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The Basic Problems of Public Finance Reforms in the 21st Century in Europe

Les réformes principales des finances publiques en Europe au début du XXIème siècle

Edited by
Eugeniusz Ruśkowski
Marcin Tyniewicki

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Reviewed by:

Jan Głuchowski
Cezary Kosikowski

Typeset by:

Jerzy Banasiuk

Cover design:

Bauhaus

Technical Editorial Team:
Jerzy Banasiuk

Proofread by:
Stefan Kubiak, Ewa Wyszczelska–Oksień, Halina Sierocka

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INTRODUCTION

The beginning of the 21st century is a period of when crucial changes in the public finances of European countries were introduced. Two new phenomena had a decisive impact. Firstly – the introduction of the Euro in twelve European Union member states, followed later by several other countries, and the associated requirements on national budgets. Secondly – the process of EU enlargement by twelve new states (in 2004 and 2007). This last phenomenon has instigated the crucial compliance process, which includes the field of public finance in the new accession countries.

The purpose of this publication is to present the most significant public financial reforms in selected European countries. Admittedly, most of the texts concern the European Union countries; however the remit of this publication has also been intentionally broadened to include non-EU member states. Thus there are studies referring to Belarus, Russia and Ukraine proving that some problems of public finance reforms are common for all European states, despite the widely diverging circumstances in their implementation. That in itself is an argument which spells out the necessity and legitimacy of conducting European-wide research.

Taking into consideration the conditions mentioned above it may be stated that the reforms of public finances in the 21st century referred to a wide range of issues and occurred with a diverse intensity in different European countries, which was taken into account in the subjective work. Two tendencies, however, were dominant and novel in that scope. Firstly, the reforms aimed at improving the effectiveness of public finances management. The reforms were comprehensively conducted in the said period in France whereas many other countries have just started or are preparing for them. On the other hand there is a trend to introduce and popularize the flat tax rates in income taxes in many countries, largely in the Central and Eastern Europe. The two issues are mainly referred to in most of the articles.

The underlying concept behind this publication is objective in nature, emphasizing the basic areas of public financial reform in Europe. It begins with the general concepts concerning the whole of public finance (part I). Critical issues include the budgetary system of the state (part II), although they also appear in part I. Part III focuses on local and regional finance. Part IV, the longest part, concerns widely understood reforms of taxes (including tax enforcement problems) and tax administration. In part V current problems in social security and health service reforms are presented from many European countries. Part VI refers to other issues of

public finance reforms, including problems in benefits. The layout of the publication in the particular parts despite of diverse importance and subject – matter of the articles was presented in alphabetical order taking into consideration the authors' (or the first co-author's) surnames.

Eugeniusz Ruśkowski
Marcin Tyniewicki
Bialystok, November 2008

PART I
GENERAL CONCEPTIONS AND PROBLEMS

Lilia Bobkova

THE STATE AS A SUBJECT OF FINANCIAL LAW IN THE FACE OF PUBLIC FINANCE REFORMS IN THE 21ST CENTURY IN EUROPE

Financial law regulates a special part of social relations and defines some of its subjects. It gives them legal rights or duties, which ensure to form, distribute and use the state budget. The issue of a state as a subject of law has not been precisely defined in the financial theory of law yet. According to financial law, we may distinguish the subjects of law and the subjects of law relationship.

The subject of financial law is a person or organization that has the ability to use their rights and can be a subject in a real relationship. Thus **the subject of a relation** means a person who can really be in a relationship. For example, at this moment in the Russian Federation we are living in the uninterrupted process when legislation is changing all the time. Therefore we must take advantage of international experience of development.

It's worth noting here that in Russia we have, first of all, the financial law which includes the budget law and tax law. In the Russian Federation the main source of budgetary law is the Budget Code, which is based on the Constitution of the Russian Federation and federal legislation[1].

According to the Constitution of the Russian Federation, Russia has about **89 subjects**, which also have the rights in the regional legislation. So we live in the federal state where every subject is independent and has equal rights in legislation[2].

The main process of budget law development started at the end of 1991 and is still in progress[3]. In spite of the fact that the fundamental subject of financial law in Russia is the state, the budget legislation does not secure it. The core of the idea

1 Карасева М.В. Финансовое право. М., 2006. С. 89.
2 The Constitution of the Russian Federation of 12 December 1993, Articles 5,10, 72.
3 Карасева М. В. Финансовое право Российской ФедерацииМ., 2002. С. 103.

of state development should be based on the theory of finance, legislation of the Russian Federation in the financial sphere and court practice[4].

According to our legislation, the state has the legal ability to form the federal budget, to form the federal tax and to take taxes. The state of Russia is a difficult subject in financial law which includes the Russian Federation and the subjects of the Russian Federation. Every part is independent[5]. Our practice gives us some examples when we say about the state as the state organ and in some cases about the state in general. But everywhere the state organ is answerable for debts of the state subjects which do not have the independent power as the state and therefore they do not have enough rights in the budget law as the state[6].

Politics is the activity of the state power and management organs reflecting social life and economic structure of the state, as well as interests and goals of many political organizations and parties. It is worth noting here that politics is the main condition to form other legal norms[7]. As practice shows, the activity of the state in the sphere of finance realizing its sovereign rights that produce negative consequences may lead to political responsibility. The construction of the state budget is a very important argument that proves that there has been a breaking point in conflict situations. That is why the budget is the basic instrument that forms political stability. The quality of state activities in the sphere of budget legislation is dependent on the frequency of voting by its people. According to theoretical knowledge, the idea of frequent changes of senior statesmen can be regarded in two ways: either their resignation is a result of their intentional violation of state organs functions, or a result of resignation, government discharge, i.e. constitutional legal responsibility, or it is a compromise of political forces to divide a part of power functions and to express their dissatisfaction with current reforms, i.e. political responsibility.

Therefore, in my opinion, political responsibility of a state is a measure of social influence on a state that is being realized in a form of people power and is determined by dissatisfaction with the reforms that results in power division and government resignation.

Political responsibility of a state in the financial sphere with sanctions in the form of mass meetings, demonstrations, strikes protesting against delays or non-payment of salaries, transforms into legal mechanisms of state reaction to its own drawbacks. It may result in changing leaders of the executive power, correcting laws, decreasing the government's expenditures, etc.

4 Корельский В., Перевалов В.М. Теория государств и права. М., 1997. С. 430.
5 Карасева М.В. Финансовое правоотношение. М, 2001.С..88.
6 Малько А. Конституционное право Российской Федерации. М., 2001. С. 251.
7 Озеров С.И., Шведова Н.Ю. Словарь русского языка: 80 000 слов. С. 553.

These statements are based on several principles; first of all, these relations concern mainly the interests of economic agents that are called tax payers. Second, they also concern the interests of those who receive these taxes. Summing up, these principles are based on political condition and participants of a budget process[8].

8 The Budget Code of 31 June 1998.

Streszczenie

Zagadnienie państwa jako przedmiotu regulacji prawa finansowego nie zostało do tej pory dosyć precyzyjnie wyjaśnione. Jak pokazuje praktyka, działalność państwa w sferze finansów, które realizuje swoje suwerenne prawa, może wywoływać negatywne konsekwencje i tym samym prowadzić do politycznej odpowiedzialności. Działalność polityczna wpływa na społeczno–ekonomiczną strukturę państwa, co jest efektem realizacji interesów i celów organizacji oraz partii politycznych.

Michel Bouvier

LA NOUVELLE GOUVERNANCE FINANCIÈRE DE L'ETAT EN FRANCE

Le Parlement a réformé à son initiative[1], par une loi du 1er août 2001, l'ordonnance du 2 janvier 1959 portant loi organique relative aux lois de finances[2] qui organisait jusqu'alors le cadre budgétaire de l'Etat. Cette réforme est doublement importante. Elle l'est par son objet puisque c'est en effet la « constitution financière » de la France qui se trouve concernée. Elle l'est par son ampleur puisque le droit budgétaire de l'Etat se trouve remanié en profondeur[3].

Au regard de l'histoire du droit public financier comme de celle des institutions politiques, le texte marque à l'évidence une étape importante. Ce n'est pas seulement d'une adaptation technique dont il s'agit. Plus largement, c'est *un nouveau contrat social pour les finances publiques*, socle d'une réforme de l'Etat qui est en filigrane du nouveau dispositif. Celui-ci ne se contente pas, en effet, de redéfinir les rapports entre Parlement et gouvernement en augmentant de manière notable les pouvoirs d'initiative et de contrôle des députés et des sénateurs, alors que l'ordonnance de 1959, dans la logique de la Constitution de 1958, avait eu au contraire pour objectif de renforcer ceux du gouvernement.

Tournant le dos à la classique logique de moyens qui s'attache à ne considérer que le montant des crédits alloués, la LOLF, qui s'applique pleinement depuis le 1er janvier 2006, lui substitue une logique de résultats qui, marquée par une philosophie d'entreprise, prend d'abord en considération les objectifs à atteindre. Ce nouveau paradigme entraîne des bouleversements en profondeur de la gestion publique et partant de l'organisation interne des administrations.

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1 Proposition «Migaud» du 11 juillet 2000. Il convient de souligner que, contrairement au passé, l'initiative n'est pas venue de l'exécutif. Cf les principaux enjeux de la réforme in Revue Française de Finances Publiques N°73-2001 :Réforme des finances publiques : Réforme de l'Etat.

2 Loi N° 2001-692 publiée au JO du 2 août 2001 et validée par le Conseil Constitutionnel (décision N° 2001-448 DC du 25 juillet 2001). Pour une présentation exhaustive de la loi , cf. RFFP N° 76-2001 : La loi organique relative aux lois de finances ; cf également RFFP N° 82-2003 : Mettre en œuvre la LOLF et RFFP N° 87-2004: Finances publiques : enjeux pour l'avenir ;aussi RFFP N°93-2005 : Le budget 2006 en LOLF. Pour approfondir, cf. M. Bouvier, MC Esclassan, JP Lassale, Manuel de Finances publiques, Editions LGDJ 2008, 9ème édition.

3 Qui a été adoptée par le Sénat en deuxième lecture le 28 juin 2001 (292 voix pour, 17 voix contre).

Les origines de la LOLF

La LOLF s'inscrit dans un processus historique de réforme des Finances publiques

La LOLF n'est en rien un texte ponctuel. Elle s'inscrit dans un processus de réforme des Finances publiques et de l'Etat qui a débuté, dans la seconde moitié des années 1970, par une critique théorique de l'impôt et de la dépense publique. Ce processus s'est poursuivi de manière très concrète à partir de la seconde moitié des années 1980 non seulement par des mesure allant dans le sens d'un allègement de la pression fiscale pesant sur les entreprises, mais aussi par des mesures structurelles telles que les privatisations ou la décentralisation.

Ce sont bien, à notre sens, les évolutions des trente dernières années qui donnent tout son sens à la réforme budgétaire actuelle . Cette période est en effet celle au cours de laquelle s'est amorcé un processus portant en germe une véritable métamorphose des systèmes financiers publics, et partant de l'Etat, une période dominée par ailleurs sur le fond par la généralisation d'une conception beaucoup plus libérale de la société et traversée enfin par des réformes institutionnelles d'ampleur comme la décentralisation, la monnaie unique européenne ou encore le développement spectaculaire des finances sociales.

On ne s'étonnera pas que dans ce contexte les limites de l'ordonnance du 2 janvier 1959, l'ancien droit budgétaire de l'Etat, aient pu se faire de plus en plus évidentes au fur et à mesure que celle-ci s'est trouvée confrontée à des réalités nationales et internationales fort différentes de celles qui, à l'origine, avaient présidé à l'élaboration du texte. Prise dans le cadre de la fin des années 1950 dominées par une conception très centralisatrice et très interventionniste de l'État, l'ordonnance en portait incontestablement les marques, reflétant les préoccupations et les illusions de la société d'après-guerre, alors qu'elle avait continué à s'appliquer à un environnement dans lequel des valeurs souvent inverses avaient pris le pas.

La LOLF s'inscrit dans un processus politique et sociologique

Les raisons de la réforme ne se limitent pas toutefois à la seule obsolescence d'un texte ni même, à vrai dire, à la seule situation française qui n'a rien de bien singulier. Ses causes sont en réalité complexes ; elles ne sont pas seulement liées à des nécessités économiques et financières, mais également au fait que *le contexte politique français a changé* avec notamment la volonté du pouvoir législatif d'accroître son pouvoir de décision financiére ainsi que la prise de conscience de l'ensemble de la classe politique de la nécessité de réformer les procédures budgétaires.

A la différence de l'ordonnance de 1959 et des textes financiers qui l'ont précédée, le caractère consensuel du processus d'élaboration de ce document est tout à fait original; il s'agit d'un *processus d'initiative législative* dont l'issue était pourtant loin d'être évidente si l'on se reporte aux termes dans lesquels le rapporteur général de la commission des finances de l'Assemblée nationale, Didier Migaud, s'adressait aux députés le 8 février 2OOO: « Nous devons aboutir ! Mais nous ne le pourrons que si nous sommes d'accord à trois : Assemblée nationale, Sénat et Gouvernement. C'est le vœu que je forme ». De ce point de vue c'est donc avec un sens de l'intérêt général et des responsabilités particulièrement poussé que la classe politique a pu, avec l'aide des fonctionnaires concernés, mener à son terme la réforme et dessiner ainsi une nouvelle architecture financière pour l'Etat . On pourra même retenir plus tard que l'adoption de ce texte fut , selon l'expression d'Alain Lambert , alors président de la commission des finances du Sénat, « un moment d'exception et d'excellence…un acte majeur de maturité démocratique… », un acte par lequel des personnalités très différentes ont eu « le génie de s'accorder pour redonner sens à la démocratie et redonner vie et force à leur Etat ».

En même temps, c'est sans doute aussi le contexte sociologique qui s'est modifié, on veut dire *le regard porté par les citoyens sur les dépenses et les recettes publiques*. L'argent se faisant rare ils se montrent aujourd'hui indéniablement plus réceptifs à la question du contrôle des deniers publics , plus intéressés qu'autrefois par l'usage qui en est fait, plus sensibles donc au thème du contrôle de la dépense et à son corollaire, l'utilisation des prélèvements obligatoires. Il est à observer de même que dans les attentes à ce sujet, deux logiques viennent dorénavant se côtoyer : la première, d'essence plutôt politique place au premier plan la transparence financière, la lisibilité des budgets et des comptes publics ; la seconde, d'essence plutôt économique, et qui se montre quant à elle essentiellement préoccupée par la rationalisation, l'efficacité et la performance de la gestion de l'argent public favorise la montée d'une culture du contrôle et de la gestion des fonds publics et cela au-delà même du cercle retreint des décideurs politiques et des gestionnaires.

La LOLF s'inscrit dans un processus international de restructuration des systèmes financiers publics

La mondialisation des échanges, qui s'est considérablement intensifiée ces dernières années a pour conséquence que, du point de vue des finances publiques, les systèmes financiers publics des Etats peuvent, à juste titre, être considérés comme des système à risques et la situation avtuelle en est une démonstration parfaite. .

La nécessité d'un pilotage adéquat de tels systèmes exige que non seulement un langage commun à l'ensemble des acteurs soit utilisé mais aussi qu'ils respectent une logique commune de fonctionnement, des normes communes. Autrement dit, il est fondamental qu'ils partagent une même logique juridique et de gestion et il est

nécessaire que celle-ci soit parfaitement intériorisée, intégrée dans leur mode de fonctionnement afin qu'une autodiscipline du système devienne possible.

C'est bien la voie dans laquelle se sont engagés la plupart des Etats ces dernières années avec l'invitation qui leur a été faite par le FMI ou l'OCDE[4] d'adhérer à des codes de bonne conduite ou mieux, comme dans le cadre de l'UE ,d'intégrer dans leur législation interne un certain nombre de normes contraignantes et de les respecter. En d'autres termes,la réorganisation du système financier international et la prévention des risques passe aussi , et peut-être surtout, par la réorganisation des systèmes nationaux de gestion des finances publiques, caractériséé notamment par la mise en place de standards internationaux de gestion financière.

Une conception stratégique de l'action de l'Etat et de la prise de décision financière publique

Une nouvelle présentation des crédits par objectifs : missions, programmes, dotations

La LOLF redéfinit d'abord de manière radicale la présentation du budget et par là même, l'étendue des pouvoirs financiers du Parlement. Ceux-ci portant prioritairement sur la répartition et l'utilisation des crédits en fonction d'objectifs préalablement fixés, le Parlement ne se borne donc plus comme auparavant à faire des choix en termes de moyens . La nouvelle architecture budgétaire s'établit par missions (environ 50) qui elles-mêmes regroupent des programmes (environ 150) , nouvelles unités de répartition des crédits; la nouvelle structure n'a pas seulement pour effet de donner plus de « lisibilité » au document budgétaire et par conséquent peut être plus d'attrait du fait d'une meilleure visibilité de l'action publique et de ses enjeux financiers ; elle favorise une meilleure cohérence de l'action publique en évitant un trop grand fractionnement des politiques publiques dans l'espace et dans le temps.

Les missions ministérielles ou interministérielles : des unités de vote des crédits

Selon les termes de la loi, les crédits ouverts par les lois de finances pour couvrir chacune des charges budgétaires de l'Etat sont regroupés par mission relevant d'un ou plusieurs services d'un ou plusieurs ministères. Chaque budget annexe de même que chacun des comptes spéciaux représente également une mission (leurs crédits étant spécialisés par programme) .

4 Cf sur ce point, Michel Bouvier, La surveillance multilatérale internationale des finances publiques et le pouvoir politique, in Processus budgétaire,vers un nouveau rôle du Parlement, Ed Sénat/OCDE 2002.

Il s'ensuit que des programmes ayant la même finalité sont regroupés en missions qui, elles, peuvent être *interministérielles*. La mission, qui ne peut être créée que par une disposition d'une loi de finances d'initiative gouvernementale, comprend ainsi un ensemble de programmes concourant à une politique publique définie.

La mission représente par ailleurs l'unité de vote. Le vote des crédits s'effectuant par mission, il intervient par conséquent sur des objectifs ministériels ou interministériels.

PROJET DE LOI DE FINANCES 2009

Répartition des crédits du budget général et des emplois par mission (2009-2011)

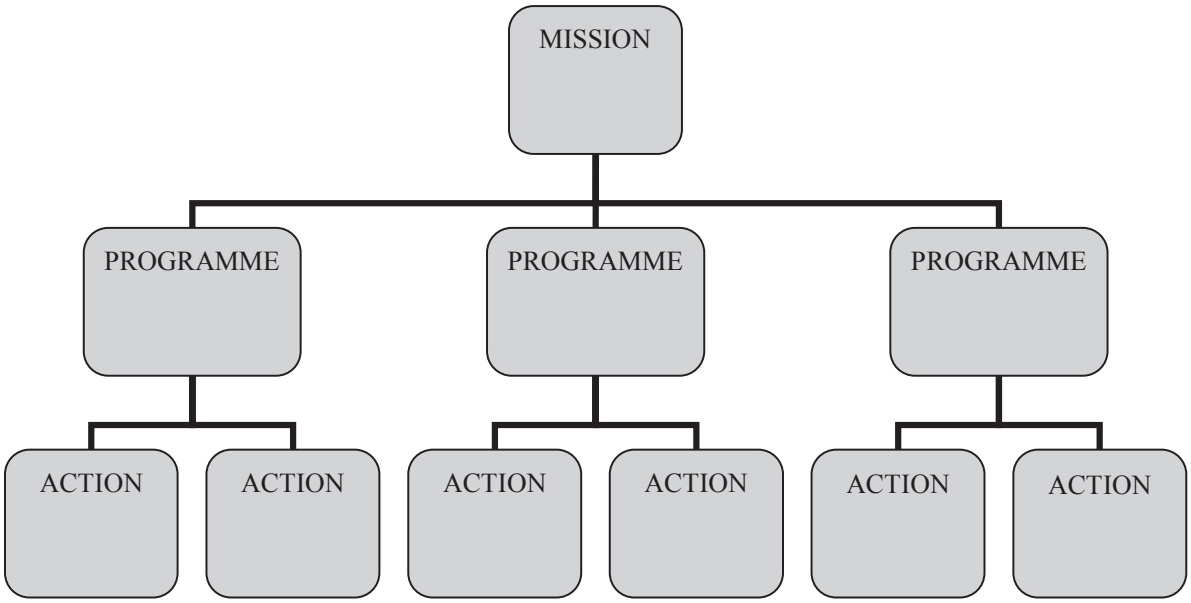
MISSIONS (en milliards d'euros)	2009		2010		2011	
	Autorisations d'engagement	Crédits de paiement	Autorisations d'engagement	Crédits de paiement	Autorisations d'engagement	Crédits de paiement
Action extérieure de l'État	2,50	2,52	2,58	2,55	2,50	2,52
Administration générale et territoriale de l'État	2,61	2,60	2,63	2,63	2,56	2,56
Agriculture, pêche, forêt et affaires rurales	3,24	3,49	2,93	3,16	2,92	3,03
Aide publique au développement	3,38	3,17	2,85	3,24	4,43	3,24
Anciens combattants, mémoire et liens avec la Nation	3,55	3,53	3,44	3,45	3,34	3,34
Conseil et contrôle de l'État	0,55	0,55	0,57	0,57	0,59	0,59
Culture	2,84	2,76	2,72	2,80	2,72	2,82
Défense	4[illegible]79	37,39	37,00	38,06	37,76	36,72
Direction de l'action du Gouvernement	0,49	0,54	0,52	0,51	0,53	0,51
Écologie, développement et aménagement durables	10,25	10,07	10,25	10,20	9,39	9,34
Économie	1,91	1,90	1,93	1,92	1,94	1,93
Engagements financiers de l'État	46,00	46,00	4[illegible]44	47,44	49,40	49,40
Enseignement scolaire	60,01	59,99	61,67	61,65	62,95	62,93
Gestion des finances publiques et des ressources humaines	11,63	11,37	11,39	11,54	11,41	11,53
Immigration, asile et intégration	0,51	0,51	0,51	0,51	0,51	0,51
Justice	8,32	6,65	7[illegible]14	6,94	7[illegible]10	7[illegible]04
Médias	1,02	1,01	1,01	1,00	0,99	0,99
Outre-mer	1,97	1,86	2,00	1,93	2,00	1,93
Politique des territoires	0,39	0,37	0,35	0,38	0,32	0,38
Pouvoirs publics	1,05	1,05	1,06	1,06	1,07	1,07
Provisions	0,23	0,23	0,05	0,05	1,15	1,15
Recherche et enseignement supérieur	24,56	24,16	25,45	24,96	26,27	25,87
Régimes sociaux et de retraite	5,18	5,18	5,45	5,45	5,75	5,75
Relations avec les collectivités territoriales	2,41	2,34	2,46	2,40	2,51	2,44
Santé	1,13	1,16	1,15	1,17	1,17	1,19
Sécurité	16,16	16,23	16,71	16,63	17[illegible]27	17[illegible]00
Sécurité civile	0,45	0,42	0,41	0,42	0,45	0,43
Solidarité, insertion et égalité des chances	11,20	11,18	11,58	11,60	12,13	12,15
Sport, jeunesse et vie associative	0,80	0,79	0,75	0,77	0,73	0,75
Travail et emploi	11,73	11,62	10,74	10,74	10,60	10,51
Ville et logement	7[illegible]60	7[illegible]64	7[illegible]30	7[illegible]53	7[illegible]28	7[illegible]37
Total	**291,48**	**278,50**	**282,66**	**283,89**	**289,77**	**289,00**

Les programmes

La notion de programme exprime le passage d'une culture de moyens à une culture de résultat

Le programme représente la clef de la réforme dès lors que posant en principe une budgétisation des crédits par objectifs, il conduit les décideurs publics, politiques ou gestionnaires, à cesser de raisonner strictement en termes de moyens. Selon la LOLF, les crédits destinés à réaliser une action ou un ensemble cohérent d'actions (environ 600) relevant d'un même ministère sont regroupés sous la forme d'un programme, étant entendu que ces actions sont associées ou participent à des objectifs définis en fonction de finalités d'intérêt général . et que les résultats doivent faire ensuite l'objet d'une évaluation pratiquée au moyen d'indicateurs de performance.

La portée de la mesure est claire. Au classique *budget de moyens* succède donc un *budget de résultats ,* c'est à dire un budget dans lequel les crédits ne sont plus présentés par nature de dépenses, mais par objectifs et donc selon une démarche qui met au premier plan la notion de *performance* de la dépense publique. Telle est la voie par laquelle le législateur a entendu introduire une plus grande rationalité dans la gestion financière publique. Les décideurs sont obligés de définir d'abord des politiques d'action en vue de l'obtention des crédits nécessaires. Ils doivent par ailleurs, une fois l'opération effectuée, en évaluer l'efficacité. S'y ajoute que le dispositif permet également de mesurer l'utilité de la dépense dès lors que cette dernière n'est plus fonction de la nature des crédits alloués mais d'objectifs clairement définis et de résultats attendus.



Les programmes sont des unités de spécialité

Les crédits sont spécialisés par programme.Avec cette nouvelle unité de spécialité, s'exprime indiscutablement un souci de cohérence et de simplification de la nouvelle nomenclature budgétaire . Celle-ci, qui est complètement transformée, comporte de 150 à 170 programmes, soit une réduction appréciable si l'on songe que les crédits étaient jusqu'à 2005 dispersés en 850 chapitres. Les programmes se déclinent ensuite en actions et sous-actions.

Les programmes sont circonscrits par ministère

Certains auraient souhaité que les programmes puissent concerner plusieurs ministères mais cette hypothèse n'a pas été retenue eu égard aux risques de confusion, voire même de paralysie de l'action, qui étaient susceptibles d'en découler. C'est

pourquoi, au nom d'une logique de responsabilisation, la règle posée par la loi est que les crédits ouverts sont mis à la disposition des ministres et donc placés sous la responsabilité de chacun d'entre eux; ainsi, à chaque programme correspond un seul responsable. Par ailleurs, un responsable de programme est désigné au sein du ministère. Ces programmes sont ensuite découpés en *Budgets opérationnels de programme (BOP)* avec à leur tête un responsable. Ces BOP sont eux-mêmes susceptibles d'être divisés en *Unités opérationnelles de programme (UOP)* pilotés là encore par un responsable chargé de réaliser les objectifs conjointement fixés avec le responsable du BOP qui a préalablement déterminé ses propres objectifs en concertation avec le responsable du programme. On appelle cette discussion entre responsables des différents niveaux un « *dialogue de gestion ».*

La loi de règlement : un outil de contrôle de la gestion

La logique de contrôle de gestion dont est porteuse la LOLF et dans laquelle se trouve placée la décision financière publique implique nécessairement un retour sur les résultats , et par conséquent un contrôle et une évaluation de l'efficacité des actions. C'est à ce titre que la loi de règlement (LR) fait l'objet d'une revalorisation importante et qu'à travers elle, se trouve organiquement consacré ce que l'on peut à notre sens qualifier de *«* contrôle parlementaire professionnalisé des finances de l'Etat » . En effet, outre que ses fonctions sont précisées et élargies , la LR est enrichie d' informations telles que les parlementaires devraient y trouver un véritable outil de contrôle pour une analyse et une évaluation des résultats , un outil les conduisant à intégrer un cadre de pensée très proche de celui du chef d'entreprise .

Des fonctions précisées qui empruntent à la logique financière des entreprises

Si la loi de règlement arrête le montant définitif des recettes et des dépenses du budget ainsi que le résultat budgétaire de l'année, elle fixe également le montant définitif des ressources et des charges de trésorerie ayant concouru à la réalisation de l'équilibre financier de l'année correspondante, présenté dans un tableau de financement .

D'autre part, la loi de règlement intervient dans le processus d'établissement de la comptabilité générale de l'Etat. Elle approuve en effet le compte de résultat de l'exercice, établi à partir des ressources et des charges constatées, l'affecte au bilan qu'elle doit approuver ainsi que ses annexes , étant sur tous ces points très proche d'une véritable logique d'entreprise.

La loi de règlement : un outil de contrôle professionnalisé de la gestion financière

La décision budgétaire étant orientée vers les résultats, il va de soi que le Parlement doit disposer d'un document suffisamment complet pour lui permettre de juger de la qualité de la réalisation des prévisions; il s'agit là d'une exigence parfaitement banale du point de vue du contrôle de la gestion. Cette logique se retrouve dans la masse très importante des informations financières fournies aux parlementaires en annexe du projet de loi de règlement et par lesquelles ceux-ci se trouvent placés en quelque sorte dans la situation qui est celle du manager d'une entreprise ou de l'expert chargé d'effectuer une analyse financière.

Autonomie et responsabilisation des administrations

La responsabilisation des gestionnaires par la fongibilité des crédits

Le dispositif institué par la loi , qui consiste dans la globalisation des crédits et leur fongibilité à l'intérieur des programmes, devrait être un facteur de transformation essentiel de la gestion publique et du fonctionnement général de l'administration y compris des objectifs et des raisons d'être de ses corps de contrôle.

En effet, avec la globalisation et la fongibilité des crédits, le gestionnaire public est doté d'une plus grande autonomie. Il réalise comme il l'entend le programme dont il a la charge et , indiscutablement, ses marges de manœuvre sont très larges ; il peut redéployer les crédits à son gré entre les titres ; il décide quelle doit être la meilleure répartition des dépenses ; il a également la faculté de transformer des crédits de fonctionnement en crédits d'investissement et inversement (on retrouve ainsi l'extension des autorisations d'engagement /crédits de paiement aux dépenses de fonctionnement). On rappellera toutefois que la fongibilité des crédits ne s'étend pas aux dépenses de personnel. Des crédits de personnel peuvent être utilisé pour financer d'autres dépenses mais l'inverse n'est pas possible, c'est pourquoi l'on parle de *fongibilité asymétrique.*

Il y a bien entendu une contrepartie. Elle consiste dans la responsabilité qui est celle des gestionnaires vis à vis des objectifs poursuivis et dans leur engagement à devoir réaliser les résultats fixés ; ces derniers doivent ainsi rendre compte de leur gestion et produire un rapport annuel de performances. Des indicateurs permettent d'évaluer la qualité de la gestion accomplie.

Le contrôle de gestion et la mesure de la performance

La comptabilité publique, ici celle qui concerne l'Etat, se trouve profondément modifiée dans sa philosophie. Les dispositifs prévus comme la logique générale qui sous-tend la loi annoncent en effet une évolution orientée vers une plus grande

maîtrise de la gestion publique, avec pour ce faire une modélisation de celle-ci sur la gestion privée. A cet égard, la création de systèmes d'information budgétaire et comptable au sein des administrations en vue de permettre de mesurer la performance et de contrôler la gestion des services participe pleinement de cet objectif. Sans compter que privilégiant l'évaluation de l'efficacité et de la performance de la dépense publique, une telle conception amène à reconsidérer les objectifs assignés à la fonction de contrôle.

On précisera encore que le texte opère une distinction nette entre deux notions , celle de comptabilité budgétaire et celle de comptabilité générale de l'Etat et que c'est de la deuxième qu'il entend faire un instrument de contrôle de la gestion et de la performance. Ainsi , si les opérations budgétaires sont établies en comptabilité de caisse tant en ce qui concerne les prévisions que l'exécution, la comptabilité générale de l'Etat est fondée quant à elle sur le principe de la constatation des droits et obligations . Les opérations sont donc prises en compte au titre de l'exercice auquel elles se rattachent, indépendamment de leur date de paiement ou d'encaissement et, en cela, les règles applicables à la comptabilité générale de l'Etat ne se distinguent de celles applicables aux entreprises (plan comptable général des entreprises) qu'au regard des spécificités de son action. La LOLF institue de la sorte un passage d'une comptabilité de flux à une comptabilité patrimoniale, d'une comptabilité de caisse à une *comptabilité d'exercice*.

Tout aussi proche de la comptabilité d'entreprise, le compte général de l'Etat qui est joint au projet de loi de règlement, comprend la balance générale des comptes, le compte de résultat, le bilan et ses annexes, et une évaluation des engagements hors bilan de l'Etat. Il est accompagné d'un rapport de présentation, qui indique notamment les changements des méthodes et des règles comptables appliqués au cours de l'exercice .

A première vue, la solution choisie, celle d'une double modalité des enregistrements, n'est pas la plus simple ; en fait ,le législateur a entendu traiter différemment les opérations budgétaires et les opérations comptables car il a jugé, d'une part qu'un enregistrement aux encaissements correspond mieux à la réalité de l'exécution du budget et assure une meilleure lisibilité immédiate , d'autre part qu'une comptabilité d'exercice est plus appropriée à la mise en place d'un contrôle de gestion, à une évaluation des performances.

On ajoutera encore que selon la loi, les comptes de l'Etat doivent être réguliers, sincères et donner une image fidèle de son patrimoine et de sa situation financière. C'est la Cour des comptes qui a la charge de certifier les comptes de l'Etat[5].

5 La certification des comptes de l'Etat : expression d'une nouvelle gouvernance financière publique, in Revue juridique de l'économie publique, N°649 Janvier 2008

Streszczenie

Reforma finansów publicznych we Francji, wprowadzona na mocy ustawy z 1 sierpnia 2001 r. (LOLF), która stała się swego rodzaju „konstytucją finansową", dokonała głębokich przemian we francuskim prawie budżetowym. LOLF wpisuje się w historyczny proces reformy finansów publicznych, w proces polityczno-socjologiczny, a także proces międzynarodowych przemian publicznych systemów finansowych. Zawiera strategiczną koncepcję działań wykonywanych przez państwo i podejmowania decyzji dotyczących finansów publicznych. Dzięki niej możliwe jest unowocześnienie struktur politycznych i administracyjnych, a w konsekwencji przystosowanie państwa do nowych uwarunkowań gospodarczych i socjologicznych.

Marie - Christine Esclassan

L'ADAPTATION DES CONTRÔLES FINANCIERS PUBLICS À LA NOUVELLE GESTION PUBLIQUE

Introduction

Dans le mouvement général d'évolution que connaissent les systèmes de finances publiques dans le monde, les changements qui affectent les contrôles occupent une place de premier plan**.** Tous quelle que soit leur nature, qu'il s'agisse des contrôles administratifs, juridictionnels, politiques, sont confrontés aujourd'hui à la diffusion d'un nouveau mode de gouvernance financière, axé sur la performance et l'efficacité, et à la mise en œuvre d'une nouvelle gestion publique répondant à cet objectif**.** Il apparaît aussi que cette confrontation – et la problématique d'adaptation parfois considérable qui en résulte- se présente comme un phénomène international d'ampleur, et ce de plusieurs points de vue**.**

Il ne s'agit pas d'abord d'un phénomène isolé ou marginal, mais bien d'un mouvement de fond qui traverse de nombreux pays dans le monde. Le caractère international des réformes tendant à promouvoir un nouveau modèle de gouvernance financière et de gestion publique mettant au premier plan l'efficacité de la gestion est en effet l'une des caractéristiques majeures des finances publiques contemporaines. Cet élément n'est du reste que l'une des manifestations du mouvement plus général de l'internationalisation du droit et de la politique observé à propos de nombreux champs[1]. C'est aussi ce qui peut expliquer le phénomène de standardisation des institutions et des procédures qui se manifeste depuis plusieurs années en matière de gestion financière publique, un phénomène qui affecte de manière plus ou moins importante les modèles de finances publiques traditionnels[2]. Un tel phénomène, il

1 Cet aspect a notamment été traité dans le cadre du colloque organisé par la Faculté de droit d'Amiens en 2003 à l'occasion des trente ans de cette Université.

2 On se permet de renvoyer à notre étude sur ce sujet : M.C. Esclassan, « Le modèle français de finances publiques à l'épreuve de l'internationalisation du droit et de la politique « in Réforme des finances publiques, démocratie et bonne gouvernance, Actes de l'Université de printemps de finances publiques, s/s direct. M. Bouvier, LGDJ, 2004.

faut le souligner, n'est pas circonscrit aux pays développés. Il s'observe à l'identique dans les pays en développement ou émergents, qui sont confrontés de la même manière à une logique de performance qui apparaît comme l'un des objectifs essentiels des réformes financières et institutionnelles en cours[3].

Il n'en est pas moins vrai d'un autre côté que la démarche de changement n'est pas partout uniforme, ce qui peut paraître limiter le caractère international du mouvement de réforme noté précédemment. Il en est notamment ainsi de la conduite de changement[4], qui n'est pas abordée toujours de la même façon, notamment par le fait que le lien entre réforme budgétaire et réforme de la gestion publique n'est pas partout automatique. Certes, la tendance générale semble être une démarche progressive, comme par exemple en Suède où la restructuration budgétaire a été antérieure au pilotage par les résultats. Toutefois d'autres pays ont opté pour une logique plus radicale en ayant choisi de mener ensemble les deux réformes (USA, France), selon la technique dite du « big-bang ». D'autres encore, comme l'Italie, se sont engagés pour leur part dans une logique de performance sans refonte de leur technique budgétaire et notamment sans établir un budget de programme[5].

Au surplus, et même lorsque la démarche de changement est identique, on observe des avancées inégales entre les pays. La plupart des pays développés sont parvenus à donner une impulsion rapide aux réformes. Dans d'autres en revanche, et notamment les pays en développement, la mise en œuvre de la réforme connaît, souvent faute de moyens, une progression plus limitée.

Mais au-delà de ces éléments de la diversité dans le processus de réforme, il n'en demeure pas moins que ce mouvement de restructuration présente une grande homogénéité du point de vue de l'objectif. En effet dans tous les pays concernés les réformes entendent répondre à une double problématique. La première concerne la maîtrise de la dépense publique. Dans un contexte de forte contrainte financière – volume élevé de la dette publique, persistance de déficits excessifs, stagnation voire régression de la ressource fiscale – cet objectif se présente désormais comme un objectif partagé par pratiquement tous les Etats. La deuxième problématique concerne l'instauration d'une bonne gouvernance financière, avec la mise en place de « bonnes pratiques de gestion » selon la formulation utilisée. Cet objectif inspire fondamentalement le processus général de réforme en cours avec, partout, l'introduction – ou la volonté d'introduire – une démarche de performance et de résultats dans les processus budgétaires et la gestion publique.

3 V. notamment sur ce point RFFP n° 98, 2007 « Logique de performance et pays en développement » qui réunit sur le sujet de nombreuses contributions de spécialistes et experts africains et qui révèlent l'ampleur de cette problématique dans cette région du monde.

4 V. sur ce thème les publiés M. Bouvier (sous direc.), Réforme des finances publiques : la conduite du changement, Actes de l'Université de printemps de finances publiques du Gerfip, LGDJ, 2006.

5 Sur ces aspects v. A. Barilari, M. Bouvier, La nouvelle gouvernance financière publique, 2e édition LGDJ, 2007.

Il est à souligner enfin que la dimension internationale de ce mouvement de réformes qui touche aujourd'hui la plupart des systèmes financiers publics a été notablement renforcée par le fait qu'elles s'alimentent très largement du point de vue de leurs sources intellectuelles, à un modèle, un standard de bonne gouvernance, que l'on trouve diffusé notamment par les organisations internationales à travers leurs recommandations relatives aux « bonnes pratiques » ou encore à travers les principes énoncés dans le cadre de « codes de bonne conduite ». Mais sur ce plan un degré supplémentaire a été franchi. En effet, la dimension internationale de ce mouvement de réformes en matière de finances publiques ne s'exprime plus seulement à travers un corpus doctrinal ou sur le seul terrain des principes. Elle s'exprime également sur le terrain des normes, et l'on fait notamment référence sur ce point aux normes comptables internationales pour le secteur public élaborées par l'Ipsas Board[6] qui ont été adoptées par nombre d'Etats à l'occasion de la récente modernisation de leur système comptable.

On peut comprendre que dans ce contexte les contrôles financiers publics soient l'objet d'une mutation d'ampleur. On tentera de montrer dans la limite des quelques pages qui suivent qu'ils sont confrontés plus précisément et de manière fondamentale à une logique totalement nouvelle (I), qui commande inévitablement une transformation une transformation des procédures et des institutions (II).

I La transformation de la logique du contrôle

Si tout mouvement de transformation est à l'évidence le fruit d'une combinaison complexe de différents facteurs, il apparaît toutefois que les évolutions actuelles de la logique du contrôle financier public sont essentiellement liées à l'introduction dans la sphère publique d'une logique de gestion qui fait appel – sans doute avec des spécificités – aux méthodes utilisées dans le cadre du management des entreprises. Le phénomène n'est pas nouveau et sans remonter très loin dans le temps on peut sur ce point rappeler les tentatives d'introduction de la RCB dans la gestion de l'Etat dans la seconde moitié des années 1960. Mais à la différence de la tentative de rationalisation d'il y a une quarantaine d'années, l'ambition d'introduire dans le secteur public une logique de management comparable à celle du secteur privé a désormais changé d'échelle en étant notamment liée à une implication importante du pouvoir politique dans la modernisation intervenue du droit budgétaire. S'il est d'un côté remarquable que le pouvoir législatif soit à l'origine de celle-ci à travers la volonté qu'il a manifestée de rénover ses pouvoirs financiers et par voie de

6 Pour plus d'informations sur ces aspects et notamment au rôle joué en la matière par le Comité de Normalisation comptable internationale (IPSAS Board) , on se permet de renvoyer à P. Adhémar et son excellent article « Mutation des problématiques budgétaires, comptables et d'audit, in RFFP,n° 98-2007.

conséquence le processus budgétaire, l'action conjointe déployée parallèlement par le pouvoir exécutif dans le processus de modernisation des structures administratives et des procédures ne l'a pas moins été, l'ensemble débouchant en définitive sur une réforme de l'Etat et de la gestion publique.

Dans ce nouveau contexte, il s'ensuit deux conséquences pour les contrôles financiers publics. D'une part ils viennent se rapprocher dans leur nature des contrôles en vigueur dans le secteur privé en devenant de plus en plus des contrôles de gestion (A). D'autre part ils apparaissent comme des éléments fondamentaux du système d'information budgétaire et comptable (B).

Du contrôle de régularité au contrôle de gestion

On assiste nolens volens au passage d'une logique ancienne, dans laquelle le contrôle de régularité était prédominant et même exclusif, à une logique nouvelle dans laquelle l'objectif prédominant du contrôle est celui de l'efficacité de la gestion. Il est tout aussitôt à relever que ce rapprochement avec la nature des contrôles en vigueur dans le secteur privé ne résulte pas d'un quelconque volontarisme mais qu'il est induit par les dispositifs sur lesquels repose la nouvelle gestion publique, des dispositifs qui induisent nécessairement des contrôles financiers publics différents dans leur nature et leur finalité des contrôles traditionnels. Ainsi par l'exemple l'introduction au sein du secteur public d'une démarche de performance et de responsabilisation va forcément dans le sens d'un développement du contrôle de gestion. De même l'adoption par l'Etat d'une comptabilité d'exercice, certes aménagée, tend inévitablement à conduire vers le contrôle des résultats et des comptes, et par suite vers la certification.

Plus globalement, il s'ensuit aussi que dans un tel cadre de gestion, la préoccupation traditionnelle de régularité, de vérification de conformité à la norme qui avait été jusqu'alors l'axe essentiels des contrôles financiers publics, tend à être concurrencée voire supplantée par une préoccupation d'efficacité et de performance.

Pour autant, le contrôle de régularité ne disparaît pas dans cette évolution. Toutefois il connaît des évolutions sensibles. D'une part il se trouve désormais associé au contrôle de la performance et des résultats et d'autre part – ce qui est sans doute l'élément le plus nouveau – il se trouve pour partie réalisé sous d'autres formes, et notamment à travers le processus informatisé de la chaîne de l'exécution des opérations financières.

Une dimension nouvelle: les contrôles, comme éléments fondamentaux du système d'information budgétaire et comptable

Dans une gestion orientée vers la performance et les résultats, l'information est essentielle. Elle est une condition sans laquelle il ne peut y avoir de contrôle effectif des résultats obtenus, sachant que les contrôles participent eux-mêmes à l'enrichissement de l'information. Cette conception est notamment développée dans les théories du gouvernement de l'entreprise qui accordent au contrôle de la gestion une importance fondamentale et considèrent que la qualité de celui-ci passe par la mise en place de systèmes d'informations et de performance, avec en particulier un système comptable et des dispositifs de gestion permettant de suivre en temps réel l'évolution financière de l'entreprise[7].

Or c'est bien dans cette même perspective que se situent désormais les contrôles financiers publics et qu'ils sont appelés à jouer un rôle fondamental du point de vue de la maîtrise de la gestion budgétaire et financière. Le schéma d'autonomie et de responsabilisation qui est celui de la nouvelle gestion publique implique que les gestionnaires doivent gérer des enveloppes globales selon une démarche de performance et d'évaluation des résultats. Dans ce cadre où l'information s'avère par conséquent fondamentale pour les besoins de la bonne gestion, les contrôles deviennent par là même des instruments stratégiques d'aide à la décision. Mais ce faisant, ils prennent en même temps une dimension nouvelle en participant aux côtés d'autres dispositifs ayant la même vocation, au bon fonctionnement d'un ensemble plus vaste constituant le système dit d'information budgétaire et comptable.

La fonction d'information des contrôles n'est certes pas nouvelle ayant même toujours constitué leur raison d'être et ayant fondé leur rôle de premier plan. Mais il est à observer que cette fonction prend une importance renouvelée aujourd'hui dans la gestion financière publique. Il en est ainsi compte tenu on l'a dit de la logique de performance et de résultats qui se trouve impulsée au plan interne. Mais il en est ainsi également au regard d'un phénomène plus récent auquel sont de plus en plus confrontés les Etats, contraints à devoir se soumettre à des exigences de communication financière au plan externe. Cette exigence relève dans un certain nombre de cas d'une obligation juridique, en vigueur au sein d' un espace géographique délimité, comme dans certaines zones régionales à l'intérieur desquelles les Etats membres peuvent être tenus de communiquer régulièrement des informations précises aux instances de la zone. Un tel exemple se rencontre au sein de l'Union européenne s'agissant des Etats appartenant à l'Union économique et monétaire qui, étant soumis à une discipline budgétaire commune et un objectif d'équilibre budgétaire à moyen terme doivent chaque année transmettre à la Commission et au Conseil

7 Nous nous permettons de renvoyer aux développements consacrés à cet aspect in M. Bouvier, M.C. Esclassan, J.P. Lassale, Manuel de Finances Publiques, 9e édition, LGDJ, 2008.

un programme triennal d'évolution de leurs finances publiques. Mais une telle obligation de communication financière relève plus généralement d'une obligation de fait qui aujourd'hui touche peu ou prou tous les Etats dans le monde et qui n'est pas sans liens avec leurs impératifs de financement auprès des marchés financiers et/ou des bailleurs internationaux. La capacité élargie des Etats de faire appel aux premiers , notamment au moyen des nouveaux instruments financiers dont ils se sont dotés il y a une vingtaine d'années, a une contrepartie qui tient à la surveillance de fait dont ils sont l'objet, leur gestion et leur situation budgétaire et financière étant régulièrement évaluées et notées. Sous cet angle, on peut comprendre l'autre dimension des contrôles et le fait que leur importance au plan interne se double de leur importance au plan externe, étant le gage de la qualité de l'information sur les comptes et de sa fiabilité.

II Une transformation des procédures et des institutions de contrôle

La transformation des procédures et même des institutions de contrôle est Inévitable, dès lors que la logique dans laquelle s'insère le contrôle se modifie sensiblement. Ce processus qui est d'ores et déjà engagé se manifeste toutefois inégalement selon les types de contrôles. Les plus touchés dans l'immédiat sont les contrôles administratifs, même si les contrôles externes connaissent toutefois des évolutions non négligeables. En revanche les procédures et les méthodes évoluent sensiblement dans tous les secteurs de contrôle.

Une évolution généralisée des procédures et des méthodes de contrôle

Dans ce domaine, deux grandes caractéristiques se dégagent de l'observation. D''une part les contrôles tendent à évoluer vers une logique de coproduction à l'inverse de la conception cloisonnée qui prévalait jusqu'alors. D'autre part l'approche exhaustive traditionnelle tend à être supplantée par une approche sélective jusqu'alors totalement inédite.

1°) Une logique de coproduction

Les contrôles financiers tendent de plus en plus à former un système interdépendant, une sorte de chaîne à laquelle participe chaque institution de contrôle, ce qui conduit à des procédures partenariales et de collaboration. Cette évolution est particulièrement mise en valeur par le nouveau dispositif des contrôles dits « partenariaux » entre ordonnateurs et comptable qui est venu sensiblement modifier la conception traditionnelle du contrôle a priori exercé par le comptable public sur l'ordonnateur. Le contrôle « partenarial » comporte en effet de manière

sous-jacente le postulat d'un cadre de gestion intégrée, faisant appel au dialogue et à la collaboration, alors que la conception traditionnelle a toujours été celle d'une séparation stricte entre les deux autorités responsables de l'exécution, les ordonnateurs et les comptables publics, appréhendés comme deux acteurs totalement indépendants l'un de l'autre et dotés de fonctions exclusives et strictement délimitées.

Il n'est pas sans intérêt d'observer que la rupture ainsi réalisée par rapport aux cadres de gestion traditionnels et qui a été très largement induite par l'informatisation de la chaîne de l'exécution des opérations, ainsi que par les effets de la nouvelle comptabilité de l'Etat, permet donc une fois encore de prendre la mesure de l'influence considérable que peuvent jouer les nouvelle techniques dans la remise en cause des principes traditionnels d'organisation, comme l'a bien montré par ailleurs André Leroi-Gourhan.

Il n'est pas contestable de ce point de vue que l'informatisation de la gestion financière publique a eu des conséquences fondamentales en induisant un cadre de gestion intégré très éloigné des principes et dispositifs définis par le décret du 29 décembre 1962 avec de fait la disparition de la séparation traditionnelle de séparation des fonctions, qui avait jusqu'alors avait caractérisé la gestion financière publique, et l'apparition d'une autre configuration, celle d'une chaîne d'exécution dans laquelle chaque acteur participant à l'acte de gestion prend place (responsable de programme, ordonnateur, comptable public, contrôleur budgétaire) selon une logique de standardisation des tâches et des processus. Ce cadre de gestion unifié est ainsi venu se substituer à l'hétérogénéité des pratiques et applications spécifiques qui se rencontraient dans les différentes administrations.

Parallèlement l'informatisation a entraîné des conséquences notables en ce qui concerne les dispositifs de contrôle traditionnel, en particulier en rendant largement obsolètes les contrôles de régularité a priori qui se sont trouvés largement intégrés dans le circuit automatisé de la chaîne de la dépense. Il en est a été de même de certaines étapes du processus de dépense rendues inutiles, comme par exemple celle de l'ordonnancement devenue redondante dans le processus continu de la dépense

La réforme de la comptabilité de l'Etat n'a pas été sans ajouter à cette dynamique. Ainsi la pratique nouvelle des contrôles partenariaux entre ordonnateurs et comptables n'est – elle en réalité que la suite logique des effets de l'introduction d'une comptabilité en droits constatés et de l'importance prise dans ce cadre par la comptabilisation des engagements laquelle, à son tour, vient démontrer que l'exclusivité de la fonction comptable n'existe plus dans un tel schéma. Il en est de même de la mission nouvelle de certification des comptes qui n'est, elle aussi,

que l'une des conséquences de la nouvelle technique comptable comme l'a souligné avec pertinence J.R. Alventosa[8].

L'avènement de la mission de certification des comptes s'inscrit en effet dans une chaîne de production elle-même induite par la comptabilité d'exercice. Or il est à remarquer que dans cette chaîne, tous les agents, sans exclusive, participent à la production de l'information. Il en est ainsi des comptables qui tiennent les comptes sur la base des éléments fournis par les ordonnateurs, mais il en est de même de ces derniers qui non seulement participent eux aussi à la production de l'information comptable en étant chargés de tenir une comptabilité d'engagements mais qui y jouent un rôle non négligeable dès lors que celle-ci inclut désormais des éléments d'appréciation et d'évaluation qui sont loin d'être mineurs au regard du principe de sincérité des comptes qui prévaut désormais; on pense notamment sur ce point aux risques de charges ou de pertes qui pour une appréciation correcte du résultat annuel et du bilan doivent faire l'objet de provisions.

2°) Une nouvelle approche du contrôle

Au demeurant, le développement de l'analyse des risques au sein de la gestion financière publique ne se situe pas seulement sur le terrain comptable mais s'observe également dans l'approche nouvelle du contrôle. Ce dernier domaine est marqué en effet par un net recul du contrôle exhaustif traditionnel au profit d'une approche sélective fondée sur l'analyse des risques et cette évolution témoigne du rapprochement sensible qui s'opère sur le terrain des procédures et des méthodes entre les contrôles publics et les contrôles en vigueur dans le secteur privé. Cette tendance qui participe plus généralement des caractéristiques de la nouvelle gestion publique[9], axée sur les résultats et la démarche de performance, est particulièrement lisible à travers les aménagements intervenus dans les contrôles a priori pour les adapter au nouveau contexte. Il en est notamment ainsi avec la nouvelle doctrine du contrôle de la dépense par les comptables publics qui substitue à la mission classique de contrôle a priori antérieure un contrôle sensiblement allégé, dit partenarial (v. supra) et hiérarchisé, c'est-à-dire modulé selon une évaluation des risques et fondé sur des sondages. Il en est de même avec la nouvelle conception du contrôle financier qui tend désormais à s'attacher avant tout à éviter les risques budgétaires en agissant soit au stade de la prévision soit en cours d'exécution.[10]

8 J.R. Alventosa, « L'évolution de la nature des contrôles, in M. Bouvier (s/direct.) Innovations, créations et transformations en finances publiques, Actes de la IIe Université de printemps de finances publiques du Gerfip, LGDJ, 2005.

9 Pour une vue commentée de ses principales caractéristiques, v. B. Abate, La nouvelle gestion publique, LGDJ, 2000, (collection Systèmes).

10 On rappellera sur ce point que seules les dépenses dites les plus « sensibles » font encore l'objet de la délivrance d'un visa ou d'un avis préalable.

Les avantages attendus de l'approche sélective, à savoir une plus grande efficacité du fait d'une plus grande rapidité de la restitution du contrôle, ainsi qu'une meilleure adaptation des coûts, suffisent sans peine à situer l'incidence considérable de la logique de performance et de résultats dans les évolutions que connaissent les contrôles du point de vue de leur approche traditionnelle. Ces nouvelles approches du reste ne concernent pas seulement les contrôles budgétaires. Elles tendent aussi – mais l'influence est plus récente – à pénétrer les contrôles fiscaux.

Une transformation des institutions de contrôle

F. Furet et M. Ozouf notent à propos de la portée de la Révolution française que « ce qui bascule entre 1787 et 1800, ce n'est pas la substance de la société: ce sont ces principes et son gouvernement »[11]. On peut se demander si toutes proportions gardées, cette observation ne peut pas être transposée au processus de transformation actuel auquel les institutions de contrôle sont confrontées. Certes, et notamment dans le cas du modèle français de finances publiques, rien ne paraît changer véritablement en tout cas au plan formel. Les institutions traditionnelles de contrôle demeurent en effet peu ou prou en place, de même que leurs trois grandes catégories traditionnelles: contrôles administratifs se déclinant en contrôles a priori et contrôles a posteriori, contrôles juridictionnels c'est-à-dire plus exactement ceux réalisés par les juridictions financières, contrôle politique, ce dernier étant le contrôle parlementaire de l'exécution du budget. Mais cependant sur le fond les fonctions se transforment sensiblement et l'on assiste en réalité à une mutation profonde de la nature des contrôles et avec elle à une transformation des institutions de contrôle elles-mêmes.

1°) Les contrôles administratifs internes a priori sont certainement les plus touchés par ce mouvement. On en a déjà évoqué les causes: l'informatisation de la chaîne d'exécution qui réalise en partie les contrôles de régularité a priori, la mise en place d'une comptabilité d'exercice qui conduit à recentrer les contrôles sur les comptes, la nouvelle logique de performance qui privilégie le contrôle de l'efficacité et des résultats et conduit à mettre au premier plan le contrôle de gestion. Par suite, les fonctions traditionnelles implosent, comme celle de comptable public qui connaît une transformation remarquable[12] – quasi disparition de son rôle de contrôleur a priori, recentrage sur la tenue des comptes avec l'obligation désormais de veiller à leur sincérité – de même que celle de contrôleur financier, devenu un contrôleur budgétaire chargé désormais de veiller à la soutenabilité des propositions financières

11 In « Dictionnaire critique de la Révolution française, Institutions et créations ».

12 Sur ce point cf. F. Akhoune, Le statut du comptable public, Thèse de doctorat, à paraître LGDJ, 2008, Bibliothèque de Finances Publiques et Fiscalité.

de chaque ministère, ainsi que du respect par les responsables de programme des règles relatives à la fongibilité asymétrique des crédits[13].

Certes et par contraste les contrôles internes a posteriori paraissent en apparence moins affectés en évoluant vers une mission d'audit qu'ils assuraient déjà en partie. Mais d'une part elle devient la mission essentielle comme l'illustre la récente démarche de révision générale des politiques publiques, d'autre part – élément tout à fait inédit – elle est désormais réalisée en « coproduction » avec des auditeurs externes du secteur privé Le phénomène est notable à plus d'un titre. Il ne concerne pas en effet les seuls contrôles internes a posteriori. Il montre aussi que les contrôles externes ne sont plus seulement le fait des juridictions financières.

2°) Les contrôles réalisés par les institutions supérieures de contrôle

S'agissant de ces dernières et de leurs missions, les évolutions sont peut être moins spectaculaires que les précédentes sachant que sur le fond elles ne sont pas moins profondes. En ce sens, la nouveauté certainement la plus essentielle est que désormais, comme l'a excellemment écrit J.F. Alventosa, la performance et la comptabilité constituent le nouvel horizon des contrôles[14], qu'il s'agisse des contrôles internes ou des contrôles externes. En ce qui concerne les contrôles externes et le rôle à leur égard des institutions supérieures de contrôle, la pratique révèle en effet des évolutions d'ampleur qui dépassent le cadre d'un seul pays ou de quelques uns. Ainsi et d'une manière générale, il apparaît que les contrôles réalisés par les institutions supérieurs de contrôle connaissent une évolution identique avec un même cheminement vers la nature des contrôles en usage dans le secteur privé, un phénomène qui s'observe en Europe comme une tendance lourde, et ce quelle que soit la diversité des formes institutionnelles en charge du contrôle externe[15].

De ce fait les missions traditionnelles de contrôle connaissent des évolutions notables, marquées notamment par deux grandes caractéristiques: d'une pat un déclin du contrôle juridictionnel au profit de la montée du contrôle de la gestion (qui englobe plusieurs aspects: qualité de la gestion et des politiques publiques), d'autre part une mutation du contrôle de la régularité de l'exécution du budget de l'Etat qui devient un contrôle des résultats et de la performance. Parallèlement s'ouvrent

13 On rappellera que depuis le 1er janvier 2006 le contrôleur budgétaire exerce un contrôle financier largement différent de celui de ses prédécesseurs. Son travail de contrôle n'est plus centré sur la vérification de la régularité des actes de dépenses, les contrôles internes au ministère étant voués à s'y substituer. Selon le décret du 27 janvier 2005 (n° 2005-54) qui expose les modalités du nouveau contrôle financier exercé par l'autorité chargée de ce contrôle « participe à la maîtrise de l'exécution des lois de finances tant en crédits qu'en effectifs. Elle concourt à ce titre, à l'identification et à la prévention des risques financiers ainsi qu'à l'analyse des facteurs explicatifs de la dépense et du coût des politiques publiques ».

14 V. J.R. Alventosa, L'évolution de la nature des contrôles, art. cit.

15 J.F. Bernicot, La diversité du contrôle externe en Europe, in M. Bouvier,(s/s direct.), Réformes des finances publiques, La conduite du changement, (Actes de l'Université de printemps de finances publiques du Gerfip), LGDJ, 2006

de nouvelles missions totalement inédites: la plus exemplaire est sans aucun doute la certification des comptes qui, de par l'importance qui s'y attache au plan externe donne à l'institution qui en est chargée une dimension internationale.

3°) Le contrôle parlementaire de l'exécution du budget connaît lui-même une évolution comparable dans son mouvement à ce qui a déjà été noté s'agissant de la progression de la logique de gestion. En s'orientant vers un contrôle de la performance et des résultats et ce à la faveur de l'enrichissement des informations qui lui sont désormais transmises dans le cadre de la loi de règlement, le contrôle parlementaire se professionnalise en se faisant désormais tout à la fois contrôle politique et contrôle de gestion[16]. Sans être aussi évidente, la progression d'une autre logique observée, une logique de co-production, peut également se déceler à travers l'amorce d'une autre vision du processus de décision en matière budgétaire que l'on peut lire à travers les deux procédures que constituent en ce sens d'une part le débat d'orientation budgétaire , officialisé par la LOLF et permettant au Parlement d'être informé sur les orientations budgétaires, d'autre part la Conférence nationale des finances publiques, nouvelle instance réunissant depuis 2004 les représentants des trois grands secteurs de finances publiques. Ces innovations permettent en effet de relever que la transformation de la logique et de la nature des contrôles n'est pas sans rapports avec les évolutions que connaît la séparation des pouvoirs en matière financière.

Le mouvement actuel de mutation que connaissent les contrôles financiers publics est loin d'être parvenu à maturité. Mais déjà pour les pays comme la France qui se sont engagés assez récemment dans la réforme de leurs institutions budgétaires et dans lesquels ce mouvement est tout juste amorcé, les changements introduits surprennent par leur ampleur et leur caractère inédit dans le secteur public. On ne s'étonnera pas que parmi les interrogations qu'il soulève, la question se pose de savoir si les institutions existantes seront en mesure de s'y adapter, au moins pour certaines d'entre elles.

16 Cet aspect a très tôt été mis en évidence par M. Bouvier, notamment dans son article « La loi organique du 1er août 2001 relative aux lois de finances », AJDA, n° 10, 2001.

Streszczenie

Ogólnoświatowa tendencja polegająca na wprowadzaniu nowego modelu zarządzania publicznego ukierunkowanego na wynik i skuteczność pociąga za sobą konieczność reformowania kontroli administracyjnej, sądowej czy też politycznej. Można wyróżnić dwa główne kierunki przemian: koncepcji oraz procedur i instytucji. Zmiana koncepcji kontroli polega na przejściu od kontroli prawidłowości do kontroli zarządzania i wykorzystywania jej jako narzędzia informacji budżetowej i księgowej. Przemiany w zakresie procedur dotyczą współpracy międzyinstytucjonalnej i podejścia selektywnego opartego na analizie ryzyka, zaś instytucjonalne modyfikują zasady kontroli wewnętrznej, kontroli dokonywanej przez organy nadrzędne oraz kontroli parlamentarnej.

