduces the tax base and, in consequence, the amount of tax. From this point of view, reliefs and exemptions fulfil the same functions and purposes. The concept of tax exemption should be equated with another element of the tax structure, which is tax relief. It can be assumed that the juridical structure of the exemption belongs to the broader category of tax reliefs[2].

A characteristic feature of tax reliefs that distinguishes them from tax exemptions is their complex legal structure. Reduction of the amount of the tax or the tax base requires a detailed specification of factors such as: in what procedure it is to be executed (at the taxpayer's request or ex officio), in what amount (percentage or amount determination of the amount of the tax base reduction or the tax), and in what form (advance payment, on a one-off basis in a tax statement or declaration). The need to precisely determine all these elements of a tax relief sometimes leads to a significant expansion of the regulations governing it. Correct shaping of the structure of a tax relief requires expansive knowledge and diligence in legislative action. In this respect, the construction of tax exemptions is less complex. Most of them can be summarised in a single sentence, stating who or what is to be exempt[3].

By reducing the amount of the tax burden, tax reliefs have a sui generis negative fiscal function. The introduction of tax reliefs is related to various economic and social objectives determined by tax policy, the implementation of which is more important for the legislator than collecting the full amount of tax[4]. Tax policy is an important component of financial policy, which is a deliberate and purposeful activity of institutions and individual entities, consisting in setting goals and establishing financial instruments for their implementation[5]. The tax system and tax policy are closely interrelated. However, while the tax system should be relatively durable, tax policy is inherently more volatile. Tax decisions made are adjusted to a specific economic, social, and political situation. Tax policy concerns the use of various tax instruments within the applicable tax system[6], which are the result of the tax authority

2 J. Witkowska, Pojęcie ulgi podatkowej jako sankcji pozytywnej, „Przegląd Prawa Publicznego" 2017, no. 1, p. 116.

3 Judgement of the Provincial Administrative Court in Gorzów Wielkopolski of 24 September 2009, I SA/Go 292/09, Legalis no. 519522.

4 W. Nykiel, Ulgi i zwolnienia w konstrukcji prawnej podatku, Warsaw 2002, p. 42.

5 E. Ruśkowski, Finanse publiczne i prawo finansowe. Instrumenty prawnofinansowe i warunki ich stosowania, Białystok 2018, p. 41.

6 S. Owsiak, System podatkowy Polski w okresie transformacji – próba oceny, „Annales UMCS – Sectio H" 2016, vol. L, no. 1, pp. 18–19.

vested in the legislator. The essence of tax authority is the creation and change of systemic tax burdens, the goals of which correspond to the assumptions of tax policy determined by responsibility for public affairs[7]. Implementation of various economic and social intentions is what determines the scale of the tax policy. The greater the share of public expenditure in a given country, the more significant is the importance of tax policy in the overall economic policy[8]. In the subject literature it has been emphasised that tax reliefs, apart from the economic effect in the form of reducing the amount of the tax burden, may fulfil important motivating and stimulating functions. Taxpayers interested in taking advantage of the economic effect of tax reliefs undertake actions beneficial from the economic or societal points of view[9]. Tax reliefs are usually treated as an important instrument of the authorities' active influence on the processes occurring in the economy. Their primary aim is to support or stimulate the desired behaviour of taxpayers, as well as provide protection and social assistance to specific social groups as part of the social policy led by the state[10].

The use of tax reliefs in order to achieve the goals assumed in the tax policy is perceived differently by various environments. Proponents of liberal theories find that tax reliefs are only a means enabling the avoidance of paying taxes and bring harm to the development of the economy. Proponents of state intervention, in turn, consider tax reliefs an efficient tool to stimulate the behaviour of taxpayers, and thus an important element in constructing the fiscal policy of the state. It is an accurate observation that an extensive system of tax reliefs usually requires additional financial expenses related to their service, which makes it necessary to increase the taxation covering these costs. When combined with a carelessly implemented law-making process, tax reliefs create new interpretation-related problems, as well as new areas related to the general tax risk[11].

2. Subjective and Objective Aspects of Deductions for Donations Made for Purposes Related to Counteracting COVID-19

The catalogue of reliefs due to donations for various socially useful purposes, consisting in the application of deductions from the income tax base, has been

7 P. Pomorski, Komplementarność krajowej i wspólnotowej polityki podatkowej, „Krytyka Prawa" 2020, t. 12, no. 1, p. 121.

8 H. Wnorowski, Oddziaływanie polityki fiskalnej na gospodarkę jako pochodna różnych doktryn ekonomicznych, (in:) H. Wnorowski (ed.), Polityka fiskalna jako instrument poprawy efektywności gospodarczej w krajach OECD, Białystok 2008, p. 47.

9 K. Ciuman, Ulgi a preferencje podatkowe w podatkach dochodowych w Polsce, „Zeszyty Naukowe UE w Krakowie" 2018, no. 2, p. 181.

10 M. Sosnowski, Społeczny aspekt opodatkowania dochodów osób fizycznych w Polsce, „Studia Ekonomiczne – Zeszyty Naukowe UE w Katowicach" 2015, no. 209, pp. 193–194.

11 W. Wyrzykowski, P. Kasprzak, Ulga podatkowa jako instrument realizacji pozafiskalnych funkcji podatków, „Zarządzanie Finansami i Rachunkowość" 2016, no. 4, pp. 20–21.

extended by a new type of relief, the purpose of which is to support specific entities in counteracting COVID-19. The catalogue already included reliefs in respect of donations made for purposes related to: public benefit activities[12], religious worship, voluntary blood donation[13], and vocational education in public schools. From 31 March 2020, it was supplemented with a new type of relief, the introduction of which is directly related to the effects of the COVID-19 pandemic. The inclusion of these regulations in the transitional and final provisions of tax acts substantiates the statement that their application is ad hoc. This conclusion also results from some of the structural elements of this new tax relief which clearly emphasise its incidental nature.

The tax relief is available to payers of the following taxes: personal income tax[14], corporate income tax[15], and flat-rate tax on registered income[16]. This, however, does not mean that such a deduction may be applied to any income or revenue of the above-mentioned taxpayers. The right to apply tax reliefs due to donations for purposes related to counteracting COVID-19 is granted to taxpayers of personal income tax whose income is taxed according to the tax scale set out in Art. 27 of the Act on Personal Income Tax, as well as taxpayers who have chosen proportional taxation of income from non-agricultural business activity or special branches of agricultural production using the 19% rate adopted in Art. 30c of the Act on Personal Income Tax. Corporate income tax payers also can use the relief, but the preference does not apply to their separately and flat-rate taxed income (i.e. certain non-resident tax income, dividend revenue, and other revenue or income from participation in the profits of legal persons with their registered office or management in the territory of the Republic of Poland, income from a foreign controlled entity, revenue from the ownership of buildings, income from qualified intellectual property rights, and income from unrealised profits). The tax relief due to donations intended for counteracting COVID-19 also applies to taxpayers of flat-rate tax on recorded revenues obtained from non-agricultural business activity, from rental, sub-rental, lease, sub-lease agreements, or other agreements of a similar nature, as well as from sales of plant and animal products processed in a non-industrial way.

12 Act on Public Benefit and Volunteer Work of 24 April 2003 (consolidated text: Journal of Laws of 2020 item 1057 as amended).

13 Act on the Public Blood Service of 22 August 1997 (consolidated text: Journal of Laws of 2020 item 1777 as amended).

14 Act on Personal Income Tax of 26 July 1991 (consolidated text: Journal of Laws of 2020 item 1426 as amended).

15 Act on Corporate Income Tax of 15 February 1992 (consolidated text: Journal of Laws of 2020 item 1406 as amended).

16 Act on Flat Rate Income Tax on Certain Income Earned by Natural Persons of 20 November 1998 (consolidated text: Journal of Laws of 2020 item 1905 as amended).

The catalogue of entities to which taxpayers may make donations as part of counteracting COVID-19, entitling them to apply deductions from their tax base, is specified in the provisions of Art. 38g of the Act on Corporate Income Tax, Art. 52n of the Act on Personal Income Tax, and Art. 57b of the Act on Flat Rate Income Tax on Certain Income Earned by Natural Persons. The catalogue evolved with the development of the pandemic, i.e., the legislator extended it to include further subjective categories. In the period from 31 March 2020 to 23 June 2020, donations could be made to:

- entities performing medical activities, entered into the list prepared by the locally competent director of the provincial branch of the National Health Fund in consultation with the voivode[17];
- Material Reserves Agency, for the purposes of performing statutory tasks[18];
- Central Base of Sanitary and Anti-Epidemic Reserves, for the purposes of performing statutory activities[19].

From 24 June 2020, the catalogue was supplemented[20] with homes for mothers with under-age children and pregnant women, night shelters, shelters for the homeless (including with care services), support centres, family welfare homes, and social welfare homes. Another amendment to the tax acts, leading to the re-extension of the catalogue to include the COVID-19 Counteracting Fund, which is a state special-purpose fund, was made on 1 December 2020[21].

The framework of the tax relief in question is also determined by the goal that must be achieved in connection with the donations made by taxpayers. This goal is "counteracting COVID-19" within the meaning of Art. 2 of the Act on COVID-19 of 2 March 2020. This term covers all activities related to combating the infection,

17 The provision of Art. 7 in conjunction with Art. 36 sec. 3 of the Act on special solutions related to the prevention, counteracting, and combating of COVID-19, other infectious diseases, and crisis situations caused thereby of 2 March 2020 (Journal of Laws of 2020 item 1842 as amended) was in force for 365 days from the date of entry into force of this act.

18 From 23 February 2021, the duties of the Material Reserves Agency were taken over by the Government Strategic Reserves Agency operating on the basis of the Act on Strategic Reserves of 17 December 2020 (Journal of Laws of 2021 item 255 as amended).

19 The Central Base of Sanitary and Anti-Epidemic Reserves is a state budgetary unit subordinate to the Minister of Health – see the Ordinance of the Minister of Health of 16 June 2010 on the Central Base of Sanitary and Anti-Epidemic Reserves (Journal of the Minister of Health No. 8, item 51, as amended).

20 Act of 19 June 2020 on subsidies to the interest on bank loans granted to entrepreneurs affected by the effects of COVID-19 and on simplified proceedings for approval of an arrangement in connection with the occurrence of COVID-19 (Journal of Laws of 2020 item 1086 as amended).

21 Act of 28 November 2020 amending the Act on personal income tax, the Act on corporate income tax, the Act on flat-rate income tax on certain income earned by natural persons and certain other acts (Journal of Laws of 2020 item 2123 as amended).

preventing the spread, as well as preventing and combating the effects, including socio-economic effects, of the infectious disease caused by SARS-CoV–2 virus (the so-called COVID-19). Although the provisions of Art. 38g of the Act on Corporate Income Tax, Art. 52n of the Act on Personal Income Tax, and Art. 57b of the Act on Flat Rate Income Tax on Certain Income Earned by Natural Persons entered into force on 31 March 2020, it was on their bases that it was made possible to deduct donations made from 1 January 2020 until the end of the month in which the epidemic state announced due to COVID-19 would be cancelled. Thus, the tax relief was also made applicable to donations made before the entry into force of the provisions constituting the legal basis for these preferences in income taxation. It was assessed that the adoption of such special solutions in income taxes was dictated primarily by the intention to stimulate socially desirable behaviours, rather than to aid taxpayers by reducing their tax burden[22].

In the absence of any reservations in the content of Art. 38g of the Act on Corporate Income Tax, Art. 52n of the Act on Personal Income Tax, and Art. 57b of the Act on Flat Rate Income Tax on Certain Income Earned by Natural Persons, it can be assumed that taxpayers are entitled to apply the deduction for both cash donations and in-kind donations. When establishing the acceptable limits for deductions due to donations for the purposes of counteracting COVID-19, the legislator adopted the time aspect in the construction of the tax relief. The amount of the deduction depends on the period in which the taxpayer made the donation. In the case of donations made:

a) until 30 April 2020 – deduction was made for an amount corresponding to 200% of the value of the donation,
b) in May 2020 – deduction was made for an amount corresponding to 150% of the value of the donation,
c) from 1 June 2020 to 30 September 2020 – deduction was made for the amount corresponding to the value of the donation.

The deduction was also applicable when the donation was made with the participation of a public benefit organisation – if the donation was made to this organisation by the taxpayer, and then transferred by this organisation to an appropriate entity (i.e. a medical entity, Material Reserves Agency, or the Central Base of Sanitary and Anti-Epidemic Reserves) in the period from 1 January 2020 to 31 May 2020, and the organisation provided the taxpayer with written information about the month of transferring the funds from the donation and the name of the entity to which these funds were transferred. The concept of making the amount of

22 A. Bartosiewicz, Szczególne rozwiązania podatkowe związane z epidemią COVID-19, „Monitor Podatkowy" 2020, no. 4, p. 12.

deduction dependent on the time of making the donation was continued after the amendment of the tax acts and the extension of the period of application of the subject tax reliefs. In the case of donations made:

a) from 1 October 2020 to 31 December 2020 – deduction was made for an amount corresponding to 200% of the value of the donation,
b) from 1 January 2021 to 31 March 2021 – deduction was made for an amount corresponding to 150% of the value of the donation,
c) from 1 April 2021 to the end of the month in which the state of epidemic declared due to COVID-19 would be cancelled – deduction was made for the amount corresponding to the value of the donation.

By introducing limits on these deductions higher than the actual expenses of the taxpayer, it was intended to increase the social effectiveness of the new tax reliefs. In the subject literature, it is emphasised that one of the crucial problems related to the use of tax instruments aimed at effective shaping of the taxpayers' behaviour is the issue of the impact strength of the instrument. The exponent of the strength of a tax instrument is the amount of financial benefit associated with the instrument. If it does not provide the taxpayer with sufficient benefits, it will not arouse sufficiently strong interest and the expected reactions from the addressee[23].

In view of the daily reports on the epidemic situation in Poland, it can be concluded that the highest limits of deductions were set for donations made in the periods with the highest number of infections and the application of the most stringent restrictions regarding running a business. The most favourable legal solutions for taxpayers regarding the donations consist in: the possibility of also deducting donations made in the first quarter of 2020, i.e. before the entry into force of tax law regulations governing tax reliefs for such expenses; the use of a multiplier increasing the amount of the deduction in certain cases[24]; the right to deduction also for personal income tax payers taxed with 19% proportional tax and payers of flat-rate tax on recorded income[25].

The statutory reservations concerning the possibility of making deductions for the donations are also significant. The tax base may only be reduced by donations that were not deducted by the taxpayer pursuant to Art. 26 sec. 1 point 9 of the Act on Personal Income Tax, Art. 11 of the Act on Flat Rate Income Tax on Certain Income

23 G. Matysek, Uwarunkowania skuteczności instrumentów podatkowych, „Prace Naukowe UE we Wrocławiu" 2011, no. 173, p. 411.

24 B. Materna, Darowizna przekazana w celu przeciwdziałania chorobie zakaźnej wywołanej wirusem SARS-CoV–2, „Doradztwo Podatkowe" 2020, no. 4, p. 38.

25 D. Borzym, Darowizny dokonywane w związku z przeciwdziałaniem COVID-19, (in:) P. Tomczykowski (ed.), Jak uniknąć ryzyka odpowiedzialności podatkowej. Tax compliance, Warsaw 2021, p. 358.

Earned by Natural Persons, or Art. 18 sec. 1 of the Act on Corporate Income Tax, the taxpayer thus cannot deduct the same donation from the tax base twice. Other than that, donations for the purposes of counteracting COVID-19 are autonomous in relation to other donations entitling taxpayers to apply tax reliefs[26]. In particular, the amounts of deductions available in connection with donations intended for counteracting COVID-19 are not combined with the limits applicable in the case of using tax reliefs for other types of donations (amounting to 6% or 10% of the tax base, respectively).

Otherwise, donations for tasks related to counteracting COVID-19 are subject to the provisions of the tax acts regulating tax reliefs applicable to donations for other socially useful purposes. This means e.g., that it is not possible to deduct donations that have been returned to the taxpayer in any form or recognised by the taxpayer as tax deductible costs. Donations should be properly documented, i.e., donations in cash – with proof of payment to the recipient's payment account or their account in a bank or a cooperative savings and credit union, and non-cash donations – with a proof identifying the donor and the value of the donation, together with the recipient's declaration of receipt. The obligation to apply these requirements means that the legislator – by expanding the permissible catalogue of donations reducing the taxpayer's income – has preserved their integrity[27].

3. Tax Reliefs for In-Kind Donations in the Form of Laptops

From 24 June 2020, a tax relief was introduced for taxpayers of personal income tax, corporate income tax and flat-rate tax on registered income, entitling them to reduce their tax base for donating laptops. The legal structure of this tax relief clearly indicates that deductions from the tax base may only be made in the case of in-kind donations. It has been assessed that the introduction of remote education in connection with the COVID-19 epidemic revealed the scale of the problem of digital exclusion, especially among pupils. In this extraordinary situation, approx. 1 million students in Poland experienced various effects of digital exclusion[28]. The introduction of these tax reliefs can be considered an example of selective use of certain instruments of tax policy in order to achieve the intended goals. In this way,

26 D.M. Malinowski, Podatkowe regulacje dotyczące darowizn związanych z przeciwdziałaniem epidemii COVID-19, cz. 1, „Przegląd Podatkowy" 2021, no. 3, p. 3.

27 Letter of the Director of the National Tax Information of 10 December 2020, 0113-KDIPT2–1.4011.751.2020.4.MAP, LEX no 569231; Letter of the Director of the National Tax Information of 8 July 2020, 0115-KDIT3.4011.323.2020.2.AWO, LEX no 547293.

28 Substantiation of the draft act on subsidies to the interest on bank loans granted to provide financial liquidity to entrepreneurs affected by the effects of COVID-19 and amending certain other acts, form no. 382 of the Sejm of the Republic of Poland of the 9th term of office, p. 20.

the tax legislator attempted to motivate taxpayers to act in a strictly defined area of social activity[29].

The subjective and objective scope of this tax relief is determined by the provisions of Art. 52x of the Act on Personal Income Tax, Art. 38p of the Act on Corporate Income Tax, and Art. 57e of the Act on Flat Rate Income Tax on Certain Income Earned by Natural Persons. It can be used by taxpayers of personal income tax whose tax is determined according to the tax scale adopted in Art. 27 of the Act on Personal Income Tax and taxpayers whose income from non-agricultural economic activity or special branches of agricultural production is taxed with the 19% proportional tax in accordance with Art. 30c of the Act on Personal Income Tax. The tax relief is also available to taxpayers of corporate income tax, but excluding the possibility of applying deductions to income taxed separately with flat-rate taxes (i.e. certain non-resident tax income, dividend revenue, and other revenue or income from participation in the profits of legal persons with their registered office or management in the territory of the Republic of Poland, income from a foreign controlled entity, revenue from the ownership of buildings, income from qualified intellectual property rights, and income from unrealised profits). The catalogue of entities entitled to this tax relief also includes taxpayers of flat-rate tax on recorded revenues obtained from non-agricultural business activity, from rental, sub-rental, lease, sub-lease agreements or other agreements of a similar nature, as well as from sales of plant and animal products processed in a non-industrial way.

The condition enabling taking advantage of this tax relief is the taxpayer making an in-kind donation in the form of laptops or tablets. According to the current classification of fixed assets[30], they are classified in group 487 (computer units), which includes machines and devices for the input, processing, storage, and output of digital or analogue information, with their expected lifetime exceeding one year. Deduction of the value of such in-kind donation is applied if the computers are complete, usable, and manufactured not earlier than 3 years before the date they are donated. If the taxpayer donates multiple laptops under one donation agreement, the above-mentioned conditions must be fulfilled for each donated device.

Income tax payers are entitled to deduct from their tax base the value of laptop donations made only for:

1) authorities in charge of educational institutions,
2) non-governmental organisations,
3) entities conducting public benefit activities:

29 R. Zieliński, Funkcje podatków w doktrynie prawnofinansowej oraz ich znaczenie dla praktyki stanowienia prawa podatkowego, „Roczniki Nauk Prawnych" 2019, vol. XXIX, no. 1, p. 124.

30 Regulation of the Council of Ministers on the Classification of Fixed Assets (KŚT) of 3 October 2016 (Journal of Laws of 2016 item 1864).

a) legal persons and organisational units operating on the basis of the provisions on the relationship of the State to the Catholic Church in the Republic of Poland, on the relationship of the State to other churches and religious associations and on the guarantees of freedom of conscience and religion – if their statutory goals include conducting public benefit activities,

b) associations of local government units,

c) social cooperatives,

d) joint-stock companies and limited liability companies as well as sports clubs that are companies operating under the provisions of the Act on Sports of 25 June 2010[31], which do not operate in order to generate profit and allocate all their income to the implementation of statutory objectives and do not allocate their profit to division between their partners, shareholders, and employees,

– intended for the purposes of further transfer, free of charge, to authorities running educational institutions or to educational institutions,

4) the Nationwide Educational Network operator, i.e., the Scientific and Academic Computer Network – National Research Institute[32] – intended for the purposes of further transfer, free of charge, to authorities running educational institutions or to educational institutions.

When delineating the subjective limits of this tax relief, the legislator used the term "educational institution" to denote the final beneficiaries of the in-kind donations. It is a collective category which includes three types of organisational units, namely:

1) entities listed in Art. 2 points 1–4 and 7 of the Act of 14 December 2016 – Education Law[33], i.e. kindergartens (including special kindergartens, integrated kindergartens, kindergartens with special or integrated groups, as well as other forms of pre-school education), primary schools (including special schools, integrated schools, schools with pre-school, integrated, special, vocational, bilingual, sports and sports championships groups, sports schools and sports championships schools), secondary schools (including special schools, integrated schools, bilingual schools, schools with integrated, special, bilingual, military preparation, sports and sports championships groups, sports schools, sports championships schools, agriculture, forestry, sea, inland navigation and fishing schools), art schools, educational

31 Consolidated text: Journal of Laws of 2020 item 1133.

32 Act on the National Educational Network of 27 October 2017 (consolidated text: Journal of Laws of 2020 item 1334 as amended).

33 Consolidated text: Journal of Laws of 2020 item 910 as amended.

institutions (including school youth hostels enabling the development of interests and talents and the use of various forms of recreation and free time organisation), continuing education institutions and vocational training centres enabling the acquisition and supplementation of knowledge, skills and professional qualifications, as well as youth educational centres, youth sociotherapy centres, special educational centres, and special educational centres for children and adolescents requiring the use of special organisation of learning, working, and upbringing methods, as well as rehabilitation and education centres enabling children and adolescents with intellectual disabilities or children and adolescents with multiple disabilities to fulfil the obligation of completing a pre-school program and compulsory schooling;

2) universities within the meaning of the provisions of the Act of 20 July 2018 – Law on Higher Education and Science[34],

3) care and educational institutions within the meaning of the provisions of the Act on Supporting the Family and the System of Foster Care of 9 June 2011[35].

The legal structure of the tax reliefs due to in-kind donations of laptops uses also the time criterion. In the original version, the tax legislator limited the application of this tax relief only to donations made in the period from 1 January 2020 to 30 September 2020; however, due to the prolonged state of epidemic, the provisions of the tax acts were amended accordingly[36]. The amendments provided for making such donations until the end of the month in which the epidemic state announced due to COVID-19 would be cancelled. Similarly to the above-mentioned relief for donations made for purposes related to counteracting COVID-19, the possibility of increasing the deductible amount in the event of donating laptops at a specific time during the ongoing epidemic was also used. Thus, the donations made during periods of particularly intense effects of the COVID-19 epidemic were rewarded. Therefore, for non-cash donations made:

– until 30 April 2020 – deduction was made for an amount corresponding to 200% of the value of the donation;
– in May 2020 – deduction was made for an amount corresponding to 150% of the value of the donation;
– from 1 June 2020 to 30 September 2020 – deduction was made for an amount corresponding to 100% of the value of the donation;

34 Consolidated text: Journal of Laws of 2021 item 478 as amended.
35 Consolidated text: Journal of Law sof 2020 item 821 as amended.
36 A. Mariański, Ł. Porada, Zmiany w podatkach dochodowych w 2021 r., „Monitor Podatkowy" 2020, no. 12, p. 16.

- from 1 October 2020 to 31 December 2020 – deduction was made for an amount corresponding to 200% of the value of the donation;
- from 1 January 2021 to 31 March 2021 – deduction was made for an amount corresponding to 150% of the value of the donation;
- from 1 April 2021 to the end of the month in which the state of epidemic declared due to COVID-19 would be cancelled – deduction was made for an amount corresponding to 100% of the value of the donation.

The introduction of increased limits on deductions for donations of laptops was intended to additionally motivate taxpayers to make the donations in those periods when classes for pupils and students were conducted remotely. It was expected that this would supplement the equipment of educational institutions and universities with the equipment necessary for remote education.

4. Deductions for Donations Intended to Reduce the Effects of the Epidemic – Technical and Procedural Aspects

Taxpayers who have made both a cash donation and an in-kind donation for purposes related to reducing the effects of the COVID-19 epidemic have been entitled to deduct the value of the donation from their tax base or from their tax advance, but deductions from the tax advance may only be made by taxpayers who obtain income from non-agricultural business activity or from special branches of agricultural production. The application of a deduction from the tax base means that the effect of the tax relief is noticeable for the taxpayer only after the end of the tax year and the submission of their annual tax return. The deduction of such a donation from the advance on income tax or from the flat-rate tax on recorded income means that the effect of the tax relief is already noticeable for the taxpayer in the tax year in which such donation was made. It should be pointed out that the application of the latter of the above-mentioned methods of deduction is not possible in the case of donations for purposes other than reducing the effects of the COVID-19 epidemic, e.g., for other public benefit purposes or for the purposes of religious worship.

Tax reliefs for cash or in-kind donations for purposes related to counteracting COVID-19 do not have a fully autonomous tax and legal status, and are in a specific way related to the reliefs available to taxpayers making donations for other socially useful purposes. Donations made for the purposes of counteracting COVID-19 cannot be deducted if they were previously deducted from the tax base according to general rules, in particular as donations for the purposes listed in the Act on Public Benefit and Volunteer Work or donations of teaching materials and other things for public schools providing vocational education. The values of donations made

for purposes related to reducing the effects of the COVID-19 epidemic are also not deductible if they have been recognised by taxpayers as tax deductible costs.

In the scope not regulated by the provisions of transitional tax acts, the provisions of these acts regulating other types of donations entitling to income tax relief should be applied to the donations in question accordingly. This means e.g., that spouses entitled to joint taxation of the sum of their income deduct the value of such donations separately, i.e., each spouse from their own income, and the income thus reduced is only added up to determine the amount of personal income tax. If the subject of the donation are goods taxed with value added tax, then the amount of the donation is the value of the goods together with the value added tax, in the part exceeding the amount of the input tax, which the taxpayer has the right to deduct in accordance with the provisions on value added tax on account of making this donation. Taxpayers using the deduction of donations are required to include the amount of the donation made, the amount of the deduction, and the data allowing the identification of the recipient, in their annual tax return. In the event of the donation being returned, the recipient is obliged to provide the tax office with information about the donation returned to the taxpayer, within one month from the date of the return.

Making a donation for purposes related to limiting the effects of the COVID-19 epidemic should be documented with a proof of payment to the recipient's payment account or bank account (for cash donations) or a proof containing the donor's identification data and the value of the donation, together with the recipient's declaration of receipt (for in-kind donations). The requirement to properly apply the cited provision of the tax act means that the implementation of the tax relief does not take place by virtue of the law itself, due to the mere fact that the taxpayer has concluded and performed a donation agreement for the purpose indicated in the tax act. It is up to the taxpayer to assess whether, in a specific case, the calculation and declaration of the tax taking into account the tax relief satisfactorily meets all the necessary conditions of tax law in this respect, at the stage of self-calculation, which is carried out by the taxpayer on their own behalf and responsibility, without the interference of the tax authorities[37].

Conclusions

The changes in tax law determined by the effects of the COVID-19 epidemic are characterised primarily by a predetermined period of their validity, i.e., they are applicable only until the end of the month following the month in which the

37 Judgement of the Provincial Administrative Court in Warsaw of 27 February 2018, VIII SA/Wa 936/17, LEX no 2469811; judgement of the Provincial Administrative Court in Warsaw of 29 October 2015, III SA/Wa 136/15, LEX no 1967190.

restrictions in the sphere of social and economic activity, justified by combating the epidemic phenomena, will be lifted. The above-mentioned concept also includes tax reliefs on income taxes, which entitle taxpayers to apply deductions from their tax base for making cash and in-kind donations for purposes related to counteracting COVID-19. It can be concluded that both the taxes and their individual structural elements, including reliefs or other tax preferences, may be an important element of a consciously constructed and implemented tax policy aimed not only at achieving long-term, but also short-term objectives. The achievement of these objectives may cause the desired effects in various areas, e.g., economic, social, or other (culture, health, social security)[38].

In view of the research carried out on the tax legislation regulating the tax reliefs available to income tax payers due to cash and in-kind donations for the purposes of counteracting COVID-19, it can be stated unequivocally that these are tax preferences of an extraordinary and temporary nature. The extraordinary nature of the tax and legal regulations is directly determined by the uniqueness of the epidemic situation and the extensive effects of COVID-19 in all areas of human activity and the surrounding reality.