Adrian Gosk

THE DEVELOPMENT AND PROSPECTS OF AN INTERNAL AUDIT IN PUBLIC FINANCE SECTOR UNITS IN POLAND

Initial comments

The introduction of an internal audit was connected with adapting Polish legal system to the European standards as a part of our accession to the European Union. During the time of a socialist state, but also after the crucial events of 1989, Polish administration consisted of similar internal control units, however, during the negotiations the stance of Polish negotiators was not accepted. The main reason for this were basic differences between these two institutions. Namely, internal control is a means of management which aims at revealing inadvertence and incorrectness, while an internal audit is supposed to facilitate (bring in the so called positive value) at the same time bearing quite an independent position in an organization.[1] Although it has been present in a Polish legal system for a few years, an internal audit is still quite a new institution and till now there have been a lot of doubts concerning its role and character, especially in local government units.

Internal audit from 2002 to 2005

This institution enriched Polish legal system by adding on the 1st January 2002 chapter no. 5 entitled: "Financial control and internal audit in public finance sector units" (art. 35a – 35t ufp) to the act dated 26th November 1998 concerning public finance.[2] The legislator's intention was mutual regulation of similar, in their opinion, institutions namely: financial control and an internal audit.[3] In accordance with the article 35a ufp financial control in public finance sector units was supposed to relate to the process connected with accumulating and administering public means as

1 K. Czerwiński, Audyt wewnętrzny, Warsaw 2004, p.16
2 Act dated 26th November 1998 concerning public finance (Law Gazette No. 15 item 148 with amendments, hereinafter referred to as: "ufp")
3 R. Krzemień, K. Winiarska, Audyt wewnętrzny w pytaniach i odpowiedziach. Komentarze, Warsaw 2004, p.10

well as property management. Financial control was supposed to include: obeying control procedures and initially evaluate the purposefulness of taking out financial obligations, bearing expenses, examination and comparison of actual and required state, taking and accumulating public means, giving competitive tendering and returning public means as well as managing financial economy. Whereas an internal audit in art. 35c of the same act was described as the whole of the actions by which the unit's manager gets objective and independent evaluation of the functioning of the unit as far as financial economy is concerned (by checking accounting evidence and accounting books' records, evaluating public means accumulation and distribution system as well as property management and effectiveness as well as economical financial management evaluation). The statement: "in particular" showed an open catalog of auditing activity although the mentioned items showed the main direction – verification of financial processes and their reflection in accounting units.[4] The regulations, at this time, did not mention anything about the advisory function.

Limiting the scope of an internal audit activity to the financial sphere only served a protective function. The reason for such regulations' construction was, in my point of view, incorrect interpretation by the Polish party of the objectives of internal audit existence, which was in turn connected with a cursory survey of European regulations.[5] What was also worth mentioning, were the objections of the units' managers who were afraid of a radical increase of transparency concerning the processes which take place in the managed units. Another interesting thing is the fact that the problem still remains, which is reflected in the number of negative opinions despite a crucial change in regulations enabling auditors to verify the whole of the organization's activity.[6]

In the scope of a subjective register of the institutions obliged to introduce an internal audit, the legislator decided upon quite an unfortunate solution, which meant enumerating these institutions in the first excerpt of the art. 35d ufp as well as adding, in the following excerpt, the information which stated that the register also includes other units provided they accumulate considerable public means or bear considerable public expenses. From the point of view of the care for succinctness and clarity of the text, which is typical of the legislation process, such a solution appears to be quite weak. Some practitioners explain the shape of the regulation by the wish to emphasize the importance of some chosen public institutions. The long list of the enumerated institutions includes: the Sejm, Senate and President of the Republic of Poland, Chancelleries, the Supreme Court, the High Administrative

4 E. Chojna-Duch, Kontrola czy audyt Najwyższej Izby Kontroli?, "Kontrola Państwowa" issue XLVII February 2002 - special edition

5 D.McNamee, Oszacowanie ryzyka w audycie wewnetrznym i zarządzaniu. Warsaw, p.23

6 A good example of this is a critical opinion, expressed by judicial circles, of ufp regulations concerning internal audit in judicature - A. Łukaszewicz, Dyrektor powinien liczyć się z prezesem, "Rzeczpospolita" No. 79 2008, p.C3 "Prawo co dnia" supplement

Court, Constitutional Tribunal, National Judiciary Council, common judicature, the Supreme Chamber of Control, ministries, Prime Minister's Chancellery, central and provincial offices as well as customhouses and Inland Revenues. Changes in this scope, during the time the act was in force, were not considerably important:

a) first of all, from 31st December 2002 the directory was enlarged by common organizational units of the public prosecution service as well as the prison service ones (one cannot resist the impression that in the original text they were simply omitted);

b) secondly, since 1st April 2003, in relation to the health insurance system reform, healthcare funds were replaced by one fund, which is: National Health Fund ("NFZ"), which theoretically narrowed down the obligation to conduct internal audit from a few to one unit. In reality the organizational structure of NFZ included its head office as well as 16 local departments, which were housed in formal regional healthcare funds (internal audit organizational units still remained both in the head office and local departments).

As far as the remaining units are concerned (art. 35d act. 2 ufp), the legislator authorized the Minister of Finance to specify the threshold of income and public means expenditure whose exceeding resulted in the necessity to introduce an internal audit as well as the deadline of its introduction. The Minister of Finance by means of the regulation which was made 12 months after the act was introduced, established the sum to be 35 million zloty and obliged to introduce an internal audit before the end of the first quarter of the year which followed the year in which the sum was exceeded.[7] It was a wish to successively introduce a new institution into Polish public finance units that can explain a doubtful structure of art. 35d ufp. The units holding a strong position and having considerable potential were forced to introduce an internal audit first while its introduction in the remaining units could be blocked by the lack of executive regulations for a few months.

Since 2002 the internal audit system has been based on internal auditors as well as the Minister of Finance acting as a coordinating organ. Because of the fact that public administration urgently needed a large group of people with specific qualifications whereas the then university offer did not enable to complete suitable education quickly, the legal requirements were not too demanding. Firstly, one should be of a Polish nationality, have higher education, legal capacity and be fully able to use public law. A candidate could not have a criminal record for a crime they committed deliberately. Such a person could take an examination in front of an examination board appointed by the Minister of Finance, and passing this exam

7 Minister of Finance regulation dated December 20th 2008 concerning the threshold of income and public means expenditure whose exceeding results in the necessity to introduce an internal audit in public finance sector units (Law Gazette No. 234, item. 1970)

with a positive result was a second necessary requirement needed to receive the qualifications. A positive attitude towards the candidates was shown by the fact that sample questions and written exam tasks were announced publicly on a Ministry of Finance's web page. A coordinating process included: analytical, informational and training activity as well as cooperation with international institutions. Despite having the right to evaluate the job from the perspective of rules and standards implementation, the verification of the coordinating unit was, at that time, mainly based on supporting auditors.

Employing auditors in each of the planned public units proved to be very difficult as well as not very economical. In accordance with the original version of ufp, the exceptions only concerned national budget units operating outside Poland (an audit was supposed to be conducted by an auditor employed in a superior or supervisory unit). Since 1st May 2002 a new regulation has been introduced (art. 35e act.2a ufp) according to which customs and revenue offices were supposed to be checked by auditors from customs or revenue offices. Since 31st December 2002 the regulations concerning the judiciary that is: courts, public prosecution services and prison management, were analogically adapted (art. 35e act.2b – 2e ufp). And a question arises here whether this type of a legal structure guarantees job's independence? If an internal auditor is a worker employed by the superior (supervisory) unit, they are automatically subordinated to the manager of such a unit, who is in turn more interested in realizing their supervisory function than receiving objective and independent evaluation of the subordinated unit.

A detailed method of conducting internal audit on the basis of legal authorization was specified by the Ministry of Finance regulation dated 5th July 2002.[8] This regulation, among other things, specifies the methods of preparing the plan of the audit as well as the rights and responsibilities of the auditor and the way they document their activity. A person responsible for setting standards compared the characteristics of their job to the job done by a chartered auditor, additionally evaluating the purposefulness, economy and punctuality of tasks' management.

Internal audit since 2006

A successive act concerning public finance dated July 30th 2005,[9] which was effective from 1st January 2006, brought about important legal changes. Chapter no. 5 was devoted to the issues concerning internal audit - "Internal audit and financial control and internal audit coordination in public finance sector units" (art. 48-

8 Minister of Finance regulation dated 5th July 2002 concerning detailed ways and methods of conducting an internal audit (Law Gazette No. 111 item. 973)

9 An act concerning public finance dated July 30th 2005 (Law Gazette No. 249, item. 2104 with amendments, hereinafter referred to as "nufp")

67 nufp). The legislator drew a distinctive division between financial control and internal audit, at the same time radically changing the characteristics of the latter institution. Financial control, until now so closely connected with an interior auditor, was attributed to the unit's manager who was obliged to introduce suitable changes to the company's rules or regulations or to give personal permission in order to assign the responsibility in this respect to any company's worker. However, the auditors were ascribed to realize the function which enabled independent research into management and control systems of the unit. A second of the ascribed functions included advisory activity which aimed at improving the unit's function. This change does not mean getting rid of a financial or budget report evaluation, but it indicates a crucial change in the legislator's approach.[10] Purely financial verification model was renounced giving way to the broad auditing of the activity.

The subjective register of the units enumerated in the previous act was enlarged with: provincial administrative courts, Office of the Committee for European Integration, customs and revenue offices and regional clearing houses. In case of the first two mentioned units as well as the Government Center for Strategic Studies, which was crossed out from the list in connection with its liquidation dated 1st April 2006, the changes simply resulted from the political system reforms in these regions. What casts doubts is adding the rest of the institutions to the register, especially as a part of them met the requirements on the basis of the following excerpt of the same act's article (art. 49 act.2 nufp). Threshold amounts obliging a company to introduce an internal audit increased from 35 to 40 million zloty,[11] which led to considerable confusion. Although the increase of the amount was relatively small, there was substantial confusion in some units concerning the existence of legal obligations. The regulation included unfortunate point no.5 imposing an obligation to conduct an internal audit to, at least, 31st March 2007 in the units which exceeded the amounts described in the previous regulation and which did not meet the requirements on the basis of the new regulation. What seems to be a reasonable solution is to oblige the units which started introducing an internal audit to continue the process without the possibility of having a choice.

The system of an internal audit characterized by the nufp rules was similar to the rules which operated before. Again, the legislator enumerated the list of institutions in which the audit was conducted by the auditors who were not employed in the units (the register included the list of institutions from the previous regulation with two exceptions). As a result of an earlier model's failure (too large scope of actions) the idea to conduct internal audit in customs and revenue offices by the auditors employed in customs and revenue offices respectively, was resigned from.

10 B. R. Kuc, Audyt wewnętrzny-teoria i praktyka, Warsaw 2002

11 The Minister of Finance regulation dated 24th July 2006 concerning the amounts whose exceeding results in introducing internal audit in public finance sector units (Law Gazette No. 112, item.763)

A second issue was a rule which assumed conducting internal audit in state tertiary–level schools that did not exceed the amount of expenditure and outcomings which oblige to introduce an internal audit. Such an audit should be conducted by the interior auditor employed in a ministry who supervises the school or in any other tertiary–level school, supervised by the minister of higher education on the basis of the university presidents' agreement. Then there has been a break in a subjective register in art. 49 of nufp. Finally, art. 51 point 12 gives the internal auditor employed in a superior or supervising unit the possibility to conduct an audit, although the institution was originally created, first of all, to serve a public unit's manager. Supposing that the regulation is used reasonably, this solution may elasticize or improve the use of auditing resources. However, if a superior or supervisory unit's manager has an ill will (resulting from political pressure), the institution may get considerably distorted.

The introduction of the possibility to employ persons without auditing qualifications in the audit units deserves apparent recognition. This enabled to construct them on the basis of a supervising auditor model and other workers realizing freelance and supporting functions. This rule may be of great help in verifying a candidate for auditor's predispositions.

Considerable changes also concerned acquiring professional qualifications. The following requirements were maintained: higher education, legal capacity, being fully able to use public law and not having a criminal record for a crime committed deliberately. The change concerning the possibility to hold an auditor's position by the citizens of other countries belonging to the European Union, Swiss Confederation and the countries of the European Economic Area agreement (Iceland, Lichtenstein, Norway) resulted from the European regulations concerning labour law. Besides, the possibility to employ such a person was planned only if detailed regulations did not require to have Polish nationality. Taking into account Polish salaries with relation to the European average of earnings, it can not be expected that this regulation will considerably influence a labour market. The biggest change concerned giving up the obligation to take ministerial examinations and introducing a need to hold other documents such as: international certificates, the certificates which confirm passing inspector's exams in the Supreme Chamber of Control ("NIK") and enable to hold a position of a tax control inspector or a chartered auditor. The legislator's intention was raising the level of factual knowledge. What causes doubts is the multitude of possibilities to obtain professional qualifications. First of all, the list of international certificates included eight positions characterized by different professional levels. The list includes the following certificates: CIA, CGAP, CISA, ACCA, CFE, CCSA, CFSA and CFA. On the one hand, a similar experience gained at the post of a chartered auditor, NIK inspector or a tax control inspector enables to handle an auditor's function. On the other hand, however, none of these positions professionally

prepares to fulfill an auditor's function. It can be assumed that the actions taken by an interior auditor, including the most important one which is a risk evaluation, will be determined by the auditor's earlier professional career. In my point of view, the regulation mentioned in art. 58 nufp is only a temporary solution, and acquiring auditor's qualifications in the future will have to become similar to obtaining a legal profession (unified rules for achieving professional titles, professional self–government supervision and so on).

Another increase concerned the competences of the organ coordinating an internal audit process. The issue is that there is a possibility for the Minister of Finance to order auditing tasks since 29th December 2006. It is quite a questionable solution – that is why an external subject, in relation to an often equivalent unit, is equipped with this instrument (including ordering the audits which do not concern spending public means directly and which are called task completing audits).

A detailed way to conduct an internal audit on the basis of the legal regulation included in nufp was specified by the Minister of Finance regulation dated July 24th 2006.[12] Apart from the issues parallel to those regulated in the previous regulation, the regulations concerning the change of internal audit's characteristics appeared. They especially included the ones which specified advisory activities.

An internal audit according to the 2005 projects

Together with the change of the political pattern in Poland since 2005 the opinions concerning a quick and radical change of nufp have appeared. A next regulation concerning public finance actually expected introducing considerable changes, although they were to concern an internal audit in only a minor part. This can mean that despite different visions of public finance management, the issues concerning an internal audit do not belong to the contentious ones. What is worth paying attention to is the fact that there has been a change in the Minister's of Finance position as a coordinating unit and the introduction to nufp the regulations concerning the possibility to order audits during the 2005 government coalition. Other issues worth mentioning here include: a return to the model based on conducting an internal audit in customs offices by an auditor employed in customs chamber (it has been accepted that as opposed to many revenue offices on the Internal Revenue Service domain, such a solution in customs offices would be optimal) as well as a duty to inform the Minister of Finance about the cases of conducting an internal audit in the units subordinated or supervised by the auditors employed in superior or supervising units.

12 The Minister of Finance regulation dated July 24th 2006 concerning the detailed ways and methods of conducting an internal audit (2006 Law Gazette, No. 112, item. 765)

This planned act was enriched with a subsequent regulation's project concerning detailed ways and methods of conducting internal audits which, among other things, regulated the issues concerning an ordered internal audit. It has been stated that such an audit will be conducted in accordance with organizational and factual principles prepared in the Ministry of Finance. The Ministry of Finance being a place where a report written after an audit was conducted and is immediately handed over. And the cooperation with the authorized ministry workers should be based on enabling them to freely enter the institutions and premises which undergo audit processes and obtain requested documentation in an electronic version. Not taking into account the recklessness of the last regulation and considering the real situation in the Polish administration (electronic versions are prepared in case of only few documents), it is worth pointing out that if these regulations become applicable, they would bring the competences of the Ministry of Finance authorized workers closer to the NIK inspectors. Eventually, these plans were put to an end, or at least moved in time, as a consequence of the 2007 parliamentary elections' results.

In connection with the first large coordinated ordered audit in a public finance sector in Poland, which was conducted from June to August 2008, concerning the verification of the process which aims at job positions in the civil service description and evaluation, a successive Minister of Finance regulation was published.[13] The regulation specifies, among other things, the fact that after the audit tasks are conducted the report or other essential information concerning the audit is handed over. It is a regulation which enables a client to choose a form depending on circumstances and is also an answer to the opposing opinions of the auditing circle which is afraid of its job's verification while handing over such reports. What is more, future rights of the workers of the institutions ordering audits were made viable. That is, in relation to the previous project, the right to freely enter the institutions and premises which undergo an audit process was made invalid while the right to receive the documents in electronic versions was limited to the documents which already exist in such a version. This regulation is the newest source of changes applying to an internal audit in the Polish finance sector units as of the end of the first half of 2008.

The prospects of an internal audit's development

As far as the regulation prospects concerning an internal audit as well as its practical application are concerned, an undeniable fact is the institution's continuous development in the reality of modern administration creation which is based on the Western European patterns. Monitoring the so called public sector in Poland it must

13 The Ministry of Finance regulation dated April 10th 2008 concerning detailed ways and methods of conducting an internal audit (2008 Law Gazette, No. 66, item. 406)

be stated that this institution worked in practice. In relation to the above mentioned internal control (in some of the public institutions these units work parallel) an audit is a more modern institution having unified legal frames independent of the manager's will and, first of all, not only pointing out to the existing transgressions and irregularities, but also obliged to prevent them in the future.[14] In the future years the auditors are faced with serious tasks whose completion is connected with our country's membership in the European Union (both in the scope of the received and expended public means verification as well as the cooperation with the institutions' equivalents in other European countries). An internal audit' approval will be connected with the development of the legal regulation. Observing recent years one can notice a systematic development in regulations or the introduction of new rules and exceptions. It can be assumed that with time the issues connected with an internal audit will be set apart from a regulation concerning public finance. An internal audit will undergo fast legislative diversity depending on the specificity of the researched areas (a national and self–government audit, a centralized audit or a coordinative one[15] and finally a sector division: a judiciary, finance or education audits). Undoubtedly, the associations and organizations such as: Internal Auditors Association IIA Poland or Public Finance Sector Units Internal Auditors Association may play an important role in the process. The rules of obtaining professional qualifications, which are only temporal now, will depend on their activity and inventiveness. Depending on the conclusions drawn on the basis of conducting a coordinated ordered audit, a decision concerning this institution will be made. In a wider perspective the regulations may lead to the unification of the documents' patterns (based on the model of NIK regulation) as well as the development of procedural regulations (which leads to strengthening contradictory rule's functioning).

What is also worth mentioning is the postulate which suggests introduction of sanctions for not implementing an internal audit despite an existing duty.[16] This solution will neutralize nonchalant attitude expressed by some of the units' managers towards this institution.

All of the suggested changes will greatly depend on the financial means allocated for them. Such financial means should not only be sufficient for paying appropriate salaries and maintaining the infrastructure but also providing a suitable level of obtaining professional qualifications and giving a possibility to use specialist expert service. Without providing financial means none of the legal regulations, even if they are the best, will enable to conduct auditing tasks in a serious way.

14 R. Elm – Larsen, Kontrola wykonawcza zadań, Warsaw 2005, p. 15
15 R. Żukowski, A. Purgot, Audyt wewnętrzny w jednostce samorządu terytorialnego, Warsaw 2005
16 The interpellation made on 4th December 2006 by W. Dzikowski MP which concerned the postulate made by Higher Education Institution Internal Audit Association (www. Interpelacje.co-myslisz.pl_5780.html).

Streszczenie

Wprowadzenie audytu wewnętrznego było związane w dostosowaniem polskiego systemu prawnego do standardów europejskich w wyniku akcesji do UE. Instytucja ta zaczęła funkcjonować z dniem 1 stycznia 2002 r. w wyniku nowelizacji ustawy o finansach publicznych z 1998 r. poprzez dodanie rozdziału 5 zatytułowanego „Kontrola finansowa i audyt wewnętrzny w jednostkach sektora finansów publicznych". Znalazła się ona również w obecnie obowiązującej ustawie o finansach publicznych z 30 czerwca 2005 r., przy czym dokonano w niej wielu znaczących zmian.

Autor artykułu dokonuje porównania głównych elementów audytu wewnętrznego w obu wspomnianych aktach, m.in. zakres przedmiotowy, kwalifikacje audytorów uprawnionych do jego przeprowadzania.

Marie Karfíková, Hana Marková, Radim Boháč

THE REFORM OF PUBLIC FINANCE IN THE CZECH REPUBLIC

Introduction

Act no. 261/2007 Coll., on the stabilization of public budgets was passed last year. This act came into effect on 1st January 2008. The Act on the Stabilization of Public Budgets is the group of legal rules which are concerned with taxes including environmental taxes, social area (especially state social support, living and subsistence minimum, system of sickness insurance, wages of state employees and employment) and with the area of public health insurance and the activities of health insurance companies.

The aim of the Act on the Stabilization of Public Budgets is to optimize state budget revenues and expenditures, to sustain the economic growth of the Czech Republic and to protect the environment. The main aim of this act in the area of the state budget expenditures is to stop any increase in state spending, because the volume of expenditure from the state budget is not sustainable. The Act on The Stabilization of Public Budgets was passed as the reform act which deals with public finance in the Czech Republic.

The regulation on the stabilization of public budgets is designated as a tax reform, a reform of financing health service, a reform of pension insurance and budgetary reform. What does the word "a reform" mean? It is important to be aware that not all the changes concerning financing the system can be called "a reform". A reform is always a fundamental, systemic change to the whole system. The concept of "reform" is not a legal definition; this concept is not defined by any law or statute. Encyclopaedias define the word "reform" as a fundamental modification, change, transformation or reformation. Usually, a reform is bound to a reaction to economic, social and political changes, and the aim of reform is to adjust the legal regulations to these new conditions. The reform aims to guarantee economic growth and fairness in taxation. It is difficult to observe whether it is a reform or an

amendment, because the difference between reform and a particular change is not clear. The reform of public finance is not a simple process, because the preparation of this reform may take a few years. In this period, lots of particular amendments are passed, and afterwards new legal regulations of the system are codified, and this codification terminates the process of reform.

Reforms in the area of financing public need are not the invention of 20th century. The reforms which were made during the reign of the Empress Maria Theresia can be considered to be the beginning of the financial reforms, in the modern sense, for the territory of the Czech Republic. She needed to increase the state finances which had been drained by war. The Empress created some central public economic bodies, established new taxes, fees, customs and stimulated completion of the state revenues and expenditures. The summary of revenues and expenditures could be considered to be the same as the basic state budget.

A lot of problems needed to be solved after the creation of the Czechoslovak Republic in 1918, including the public finance system. Subsequently, legal rules were passed with the aim of consolidating public finance, e.g. in 1927, so-called financial amendments were passed. Those amendments changed the local authorities' financial system. In addition, the act on direct taxes was passed. A lot of these important changes were the output of a reforming initiative by Professor Karel Engliš, then the Minister of Finance. That system of the creation of and content of the public budget, adopted in 1927, continued until 1947.

After 1948, in the context of political changes, there was the change to the content of the financial system (e.g. national insurance, which was managed using the principal of fund management, was included into the state budget in 1950). At the beginning of the 1960s, the tax system was modified, and the whole area of financial law was influenced by creation of federation.

Obviously, the next period of important changes occurred after 1989. Apart from the important political changes, the amendments of legal regulation, as a result of the new political environment, were adopted. A lot of new acts and by-laws were passed. These laws and by-laws regulated the new social relationships established by a new political situation (e. g. new tax acts were passed). These new tax acts are called "the new tax system of 1993".

In 2004 the Czech Republic joined the European Union. This fact resulted in changes to many legal rules, including the financial legal rules to match the rules of other European Union member states. Apart from those processes between the Czech Republic and the European Union, some changes in Czech society took place and are still occurring today. It is necessary to fulfil the needs of the state, to solve demographic problems (e.g. the ageing of the population of the Czech Republic) as well as to improve living conditions. Due to the increasing deficit in public finances,

the government prepared amendments to many acts, which are known as the "Act on the Stabilization of Public Budgets". Although this act is called a reform of public finance, the regulations only change some legal rules aiming at responding to social changes, ensure a decrease in the budgetary deficit, and fulfil the criteria for convergence in the European Union. These legal rules, which are amended by the Act on the stabilization of public budgets, are the rules on taxes, welfare systems and public health insurance. The aim of the Act on the stabilization of public budgets is to optimize the revenue of the state budget, to support economic growth, to empower environmental protection and to stop the increase of public budget expenditure. The public debt and the deficit of the state budget are very high. This is a very serious problem for both the economy and for the state.

One of the reasons for the increase of public debt is that in the Czech Republic there is an increase in welfare expenditure. Those expenditures grew by more than 70 % since 1999, and in 2007 were CZK 70 billion higher than in 2006. According to the Program Declaration, the government has decided to decrease the deficit in the government sector in 2008 to a corresponding level of 3% of gross domestic product, and in 2009 to the level of 2.6% of gross domestic product, and again in 2010 to the level of 2.3% of gross domestic product. The current mandatory expenditures should be revised so that their share of the state budget falls below 50 % by 2010. The government will fulfil the Czech Republic's obligation to European Union in the area of fiscal strategy, with the aim of preparing the Czech Republic for admission to the Euro. Every year this fiscal strategy is included in the Convergence Programme. In 2004, the government of the Czech Republic committed itself to decrease the deficit in public finances in this way, so that by 2008 a transparent and sustainable fulfilment of the Maastricht Convergent Criteria of fiscal sustainability will be achieved. The Czech Republic committed itself to the rate of fiscal consolidation, which will provide 1% growth by 2012 - the medium-term fiscal aim as defined by the Pact of Stability. It may be concluded from the state budget and the budgetary plan for 2008 and 2009 that the 2004 strategy of fiscal consolidation will not be fulfilled due to the increase in welfare payments. Diverting from this strategy will surely incur a negative assessment of the Czech Republic by the European Commission, which would include giving notice for the procedure of excessive deficit to the Council ECOFIN[1] (releasing a new appeal for the elimination of an excessive deficit and other recommendations). A withdrawal of Cohesion Fund support (for the Czech Republic it could amount to € 1.4 billion per year) could be the sanction for not keeping the deficit within the recommended limits.

1 Economic and Financial Affairs Council.

Main changes in the tax area

In the tax section of the Act on the Stabilization of Public Budgets, the Programme declaration of the Government of the Czech Republic is set in stone. The changes have influenced practically all tax acts and can be divided into three main groups, namely reform changes, harmonization changes and technical changes.

1) Indirect taxes

Value-added tax, excise taxes and new environmental taxes are classified as the group of indirect taxes in the Czech Republic.

The area of **value added tax** is harmonized within the European Union; therefore, a lot of regulations on value added tax come from the EU. The Act on value-added tax is mainly conforms to *acquis communautaire*. The Czech Republic acquired two exemptions which deal with the amount of the turnover for compulsory registration of value added tax (value added tax registration of the person is mandatory if their turnover reaches CZK 1,000,000 per 12 months); in addition, there is a reduced rate on heating and home construction including reconstruction and modernization. The main changes to reforms in the area of value added tax are, with effect from 1st January 2009, a group of related companies can be registered as a single value added tax entity, and a reduced rate of value added tax on social housing constructions has been introduced. The reduced rate of value added tax increased from 5% to 9%; a reduced rate applies to food supply, medicine, newspapers etc.

In the area of **excise taxes**, the rates of tax increased on tobacco products. These rates are now fully compatible with the rules of the European Union. Taxation on gas was excluded from the regulation on excise taxes, and a new natural gas tax has been introduced. Other changes to value added tax and excise taxes were more technical than reformatory.

The Act on the Stabilization of Public Budgets introduced a new type of indirect tax, implementing the relevant European Union regulations in the area of environmental taxes. Since the 1st January 2008 three **environmental taxes** have been levied in the Czech Republic, namely a natural gas tax, an electricity tax and a solid fuel tax. These indirect taxes are supposed to improve environmental protection.

2) Direct taxes

The following taxes are classified as direct taxes in the Czech Republic: personal income tax, corporate income tax, real-estate tax, road tax, gift tax, inheritance tax and real-estate transfer tax. Personal income tax and corporate income tax are the

two main direct taxes in the Czech Republic. The tax yield of these income taxes is divided between the state budget and budgets of regions and local authorities.

The reform part of the changes to **personal income tax** is typical of introducing a flat rate of tax and other related changes. The flat rate of tax substituted the progressive sliding-scale tax rate with four tax brackets. On the basis of economic analysis, the Ministry of Finance decided on a flat rate of tax at 15%. Thus the rate of personal income tax is now 15% and in 2009 is set to decrease to 12.5%, but this decrease can be changed up to the end of the year 2008. The tax rate decrease was compensated by an increase in the tax threshold of personal income tax. The employee's taxable income (the tax threshold of employment income) was extended by employee's statutory health insurance and social security contributions paid by the employer. The tax threshold of employees is called the "super-gross salary". The payments of health insurance and social security contributions are now not tax deductible items, which can decrease the tax threshold of business incomes.

On the other hand, the tax credits, which are binding to the taxpayer, were increased. This increase was made to compensate for the disadvantage to low-income taxpayers, who were taxed in the lowest tax bracket at 12 %. The tax burden of these taxpayers is now no worse than their tax burden before the reform. Of significance is the increasing of the tax credit for a husband or wife (dependent spouse tax credit). This increased dependent spouse tax credit compensates for the abolishing of the married couples' joint taxable threshold. Some tax exemptions were cancelled.

The rate of **corporate tax** continues to successively decrease. The rate is now 21%, and will decrease to 20% in 2009 and to 19% by 2010. The decrease rate of corporate tax is compensated for by the raising of the corporate tax threshold.

Real estate tax is payable by the owner of land or buildings situated in the Czech Republic. The revenues from real estate tax constitute the revenue for the local authorities. Real estate tax comprises of two taxes, namely land tax and building tax. The most important change to real estate tax is the authorization of local authorities to introduce a local coefficient. The local coefficient may vary from 2 to 5 and this coefficient is multiplied by the real estate tax. Local authorities can increase their budgetary revenues. Local authorities can also now exempt owners of agricultural land from paying real estate tax.

The transfers of property are taxed by **transfer taxes**, namely gift tax, inheritance tax and real-estate transfer tax. The yield of these taxes flows into the state budget. The main change in the area of transfer taxes is the extension of exemptions to gift tax and inheritance tax. Since 2008 direct relatives and spouses and other relatives (in the collateral line) have been exempted from paying gift tax and inheritance tax.

3) Tax procedure

The changes which are bound to the reform of public finance not only amended material tax law, but also the process of tax administration. The Act on Administration of Taxes and Fees was changed especially with reference to binding decisions by the tax administrator, the recording of taxpayers' duties on given or received monies, interests on late payments and confidentiality.

The institution of binding decisions was extended. The purpose of the regulation is to avoid incorrect tax payment procedure. A taxpayer is entitled to apply for a binding decision at the tax administrator or the Ministry of Finance. The binding decisions deal, for example, with transfer pricing, value added tax rates or tax deductible items. The administration fees have to be paid for the application for binding decisions. The binding decisions should be followed by legal entities and businesses.

Main changes to the areas of social security and health care

The concept of social security is mostly connected with the welfare system. In the Czech Republic social security comprises of health insurance, pension insurance, the system of state benefits and social care (social services). Health insurance and pension insurance is bound into the payment of premiums. Social security is the part of state social policy. This security is used to solve the effects of social upheaval or risks and act as a guarantee for social stability.

In the free market economy, these principles of social security respect: universality, equality, entirety, subsistence, social stability, social solidarity, social justice and participation.

The financing of social security is closely tied to the system of public budgets, respectively on public revenues and public expenditures. Direct instruments (obligatory payments, allowances) and indirect instruments (tax relief) are used to finance social security. In the Czech Republic, the expenditure on social security (and state policy of employment) is derived from the state budget. Also social security payments are established as state revenue. This revenue has a specific character in contrast to other revenue (e. g. taxes or fees).

The financing of social security becomes a serious problem in most countries due to the insufficiency of public resources to finance public needs (decrease of public revenue) and the increase of citizens' public needs. States have to decide how to replace the current system of continuously financing social security from the state budget. Financing the system through the extra-budgetary fiscal fund of social security supplements with the other forms of financing - private insurance

- is one way to replace the current system. Most countries prefer a combination of the continual financing of the social security system (a pay-as-you-go system; an unfunded system in which current contributors to the system pay the expenses for the current recipients) and financing from capitalized funds. This is called a multi-pillar system with the payment of premiums by beneficiaries, employers and the state. It can be two- or three-pillar system, when as well as the public pillar, a voluntarily private pillar or obligatory private pillar exists. In the Czech Republic, the two-pillar system is used, but in a narrow scope, since the voluntary insurance is not very important. The basis of the system rests on the continuous financing system and most of the money is spent from the state budget.

The reform of public finance brought amendments to many acts in the social system area (e.g. Act of State Social Support, Act on Living on the Subsistence Minimum, Act on Sickness Insurance or Act on Pension Insurance). These changes are called the "first stage of the social reforms". The second and the third stage of social reforms should comprise of, for instance, the introduction of a 'negative' tax, which replaces some social contributions along with changes in administration etc.

With reference to pension insurance, the proposal to amend the Act on Pension Insurance is in the legislative process. This amendment is called "first stage of the reform of pension insurance". The main principle of this amendment is to change the conditions for receiving old-age pension. The retirement age for men and women with at least one child will increase from 63 years to 65 years, and the retirement age for women with two or more children will increase from 62 to 64 years. The duration of pension insurance, which is necessary to qualify for a pension, will increase from at least 25 years to at least 35 years. Within the second and third stage of the reform of pension insurance, the problem of financing this system should be solved with the emphasis on the relationship between public pension insurance and private pension insurance.

In the Czech Republic, health insurance is not the part of the social security system, although it is common in many countries. The main aim of health insurance is to ensure health care without direct payment by the natural person. Everyone needs such health care. The payment for health care is provided by health insurance companies to the health care institutions. The natural person does not pay directly for the health care, but this payment is paid in the form of premiums to the health insurance. The insurance principle is strictly adhered to in the case of health insurance. This means that the insurance is individually based (everyone is insured, everyone has their own insurance). The employer participates in the payment together with the employee. The state pays the premiums for some people (e.g. students, the elderly) and some people, like business owners, pay the premiums in full.

Health insurance forms the revenue of a special fund managed by the health insurance companies. Health insurance is an obligatory payment, which is not revenue destined for the state budget, but the revenue of the General Health Insurance Company of the Czech Republic, or other health insurance companies that are public bodies (legal entities *sui generis*). The budgets of health insurance companies are granted from the state budget for those people (children, the elderly) for whom the health insurance premiums are paid for by the state.

The Act on the Stabilization of Public Budgets amends many acts in the area of public health insurance (e.g. the Act on Public Health Insurance, the Act on the Public Health Insurance Premium and the act regulating health insurance companies). The main change is the introduction of regular payments for visiting health care institutions, for residence in hospitals or for items on prescription. The Czech Constitutional Court has declared that this regulation conforms with the Constitution. The reform should continue with legal transformation of hospitals and other changes. The health reforms are the subject of many political and scientific discussions and are not universally accepted.

Streszczenie

Reforma finansów publicznych w Republice Czeskiej została wprowadzona ustawą o stabilizacji budżetów publicznych. Pomimo, że akt ten zawiera wiele istotnych zmian można mieć wątpliwości czy uprawnionym jest nazwanie go „reformą"? Reforma stanowi zawsze fundamentalną, systematyczną modyfikację całego systemu. Wprowadzone zmiany w finansach publicznych nie spełniają warunków reformy. Celem wspomnianej ustawy było, jak to ujęto w tytule, ustabilizowanie dochodów i wydatków publicznych. Stabilizacja nie może być określana jako „reforma".

Efekty zmian w wyniku wprowadzenia ustawy o stabilizacji budżetów publicznych będą znane w swoim czasie, jednakże proces ten powinien być kontynuowany na innych płaszczyznach, np. w zakresie ubezpieczeń społecznych i zdrowotnych.

Alexander N. Kostukov

CONSTITUTIONAL AND LEGAL PRIORITIES OF SOCIO-ECONOMIC DEVELOPMENT OF RUSSIA

Nowadays an increasing number of Russian scientists support the idea about the connection between socio-economic development and the constitutional and legal development of Russia.

In general it is possible to single out three basic groups of problems regulated by the constitution and directly related to the socio-economic development of the country. Firstly, property rights, their structure and guarantees. Secondly, citizens' social and economic rights and guarantees. Thirdly, the regulation of fiscal problems. All these three groups somehow reflect the connection between the rights and opportunities of the state and the individual, and in some cases they directly define the economic role of the state, its opportunities and the limits of intervention by the authorities in the economic process.

The analysis of the Russian Federation's (RF) Constitution's provisions proves that the following principles are reflected in them: the protection of life and property, society, territorial integrity and the federalist structure, the stability of the economic system, i.e. the functioning principles of market democracy particular to the democratic constitution[1].

In the RF Constitution the main principles have been stated. They unite the population living in a country and, according to some authors, they underlie the Russian national ideal; they are freedom and equity, the civil rights of a human being, his (her) welfare and social responsibility[2].

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1 See: В. Мау Конституционное регулирование социально-экономических отношений // Voprosy economiki. 1999 No.4 p. 4.

2 See: Full text of Dmitry Medvedev's speech at II Civil Forum in Moscow on January 22, 2008 // Rossiiskaya gazeta. January 24, 2008. p. 2.

As stated in the literature on constitutional law, the RF Constitution provided the political, economic and social integrity of Russia[3], and thus it "continues to achieve its target", "its democratic potential is far from being exhausted"[4].

The analysis of the RF Constitution proves that its acceptance created a basis for strengthening of market democracy in Russia. The suggestions to change the Fundamental Law that appear periodically should be recognized as untimely; they can damage the constitutional and legal stability of the Russian economy.

According to V.A. Mau, the specification of actual constitutional norms, if necessary, can be made by using other means (amendments to federal constitutional laws, decrees and decisions of the Constitutional Court of the Russian Federation)[5].

At the same time the constitutional and legal regulation of Russian economy is not limited to rules of the RF Constitution; it is specified in the provisions of legislative acts. As a result, the accuracy and validity of the general principles fixed in the Fundamental Law does not automatically optimise the Russian constitutional economy as a whole. Some provisions of the federal acts (especially when applied in practice), definitely require correction as they do not correspond to the principles of a constitutional economy determined by the Fundamental Law. In my opinion, to perfect the direction of the constitutional economy, what should be considered are the main issues of constitutional and legal order of the separate subsystems of the Russian economic system (like the subsystems of ownership, tax, budgetary, bank and currency).

Regulation of ownership rights is a key element of constitutional regulation of social and economic processes in developed countries. Part 2 of Article 8 of the RF Constitution says that private, state, municipal and other kinds of ownership in the Russian Federation are recognized and protected equally. Meanwhile, recognition and protection are impossible without assigning each object of a property right to its appropriate subject; this is not fully provided for at the moment.

Nowadays, all rights to immovable property are fixed in the Unified State Register. Some of them – due to the fact that they appeared before the Federal law No.122-ФЗ of 21.07.1997 - were signed. Article 6 (2) of the given law states that registration of such rights is necessary only if transactions concern different objects which are part of the same property right, and may also be made upon request by the

3 В.Д. Зорькин Выступление на конференции, посвященной десятилетию Конституции Российской Федерации // The Constitution of the Russian Federation: stability and development of society/ Executive editor B.N. Toporin Moscow: Yurist, 2004. p. 21.

4 Б.Н. Топорнин Выступление на конференции, посвященной десятилетию Конституции Российской Федерации // The Constitution of the Russian Federation: stability and development of society/ Executive editor B.N. Toporin. Moscow: Yurist, 2004. pp. 47 - 48.

5 See: В. Мау Экономическая реформа: сквозь призму конституции и политики / Editor N. Gayamova. Moscow, 1999. p. 237.

holders of the title deed. Thus the legislator does not encourage such an aspiration in legal owners without considering that the absence of a record of a title deed in the Unified Register causes economic uncertainty; taking into account the volume of unregistered rights, it has a negative effect on the economic development of the country as a whole. One of the stimuli could be the full abolition of state fees for the initial registration of rights that appeared before the Federal law No.122- ФЗ of 21.07.1997.

Other rights are not registered in the Unified Register due to the fact that subjects of such rights were not formed. It refers to land plots, the formation of which is not actively carried out by the authorized bodies mostly due to its extremely complicated procedure[6]. Such a state of affairs has a negative effect on the economic development of the country, not only for the above reasons, but also because the rate of land tax revenue appears to be far from optimal.

Therefore, the situation within the public domain is unacceptable. The process of its differentiation has already been performed for more than 15 years and it is still far from finished. We believe that public and territorial formations cannot effectively realize their power by without having an economic basis.

Moreover, the instability in the legal status of public property complicates the landuse/ownership restrictions stipulated by the legislation. The land can be registered as the property of the citizens of the Russian Federation and municipal bodies. The public bodies, having no guarantees that they would be able to get any property in future, are forced to give up what they currently hold. It is obvious that such a situation does not promote economic stability and even widens the development gap between regions. By necessity, one concurs with G.A. Gadzhiev's[7] opinion that the requirements (of the Federal law No.95-ФЗ of July 4, 2003 "On the amendments and additions to the Federal law "On the general principles of organization of legislative (representative) and executive public authorities of the Russian Federation" and the Federal law No.131- ФЗ of October 6, 2003 "On the general principles of organization of local government in the Russian Federation" mentioned above) contradict the principles stated in Part 2 of Article 8 and in Part 1 of Article 132 of the RF Constitution.

Thus it can be argued that it is necessary to complete the formation of both private and public property in Russia with a view of improving the constitutional economy.

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6 See: Е. Зверева Формирование земельного участка как объекта гражданского оборота // Korporativny yurist. 2005. No. 2.

7 See: Г.А. Гаджиев Конституционные основы современного права собственности // Zhurnal rossiiskogo prava. 2006. No.12.

Tax calculation and collection is one of sovereign features of any state, therefore the **constitutional regulation of the tax system** plays a very important role in state and legal policy.

Article 57 of the RF Constitution establishes a duty for everyone to pay taxes and dues stipulated by law.

Meanwhile, the analysis of law-enforcement practice shows that there are no due guarantees to fulfil a given duty. Such a situation is caused, in my opinion, by a number of factors.

First of all, legislation on taxes and dues is characterized by extreme complexity[8]. Although this problem is not unique to Russian legislation[9], it is aggravated by the fact that the Tax Code of the Russian Federation is subject to groundless and frequent changes. This disorientates the taxpayers and does not allow them to perform their tax obligations according to currently applicable norms. It also causes further complication of the legislation concerning the establishment of special rules for a transitional period.

The introduction of a restriction on the number of changes in tax legislation within one year would eliminate the defect mentioned above and improve the quality of legal methodology for drafting adopted bills.

Secondly, the tax base of some taxes (in particular, land tax and tax on the property of physical persons and organizations) is not fully fledged due to the reasons described in the previous paragraph. Tax authorities do not have the information on much of the real estate which should be levied with the above taxes.

Accordingly, it is impossible to support efforts to introduce a real estate tax in the near future as, in my opinion, it is necessary first of all to achieve an effective administration of the current taxes. In particular, the minimum that could be achieved would be the completion of remaining work on existing land legislation provisions (the identification of land ownership rights, land surveying, registration of land rights, etc.)[10].

A change to the taxes and dues system under the current conditions will inevitably entail an even greater reduction in tax payments.

Moreover, the tax system in Russia does not encourage the payment of taxes. The local authorities dealing with the public and solving their pressing problems

8 See e.g.: Д.Б. Будников Проблемы налоговой реформы в России на современном этапе развития государственности // Nalogi. 2006. No. 2.

9 See e.g.: А.П. Кузнецов Ответственность за налоговые деликты по законодательству США // Finansovoe pravo. 2005. No. 6.

10 See: А.А. Артемьев, Л.И. Гончаренко Обсуждение проблем и перспектив введения в России налога на недвижимость // Vash nalogovy advokat. 2007. No. 4.

are directly responsible for only two taxes: land tax and tax on the property of physical persons. These two types of taxes, according to V.S. Mokry, cannot become instrumental in the revenue structure of local budgets[11]. These taxes are secondary in the process of fiscal redistribution of public resources and do not cover most of the expenditure of municipal bodies. The revenue from these kinds of taxes in 2006 comprised only about 13% of the general income of local budgets[12].

Local authorities have more information on local conditions and preferences than national government and even regional authorities. It means that they make better decisions on the most pressing issues for the population[13]. "Local government should be absolutely self-sufficient"[14] in performing all its functions. Thus it is obvious that the resulting balance sheets are not sufficient to provide the elected authority closest to the local electorate with fiscal autonomy.

The increase in number of local taxes is made possible by establishing new taxes or redistributing those that are already provided by the RF Tax Code for citizens of the Russian Federation, for utilisation by a local authority.

As taxation practice in Russia shows, the increase in number of taxes causes problems in exercising control over the observance of payment terms and conditions for the territorial bodies of the RF Federal Tax Service[15]. Accordingly, it is more logical to amend Article 15 of the RF Tax Code by increasing the number of local taxes and dues through redistribution, i.e. to exclude some tax payments from the category of federal and regional taxes, and to ringfence these kinds of taxes for municipal bodies.

The Budget as the centralized fund of financial resources is an integral part of the functioning of any public authority that objectively needs such resources.

Recently the federal budget in Russia has been approved with a planned surplus that increases from year to year. In the Federal law "On the federal budget for the year 2008" the surplus is an enormous sum: 1.16 trillion rubles. Certainly, the stabilisation of surplus monetary funds in the economy is an important macroeconomic task. But

11 В.С. Мокрый О финансовом обеспечении местного самоуправления в условиях проведения реформы федеративных отношений и местного самоуправления и основных направлениях совершенствования межбюджетных отношений // Gosudarstvennaya vlast I mestnoe samoupravlenie. 2005. No. 12.

12 Силуанов А.Г. Обеспечение сбалансированности местных бюджетов в условиях реализации Федерального закона от 6 октября 2003 г. № 131-ФЗ / Report by A.G. Siluanov at the round-table of the Council of Federation Committee on local government issues [www-document] // Official web-site of the Ministry of Finance of Russia // URL: http://www1.minfin.ru/rms/doklad261006.ppt (August 30, 2007).

13 See В. Назаров О возможности зачисления части налога на прибыль в бюджеты муниципальных образований [www-document] // URL: http://www.iet.ru/publication.php?folder-id=44&category-id=90&publication-id=237158 – Official web-site of the Institute of Economics of transitional period // (January 20, 2008).

14 See: Full text of Dmitry Medvedev's speech at II Civil Forum in Moscow on January 22, 2008 // Rossiiskaya gazeta. January 24, 2008. p. 2.

15 See: Н.В. Герасименко Правовое регулирование деятельности органов местного самоуправления в бюджетно-налоговой сфере // Zakonodatelstvo i economica. 2003. No. 4.

it is impossible to agree that a lack of a developed infrastructure and a poor state of fixed assets substantially restrains the growth of manufacturing in modern Russia. At the same time, the absence of infrastructure is one of the constraints for investment in the country[16]. Expenditure of budgetary revenue for infrastructure development does not lead to growth in inflation according to the laws of economics.

Moreover, due to the consistency principle of budgetary legislation, such a surplus from one source inevitably means a deficiency in others. The "others" are the budgets of municipal bodies which are subsidised and where the lack of resources is particularly obvious.

Thus the restriction of the rate of surplus in the budget (which should be stated in the RF Fiscal Code) and the establishment of rules in its application seems to be more rational.

I would also like to offer an opinion on the recent practice of the adoption of a Federal law on budgeting for a planning period (of three years).

The introduction of long-term financial planning should be perceived as a positive aspect of Russian budgetary policy. Drawing up a three-year budget as a financial plan allows the control over the accumulation of funds, to manage cash flows more rationally, and to finance the achievement of social objectives in due course.

At the same time the approval of such a long-term financial plan in the form of a normative legal act - a Federal law - is not considered to correspond exactly to the requirements of legal drafting methodology.

Such a federal law turns out to be subject to frequent correction and actually lacks one of the main features of a normative act - namely, standard setting. For example, the Federal law for 2007 on the federal budget was changed by four acts in that year alone; the Federal law "On the federal budget for 2008 and for the scheduled period of 2009 and 2010" has already been changed too.

Therefore, according to a legal point of view, it is more reasonable to keep "a three-year budget" on an economic level and to approve a budget for the current fiscal year by federal law.

Social processes which took place at the beginning of the 1990s led to the establishment **of the essentially new basis of the state banking system,** which was an improvement**.** The legislator developed and introduced a two-tier banking system where an independent central bank is on a higher level and it has a high degree of authority, the exercise of which essentially influences the whole financial

16 See: А.В. Пушкин Правовой режим иностранных инвестиций в Российской Федерации. Moscow, 2007. p. 63.

system of the country. "Centralized control of the monetary and credit system of the Russian Federation is one of the key elements of its statehood. At the same time it is impossible to regard legal regulation of the banking system and the system of the Bank of Russia as perfect, and in this, in connection with their organization and functioning, provoke more questions than answers"[17].

This serious theoretical problem (to law-enforcement practice, and also causes conflict) raises uncertainty as to the legal status of the Bank of Russia.

According to the official charter of the Central Bank of the Russian Federation, the Bank of Russia acts as a special public establishment and possesses the exclusive right to issue money and to organize money circulation; it is not the public authority but its powers (by their legal nature) refer to public authority functions, as their fulfilment presupposes the enactment of state coercion measures[18].

I believe that the financial and legal status of the Central Bank has a dual character. The Central Bank of the Russian Federation operates as a public authority in financial legal relations on issuance of money, servicing of budgetary accounts, public debt, management of assets of the Reserve Fund and the National Welfare Fund, and developing the basic direction of monetary and credit policy. The Bank of Russia is incorporated as a legal entity in legal relations on the maintenance of expenses for accommodation, the payment of salaries, the settlement of obligations to the Russian Federation, tax payments and the transfer of a part of its income to the budget.

This uncertainty over the legal status of the Central Bank of the Russian Federation affects the regulation of its mutual relations with public authorities. For instance, co-ordinating the basic direction of the unified state monetary and credit policy with the Government of the Russian Federation is not regulated by any relevant laws.

Moreover, the legal status of the Central Bank requires modification in view of best practice in regulation of banking relations in foreign countries. For instance, to implement the Agreement of the Basle Committee on Banking Supervision "International Convergence of Measurement of Capital and Standards of Capital: New Approaches", the powers of the Bank of Russia require specification in regard to the following: the establishment of identified standards of capital adequacy by banks resulting from a risk assessment; the requirement for internal auditing; the establishment of public disclosure requirements - the list of which is determined

17 See.: Я.А. Гейвандов Центральный банк Российской Федерации: юридический статус, организация, функции и полномочия. Moscow, 1997. p. 206.

18 See: Д.Н.Дружинин, М.Н. Тоцкий К вопросу о правовом статусе Центрального банка Российской Федерации // Finansovoe pravo. 2006 No. 6.

by the third component of the Agreement; the establishment of requirements on developing internal risk management procedures by credit organizations, etc[19].

Thus, perfecting of constitutional and legal regulation of the banking system in many respects depends upon the normalisation of the legal status of the Central Bank.

According to Part 2 of Article 75 of the RF Constitution, "**protection and stability of the ruble exchange rate is the main function of the Central Bank of the Russian Federation;** this function is carried out irrespective of other public authorities".

Currently, the Central Bank consolidates the dollar exchange rate by intervening in the exchange rate market, and consequently prevents the fixing of the ruble exchange rate.

However, there are also some theories currently in the economic arena, which rightly claim the necessity of a fixed ruble exchange rate. According to some points of view, it is enough to stop interventions on the ruble if the exchange rate would be approximately 6 rubles: 1 dollar. Thus, the Central Bank of the Russian Federation would be able to keep this exchange rate level[20], which fully corresponds to the objectives stated in Part 2 of Article 75 of the RF Constitution.

The consequences of a fixed ruble exchange rate will be, according to officials of the Bank of Russia: an increase of the population's equivalent wealth in dollars, a decrease in inflation (as an injection of ruble funds into the economy will be halted, and against the background of a cheap dollar there would be an increase in amount of imported goods, and, accordingly, a growth in competition)[21].

There is an opinion that a fixed ruble exchange rate can lead to a decline in the export of Russian goods. At the same time it is necessary to take into account that the "competitiveness of goods can be provided by both cost and quality"[22]. A fixing of the ruble exchange rate will make manufacturers improve the quality of their products. With a cheap dollar it will be easier to provide this quality by purchasing first-rate foreign equipment at a lower price. Furthermore, Russian exports are mainly represented by raw materials, and in conditions of growth in world prices for raw materials, a fixing of the ruble exchange rate would hardly lead to losses for Russian exporters.

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19 See, e.g.: Н.Р. Чебыкина Центральный банк Российской Федерации как орган государственной власти в денежно-кредитной и банковской сферах (финансово-правовое исследование).Author's summary for the dissertation. Cand. Sc. (Law), Omsk, 2006. p. 22.

20 See: С. Минаев Смена валют // Kommersant – Pervy reiting. 2008. No. 1. p. 186.

21 Ibid. p. 188.

22 И.А. Николаев Единая государственная денежно-кредитная политика на 2008 год: оценка реалистичности // Finansovye i buhgalterskie konsultacii. 2007. No. 10.

In such conditions it is necessary to carefully analyze the opportunity to stop the process of fixing a high US dollar exchange rate by the Central Bank and to start the process of fixing the Russian currency rate.

Streszczenie

W artykule zostały przedstawione następujące konstytucyjne zasady rozwoju finasów publicznych w Rosji w XXI w.: zasada konstytucyjnych podstaw stosunków majątkowych, zasada konstytucyjnych regulacji struktury podatkowej; zasada stanowiąca, że budżet jest kluczowym instrumentem realizacji zadań przez władze publiczne; zasada konstytucyjnych podstaw systemu bankowego.

Krystyna Piotrowska-Marczak

EXPLANATION OF PUBLIC FINANCE REFORMS IN POLAND

Introduction

The starting point for the analysis of the public finance architecture is doctrines on the state and law.

The form of public finance, its size, structure and redistribution methods depend on what has been accepted by the government and the political parties which are currently in power in a given state.

A specific form of public finance stirs specific emotions, discussions and controversies, as a result of which concepts of changes and reforms are formulated. However, justification must be sought for every reform and supporters of the new solutions, starting from the public to the groups of decision makers, must be won over. To make people accept the newly chartered course appropriate arguments are needed. This mechanism makes it worthwhile to analyze the direction of translational processes that heralded public finance reforms in the transition period in Poland. Naturally, such an analysis cannot be expected to be complete, because an all-inclusive presentation of the outlined subject would require a much broader study, which is unfeasible within the scope permitted for this article.

In general terms, the necessity to implement a public finance reform is justified by references to certain doctrines upon which the state's functions are based.

According to the tradition of classical economics represented by Adam Smith, economy is dominated by the market, and so defense and protection should be the primary domains of state's activity.

A. Smith wrote that "The first duty of the sovereign, [is] that of protecting the society from the violence and invasion of other independent societies"[1]. "The second

1 A. Smith, Badania nad naturą i przyczynami bogactwa narodów (An Inquiry into the Nature and Causes of the Wealth of Nations), PWN 1954, p. 399

duty of the sovereign, [is] that of protecting […] of every member of the society against injustice or oppression of every other member of it… "[2]. In the light of the quotations economic processes take place in the market and through the market, so it is not necessary for the state to "interfere" in the mechanism. This does not mean, however, that the government can take no action within a broadly understood public sphere that encompasses healthcare and security, education, culture, or welfare. All these domains perform their allocated functions via appropriate institutions that are frequently called the public benefit institutions. A. Smith believes that the above is another field where the state should be active. "The third and last duty of the sovereign or commonwealth is that of erecting and maintaining those public institutions and those public works, which, though they may be in the highest degree advantageous to a great society, are, however, of such a nature that the profit could never repay the expense to any individual or small number of individuals, and which it therefore cannot be expected that any individual or small number of individuals should erect or maintain." [3]. One of the effects is, for instance, that "…the course of education [goes] towards objects more useful, both to the individual and to the public, than those to which it would naturally have gone of its own accord"[4].

All the quotations derived from the classical approach to economic processes make us raise the question, whether the approach entails a solution with two alternative lines of action: one increasing public revenue and the other reducing expenditure. A. Smith answers this question in the following way: "In order that the greater part of the members of any society should contribute to the public revenue in proportion to their respective expense, it does not seem necessary that every single article of that expense should be taxed."[5] This statement can certainly be challenged, because there are many other approaches and perspectives on the discussed issues. Other proposals that appeared in the history of economic doctrines indicate that the role of the state should be treated differently. These doctrines are generally associated with state interventionism, whose prominent representative is Maynard Keynes, a determined opponent of *laissez faire*. Keynes proposes an active role of the state in economy, but the one respecting private ownership. He believes that a market system is not perfect, mainly because it is not fully capable of self-regulation. He considers economic processes globally, as a whole, without going into microeconomic details. Hence his position on the public finance sphere is that the high-income groups should be subject to progressive taxation, while the poorest provided with welfare benefits[6]. When an economy accepts state interventionism

2 Ibidem, p. 423
3 Ibidem, p. 441
4 Ibidem, p. 493
5 Ibidem, p. 669
6 I. Bludnik, Keynes i postkeysizm, w: Współczesne teorie ekonomii, collective works, M. Ratajczak (red.), Poznań 2007, p. 37

then public expenditure must be adequately increased, with the following rise in the collected revenues. Because of the rise, resources available to the population shrink, likewise the citizens' disposable funds. Some economists claim that this mechanism constrains the economic freedom of societies and that placed between high taxes and substantial subsidies in favor of the public a state is thrown "out of gear"[7].

J. Buchanan opposes state interventions even in cases when the market fails. He argues that it is the citizen of a democratically organized society that decides what portions of their potential income should be allocated to public benefit[8]. At the same time, however, Buchanan doubts about the rationality of individuals' behavior[9]. The doubts are provoked by the relationship between the amount of public expenditure and the standard of living of population measured by so-called socio-economic indexes (Human Development Index – HDI). According to analyses, the two elements are not correlated[10], which means that substantial public spending does not ultimately translate into society's well-being.

Nevertheless, public spending is high in many countries that want to retain state monopoly in many fields, such as healthcare, education, or the power industry, and this in many cases brings about crisis in public finance. To counteract such a scenario states take efforts to launch frequently ostensible reforms, that are intended to prevent a lack of acceptance for those in power. Therefore, some reforms can have a political background rather than economic. Accordingly, pertinent doctrines operate special condensed phrases intended to reflect the nature of the state, for instance, the classical economics uses „a night watchman"; a social, welfare state (Sweden, FRG), or a partnership state (USA) are also used. This approach materializes as a slogan in many states today. Such state definitions are promoted also in Poland, especially during campaigns preceding parliamentary elections. The government formed in 2007 uses the term "friendly state", while the previous one stressed "low-cost state" These examples suggest that governments wish to share summarized knowledge about their plans with the society. In fact, however, the approach intends to explain the government's current or future public finance reforms, while winning over the society and public support for actions that in fact only pretend to be real reforms.

The attempts undertaken after the year 1990 to reform public finance can be divided into three stages.

The first distinct period is the years 1990-1993, when three important changes were made. In 1990 the institution of self-government was reinstated at the gmina (commune) level; two years later the personal income tax and corporate income

7 Vito Tanzi, Gospodarcza rola państwa w XXI wieku, NBP, Materiały i studia, fascicle no. 204, Warszawa 2006, p. 10
8 J. Buchanan, Finanse publiczne w warunkach demokracji, Warszawa 1997, p. 23
9 Ibidem, p. 25
10 V.Tanzi, op. cit, p. 9

tax were brought in (1992), followed by the establishment of the tax on goods and services (i.e. VAT).

In the second period (1994-2004) reforms were implemented in three new areas. Firstly, the administrative division of the country changed with the introduction of three tiers: gminas (communes), poviats and self-governing voivodeships (provinces).

Secondly, the financial control over the healthcare system had been given to the Health Insurance Offices that after several years were transformed and renamed the National Health Fund.

And thirdly, the disability and old age pension systems were redesigned and based upon three pillars.

This catalogue of reforms can be extended by adding that in 1990 the Parliament enacted a law allowing the establishment of private educational institutions, thus opening door to the creation of private schools at the secondary and tertiary levels.

The third period of changes started in 2004 when Poland joined the European Union. At that time no institutional reforms were attempted within public finance, because the necessary harmonization of public finance systems across the European Union stressed financial instruments, mainly taxes, as the primary target of action.

The presented list of reforms makes us ask the question whether they were comprehensive, „sufficiently complete" in formal terms and coherent internally, whether their effects really improved the condition of public finance and, finally, whether they were consistent with the slogans spread to explain their necessity.

I believe that none of the mentioned reforms was thorough and well thought out. Because of their deficiencies the authorities had to adjust the lines of the reforms, sometimes deviating from the right, straight and logical course, and the reforms' translations frequently turned out to be contentless catchphrases that did not have much to do with real life.

The reform reinstating self-governing territorial units initially concentrated on establishing their lowest tier (the gminas). However, neither the concept of gminas' sources of finance was sufficiently elaborated, nor their tasks precisely defined. A perfect case in point is the school system. There were problems in deciding whether its control authority should be the central government, or perhaps local governments financed by educational subventions. In that period the slogan promoting decentralization of the state and of its system of government was emphasized the most strongly. All rough elements of the implemented changes were blamed on the conditions of the transitional period. In the pilot phase schools were transferred to

the volunteering gminas, but then it was decided to make schools a mandatory task of gmina authorities.

Almost ten years later, in 1999, the reform of the administrative division of the country was resumed, and poviats and self-governing voivodeships were established. Long debates preceded determination of the number of the units for each of the tiers, as well as their areas. Another difficult problem to resolve was financial management in the units, particularly with regard to their sources of funding. As a result of the debates, it was initially decided that the units would be supported by the national budget allocations, enhanced by the units' own revenues. In this period the democratic character of the state was brought to the fore to justify the necessary reforms, while economic issues, such as projects extending beyond the area of one gmina (e.g. environmental undertakings), played a secondary role.