The temporariness of the analysed and assessed legal solutions has been repeatedly strongly emphasised by the legislator. First of all, it should be noted that the amendments to tax laws were made by provisions contained in special acts in the form of the Act on special solutions related to the prevention, counteracting, and combating of COVID-19, other infectious diseases, and crisis situations caused thereby, and the acts amending it. The regulation of these tax reliefs in the transitional and final provisions of individual tax acts clearly indicates that they have been assigned a temporary nature. The transitional provisions are special because their duration is predetermined, and the standards expressed in them will no longer be applicable from a certain point[39]. Each tax act that regulates the tax reliefs in question contains clear provisions specifying the starting point and the end point of their validity. According to these regulations, the taxpayer may deduct donations made from 1 January 2020 until the end of the month in which the state of epidemic announced due to COVID-19 will be cancelled.

In the legal structure of the reliefs for cash and in-kind donations for purposes related to counteracting COVID-19, a strong promotional accent is noticeable. The deduction limits have not been linked in a specific proportion to the tax base, as is the case with other tax reliefs, which entitle income tax payers to reduce it by no more than 6% or 10% of their income (for personal income tax, or corporate income

38 Z. Ofiarski, Ogólne prawo podatkowe. Zagadnienia materialnoprawne i proceduralne, Warsaw 2013, p. 33.

39 S. Wronkowska, M. Zieliński, Komentarz do zasad techniki prawodawczej z dnia 20 czerwca 2002 r., Warsaw 2012, p. 102.

tax, respectively). Deductions for donations made for the purposes of counteracting COVID-19 are made in the full value of the donation; moreover, donations made in the statutory periods entitle to an increased deduction limit of 150% or 200% of the donation value. The introduction of this additional preference is supposed to stimulate and motivate taxpayers.

The taxpayer's use of the reliefs for donations made for purposes related to counteracting COVID-19 does not exclude the possibility of applying deductions in the same accounting period justified by donations for other purposes, e.g., purposes listed in the Act on Public Benefit and Volunteer Work, religious worship, or vocational education in public schools. The two types of tax relief presented herein, i.e., tax relief due to cash and in-kind donations for counteracting COVID-19 and tax relief due to in-kind laptop donations, are also not competitive or mutually exclusive. The taxpayer may use both categories of tax reliefs introduced into the Polish tax legislation due to the epidemic within the same period, having fulfilled the necessary condition of a sufficiently high tax base.

This is justified primarily by the provisions of Art. 52y of the Act on Personal Income Tax, Art. 38q of the Act on Corporate Income Tax, and Art. 57f of the Act on Flat Rate Income Tax on Certain Income Earned by Natural Persons, according to which both categories of donations are to be included in the annual tax return with the use of deduction limits appropriate for the legal structure of each of the tax reliefs available. Simultaneously, the legal provisions regulating the tax reliefs in question do not exclude the possibility for taxpayers to use other preferences conditioned by donations for purposes not related to counteracting COVID-19. If a taxpayer makes separate donations to different beneficiaries, with their legal bases being non-identical provisions of tax acts, then for each donation they are entitled to apply a deduction from the tax base within the limit set for a specific tax relief.

Moreover, it has been demonstrated that from the point of view of substantive law, the presented tax reliefs should be treated as relatively independent from other tax reliefs the legal structure of which uses the theme of a donation made by the taxpayer. In procedural terms, the legislator did not actually apply such a separation, with the exception of allowing the possibility of using the tax relief for cash and in-kind donations for the purposes of counteracting COVID-19 not only after the end of the tax year in the form of a deduction from the tax base, but also during the tax year by a corresponding reduction of the tax advance. Otherwise, in particular with regard to the documentation of events giving entitlement to apply such reliefs, a requirement was introduced to properly apply the provisions regulating the documentation of other tax preferences in the event of donations for other socially useful purposes. The word "properly" emphasises the relativity of the reference consisting in the need to

take account of the special circumstances connected with adapting the content of the indicated provisions to those in which the reference is made[40].

The tax preferences related to cash and in-kind donations provided for the purposes of counteracting COVID-19 are used not only by donors, but also by recipient entities listed in the provisions of tax acts regulating the legal structure of the subject tax reliefs, e.g., entities performing medical activities, educational institutions, or universities. Income from non-agricultural economic activity of recipient entities does not include the value of donations received from 1 January 2020 to the end of the month in which the epidemic state announced due to COVID-19 would be cancelled. This means that the entities receiving such donations do not bear the tax burden on this account. The justification for adopting such a solution was a significant strengthening of the stimulating function of the tax reliefs in counteracting the negative effects of the epidemic situation.

In conclusion, specific tax and legal instruments, which also include income tax reliefs for donations made for purposes related to counteracting COVID-19, have positively motivated taxpayers to provide more intensive support for the activities of various entities in reducing the effects of the epidemic. In addition to the material effect of this support for the beneficiaries of donations, the integration of actions in a gesture of solidarity of all entities interested in solving the problems occurring in this extraordinary situation is also of great importance.

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Government Fund for Local Investments – Legal Aspects of Financial Support for Local Government Investment Projects during the COVID-19 Pandemic

Abstract: The effects of the COVID-19 pandemic in the form of a reduction in the own revenue of local government units and the corresponding reduction in their expenditure, including asset expenditure, were the determining factor for the introduction of extraordinary and temporary mechanisms to minimise this negative phenomenon from 2020. One of such solutions is the Government Fund for Local Investments, separated within the state special-purpose fund - the COVID-19 Counteracting Fund. The aim of this study is to establish the legal status of the Government Fund for Local Investments (Rządowy Fundusz Inwestycji Lokalnych - RFIL). The hypothesis about the temporary nature of this fund and its close relations with the COVID-19 Counteracting Fund has been verified as being true. It has been established that the RFIL does not have its own sources of revenue, and its financial resources are the result of separating a certain amount of funds accumulated in the account of the COVID-19 Counteracting Fund, which means it is, in fact, its sub-fund with clearly defined tasks to be performed. The RFIL-provided support is non-returnable, and its only beneficiaries are local government units. The resources transferred from this fund may only be used for the implementation of investment projects or for meeting asset expenses. The study uses the legal-dogmatic method and, additionally, the statistical analytical method, to present specific numerical values reflecting the importance of the RFIL support in relation to the own revenue of local government units.
Keywords: asset expenditure, COVID-19 epidemic, financial support for local government investments, local government, the Government Fund for Local Investments

Introduction

The COVID-19 pandemic, with the related periodic closures of individual economy sectors, occurring repeatedly since March 2020, and significant restrictions on the domestic mobility of the population in Poland, may have a negative impact on the fiscal efficiency of local government units' sources of own revenue. There is a probable risk of disturbing their budget balance, as well as reducing the outlays necessary to maintain continuity in asset expenditure, including investment expenses that guarantee the proper functioning and development of local government units. Threats may also relate to the sources of supply revenue (especially subsidies) provided to local government units from the state budget. One of the solutions that could minimise the occurrence of these negative phenomena is the Government Fund for Local Investments, established in 2020.

The aim of the study is to analyse and evaluate the applicable legal regulations regarding the Government Fund for Local Investments, including those that determine its legal status, the scope of financing, and the procedures for granting support. The hypothesis verified herein concerns the legislator's creation of an *ad hoc* mechanism of financial support for local government units in the form of a separate financial resource. The justification for its creation was the threat to the continuity of the implementation of investment projects by local government, which condition the proper satisfaction of the needs of local communities. In addition, an attempt was made to demonstrate that the separated financial resource is special-purpose in terms of its subject matter and dedicated only to local government units of the commune, poviat and voivodeship level; thus, the beneficiaries of the non-returnable support cannot be associations of such units or a metropolitan association operating in the Silesian Voivodeship. The study uses the legal-dogmatic method and, additionally, the statistical analytical method. The effects of the COVID-19 pandemic may be long-term; therefore, the period of application of the RFIL support mechanism is difficult to estimate, despite the fact that the fund includes relatively limited resources compared to the needs reported by local government units. The restitution of the fiscal efficiency of local government units' sources of revenue, both own and external (i.e., supply revenue), may turn out to be a long-term process, significantly exceeding the *caesura* determined by the time of eradication of the pandemic. There may emerge a need to apply similar legal solutions in the future in order to protect the general financial balance in local government.

1. General Assessment of the Situation of the Local Government Sector in Terms of Own Revenue and Investment Expenditure

Initial comparisons of the overall results regarding the situation of local government units in 2019 and 2020, in terms of their own revenue sources, may lead

to the conclusion that the COVID-19 pandemic has not yet caused a reduction in the fiscal efficiency of these sources. The sum of the own revenues of local government units in 2020, compared to the end of 2019, increased by 7.80%. However, this may be a short-term tendency, and its reversal in the following years cannot be ruled out. Table 1 below shows the dynamics of the total amount of own revenue of local government units in the five financial years preceding the starting point of the pandemic as well as in 2020, when restrictions were applied to business and other forms of social activity with varying degrees of intensity.

Table 1. Dynamics of the total amount of own revenue of local government units in 2015–2020

Year	Own revenue (in PLN million)	Dynamics of own revenue in relation to the previous year (in %)
2015	103 441.0	100.00
2016	106 683.5	103.13
2017	113 245.3	106.15
2018	124 042.1	109.53
2019	135 768.6	109.45
2020	146 356.5	107.80

Source: Główny Urząd Statystyczny (Central Statistical Office), Gospodarka finansowa jednostek samorządu terytorialnego 2019. Analizy statystyczne, Warsaw 2020, p. 30 (the information relates to the years 2015–2019), the data for 2020 was adopted on the basis of the collective information of the Ministry of Finance after four quarters of 2020, https://www.gov.pl/web/finanse/zestawienia-zbiorcze3 (30.05.2021).

In 2015–2020, there was a systematic increase of a few percent in the nominal total amount of local government units' revenues, including in 2020. The distribution of this increase, however, is not even. Communes and cities with poviat status remained in the best financial situation. At the same time, each year about 1,000 communes planned deficits in their budgets, financed mainly from returnable sources of revenue (credits and loans or bond issues). The possibilities of increasing the own revenues of poviats and voivodeships are limited for objective reasons, as the structure and catalogue of sources of these revenues are less developed compared to communes, which significantly affects their efficiency. When examining the overall good result regarding the own revenue of all local government units, one should bear in mind its geographical (territorial) differentiation, because some units noted both increases and decreases in their own revenues during this period. An important issue is also the identification of individual sources of own revenue in terms of their fiscal efficiency. The amounts of revenue obtained from these sources in subsequent years are presented in Table 2.

Table 2. Own revenue of local government units from individual sources in 2015–2020 (in PLN million)

Items	2015	2016	2017	2018	2019	2020
Share in CIT	7 076.1	7 441.2	8 381.1	9 697.6	10 901.6	11 325.5
Share in PIT	38 100.1	41 108.1	44 885.4	50 907.8	56 140.3	55 077.6
Agricultural tax	1 593.0	1 513.5	1 485.2	1 482.1	1 536.6	1 619.2
Property tax	20 171.3	20 774.5	21 829.0	22 617.4	23 299.4	24 215.9
Forest tax	229.7	295.9	295.0	304.3	298.0	301.3
Tax on means of transport	1 015.5	1 055.2	1 092.4	1 134.6	1 169.8	1 168.7
Tax deduction card	73.1	70.6	68.6	67.6	66.5	66.4
Inheritance and donation tax	246.4	279.3	293.5	297.9	326.5	304.5
Tax on civil law transactions	1 749.1	2 171.5	2 550.6	2 747.7	2 926.6	3 004.7
Stamp duty	408.7	430.1	461.3	477.1	502.4	485.6
Share in usage fee	298.7	359.6	411.1	429.3	433.5	420.9
Market fee	184.3	162.8	146.4	140.1	139.3	115.4
Property revenue	7 462.9	7 354.1	7 439.2	7 700.4	7 492.9	8 023.4
Other	24 832.1	23 667.1	23 906.5	26 038.2	30 535.2	40 227.4
In total	103 441.0	106 683.5	113 245.3	124 042.1	135 768.6	146 356.5

Source: Główny Urząd Statystyczny (Central Statistical Office), Gospodarka …, op. cit., p. 33 (the information relates to the years 2015–2019), the data for 2020 was adopted on the basis of the collective information of the Ministry of Finance after four quarters of 2020, https://www.gov.pl/web/finanse/zestawienia-zbiorcze3 (30.05.2021).

The data in Table 2 shows that among the different sources of local government units' own revenue, the most significant are shares in revenues from personal income tax. They amounted to, respectively: 36.83% in 2015; 38.53% in 2016; 39.64% in 2017; 41.04% in 2018; 41.35% in 2019; 37.63% in 2020. It should be emphasised, however, that this is a source of own revenue only in a formal sense, because the bodies of local government units are not entitled to any tax authority attributes relating to the structural elements of this tax. Proceeds from personal income tax are recorded in the state budget accounts, and then transferred in appropriate proportions to local government units. They express the statutory rights of local government units to a specific participation in the state tax, while constituting a form of division of public law revenues from a specific source between the state budget and the budgets of

local government units[1]. A similar function is performed by shares in revenues from corporate income tax, but their importance in the own revenues of local government units is smaller, and in the total amount of own revenue in the analysed period they amounted to: 6.84% (in 2015); 6.98% (in 2016); 7.40% (in 2017); 7.82% (in 2018); 8.03% (in 2019), and 7.74% (in 2020).

The legislator is free to make changes to the legal structure of income taxes, and thus influence the fiscal efficiency of these sources of own revenue. In particular, their efficiency is adversely affected by tax exemptions, tax reliefs, and lower tax rates introduced in subsequent years. From the point of view of a specific taxpayer, these solutions are attractive, but in a more general sense, they may be the cause of a decrease in budget revenues. This forces local government units to set the rates of local taxes and fees at levels close to the maximum statutory rates and to withdraw from the use of objective exemptions in local public levies. Local communities perceive these actions as an increase in the fiscal burden, for which the authorities of a specific local government unit are responsible. As a result, this means abstention from the possibility of using the tax authority guaranteed to local government units by constitutional and statutory provisions, and in the longer term, limiting the use of local tax policy instruments in creating economic and social development.

In the catalogue of local government units' own revenue sources, the most important factor is the real estate tax, the revenues from which supply the budgets of communes. In the analysed period, the share of revenue from this source in the total amount of own revenue of all units was at the following levels: 19.50% (in 2015); 19.47% (in 2016); 19.28% (in 2017); 18.23% (in 2018); 17.16% (in 2019), and 16.55% (in 2020). Despite the nominal increase in revenues from real estate tax in the subsequent years, their share in the total amount of local government units' own revenue systematically decreases. Increase in the total amount of own revenue of the units it is primarily determined by the progression of shares in income tax revenues, real estate tax revenues, and revenues from other sources (e.g., various fees charged for communal services).

Certain concerns may be raised by the situation regarding other sources of own revenue. As for agricultural tax, there was a slight increase in revenue in 2020 compared to the result achieved in 2019 - by 5.38%, but in 2015–2018, revenues from this source decreased: by 5% in 2016 compared to 2015; by 1.87% in 2017 compared to 2016; and by 0.21% in 2018 compared to 2017. The increase in revenues from forest tax in 2020 compared to 2019 was only 1.11%, meaning that it did not even reach the level of the inflation rate. These are sources of revenue typical of the budgets of rural communes, in which the revenues from shares in income taxes are not as important as for other local government units, in particular municipal communes or

1 P. Pest, Udziały jednostek samorządu terytorialnego we wpływach z podatków dochodowych, Warsaw 2016, p. 51.

cities with poviat status. The revenue side of the budgets of rural communes during the COVID-19 pandemic is particularly difficult.

In terms of other sources of local government units' own revenue in 2020, compared to 2019, there is a noticeable decrease in revenues, e.g. by 0.09% from the tax on means of transport, by 0.15% from tax deduction card, by 2.91% from the share in the revenues from usage fee, by 3.34% from stamp duty, by 6.74% from inheritance and donation tax, by 17.16% from the market fee. The share of these taxes and fees among the local government units' sources of own revenue is not significant and the decrease in revenues does not yet threaten the budgetary balance of the units. However, it should be noted that the aforementioned taxes and fees are primarily borne by local entrepreneurs. The negative impact of the COVID-19 pandemic, especially if it results in a reduction in the size of economic activity, may lead to a greater decrease in revenues from these sources of own income in the following financial years.

The analysis of the data contained in Table 2 shows that the revenues from the property of local government units are characterised by significant instability. The amounts of revenue from this source increase or decrease in individual years. There is no lasting trend in this respect, e.g., the revenues in 2016 decreased by 1.46% compared to 2015, and then increased in the two following years, while in 2019 they decreased by 2.69% compared to the previous year. In 2020, there was an increase in revenues from this source by 7.08% compared to the results for 2019. Revenues from other sources are systematically increasing and in 2020 reached the level of PLN 40.2 billion, which is an increase by as much as 31.74% compared to 2019.

The budget balance of local government units is also determined by the expenditure from their budgets. At the end of 2020, its total amount was PLN 299,240,623,803, i.e., higher by 10.68% (at the end of 2019, the expenditure amounted to PLN 280,208,973,920). The dynamics of the increase in expenditure was greater than the dynamics of the increase in revenues, both own and supply[2]. One tendency that should be noted here is the decrease in asset expenditure made by local government units. In 2020, it amounted to PLN 48,751,814,791 and decreased by 4.51% compared to 2019 (in 2019, local government units made asset expenditure for the total amount of PLN 51,052,364,871). A downward trend was also maintained in the case of investment expenditure, which is part of asset expenditure, as it amounted to PLN 48,973,869,354 in 2019, while in 2020 it was only PLN 46,633,434,579, meaning that its level decreased by 4.78%. What may be concluded from this is that in the first period of the COVID-19 pandemic, the total amount of expenditure from local government budgets increased, while asset expenditure, including investment

2 The dynamics indicators were calculated based on the collective information of the Ministry of Finance after four quarters of 2020, https://www.gov.pl/web/finanse/zestawienia-zbiorcze3 (30.05.2021).

expenditure, decreased. The increase in the total amount of expenditure is the result of an increase in current expenditure.

The developing trends in the area of own revenue and expenditure, especially asset expenditure, are a sufficient argument to justify the introduction of extraordinary and *ad hoc* solutions. One of such solutions is the separation of a special resource of public funds in the form of the Government Fund for Local Investments (RFIL).

2. Legal Status of the Government Fund for Local Investments

The Government Fund for Local Investments was established in 2020 pursuant to a resolution of the Council of Ministers[3], which was adopted on the basis of the provisions of the delegation of legislative powers[4] in force only from 18 July 2020. The fund was formally separated as of 25 July 2020 as a sub-fund, however remaining within the structural framework of the COVID-19 Counteracting Fund. According to the provisions of this law, the COVID-19 Counteracting Fund is a state special-purpose fund. Originally, the legislator did not plan to introduce a separate resource of public funds in the form of the RFIL. Pursuant to the delegation, in order to counteract the socio-economic effects of COVID-19, the Council of Ministers may define, by a resolution, the rules for the distribution and transfer of support for investment tasks for local government units, the scope, manner, and time limit of presenting information on the use of support, and indicate the budgetary part administrator, or the minister in charge of a specific department of government administration to provide this support. The wording of the delegation of legislative powers implies that it is optional, i.e., the legislator did not introduce an obligation to separate the RFIL.

Pursuant to Art. 93 sec. 1 of the Constitution of the Republic of Poland[5], resolutions issued by the Council of Ministers are internal and only apply to organisational units subordinate to the issuing authority. A constitutional provision establishes a general and mandatory model of an internal act. The basic element of this model is the scope of an internal act, which in no case may concern any entities that are not subordinate to the authority issuing such a legal act[6]. This means that

3 Resolution No. 102 of the Council of Ministers of 23 July 2020 on support for the implementation of investment tasks by local government units (M.P., item 662, as amended), hereinafter referred to as Resolution No. 102/2020/RM.

4 Art. 65 sec. 28 of the Act of 31 March 2020, amending the Act on special solutions related to the prevention, counteracting, and combating of COVID-19, other infectious diseases, and crisis situations caused thereby, and certain other acts (Journal of Laws item 568, as amended).

5 Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended).

6 I. Malinowska, Źródła prawa w Konstytucji RP z 1997 roku, „Przegląd Sejmowy" 2017, no. 6, p. 297; J. Zaleśny, Specyfika aktów prawnych o mocy wewnętrznego obowiązywania, „Studia

a normative act of an internal nature cannot contain standards addressed e.g., to local government units and their associations[7].

The legislator's permission for the RFIL to be created by way of a resolution of the Council of Ministers is a significant deviation from the rule of creating separate funds only by means of an act, which has applied in Poland for many years. This condition applies both to state special-purpose funds which are units of the public finance sector[8] and to other funds aimed at financing statutory tasks of particular importance for the implementation of the objectives of the state socio-economic policy (subsidies to interest on certain types of loans, thermal modernisation, rail transport modernisation, supporting student scholarship programmes, improving road infrastructure). The category of "other funds" formally remains outside the public finance sector, but can be recognised as public, both due to the status of tasks carried out with their participation, and the large use of budget subsidies[9].

It can be concluded, that due to the extraordinary circumstances related to the COVID-19 pandemic, an unusual solution was applied with regard to the RFIL. Nevertheless, the creation of each new separated fund leads to budget decomposition, i.e., to the debudgetisation of state finance, assessed critically in the doctrine, which is in opposition to the principle of budget completeness. Debudgetisation is, primarily, a way to minimise the impact of strict rules regarding financial management with the use of budget institutions[10]. According to the legal status in force as of 1 January 2021, 35 state special-purpose funds and approximately 20 other separate funds (entrusted to a state bank, i.e., Bank Gospodarstwa Krajowego, for administration) with statutory expenditure catalogues were established in Poland. It should be emphasised that an excessive number of such funds leads to a deepening of the phenomenon of debudgetisation, and limiting their number is one of the most important postulates included in the doctrine for many years[11].

The concept of identifying a special financial resource in Poland, from which support is provided for the implementation of local investments, is neither new nor original. The years 2003–2013 were the period of operation of the Municipal

Politologiczne" 2009, vol. 14, p. 282.

7 S. Wronkowska, M. Zieliński, Komentarz do zasad techniki prawodawczej z dnia 20 czerwca 2002 r., Warsaw 2012, p. 268.

8 E. Ruśkowski, Finanse publiczne i prawo finansowe. Instrumenty prawnofinansowe i warunki ich stosowania, Białystok 2018, p. 121.

9 J. Szołno-Koguc, Funkcjonowanie funduszy celowych w Polsce w świetle zasad racjonalnego gospodarowania środkami publicznymi, Lublin 2007, p. 179.

10 J. Stankiewicz, Debudżetyzacja finansów państwa, Białystok 2007, p. 35.

11 C. Kosikowski, Naprawa finansów publicznych w Polsce, Białystok 2011, p. 376.

Investments Development Fund[12]. A form of support in this period were preferential loans intended for the preparation by communes, associations of communes, poviats and poviat associations, of documentation necessary for the implementation of municipal investment projects to be co-financed from European Union funds, funds from the Financial Mechanism of the European Economic Area 2009–2014, and the Swiss-Polish Cooperation Program[13]. The fund was serviced by Bank Gospodarstwa Krajowego, and when the fund was liquidated, the unused funds were transferred to the state budget revenue account. They were used to provide special-purpose subsidies for local government units' own tasks in the field of development policy[14]. An important difference, compared to the aid granted from the Municipal Investments Development Fund, is that the RFIL grants non-returnable support.

It should be pointed out that, in the authorisation for the Council of Ministers formulated in Art. 65 sec. 28 of the Act of 31 March 2020, the term "fund" was not used in the context of this authority defining the principles of the distribution and transfer of support for investment tasks for local government units. The term "fund" was also not used in the title of Resolution No. 102/2020 of the Council of Ministers. However, the name of the Government Fund for Local Investments was used in § 2 sec. 1 of this resolution for the purpose of universal recognition of the subjective and objective catalogue of investment projects and beneficiaries of financial support granted in this regard. The financial resource in the form of the RFIL is part of the COVID-19 Counteracting Fund established by law and entrusted by the legislator to Bank Gospodarstwa Krajowego to administer. In conclusion, the term "fund" used by the legislator in relation to the RFIL should not be equated with the term "state special-purpose fund" within the meaning of the Act on Public Finance[15] or with the name adopted in separate acts to denote separate accounts kept at Bank Gospodarstwa Krajowego, from which specific programmes or tasks justified by the public interest are financed. The analysed statutory provisions show that the RFIL can be treated as a separate financial resource within the COVID-19 Counteracting Fund. The scope of this separation is determined by subjective premises, as the only beneficiaries of the support may be local government units, as well as objective premises, because only investment projects of these units may be supported.

12 Act on the Municipal Investments Development Fund of 12 December 2003 (Journal of Laws No. 223, item 2218, as amended).

13 M. Ofiarska, Z. Ofiarski, Administrowanie przez Bank Gospodarstwa Krajowego funduszami wspierającymi rozwój lokalnej przedsiębiorczości w Polsce – wybrane aspekty prawne, (in:) J. Ryszka, C. Woźniak (eds.), Prawnoadministracyjne regulacje samorządności i zarządzania państwem w Unii Europejskiej, Opole 2006, pp. 137–152.

14 Act on the Liquidation of the Municipal Investments Development Fund of 30 August 2013 (Journal of Laws item 1251, as amended).

15 Act on Public Finance of 27 August 2009 (consolidated text: Journal of Laws of 2021, item 305).

3. Subjective and Objective Scope of Projects Subject to Co-financing from the Government Fund for Local Investments

The Council of Ministers, exercising the authorisation provided for in Art. 65 sec. 28 of the Act of 31 March 2020, defined the rules for the distribution and transfer of support for investment tasks for local government units in the total amount of PLN 13,250,000,000. Pursuant to § 2 sec. 1 of Resolution No. 102/2020 of the Council of Ministers, funds included in the RFIL are allocated to financial support for:

1) communes, including cities with poviat status (in the total amount of PLN 5,000,000,000),
2) communes - intended for investments and investment purchases carried out in places where liquidated state-owned agricultural enterprises used to operate (in the total amount of PLN 250,000,000, with the possibility of increasing it by unused funds indicated in point 4),
3) poviats, not including cities with poviat status (in the total amount of PLN 1,000,000,000),
4) local government units (in the total amount of PLN 6,000,000,000, with the possibility of increasing it by unused funds indicated in points 1, 3 and 5),
5) communes included in the list of communes covered by support, constituting Annex 7 to the cited resolution (in the total amount of PLN 1,000,000,000) - intended for investment purchases or investments in generally accessible tourist infrastructure and communal infrastructure related to tourist services.

The structure of the primary distribution of the RFIL funds is presented below, taking into account the main categories of beneficiaries and the amounts of support allocated to them.

Table 3. Structure of the primary distribution of funds from the Government Fund for Local Investments

Items	Total amount of funds (in PLN)	Share in the total amount (in %)
Communes, including cities with poviat status	5 000 000 000	37.74
Communes with liquidated state-owned agricultural enterprises	250 000 000	1.88
Poviats, not including cities with poviat status	1 000 000 000	7.55
Local government units	6 000 000 000	45.28

Communes included in Annex 7 to Resolution No. 102/2020 of the Council of Ministers	1 000 000 000	7.55
In total	13 250 000 000	100.00

Source: own calculations based on Resolution No. 102/2020 of the Council of Ministers.

The highest amounts from the RFIL were initially intended for communes, due to the fact that all communes in Poland were to be covered by support, as well as for the category of beneficiaries called local government units. The latter pool of funds can be used by all beneficiaries of support listed in the provisions of Resolution No. 102/2020 of the Council of Ministers. The use of support under the beneficiary's own category does not deprive it of the possibility of applying for funding from the amount allocated to local government units, because communes and poviats have such a legal status. The amount separated for local government units, in fact serves as a reserve for investment projects eligible for financing after conducting the call for applications from interested units and their positive recommendation by the Commission for Supporting Local Government Units appointed by the Prime Minister.

It should be emphasised that the subjective scope of support is not fully consistent with the adopted name of the separate financial resource in the form of the RFIL. The name of this fund could suggest that the aid will be directed only to local government units, i.e., at the commune and poviat levels. Within the meaning of the provisions of the Act on Commune Local Government of 8 March 1990[16] and the Act on Poviat Local Government of 5 June 1998[17], communes and poviats are local government units of a local nature. The above-mentioned catalogue of beneficiaries of the support granted from the RFIL lists communes and poviats, but also local government units without a specific indication of their category, thus, apart from communes and poviats, they can also be voivodeships. According to the provisions of the Act on Voivodeship Local Government of 5 June 1998[18], it is a local government unit of a regional character, and certainly supra-local. In order to maintain the standards set out in the provisions of the so-called systemic local government acts, the legislator should change the name of the separate financial resource by replacing the phrase "local" with the term "local government". In such a situation, the support would be granted from the Government Fund for Local Government Investments, i.e., in accordance with the subject catalogue adopted in § 2 sec. 1 of Resolution No. 102/2020 of the Council of Ministers.