Changes in the healthcare system provide another example of the reforms. A system of Health Insurance Offices financed from both employers' and employees' contributions was introduced as late as 1999. The HIOs had an open, public character. Certain concerns prevented the authorities from introducing privately-owned HIOs. In addition to controversies over the level of contributions, the possible variety of HIOs was also disputed (an exception was separate HIOs for the military and police personnel). It is worth noting that the reform was delayed by more than a dozen of years, as its draft version had been developed already in the 1980s. Ultimately, the system was modeled after the German Krankenkasse, however some unjustified modifications were made to what had already been validated in Germany. The system for collecting contributions and controlling their „inflow" remained unfinished, and the IT system calculating amounts accumulated on individuals' accounts was not built. As a consequence, the budget had to subsidize the HIOs that initially suffered from a shortage of funding. Additionally, the design of the basket of services available to the insured was not finalized. Chambers of the HIO Physicians empowered to supervise and verify payments made to physicians were not established, either. Still another problem was medicines and the payments for them.

Without waiting for the system to consolidate, including financial management in the HIOs, a change establishing the institution of the National Health Fund was introduced after a short time. The promoted explanation justified the decision by stressing the necessary improvement of the quality of healthcare services, their increased accessibility and smaller allocations to the HIO system perceived as a way of reducing the budget deficit. In this case the translation of the implemented line of action boiled down to "the rational state" slogan that alluded to a more coherent use of public funds.

The effects of actions undertaken within the healthcare reform can be succinctly described by the phrase "let's make it different if we can't make it better".

The National Health Fund has not become a remedy improving the quality and accessibility of medical services. Hence participants of discussions following its establishment ponder whether the institution of HIOs could be restored, etc. In other words, the necessity to make more changes is indicated, even though the new system has not been precisely defined. This approach provokes strong reluctance in the society, because citizens continually lose their trust in the reformers.

Another illustration of the public finance reform is the old-age and disability pension system reorganized in 1999. It was decided to base the system upon three pillars having different sources of funding. Hopes were expressed that the changes would propel economic growth as a result of investment activities carried out by pension funds being part of pillars two and three.

The expectations were again not to be fulfilled. Pension funds turned out to be a relatively inactive vehicle. The IT system allowing the establishment of beneficiaries' individual accounts was not completed. As an intermediary body responsible for collecting contributions and making payments, the Social Insurance Institution proved to be a rather ineffective and costly operator.

Again, the reform was justified by the need to provide the disabled and the elderly with better living conditions, and again the result was disillusionment of the public.

Although many other examples of actions intended to reform the public finance sphere in Poland could be given, for instance those arising from analyses of the functioning of funds and agencies, the above cases seem persuasive enough. The "low-cost state" slogan promoted by the previous government is certainly unacceptable to the public, especially that despite the declared reduction in, for instance, amounts allocated to the state administration, its implementation affects social services and deteriorates the well-being of the population.

Another issue worth bringing up in this context is the present actions of the government and how changes are being interpreted today. "A friendly state" has become a paramount slogan encapsulating changes proposed in „A Convergence Program"[11] announced in March 2008 and spanning the years 2008-2010. The document stresses two points:

1) the excessive budget deficit must be reduced from 3.8 % to 1.5% of GDP, and the public debt level brought down to 42.3% of GDP in 2010.

2) a smaller tax wedge.

11 Program Konwergencji. Aktualizacja 2007, Warszawa 2008

The two lines of action are expected to entail considerable costs amounting to 1.3% of GDP [12]

There are also plans to introduce two rates of the personal income tax in 2009, an income tax threshold equal to PLN 84,426, a tax free amount of PLN 556.02, and tax deductible expenses amounting to PLN 1,335. [13]

In addition to the presented solutions, it is also proposed to terminate the early retirement program and to make bridging pensions available to persons who must leave the labor force for health reasons.

Regarding the restructuring of budget expenditure, larger allocations to development-boosting activities, including science, are predicted.

However, this is another document that does not bring forward any specific solutions that might contribute to reformation of the farmer insurance system.

As a new convergence program will be probably presented in October 2008 more changes can be expected, not necessarily consistent with those presented in its March edition.

Conclusion

The outlined concepts and doctrines on the state, which are translated into the language of slogans synthetically describing the character of the state and then broadcast by successive governments, constitute the basis for explaining the public finance reforms. However, the real-life examples of implemented improvements reveal a considerable gap between the two ends.

Considering the circumstances, it is worth analyzing what gives the impulse for reforming public finance, and how the reforms relate to the promoted slogans aimed at winning over the voters and public approval.

Public finance reforms are induced by objective factors, but governments translate them using specific and frequently populist phrases that refer to the prevailing feature of the state. Hence, the following relationships are typically stressed:

1. A central authority emphasizing democracy as the state's cornerstone tends to explain public finance reforms by stating that the representative bodies are endowed not only with law-making powers, but they are also obligated to

12 Ibidem p. 17
13 Ibidem p. 11

control revenues and expenditure, so they must have control over the goals and amounts of the redistributed public funds.

2. In a state that defines itself as a community observing civil society principles reforms are explained with the necessity to provide egalitarian access, i.e. ensuring equal chances, to public goods.
3. A state calling itself a social state claims that reforms are needed because the market is not an instrument helpful in molding a socially desired consumption that might ensure society's well-being.
4. When the "low-cost state" slogan is stressed in a state, then the reforms are presented as an attempt at diminishing costs necessary to service the public sector, particularly these areas of the sector, where the effectiveness of allocations cannot be precisely established.
5. A state promoting the phrase "friendly state" declares that reforms are needed because the public sector is a better manager, especially in some specific areas, and so the services will be more effective. The expected result is social and political support for those who are currently in power. It is regrettable that the turn of the 1980s and 1990s was not sufficiently utilized to gain public support for radical improvement of public finance.

Streszczenie

Niniejszy artykuł obejmuje dwa tematy ściśle powiązane ze sobą. Pierwszy odnosi się do potrzeby i niemożności ucieczki przed reformą finansów publicznych w Polsce, gdzie kryzys jest właśnie obserwowany. Drugi z tematów wskazuje, że potrzeba reformy jest uzasadniona przez różne hasła, które wywodzą się z określonych doktryn ekonomicznych i które odzwierciedlają główne cechy państwa.

Artykuł, na podstawie analizy konkretnych przykładów, uzasadnia dlaczego reforma finansów publicznych jest tak niezbędna.

Anna Ostrowska

THE LAW OF STATE AND LOCAL GOVERNMENT GRANTS - NECESSARY AMENDMENTS AND REFORMS

Introduction

There has been considerable stabilization and standardization in public revenues law, especially in tax law which, apart from some amendments, does not need radical legislative reforms. By contrast, public expenditures law (public spending law), especially the regulations on government grants, needs not only amendments, but also a general legislative reform to make it more transparent and effective. One may venture to say that the public expenditures will contribute to political and legislative changes in the 21st century just like the evolution of taxes resulted in the birth of parliamentary democracy in previous centuries.

The first projects of performance-based budgeting which are undertaken nowadays in Poland are good examples of enhancing the role of public spending law. Performance-based budgeting, which has long been in effect abroad[1], is an instrument of developing a budget itself and of informing on the resource allocation decisions. In Poland, however, the law on making grants and its defectiveness has not been focused by public finance doctrine and by the legislator yet.

Imperfection of granting law

The 1997 Constitution of the Republic of Poland reflects modern European trends and provides a framework for public and local government finance by setting forth its basic rules and principles. However, the Constitution does not provide for any regulations or principles for public spending (public expenditures), giving freedom to the legislator to regulate this sphere in statutes. The main regulations on

1 J. Mercer, What is a Performance Budget? Overview, http://www.governmentperformance.info, June 26th, 2008.

public expenditures were set in the 2005 Public Finance Act[2], but unfortunately most of them have rather statistical and schematic character and are inefficient in solving many budgetary problems and answering many questions.

The 2005 Public Finance Act provides a wide range of regulations on state government grants, however, many of them are not complete or adequate to what the Parliament sets in the State Budget Act decreed each year. State government grants for private investment are a good example of this relation, because the real character and variety of these grants are only provided by the State Budget Act (Schedule: Long-Term State Programs) and the analysis of the functioning of Polish Special Economic Zones.

Local and regional governments have a great many problems with the application of the law on making grants as the 2005 Public Finance Act does not define or categorize local government grants at all and provides very few regulations on them. The European, universal right of local government to make grants for designated tasks or units (which derives from the financial independence of local government) in many cases can hardly be applied in Poland. One of the main principles of local governments finance in Poland is that local governments can act only when they are allowed or obliged to do so by law. The law on making grants by local government is spread in many different acts and the permission to make a grant is usually formulated as the blanket clause, which in practice results in giving up granting by local government.

Grants and subventions constitute about 50% of total expenditures of the state budget and most of them (80%) are mandatory spending on the public tasks conducted by local governments and state special purpose funds. It is worth remarking here that the ratio mentioned above proves how much public revenues are centralized in the Polish state budget.

At local level, expenditures for making grants constitute about 15% of total expenditures of local governments budgets and most of them are mandatory spending (mandatory grants) on the public local tasks, like theatres, museums, private and public kindergartens, private primary and secondary schools, private welfare houses and non-profit organizations. There are many statutes which allow local governments to make a grant (as discretionary spending) for other units, but unfortunately the permission is stipulated in an unclear way like: "financial support" or "financial help". Such regulations remain "dead" if we take into the consideration the local government principle of acting only by a legal permit mentioned above. If the statute does not explicitly indicate that this "financial support or help" can be

2 Ustawa z dnia 30 czerwca 2005 r. o finansach publicznych (Dz. U. No 249, item 2104 as amended), hereinafter Public Finance Act 2005.

performed by making grant from a local budget, a local government would rather give up any support or help, not to be suspected of illegal action by a supervision body.

The structure and character of state government grants are much more different than the structure and character of local government grants, which results from the different nature (different public tasks) of both the governments and their budgets. Therefore, it seems obvious that the substantive law (material law) of making grants may remain different at the central and local levels of the government (*e.g,* the definition of a grant, categories of grants, tasks and units for which grants can be designated). However, the formal granting law (its main principles), should remain the same at the central and local levels for the safety of public finances and should stipulate general legal rules on: grant procedures, control of grantees, grants refunds and penalties or grant frauds.

State government grants

Decentralization of public tasks to newly created levels of local government (counties and regions), which took effect in 1999, caused a great change in the structure of state budget expenditures. Since then, grants and subventions for local governments and state special purpose funds have amounted to about 50% of total state budget expenditures each year. It is worth pointing out here that there is a confusion with reference to the terms of this kind of budgetary transfer in Polish law (fortunately only at the central level). There are common grants and two kinds of subventions: 1) a general subvention for local governments - which includes 'education' and 2) a subvention for political parties in the structure of state budget grants. It is quite confusing to use both terms: grants and subventions, especially when we compare the etymological meaning of "subvention" (aid or help) with the real functions of subventions mentioned above and when we consider that other European countries use terms like General Grant (Block Grant) instead of "subvention".

According to Article 106 (1) of Public Finance Act 2005, State Budget Reports present eight economic groups of expenditures every year and 'Grants and Subventions' group constitutes one of these groups. The analysis of this group shows a great variety of state government grants, which we cannot find in the catalogue presented in Article 106 (2) of Public Finance Act 2005.

Table 1. State Government Grants and Subventions in 2007 (selected positions)

		Amount in thousand zl	**%**
1.	General Subvention for Local Gov. including:	36.756.209	**32,6**
	- education - other parts	28.204.949 8.551.260	
2.	Grants for state special purpose funds	39.034.834	**34,5**
3.	Grants for local governments	16.841.267	**14,9**
4.	Grants for mandatory tasks conducted by the other units of public finance sector	1.580.144	**1,3**
5.	Grants defined as to the objective, including:	547.226	**0,3**
	-grants for units of PFS* -grants for units which do not belong to PFS	40.067 507.159	
6.	Grants defined as to grantee, including:	17.194.235	**15,3**
	- grants for units of PFS -grants for units which do not belong to PFS	16.258.884 935.351	
7.	Grants for non-governmental organizations	1.055.887	1,0
8.	Subventions for political parties	94.834	**0,1**
TOTAL		**113.104.636**	**100,00**

** public finance sector*

Source: own calculations on the basis of: State Budget Report 2007, Part I, Chapter 3.4. Expenditures according to the main economic groups, Ministry of Finance, Warsaw 2007, www.mf.gov.pl, June 16th, 2008.

A few conclusions with regard to the specific nature of public finance in Poland can be drawn from the analysis of the above data. First of all, the number of subventions and grants for local governments is nearly the same as the number of grants for state special purpose funds, which is the evidence of diversification and centralization of public finance. Secondly, there is a considerable number of grants defined as to grantee, which, according to public finance theory, should be applied

in exceptional cases only. Thirdly, we cannot find any grants for public and private investments in the above group because they are calculated into the total number of capital expenditures of state budget.

It is sufficient to remark here that Public Finance Act 2005 sets many regulations on grants for public and private investments. Under the regulations the legislator is obliged to present the grants in the schedule of State Budget Act. In fact, we have to look for this kind of grants in the total number of state budget capital expenditures and we can also find them in the Schedules of State Budget Act (which refers to other questions) like: Schedule 13. Long-Term State Programs (which presents grants for private investments conducted in Polish Special Economic Zones)[3] and Schedule 6. Long-Term Public Investment's Programs (which presents grants for public investments conducted by public units).

Local government grants

In comparison with the state government granting law, there are a very few regulations on local government granting in Public Finance Act 2005, which results in many problems with the application of the law on grants at local level. A great number of administrative and courts' judicial decisions are examples of such difficulties. Supervision bodies or administrative courts usually prohibit local governments from making a grant, if there are no clear legal grounds for grants from local budget. We can sum up here, that local governments' "freedom of granting" is strictly limited by the material statutes which provide different types of granting procedures. At the same time, however, many of these statutes include only a blanket regulation on that matter, which, we can say, is a kind of encouragement for local governments to make spending on a particular sphere. But what kind of budgetary transfer can they use in such a situation? Should they set a local programme on these grants? Proper amendments to this kind of statutes, which would provide a clear indication of budgetary transfer, are expected from the legislator.

The phenomenon described above is best reflected in the area of local government grants for the units which do not belong to PFS[4] (non-governmental organizations, private educational units, professional sports clubs), especially when they act as joint stock company or limited liability company. However, legal permission to make grants with regard to the units belonging to PFS results in problems too, which could

3 Polar S.A., Philips Polska Sp. z o.o., Volvo Polska Sp z o.o., Toyota Polska Sp z o.o., Shell Polska Sp. z o.o., IBM Polska Sp. z o.o. and others are in the group of corporations which make investments in Polish Special Economic Zones and receive state government grants.

4 PFS – Public Finance Sector

be reflected in the questions: 'What kind of grant can be made?'[5], 'Can one local government make a grant for the unit of another local government (for example regional government for a county hospital)?', 'Can a local government make a grant for investments of their culture units (which are separate and independent legal persons)?' and finally, 'Can a local government make a grant at all (if the statute provides only blanket terms like "financial aid or help")?'[6]

Polish regional governments have great financial and legal capabilities for making grants, which results from the nature of their public tasks, in particular in redistributing EU sources. Grants constituted about 35% of total regional governments expenditures in previous years and will make about 50% in 2008.

Table 2. Regional Government Grants in 2008 (example of Podlaskie Vivodeship)

		amount /in zl/	%
1.	Grants defined as to objective, including:	30.614.105	16,46
	- grants for regional train transportation	12.914.105	
	- grants for regional bus transportation	17.700.000	
2.	Grants defined as to grantee, including:	22.307.050	11,99
	- grants for regional hospitals	840.000	
	- grants for theatres	3.532.850	
	- grants for regional philharmonic hall	4.292.000	
	- grants for regional libraries	3.870.000	
	- grants for regional museums	7.130.000	
	- grants for cultural centers	2.642.200	
	- grants for medical university	704.220	
3.	Grants for designated tasks including:	21.362.660	11,49
	- grants for units which do not belong to PFS* (non-profit organizations)	3.640.000	
	- grants for units of PFS	3.496.000	

5 There are four main categories of government grants in Polish law: grants for designated tasks, grants defined as to grantee, grants defined as to objective and grants for investments.

6 The blanket terms, mentioned above, can be found in *e.g.*: ustawa z dnia 29 lipca 2005 r. o sporcie kwalifikowanym /on professional sport/ (Dz.U. No 155, item 1298 as amended), ustawa z dnia 27 lipca 2005 r. - Prawo o szkolnictwie wyższym /Higher Education Act/ (Dz.U. No 164, item 1365 as amended).

4.	Grants for investments including:	11.529.000	6,22
	- grants for regional hospitals - grants for regional theatre - grants for regional library	10.710.000 560.000 189.000	
5.	Grants redistributed from EU funds including:	100.102.837	53,84
	- from 2007-2013 EU perspective - from previous EU perspective	97.405.177 2.697.660	
	TOTAL	185.915.652	100

* *Public Finance Sector*

Source: own calculations on the basis of: Podlaskie Voivodeship Budget 2008, Białystok 2008, www.wrotapodlasia.pl*, June 16th, 2008.*

We may conclude from the table presented above that there is a considerable variety of regional government grants. However, this variety derives mainly from the specific character of Polish public finance sector and from the mechanism of financing particular units belonging to that sector. For example, regional governments grants for theatres, museums, philharmonic hall, libraries are, in fact, the instruments of financing whole activity of these institutions and kind of mandatory local and regional spending for culture. These grants, therefore, can be treated as General Culture Grant and should have general, universal grants' procedures and principles, based on regional culture programme. Grants for culture units do not have the proper "granting" function (aiding function) in Poland, which derives from the fact that, although these institutions are independent legal persons, nevertheless, they are not able to finance their whole activity from their own incomes. However, some of them, especially situated in Western Poland, are trying to do so.

Moreover, local and regional government grants for hospitals have another specific character and constitute a discretionary instrument of financial help provided to hospitals. The dramatic financial situation of many hospitals in Poland forces local and regional governments to provide them with a grant, although the governments are not obliged to do so.

On the whole, an appropriate procedure of making grants for non-governmental organizations can be observed, provided by April 24th 2003 Act on Public Benefit and Volunteer Work[7]. This probably derives from long, good experience and development of European third sector (NGO sector) and from legal activity of European Economic

7 Ustawa z dnia 24 kwietnia 2003 r. o działalności pożytku publicznego i o wolontariacie (Dz. U. No 96, item 873 as amended)

and Social Committee. However, one question remains unanswered in this sphere in Poland: Could a joint stock company or limited liability company receive a status of a non-governmental organization and a non-profit organization and be granted by local governments?

Concluding remarks

This article has focused on only some factors with regard to the shape of law on state and local governments grants in Poland. The legal framework of these grants provided by Public Finance Act 2005 is not appropriate for a modern state. The law on government grants requires a truly radical redefinition and changes, which would adopt all principles of modern granting, such as transparency, cooperation, programming and clear procedures. In particular, these changes are desirable at local level, as great disorganization, diversity of systems and "water" regulations could be observed there. To put it plainly, the law on making government grants requires not only amendments, but a general reform, which could be conducted by means of a separate chapter in Public Finance Act 2005 or a separate act on making government grants.

Streszczenie

Istotną częścią nauki prawa finansowego staje się obecnie prawo wydatków publicznych, w tym prawo dotacyjne. Niejasne i niejednoznaczne przepisy dotacyjne samorządu terytorialnego w ustawach materialnych oraz „skromna" regulacja tego zagadnienia w ustawie z 2005 r. o finansach publicznych, przy uwzględnieniu zasady działania samorządu terytorialnego na podstawie i w granicach prawa, wywołują liczne problemy interpretacyjne w zakresie jego kompetencji dotacyjnych. Artykuł przedstawia analizę dotacji udzielanych z budżetu państwa i budżetów jednostek samorządu terytorialnego oraz wskazuje na potrzebę przeprowadzenia stosownych nowelizacji prawa w tym zakresie.

Christina Peshkova

SOME ASPECTS OF INTERGOVERNMENTAL RELATIONS IN THE RUSSIAN FEDERATION

Intergovernmental relations are the relations between different levels of governments: federal government, state governments and local governments in financial (budget) sphere. The development of intergovernmental relations is very important for federalism, however federalism itself affects the relations.

Russian budget federalism of today is quite different from the previous one. In the soviet period of Russia, federalism was a state-centered system with the states (republics) continuing to administer the scores of local programs and the central government handling a specific few. Constitutional changes, historic developments, and social, political, and economic transformations of the nation – all of these have changed the meaning of the term «federalism» – «budget federalism». What started as an effort to create a perfect Union, in the 1990s evolved into a relatively integrated governmental system. Three levels of governments (federal government, state governments and local governments) are sovereign in their own assigned spheres of authority. However, only few would deny that current federal-state relationships are characterized far more by cooperation, coordination, and sharing the power than by separation and competition. National, state, and local governments are daily involved in mutual activities – constructing transports projects, etc. National government shares functions with state and local governments. «Federalism» has become synonymous with «intergovernmentalism», and «intergovernmentalism» has become synonymous with the «sharing functions». The pattern of intergovernmental cooperation has always been characteristic of Russian federalism (Russian budget federalism). Nevertheless, the model of distribution of functions of levels of Russian governments – and functions in financial sphere – has always been different.

The principal way the federal government makes policy in the federal system is through grants-in-aid to the states. As we have already said, intergovernmental relations involve interactions between the federal government and the states, between states, and between states and their localities.

The Russian budget system has developed gradually over a number of years into what it is today. To understand the transformation of Russian budget federalism, it is necessary to look at the transformation that Russian society has experienced over the past twenty years. Historically, the new Russian Constitution of 1993 came into existence in response to recognized social, political, and economic needs – beginning with the Russian Federation. The Constitution of Russian Federation (1993) laid down the economic and juridical standards for the distribution of incomes and expenditure among the various budgets. Intergovernmental complexity has always been one of the most dynamic aspects of regulatory law, politics, and administration. Courts, legislatures, and agencies have found themselves involved in testing the boundaries of federalism; passage of legislation which intentionally builds in intergovernmental components. Budget laws were adapted to changing circumstances within the Constitution's parameters. Federal regulations have a direct impact on the states and localities.

The *budget system is the principal link between federal, state and local governments* in the financial federal system of Russia. If we view any budget system apart from the federal system of the country in which it exists, we may define it as the sum total of the budgets of all administrative-territorial regions and institutions of the country. In Russia the budget system covers all the budgets plus all the juridical standards determining the competence of central and local bodies in the compiling, approving and executing budgets. Every territory, region, autonomous region, area, district, city, town has its own budget, known as «local budget». Even though there are tens of thousands of budgets in the Russian Federation at present, they together comprise an integrated and harmonious budget system.

The division of revenues and expenditures of the federal budget, state budgets and local budgets is governed by the federal and state legislation. Federal legislation determines the organization of the budget system as a whole and the organization of intergovernmental relations. The main purpose of Russian legislature is to observe combining federal, state and local interests in financial affairs. In these circumstances there can be no or little opposition between central, state and local governments.

All budgets of Russian *budget system have complex structure*. For example, budgets as financial plans and funds of money include information about the level of revenue and necessary expenditures. The federal budget also includes the *state insurance budget*. Resources from the state insurance fund are used to aid purposes. This fund accumulates money for grants-in-aid system (financial aid system). The same insurance budgets are planned in state budgets. Local governments also hope for federal and state financial aid. Paralleling the national system, states also subsidize local governments on a massive scale. Thus, state and local governments depend heavily on the national governments for grants and subsidies in the Russian

Federation. Grants are an important part of all budgets of budget system. Spending at a higher level of government becomes a revenue source at a lower level. About 30 percent of federal expenditures goes to states and localities in the forms of grants, funding everything from transport constructions to health programs. Although the amounts vary widely from state to state, approximately 20 percent of state revenue comes from the federal government. These federal grants can shape policies at all levels of government.

There are many *reasons for providing financial aid* to lower levels of governments.

The main reason is that states and localities really need money. In their attempts to raise revenue, state and local governments are limited by a number of factors. Most fundamentally, they are affected by the level of wealth. Unless they increase tax rates to unbearable levels, poor states simply cannot raise sufficient revenue to provide services comparable to those in more affluent areas. Moreover, when states do raise taxes, they risk causing an exodus of business, industry, and middle-class residents to the regions where taxes are lower. State and local governments also encounter constitutional limits of taxation. Federal tax policy has not been strongly limited by provisions of the Tax Code of Russian Federation. State and local governments have only those powers of taxation that federal laws (Tax Code) have granted them. The Tax Code prescribes what taxes state and local governments may impose, establishes the amount of taxation, specifies procedures of tax administration.

Another reason for providing financial aid to lower levels of governments is high level of state and local expenditures. There are several factors of growing state and local expenditures for the last ten years. States have greatly increased their share of funding for programs such education and welfare that previously were largely funded by federal governments. Urbanization and population growth have placed increasing demands on state and local governments for additional services. Wage increases, inflation have all put pressure on state and local governments to raise more sharing. State and local spending varies greatly among states and regions. Still, states and localities face many of the same financial problems because of the drop in federal aid and the elimination of revenue sharing. Many states and localities face serious problems of deteriorating infrastructures (roads, bridges, water systems etc.).

When tax revenue is insufficient to meet general operating costs or when state ant local governments wish to finance major capital programs such as highway or agriculture development, money must be borrowed. State and local borrowing is a standard procedure. It is regulated by the Budget Code of Russian Federation that places limits on borrowing.

There are economic rationales that support the entire grants-in-aid system. It is easier to raise revenue at the national level than at the state and local levels. This is so because the federal tax structure is more flexible than that of the state and local governments. Federal revenues rise in direct proportion to overall economic growth. As a result, federal revenue expands greatly without any increase in tax rates. In contrast, state and local taxes are less flexible. A second economic rationale for grants-in-aid is spillover benefits. This means that the benefits obtained from a program administrated in one governmental area may extend into other governmental areas. Thus it seems fair that all who benefit should share the cost.

There are four reasons why federal money seemed, to state officials, so attractive. For one thing, the federal government is taking in more money than it is spending. The federal government, unlike the states, managed the currency and thus could print more money whenever it needed it. Federal aid often represents the largest source of revenue for the recipients.

Federal aid is known in the early years of Russian country. In the soviet period money was transferred to states. As a prototype of grant programs to come, the federal legislation established standards of cooperation for the state and national governments in the administration of joint projects. State and local governments were called upon to share the administration and financing parts of the program. Later the government adopted plans for federal-state cash support. As federal policymakers exerted greater and greater influence over state and local decision making and administration, the ardor of state and local officials for grants began to cool.

Grants are not the only kind of intergovernmental relations. Fiscal federalism – grants of money from the national government to the states and from the states to local governments – is at the center of intergovernmental relations. Federal government shares taxes with state and local government. It means that one level of government spends money raised at another level of government. *Revenue sharing* is an important experiment in federal-state-local finance. General revenue sharing program was not regulated for a long time. Nowadays it is regulated by the Budget Code. For example, it is proposed to return 70 percent of federal individual income tax revenue to the states (Article 56 of the Budget Code of the Russian Federation). State and local officials liked the program of revenue sharing because they felt that they could better decide how to spend money provided to them than federal officials who are geographically and emotionally distant from their problems.

In addition to general revenue sharing, other suggestions have been offered to reform the *grant system*. Grants are another source of revenue for state and local governments and they represent a significant contribution to state budgets. Grants-in-aid mean payments made by voluntary appropriation from one level of government to another. Such grants are common from higher to local levels. One argument for

increased federal involvement in traditional state and local activities has been that it provides a degree of national uniformity (in the form of minimal standards) in a system divided by interstate cooperation. Also, because of great differences in state wealth, spending for such programs as public assistance varies greatly from one part of the country to another. Federal aid can do more by transferring money from rich states to poor states. As a result, the federal grants-in-aid program has provided a politically acceptable way of providing needed money to state and local governments while keeping the formal structure of federalism.

There are *three types of federal grants to states (state grants to localities)*:

1) block grants,

2) categorical grants – subsidies,

3) categorical grants – subventions.

Block grants – as opposed to other types of grants are used when the state and local governments do not or cannot provide a public service at a sufficiently high level without the help of the federal government. The result is that the money available for state and local government services enables authorities all over the country to provide services of roughly equal standard. Citizens living in poorer areas may have to accept a poorer environment, but they do not suffer appreciably in the quality of their schools, housing, road maintenance and other basic services. Thus, block grants represent a balance between national goals and the interests of states. Under a typical block grant program state and local agencies receive a larger amount of money that is awarded for some general purposes, such as transportation, for example.

Block grants are much broader in their scope. They allow a greater choice by the recipient. Block grants give states greater independence, than categorical grants. Block grants give states governments great discretion in how the money should be spent and generally is used for a wide range of purposes within a broad policy area such as education.

Block grants as a form of grants are given under a very complex formula that takes into consideration such factors as total population, state and local tax revenue, federal tax liabilities, and degree of urbanization.

Grants awarded for specific purposes are called *categorical grants*. There are two forms of categorical grants: subsidies and subventions. Subsidies are given for specific purposes and programs, such as education, transport, job training, highway safety, prevention of juvenile delinquency, agricultural extension, public assistance, employment security, educational assistance, hospital construction, etc.

Subventions are the financial base of functions of federal governments delegated to state governments.

Federal aid which is connected with a specific category of services, welfare or highway construction, for example, is categorical aid. Categorical grants reached their present level of importance during the turbulent decade of 1990s. Frustrated by their inability to influence the behaviour of state and local agencies, national policymakers seized upon categorical aid as a means of ensuring compliance with national policy objectives. Categorical grants tend to be more popular with federal governments than with state and local officials. Categorical grants represent an attempt by national policymakers to take the money where the action is. Subsidies and subventions are mostly redistributed, and states governments have less discretion in how the money should be spent than in case of block grants. So the federal governments retains more control with this type of grant.

The dominance of categorical grants is a relatively new phenomenon. Categorical grants reached their present level of importance in 1995. Frustrated by their inability to influence the behaviour of state and local agencies, national policymakers seized upon categorical aid as a means of ensuring compliance with national policy objectives.

There are two major funding models by which grant money can be allocated.

In one case, money is distributed by formula (e.g. in accord with the percentage of the population below the official poverty line, level tax revenue) – block grants. Block grants are determined by a complex formula that has been changed from time to time.

In the other case, money is provided for specific projects and programs under special conditions. The conditions attached to the grants received are the most important federal restrictions on state action. Some conditions are specific for particular programs. Others are general, covering most or all grants. The second model is the largest category of on-budget expenditures. Over 70 percent of federal spending goes for these programs. Grant programs have been in use long enough to prove that they are avenues through which the national government has encroached upon the rightful role of states in the federal system. Federal grant programs made it possible for the redistribution of nationally collected resources to guarantee a minimum level of services for the nation. This was necessary because all states are not equally blessed with fiscal resources and all needs are not equally spread among the states.

The tendency at both national and state levels since 1990s has been to combine types of grants – block grants and categorical grants (subsidies and subventions).

Although grants-in-aid are found in a wide variety of forms, the common characteristic of all forms is the central government's provision for aid for a particular service, without supplanting the responsibilities and powers of the recipient units of government which actually perform the service. Grants are usually made in the form of money, although the early grants were an exemption, as are some present grants of agricultural commodities. The federal grant program viewed as a whole may seem to be a hodgepodge, but it is the natural outgrowth of various goals and piecemeal development. The federal government has used the grant primarily to achieve some national goals, such as to get the farmer out of the mud or to prevent cancer, rather than merely to help state and local governments to finance existing programs. The great majority of all federal grants is for a relatively small number of programs. Grant program provides opportunities for states to add their own goals to grant programs. Federal grant program has given great impetus to the intergovernmentalization of the federal system. Specific programs are funded in only some of the areas in which problems exist. Nearly 70 percent of all grants are project grants.

In an urbanized society, it is no longer reasonable to view federalism only through the states. The nature of intergovernmental federalism must also take into consideration the localities. Many of grants for localities are for programs where the benefits are primarily local rather than national, such as local economic development and the construction and operation of local transportation systems. In contrast the states, local governments receive most of their federal aid in project grants.

Grants-in-aid from higher levels of government to lower ones have become a prominent part of Russian federal system. Federal grants allow to form national objectives, which are put into effect through the cooperation between federal officials and state and local governments. State-local relationships must be considered in the context of other federal relationships, the most important of which is the federal-local relationship. Local functions may be the subject for periodic inspection. National control of state and local government determines how local authorities are organized, what services they must provide, what other services they may provide if they choose to do so and how most of their services must be administrated.

Federal grants will continue to be an important factor in the federal-state and federal-local relations in the years ahead. Federal grants have become necessary to divert state attention from their own priorities and force them to remember that they are a part of the nation.

Streszczenie

Przedmiotem rozważań w niniejszym opracowaniu są stosunki zachodzące pomiędzy organami publicznymi na różnych szczeblach władzy, tj. w realcjach pomiędzy rządami federalnym, państwowymi i lokalnymi. Każdy z ośrodków władzy jest niezależny w ramach przydzielonych obszarów działania, jednakże rząd federalny dzieli się zadaniami z rządami państwowymi i lokalnymi. W Federacji Rosyjskiej dwa ostatnie ośrodki uzyskują dotacje i subwencje od rządu federalnego. W dalszej części pracy szczegółowo analizowane są te dwie formy wsparcia finansowego.

Sebastian Skuza

BANK GOSPODARSTWA KRAJOWEGO (DOMESTIC MANAGEMENT BANK) AS A FINANCIAL INSTITUTION IN THE STATE PUBLIC FINANCE SYSTEM

Bank Gospodarstwa Krajowego (BGK) has, in fact, existed since 1924. It was created by a President of the Republic of Poland ordinance of May 30th, 1924 on the joining (fusion) of State Crediting Institutions into Bank Gospodarstwa Krajowego. On March 14th 2003, the Seym of the Republic of Poland passed the Act on Bank Gospodarstwa Krajowego. The draft of the act was prepared by the Government within the frameworks of realizing the economic strategy program called "Entrepreneurship – Development –Employment". Due to the nature of the activity assigned to BGK, comprising of performing public tasks, it occupies a special position among the other banks operating on the Polish banking market. Regulation of the basic principles and the scope of BGK's activity became necessary both due to legal and formal issues, as well as in the face of integration with the European Union. Even though the act on Banking Law contains regulations concerning the creation and organization of state banks, the Government drafted (and the Parliament approved) a separate legal act for BGK. This seems justifiable due to the scope of departures from the regulations in the Banking Law and the specific nature of BGK's activity. Within the negotiations of the European Union, Poland strove for the placement of BGK on the list of exceptions, contained in the Directive of the European Parliament and of the Council 2000/12/EC (presently 2006/48/EC) relating to the taking up and pursuit of the business of credit institutions. The Union accepted the abovementioned position (European Union Common Position CONF-PL-66/00) and BGK received a subjective exclusion. It must be noted that institutions of a nature similar to that of BGK, excluded from the provisions of the said Directive, operate in European Union member states, examples of which may be Instituto de Credito Comercial (ICO) in Spain or Kreditanstalt für Wiederaufbau (KfW) in Germany.[1]

The legal bases of BGK's functioning are constituted by:

1 T. Olszówka, S. Skuza, Ustawa o Banku Gospodarstwa Krajowego, „Prawo Bankowe", 2003, No. 9, p. 9.

1. The Act of 29th August 2003 on Banking Law (Journal of Laws of 2002, No. 72, item 655 with further amendments);
2. The Act of March 14th 2003 on Bank Gospodarstwa Krajowego (Journal of Laws No. 65, item 594 with further amendments);
3. The Ordinance of the Minister of Treasury of 27th August 2003 on the awarding of statute to Bank Gospodarstwa Krajowego (Journal of Laws No. 156, item 1526 with further amendments).

The operation of BGK as a bank is regulated by the provisions of the Act on Banking Law. Simultaneously, Art. 3 of the Act on BGK (as a *lex specialis* regulation in relation to the provisions of the Act on Banking Law) states that the activity of BGK is governed by the provisions of the Banking Law, unless the provisions of the Act on BGK provide otherwise.

The aims of the activity of BGK outlined by the Act clearly define its public mission and the particulars of its operations on the banking market. Thus the basic aims of BGK's operations include supporting the government social and economic programs as well as local self-governance and regional development programs carried out with the employment of public means. Currently, BGK joins its full commercial activity in the scope of national and international trade with the mission of supporting social and economic endeavours of the state. The commercial activity however, serves to increase the effectiveness of realization of commissioned tasks and the development and strengthening of BGK's infrastructure and resources employed for the fulfillment of tasks commissioned by public administration bodies.

The basic tasks of BGK include:

– operating the funds created by, entrusted or transferred to BGK based on separate acts;
– operating export transactions with the application of export supporting instruments in accordance with separate provisions of law;
– performing the activities concerning credit institutions liquidated or deemed liquidated based on the Decree of 25th October 1948 on the Principles and Mode of Liquidation of Certain Banking Enterprises, the Decree of 25th October 1948 on the Principles and Mode of Liquidation of Certain Long-term Credit Institutions and the Decree of 25th October 1948 on the Banking Reform;
– performing the activities defined by the Act of 29th August 1997 on Banking Law.

The Act on BGK allows BGK to perform all the activities defined by the Act on Banking Law. This means that BGK may run, like up until now, full banking operations, thus performing the banking activities restricted exclusively for banks as well as operations with the status of "banking activities", under the condition that they are performed by banks. The above solution enables BGK to employ all the tools applied in banks' operational activity for the realization of basic aims of BGK's activity, defined in the Act.[2]

Tasks concerning the operating funds functioning at BGK are performed based on the provisions of separate acts, under which the funds were created.

Currently, BGK services the following funds and programs (the most important positions):

– National Housing Fund (NHF), established under the Act of 26th October 1995 on Certain Forms of Supporting House Building (Journal of Laws of 2000, No. 98, item 1070 with further amendments);

– Subsidy Fund, established under the Act of 5th December 2002 on Providing Subsidies to Interest on Mortgage Loans with Fixed Interest Rates (Journal of Laws of 2002, No. 230, item 1922 with further amendments);

– The National Road Fund, established under the Act of 27th October 1994 on Toll Motorways and the National Road Fund (Journal of Laws No. 256, item 2571 with further amendments);

– Thermo-modernization Fund, established under the Act of 18th December 1998 on Supporting Thermal Modernization Projects (Journal of Laws No. 162, item 1121 with further amendments);

– Technological Credit Fund, established under the Act of 29th July 2005 on Certain Forms of Supporting Innovative Activities (Journal of Laws No. 179, item 1484 with further amendments);

– National Credit Guarantee Fund, established under the Act of 8th May 1997 on Guarantees Extended by the State Treasury and by Certain Legal Persons (Journal of Laws of 2003, No. 174, item 1689 with further amendments);

– Students Loans and Credits Fund, established under the Act of 17th July 1998 on Student Loans and Credits (Journal of Laws No. 108, item 685 with further amendments);

2 B. Mikołajczyk (ed.), Finansowe uwarunkowania konkurencyjności przedsiębiorstw z uwzględnieniem sektora MSP, Difin, Warsaw 2006, p. 296

- European Union Guarantee Fund, established under the Act of 16th April 2004 on the European Union Guarantee Fund (Journal of Laws No. 121, item 1262 with further amendments);
- Export supporting Program DOKE, established under the Act of 8th June 2001 on Subsidies to Interest on Export Credits with a Fixed Interest Rate (Journal of Laws No. 73, item 762 with amendments);
- Public health units restructuring Program, established under the Act of 15th April 2005 on Public Assistance and Restructuring of Public Health Units (Journal of Laws No. 78, item 684 with amendments).

As already mentioned, BGK has been placed on a list of institutions excluded from the provisions of Directive 2006/48/EC of the European Parliament and of the Council of 14th June 2006 relating to the taking up and pursuit of the business of credit institutions.

The justification of this exclusion was the orientation of Bank Gospodarstwa Krajowego, based on the legal norms presented above, towards operating tasks commissioned by the government, while at the same time providing it with the possibility to pursue commercial operations in a scope allowing it to keep qualified staff and infrastructure necessary for the proper operation of funds entrusted to BGK, while simultaneously avoiding the creation of conditions for unfair competition towards other financial institutions.

Excluding BGK from the provisions of Directive 2006/48/EC does not mean its exclusion from the provisions of the Act on Banking Law. BGK, pursuing its banking activity (based on authorisations to perform banking operations exposing to risk any funds which have been entrusted to the bank and which are in any way repayable) is obliged to observe provisions in force for banks.

BGK, similarly to other banks, is subject to the amended (due to the introduction of the new capital requirements Basel II into the Polish legal order) provisions of the Act on Banking Law. The application of rules in force since 1st January 2008 has resulted in the increase of capital requirements towards BGK (mostly due to the increase of risk weight on mortgage loans granted from the funds of NHF and to the inclusion of operational risk - up until now, the capital requirements statement included credit and market risk), which in turn led to the decrease of the capital adequacy ratio.

The potential increase of the total capital requirement in force since 1st January 2008 results principally from the risk weight increase from 50% to 100% for mortgage-secured expositions within the activity of NHF, due to the fact that the main source of credit repayment are rents received from credited housing units and not other independent sources.

Art. 128b of the Act on Banking Law was supposed to open a certain possibility of excluding BGK from capital requirements. According to this provision, the Commission for Banking Supervision may, at the request of a state bank, exempt a part of the activity or the entire activity of that bank related to servicing funds created, entrusted of transferred to that bank pursuant to separate acts, from the obligation to comply with certain requirements and standards stipulated in the Act, provided that the activity has been isolated financially, and particularly that the bank does not participate in its financing and that the risk related to this activity is not borne by the bank in any way, and particularly that the bank is not in any way liable for losses arising from the activity.

The fund, (which is a credit fund) currently has, at its disposal, assets amounting to PLN 6.061,9 billion.[3]

It must however, be noted, that currently BGK has no possibility of taking advantage of the exclusion stipulated in Art. 128b of the aforementioned Act, as in the case of programs realized within the framework of NHF, BGK participates in their financing by incurring liabilities in order to support the program. Moreover, Provision 34 of BGK's Statute stipulates, that in the event of losses arising from the activity of any of the funds (serviced by BGK), the loss is covered from this fund. However, the provision does not state who is liable for losses arising from the activity of the fund should they exceed the value of the fund. The problems connected with lack of a clear definition of loss-related risk create a particularly specific situation for BGK. While calculating the capital adequacy ratio, there is no possibility to include funds located at BGK as own funds, while the assets of these funds are included in the capital requirement.

The situation of BGK in the scope of internal capital and the capital adequacy ratio due to the introduction of New Capital Requirements' (Basel II) results, in practice, from the specificity of the Bank's activity.

The activity of the aforementioned funds is similar to that of special purpose funds, although they do not constitute special purpose funds as construed by the Act on Public Finances, neither can BGK (as a bank) be included in the sector of public finances. Nevertheless, its relations with the public finances sector are close.

Firstly, the composition of the Supervisory Board reflects the ministerial bodies – members of the Council of Ministers, i.e. the Minister of Finance, Infrastructure, Treasure and Economy. Secondly, pursuant to Art. 164 of the Act on Public Finances, the Minister of Finance has the ability to locate budget surplus at BGK or at Narodowy Bank Polski. Thirdly, BGK is already an agent of the Ministry of Finance in the scope of operating foreign debt (with the exclusion of debt owed to

3 Bank Gospodarstwa Krajowego, 30th June 2008

international financial institutions). Fourthly, in accordance with the position of the Office of Public Procurement, Bank Gospodarstwa Krajowego is obliged to apply and comply with the procedures of public procurement. Fifthly, eventually, after Poland adopts the euro, BGK will be entitled to provide banking services to the state budget.[4] Sixthly, BGK is obliged by law to operate the accounts of the National Health Fund.

These possibilities and the pursuit of tasks in the scope of funds located at BGK, considering also their size, should form part of the public finances reform. The first and foremost issue seems to be the necessity to regulate the status of funds located at BGK. Two opposing solutions seem to be possible to achieve this aim - the inclusion or the exclusion of these funds. The first proposal would mean the liquidation of the funds or a part of them (at least the credit and guarantee ones, such as NHS). The liquidation of funds would not mean the termination of the government support of individual domains of economic and social life. It would be possible to assume that BGK would continue the activities taken up until now, but exclusively as programs realized under separate acts, within own activities. The capital of the funds would be transferred to the statute fund or to a supplementary capital of BGK, which would be advantageous for two reasons:

1. it would solve the risk-related problems and cause a capital strengthening within the New Capital Requirements (Basel II);
2. it would increase BGK's operational possibilities in relation to credit concentration standards.

A recapitalization of a few billion of BGK, without any cost to the budget, seems to be a solution advantageous to both BGK as well as to the sector of public finances. It should be noted that BGK, as a state bank has very limited possibilities of recapitalization, i.e. from profit and/or from state budget recapitalization (possibly in the form of a contribution-in-kind, e.g. minority stakes held by State Treasury). After the liquidation of funds, in order to support government programs, BGK would grant credits, guarantees and sureties on its own behalf and account, using the funds from budget subsidies. Funds from the liquidation of funds (established on the basis

4 Currently, BGK pursuant to Art. 160 of the Act on Public Finances, within the framework of banking services provided to the state budget, could operate the current accounts of state special purpose funds, unless the provisions of separate acts provide otherwise, the current accounts of budgetary enterprises and of auxiliary enterprises of budgetary units and auxiliary accounts. Moreover, as a bank of first choice (without the procurement procedure), pursuant to the aforementioned article, BGK could operate the bank accounts of state legal persons established under separate acts, included in the public finances sector (government agencies).

of statement of liquidation and the opinion of an expert auditor) would increase the stature of supplementary fund of BGK. The intention, thus, should be to create legal framework in accordance with which BGK, as a commercial bank within the scope of its own activity, would pursue banking operations, supporting social and economic government programs as well as local self-governance and regional development programs, with the employment of public funds. The liquidation of certain funds in the proposed way, i.e. through the recapitalization of BGK from these funds, would solve the problem of providing BGK with appropriate own funds, enabling BGK to become more involved in large projects, of increasing the security of BGK and of fulfilling precautionary standards (capital adequacy ratio).[5]

The other of the proposed solutions would be directed at exempting the funds located at BGK from capital standards. Such a solution could be implemented in various manners. The first would be to introduce special capital standards exclusively for BGK directly in the provisions of the Act on BGK - with consideration of the specificity of the functioning of these funds. These provisions, as *lex specialis* to the Act on Banking Law would define the legal standards of exclusion for BGK - while considering the specificity of these funds' functioning. Another solution could be the amendment of Art. 128b of the Act on Banking Law, enabling to use the legal exclusion in practice. The amendment should involve creating a substantive law provision concerning the capabilities of a defined discretionary decision of the supervisory bodies without the currently isolated prerequisites, which, in practice, are impossible to fulfill. That is because it is impossible to completely relieve BGK, operating the fund, of the risk, for example in the scope of operational risk. The third alternative in this issue could be to transform the said funds into state special purpose funds. Such a solution, i.e. the creation of new special purpose funds by way of an act is provided for by the Act on Public Finances (the 1998 act did not provide for such a possibility).[6] Another solution could be to exclude the funds from BGK and to grant them the form of a separate organizational unit, which would exclude the liability of BGK for losses arising from the activity of funds. One issue must be considered: whether or not such a unit should have legal personality; in the event of units with legal personality, they could be, e.g. special purpose funds, companies of which BGK would be the only (100%) shareholder, or legal persons managed by BGK similarly to the Social Security Fund managed by the Social Insurance Company or investment funds managed by the Investment Fund Company.

5 Currently, despite listing the funds located at BGK in the Bank Gospodarstwa Krajowego balance sheet, there are no possibilities of including them in own funds pursuant to the requirements of the Act on Banking Law.

6 The employment of solutions in the scope of funds and recapitalization of the Bank included in the public finances reform by professor Zyta Gilowska (liquidation of a part of BGK funds or their transformation into special purpose funds, or the inclusion of certain funds among Bank's own funds in exchange for transferring tasks to the Act on BGK).

Another change should be introduced in the context of banking services provided to the state budget. It does not seem like a rational solution to maintain a time limit from which BGK could start providing banking services to the state budget. The issue of preparing an adequate infrastructure for the operation of the state budget is much more important. In the author's opinion, with the amendment of the Act on Public Finances, it would be necessary to exempt BGK from the obligation to pay the obligatory reserve on public funds collected on budget accounts. Such an action would require the amendment of the Act on Narodowy Bank Polski. Also the issue of BGK's bankruptcy in terms of operating public accounts should be considered. It should be noted that NBP has no bankruptcy capacity.

The issue of public procurements does not seem to be of less importance. Without negating completely the interpretation of the Office of Public Procurement, which regards BGK as a "public utility institution", the justifiability of introducing these procedures should be considered in the context of broadly understood activity on financial markets. In the author's opinion, BGK should enjoy defined subjective exclusions in the scope of public procurements, analogically to Narodowy Bank Polski. The procedures of public procurement would not be limited to only, for example, the purchase of equipment, software, furniture, deliveries, etc. In the light of the position held by the Office of Public Procurement during the work on the Act on BGK, the EU law allows for a very small margin of exemptions from the mode of public procurement which, in the case of BGK, is limited to banking services provided to the state budget. It seems that in the light of EU regulations, the only possible solution is the subjective exclusion of a defined scope of BGK's activity from the mode of public procurement. It must, however, be noted that other banks controlled directly or indirectly by public finance sector units are not subject to the procedure of public procurement in the scope of own (commercial) activity. In the event of a subjective exclusion of BGK from the provisions on public procurement being impossible, actions should be undertaken towards the subjective exclusion of strictly banking operations (similar subjective exclusions are granted to Narodowy Bank Polski).

To sum up, BGK is currently an important institution within the system of public finances. Even though BGK remains outside of the public finance sector, it seems necessary to join the public finances reform with changes in the principles of functioning of BGK and of funds located at it. The scope of BGK's activity as an entity realizing government programs is a significant factor pointing towards the necessity to consider these issues jointly with a complex reform of public finances.

Streszczenie

Bank Gospodarstwa Krajowego (BGK) jest ważną instytucją w systemie finansów publicznych. Pomimo, że został wyłączony z sektora finansów publicznych, wydaje się jednak koniecznością połączenie reformy finansów publicznych z jego funcjonoweaniem, uwzględniając również fundusze, którymi dysponuje. Zakres działalności BGK jako jednostki realizującej programy rządowe jest znaczączym czynnikiem, który powinien być uwzględniony w procesie kompleksowej refomy finansów publicznych.

Urszula Kinga Zawadzka

LA RÉFORME DES FINANCES PUBLIQUES EN FRANCE

L'introduction

Dans la plupart des pays du globe les systèmes financiers publics font l'objet de réformes plus ou moins importantes. En France, on a tenté de transformer le système budgétaire depuis les années soixante, sans presque aucun résultat. L'ordonnance du 2 janvier 1959[1] portant loi organique relative aux lois de finances a servi de la constitution financière pendant presque cinquante ans. La loi organique relative aux lois des finances du 1er août 2001[2] a remplacé l'ordonnance et a provoqué une « révolution budgétaire ». La LOLF est tellement importante parce qu'elle définit un nouveau cadre budgétaire et introduit la réforme de la gestion publique à la fois. Après la présentation des étapes de la réforme seront analysés ses causes et ses principes directeurs.

Les étapes de la réforme

Pendant près d'un demi-siècle les règles des finances publiques en France ont été déterminées par l'ordonnance du 2 janvier 1959 portant loi organique relative aux lois de finances. Dans ce temps, presque quarante initiatives de la réforme émanant des parlementaires ont échoué. Enfin, le 11 juillet 2000, M. Didier Migaud, député socialiste, rapporteur général de la commission des Finances, a déposé à l'Assemblée nationale la proposition de la loi organique no 2540 relative aux lois de finances (LOLF). Il est important de souligner que le projet de cette loi n'était pas rédigé par le gouvernement. « Le fait que la LOLF soit d'initiative parlementaire lui confère une double force : celle d'éviter la remise en cause lors du changement de la majorité gouvernementale et celle d'impliquer le Parlement dans la réforme afin

1 L'ordonnance n° 59-2 du 2 janvier 1959 portant loi organique relative aux lois de finances (JORF du 3 janvier 1959, page 180).

2 La loi organique no 2001-692 relative aux lois de finances (JORF n°177 du 2 août 2001, p 12480, texte n° 1).

d'éviter que les administrations, laissées à elles-mêmes, ne neutralisent la réforme comme elle l'ont fait de presque toutes les tentatives précédentes. » [3]

Le projet de la loi a été discuté à l'Assemble nationale et au Sénat entre février et juin 2001. La LOLF a été adoptée en juin par une majorité parlementaire de gauche en accord avec l'opposition de droite. Le 25 juillet 2001, le Conseil constitutionnel a reconnu la conformité de l'essentiel des dispositions de cette loi, par la décision n° 2001-448 DC. Le 1er août 2001 « la nouvelle constitution financière » a été promulguée.

Les dispositions de la LOLF sont entrées en vigueur en plusieurs étapes. Dix-neuf articles de la LOLF sont applicables à compter du 1er janvier 2002, notamment les dispositions relatives au principe de sincérité, aux rapports joints au projet de la loi de finances et au projet de la loi de finances rectificative, aux dispositions élargissant les pouvoirs de contrôle des commissions des finances, à la procédure d'examen du projet de la loi de finances (PLF) et du projet de la loi de règlement. Au 1er janvier 2003 entrent en vigueur les dispositions relatives au débat parlementaire (le débat d'orientation budgétaire) pendant lequel est discuté un rapport sur l'évolution de l'économie nationale et sur les orientations des finances publiques. Depuis le 1er janvier 2004 sont applicables les dispositions sur l'obligation de déposer toutes les disponibilités des collectivités territoriales et leurs établissements publics auprès de l'État. Le projet de la loi de finances pour 2005 était voté en double présentation : selon l'ordonnance de 1959 et selon les principes posés par la LOLF. L'ensemble de la loi organique relative aux lois de finances est en vigueur à compter du 1er janvier 2005. Le projet de la loi de finances pour 2006 était donc le premier entièrement conçu, élaboré et adopté selon les nouvelles règles de la LOLF.

Les causes de la réforme

L'obsolescence du texte de l'ordonnance portant loi organique relative aux lois de finances du 2 janvier 1959 était une des causes majeures de la nécessité de réformer le système des finances publiques en France. « Prise dans le cadre de la fin des années 1950, dominée par une conception très centralisatrice et très interventionniste de l'Etat, l'ordonnance en porte inconsciemment les marques, reflétant en effet les préoccupations et les illusions de la société d'après guerre, alors qu'elle a continué à s'appliquer à un environnement dans lequel des valeurs souvent inverses avait pris le pas »[4]. Les changements juridiques, financiers et économiques qui avaient lieu en France ont provoqué l'inadéquation du système budgétaire

3 C. Rochet, Une seule flèche pour deux cibles : le pari ambitieux de la réforme budgétaire en France, « Management International », nº 9, 2004, p. 86.

4 M. Bouvier, M.-Ch. Esclassan, J.-P. Lassale, Finances publiques, Paris, 2002, p. 27.

à la réalité. L'architecture budgétaire reflétant le découpage par ministères et les structures administratives privilégiait les moyens au détriment des objectifs et des résultats. De plus, il est important de mentionner « l'écart toujours croissant entre un système budgétaire étatique juridico-technique, s'appliquant à lui-même des règles autonomes, et un environnement économique et international qui obéit davantage à une logique de gestion.[5] » Le droit français devrait être donc ajusté surtout aux régulations de l'Union européenne.

Parmi d'autres prémisses de la réforme se trouvent la volonté du pouvoir législatif de renforcer ses compétences en matière de l'élaboration et du contrôle de l'exécution du budget. Depuis longtemps, les autorisations parlementaires ont été privées de leur signification et une situation budgétaire peu transparente a privilégié le point de vue du ministère des Finances. En outre, les informations transmises au Parlement ne lui permettaient pas d'effectuer le contrôle effectif de l'utilisation des deniers public.

Enfin, comme l'a expliqué dans l'exposé des motifs de la proposition de la LOLF M. Didier Migaud, l'ordonnance du 1959 n'a pris guère en compte le fait que l'Etat joue un rôle important dans le financement et l'encadrement de la sécurité sociale qui, depuis la loi constitutionnelle du 22 février 1996, est réglée par une loi spécifique de financement. Or, aujourd'hui, tous les observateurs, notamment à l'échelon de l'Union européenne, s'intéressent à la notion d'« administrations publiques », qui suppose une appréhension globale des opérations financières de l'Etat mais aussi de la sécurité sociale et des collectivités territoriales.[6]

Les principes directeurs de la réforme

La LOLF a reformé à la fois le système budgétaire et la gestion publique. La réforme budgétaire a visé à rendre possible au Parlement de mieux exercer ses pouvoirs qui sont devenues fantomatiques. Il n'était pas nécessaire d'introduire une nouvelle répartition des rôles entre le Gouvernement et le Parlement car ceux-ci étaient bien marqués.[7] Les mesures facilitant l'exercice des pouvoirs d'autorisation et de contrôle consistent en :

a) L'introduction du principe de la justification au premier euro. Grâce à la distinction entre les mesures nouvelles et « les services votés » (auparavant 95% des crédits en moyenne), le Parlement peut se prononcer sur toutes

5 M. Bouvier, M.-Ch. Esclassan, J.-P. Lassale, Finances publiques, Paris, 2002, p. 232.

6 Proposition de la loi organique relative aux lois de finances présentée le 11 juillet 2000 par M. Didier Migaud, Document de l'Assemblée nationale mis en distribution le 12 juillet 2000, n° 2540.

7 A. Lambert, Une première expérience riche d'enseignement, « Revue Française de Finances Publiques », nº 94, 2006, p. 35.

les dépenses au premier euro. « Les services votés » faisant objet d'un seul vote ont induit la reconduite automatique des budgets de fonctionnement[8]. Seulement les nouvelles mesures ont pu être réduites où rejetées par le Parlement.

b) L'élargissement du droit d'amendement parlementaire. A présent, selon l'article 47 de la LOLF, l'irrecevabilité financière résultant de l'article 40 de la Constitution[9] s'apprécie par rapport à la mission. Les parlementaires peuvent redéployer des crédits entre les programmes au sein d'une même mission sous réserve de ne pas majorer le plafond des dépenses de la mission. « Les parlementaires ont fait un usage modéré mais significatif de cette nouvelle liberté ; comme le relèvent tant les rapports de la MILOLF (juin 2006) pour l'Assemblée nationale que celui de la Commission des Finances pour le Sénat (avril 2006) ». [10]

c) Le caractère contradictoire du débat budgétaire qui n'est plus la suite des monologues mais une véritable discussion par mission ministérielle ou interministérielle.

d) La remise en relations des questions financières, qui n'intéressent guère les parlementaires, avec les politiques publiques financées, qui les intéressent bien davantage, alors que les deux sujets paraissaient déconnectés[11]. LOLF « concerne toutes les commissions parlementaires, non les seules commissions des finances. Il n'y a plus, désormais, d'un coté la commission des finances qui se concentre sur les crédits et, de l'autre, les commissions « pour avis » qui ne considèrent que le « fond » de la politique sectorielle suivie. Toutes les commissions doivent désormais apprécier l'adéquation des résultats aux moyens»[12].

e) L'information budgétaire qui est enrichie. Le Parlement est informé sur tous les mouvements de crédits en exécution, il émet un avis sur les projets de décret d'avance, la procédure des questionnaires budgétaires plus formalisée, au projet de loi de finances de l'année sont joints un rapport sur la situation

8 C. Rochet, Une seule flèche pour deux cibles : le pari ambitieux de la réforme budgétaire en France, « Management International », nº 9, 2004, p. 86.

9 Art 40 de la Constitution : « Les propositions et amendements formulés par les membres du Parlement ne sont pas recevables lorsque leur adoption aurait pour conséquence soit une diminution des ressources publiques, soit la création ou l'aggravation d'une charge publique. ».

10 H. Bied-Charreton, X. Hurstler, C. Wendling, S.Magne, Un premier bilan de la préparation et de l'exécution de la loi de finances sous le régime de la loi organique relative aux lois de finances du 1er août 2001, « Revue Française de Finances Publiques », nº 96, 2006, p. 186.

11 A. Lambert, Une première expérience riche d'enseignement, « Revue Française de Finances Publiques », nº 94, 2006, p. 33-34.

12 J. Arthuis, La première discussion budgétaire en « mode LOLF » : un pouvoir d'arbitrage exercé par le Parlement, « Revue Française de Finances Publiques », nº 94, 2006, p. 20.

et les perspectives économiques, sociales et financières de la nation et autres annexes.

f) Le principe de sincérité budgétaire (art. 27 et 32 de la LOLF) qui est « moins une innovation qu'une codification de la jurisprudence antérieure du Conseil constitutionnel[13]»

g) La reddition des comptes et évaluation des résultats avant le vote du budget suivant.

Par contre, la voie de l'amélioration de la gestion publique a conduit par le passage de l'Etat d'une logique de moyens à une logique de résultats. Notamment, il était donc nécessaire de modifier radicalement le principe de spécialité en instaurant de véritables programmes ministériels pour que l'utilisation des deniers publics soit plus efficace. Les crédits ne sont plus divisés par les ministères et les structures administratives (présentation par chapitres). Sous le régime lolfien la nomenclature budgétaire se fonde sur le regroupement des politiques publiques par finalités, le budget est donc structuré en missions, programmes et actions. Une mission, qui est l'unité de vote au Parlement, regroupe un ensemble de programmes et d'actions concourant à une politique publique définie. Un programme, étant l'unité de l'amendement pour les parlementaires, regroupe les crédits destinés à mettre en oeuvre une action ou un ensemble cohérent d'actions relevant d'un même ministère. A chaque programme sont associés une stratégie, des objectifs précis et des indicateurs de performance, placés dans les projets annuels de performance (PAP) grâce à qui est mesurée la réalisation des actions (la performance). Ils sont annexés au projet de la loi de finances initiale. Pour mesurer les écarts entre les prévisions et l'exécution sont préparés les rapports annuels de performance (RAP), annexés au projet de la loi de règlement.

La LOLF organise le budget en programme sans se référer toujours aux institutions administratives. C'est pourquoi il était nécessaire de créer une nouvelle fonction publique de responsables des programmes. Leur tâche consiste à allouer les crédits entre les gestionnaires des programmes (les responsables des budgets opérationnels de programmes) en fonction des objectifs poursuivis et rendre compte des résultats.[14] Les responsables de programme sont à la tête de masses financières importantes, ce qui leur confère une grande latitude d'actions et permet de s'affranchir des pesanteurs décisionnelles pour gagner en initiatives stratégiques[15]. Ils sont libres de redéployer les crédit appartenant à leur programme entre leurs actions en

13 M. Bouvier, M.-Ch. Esclassan, J.-P. Lassale, Finances publiques, Paris, 2002, p. 275.

14 H. Bied-Charreton, X. Hurstler, C. Wendling, S.Magne, Un premier bilan de la préparation et de l'exécution de la loi de finances sous le régime de la loi organique relative aux lois de finances du 1er août 2001, « Revue Française de Finances Publiques », nº 96, 2006, p.187.