Certain interpretation-related doubts also appear in the context of the analysis of the provisions of Resolution No. 102/2020 of the Council of Ministers governing

16 Consolidated text: Journal of Laws of 2020, item 713, as amended.
17 Consolidated text: Journal of Laws of 2020, item 920.
18 Consolidated text: Journal of Laws of 2020, item 1668, as amended.

the objective framework of the RFIL support. In § 2 sec. 1 of Resolution No. 102/2020 of the Council of Ministers, in only two out of five cases, was it expressly stated that the financial support from the RFIL was intended for investment purposes, i.e., in communes, or rather in specific localities where liquidated state-owned agricultural enterprises used to operate, and in the communes indicated in Annex 7 to the cited resolution. In the remaining cases, only the beneficiaries of support were specified, which may be other communes, including cities with poviat status, as well as poviats (not including cities with poviat status) and, in general, all local government units. Nevertheless, this breakdown serves different purposes; namely, each of the five categories of beneficiaries was allocated a total amount of the RFIL support. The allocation of these amounts to individual categories of beneficiaries is not, however, definitive, as the legislator allows for parts of the funds that were not used under the originally agreed distribution to be transferred between certain categories of beneficiaries.

With regard to all categories of beneficiaries listed in § 2 sec. 1 of Resolution No. 102/2020 of the Council of Ministers, the provision of § 3 sec. 1 of the cited resolution applies, stating that the support from the RFIL may be used for asset expenditure only. Pursuant to the provisions of the Act on Public Finance of 27 August 2009, two basic categories of expenses are distinguished in the budgets of local government units, i.e., current expenses, and asset expenses. Pursuant to Art. 236 sec. 4 of the Act, in the asset expenditure plan, the planned amounts of asset expenditure are distinguished in the structure of sections and chapters, which include expenditures for:

- investments, and investment purchases, including programs financed with the participation of European funds, in the part related to the implementation of tasks of local government units;
- purchase and acquisition of stocks and shares;
- making contributions to commercial law companies.

Asset expenses from the local government unit budgets have been included in the form of a closed catalogue, and thus all other expenses are current[19]. The provisions of Art. 236 sec. 4 of the Public Finance Act also imply that investment expenditure is only one type of asset expenditure[20], so the terms "asset expenditure" and "investment expenditure" should not be construed as synonyms. In reference to this division of expenditures to the provisions adopted in Resolution No. 102/2020 of the Council of Ministers, it should be clearly stated that subsidising local government units from the RFIL in terms of their current expenses is not allowed, whereas in those cases for which the cited resolution provides for the possibility of supporting

19 K. Sawicka, Komentarz do art. 236, (in:) Z. Ofiarski (ed.), Ustawa o finansach publicznych. Komentarz, Warsaw 2020, p. 1264.

20 E. Chojna-Duch, Prawo finansowe. Finanse publiczne, Warsaw 2017, p. 323.

specific investment expenses, it is not possible to subsidise other asset expenses of local government units. In other cases, where the support has not been limited to investment expenditure only, it is possible to co-finance any type of asset expenditure from the RFIL.

4. Financial Support for Investments and Investment Purchases from the Government Fund for Local Investments

The beneficiaries of financial support for investments and investment purchases from the RFIL were divided into two groups in the provisions of Resolution No. 102/2020 of the Council of Ministers. The first one includes communes with localities where liquidated state-owned agricultural enterprises used to operate, and the investments or investment purchases must be made in these specific localities. According to the provisions of the cited resolution, the estimated value of a single investment in these localities, financed or co-financed from the RFIL, may not be lower than PLN 50,000 or higher than PLN 5,000,000. It was also stipulated that the maximum total cost estimate of all such investments in the commune may not exceed PLN 5,000,000. This means that the total amount of PLN 250,000,000 intended for co-financing or financing investments in localities where liquidated state-owned agricultural enterprises used to operate can be used by 50 communes (assuming the maximum use of funds per commune) or more (if some of them do not use the full limit of co-financing). In each of these situations, it is possible to increase the number of communes-beneficiaries, but only in the event that some of the funds not used by the beneficiaries of support included in separate categories are transferred, which is permissible in view of the provisions of the quoted resolution of the Council of Ministers.

Preferred investments and investment purchases made in localities where liquidated state-owned agricultural enterprises operated are listed in § 3a of Resolution No. 102/2020 of the Council of Ministers, with it being an open catalogue, as the list was preceded by the phrase "in particular". Support from the RFIL should primarily be allocated to the financing or co-financing of:

– construction, expansion, or reconstruction of: sanitary sewage system or local sewage treatment plants with sewage systems and sewage pumping stations; water pipes, gas network connections; roads within the village or access roads to the village; sidewalks, bicycle paths, traffic-calming elements, bus stops; public utility buildings in town centres enabling social integration and activation of residents; sports facilities, social and sanitary facilities; common rooms, library facilities; lighting in the village; fire stations;

– modernisation of property components from the resources of liquidated state-owned agricultural enterprises, including buildings, fences, and thermal modernisation of buildings;
– conservation, restoration, and construction work on a monument entered in the register of monuments.

The other group of beneficiaries of financial support from the RFIL includes the communes entered in the list constituting Annex No. 7 to Resolution No. 102/2020 of the Council of Ministers. The total amount of support for these communes is planned to be PLN 1,000,000,000, which may be spent on investment purchases or investments in generally accessible tourist infrastructure and municipal infrastructure related to tourist services. The list includes 203 communes located in only 6 out of the 16 voivodeships existing in Poland, namely: Lower Silesian (58 communes), Lesser Poland (82 communes), Opole (3 communes), Subcarpathian (27 communes), Silesian (28 communes) and Świętokrzyskie (5 communes) voivodeships; and the support may be used in specific localities from the area of each commune, rather than anywhere within the commune indicated in the list. An open catalogue of investment purchases or investments in generally accessible tourist infrastructure and in municipal infrastructure related to tourist services that may be supported by the RFIL is included in § 3b of Resolution No. 102/2020 of the Council of Ministers. According to the legislator, the co-financing should be allocated primarily to the construction, extension, reconstruction, or modernisation of:

– hiking, cycling, horse riding, water, ski, and winter tourism routes, as well as their marking;
– squares, promenades, parks, viewpoints;
– parking lots, recreational equipment rentals;
– open-air museums, museums, regional cultural facilities, and other tourist attractions;
– municipal infrastructure necessary for the provision or development of tourist services, in particular roads, sidewalks, sewage treatment plants.

The catalogue of preferred investment purchases or investments in generally accessible tourist infrastructure and municipal infrastructure related to tourist services is open. This means that other projects may also be supported by the RFIL; they should, however, be related to the aforementioned tourist infrastructure or municipal infrastructure. It should be emphasised here that in certain cases, doubts may arise with regard to interpretation, because the term "tourist infrastructure" has not been defined by the legislator, despite it being used in many legal acts, e.g. in the context of tasks performed by the Polish Tourist Organisation or by regional and local tourist organisations, which should rely on initiating, providing opinions on, and supporting development plans and modernisation of tourist

infrastructure[21], or necessary elements of the protection plan for the Natura 2000 areas[22]. Attempts to define this concept have been made in the subject literature. The broadest definition of the term "tourism infrastructure" includes: accommodation, gastronomy and catering, communication and accompanying services and facilities (i.e., tourist & recreational, and para-tourist institutions and equipment)[23]. In the literature, the accompanying (supplementary) tourist base, also referred to as tourism-related, is defined in a particularly broad way. It is postulated to include the following facilities and equipment: sports halls, tennis courts, swimming pools, golf courses, various cultural facilities (e.g., galleries, exhibitions, museums, theatres, cinemas), commercial and service networks, as well as items of technical and social infrastructure directly related to the service of tourist traffic (parking lots, access roads, social and service facilities)[24].

The term "tourist service" is defined in Art. 4 point 1 of the Act on Tourist Events and Associated Tourist Services of 24 November 2017[25]. It is a defined set of activities which includes: transportation of passengers; accommodation for purposes other than residence, which is not an inherent element of the transport of passengers; rental of cars or other motor vehicles; other services provided to travellers that are not an integral part of the above-mentioned activities. Support from the RFIL for investment purchases or investments in generally accessible municipal infrastructure related to tourist services, understood as described above, is preferred. The term "municipal infrastructure" is very broad, and it refers to, inter alia, the following areas: thermal energy, municipal waste management, public transport and roads, housing resources, water and sewage network[26]. It is aptly indicated in the literature that investments of local government units may concern both municipal technical infrastructure, i.e., various technical devices that make up this infrastructure, as well as municipal social infrastructure, e.g., healthcare, culture and arts, physical culture and recreation, gastronomy and catering, or public order[27].

21 Act on the Polish Tourist Organisation of 25 June 1999 (consolidated text: Journal of Laws of 2018, item 563).

22 Art. 29 of the Act on Nature Protection of 16 April 2004 (consolidated text: Journal of Laws of 2020, item 55, as amended).

23 M. Widz, Ocena atrakcyjności infrastruktury turystycznej Tunezji metodą wielowymiarowej analizy porównawczej, „Annales UMCS – Polonia – Sectio B" 2019, vol. LXXIV, p. 178.

24 J. Bański, Rola infrastruktury turystycznej w rozwoju turystyki na obszarach wiejskich, (in:) C. Jastrzębski (ed.), Infrastruktura okołoturystyczna jako element wzbogacający ofertę obszarów wiejskich, Kielce 2014, p. 34.

25 Consolidated text: Journal of Laws of 2020, item 2139.

26 W. Kozłowski, Kryteria analizy inwestycji infrastruktury komunalnej, „Studia i Prace WNEiZ US" 2017, no. 48/1, p. 44.

27 K. Witkowski, Inwestycje infrastrukturalne w realizacji usług publicznych „Studia Lubuskie" 2011, vol. VII, p. 267.

An amount and value framework regarding the support for municipalities for investment purchases or investments in generally accessible tourist infrastructure and municipal infrastructure related to tourist services is provided in § 2 sec. 3 and 4 of Resolution No. 102/2020 of the Council of Ministers. Support for a commune cannot exceed:

1) 40% of the amount of expenditure incurred by the commune for the implementation of investments annually on average in 2016–2020, but not more than PLN 8,000,000, or

2) 80% of the revenue lost by the commune due to the introduction, for some or all months of the first quarter of 2021, of the real estate tax exemption[28] on: land, buildings, and structures related to running a business in the field of:

   a) hotel services consisting in short-term, generally available rental of houses, apartments, rooms, beds, as well as places for setting up tents or car trailers, and the provision of related services within the facility[29], or

   b) services relating to the operation of over-ground cable railway, cable railway, T-bar lifts, and ski lifts, provided that they are not part of the urban or suburban transport system.

In the event that, based on the applications for support, it is likely that the total amount, i.e., PLN 1,000,000,000 (planned for this category of beneficiaries), may be exceeded, the support is proportionally reduced so as to ensure that the amount is not exceeded. It should be pointed out that the legislator does not provide for the possibility of increasing this total amount of support by funds unused by the beneficiaries qualified for the other subject categories.

5. Support from the Government Fund for Local Investments for Asset Expenditure of Local Government Units

With regard to the remaining three categories of beneficiaries, no detailed requirements have been formulated regarding the types of investment purchases or investments that can be subsidised from the RFIL. There is only the general order

28 Pursuant to Art. 15p of the Act on special solutions related to the prevention, counteracting, and combating of COVID-19, other infectious diseases, and crisis situations caused thereby of 2 March 2020 (Journal of Laws item 1842, as amended), commune councils were entitled to introduce, by resolution, for part of 2020 and for selected months of the first half of 2021, exemptions from real estate tax on land, buildings and structures related to running a business, to selected groups of entrepreneurs whose financial liquidity has deteriorated due to negative economic consequences related to COVID-19.

29 Art. 3 sec. 1 point 8 of the Act on Hotel Services and the Services of Tour Leaders and Tourist Guides of 29 August 1997 (consolidated text: Journal of Laws of 2020, item 2211).

that the support may only be allocated to asset expenditure, but the possibility of reimbursing expenses already incurred by the local government unit is eliminated. Support from the RFIL may also be used for own contribution to investments carried out with the participation of other public funds, to the extent that this contribution was supposed to be financed from the revenue of the local government unit (in this case, again, the support may be allocated only to asset expenditure and may not be a reimbursement of already incurred expenses). As for investments to which the provisions on state aid apply, the support may be allocated to own contribution - if the project implementation contract has not yet been signed and it does not result in exceeding the state aid intensity ceilings.

Annexes 1 and 2 to Resolution No. 102/2020 of the Council of Ministers set the maximum amounts of support from the RFIL to be granted to communes, including cities with poviat status (the list includes 2,477 communes, i.e., all communes functioning in Poland in 2021), and to poviats, excluding cities with poviat status (the list includes 314 poviats, i.e., all poviats functioning in Poland in 2021). The amounts of support planned for individual communes are significantly differentiated. The lowest amount of support is PLN 500,000, and the highest amount is PLN 93,500,000 (this amount is planned as support for five large cities, i.e., Warsaw, Kraków, Poznań, Łódź and Szczecin). The relatively low amount of support for Wrocław is conspicuous, amounting to PLN 66.4 million, while the amount planned for Gdańsk is PLN 81.5 million. The analysed list is dominated by amounts ranging from PLN 1 million to PLN 8 million. Relatively high financial support is planned for several cities in the Silesian Voivodeship, e.g., Gliwice (PLN 37.9 million), Sosnowiec (PLN 31.8 million), Tychy (PLN 25.3 million), Zabrze (PLN 22.8 million), Rybnik (PLN 22.9 million). For other larger cities, the planned amounts of support are as follows: Białystok (PLN 39.5 million), Gdynia (PLN 38.6 million), Opole (PLN 31.5 million), Rzeszów (PLN 29.7 million), Kielce (PLN 23.1 million), Olsztyn (PLN 20.6 million). The differences in the amounts of support are greater than would result from the budgetary potential of individual communes (cities) or their population, e.g., revenues in the budgets of the largest cities are planned for 2021 in the following amounts: Warsaw (PLN 20.6 billion), Kraków (PLN 6.4 billion), Wrocław (PLN 5.4 billion), Łódź (PLN 5.2 billion), Poznań (PLN 4.4 billion), Gdańsk (PLN 3.8 billion), Szczecin (PLN 3.2 billion). These cities have the following numbers of inhabitants: Warsaw (1.8 million), Kraków (767.000), Wrocław (639.000), Łódź (690.000), Poznań (532.000), Gdańsk (472.000), Szczecin (401.000).

The amount of financial support and its territorial distribution have been critically assessed in the literature, with particular emphasis on the use of political criteria rather than substantive premises taking into account economic arguments[30].

30 J. Flis, P. Swianiewicz, Rządowy Fundusz Inwestycji Lokalnych – reguły podziału, Warsaw 2021, pp. 10–11, www.batory.org.pl (30.05.2021).

Attention also has been paid to the use of arbitrary decisions in this respect and non-transparent procedures concerning the call for applications for the support and their evaluation[31].

The amounts of support available for particular poviats are also differentiated. The lowest amount of support is PLN 500.000, while the highest amounts are planned for the following poviats: Poznań (PLN 20 million), Kraków (PLN 16.3 million), Lublin (PLN 13.9 million), Ostrołęka (PLN 13.7 million), Wołomin (PLN 13.6 million), Rzeszów (PLN 12.3 million), Białystok (PLN 11.3 million), Radom (PLN 11.1 million), and Nowy Targ (PLN 10.8 million). In other cases, the support is planned for individual poviats at the level of approx. PLN 1 million to PLN 8.5 million.

The last group of beneficiaries of the RFIL support covers all local government units, so it also includes beneficiaries identified in the groups already mentioned above. This means that they can apply for support both from the total amount planned for their group as well as from the amount set aside for all local government units, which amounts to PLN 6 billion. In this regard, the legislator only formulated the general conditions and criteria for support in § 2 sec. 2 of Resolution No. 102/2020 of the Council of Ministers. Only investments may be the subject of support from the RFIL, but their minimum cost estimate should be PLN 400,000.

6. Procedure for Granting Support from the Government Fund for Local Investments

No universal procedure for granting support from the RFIL has been introduced, but the procedures of action have been differentiated depending on the groups of beneficiaries identified in the provisions of Resolution No. 102/2020 of the Council of Ministers and on the allocated total amounts of support for these categories. A rule has been introduced, applicable to all groups of beneficiaries, that the RFIL support is granted at the request of a local government unit, submitted by electronic inbox. Depending on the group to which the beneficiary has been qualified, the request should be submitted to one of the following:

– the Prime Minister, through the competent voivode - for applications submitted by communes (including cities with poviat status) or poviats;
– the competent voivode - for applications submitted by communes with localities where liquidated state-owned agricultural enterprises used to operate (the application should be accompanied by an opinion of the head of

31 D. Sześciło, A. Gąsiorowska, R. Łapszyński, S. Zakroczymski, Rządowy Fundusz Inwestycji Lokalnych: każdemu według potrzeb czy według barw politycznych?, Warsaw 2020, pp. 3–5, www.batory.org.pl (30.05.2021).

the relevant local branch of the National Centre for Agricultural Support, and the commune may submit up to three applications for no more than three investments);

– the competent voivode - for applications submitted by local government units (a maximum of three applications may be submitted, for no more than three investments) or communes listed in Annex No. 7 to Resolution No. 102/2020 of the Council of Ministers (only one application may be submitted).

The procedure for assessing the applications for support is also different. A voivode is an entity authorised to evaluate applications submitted by communes with localities where liquidated state-owned agricultural enterprises used to operate. Such applications are simultaneously reviewed by the head of the relevant local branch of the National Centre for Agricultural Support (the opinion should confirm the location of the investment in a locality where liquidated state-owned agricultural enterprises used to operate as well as the investment's compliance with the formal requirements set out in Resolution No. 102/2020 of the Council of Ministers). The voivode also assesses applications for support submitted by local government units. After assessing the above-mentioned applications, the voivode submits the recommended ones to the Prime Minister within 7 days after the date of closing the call for applications.

The next stage of qualifying the applications is their assessment by the Commission for the Support of Local Government Units appointed by the Prime Minister. The commission consists of: three representatives of the Prime Minister, two representatives of the minister responsible for economy, two representatives of the minister responsible for public finance, and two representatives of the minister responsible for regional development. The commission's task is to evaluate the applications and submit recommendations to the Prime Minister regarding the amount of funds awarded to individual applicants. The evaluation criteria to be used by the commission are listed in § 10 of Resolution No. 102/2020 of the Council of Ministers. When assessing the applications, the commission is obliged to take into account the following factors:

– implementation of the principle of sustainable development;
– the complexity of planned investments;
– limiting the emission intensity and the level of environmental interference of planned investments;
– cost of planned investments in relation to the planned revenue of the unit in the year of starting the investment;
– number of people to benefit from planned investments;
– ratio of the cost of planned investments to the projected effect;

- impact of planned investments on limiting the effects of natural disasters or preventing them in the future - if the planned investment might have such an impact;
- ensuring architectural, digital as well as information and communication accessibility, at least in terms of the minimum requirements set out in Art. 6 of the Act on Providing Accessibility to People with Special Needs of 19 July 2019[32] (accessibility should be the result of universal design or the application of rational improvement and consists, *inter alia*, in ensuring barrier-free horizontal and vertical communication spaces of buildings, ensuring information on the layout of rooms in the building - in visual and tactile or auditory forms).

Applications for support for communes (including cities with poviat status) and for poviats, could only be submitted from 27 July 2020 to 10 August 2020 through the competent voivode to the Prime Minister. On the basis of the information received from the voivode, the Prime Minister, by 31 August 2020, submitted an instruction for funds to be paid out to beneficiaries in amounts not higher than those set out in Annexes 1 and 2 to Resolution No. 102/2020 of the Council of Ministers. The qualification procedure with the participation of the Commission for the Support of Local Government Units was not applied in this regard. The method of allocating the funds, and in particular the non-transparency of the criteria for evaluating applications, has been assessed critically in the subject literature[33].

Applications submitted by communes listed in Annex 7 to Resolution No. 102/2020 of the Council of Ministers are processed in a very simplified manner. They are assessed by the voivode, only in formal and accounting terms, and then submitted to the Prime Minister, who, within one month from the date of their receipt, submits an instruction for the funds to be paid out to the communes.

Conclusions

After a detailed analysis of the sources of law and the assessment of the legal regulations concerning the RFIL, it can be concluded that the examined fund - despite the use of its proper name by the legislator - should not be treated as a separate unit of the public finance sector. It is, in fact, a financial resource, subjectively and objectively profiled, included in the COVID-19 Counteracting Fund[34]. In consequence, a legal

32 Consolidated text: Journal of Laws of 2020, item 1062, as amended.

33 R. Rudka, E. Kocemba, Rządowy Fundusz Inwestycji Lokalnych – podział środków w powiatach, „Analizy Samorządowe" 2021, no. 13, Warsaw 2021, p. 31.

34 B. Dziedziak, A. Ostrowska, W. Witalec, Uchwała budżetowa jednostki samorządu terytorialnego, Warsaw 2020, p. 54.

structure was created, that can be described as a "fund within a fund" or a "sub-fund of a state special-purpose fund". The RFIL was not directly called a state special-purpose fund. However, the adopted legal structure requires that with regard to the RFIL, as a component of a state special-purpose fund, i.e., the COVID-19 Countermeasure Fund, the legal regime adopted for such funds being units of the public finance sector in the Act on Public Finance, should be applied.

The hypothesis, according to which the RFIL is a mechanism for *ad hoc* support for local government units in the implementation of their investment projects, has been verified as being correct. It has also been demonstrated that the financial resources separated under the COVID-19 Counteracting Fund, referred to by the legislator as the Government Fund for Local Investments, is a collection of five cash flows dedicated exclusively to local government units. A dual method has been adopted for marking these cash flows, indicating the beneficiaries of support by specifying a certain category of local government units (e.g., communes and cities with poviat status) and stipulating the purpose of support in the form of investment purchases or implementation of investment projects. However, these cash flows are not ultimately separated from each other, as unused cash may be transferred between them.

The legal form used for the transfer of funds from the RFIL to local government units is the so-called support. It should be noted that the phrase "financial support" is used many times in the provisions of the Act of 31 March 2020, amending the Act on special solutions related to the prevention, counteracting, and combating of COVID-19, other infectious diseases, and crisis situations caused thereby, and certain other acts. The term "support" also appears in some provisions of the Act on Public Finance, but used in a different context, e.g., Art. 81 of the Act refers to medium-term loans and credits taken out from the European Community and its Member States by the State Treasury at the request of the Monetary Policy Council, in order to support the balance of payments. Moreover, at the request of the Council of the European Union, the State Treasury may participate in granting a loan to support the balance of payments of another Member State, on the terms specified in the Budget Act. In Articles 180a and 180b of the Act on Public Finance, added to the act in the pandemic period in March 2020, the Council of Ministers was authorised to transfer planned budget expenditures between parts and sections of the state budget in the event of an epidemic threat, or an epidemic being declared, as well as in the event of an economy mobilisation programme being launched. In such cases, the aim is to support the implementation of tasks resulting from the provisions on the prevention, and combating, of infections and infectious diseases in humans, as well as to support the implementation of tasks resulting from the provisions on organising tasks for state defence carried out by entrepreneurs.

The essence of "support" from the RFIL can be interpreted from the provisions of Resolution No. 102/2020 of the Council of Ministers. The support consists in

transferring financial resources for the implementation of investment tasks of local government units, or at least for increasing the asset expenditure of those units. However, it cannot be used to reimburse expenses already incurred. Two forms of support are allowed, namely: co-financing (partial financing of a specific project) or financing (where the amount of support fully covers the costs of the project). The support may refer only to a given project, or to supplementing the local government unit's own contribution necessary for the implementation of investments financed with the participation of other public funds, to the extent that this contribution was supposed to be financed from the revenue of the unit. The transfer of support from the RFIL does not occur *ex officio*, even for communes listed in Annex 7 to Resolution No. 102/2020 of the Council of Ministers, which have been assigned specific amounts of financial aid; instead, it is activated in each case, at the request of the interested entity, and after its positive verification. It can be concluded that the discussed support is similar to the specific-purpose subsidies listed in Art. 127 sec. 1 point 1 item f of the Act on Public Finances, i.e., intended for the financing or co-financing of the costs of investment implementation. The legislator did not, however, adopt the legal form of a subsidy for aid provided to local government units from the RFIL, thus departing from the application of certain legal rigours specific to special-purpose subsidies. In particular, this refers to the rigours relating to the method of controlling their use and the dates of settlement of funds received by the beneficiaries.

The funds received in the form of support from the RFIL have the status of profiled funds, i.e., in the local government unit's budget and in its multiannual financial forecast, they must be allocated to asset expenditure only[35]. This means that expenses financed with funds from the RFIL should be planned in sections and chapters consistent with their purpose, type of activity, and in paragraphs consistent with the economic nature of the expenses. The nature of the RFIL funds is asset, not current, and in the budget of a local government unit they should be included on the expenditure side[36].

Investment projects implemented with support from the RFIL must be properly marked. An information board attached to the completed investment or placed in its vicinity and the website of the local government unit should provide information on the amount of financing or co-financing from the RFIL, and the total value of the investment. The information board should be displayed for five years from the date of receipt of funds from the RFIL.

35 Resolution of the Regional Audit Chamber in Poznań of 20 January 2021, 2/119/2021, Legalis no. 2551123; Resolution of the Regional Audit Chamber in Kielce of 8 February 2021, 2/2021, Legalis no. 2533218.

36 Resolution of the Regional Audit Chamber in Kielce of 9 November 2020, 25/2020, Legalis no. 2500611.

The use of funds received in the form of support from the RFIL is subject to specific control. Pursuant to § 13 and § 14 of Resolution No. 102/2020 of the Council of Ministers, the local government unit that received the funds is obliged to submit annual information on the use of funds, as at the end of the year, to the competent voivode, via the electronic inbox. The information should be submitted within 30 days from the end of the period for which the information on the use of funds is prepared, and 60 days from the date of ending the disbursement of the funds provided. From the individual information obtained, the voivode prepares collective information on the use of funds, which they then transmit via the electronic inbox to the minister responsible for economy, the minister responsible for public finance, and the minister responsible for public administration.

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Special Legal Solutions Introduced in Regard to the Relationship with COVID-19 Affecting Municipal Budgets – Selected Issues

Abstract: The article discusses the legal changes related to the finances of communes, introduced into the Polish legal order to counteract adverse social effects and the economic aspects of the SARS-CoV–2 epidemic. It indicates the impact of new regulations on the website revenue for the budgets of municipalities and the powers of municipal authorities concerning, first and foremost, budget control and implementation. The solutions that were presented in detail have the goal of helping entrepreneurs most economically affected by the pandemic – such as the possibility of exemption from real estate tax by resolution of the commune council for part of 2020 and selected months of 2021, an extension of instalment payment deadlines for real estate tax, or the failure to collect the market fee in 2021. Essentially, only some of these solutions provide for financial compensation from the commune budgets. The consequences for the budgets of communes related to the changes indicated, in the context of the need to perform their tasks.
Keywords: budget of commune, impact of COVID to local finances, public finances, real estate tax

Introduction

The spread of SARS-CoV–2 virus infections made it necessary to introduce solutions that enable undertakings to minimize activities which are threats to public health, which would complement existing regulations, especially in the Act of 5 December 2008, on prevention and combating of human infectious diseases[1]. The new coronavirus was identified at the end of 2019 and was a strain previously unknown in humans. The economic impact of the spread of COVID-19 has occurred in a significant number of entrepreneurs whose plants have been closed due to cases of employee infection or placing them in quarantine, and the preventive measures taken affected consumer behavior in many industries (hotel industry, gastronomy, tourism, transport, entertainment, and cultural services, etc.).

It caused the overwhelming majority of entrepreneurs, especially from the small and medium-sized enterprise (SME) sector, to find themselves in a difficult situation. It became necessary to introduce instruments that would provide them with financial liquidity, enabling them to survive the most challenging period. The Health Minister's regulation from 20 March 2020,[2] until further notice was announced in the territory of the Republic of Poland, introducing an epidemic state in connection with SARS-COV–2 virus infections. Therefore, the resulting situation required the application of procedures that would provide support for entrepreneurs as quickly as possible. The first legal act was the Act of 2 March 2020 regarding special solutions related to the prevention, counteraction, and combating of COVID-19, other infectious diseases, and the situations that caused the crisis[3]. The purpose of the government's bill was to define the rules and procedures for prevention and fighting infection and take antiepidemiological measures and preventive measures to neutralize the sources of infection[4]. In intention, this regulation was to define the rules and procedure for the intersection of the dissemination paths of disease, tasks of public administration bodies in the field of prevention and fighting this disease, rights and obligations of beneficiaries and service providers, and persons staying on the territory of the Republic of Poland in the field of preventing, and combating, it, as well as the principles of covering the costs of implementing related tasks with counteracting COVID-19, in particular the mode of financing healthcare services for people suspected of, or actually, being infected with this disease for providing these people with appropriate access to diagnostics and treatment[5].

1 Journal of Laws of 2020, item 1845 as amended.
2 Regulation of the Minister of Health of 20 March 2020 on the declaration of an epidemic in the territory of the Republic of Poland, Journal of Laws, item 491, as amended.
3 Journal of Laws from 2020, item 374 as amended, hereafter covid act.
4 9th term of office, Sejm print no.265, received by the Sejm on March 1, 2020.
5 See: Justification to the act, p. 1.

This article discusses the legal solutions introduced in connection with the epidemic of SARS-CoV–2 that affect the budgets of local government units. They have also been compared with the previous legal status. Due to the multiplicity of introduced legal changes, only some of them will be discussed which, in the authors' opinion, play the greatest role in practice. The aim of the study is to evaluate them from the point of view of the citizens' situation, as well as their impact on the financial situation of public entities.

1. Reliefs and Exemptions from Real Estate Tax

Bearing in mind the need to come to the aid of entrepreneurs, especially those who, due to the introduced lockdown, could not operate at all, art. 15p. the Act of 31 March 2020, amending the act on special solutions related to preventing, counteracting, and combating COVID-19 and other contagious diseases, and emerging crises, and specific other laws[6] municipal councils were authorized to grant them certain tax privileges. In particular, the councils may introduce, by means of resolutions, for part of 2020 and selected months of 2021, exemptions from real estate tax: land, buildings, and building structures related to running a business, to the indicated groups entrepreneurs whose financial liquidity has deteriorated due to incurring negative economic consequences due to COVID19. Moreover, under art. 15q., Municipal councils may extend, by resolution, the terms of payment of real estate tax instalments, payable in April, May, and June 2020, no longer than to 30 September 2020 and payable in selected months of 2021, no longer than until 31 December 2021.

It should be remembered, however, that tax reliefs and exemptions are an optional, but crucial element of the tax structure, and shape the actual tax and legal status, excluding certain entities from taxation or narrowing its scope subject. In the Constitution[7], arts. 84 and 217 regulate the universality of the obligation to bear the tax burden, provided that it is introduced by the act, whose features (elements) are defined precisely by the Constitution. However, reliefs and exemptions are an exception to this rule and may be included in the regulations governing a specific tax – and then they are of a general nature or maybe discretionary, related usually with the existing, specific factual state, determined by the authority in tax proceedings. In normative terms, relief is understood as provided for in the tax law provisions: exemption, deduction, reduction, or reduction, and its application causes a reduction in the tax base or the amount of tax. According to art. 217 of the Constitution, relief, redemption, or dismissal of a nature subject matter may only be introduced by statute

6 Journal of Laws from 2020, item568, as amended.

7 Constitution of the Republic of Poland of 2 April 1997, Journal Of Laws of 1997, No. 78, item 483 as amended, hereinafter Constitution.

and constitutes this element of the legal and tax structure, which co-decides about the content of the tax obligation. They are most often related to the personal and economic situation of the taxpayer, while exemptions, in turn, are an expression of specific economic preferences of the state or local government units.

Reliefs and exemptions are often treated as incentive tax advantages to engaging capital, regulating supply and demand, developing economically backward regions, promoting employment, and as an instrument for mitigating income disparities. Among the most frequently indicated functions, relief and dismissal are to fulfil taxation's economic and social functions, which can, among other things, include: supporting investment activities, supporting the desired business activity, adjusting the tax assessment due to circumstances that weaken the taxpayer's ability to pay the and the nature of the activity performed (economic functions), and supporting certain taxpayers due to the nature of their activity, running a pro-family policy, protection of the disabled, and increasing taxpayers professional qualifications (social functions).

An example of such discounts introduced in 2020 is the discussed art. 15p of the established act. It should be emphasized that according to art. 7 sec. 3 of the Act of 12 January 1991, on local taxes and fees,[8] the commune council may introduce by resolution only exemptions other than those provided for in the act, but only of material nature. Thus, art. 15p is a deviation from the adopted principle and allows for the possibility of introducing real estate tax exemptions of a subjective nature but limited to "specified groups of entrepreneurs." The purpose of this regulation, resulting from the justification of the draft act introducing the described provisions, is that it is possible for municipalities within their framework tax autonomy the use solutions aimed at helping entrepreneurs particularly affected by the SARS-CoV–2 pandemic. Their job was to positively impact the economic situation of taxpayers and contribute to their improved financial liquidity[9]. Notably, eligible persons are not required to apply the relief resulting. Moreover, there is not required a separate decision by the tax authority confirming the right to be applied to a given entrepreneur's discount[10].

In resolutions of municipal councils, issued pursuant to art. 15p of the Covid Act, more detailed information related to the application of special discounts for entrepreneurs in connection with the spread of COVID-19 should be found. The

8 Journal of Laws of 2019, item 1170 as amended, hereinafter u.p.o.l.

9 See: Justification to the governmental draft act amending the act on special solutions related to the prevention, prevention and combating of COVID-19, other infectious diseases and emergencies caused by them, and some other acts, Sejm print number 299, http://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=299 (24.01.2021)..

10 See: R. Dowgier, Weryfikacja prawa do zwolnienia oraz przedłużenia terminu płatności na podstawie uchwały rady gminy podjętej w związku z epidemią COVID-19, „Przegląd Podatków Lokalnych i Finansów Samorządowych" 2020, no. 7, pp. 6–11.

task of the individual local government is to include in the content of the resolution, above all, the following content:

- a specific definition of the groups of entities that are entitled to the described reliefs;
- clarification of the concept of deterioration in financial liquidity concerned with negative economic consequences of COVID-19;
- indication of the method of documenting the deterioration of financial liquidity;
- specification of the subject of taxation that is subject to real estate tax reliefs – because it can only be land, buildings, or structures related to specific economic activities and all land, buildings, or structures of specific groups of entrepreneurs.

It should also be clearly emphasized that the wording of the provisions authorizes only entrepreneurs to apply for tax credits in the real estate tax. It is impossible to apply the exemption to non-conducting entities' economic activity – including for landlords who lease their real estate to others for running a business.

From the point of view of municipal budgets and the fiscal policy conducted by local governments within their financial sovereignty, however, this is not beneficial. The Covid Act does not provide for compensation for the communes that decide to introduce by a resolution an optional exemption from real estate tax for certain groups of entrepreneurs[11]. In addition, due to the limitations of the ability to drive economic activity due to the epidemic threat by some entrepreneurs, the income of local government units from their participation in the income tax from natural and legal persons has undergone considerable reductions. The growing losses caused to local governments are also not without significant restrictions on the use of local public transport or other services offered by their subordinate units. It all causes

11 The exception is the resources of the COVID-19 Countermeasure Fund, which, in accordance with § 2 point 5 of the Resolution No. 102 of the Council of Ministers of 23 July 2020 on support for the implementation of investment tasks by local government units, introduced by Resolution No. 6 of the Council of Ministers of 12 January 2021 amending the above-mentioned resolution, are directed to communes located in mountain areas, described in the list of communes covered by support, constituting Annex 7 to the resolution, in the total amount of PLN 1 000 000000. PLN, for investment purchases or investments in generally accessible tourist infrastructure and municipal infrastructure related to tourist services. It may amount to 40% of the amount of expenses incurred by the commune for the implementation of the investment, on average annually in 2016–2020, but not more than PLN 8 000 000, or 80% of the revenue lost by the commune due to the introduction, for selected or all months of the first quarter of 2021, based on art. 15p of the Covid Act, exemptions from real estate tax: land, buildings and structures related to running a business in the field of hotel services or services included in the Polish Classification of Activities in subclass 49.39.Z – operation of overground cable cars, T-bar lifts and ski lifts provided that they are not part of an urban or suburban transport system.

that – as follows from the research conducted – commune councils relatively rarely decided to undertake a resolution exempting certain groups of entrepreneurs from the real estate tax, about which is referred to in art. 15p of the Covid Act[12].

However, this does not mean that in other communes, entities that bear negative financial consequences cannot apply for tax relief. The economic and social consequences of the SARS-CoV–2 pandemic may justify the direct application of art. 67a of the Act of 29 August 1997 Tax Ordinance[13], allowing for the postponement of the tax payment deadline, distributing it in instalments, or cancelling tax arrears. This provision mentions two premises that may constitute the basis for granting the request – significant taxpayer interest, or public interest. It should be noted that they are independent of each other. These are general clauses, i.e., vague and undefined concepts which haven't been defined in the act. Thus, in practice, there are many problems related to assessing individual facts in terms of the occurrence of the premises as mentioned above. The tax authority has a certain discretion both in terms of interpretation concepts and assessing the taxpayer's position, ruling under administrative discretion. Importantly, these premises are not competing with each other, but because of the democratic rule of law, neither of them can by definition be considered more critical without examination of the specific case[14]. In the jurisprudence of tax authorities and administrative courts, it is assumed that the deterioration of the financial situation caused by the epidemic SARS-CoV–2 may constitute the basis for considering that there is an indication in a given case of substantial interest of the taxpayer, and even – e.g., in the case of entrepreneurs employing many employees – public interest. This is confirmed by the position of the Regional Chamber Of Auditors in Kielce, expressed in a letter of 17 April 2020, in which it was found that the tax authority may grant concessions at the request of the parties to the proceedings, justified by the deterioration of the financial condition in connection with the epidemic on under art. 67a of the O.p. and art. 67b of the O.p. It was emphasized that the related circumstances with the spread of COVID-19 could qualify as a natural disaster – which is defined in art. 3 sec. 1 point 1 of the Act of 18 April 2002 on the state of disaster[15] as a natural disaster or technical failure, the consequences of which are life-threatening or affect the health of a large number of people, property of great size, or large areas of the environment, and help and protection can only be effectively undertaken with extraordinary application measures in cooperation with various bodies and institutions, and specialized

12 For example, in the Śląskie Voivodeship, as at the date of this article, only 53 out of 167 municipalities have decided to adopt at least one resolution temporarily exempting entrepreneurs from real estate tax for selected months of 2020 or 2021.

13 Journal of Laws of 2020, item 1325 as amended, hereinafter O.p.

14 See judgment of the Supreme Administrative Court of 31 October 2012, file ref. II FSK 510/11.

15 Journals of Laws of 2017, item 1897 as amended.

services and formations operating under uniform leadership. Although there is no state of emergency, which is the state introduced in Poland for natural disasters, the SARS-CoV–2 pandemic situation meets the criteria for recognition as a natural disaster. Moreover, the literature emphasizes that a natural disaster means abnormal phenomena that occur independently of human activity and result from the action of the forces of nature or a force higher than man's control. Consequently, this state may significantly reduce or deprive the taxpayer of property and income opportunities[16].

What is important the concessions granted to entrepreneurs under the Covid Act should be recognized as state aid. According to art. 15zzzh of the covid act, support referred to, among other things, in its art. 15p, and also granted based on art. 67a § 1 point 1 and 2 of the act in connection with COVID-19 (for tax due after 31 December 2019 or in arrears after that date). This is the state aid which is granted in order to remedy a serious disturbance in the economy pursuant to art. 67b § 1 point 3 point b O.p.

2. The Exclusion of the Market Fee Collection in 2021

Another legal solution adopted in connection with the state of the epidemic SARSCoV–2, which affects the income side of municipalities' budgets, is an exclusion of collection of the market fee in 2021 referred to in art. 15 sec. 1 u.p.o.l. It was introduced in art. 31zzm of the Covid Act and added to it on 16 December 2020 under art. 1 clause 1 point 38 of the Act of 9 December 2020 amending this act.

For failure to collect the indicated fee, local government units are entitled to compensation from the COVID-19 Counteracting Fund. The basis for its calculations constitutes the income from the market fee for the year 2019 in the reports of local government units, the obligation of which is to prepare results from the provisions of the Act of 27 August 2009 on public finances[17] taking into account corrections of reports submitted to competent regional chambers of accounting records, by 30 June 2020.

However, it should be emphasized that the establishment of the market fee is optional; therefore, the described support in the form of compensation will apply only to those communes which, in 2019, obtained their revenues on this account. No toll collection market means that it is not due, no matter in what form this obligation would be fulfilled – and it concerns both natural persons, , persons legal entities, and organizational units without legal personality, selling at marketplaces[18].

16 See: M. Kępa, A. Zając-Caboń, Skutki podatkowe klęski żywiołowej, „Radca Prawny" 2011, no. 7, pp. 710.

17 Journal of Laws of 2021, item 305 as amended, hereinafter u.f.p.

18 See: R. Dowgier, Zawieszenie poboru opłaty targowej w 2021 r., „Przegląd Podatków Lokalnych i Finansów Samorządowych" 2021, no. 2, pp. 10–12.

3. Changes in the Principles of Budgetary Economy in Communes

The legislator also introduced significant changes in the field of individual local government finances. Art. 15zn of the Covid Act[19] authorized the authorities executive: commune head (mayor, city president), poviat board or board voivodeships to:

1) changes in the plan of income and expenditure of the budget of a local government unit, including transfers of expenditure between headings of budget classification;

2) activities referred to in article 1 paragraph. 1 point 2–4 of the u.f.p., i.e., activities to which – under this provision, the decision-making body may authorize the executive to the delegation of certain powers to carry out transfers of planned expenditure other organizational units of this unit; delegation of powers to other local government organizational units for contracting liabilities under contracts, the implementation of which in the financial year and subsequent years it is necessary to ensure the continuity of the entity's operations and from which payments arise that go beyond the financial year, and making changes to the revenue plan and expenses related to:

   a) changing the amounts or obtaining payments from the budget of appropriations European countries, as long as these changes do not worsen the budget result,

   b) changes in the implementation of the project financed with the participation of European Union funds or aid measures, as long as these changes do not worsen the resulting budget,

   c) reimbursement of payments received from the budget of European funds – which means that if the council did not grant the authority to such authorization, it currently arises from the Act of 2 March 2020 on unique solutions related to preventing, counteracting, and combating COVID-19;

3) changes in the long-term financial forecast and in the local government entity's budget expenditure plan related to the introduction of new investments, or purchases, , by the entity, as long as the change does not worsen the budget result units;

4) changes in the purpose of the special-purpose reserve created in the local government unit's budget without obtaining the opinion of the committee responsible for the budget of the authority constituting this unit. In this case, the resulting limitation does not apply to art. 259 paragraph. 3 of the u.f.p. that expenses transferred from the general reserve may not be increased planned

19 Art. 15zn added by art. 1 point 14 of Shield 1.0 amending this Act as of 31 March 2020.

expenses for salaries and remuneration from the employment relationship, if separate the regulations do not provide otherwise;

5) changes in the limit of liabilities, underdrawn credits, and loans and issued securities referred to in art. 89 sec. 1^{20} and art. 90^{21} of the u.f.p., consisting of increasing the limit of liabilities to cover a temporary deficit of the budget of a local government unit occurring during the year.

Moreover, according to art. 15zn point 5 of the Covid Act, the executive bodies may create a new special-purpose reserve without obtaining the opinion of the decision-making committee responsible for the budget of this unit, transferring the blocked amounts of expenditure to it pursuant to art. 260 sec. 1 of the u.f.p. The provision referred to provides that the executive body may decide to block planned budget expenditure in cases finding: mismanagement in specific units, delays in the performance of tasks, excess funds, violation of the principles of financial management.

Blocked expenses transferred to the new reserve may increase expenses planned for salaries and wages, as restrictions have been lifted provided for in art. 259 sec. 3 and art. 260 sec. 4 u.f.p. prohibiting increasing funds for this goal[22].

In light of the above, a question arises as to the rationale of such a solution. On the one hand, granting these powers to executive bodies will accelerate the process; of course, deciding what, from the point of view of the efficiency of the institution's operation in the state epidemic, is of significant importance. On the other hand, it is impossible not to notice that this solution significantly limits the role of the legislative bodies.

Authorities constituting local government units – which are also inspection authorities – they are obliged to check and verify, under the applicable regulations, financial statements and, on this basis, to grant or refuse to grant discharge for the implementation of the budget. By local government system laws, councils (assemblies) control the activity of executive bodies, and for this purpose, they set up audit committees, which give an opinion on the implementation of the budget

20 It should be remembered that a local government unit may take out credits and loans and issue securities for: covering the temporary budget deficit occurring during the year, financing the planned budget deficit, repaying previously incurred liabilities due to issuing securities and contracted loans and credits, ahead of financing activities financed with funds from the budget of the European Union.

21 This provision entitles local government units to contract loans in state special purpose funds and in state and local government legal entities included in the public finance sector, for the financing of investment expenditure and investment purchases, including those included in the projects provided for in the Long-Term Financial Forecast.

22 See: J. Glumińska-Pawlic, Komentarz do rozdziału 6 ustawy o samorządzie powiatowym, (in:) B. Dolnicki (ed.), Ustawa o samorządzie powiatowym. Komentarz, Warsaw 2020, pp. 808–809.

and submits a request to the council in the matter of discharge. Committees also perform other audit tasks commissioned by the boards, not violating the control powers of other committees appointed by the councils. Essential from the point of view of proper financial management, it is important to keep the deadlines related to ensuring the proper fulfilment of obligations in public finance, including in the field of keeping records and financial reporting. Noting the difficulties that may arise in connection with the announced state of the emergency epidemic and the state of the epidemic, the legislator – taking into account the necessity of ensuring the proper performance of these obligations, granted to the minister competent for public finance matters, the right to define other time limits by way of an ordinance fulfilling the obligations referred to in:

– the Act of 29 September 1994 on Accounting[23] and in the regulations issued based on this act;
– the Public Finance Act and executive acts were issued based on this act.

If a new approval deadline is specified in the regulatory financial statements of a local government unit, the decision-making body takes a resolution on discharge for the executive body, not by 30 June, but by on the date specified in that regulation. The audit committee presents to the authority, which is a local government unit, an application for discharge for the commune head (mayor, city president), poviat board, or voivodeship board instead of up to 15 June, it has 15 days before the date specified in the regulation, as provided for art. 15zzh (1) of the Covid Act. This solution should be assessed positively in terms of creating conditions for implementing the tasks of self-government bodies.

During the epidemic threat or epidemic state, the legislator introduced the possibility of collective bodies – legislative and executive units of local government, remotely. According to art. 15zzx of the covid act:

1) decision-making bodies of local government units,

2) collective bodies: executive bodies in local government units, in associations of local government units, in a metropolitan association, in regional accounting chambers, local government appeals boards, and in auxiliary bodies of local government units

– may convene and hold deliberations, sessions, meetings, assemblies, or other forms of actions appropriate for these authorities and take decisions, including resolutions, using means of distance communication or by correspondence (remote deliberation mode). Meeting in this mode is ordered by a person authorized to chair a given decision-making body of a local government unit and another body acting collegially. This also applies to collegial internal bodies, such as committees and

23 Journal of Laws of 2019, item 351 as amended.

teams operating in decision-making bodies local government units. The adopted solution should be assessed positively; it states that it is an alternative form that allows councillors to implement the planned local government duties. The quoted provision may supplement the primary form of stationary organization of the work of decision-making bodies and conduct their deliberations[24]. The dominant view in the jurisprudence of administrative courts is that activities related to organizing the work of the commune council should include activities related to its proper functioning, "consisting in activities related to the preparation of the draft session, notification of councillors about the place and date of the session, and the agenda, preparation of relevant documents and other materials for them, receiving complaints, or motions addressed to the council"[25]. The counsellor should be able to properly perform duties by the oath taken[26]. He confirms also that art. 7 sec. 1 of the European Charter of Local Self-Government[27] states that the status representatives elected to local authorities should free in free carrying out their mandate. Thus, a councillor in a commune, county, or province also in the state the epidemic should have conditions for performing duties for the sake of the good the unit and its inhabitants. The form of remote conduct of council committee meetings and participation in them can also serve to fulfil the mandate of a councillor[28], especially considering difficulties related to maintaining a direct, permanent relationship with the inhabitants of given communities that exist objectively in the state of epidemics. In this situation – in a persistent epidemic – it becomes imperative to exercise the mandate in this form. Then the limit is granted to the councillor based on, e.g., art. 24 sec. 2–7 of the Act of 8 March 1990 on Municipal Self-Government[29] (if it does not infringe the personal rights of other people) the right to:

- obtain information and materials;
- access to the premises where this information and materials are available;
- access to the activities of the commune office, as well as companies with the participation of the commune, companies trade with the participation of municipal legal entities, municipal legal entities and plants, enterprises, and

24 See: M. Augustyniak, B. Przywora, Organizacja wewnętrzna rad gmin i powiatów oraz sejmików wojewódzkich. Analiza prawna ze wzorami dokumentów, Warsaw 2020, p. 152.

25 See: judgment of the Provincial Administrative Court in Gliwice of 21 January 2020, file ref. no. III SA/Gl 926/19.

26 See: B. Przywora, Etyka radnych i innych wybieralnych funkcji w samorządzie terytorialnym, (in:) R. Hauser, Z. Niewiadomski, A. Wróbel (eds.), System Prawa Administracyjnego, t. 13, Etyka urzędnicza i etyka służby publicznej, Warsaw 2016, p. 465.

27 The European Charter of Local Self-Government drawn up in Strasbourg on October 15, 1985 (Journal of Laws of 1994, No. 124, item 607 as amended).

28 See: B. Jaworska-Dębska, Mandat radnego, (in:) M. Stahl, B. Jaworska-Dębska (eds.), Encyklopedia samorządu terytorialnego dla każdego, Warsaw 2010, pp. 103–104.

29 Journal of Laws of 202, item 1372 as amended, hereinafter u.s.g.

other communal organizational units, subject to the provisions on legally protected secrecy (section 2).

A councillor exercising his mandate in an epidemic emergency or state of an epidemic can remotely submit complaints and motions of residents of the commune and present them to the council and the executive body. It can also inform citizens about the affairs of a given self-governing community and the activities of its organs (e.g., on bans and restrictions introduced in the state of an epidemic) undertaken to counteract the adverse effects of a pandemic and its negative economic consequences.

According to art. 15zzy of the Covid Act, in the event that during the period of validity, a state of epidemic threat or a state of an epidemic, the public administration office or other entity performing public tasks will become incapable of performing the tasks in whole or in part, the voivode may entrust performance by order the tasks of this office or entity, in whole or in part, within a specified period, to another a public administration office or an entity performing public tasks. The performance of these tasks may be entrusted to a group of the same offices' public administration or the same entities performing public tasks at the cost of the public administration office or other entity from which it took over these tasks to exercise.

However, this means a significant limitation of the independence of the activities of local government[30] units territorial and arbitrary decisions of the voivode who will alone decide by an administrative act whether an individual had become "incapable of performing tasks in whole or in part"[31].

4. Changes in the Possibility of Incurring Liabilities by Communes

Pursuant to art. 15zo. Covid Act – during the period of the state of epidemic emergency or epidemic status, and the associated risk of a material breach of the terms and conditions for the implementation of the commune's tasks, the commune head (mayor, city president) may make changes and actions referred to in art. 15zn points 1 and 2, or the commune issuing the obligations referred to in art. 91 paragraph. 2 u.f.p. does not require obtaining the opinion of the regional accounting chamber on the possibility of repayment of liabilities, if these liabilities were provided for in the debt amount forecast and the commune obtained a positive result, the opinion of the regional audit office on this forecast – until the epidemic emergency or epidemic state is revoked.

30 See: J. Glumińska-Pawlic, Samodzielność finansowa jednostek samorządu terytorialnego w Polsce. Studium finansowoprawne, Katowice 2003, p. 216–271.

31 See: J. Glumińska-Pawlic, B. Przywora, Realizacja uprawnieńorganu stanowiącego i kontrolnego jednostki samorządu terytorialnego w stanie epidemii, „Samorząd Terytorialny" 2020, no. 7–8, pp. 129–138.

In turn, according to art. 15 paragraph. 1 of the Covid Act, in 2020, the commune will make budget changes that may exceed the ratio referred to in art. 242 ufp by the amount:

- planned, current expenses incurred in order to perform the tasks related to counteracting COVID-19 in the part in which they were financed by property incomes or revenues in question in art. 217 section 2 items 1–4 and 7 of the u.f.p.;
- the planned loss in income resulting from the occurrence of COVID-19.

The income loss from COVID-19 is reduction of income, calculated as the difference between the planned commune income in the changed budget and the planned income shown by the entity in the report for the first quarter of 2020. These revenues are the tax revenues referred to in art. 20 paragraph 3, art. 22 sec. 3 and art. 24 sec. 3Act of 13 November 2003 on the income of local government units[32].

In addition, at the end of the 2020 financial year, the assessment of compliance with the rule set out in art. 242 of the u.f.p. will take into account the current incurred expenses in order to perform tasks related to the prevention of COVID-19 and the loss in the income made resulting from the occurrence of COVID-19.

The limitations set out in art. 243 paragraph. 1 of the u.f.p. concerning the repayment of commune liabilities does not apply to redemptions of securities, repayment of credit and loan instalments, together with interest due and discount, respectively issued or incurred in 2020 up to the equivalent of the amount of the deficit in the performed income, resulting from the occurrence COVID-19. When establishing a relationship limiting the amount of the municipal debt repayment:

- for the years 2020–2025, the current expenditure of its budget is reduced of current expenditure on debt servicing; in this respect, art. 9 paragraph 3 of the Act of 14 December 2018 on the amendment of the u.f.p. and some others acts (Journal of Laws, item 2500);
- for the year 2021 and subsequent years, running expenses of the commune's budget are subject to less current expenses incurred in 2020 in order to perform the tasks related to counteracting COVID-19.

However, incurring liabilities may not threaten the performance of public tasks by the commune in the budget year and subsequent years. The Regional Audit Chamber, when issuing an opinion on the repayment of these liabilities, will assess in particular the impact of planned commitments for the implementation of public tasks.

32 Journal of Laws of 2021, item 38, as amended.

According to art. 15, at the end of the fiscal year 2020, the total amount of the municipality's debt may not exceed 80% of the total revenue made for that financial year, and the total amount of debt at the end of the quarter may not exceed 80% of that planed in a given fiscal year of income. However, these relations may only be unsaved in the event that the commune complies with the limitation in the repayment of liabilities specified in art. 243 paragraph. 1 of the act, without applying the exemption specified in art. 15 paragraph 1 of the Covid Act[33].

Conclusions

There is no doubt that the challenges of fighting a coronavirus pandemic, and its negative economic effects, require far-reaching involvement of the legislator in creating new solutions that, on the one hand, their task would be to support entrepreneurs particularly affected by the restrictions introduced during an epidemic, and on the other hand, to maintain stable and safe state public finances – including municipal ones. This is especially true in the case of local government; hence many new regulations apply to this scope.

The primary task and purpose of self-government bodies is to serve the local community[34]. The servant role of local government is updated in a special way in an epidemic, becoming a challenge in implementing the law tasks. At the same time, however, financial difficulties may arise with the performance by self-government units wholly from the implementation of the tasks entrusted to them by law. This especially applies the basic tasks of the commune, serving the needs of the local community government (Article 166 of the Constitution). It should be emphasized that local government performs a significant part of public tasks assigned to it under statutes at its own risk. Failure to perform the assigned tasks is the basis for interference by supervisory authorities: the Prime Minister, voivodes, and for financial matters – regional accounting chambers. The legislator has granted many powers to those authorities, incl. the right to request information and data on their organization and operations necessary for performance of their supervisory powers (e.g., art. 88 of the act on u.s.g.) and in an emergency – the right to apply personnel supervisory measures (e.g., establishing a receivership pursuant to art. 97 on u.s.g.)[35].

33 See: J. Glumińska-Pawlic, Komentarz do ustawy o samorządzie gminnym. Suplement do art. 51, (in:) B. Dolnicki (ed.), Ustawa o samorządzie gminnym. Komentarz, Warsaw 2021, pp. 842–845.

34 See: J. Regulski, Idea samorządności, rzeczywistość samorządności, wyzwania samorządności, „Samorząd Terytorialny"2015, no. 1–2, pp. 7–10.

35 See: M. Masternak-Kubiak, Prezes Rady Ministrów jako organ nadzoru nad samorządem terytorialnym, (in:) Ratio est anima legis, Księga jubileuszowa ku czci profesora J. Trzcińskiego, Warsaw 2007, pp. 335–336; B. Dolnicki, Pojęcie, geneza i podstawy prawne nadzoru i kontroli nad działalnością samorządu terytorialnego, (in:) A. Wierzbicka (ed.), Nadzór i kontrola nad samorządem terytorialnym w Polsce i w Austrii, Warsaw 2019, pp. 16–17.

Accordingly, the solutions described in this article that have been introduced as part of the fight against the coronavirus pandemic, and which are related to the budgets of municipalities, should be assessed not only from the point of view of the interests of the entrepreneurs for whom the possibility of running a business has been limited, but also having regard to local government units which must meet the basic community needs and tasks. This is all the more important as it is during the ongoing state epidemic, the incomes of local government units have decreased, and the number of their tasks increased. Lack of proper legal mechanisms that will ensure sufficient amounts on the revenue side of municipal budgets may even limit the financial independence of local government units, which should be considered a serious threat to Poland's idea of local self-government.