15 C. Rochet, Une seule flèche pour deux cibles : le pari ambitieux de la réforme budgétaire en France, « Management International » nº 9, 2004, p. 85.

respectant le principe de la « fongibilité asymétrique » qui suppose que l'affectation de certains crédits n'est pas prédestinée de manière rigide, mais prévisionnelle. Les crédits de personnels peuvent être transformés en crédits de fonctionnement, mais non l'inverse. Au sein d'un programme seulement les crédits de personnels ont donc le caractère limitatif.

De plus, la réforme était centrée sur la responsabilisation des gestionnaires et sur le contrôle de leur performance. La responsabilisation des gestionnaires publics, qui est un des principes de base de la LOLF, est constituée de deux volets. Le premier consiste à donner aux gestionnaires plus de liberté, « la responsabilisation s'accompagne ainsi progressivement d'un allègement des procédures, de la réduction des contrôles *a priori* et de la simplification de la réglementation, en vue d'une plus grande efficacité de l'action administrative et d'une meilleure performance des services public ».[16] Selon le deuxième volet, les gestionnaires publics doivent être responsables des résultats qu'ils obtiennent et dont ils sont obligés de rendre compte.

Les conclusions

Avec la LOLF, on a mis en place en France une nouvelle gouvernance financière publique. Ce n'est pas seulement un texte technique définissant les cadres dans lequel sont élaborées, adoptées et exécutées les lois de finances. La « nouvelle constitution financière» a introduit la réforme centrée sur une grande liberté et une forte responsabilisation des gestionnaires, et le contrôle de leur performance.

De plus, la LOLF a amélioré l'information budgétaire destinée aux citoyens et à leurs représentants et permet d'obtenir des informations difficiles à recueillir auparavant telles que les moyens financiers et humains affectés par l'Etat aux politiques, ce qui rend les finalités des actions publiques plus lisibles. Cependant, dans un rapport paru en mars 2005, les sénateurs soulignent un problème non résolu : « la LOLF n'adopte pas l'approche globale de l'action publique. Or, certaines missions publiques sont partagées entre plusieurs acteurs : Etat, collectivités territoriales, organismes de sécurité sociale. C'est le cas notamment des domaines sanitaire et social, des transports ou encore de la formation professionnelle. A ce jour, il n'est pas possible d'apprécier l'impact global des dépenses des autres organismes publics et donc d'une politique publique dans son ensemble ».[17]

16 A. Froment-Meurice, N. Groper La responsabilité des acteurs de la gestion publique en matière budgétaire, financière et comptable : l'heure du bilan, « Actualité juridique - droit administratif », 2005, p. 714.

17 J. Arthuis, La LOLF : culte des indicateurs ou culte de la performance?, rapport d'information no 220 (2004-2005) déposé le 2 mars 2005.

Enfin, dans l'exposé des motifs de la proposition de la loi organique visant à permettre le retour à l'équilibre budgétaire présentée le 15 juillet 2008 le sénateur Bruno Retailleau décrit la situation dangereuse : « Depuis la fin des années 70, la France a accumulé une dette considérable : près de 1 200 milliards d'euros. Durant cette période, celle-ci a été multipliée par cinq et a atteint près de la 2/3 du PIB français[18].» Certains auteurs convainquent que la LOLF à plus long terme offre des instruments en vue de la réduction des déficits publics[19]. Il est donc toujours nécessaire de suivre de manière conséquente les reformes commencées par la LOLF et de chercher les méthodes plus efficaces de gérer les ressources et les dépenses publiques pour que la situation financière de la France soit améliorée.

18 La proposition de la loi organique visant à permettre le retour à l'équilibre budgétaire présenté par M. Bruno Retailleau du 15 juillet 2008, nº 467 (2007-2008), site Internet http://www.senat.fr/leg/ppl07-467.html du 22 juin 2008.

19 P. Marini, La loi organique relative aux lois de finances (Lolf), un outil pour la réforme de l'État, « Sociétal » no 53, 2006, p. 34.

Streszczenie

Próby reformowania systemu finansowego we Francji były podejmowane od wczesnych lat 60. Przez pięćdziesiąt lat finanse publiczne były regulowane przez ordonans nr 59-2 z 2 stycznia 1959 r. ustanawiający konstytucyjną ustawę o ustawach budżetowych. Nieadekwatność tego aktu do zmian następujących na różnych płaszczyznach (prawnej, finansowej i gospodarczej) dawały asumpt do podejmowania prac nad nową ustawą. Po wielu próbach, 1 sierpnia 2001 r. została uchwalona nowa ustawa (loi organique relative aux lois des finances, w skrócie LOLF). Jej postanowienia stopniowo wchodziły w życie w pięciu etapach (pomiędzy 2001 a 2005 rokiem). Ustawa budżetowa na 2006 tok była pierwszą w pełni uchwaloną na postawie LOLF, która zreformowała zarówno system budżetowy, jak i zarządzanie publiczne.

Anna Jurkowska-Zeidler

THE REGULATION OF THE SINGLE FINANCIAL MARKET IN THE EUROPEAN UNION. A NEW DIMENSION

Background

Financial markets are crucial to the functioning of modern economies. The more integrated they are, the more capable and effective the allocation of capital will be. Therefore the single financial market is a fundamental part of the European Union (EU) purpose of achieving more and better jobs in a more dynamic and inventive Europe. Completing the single market in financial services is more and more recognized as one of the key areas for EU future growth, essential for the European Union global competitiveness and thus a crucial part of the Lisbon economic reform process.

Over the past couple of decades we have witnessed a rapid expansion and integration of financial markets - both in the EU and globally. Financial markets are becoming ever more important for economic development. Their quality is a critical determinant of countries' economic stability and of their success in a world of financial globalization. Financial markets development and legal regulatory framework are so closely connected as to be part of a single phenomenon. The marketplace changes would not have occurred without the regulatory developments but, on the other side, the regulatory changes have helped to remove barriers to the cross-border provision of services and created conditions for integration of financial markets.

The financial services sector includes three major areas for which similar EU regulation apply notably banking services, insurance services and capital market (investment services and securities) and also investment funds, financial markets

infrastructure (such as well-functioning cross-border clearing and settlement processes), retail financial services and payment systems.[1]

It had been comprehensible for some time that the increasing size and sophistication of financial markets was becoming a huge challenge for existing framework for financial regulation and supervision. For that reason at the global level, EU financial market regulation in terms of safe and stability is being coordinated and synchronized with the relevant organizations – the Financial Stability Forum, the International Monetary Fund, G-10 Basel Committee on Banking Supervision etc.

The Single European Financial Market

There is no widely accepted definition of financial integration. Generally, a perfectly integrated market is regarded as a market where prices for similar products and services converge across geographical borders. An integrated market should enable all market participants to buy and sell financial services, which share the same characteristics, under the same conditions, regardless of the location of origin of the participant.[2]

Financial integration can be also described as an absence of obstacles to significant cross-border activities and to enterprises in their access to, or in their ability to supply, financial services and products, in particular with respect to their geographic location. The general objective of the single market is to remove all public policy/regulatory obstacles to the free movement of goods, services, persons and capital.[3]

Europe has made considerable progress in creating a single market for financial services. There is no doubt that the European Monetary Union has been the catalyst for the renewed attention given in recent years to the challenges of financial integration.[4] The Single European Market stands for **"free movement"** of people, goods, services, and capital.[5] For financial services the principles of freedom of establishment and free movement of services have been clarified and developed

1 Detailed information on these subjects see EU general financial services policy issues see http://ec.europa.eu/internal_market/finances/index_en.htm

2 European Financial Integration Report 2007, Commission Staff Working Document, Brussels, 10.12.2007, SEC(2007) 1696, p. 8; http://ec.europa.eu/internal_market/finances/docs/cross-sector/fin-integration/efir_report_2007_en.pdf

3 Report from the EU Financial Services Committee (FSC) on Financial Integration, FSC 4156/04, Brussels 17 May 2004, See R. M. Lastra, Legal Foundations of International Monetary Stability, Oxford University Press 2006, p. 321.

4 See C. Kosikowski, Prawo Finansowe w Unii Europejskiej, Oficyna Wydawnicza Branta, Bydgoszcz-Warszawa 2008, p. 206.

5 About EU single market general policy framework see http://ec.europa.eu/internal_market/index_en.htm

over the years through the case law of the European Court of Justice. In addition, significant developments and progress in the field of financial services have been brought about through specific legislation in this field.

History of the legislative process to adopt regulation of the EU financial market

The goal of creating an internal market in financial services was given fresh impetus with the 1985 White Paper on the Internal Market[6] and 1986 Single European Act.[7] The new strategy was based on the generalization of the concept of mutual recognition on the basis of prior minimum harmonization, the principle of "single passport" and the rule of home country control.[8] However, maximum harmonization is inconsistent with the fundamental Single Market principles of minimal harmonization and mutual recognition nowadays, in some directives the use of maximum harmonization as a method of integration through law.[9] is noticed. With this approach, EU Member States cannot introduce additional requirements other than those specified in the directive.

The principles of mutual recognition and the "single passport" allow financial institutions legally established in one EU Member State to establish/provide their services in the other Member States without further authorization requirements. These principles are essential for financial stability in the EU and require the establishment of a common framework ensuring prudential supervision and consumer protection all over the European Single Financial Market.

Directives became the preferred legislative measure for achieving financial integration in the European Union.[10] They regulate the initial and on-going conditions for financial service providers (banks, insurers, investment firms, investment funds), establish requirements for the providing financial services, enact a prudential norms and capital adequacy norms. The conditions for the setting-up of financial institutions and their on-going business are similar in individual sectors of financial market, but specially provide for a level playing field between non-bank investment firms and banks providing investment services.[11]

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6 Completing the Internal Market: White Paper from the Commission to the European Council, Milan, 28-29 June 1985, COM(85) 310, June 1985; http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf

7 Single European Act of 28 February 1986 (entry into force 1.7.1987); OJ L 169, 29. 6. 1987.

8 See J. Steiner, L. Woods, Textbook on EC Law, Fifth Edition, London 1996 p. 294

9 Maximum harmonization was used, for example, in Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services, OJ L 271, 9.10.2002.

10 See A. Jurkowska-Zeidler, Bezpieczeństwo rynku finansowego w świetle prawa Unii Europejskiej, Wolters Kluwer, Warszawa 2008, pp. 136-151.

11 About Acquis communautaire in the field of financial services See Finanse, seria Acquis communautaire, ed. Z. Brodecki, LexisNexis, Warszawa 2004

From 1999 to 2005, this overarching EU policy to improve the Single Market for financial services was delivered in the framework of the *Financial Services Action Plan* (FSAP).[12] The Action Plan identified a range of issues calling for urgent action to secure the full benefits of the single currency euro and an optimally functioning Single European Financial Market.

The FSAP suggested indicative priorities and time-scales for legislative measures to tackle three strategic objectives: ensuring a Single Market for wholesale financial services, developing open and secure markets for retail financial services and ensuring the continued stability of the EU financial market through the established state-of-the-art prudential rules and supervision.[13] So essentially the action was envisaged under three headings: wholesale markets, retail markets, and sound supervisory structures. The Action Plan also addressed broader issues concerning an optimal EU Single Financial Market, including the elimination of tax obstacles to financial market integration.

Although progress has been made through the successful completion of the Financial Services Action Plan (FSAP), the Commission concluded that the EU financial services industry (banking, insurance, securities, asset management) still has a strong untapped economic and employment growth potential. So in December 2005, the Commission published the *White Paper on Financial Services Policy 2005-2010*, which sets out the Commission's objectives in financial services policy for the period to 2010.[14] The Commission's new strategy explores the best ways to effectively deliver further benefits of financial integration to business and consumers alike. While the FSAP focused mainly on the wholesale market, retail integration became more important over the next period provided in the White Paper.

The objectives of the Commission's financial services policy over the 2005-2010 years are:

1. dynamic consolidation of financial services, towards an integrated, open, inclusive, competitive, and economically efficient EU financial market;

2. *better regulation* - implement, enforce and continuously evaluate the existing legislation and to apply rigorously the better regulation plan for future initiatives;

12 Financial Services: Building a Framework for Action, European Commission COM (1998) 625, IP/98/941 , Brussels 28 October 1998; Financial Services – Implementing the Framework of Financial Markets: Action Plan, Commission Communication COM (1999) 232, 11.05.1999; http://ec.europa.eu/internal_market/finances/docs/actionplan/index/action_en.pdf

13 The FSAP set a schedule for the adoption of 42 legislative measures (mostly directives) to be adopted by 2005.

14 White Paper - Financial Services Policy 2005-2010, European Commission, Brussels 5 December 2005, IP/05/1529; http://ec.europa.eu/internal_market/finances/docs/white_paper/white_paper_en.pdf

3. *enhancing supervisory cooperation and convergence*, deepen relations with other global financial marketplaces and strengthen European influence globally
4. *removing the remaining economically significant barriers* so financial services can be provided and capital can circulate freely throughout the EU at the lowest possible cost – with effective levels of prudential and conduct of business regulation, resulting in high levels of financial stability, consumer benefits and consumer protection;

Both the Financial Services Action Plan and the White Paper on Financial Services Policy are important initiatives in the field of EU financial market integration but they do not change the current financial supervisory structure, which is a crucial element of the Safety Net of the EU Single Financial Market. The home country supervision principle, underpinned by mutual recognition, and separation, decentralization, segmentation, cooperation are the core of the supervisory architecture in the European Union.[15]

The Lamfalussy Framework for financial market regulation and supervision in the EU

The emerging European Financial Architecture is the result of the extension of the Lamfalussy Framework for the regulation of securities markets to banking and insurance.[16] The major novelty of the Lamfalussy Procedure is its four-level regulatory approach, namely (1) framework principles, (2) implementing measures, (3) cooperation, (4) enforcement, whose aim is to accelerate the legislative process for the financial regulation in the EU.[17] The main innovation is the distinction between "EU implementation" in level 2 (with new "Lamfalussy level 2 regulatory committees" established individually for securities, banking and insurance as well as for financial conglomerates) and "national implementation and cooperation" in level 3 (with "Lamfalussy level 3 supervisory committees" established for securities, banking and insurance). The level 2 and level 3 committees are a form of supervisory cooperation between competent authorities of EU Member States.

15 See A. Jurkowska, The institutional architecture of banking supervision in the European Union, [in:] Current questions of the efficiency of public finance, financial law and tax law in the countries of Central and Easter Europe, ed. M. Štrkolec, Univerzita Pavla Josefa Šafárika v Košiciach, Košice 2005 also See R. M. Lastra, The Governance Structure for Financial Regulation and Supervision in Europe, Columbia Journal of European Law, vol. 10, Issue 1, Fall 2003, p. 50.

16 Lamfalussy Report was published in February 2001 and adopted by the European Council in its Resolution of 23 March 2001; http://ec.europa.eu/internal_market/en/finances/general/lamfalussy.htm

17 For the strengths and weaknesses of the Lamfalussy Procedure see K. Lanoo, The Transformation of Financial Regulation and Supervision in the EU, [in:] Handbook of Central Banking and Financial Authorities in Europe, ed. D. Masciandaro, p. 490.

Through the Level 3 committees more than 80 national supervisors in the EU have been brought together.

It should be emphasized that through the Lamfalussy approach started, as a "regulatory issue", it soon became a "supervisory" matter, leading to an overhaul of the institutional architecture of supervision in the European Union.[18] Nevertheless, the Lamfalussy Procedure does not imply the centralization of supervisory and regulatory responsibilities. Hence there is no transfer of supervisory competencies from national to the supranational arena. Therefore, building the effective Financial Safety Net still remains at the national level.

The Safety Net of the EU Single Financial Market

The Financial Safety Net is widely defined as a set of procedures and facilities in place to protect stakeholders and society at large from loss should a financial institution fail or default.[19] Therefore, the preservation of financial stability is the aim of the new financial architecture. The stability of financial market is an important global public good, so there is a strong need to build the Financial Safety Net as a system to prevent, manage and resolve financial crises.[20]

Since the subprime mortgage loans crisis in the United States in mid 2007, the European Union has been a key player in international efforts to bring financial stability back to the financial markets.[21] In the future the EU needs particularly a refocusing of financial supervision to ensure better management of crisis situations and market problems of the scale we have been experiencing over the past period.

In October 2007 EU finance ministers agreed on a 15 month "roadmap" to examine whether financial rules need to be changed in order to improve the way cross-border banking crises are handled in the future and avoid a repeat of this market turmoil following the US subprime mortgage crisis.[22] EU roadmap to get out of the turmoil combines actions of a regulatory and non-regulatory nature which are structured around four main objectives notably enhancing transparency in the market, especially relating to complex financial instruments; improving the

18 R. M. Lastra, Legal Foundations…, p. 321.

19 D. G. Mayes, The Role Of The Safety Net In Resolving Large Financial Institutions, IADI 4th Annual Conference "Challenges for Deposit Insurers in Resolving Bank Failures", Taipei, Taiwan 28-29 September 2005; http://www.iadi.org/pastevents/.

20 More about architecture of the EU Financial Safety Net see A. Jurkowska-Zeidler, Bezpieczeństwo rynku finansowego…, pp. 193-207.

21 Financial markets across the globe went into a financial turmoil following the US subprime mortgage crisis in early August 2007, compelling the European Central Bank, the Bank of England and the US Federal Reserve to massively provide liquidity to keep the financial system repulsing a possible liquidity crisis.

22 Council Conclusions on enhancing the arrangements for financial stability in the EU, 2822nd Economic and Financial Affairs Council meeting, Luxembourg 9 October 2007; http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ecofin/96351.pdf

way investments are valued, by agreeing on common standards; strengthening the prudential framework and supervisory mechanisms in banking sector, through better information-sharing between national authorities and the development of cross-border cooperation agreements, and; improving market functioning, with a particular focus on credit rating agencies.[23] EU ministers have also agreed on a Memorandum of Understanding (MoUs) which lays down how supervisory authorities, central banks and financial ministers from the twenty seven EU Member States should work together more closely and effectively when a systemic important cross-border bank is in trouble.

In the light of the agreements reached by the ECOFIN Council in October 2007, the Financial Supervisory Authorities, the Central Banks and the Finance Ministries of the European Union have agreed on a new *Memorandum of Understanding on co-operation in financial crisis situations*.[24] The Memorandum took effect on 1 June 2008, included one hundred and eighteen signatories from twenty seven EU Member States and the ECB. The MoUs is designed to facilitate the management and resolution of cross-border systemic financial crises in a way that minimises the economic and social costs of a crisis, while promoting market discipline and limiting moral hazard effect. The Memorandum, defines practical procedures for the involvement of all relevant parties in a crisis situation, based on the existing legal responsibilities and built on existing networks of authorities. The document defines coordination mechanisms, including the identification of a national coordinating authority and a cross-border coordinating authority. As a rule, the cross-border coordinator is one of the authorities of a financial group‘s home-country.

The Signatories of the Memorandum agreed to follow a set of common principles in the management of any cross-border financial crisis, which involves at least one banking group which has substantial cross-border activities and is facing severe problems which are expected to trigger systemic effects in at least one EU Member State and is assessed to be at risk of becoming insolvent. These principles, set out in MoU, should be respected in the management of any cross-border financial crisis with potential systemic implications. The common principles include references to banks and banking groups, reflecting their specific role in the financial system.[25]

The new Memorandum extends the previous Memorandum signed in 2005 in two ways. Firstly, the Memorandum includes common principles on cross-border crisis management, a common framework for assessing the systemic implications

23 See article EU agrees roadmap to avert future financial turmoil, Wednesday 10 October 2007; http://www.euractiv.com/en/financial-services/eu-agrees-roadmap-avert-future-financial-turmoil/article-167508

24 Memorandum Of Understanding On Cooperation Between The Financial Supervisory Authorities, Central Banks And Finance Ministries Of The European Union On Cross-Border Financial Stability, Brussels 1 June 2008, ECFIN/CEFCPE(2008)REP/53106 REV REV; http://www.ecb.int/pub/pdf/other/mou-financialstability2008en.pdf

25 These common principles were endorsed by the ECOFIN Council of 9 October 2007.

of a financial crisis, and common practical guidelines for crisis management in line with the ECOFIN conclusions of 9 October 2007. Secondly, considering the increasing inter-linkages between financial sectors, the securities market, insurance and occupational pension, supervisors have agreed to join the new Memorandum, thereby acknowledging that the involvement of a broader range of authorities is necessary.

The creation of an agreement on common principles and practical arrangements to be applied in the case of cross-border financial crisis reflects the ongoing integration of financial markets and market infrastructures in the EU, the growing number of large financial institutions, more and more complicated structure of financial conglomerates, sophisticated financial instruments and the ensuing higher risk of cross-border contagion affecting more than one EU Member State.

In the legal context the Memorandum is a non-legally binding instrument for setting out practical arrangements aimed at promoting co-operation between authorities in crisis or potential crisis situations. The Memorandum is based on the current institutional and legislative framework and does not preclude any respective institutional responsibilities or restricting capacity of home state authorities, which are set out in national and Community legislation.

Conclusions

Financial integration in the European Union has progressed although the speed and scope of that process has not been the same across all market segments. It is crucial that the EU Single Financial Market delivers its full potential for consumers, in terms of a broad range of safe, competitive financial services, and for undertakings, in terms of easier and wide-ranging access to a deep and liquid market for investment capital.

I am confident that realization of the complete integration of financial market still will be accorded the highest political priority because of an extensive awareness of the huge potential benefits the EU Single Financial Market offers. In parallel there have been developments in the regulation and supervision of financial institutions in the EU. Therefore, in my opinion, this awareness stems notably from the introduction of the single currency euro and the gathering pace of adopting financial regulation dedicated to preserving and securing the stability of the Single European Financial Market.

It is obvious that financial stability in the EU is a common concern for all Member States and must be safeguarded on the basis of close cooperation. All agree with a suggestion that an integrated financial market requires a more integrated

supervisory design, so that there must be strengthened cooperation and coordination at regional or pan-European level and convergence of supervisory practices.

Integration, internationalization, globalization, open financial markets and the challenges that come along with them, will remain a reality. The regulatory and supervisory EU authorities must learn how to manage; the European Financial Architecture needs comprehensive reform. In this respect, the latest financial crisis underlines more than ever how urgently major change of the existing EU supervisory structure is needed. The EU Financial Safety Net - framework for prudential supervision and crisis management and resolution - must allow a quick response to cross-border systemic financial crises and their implications.

Streszczenie

W niniejszym artykule przeanalizowane zostały procesy i procedury implementacji finansowych regulacji w obszarze jednolitego rynku finansowego w Unii Europejskiej. Kształt obecnych przepisów dotyczących usług finansowych w UE opiera się na wzajemnej uznawalności na podstawie wcześniejszej harmonizacji, na zasadzie „jednolitego paszportu" i regule kontroli krajowej. Jednakże Europejska Architektura Finansowa nie jest strukturą statyczną. Pojawia się szereg czynników, które wpływają na zmiany instutcjonalne jednolitego europejskiego rynku finansowego, w szczególności są to procesy ukierunkowane na ujednolicanie i konsolidację organów nadzorczych na poziomie krajowym (które mogą torować drogę do powstania jednolitej instytucji nadzorczej – Eurpejskiego Organu Usług Finansowych) oraz procesy ustanawiające efektywny system bezpieczeństwa jednolitego rynku finansowego UE.

PART II
BUDGET SYSTEM OF THE STATE

Chebykina Natalia

SPECIAL BUDGETARY FUNDS – THE PRACTICE OF ESTABLISHMENT, FUNCTIONING AND REFORMING

Legislations of various countries all over the world provide possibilities of establishing of special budgetary funds. The main purpose of such establishment is more efficient usage of budgetary funds as such. The experience of some countries that specialize in raw material export shows that the state governments, which are influenced by international economic situation, have the opportunity to take advantage of the periods of high prices for raw material in order to save temporary surplus profit to establish special funds such as a stabilization fund and a future generations fund. Means of such funds can be used at some unfavourable periods to support a real expense level of state budget and discharge of external debt. By the end of the 1990s of the 20th century stabilization funds and their analogues functioned at least in 15 countries or separate regions of states. State funds of financial resources existing in different countries (that are formed at the expense of additional budget revenues and intakes from natural resources export) can be divided into three types:

- Stabilization funds (Alaska, Venezuela, Colombia, Kuwait, Nigeria, Norway, Chile);
- Future generations funds (Alberta, Alaska, Kiribati, Kuwait, Oman, Papua New Guinea);
- Budgetary reserve funds (Hong Kong, Singapore, Estonia and Republic of South Africa).

The last type of funds is connected with accumulation of profits in the years of state budget surplus. The purpose of establishment of these funds is stabilization of state expenses either in the period of decrease and economic recession, or unfavorable economic situation on the world raw materials markets (in this case – high prices of raw materials). The first two types of funds are connected with accumulation of one or the other part of profits from natural resources export or some other nonrenewable resources. The main difference between the above-mentioned funds is in purposes of their establishment: stabilization funds are established in order to smooth down

fluctuations in profits and expenses of state budget, to give additional financing to state expenses on the territories where natural resources output is carried out. Future generations funds are intended for their use either after the time when the deposits of natural resources are exhausted or for paying-out of additional (quasi-rental) payments to population of territories where natural resources output is carried out. In some cases these funds can fulfill mixed roles (as for instance in Alaska, Kuwait and Norway)[1].

In the Russian Federation Legislation, in 2004-2007 Chapter 13.1 of Budgetary Code of the RF was in force, which defined the mechanism of establishment and use of the means of Stabilization Fund of the Russian Federation[2]. General precondition for Stabilization Fund establishment was high dependence of economy and financial system of Russia on export prices of fuel-energy resources.

Stabilization fund of the Russian Federation represented a part of means of federal budget, which appeared because of oil overprice in comparison to reference oil price that was subject to separate accounting, management and use in order to provide equilibration of federal budget in case of oil price reduction in comparison to reference oil price. Oil price was the price of crude oil blend Urals, determined according to the order stipulated to define a rate of export customs duty for crude oil. Reference oil price was the price of crude oil blend Urals, equivalent to USD 197,1 per ton (USD 27 per barrel).

The sources of Stabilization Fund were as follow:

– additional profits of federal budget, formed by a calculation of the expense of oil overprice in comparison to reference oil price;

– remains of federal budget at the beginning of the corresponding financial year including profits gained from Stabilization Fund means allocation[3].

It was determined that the means of Stabilization Fund could be used in order to finance deficit of federal budget in case of oil price reduction in comparison to reference oil price, and also these means could be used for some other purposes in case a saved amount of Stabilization Fund means exceeded the sum of 500 billion Roubles. The volume of Stabilization Fund means to be used was defined according to the federal law concerning federal budget for the corresponding financial year.

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1 А. Золотарева, С. Дробышевский, С. Синельников, П. Кадочников Перспективы создания Стабилизационного фонда в РФ. - М.: Institute of Economics at Transition Period, 2001. - P. 7.

2 Was introduced by Federal Law # 184-ФЗ of 23rd December 2003, passed according to budget message of President of the RF to Federal Assembly of the Russian Federation of 30th May 2003 “About Budget Policy in 2004”.

3 Постановление Правительства РФ от 23 января 2004 г. № 31 «Об утверждении Правил перечисления в Стабилизационный фонд РФ дополнительных доходов федерального бюджета, остатков средств федерального бюджета на начало финансового года и доходов от размещения средств Стабилизационного фонда РФ // Code of Laws of the RF. - 2004. - № 5. - Article 370.

For example, in the federal law "On Federal Budget for 2005" it was determined that the Government of the RF in 2005 had the right to intend the means of Stabilization Fund of the Russian Federation for fulfilling payments that could reduce debt instruments of the Russian Federation[4]. Moreover, it was also agreed that the means of Stabilization Fund of the RF beyond the saved sum of 500,0 billion Roubles could be used in order to cover budget deficit of Pension Fund of the Russian Federation in the course of its implementation[5].

Management of Stabilization Fund was fulfilled by Ministry of Finance of the RF according to the procedure determined by the Government of the Russian Federation. Moreover, some separate authorities in Stabilization Fund means management could be executed by Central Bank of the Russian Federation on the basis of the agreement with the Government of the Russian Federation.

Management of RF Stabilization Fund was performed:

– by purchasing foreign currency in US dollars, Euros and GB pounds at the expense of Stabilization Fund means; and allocation of the above-mentioned currency at bank accounts (in lawful foreign currency) opened in Central Bank of the Russian Federation;

– by purchasing debt instruments of other foreign states at the expense of Stabilization Fund means; and then the Stabilization Fund means could be allocated into above mentioned debt instruments.

According to Resolution #229[6] of the Government of the Russian Federation, the list of requirements referring to debt instruments (into which Stabilization Fund means could be allocated) was defined. Debt instruments of foreign states included debt instruments in the form of securities and stock of the governments of Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, the UK and the USA; those instruments had to correspond to a series of demands, for instance, an issuer of debt instruments had to have the rating of long-term credit worth not lower than the level "AAA" according to the classification of rating agencies "Fitch-Ratings" or "Standard & Poor's"; or not lower than the level

4 Распоряжение Правительства РФ от 29 января 2005 г. № 102-р «О досрочном погашении задолженности Российской Федерации перед Международным валютным фондом» // Code of Laws of the RF. - 2005. - № 6. Приказ Министерства финансов РФ от 30 июня 2005 г. № 160 «Об осуществлении платежей по досрочному погашению части внешнего долга РФ перед странами-членами Парижского клуба» // URL: http://www1.minfin.ru/stabfond_rus/stabfond_rus.htm Распоряжение Правительства РФ от 30 декабря 2005 г. № 2333-р «О досрочном погашении остатка задолженности по кредитам Внешэкономбанка»// Code of Laws of the RF. – 2006. - № 4. – Article 452.

5 Приказ Министерства финансов РФ от 22 декабря 2005 г. № 345 «О направлении средств Пенсионному фонду РФ» // URL: http://www1.minfin.ru/stabfond_rus/stabfond_rus.htm

6 Постановление Правительства РФ от 21 апреля 2006 г. № 229 «О порядке управления средствами Стабилизационного фонда Российской Федерации» // Code of Laws of the RF. - 2006. - № 18. - Article 1998.

"Aaa" according to the classification of the rating agency "Moody's Investors Service". The corresponding rating must be given by two mentioned agencies as minimum.

In order to execute Resolution #229 of 21st April 2006 made by the Government of the Russian Federation "On Procedures of Means Management of Stabilization Fund of the Russian Federation" of 11th July, 2006 Federal Board of Treasury entered into contract with Bank of Russia concerning the bank account in record-keeping of Stabilization Fund means in foreign currency.

Central Bank of the RF at the expense of Stabilization Fund purchased and allocated foreign currency at the accounts of Federal Board of Treasury at the bank of Russia. Standard currency structure of the means of Stabilization Fund of the Russian Federation was determined in the following composition: 45 % of Stabilization Fund means in foreign currency was allocated in US dollars, 45 % - in Euros, 10 % - in GB pounds[7].

The reform of the budget process continued in Russia in 2007. In annual Budget Message of President of the RF[8] it was mentioned that budget strategy for medium-term prospect must be focused on assistance to social and economic development of the Russian Federation taking into consideration the criteria of efficiency and effectiveness of budget expenses. President of the RF pointed out that the Government of the RF should concentrate on providing long-term budget balance.

The state highlighted the issue of providing stability of budget expenses regardless of raw material price. In effect it was decided to transform Stabilization Fund of the Russian Federation into Reserve Fund and Future Generations Fund. Reserve Fund must provide budget expenses in case there is a considerable reduction in oil prices in medium-term prospect. The volume of Reserve Fund and also the volume of profits gained from oil and gas used for financing federal budget expenses must be legislatively fixed in percentage ratio to gross domestic product, taking into consideration the period of 3 years for the adoption of new principles of oil and gas profits management.

Future Generations Fund must accumulate oil and gas profits which arise as a result of profits excess of oil and gas sector over contribution to Reserve Fund and means that are used for financing federal budget expenses.

Within implementation of Budget Message of President of the RF for 2007, Federal Law # 63-ФЗ of 26th April 2007 was passed and it was called "On Alteration

7 Приказ Министерства финансов РФ от 22 мая 2006 г. № 157 «Об утверждении нормативной валютной структуры средств Стабилизационного фонда РФ и порядка приведения фактической валютной структуры средств Стабилизационного фонда РФ в соответствие с нормативной валютной структурой» // URL: http://www1.minfin.ru/stabfond_rus/stabfond_rus.htm

8 Бюджетное послание Федеральному Собранию Российской Федерации о бюджетной политике в 2008 – 2010 годах от 9 марта 2007 г. // The text of this message was not officially published.

of Budgetary Code of the Russian Federation in the Part of Budget Process Regulation and Adjustment of some Legislative Acts of the Russian Federation in accordance with Legislation of the Russian Federation"[9]. The present law suggests correcting of some functions and structure of Stabilization Fund of the RF, it also states a new procedure of the use of financial resources gained from oil and gas profits. All oil and gas profits were divided into three categories:

1. Reserve Fund for minimization of economic risks in Russia in case of a great drop in prices for energy resources at world markets as well as for support of macroeconomic stability and counter inflation;
2. Federal budget profit for implementation of uppermost scale social programmes;
3. Future Generations Fund into which all the rest oil and gas profits should be directed.

Subsequently concerning Future Generations Fund President of the RF suggested using the means of this fund in order to improve quality of people's life and economy development, and to improve welfare both of future and present generations. Accordingly, President of the RF noted that it would be more correct to call this fund more exactly as National Welfare Fund[10].

For the purpose of implementation of Message by Federal Law # 247-ФЗ of 2nd November 2007[11], Budgetary Code of the RF and Law # 63-ФЗ (in the part of the Code standards of this law which were not in force) were subjected to a number of systematic corrections that provide for replacement of the term "Future Generations Fund" by the term "National Welfare Fund», the latter also specifies the directions of the use of this fund.

Thus within changes introduced into Budgetary Code of the RF by Law 2007 # 63-ФЗ Chapter 13.1 of RF, Budgetary Code ("Stabilization Fund of the RF") was excluded and there was introduced Chapter 13.2 of RF Budgetary Code ("Use of Oil and Gas Profits of Federal Budget"), providing for application of "oil and gas balance" methodology in budget planning. The present methodology is used in order to reduce risks of default on budgetary obligations in case of deterioration of external

9 Федеральный закон от 26 апреля 2007 г. № 63-ФЗ «О внесении изменений в Бюджетный кодекс Российской Федерации в части регулирования бюджетного процесса и приведении в соответствие с бюджетным законодательством Российской Федерации отдельных законодательных актов Российской Федерации» // Code of Laws of the RF. – 2007. – № 18. - Article 2117.

10 Послание Президента РФ Федеральному Собранию РФ от 26 апреля 2007 г. // Newspaper Rossiiskaya Gazeta. - 2007. – 27th April.

11 Федеральный закон от 2 ноября 2007 г. № 247-ФЗ «О внесении изменений в Бюджетный кодекс Российской Федерации и Федеральный закон «О внесении изменений в Бюджетный кодекс Российской Федерации в части регулирования бюджетного процесса и приведении в соответствие с бюджетным законодательством Российской Федерации отдельных законодательных актов Российской Федерации» // Code of Laws of the RF. – 2007. – № 45. - Article 5424.

economic situation and in order to preserve profits of non-renewable resources for future generations; it also provides for separate record keeping of oil and gas (raw) and non-oil and gas profits of federal budget; it defines the procedure of formation and maintenance of both Reserve Fund and National Welfare Fund as well.

Law # 63-ФЗ 2007 stated that the means of Stabilization Fund of the RF as of 1st January 2008 enter correspondingly Reserve Fund and National Welfare Fund by 1st February 2008. The volume of means entry of Stabilization Fund of the RF into Reserve Fund estimated 10% of gross domestic product volume predicted for 2007, mentioned in the forecast for social and economic development of the Russian Federation for the period 2008-2010, submitted in the pack of documents and materials to the Russian State Duma along with the project of Federal Law "On Federal Budget for 2008 and for the Period till 2010". The remaining means of Stabilization Fund of the RF were entered into National Welfare Fund.

Article 96.9 of RF Budgetary Code states that Reserve Fund represents a part of federal budget means that are subject to separate accounting and management in order to implement oil and gas transfer in case of shortage of oil and gas profits for financial provision of the above-mentioned transfer. Budgetary Code of the RF (Article 96.8) introduced the notion of oil and gas transfer which represents the part of federal budget means used for financing oil and gas deficit of federal budget at the expense of oil and gas federal budget profits and Reserve Fund means.

Federal Law on federal budget for the next financial year and planning period[12] determines regulatory value of Reserve Fund in absolute volume based on 10 % of gross domestic product volume predicted for the corresponding financial year; the rate of gross domestic product volume is stated in federal law about federal budget for the next financial year and planning period.

Subject to this rate in Law on federal budget for the period 2008-2010 regulatory value of Reserve Fund is approved for 2008 in the sum of 3 500,0 billion Roubles, for 2009 and 2010 - 3 969,0 billion Roubles and 4 480,0 billion Roubles correspondingly.

As it was mentioned in the explanatory note to indices of the project of Federal Budget Law for the period 2008-2010, Reserve Fund serves compensation of omitted profits of federal budget within 3 years at a decrease of world prices for energy resources. The compensation period is defined by a three-year-long period of budget planning and it is also defined by time period necessary for adaptation of budget policy to changing external economic conditions.

Reserve Fund is formed with the help of:

12 Федеральный закон от 24 июля 2007 г. № 198-ФЗ «О федеральном бюджете на 2008 год и на плановый период 2009 и 2010 годов» // Code of Laws of the RF. - 2007. - № 31. - Article 3995.

– oil and gas profits of federal budget in the volume that is higher than the approved for the corresponding financial year rate of oil and gas transfer providing that saved amount of Reserve Fund is no more than its regulatory value; if the saved amount of Reserve Fund means reaches (exceeds) its regulatory value, then oil and gas profits of federal budget in the volume exceeding oil and gas transfer are directed to National Welfare Fund according to item 3 Article 96.10 of Budgetary Code of the RF.

– profits gained from means management of Reserve Fund.

Reserve Fund means are used in case of shortage of oil and gas profits in order to generate oil and gas transfer. Meanwhile Federal Law on federal budget for the next financial year and planning period must approve of the usage limiting volume of Reserve Fund means in order to provide oil and gas transfer.

Besides, it is assumed to use Reserve Fund means for the purpose of advanced discharge of state external debt of the Russian Federation. The usage of Reserve Fund means for the mentioned purposes is stipulated by Federal Law on federal budget for the next financial year and planning period. In this connection it should be noted that in item 1 part 2 Article 21 of Federal Budget Law for the period 2008-2010 it is provided that the Government of the RF in 2008 is entitled to make decisions concerning direction of Reserve Fund means for advanced discharge of state external debt of the Russian Federation.

National Welfare Fund represents a part of federal budget means that are subject to separate accounting and management in order to provide co-financing of voluntary pension savings of the RF citizens as well as to provide balance (deficiency payment) of Pension Fund budget of the Russian Federation.

Federal Law on federal budget for the next financial year and planning period determines the volume of federal budget means that are directed to co-financing of voluntary pension savings and deficiency payment Pension Fund budget of the Russian Federation.

Considering this standard, Federal Law № 269-ФЗ of 23rd November 2007[13] introduced the amendment to Federal Budget Law for the period 2008-2010; according to this amendment the Government of the RF in 2008 directs additional profits gained from the process of federal budget implementation in the volume of 138,0 billion Roubles in order to provide balance (deficiency payment) of Pension Fund budget of the RF related to growth of base section of work pension; in case of

13 Федеральный закон от 23 ноября 2007 г. № 269-ФЗ «О внесении изменений в Федеральный закон «О федеральном бюджете на 2008 год и на плановый период 2009 и 2010 годов» // Code of Laws of the RF. - 2007. - № 48 (Part II). - Article 5813.

their lack the Government is entitled to use National Welfare Fund means for these purposes in the volume not exceeding the above-mentioned sum of money.

Accordingly, the use of National Welfare Fund means as the source of deficiency payment of pension system is planned as far as replenishment of this fund takes place.

National Welfare Fund is formed with the help of:

– oil and gas profits of federal budget in the volume exceeding the approved for the next financial year volume of oil and gas transfer in case the saved amount of Reserve Fund means reaches (exceeds) its regulatory value;

– profits gained from management of National Welfare Fund means.

Management of Reserve Fund and National Welfare Fund respectively is executed by Ministry of Finance of the Russian Federation Some separate authorities in management of Reserve Fund can be fulfilled by Central Bank of Russia; some authorities in management National Welfare Fund means can be fulfilled by Central Bank of the Russian Federation and some special-purpose institutions in accordance with agreements made with Ministry of Finance of the Russian Federation. The purposes of management of Reserve Fund and National Welfare Fund are provision of means preservation of the above-mentioned funds and provision of stable level of profits gained from their allocation in the long-term perspective.

The means of Reserve Fund and National Welfare Fund can be allocated into foreign currency, debt instruments of foreign states, central banks and debt instruments of international finance organizations along with a number of other financial assets.

In order to consolidate the transparency (exposure) principle stated in Article 36 of Budgetary Code of the RF Ministry of Finance is in charge of monthly publishing of data concerning the receipt and usage of oil and gas funds of federal budget every accounting month; as well as the volume of assets of Reserve Fund and National Welfare Fund at the beginning of every accounting month, the receipt of means into the above-mentioned funds, their allocation and usage within the accounting month.

As it was mentioned, the practice of establishment of stabilization funds and future generations funds is known in a lot of states all over the world. A good example of the country where stabilization fund functions successfully and stably is Norway.

Norwegian State Petroleum Fund was established in 1990 in order to smooth a short-term fluctuation of currency intakes gained from oil and gas export, in order to finance growing expenses for paying-out old-age pensions and disability pensions

along with health care costs. Establishment of this fund makes Norwegian economy more stable and increases the possibility to manoeuvre in the sphere of social policy. Therefore the Fund is the savings and stabilization one at the same time; it must provide stability of the budget sphere in the long-term period[14].

State Petroleum Fund is a component part of state finances in Norway. Fund assets are replenished at the expense of two sources: funds gained from oil export and profits from fund capital investment. The condition of means receipt in the Fund is attainment of the state budget surplus. For achieving this one has to define the level of export prices for oil and possible dimension of budget deficit excluding profits gained in petroleum sector. Along with that in Norway there is no formula according to which the size of contribution for the Fund can be calculated, and the sum of every annual contribution is approved separately within general budget process.

The procedure of Fund means usage is similar to the mechanism of means accruing. According to legislation the Government is entitled to request permission from the Parliament to use the means both for short-term needs (compensation of budget profits decrease) and for long-term levelling of the amount of budget profits as far as the volume of oil output decreases and social costs increase. The Government (Ministry of Finance) defines the main directions of Fund means investment, as well as they define the constitution of basic portfolio concerning its profitability – the assessment of efficiency of Fund means usage takes place. Current management of Fund assets is executed by Central Bank. At present Fund assets consist of foreign financial assets (state stock and securities of companies which have no relation to oil sector), which aims to slowdown the increase of current national rate of exchange.

The experience of ten-year-old Fund's function has appeared to be successful. Fund allowed keeping balance of budget, smooth fluctuation of aggregate internal demand, reducing inflation pressure and restraining rise in prices for national currency[15].

Therefore we hope that the implementation of the mechanism of Reserve Fund and National Welfare Fund in the Russian Federation in fact indicates transition from short-term smoothening of fluctuation effects of external economic situation to long-term stabilization of conditions for Russian economy development. The condition of such stability will be a successive conversion of some part of natural assets to financial form, which serves as a guarantee of their further usage in order to substitute failing (omitted) oil and gas profits.

14 The government Petroleum fund and its influence on the Norwegian Economy. Jarle Bergo.2003, www.norges-bank-no.

15 The Norwegian Government Petroleum Fund. A National Strategy for Investing Resource wealth. Norges Bank Investment Management Knut N. Kjaer, http://www.bsi.ch/gammaf/conference/kjaer.pdf.

Streszczenie

W opracowaniu autorka koncentruje się na procesach tworzenia, funkcjonowania i reformy budżetowych funduszy specjalnych ustanowionych w ustawodawstwie Rosji i Norwegii. Główny wniosek wynikający z publikacji jest taki, że rządy centralne tych państw, na których działalność wpływa międzynarodowa sytuacja gospodarcza, generują znaczne nadwyżki finansowe w okresach wysokich cen surowców. Środki te służą do tworzenia funduszy stabilizacyjnych lub funduszy pokoleniowych, których celem jest stabilizacja wydatków państwowych w okresach spowolnienia i recesji gospodarczej.

Jolanta Szołno-Koguc

PROSPECTS FOR THE DEVELOPMENT OF FUND ECONOMY IN POLAND

Introduction

In the context of actions undertaken especially in recent years in order to improve public finance the dilemma returns, which of the forms of accumulation and expenditure public money – budgetary or fund-based – offers greater possibilities for rationalization (efficiency, effectiveness, and transparency) of public finance: whether and to what extent appropriated funds should complement the state budget properly or, conversely, should be the foundation of managing public money. The current fund economy in Poland covers nearly one quarter of public revenues (i.e. over 10% of GDP) and over 30% of public expenditures (i.e. 15-16% of GDP).[1] Just to compare to the state budget accumulates circa 50% of all public revenues while expending less than 30% of total public expenditure. When an exception to the rule (of classical principles of budgetary universality and material unity) has practically become the fundamental institution of spending public money, it comes as no surprise that both theorists and practitioners postulate that the practice of fund-creation should be, if not entirely eliminated, at least radically curtailed. On the other hand, one can observe that there is clear social and political pressure towards creating new public appropriated funds.

The purpose of the present paper is to outline, in the context of the most important merits of the public appropriated fund and taking its imperfections and defects into account, the conditions for the rational use of this institution for the accumulation and allocation of public money.

1 S. Owsiak, Finanse publiczne. Teoria i praktyka, Warszawa 2005, Tables 12.1-12.4.

The Essence of Public Appropriated Fund

What is the public appropriated fund? In the doctrine of public finance three fundamental characteristics of public appropriated funds are most frequently indicated:[2]

a) they are separated from general budget resources in different ways and constitute a whole,

b) their income is received from strictly defined sources and basically connected with their purposes,

c) funds are expended on specific tasks/expenditures.

These attributes are also emphasized by the legal definition of public appropriated funds (in the light of the Public Finance Act), which defines the appropriated fund as a fund established by statute, whose revenues come from public money, its expenditures being allocated for the fulfillment of separate specific tasks.[3] Two statements could be concluded from the legal definition of the appropriated fund. Firstly, a statute exclusively constitutes the legal source of an appropriated fund, therefore it cannot therefore be established by lower-level regulations, including executive orders or local laws. The scope of the concept of appropriated fund, adopted in the Public Finance Act, also excludes funds created by international agreements. Secondly, the Public Finance Act itself does not constitute sufficient legal grounds for establishing an appropriated fund. Individual funds operate on the basis of separate statutes. The Public Finance Act only specifies general conditions, the fulfillment of which results, under the laws, in recognition of a given form of financing public tasks as an appropriated fund.

The provisions of the Public Finance Act of 2005 contain a clear regulation which excludes the following appropriated funds from the catalogue:

1) statutory bank accounts, which have not been defined by the constituting statute as an appropriated fund; and

2) funds whose only source of revenue, excluding bank account interest and donations, is a budget grant.[4]

This restriction was undoubtedly introduced to order the subjective scope of the legal institution under consideration formally but at the same time it hindered comprehensive interpretation of the fund-creation phenomenon. As far as the procedural law aspect is concerned, a given institution which accumulates and

2 See: J. Harasimowicz, System funduszów w Polsce [in:] Wybrane źródła i literatura do obowiązującego prawa finansowego, Toruń 1949; Z. Pirożyński, H. Sochacka-Krysiak, Budżet państwa, Warszawa 1969, p. 31.

3 Art. 29, (1) of the Act of 30 June 2005 (Official Journal No. 249, item. 2104).

4 Act of 30 June 2005., Art.29 (3).

spends public money may be considered as an appropriated fund if it meets the prerequisites specified in the Public Finance Act and is called so by the constituting statute. The economic aspect of the analysis, however, emphasizes the purpose-specific connection of the accumulated financial resources with expenditures, which is implemented using different forms of financial, organizational and/or legal separation from the general budget resources (for example, the National Health Fund is, in the light of regulations, a state organizational entity with legal personality although in the economic sense it has the features characteristic of fund economy, National Road Fund [KFD] and many other funds deposited in the BGK [National Economy Bank] and Bank Guarantee Fund [Bankowy Fundusz Gwarancyjny]).

Motives for the Creation of Appropriated Funds

The motives for creating appropriated funds can vary considerably. This is evidenced by a great number of appropriated funds that were established in various periods for the implementation of various objectives and which were frequently transformed due to the circumstances that justified the setting up this special form of public money management. Public appropriated funds are created in different countries, as a part of different legal systems (their extensive development being observable in the countries with Continental law tradition, whereas they are a marginal occurrence in the countries with the legal systems of Anglo-Saxon origin). Furthermore, one should note that the actual reasons for the setting up and functioning of a fund are not always known.[5] An example in the interwar period can be the fund for combating smuggling, which the then Vice Minister for Treasury himself described as 'an unspecified fund'.[6] Especially in the People's Republic of Poland the establishment of appropriated funds was not accompanied by official government documents that would justify the motives for the its setting up. Nor did the practice of the functioning of a particular fund always allow to comprehend the motives for and purposes of its existence fully due to the lack of available and properly prepared reports on its operations.

In general, the motives for establishing appropriated funds can be divided into three groups of justifications which usually occur together in practice:

economic reasons,

social and political reasons,

5 The views of W. Łączkowski, J. Kaleta, N. Gajl and E. Denek referred to by J. Stankiewicz, Sanacja finansów publicznych a problem funduszy celowych państwa, [in:] Sanacja finansów publicznych w Polsce. Aspekty prawne i ekonomiczne, Uniwersytet Szczeciński, Szczecin 2005, p.364.

6 I. Weinfeld, Skarbowość polska, Warszawa 1939, p. 149 [after:] J. Małecki, Założenia funduszów celowych rad narodowych, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" No. 1/1974.

technical and organizational reasons.[7]

The most often indicated **economic reason** is the so-called economic calculation on the scale of the state. This comprises both the correct reflection of management processes in a specified section of public tasks by comparing costs and effects and, on the other hand, the exertion of a motivating impact on reducing operating costs or maximizing revenue, on enhancement of the quality of operation and its efficiency. The aforementioned incentive condition for the creation of appropriated funds is justified by the fact that the dimensions of activities financed by a fund depend in principle on the amount of money the fund has. This condition plays a role if the managing body can affect the increase in revenues or, more often, minimization of costs, thereby indirectly broadening the possibilities of operation with given revenues. The factors that neutralize the aforementioned motives can be all kinds of administrative restrictions when the scale of operation is determined not so much by the money at the fund's disposal but by whether a particular task is within all manner of limits.

Another economic reason for creating appropriated funds is a tendency to increase the burden imposed on economic entities or population with the costs of public services, for example by introducing a new tax, a purpose-specific payment or -contribution that goes towards a corresponding fund.

It is far more difficult to establish the **socio-political motives** for creating appropriated funds even if they are undeniably prevalent in the current practice.[8] These are highly varied and depend on the current assumptions of the parliamentary and government activities, which after all do not have a permanent character. Appropriated funds are usually set up in order to solve some important tasks, e.g. liquidation of surplus on the labor market, health protection, road construction, etc. The motivational aspect is frequently emphasized here: these institutions combine the funds of a number of entities with the purpose of implementing selected objectives of extraordinary significance. On the other hand, one should realize that very often the underlying intention may be to emphasize certain expenditures only for tactical and political reasons (the use of the institution of fund in a political game), and to satisfy immediate demands voiced by certain circles, professions or territorial problems.

Most often, however, literature names technical-organizational reasons as the motives for the creation of appropriated funds. Appropriated funds are set up first of

7 J. Małecki, Założenia funduszów celowych rad narodowych, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" No. 1/1974.

8 This view is expressed by C. Kosikowski (Finanse publiczne. Komentarz, Warszawa 2006, p. 117), referring for support to J. Brożek, Rozwój gospodarki funduszowej w Polsce Ludowej, "Studia Finansowe" No. 23/1977; S. Owsiak, Parabudżety w systemie planowania finansowego, "Finanse" No. 5/1978; J. Małecki, Fundusze pozabudżetowe rad narodowych, "Problemy Rad Narodowych" No. 40/1978.

all because of the imperfections of budgetary economy, its excessive subordination to the rigors of the annuality principle and lack of sufficient flexibility, which hinders rational planning of public revenues and expenditures, and first of all the implementation of them under the conditions of the continually changing reality. Appropriated funds are regarded as some kind of panacea for the aforementioned inconveniences.

Appropriated funds may sometimes be used in tax technology as a tool for increasing tax burdens.[9] For example, when the introduction of a new tax is likely to provoke resistance, it may turn out easier to introduce a new special quasi-tax encumbrance with the purpose of allocating revenues from it for some specific, socially important objectives.[10] After some time the fund may be closed, the encumbrance ceases to be purpose-specific but the receipts – now pure taxes – remain.

Appropriated funds are also regarded as a very good tool for managing specific important areas or segments of public activity (social security, environmental protection).[11]

To sum it up, there are the following arguments for departing from rigid budgetary principles and for setting up appropriated funds:[12]

- **first,** the importance of public tasks being implemented, which need not, because of their privileged position, compete for funds with other tasks included in the budget (whether state or local government),
- **second**, departure from the principle of annuality guarantees financing continuity,
- **third**, expenditures of an appropriated fund depend on the money at its disposal that comprise current revenues (including budget grants) and the money remaining from previous periods; realization of greater revenues/ net income is the grounds for incurring greater expenditures than planned whereas the amount of budget expenditure and outgoings is a non-extendible limit;
- **fourth,** the functioning of appropriated funds is not directly subject to budgetary control because their revenues and expenditures are not directly a part of the budget although the financial plans of some funds are included into the state budget act.

9 J. Jaśkiewiczowa, Z. Jaśkiewicz, Zarys nauki finansów publicznych, Warszawa 1968, p. 51.
10 J. Małecki, Założenia funduszów celowych rad narodowych, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" No. 1/1974.
11 I. Weinfeld, op. cit., p. 149.
12 See B. Woźniak, Fundusze celowe, [in:] System finansowy w Polsce, (eds.) B. Pietrzak, Z. Polański, B. Woźniak, Warszawa 2003, p. 581.

It should be noted that the foregoing reasons and arguments can certainly be strengthened or weakened under specific economic, social, and political conditions. What is conducive to the creation of funds is the difficult economic situation of the country, which usually results in, if not a deep crisis, then at least destabilization of the state finance. A decline in public revenues on the one hand, (especially derived from taxes), and on the other the stronger and stronger social (and political) pressure for increasing budget expenditures, is often an incentive to secure the funding of specific tasks precisely by creating a separate fund. The different level of economic development territorially-wise also contributes to setting up appropriated funds. Similarly, of significant importance are political conditions: the parliamentary opposition usually opposes the "relaxation" of the rules of budgetary economy while the ruling parties are more inclined towards developing the fund economy, of which numerous examples can be found in Polish practice in recent years. Moreover, the more rigid the formal rules in the systemic solutions concerning the budget and budgetary economy are, the greater is the tendency to create para-budgetary institutions.

Conditions for the Efficient Functioning of Public Appropriated Funds

While considering the principles of rational management of public moneys, one can show at least several criteria determining the possibility of using appropriated funds in the system of public finance:

1) extraordinary character of tasks financed from the fund,
2) comparative financial autonomy,
3) obvious causal relationship between revenues and expenditures,
4) allocation of given revenues for only one, strictly specified purpose,
5) uniform character of solutions used in relations to the budget (either only budgetary or only extra-budgetary),
6) appropriate manner of management, including control and planning, which ensures the tightness and consolidation of the whole system of public finance.

Undeniably, the most important requirement follows from the particulars of objectives and tasks, for the implementation of which a given para-budgetary institution has been or will be established. The tasks implemented by the state as

well as by other public law entities (including local government) can be divided into three basic groups:13

1) strictly public tasks,

2) social and welfare tasks,

3) economic tasks.

Strictly public tasks derive from classic functions of the state, which ensures internal and external security of citizens, the need to represent a given state in diplomatic relations, and taking into consideration the necessity of maintaining the bodies of authority and public administration: the Sejm (Parliament), government and its subordinate ministries, central and local administration offices, justice etc. Public tasks constitute, as it was, the essence of the state; without them the institution of the state simply would not exist. Therefore, if the state budget is the state's financial plan, it should, undoubtedly, comprise all the revenues and expenditures connected with the implementation of exclusively public tasks in the first place; it should show how much it costs to maintain the state as an institution. It is difficult to discriminate here between the importance of individual areas covered by the category of public tasks. This differentiation may, admittedly, occur in the short run (especially when the country's security is at issue) but will not take place in the long-term perspective (assuming of course a comparative stability and political autonomy of a particular state). The implementation of individual public tasks requires an equal and balanced treatment. In the long term, therefore, there will be basically no sufficient reasons that would justify the creation of special-purpose, especially extra-budgetary, funds.

As far as economic and social and welfare tasks are concerned, theoretically or rather hypothetically, the state does not have to implement them directly. However, taking into consideration historical experience as well as the total achievements of social and economic thought, it is difficult to imagine a contemporary state that would be indifferent to the problems of healthcare, welfare, education or science. Contrary to the views of orthodox supporters of free market, the state should take advantage of its possibilities to intervene in social and economic affairs by implementing the allocative and stabilizing function of public finance. However, the scale of implementation of both social and economic tasks may be and is different depending on the adopted model of state in a given case, and on the more or less

13 See S. Owsiak, Finanse publiczne. Teoria i praktyka, Warszawa 2005, p. 690 and B. Woźniak, Zasady funkcjonowania i zakres publicznego systemu finansowego, [in:] B.Pietrzak, Z.Polański, B.Woźniak, System finansowy w Polsce, Warszawa 2003, p. 426 et seq. See J. E. Stiglitz, Ekonomia sektora publicznego [Polish translation of 'Economics and the Public Sector'], Warszawa 2004.

consistent reflection of the model in the current policies and actions undertaken by individual governments.[14]

In the area of social welfare tasks the state should ensure a certain standard of guaranteed benefits and services. Nevertheless, the question arises 'what standard is meant, what should be the point of reference: needs that are essentially unlimited, solutions adopted by other countries at the similar level and the conditions of development, or financial capacity – what standard a given state can afford taking into account the degree of affluence or rather impoverishment of its society (the main source of financing all the state's tasks are fiscal burdens: it is on the affluence of taxpayers – present and future – that depends what money the state has at its disposal). Even a greater problem relates to economic tasks. Until the present day neither theory nor practice has offered a clear-cut solution to the fundamental dilemma of financial policy: to what extent, under what circumstances and which instruments exhibit greater efficacy – those of fiscal or monetary policy.

Without creating a clear conception of the state, especially from the standpoint of its social and economic role, it is difficult to answer the foregoing emerging questions. Without doing this, one cannot determine whether and to what extent the state should confine itself to the budgetary form of financing economic and social welfare tasks. The form of funds certainly makes it easier and quicker for society to implement the 'golden rule' of public finance: a direct relation between benefits that an individual citizen and the whole society obtain, and current fiscal burdens (as well as future ones if state expenditures are financed by the increased public debt).[15] It is not enough to make superficial declarations about a particular care in expending public funds. The grounds that justify the possible admissibility of diverse forms of managing public money must stem from the adopted and consistently implemented social and economic model of the country. The clear tasks and objectives, which are emphasized in it, can due to their strategic priority constitute a justification for financing them from appropriated funds.

An appropriated fund should be characterized by comparative financial autonomy, which denotes being based on the fund's own sufficient income-earning sources that come from public revenues i.e. obligatory contributions, charges or payments, directly connected with the tasks for the implementation of which the fund has been established. Budget grants may complement the fund's own financial resources but only in extraordinary circumstances and temporarily, i.e. until the fund regains its financial stability. Should the need arise, budget transfers will replace the necessity to acquire money from returnable sources in the fund economy. However,

14 On the modes of social policy see S. Golinowska, Polityka społeczna: koncepcje, instytucje, koszty, Warszawa 2000, also R.M. Titmuss, Social Policy: An Introduction, London 1974 and G. Esping-Andersen, Three Worlds of Welfare Capitalism, Cambridge 1999.

15 S. Owsiak, op. cit., p.717.

the higher the share of the budget in financing the tasks of an appropriated fund, the more dubious is the justification for implementing them off-budget.

Comparative financial autonomy does need and does not mean the full possibility of using credits and loans: one should think that it is not a recommended solution with the fund-based forms because it carries a well-grounded risk of difficulty in controlling and systematically monitoring the debt of the public finance sector. The issue is rather the use of forms of returnable funding within the whole sector: the management of the current liquidity of the sector's institutions should be facilitated by a complete balance consolidation, assuming that the increase in long-term obligations is to be conditioned by the extraordinary character of development tasks being implemented.

An important role from the standpoint of efficient functioning of appropriated funds plays the fact that there is a direct cause and effect relationship between the income (or more broadly, gross revenues) accumulated within the fund and the fund's expenditures. This has a significant motivational virtue, which produces an actual advantage of appropriated funds over the budget and its general and universal character. Usually, when paying monthly advance income tax payments or clearing VAT accounts, average taxpayers see no connection between the tax burden they bear and the improvement, for example, in the condition of the road they drive to work every day, a sense of security etc. This relation should, however, be noticeable in the case of purpose-specific tax burdens incurred by fund institutions. For example, increased health insurance contributions should result in the improvement in financing health protection. It should also be noted that this improvement in financing does not need to mean full satisfaction of those insured with the performance of public services in this area: this problem does not depend on finance management only but also on the adopted standards of quality and a redistribution model (e.g. on the content of the so-called basket of medical services financed from public money).