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Legal Instruments to Support Borrowers (Consumers and Entrepreneurs) in Connection with the COVID-19 Pandemic in Poland, and Vietnam

Abstract: The COVID-19 pandemic restrictions introduced in 2020 in many countries on economic activity and gainful employment have in many cases, reduced the incomes of individual households. As a result, the actual ability to meet credit obligations has declined, particularly for those who have lost their jobs or livelihoods. The COVID-19 pandemic has become a significant challenge for economies, national authorities, and entrepreneurs, including borrowers. This article aims to analyse the legal regulations in Poland, and Vietnam, introducing instruments to support borrowers, consumers, and entrepreneurs, in connection with the COVID-19 pandemic. The authors will present the legal basis for the instruments to support borrowers provided in the studied countries, indicate their legal nature, forms, and conditions of using them. They also compare legal solutions introduced in connection with the pandemic aimed at mitigating its adverse effects on borrowers in Poland, and Vietnam, to indicate whether cultural differences and differences in legal systems, as well as individual approaches to the domestic credit market, affected the choice of legal instruments for supporting borrowers in connection with the COVID-19 pandemic, or not.
Keywords: anti-crisis regulation, COVID-19, consumer credit, credit vacation, lender, trader

Introduction

The declaration of a COVID-19 pandemic in many countries in 2020 and the need to introduce numerous restrictions in the functioning of the economy, the public service sector, as well as in the private sphere, forced many countries and legislators to take appropriate action. Their purpose was to protect and ensure the safety of the, broadly understood, interests of consumers[1] and other entities operating in the market, including entrepreneurs. In addition, the occurrence of the CoVID-19 pandemic and the economic and social constraints caused by it has had a huge impact, not only on the economies of individual countries[2], but also on the financial situations of households and businesses, while affecting household confidence and highlighting the importance of preparing household budgets for an unexpected loss of income.[3] As was shown in an earlier study (2015) by The Pew Charitable Trusts[4], even unexpected but straightforward events cause an impact on the financial economy of households, especially of the most vulnerable, less educated, and less wealthy, let alone in a pandemic.[5] Many households and businesses had difficult and unstable financial situations, lost liquidity, and thus experienced environmental threats to their economic well-being.[6] The airline, automobile, hotel, and restaurant industries suffered the most significant losses[7], and many people experienced reductions in pay, or were made unemployed.[8] Communities all over the world face these problems . Therefore aid solutions were sought, both for businesses and individuals who found

1 A natural person makes a legal transaction with an entrepreneur who is not directly related to his/her business or professional activity. Thus, art. 22 1 of the Act of 23 April 1964 – Civil Code (Journal of Laws 1964, No. 16, item 93, as amended).

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3 Ł. Kurowski, Household's Overindebtedness during the COVID-19 Crisis: The Role of Debt and Financial Literacy, "Risks" 2021, no. 9(4), 62.

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5 European Consumer Payment Report 2020, https://www.intrum.com/media/10154/intrum-ecpr-2020.pdf (13.10.2021).

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8 K. Parker, R. Minkin, J. Bennett, Economic fallout from COVID-19 continues to hit lower-income Americans the hardest, Washington DC: Pew Research Centre, 2020, https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/ (13.10.2021).

themselves in difficult financial situations, lost their jobs, lost their source of income, or whose economic conditions deteriorated.[9] Thus, they were forced to seek new sources of financing to cover current operating costs.[10] All over the world, solutions have been, and are being, sought to mitigate sudden economic shocks, maintain the functioning of primary sectors of the economies of individual countries[11] in the face of rising social expectations.[12]

The economic crisis triggered by the COVID-19 virus outbreak also seriously affected the financial sector and the credit market (credit sector). The loss of part of the income caused real concerns about the ability to service the debt, especially in Central and Eastern European countries.[13]. The economic consequences of the COVID-19 pandemic and its impact on the global economy, and consumers' financial situations, have been analysed by commercial research institutes and academic centres around the world: Teresiene[14], van der Wielen and Barrios[15], Baker[16], Kanapickiene[17]. The

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10 Cf. V.V. Acharya, R.F. Engle III, S. Steffen, Why did bank stocks crash during COVID-19?, "National Bureau of Economic Research" 2021, https://www.nber.org/papers/w28559 (13.10.2021); A. Demirgüç-Kunt, A. Pedraza, C. Ruiz-Ortega, Banking sector performance during the COVID-19 crisis, "Journal of Banking & Finance" 2021, https://www.sciencedirect.com/science/article/pii/S0378426621002570#bib0002 (13.10.2021).

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16 S.R. Baker, N. Bloom, S. Davis, S.J. Terry, COVID-Induced Economic Uncertainty…, *op.cit.*

17 Cf. Ł. Gębski, The Impact of the Crisis Triggered by the COVID-19 Pandemic and the Actions of Regulators on the Consumer Finance Market in Poland and Other European Union Countries, "Risks" 2021, no. 9, 102, https://doi.org/10.3390/risks9060102; M. Zaleska (ed.), The financial impact of COVID-19. Polish perspective, Warsaw 2021; J. Koleśnik, The Cognition Effect and its Mitigation in the Modern Banking System, "European Research Studies Journal" 2021, no. 24, https://www.ersj.eu/journal/2008 (10.10.2021); R. Kanapickiene, D. Teresiene, D. Budriene,

consumer finance market in all national markets of Eurofinas member states in the region experienced sharp declines in the lending volume, as evidenced by the research.[18] The crisis triggered by Covid-19 was accompanied by rising household indebtedness, which resulted from difficulties in servicing it[19] on an ongoing basis and increased credit risk, due also to the deterioration of the financial situation of companies affected by repeated foreclosures and rising unemployment. In July 2020, the European Commission published a list of best practices[20] for assisting consumers and businesses affected by the pandemic for bank, and non-bank, financial institutions. EU supervisors also monitored the situation in EU member states to ensure market stability. They recommended the introduction, where possible, of moratoria for repayments of consumer and business loans, the creation of national programs to support efficient lending to mitigate the impact of the crisis caused by the pandemic, while keeping the levels of fees and interest rates under control, thus preventing unfair practices in this regard. In crisis (forced) situations, debtors with obligations under credit agreements can only meet their responsibilities in the short term. Therefore, it was necessary to find such solutions that made it possible to temporarily relieve the debtor from the obligation to meet their requirements, or to postpone them.[21]

In many countries, to counteract these negative effects, it was necessary to take regulatory action as a result of a reduction of the debtor's creditworthiness related

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18 EUROFINAS. 2021. Biannual Survey 2020, New Consumer Credits Granted for Personal Consumption and Individual Vehicles, http://www.eurofinas.org/uploads/documents/statistics/Eurofinas%20Biannual%20Survey%202020.pdf (8.10.2021); J. Ophem, COVID-19 and consumer financial vulnerability, "Central European Review of Economics and Management" 2020, no. 4, https://www.ceeol.com/search/article-detail?id=929094 (15.10.2021).

19 V. Bignon, O. Garnier, Mesurer l'impact de la crise Covid-19 L'expérience de la Banque de France, "Revue de l'OFCE" 2020, no. 2, pp. 45–57, https://www.cairn.info/revue-de-l-ofce-2020–2-page-45.htm#s1n3 (13.10.2021).

20 European Central Bank 2020, Decisions taken by the Governing Council of the ECB (in Addition to Decisions Setting Interest Rates), https://www.ecb.europa.eu/press/govcdec/otherdec/2015/html/gc150918.en.html (10.10.2021); European Central Bank 2020, Recommendation of the European Central Bank of 15 December 2020 on Dividend Distributions during the COVID-19 Pandemic and Repealing Recommendation ECB/2020/35 (ECB/2020/62) 2020/C 437/01, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2020.437.01.0001.01.ENG (13.10.2021).

21 B.S. Aji, M. Warka, E. Kongres, Credit Dispute Resolution through Banking Mediation during Covid-19 Pandemic Situation, Budapest International Research and Critics Institute-Journal, p. 1618, https://doi.org/10.33258/birci.v4i2.1823 (14.10.2021); M. Tjoanda, Y. Hetharie, M. V.G. Pariela, R.F. Sopamena, The Outbreak of Covid-19 as an *Overmacht* Claim in Credit Agreements, "Fiat Justisia Jurnal Iimu Hukum" 2021, no. 15(1), p. 85, http://jurnal.fh.unila.ac.id/index.php/fiat (14.10.2021).

to the loss of income, in order toto counteract potential credit risks and disruptions of banking activity and, in turn, the stability of the financial systems of individual countries. Restructuring of credit or financing through, among other things, the reduction of interest rates; extension of the term; reduction of arrears of principal and interest; addition of credit or financial instruments (subsidized loans), deferral of loan repayment, depending on the situation of the debtor adversely affected by COVID-19, became a challenge, and often required the introduction of these instruments through specific (emergency) and temporary acts.

This article presents only a part of those regulatory actions implemented in the credit market to counteract the effects of the pandemic on borrowers, both businesses and consumers. It shows only the regulations that affected borrowers in Poland and Vietnam. However, it is worth noting that they were also introduced in other countries of the world (Indonesia[22], China[23], Brazil[24], Austria[25], Italy[26], Hungary,[27] Germany[28], Belgium, and Spain), which will not be analysed. In this study, the reason for choosing the subject of legal regulations adopted in Poland, and Vietnam, is primarily the long-term and established scientific contacts of one of the authors from Poland with the

22 H. Sytra Disemandi, A. Ismail Shaleh, Banking credit restructuring policy on the impact of COVID-19 spread in Indonesia, "Journal Inovasi Ekonomi" 2020, vol. 05, p. 68, https://ejournal.umm.ac.id/index.php/JIKO/article/view/11790/8316 (13.10.2021); H.S. Disemadi, A.I. Shaleh, Banking credit restructuring policy on the impact of COVID-19 spread in Indonesia, "Journal Inovasi Ekonomi" 2020, no. 5(2), p. 63, Special Issue of Economic Challenges in COVID-19 Outbreak, http://ejournal.umm.ac.id/index.php/jiko (14.10.2021).

23 A. Błaszczyk, Impact of coronavirus on trade policy of the People's Republic of China and the Republic of Poland in Challenges of the modern world, VII, J. Kawa (ed.), Archegraph 2020, s. 18, https://www.archaegraph.pl/lib/l231bv/wyzwania-7-ebook-kfy8iite.pdf#page=16 (13.10.2021).

24 R.M. Goncalves, A.F.A. Alves, T. Almeida, Debtor-financing in judicial recovery and covid-19 pandemia impacts on the Brazilian entrepreneurs, "Revista Juridica" 2021, no. 2(64), pp. 203–234, https://pesquisa.bvsalud.org/global-literature-on-novel-coronavirus-2019-ncov/resource/pt/covidwho-1404238 (14.10.2021).

25 Memorandum on legal solutions adopted in Austria intervening in the relationship of lenders with borrowers in order to protect borrowers, in connection with the COVID-19 pandemic. Analysis of Article 37 § 2 of the COVID-19-Gesetz of 4 April 2020, https://rf.gov.pl/wp-content/uploads/2020/05/Analiza_wakacje_kredytowe_Austria.pdf (5.10.2021).

26 Trieste, 16 April 2020 Italian Report by Francesca Fiorentini, University of Trieste https://rf.gov.pl/wp-content/uploads/2020/05/Italian-Report_Consumer-loans-and-Coronavirus1.pdf (15.10.2021).

27 Payment moratorium in Hungary; Measures to mitigate the impact of a coronavirus pandemic on the national economy https://rf.gov.pl/wp-content/uploads/2020/05/Wakacje_kredytowe_W%C4%99gry_maj2019.pdf (15.10.2021).

28 B. Giessen , Report on the German law on the mitigation of the COVID-19 epidemic in the consumer credit sphere (Gesetz zur Abmilderung der Folgen der Covid-19-Pandemie im Zivil-Insolvenz- und Strafverfahrenrecht vom 27.3.2020.1), prepared for the Financial Ombudsman, https://rf.gov.pl/wp-content/uploads/2020/05/Wakacje_kredytowe_Niemcy_Analiza.pdf (15.10.2021).

National University in Ho Chi Minh City in Vietnam. Besides, it was considered that a comparison of legal solutions introduced in connection with the pandemic aimed at mitigating its negative effects on borrowers in Poland, and Vietnam (one of the first countries where cases of COVID-19 infection were disclosed), may be an interesting procedure due to cultural differences and differences in legal systems; even different economic development, and individual approaches to the domestic credit market.[29] Indirectly, it was also examined whether, or not, these dissimilarities influenced the choice of legal instruments to support borrowers in the wake of the COVID-19 pandemic. The research undertaken in this article was carried out using the formal-dogmatic method and linguistic-logical analysis of the texts of the relevant legal acts aimed at interpreting the legal norms contained therein.

1. Instruments of Support to Borrowers in the Light of Legal Regulations in Poland in Connection with COVID-19 Pandemic

1.1. General Comments

In Poland, on March 14, 2020[30], a state of epidemic emergency was introduced, and on March 20, 2020, an epidemic state was declared. Poland was entering 2020 with dynamic economic growth – according to the Central Statistical Office, GDP growth in 2019 was 4.5%[31]. A decrease in household income greater than 30% could mean the inability to cover necessary expenses without breaching savings or incurring new liabilities. The results of a cyclical international survey conducted by the ING Group[32]showed that in Poland, the impact of the pandemic was, on the one hand, smaller than in other countries, but the economic consequences were still severe.[33]

In response to the unique situation caused by the spread of the SARS-CoV–2 virus, regulations were introduced into the Polish legal system in 2020 that also affected credit relations and the position of borrowers; both consumers and businesses. They were temporary and extraordinary. The first law introducing

29 Cf. Ł. Gębski, The Impact of…, *op. cit.*

30 Regulation of the Minister of Health of 13.03.2020 on the declaration of an epidemic emergency on the territory of the Republic of Poland (Journal of Laws 2020, No. 433, as amended, not in force).

31 Information from the Central Statistical Office on the revised estimate of gross domestic product for 2019, CSO, October 05, 2020, https://stat.gov.pl/obszary-tematyczne/rachunki-narodowe/roczne-rachunki-narodowe/informacja-glownego-urzedu-statystycznego-w-sprawie-skorygowanego-szacunku-produktu-krajowego-brutto-za-2019-rok,9,6.html (05.07.2021).

32 Results of international survey "ING Financial Barometer – August 2020" Impact of Covid-19 on personal finances of Poles and Europeans Results of international survey "ING Financial Barometer, https://www.ing.pl/_fileserver/item/s1m3flr (05.07.2021).

33 Survey commissioned by the BIG InfoMonitor Debtor Register, April 2020.

unique solutions in connection with the COVID-19 outbreak is the Act of 2 March 2020 on unique solutions related to the prevention and counteraction of COVID-19[34]. The Act was repeatedly amended by subsequent acts referred to as the Anti-Crisis Shield:1.0[35], 2.0[36], 3.0[37], 4.0[38]. Shield 1.0 and 4.0 were important in terms of instruments supporting borrowers. Shield 1.0 introduced credit vacations for entrepreneurs[39]and reduced maximum costs of consumer loans.[40] On the other hand, in Shield 4.0 statutory credit vacations for consumers and interest rate subsidies for bank loans granted to entrepreneurs (revolving and non-revolving working capital loans given in PLN) were envisaged. Shield 4.0 was intended to provide support for entrepreneurs who, in times of the COVID-19 pandemic, face difficulties in running their businesses, or their operations are significantly impeded, causing problems in the form of loss of financial liquidity.

1.2. Instruments to Support Consumer Borrowers in the Light of the Anti-Crisis Shield in Poland

The Crisis Shield provided instruments to support consumer borrowers adversely affected by the COVID-19 pandemic, who had previously incurred credit obligations and, as a result of the loss of sources of income, had difficulty repaying them, or who had incurred them during the pandemic. On 31 March 2020, at the initiative of the President of the Office of Competition and Consumer Protection (from now on referred to as the OCCP), the Shield 1.0 was enacted, which introduced a "new" and "temporary" reduced limit on non-interest costs of consumer credit. Its

34 The Act of 2 March 2020 – on special solutions related to preventing, counteracting, and combating COVID-19, other infectious diseases and crisis situations caused by them (Journal of Laws 2020, item 374, as amended), further Act COVID-19.

35 The Act of 31 March 2020 – on amending the Act on special solutions related to the prevention, counteraction and eradication of COVID-19, other infectious diseases and crisis situations caused by them and some other acts (Journal of Laws 2020, item 568), further Shield 1.0.

36 Act of 14 April 2020 – on specific support instruments in connection with the spread of the SARS-CoV–2 virus (Journal of Laws, item 695 as amended), further Shield 2.0.

37 Act of 14 May 2020 – amending certain laws with respect to protective measures in connection with the spread of the SARS-CoV–2 virus (Journal of Laws 2020, item 875), further Shield 3.0.

38 Act of 19 June 2020 – on interest subsidies for bank loans granted for providing liquidity to entrepreneurs affected by COVID-19 and on simplified proceedings for approval of an arrangement in connection with the occurrence of COVID-19 (Journal of Laws, item 1086), further Shield 4.0.

39 Cf. T. Białek, The most important changes for banks resulting from the Anti-Crisis Shield, LEX/eL; A. Serzysko, Contractual clauses in banking contracts and COVID-19, LEX 2020, eL.

40 Cf. art. 8d, 8ei8fAct COVID-19; T. Czech, New limits on non-interest consumer credit costs due to the coronavirus outbreak, "Banking Law Monitor" 2020, vol. 6, p. 79.

purpose was to protect consumer borrowers who entered into a consumer credit agreement[41]during the COVID-19 outbreak.

They were initially in force for one year after their introduction (until 31 March 2021); however, another amendment to the Act COVID-19[42] extended this deadline to 30 June 2021. The "Temporary" nature of the validity of this particular "new" and reduced limit was argued for by the necessity of rebuilding the Polish economy to the state before the COVID-19 epidemic, which may have a medium-term character. Regarding the notion of 'non-interest credit costs' and limitations on their amount, the Consumer Credit Act, implementing Directive 2008/48[43], contains its solutions, which do not transpose its provisions or other EU regulations[44]. According to Article 5.6a of the CCA, these are all costs (fees[45], including collection fees[46], commissions[47], taxes, margins, and other expenses directly related to the consumer credit agreement) incurred by the consumer, excluding interest. Since they often exceed the amount of the credit obligation (credit or loan)[48], regulations were introduced governing the maximum amount of non-interest credit costs (i.e., the limit of non-interest credit costs) and rules of their calculation in the case of postponement of credit repayment and granting of subsequent credits (Art. 36a – 36c of the CCA).[49]

41 Consumer credit agreement within the meaning of Article 3 of the Act of 12 May 2011 – on consumer credit (Journal of Laws 2019, item 1083), further CCA.

42 Act of 21 January 2021 – on amending the Act on special solutions related to the prevention, counteraction and combating of COVID-19, other infectious diseases, and crisis situations caused by them, and some other acts (Journal of Laws 2021, item 159), further Act of 21 January 2021.

43 Directive 2008/48EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (O.J. L 133/66, 22.05.2008, p.1).

44 v. T. Czech, Article 5 Definitions, (in:) Consumer credit. Comment, 2017, LEX, eL.

45 The CCA does not provide a definition of the term "fees" and does not distinguish the fees that may be charged by lenders. The lack of uniform naming these fees results in lenders using different names and charging different fees in practice. v. E. Rutkowska-Tomaszewska, Creditor's remuneration related to the crediting process and legal regulation of the reduction of the total cost of consumer credit in cases of its early repayment as a manifestation of the protection of consumer's economic interests, (in:) E. Rutkowska-Tomaszewska (ed.) Customer protection on the financial services market in the light of current problems and legal regulations, Warsaw 2017, pp. 285–324.

46 T. Czech, Limit on non-interest costs of consumer credit, "Banking Law Monitor" 2016, vol. 2.

47 v. E. Rutkowska-Tomaszewska, Creditor's remuneration related…, *op. cit.*

48 Explanatory Memorandum to the Government Bill amending the Act on supervision over the financial market, the Banking Law Act, and certain other acts, http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=3460, p. 19 (14.07.2021).

49 Due to the limited scope of this paper, they will not be discussed here. More extensively on their topic: T. Czech, Limit…, *op.cit*.

However, due to the prevailing epidemic condition, as well as the economic situation of the country and consumers, the legislature[50] found the existing limits on non-interest credit costs too high, and introduced reduced ones. The new limits are governed by Article 8d of COVID-19, and have different values depending on the loan repayment period. For loans granted from March 8, 2020, to March 8, 2021 (extended to June 30, 2021), there are two maximum non-interest credit cost limits: a separate higher limit for loans with a repayment period of more than 30 days and a relatively lower limit for loans with a repayment period of less than 30 days, which applies, in particular, to loans offered by lending institutions. Thus, loans with a repayment period of fewer than 30 days cannot be higher than 5% of the total loan amount. However, for consumer loans with a repayment period of more than 30 days, the non-interest credit costs amount to a maximum of 15% of the total credit amount and 6% for each year of the loan agreement, not more than 21% for a loan granted for one year. Regardless of the length of the credit agreement, non-interest charges may not exceed 45% of the total credit amount (Article 8d of the Act COVID-19).[51]

The term of the new limits (365 days) shall not be counted from the effective date of Shield 1.0 (Amendment Act, March 31, 2020), but from March 8, 2020 (the effective date of COVID-19). Initially, it was applicable till March 8, 2021. However, the Act of 21 January 2021 was extended till June 30, 2021. The Draft[52]even proposed to extend them to December 31, 2021, which was justified by the need to protect consumers from being taken advantage of by lending institutions because of their weaker position.

According to Section 31zc(1) of Act COVID-19, where a credit or loan agreement is entered into during the period in which the new limits apply but for a period exceeding 365 days calculated from March 8, 2020, the lender is required to use both the new and existing limits on non-interest credit costs. It must make separate calculations of these limits for both periods for the same loan or credit agreement. The new limitations on non-interest credit costs, as with the limits outlined in Article 36a of the COVID Act, do not apply to credit in a consumer's savings and checking account maintained by the creditor, and to a credit card agreement if the creditor is also the issuer of the credit card (Articles 8d and 8e of the COVID Act-19).

50 Justification to the draft law on amending the Law on Special Solutions for Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and Crisis Situations Caused by Them and Some Other Laws, Parliament Print No. 299,https://www.sejm.gov.pl/sejm9.nsf/PrzebiegProc.xsp?nr=299 (14.07.2021), further Explanatory Memorandum to the Act of March 31, 2020.

51 T. Czech, Limit…, *op.cit*., p. 86.

52 Government bill on amending the Act on special solutions related to preventing, counteracting, and combating COVID-19, other infectious diseases and crisis situations caused by them and some other acts – the essence of preserving the reduced limits, http://www.sejm.gov.pl/sejm9.nsf/agent.xsp?symbol=RPL&Id=RM-10–106-20 (29.07.2021).

Special rules have been introduced regarding granting a credit card by the creditor or an entity affiliated with the creditor[53]. If the creditor, or an affiliate of the creditor, consents to subsequent loans to the consumer within 120 days of the disbursement of the first loan, and the consumer has not repaid the loan in full, the total amount of the loan, for the purpose of determining the maximum non-interest credit costs, is the amount of the first loan. In that case, the non-interest credit costs include the sum of the non-interest costs of all loans granted during that period (Article 8e of COVID-19).

The Act COVID-19 did not separately (specifically) address issues related to lenders' violations of the new limits on non-interest credit costs established by the time indicated. In particular, no new sanction to free credit was introduced. In this situation, there should be no doubt that the sanction for violation of the established "ordinary" and fixed limits of Article 45 of CCA[54] also applies in the case of non-compliance with the "new" "temporary". Shield 1.0 constituted an amendment to the solutions adopted in this respect in the Consumer Credit Act.

While in principle, the solutions adopted by the legislator concerning the lowering of non-interest credit limits, as it is a manifestation of consumer protection against over-indebtedness directly caused by the COVID-19 epidemic, have been assessed very positively by representatives of the loan industry.[55]

Another instrument to support consumer borrowers connected with the COVID-19 pandemic was the introduction of so-called statutory credit vacations. It is worth mentioning that the institution of so-called credit vacations[56] is not itself only created and used in connection with the pandemic. However, it became popular at that time. Financial institutions, especially banks, took measures to help consumers repay their loans (as part of an offer to take advantage of so-called "contractual credit vacations"). Despite considerable media coverage[57], they did not meet the real

53 Related entity within the meaning of Commission Regulation (EC) No 1126/2008 of 3 November 2008, adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council (O.J. L 320/1, 29.11.2008, p.1).

54 v. E. Rutkowska-Tomaszewska, Consumer banking, (in:) W. Góralczyk (ed.), Problems of modern banking. Legal issues, Wolters Kluwer, Warsaw 2014, pp. 189–190.

55 They argued that failure to profit from the non-interest costs of consumer credit would result in losses and the withdrawal of many lending institutions from the market.

56 It is an entitlement (contractual or statutory) of the borrower allowing the possibility of deferring (suspending) the payment of capital and interest installments. Initially, it was subject to the lender's will (bank) under the so-called contractual (commercial) credit vacations. The suspension could cover: the whole installment, capital installment, or interest installment, and the suspension period could be up to 6 months, depending on the regulations adopted by the bank.

57 Communication from the ZBP on banks' relief efforts in the wake of the COVID-19 coronavirus pandemic, Warsaw, 16.03.2020, https://zbp.pl/Aktualnosci/Wydarzenia/Komunikat-ZBP-nr-2-ws-dzialan-pomocowych (22.07.2021).

needs and did not fulfil their intended purpose.[58]. They were not only a partial and insufficient solution, but also raised concerns of the President of the OCCP. For this reason, a statutory regulation became necessary, the purpose of which was to relieve those consumers who were directly affected by the consequences of the pandemic in the form of loss of work or their main source of income. In addition, the aim was to ensure that the use of the statutory credit vacations would not imply an increase in the burden of credit service for consumers affected by the consequences of the epidemic after the suspension of the credit agreement had ended[59]. The provisions regulating the so-called statutory credit holidays for consumers were introduced by Article 77 point 57 of the so-called Shield 4.0, which amended the COVID Act -19 and came into force on 24 June 2020. It is worth noting that the institution of statutory credit vacations was introduced in Poland and other European countries; Austria, Italy, Hungary, Germany, and others.

The essence of statutory credit vacations (suspension of contract performance) was to suspend the obligation to make loan repayments to which the borrower is contractually obligated, and thereby avoid an increase in the burden of servicing the loan. It applies to the suspension of both principal and interest instalment payments. During this time, the lender may not charge any other fees, except for cash benefits resulting from the borrower's insurance policies linked to the loan agreement due to insurance coverage continuity[60]. This right was granted to the borrower by law – with ex lege effect from the moment the lender received the application for suspension of the agreement.

Under Section 31 of the Act COVID – 19, the statutory credit vacations[61] apply to the following credit agreements with consumers[62]:

1) consumer credit agreements[63] within the meaning of CCA, or

58 Justification to the draft law on subsidies to interest rates on bank loans granted to ensure financial liquidity of entrepreneurs affected by COVID-19 and on amendments to some other laws. http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20200001086/T/D20201086L.pdf (22.07.2021).

59 Credit vacations and anti-transfer provisions in Shield 4.0, release dated 08/06/2020 https://www.uokik.gov.pl/aktualnosci.php?news_id=16465; The crisis shield – credit vacations and protection against hostile takeovers, https://www.uokik.gov.pl/aktualnosci.php?news_id=16423 (22.07.2021).

60 Explanatory Memorandum to the draft law on subsidies to interest rates on bank loans granted for providing liquidity to entrepreneurs affected by COVID-19 and on amending some other laws, p. 73, further Explanatory Memorandum COVID-19.

61 v. M. Urban-Theocharakis, Credit Vacation, LEX 2020, eL.; Ł. Wilkowicz, Shield 4.0: Lose your job or source of income? You'll be able to suspend your loan payments, https://serwisy.gazetaprawna.pl/finanse-osobiste/artykuly/1479492,zawieszenie-splaty-kredytu-tarcza-4–0.html (30.07.2021).

62 A natural person makes a legal transaction with an entrepreneur (in this case, a creditor) that is not directly connected with their business or professional activity.

63 According to the legal definition (Article 3.1 CCA, consumer credit is a credit in the economic sense, regardless of its legal form, granted by a creditor to a consumer in an amount not exceeding

2) mortgage credit agreements[64], including those indexed to a foreign currency, within the meaning of the Act of 23 March 2017 on mortgage credit and supervision of mortgage credit intermediaries and agents[65], or

3) a credit agreement[66] within the meaning of Article 69 of the Act of 29 August 1997. – Banking Law, if the borrower is a consumer within the meaning of Article 22^1 of the Civil Code.

The suspension of credit agreements was addressed to consumers who entered into a deal before 13 March 2020. The end of the credit period was to fall after six months from that date (credit agreements with long repayment periods).

Where a borrower had several loans of the same type (e.g., two consumer loans) with a given lender, the possibility to exercise power to suspend the contract only concerned one of them, at the borrower's choice (Article 31fa(3) of Act COVID-19). This restriction did not apply when credit agreements of a given type were concluded with different creditors.

Entitlement to benefit from the "statutory credit vacations (Section 31fa(2) of the Act COVID-19) was available to a borrower who lost their job or another main source of income after 13 March 2020. A borrower applying for a statutory credit vacation is required, among other things, to make a declaration to that effect[67] (this did not only apply to persons employed under a contract of employment), under pain of criminal liability.[68]

The period of suspension of contract performance under the "statutory credit vacations" (up to a maximum of 3 months) is not considered a credit period. It is, and all deadlines stipulated in the credit agreement are, extended by the period for which the execution of the agreement has been suspended, contrary to the rules of commercial credit vacations offered by banks.