The money of appropriated funds, since they come from public levies, which are paid, instead into the state's general budget, into the account of a separate fund, should not be expended on other purposes than those specified in the legal act concerning the establishment of an appropriated fund. Considerations of efficiency and efficacy compel a given appropriated fund to implement one specific objective. A great number of objectives obscure the picture of a fund's activities. In practice, it is difficult to determine their hierarchy of importance, still more difficult – to show accurate measures that enable objective assessment to what extent the functioning fund contributes to attaining these goals (or at least to bringing closer their implementation in a measurable way). The appropriated fund then loses its characteristic properties and becomes a budgetary institution: apart from the general

budget, special budgets emerge (it should be, however, kept in mind that this type of solution functions successfully in the Japanese system, for example).

In general, the fund economy should be a distinct exception to budget rules. Its scope, if we agree on its admissible co-existence with the budget, should be definitely limited. It is difficult to suggest any specific, numerical values in this respect but the proportions both on the side of income and expenditure operations of the public finance sector should certainly show the undeniable dominance of the state budget and possibly of local government budgets. At this point it is important to adopt uniform solutions for possible fund institutions within a given system of public finance. Although theory and current practice offer a broad spectrum in this area, the solution should rather be confined to one type of connections with the state budget in order to achieve a greater transparency of the system. Therefore, one should consider the alternative existence of either only intra-budgetary appropriated funds treated as special accounts (for instance in the form of separate programs as part of the task budget, which was employed e.g. in the French system) or only extra-budgetary ones, assuming that all budgetary institutions fulfill the principle of gross budgeting, having no purpose-specific connections with expenditures.

A rational appropriated fund is a fund created according to a suitable legal-organizational formula that enables rational management of its money. This rationality is not ensured by the functioning of appropriated funds within structures that have legal personality as it is difficult to find sufficient arguments which justify granting a separate legal status to any appropriated fund; on the contrary, this increases the cost of handling, brings about the risk of the fund becoming alienated, running out of the control of public finance that makes it difficult if not entirely impossible to conduct a single financial policy on the state's scale together with any concrete attribution of responsibility for its effects.

In order to manage an appropriated fund efficiently, diverse, detailed organizational solutions can be adopted: a separate section for a specific appropriated fund in a particular ministry as a budgetary entity or a specially established separate office (bureau) as a budgetary entity subordinated to this ministry, with the statutory task of managing or rather administering the process of accumulating and spending the money of the appropriated fund. In either case the organizational question is of secondary character: what is essential is that we are dealing with the financial allocation of a specified amount of money from the state budget to implement a particular task or objective. The character of this task or objective, and consequently, the necessary scale of financial operations, will determine the model of their organization and management.

Efficient management requires a uniform system of financial planning and a corresponding appropriate reporting system so that a comprehensive assessment

of plans and their actual accomplishment will be possible. Reports on the activities of appropriated funds should make it possible to assess a given institution time-wise and to compare it with other elements of the system of public finance, and in this context, assess the efficiency and efficacy of the task implementation. Absolutely, all fund-based institutions should find an appropriate position in the consolidated balance of the public finance sector while their character should be exactly defined: budgetary or extra-budgetary funds. Another condition is also the adoption and consistent application of the accounting record system identical for all institutions, which results in the required coherence in consolidating public finance.

Streszczenie

Obecna sytuacja w gospodarce funduszowej w Polsce wymaga głęboko idących zmian, szczególnie o systemowym charakterze. Utrzymywanie i rozwój lub, na odwrót, ograniczenia lub nawet eliminacja właściwych funduszy i podobnych form organizacyjnych, które funkcjonują na poza budżetem zależy od konsekwentnie stosowanego modelu finansów publicznych w danym państwie. Władze publiczne powinny jednoznacznie opowiedzieć się za preferowaną filozofią zarządzania środkami publicznymi. **Obecna doktryna teoretyczna nie daje jednoznacznej odpowiedzi. Co prawda odpowiednie fundusze dzielą posiadane środki i naruszają tradycyjnie rozumiane budżetowe zasady jedności i powszechności, ale uwzględniając obecną skalę i wagę finansów publicznych, mogą być one alternatywną dla niewystarczająco elastycznej gospodarki budżetowej.** Należy zdać sobie sprawę, że bez świadomych decyzji w tym kierunku, właściwe fundusze mogą być – co zostało pokazane w tym referacie – i często są „ucieczką" od pełnej przejrzystości, która determinuje potrzebę kontroli akumulacji i wydatkowania środków publicznych. Bardziej niż przyczynianie się do poprawy racjonalności, fundusze będą w praktyce źródłem marnotrastwa, w ostateczności powodując nieefektywność i nieskuteczność całego systemu.

Teresa Lubińska, Alberto Lozano-Platonoff,
Magdalena Godek, Tomasz Strąk, Marcin Będzieszak

PERFORMANCE BUDGETING IN POLAND: ACHIEVEMENTS AND FUTURE PERSPECTIVES

Introduction

This article presents Polish performance budget methodology and first results of its implementation. The methodology is based on: the analysis of global achievements and failures in performance budgeting, Polish local governments' performance budget experience, private sector's experience in performance management, audit and accounting experience, experience in managing EU funds and lessons from the pilot projects. The results of the initial implementation stage are: defining tasks and subtasks specifying objectives and measures defined, and linking them with public expenditure, earmarked funds and expenditure of government agencies. At the moment Polish Ministry of Finance continues performance budgeting implementation on a basis of methodology presented in this article.

In November 2007 the World Bank prepared an assessment report on performance budgeting in Poland. In the comments concluding the document it was stated that "**Poland has made considerable and praiseworthy progress in the development of enhanced performance budgeting which focuses on outcome and responsibility**". It was emphasized that when developing a concept for Poland, the authors derived from the practice and experience of several European countries and OECD member states. This approach was considered practical, and appropriate for Poland's situation. D. Webber argues that the 2008 performance budget is constructed correctly in most of the key areas, including at the same time international best practices within state budget management.

Definition of a performance budget

In the authors' opinion the essence of the performance budget consists in introducing the management of public funds by objectives that are properly specified and arranged in order to achieve specific results measured using a defined system of measures[1].

In the performance budget it is possible to decide which tasks are most relevant to the implementation of specific objectives, and its measures show to what extent they have been achieved.

Table 1 presents the major differences between the traditional budget and the performance budget in Poland.

Table 1. Basic characteristics of the traditional and performance budgets

Traditional Budget	Performance Budget
Spending Tool	**Governance Tool**
Difficult definition of the relationship between the state expenditure and its objectives and tasks – traditional classification	Makes it possible to establish a relationship between expenditure and objectives and tasks thus allowing functional arrangement of expenditure by tasks – new classification
No relationship between expenditure and the effectiveness and efficiency categories	Management of expenditure towards better effectiveness and efficiency through an evaluation system
No long-term prediction of expenditure earmarked for individual tasks	Long-term approach – a three-year projection of expenditure for controllers by tasks
No integration of expenditure	Global approach to public sector expenditure – consolidation by tasks
Difficult ranking of expenditure by relevance	Hierarchy of expenditure and instruments according to their relevance to the government's tasks
Ministry-based approach	Encourages cooperation between ministries and other public sector institutions
No clear information about departmental spending policy in ministries – low transparency	Clear information about expenditure classified by tasks makes it possible to communicate with the public
Parliamentary discussion focusing on single expenditure items	Makes it possible to conduct a parliamentary technical discussion on the government's priority tasks

Source: own study

1 T. Lubińska, A. Lozano Platonoff, T. Strąk, Budżet zadaniowy – racjonalność–przejrzystość–skuteczność, „Ekonomista", No 5, 2006. Por. A. Schick, Budgeting For Results: Recent Developments In Five Industrialized Countries, "Public Administration Review", January/February, 1990, P. Joyce, Future of federal budgeting: What will the government do? How will it make its choices?, "Journal of Public Budgeting, Accounting & Financial Management", Spring 1997, K. Willoughby, Performance Measurement and Budget Balancing: State Government Perspective, "Public Budgeting & Finance", Summer 2004, T. Carlin, Output Based Budgeting & the Management of Performance, "Macquarie Graduate School Of Management Working Papers In Management", WP 2004-7, D. Kong, Performance-Based Budgeting: The U.S. Experience, "Public Organization Review: A Global Journal" 2005.

Fig. 2. Performance budget – budget and performance spheres

Traditional state budget

Budget sphere

Current budgetary classification

Part	Section	Chapter	Expenditure
XX	**Name of part**		**1 258 320**
	YYY	Name of section	468 767
	YYYZZ	Name of chapter	1 100
XX	**Name of part**		**3 908 336**
	YYY	Name of section	2 648 868
	YYYZZ	Name of chapter	136 610

Year plan of state budget expenditure

Performance budget

Budget sphere **Performance sphere**

New budgetary classification

	Expenditure					Value			
	2008	2009	2010	Objective	Indicator	Base	2008	2009	2010
Task 1									
Subtask 1.1									
Subtask 1.2									
Subtask 1.3									
Task 2									
Subtask 2.1									
Subtask 2.2									
Subtask 2.3									

Multiyear rojection of expenditure **Multiyear projection of results**

Source: own study

Performance budgeting is a broader concept than traditional budgeting, as it covers the so-called performance part which supports long-term management by objectives.

Modern performance-oriented management of public expenditure is a challenge for Central and Eastern European Countries. The expenditure becomes an especially strong instrument of socio-economic policy in the integrated European Union. Common currency narrows the range of instruments of the monetary and fiscal policy that includes interest rates, exchange rates, taxes, expenditure, budget deficit and public debt. It is public expenditure that starts to play the major role; taxes are being harmonized, whereas the budget deficit and public debt are subject to limitations imposed by the Maastricht Treaty[2].

The aim of introducing performance budgeting in Poland is to facilitate e.g. the maintenance of a low deficit and implementation of the Lisbon Strategy. It is therefore included in the Convergence Programme and the National Reform Programme Implementation Document. The Convergence Programme developed in the years 2005/2006 stated in a chapter on public finance that "The government has begun to work on the proposal to implement a performance budget. This new structure of the budget should become a tool supporting efficient management of public expenditure to ensure more transparency. Gradual performance-oriented approach to budget expenditure (or the entire public expenditure) should involve development of a long-term budget planning system in Poland. This long-term approach will enable government units to develop programmes oriented at accomplishment of certain tasks and to define the target level of expenditure in those programmes." The same regulations have been introduced to the Convergence Programme 2008.

The reform implementing the performance budget as a modern system of management of public expenditure is a long-term project. The implementation itself is part-financed by the European Union. The following amounts of expenditure are planned for the years 2007-2013 in connection with the process of implementing performance budgeting in the Polish public sector:

– EUR 64.3 million within the "Human Capital" Operational Programme Priority V "Good Governance" and within the HC OP technical assistance;

– EUR 10 million within the "Innovative Economy" Operational Programme Priority VII "Building and Development of an Information Society".

2 T. Lubińska, Wyzwania dla polityki gospodarczej. „Polityka Gospodarcza", No. 11, 2005, SGH, Warsaw.

Methodological foundations of the performance budgeting reform

Developing the methodology to construct a performance budget and defining the principles which the new budgeting system should meet requires a multidimensional analysis of experience in long-term budget planning and programming, and management by objectives in both public and private sector. Public finance systems vary with the country thus making it impossible to simply transfer foreign solutions to Poland without modifying them.

The methodological foundations of the performance budgeting reform were published for the first time in 2006[3]. The new system was developed after a careful analysis of[4]:

1) Global successes and failures in performance budgeting – literature study, visits to ministries of finance in selected countries, WB's and IMF's reports[5];
2) Experience in performance budgeting in Polish local governments[6] and tax administration[7];
3) Experience in management by objectives in the private sector[8];

3 T. Lubińska, A.Lozano,… op.cit.

4 T. Lubińska, T. Strąk, A. Lozano Platonoff, M. Będzieszak, Metodologiczne i wdrożeniowe aspekty zastosowania budżetu zadaniowego, „Ekonomista", No. 5, 2007.

5 R. Kaplan, The Balanced Scorecard for Public-Sector Organizations, "Harvard Business Review",1999, R. Kaplan, Overcoming the Barriers to Balanced Scorecard Use in the Public Sector, "Harvard Business Review", 2000, P. Knaap van der, Performance Management and Policy Evaluation in the Netherlands – Toward an Integrated Approach, "Evaluation", vol. 6(3) 2000, R. Allen, D. Tommasi, (eds). Managing Public Expenditure. A Reference Book for Transition Countries. OECD, 2001, I. Joumard, P. Kongsrud, Y.S. Nam, R. Price, Enhancing the Effectiveness of Public Spending: Experience in OECD Countries. OECD Economics Department Working Papers, No. 380, OECD, 2004, D. Webber, Managing the Public's Money: From Outputs to Outcomes – and Beyond. OECD Journal of Budgeting vol. 4 no. 2, Paris, 2004, M. Bouvier, M. Esclassan, J-P Lassale, Finance Publiques, LGDJ, 2006, J. Diamond, Budget System Reform in Emerging Economies. The Challenges and the Reform Agenda. International Monetary Fund, Washington DC, 2006, A. Lambert, Une première expérience riche d'enseignement'. Revue Française de Finances Publiques, No. 94, 2004, M. Robinson, Making Performance Budgeting Work in M. Robinson, M. (ed.). Performance Budgeting. Linking Funding and Results. International Monetary Fund-Palgrave-Macmillian 2007, Models of Public Budgeting and Accounting Reform, OECD Journal on Budgeting vol.2, supplement 1, OECD 2002.

6 Pakonski, K. (ed.). Budżet – zintegrowane zarządzanie finansami. Municipium, Warsaw 2000, M. Kosek-Wojnar, K. Surówka, Finanse samorządu terytorialnego. Wydawnictwo Akademii Ekonomicznej w Krakowie, Cracow 2004, Owsiak, S. (ed.). Budżet władz lokalnych, Polskie Wydawnictwo Ekonomiczne, Warsaw 2002, J. Bober, A. Władyka, M. Zawicki, (eds.). Katalog narzędzi rozwoju instytucjonalnego Małopolska Szkoła Administracji Publicznej, Cracow 2004, Lubińska, T., Strategia rozwoju samorządów a program gospodarczy i budżet samorządów, Zeszyt Naukowy US No. 385, Prace Katedry Finansow No. 12, Szczecin 2004, p. 117-132, Misiag, W. (ed.). Wzorcowy urząd, czyli jak usprawnić administracje samorządową, jak mierzyć jej zadania i wyniki. IBnGR, Warsaw 2005.

7 E. Ruśkowski, Kilka uwag o reformie administracji skarbowej w aspekcie reformy finansów publicznych in: J. Głuchowski, A. Pomorska, J. Szołno-Koguc (eds) Uwarunkowania i bariery w procesie naprawy finansów publicznych, Wydawnictwo KUL, Lublin 2007,s. 261-266.

8 A. Lozano-Platonoff, System dynamicznego zarządzania przedsiębiorstwem. Rozprawy studia T. (DXCV) 521, Uniwersytet Szczecinski, Szczecin 2005.

4) Experience in auditing and accounting[9];

5) Experience in administering EU funds[10];

and:

6) Conclusions reached after pilot studies carried out by: the Ministry of Science and Higher Education, the Ministry of Education, the Ministry of Labour and Social Policy, the Interministerial High-Tech Programme.

A traditional budget is a plan of income and expenditure, revenue and outgoings. The expenditure is classified in appropriate components of the budget classification – parts, sections and chapters.

As already mentioned, performance budgeting is a broader concept, as it includes the so-called performance part supporting long-term management by objectives.

For each part of the budget, the **methodology of performance budgeting** identifies the following levels of classification: **tasks** and **subtasks** which are the responsibilities of appropriate units and group the expenditure by objectives, including targets. This performance classification is based on activities – the expenditure and costs by paragraphs of the budget classification.

A **task** is a major unit which groups separate areas of activity of the controller so that each task can be assigned one or more objectives, together with efficiency and effectiveness measures. The **task** becomes, therefore, a multi-purpose **category** supporting **management, budgeting and accounting**.

The definition of tasks was considered in the performance budgeting methodology in Poland as a starting point for implementing performance budgeting. Ministries become the authors of their own classifications as those who are most aware of their information needs. The breakdown of the budget into a certain number of tasks and subtasks was a resultant of flexibility in activity (spending), stabilization of the classification and clarity – each budget part was broken down into 4 to 7 tasks. Each ministry has its own list of tasks.

The methodology of performance budgeting anticipates the definitions of **objectives** and **measures** for individual **tasks** and **subtasks**. The measures quantify the objectives to evaluate their achievement. Depending on the data and type of the task, **output**, **outcome** or **impact** measures were employed. The process requires

9 K. Czubakowska, Budżetowanie w controllingu, ODiDK Gdansk 2004, T. Strąk, Wyrywkowe badania w audycie wewnętrznym, Wydawnictwo Economicus, Szczecin 2005. T. Strąk, Sekwencyjne próbkowanie według jednostek pieniężnych in Standaryzacja rachunkowości i rewizji finansowej według MSSF i MSRF, Krajowa Izba Biegłych Rewidentów, Warsaw 2006.

10 Working Paper 3. Indicators for monitoring and evaluation – an indicative methodology, European Commission, 1999.

appropriate knowledge, systems of gathering and analysis of information as well as experience.

The methodology of performance budgeting assumes that measures will become more and more important with time. Two stages of development and implementation of measure in performance budgeting were identified:

– Stage I – the years 2008 and 2009 (at least) – measures are instruments both accepted by the Minister of Finance and line-minister (heads of departments) and helpful in governing;

– Stage II – measures are instruments which are not only acceptable and helpful in governing but also support distribution of resources in the budget. The stimulating and controlling role of measures should be anticipated within 2-3 years following the implementation of the complete performance budget.

An important role in the implementation of performance budgeting and assuring the best effects in improvement in managing public expenditure should be played by the Supreme Chamber of Control and internal auditing. Interesting in this aspect seems the experience of Supreme Chamber of Control in the Netherlands[11].

Each budget task can be assigned directly the cost of employing resources (both human and tangible) essential to perform that task, the amounts transferred within the task to final recipients and capital expenditure. While allocating direct expenditure to individual tasks it is important to bear the essentiality principle in mind. It is not advisable to strive to allocate all the costs of implementing a given task to that task but only those costs that will be regarded as essential because of their amount or type. For example, the allocation of paper or electric energy consumption costs to individual tasks may turn out to be unprofitable because it will be necessary to extend the record system for those costs and because they are small.

It should also be mentioned that the methodology of performance budgeting separates the task "policy development and coordination". This task accounts for the expenditure on general activities, common for the tasks performed for the entire part of the budget or a unit performing tasks, which cannot be directly assigned to individual tasks. They refer mostly to management, or administrative and technical service of the controller, in particular:

1) coordination of the controller's activity, strategic and operational planning, or consulting for the minister, province governor or head of a central office;

2) administration of tasks (for instance: HR department, accounting, controlling and auditing, archive, health and safety, civil defense);

11 P. Knaap van der, Responsive Evaluation and Performance Management, "Evaluation", Vol. 12 (3), 2006., pp. 278-293.

3) technical service (transportation, IT, security, cleaning, repair, maintenance).

Public expenditure in the performance budget is organized so that it refers to individual **tasks, objectives and measures**. A performance budget should answer five basic questions: **what tasks** are performed by ministries and central offices?; **how much** does the society **spend** on individual tasks?; **what** are the major **objectives**?; **what effects** are expected?; **to what extent** have the objectives been achieved? The answers to those questions comply with the standards of transparency set by the IMF[12], including those concerning tasks and responsibility. The questions formed a methodological framework for performance budgeting, expressed in the following principles: transparency, efficiency, effectiveness, consolidation of expenditure, and a long-term approach[13].

According to the framework of performance budgeting presented above, in 2006 Articles 124 and 158 of the Act on Public Finance were amended to their present version:

"Art. 124. The budget act should be accompanied by a justification that contains in particular:

9) A list of **tasks**, within the planned amounts of **expenditure**, along with the description of their **objectives**, performance measures and anticipated long-term financial costs of their implementation

Art. 158. 3. The budget execution report should present:

9) information about **task** performance, within the planned amounts of **expenditure**, along with the description of their objectives, performance measures and anticipated long-term financial costs of their implementation as well as expenditure on their implementation."

Modern management of expenditure by means of performance budgeting, which answers the above questions, should be based on the following planning documents: **guidelines for long-term performance budgeting (including the government's priorities), a three-year projection of expenditure, an annual budget and plans of activities** (see: Fig. 2). Following the reform, the initial implementation of long-term performance budgeting was expected in the year 2009.

It should be emphasised that C. Kosikowski developed a draft amendment to the Act of 30 June 2005 on Public Finance (Journal of Laws 2005, No. 249, Item 2104, as amended) based on performance budgeting. It included, in particular, the introduction of new planning documents accompanying the annual budget

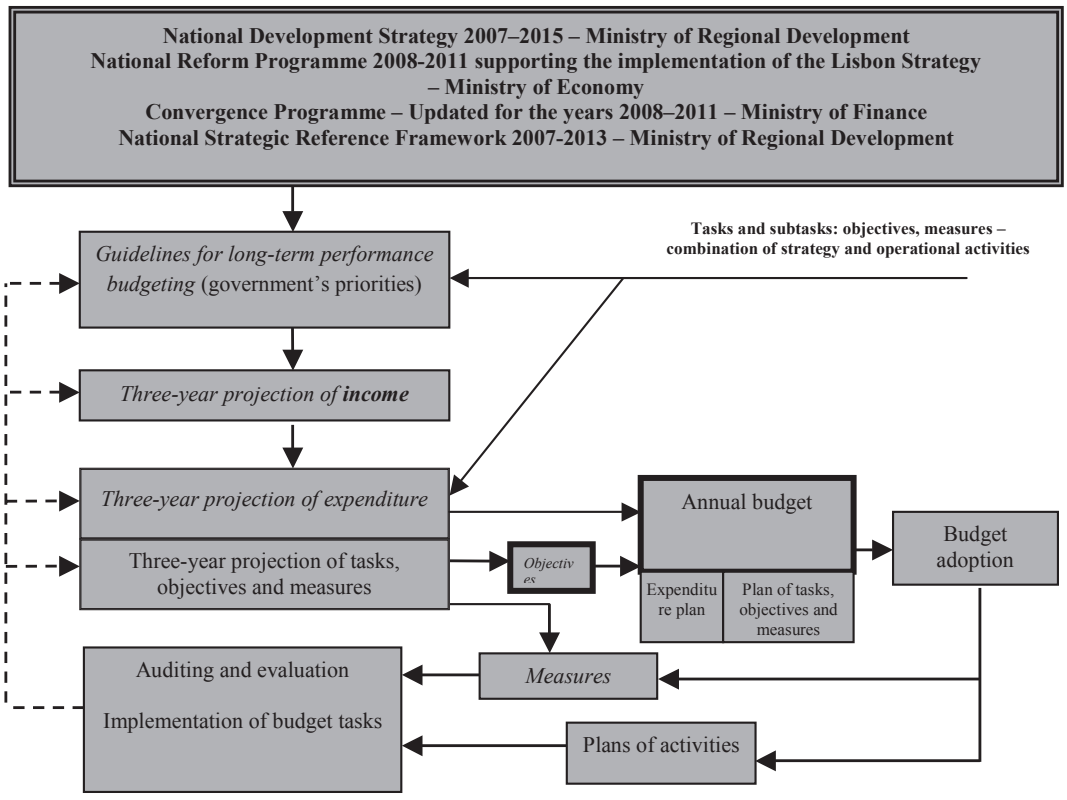
12 T. Lubińska, A.Lozano,… op.cit. p. 649.
13 T. Lubinska (red.), Budżet zadaniowy w Polsce, Difin, Warsaw 2007.

(introduction of Part II to the Act on Public Finance) allowing long-term budget management:

a) Guidelines for long-term performance budgeting;
b) Three-year projection of income;
c) Three-year projection of public expenditure by tasks, including tasks, objectives and measures;
d) Interministerial task programmes;
e) Annual public expenditure consolidation plan;
f) Annual plans of activities.

According to the draft Act on Public Finance, which Polish Ministry of Finance is currently working on, controllers responsible for individual budget parts would be obliged to develop a plan of income and expenditure for the given budget year and the following two years. The two-year planning cycle proposed was an effect of broad consultation with a number of experts in public finance and budgeting practitioners.

Fig. 2. System of planning documents and their interrelations in Poland



Source: T. Lubinska (ed), Budzet…, op. cit, p. 63.

It was assumed that the above documents would be required starting from the 2010 budget. From that year on, budgeting in Poland would be based on three-year strategic planning replacing the existing short-term approach to decision making concerning expenditure.

Effects of work on the performance budgeting reform observed in the years 2006-2007

The first version of the performance budget was prepared for the year 2008. The budget was presented in a short version in the justification of the draft budget act 2008. The full version of the performance budget was included in the Performance Budget Report[14] consisting of two volumes: Vol. 1. Performance Budget 2008, and Vol. 2. Description of performance budgets of controllers of individual parts of the 2008 budget. Performance budgeting includes:

- public expenditure for the year 2008 by tasks – 166 tasks and 454 subtasks – expenditure plan in the performance budget,
- list of expenditure specifying tasks, objectives and measures – 656 objectives and 957 measures – performance part of the performance budget,
- consolidated public expenditure, earmarked funds and expenditure of government agencies for tasks and subtasks totaling PLN 161,287,702,000,
- linking the traditional and performance budgets – allocation of expenditure to individual tasks.

According to the requirements of the budget notification, budget controllers prepared, for the first time, a two-year projection of expenditure for the years 2009-2010.

Performance budget 2008 allowed for the expenditure of 118 controllers, classified into 132 budget parts, 19 earmarked funds and 7 state legal persons, as referred to in the Art. 4 para. 1 item 12 of the Act on Public Finance (i.e. the Office of Technical Inspection, the Polish Center for Accreditation, the Polish Agency for Enterprise Development, the Material Reserve Agency, the Transportation Technical Supervision, the Military Property Agency, the Military Housing Agency).

It should be emphasized here that province governors' performance budgets include up to 34 tasks to be performed on the regional level, in relation to the

14 Raport Budżet zadaniowy. Tom I – Budżet zadaniowy na rok 2008, Kancelaria Prezesa Rady Ministrów, Warsaw 2007, Raport Budżet zadaniowy. Tom II – Omówienie budżetów zadaniowych dysponentów części budżetowych na rok 2008. Kancelaria Prezesa Rady Ministrów, Warsaw 2007.

responsibilities of various ministries. It should come as no surprise that the tasks performed by the governors correspond with the subtasks of individual ministries.

Performance budget does not allow for the expenditure made by the following budget parts: 01. the Chancellery of the President of the Republic of Poland, 02. the Chancellery of the Sejm, 03. the Chancellery of the Senate, 04. the Supreme Court, 05. the Supreme Administrative Court, 06. the Constitutional Tribunal, 08. the Commissioner for Civil Rights Protection, 09. the National Broadcasting Council, 10. the National Data Protection Supervisor, 11. the National Election Office, 13. the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, 14. the Commissioner for Children's Rights Protection, 16. the Chancellery of the Prime Minister, 52. the National Council of the Judiciary, 72. the Agricultural Social Insurance Fund, 73. the Social Insurance Institution, 75. the Government Legislation Center, 78. Foreign debt service, 79. National debt service, 81. General reserve, 82. Subsidies for local governments, 83. Special purpose reserves, 84. contribution to the EU budget, totaling PLN 173,689,152,000.

Those parts were considered to be included in the second stage of implementing performance budgeting. A part of this expenditure was not included due to its nature, e.g. 78. Foreign debt service, 79. National debt service, 82. Subsidies for local governments.

To illustrate the effects of the works on performance budgeting, the draft version of the budget prepared by the Ministry of Economy in the traditional and performance-oriented form has been presented in Table 2.

The Minister of Economy administers only one part of the budget – 20. Economy. Within this part, four major tasks are separated. In the traditional budget part 20 consists of 7 sections and 20 chapters, whereas the "Other activity" chapter appears three times. Other chapters indicate mainly institutions which receive resources from part 20, or sectors of the economy but the information is too general to allow detailed identification of the tasks performed e.g. within mining.

Table 2. Traditional and performance budgets for the part Economy
Traditional budget (PLN thousand)

20	**ECONOMY**			**2 021 152**
	100	Mining and quarrying		448 713
		10001	Hard coal mining	370 500
		10002	Brown coal mining	2
		10005	Production of salt	66 000
		10095	Other activity	12 211
	150	Manufacturing		925 357
		15006	Metallurgy	100
		15011	Enterprise development	21 013
		15012	Polish Agency for Enterprise Development	351 181
		15095	Other activity	553 063
	500	Trade		390 963
		50003	Material Reserve Agency	312 040
		50005	Promotion of exports	78 923
	750	Public administration		189 728
		75001	Offices of central government administration bodies	107 283
		75057	Foreign posts	68 325
		75061	Centre for Eastern Studies	7 117
		75095	Other activity	7 003
	752	National defence		62 726
		75212	Other defence expenditure	726
		75215	Tasks related to maintaining reserves for the needs of Polish Army	62 000
	754	Public security and fire fighting		40
		75417	NATO	40
	900	Public utilities and environmental protection		3 625
		90011	National Fund for Environmental Protection and Water Management	3 625

Performance budget (PLN thousand)

	MINISTER OF ECONOMY	2 021 152
	Part 20. Economy	**2 021 152**
1.	**Improvement in the economy's competitiveness, of which:**	**750 073**
1.1.	Better quality of legal regulations concerning business activity	5 974
1.2.	Providing favourable conditions for supporting innovation	270 220
1.3.	Providing favourable conditions for supporting development of enterprises	352 981
1.4.	Implementation of the principle: focus on micro, small and medium-sized enterprises	120 898
2.	**Diversification of energy supply sources and methods of energy production, of which:**	**413 676**
2.1.	Diversification of energy supply sources and development of new transmission and transport capacities for electricity, natural gas and crude oil and expansion of underground natural gas stock	6 745
2.2.	Providing favourable conditions for effective operations of hard coal mining	383 157
2.3.	Improvement in energy efficiency	13 710
2.4.	Intensification of use of renewable energy sources and liquid biofuels in transport	10 064
3.	**Internationalisation of Polish economy, of which:**	**431 810**
3.1.	Contribution to development of economic and common trade policies of the European Union respecting Poland's interests	131 766
3.2.	Economic promotion of Poland	111 884
3.3.	Intensification of trade exchange of goods, services and capital	29 391
3.4.	Development of an investor-supporting system	158 769
4.	**Tasks related to national security, of which:**	**377 196**
4.1.	Economic potential for the needs of national security	314 718
4.2.	Maintaining production capacity for the needs of national defence	62 478
5.	**Policy development and coordination, of which:**	**48 397**
5.1.	Coordination of the Ministry's activities	15 353
5.2.	Coordination of the National Reform Programme	452
5.3.	Administrative and technical service of the Ministry's activities	32 592

Own study based on: Raport Budżet zadaniowy. Tom I – Budżet zadaniowy na rok 2008, Kancelaria Prezesa Rady Ministrów, Warsaw 2007, p. 52-53 and a draft budget act 2008.

Performance budget aims to improve the efficiency of performing public tasks and to raise the effectiveness of public expenditure. It would therefore be essential to identify the objectives of public expenditure earmarked for individual tasks and subtasks and their measures.

In many cases the measures proposed raise certain reservations. It should not be forgotten, however, that it is the first attempt to define measures for public tasks in Poland, and so they should be subject to natural verification and enhancement focusing on developing a closer link to objectives.

Table 3 presents the objectives and measures for tasks and subtasks performed by the Minister of Economy.

In the case of the task "Diversification of energy supply sources and methods of energy production" and relevant subtasks, we are dealing with all the three types of measures: output, outcome and impact. For the subtask 2.1 output measures were employed, for subtask 2.2 – outcome measures, and for the remaining subtasks 2.3-2.4 as well as the task 2 itself – impact measures.

Table 3. Objectives and measures for selected tasks and subtasks performed by the Ministry of the Economy (consolidated expenditure)

No.	Task/subtask	2008 Plan (PLN thousand)	Objective	Measure		
				Name	Value	
					reference	2008
	MINISTER Of ECONOMY	3,625,548				
	Part 20. Economy	3,625,548				
1.	Improvement in the economy's competitiveness, of which:	1,727,212	To ensure sustainable development of Polish economy	GDP per capita (in relation to EU-27).	53% (2006)	57.60%
				Number of enterprises, including SMEs	1,677,000 (2005), SMEs: 1,674,000 (2005) 79.9% net profitability 4.6%	57.6% 1,700,000 SMEs 1,697,000>80% net profitability >5%
1.1.	Better quality of legal regulations concerning business activity	5,974	To ensure stable and development-supporting legal and organizational conditions for entrepreneurs	Number of people trained in the evaluation of effects of regulation	373 (December 2006 – June 2007)	1000
				Duration of the business registration process.	Natural persons: 31 days legal persons: 31 days	Natural persons 3 days legal persons 7 days
1.2.	Providing favorable conditions for supporting innovation	270,220	To increase the share of innovative enterprises	GERD	0.57% (2005)	0.81%
				% share of innovative enterprises	industry 41.5% (2003-2005) services 22% (2001-2003)	industry 44.6% services 26.1%
				Share of high- and medium-tech products in the total production sold by industry.	30.6% (2005)	34.7%
1.3.	Providing favorable conditions for supporting development of enterprises	645,559	To ensure stable and development-supporting conditions for entrepreneurs. To develop Polish industry.	Average profitability of enterprises.	4.6%	> 5 %
				Survival rate of businesses	67.6 % (2006/2005)	68 % (2008/2007)
				Total value of venture capital investment	EUR 108 million	EUR 345 million
				Number of pilot Public-Private Partnership programmes	0	3

1.4.	Implementation of the principle: focus on micro, small and medium-sized enterprises	805,459	To ensure stable and favorable conditions for running micro, small and medium-sized enterprises	Share of SMEs in GDP.	48.3% (2004)	50%
				Number of existing SMEs	1,674,000 SMEs (2005)	1,697,000 SMEs
				SME start-ups	4.3% (2006)	>5%
2.	Diversification of energy supply sources and methods of energy production, of which:	413,676	To ensure energy security for the country	Share of energy acquired from renewable resources in its total consumption	2.64% (2005)	5%
2.1.	Diversification of energy supply sources and development of new transmission and transport capacities for electricity, natural gas and crude oil and expansion of underground natural gas stock	6,745	To develop energy infrastructure allowing for the security of natural gas supply.	Potential of underground natural gas stock.	8.197 million m3 (31.12.2005)	To be monitored
				Length of newly constructed transmission/distribution gas pipes	Increase by 80 km	Increase by 50 km
2.2.	Providing favorable conditions for effective operations of hard coal mining	383,157	To improve effectiveness of hard coal mining	Profitability of mining enterprises.	Net profitability 2.1% (2006)	Net profitability >0
				Sales of coal per unit	8.08 PLN/t (2006)	>0
2.3.	Improvement in energy efficiency	13,710	To raise efficiency of production, transmission, distribution and use of energy	Energy consumption in the economy = 1 kg of contracted fuel/1 Euro of GDP	0.27 (2005)	0.26
2.4.	Intensification of use of renewable energy sources and liquid biofuels in transport	10,064	To increase the share of renewable energy sources in the total energy balance, including biofuels.	Share of electricity acquired from renewable sources in its total consumption	2.64% (2005)	5%
3.	Internationalization of Polish economy, of which:	431,810	To improve the structure of trade exchange with EU member states – balancing of the trade	Share of exports in GDP.	32.4% (2006)	34.5%
				Total value of FDI	EUR 11.6 bn (2006)	>EUR 10 bn
3.1.	Contribution to development of economic and common trade policies of the European Union respecting Poland's interests	131,766	To strengthen the position of Polish business interests in the Common European Market. To protect the EU market from unfair trade practices.	Transposition deficit.	0.9% (November 2006)	<1.5%
3.2.	Economic promotion of Poland	111,884	To improve the image of Polish economy and the identification of Polish products abroad	Number of promotion projects carried out individually or with other partners.	3 (2007)	5

3.3.	Intensification of trade exchange of goods, services and capital	29,391	To balance the trade exchange. To increase Polish exports.	Export per capita	EUR 2,700 (2006)	EUR 3,000
3.4.	Development of an investor-supporting system	158,759	To create new jobs and raise capital expenditure in relation to long-term programmes	Total value of FDI.	EUR 11.6 bn (2006)	> EUR 10 bn
				Number of jobs created in relation to investment.	approx. 20,000 (2006)	approx. 20,000
4.	Tasks related to national security, of which:	1,004,453	To provide national security within the part Economy	Amount of the state's economic reserves, and reserves of crude oil and oil products	1,972,190	2,394,285
4.1.	Economic potential for the needs of national security	941,975	To provide the society and industry with the material resources within agriculture products and food, medical products, raw materials and fuels essential to perform the tasks within national defense and security	Amount of the state's economic reserves, and reserves of crude oil and oil products	1,972,190	2,394,285
4.2.	Maintaining production capacity for the needs of national defense	62,478	To perform tasks originating in the Economic Mobility Programme	Number of entrepreneurs who have been granted subsidies to maintain their production capacities in case of national security threat	0	26
5.	Policy development and coordination, of which:	48,397	To provide favorable conditions for flawless performance of tasks			
5.1.	Coordination of the Ministry's activities	15,353				
5.2.	Coordination of the National Reform Programme	452	To implement efficiently the Lisbon Process in Poland			
5.3.	Administrative and technical service of the Ministry's activities	32,592				

Allocation of expenditure for budget tasks and consolidation of expenditure in performance budgeting

Budget tasks are "modules" which transform expenditure from a traditional budget into a performance budget. The two types of budgets are linked by means of **budget classification chapters**, those links being generally complex. A **budget task** includes usually expenditure grouped in several chapters of the budget classification, whereas one chapter, on the other hand, is a part of several budget tasks. It refers mainly to chapter 75001 "Offices of central government administration bodies" and chapters "Other activity", where the last two digits are 95 (e.g. 75095, 92695).

Allocation of expenditure to budget tasks is defined by the Directive of the Minister of Finance of 18 May 2007 on the specific manner, procedure and deadlines for developing the materials to the 2008 draft budget act – the so-called budget notification 2008 – Appendix 58. Detailed principles of developing materials for the draft budget act 2008 Chapter 5. List of tasks Item 72 addresses the planning of expenditure by budget tasks.

According to the principles defined in the budget notification, the major tasks of given controller's activity are assigned expenditure classified in individual chapters of the performance budget to essential activities, the so-called essential sections (e.g. section 926 – Physical education and sport, section 803 – Higher education, section 921 – Culture and protection of national heritage), as well as the expenditure in section 750 – Public administration, incurred in direct relation to performance of those tasks. It refers mainly to the following types of expenditure: personnel costs (paragraphs 401, 402, 403, 410, 411, 412, 413, 414, 417), other current expenses (paragraphs 421, 430, 441, 442), and capital expenditure (paragraphs 605, 606) – incurred by units responsible for performing the tasks.

In practice, depending on the financial and accounting system used by individual controllers, in the case of section 750 "Public administration" the essential tasks include:

1) only personnel costs, estimated in a simplified way with the following formula:

$$WOZ_i = \frac{WO}{LP} \; x \; LPZ_i \quad \text{, where:}$$

WOZ_i – personnel costs allocated to a given task,

WO – personnel costs incurred by the analyzed main controller,

LP – number of employees working for the controller,

LPZ_i – number of employees working on a given task;

2) only personnel costs, in the planned including salaries and charges for employees working on a given task;

3) total amount of current expenditure;

4) current and capital expenditure.

Due to the extent of the project, in the first stage of implementation of performance budgeting, individual approaches of certain controllers to the allocation of expenditure from Section 750 to individual tasks were accepted. Simplifications made at this stage were inevitable. It triggered off, however, the evolution of accounting principles used by individual controllers. The financial and accounting services of ministries have already begun works on the modification of their recording systems so as to provide information on all the direct costs of individual budget tasks thus enabling the controllers to estimate the costs of operations of individual departments and units. Budget expenditure is related mainly to task performance and activity of the essential departments. Lack of information about the administrative costs they generate affects efficient management, including control over their legitimacy.

After adjustment of accounting systems aimed at providing the information on direct costs generated by individual budget tasks, the next stage will involve implementation of the full cost accounting based on the activity based costing.

The principle of consolidation in a performance budget means "showing in the performance budget the expenditure incurred by those institutions, aimed at performance of a given task or subtask after their mutual settlements have been eliminated (e.g. subsidies from the ministry to an earmarked fund). It means including in the performance budget also own earmarked funds and the so-called government agencies as sources of financing for a given task or subtask."[15]. Moreover, in certain cases the extra-budget sources of financing include for instance:

– accounts of own income (the Ministry of Finance, the Ministry of State Treasury, the Ministry of Foreign Affairs, the Public Procurement Office)

– foreign sources other than structural funds of the European Union (the Office of the Committee for European Integration, the Ministry of Environment, the Ministry of National Defense, the Minister of Labor and Social Policy).

It shows that including earmarked funds and government agencies in the budget act does not exhaust the sources of financing for public tasks.

Below the list of 14 institutions, for which consolidated financial plans were prepared, is presented:

1. Ministry of Interior and Administration

15 T. Lubińska, Budżet…, op.cit. pp. 45-46.

2. Ministry of Finance
3. Ministry of Economy
4. Minister of Environment
5. Office of the Committee for European Integration
6. Ministry of Culture and National Heritage
7. Ministry of Sport and Tourism
8. Ministry of Transportation
9. Ministry of Science and Higher Education
10. Ministry of National Defence
11. Ministry of Labour and Social Policy
12. Minister of Treasury
13. Ministry of Foreign Affairs
14. Public Procurement Office

The share of expenditure financed with extra-budget sources in the consolidated expenditure was ranging from 0.27% in the Ministry of Foreign Affairs (additional sources: accounts of own income) to 95.39% in the Ministry of State Treasury (four earmarked funds and an account of own income).

Streszczenie

Obecnie polskie Ministerstwo Finansów kontynuuje prace nad budżetem zadaniowym w oparciu o metodologię zaprezentowaną w tym artykule. Po raz pierwszy w Polsce przygotowano trzyletnią projekcję wydatków budżetu państwa. Dalsze prace będą skupiały się na ustaleniu priorytetów i powiązaniu ich z wydatkami. W efekcie zostanie przedstawiona druga wersja budżetu zadaniowego, z którego będą pokrywane wszystkie wydatki, jak również zostanie przedstawiona wieloletnia projekcja budżetu państwa.

Alexander Matnenko

INTRODUCTION OF BUDGETING FOCUSED ON THE RESULT (COMPARATIVE LAW RESEARCH)

The last four years in the Russian Federation are marked by a radical change of a budgetary paradigm, the essence of which is the transition from cost management to results management. It means that any budgetary plan should have a system of budgetary policy targets as its logic continuation and embodiment. These purposes should influence final social and economic results - the condition of public relations and the level of material and non-material values in a society that are provided by budgetary financing. This criterion, not the formal execution of an expenses budget, should determine an estimation of budgetary activity and a degree of its efficiency. This concept is stated in details in the Decree of the Government of the Russian Federation No.249 of May 22, 2004 "About Measures on Increase of Productivity of Budgetary Charges"[1].

It is necessary to note that no country of the world that tried similar change of budgetary ideology managed to pass it quickly and without difficulties, no country of the world could find unique answers to many questions concerning the change of the style of finance management which have been formed for centuries.

The experience of other states in this sphere is of great interest for Russia.

The first attempt to create and introduce the results-oriented budgeting system was undertaken in the USA at the end of 1940s - the beginning of 1950s. In 1949 the special commission on development of suggestions aimed at perfection of organization and activity of the executive branch (The Commission on the Organization of the Executive Branch, also known according to the name of its leader as "Hoover Commission") offered essentially new format of the budget named "performance budget" that was focused not on the expenses of state resources but on productivity of state functions performance. The new approach got its legal expression in "Budget and Accounting Procedures Act" (Budget and Accounting Procedures Act, 1950).

1 Lawbook of the Russian Federation. May 31, 2004, No. 22, p. 2180.

In 1965 the United Nations Organization issued "A Manual for Program and Performance Budgeting". It popularized ideas of a new budgetary planning model as "consisting of interconnected elements of a program structure, a system of financial data reporting and financial management in combination with classification and measurement of efficiency". The document also contained the definition of the results-oriented budgeting as reflection of "tasks and purposes for which budgetary financing, cost of programs developed to achieve these purposes, and the quantity indicators describing realization of the given programs are necessary"[2].

The experience of New Zealand[3] is often considered as one of the most consecutive and successful variants of results-oriented budgeting. When in 1984 the labor government came to power, the system of contract registration of obligations on achievement of purposes provided by budgetary financing (Performance Agreements) became very popular in this country. This system covers the whole chain of participants of an administrative process: the ministries, agencies subordinated to them, organizations financed from the budget, heads and workers of state bodies and organizations financed from the budget. Legal registration of relations arising at all levels of activity results planning, mutual rights and duties of participants of these relations are pointed out by researchers among advantages of the New Zealand model.

The strategy of public finances reforms was determined by the Public Finance Act issued in 1989 (The Public Finance Act, 1989). It stated that in contrary to traditional system of budgetary management, where the data for incoming resources (salary of the personnel, transport, fuel and communication costs, capital investments are the basis for decision-making, the system of public finances management should be based on parameters of productivity which include such concepts as "product" and "results of activity". Thus the basic documents for the system of state bodies should be agreements on achievement of productivity (performance agreements). They should be concluded between the government and its departments that are responsible for granting these or those public benefits, and the subject of these agreements should be rendering services (delivery of a product) for the following fiscal year.

The outcomes of a New Zealand new model of the results-oriented budgetary process are significant:

2 A Rose. Results-Oriented Budget Practice in OECD Countries. – London. Overseas Development Institute, 2003, p. 7.

3 More information on the budgetary reform in New Zealand see: A. Kibblewhite, C. Ussher. Outcome-focused Management in New Zealand. OECD Journal on Budgeting, 2002, No.1 (4), pp. 7-34; A. Schick. The Spirit of Reform: Managing the New Zealand State Sector in a Time of Change. Wellington. State Services Commission, 1996; J. Pallot. Centrale State Government Reforms. Report on New Zealand. Berlin 1999.

Public expenses rate decreased from 40 - 44% of GDP at the beginning of 1990s to 35% of GDP; infrastructure costs rate - by 50-60%. Within 17 years after the reforms have been completed, the government for the first time began to execute the budget with surplus. A share of state manufacture in GDP during the years of reforms decreased from 12% to 5%, and the total number of people involved in the state administration system - from 86.000 to 36.000 people[4].

Among the countries of continental Europe, legal traditions of which are close enough to Russia, Spain was one of the first countries that started introduction of results-oriented methods in the budgetary activity. The beginning of this process started when in 1977 a new Budgetary Law (Ley General Presupuestaria) appeared. It obliged the government to formulate the budget by using purposes and programs. The Constitution of Spain signed in 1978 fixed the main principles of modernization of the public finance management expressed in the following constitutional norms: granting public services should be economic and effective (Article 31.2) and productive (Article 103). Since 1982 the Ministry of Economy and Finance of Spain demanded from departments to formulate their budgets as programs. By the end of 1980s there were changes in the sphere of budgetary reform: the definition of a new budget format was deemphasized and the budgetary process was emphasized. The purpose of financial department of Spain was to transform budgetary and procedural rules into the mechanism which would promote the introduction of the budget of results.

Summing up the results of two decades from the time when results-oriented principles of budgeting were introduced in Spain, Eduardo Zapico-Goni marks, as one of the main lessons of this experience, necessity to pay special attention to issues of not only legal regulation of reformed relations but also to create the culture of law enforcement of regulations stated in new legislative acts. In particular, the author points out that: “Attempts of the Ministry of Finance are focused, first of all, on the development of new laws and instructions. It is necessary to take measures to estimate and strengthen the influence of reforms on developing relations. Now the reform is limited by legislation, as well as the amendments of regulations on budgetary process, budgetary account and control, which results from both lack of political support for the changes and the prevalence of the normativist approach to the reforms”.

People in charge of budgetary funds present their financial proceedings and information system in conformity with requirements of the Ministry of Finance but they do not find them beneficial for their own administrative interest. The strategy of reforms is based on hierarchical inter-subordination, on the assumption of reforms aims as something that goes without saying and on the belief in power of norms and

4 A. Ulyukaev Problems of state budgetary policy. Moscow, 2004. p. 410.

rules and natural professionalism. Normativist and hierarchical traditions go back to the old times. There is a belief that new norms can bring success simply due to the fact that they are correct and legislatively fixed"[5].

The example of more "flexible" and decentralized model of results-oriented budgetary planning, based on the initiative of executive bodies rather than on imperative legislative instructions, is Finland. Finland started the process in 1988 with trial projects carried out in some agencies and in 1995 new principles of public finance management were distributed in the whole budgetary sector. Contracts - so-called agreements on activity results concluded between ministries and agencies (Performance Contracts) constitute an important form of fixing budgetary legal relations. On the other hand, in New Zealand for example, the arrangement order of the given agreements is not settled by the legislation, and all questions concerning their conclusion and performance are the discretion of executive bodies. According to Jon R. Blondal, Jens Kromann Kristensen and Michael Ruffner, "only few aspects of a reform are initiated by legal acts, and it emphasizes that the responsibility for realization of reforms belongs to the ministries and agencies. Actually, the issues concerning a form and contents of a reform are solved by branch ministries and agencies within wide parameters established by the Ministry of Finance"[6].

The People's Republic of China represents the example of gradual introduction of results-oriented principles of budgetary activity based on the selection of trial regions and trial programs which were to test and approve a new method.

The Government of China chose the province Guangdong, located in the south of the country, as the first trial territory. The experiment on the introduction of the results-oriented budgetary planning started there in 2003. The experience of Canada, France, the UK and the USA was preliminary investigated in details and taken as the basis. A special division for estimation of activity productivity, responsible for analytical and methodological support of the reform, was created in the department of finances of the province.

Originally, six projects administered by different departments were chosen to develop a new model of budgeting:

1) Creation of technology park for private enterprises (Department of Science and Technologies);

2) Reorganization of the elementary school system in mountain and backward districts in sixteen cities (Department of Education);

5 E. Zapico-Goni . Budget for Results in Spain: Lessons Learned after Two Decades of Reform. OECD Journal on Budgeting 2003, vol. 4, No.2, p. 45.

6 J. Blondal, J. Kristensen and M. Ruffner. Budgeting in Finland. OECD Journal on Budgeting 2002, vol. 2, No. 2, p. 27.

3) Construction of high-speed routes in sixteen poor districts (Department of Transport, Department of Roads);

4) Foundation of universities within the framework of the 10th five-year plan (Department of Education);

5) Reorganization of commercial and industrial corporation assets (Commercial and Industrial Corporation);

6) Development of tourism as a means of support for poor districts (Department of Tourism).

Despite many problems which arose during the reform, its first results were considered successful[7].

According to the comparative analysis, the outcomes of results-oriented methods of budgetary planning introduced in different states have some essential peculiarities. It is possible to single out a number of common tendencies and features peculiar to the given process and determine its essence at the same time.

1. Distribution of budget expenses is carried out not according to the types of expenses but according to the purposes of activity and programs of authorities. The budget and other results-oriented documents are considered as a united program and budgetary complex.
2. Development and performance of plans, programs and other similar documents that determine tasks and purposes of authorities for the certain prospect, both development and performance of the budget are mutually integrated and represent a united procedural mechanism.
3. Efficiency of budget expenses is defined by a degree of result achievement which is expressed in a quantitative or qualitative way.
4. People in charge of budgetary assets, within the limits of their competence, possess a lot of freedom in financial resources management and bear responsibility for results.
5. Reporting on the budget performance includes not only financial parameters but also the ones describing management quality and productivity of budgetary funds use.
6. Introduction of results-oriented budgetary planning represents a long, step-by-step process that requires constant political support from the higher authorities of a country and appropriate legislative security, a serious reform

7 For details see: M. Niu, A. Ho, J. Ma. Performance-Based Budgeting in China: a Case Study of Guangdong - www.umac.mo.

on organization and functioning of the whole system of public authority and budgetary sector of a country, training of a significant amount of the qualified personnel.

The main problems that almost all countries face during the implementation of the results-oriented budgetary planning model are:

1. A high degree of resistance of administrative culture focused on former methods of budgetary activity with a slant on the observance of formal requirements of legislation during the budgetary process; inability of a significant amount of participants of a budgetary process to think with such categories as "efficiency", "productivity" and to use new administrative technologies in their activity.
2. Labour intensiveness and high expenses for national of account and reporting system adaptation, including government statistics, to the needs of results-oriented budgetary planning system.
3. Difficulties in formulation of quantitatively measured purposes of programs. It is objectively impossible to measure separate results of activity exactly, to connect them with another concrete program.
4. A problem of personification of tasks on results achievement that some public authority bodies are responsible for.

Streszczenie

Ostatnie cztery lata w finansach publicznych Federacji Rosyjskiej przebiegały pod wpływem radykalnych zmian w budżecie, których istota dotyczyła przejścia od modelu zarządzania kosztami do modelu zarządzania rezultatami. Jak wskazuje analiza porównawcza, główne problemy, na które napotykają prawie wszystkie kraje wprowadzające w swoich finansach publicznych planowanie budżetowe oparte na rezultatach są następujące:

1) wysoki stopień wytrzymałości kultury administracyjnej skoncentrowanej na obowiązujących metodach gospodarki budżetowej z uwzględnieniem formalnych wymogów legislacyjnych w trakcie procedury budżetowej,
2) intensyfikacja i wzrost wydatków krajowych budżetów,
3) problemy w formułowaniu sposobów mierzenia celów programów,
4) problem w personifikacji zadań skierowanych na osiągnięcie rezultatów, za które odpowiedzialne są określone organy publiczne.

Aleksey G. Paul

BASIC QUESTIONS OF RUSSIAN BUDGET LAW REFORMS

The end of 20th and the beginning of 21st century was a period of significant reforms in Russian budget law.

Prerequisites for the Budget law reforms were transition to market economy and changes in public finance.

At the beginning of 1990s there was old uncoordinated budget legislation. Problems were complicated by economic instability in Russia which affected budget procedures. At the same time the imperfection of budget procedures led to the crisis of nonpayment and other negative consequences in economy. Thus a necessity arose to create new up-to-date budget laws.

The basis of the new budget legislation is the Constitution of the Russian Federation. It established fundamental norms for the budget law, which was followed by the process of budget law reforms.

Specialists in the Russian Ministry of Finance distinguish three stages in the budget reform[1].

At the first stage it was necessary to normalize budget procedures in Russia[2], to set up the principles of budget legislation and to coordinate different budget laws. The budget legislation of that period consisted of some laws which regulated separate parts of budget relations[3]. That legislation was passed before the

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1 Т. Нестеренко Этапы бюджетной реформы // "Финансы", 2008, № 2, С. 3.

2 М. Блинов Комментарий к Бюджетному кодексу Российской Федерации // "Право и экономика", 1998, № 12.

3 Закон РСФСР от 10.10.1991 № 1734-1 "Об основах бюджетного устройства и бюджетного процесса в РСФСР" // Ведомости СНД и ВС РСФСР, 1991, № 46, Ст. 1543; Закон РФ от 15.04.1993 № 4807-1 "Об основах бюджетных прав и прав по формированию и использованию внебюджетных фондов представительных и исполнительных органов государственной власти республик в составе Российской Федерации, автономной области, автономных округов, краев, областей, городов Москва и Санкт - Петербург, органов местного самоуправления" // Ведомости СНД и ВС РФ, 1993, № 18, Ст. 635 и Закон РФ от 15.07.1992 № 3303-1 "О субвенциях республикам в составе Российской Федерации, краям, областям, автономной области, автономным округам, городам Москва и Санкт-Петербург" // Ведомости СНД РФ и ВС РФ, 1992, № 34, Ст. 1972.

Russian Constitution and collided with it, despite the fact that the laws there were special annual laws for the regulation of the budget law adoption.

At that time there were no norms for the regulation of budget execution, budgetary control or Treasury execution of budgets. Inter-budget relations were indigested.

The Russian President in the messages to Parliament in 1997 and in 1998 pointed out that the essential element to solve the problems was an adoption of the Budget Code[4].

The Russian Budget Code was adopted in 1998 and came into effect in 2000.

The Budget Code set up common principles of budget legislation, budget system functioning, legal status of budget relation subjects, as well as established basics for the budget process and inter-budget relations, causes and kinds of responsibility for budget offences.

So, the Budget Code created a comprehensive system of budget regulations. It included the rules which earlier had been contained in different laws. Moreover, as some authors claim, the Budget Code solved the problem of budget legislation perfection[5].

However, the realization of the Budget Code showed that a great number of its rules did not work properly. So the authorities had to introduce amendments thereto.

The second stage of the budget reform was concerned with changing in inter-budget relations. The beginning of the reform revealed several significant problems concerning budget competence of different levels of authority. There was no precise delimitation therein. The Russian Federation adopted a great deal of laws which created expense obligations for regions and municipalities. At the same time regions and municipalities did not have enough revenues to execute them. It led to a great number of suits against the Treasury.

In 2001 Russian Government worked out the Program of development of budget federalism[6]. Its main purpose was to form and develop budget arrangements

4 Послание Президента РФ Федеральному Собранию от 6 марта 1997 г. “Порядок во власти - порядок в стране” (О положении в стране и основных направлениях политики Российской Федерации) // “Российская газета”, 1997, 7 марта (№ 47); Послание Президента РФ Федеральному Собранию от 17 февраля 1998 г. “Общими силами - к подъему России (О положении в стране и основных направлениях политики Российской Федерации)” // “Российская газета”, 1998, 24 февраля (№ 36).

5 Т. Конюхова Важный шаг на пути совершенствования бюджетных правоотношений. К принятию Бюджетного кодекса Российской Федерации // “Журнал российского права”, 1998, № 10-11.

6 Постановление Правительства РФ от 15.08.2001 № 584 “О Программе развития бюджетного федерализма в Российской Федерации на период до 2005 года // Собрание законодательства РФ, 2001, № 34, Ст. 3503.

so that every authority level could lead its own tax-budget policy according to the established differentiation of competence and responsibility.

The implementation of the Program resulted in the change of the Budget Code. Amendments were adopted in 2004[7]. The amendments concerned some aspects of inter-budget relations and solved the problems through the following measures:

1) introduction of clarity into the delimitation of authority levels' competence;
2) specification of budget arrangements and principles of the budget system;
3) delimitation of tax revenues between different budget levels;
4) delimitation of expense obligations between different budget levels;
5) regulation of inter-budget transfers;
6) regulation of budget power implementation for regional and local levels concerning conditions of temporary finance administration;
7) clarifying the order of budget execution.

That system of amendments established a legal basis for new inter-budget relations.

The third stage of the reform was devoted to the increasing in the effectiveness of budget expenses. It started with the adoption of the Conception of budget process reforming in 2004-2006[8].

The main purpose of the Conception was the creation of conditions and prerequisites for effective management of public finance according to the state policy priorities.

The new approaches were expected to increase attention to the tax-budget policy, medium and long-term budget planning with the aim of financial stability and effectiveness of the state expenses as well as the increase in the responsibility for the results of using tax payers` money.

This stage of the budget reform included the following orientations:

1) One of the main elements of the budget reform was a transition to a medium-term (long-term) budgeting. According to it, a budget cycle starts with the consideration of the main parameters of a medium-term finance plan for the corresponding year, which had been approved of in the previous budget cycle,

7 Федеральный закон от 20.08.2004 № 120-ФЗ "О внесении изменений в Бюджетный кодекс Российской Федерации в части регулирования межбюджетных отношений" // Собрание законодательства РФ, 2004, № 34, Ст. 3535.

8 Утверждена Постановлением Правительства РФ от 22.05.2004 № 249 "О мерах по повышению результативности бюджетных расходов" // Собрание законодательства РФ, 2004, № 22, Ст. 2180.

the analysis of changeable external factors and conditions, the substantiation of changes in basic budget characteristics for the planned year, as well as the correction or development of budget projects for the following years of the planned period[9].

In 2007 the amendments were made to the Budget Code of the Russian Federation due to which the budget is drawn not for a year but for three years, or, to be more exact, for the next financial year and the predicted period. Accordingly, on 24 June, 2007 the Federal law "On the Federal Budget for 2008 and 2009-2010 planned period" was adopted.

As the author of the changes in the Budget Code of the Russian Federation noted, the method of "a slipping three-year-period," well-known in international practice, constituted the basics of budgeting. In accordance with this method the formerly approved projects for the second and third years of a 3-year-period become the foundation of the next budget with an annual addition of new third-year projects[10].

"A slipping three-year-period" guarantees on the one side stability and predictability of budget projects and, on the other side, an ability to react to a changing situation, restructuring of liabilities and implementation of new priorities in the budget policy.

The medium-term principle (usually 3 years) is in the basis of the budget planning of the most developed countries, such as Great Britain, Canada, the Netherlands, Sweden, Denmark, Finland, Norway, France, Australia and New Zealand[11].

2) The main direction in the Russian budget law reform in the last years was a transition to the primarily program-objective methodology of budget planning.

Previously, the Russian budget was mainly formed by indexing of the used expenses. There were no substantiations to the expected results of the budget expenses and budget management was more often turned into the control of factual and planned results.

Subsequently, it was decided to introduce the "result management" conception under which the budget is formed on the basis of state policy planned results. The budget allocations are directly connected with the functions (services, activities) and

9 Концепция реформирования бюджетного процесса в Российской Федерации в 2004 – 2006 годах. Утверждена Постановлением Правительства РФ от 22.05.2004 № 249 "О мерах по повышению результативности бюджетных расходов" // Собрание законодательства РФ, 2004, № 22, Ст. 2180.

10 Пояснительная записка к проекту Федерального закона "О внесении изменений в бюджетный кодекс РФ в части регулирования бюджетного процесса и признании утратившими силу отдельных законодательных актов Российской Федерации" // www.consultant.ru.

11 С. Тюнина, М. Шамьюнов Профессиональный взгляд на новый Бюджетный кодекс // "Финансы", 2007, № 8, С. 13.

when planned much attention is paid to the final results within the framework of the budget programs.

According to the authors of the reforms a widely spread model of "budgeting oriented towards results within the framework of the middle-termed finance planning" should become the nucleus of the new budget process organization. Its essence lies in the allocation of the resources in accordance with the real results (supplied services) and taking into consideration medium-terms priorities of the social-economic policy and within the long-term forecast budget resource volume[12].

The established budget allocation planning adjusted for the state (local) tasks must be of great importance now as it will have to describe the volume, enumeration, quality and conditions for providing state (local) services for both individuals as well as organizations.

Besides, various single purpose programs must play an important part in result-oriented budgeting.

The new edition of the Budget Code of the Russian Federation allows for long-term single purpose programs, departmental special purpose programs as well as the federal targeted investment program. It is exactly these programs where the predicted results of budget expenses must be clearly defined.

3) The Russian Federation Budget Code rules concerning budget expenses splitting in accordance with their economic allowance for current and capital have been considered out-of-date.

These changes correspond to universally accepted principles of public finance management. The idea of budget splitting into current and capital spending cannot be counted in the range of modern methods of budget planning and state (public) management.

The separate current and capital budget formation is still practiced by a number of developing countries, sometimes because of a large-scaled support provided by donors and international creditors.

In fact, by now budget splitting has been unanimously recognized out-of-date, methodologically faulty and unsuitable in terms of advanced public finance management.

International practice testifies that spending results are improving and the level of control and stability is increasing when current and capital expenses are managed on the basis of consolidation within the framework of long-term planning.

12 Концепция реформирования бюджетного процесса в Российской Федерации в 2004 – 2006 годах. Утверждена Постановлением Правительства РФ от 22.05.2004 № 249 "О мерах по повышению результативности бюджетных расходов" // Собрание законодательства РФ, 2004, № 22, Ст. 2180.

The integration of current and capital spending management is a key factor in providing general stability for the budget, in enhancing the effectiveness of budget programs and investment projects with due regard of their overall costs and results achieved[13].

As the analysis of investment cost planning in some countries demonstrates, current and capital expenses are planned, observed and ratified within the framework of a single budget. This is true about such developed countries as Great Britain, the USA, the Netherlands, Germany, France and others[14].

The program-based and objective-oriented methods of planning are successfully carried out if current and capital expenses are viewed as a whole. Objective-oriented budgeting presupposes the choice of the most effective ways of using the budget to achieve the objectives. Thus, if some expenses formed specifically are distinguished, this choice is limited.

4) The effective budget reserves management can be crucial in providing the stability of public finance.

The majority of the countries where oil is extracted (such as Azerbaijan, Kazakhstan, Kuwait, Norway, Venezuela) use special management regime to control state profits from the oil sector. Such management regimes are also used in some federal states (Alaska, for example)[15].

Russia, as many other countries profiting from the natural resource export, has considered it indispensable to form the Stabilization Fund, which accumulates the returns from oil and gas exports, in order to avoid fluctuation in these restricted incomes that can undermine the financial stability of the country.

Oil and gas incomes were first accumulated into the Financial Reserve which later was transformed into the Stabilization Fund. Nowadays the Stabilization Fund is reorganized into two funds: the Reserve Fund and the National Well-being Fund.

We should point out that the above-mentioned funds were formed and are now being formed as a part of the Federal Budget rather than independent funds.

The Reserve Fund must provide for the spending of the Federal Budget in case of a significant decrease in oil prices in the medium-term perspective and the rise of deficiency connected therewith. The National Well-being Fund must accumulate the oil and gas incomes which occur as a result of a surplus of incoming returns from oil

13 Принципы эффективного и ответственного управления общественными финансами // “Государственная власть и местное самоуправление”, 2006, № 12.

14 С. Тюнина, М. Шамьюнов Профессиональный взгляд на новый Бюджетный кодекс // “Финансы”, 2007, № 8, С. 13.

15 И. Гетьман-Павлова Управление Стабилизационным фондом РФ: проблемы правового регулирования // “Банковское право”, 2007, № 4.

and gas industries as well as deductions made into the Reserve Fund, and the funds which are used to finance the expenses of the Federal Budget. The main purpose of the National Well-being Fund is to retain part of the incomes from irreplaceable natural resources in order to use them when resources are exhausted. These funds must work to improve the well-being of both present and future generations.

5) One of the directions which the budget reform in Russia has taken is the adjustment of the budget classification to international standards.

The changes in the Budget Code of the Russian Federation of 2007 enabled to meet the requirements of international standards and to implement the integrated plan of budget classification calculated on accrual basis.

The aforesaid changes were connected with implementation of program-objective methods in budget planning.

It was decided to renounce the practice of ratifying the budget classification by a special federal law. Instead the Budget Code of Russian Federation only sets the main codes of budget classification obligatory for all levels of the state budget system This approach is applied by most countries of the international community. More detailed structure of the classification is determined by local authorities when adopting a budget statute. Such an approach gives more independence and responsibility to local authorities while preparing a budget project within the frame of uniform principles of budget classification.

Thus, the Russian budget law of the last few years has experienced several stages of reforms. It transformed from a set of uncoordinated incomplete law into a well-ordered system. Some solutions were adopted from international experience. However, some changes have not been completely implemented yet.

Streszczenie

Koniec XX i początek XXI w. był okresem znaczących reform rosyjskiego prawa budżetowego. Został on podzielony na trzy etapy.

W pierwszym – uchwalono Rosyjski Kodeks Budżetowy (1998), który zaczął obowiązywać od roku 2000. Dzięki niemu usprawniono procedurę budżetową, ustanowiono zasady legislacji budżetowej oraz ujednolicono regulacje prawne z tego zakresu.

W drugim okresie reforma została skoncentrowana na poprawie relacji międzybudżetowych. W 2001 r. rosyjski rząd opracował program rozwoju budżetu federalnego.

Etap trzeci dotyczył poprawy efektywności wydatków budżetowych. Począwszy do 2007 r. budżet rosyjski projektowany jest na następny rok oraz na dwa kolejno następujące lata budżetowe. Rozpoczęto również stosowanie programowo-zadaniowej metodologii planowania budżetowego.

Ludmiła Lipiec-Warzecha

RESPONSIBILITY OF MEMBERS OF THE BODY WHICH EXECUTES BUDGET OR THE FINANCIAL PLAN FOR VIOLATING THE DISCIPLINE OF PUBLIC FINANCE

The Act on the Responsibility for Violating the Discipline of Public Finances,[1] which has been in effect for over three years is to regulate, as suggested by the legislator, in a comprehensive and complex way, the subjective and objective scope of a particular type of legal responsibility which is the responsibility for violating the discipline of public finances. One of the major changes regarding the current legal state, introduced by this Act to the system of Polish public finances is including the responsibility of the members of executive bodies of collegial character in the responsibility for violating the discipline of public finances. The subject of this report is the legal analysis of the article which allows executing the responsibility for violating the financial discipline from members of such bodies and ratio legis of the implementation of this regulation.

The subjective scope of responsibility is determined by art. 4. The structure of the responsibility of people who are members of the body which executes budget or financial plan of the unit in the sector of public finances or a unit which is not numbered among the sector of public finances but which receives public resources or which manages the property of these units, was neither included in the Public Finances Act of 1998, nor by the regulations which concern the financial discipline that had previously been in effect[2]. The Public Finances Act of 1998 restricted the

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1 Act of 17th December 2004 on responsibility for violating the discipline of public finances (Journal of Laws of 2005. No 14, pos. 114 with further changes, referred to as „a. a. v.d.o.p.f."), that came into effect on July 1st 2005.

2 Before the act on responsibility for violating the discipline of public finances came into effect this issue had been regulated with an Act of November 26th 1998 about public finances. The Act concerning public finances of 1998 devoted to the problem of the discipline of public finances only a few regulations. The major part of regulations, both from the range of the material law as well as the procedural law was spread among a few legal acts of a different degree, that is in the Act of May 20th 1971 – The Code of Criminal Procedure.) (regulations mentioned in art .170 u.f.p. of 1998 r. in con. with art. 3 § 2 of act of August 24th 2001 r. – Regulations which introduced the code of criminal procedure (Journal of Laws No 106, pos. 1149 with further changes), act of May 20th 1971 – Code of Offences (Journal of Laws No 12 pos. 114 with further changes.), regulations mentioned in art. 142 u.f.p. of 1998.), the ordinance of the Council of Ministers of April 27th 1999 concerning the characteristic features of procedure of appointing the spokesmen of the discipline of public finances, decision-making bodies as well

scope of subjective responsibility for violating the discipline to employees at the unit in the sector of public finances and other people who administered public resources (art. 137 of Act of Public Finances of 1998)[3].

To justify the necessity to extend, in comparison with the solutions which were previously valid, the scope of subjective responsibility for violating the financial discipline over the people who were the members of the body that executed the budget or financial plan of a given unit or the manager of its property, during works on the act, it was emphasized that the need to extend the responsibility was indicated many times, among other things, on account of wide decisive powers, which collegial bodies had at their disposal in some special funds or units of the local government on county and provincial level[4]. The lack of the responsibility of the members of collegial bodies in case of passing resolutions that included an authorization or an order to perform an action which violated the discipline of public finances, resulted in the impunity of both executors of the resolution who directly performed it and its authors. Before the regulation commented on came into effect it was impossible to include people who were the members of collegial bodies into responsibility for violating the discipline of public finances. In the ruling of 13 March 2003 the Main Adjudication Commission admitted that the management could not be responsible for violating the financial discipline. On the other hand, the member of the management, who contributed to some particular decisions by the management (concerning giving a grant), couldn't have made this decision by himself, because it was a collective decision, made by a group of people in a legally specified procedure[5]. In the assessment of the legislator, this regulation allows the possibility to be held responsible by the members of collegial bodies as perpetrators who ordered to commit an action which violates the discipline of public finances. In this way the responsibility is individualized.

Involving the people who are members of the body which executes budget or a financial plan in the responsibility for violating the discipline of public finances is implemented by means of a legal fiction specified in the art. 20 of v.d.o.p.f Act.

as detailed rules of procedures concerning violation of the discipline of public finances (Journal of Laws No 42 pos. 421 with further changes.), in the Minister of Finance's ordinance of August 4th 1999 concerning the work of decision-making commissions and spokesmen of the discipline of public finances (Journal of Laws No 69, pos. 765) the ordinance of the Council of Ministers of December 14th 1999 about detailed rules and procedures of performing punishment concerning ban on performing administrative functions connected with having public resources at disposal. (Journal of Laws No 106, pos. 1206).

3 In the doctrine of administrative law, collegiality constitutes the way of acting of a collective body. (tres faciunt collegium). From a functional perspective the collegiality means the procedure of acting and deciding which relies on examining cases that belong to the competence of a given authority, often by majority of votes. From a structural perspective the collegiality indicates the way of organization of a given organ. The whole team is authorized to act (if quorum meets), and not particular people who are the members of the body. See: Wielka encyklopedia prawa, red. E. Smoktunowicz, C. Kosikowski, Warsaw 2000, p. 346.

4 From the justification of the governmental project of the Act on responsibility for violating the discipline of public finances, parliamentary form no 1958.

5 DF/GKO/Odw.-136/173/2002, Lex nr 81679.

The member of an executive collegial body, participating in the process of passing a resolution which contains an order or an authorization to commit an action that violates the discipline of public finances is responsible for the aforesaid action, if the person had not raised an objection to this resolution. According to the rules specified in art. 20 of v.d.o.p.f. Act the person is responsible when he jointly meets the following premises:

- is a member of a collegial body which executes budget or a financial plan of the unit of a sector of public finances or a unit which is not numbered among the sector of public finances which receives public resources or which manages the property of these units;
- took part in passing a resolution which contained an order or an authorization to commit an action which violates the discipline of public finances;
- did not raise an objection to this resolution in a written form or verbally to protocol, or did not vote against the resolution in the case of a vote by roll-call.

Responsibility for violating the discipline of public finances has, according to general rule, a strictly individual character and the article which enforces the responsibility from a person who takes part in passing a resolution theoretically does not modify this rule. Still, the responsibility is held by particular individual people and not by bodies. In the situation when violation of financial discipline occurs as a result of a collegial body's action it does not settle this responsibility *in gremio*[6].

However, the structure of responsibility which is based on an assumption that the act of voting to accept this resolution is identical with making an order to perform this resolution, is open to doubts of legal nature. In the literature in this field, it is argued that it is difficult to accept the application of the repressive law towards the people to whom the committment of an offence is ascribed on the grounds of the legal fiction[7]. Moreover, interpreting it *ad absurdum*, it is easy to imagine a situation when the members of a collegial body pass unanimously some resolution, and then raise objection in a written form in order to free themselves from any probable responsibility[8].

6 L. Lipiec-Warzecha, Ustawa o odpowiedzialności za naruszenie dyscypliny finansów publicznych. Komentarz, Warsaw 2008 (in print).

7 „With absolute certainty, voting on a resolution is not equivalent to the action of a collegial body, and for sure one cannot recognize that it is identical with giving any order" – Ustawa o finansach publicznych. Ustawa prawo zamówień publicznych: P. Kryczko, Cracow 2005, p. 15.

8 In consequence people who created specific actions, then negate them in fear of being accused of violating the discipline of public finances. P. Sławiszyn, Zmiany w odpowiedzialności za naruszenie dyscypliny finansów publicznych jako przykład sanacji finansów publicznych w Polsce, (w:) Ogólnopolska Konferencja Naukowa – Sanacja finansów publicznych w Polsce. Aspekty prawne i ekonomiczne, red. K. Święch, A. Zalcewicz, Szczecin 2005, p. 380.

In the light of the above-mentioned case, the aim of the regulation, that is to determine which people are responsible for making decisions is not possible to be achieved[9]. The open nature of the ballot does not provide the answer to a question in what way a given person was voting. This condition would be only fulfilled if the open vote by roll-call was implemented[10].

During the progress of works on the regulation in question it was mentioned that the intention of "constitution of the responsibility for the discipline of public finances of people who are members of collegial bodies and who have at their disposal public resources is understandable. Bodies of legal persons accepted to the sector of public finances have at their disposal huge public resources and they distribute them not always in a legal way. Solutions suggested in this subject, however, (especially art. 20 and 29 of Reg.2 of v.d.o.p.f.) are hard to be recognized as right. They are incoherent with rules which regulate legal persons' functioning. The proposed solution requires consultation with the experts who specialize in civil and administrative law, above all in the range of the possibilities of ascribing the legal responsibility to the members of the body for a decision (resolution) of this body, as well as possibilities to recognize the resolution of the body as an "order" to perform an action which violates the discipline of public finances, or more precisely, the lack of opposition to such a resolution as an order to perform a criminal act (art. 20 of Reg. 1 of v.d.o.p.f.). Here, it is also worth emphasizing the fact that the responsibility for violating the discipline of public finances can be held by a person who committed an offensive act (art. 19 of Reg.1 of v.d.o.p.f.) or gave an order to perform such an act (art. 19 of Reg. 3 of v.d.o.p.f.). The member of a collegial organ, even if he votes for passing a resolution, which could result in violating the discipline, personally neither commits an offensive act nor gives an order to commit such an act. He just contributes to the fact of violating the discipline by the body. However, it is also difficult to judge whether he co-operates with the others in the process of violation, and such a form of violation does not result in liability for it because the regulation does not envisage such a possibility"[11].

9 From the justification of the governmental project of the Act on responsibility for violating the discipline of public finances, parliamentary form no 1958, p. 2.

10 E. Ruśkowski, J. M. Salachna, Wpływ zmian regulacji zasad publicznej gospodarki finansowej na odpowiedzialność za naruszenie dyscypliny finansów publicznych, „Finanse Komunalne" 2006, no 10.

11 „The scope of responsibility of people who pass a resolution and perform it was ambiguously settled in the project too. If even it is assumed, in accordance with art. 19 Of Reg. 1 and 3, that is such situation they both are responsible, but doubts appear in relation to article 29 Reg 2. From it results that, only when the one who performs the resolution frees himself from responsibility, the members of the body who passed this resolution, and not all of them, but only the ones who have signed the written conformation of performing the resolution. However, when there is no such document, the responsibility rests on each member of the body that took part in passing the resolution who did not raised an objection to the resolution and voted for it. I am leaving the fact that in the presence of the latitude in the form of written confirmation of performing a resolution and the lack of an obligation to sign it by all who had voted on it, it is however difficult to receive such document. Doubtful is also the institution of raising an objection to the resolution. Towards the lack of regulations in other legal acts this situation will have only one result: the member of a collegial body who raises an objection is free from responsibility for the decision of the whole body. Objection will have no influence on the importance of the resolution and obligation to

Beyond the range of hypothesis of art. 4 point 1 of v.d.o.p.f. are councilors who, being members of a decision-making body, and not an executive body, and borough leaders (mayors, presidents), who are not a collegial body. They are the managers of budgetary units, but the regulations (decisions) are taken as the communities' executive bodies, not as people who only manage the Municipal Council. In the literature in this field, it is emphasized, that they are the managers of a unit of the public finances' sector (art. 4 point 2 of v.d.o.p.f.), however decisions concerning management of public resources are made by them as executive bodies of a community, and not by people who lead an office[12].

The next problem connected with practical application of the responsibility of collegial members of executive bodies is the possibility (or rather impossibility) to specify the level of the offence of individual people who took part in the act of passing the resolution that included an order or an authorization to commit a crime which violated the discipline of public finances. Ascribing responsibility to people covered under hypothesis art. 4 point 1 can be difficult because of the necessity to prove them an intentional or non-intentional character of their action. Responsibility for violating the discipline of public finances is held by a person to whom the guilt can be attributed to during the time of committing the violation (art. 19 of Reg. 2 of v.d.o.p.f.). The guilt constitutes the subjective basis of responsibility. The guilt is when the perpetrator of the violation can be accused of committing a punishable offence, but the accusation must be based on a possibility to believe in a legal norm[13].

We can speak about a violation of the financial discipline committed by a member of a collegial organ that implements the budget, also when it is possible to charge the perpetrator with the fact that he did not believe in the legal norm which specified the rules of public resource management, despite the fact that *in concreto* he had a possibility to act according to the norm. Determining the way of understanding in the process of proving the culpable act the Main Adjudication Commission in justification of one of the legal decision has made a reasoning from which it can be concluded that "fundamental meaning for the substantive correctness of the adjudication will have an answer to a question: whether the Accused in the subjective real state had the possibility to behave in a different way? In other words one should indicate the Accused how she should have behaved in order not to violate the discipline of public finances. If, however, it is revealed that in a given

perform it. When the regulations have such a form is hard here to believe that the members of collegial bodies who voted for passing a resolution would behave otherwise than raise an objection to it just after they had passed it, and what in fact would free them from responsibility, and would not influence the content of the resolution" (M. Karlikowska, Commissioned opinion of the Studies and Expertises Office of the Seym of the Republic of Poland about the governmental project of an Act about the responsibility for violating the discipline of public finances, parliamentary form no 1958, www.sejm.gov.pl).

12 E. Ruśkowski, J.M. Salachna, Wpływ zmian regulacji zasad publicznej gospodarki finansowej, p. 7.

13 L. Gardocki, Prawo karne, Warsaw 1999, p. 51; K. Buchała, A. Zoll, Kodeks karny. Część ogólna. Komentarz do art. 1-116 Kodeksu karnego, Cracow 2000, p. 24.

circumstances the accused had no other possibility to behave, despite an impartial ascertainment that a penal act had been committed, guilt cannot be attributed to her"[14]. To attribute responsibility it is enough to indicate a formal violation of the rules of law, but offence must be proved being the perpetrator's guilt. (decision of MAC of 23rd November 2006 r., DF/GKO-4900-83/103/06/2564, non publ.)[15]. In the interpretation of art. 4 point 1, there appear some doubts concerning how one can attribute guilt to a member of a body who took part in voting for a resolution (as a result of which the discipline has been violated), in a situation when it is only known that he did not raise an objection to this act[16]

With the individualization of the responsibility for violating the discipline of public finances the problem of the sentence, except just premises, is connected. In the process of inflicting a punishment the regulations demand, inter alia, to take into consideration also motives and the way of acting, personal conditions of the perpetrator, his professional experience, the way he carries out his business responsibilities, conduct after he violated the discipline. Moreover, the extenuations, which exemplary catalogue is formed by article art. 36 of Reg. 2, that allow to use the benefits of an exceptional commutation of punishment, or refrain from imposing the punishment, concern strictly personal circumstances.[17]. In this context, respected rules of the individualization of the responsibility expressed in art. 33 of Reg. 3 of v.d.o.p.f., which imposes the consideration of all circumstances that may influence the infliction of the punishment only to the person to whom it is concerned, are impossible.

Problematic can be also interrelation between the act of voting with giving an order and determining whether the fault of the member of a collegial body should be examined with respect to the act voting itself or to giving an order. It often occurs that the resolution passed by the management does not constitute any order (e.g. resolution about a change of financial plan, in a situation when the change is not acceptable constitutes violation of the discipline of public finances, despite the fact that it is not an order to commit a penal act)[18].

14 GKO statement of September 2002, DF/GKO/Odw.-94/126-RN-29/2002, LEX no 79999.

15 The opinion of the NSA expressed under the government of Budgetary law which was in effect until December 31st 1999 of 1999, which emphasized the rule of committing an offence, according to which „person who, indeed, exemplified by his behaviour premises of violating the budgetary discipline [currently: discipline of public finances – L.L.W.], but to whom guilt cannot be ascribed to" (verdict of NSA of January 8th 2002 r., III SA 2079/01, non-publ.).

16 E. Ruśkowski, J.M. Salachna, Wpływ zmian regulacji zasad publicznej gospodarki finansowej, p. 7.

17 As the extenuations one particularly can take into account: acting or renunciation on specific motives or in specific conditions, that must be taken into account, in order to prevent the damage of public property, being distinguished before violating the discipline of public finances by an excellent attitude towards fulfilling his professional duties, contribution to remove the harmful consequences of violating the discipline of public finances or making efforts to achieve it.

18 P. Kryczko, Wybrane zagadnienia z zakresu podmiotowego i przedmiotowego odpowiedzialności za naruszenie dyscypliny finansów publicznych w orzecznictwie Głównej Komisji Orzekającej, (w:) Gospodarka budżetowa jednostek samorządu terytorialnego, red. W. Miemiec, Wrocław 2006, p. 336–337.

Conclusions

The need to spread the responsibility for violating the discipline of public finances over members of collegial bodies who perform budget or a financial plan has been indicated many times, among other things, on account of wide decisive powers, which collegial bodies have at their disposal in some special funds or units of the local government on county and provincial level.

Specifying a separate categories bearing responsible, that are members of collegial body, there were not dissipate doubts which previously existed in the doctrine, administrative and judicial case-law administrative judicature; currently the doubts especially concern proving that particular individuals committed an offensive act, conditions on which the responsibility may be laid upon them.

Doubts of a legal nature are raised in reference to the scope of responsibility members of collegial bodies. Voting for a resolution (or against it) cannot be identified with committing an offence or with giving an order to commit such an act.

Streszczenie

Ustawa z dnia 17 grudnia 2004 roku o odpowiedzialności za naruszenie dyscypliny finansów publicznych, która obowiązuje już od ponad trzech lat, reguluje – jak sugeruje ustawodawca – zupełnie i kompleksowo podmiotowy oraz przedmiotowy zakres szczególnego rodzaju odpowiedzialności prawnej jaką jest odpowiedzialność za naruszenie dyscypliny finansów publicznych. Jedną z kluczowych instytucji wprowadzoną przez ustawę do polskiego systemu finansów publicznych, jest ustanowienie odpowiedzialności członków organów wykonawczych o kolegialnym charakterze. Przedmiotem niniejszego referatu jest analiza prawna przepisu, który reguluje taką odpowiedzialność oraz jego *ratio legis*.

PART III
LOCAL AND REGIONAL FINANCE

Rafał Bucholski

SECURITIZATION AS AN INSTRUMENT OF ADMINISTRATION OF TERRITORIAL SELF-GOVERNMENT UNITS' FINANCES

The financial policy of territorial self-government units

The administration of assets by self-government units is one of their most important activities. This activity refers to financing of all the fixed and current assets as well as financing the needs of the members of a particular self-government community. In order to make appropriate decisions about the administration of assets, a self-government unit has to make use of instruments such as shaping strategies for financing assets, administering debts within limits defined in Articles 169 and 170 of the Act of 30 June 2005 on Public Finance[1] (Public Finance Act 2005), predicting debts and monitoring the costs of debts[2].

The activities of self-government units, including decision-making within the financial policy, entail a certain group of risks. Among the risks in the self-government activity, six basic types of risk can be distinguished. These risks include operational risk, financial risk, risk of damages and assets loss, political risk, social risk and investment risk[3]. For the financial security of the self-government's tasks being carried out, the financial risk is particularly important. The effects of miscalculating the financial risk may burden self-government budgets for many years to come. The financial risk is directly connected with the operational risk (associated with the

1 The Act of 30 June 2005 on Public Finance (Journal of Laws - Dz. U. No. 249, item 2104 with amendments).

2 M. Dylewski, Zarządzanie kapitałem i długiem, [in:] M. Dylewski, B. Filipiak, M. Gorzałczyńska-Koczkodaj, Finanse samorządowe. Narzędzia. Decyzje. Procesy, Warsaw 2006, p. 175. Vide: M. Dylewski, Prognoza długu publicznego jako prawny i ekonomiczny instrument oddziaływania na długoterminowe decyzje w jednostkach samorządu terytorialnego, [in:] Sanacja finansów publicznych w Polsce, edited by K. Święch and A. Zalcewicz, Szczecin 2005, p. 323-336; B. Filipiak, M. Dylewski, Prognoza długu publicznego w jednostkach samorządu terytorialnego, "Finanse Komunalne" 2005, no. 11, p. 23-36.

3 B. Filipiak, Rodzaje decyzji finansowych a ryzyko, [in:] M. Dylewski, B. Filipiak, M. Gorzałczyńska-Koczkodaj, Finanse samorządowe…, p. 107.

administration of public funds when carrying out current tasks) as well as the risk of investment (associated with long-term investments)[4].

There are several ways to limit the risk in the activity of territorial self-government units which is an element of the administration of assets. These are, among other things, a choice of financial instruments that balance one another in terms of risk, transfer of risk, and diversification of sources of financing. The basic financial instruments used by territorial self-government units to finance a budget deficit and debt, as defined in Article 168 Section 2 of the Public Finance Act, are credits, loans and municipal securities[5]. These instruments, however, are burdened with a high financial risk.

An instrument that allows to transfer risk from the originator to investors is securitization[6]. This means that the financial risk (as well as other risks that a territorial self-government unit takes carrying out its tasks) is transferred from the territorial self-government unit originating securitization into an SPV (special purpose vehicle – a participator in the process of securitization which issues securities) and the investors that buy the securities backed with the assets transferred.

Bearing the above in mind, securitization of certain self-government assets appears to be an interesting and convenient financial instrument used by self-governments to conduct their financial policies. It should be taken into account, however, that securitization used as an instrument which brings self-governments external means to be paid for and repaid is also burdened with a group of risks such as, e.g., market risk (including the risk of fluctuations in interest rates or in exchange rates), risk of reinvestment, operational risk, liquidity risk, and legal risk (e.g. a possibility of legal flaws in contracts concerning the transfer of claims or sub-participation, which can even cause investors' regress from the originator)[7].

It needs to be underlined that the decision about securitization to be carried out by territorial self-government units should be preceded by a thorough analysis of not only the financial but also the social costs and benefits.

4 M. Dylewski, Identyfikacja ryzyka finansowego w JST, [in:] Bankowo-finansowa obsługa jednostek samorządu terytorialnego, edited by B. Filipiak and S. Flejterski, Warsaw 2008, p. 211.

5 J. Sierak, Zasady i formy pozyskiwania przychodów zwrotnych przez jednostki samorządu terytorialnego, [in:] Gospodarka finansowa jednostek samorządu terytorialnego w warunkach decentralizacji zarządzania sektorem publicznym, edited by H. Sochacka-Krysiak, Warsaw 2008, p. 200-207.

6 B. Półtorak, *Ryzyko w transakcji sekurytyzacji aktywów bankowych*, "Prawo Bankowe" 2004, no. 10, p. 68.

7 Ibidem, p. 62-63.

The notion of securitization

Securitization is currently one of the most dynamically developing financial instruments[8] used to administer the financial liquidity and the assets liquidity as well as to administer the assets themselves[9]. At the same time, securitization is one of the most complicated forms of gaining capital on international markets[10], which is shown by the fact that not only experts on banking but also auditors, solicitors, tax and financial advisors participate in conducting securitizations[11]. The development of securitization is determined by such processes as globalization, internationalization and market deregulation, or simply by growing knowledge and, consequently, by growing needs[12].

In the last years the principles of securitization in the EU have been unified. This fact should contribute to further development of this financial technique in Europe. At present, in the EU securitization is regulated by Directive 2006/48/EC[13] and Directive 2006/49/EC[14]. These Directives result from the amendments to the two previously binding directives, i.e. Directive 2000/12/EC[15] (the Consolidated Banking Directive – CBD) and Directive 93/6/EEC[16] (the Capital Adequacy Directive), introduced by the Capital Requirements Directive (CRD)[17]. The CRD is an instrument that is used to implement Basel II in the legal systems of the EU and its member states. Its contents were devised and proposed by Basel Committee on Banking Supervision[18].

Securitization is a process whereby instruments of the credit market are introduced into the capital market, which means issuing securities backed with specified packages of assets called asset-backed securities[19]. In other words, securitization is a form of gaining capital by, e.g. territorial self-government units, their unions as well as by, e.g. enterprises or financial institutions, whereby the assets owned by a particular subject are converted into securities which are then sold on

8 (edt.), *Dwa miliardy złotych do funduszy sekurytyzacyjnych*, "Biuletyn Bankowy" 2006, no. 4, p. 23.
9 J. Koleśnik, M. Rewieński, *Sekurytyzacja wierzytelności bankowych – wybrane aspekty*, "Prawo Bankowe" 2000, no. 7-8, p. 81; J. Grodzicki, R.W. Kaszubski, *Sekurytyzacja – aspekty prawne*, "Glosa" 1999, no. 8, p. 4.
10 J. Węcławski, *Sekurytyzacja – nowa forma finansowania przedsiębiorstw*, "Bank i Kredyt" 1994, no. 8, p. 49.
11 Ł. Reksa, *Sekurytyzacja po polsku*, "Bank" 2003, no. 10, p. 51.
12 Ibidem, p. 51.
13 Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ L 177, 30.6.2006).
14 Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (OJ L 177, 30.6.2006).
15 Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ L 126, 26.5.2000).
16 Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investments firms and credit institutions (OJ L 141, 11.6.1993).
17 J. Zombirt, Mamy ją!, "Bank" 2005, no. 10, p. 22-23.
18 More about Basel II: *Konsultacje i wdrożenie postanowień Nowej Umowy Kapitałowej w sektorze bankowym w Polsce*, "Prawo Bankowe" 2005, no. 7-8 (supplement), J. Zombirt, Nowa Umowa Kapitałowa. Ewolucja czy rewolucja, Warsaw 2007.
19 J. Zombirt, *Polubić sekurytyzację*, "Bank" 1998, no. 5, p. 35.

the financial market. Securitization is also defined as a process of 're-packing' of a group of claims, e.g. tax or credit claims, and other groups of relatively non-liquid assets into a form of securities, providing that they have some common qualities.

As defined in Article 4 Subparagraph 36 of the CBD, 'securitization' means a transaction or scheme, whereby the credit risk associated with an exposure or pool of exposures is tranched, having the following characteristics:

– payments in the transaction or scheme are dependent upon the performance of the exposure or pool of exposures; and

– the subordination of tranches determines the distribution of losses during the ongoing life of the transaction or scheme.

During the development of securitization instruments, initially 'traditional securitization' was used. Along with the development of the derivatives market, a new form of securitization called 'synthetic securitization' was introduced. The CBD defines both types of securitization. As defined in Article 4 Subparagraph 37 of the CBD, 'traditional securitization' means a securitization involving the economic transfer of the exposures being securitized to a securitization special purpose vehicle which issues securities. This shall be accomplished by the transfer of ownership of the securitized exposures from the originator credit institution or through sub-participation. The securities issued do not represent payment obligations of the originator credit institution. As defined in Article 4 Subparagraph 37 of the CBD, 'synthetic securitization' means a securitization where the tranching is achieved by the use of credit derivatives or guarantees, and the pool of exposures is not removed from the balance sheet of the originator credit institution.

On the whole, securitization can be characterized as a process which involves the following elements[20]:

– selecting homogeneous assets from the whole portfolio of assets (the originator of securitization selects and combines those assets from the whole portfolio of assets which have common characteristics),

– founding an SPV by either the originator or the financial institution which handles the process (ultimately, however, the SPV has to be independent from the originator in terms of its capital, legal status and personnel because the SPV needs to be characterized by bankruptcy remoteness, which means

20 R. Łopiński, M. Mikołajczyk, *ABC Sekurytyzacji*, [in:] *Sekurytyzacja aktywów ze szczególnym uwzględnieniem wierzytelności hipotecznych – praktyczne doświadczenia w wybranych krajach europejskich, Stanach Zjednoczonych, Kanadzie i Polsce*, "Zeszyt Hipoteczny" no. 16, Warsaw 2003, p. 14. Vide: S. Gudkova, *Sekurytyzacja należności kredytowych banków*, Warsaw 2002, p. 23-53. Similarly: S. Antkiewicz, *Rola banków w procesie sekurytyzacji w świetle obowiązujących i planowanych przepisów prawnych*, "Biuletyn Bankowy" 2006, no. 6, p. 85-86; M. Rudnicki, Wykorzystanie sekurytyzacji przez jednostki samorządu terytorialnego w pozyskiwaniu środków finansowych na inwestycje, "Finanse Komunalne" 2006, no. 1-2, p. 5.

that its assets are secured against potential claims from the originator's creditors[21]),

- selling claims to the SPV through transferring of claims or by the use of sub-participation or novation[22],
- issuing securities by the SPV to discharge its obligations towards the originator for the purchased assets,
- rating the securities issued by the SPV,
- selling the issued securities to investors and transferring the means acquired in this way by the SPV to the originator as a payment for the assets purchased (at this stage the SPV may charge a commission for its service),
- re-purchasing the issued securities at the moment of their maturity with the means acquired from the originator.

It should be underlined that in order to limit the credit risk of the securities issued in a securitization the assets being securitized have to guarantee financial revenues in the future and enable to determine precisely the amount of these revenues. However, because of the fact that assets of such qualities are hard to achieve in practice, it is accepted that the assets selected for securitization should have a specified schedule of cash-flow, a low risk of repayment failure to assure investors that their claims shall be discharged, as well as an adequate unit value to achieve a diverse portfolio of claims (this is to assure that despite the failure to repay debts as stated in the schedule, in total the cash-flows shall be regular and of appropriate amount). What is more, the assets should be homogeneous in terms of type in case of securing the same series of securities issued, for instance arrears of taxes or obligations of national health service institutions being in debt, in which cases, however, certain diversity in a particular group of claims is advisable in order to decrease the influence of the particular assets' characteristics on the total cash-flows (e.g. demographic or regional diversity)[23].

21 S. Jóźwiak, P. Wiśniewski, *Europejski rynek sekurytyzacji*, "Bank" 2003, no. 9, p. 47.

22 M. Borek, *Techniki sekurytyzacyjne w zarządzaniu bilansem banku*, "Bank" 2001, no. 2, p. 59; P. Jaroński, *Zagadnienia prawne sekurytyzacji na tle dotychczasowych prób transakcji sekurytyzacyjnych*, [in:] *Sekurytyzacja aktywów ze szczególnym uwzględnieniem wierzytelności hipotecznych – praktyczne doświadczenia w wybranych krajach europejskich, Stanach Zjednoczonych, Kanadzie i Polsce*, "Zeszyt Hipoteczny" no. 16, Warsaw 2003, p. 25.

23 R. Łopiński, M. Mikołajczyk, op. cit., p. 13; J. Koleśnik, M. Rewieński, op. cit., p. 82-83.

Securitization in Poland – legal conditions

In Poland securitization is regulated by the EU regulations and two acts, i.e. the Banking Law Act of 29 August, 1997[24] and the Investment Funds Act of 27 May, 2004[25]. The regulation of securitization included in the Investment Funds Act does not sufficiently cover problems associated with securitization[26]. At present, it is the sole source of laws which provides legal definitions of 'pool of exposures,' 'originator of securitization,' and 'securitized claims'. Article 4 Subparagraphs 25-27 of the Banking Law Act refers to the Investment Funds Act for definitions of 'investment fund management company,' 'securitization fund,' and 'sub-participation contract'.

For territorial self-government units, the regulation included in the Investment Funds Act is of more importance. As defined in Article 2 Subparagraph 31 of the Investment Funds Act, 'the originator of securitization' is either a territorial self-government unit, or a union of territorial self-government units, or a subject engaged in business activity, which either sell the pool of claims to the securitization fund or commit themselves to transfer to the securitization fund all the benefits acquired from a particular pool of claims. This means that territorial self-government units, a union of such units or e.g. municipal companies, as stated in the Municipal Management Act of 20 December, 1996[27] can become originators of securitization.

During the work of the Sejm of the fourth term of office, a parliamentary bill draft of securitization was prepared[28]. The work, however, was not completed before the end of term of office. The reason for the suspension of the work was a lack of agreement concerning the solution to the problem of the enforcement clause for the issuer's enforcement titles[29]. It seems, however, that owing to the importance of the problem, the bill draft should return to the Sejm[30].

24 Uniform text Journal of Laws - Dz. U. of 2002 No. 72, item 665 with amendments.
25 Journal of Laws - Dz. U. No. 146, item 1546 with amendments.
26 More about problems and perspectives of the development of securitization funds: R. Janiak, Długami handlowanie, "Bank" 2005, no. 9, p. 57-58. More about principles of carrying out securitization based on securitization funds and about the types of securitization funds: M. Barowicz, Powtórka z sekurytyzacji, "Bank" 2005, no. 11, p. 44-46; A. Zwolińska-Doboszyńska, Sekurytyzacja wierzytelności z udziałem funduszy sekurytyzacyjnych na tle innych uregulowań dotyczących sekurytyzacji, "Przegląd Prawa Handlowego" 2005, no. 2, p. 17-25; M. Rudnicki, op. cit., p. 8-14.
27 Journal of Laws - Dz. U. of 1997 No. 9, item 43 with amendments.
28 The bill draft of the Act on Securitization (parliamentary paper no. 2080, the Sejm of the fourth term of office).
29 P. Jaroński, *Gdzie jesteś sekurytyzacjo?*, "Bank" 2005, no. 2, p. 49.
30 More about the bill draft of securitization: M. Rudnicki, op. cit., p. 14-15.

Securitization as an instrument of the financial policy of territorial self-government units

It needs to be clearly stated that currently banks are the greatest beneficiaries of securitization. Owing to the securitization of assets, they can increase their incomes from the credit portfolio by altering it, as well as acquire financial means for further credit activity[31]. However, in the specialist literature the problem of securitization carried out by territorial self-government units is being raised more and more frequently[32]. Unfortunately, the discussions on the problem are often too general. Nevertheless, it seems that in the theory of management there are no objections to this modern instrument of financial engineering to be used by units of the public finances sector in Poland including units of the self-government public finances sub-sector. In this field Poland should learn from the experience of American cities and states[33].

Securitization as a source of off-balance financing may facilitate the activity of wealthier territorial self-government units whose capability of debt handling is at a higher level than the one defined in Articles 169-170 of the Public Finance Act. Applying securitization by self-governments would enable to pass over the limits specified in the articles mentioned[34].

The means acquired in a securitization whose originator is a territorial self-government unit, as defined in Article 5 Section 1 Subparagraph 5 of the Public Finance Act, should be qualified as the public means which are the incomes of the

31 M. Borek, *Techniki sekurytyzacyjne w zarządzaniu bilansem banku*, "Bank" 2001, no. 2, p. 54.

32 B. Filipiak, Nowe instrumenty finansowe w zarządzaniu finansami, [in:] M. Dylewski, B. Filipiak, M. Gorzałczyńska-Koczkodaj, Finanse samorządowe…, p. 200; B. Półtorak, Sekurytyzacja finansowych aktywów samorządowych, [in:] Perspektywy współpracy banku z samorządem terytorialnym w Polsce, edited by D. Korenik, Wroclaw 2005, p. 158-161; I. Kidacka, Finanse zintegrowane. Sekurytyzacja, struktury finansowe, Warsaw 2006, p. 306-308; M. Poniatowicz, Obligacje przychodowe i sekurytyzacyjne jako innowacyjne instrumenty na polskim rynku komunalnych papierów wartościowych, "Finanse Komunalne" 2005, no. 3, p. 20-29.

33 I. Kidacka, op. cit., 148-149.

34 The problem was recognized in the bill draft of the Public Finance Act (parliamentary paper no. 1912, the Sejm of the fifth term of office) which was prepared by the cabinet of Prime Minister Jarosław Kaczyński. In Article 174 of the bill draft of the Public Finance Act, a new ratio limiting the repayment of territorial self-government units' obligations was formulated. This ratio shall be individually determined for each territorial self-government units. "On the one hand, the new ratio abolishes the currently binding limits for the territorial self-government units with high potential for development for which contracting even substantial financial obligations may be an instrument of a safe development policy. On the other hand, it imposes some discipline on the units whose excessive financial obligations require caution in contracting new credits and loans. It is estimated that the annual value of the obligations to be repaid and the related services compared with the projected incomes can not excess the ratio based on the arithmetical average for the previous three years calculated from the relation of the current incomes enlarged by the revenues from sales of property and reduced by the current expenditures having excluded the interest to the incomes in total. This ratio is calculated on the basis of reports from the previous three years and presents the real capability of the obligations repayment by a particular territorial self-government unit." (the explanatory statement to the bill draft of the Public Finance Act, p. 17) There is high likelihood that Donald Tusk's cabinet shall accept this solution for their bill draft of the Public Finance Act (at the time the article was being written the bill draft had not yet been presented.) However, even if the rules for calculating the limits of the obligations repayment by territorial self-government units were to be changed, securitization may still be an attractive instrument for gaining external capital.

public finances sector's units from other sources. They shall not be incomes from other financial operations (Article 5 Section 1 Subparagraph 4(a) of the Public Finance Act). The reason for this is that it is not the territorial self-government unit that shall acquire the means on financial markets; the SPV is to do this.

The means acquired by territorial self-government units in securitizations can be utilized by territorial self-government units in a number of ways: to cover a temporary budget deficit arising over the budget year, to finance the projected budget deficit, or to repay the obligations previously contracted on account of securities to be issued as well as their loans and credits, providing that either the new sources of financing should be cheaper or fulfilling the limits specified in Articles 169-170 of the Public Finance Act should be endangered.

In the specialist literature it is suggested that by the use of securitization techniques it is possible for national health service institutions to have their debts written off[35]. This process shall be based on taking over their debts by voivodship and poviat self-governments which are founding bodies for public hospitals. Taking over the debts shall occur in the form of loan granting to hospitals by self-governments. Then the obligations resulting from the granted loans shall be transferred onto the SPV which, pursuant to these assets, issues long-term securities (e.g. for 7 years with a prolongation option). The hospitals' repayments of debts shall be forwarded by self-governments to the SPV in order to pay off the obligations towards the investors. At present, however, such a task seems impossible to be carried out. Apart from the lack of appropriate legal solutions for securitization, it is doubtful whether hospitals, which are continually increasing their indebtedness, would be able to begin to handle the repayment of their debts within a few years. In case of a negative answer to this question, financial collapse of poviat and voivodship governments whose budgets even at present are relatively low would have to be taken into account.

The specialist literature also suggests that securitization could be applied in financing costly undertakings in the field of environmental protection and pro-ecological investments[36].

The catalogues of tasks which can be financed with means acquired from securitization are defined in the acts regulating the activity of territorial self-governments of particular levels in Poland[37]. It appears that the tasks financed should have the nature of investment rather than be of the operational character, considering the scale of the securitization process (it is accepted that the profitability

35 M. Poniatowicz, op. cit., p. 26-29.

36 M. Rudnicki, op. cit., p. 7, 13.

37 The Act of 8 March 1990 on Local Self-Government (uniform text Journal of Laws - Dz. U. of 2001 No. 142, item 1591 with amendments), the Act of 5 June 1998 on Poviat Self-Government (uniform text Journal of Laws - Dz. U. of 2001 No.142, item 1592 with amendments), the Act of 5 June 1998 on Voivodeship Self-Government (uniform text Journal of Laws - Dz. U. of 2001 No. 142, item 1590 with amendments).

of a securitization scheme is assured by issuing of securities worth about PLN 50 million[38]). Securitization transactions may be used by self-governments to build or extend infrastructure such as roads, tram lines, or laying of pipes, sewers and power lines. Such investments should raise the standard of living and attractiveness of the territorial self-government units investing. This may result in an increase in the budget incomes and facilitate the handling of the securitization applied.

All the assets fulfilling the criteria mentioned in this article can be securitized. This is why it appears that in securitization whose originator is a territorial self-government unit the securitization may cover all the incomes of territorial self-government units determined in the Local Government Revenue Act of 13 November, 2003[39], providing that the projected cash-flow over a definite period of time and of a specified amount can be determined. Therefore, incomes such as inheritances, legacies and donations to gminas, poviats and voivodships can not be securitized. Moreover, a detailed legal analysis should be performed to determine options for securitization of the proceeds from local taxes or for securitization of shares in income taxes. There is no doubt, however, that a gmina can have the tax arrears securitized.

Finally, securitization can be carried out on, e.g., future incomes of municipal companies.

The advantages and disadvantages of securitizations carried out by territorial self-government units

The basic advantage of securitization is the possibility of exchanging the dues scheduled over time for single incomes acquired from the issuing of securities. Owing to such operations, the originator of securitization (e.g. a territorial self-government unit) gains a direct influx of money and divests the risk associated with the claims sold. What is more, as a result of this kind of transaction the originator is secured in case the SPV is not capable of paying off the issued securities with the claims transferred[40]. In addition, securitization helps territorial self-government unit to achieve the effect of their debt structure adjustment, to accelerate the realization of certain projects, to improve liquidity ratio owing to the liquidation of low liquidity ratio assets and, finally, to diversify sources of financing for their activity by forwarding offers to purchase securities to many investors.

38 R. Łopiński, M. Mikołajczyk, op. cit., p. 19.

39 The Act of 13 November 2003 on Local Government Revenue (uniform text Journal of Laws - Dz. U. of 2008 No. 88, item 539).

40 K. Haładyj, Mechanizmy zbywania wierzytelności bankowych, "Transformacje Prawa Prywatnego" 2006, no. 1, p. 37.

Problems with applying securitization techniques by territorial self-government units may arise due to unfavorable legal conditions. Despite the authority to apply securitization by territorial self-government units included in the Investment Funds Act, the reality shows that self-governments do not use this instrument. The reason for this situation is complex. Apart from the unfavorable legal conditions, it needs to be underlined that self-government officials possess a low level of the specialist knowledge of finances, which results in the ignorance of the modern financial instruments facilitating a rational administration of self-governments' assets.

Presumably, securitization due to its high profit threshold shall rather be used by larger and wealthier territorial self-government units which additionally shall be able to make use of the experience of academic circles active in their areas. Small gminas and poviats shall not take the risk of applying an unknown financial instrument, even in the multi-sellers program whereby a number of originators may securitize homogeneous assets in one pool (e.g. the securitization of tax arrears by twenty gminas).

Therefore, a return to the concept of passing the act on securitization should be proposed. The act should resolve basic problems connected with carrying out securitizations. Moreover, the act should determine the principles for originating securitizations by self-governments as well as clearly define the catalogue of assets which can be securitized by self-governments. Finally, it should be suggested that the tax regulations should be changed so that they introduce the tax neutrality of securitization. In case of financing public tasks by the use of securitization, the Polish tax system should even perform a stimulating function for a dynamic development of securitization transactions[41].

41 M. Rudnicki, op. cit., p. 15-17.

Streszczenie

Celem niniejszego artykułu jest przedstawienie możliwości zastosowania instytucji sekutyryzacji przez jednostki samorządu terytorialnego dla efektywnego zarządzania środkami budżetowymi. Dokonana analiza opiera się na regulacjach ustawy o finansach publicznych z 2005 r. Autor próbuje zaklasyfikować środki nabyte w ramach sekularyzacji do jednej z kategorii środków publicznych wymienionych w art. 5 ustawy. Ponadto rozważa zastosowanie sekutyryzacji w różnych jednostkach samorządu terytorialnego stosownie do ustawy o dochodach jednostek samorządu terytorialnego z 2003 r.

Ewelina Leja

ATTEMPTS AT DETERMINING REGIONAL FINANCES IN INTERNATIONAL CONVENTIONS

Until recently regions were considered to be territorial self-government units governed in accordance with the rules of European Charter of Local Self-Government[1]. For some time now the relevance of such an approach has been questioned. Legislative changes in some countries are the instances of this, Poland being the exemplification. In 2006 the Polish translation of the Charter's name was changed from the European Charter of Territorial Self-Government (it relates to all territorial self-government units, also to regions) to the European Charter of Local Self-Government, leaving regions beyond this Charter. Hence, the international definition of the status of regions, including their financial position, has become an important issue.

The first tests in this field were carried out while preparing a draft of the European Charter of Regional Self-Government. The works on this document lasted for three years. Finally, the document was adopted on June 3-5, 1997 in Strasbourg during the Council of Europe's Congress of Local and Regional Authorities of Europe (CLRAE). Therefore, it will be justifiable to discuss the main principles of financing regional self-government within the context of the aforementioned draft of the European Charter of Regional Self-Government first.

In accordance with the Charter's provisions, the financial system of regions shall ensure predictable amounts of public income adjusted to the responsibilities of regions and enabling them to follow their own policy. The sources of regional financing should be sufficiently diverse and flexible so that the regions are given the opportunity to adjust to the general economic development and actual change in the costs of their duties. According to the Charter, the financial resources used for fulfilling their responsibilities shall be derived mostly from their own resources, which shall be freely used by regional authorities. However, as far as their own financial resources are concerned, the taxes and charges which could be collected

1 The European Charter of Local Self-Government prepared in Strasbourg on October 15, 1985. Till 2006 its name was the European Charter of Territorial Self-Government.

by regions within the scope defined by the constitution or the law were mainly mentioned. In accordance with the provisions of the Charter, the share of regions in general taxes, defined by the constitution or the law, was also included in the foregoing own resources.

Regardless this, the Charter granted regions the right to determine the regional taxes and charges. On the other hand, in the case of the lack of such a possibility, the regions should be authorized, within the frames defined by the constitution or the law, to establish an additional percentage from taxes levied by other public authorities. Moreover, the appropriate procedures of consulting the rules and agreements concerning the division and allocation of the aforementioned resources should be defined. According to the Charter's provisions, administration, comprising of a few levels of authority, or the regional authority could be responsible for the management of the regional taxes, in order to rationalize it and improve its effectiveness and coordination. Obviously, it shall not influence the ownership and usufruct rights. The solidarity principle, included in the Charter, constituted the requirement of introducing, within the limits of each of the countries, the mechanism of financial compensation – accounting for the potential resources as well as the needs of regions, - the objective of which would be the harmonization of the living standards of residents in various regions. As far as the transfers and grants are concerned, the Charter provided that, as a rule, they should be allocated to general purposes, although the financial transfers to regions and the participation in taxes must result from the rules defined in advance, which are based on a few objective criteria connected with the actual needs of the regions. It also gave the regions (within the law limits) an access to capital markets in order to get loans for capital costs (with reservation that they can present their debt service capacity during the debt repayment period using their own revenues). Still, the statutory requirements of compliance with some budgetary provisions or the standard clearing system should not be the limitation for the financial autonomy of the regions.[2]

The aforementioned solutions proposed by the European Charter of the Regional Self-Governments were not accepted by the Member States, including Poland, since in spite of the involvement and optimism during its preparation, the Charter was not ratified, due to rather restrictive character of some solutions, which applied also to the principle of financing regions. Among others, it resulted from Art. 20 (1) of the Charter, according to which, the contracting countries shall be obliged to obey all the Charter's provisions and not to make the supervision of its application difficult. As far as the provisions concerning the financing of regions are concerned, no appeasement in this respect was anticipated. What is more, the lack of precision while formulating particular terms was emphasised. It was underlined that

2 E. Ruśkowski, Local Finances (lecture's outline), Siedlce 2001, p. 189 and the next

the rights guaranteed to the regions by the Charter were also vaguely formulated. Moreover, there was a risk that the document would impose such solutions which would limit the sovereignty of the internal law. These limitations would involve, in particular, the country's competences of shaping the regional relations with other units of country's political system, including public authorities and administration.[3] The aforementioned and other issues which raise doubts caused that the European Charter of Regional Self-Governments was not ratified by the Council of Europe Member States.

What can be pointed as the second attempt at defining of the statute and their financial position in the international law was the action undertaken to create a new draft of the European Charter of Regional Self-Government, which in short can be called the European Charter of Regional Self-Government-Bis. It was presented on September 15, 2004 by the Committee of Ministers of the Council of Europe in the annex to the "Final Report on the Activities Concerning the Preparation of Various Legal Instruments as regards Regional Self-Government".

This draft varied significantly from the previous European Charter of Regional Self-Governments. Fundamental changes related to the Preamble as well as to the detailed rulings. The new draft included the solutions which were much more moderate than the previous Charter of 1997 with regard to the issue of definitions as well as the prerogatives of the regional self-government or the financial system itself. The provisions on the issues of financing regions, were formulated in only one article – Art. 16. The whole structure of Article 16, which was dedicated precisely to the financial resources of the regional self-government, compensation and transfers was modelled on eight points of Art. 9 of the European Charter of the Local Self-Governments. Only, the two first points of this article were of the obligatory character.[4] It was also characteristic that the draft did not use the concept 'own resources' directly, in spite of the obligation of ensuring financial autonomy for the regions on the basis of proposed funds - it was indicated by the provisions of Art. 16 of the Charter, in paragraph 1 in particular. According to its content, regional community should have at their disposal public funds adjusted to their responsibilities, which enable them to prepare activities as regards their competences. Paragraph 2 of the quoted article, which developed the thought, gave the regional communities the right to manage their funds freely while performing tasks with regard to their competences. Having said that it should be noted that in accordance with the content of Article 16, at least some of the regional communities funds should be derived from taxes and regional charges, the amounts of which shall be decided by regional communities within the limits provided for by the act. These funds could cover the shares in taxes

3 L. Kieres, The European Charter of Regional Self-Government: future constitution of regions, „Acta Universitatis Wratislaviensis" 1999, No 2154, p. 145

4 E. Ruśkowski, J. M. Salachna, Local Finances after Accession, Warsaw 2007, p. 259

constituting the country's revenue which were not purposeful subsidies, thus having a predefined allocation.[5]

While analysing the draft of the European Charter of Regional Self-Governments-Bis we may notice that it dispelled some doubts which appeared with reference to the European Charter of Regional Self-Governments of 1997. However, it did not give the basis for the international acceptance. Therefore, during the Congress of Ministers responsible for the local and regional democracy, which took place in 2005 in Budapest, it was officially rejected. Due to these circumstances the decision to prepare a new Charter draft from the scratch was taken.

The new draft entitled the European Charter of Regional Democracy was submitted for discussion and to consultation on May 15, 2007, as a result of reopening of discussion on European legal instruments concerning regionalization. The new document resulted from the necessity of quick and sudden changes, not only in communities but also in their political structures and management methods. This innovative approach was created to gain international acceptance for that new legal instrument concerning regional democracy.

Between May 27-29, 2008 in Strasburg, the Congress of Local and Regional Authorities of the Council of Europe adopted a draft of the European Charter of Regional Democracy with the assumption that after acceding of five Member States of the European Council, it will become the binding international convention and it will be possible to recommend its adoption by all the Member States of this organization.

This draft of regional 'constitution' is composed of a preamble and four parts (part I – "Key elements of regional democracy"; part II – without the specified title; part III – "Forms of regional organization"; part IV – "Final provisions"). The provisions of Art. 1 of the Charter have crucial significance for the content and obligations of the adopting countries. They state that:- all the provisions of part I of the Charter are obliging - one of the eventualities provided for by points a, b or c of Art. 23-28 shall be selected from the part II of the Charter; - from part III of the Charter at least 27 from included there 41 paragraphs shall be chosen. Articles which are not divided into paragraphs are treated as a single paragraph. The paper under consideration relates exclusively to the financial issues and excludes the holistic presentation of the Charter's content. However, it should be kept in mind that also the remaining rules influence the financial principles (e.g. organizational, constitutional, etc.) – therefore, while assessing and choosing provisions concerning regional finances, the entirety of the Charter's provisions shall be taken into

5 A. Kostecki, Harmonization of legal regulations as regards financing local and regional self-government with requirements of the Council of Europe, in: E. Chojna – Duch (eds.), Current problems of local and regional finances in Poland and other EU countries, Warsaw 2006, p. 35 and the next.

consideration. As far the solutions which relate to the regional finances directly, it should be noted what follows:

1) Part I Art. 16 of part 7 is devoted to these issues ("Regional Revenue Sources") and has to be adopted in its entirety by the countries ratifying the Charter. The provisions are the following:
   - regions shall have property rights;
   - regions have the right to administer the sources of revenue provided for by the law, predictable, and sufficient for the effective executing of their competences and responsibilities;
   - the sources of the revenue of regions shall be sufficiently varied. On one hand, they should ensure the rational stability and on the other hand, shall ensure real evolution in relation to the costs involved in the performed function;
   - financial transfers for the benefit of regions shall be regulated by statutory provisions based on the objective tests connected with regional responsibilities;
   - transfers of responsibilities for the benefit of regions shall be accompanied by appropriate transfers of funds;
   - as a general rule a country does not define the allocation of loans transferred to regions.
2) In part II of the Charter, which is based on selecting one of three possible solutions, Art. 25 ("Revenue Sources") is related directly to regional finances. The solutions are the following:
   - revenue sources of regions and conditions of their exploitation are specified in the constitution;
   - regions shall have at their disposal the revenue sources which can be utilized independently. The substantial part of the revenue shall be derived from taxes and charges, the amount of which is determined by a region within the limits specified by the law;
   - revenue sources of a region and conditions of their exploitation are specified by the law or a statute. The revenue may include contributions from local unions which are a part of regions.
3) Part III of the Charter includes 12 principles relating directly to regional finances (Art. 34 to 37). Having regard to the fact that the countries adopting the Charter have to choose at least 27 out of 41 regulations presented in this part, it can be assumed that a country ratifying the Charter may adopt all or

none of the proposed financial provisions, however, this possibility is not a very realistic one.

Article 34 of the Charter, concerning the application of correlation principle, provides for four possibilities.

- a rule according to which the revenue resources should be proportional to their responsibilities and shall be sufficient for the effective carrying out responsibility, ought to be recorded in the constitution or a statute;
- losses in regional revenue resulting from a decision of authorities concerning annulling or reducing regional taxes, shall be compensated by means of stable, adequate and equivalent revenues;
- in case of the transfer of a new responsibility, transferred revenue shall be at least of the amount equivalent to these exploited earlier for the realization of the objective tasks; the revenue shall provide for funds, property and/or employees;
- an obligation to transfer the adequate revenue or grant entirely new revenue shall also provide for decisions resulting from fluctuation of indicators of general costs such as salaries, national insurance contribution or environmental protection norms.

Article 35 of the European Charter for Regional Democracy refers to own revenue of regions while offering two possible provisions:

- substantial part of regions revenues shall be derived from charges that can be introduced individually and from regional taxes (exclusive and joint) the amount of which is generally defined by a region, and in particular cases within the limits provided for by the law.
- own resources shall be sufficient for the effective carrying out of regional responsibilities resulting from their competences.

Article 36 of the Charter is devoted to global and specific subsidies. If one would like to refer to Polish terminology, they shall be translated as subventions and grants. The article includes three types of provisions:

- principles of subventions and grants shall guarantee economic and financial stability of regions and shall take into account such criteria as economic growth, costs increase, increase in salaries and evolution of minimum subsistence level and environmental protection;
- grants for regions allocated for financing specific projects shall be limited and shall concern mainly investments and delegated responsibility;

– if subventions and grants are conditioned by the participation of regions, the level of this participation shall take into consideration financial abilities of regions.

Article 37 of the Charter is dedicated to financial compensation. In this respect, three solutions are anticipated:

– the aim of financial compensation is to reduce, on one hand the differences resulting from structural factors of regions, and on the other the differences between regions as regards global financial abilities.

– criteria and procedures of compensation are specified by the law and shall be objective, clear, transparent, predictable, real and non-discriminatory.

– compensation procedures shall lead to flexible level of compensation, shall not make the realization of regional autonomy difficult and shall not prevent unrestrained administration of regions.

If the presented solutions of the European Charter of Regional Democracy are compared with corresponding solutions of the European Charter of Regional Self-Government or European Charter of Regional Self-Government-Bis, the fundamental change of philosophy and content of provisions is visible. It is because the draft of the European Charter of Regional Democracy adopts solutions which are much more universal and less restricting, whereas in relation to more detailed solutions it gives ratifying countries a possibility of flexible choice of solutions which are the most appropriate for them. It gives the realistic hope that the European Charter for Regional Democracy will come into force soon and that it will play a role of "constitution" in harmonious development of regionalism in Europe.

Streszczenie

Do niedawna uznawano, że regiony jako jednostki samorządu terytorialnego objęte są zasadami Europejskiej Karty Samorządu Terytorialnego[6]. Od pewnego czasu zgłaszane są wątpliwości czy jest to podejście zasadne. Przykładem tego są pewne zmiany legislacyjne niektórych państw, czego egzemplifikacją jest Polska. W 2006 r. zostaje zmieniona nazwa Europejskiej Karty Samorządu Terytorialnego (odnosi się to do wszystkich JST, także regionów) na nazwę Europejska Karta Samorządu Lokalnego, pozostawiając regiony poza tą Kartą. W tej sytuacji ważną sprawą staje się międzynarodowe określenie statutu regionów, w tym ich pozycji finansowej. Wobec powyższego zasadnym jest podjęcie próby określenia finansów regionalnych w konwencjach międzynarodowych.

6 Europejska Karta Samorządu Lokalnego sporządzona w Strasburgu dnia 15 października 1985 r. (Dz.U. z 1994 r., Nr 124, poz. 607, sprost.: Dz. U. z 2006 r., Nr 154, poz. 1107). Do 2006 r. obowiązywała jako Europejska Karta Samorządu Terytorialnego.

Małgorzata Ofiarska, Zbigniew Ofiarski

STABILISATION DE LA RÉGULATION DES SOURCES DE REVENUS DES COLLECTIVITÉS TERRITORIALES EN POLOGNE À LA LUMIÈRE DE LA CONSTITUTION DE LA RÉPUBLIQUE DE POLOGNE ET LA CHARTE EUROPÉENNE DE L'AUTONOMIE LOCALE

Introduction

La notion de la stabilisation est utilisée dans le présent travail au sens d'un ordre déterminé et de l'état de l'équilibre, du maintien des solutions adoptées pendant un temps prolongé[1]. En Pologne, dès le moment de la réactivation de l'administration locale décentralisée, c'est-à-dire à partir de 1990, continue le processus de perfectionnement des principes et méthodes du financement des devoirs des collectivités locales. Jusqu'en 1994, ce processus était en danger des changements temporels parce qu'il n'y avait pas de standards formels en vigueur qui auraient déterminé des modèles précis des revenus des collectivités locales, puisque la Constitution de 1952 ne comprenait aucune décision en cette matière. Seulement dans l'article 73 alinéa 2 de la loi constitutionnelle de 1992[2], a été introduite la règle selon laquelle les sources de revenus des collectivités locales dans le domaine des devoirs publics sont garanties par la loi. Dans l'article mentionné on peut percevoir les premières directives indiquant le besoin de créer des solutions stables dans le domaine du système des revenus des collectivités locales.