The triggering of a "statutory credit vacation" occurs upon the borrower's request in a durable medium (e.g., in writing, by email, or through electronic banking, if

PLN 255,550 (or its equivalent in a currency other than the Polish currency), which the creditor grants or promises to grant to the consumer within the scope of its business activity. In particular, a consumer credit agreement is: a loan agreement, a credit agreement within the meaning of Article 69 of the Polish Banking Act, a revolving credit agreement, or a contract that was deferring the payment date to the consumer.

64 Article 3 of Act of 23 March 2017 – on mortgage credit and supervision of mortgage brokers and agents (Journal of Laws 2017, item 819).

65 *Ibidem*.

66 Article 69 of Act of 29 August 1997 – Banking Act (Journal of Laws 1997, No. 140, item 939, as amended, further Banking Act.

67 Banking Act.

68 When more than one borrower is a party to the agreement, loss of employment or another primary source of income by one of them is sufficient to meet the condition.

it has such functionality), and the request binds the lender.[69] This was intended to reduce the possibility of consumers being hindered from taking advantage of them by lenders imposing procedural restrictions or imposing onerous requirements that are difficult for consumers to meet. Within 14 days following the application being delivered to it, the creditor must provide the borrower with an acknowledgment of receipt, also in a durable medium, and inform the borrower of the charges under the insurance contracts.

Statutory credit vacations are also available to a borrower to whom the bank has deferred on a commercial basis. According to Section 31fc(1) of Act COVID-19, at the time the application for statutory credit vacations is served on the lender, the term of the "commercial credit vacations" previously granted by the lender is shortened by operation of law. In such a situation, the consequence of requesting of a statutory credit vacation is that the term of the "commercial credit vacation" is shortened, and the lender automatically switches to a statutory suspension of performance.

The regulations governing statutory credit vacations for consumers related to COVID pandemic 19 took effect on June 24, 2020. As early as August, the OCC, and the Financial Ombudsman[70]received signals indicating irregularities related to their proper application by creditors that necessitated appropriate action.[71]

1.3. Instruments to Support Borrowers of Entrepreneurs in Connection with the COVID-19 Pandemic in the Light of Legal Regulations in Poland

On March 18, 2020, the government presented a project called the Economic and Social Crisis Shield for the Security of Businesses and Workers in Connection with the SARS Virus Pandemic – Cov – 2 (from now on Crisis Shield[72], which includes the protection of five pillars, including, among others, issues related to corporate financing. The total amount of support granted is PLN 212 billion (over 9% of GDP). The project assumptions indicate instruments of support given to entrepreneurs, in the scope of, among other things, credit guarantees, financing of leasing for transport companies, and micro-loans.[73]

69 Explanatory Memorandum COVID-19, p.74.

70 Credit vacations – summary of issues and activities undertaken by the Financial Ombudsman, https://rf.gov.pl/wakacje-kredytowe-podsumowanie-problematyki-i-dzialan-podjetych-przez-rzecznika-finansowego/ (20.07.2021).

71 Proceedings under reference number DAR-2.401.2.2020 STATUTORY CREDIT VACATION – OCCUPIED BANKS, https://www.uokik.gov.pl/aktualnosci.php?news_id=16667 (15.07.2021).

72 This is a package of legal acts that aims to support Polish entrepreneurs struggling with the effects and consequences of the COVID-19 epidemic, as well as to protect the state and its citizens from the crisis caused by the COVID-19 epidemic.

73 Prime Minister: PLN 212 billion for the government's aid package for entrepreneurs and the economy, https://www.gov.pl/web/premier/premier-212-mld-zl-na-rzadowy-pakiet-pomocowy-dla-przedsiebiorcow-i-gospodarki (12.07.2021).

This part of the study will discuss the essential tools that were offered to entrepreneurs as part of financial assistance in raising funds in connection with combating the harmful effects of the pandemic. The legislative solutions provided two directions of action. On the one hand, the aim was to assist in obtaining preferential loans, which were supposed to improve the financial situation of companies. In this respect, solutions concerning guarantees issued by Bank Gospodarstwa Krajowego (further BGK), loan holidays, and subsidies to interest on loans were introduced. On the other hand, financial assistance was to be granted with regard to the repayment of the credits taken earlier. Here, entrepreneurs had an opportunity to obtain funds within the framework of non-returnable loans and subsidies of the State Development Fund. Each of these solutions is analysed later in this study.

Entrepreneurs expected a quick response from the state concerning this challenging situation they were forced to face. In this regard, in the initial legislative phase, government work proceeded very quickly.

In the first phase, the Act COVID-19 was enacted. Pursuant to its Article 15zzzd, the legislator provided for granting sureties and guarantees of repayment of credits or other liabilities to entrepreneurs (excluding micro and small entrepreneurs) by BGK under the provision of public aid in connection with the effects of COVID – 19. In Article 70 of the Shield 1.0, it is indicated that a Liquidity Guarantee Fund (hereinafter FGP) will be established at BGK, and the funds will be raised from, inter alia, commission fees for financial guarantees and sureties from FGP funds, proceeds from recoveries paid by BGK in performance of the guarantee or surety agreement, as well as from interest, donations and bequests, and funds from the state budget. The funds from the FGP will be used to cover costs and expenses related to the issuance of sureties and guarantees of repayment of loans and other liabilities. In addition, the amount of surety or guarantee covers up to 80% of the amount of the credit or other liability, and in special cases (due to important economic or social interests) up to 90%. This solution is designed for medium and large enterprises to secure the repayment of credit that is granted by the crediting bank in order to ensure the financial liquidity of the company. The maximum guarantee amount is PLN 200 mln.

Another financial support tool for entrepreneurs is the introduced facilitation in obtaining credits for technological innovations under the Act of 30 May 2008, on some forms of support for innovative activity. According to article 2 sec. 1 item 6 a specialized credit is a credit granted to an entrepreneur by a crediting bank to realize a technological investment. The idea behind this tool is a partial repayment of the credit in the form of a technology bonus (subsidy of up to 75% of the investment). Within the anti-crisis shield, the possibility of extending the deadline for application and signing a credit agreement was prepared, and most importantly, the requirement to produce completely new or significantly improved products or services was

waived, and the only condition for receiving financial support is the implementation of innovative technology by the entrepreneur.[74]

Another form of assistance provided for entrepreneurs was the postponement and modification of credit agreements of entrepreneurs. Under Article 31f (1) of the Act Covid – 19, banks, in connection with the state of the epidemic, have the right to make changes to specific contractual terms and repayment dates of loans granted to entrepreneurs under the Banking Law. The legislator provided in Article 31f point 1 of Act Covid – 19 that the indicated solutions will be applicable in a situation where the loan was granted before 8 March 2020 and the change is justified by the current financial and economic situation of the borrower (in relation to the circumstances on 30 September 2019). In addition, pursuant to Article 31f(2) of the Act Covid – 19, amendments to the loan agreement shall be made in consultation between the bank and the borrower and shall not lead to deterioration of the borrower's financial and economic situation.

It is worth mentioning that the implemented solution provides only a possibility and not an obligation for banks to change contractual terms and conditions or repayment dates of loans or credits to entrepreneurs. In line with the recommendation of the Polish Bank Association, banks have taken the initiative in favour of entrepreneurs by offering two options. Entrepreneurs could, upon request, take advantage of an additional grace period (up to 3 months) concerning repayment of principal instalments or loan holidays (up to 3 months) concerning the principal or capital-interest instalments.[75]It should also be emphasized that during the second lockdown in Poland, banks offered non-statutory credit holidays to entrepreneurs, allowing them to maintain the liquidity and continuity of their operations. Conditions provided for entrepreneurs were determined individually by each institution. Entrepreneurs were offered e.g., an extension of the crediting period, limit reduction, reduced amounts of instalments, or suspension of credit repayments, usually for up to 3 months (although there are examples of postponement of instalments for 12 months).[76]

To sum up, solutions introduced into the Polish legal system largely left the freedom of actions taken, in the scope of forms of support for entrepreneurs in a difficult financial and economic situation concerning the occurrence of COVID – 19 pandemic, to the banks. The proposed legal solutions indicate vagueness of

74 Key changes to the technology innovation loan, https://www.funduszeeuropejskie.gov.pl/strony/o-funduszach/fe-koronawirus/ruszyl-nabor-wnioskow-o-premie-technologiczna-na-nowych-zasadach/ (20.07.2021).

75 Communication from the ZBP concerning bank support measures in connection with the COVID 19 coronavirus pandemic, https://www.zbp.pl/Aktualnosci/Wydarzenia/Komunikat-ZBP-w-sprawie-dzialan-pomocowych-podejmowanych-przez-banki (22.07.2021).

76 Companies can suspend loan installments during lockdown, https://pieniadze.rp.pl/firma/27315-firmy-moga-zawieszac-raty-kredytow-podczas-lockdownu (21.07.2021).

regulations, which left too much decision-making leeway for banking institutions. For these reasons, the conditions offered by banks to amend the content of credit agreements were each time determined individually, and the conditions provided for entrepreneurs were not the same for everyone.

In the face of the third wave of the pandemic, restrictions in the operation of specific industries, and the end of the credit vacation period, entrepreneurs found themselves in a difficult financial situation. Despite numerous solutions proposed by the government, business owners also tried to raise funds on their own to run their businesses. Nevertheless, data from the National Information Bureau (from now on BIK) indicate that banks were less willing to grant loans to entrepreneurs during the second wave of the pandemic. For example, comparing February 2021 to February 2020, banks gave 26.9% fewer working capital loans, 3.3% fewer overdrafts, and 17% fewer investment loans to microentrepreneurs by number. In terms of value, the value of overdrafts decreased by 10.2%, working capital loans by 22.3%, and investment loans by 10.7%.[77] It is worth mentioning that entrepreneurs first indicated problems with obtaining funds for running business activities, which was mainly caused by unfavourable legal regulations and the monetary policy pursued by the state, and thus difficulties in obtaining loans.[78]

Another form of financial assistance provided for entrepreneurs was the granting a non-refundable one-time loan from the funds of the Labour Fund to cover the current costs of conducting business activities according to Article 15zzd Act Covid – 19. Eligible to benefit from this form of financial assistance were micro-entrepreneurs who, by Article 7 of the Act of 6 March 2018 Entrepreneurs Law[79], employed in the last two years on average less than 10 employees and achieved an annual net turnover from sales of goods, products and services and financial operations up to EUR 2 million. The entrepreneur was obliged to apply to the Poviat Employment Office appropriate to the registered office for a loan, the value of which was PLN 5,000.00. Its interest rate was fixed at 0.05% of the rediscount rate on bills of exchange accepted by the National Bank of Poland. The loan was forgiven with interest if the entrepreneur conducted a business activity for three months after the granting of the loan. If the requirement to conduct business activity was not fulfilled, the loan was subject to repayment with interest within twelve months. It is worth emphasizing that in accordance with Article 15 Zzd item 10, loan cancellation did not constitute tax revenue for the entrepreneur. This action of the legislator should be assessed

77 Ending credit payment holidays and 3rd wave of Covid-19 plunge micro-businesses, BIK data for February, https://alebank.pl/konczace-sie-wakacje-kredytowe-i-iii-fala-covid-pograzaja-mikrofirmy-pokazuja-dane-bik-za-luty/?id=364769&catid=22872 (31.07.2021).

78 Access to commercial finance for SMEs with the support of public institutions, https://alebank.pl/dostep-mmsp-do-finansowania-komercyjnego-ze-wsparciem-instytucji-publicznych/?id=376412&catid=22872&cat2id=25928 (29.07.2021).

79 The Act of 6 March 2018 – Business Law (Journal of Laws 2018, No. 646), further Business Law.

positively. It is worth emphasizing that by Article 15zzd Act COVID – 19, the funds received had to be used to cover current costs of business activity. Thus, spending them was solely up to the entrepreneur, as no legal definition of current costs was introduced. The legislator only made a list of sample costs in the instructions to the loan application, indicating that the costs were to be spent on, e.g., payment of taxes, contributions, or costs of renting the premises.[80]It should be remembered that the above list is for reference only and is not exhaustive. Therefore, the amounts received could be used, among other things, to repay earlier loan liabilities incurred in the course of business.

At the end of March 2020, the Shield 1.0 on amending the Act on the system of development institutions, was passed, according to which, by Article 1.9. the Council of Ministers in connection with the prevailing state of the epidemic, is authorized to delegate tasks related to the anti-crisis shield project to the Polish Development Fund (hereinafter PFR). The solutions of financial assistance for entrepreneurs are called the PFR 1.0 and PFR 2.0 financial shield for micro, small and medium-sized enterprises. This is a type of financial support in the form of subsidies paid by banks in order to improve the financial liquidity of companies, compensate for losses incurred during the epidemic, protect jobs, and support the sectors most affected by the effects of COVID – 19. The application procedure was fully electronic, and the entrepreneur was obliged to provide basic information about the business activity conducted and the results of the pandemic (issues of demonstrating the losses incurred). According to the data supplied by PFR, over 347 thousand business entities benefited from the solutions of shield 1.0. More than PLN 60.5 billion has been paid out.[81] As of June 2021, PLN 42–45 million has been written off from the funds of Shield 1.0.[82] In the Shield 1.0 program, subsidies granted were subject to full or partial write-offs, depending on whether the entrepreneur was conducting business activity for another 12 months from the date of receiving the subsidy and depending on the maintenance of employment.[83] It should be mentioned that according to point 3.2 of the Regulations of applying for participation in the governmental program "TarczaFinansowaPolskiegoFunduszuRozwojudlamałychiśrednichprzedsiębiorstw" (Financial Shield of the Polish Development Fund for Small and Medium-Sized

80 Instructions for submitting an application for a loan to cover the current costs of micro-entrepreneur's business activity by persons who are not logged in, https://www.gov.pl/attachment/17f8b89b-91e6–4a04–8dd1-f2fb872e4cd0 (31.07.2021).

81 PFR Financial Shield for Companies and Employees, https://pfrsa.pl/tarcza-finansowa-pfr.html (20.07.2021).

82 PFR 1.0 shield – over PLN 42 billion of redeemed subsidies, https://ksiegowosc.infor.pl/wiadomosci/5280610,Tarcza-PFR-10-ponad-42-mld-zl-umorzonych-subwencji.html (20.07.2021).

83 PFR Financial Shield 1.0. Accounting for and cancelling subsidies, https://pfrsa.pl/dam/jcr:b0aee6fa-f81b-4c21-ab09–564e84d366f3/TF-1–0-prezentacja-MIKRO (20.07.2021).

Enterprises)[84], the funds received could be used for covering the costs of current economic activity, including the possibility of repayment of loans taken earlier, up to a maximum of 25% of the financial subsidy received. Additionally, in January 2021, due to the next wave of the COVID – 19 outbreak, the PFR launched a second program, Financial Shield 2.0, aimed at entrepreneurs in industries particularly affected by the pandemic situation who were required to suspend or limit their activities. For this purpose, funds in the amount of PLN 13 billion were allocated for micro, small and medium enterprises, while in the case of large economic entities, the budget amounted to PLN 25 billion, and the method of granting subsidies was the same as in the case of Financial Shield 1.0. In the end, almost PLN 7 billion of support was paid out to nearly 50 thousand entrepreneurs.[85]The maximum subsidy that micro-enterprises could receive was PLN 324 thousand, while the total amount of financial assistance from shield 1.0 and 2.0 could not exceed PLN 144 thousand per one employee.[86]The entities that received the subsidy are obliged to account for it 12 months after receiving it. In the absence of prerequisites for cancelling 100% of the received amount, the value to be repaid is spread into 24 equal instalments. As far as the manner of spending the funds received under the financial subsidy from the financial shield 2.0 is concerned, they should have been earmarked for covering current costs of conducting business activity, under § 8 of the Regulations of applying for participation in the governmental program "Financial shield 2.0 of the Polish Development Fund for micro, small and medium enterprises".[87] Included in these categories are, but are not limited to, employee compensation expense, purchase of goods and materials, third-party services expense, and ongoing borrowing costs. Prepaid loans, leases, and other similar instruments were excluded.

The issue that raised many interpretational doubts for over a year concerned recognizing the amounts of subsidies redeemed as taxable income. At the end, which should be evaluated positively, taxation of the value of the written-off subsidies was abandoned, and tax collection on this account was discontinued. As a result,

84 Regulations to apply for participation in the governmental program "Financial shield Polish development fund for small and medium-sized enterprises, https://pfrsa.pl/dam/jcr:96b68d11-f9f8–4850-a813-edd4bf7d241a/regulamin_programu_tarcza_finansowa_pfr_dla_mmsp.pdf (31.07.2021).

85 PFR Financial Shield 2.0., https://pfrsa.pl/tarcza-finansowa-pfr/tarcza-finansowa-pfr-20.html#mmsp (22.07.2021).

86 A. Świstak, A. Dahms, Financial Shield 2.0, (in:) M. Militz, Support provided to entrepreneurs in connection with the COVID-19 pandemic. Clearing and control, Wolters Kluwer Polska, 2020, eL.

87 Regulations of applying for participation in the governmental program "Financial shield 2.0 Polish Development Fund For micro, small and medium companies", https://pfrsa.pl/dam/serwis-korporacyjny-pfr/documents/tarcza-finansowa-pfr-20/Regulamin-programu-tarcza-finansowa-pfr-20.pdf (25.07.2021).

entrepreneurs gained new means of financing their activities, which will undoubtedly allow them to at least partially mitigate the harmful effects of the COVID epidemic.[88]

The last of the forms of financial assistance for entrepreneurs was the possibility to obtain subsidies for interest on loans introduced under the Anti-Crisis Shield (4.0). Under Article 4 of the Shield 4.0 on subsidies to interest on bank loans granted to entrepreneurs affected by COVID-19 and on simplified proceedings for approval of an arrangement in connection with the occurrence of COVID-19, an entrepreneur who was not in a difficult financial and economic situation as at 31 December 2019, is in business, has not taken out another loan under this Act, and has lost liquidity (which is to be understood as the ability to repay maturing obligations when due) or is at risk of losing liquidity due to the adverse effects of the epidemic may apply for a loan with a subsidy. The provisions of the Shield 4.0 in Article 8 indicate that the subsidy in the form of a part of the interest due to the bank for the SME sector is two percentage points, while for other entities, it is 1 percentage point. The subsidy will be paid at the entrepreneur's request and will depend on the entrepreneur's financial and economic situation. The introduced solution was aimed at granting financial aid to entrepreneurs who experienced difficulties in maintaining financial liquidity due to a pandemic situation.[89] Interestingly, it was not the lack of funds for business operations itself that caused most problems among entrepreneurs, but the way of interpreting regulations indicating the possibility to receive subsidies. Most problems and doubts were caused by unclear and imprecise rules of counting the number of people employed in a given company because with financial tools other than PFR, the status of an entrepreneur had to be determined by the provisions of the Act Entrepreneurs' Law, while in order to receive subsidies under PFR, the status of an entrepreneur had to be determined in accordance with the Commission Regulation (EU) of 17 June 2014, recognizing certain types of aid as compatible with the internal market in application of Article 107 and 108 of the Treaty No. 651/2014[90]. The consequence of these changes was the erroneous qualification of some companies as SMEs, which met the definition of a large enterprise under CR 651/2014. The most doubtful is the fact of different positions of the PFR itself in the field of inquiries addressed by entrepreneurs because the regulations initially gave the definition of SMEs resulting from the provisions of the Entrepreneurs' Law, then this point was corrected, and the provisions of the EU regulation were cited. However, at the same time, in the questions and answers provided by PFR and the very definitions referred

88 Cancelled subsidies from the Financial Shield without tax, https://ksiegowosc.infor.pl/wiadomosci/5293492,Umorzone-subwencje-z-Tarczy-Finansowej-bez-podatku.html (18.07.2021).

89 A. Serzysko, Loan subsidies in the Anti-Crisis Shield 4.0, LEX2020, eL.

90 Commission Regulation (EU) No 651/2014 od 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (O.J. L 187, 17.06.2014), further CR 651/2014.

to by the Fund, guidelines from the provisions of the Entrepreneurs' Law were still left. Notably, such changes in the qualification of a given entity as a micro or small entrepreneur, or erroneous interpretations by the entrepreneur themselves, resulted in an error in the submitted declarations and, therefore, no possibility of receiving any assistance, or even worse, an obligation to return it immediately. As it follows from the regulations governing the granting of PFR aid, any financial consequences of changes resulting from improper action by PFR are borne by the entrepreneur.[91]

2. Borrower Support Instruments in the Light of Regulations in Vietnam in Relation to the COVID-19 Pandemic

The first Coronavirus infected case in Vietnam was reported on 23 January 2020, right after the Tet Holiday.[92] Since then, the Vietnamese government carried out comprehensive policies to contain Coronavirus and reduce its impacts very early before the Prime Minister officially declared the Coronavirus epidemic on 1 February2020 as a threshold to trigger subsequent urgent measures.[93]

The Coronavirus landscape in Vietnam shows that enterprise and household income have suffered harshly and requires governmental responses to avoid economic collapse. The government has maintained direct support policies to targeted enterprises and individuals by taxation policies and monetary assistance.[94]

Besides, the government has induced many supporting programmes carried out by the private sector, including credit support policy targeted at loan borrowers. At the very early stage of the pandemic in March 2020, it was reported that the coronavirus outbreak affected about VND 926,000 billion of debts, accounting for about 14.27% of total debts in twenty-three banks.[95] Banks launched preferential programmes to lower the interest rates and restructure loans for their customers at their own incentives.[96]

91 SME status and the PFR Financial Shield, https://codozasady.pl/p/status-msp-a-tarcza-finansowa-pfr (20.07.2021).

92 T. Le, Covid-19 Control in Vietnam, "Nature Immunology" 2021, no. 22, https://doi.org/10.1038/s41590–021-00882–9 (29.07.2021).

93 Decision No. 173/QĐ-Ttg dated 01 February 2020 of the Prime Minister on Declaration of Covid-19 Epidemic; Decision No. 447/QĐ-Ttg dated 01 April 01, 2020, of the Prime Minister on Declaration of Covid-19 Epidemic.

94 Cf. Resolution No. 116/2020/QH14 dated 19 June 2020 of National Assembly on Reduction in Corporate Income Tax Payable In 2020 by Enterprises, Cooperatives, Public Service Providers and Other Organizations; cf. Decision No. 15/2020/QD-TTg dated 24 April 2020 of the Prime Minister on Implementation of Policies on Assistance for People Affected by Covid-19 Pandemic.

95 K. Loan, Banks Cut Interest Rates to Support Businesses amidst COVID-19 Outbreak, "Online Newspaper of the Government of the Socialist Republic of Viet Nam" 11 March 2020, http://news.chinhphu.vn/Home/Banks-cut-interest-rates-to-support-businesses-amidst-COVID19-outbreak/20203/39131.vgp (29.07.2021).

96 *Ibidem*.

On 13 March 2020, the State Bank of Vietnam ("SBV") issued Circular No. 01/2020/TT-NHNN dated 13 March 2020 on providing for credit institutions, foreign bank branches to restructure loan terms, exempt and lower interests and charges, and retain debt categories to assist customers who were affected by the coronavirus epidemic ("Circular No. 01/2020/TT-NHNN"). The given circular is amended by Circular No. 03/2021/TT-NHNN dated 02 April 2021 ("Circular No. 03/2021/TT-NHNN"). The credit supporting programme setting up in the given circulars does not distinguish between corporate, household, or individual borrowers.

Restructuring loan terms and cutting interest rates is within the credit institutions' autonomy. However, through the circulars mentioned above, the SBV demonstrates a solid determination to command all credit institutions to quickly implement the given credit support policy and request the chairman of the board and the chief executive officer to be accountable to the Governor for implementation's outcomes.[97] Any credit institution's units, managers, and employees shall also be accountable for any delay or annoyance caused to customers subject to the assistance programme.[98] On the other hand, the SBV grants incentives to credit institutions whose primary business is to generate revenue from loan interests. Keeping the status quo of loans is expected to prevent loans from being categorized as "bad" loans that require credit institutions to set aside funds for loan loss provision.

Loan categories and entitlement to freezing loan categories are discussed first to evaluate the lender's incentives and loan eligibility for the credit support scheme.

2.1. Freezing Loan Categorises

Categorising loans and saving funds for loan loss provision are tools to counterweigh the credit institute's autonomy to restructure and reschedule loans and cutting interest rates. Loans are basically organised into five categories.[99] Loans in Category 3, 4 and 5 are classified as bad debts, ranging from loan not recoverable at the due date due to declining credit worthiness, to loan potentially irrecoverable and lost.[100]Loans subject to restructuring, extension or cutting interest rate could be placed in "bad debt" categories. As a result, ratios to set aside funds for loan loss provisions for each loan is provided as follows:[101]

97 Directive No. 02/CT-NHNN dated 31 March 2020 of the SBV on Urgent Measure of Banking Industry for Contribution to Covid-19 Control Effort and Alleviation of Difficulties Caused by Covid-19 Section IV.3.

98 *Ibidem*.

99 Cf. Circular No. 02/2013/TT-NHNN dated 21 January 2013 of the SBV on Providing on Classification of Assets, Levels and Method of Setting Up of Risk Provisions, and Use of Provisions Against Credit Risks in the Banking Activity of Credit Institutions, Foreign Banks' Branches Article 10.

100 *Ibidem,* Article 3.8.

101 *Ibidem,* Article 12.2.

- Category 1: 0%
- Category 2: 5%
- Category 3: 20%
- Category 4: 50%
- Category 5: 100%

To ensure the credit support policy's implementation, the SBV allows credit institutions to retain loan categories at the time nearest to 23 January 2020 for any loan under reconstruction for payment terms, or eligible to interest rate cutting subject to the credit support programmes, if loans are concluded before the above-mentioned date.[102] It was the date when the first coronavirus infection case was reported in Vietnam. For loans granted after that date and before 10 June 2020, when the prime minister announced a "new normal" in Vietnam and enabled businesses with highly intensive contact to reopen,[103] freezing loan categories is tighter. Accordingly, it is allowed to freeze existing loan categories with regard to loans in Category 1, loans arising not later than 17 May 2021, the effective date of Circular No. 03/2021/TT-NHNN, or loans subject to interest rate cutting in this period.[104] It is noticeable that the SBV has targeted loans eligible to credit support policies that arise before the above-stated "new normal" started. The provision reflects an optimistic view about the economy's recovery after nearly six months of putting in strict policies to contain coronavirus, despite an outbreak in Da Nang, a big city in Central Vietnam, which occurred about a month later and lasted for about forty days.[105]

2.2. Restructuring Loan Terms

Credit institutions can accept restructuring or rescheduling the payment term when a customer cannot duly pay the loan or interest as agreed. Still, there is sufficient ground to assess that the customer can pay the loan and interest under

102 Circular No. 01/2020/TT-NHNN dated March 13, 2020 of the Governor of SBV providing instructions for credit institutions and foreign branch banks (FBB) on debt rescheduling, exemption or reduction of interest and fees, retention of debt category to assist borrowers affected by Covid-19 pandemic Article 6.1 (amended by Circular No. 03/2021/TT-NHNN).

103 'Bản Tin Dịch COVID-19 Ngày 10/6/2020: Việt Nam an ToànĐểPhátTriểnBềnVữngTrongTình HìnhMới' (*General Department of Preventive Medicine*, 10 June 2020) <https://vncdc.gov.vn/ban-tin-dich-covid-19-ngay-1062020-viet-nam-an-toan-de-phat-trien-ben-vung-trong-tinh-hinh-moi-nd15780.html> (28.07.2021).

104 Circular No. 01/2020/TT-NHNN Article 6.2 (amended by Circular 03/2021/TT-NHNN).

105 Cf. 'QuyếnBộTrưởngBộ Y Tế: BệnhNhân ở ĐàNẵngĐượcKhẳngĐịnhDươngTínhVới SARS-COV–2' (*SucKhoe& Doi Song*, 25 July 2020) <https://suckhoedoisong.vn/quyen-bo-truong-bo-y-te-benh-nhan-o-da-nang-duoc-khang-dinh-duong-tinh-voi-sars-cov-2-n177597.html> accessed 28 July 2021; 'CậpNhậtTìnhHình Covid-19 TạiĐàNẵngNgày 5–9' (*Da Nang Online*, 5 September 2020), https://baodanang.vn/infographics/202009/cap-nhat-tinh-hinh-covid-19-tai-da-nang-ngay-5–9-3703001 (31.07.2021).

a restructured or rescheduled term.[106] Loans are restructured when the period for paying the loan and interest in part or in full, whether or not the number of periods is changed, is extended, but the loan term remains unchanged. Loans are scheduled when a loan term is extended.[107] For the purpose of the current research, the term "loan restructuring" mentioned covers both loan restructuring and rescheduling.[108]

Loans, including finance leases, eligible for the credit support scheme must satisfy several requirements. From the lender's perspectives, loan restructuring eligible to freezing loan categories and loan loss provision as previously discussed, must possess eight elements. For the first three requirements, the SBV provides standards to leave discretion for credit institutes to evaluate the customer's creditworthiness, and the capacity to discharge debt under the restructuring scheme. The other subsequent five requirements are strict and specific rules.

First, there is a deficiency in the customer's creditworthiness. Credit institutions must evaluate whether a customer cannot pay the loan and interest in full and on time as agreed, due to the impact of the coronavirus pandemic. In other words, loan restructuring should correspond to the customer's declining creditworthiness.[109]

Second, it is required to perform the payment obligation duly under the restructuring scheme at the credit institution's assessment. Also, a customer must apply for a restructured loan due to financial difficulties.[110]

Thirdly, the term for loan restructuring, including loan rescheduling, shall be determined corresponding to the impact of the coronavirus pandemic on the borrower and not exceed twelve months from the date of restructuring.[111]

Fourthly, the loan must have been granted before 10 June 2020,[112] the date marking the "new normal" in the country. It can be assumed that the situation after the given date is considered as returning to normality at least as expected and witnessed at the effective date of Circular 03/2021/TT-NHNN, 17 May 2021. In other words, any financial deficiency resulting in a customer's capacity to pay a loan cannot blame the impact of coronavirus pandemic despite the economy heavily relying on international trade and the prospect of controlling coronavirus being unclear. In fact, a few cases of community transmission were reported and the gradually increasing, but small, number of cases reported at the outset were quarantined right away. Thus, before 17 May 2021, Vietnam did not endure any prolonged period of social distancing and businesses closing as in early months of 2020.

106 Circular No. 02/2013/TT-NHNN Article 3.7.
107 Circular No. 39/2016/TT-NHNN dated on 30 December 2016 of the SBV Prescribing Lending Transactions of Credit Institutions and/or Foreign Bank Branches With Customers Article 2.10.
108 Circular No. 01/2020/TT-NHNN Article 4 (amended by Circular No. 03/2021/TT-NHNN).
109 *Ibidem,* Article 4.4 (amended by Circular 03/2021/TT-NHNN).
110 *Ibidem,* Article 4.5 (amended by Circular 03/2021/TT-NHNN).
111 *Ibidem,* Article 4.7 (amended by Circular 03/2021/TT-NHNN).
112 *Ibidem,* Article 4.1 (amended by Circular 03/2021/TT-NHNN).

Fifthly, it is the due date to repay the debts and interest. The principal loan and/or interest must be overdue from 23 January 2020, the date marking the first infected case reported, to 31 December 2021.[113]

Sixthly, it is a requirement to fall in one of three situations as follows for restructuring the outstanding debts:

- The outstanding debt is not due or up to ten days overdue;
- The loan is incurred before 23 January 2020, and the outstanding debt becomes overdue from 23 January 2020 to 29 March 2020;
- The loan is incurred from 23 January 2020, and the outstanding debt becomes overdue before 17 May 2020.[114]

When the fifth and sixth requirements are read together, it could be inferred from the above regulations that the SBV made an effort to strike a balance between the policy to support borrowers vulnerable to the coronavirus impact and the risk management concerning bad credits. Loose conditions to be eligible for the credit support programme may account for insufficient funds being set aside for loan loss provisions. Therefore, it primarily targeted Category 1 loans not yet due, or overdue for up to ten days. However, it is no more than an assumption because the SBV did not expressly stipulate Category 1 loans. It is raised a question whether a restructured loan can fall within the scope of application if it meets the requirement of not being due, or overdue less than ten days.

Bad loans are eligible for the scheme if they are due in the most severe period of social distancing; that is to say, from the date of the first case reported to the date starting the social distancing policy,[115] 29 March 2020, for any loan incurred before the former date, or before the effective date of Circular 03/2021/TT-NHNN, 17 May 2021, for any loan incurred after the date of the first case reported. Bad loans restructured that do not comply with the conditions cannot remain in the existing loan category, and the credit institution must make loan loss provisions for these loans, respectively.

Seventhly, loans must not violate rules or regulations of law.[116]

Eighthly, loan restructuring shall be carried out up to 31 December 2021.[117]

In brief, the SVB imposes both rules and standards to evaluate the performance of credit institutes in carrying out the credit support policy to assist borrowers. On the

113 *Ibidem,* Article 4.2 (amended by Circular 03/2021/TT-NHNN).

114 *Ibidem,* Article 4.3 (amended by Circular 03/2021/TT-NHNN).

115 Under Directive No. 15/CT-TTg dated 27 March 2020 of the Prime Minister On Climax Stage of Covid-19 Control Effort, the Prime Minister guides the local goverments to implement the social distancing policy starting at 0.00 28 March 2020.

116 Circular No. 01/2020/TT-NHNN Article 4.6 (amended by Circular 03/2021/TT-NHNN).

117 *Ibidem,* Article 4.8 (amended by Circular 03/2021/TT-NHNN).

other hand, implementing broad credit supporting programmes may expose credit institutes to the risk of bad debts. Specific rules can help to avoid the probability of evading from the general rule of loan loss provisions. The standards emphasize the credit institution's discretion to evaluate on a case-to-case basis.

2.3. Exempting and Lowering Interest Rates

Credit institutions can cut interest rates by exempting or reducing interests and charges complying with their internal regulations on outstanding debts. Under the credit supporting programme, the requisites are:

- Loans incurred before 10 June 2020;
- The obligation to pay principal debts and/or interests is due in the period from 23 January 2020 to 31 December 2021;
- The borrower cannot pay the loan and interest in full and in the agreed time due to the impact of the coronavirus pandemic;
- Interest rate cutting is executed before 31 December 2021.[118]

Compared to loan restructuring, conditions for cutting interest rates under the credit supporting programme are not relatively tight. The wording again does not mention whether or not eligible loans are allowed to already being restructured. The period in which the overdue debt arises for the purpose of interest rate cutting lasts for almost two years, enabling bad debts to benefit from the allowances. However, if the loan incurred after 23 January 2020 is subject to the second time of interest cutting rate, the loan cannot remain in the existing loan category.[119]Indeed, many commercial banks in Vietnam have announced an interest rate cutting programme in response to the SBV policies. Vietcombank, one of the biggest commercial banks in Vietnam, reduces the rate of 1% per year for corporate customers in industries heavily affected by the pandemic, individual customers borrowing loans for business, and 0.5% for individual customers borrowing loans for household purposes. This programme accounts for 1,800 billion VND, equivalent to around 78 million USD.[120]

Figures collected show that abundant borrowers got access to the credit supporting policy initiated by the SBV and implemented broadly by credit institutions from March to November 2020, according to the IMF report.[121] 272,183 borrowers

118 *Ibidem,*Article 5 (amended by Circular 03/2021/TT-NHNN).

119 *Ibidem* Article 6.2.c (amended by Circular 03/2021/TT-NHNN).

120 A. Minh, Vietcombank Giảm Lãi Suất Hỗ Trợ Khách Hàng Bị Ảnh Hưởng Bởi Dịch COVID-19 (16 July 2021), http://baochinhphu.vn/Doanh-nghiep/Vietcombank-giam-lai-suat-ho-tro-khach-hang-bi-anh-huong-boi-dich-COVID19/438491.vgp (28.07.2021).

121 International Monetary Fund, „IMF Country Report: Vietnam" 2021, vol. 21/42, pp. 49–50, https://www.imf.org/-/media/Files/Publications/CR/2021/English/1VNMEA2021001.ashx (20.07.2021), cf. National Economics University and Japan International Cooperation Agency v. 3,35

accounting for 342 trillion VND of outstanding loans (making up 3.9 per cent of total system outstanding loans) are entitled to loan restructuring and rescheduling. 552,425 borrowers accounting for 931 trillion VND of outstanding loans (making up 10.8 per cent of the banking system outstanding loans) are entitled to interest rate cutting. Banking transaction fees are also reduced to a small amount of 1 trillion VND. Data for the period after November 2021 has not been recorded and declared yet.

The implication of the policy is targeting borrowers in manufacturing, trading, and exporting industries who are heavily affected by the coronavirus outbreak. Tourism is also damaged and not recovered, but this industry is not frequently dependent on bank credits for operation. The real estate business is seemingly not eligible for the credit support programme due to difficulties in proving financial deficiency arising from the coronavirus impact. Therefore, even though the ratio of outstanding debts subject to loan restructuring and interest rate cutting is not very large, it reflects the landscape of the Vietnamese economy to some extent.

However, the situation has changed drastically since community transmission was reported in early June 2021 in Ho Chi Minh City. At the time of preparing the manuscript, the number of infected cases recorded is more than 137.000, and new cases every day are about 6000.[122] The acceleration of transmission is expected since the latest outbreak in Da Nang recorded only more than 300 cases. As a result, the impact of the new wave outbreak is supposed to be highly severe. It is predicted that manufacturing, trading industries and exportation are the most vulnerable areas. Loans for household purposes, including house mortgages, certainly expose the incapability to pay overdue debts due to wage and working hour cutting and even termination of full-time jobs.

The SBV is likely to update the policy in response to the changing situation. The deadline of 31 December 2021 for loan restructuring and interest rate cutting should be extended. The period in which outstanding debts are eligible to loan restructuring and rescheduling should be extended beyond 17 May 2021, because Vietnam is no longer in normality. The SBV should clarify whether the second time loan restructuring and scheduling could benefit from the credit support scheme.

Conclusion

The occurrence of the COVID-19 pandemic is undoubtedly a phenomenon negatively affecting the economy as well as the financial standing of borrowers, both consumers, and businesses. The opportunities offered to entrepreneurs in Poland were extensive and, to a large extent, were expected to mitigate the negative financial effects

122 Trang Tin Về Dịch Bệnh Viêm Đường Hô Hấp Cấp Covid-19, https://ncov.moh.gov.vn (30.07.2021).

of the abovementioned areas of the economy. Nevertheless, from the perspective of businesses affected by the consequences of the epidemic, it can be demonstrated that the aid received regarding the losses incurred was small. The closure of particular industries (e.g., hotels and restaurants) for several months and the formulation of quite strict requirements for the granting of individual aid measures led, in many cases, to a lack of opportunity to take advantage of the aid offered. Despite huge outlays from the state budget, financial aid did not reach all those entrepreneurs affected by the consequences of the pandemic. In addition, as confirmed by the COVID-19 Barometer study, conducted by the European Leasing Fund, from the point of view of current trends, entrepreneurs expect an improvement in the situation in industries affected by the pandemic over the next six months.[123]Initially, the "credit holidays" for entrepreneurs were based on bilateral, autonomous arrangements of the parties; however, with respect to consumers meeting the indicated conditions, the so-called statutory credit holidays were introduced. Although the idea behind the introduction of such regulations was probably to help indebted citizens, they were not well thought out and met with justified criticism from the lending community.

On the other hand, as far as forms of support for consumer borrowers are concerned, which were introduced as part of the so-called "anti-crisis package" as one of the responses to the COVID-19 outbreak in Poland, one should point to the reduction of the limit of non-interest credit costs and statutory credit holidays. They were a response to the risk of a significant reduction of consumers' current income and the possibility of falling into a "debt spiral".

Vietnam contained the coronavirus outbreak early on in 2020 using comprehensive social and economic policies. The given guidelines, including credit supporting programmes implemented by credit institutions, probably resulted in the success that could be proved by slightly increased GDP mentioned elsewhere in the current essay. The SBV plays a crucial role in the credit supporting policy in terms of using economic incentives and administrative order to induce credit institutions to implement the loan restructuring and reduced interest rates programme widely. Both consumer and business borrowers are beneficiaries under the programme. As a side effect, avoiding the "bad debts" group can facilitate credit institutions to the extent that they can use funds in the ordinary course of business rather than making it for loan loss provisions. Although the programme has some achievements in the short term; it is expected to have additional policies and legal instruments to support borrowers in the long term, when the impacts of coronavirus are seemingly severe and long-lasting in Vietnam.

123 COVID-19 Barometer: positive trend continues, one in three companies expect their industry to improve in the next 6 months, https://alebank.pl/barometr-covid-19-trwa-pozytywny-trend-co-trzecia-firma-spodziewa-sie-poprawy-w-swojej-branzy-w-ciagu-najblizszych-6-miesiecy/?id=377732&catid=22872&cat2id=25926 (27.07.2021).

Comparing the instruments of support of borrowers introduced in Poland, and Vietnam, in connection with their difficult financial situation caused by the COVID-19 pandemic, it is worth noting that in both countries, there were different legal bases for their introduction, their catalogue, and scope of entities and conditions (prerequisites) for their application. A common feature of the introduced support instruments was the temporary character of their validity and the period in which the incurred credit liabilities were covered by the support mechanisms. In Poland, this was done by acts of a statutory rank of a specific and temporary character which provided for support instruments different for consumer borrowers (statutory credit holidays, temporarily reduced limit of non-interest costs of consumer credit for credits contracted during the pandemic in the indicated period), and different for business borrowers (assistance in obtaining preferential credits in the form of guarantees issued by Bank Gospodarstwa Krajowego, credit holidays and subsidies to credit interest rates, the possibility of obtaining funds within non-returnable loans and grants from the State Development Fund). This was dictated by the existence of well-established pro-consumer regulations in the legal system, and the introduced anti-covid regulations modified the existing legal solutions protecting consumer borrowers. In Vietnam, on the other hand, borrower support instruments were introduced as part of the government's aid policy – credit support policy by Bank Ce already meant by law the Central Bank of Vietnam – State Bank of Vietnam (SBV), which acts as the primary regulator of the financial market and exercises supervision over banks, using circulars. Besides, the instruments were not differentiated according to whether the borrower is a consumer or an entrepreneur. The banks, within their autonomy, launched support instruments, which consisted in lowering (or waiving) interest rates and restructuring loans for their customers, based on a circular of the State Bank of Vietnam, which allowed them to do so and set conditions, which in Poland was a statutory and automatic requirement for consumers, once they met them. At the same time, the SVB, under its authority, created incentives for banks to activate support facilities to prevent them from qualifying as "bad" loans, which in turn required setting aside funds for loan loss reserves.

Measures undertaken by the legislator, the purpose of which was to provide temporary and interim support to borrowers facing financial difficulties in settling their credit obligations under loans taken before the outbreak of the pandemic, deserve, in principle, a positive assessment. Regardless of the legal evaluation of the quality of some solutions concerning the statutory regulation of credit holidays (which admittedly raise doubts)[124], not only in practice but also in doctrine, they

124 v. Letter of 25 June 2020 Polish Bank Association Selected interpretative comments on the so-called statutory credit vacations, https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/pisma-urzedowe/wybrane-uwagi-interpretacyjne-w-zakresie-tzw-ustawowych-185098167 (access 25.07.2021).

were necessary. Another issue is whether the conditions for using the introduced instruments of support for borrowers were a real help in this situation and whether borrowers actually used them. Another issue is whether the assistance was properly provided and whether there were no irregularities in this respect that constituted a violation of their interests. Hence, in this area, the necessity of ensuring adequate ongoing supervision of market practices of lenders so that the problematic, often forced, and independent position of the borrower regarding the pandemic was not exploited by a professional. Besides, an important issue was to ensure the enforcement of the introduced instruments with specific legal regulations of borrower support.

Above all, in the face of the next wave of the COVID – 19 epidemic, it may be necessary to extend the deadlines of temporary support instruments to borrowers and revise them, taking into account experience and irregularities. This will be quite a challenge for the legislature, which should consider the borrower's interest so that the support has an actual dimension and is not delayed.

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Postępowanie w sprawach podatkowych przed Naczelnym Sądem Administracyjnym w okresie pandemii COVID-19 (2020 r. – lipiec 2021 r.)

Proceedings in Tax Matters Before the Supreme Administrative Court during the COVID-19 Pandemic (2020 – July 2021)

Abstract: In Poland, the administration of justice, including in tax matters, is exercised by the provincial administrative court in the first instance, and the Supreme Administrative Court, as an appeal (cassation) court. In this article, its author discusses the repeatedly changing rules of conduct in tax matters before the Supreme Administrative Court during the COVID-19 pandemic (for the period 2020 – July 2021). The almost one-and-a-half-year duration of the pandemic allowed for the formulation of conclusions relating to both the legal solutions and the practice of litigation in tax matters before the Supreme Administrative Court during this period. In the work, the author presents his conclusions based on the judicature of the Supreme Administrative Court and the available statistical data on the completed court hearings and closed sessions, as well as resolved cassation complaints in tax matters.
Keywords: covid-19 pandemic, Supreme Administrative Court, tax cases
Słowa kluczowe: pandemia COVID-19, Naczelny Sąd Administracyjny, sprawy podatkowe

Wprowadzenie

Celem tego artykułu jest ocena zmian regulacji przepisów prawa i praktyki, odnoszących się do procedur w sprawach podatkowych, jakie obowiązywały przed Naczelnym Sądem Administracyjnym (NSA) w okresie pandemii COVID-19 (2020 r. – lipiec 2021 r.). W Polsce wymiar sprawiedliwości sprawują Sąd Najwyższy, sądy po-

wszechne, sądy administracyjne oraz sądy wojskowe (art. 175 Konstytucji Rzeczypospolitej Polskiej[1]; dalej: „Konstytucja"). Od 2004 r. funkcjonuje dwuinstancyjne sądownictwo administracyjne[2]. Jego zadaniem jest kontrola administracji, w tym organów podatkowych, w oparciu o zasadę legalności. Kontroli tej dokonuje wojewódzki sąd administracyjny w pierwszej instancji i NSA jako sąd odwoławczy (kasacyjny). W myśl przepisów art. 10 p.p.s.a., rozpoznawanie spraw podatkowych odbywa się jawnie, chyba że przepis szczególny stanowił inaczej. Natomiast zgodnie z art. 90 § 1 *in fine* p.p.s.a. zasadą pozostaje, że NSA rozpoznaje sprawy podatkowe na rozprawie. Wyjątkiem od tej zasady było orzekanie na posiedzeniu niejawnym. Jeszcze innym sposobem rozpatrzenia sprawy podatkowej przed NSA, zgodnie z zasadą jawności, jest jej rozpoznanie na rozprawie przy użyciu urządzeń technicznych, umożliwiających odbycie jej na odległość z jednoczesnym bezpośrednim przekazem obrazu i dźwięku. O tego rodzaju sądowych „rozprawach online" przeprowadzanych w wielu krajach można coraz częściej przeczytać w fachowych publikacjach[3]. Wiąże się to, w znaczeniu szerszym, z zasadą dostępu do sądu. Zasada ta stanowi punkt odniesienia, decydujący o samej regulacji prawnej związanej z informatyzacją postępowania sądowoadministracyjnego[4]. Rozwój tych regulacji prawnych w Polsce nastąpił niezwykle nagle i szybko, w szczególności wymuszony pandemią COVID-19.

Przeprowadzone w niniejszym artykule omówienie zasad postępowania w sprawach podatkowych przed NSA w okresie pandemii COVID-19 za okres 2020 r. – lipiec 2021 r., na tle zmieniających się regulacji prawnych, ma na celu przybliżenie tego zagadnienia wszystkim zainteresowanym osobom. W pracy główną metodą badawczą jest metoda dogmatyczno-prawna. Jedynie uzupełniająco zastosowano metodę emipiryczno-analityczną do zaprezentowania zachowań i postaw podatników (skarżących) oraz ich pełnomocników w przedmiocie rezygnacji z przeprowadzania rozprawy w sprawie podatkowej. Wówczas alternatywą zawsze jest rozpatrzenie takiej sprawy przed NSA na posiedzeniu niejawnym. Ze względu na ograniczoną objętość tekstu w artykule jego autor skupił się jedynie na analizie podstawowych i najważniejszych elementach rozwiązań prawnych, odnoszących się do procedowania w sprawach podatkowych przed NSA w okresie pandemii COVID-19. Zaprezen-

1 Ustawa z dnia 2 kwietnia 1997 r., Dz.U. Nr 78, poz. 483 ze zm.

2 Zakres i formy kontroli sprawowanej przez sądy administracyjne znajdujemy w trzech ustawach: (1) ustawie z dnia 25 lipca 2002 r. – Prawo o ustroju sądów administracyjnych (Dz.U. z 2020 r. poz. 2071; dalej: p.u.s.a.), (2) ustawie z dnia 30 sierpnia 2002 r. – Prawo o postępowaniu przed sądami administracyjnymi (Dz.U. z 2019 r., poz. 2325 ze zm.; dalej: p.p.s.a.) oraz (3) w ustawie z dnia 30 sierpnia 2002 r. – Przepisy wprowadzające ustawę – Prawo o ustroju sądów administracyjnych i ustawę – Prawo o postępowaniu przed sądami administracyjnymi (Dz.U. Nr 153, poz. 1271 ze zm.).

3 R. Susskind, Sądy internetowe i przyszłość wymiaru sprawiedliwości, Warszawa 2021, s. 53 i n.

4 Zob. P. Pietrasz, Informatyzacja polskiego postępowania przed sądami administracyjnymi a jego zasady ogólne, Warszawa 2020, s. 606.

towano przykładowe treści fragmentów uzasadnień orzeczeń wprost odnoszących się do zmieniającego się w czasie reżimu prawnego i sanitarnego. Przedstawiono i dokonano analizy danych statystycznych spraw podatkowych rozpatrzonych przed NSA. Omówiono również działalność uchwałodawczą NSA w czasie pandemii COVID-19 za okres 2020 r. – lipiec 2021 r. jako wzorcowy sposób procedowania, także w sprawach uchwał podatkowych. W danych okresie jednakże NSA nie podjął żadnej uchwały w sprawach podatkowych.

1. Orzekanie przez NSA w sprawach podatkowych w okresie pandemii COVID-19 od 14 marca 2020 r. do 15 maja 2020 r.

Przed 14 marca 2020 r., zgodnie z art. 10 p.p.s.a., rozpoznawanie spraw podatkowych odbywało się jawnie, chyba że przepis szczególny stanowił inaczej. Stosownie do postanowień art. 90 § 1 *in fine* p.p.s.a. zasadą pozostawało, że Naczelny Sąd Administracyjny rozpoznawał sprawy podatkowe na rozprawie z udziałem uprzednio zawiadomionych stron oraz ich pełnomocników na sali sądowej. To między innymi wynik realizacji zasady jawności postępowania określonej w art. 45 Konstytucji. Wyjątkiem od tej zasady było orzekanie na posiedzeniu niejawnym (bez udziału stron i ich pełnomocników) i to tylko wówczas, gdy pozwalał na to konkretny przepis ustawy (np. odrzucenie skargi)[5]. W literaturze przedmiotu podkreśla się, że rozprawa służy merytorycznemu rozpoznaniu sprawy w danej instancji i obejmuje ciąg sformalizowanych czynności od jej otwarcia aż do zamknięcia[6]. W dniu 2 marca 2020 r. została uchwalona ustawa o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych[7]. W uzasadnieniu do projektu tej ustawy między innymi stwierdza się, że „w związku z zagrożeniem rozprzestrzeniania się zakażeń wirusem SARS CoV–2 istnieje konieczność wprowadzenia szczególnych rozwiązań, umożliwiających podejmowanie działań minimalizujących zagrożenie dla zdrowia publicznego […]. Nowy koronawirus nazwany SARS-CoV–2 jest wirusem mogącym wywołać zespół niewydolności oddechowej, a wywołana nim choroba jest określana jako COVID-19. SARS-CoV–2 został zidentyfikowany pod koniec 2019 roku i jest nowym szczepem koronawirusa, który nie był wcześniej identyfikowany u ludzi”[8]. Na podstawie rozporządzenia Ministra Zdrowia z dniem 14 marca

5 Zob. S. Presnarowicz, Zaskarżanie decyzji podatkowych w Polsce, Białystok 2014, s. 137.

6 Zob. B. Dauter, Metodyka pracy sędziego sądu administracyjnego, Warszawa 2011, s. 334–335.

7 Dz.U. z 2020 r. poz. 374 ze zm., dalej: uCOVID-19.

8 Zob. uzasadnienie do rządowego projektu ustawy o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych, druk sejmowy nr 265 z dnia 1 marca 2020 r., Sejm RP VII kadencji, s. 1, http://www.orka.sejm.gov.pl (8.08.2021 r.).

2020 r. na obszarze Rzeczypospolitej Polskiej wprowadzono stan zagrożenia epidemicznego[9]. Ponadto na podstawie art. 15zzs ust. 6 uCOVID-19 ustawodawca postanowił, że w okresie epidemii nie przeprowadza się rozpraw ani posiedzeń jawnych, z wyjątkiem rozpraw i posiedzeń jawnych w sprawach określonych w art. 14a ust. 4 i 5 tej ustawy (tj. w sprawach z terminem rozpatrzenia oraz w sprawach wniosków o wstrzymanie aktu lub czynności)[10]. Spowodowało to, że w NSA musiały także ulec zmianom procedury orzekania, między innymi w sprawach podatkowych. Odwołano wyznaczone uprzednio rozprawy, jednocześnie przygotowując się do orzekania przez sędziów na trzyosobowych posiedzeniach niejawnych[11].

2. Zmienione zasady orzekania w sprawach podatkowych przez NSA w okresie pandemii COVID-19 od 16 maja 2020 r. do 5 stycznia 2021 r.

Ustawą z dnia 14 maja 2020 r. o zmianie niektórych ustaw w zakresie działań osłonowych w związku z rozprzestrzenianiem się wirusa SARS-CoV–2[12] został uchylony przepis art. 15zzs ust. 6 uCOVID-19, na podstawie którego postanowiono, że w okresie epidemii nie przeprowadza się rozpraw ani posiedzeń jawnych. Począwszy od 16 maja 2020 r. na mocy tejże ustawy zmieniającej dodano do uCOVID-19 art. 15 zzs^4.

Stosownie do postanowień art. 15 zzs^4 ust. 1 uCOVID-19 w okresie obowiązywania stanu zagrożenia epidemicznego albo stanu epidemii ogłoszonego z powodu COVID-19 oraz w ciągu roku od odwołania ostatniego z nich w sprawach, w których strona wnosząca skargę kasacyjną nie zrzekła się rozprawy lub inna strona zażądała przeprowadzenia rozprawy, Naczelny Sąd Administracyjny może rozpoznać skargę kasacyjną na posiedzeniu niejawnym, jeżeli wszystkie strony w terminie 14 dni od dnia doręczenia zawiadomienia o zamiarze skierowania sprawy na posiedzenie niejawne wyrażą na to zgodę. Na posiedzeniu niejawnym w tych sprawach Naczelny Sąd Administracyjny orzeka w składzie trzech sędziów. Zgodnie z przepisem art. 15 zzs^4 ust. 2 uCOVID-19 w okresie obowiązywania stanu zagrożenia epidemicznego albo stanu epidemii ogłoszonego z powodu COVID-19 oraz w ciągu roku od odwołania ostatniego z nich wojewódzkie sądy administracyjne oraz Naczelny Sąd Administracyjny przeprowadzają rozprawę przy użyciu urządzeń technicznych umożliwiających przeprowadzenie jej na odległość z jednoczesnym bezpośrednim przekazem obrazu i dźwięku, z tym że osoby w niej uczestniczące nie muszą przebywać w budynku sądu, chyba że przeprowadzenie rozprawy bez użycia powyższych urządzeń nie wywoła

9 Dz.U. z 2020 r. poz. 433.
10 Dz.U. z 2020 r. poz. 568. Przepis wszedł w życie 31 marca 2020 r.
11 Zob. Naczelny Sąd Administracyjny. Informacja o działalności sądów administracyjnych w 2020 roku, Warszawa 2021, s. 30.
12 Dz.U. z 2020 r. poz. 875.

nadmiernego zagrożenia dla zdrowia osób w niej uczestniczących. W myśl przepisu art. 15 zzs ust. 3 uCOVID-19 przewodniczący może zarządzić przeprowadzenie posiedzenia niejawnego, jeżeli uzna rozpoznanie sprawy za konieczne, a przeprowadzenie wymaganej przez ustawę rozprawy mogłoby wywołać nadmierne zagrożenie dla zdrowia osób w niej uczestniczących i nie można przeprowadzić jej na odległość z jednoczesnym bezpośrednim przekazem obrazu i dźwięku. Na posiedzeniu niejawnym w tych sprawach sąd orzeka w składzie trzech sędziów. Należy również pamiętać, że w związku z objęciem Miasta Stołecznego Warszawy obszarem czerwonym zagrożenia epidemiologicznego Prezes NSA zarządzeniem nr 39 z 16 października 2020 r. postanowił, że z dniem 17 października 2020 r. odwołuje wszystkie rozprawy, kontynuując jednocześnie działalność orzeczniczą NSA na posiedzeniach niejawnych[13].