L'achèvement au 1 mars 1994 de la procédure de ratification[3] de la Charte européenne de l'autonomie locale par la Pologne était une étape importante

1 Słownik języka polskiego (Dictionnaire de la Langue Polonaise) vol.5, (dir. M. Bańko), Wydawnictwo Naukowe PWN. Varsovie 2007, p.165.

2 Loi Constitutionnelle du 17 octobre 1992 sur les relations réciproques entre le pouvoir législatif et exécutif de la République de Pologne et sur l'autonomie locale (Dz. U. Nr 84, poz. 426 ze zm.), en vigueur jusqu'au 17 octobre 1997.

3 Déclaration de Gouvernement du 14 juillet 1994 dans la matière de la ratification de la Charte européenne de l'autonomie locale, faite à Strasbourg le 15 octobre 1985 (Dz. U. Nr 124, poz. 608).

de ces changements. Dans l'article 9 de la C.E.A.L.[4] on a formulé des principes fondamentaux du système financier des collectivités locales. On peut y voir aussi le principe de stabilisation des bases de l'économie financière des collectivités locales, surtout par rapport aux décisions de l'article 9 de la C.E.A.L., où l'on a fait rappel à la loi comme garantie d'adapter le niveau des ressources financières des collectivités locales au domaine de leurs compétences, d'exercer l'autorité fiscale, d'avoir l'accès au marché des capitaux national.

Pourtant, c'est seulement le vote de la Constitution de la RP en 1997[5] qui a consolidé le principe mentionné, qui devrait actuellement être considéré comme standard suprême au moment de créer les modèles des revenues des collectivités locales en Pologne. Il est aussi important que le principe de stabilisation a été visiblement associé à d'autres principes constitutionnels importants qui concernent directement l'économie financière des collectivités locales, c'est-à-dire au principe de la compatibilité des ressources financières et des devoirs (dans le cadre statique et dynamique), de la priorité des revenus propres sur les revenus subventionnels (subventions générales et dotations spécifiques du budget national) et de l'autorité fiscale, déterminée par les lois. La détermination de tels standards directement dans les actes constitutionnels satisfait aux postulats avancés depuis plusieurs années par les représentants de la doctrine, proposant que le système des finances locales respecte les conditions de clarté, de stabilité et de compatibilité dans le domaine du financement des objectifs confiés à la collectivité locale[6]. La nécessité de régir par les lois la création des sources de revenus est fortement accentuée dans la doctrine[7].

La loi comme « garantie » de la stabilisation des ressources financières des collectivités locales

Dans les conditions polonaises, à cause de l'aisance d'initier des régulations législatives et du prétendu idéalisme administratif (conviction que l'établissement ou le changement des standards législatifs peut entraîner des changements souhaités dans la vie sociale) il faut rappeler sans cesse que les moyens législatifs ne sont qu'un moyen parmi d'autres d'influencer la vie sociale[8]. Formellement, on se référait à la loi comme à un moyen législatif qui régule les bases de l'économie financière

4 Charte européenne de l'autonomie locale, faite à Strasbourg le 15 octobre 1985 (Dz. U. z 1994 r. Nr 124, poz. 607).

5 Constitution de la République de Pologne du 2 avril 1997 (Dz. U. Nr 78, poz. 483 ze zm.).

6 Cz. Rudzka - Lorentz, H. Sochacka - Krysiak, Źródła finansowania lokalnych zadań publicznych a problem samodzielności jednostek samorządu terytorialnego (w:) Gospodarka jednostek samorządu terytorialnego w warunkach decentralizacji zarządzania sektorem publicznym, sous la dir. de H. Sochacka-Krysiak, Varsovie 2008, p. 139.

7 W. Miemiec, Prawne gwarancje samodzielności finansowej gminy w zakresie dochodów publicznoprawnych, Wrocław 2005, p. 90.

8 S. Wronkowska, M. Zieliński, Komentarz do zasad techniki prawodawczej, Varsovie 2004, p. 23.

des collectivités locales mais, dans la période qui précède l'entrée en vigueur de la Constitution de la RP de 1997, on n'apercevait souvent pas le besoin de stabilisation des solutions appliquées dans ce domaine.

Dans les années 1990-1998, il y avaient deux lois régulant les principes de l'économie financière des communes : la loi du 14 décembre 1990 sur les revenues des communes et les principes de leur subventionnement dans les années 1991-1993[9], et la loi du 10 décembre 1993 sur le financement des communes[10], entrée en vigueur le 1er janvier 1994, mais qui a perdu sa force obligatoire à la fin de 1998. Un trait caractéristique pour cette période était la temporalité des solutions législatives, qui est malheureusement devenue un standard et une méthode d'établir des sources des revenues des collectivités dans le années suivantes[11]. La première des lois mentionnées était renouvelée trois fois, et la deuxième treize fois (dans ce cas, on a introduit en plus une période de transition de deux ans).

L'acte suivant, aussi temporaire par principe, aurait dû être en vigueur pendant deux ans seulement, mais cette période a été trois fois prolongée[12]. Cet acte a été amendé huit fois. A partir du 1er janvier 2004, il y a la loi du 13 novembre 2003 sur les revenus des collectivités locales[13] qui est en vigueur. Cependant, il faut souligner qu'elle introduisait des solutions temporaires pour les années 2004-2005, et qu'elle a été en plus amendée déjà six fois.

Dans les années 1990-2008, il y avait quatre lois en vigueur, régulant le système des revenues des collectivités locales, qui étaient amendées au total trente fois. Cela ne favorisait certainement pas la stabilisation des solutions relatives aux sources des revenues des collectivités locales mais, au contraire, a renforcé l'opinion à propos de l'instabilité de ces solutions, de la création des régulations temporaires et passagères, visant des objectifs *ad hoc*. L'admission du juste principe selon lequel la loi - comme moyen législatif - devrait consolider les solutions relatives au système des revenus des collectivités locales pour une période prolongée, n'a pas conduit à la réalisation de ces objectifs.

Le problème est sérieux et ne devrait pas être amené au seul phénomène d'initiative législative relativement simple et de dévalorisation de la loi en tant qu'un moyen législatif appliqué en Pologne. Il faut en chercher des raisons dans le manque d'une conception de l'autorité territoriale en Pologne cohérente. Des prétendues reformes de l'autorité locale que l'on voit de temps en temps surgir ne devrait pas se concentrer sur le nombre des collectivités, comme par exemple la discussion de

9 Dz. U. Nr 89, poz. 518 ze zm.
10 Dz.U. du 1998, Nr 30, poz. 164 ze zm.
11 E. Ruśkowski, Finanse lokalne w dobie akcesji, Varsovie 2004, p. 54.
12 La loi du 26 novembre 1998 sur les revenus des unités de l'autorité locale dans les années 1999-2003 (Dz. U. Nr 150, poz. 983 ze zm.).
13 Dz. U. Nr 2003, poz. 1966 ze zm.

1998 sur le nombre de districts et de voïvodies ou, depuis 2007 sur le nombre de métropoles.

C'est le problème du domaine de la décentralisation dans la réalisation des objectifs publics, de la détermination des frais de leurs réalisation et des méthodes visant à satisfaire d'une manière optimale les besoins des communautés locales qui est d'une importance fondamentale. Il faut en plus prendre en considération les possibilités de financement de ces objectifs avec les moyens publics. On ne peut donc pas oublier, dans la discussion sur le modèle des revenus des collectivités locales, la situation de tout le secteur des finances publiques. Le sous-secteur des finances locales est bien un des éléments du secteur des finances publiques, qui est en plus composé du sous-secteur gouvernemental et du sous-secteur des assurances sociales. Tous les trois sont dépendants les uns des autres. Il faut donc retenir que même les moindres changements effectués dans l'un des sous-secteurs peuvent influencer non seulement ce sous-secteur, mais aussi deux autres. De tels changements peuvent donner des résultats pareils a ceux que provoque une pierre jetée dans l'eau et faisant apparaître des cercles à la surface.

Changements temporaires ou "grande" réforme des finances locales?

Les expériences vécues prouvent qu'on a profité plus souvent de la méthode des changements temporaires, en adaptant le système des revenus des collectivités locales aux phénomènes survenus. Il est caractéristique que seulement en 2003, en présentant les principes du projet de loi sur les revenus des collectivités locales, on a constaté que c'étaient des solutions à caractère définitif. On estimait à l'époque que le vote d'une loi devrait être une étape importante sur la voie à une meilleure décentralisation et à la consolidation de l'autonomie locale en Pologne. Elle devrait aussi constituer un élément important du programme de la réparation des finances publiques[14]. Les projets de loi sur les revenus des collectivités locales antérieurs non seulement ne comprenaient de telles précisions, mais on y soulignait en plus la temporalité des solutions proposées.

Il est incontestable que le système des revenus des collectivités locales, déterminé par la loi du 13 novembre 2003 n'est pas parfait et n'assure pas la réalisation de l'un des principes fondamentaux de la prétendue économie financière autonome[15]. La stabilisation de l'économie financière demande d'entreprendre plusieurs actions,

14 Justification du projet de la loi sur les revenus des collectivités locales - document numéro 1732 de la Chambre des Députés de la RP de la IV législature.

15 A comparer l'art. 51al. 1 de la loi du 8 mars 1990 sur l'autonomie communale (Dz. U. z 2001 r. Nr 142, poz. 1591 ze zm.), l'art 51 de la loi du 5 juin1998 sur l'autonomie du district (Dz. U. z 2001 r. Nr 142, poz. 1592 ze zm.), et l'art. 6 de la loi du 5 juin 1998 sur l'autonomie de la voïvodie (Dz. U. z 2001 r. Nr 142, poz. 1590 ze zm.).

dont l'augmentation de l'importance des sources des revenus propres dans le financement des objectifs des districts et des voïvodies, l'élimination des restes des mécanismes d'estimation dans l'attribution des subventions générales, la réduction du nombre des dotations spécifiques du budget de l'Etat, le renforcement du rôle de la représentation des collectivités locales dans le processus de subventionner celles-ci (par exemple remplacer la présente opinion par l'exigence d'obtenir une opinion positive de la représentation par un ministre compétent), l'introduction du mécanisme de remboursement des revenus perdus à la suite des changements défavorables pour la collectivité locale dans les actes régulant les principes d'exécution des revenus propres des collectivités locales, la régulation conséquente des principes de financement des objectifs des collectivités locales dans les lois et non dans les actes exécutifs.

La préparation d'un nouvel acte sur les revenus des collectivités locales n'est conseillé que s'il prend en compte tous les standards résultant des dispositions de la Constitution de la RP et la C.E.A.L. Cela devrait être précédé d'une analyse minutieuse des effets de la législation en vigueur jusqu'à présent, et surtout d'une analyse de la jurisprudence du Tribunal Constitutionnel, des tribunaux administratifs et des chambres de compte régionales. Il faut définir précisément les objectifs visés par la nouvelle loi sur les revenus des collectivités locales.

Tenant compte des décisions du § 2 des principes de la technique législative[16], selon lesquels un acte devrait réguler d'une manière exhaustive un domaine donné, sans laisser de côté des fragment essentiels de ce domaine, il faut réfléchir sur l'intégration de plusieurs règlements qui se trouvent actuellement sous la loi sur les revenus des collectivités locales. Cela peut concerner les principes de transmission de la part compensatrice de la subvention générale aux communes, à titre de la perte d'une partie des recettes fiscales sur les biens immeubles[17]. En plus, il faut formuler correctement dans ce nouvel acte les dispositions qui renvoient aux autres lois, régulant les principes d'accorder les dotations pour les collectivités locales (actuellement, les principes d'accorder les dotations ont été régulés dans plus d'une douzaine d'actes, par exemple dans le domaine de l'organisation et de l'exécution des objectifs dans le domaine de la culture, de la conservation des monuments, du rapatriement, et aussi les dotation pour les communes thermales).

A l'occasion de la préparation d'une nouvelle loi sur les revenus des collectivités locales, il faut aussi éliminer de nombreux règlements incohérents concernant l'économie financière des collectivités locales, présents dans les lois sur l'autorité communale et de district, et dans la loi sur l'autorité de voïvodie. Les actes mentionnés

16 Arrêté du Premier ministre du 20 juin 2002 relatif aux „Principes de la technique législative" (Dz. U. Nr 100, poz. 908).

17 Ces questions sont actuellement réglées par la loi du 2 octobre 2003 sur le changement de la loi sur les zones économiques spéciales et certaines autres lois (Dz. U. Nr 188, poz. 1840 ze zm.).

utilisent des notions et la structure des ressources des collectivités locales qui ne correspondent pas aux standards admis dans la loi sur les revenus : les revenus stables et extraordinaires y sont par exemple classés autrement, on utilise des notions qui ne sont pas compatibles à celles de la loi sur les revenus (par exemple *subvention compensatrice* au lieu de *partie compensatrice de la subvention générale*). Il faut ajouter en outre que le classement des sources des revenus des collectivités locales, appliqué dans les lois sur l'autorité communale et de district, ainsi que dans la loi sur l'autorité de voïvodie ne tient pas compte des critères de la division de ces sources, appliqués dans l'article 167 de la Constitution de la RP, conformément auxquels les revenus propres, les subventions générales et les dotations spécifiques du budget de l'Etat ont un caractère stable. Dans les lois régulant régime, objectifs et bases de l'économie financière de l'autorité locale, les dotations spécifiques sont traitées comme sources des revenus de caractère extraordinaire.

Tenant compte des dispositions du §4 alinéa 1 des principes de la technique législative, selon lesquelles une loi ne peut pas répéter les dispositions des autres lois, il faut supprimer de nombreuses répétitions se référant aux étapes de la procédure budgétaire. Aussi bien dans les lois sur l'autorité communale et de district, que dans la loi sur l'autorité de voïvodie et la loi sur les finances publiques[18] se trouvent des dispositions pareils ou même identiques, régulant la préparation du projet de budget des collectivités locales et le vote de la loi budgétaire. Les règlements de procédure devraient être inscrits dans la même loi, par exemple loi sur les finances publiques.

En préparant le projet d'une nouvelle loi sur les revenus des collectivités locales, il faut normaliser exhaustivement les principes de l'économie financière, surtout dans le domaine des revenus des fédérations intercommunales et fédérations de districts. Le maintien des solutions actuelles, qui consistent à imposer l'application des dispositions concernant l'économie financière des communautés et districts, peut être considéré comme un exemple d'un attachement exagéré et irrationnel du législateur aux régulations provisoires. La spécificité du fonctionnement des fédérations, en tant qu'une forme la plus stricte et la plus avancée de coopération des collectivités locales ne fait pas douter, que les fédérations sont des sujets de loi distinctes des collectivités qui les forment[19]. Cela devrait trouver un reflet adéquat dans des régulations propres et intégrales des principes de l'économie financière des fédérations dont l'importance ne cesse d'augmenter.

La préparation d'une nouvelle loi cohérente sur les revenus des collectivités locales, de la loi sur l'économie financière de celles-ci et de leurs fédérations, normalisant non seulement les sources de revenus mais aussi les principes de

18 Loi du 30 juin 2005 sur les finances publiques (Dz. U. Nr 249, poz. 2104 ze zm.).

19 M. Ofiarska, Formy publicznoprawne współdziałania jednostek samorządu terytorialnego, Varsovie 2008, p. 441.

financement des objectifs propres et délégués, la création et l'application des procédures compensatrices et équilibrantes, la surveillance et le contrôle dans le domaine financier et les règles de la participation au marché des capitaux, exige de longues préparations, des consultations sociales et des analyses économiques et financières approfondies. C'est pourquoi on peut s'attendre dans les années à venir à ce que les réformes et les changements partiels continuent, forcés souvent par les verdicts du Tribunal Constitutionnel et la pression des milieux locaux, mais aussi par le lobbying des collectivités locales au Parlement. C'est n'est pourtant qu'un substitut des réformes. La réforme des finances locales en Pologne devrait être associée à une réforme structurale de tout le secteur des finances publiques[20].

Tendances principales des changements temporaires dans les années 2006–2008

Apres l'achèvement de la prétendue période transitoire, qui a duré deux ans à partir du moment de l'entrée en vigueur de la loi sur les revenus des collectivités locales, on peut apercevoir des actions qui résultent en l'affaiblissement progressif du potentiel des revenu des collectivités locales, surtout des communes. A partir du 1er janvier 2007, on a effectué des changements dans quelques impôts et taxes locales, sources de revenus propres des communes, qui peuvent à long terme provoquer une diminution considérable des revenus budgétaires.

En amendant[21] la loi relative à l' impôt sur l'héritage et les donations[22], on a introduit une exemption de l' impôt essentiel, qui consiste à éliminer la charge de l'impôt des personnes qui acquièrent gratuitement les biens des personnes les plus proches. Guidé par le besoin de la protection particulière de la situation matérielle de la famille, et par le fait que la transmission gratuite de la propriété a en principe lieu entre les personnes les plus proches, le législateur a adopté les solutions qui mènent a une exemption totale de l' impôt l'acquisition gratuite de la propriété des personnes les plus proches. On a admis que les liens personnels et familiaux particuliers entre les parents en ligne directe et entre les époux justifient l'exemption totale de l' impôt en cas de l'acquisition des choses ou des droits patrimoniaux par l'époux, les descendants, ascendants, beau-fils et belle-fille, frères et soeurs, beau-père et belle-mère. Cette exemption dépend des conditions formelles imposées à l'acquéreur (déclaration dans le délai prévu de l'acquisition à la trésorerie compétente, acquisition de la donation en argent sur le compte bancaire ou par mandat postal).

20 E. Ruśkowski, J.M. Salachna, Finanse lokalne po akcesji, Varsovie 2007, p. 267.
21 Loi du 16 novembre 2006 sur le changement de la loi sur l'impôt sur les héritages et donations et de la loi sur l'impôt sur les actes de droit civil (Dz. U. Nr 222, poz. 1629).
22 Loi du 28 juillet 1983 sur l'impôt sur les héritages et donations (Dz. U. z 2004 r. Nr 142, poz. 1514 ze. zm.).

On a introduit aussi d'autres changements menant à élargir les limites des dégrèvements et exemptions de l'impôt sur l'héritage et les donations (par exemple dans l'article 4 alinéa 1 numéro 5 de la loi, on a élargi le catalogue des objectifs qui conditionnent l'exemption des donations acquises par les personnes du premier groupe d'impôt, en y ajoutant le remboursement du crédit de logement hypothécaire avec les intérêts; on a ajouté une nouvelle disposition à l'article 4 alinéa 1 numéro 5a de la loi, selon lequel est exempte de l'impôt l'acquisition par voie héréditaire des droits à l'investissement résidentiel dans une société coopérative par les personnes appartenant au premier ou deuxième groupe d'impôts, qui satisfont aux conditions donnant le droit à une remise résidentielle; on a introduit en plus des conditions plus favorables, qui permettent de garder le droit à la remise résidentielle décrite dans l'art. 16 de la loi, en prolongeant de six mois à deux ans la période dans laquelle on devrait acquérir un nouveau bâtiment ou local avec les moyens acquis de la vente du local ou bâtiment précédent).

A la suite de ces changements on a diminué la charge fiscale liée à l'acquisition gratuite des objets et droits patrimoniaux, mais cela a d'autre part mené à marginaliser cette source de revenus propres des communes. On estime que les revenus de l'impôt sur l'héritage et les donations venant des acquéreurs du premier groupe d'impôt diminueront a peu près de 65% à 70%, soit d' environ 165 millions de zlotys par an[23].

A partir du 1er janvier 2007, on a renoncé à l'impôt sur les activités de droit civil[24] du contrat de constitution de rente et des contrats de mariage, des contrats d'emprunt accordés en argent sur la base d'un contrat entre les personnes les plus proches (définies dans l'article 4a de la loi sur l'impôt sur l'héritage et les donations) à condition de déposer la déclaration de revenus dans le délai de 14 jours à partir de la date de l'acte, de prouver la réception de l'argent par l'emprunteur sur son compte bancaire ou sur le compte de celui-ci, tenu par la caisse d´épargne et de crédit, ou par mandat postal, et à condition que le montant de l'emprunt dépasse la somme non soumise à l'impôt, conformément aux principes définis dans les dispositions sur l'impôt sur les héritages et les donations. Si ces conditions ne sont pas satisfaites, l'impôt sur cette activité s'élève à un tarif augmenté, soit à 20%.

On n'a pas fait d'analyse détaillée des effets financiers négatifs de ces changements pour les budgets communaux. On a indiqué en même temps la possibilité d'avoir des recettes budgétaires plus élevées à la suite de: l'imposition des actes de droit civil exempts de la taxe à la valeur ajoutée des contrats de vente et d'échange, dont l'objet est le droit de propriété du local coopératif, le droit à

23 Justification du projet de loi sur le changement de la loi sur les héritages et donations et de la loi sur l'impôt sur les actes de droit civil.

24 Loi du 9 septembre 2000 sur l'impôt sur les actes de droit civil (Dz. U. z 2007 r. Nr 68, poz. 450 ze zm.).

une maison dans la société coopérative ou le droit à une place de stationnement dans les garages multipostes ou la participation à ces droits, ainsi que des contrats de vente des parts et actions dans les sociétés de droit commercial; la dérogation à l'exemption de l'impôt des contrats des crédits pour l'activité économique. Tout cela peut contribuer à la hausse des revenus budgétaires d'environ 150 millions de zlotys[25].

Des changements importants ont été effectués aussi en ce qui concerne l'impôt sur les biens immeubles[26], entre autres par la hausse ou particularisation du catalogue des exclusions et exemptions de l'impôt. Les terres et bâtiments faisant partie des immeubles destinés à la construction des voies publiques, acquis comme propriété ou gestion durable du Trésor public et transmis à la Direction Générale des Chemins Nationaux et Autoroutes[27] ont été exempts de l'impôt sur les immeubles. Le catalogue d'exclusions de l'impôt a été élargi des terres sous les eaux maritimes intérieures. Ce changement a pour but d'éliminer les doutes d'interprétation dans le domaine de l'imposition des immeubles des terres sous les eaux maritimes intérieures[28].

Le contenu de l'article 7 alinéa 1 numéro 1 de la loi sur les impôts et taxes locales a été reformulé, en exemptant de l'impôt les bâtiments faisant partie de l'infrastructure ferroviaire et les terres que celle-ci occupe, et qui satisfont aux conditions formelles définies dans la loi (rendus accessibles aux transporteurs du rail licenciés ou destinés uniquement au transport des personnes, effectué par un transporteur qui a en même temps dans sa gestion cette infrastructure, sans donner l'accès aux autres transporteurs, ou bien créant des lignes de rail dont largeur dépasse 1.435 mm). On a en outre exempt de l'impôt les terres, bâtiments et constructions restés après la liquidation des voies ferroviaires ou de leurs segments, jusqu'au moment de cession de leur propriété ou du droit au bail emphytéotique, mais pas plus que pendant 3 ans à partir du premier jour du mois suivant le mois où la décision définitive a été prise ou bien un règlement adéquat est entré en vigueur, approuvant la liquidation des voies ou de leurs segments (la dernière des exemptions mentionnées causera passagèrement un abaissement des recettes budgétaires, et seulement après quelques années peut avoir lieu une augmentation de ces recettes de 70 millions zlotys environ).

25 De la justification du projet de loi sur le changement de la loi sur les héritages et donations et de l'acte sur l'impôt sur les activités civiles et législatives.

26 Loi du 12 janvier 1991 sur les impôts et taxes locales (Dz. U. z 2006 r. Nr 121, poz. 844 ze zm.).

27 Dispositions de la loi du 10 avril 2003 sur les principes de préparation et de réalisation des investissements dans le domaine des voies publiques (loi du 10 avril 2003 sur les principes particuliers de préparation et de réalisation des investissements dans le domaine des voies publiques ; Dz. U. Nr 80, poz. 721 ze zm.) étaient douteux du point de l'interprétation.

28 Justification du projet de loi sur le changement de la loi sur les impôts et taxes locales et le changement de certaines autres lois - document n° 1082 de la Diète de la RP de la Vème législature.

Des résultats financiers importants pour les budgets communaux sont causés par les changements dans l'imposition des moyens de transport, en vigueur depuis le 1er janvier 2008. Un changement rédactionnel, apparemment insignifiant, effectué dans l'article 8 de la loi sur les impôts et taxes locales, qui a consisté à remplacer l'expression "à partir de 3,5 tonnes" par "au dessus de 3,5 tonnes" fait qu'on a exclu de l'imposition les camions de masse totale admissible égale à 3,5 tonnes[29].

Mais les résultats financiers les plus graves sont liés à l'introduction du dégrèvement dans l'impôt sur le revenu des personnes physiques[30], à titre de la charge des enfants, qui consiste à abaisser le montant de l'impôt sur le revenu calculé de l'équivalent du produit du nombre d'enfants en charge et du double du montant diminuant l'impôt déterminé dans le premier intervalle de 'échelle d'impôt (dans le règlement de l'impôt pour l'année 2007, c'est le montant de 1145,08 zlotys par enfant). On a estimé que la diminution des recettes provenant cet impôt peut s'élever même à 7 milliards de zlotys par an (la part de cet impôt dans les recettes des collectivités locales s'élève, on le sait bien, à presque 50%).

Remarques finales

Du point de vue des intérêts des contribuables, la diminution de la charge de l'impôt est jugée positivement. Mais les contribuables sont aussi membres des communauté locales et bénéficiaires des actions effectuées par celles-ci. L'autorité locale ne peut pas réaliser les objectifs publics d'une façon autonome sans certaines garanties de caractère économique. Des garanties juridiques de cette autonomie résultent des dispositions de l'article 167 de la Constitution de la RP et de l'article 9 de la Charte européenne de l'autonomie locale[31]. Compte tenu de ces standards, il est difficile de juger d'une façon enthousiaste les changements récents des impôts, sources de revenus propres des communes, parce que ceci mène généralement à la diminution des recettes de ces impôts. En plus, la hausse permanente des frais de la réalisation des objectifs dans la collectivité locale est une occurrence négative, causée surtout par la hausse des prix des matériels, d'énergie etc. La diminution de la productivité des sources des revenus propres des communes est généralement compensée dans les collectivités locales par la hausse des prix des services communaux, dont l'accessibilité peut devenir un problème pour des personnes

29 La diminution des revenus de budget est estimée à un niveau de 100 à 130 millions de zlotys par an.

30 Loi du 26 juillet 1991 sur l'impôt sur le revenu des personnes physiques (Dz. U. z 2000 r. Nr 14, poz. 176 ze zm.).

31 L. Jędrzejewski, Gospodarka finansowa samorządu terytorialnego w Polsce - wybrane zagadnienia, Oficyna Wydawnicza Branta, Bydgoszcz 2007, p. 35.

moins aisées. Une autonomie limitée des collectivités locales dans le domaine de la formation de leurs revenus[32] est donc dans les dernières années encore limitée.

Les changements effectués dans la loi sur les revenus des collectivités locales, relatifs aux principes du subventionnement peuvent être un exemple de la "petite stabilisation". En tenant compte de la nécessité de la compatibilité entre la Constitution de la RP et les règlements mis en question par le Tribunal Constitutionnel[33], on a défini les principes de partager la subvention générale directement dans la loi: dans la partie régionale pour les voïvodies et dans les parties équilibrantes pour les communes et districts. On a renoncé à la régulation annuelle de ces principes dans les arrêtés. Ce changement ne peut être estimé comme entièrement positif parce qu'on s'est limité à introduire dans la loi les arrêtés du Ministre des Finances récemment en vigueur, sans créer des solutions nouvelles et plus claires pour la division des parties de la subvention générale mentionnées. La stabilisation de la situation consiste alors en la fixation législative du partage intérieur en sommes composantes des parties de la subvention générale, auxquelles on applique des critères différents du calcul des montants.

32 J. Glumińska - Pawlic, Samodzielność finansowa jednostek samorządu terytorialnego w Polsce. Studium finansowoprawne, Katowice 2003, p. 126.

33 Jugement du Tribunal Constitutionnel du 25 juillet 2006, K 30/04 ; Dz. U. Nr 141, poz. 1011.

Streszczenie

Od momentu przywrócenia samorządu lokalnego w Polsce, tj. od 1990 r., obserwuje się nieustanny proces ulepszania regulacji prawnych i metod finansowania zadań JST. Mimo to system dochodów JST wciąż nie jest stabilny, a kolejne zmiany przynoszą tylko czasową poprawę. Stabilizację należy zatem osiągać, nie tylko w drodze wydawania aktów prawnych, ale również poprzez unikanie zbyt częstych zmian metod oraz poprzez dostosowanie środków finansowych do wielkosci przekazywanych zadań.

W Polsce standardy te są stopniowo osiągane, a kluczową rolę pełni Trybunał Konstytucyjny, którego decyzje przyczyniają się do zmian ustawodawstwa w zakresie zasad finansowania JST oraz zmian mających na celu dostosowanie regulacji prawnych do postanowień Konstytucji RP i postanowień Europejskiej Karty Samorządu Lokalnego.

Jadwiga Glumińska-Pawlic

LES ASPECTS JURIDIQUES ET FINANCIERS DE LA COOPÉRATION DES VILLES SUR LES AIRES MÉTROPOLITAINES EN POLOGNE

Les observations préliminaires

Les formes d'organisation et juridique de la coopération des collectivités territoriales et la portée des tâches prises en charge par celles-ci, sont les deux circonstances qui peuvent influencer les règles de réalisation de la gestion financière pour les aires métropolitaines. Dans la législation polonaise, la notion d'aire métropolitaine n'a pas été définie de façon précise, toutefois, conformément aux dispositions de la loi du 27 mars 2003 sur la planification et l'aménagement du territoire[1], elle est entendue comme une structure spatiale, composée d'une grande ville et des terres environnantes fonctionnelles étroitement liés à cette ville (les villes, les communes ou les districts directement adjacent à la ville); c'est la structure créée dans le concept de l'aménagement du territoire dans le pays. Pour l'aire métropolitaine, la diétine de voïvodie adopte le plan d'occupation des sols de l'aire métropolitaine comme la partie du plan d'occupation des sols de la voïvodie, dans lequel on prend en compte les résultats de la stratégie de développement de la voïvodie et dans lequel on détermine, entre autres, les zones difficiles, ainsi que les règles pour les aménagements. Au cours de la formulation et la mise en œuvre de la politique du développement, la voïvodie qui est, en Pologne, une collectivité territoriale au niveau régional désigné pour conduire une politique moderne correspondant aux normes en vigueur dans l'Union européenne, collabore avec les collectivités locales à l'intérieur de la voïvodie, avec les organismes chargés de représenter les intérêts des entreprises commerciales, industrielles et de service, avec les associations professionnelles et avec l'administration central (en particulier avec

1 Voir l'art. 2 point 9 et l'art. 39 alinéa 3 point 4 et alinéa 6 – Ustawa z dnia 27 marca 2003 r. o planowaniu i zagospodarowaniu przestrzennym (Dz.U. Nr 80, poz. 717 ze zm.).

voïvode), et enfin avec d'autres voïvodies, les organisations non gouvernementales, les universités ainsi que les unités de recherche[2].

Dans ce sens, les aires métropolitaines sont seulement une entité de planification (spatiale). En décidant de mettre en place les aires métropolitaines, il faut définir cette notion et il faut prendre en compte leur différenciation spatiale. Il faudra également décrire l'ampleur des tâches et développer des outils pour les coordonner. Dans le projet de révision de loi sur la planification et l'aménagement du territoire, on a proposé la définition de «l'aire métropolitaine» comme « L'espace de grande ville où les grandes villes mutuellement dépendantes et leur environnement directement associé d'un point de vue fonctionnel, étant créé dans le concept de l'aménagement du territoire du pays, conformément à une division territoriale de base de l'État en districts et qui représente un complexe habité par plus de 500 mille personnes, réunissant les institutions de la coopération internationale ».

Les aires métropolitaines peuvent fonctionner sous des formes diverses. A titre d'exemple, on peut indiquer que la ville de Barcelone est une commune divisée en 10 quartiers; autour de cette ville s'étend l'espace métropolitain qui comprend 35 municipalités. Jusqu'à 1997 son fonctionnement était assuré par la société « Métropole de Barcelone » puis, après sa dissolution, il a été créé trois associations à but non lucratif, dont les tâches et les zones de fonctionnement sont maintenant différentes. Dans un autre point de vue, la ville de Londres est créée par 33 communes, organisée notamment en association qui est un groupe de pression, une société de droit commercial, qui ne reçoit aucun soutien des fonds publics ou d'agence de développement. La ville de Stockholm est organisée en commune divisée en 18 quartiers, Toronto est divisé en 44 quartiers et L'Espace du Grand Toronto (Greater Toronto Area - GTA) comprend 4 régions de 24 municipalités, tandis que Sao Paulo est une commune divisée en 31 quartiers incluant les 39 communes environnantes. Cette ville entre dans la structure de la région métropolitaine[3]. L'objectif principal d'une telle zone est l'organisation conjointe des transports publics, le développement régional, la planification spatiale et le logement. L'Association Régionale de la Ruhr est un autre exemple – elle fonctionne sur la base de la loi et elle couvre les villes exclues du district (11) et des districts (4) qui bordent les uns les autres. Cette association est une personne morale, elle excède le niveau local et possède ses propres revenus provenant en premier lieu des contributions de certains membres[4]. La loi garantit le droit à l'autodétermination et elle précise les tâches de l'association.

2 Voir l'art. 11-12a – Ustawa z dnia 5 czerwca 1998 r. o samorządzie województwa (t.j. Dz.U. z 2001 r. Nr 142, poz.1590 ze zm.).
3 www.metropolis.eu
4 www.rvr-online.de

Les formes juridiques de coopération de villes

La nécessité de coopération entre les communes voisines qui réalisent les mêmes activités existe en Pologne depuis la remise en place de l'autonomie locale en Pologne en 1990. Cependant, jusqu'à aujourd'hui, le législateur n'a proposé aucune nouvelle idée regroupant cette coopération, tant au niveau organisationnel qu'au niveau du financement. Ses tentatives de créer un projet de loi « sur la métropole » - regroupant plusieurs villes – n'a à ce jour reçu aucune suite.

La coopération des collectivités territoriales en Pologne peut prendre des formes diverses. Parmi les solutions proposées, il est possible de créer des syndicats métropolitains qui peuvent exercer en vertu de la loi, les syndicats obligatoires avec des objectifs spécifiques, dénommé les « méga-villes » qui sont divisés en quartiers, ou «les districts métropolitains » composé d'unités du même statut[5]. Toutefois, chacune de ces propositions est liée à la nécessité d'examiner les conséquences financières de cette réglementation et la façon d'utiliser au mieux les instruments existants pour coordonner ses tâches. La sélection des solutions choisies décide des sources potentielles de financement et également des restrictions découlant des dispositions de la Constitution et des lois en vigueur.

La possibilité de créer un syndicat de communes, afin de mener conjointement les tâches publiques, est établie par l'art. 64 alinéa 1 de la loi du 8 mars 1990 sur les municipalités de commune[6]. Ce syndicat ne peut être à caractère obligatoire (alinéa 4) et l'obligation de sa création ne peut être imposée que par la loi qui précise les tâches et le mode d'approbation de leur statut. En revanche, la réglementation autorisant la possibilité de créer des associations de districts avec d'autres est inclus dans l'art. 65 alinéa 1 de la loi sur la municipalité de districts[7], toutefois ces associations ne peuvent pas avoir de caractère obligatoire. L'essence de l'association des collectivités locales (les associations de communes et les associations de districts) se manifeste dans le fait qu'elles sont créés par les communes ou les districts pour exercer conjointement les tâches publiques[8], ce qui aura lieu lorsque, pour des raisons de leur organisation ou de leurs résultats économiques, leur activité individuel dans les communes ou les districts, seront irrationnels.

Parmi les formes juridiques de la coopération entre des collectivités territoriales, le législateur a admis la possibilité de créer une association ou une adhésion à

5 Voir: J. Glumińska-Pawlic: Koncepcje finansowania obszarów metropolitalnych (na przykładzie aglomeracji śląskiej). /Dans:/ Ekonomiczne i organizacyjne instrumenty wspierania rozwoju lokalnego i regionalnego, Tom 2. „Zeszyty Naukowe Uniwersytetu Szczecińskiego", Nº 471, Szczecin 2007, p. 233-241.

6 Ustawa z dnia 8 marca 1990 r. o samorządzie gminnym (t.j. Dz.U. z 2001 r. Nr 142, poz. 1591 ze zm.). Voir aussi: R. Mikosz: Związki komunalne, porozumienia komunalne, stowarzyszenia gmin. Edition ZPP, Katowice 1991.

7 Ustawa z dnia 5 czerwca 1998 r. o samorządzie powiatowym (t.j. Dz.U. z 2001 r. Nr 142, poz. 1592 ze zm.).

8 J. Kosik: Związek komunalny — osoba nieznana /Dans:/ Gospodarka–Administracja–Samorząd /sous la red. H. Olszewski, B. Popowska/, Poznan 1997, p. 221–232.

l'association déjà existante avec le transfert des autorités pour l'exécution des tâches publiques pour un exercice conjoint; le contenu des dispositions en vigueur désigne clairement le champ d'application des tâches que l'association peut accomplir[9]. La création d'association ne fait pas obstacle à d'autres formes de coopération des collectivités locales, tels que le droit de conclure des accords sur l'exercice de fonctions publiques. Toutefois, il faut souligner qu'il existe des différences fondamentales parmi les diverses formes de coopération, et elles doivent être prises en compte au moment du choix des formes spécifiques de coopération. À moins que l'association soit une personne morale autonome et self-government et le sujet qui est créé par la volonté des parties intéressées, exprimé dans les résolutions ayant le même contenu, l'accord ne représente que le transfert des pouvoirs pour mener à bien les tâches accomplies par une ou plusieurs communes pour les autres; on exige également la volonté expresse des communes qui sont intéressées de conclure un accord[10].

Prenant en compte l'expérience d'autres pays, on a proposé la création en Pologne de syndicats métropolitains avec des frontières définies par la loi[11]. Ces syndicats pourraient être composés de villes ayant droit de district et d'autres communes répondant aux critères fonctionnels et urbains de l'association, tel que défini par la loi. L'objectif principal de ces syndicats obligatoires pourrait être l'assurance de développement durable de tout l'espace métropolitain, grâce à la coordination et l'exécution de certaines tâches publiques, ainsi que par la mise en œuvre conjointe de projets confiés aux membres de l'association. En raison de la diversité spatiale des projets potentiels dans les aires métropolitaines, les auteurs de projets ont proposé de diversifier les tâches, en fonction des circonstances locales et des besoins locaux. Selon les types de tâches effectuées par les syndicats métropolitains agissant sur la base de la loi, les options possibles d'action concernant la coordination, la gestion et le transfert de la puissance sur la catégorie de tâches. L'association doit être créée dans un but précis et l'étendue de ses tâches pose un préalable fondamental pour déterminer le nombre et le type des collectivités territoriales qui peuvent entrer dans sa composition.

Toutefois, il convient de noter que les expériences sur le fonctionnement, en Pologne, des syndicats de communes, dont une partie est obligatoire, ne sont pas optimistes, et les vérifications qui ont été faites ont révélé de nombreuses irrégularités

9 Voir en plus: Ustawa o samorządzie powiatowym. Komentarz. /sous la red. B. Dolnicki/, Zakamycze 2005, p. 429 et suiv.

10 P. Brzezicka: Niektóre zagadnienia zawierania porozumień przez organy samorządu terytorialnego, „Samorząd Terytorialny" nº 3, 2000, p. 42; P. Brzezicka: Porozumienie administracyjne – problemy węzłowe, „Państwo i Prawo" nº 6, 2000, p. 43–50.

11 Voir: Założenia do projektu ustawy metropolitalnej. Projekt zespołu powołanego przez Wojewodę Śląskiego z dnia 16 maja 2007 r. Manuscrit reproduit.

tant dans l'acquisition des revenus que les dépenses de fonds publics, la comptabilité, la gestion des marchés publics et également celle des biens[12].

En l'absence de loi sur l'agglomération, les quatorze villes de la région Silésienne (les villes ayant droit de district) ont formé une association de communes, bien que cette méthode porte de nombreuses restrictions qui ont déjà révélé au cours des travaux sur la finalisation de statut de l'association, mais aussi les problèmes qui peuvent apparaître dans un proche avenir, et qui peuvent porter atteinte à certains de ses précédemment, et en particulier de réduire les sources de son financement. L'Association Métropolitaine de Haut-Silésie est la zone avec la plus grande densité de population du pays - plus de 2 millions d'habitants et elle est un des plus grands espaces métropolitain d'Europe, qui s'étend sur environ 1500 km2. L'agglomération Silésienne génère plus de 9 % du PIB et elle est en mesure d'affronter la concurrence d'autres métropoles pour attirer les investisseurs, tant nationaux qu'internationaux. L'Association de commune est un élément doté d'un grand potentiel de développement social et économique ; la nécessité de sa création a déjà été formulée dans le milieu des années 90. La faiblesse de la structure administrative ainsi que de la capitale, l'absence d'un centre scientifique, économique ou culturel a eu pour conséquence dans cette région, un développement beaucoup moins rapide que d'autres villes polonaises telles que Wroclaw, Poznan et Gdansk. L'Association peut devenir un partenaire dans la promotion de l'activité dans l'Union européenne, et sera responsable de la répartissions des fonds Européens d'aides aux programmes sectoriels, un point qui permettrait d'améliorer la compétitivité de Silésie par rapport aux autres métropoles, tout en réduisant la concurrence à cet égard entre elles. Conformément aux dispositions du statut de l'Association, elle a pour objet la réalisation de stratégie commune pour le développement de la région métropolitaine, afin de recueillir des fonds intérieurs ou étrangers et les ressources publiques provenant du budget de l'UE, pour améliorer l'activité sur le marché du travail, promouvoir des programmes novateurs visant à améliorer la compétitivité économique des villes et de mener à bien une politique commune parmi d'autres dans les domaines des transports locaux, y compris la gestion des moyens importants du point de vue de l'agglomération de Silésie. Dans la zone d'intérêt de l'Association sont également inclues certaines tâches dans le domaine de la protection de l'environnement, la gestion des déchets, l'eau et les déchets industrielles ainsi que l'approvisionnement en énergie.

12 Les informations sur les résultats de la gestion financière de contrôle des associations intercommunales, le Conseil national des chambres régionales des comptes, La Commission de Coordination de Contrôle, Katowice 2007. („Informacja o wynikach kontroli gospodarki finansowej związków międzygminnych", Krajowa Rada Regionalnych Izb Obrachunkowych, Komisja Koordynacji Kontroli).

Les objectifs principaux et les tâches de métropole

En fait, dans la discussion en cours on soulève les questions relatives aux modalités de création de régions métropolitaines en Pologne, susceptibles de concurrencer avec les régions métropolitaines de l'UE et du monde, mais aussi les questions relatives au statut: l'opportunité de créer des groupes métropolitains - c'est-à-dire une institution particulière de coopération une ville avec les communes de l'agglomération, mais l'autre par rapport au syndicat de communes, ou des districts métropolitains - les unités particulières des administrations territoriale, mais en même temps les unités de base de la division territoriale et qui assurera une plus grande capacité d'accomplir leurs missions publiques, conformément à l'art. 15 et 16 de la Constitution. Il est nécessaire également de résoudre un autre problème – est-ce que l'administration du métropole devrait signifier la centralisation de certaines tâches, de compétences ainsi que de revenus des villes, des communes et des districts liées au niveau de l'agglomération ou la décentralisation de tâches métropolitaines et de recettes de l'État et de voïvodie pour le compte des autorités de la région métropolitaine.

Les tâches métropolitaines sont assimilées à des obligations de capital accomplies au niveau national ou trans-national. Le sujet métropolitain devrait en particulier:

- mettre en place une stratégie du développement et un plan de l'aménagement du territoire de l'aire métropolitaine, compatible avec la Stratégie de Développement du Pays et la conception de l'Aménagement Territoriale du Pays et réaliser ces projets à travers les programmes opérationnels,
- fixer de manière obligatoire les réseaux du transport, les réseaux d'hypermarchés et les nouveaux espaces à la colonisation massive ainsi que les zones protégées contre les bâtiments, créer et réaliser la politique métropolitaine dans le domaine de la protection des paysages et de l'environnement, établir un plan de gestion des déchets,
- voter et mettre en place la politique métropolitaine dans le domaine du transport et les programmes d'investissement de renouvellement et de l'expansion du centre de réseau TEN-Transports, en collaboration avec les programmes opérationnels nationaux et régionaux et avec les programmes de partenariat public-privé,
- gérer le réseau routier local et le trafic routier dans l'aire métropolitaine, coordonner le maintien et le développement des transports publics, y compris fixer les prix des services rendus dans l'agglomération (un billet commun)

– maintenir – en coopération avec la police agissant sous un gestionnaire dans l'ensemble de l'aire métropolitaine – le Centre Intégrale de Gestion de la Crise en Métropole,

– promouvoir le développement de l'enseignement supérieur, des instituts scientifiques, des institutions de recherche et de développement et les divisions d'innovation des entreprises et - en consultation avec le curateur de l'éducation - établir le réseau des collèges,

– assister à la création et à l'exercice des accords intercommunaux, des sociétés et des syndicats de communes pour atteindre l'objectif commun p.ex. dans le domaine de la communication et des sujets qui misent en œuvre des projets co-financés par les fonds européens, dont les projets réalisés en vertu de partenariat public-privé,

– promouvoir les villes en organisant des événements d'importance internationale au niveau médiale et touristique et - en accord avec GUS (l'Office Générale de la Statistique) – organiser l'Office (le département) Métropolitaine de la Statistique qui étudiera la statistique de l'aire métropolitaine dans les cadres des sous-régions statistiques de NUTS-3 .

L'objectif principal de la construction et du fonctionnement de la métropole est un nouvel élan du développement et de l'amélioration de la coopération avec d'autres pays de l'UE, afin d'accroître la compétitivité, mais aussi l'amélioration de la coopération de la ville centrale de l'aire métropolitaine avec les communes dans l'agglomération; l'objectif juridique concerne l'attribution de la personnalité pour les aires métropolitaine pour mettre fin à processus de décentralisation de l'autorité publique.

L'Observatoire en Réseau de l'Aménagement du Territoire Européen (ORATE) indique en Pologne 8 régions métropolitaines, à savoir: Varsovie, Gdansk, Katowice, Cracovie, Lodz, Poznan, Szczecin et Wroclaw. Il prend en compte la population comme le critère de base (en 2006 de 725,000 à 3.065,000 d'habitants). Les critères d'ORATE sont réunis par les métropoles suivantes : Bydgoszcz-Toruń, Białystok, Lublin et Rzeszów (de 504,000 à 758,000 d'habitants). Par contre, dans la hiérarchie métropolitaine du monde on désigne:

– la métropole transnationale d'intérêt mondial (par exemple Londres),

– la métropole transnationale d'intérêt continental (par exemple Bruxelles),

– la métropole transnationale d'intérêt sub-continental (par exemple Berlin),

– la métropole nationale – les capitales des pays (par exemple Varsovie, Prague),

– la métropole sub-national – les capitales des macro-régions (par exemple Wroclaw, Poznan).

Les aires métropolitaines doivent être compatibles avec les critères de création des sous-régions NTS-3, en tenant compte des liens sociaux, économiques, culturels et écologiques. Bien que la Nomenclature statistique des unités territoriales (NTS) , adoptée par le règlement du Conseil des ministres du 14 novembre 2007 formellement doit être utile pour les objectifs statistiques, elle est également utilisée dans l'élaboration des politiques des états membres de l'Union et elle est indispensable pour effectuer l'analyse du degré de développement socio-économique des régions au point de vue l'appréciation du degré de la diversification et pour l'élaboration des programmes de développement régional. La classification de NTS divise la Pologne en unités liées territorialement et hiérarchiquement aux cinq niveaux, dont les trois niveaux régionales et deux niveaux locaux. Le concept de région métropolitaine se réduit essentiellement à intégrer la gestion des aires métropolitaines en décentralisant leurs fonctions, leurs pouvoirs et leurs revenus. La métropole devrait être l'unité régionale créée par la loi et qui est semblable avec l'unité de base de la division territoriale de l'État. Ses habitants devraient avoir une influence directe sur le choix des autorités indépendants de communes créant cette entité.

Les modalités de gestion financière

Le choix de la forme d'organisation et la forme juridique de coopération de villes aura un impact particulier sur la modalité de gestion financière sur l'aire métropolitaine et sur la mobilisation de ressources financières. Parmi les sources existantes on peut indiquer les cotisations et les dotations d'État, ainsi que les fonds européens, les recettes propres (les taxes, les impôts, les bénéfices de la propriété) et les subventions résultant du transfert de tâches par le gouvernement, par la voïvodie et par les communes formant la métropole.

Pour évaluer les règles adoptées en Pologne et le système actuel de financement des missions de service public il faut dire que parmi les solutions proposées, il semble que la solution le plus optimale est la création des districts métropolitains recouvrant les villes ayant droit de district et avec les mêmes tâches. Il faut souligner que le caractère des aires considérées comme les aires métropolitaines est pleinement différencié. Il peut provoquer les difficultés dans l'exercice de la gestion financière uniforme et approprié pour tous. Le législateur, avant de se prononcer sur le régime, devraient examiner quelles tâches doivent être pris en charge par les métropoles et quels sont leurs coûts, pour prévenir la répétition des erreurs déjà commises et que les décisions sur les sources de revenus et les règles de gestion financière n'ont pas été prises comme les dernières.

L'obligation constitutionnelle de conserver un équilibre entre le montant des revenus des collectivités territoriales et le contenu des tâches, impose au législateur l'obligation de l'appréciation si le niveau global des recettes permet la mise en œuvre des tâches qui sont imposées. L'article 167 de la Constitution ne peut être comprise comme une base pour l'introduction, au profit des collectivités territoriales, l'obligation d'assurance un certain niveau de revenu, indépendamment de la situation financière de l'ensemble du pays. Cette disposition doit être traitée comme une directive fixant les modalités de partage, dans une période donnée, des ressources financières entre le gouvernement central et les administrations locales en tenant compte de ses différents niveaux . La répartition compétente des revenus est importante pour le fonctionnement de l'économie locale, notamment en raison de la diversité du caractère des collectivités territoriales, ainsi que les disproportions du développement.

L'autonomie des collectivités territoriales au niveau de la collecte des recettes se manifeste non seulement dans l'évaluation du montant des recettes provenant de diverses sources, mais aussi dans le droit de poursuivre une politique financière active, dans le cadre de laquelle il y a la possibilité d'emprunter des obligations et l'obligation d'enquête des dettes avec les intérêts pour retard de paiement. La stratégie de la gestion des ressources et le droit de tirer les bénéfices de cette propriété peuvent avoir l'influence sur le niveau des recettes budgétaires. La répartition des recettes entre le public et de l'État et les collectivités territoriales doit se référer à leur mission, et dans d'autres mots – aux frais de l'accomplissement de ces tâches. La redistribution des recettes provenant des impôts par l'intermédiaire des dotations et des subventions ne devrait pas remplacer la division base de sources fiscales et peut être liée à l'existence des sujets beaucoup plus faibles et la nécessité d'influer sur les activités de collectivités territoriales .

La transmission d'une partie des tâches sur la métropole pourrait réduire sensiblement le coût d'exécution, ainsi que d'éliminer la concurrence entre les villes et d'accroître les chances de demande de fonds sur le budget de l'Union européenne et d'autres ressources non-remboursable découlant de sources étrangères. La sélection de l'organisation et de formes juridiques devrait permettre de conserver l'autonomie des villes et d'autre part, de garantir une participation dans les recettes publiques, sans qu'il soit nécessaire la discussion concernant des cotisations de membres et la propriété, les discussions qui peuvent se former dans le cas de la création de l'association communale obligatoire.

Les conclusions

La mise en œuvre - en particulier dans l'agglomération silésienne – du district englobant les collectivités territoriales ayant le même statut (les villes ayant droit de district) peuvent être une solution intéressante. Ce district pourrait prendre en charge au moins une partie des tâches de service public qui sont effectuées par les communes avec les ressources de financement, en tenant compte les prix de ces tâches calculés correctement.

Le district, comme une collectivité locale – par opposition aux syndicats des communes - a le droit de posséder ses propres revenus. Il peut obtenir des subventions et des dotations du budget de l'État. Cependant, le système de subventions devrait compenser les recettes des collectivités territoriales de différents niveaux, en prouvant que l'équilibrage est approprié et qu'il prend en compte une capacité financière de l'État et qu'il ne repose pas sur une marge d'appréciation, mais sur les critères objectifs, définis dans la loi .

Cela signifie que la loi doit contenir toutes les dispositions de base pour désigner le type et la nature juridique de diverses sources et toutes les règles concernant la détermination de montant de ce revenu. Ainsi, le niveau global des recettes de collectivités territoriales doit être possible à déterminer, sur la base déjà réglementée par la loi, qui doit maintenir un rang approprié de précision et de détail et ne peut pas être limitée seulement aux dispositions blanchets . En revanche, les subventions ciblées peuvent servir seulement une fonction des revenus complémentaires et ils ne devraient pas être une forme de « soutien » des collectivités territoriales ce qui menace l'autonomie qui est garantie par la Constitution.

Streszczenie

Wybór formy organizacyjnej tj. współpracy prawnej jednostek samorządu terytorialnego i przyjętych przez nie zadań, wpływają w znacznym stopniu na zasady zarządzania gospodarką finansową regionów metropolitalnych. Podjęte decyzje przyczyniają się również do wyboru potencjalnych źródeł finansowania tych zadań, przy uwzględnieniu ograniczeń wynikających zarówno z Konstytucji jak i innych ustaw. Wśród sugerowanych rozwiązań znajduje się stworzenie obligatoryjnych stowarzyszeń obejmujących kilka miast lub dzielnic o tym samym statusie prawnym. Każde z tych rozwiązań wymaga przeanalizowania finansowych konsekwencji wprowadzanych regulacji, jak i istniejących instrumentów finansowych oraz ich koordynacji.

Elżbieta Kornberger-Sokołowska

ISSUES OF FINANCING REGIONAL DEVELOPMENT

Under Art. 158 of the Treaty establishing the European Community (TEC), one of the EU's main aims is to enhance the Community's social and economic cohesion, in particular by diminishing the developmental disparities between various regions, as well as eliminating the backwardness of the less privileged regions or islands, including rural areas. In order to pursue this goal, the funds accumulated in the EU budget are used, as well as supporting funds from member states, in compliance with the principle of additionality.

Cohesion policy includes financial activities aimed both at member states (by making member states eligible for support according to specific criteria), as well as at regions within these states (by making particular regions eligible for support). One of the elements of cohesion policy is regional (structural) policy. Regional policy is defined as long-term activities of public authorities in various fields, aimed at stimulating economic and social development in regions. It is the effect of deeming any disparities existing between them undesirable, whether in terms of economic or social development. The aim of this policy is to create conditions enhancing competitiveness of regions and to prevent marginalization of certain areas of the EU. The basic message of this policy is the need for a balanced economic growth throughout the EU. This policy focuses on economic and social issues. Actions aimed at supporting innovative and competitive economy have been playing an increasingly important role in cohesion policy. The policy also supports regional innovation systems.

The core of regional policy is for public authorities to impact economic and social development on the regional level. A region can be defined as a homogenous and the largest specified territory of a state's area, on the supralocal level, with a considerable number of inhabitants. We can distinguish between natural regions (usually based on social bonds, tradition or homogenous features) and artificial regions (the remaining ones, with a social and administrative character – like the Polish voivodships).

The uniform European regional policy is based on a network of regions used by the UE. It is based on a classification of territorial units for statistical and planning purposes. The classification was made by Eurostat and the European Commission.

Currently in Poland, there are five functional levels of classification for statistic and planning purposes. Level I is created by regions – with the effect of streamlining 6 regions that include two or more voivodships, level II consists of voivodships, levels III, IV and V are local levels. Currently regional policy in Poland is conducted mainly on levels II (i.e. voivodships) and III (with the scope of several poviats - districts), as the main eligibility criteria for support participation have been set on these levels.

The principles and demands of EU regional policy for the programming period 2007-2013 are specified by the Strategic Community Guidelines programmed by the European Commission and accepted by the Council, decision no 2006/702 EC, dated 6th October 2006.

A document that is strictly related to the programming document is the National Strategic Reference Framework (NSRF), prepared by Poland and specifying the strategy for actions on the national level, aiming at implementing the Community Strategic Guidelines and allowing to coordinate the use of EU and national funds.

The main strategic aim specified by NSRF is to "create conditions allowing the growth of competitiveness of Polish economy based on knowledge and entrepreneurship, ensuring growth of employment and an improvement of the level of social, economic and spatial cohesion".

The aim of drafting such a programming document is to ensure the appropriate use of EU funds allocated to structural policy.

NSRF contains the following elements:

1) an analysis of the developmental potential, disparities and weaknesses in the context of current trends in the European and global economy,
2) a strategy of actions, including priority actions from a substantive and territorial point of view.
3) an index of operational programmes for objectives: Convergence and Regional Competitiveness and Employment,
4) a description of the way the funds within the Convergence and Regional Competitiveness and Employment objectives will contribute to implementing European Union's priorities for promoting competitiveness and creating jobs,

5) indicative annual allocation of each of the funds into particular programmes,
6) only for regions included in the Convergence objective:
   a) actions foreseen in order to improve the efficiency of a member state's administration,
   b) the amount of overall annual funds allocated within EAFRD and EDF,
   c) information required in order to perform *ex ante* verification of the additionality principle compliance;
7) with respect to member states eligible under Cohesion Fund - information on the mechanisms aiming at providing coordination between various operational programmes and between these programmes and EAFRD, EDF and – where applicable – interventions of EIB and other existing financial instruments.

National Cohesion Strategy (NCS)

(National Strategic Reference Framework NSRF) is a strategic document which specifies:

– priorities,
– areas,
– method of using,
– system of implementing EU funds within the Community budget for 2007-13. It was ultimately approved by the European Commission in May 2007.

The strategic objective of NCS (NSRF) is to create conditions allowing the growth of competitiveness of Polish economy based on knowledge and entrepreneurship, ensuring growth of employment and an improvement of the level of social, economic and spatial cohesion.

The strategic objective will be obtained by realizing horizontal detailed priorities. The horizontal priorities of NCS (NSRF) are:

– to improve the quality of public institutions operation and extend partnership mechanisms,
– to improve the quality of human capital and increase social cohesion,
– to develop and modernise technical and social infrastructure which is crucial for the growth of Poland's competitiveness,

- to improve competitiveness and innovation of enterprises, including in particular the manufacturing sector with a high added value and to develop the service sector,
- to increase the competitiveness of Polish regions and to prevent their social, economic and spatial marginalization,
- to provide equal development opportunities and support structural changes in the rural areas.

NSRF is the executive plan under the Act on the Principles of Development Policy.

The activity of EU funds in member states takes the form of operational programmes within NSRF. The content of operational programmes, depending on the objective they are related to, is specified in detail by Council regulation (EC) no 1083/2006. The programmes which obtain support within cohesion policy should aim at focusing their resources on the priorities specified in the CSG (Community Strategic Guidelines).

Operational programmes constitute the basic programming document for the implementation of cohesion policy, covering the programming period, i.e. 2007-2013. The programmes realize the state's development strategies, sector strategies and voivodeship development strategies. For national and sector strategies, the drafting procedure and the legal form of the development strategies is specified in the Act on the Principles of Development Policy, while for voivodeship strategies – the act on the local voivodeship government. The national development strategy is prepared by the relevant minister in the field of regional development in cooperation with other ministers, then, under the provisions of the act, it is adopted as an act of law (the wording used in the act is unclear). The sector strategy is prepared by the relevant minister and, together with an opinion by the minister of regional development, it is presented to the Council of Ministers, which adopts it in the form of a resolution.

The strategies for the development of voivodeships are adopted by the managing councils of the voivodships.

Under currently binding legal regulations, the operational programmes may be:

- national programmes
- regional programmes

A national operational programme which includes foreign financing is developed by the minister of regional development and adopted by the Minister of Council by way of a resolution. Such a programme is then approved by the

European Commission and published on the internet site of the authority managing the programme.

A regional operational programme which includes foreign co-financing is adopted by the voivodship managing council in a form of a resolution. It is approved by the European Commission. The notification about the programme approval is published in the voivodeship's official journal, with reference to the relevant internet site where the content of the programme is uploaded. The act on principles of regional policy also obliges the authority managing an operational programme to quote any possible changes to the programme.

Regional operational programmes are co-financed also from the state budget. The conditions for co-financing are specified in the "Voivodeship Contract", which also constitutes the basis for forwarding the developmental subsidy from the state budget to the budget of the voivodeship local government.

22 operational programmes are being implemented in the 2007-2013 financial perspective: 6 national programmes and 16 regional programmes. The national programmes are:

- Operational Programme "Development of Eastern Poland",
- Operational Programme "Infrastructure and Environment",
- Operational Programme "Innovative Economy",
- Operational Programme "Human Capital",
- Operational Programme "Technical Cooperation",
- Operational Programme „Technical Support".

The detailed breakdown of structural funds and Cohesion Fund in Poland with fund allocation to particular operational programmes:

- OP Infrastructure and Environment 41.9% of all funds (EUR 27.9 bn),
- OP Human Capital 14.6% of all funds (EUR 9.7 bn),
- OP Innovative Economy 12.4% of all funds (EUR 8.3 bn),
- OP Development of Eastern Poland 3.4% of all funds (EUR 2.3 bn),
- OP Technical Assistance 0.8% of all funds (EUR 0.5 bn),
- OP European Territorial Cooperation 2% of all funds (EUR 0.7 bn),
- 16 Regional Operational Programmes 24.9% of all funds (EUR 16.6 bn).

Financing of the National Cohesion Strategy (National Strategic Reference Framework)

The total amount devoted to the implementation of NSRF between 2007 and 2013 will amount to approximately **EUR 85.6 bn.** The amount of yearly expenditure related to NSRF (until 2015) will be approximately EUR 9.5 bn, which corresponds to about **5% of GDP.**

Out of this amount:

- **EUR 67.3 bn** will come from EU budget,
- **EUR 11.9 bn** will come from national state funds (including approx. EUR 5.93 bn from the state budget),
- approx. **EUR 6.4 bn** will come from the involvement of private entities.