Wykładnia powyższych przepisów prowadzi do wniosku, że ustawodawca w obliczu realnego zagrożenia chorobą zakaźną COVID-19 w okresie od 16 maja 2020 r. do 5 stycznia 2021 r. zmienił zasady rozpatrywania spraw podatkowych przed Naczelnym Sądem Administracyjnym. Na posiedzeniu niejawnym sprawa taka w okresie od 16 maja 2020 r. do 17 października 2020 r. mogła być rozpatrzona wyłącznie po uzyskaniu zgody wszystkich stron (art. 15 zzs^4 ust. 1 uCOVID-19). Natomiast rozpatrzenie sprawy podatkowej przed tym sądem na rozprawie było możliwe przy użyciu urządzeń technicznych umożliwiających przeprowadzenie jej na odległość z jednoczesnym bezpośrednim przekazem obrazu i dźwięku (rozprawa „zdalna", odmiejscowione posiedzenie, e-rozprawa). Bez użycia powyższych urządzeń możliwe było przeprowadzenie rozprawy (tradycyjnie na sali NSA), jeżeli nie powodowało to nadmiernego zagrożenia dla zdrowia osób w niej uczestniczących (art. 15 zzs^4 ust. 2 uCOVID-19). Wyjątkowo przewodniczący mógł zarządzić przeprowadzenie posiedzenia niejawnego przed NSA w sprawie podatkowej bez zgody stron, jeżeli uznał rozpoznanie sprawy za konieczne, przy czym musiało wystąpić nadmierne zagrożenie dla zdrowia osób w niej uczestniczących i jednocześnie nie można było jej przeprowadzić na odległość z bezpośrednim przekazem obrazu i dźwięku (art. 15 zzs^4 ust. 3 uCOVID-19). W literaturze przedmiotu podkreśla się, że w cytowanych regulacjach prawnych ustawodawca wprowadził przesłankę „nadmiernego zagrożenia dla zdrowia osób". To zwrot o charakterze niedookreślonym. Powstaje pytanie, kto i w jakim reżimie prawnym powinien ocenić zaistnienie „nadmiernego zagrożenia dla zdrowia osób" jako przesłanki do odbycia posiedzenia niejawnego. Brak wskazania przez ustawodawcę na konkretny podmiot pozwala na przyjęcie, że w praktyce będzie to zadanie przewodniczącego składu orzekającego NSA. Wówczas osoba podejmująca decyzję o rozpatrzeniu sprawy podatkowej na posiedzeniu niejawnym

13 Zarządzenie Prezesa NSA opublikowane na stronie internetowej www.nsa.gov.pl w zakładce „Komunikaty".

powinna rozważyć, czy nie dojdzie do naruszenia konstytucyjnej zasady jawności postępowania przed NSA[14].

Nie uległ zmianie przepis art. 182 § 2 p.p.s.a. Stosownie do jego postanowień NSA rozpoznaje skargę kasacyjną na posiedzeniu niejawnym, gdy strona, która ją wniosła, zrzekła się rozprawy, a pozostałe strony w terminie czternastu dni od dnia doręczenia skargi kasacyjnej nie zażądały przeprowadzenia rozprawy. NSA w tym zakresie ma obowiązek uszanować wolę stron postępowania przed sądem.

Z danych elektronicznego systemu informacji o sprawach (OSO) wynika, że w Izbie Finansowej NSA od 16 maja 2020 r. do 5 stycznia 2021 r. odbyło się 137 trzyosobowych sesji jawnych (rozpraw), natomiast liczba trzyosobowych posiedzeń niejawnych w danym okresie wyniosła 279[15]. Wszystkie trzyosobowe posiedzenia jawne (rozprawy) w sprawach podatkowych przed NSA odbywały się w okresie od 16 maja 2020 r. do 17 października 2020 r. w pełnym reżimie sanitarnym przewidzianym obowiązującymi wówczas przepisami prawa (między innymi: ekrany ochronne na stołach w salach sądowych NSA, obowiązkowe maseczki, dezynfekcje sal NSA po każdej sprawie). Ponad dwukrotnie większa liczba trzyosobowych posiedzeń niejawnych w omawianych sprawach w szczególności wynikała z udzielanych odpowiedzi (zgód) stron postępowania na odbycie posiedzenia niejawnego w związku z kierowanymi do nich pytaniami. Oczywiście drugim powodem tego stanu rzeczy było odwołanie przez Prezesa NSA, cytowanym wyżej zarządzeniem nr 39, wszystkich rozpraw z dniem 17 października 2020 r. i przejście wyłącznie na posiedzenia niejawne. Wykonywanie w praktyce przez NSA powyższego reżimu prawnego i sanitarnego ilustrują treści uzasadnień sporządzonych w wydawanych od 16 maja 2020 r. do 17 października 2020 r. wyrokach NSA w sprawach podatkowych. Na przykład w uzasadnieniu orzeczenia z 2 lipca 2020 r. NSA stwierdził, że skarżący wniósł o nieprzeprowadzanie rozprawy, a strona przeciwna nie oponowała przeciwko rozpatrzeniu sprawy podatkowej na posiedzeniu niejawnym[16]. Podobnie w uzasadnieniu wyroku z 17 lipca 2020 r. NSA podkreślał, że skarżący złożył oświadczenie o zrzeczeniu się rozprawy, natomiast organ podatkowy nie zażądał jej przeprowadzenia[17]. W uzasadnieniu orzeczenia z 16 października 2020 r. NSA podkreślał, że w pismach procesowych z dnia 23 czerwca 2020 r. i 16 lipca 2020 r. odpowiednio organ podatkowy i gmina – w odpowiedzi na zawiadomienia sądowe o zamiarze skierowania sprawy na posiedzenie niejawne w składzie trzech sędziów w związku z przepisami o prze-

14 Zob. M. Jagielska, A. Wiktorowska, K. Zalasińska, A. Jaskułowska, M. Rypina, M. Wierzbowski, Komentarz do art. 90, (w:) R. Hauser, M. Wierzbowski (red.), Prawo o postępowaniu przed sądami administracyjnymi. Komentarz, Warszawa 2021, s. 612–613.

15 Wydział Informacji Sądowej NSA, Odpowiedź na wniosek o udzielenie informacji publicznej, sygn. WIS.0144.163.2021, dnia 19 sierpnia 2021 r.

16 Zob. wyrok NSA, sygn. akt II FSK 2133/19.

17 Zob. wyrok NSA, sygn. akt II FSK 1107/20.

ciwdziałaniu i zwalczaniu COVID-19 – wyrazili zgodę na rozpoznanie skargi kasacyjnej na posiedzeniu niejawnym[18].

3. Działalność orzecznicza NSA w sprawach podatkowych w okresie pandemii COVID-19 od 6 stycznia 2021 r. do 2 lipca 2021 r.

Począwszy od 6 stycznia 2021 r., równolegle z przepisem art. 15 zzs^4 uCOVID-19, zaczęły obowiązywać regulacje art. 94 § 2 p.p.s.a wprowadzone przez art. 96 pkt 18 ustawy z dnia 18 listopada 2020 r. o doręczeniach elektronicznych[19]. Stosownie do przepisu art. 94 § 2 p.p.s.a, przewodniczący może zarządzić przeprowadzenie posiedzenia jawnego przy użyciu urządzeń technicznych umożliwiających jego przeprowadzenie na odległość. W takim przypadku uczestnicy mogą brać udział w posiedzeniu sądowym, gdy przebywają w budynku innego sądu, i tam dokonywać czynności procesowych, a przebieg czynności procesowych transmituje się z sali sądowej sądu prowadzącego postępowanie do miejsca pobytu uczestników postępowania oraz z miejsca pobytu uczestników postępowania do sali sądowej sądu prowadzącego postępowanie. Mając na uwadze treść powyższych unormowań, należy odpowiedzieć na pytanie, jakie zachodzą relacje pomiędzy przepisem art. 94 § 2 p.p.s.a. a przepisem art. 15 zzs^4 uCOVID-19. W literaturze przedmiotu podkreśla się, że unormowanie zawarte w art. 15 zzs^4 uCOVID-19 ma charakter epizodyczny, na co wskazuje zapis, że przeprowadzenie odmiejscowionej rozprawy w siedzibie NSA nie wywoła „nadmiernego zagrożenia dla zdrowia osób w niej uczestniczących"[20]. Można również przepis zawarty w art. 15 zzs^4 uCOVID-19 określić jako *lex specialis* wobec treści art. 94 § 2 p.p.s.a.[21]. W tej sytuacji nie ulega wątpliwości, że w danym okresie do procedur rozpatrywania spraw podatkowych przed NSA w dalszym ciągu podstawowym pozostawał przepis art. 15 zzs^4 uCOVID-19, łącznie z cytowanym wyżej zarządzeniem nr 39 Prezesa NSA z 16 października 2020 r. o odwołaniu wszystkich rozpraw. Jednocześnie aktualne pozostawało wskazanie na kontynuację działalności orzeczniczej NSA na posiedzeniach niejawnych.

Przedstawiony powyżej stan prawny doskonale obrazują dane statystyczne rozpatrzonych spraw podatkowych przed NSA. Z elektronicznego systemu informacji o sprawach (OSO) NSA wynika, że w Izbie Finansowej NSA od 6 stycznia 2021 r. do 2 lipca 2021 r. odbyło się jedynie 8 trzyosobowych sesji jawnych (rozpraw), na-

18 Zob. wyrok NSA, sygn. akt I FSK 151/18.

19 Dz.U. z 2020 r. poz. 2320.

20 Zob. P. Pietrasz, Komentarz do art. 94, (w:) R. Hauser, M. Wierzbowski (red.), Prawo o postępowaniu przed sądami administracyjnymi. Komentarz, Warszawa 2021, s. 625.

21 H. Filipczyk, Rozpoznanie sprawy na posiedzeniu niejawnym na podstawie art. 15 zzs^4 ust. 3 specustawy w świetle zasady jawności postępowania podatkowego, „Przegląd Podatkowy" 2021, nr 5, s. 20.

tomiast liczba trzyosobowych posiedzeń niejawnych w danym okresie wyniosła 311[22]. W praktyce realizację przez NSA powyższego reżimu prawnego i sanitarnego ilustrują odpowiednie fragmenty treści uzasadnień sporządzonych w wydawanych w danym okresie wyrokach NSA w sprawach podatkowych, które warto przytoczyć. Na przykład w uzasadnieniu wyroku z 13 kwietnia 2021 r. NSA stwierdził, że rozpoznał skargę kasacyjną na posiedzeniu niejawnym w składzie trzech sędziów na podstawie wydanego w oparciu o art. 15zzs[4] ust. 3 uCOVID-19 zarządzenia Przewodniczącego Wydziału III Izby Finansowej NSA o skierowaniu niniejszej sprawy na posiedzenie niejawne w dniu 13 kwietnia 2021 r. Przewodniczący uznał rozpoznanie sprawy za konieczne, a przeprowadzenie wymaganej przez ustawę rozprawy mogłoby wywołać nadmierne zagrożenie dla zdrowia osób w niej uczestniczących i nie można było przeprowadzić jej na odległość z jednoczesnym bezpośrednim przekazem obrazu i dźwięku. Nadmienić jedynie można, że Sąd zwrócił się do stron postępowania o wyrażenie zgody na rozpoznanie sprawy na posiedzeniu niejawnym w myśl art. 15zzs[4] ust. 2 opisanej wyżej ustawy. Spółka zgodę taką wyraziła, zaś organ podatkowy nie odpowiedział na zapytanie Sądu[23]. Najczęściej jednak w treści uzasadnień orzeczeń NSA z tego okresu znajdujemy zapis, że „w odpowiedzi na zawiadomienie skierowane przez Naczelny Sąd Administracyjny w trybie art. 15zzs[4] ust. 3 uCOVID-19 strony postępowania wyraziły zgodę na rozpoznanie sprawy na posiedzeniu niejawnym"[24]. W składanych pismach o rozpatrzenie sprawy podatkowej na rozprawie NSA przychylał się do uwzględnienia takich wniosków. W postanowieniu z 22 czerwca 2021 r. NSA skierował sprawę podatkową do rozpoznania na rozprawie, której termin zostanie wyznaczony z urzędu[25].

4. Nowe zasady orzekania w sprawach podatkowych przez NSA w okresie pandemii COVID-19 od 3 lipca 2021 r.

Od 3 lipca 2021 r. na podstawie art. 3 ust. 4 pkt 3 ustawy z dnia 28 maja 2021 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw, ustawodawca postanowił o zmianie art. 15 zzs[4] uCOVID-19[26]. Zgodnie z nowym brzmieniem art. 15 zzs[4] ust. 1 uCOVID-19 w okresie obowiązywania stanu zagrożenia epidemicznego albo stanu epidemii ogłoszonego z powodu COVID-19 oraz w ciągu roku od odwołania ostatniego z nich NSA nie jest związany żądaniem strony o przeprowadzenie rozprawy. W przypadku skierowania sprawy podlegającej roz-

22 Wydział Informacji Sądowej NSA, Odpowiedź…, *op. cit.*
23 Zob. wyrok NSA, sygn. akt III FSK 880/21.
24 Zob. wyrok NSA z 22 czerwca 2021 r., sygn. akt I FSK 1604/18.
25 Zob. postanowienie NSA, sygn. akt III FSK 24/21.
26 Dz.U. z 2021 r. poz. 1090.

poznaniu na rozprawie na posiedzenie niejawne NSA orzeka w składzie trzech sędziów. W tym okresie wojewódzkie sądy administracyjne oraz NSA przeprowadzają rozprawę przy użyciu urządzeń technicznych umożliwiających przeprowadzenie jej na odległość z jednoczesnym bezpośrednim przekazem obrazu i dźwięku, z tym że osoby w niej uczestniczące nie muszą przebywać w budynku sądu (art. 15 zzs^4 ust. 2 uCOVID-19). Ponadto przewodniczący może zarządzić przeprowadzenie posiedzenia niejawnego, jeżeli uzna rozpoznanie sprawy za konieczne, a nie można przeprowadzić jej na odległość z jednoczesnym bezpośrednim przekazem obrazu i dźwięku. Na posiedzeniu niejawnym w tych sprawach sąd orzeka w składzie trzech sędziów (art. 15 zzs^4 ust. 3 uCOVID-19).

Należy również przypomnieć, że nie zmieniła się treść art. 182 § 2 p.p.s.a. Stosownie do jego postanowień NSA rozpoznaje skargę kasacyjną na posiedzeniu niejawnym, gdy strona, która ją wniosła, zrzekła się rozprawy, a pozostałe strony w terminie czternastu dni od dnia doręczenia skargi kasacyjnej nie zażądały przeprowadzenia rozprawy. Taki sposób orzekania zależy wyłącznie od woli stron. NSA jest związany w tym zakresie ich decyzją.

Wykładnia wyżej cytowanych regulacji prawnych nie pozostawia wątpliwości, że również po 3 lipca 2021 r. mają one charakter podstawowy i stanowią *lex specialis* w stosunku do postanowień przepisu art. 94 § 2 p.p.s.a. Należy jednak zauważyć, że od momentu wejścia w życie omawianych przepisów, tj. od 3 lipca 2021 r., NSA nie jest związany żądaniem strony o przeprowadzenie rozprawy. Jednocześnie ustawodawca nałożył na NSA obowiązek przeprowadzania rozpraw przy użyciu urządzeń technicznych umożliwiających przeprowadzenie jej na odległość z jednoczesnym bezpośrednim przekazem obrazu i dźwięku (osoby w niej uczestniczące nie muszą przebywać w budynku sądu). Jednocześnie pozostała możliwość odstąpienia od obowiązku przeprowadzania rozpraw i kierowania spraw podatkowych na posiedzenia niejawne. Przewodniczący wydziału może bowiem zarządzić przeprowadzenie posiedzenia niejawnego po spełnieniu dwóch przesłanek: (1) jeżeli uzna rozpoznanie sprawy za konieczne, (2) nie można przeprowadzić jej na odległość z jednoczesnym bezpośrednim przekazem obrazu i dźwięku. Zaistnienie obu przesłanek łącznie wymaga ich uzasadnienia. Zbyt krótki okres obowiązywania tej regulacji prawnej w stosunku do daty przygotowania niniejszego artykułu nie pozwalał na przeprowadzenie jej analizy z uwzględnieniem praktyki procedowania w sprawach podatkowych przed NSA.

5. Konstytucyjna zasada prawa do sądu a podejmowanie przez NSA uchwał w okresie pandemii COVID-19

Stosownie do postanowień art. 45 ust. 1 Konstytucji każdy ma prawo do sprawiedliwego i jawnego rozpatrzenia sprawy bez nieuzasadnionej zwłoki przez właściwy, niezależny, bezstronny i niezawisły sąd. Wyłączenie jawności rozprawy może nastą-

pić ze względu na moralność, bezpieczeństwo państwa i porządek publiczny oraz ze względu na ochronę życia prywatnego stron lub inny ważny interes prywatny. Wyrok ogłaszany jest publicznie (art. 45 ust. 2 Konstytucji). W cytowanym wyżej przepisie wprowadzono zasadę określaną mianem prawa do sądu. W doktrynie prawa podkreśla się, że w artykule tym mowa jest o prawie do sprawiedliwego i jawnego rozpatrzenia sprawy, a więc została wprowadzona zasada jawności rozprawy sądowej. Z kolei wyłączenie jawności rozprawy ma wyjątkowy charakter i może być zarządzone wyłącznie z uwagi na następujące przyczyny: a) względy moralności, b) bezpieczeństwo państwa, c) porządek publiczny, d) ochrona życia prywatnego stron, e) inny ważny interes prywatny[27]. Mając na uwadze treść wskazywanych wyżej reguł, należy zaznaczyć, że przy istniejących w 2020 r. warunkach pandemii COVID-19 pojawiła się kwestia możliwości podejmowania uchwał przez NSA na posiedzeniach niejawnych. Dotyczy to również uchwał w sprawach podatkowych, chociaż uchwał w tych sprawach w danym okresie nie podejmowano. Problem ten był przedmiotem rozważań NSA w uchwale z 30 listopada 2020 r.[28] W jej uzasadnieniu NSA między innymi stwierdził, że „istniejący stan epidemii ogłoszony z powodu COVID-19 (co jest okolicznością notoryjną) nie stanowi aktualnie przeszkody, między innymi do działania przez Naczelny Sąd Administracyjny w sprawach podjęcia uchwały, o której mowa w art. 15 § 1 pkt 3 p.p.s.a. W ocenie składu siedmiu sędziów Naczelnego Sądu Administracyjnego wykładnia funkcjonalna przepisów uCOVID-19 nakazuje opowiedzieć się za dopuszczalnością zastosowania konstrukcji zawartej w art. 15 zzs[4] ust. 3 uCOVID-19 w przedmiotowej sprawie i możliwością podjęcia uchwały na posiedzeniu niejawnym. Powyższy przepis należy traktować jako »szczególny« w rozumieniu art. 10 i art. 90 § 1 p.p.s.a. Prawo do publicznej rozprawy nie ma charakteru absolutnego i może podlegać ograniczeniu, w tym także ze względu na treść art. 31 ust. 3 Konstytucji, w którym jest mowa o ograniczeniach w zakresie korzystania z konstytucyjnych wolności i praw, gdy jest to unormowane w ustawie oraz tylko wtedy, gdy jest to konieczne w demokratycznym państwie m.in. dla ochrony zdrowia. Nie ulega wątpliwości, że celem stosowania konstrukcji przewidzianych przepisami uCOVID-19 jest między innymi ochrona życia i zdrowia ludzkiego w związku z zapobieganiem i zwalczaniem zakażenia wirusem COVID-19, a w obecnym stanie faktycznym istnieją takie okoliczności, które w zarządzonym stanie pandemii w pełni nakazują uwzględnianie rozwiązań powyższej ustawy w praktyce działania organów wymiaru sprawiedliwości". Należy także podkreślić, że uprzednio zarządzeniem z 19 października 2020 r. Prezes Izby Ogólnoadministracyjnej NSA, powołując się na art. 15 zzs[4] uCOVID-19, odwołał posiedzenie jawne w przedmiotowej sprawie i wyznaczył posiedzenie niejawne na dzień 30 listopada 2020 r. Jednocześnie powiadomiono strony o treści art. 187 § 3 p.p.s.a. oraz o możliwości przedstawienia w terminie 7 dni dodat-

27 W. Skrzydło, Konstytucja Rzeczypospolitej Polskiej. Komentarz, Warszawa 2007, s. 44–45.
28 Sygn. akt II OPS 6/19.

kowych wyjaśnień w sprawie. Uchwała ta doczekała się aprobującej glosy. W jej treści A. Rzetecka-Gil między innymi stwierdza, że zasada jawności posiedzeń sądowych nie ma charakteru absolutnego. Sam bowiem ustawodawca przewidział w art. 10 oraz w art. 90 § 1 p.p.s.a. możliwość odstąpienia od niej, jeśli takie odstępstwo wynikało będzie z „przepisu szczególnego". W analizowanej sprawie za taki przepis NSA słusznie uznał art. 15zzs[4] ust. 3 ustawy o COVID-19[29]. Podobne stanowisko odnośnie do możliwości podjęcia uchwały przez NSA na posiedzeniu niejawnym wyraził sąd w innej uchwale z tej samej daty, tj. z 30 listopada 2020 r.,[30] także na posiedzeniu niejawnym. Omawiane wyżej treści uchwał NSA stanowią również istotny element uzasadnień wyroków NSA wydawanych w sprawach podatkowych na posiedzeniach niejawnych. Na przykład w postanowieniu z dnia 3 lutego 2021 r. NSA stwierdził, że przepis art. 15zzs[4] ust. 3u COVID-19 należy traktować jako „szczególny" w rozumieniu art. 10 i art. 90 § 1p.p.s.a. Prawo do publicznej rozprawy nie ma charakteru absolutnego i może podlegać ograniczeniu, w tym także ze względu na treść art. 31 ust. 3 Konstytucji RP, w którym jest mowa o ograniczeniach w zakresie korzystania z konstytucyjnych wolności i praw, gdy jest to unormowane w ustawie oraz tylko wtedy, gdy jest to konieczne w demokratycznym państwie m.in. dla ochrony zdrowia[31]. Podobnie w orzeczeniu z dnia 22 czerwca 2021 r. NSA podkreślał, że rozpoznanie skargi kasacyjnej nastąpiło na posiedzeniu niejawnym w składzie trzyosobowym na podstawie art. 15zzs[4] ust. 3uCOVID-19 oraz zarządzenia Przewodniczącego Wydziału III Izby Finansowej NSA. Sąd w obecnym składzie podzielił stanowisko przedstawione w uzasadnieniu uchwał składu siedmiu sędziów Naczelnego Sądu Administracyjnego z dnia 30 listopada 2020 r. – sygn. II OPS 6/19 i II OPS 1/20 – zgodnie z którym powyższy przepis należy traktować jako „szczególny" w rozumieniu art. 10 i art. 90 § 1 p.p.s.a.[32]

W literaturze przedmiotu podkreśla się, że prawo do występowania przed sądem administracyjnym należy do istotnych elementów rzetelnego procesu[33]. Patrząc z tej perspektywy, czyli prawa do rzetelnego procesu, zgodzić się trzeba z poglądem, że najistotniejsze było tu zachowanie przez stronę uprawnienia do przedstawienia stanowiska w sprawie. Mają na uwadze okoliczność, że w postępowaniu przed sądem administracyjnym co do zasady nie przeprowadza się postępowania dowodowego (wyjątek art. 106 § 3 p.p.s.a., tj. dowód z dokumentu), należy stwierdzić, iż standardy rzetelnego procesu zostały zachowane. W omawianych wyżej sprawach uchwał Pre-

29 Zob. A. Rzetecka-Gil, Dopuszczalność posiedzeń niejawnych celem podejmowania uchwał przez NSA (w trybie art. 269 ustawy – Prawo o postępowaniu przed sądami administracyjnymi) w czasach pandemii Covid-19. Glosa do uchwały NSA z dnia 30 listopada 2020 r., II OPS 6/19; opublikowano: LEX/el. 2020

30 Uchwała NSA, sygn. akt II OPS 1/20, opublikowana na stronie: http://orzeczenia.nsa.gov.pl

31 Sygn. akt II FSK 2193/19.

32 Sygn. akt III FSK 65/21.

33 A. Mudrecki, Rzetelny proces podatkowy, Warszawa 2015, s. 204 i n.

zes Izby Ogólnoadministracyjnej NSA zawiadomił strony o możliwości zajęcia stanowiska na piśmie[34]. Sposób procedowania odnoszący się do zaprezentowanych wyżej uchwał należy uznać za wzorcowy przy podejmowaniu przez NSA uchwał w sprawach podatkowych.

6. Wpływ i ilość skarg kasacyjnych w sprawach podatkowych rozpoznanych przez NSA w 2019 r. oraz w pierwszym roku pandemii COVID-19 (2020 r.)

W 2019 r. do Izby Finansowej NSA wpłynęło 5650 skarg kasacyjnych oraz 16 skarg o wznowienie postępowania, z czego 42% (2373) dotyczyło spraw z zakresu podatku od towarów i usług, 17% (966) podatku od nieruchomości, 14% (795) podatku dochodowego od osób fizycznych, a 8% (443) podatku dochodowego od osób prawnych. Spośród skarg kasacyjnych zarejestrowanych w tym okresie ponad 24,3% (1373 sprawy) dotyczyło interpretacji indywidualnych wydawanych przez dyrektora krajowej administracji skarbowej, ponadto wpłynęło 50 skarg kasacyjnych od interpretacji indywidualnych wydawanych przez inne organy. Liczba skarg dotyczących interpretacji stale pozostaje wysoka. W Izbie Finansowej NSA rozstrzygnięto 5684 skargi kasacyjne, w tym 4601 na rozprawie oraz 1071 na posiedzeniu niejawnym[35].

W 2020 r. do Izby Finansowej NSA wpłynęły 4803 skargi kasacyjne oraz 49 skarg o wznowienie postępowania, z czego 37% (1774) dotyczyło spraw z zakresu podatku od towarów i usług, 18% (884) podatku od nieruchomości, 16% (757) podatku dochodowego od osób fizycznych, a 9% (421) podatku dochodowego od osób prawnych. Wśród zarejestrowanych w 2020 r. skarg kasacyjnych, interpretacje indywidualne wydawane przez ministra właściwego do spraw finansów publicznych stanowiły ponad 21% (1020 spraw), a 16 skarg kasacyjnych od interpretacji indywidualnych wydawanych przez inne organy. W 2020 r. w Izbie Finansowej NSA rozstrzygnięto 4223 skargi kasacyjne, w tym 1896 spraw na rozprawie oraz 2327 spraw na posiedzeniu niejawnym. W kilku przypadkach zdecydowano również o przeprowadzeniu rozprawy na odległość z jednoczesnym bezpośrednim przekazem obrazu i dźwięku; strony uczestniczyły w niej, przebywając w budynkach wyznaczonych wojewódzkich sądów administracyjnych[36].

34 Zob. Naczelny Sąd Administracyjny. Informacja o działalności sądów administracyjnych w 2020 roku, Warszawa 2021, s. 217.

35 Zob. Naczelny Sąd Administracyjny. Informacja o działalności sądów administracyjnych w 2019 roku, Warszawa 2020, s. 25.

36 Zob. Naczelny Sąd Administracyjny. Informacja o działalności sądów administracyjnych w 2020 roku, Warszawa 2021, s. 29–30.

Wnioski końcowe

Prawie półtoraroczny czas trwania pandemii COVID-19 (2020 r. – lipiec 2021 r.) pozwala na sformułowanie wniosków odnoszących się tak do rozwiązań prawnych, jak i praktyki w przedmiocie procedowania w tym okresie w sprawach podatkowych przed NSA. Przede wszystkim należy zauważyć, że w tym stosunkowo krótkim czasie kilkakrotnie zmieniały się regulacje prawne odnoszące się do możliwości orzekania przez NSA, zarówno na posiedzeniach niejawnych, jak również na rozprawach. Ustawodawca, dokonując nowelizacji tych przepisów, musiał mieć na uwadze aktualny stan zagrożenia epidemicznego. Zasadniczo zmiany prawne przyjmowane w analizowanym okresie należy ocenić pozytywnie (jako adekwatne do zaistniałej sytuacji), chociaż wpływały one na ograniczenie zasady jawności postępowania w sprawach podatkowych przed NSA. Miało to także bezpośrednie przełożenie na sposób orzekania (rozprawa, posiedzenie niejawne) oraz na ilość załatwionych skarg kasacyjnych. Dlatego też w Izbie Finansowej NSA w 2020 r., czyli w pierwszym roku pandemii COVID-19, odbyło się ponad dwukrotnie mniej trzyosobowych rozpraw (137) niż trzyosobowych posiedzeń niejawnych (279). W ogóle w 2020 r. w Izbie tej rozstrzygnięto 4223 skargi kasacyjne, podczas gdy w 2019 r. rozstrzygnięto 5684 skargi kasacyjne (mniej o 1461). Z kolei w pierwszym półroczu 2021 r. odbyło się jedynie 8 trzyosobowych sesji rozpraw, natomiast liczba trzyosobowych posiedzeń niejawnych w danym okresie wyniosła 311. Z perspektywy półrocza 2021 r. trudno jest jednak dokonać oceny analogicznej pracy Izby Finansowej NSA, tak jak w stosunku do roku 2020.

W praktyce na stosunkowo dobry wynik ilości rozstrzygniętych skarg kasacyjnych w 2020 r. przed Izbą Finansową NSA, pomimo trudnej sytuacji epidemicznej, złożyło się wiele czynników (m.in. dobra organizacja pracy, wysiłek wielu pracowników, korzystanie z podpisów elektronicznych). Jednak za najistotniejszy czynnik należy tu uznać wolę stron skarżących o podjęciu decyzji o zrzeczeniu się rozprawy (art. 182 § 2 p.p.s.a.) lub wyrażeniu zgody na rozpatrzeniu ich skargi kasacyjnej na posiedzeniu niejawnym (art. 15zzs[4] ust. 3 uCOVID-19). Mając na uwadze obowiązek dbałości przez NSA o realizację zasady jawności postępowania (art. 45 Konstytucji, art. 10 p.p.s.a. i art. 90 § 1 *in fine* p.p.s.a.), należy stwierdzić, że bez decyzji skarżących o ich samoograniczeniu w prawie do sądu (rezygnacja z rozprawy) dane o orzecznictwie Izby Finansowej NSA w omawianym okresie pandemii ukształtowałoby się inaczej niż wyżej zaprezentowano.

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