The cohesion policy concerning expenditures will be coordinated with expenditures targeted at structural instruments of the Common Agricultural Policy and Common Fisheries Policy, as well as with European programmes for supporting competitiveness.

Under Art. 206 of the Act of 30 June 2005 on Public Finance, operational programmes constitute an annex to the budget act. For every operational programme, the following should be specified: the managing authority, funds for the programme implementation, the state's revenue coming from EU funds inflow allocated for a particular year of budgeting and two subsequent years, expenditures for the programme implementation allocated for the given year of budgeting and two subsequent years, the state budget expenditure plan for programme co-financing (with specific breakdown into: part, division, allocation). Both funds for the programme implementation and the expenditures planned for the implementation (in a given year of budgeting and two subsequent years) should be described broken down to: EU budget funds, state budget funds, territorial government budget funds, other national public funds and other funds. Local government unit funds should be specified in the resolutions of relevant bodies constituting the territorial government units.

The Act on Public Finance also specifies deadlines for submitting relevant information by the local government units, concerning the planned budget for the implementation of operational programmes. The gmina (commune) and poviat (district) authorities present such information to the voivodeship management council by the 15th of August. On the 31st of August the voivodeship managing council presents all the information about funds for the operational programme implementation within the voivodeship, to the minister of regional development.

The largest amount of funds has been allocated to the implementation of OP Infrastructure and Environment - over 40% of all funds allocated to Poland in the financial perspective 2007-2013 for cohesion policy.

In the period of the 2007-2013 financial perspective, local governments have an important role to play in the implementation of regional policy. They are responsible for preparing regional operational programmes, for adopting them, and then, as managing authorities, for their implementation. The most important powers of the voivodeship managing councils include: preparing a detailed description of the operational programme projects, preparing the proposal for selection criteria of projects eligible for co-financing, and then selecting the projects and making the payments. Their mandate also includes ensuring appropriate publicity for the operational programme.

The funds from the EU budget, allocated to the implementation of the cohesion policy (excluding funds allocated for the implementation of programmes within objective European Territorial Cooperation and European Neighbourhood and Partnership Instrument) currently constitute the state budget's revenue. Funds from Structural Funds and Cohesion Fund are forwarded by the European Commission to Poland in the form of advance payments, periodical payments and final payments, onto specific bank accounts in euros, managed by the Minister of Finance. These funds constitute the state budget revenue. Then they are forwarded from the state budget in the form of a developmental subsidy, combined with the national funds from the state budget.

The terms and conditions of forwarding subsidies are stipulated by Art. 202 and 203 of the Act on Public Finances.

The developmental subsidies can be forwarded as:

– advance payments for the implementation of the operational programme

or

– reimbursement of expenditures made for the implementation of such programmes.

The subsidy, to the voivodeship local authorities for the implementation of regional operational programmes, constitutes revenue of this voivodeship's budget. It may not be higher than the limit of the state budget expenditures allocated for financing such a programme in a given budgeting year. The voivodeship local authority, as the managing authority for the operational programme, then provides subsidies to beneficiaries of regional operational programmes.

Developmental subsidies in the form of an advance payment are paid based on a contract concluded between the disposer and the beneficiary. The content of

such a contract is specified by Art. 209 (2) of the Act on Public Finances. These subsidies are targeted and may only be designated to implement the projects within operational programmes. They are to be accounted for according to the principles and deadlines specified in the Act on Public Finances (Art. 210 and 211 of the Act). National development subsidies paid as reimbursement of the expenses made, are transferred on the basis of a correctly submitted and approved payment claim.

The subsidies have the objective of co-financing projects selected in the competition. The rules of conducting such competitions are specified in the act on the principles of development policy.

The competitions may be cyclical or ongoing. If the competitions are held cyclically, the deadlines for application submission are set in advance, if the competition is an ongoing one, the incoming applications are examined until the limit for financing is reached.

The results of the competition are advertised on the internet site of the institution which organizes it. The successful applicants receive subsidies based on a co-financing agreement. Unsuccessful applicants have a right to appeal. A two-instance appeal procedure has been provided for in the act on the principles of regional development, i.e. filing a complaint followed by filing a request to have the matter re-examined. The deadline for examining an appeal is one month. For regional operational programmes, the examination of a complaint is the task of the relevant voivode, and the processing an appeal is the task of the minister of regional development. The applicants do not have the right to file a complaint with the administrative tribunal, as the decision on granting or refusal of co-financing is not an administrative decision, under the law. This solution has aroused doubts and a complaint has been filed against it with the Constitutional Tribunal.

In the current programming period the institutional system of absorption of EU funds allocated for the implementation of cohesion policy has been organized so as to take into account past experience and eliminate mistakes that hinder the absorption process.

A particularly successful measure is the decentralized management of regional operational programmes, delegated to the voivodeship level. Possible improvements at the following stages of systemic changes include: increased participation of the voivodeship local authorities in managing cohesion polices, especially within the scope of aligning the objectives of cohesion policy with regional development strategies, and programming developmental activities together with other local government units and social partners. It is also necessary to simplify the procedures gradually and increase the transparency of project selection system and the system of financial mechanisms operation.

For purposes related to the process of community projects implementation, Polish local governments are entitled to undertake financial obligations (credits, loans, issuing of securities) to the extent that exceeds the limits specified by the law. These limits are specified in the act on public finances and according to them the amount of debt of a local government unit may not exceed 15% of its planned revenue. These limitations do not apply for obligations undertaken in connection with the implementation of projects co-financed from EU funds. This solution is to ensure that local governments have better opportunities for rising funds to implement these projects.

Streszczenie

Cele polityki regionalnej Unii Europejskiej na okres programowania budżetowego 2007-2013 zostały sprecyzowane w dokumencie pod nazwą „Strategiczne Wytyczne Wspólnoty", przyjętym w formie decyzji Rady z dnia 6 października 2006 r. Dokument ten jest wdrażany w poprzez tzw. Narodowe Strategiczne Ramy Odniesienia (NSFR), przygotowane także przez Polskę jako kraj członkowski, które określają program działań na poziomie narodowym w celu koordynacji wykorzystania środków pochodzących z UE i funduszy krajowych, a przeznaczonych na politykę regionalną.

Referat prezentuje główne elementy składające się na NSFR, m.in. cele, programy operacyjne łącznie ze wskazaniem wysokości środków przeznaczonych na każdy z programów. Jak podkreśla autorka dużą role we wdrażaniu polityki regionalnej odgrywają jednostki samorządu terytorialnego, które odpowiadają za przygotowanie i wdrożenie regionalnych programów operacyjnych. Ponadto wskazuje na przepisy ustawy o finansach publicznych, które regulują sposób wydatkowania środków z pochodzących z UE i przeznaczonych na rozwój regionalny.

Oksana Muzyka-Stefanchuk

LOCAL PUBLIC FINANCES IN THE CONTEXT OF THE FINANCE LAW SUBJECT

At the current stage of the law development, both Ukrainian and Russian researchers in the field of financial law are positive that the finance law is a public field of law that regulates public relations[1]. While considering the public law, the theorists conclude that it should be defined as a legal subsystem that presents state, international and social interests. At the same time, the subject of the public law regulation alters a little because of the need to regulate the new entities that appear in modern society (self-government, parties, social associations etc.). The inclusion of the relations which appeared because of the mobilization, distribution and use of the local self-government bodies' money funds means the broadening of the financial law subject[2]. All these factors generated the following questions: What are the public finances? Do the self-government bodies' finances belong to the public finances and public relations?

In general, according to A.A. Nechay, the public finances are social relations connected with the satisfaction of the public interest of all kinds[3]. They appear in the process of formation, distribution (re-distribution) and use of the state and self-government bodies' money funds and the funds that satisfy social interests,

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1 Воронова Л.К., Фінансове право України. (Kyiv: Precedent, My Book, 2006), P. 36; Бех Г.В., Дмитрик О.О., Криницький І.Є., Фінансове право, (Kyiv: Yurincom Inter, 2004), P. 39; Орлюк О.П. Фінансове право (Kyiv: Yurincom Inter, 2003), P. 22; Химичева Н.И., Финансовое право, 2d ed. (Moskow: Yurist, 1999), P. 37.

2 Нечай А. Фінансова діяльність держави та фінансове право в сучасний період: їх поняття, «Право України», 2000, № 1, P. 56.

3 In the modern theory of the finance law, we can come across such a category as "publicity" and "public interest". According to A. Nechay, "public interest" is the interest that serves as the criterion of the public and private law differentiation. State interests, legal status of the state bodies, authorities and the regulation of the social relations play a great role for the public law. The private law has the deal with the interests of a particular person. See Нечай А.А. . Проблеми правового регулювання публічних фінансів та публічних видатків (Chernivtsy: Ruta, 2004), P. 29). The public interest according to N.Yu. Pryshva, is: 1) the concentrated expression of the general social needs and pursuits; 2) the recognized by the state and secured with the law social interest, the satisfaction of which is the condition and guarantee of the social unity existence and development. See Пришва Н.Ю. Правове регулювання публічних доходів «Вісник Київського національного університету. Юридичні науки», 2005, №63-64, P. 71). See also Музика О.А. Категорія «публічність» у фінансовому праві «Фінансове право», 2007, № 1, P. 25–30.

recognized by the state or by the self-government bodies regardless of the property form of such funds[4]. Thus, this definition specifies both state and local finances.

The essence of the relations regulated by the financial law is rather different. The reason is the multilink financial system of Ukraine and the participants of this legal structure. The subject and notion of the financial law are connected both with state and local finances. The exclusion of the relations concerning the local finances, would contradict the unity of the financial system as well as the unified financial, credit and monetary policy. The state and local finances (and relations which seem to concern them) have the same public character and are classified as centralized and decentralized.

During the Soviet period the state finances were privileged. The local finances as a kind of a local self-government were simply denied (they were considered as a part of the state finances). In such a situation, the subject of the financial law covered only the relations to the financial activity of the state. Nevertheless, the nowadays development of commodity-money, economic and social relations has caused a progress in the financial relationship not only at the state level but at the local level as well. All this changes have caused the alteration of the financial law subject. Today, some financial relations have become part of the private financial sector. As a result, these relations became an object of either civil or private law. The other part of the private finances is involved in the field of the state finances through different obligatory payments and assessments. This causes the broadening of the state finance influence and, correspondingly, the subject of the finance law[5].

It should be noted, that local finances and financial basis of the local self-government are very often understood as a municipal law institution. Thus, the municipal law regulates the relations in this field. The development of the Ukrainian legal system contributes to the formation of new areas of law. But there is still a discussion among lawyers whether to separate the public law as an independent field of law, the so-called municipal law, which regulates social relations that appear in the process of the local self-government organization and activity.

Financial activities of the local self-government are certainly an expression of public interest. Therefore, local self-government money funds (local finances) and the structure based on these funds are also public. Thus, as A.A. Nechuy points out, the legal regulation of local self-government bodies' financial activities forms the

4 Нечай А.А. Проблеми правового регулювання публічних фінансів та публічних видатків (Chernivtsy: Ruta, 2004), P. 61.

5 Заверуха О.Б. До питання про поняття бюджетних повноважень органів місцевого самоврядування «Держава і право: Збірник наукових праць. Юридичні та політичні науки». №8. – (Kyiv, Institute of State and Law named by V.M. Koretsky of National Academy of Science of Ukraine), 2000, P. 268.

subject of public and not private law[6]. The author of the cited article raises the issue if it is rightful to speak about the appearance of a new "municipal finance law" and presents some arguments against it. Thus, the essence and the aim of the local self-government bodies' activity is the formation of the public funds and the bearing of the expenses that are needed both for the fulfillment of the self-government functions and for the territorial (public) interest satisfaction. The subject and the method of the relation regulation have all the characteristics that are inherent in the financial law. Thus, the subject of the regulations of the financial law should include both the local and the state finances.

A great number of the municipal legal regulations concerning property, financial, land and other relations at the local level can be the regulations of the civil, finance, land or other areas of law, according to Fadeev V.I.[7]. Hence, this new "area" of law is a public-private law, which uses the regulations of the other fields of law for the absence of its own. Thus, the municipal law regulations cannot even in part govern the relations that make up the subject of the aforesaid area. It seems that the local finances (from the point of view of the legal regulation) cannot be referred to the complex municipal law that has the qualities of private and public-private regulations.

On the grounds of the above-mentioned reasons, it can asserted that the state and the local public finances are inseparably linked together in the aspect of the financial law but not of the municipal or some other areas of law.

6 Нечай А. Фінансова діяльність держави та фінансове право в сучасний період: їх поняття. « Право України», 2000, № 1, P. 57.

7 Кутафин О.Е., Фадеев В.И., Муниципальное право Росийской Федерации, 2d ed. (Moskow, Yurist, 2000), P. 12.; See Погорілко В.Ф., Фрицький О.Ф., Муніципальне право України (Kyiv: Yurincom Inter, 2001), P. 7.

Streszczenie

Współczesne prawo finansowe podlega ciągłym procesom rozwoju. Jednym z jego czynników jest coraz większy udział samorządów lokalnych w pozyskiwaniu i dystrybucji środków finansowych. Niniejszy artykuł został poświęcony teoretycznym i praktycznym problemom dotyczącym przepisów regulujących finanse publiczne na Ukrainie. Autorka analizje m.in. definicję finansów publicznych, ich miejsce w prawie finansowym oraz podnosi problemy finansów lokalnych.

PART IV
TAXES AND TAX ADMINISTRATION

Lilia Abramchik

BASIC DIRECTIONS OF TAX SYSTEM IMPROVEMENT IN BELARUS IN THE 21ST CENTURY

Introduction

The necessity of carrying out tax reforms could be explained as follows: firstly, the tax laws are still undergoing serious changes. Imperfection, instability and ambiguity of the tax laws do not accompany effective implementation of the tax reform at all. Carrying out the tax reform should be based on scientific concepts whereas the purpose of the reform should be precisely established. Secondly, there is no systematization in carrying out the reforms whereas the reform of the tax system should be introduced in parallel to other reforms, such as administrative, judicial, etc. Thirdly, existing shortages or flaws are caused by the fact that during the development of a concept of the tax system, a complex approach to the issue of taxation has not been fully adopted. Complex interrelations between all parties to the process of establishment and collection of taxes have not been considered. The absence of a complex approach at the formation of the tax system of Belarus leads to the aggravation of economic and social contradictions, the outflow of the capital abroad and the development of shadow economy. The reasons for such condition of the tax laws can be named as following: 1) there is no conceptual unity in the science of tax rights; a multi-variant approach and differences in the directions and levels of conceptual approaches and construction separate the institutes of tax laws and all system of certificates in the field of financial activity of the state; 2) the second reason is the imperfection of the tax laws connected with current needs of the experts. A problem of compatibility of tax policy and promptly developing economy is one of the key problems in Belarus. Thus, any tax reform should be connected with the improvement of tax institutes.

The necessity for the society to maintain public authority embodied in the state has caused the establishment and development of taxes. In conditions of market relations the tax system is one of the major economic regulators.

The stages of the tax system reform

The tax system is one of the components of the legal system of Belarus. The tax system of Belarus has been functioning since 1992. It has a conventional set of tax payments used both in European and CIS countries. For the period of the development of Belarus it is necessary to allocate four stages in the development of the tax system.

Originally, the tax system included 15 basic taxes. Thus, legal persons paid 8 kinds of deductions in inappropriate funds. The initial stage of the domestic tax system's foundation (1992 - 1998) was characterized by a standard activity followed by a subsequent improvement of already accepted legal certificates in the sphere of taxation. It allowed to eliminate operatively loopholes included in the tax laws, and also strengthen the role of taxes as a tool realizing priority directions of the economic development of the Republic. Therefore by the end of the specified period, the legislative base of the taxation in the Republic has practically been completely generated. Further, the system of taxes was repeatedly corrected with regard to the list of taxes, different rates and tax privileges. But especially essential changes have occurred regarding inappropriate funds, which have been incorporated and transformed to budgetary funds with simultaneous revision of their rates. All this has led to the essential change in the structure of taxes and tax collection.

A basic direction of the second stage of the development of the tax system of the Republic was the performance of a stage-by-stage decrease in tax loading on economy with a view of the stimulation of economic growth and business activity in all sectors of economy.

Tax rates have been considerably reduced. In comparison with 1992, a basic VAT rate has been lowered from by 28 to 18%[1] whereas income tax – from 30 up to 24%[2]. The scale of surtax rates has been reconsidered: the minimal rate has been lowered from 12 up to 9% whereas the maximum – from 50 to 30%[3].

The mechanism of the taxation of separate categories of taxpayers has been simplified. 7 special modes of taxation are in force now: the simplified system of the taxation for subjects of small business[4], the uniform tax for individual businessmen

1 Закон Республики Беларусь от 20 июня 2000 г. N 403-З О Внесении дополнений в закон Республики Беларусь «О налоге на добавленную стоимость», Национальный реестр правовых актов Республики Беларусь 21 июня 2000 г. N 2/178

2 Закон Республики Беларусь 30 июля 2001 г. N 51-З О внесении дополнения в закон Республики Беларусь "О налогах на доходы и прибыль", Национальный реестр правовых актов Республики Беларусь 2 августа 2001 г. N 2/794

3 Закон Республики Беларусь от 21.12.1991г. О подоходном налоге с физических лиц. №1327 – XII (в ред. 24.07.2002) // ВНС Республики Беларусь.- 1999.- № 16-17. – Ст. 322; Национальный реестр правовых актов Республики Беларусь. – 2002.- № 87, 2/883.

4 Указ Президента Республики Беларусь «Об упрощенной системе налогообложения» 9 марта 2007 г. N 119 (в ред. Указов Президента Республики Беларусь от 15.10.2007 N 497. Национальный реестр правовых актов Республики Беларусь 20 марта 2007 г. N 1/8417

and manufacturers of agricultural production[5], taxes on gaming and lottery activity[6], etc.

The third stage - carrying out the codification of the tax laws, which in turn is the guarantor of stability and predictability of a tax system.

On 1st of January, 2004 the General Part of Tax Code of the Republic of Belarus was put into operation. The acceptance of the General Part of the Tax Code is an important point in the development of the economic reforms in our country - owing to it, a complex revision of the entire system of taxation has begun.

Until now the systematized standard-legal base of taxation has been in force in the Republic, which allows a taxpayer to find the answer practically to any question arising in connection with the execution of his tax obligations, which has been practically created.

Certainly, it does not mean that the tax system and the tax laws have reached perfection. Quite often a fiscal nature of taxes is ignored. Therefore even today the urgency of the problem of tax system improvement (internal structure of taxes) is still valid[7].

A legal basis of taxation will be further developed with the adoption of the Special Part of the Tax Code. Work on this project, at a level of the interested ministries, has already been completed.

The project is changing the structure of taxes mostly by reducing their number and optimizing ineffective tax collection as much as possible. Special attention has been given to the increasing role of direct taxes.

Discussing deeper reforming of the tax system, in our opinion, it should be guided by both internal and external unification. Internal unification provides the following basic directions:

– tax elements of a tax legal structure should be precisely defined in the law;

– it would be necessary to separate two directions of privileges. Social tax privileges should be applied under the most general bases and

5 Указ президента Республики Беларусь 18 июня 2005 г. N 285 «О некоторых мерах по регулированию предпринимательской деятельности», Национальный реестр правовых актов Республики Беларусь 21 июня 2005 г. N 1/6561

6 Закон Республики Беларусь 30 июля 2001 г. N 51-З «О внесении дополнения в закон Республики Беларусь “О налогах на доходы и прибыль», Национальный реестр правовых актов Республики Беларусь 2 августа 2001 г. N 2/794.

7 Комментарий к налоговому кодексу Республики Беларусь. Общая часть / А.Б. Дробыш, Л.Н. Добрынин, Е.А. Панасюк; Под общ ред. канд. экономич. Наук. О.А. Леоновича, канд. юрид. наук Л.И. Липень. – Мн.: Дикта, 2003. – 288с.

extend to all. The application of economic stimulus should be strictly selective. Privileges should be granted under absolute control of the state;

- simplification of taxes calculation techniques;
- application of the identical mechanism of taxation with regard to all taxpayers and objects of the taxation;
- unification of the procedure of execution of tax obligations.

First of all, the mechanism of external unification should include the reduction of the operating tax system of the Republic so that it conforms to the tax systems of foreign countries. For this purpose decisions solving the following problems are necessary:

- a possibility of concluding international contracts on avoidance of double taxation without damage to national economy;
- further integration of the Republic's economy;
- the creation of favorable conditions of taxation for foreign investors;
- the creation of equal conditions of functioning for domestic commodity producers both inside the country and on foreign markets.

The problem of repeated taxation

It is necessary to point out the problem of double taxation. One of the reasons for the occurrence of double taxation is that majority of countries, despite economic development, purposes and priorities of financial policy in the tax systems, combine residency (that is taxation of individuals having permanent residence in these countries under all incomes, including those received abroad) and territorial area (that is a collection of taxes from the incomes obtained in the territory of a given countries irrespective of permanent residence of an individual obtaining incomes).

There are two ways of elimination of double taxation or reduction of its burden. The first way involves the acceptance of internal acts unilaterally by the state; the second - in the regulation on double taxation by the conclusion of international agreements. The majority of countries practically combined both directions which supplement each other and at the same time cannot be completely interchangeable. Frequently, unilateral methods of elimination of taxation duality offered by the national legislation (full or partial clearing, the tax credit), coincide with the mechanism stipulated in international agreements. However, a complete solution of

the problem itself is not possible as there always is a dual problem: on the one hand – the maintenance of a sufficient level of receipts in the budget, and on the other – the creation of optimum conditions for stimulation of economic development, especially in the sphere of the movement of capitals. Granting tax privileges under the national legislation in a greater degree is focused on the creation of favorable conditions for taxpayers - residents of these countries where the expansion of tax privileges for foreign companies and citizens always has a specific goal and attracts foreign investors and development of bilateral trading, economic, financial and other agreements.

Belarusian tax laws contain provisions to adjust to this issue[8]. In general or under a unilateral order they provide clearing of double taxation. In particular, Article 5 of the Law of the Republic of Belarus «On surtax from natural persons» provides that the sums of taxes paid abroad according to the legislation of foreign states by persons who are taxpayers of the Republic of Belarus and have permanent residence there, are deducted from payment of surtax they pay in the Republic of Belarus[9]. Concerning legal persons such mechanism is absent. A unique source of establishing an opportunity for and adjusting {regulating} the mechanism of elimination of double taxation in the Republic of Belarus are special international agreements. If an international contract establishes other rules, than the rules established by the legislation of the Republic of Belarus on international contract are applied.

All agreements are subject to ratification, that is they are accepted by the parliaments of the agreeing states. Before an agreement comes to force and a real application of its provisions starts, there can be a significant time interval as these provisions are applied only to incomes which are obtained after 1st January of the year following a year when the agreement came to force.

The international agreements on avoidance of double taxation the Republic of Belarus is a party to can be divided into two groups:

1. Those that have actually been concluded by the Republic of Belarus (as of now nine agreements has come into force and nine has been signed)[10];

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8 Комментарий к налоговому кодексу Республики Беларусь. Общая часть / А. Дробыш, Л. Добрынин, Е. Панасюк; Под общ ред. канд. экономич. Наук. О. Леоновича, канд. юрид. наук Л. Липень. – Minsk: Dikta, 2003. – С.28-29.

9 Закон Республики Беларусь от 21.12.1991г. О подоходном налоге с физических лиц. №1327 – XII (в ред. 24.07.2002) // ВНС Республики Беларусь.- 1999.- № 16-17. – Ст. 322; Национальный реестр правовых актов Республики Беларусь Республики Беларусь. – 2002.- № 87, 2/883.

10 Сборник международных договоров об избежании двойного налогообложения. Международные соглашения Республики Беларусь / сост. Л.Е. Астапович и др. – Мн.: Амалфея, 1997.; Закон Республики Беларусь «О ратификации соглашения между правительством Республики Беларусь и государства Кувейт об избежании двойного налогообложения и предотвращения уклонения от уплаты налогов в отношении налогов на доходы и капитал» // Национальный реестр правовых актов Республики Беларусь. – 2002.-№8; Закон Республики Беларусь «О ратификации конвенции между правительством Республики Беларусь и Ливанской Республикой об избежании двойного налогообложения и предотвращения уклонения от уплаты налогов в отношении налогов на доходы и имущество // Национальный реестр правовых актов Республики

2. Agreements concluded by the former USSR which are used by the Republic of Belarus as its assignee (it applies to 18 agreements, in particular the agreement on elimination of double taxation of incomes and property of natural persons of 5/27/1977 and the agreement on elimination of double taxation of incomes and property of legal persons of 5/19/1978).

All agreements concluded by the Republic of Belarus are similar in structure, their provisions are appreciably unified. As far as Belarus is concerned, these agreements refer to the following taxes: real estate tax, tax on incomes and profit of legal persons, surtax from natural persons. The main task for applying the mechanism of elimination of double taxation is the exact definition of the terms: "resident" and "permanent mission".

The term "resident" means any person who under laws of the state is a subject to taxation there on the basis of residence, constant dwelling, place of registration, place of supervising body or any other similar criterion.

As to the persons who according to the above-mentioned term are residents of both agreeing states the basis according to which they are considered residents of one state is this state where they constantly dwell. If a natural person constantly dwells in two states, he or she is considered the resident of that state where he or she has closer personal and economic relations. If the state in which there is a center of his or her vital interests cannot be certain, or he or she has no constant dwelling in any of the agreeing states, a natural person is considered to be the resident of that state in which he or she usually lives. Citizenship is the basis for the collection of taxes and recognition of a natural person as a taxpayer. If each of the states considers him or her as its citizen, or he or she is not a citizen of any of them, competent bodies jointly solve this problem.

The term "permanent mission" means any constant place of activity through which the commercial activity of the enterprise is in full or in part carried out, and it includes: a place of management, a branch, an office, a factory, a building site or the premises used for selling products.

Беларусь. – 2002.-№8; Закон Республики Беларусь «О ратификации конвенции между Республики Беларусь и Венгерской Республикой об избежании двойного налогообложения и предотвращения уклонения от уплаты налогов в отношении налогов на доходы и капитал» // Национальный реестр правовых актов Республики Беларусь. – 2002.-№125; Закон Республики Беларусь «О ратификации конвенции между правительством Республики Беларусь и королевством Бахрейн об избежании двойного налогообложения и предотвращения уклонения от уплаты налогов в отношении налогов на доходы и имущество // Национальный реестр правовых актов Республики Беларусь. – 2003.-№52; Закон Республики Беларусь «О ратификации конвенции между Республики Беларусь и правительством ЮАР об избежании двойного налогообложения и предотвращения уклонения от уплаты налогов в отношении налогов на доходы и капитал» // Национальный реестр правовых актов Республики Беларусь. – 2003.-№52; Соглашение между правительством Республики Беларусь и правительством Республики Армения о принципах взимания косвенных налогов при экспорте и импорте товаров (работ) // Национальный реестр правовых актов Республики Беларусь. – 2002.-№36;

In all agreements a general mechanism of elimination of taxation is applied. It involves deducting a sum that is a subject payment according to the provisions of the agreements in one state from the amount of total taxes already paid in another state. Thus the size of the subtracted sum cannot exceed the sum of the tax calculated for a given kind of tax in the first state. Concerning all other kinds of incomes which deliberately have not been included in the agreements, according to a general rule they are subjects to taxation in the state where the addressees are recognized as residents.

In our opinion, taking into consideration elimination of double taxation, the criterion of residency has that advantage that owing to it such elements as material and social status of a taxpayer in the country of his constant residence provide for a possibility to estimate his net profit in the best and fairest way. From the point of view of corresponding tax bodies, especially in connection with a problem of double taxation evasion, the criterion of territorial area is more preferable provided that its application will not lead to superfluous taxation of cumulative income. Work on the unification of tax laws within the limits of integration of Belarus and Russia in the Eurasian economic union has been conducted.

The main task of reforms in the sphere of taxation is to create accessible, clear and simple tax laws of Belarus. Therefore the tax system reform involves various parameters, including budget execution or taxes administration. In order to improve the system of taxation it is necessary to gradually cancel turnaround taxes, reorient the structure of taxes towards direct taxation, and decrease tax loading in wage fund.

Thus, canceling turnaround taxes will considerably enable enterprises to simplify the mechanism of tax calculations. Positive dynamics of the receipts of direct taxes and their relative density in tax loading as a whole will enable to accelerate the tax rates and withdraw from turnaround taxes. With a view of simplification of the tax laws, it is expedient to consider the problem of association of taxes having a similar taxable base. Thus, the distribution of tax revenues should be settled by inter-budgetary relations.

Conclusions

To reach the perfection of the tax system of the Republic of Belarus, it is necessary to consider basic tendencies of development of the international tax rights, the achievement of the world legal science and legal tax practice, and to observe the priorities of national interests of the country. The list of the taxes raised in the Republic of Belarus annually is concretized (as a rule, aside reduction) at the acceptance of the law on the budget of the Republic of Belarus for the next fiscal year. With the purpose

of the creation of a favorable tax climate and the optimization of the procedure of the execution of tax obligations for separate categories of payers, special tax modes work: a simplified system of taxation for subjects of small business, taxation within the limits of free economic zones, a uniform tax for manufacturers of agricultural production, a uniform tax from individual businessmen and other natural persons. Optimally, such a tax system should be capable of harmonizing economic interests of the state and payers. It is expressed in the maintenance of modern receipt of taxes in the budget in compliance with budgetary needs without essential influence upon the financial position of organizations and citizens. As far as the implementation of the reform is concerned, a complex of social guarantees of free-of-charge formation of public health services and a developed system of pensions and social services provision should be introduced.

Work on tax laws' simplification, among the others, by reducing the list of taxes and the amounts of tax rates, is constantly conducted in the Republic of Belarus. Ineffective deductions in inappropriate funds have been cancelled, VAT rates, profit tax, income and extreme taxes are reduced, taxes with similar tax base are incorporated into uniform payments.

The General Part of the Tax Code of the Republic of Belarus is actually applied in whole. Work on its Special Part regulating the mechanism of calculation and payment of separate taxes is actively conducted.

The tax system has become more stable, liberal and pragmatic. It confirms not only the stable positive dynamics of tax revenues of last years, but also tactile increase of the general level of tax culture and social responsibility.

Streszczenie

Głównym zadaniem reformy opodatkowania na Białorusi jest zachowanie przystępności, przejrzystości i prostoty przepisów prawnych. Z tego powodu reforma objęła różne sfery, włącznie z regulacjami dotyczącymi budżetu i administracji skarbowej. W celu poprawy funkcjonowania systemu podatkowego koniecznym jest stopniowe usuwanie obciążeń okołopodatkowych, zmiana struktury podatków na rzecz podatków bezpośrednich, obniżanie opodatkowania wynagrodzeń. Z kolei mając na uwadze uproszczenie regulacji podatkowych, wskazanym jest rozważenie kwestii ujednolicenia (zwiększenia spójności) podatków mających podobną bazę podatkową.

System podatkowy na Białorusi staje się stabilny, liberalny i racjonalny. Potwierdza to nie tylko dynamika wzrostu dochodów podatkowych w ostatnich latach, ale również wzrost ogólnego poziomu kultury podatkowej i odpowiedzialności w społeczeństwie.

Elżbieta Ambrożej

PROPOSALS OF AMENDMENTS OF THE POLISH TAX LAW PROTECTING TAXPAYER'S RIGHTS

Introduction

Tax Law in Poland, which has been functioning as a separate branch of law for several years, can be characterized by a lack of stability and transparency. Numerous changes of tax regulations, often implemented in order to achieve expedient targets, including political ones, are fragmentary and chaotic. Besides, many norms lack a balance between the taxpayer's and tax agencies' rights and duties. The need to conduct a thorough reform of the tax system as well as the tax law has become more and more noticeable. At the same time, it is reckoned that conducting such a reform goes beyond the scope of the Ministry of Finance and requires involvement and cooperation of politicians, professionals and social forces.[1]

Conducting a deep and fundamental reform of the tax system is not possible in a short time therefore single solutions, which would eliminate wrong, unclear and inconsistent regulations and introduce new legal institutions required by both tax agencies and taxpayers, should be implemented.

During the last few months many attempts to change tax law regulations have been initiated. According to their authors they would contribute to the effective protection of taxpayers' rights. Special attention will be paid to bills on changing the Tax Ordinance Act.[2]

1 W. Nykiel, A. Mariański, Potrzeba zmian prawa podatkowego-reforma a bieżące udoskonalenia, „Przegląd Podatkowy" No. 5 2008 , pp. 8-10

2 The Act of 29th August 1997 – Tax Ordinance Act (Consolidated text, Journal of Laws – Dz.U. 2005, No. 8, item 60, with amendments; hereinafter referred to as: the OP)

Execution of tax body decisions

In the Polish tax procedure, differently than in the administrative procedure, the rule of immediate execution of tax body decision is accepted.[3] The suspension of the decision execution is treated by the OP as an exception to the accepted rule.

The differences between regulating the rules of the non-final decision execution in tax procedure and administrative procedure emerge from the fact that the tax procedure is characterized by a specific protection of a fiscal interest (the budget incomes are generated through taxes), whereas the administrative procedure is characterized by the protection of the procedure parties' interests.[4]

The solution accepted on the basis of the OP is quite controversial, and above all does not contribute to the protection of taxpayers' rights (interests). According to the OP, the decision of the first instance body should be executed within 14 days from the date it is served to a party. At the same time the party can appeal to the body of the higher instance through the body which issued the decision. The body relays the appeal alongside with the case files to the body of the higher instance within 14 days unless it annuls its own decision following so called auto-control course. The appellate body considers the case within 2 months (on pain of suspending the decision execution). The excess payment (with the interest) should be returned within 30 days starting on the day of issuing the decision about the change or suspension of the first instance body decision. It usually takes a few months from the execution of the tax decision to issuing the decision in the appellate course and returning the tax undue or higher than due, which is vital especially when we take into consideration an economic turnover. It should be noticed that the return of the tax undue (with interest) often cannot compensate the losses incurred due to the decision execution, which in appeal procedure was changed or annulled (for example limiting the range of the company's activity, the loss of reliability, closing down the company, dismissing the employees, and other).

In order to mitigate the effects of the immediate execution of the decision, and to protect the taxpayer's interests in case of a litigation between them and the tax body, the suspension of the tax decision is used.

In Poland we deal with a case of an obligatory suspension of the tax decision when the appellate body does not consider it within two months from the date of receiving it and when the appealed decision is not executed as a whole or partially.

3 Article 224 § 1 of the OP

4 Article 7 of the Act of 14th June 1960 – Code of Administrative Procedure (Consolidated text: Journal of Laws – Dz.U.2000, No. 98, item 1071 with amendments; hereinafter referred to as the K.p.a.) compels a duty upon the public administration agencies to take into consideration the public interest and the right interest of citizens in their procedures,

In such a situation the execution of the decision is suspended ipso jure, within the limits of the claim which is the subject of the appeal.[5]

The OP regulations give the tax agencies the power to suspend the decision as a whole or its part ex officio or by the party's claim, but only in a case justified by an important interest of the party or public interest.[6] What is important, the tax body's conclusion is based on its own recognition and therefore the reluctance to question its own decisions and to use this institution can be noticed.

Besides, the tax body sustains the execution of the appealed decision as a whole or partially till the date of the final decision or in case of lodging a complain before the administrative court until the decision of the administrative court comes into force, in case of a due provision for the discharge of the commitment.[7]

The necessity to introduce changes in the tax decisions executions in force has been lately widely discussed. As a result, some actions have been undertaken which aim at preparing the OP alteration. The work has been taken by MPs, the members of the Special Commission 'Friendly State' which deals with the issues connected with limiting bureaucracy and the Ministry of Finance simultaneously.[8] The first bill, which was officially presented to Sejm, is a Deputies' bill on the change of the OP of 15th April 2008.[9] It posits introducing a system change in the tax procedure dealing with sustaining the execution of a decision. The bill suggests applying a solution from an administrative procedure, where on the basis of a principle, the decision before the appeal's expire date is not executed (Article 130 § 1 K.p.a) and lodging an appeal within the time limits defers the execution of the decision (Article 130 § 2 K.p.a). However, it does not concern the situation when the decision is on pain of an immediate execution and when the decision is a subject to an immediate execution ipso jure (Article 130 § 4 K.p.a). The appeal against the decision (except the cases mentioned above) is therefore an absolutely suspensive legal mean.

As a result of implementing the proposed changes in the OP, the decision of a tax body will not be executed until the final conclusion in the tax procedure (or – on the basis of the regulations of a fiscal control – in a control procedure by the

5 Article 225 of OP.
6 Ibid. Article 224 §2
7 Ibid. Article 224 a
8 See: Biuletyn Komisji Sejmowych No. 732/VI on 4th June 2008. According to its content, the Special Commission 'Friendly State', which deals with the issues connected with limiting bureaucracy, adopted a bill on changing the Tax Ordinacne Act with amendments and will soon be presented for approval by Sejm. The change introduces a rule that the tax decision will not be executed before the finale date of the appeal. Filing the appeal will defer the execution of the decision unless it will be on pain of an immediate execution or the execution of the decision will fully provide for the party's application notice before the time for the appeal is over.
Introducing the rule of the execution of final decisions appears also in the OP alteration, which is being prepared by the Public Finance Department of State.
9 Druk Sejmowy No. 596

finance control agencies) is made. Only in particularly justified cases[10], which are listed taxatively, the bill gives the tax bodies the right to classify the decision as on pain of an immediate execution. The decision which is not on pain of an immediate execution will not be executed until the decree of the administrative court is legalized. The bill indicates that the court, on request of a body (which is a party of the legal procedure) whose actions are the object of the appeal, will be empowered to classify the decision as on pain of an immediate execution if there is an important public interest involved, especially if the circumstances between issuing the decision and lodging the application in question suggest that the complainant is selling out his assets.

In regard to the decisions which were on pain of an immediate execution at the stage of the tax procedure, the complainant will be allowed to lodge an application before the court to defer the execution of the decision on the bases of existing regulations. They will also be in force in case when he court imposes the execution of a decision which was deferred earlier.

The bill not only defines the cases which can be on pain of an immediate execution but also lists those which cannot, though the case deals with those taxpayers who are from the 'unsafe' circuits. It is when the tax body will be in possession of a payback protection (e.g. mortgage, fiscal pledge, bank or insurance guarantee, bank guarantee or a bill backed by a bank, a cheque certified by a national bank of a cheque nominator, a pledge registered as shares emitted by the Treasury or the National Bank of Poland – according to their nominal value, deposit in cash) or when the taxpayer is a subject of an interpellation issued by the Minister of Finance.

It seems that the direction of the proposed changes is right, especially due to the taxpayer's right protection. One should abandon the philosophy which says: first take the money from the taxpayer, then analyze if it was right or wrong and pay back with the interest. Defining the rights and duties of the taxpayers only through securing the fiscal interest of the state is unfair and discriminatory. Maybe new solutions will cause an increased and not necessarily justified activity of taxpayers

10 The Bill on the change of Tax Ordinance, op cit:

'Art. 224a §1. The pain of an immediate execution can be applied to a decision, which can be appealed against, in the following cases:

1) the commitment amount defined or set by the decision exceeds 500.000 PLN,
2) the subject of the decision is a subject that is under closing down or bankruptcy,
3) there are enforcement proceedings towards the subject of the decision as far as the public and legal debt are concerned
4) the subject of the decision was convicted with legal validity for a fiscal crime or a crime against an economic turnover, in case of a legal person the condition refers to all the partners entitled to manage the corporation's affairs according to separate regulations,
5) the subject of the decision runs the enterprise for less than 12 months,
6) the subject of the decision has tax arrears, § 6 excepted,
7) the decision concerns undisclosed income.'

in lodging appeals against decisions, which not always would end with changing or annulling them, but it would certainly give a possibility to 'postpone' the deadline for the tax payment. It can be assumed that such a situation would not affect the state budget needs.

'Tax Abolition'

For the last few years, especially after the accession of Poland to the European Union, job migration mainly to those countries which opened their labour markets, such as Great Britain and Ireland, can be noticed. According to the Natural Persons Income Tax Act[11], Poles whose tax residence remained in Poland and who are employed abroad are obliged to reckon their income tax, obtained not only in Poland but also abroad, in Poland. In order to avoid a double taxation, Poland has signed about 80 mutual international agreements. Those agreements for the prevention of a double taxation eliminate double taxation using one of the two methods: the credit method [12] and the exemption with progression method.[13] The first method is less favourable for the taxpayers and means that the taxpayers have to pay extra in Poland although they have already paid the tax abroad. Such a situation causes that some Poles do not return to Poland only because of the fear that they would have to pay high taxes. The phenomenon is so worrying (it concerns mostly young and well-educated people) that there have been some legislative initiatives, such as tax abolition for the above mentioned group of taxpayers, taken.

A legislative initiative has been submitted to the Marshal by a group of MPs. It proposes authorising the Minister of Finance to issue a regulation abandoning the liability to taxation in case when the taxpayer is compelled to pay a tax, notwithstanding applying the method of avoiding a double taxation resulting from the Agreement for the prevention of a double taxation.[14]

The main aim of the proposed changes is to stop the process, which appears among the Poles working abroad, of abandoning the idea of returning to Poland. However, the proposed bill can receive some criticism.

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11 The Act of 26th July 1991 Natural Persons Income Tax (consolidated text: Journal of Laws – Dz. U. 2000, No. 14, item 176, with amendments), Article 27, item 8,9,9a

12 In the country of residence of the taxpayer the tax paid in the country where the income was received is allowed for in a whole or partially in the all-in income tax due. The tax paid abroad is returned only up to the amount which is equal to the tax due in the country of the income source, More on that topic: : L. Etel (edit.), Prawo podatkowe, Difin, Warsaw 2005, pp.119-120,

13 Ibid. pp 116-118, 'Eliminating a double taxation with the use of an exclusion with progression means that in the country of residence of the taxpayer the taxable income is reckoned not taking into consideration the income received abroad. As a consequence, the tax is levied only on the income which was received within the borders of that country. However, a special tax rate is used to assess the tax.'

14 A Deputies' Bill on the change of the Act of 6th February 2008 Tax Ordinance, druk Sejmowy No. 549. The first reading took place on 12th June 2008, the bill was relegated to the Public Finance Commission,

Firstly, is there really a need for such an alteration? After all, in the present state of law, the Minister of Finance can, in a form of a regulation, abandon as a whole or partially the collection of taxes, defining the tax type, period of time and a group of taxpayers. The regulation must be legitimised by a public interest or an important taxpayers' interest.[15]

Authorising the Minister of Finance to issue a regulation abandoning the liability to taxation also in case when the taxpayer is obliged to pay the tax in Poland (notwithstanding the method of avoiding a double taxation) may lead to violating the constitutional rule of equality before the law. The 'Tax Abolition' cannot favour those taxpayers who have a tax arrear in comparison to the persons who paid their taxes according to the law in force.[16]

According to the present legal state, the regulation on abandoning the tax collection as regards the taxpayers who run the enterprise (in the discussed case it considers a one-person enterprises) may mean a public aid as in the regulations of the Act on Public Aid Procedures.[17] The attempt to provide aid for entrepreneurs has to be submitted to the European Commission in a form of an aid programme project defining the destination and conditions of the public aid.

It can also be questioned if, considering a wide circuit of the addressees of the proposed legal regulation, the rules and scope of abandoning tax collection should be in a form of a normative act such as a regulation or such as an Act. The proposed tax collection abandonment is in fact a tax relief, and so, according to the Article 217 of the Polish Constitution on granting tax relieves and exempts, it should be done in a form of an act. [18]

It seems that the alteration of the Act in the proposed form will not solve the problem of a double taxation of Poles in a systematic way and the goal set in the justification for the bill – encouraging Poles who work abroad to return to their motherland and restraining the process of deciding not to return to Poland. The reasons should be looked for in leaving a decision to issue the regulation in hands of the Minister of Finance, in the lack of defining the scope of the tax collection (will it refer to the whole tax or to a part of it), taxpayers groups which will be included in the tax relief, and also the time period which the relief considers.

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15 Article 22 § 1 of the Tax Ordinance Act.

16 Compare: the opinion of the Polish Chamber of Commerce on the Deputies' Bill on the OP change, druk Sejmowy No. 549

17 The Act of 30th April 2004 Public Aid Procedures (consolidated text, Journal of Laws – Dz.U. 2007, No. 59, item 404; with amendments)

18 More on this topic: C. Kosikowski, Konstytucyjność Ordynacji podatkowej, Państwo i Prawo, No. 2, 1998:

'The certificates to issue administrative acts included in Article 22 § 1 and 5, Art. 25, Art. 46 § 3 p. 2, Art. 48 § 3, Art. 58, Art. 67 § 3 and 4, Art., 79 § 3, Art. 85, Art. 89 and Art. 119 § 2 of Tax Ordinance (the Act of 1997 – Tax Ordinance) are not compliant with the Article 217 of the Constitution. The object of the regulation named in those regulations belongs to the sphere which comes within the tax act exclusivity therefore it cannot be a subject of a certificate to issue an administrative act.'

An attempt to solve the problem of a double taxation was also presented in another Deputies' bill, the act on the change of the Natural Persons Income Tax Act.[19] The authors of the alteration claim that 'the diversification of the taxpayers situations in accordance to the place of generating their income from the wage labour and due to a different order in agreements on preventing double taxation as for the methods of eliminating double taxation has no justification, furthermore, it rises serious doubts of constitutional nature (such a diversification violates the constitutional rights of equality in the eyes of law and social justice).[20]

The Bill introduces the possibility to choose the method of taxing incomes by all natural persons who earn their incomes in the countries that Poland has signed agreements to avoid a double taxation with (a credit method or an exemption with progression method) as far as the tax was levied on their incomes and the personal income tax was paid. The proposed regulation includes also a proposal to regulate the situation of those taxpayers who paid the tax according to the law in force. They will be allowed to apply for a return of the excess income tax with regard to the application of a more favourable taxation method.

It is also suggested that the taxpayers who in the years 2002 – 2006 did not fulfil the obligation to reckon their taxable income according to the law in force would be allowed to reckon those arrears using a chosen method of avoiding double taxation regardless of which method of avoiding double taxation is included in the international agreement. The proceedings in fiscal crime or offence will not be initiated and those that have already been conducted will be discontinued and the interest for the delay will not be charged.

The presented bill rises many doubts. Especially the proposal of choosing the best method of eliminating a double taxation by the taxpayer when the international agreement clearly states such a method evokes criticism.

The Constitution of the Republic of Poland[21] establishes the sources of law. According to its content[22], a ratified international agreement, after being promulgated in the Journal of Laws of the Republic of Poland, becomes a part of a legal order and is directly applied unless its appliance depends on issuing a legal act. A ratified international agreement on a prior approval expressed in an act has priority over an act if the act does not correspond to the agreement.

Constitutional regulations do not allow introducing regulations in a form of an act which permits a free choice of a method eliminating double taxation in case when

19 The Bill on the change of the Act on Natural Persons Income Tax of 29th January 2008, druk Sejmowy No. 548,
20 The justification for the Bill on the change of the Act on Natural Persons Income Tax, druk Sejmowy No. 548
21 The Constitution of the Republic of Poland of 2nd April 1997 (Journal of Laws – Dz. U. No. 78, item 48; with amendments)
22 Article 91, part 1 and 2 of the Constitution

the international agreement preventing double taxation clearly states such a method. The addressees of the act would have to use the method mentioned in the agreement anyway.

A negative but quite common phenomenon occurring in the tax law creation in Poland is making changes in tax legislation so to say incidentally while altering other acts, which often do not have anything in common with the tax law regulations. Those regulations, due to their frequent changes, are difficult to get to know. The discussed bill represents a similar case. The authors of the alteration propose introducing regulations to the Act on Natural Persons Income Tax, which deal, among others, with not initiating the legal proceedings in fiscal crimes or offences. Those regulations belong to the issue of the Act on Fiscal Penal Code[23] and according to the legislative technique[24], should not appear in the discussed bill because they concern the change of the Act on Natural Persons Income Tax and not the change of the Act on Fiscal Penal Code.

Examples of other proposals of changes in the Tax Ordinance Act

There will be a Deputies' bill on the change of the OP[25] submitted to Sejm soon. It proposes the introduction of a three-month deadline for the post-tax control procedures to be initiated by taxation agencies in cases when the taxpayer did not rectify incorrectness revealed by the control. The above obligation will not be assumed in a case when the controlled taxpayers present explanations or the reservations about the protocol will be granted by the inspectors.

The proposed change should be appraised positively. The regulations in force do not specify the deadline of starting the tax procedure after the tax control was accomplished. The situation is unfavourable for the taxpayers who are anxiously waiting for the result of the procedure, which may start at an undefined time.

On 25th April 2008 a bill on the amendments of the OP[26] was submitted to the Sejm. It proposes repealing § 3, art. 81b of the OP[27], which excludes the right to rectify

23 The Act of 10th September 1999 – Fiscal Penal Code (consolidated text, Journal of Laws – Dz. U. 2007, No. 111, item 765; with amendments),

24 The Prime Minister's regulation of 20th June 2002 regarding 'The legislative technique principles' (Journal of Laws – Dz. U. No. 100, item 908). According to the § 18, part 1 of the annex to the above regulation, an object of an act is defined possibly the most briefly, but at the same time adequately informing about its content. According to part 2, while defining the object of an act the titles of other acts are not quoted, with an exception of an act changing or introducing another act, where the object of the act being changed or introduced is given.

25 See: Biuletyn Sejmowy No. 732/VI. On the sitting on 4th June 2008 the Special Commission 'Friendly State' for the issues connected with limiting bureaucracy, adopted the discussed bill on the change of the OP unanimously.

26 Druk Sejmowy No. 664,

27 As for the principle, the taxpayers, remitters and collectors can rectify the filed tax return. The rectification is by filing a rectified tax return along with a written justification for its reasons. The right to rectify the tax return can be

the tax return after the tax control has finished in case of the goods and services tax. The Article 178 § 1 of the OP[28] is also going to be changed. According to its content, the tax body, at every stage of the tax proceedings, is obliged to enable a party to look through the case files and to make notes, copies or photocopies. Nowadays it happens quite often that the tax bodies contest the taxpayers' right of the access to the case files after the first or second instance procedure and before lodging an appeal against the decision or a complaint before the administrative court. Such an attitude makes it quite difficult for the taxpayers to prepare means for a suit and to coach the charges and the demands correctly, which in consequence prevents them from claiming their rights.

Since 1st January 2009 every taxpayer who is a subject to a tax proceeding will have a right to look through the case files, to make notes, copies or photocopies.

Summary

The proposals for the tax legislation amendments presented here, especially the ones concerning Tax Ordinance, seem indispensable. However, not always the method of conducting those changes suggested by the movers is the best one. It seems that the direction or the idea of changes itself is right, though. What is important, each of the presented alterations is on the stage of a bill which is to be submitted to Sejm or it has already been submitted but the procedure is not completed. Therefore, the process of the legislative proceeding in those cases requires undivided attention and one should hope that it will be finalised with the best possible result which will assure an effective protection of taxpayers' rights in Poland.

suspended for the time of the tax proceedings or tax control – in the ambit of those proceedings or control. The right continues after the tax control or tax proceedings are completed – in the ambit not included in the decision defining the amount of the tax liabilities, thus, for the time being it does not apply to the goods and services tax.

28 E. Matuszewska, Dostęp do akt podatkowych będzie nieograniczony, „Gazeta Prawna" 24th June 2008.

Streszczenie

Niniejsze opracowanie przedstawia projekty ustaw (w szczególności dotyczące zmian w ustawie Ordynacja podatkowa), które przyczynić się mają do skuteczniejszej ochrony praw podatników. Analizie poddano projekty ustaw dotyczące: wprowadzenia do postępowania podatkowego zmiany w zakresie wykonalności nieostatecznej decyzji podatkowej (przed upływem terminu do wniesienia odwołania nie będzie ulegać wykonaniu); wprowadzenia trzymiesięcznego terminu na wszczęcie przez organy podatkowe postępowania podatkowego po kontroli podatkowej, w sytuacji gdy podatnik nie skorygował w całości nieprawidłowości ujawnionych w toku kontroli; przyznania podatnikowi prawa do skorygowania deklaracji podatkowej po zakończeniu kontroli podatkowej w zakresie podatku od towarów i usług; przyznania podatnikowi, wobec którego prowadzone będzie postępowanie podatkowe prawa do wglądu w akta sprawy, sporządzania z nich notatek, kopii lub odpisów w każdym czasie, wprowadzenia w Polsce „abolicji podatkowej".

Vladimír Babčák

L'IMPOT DIT EGAL[1] – LA VOIE VERS LA FISCALISATION DES REVENUS PLUS JUSTE

L'introduction

Les impôts font partie de la vie de la société et des individus vivant dans la société déjà depuis la formation de l'économie monétaire et de la création des Etats. En outre, ce sont seulement les impôts qui accompagnent indissolublement la majorité des gens durant leur vie sur Terre. Les impôts ne nous « abandonnent » même pas quand notre voie terrestre finit, étant donné que l'obligation fiscale passe aux successeurs. Dans le domaine économique, on considère les impôts comme un élément indispensable de notre vie, comme un mal nécessaire et les règles fiscales sous l'aspect juridique sont l'expression de ce mal.

La République slovaque est un nouvel Etat au coeur de l'Europe. L'année dernière, elle a fêté le quinzième anniversaire de son indépendance. De point de vue de l'évolution de l'humanité, cela n'est qu'une goutte dans la mer. Les quinze années passées vont toutefois apparaître autrement si on prend en considération que pendant cette très courte période, il y a déjà la troisième loi sur l'impôt sur les revenus en vigueur en Slovaquie. Les deux lois précédentes[2] ont subi plusieurs modifications mais cela ne suffisait pas pour que la régulation juridique de fiscalisation des revenus ait été concurrentielle aux régulations juridiques des autres Etats, économiquement développés. La Slovaquie, surtout en ce qui concerne son infrastructure, ne faisait pas partie des régions primordiales de l'intérêt des investisseurs dans le passé. La seule chose qui pouvait les motiver et qui les motivait, était la main-d'oeuvre bon marché. Pour cette raison, il fallait chercher des possibilités afin de créer les

1 Etant donné qu'il ne s'agit pas du terme légal et que cette expression elle même n'amène pas le fond de cet instrument, il convient d'indiquer ce phénomène comme « dite ». Néanmoins, dans le texte ci-après je vais utiliser l'indication « l'impôt égal ».

2 C'étaient la loi n° 286 de 1992 J.O. sur les impôts sur les revenus conformément aux énoncés des règles postérieures et la loi n° 366 de 1999 J.O. sur les impôts sur les revenus conformément aux énoncés des règles postérieures.

conditions appropriées pour l'afflux des capitaux étrangers. L'approbation d'une régulation juridique de fiscalisation des revenus moderne s'est révélée comme l'une des voies relativement juste, et qui aurait créé des conditions attrayantes pour la fiscalisation des revenus.

En Slovaquie, on accentue en général que la loi en vigueur sur les impôts sur les revenus[3] est devenue l'une des parties de la réforme fiscale qui fut effectuée en 2004.[4] Dans son cadre, il y avait la décentralisation fiscale, l'adoption des lois sur les règles budgétaires de l'administration publique et de l'administration régionale, l'adoption de la loi sur les impôts locaux etc. Il s'agissait de la partie des mutations structurales dans l'économie slovaque dont le sens était en outre de renforcer l'indépendance économico-financière des organes régionaux autonomes. La loi sur les impôts sur les revenus évoquait le plus grand intérêt à cause du fait qu'elle avait introduit l'impôt égal.[5] J'accentue que cette indication, appliquée et acceptée en général presque par tout le public slovaque est du côté de sa base fallacieuse et égarée. Cette indication s'est enracinée comme l'une des expressions les plus populaires du vocabulaire des politiques populistes. Par la présente, je veux également indiquer que l'impôt égal est devenu l'objet de combat politique relativement violent entre le regroupement gouvernemental précédent et actuel. Pour nous, qui représentons le milieu professionnel il est évident que l'utilisation de l'indication « impôt égal » est pour ses adversaires un argument plus convainquant que le terme « taux d'impôts linéaire ».

L'impôt égal exprime le fait que chaque individu est fiscalisé par le seul, le même taux d'impôts. Dans ce système, au lieu d'indiquer les différents degrés des revenus d'après leurs étendues limitées « d'un certain revenu à un certain revenu », fiscalisées d'après le modèle « plus élevé est le revenu, plus élevé est le taux d'impôts »[6], l'Etat fixe d'une manière légale le plafond, après le dépassement duquel tous paient le taux d'impôts fixe sur leurs revenus. Ce plafond aurait dû être assez bas pour « motiver » les citoyens à payer les impôts au lieu de chercher des voies aussi bien légales que clandestines pour éviter leur paiement. De cette façon, tous les revenus ne sont fiscalisés qu'une seule fois, sans avoir égard au fait qui est l'imposé, quel revenu est concerné par la fiscalisation etc.

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3 La loi n° 595 de 2003 J.O. sur l'impôt sur les revenus conformément aux énoncés des règles postérieures.

4 En outre la réforme fiscale en Slovaquie ils furent réalisés cependant plusieurs différentes réformes structurales qui influencent directement le fonctionnement efficace des impôts. Il s'agissait notamment de la réforme des charges sociales et du système des prestations sociales.

5 En outre cependant ladite loi facilitait le mode de fiscalisation des revenus par l'abrogation de taux d'impôts sur les revenus particulier perçu par le biais de retenue qui était appliqué jusqu'à ce moment là (les taux d'impôts de 5% au 25%), supprimait ou réduisait un large cercle des exceptions et libérations, supprimait l'institut d'impôt à forfait etc.

6 La personne physique avec le revenu plus haut est alors soumis à la fiscalisation par le taux de pourcentage plus élevé que la personne avec le revenu plus bas, ce qui est le facteur démotivant par rapport à atteindre les revenus plus hauts.

L'impôt égal n'est pas une invention slovaque, la Slovaquie n'a fait qu'introduire une idée qui résonnait en science économico-financière déjà au 19ième siècle et aurait dû exprimer le désir d'une fiscalisation des revenus plus juste. A l'époque, la pratique dans la majorité des Etats divergeait avec la théorie car les Etats économiquement développés se sont plutôt orientés vers la fiscalisation progressive des revenus que vers l'application des taux d'impôts linéaires. Cependant, je ne veux persuader personne que le système d'impôt égal est absolument juste. Après l'introduction de l'impôt égal, la progressivité de fiscalisation n'était pas supprimée, mais était assez affaiblie. C'est pourquoi même le titre de cet article a pour but d'exprimer la voie de la Slovaquie vers la fiscalisation des revenus plus juste et non juste, car cela serait probablement confronté déjà à l'utopie.

La justice est une notion relative que l'on peut aborder de différentes façons, du point de vue philosophique, social, psychologique ou bien juridique. Par rapport à la notion relative « la justice d'impôt égal » donc de point de vue contraire exprime même un certain degré d'injustice de l'impôt égal. C'est lié au fait que l'impôt égal reste – à l'égard de l'application du système « des parts de l'abattement non soumises à la fiscalisation » - désormais au certain degré des revenus progressifs. Cela signifie que le taux des revenus bas est nul, en outre les personnes avec les revenus élevés livrent au budget de l'Etat plus de ressources à titre d'impôt sur les revenus, vu que par le même taux sont soumis à l'impôt leurs revenus les plus élevés etc.

Ni dans le passé, ni de nos jours, malgré les discussions, les réactions et les considérations positives de Slovaquie, aucune économie développée n'est passée vers le régime fiscal s'appuyant sur l'impôt égal, et alors fût appliquée la fiscalisation des revenus progressifs. Les raisons peuvent être différentes. Dans la majorité des cas, ce sont des raisons de caractère subjectif et qui représentent souvent le résultat de la vision politique sur le problème de fiscalisation des revenus linéaires ou progressifs et le fond idéologique indispensable de cette problématique. Une raison véritablement sérieuse s'offre elle même, et ce sont les charges élevées de l'administration publique qui ne sont pas productives.

Considérant le fait que la majorité des Etats ayant introduit l'impôt égal ne font pas partie des pays économiquement puissants, il pourrait sembler que dans leurs cas il s'agit d'une aventure pure sans justification économique réelle. Toutefois, la réussite macroéconomique de ces Etats après l'introduction de l'impôt égal signale que c'est une démarche pertinente. Les évaluations et la réussite de l'impôt égal ne sont cependant qu'une face de la monnaie ; l'autre face – moins visible, mais plus sensible est la volonté de reprendre ce qu'avait introduit un Etat économiquement moins important.

Il existe dans le monde entier plus de trente Etats qui appliquent l'impôt égal. C'est un certain paradoxe que plusieurs Etats dit postcommunistes ce sont résolus à

introduire l'impôt égal dans les dernières années. En plus, quelques-uns d'entre eux sont caractérisés par l'environnement économiquement et partiellement politiquement instable. La Slovaquie était le premier pays qui avait introduit l'impôt égal, or elle fait partie des Etats économiquement plus développés. Parmi les nouveaux Etats membres de l'Union européenne, l'impôt égal sur les revenus est apparu en Estonie en 1991, ensuite en Lettonie et en Lituanie en 1994. C'est en 2003 que la Slovaquie introduit l'impôt égal, et en 2005 fut le tour de la Roumanie. Parmi les Etats non membres, citons la Russie en 2001, la Serbie et l'Ukraine en 2003, et la Géorgie en 2004. A partir de ces données, on peut constater que dans l'Europe centrale on est devenu une certaine exception, on pourrait même parler d'une curiosité parce que le plus proche de la Slovaquie est le système d'impôt égal en Lettonie et en Suisse. Cependant, ce n'est pas un seul exemple d'une telle situation rare : l'autre exemple serait l'introduction de l'euro.

Parmi les avantages de l'impôt égal il faut voir notamment :

– la diminution de la disproportion entre les différents groupes des contribuables,
– la motivation vers la discipline fiscale et la prévention des évasions fiscales,
– l'allègement manifeste de l'administration liée à la perception des impôts,
– la création des conditions pour l'assurance d'un volume des revenus fiscaux plus élevée.

Sur certains principes de la fiscalisation

La réforme fiscale, dont l'introduction d'impôt égal faisait également partie, était construite selon les principes de la justice, de l'efficacité et de la simplicité fiscales. Tous ces principes influencent, même indirectement la morale fiscale de la société.[7]

7 L'étude du rapport le droit fiscal ↔ la conscience fiscalo-juridique ↔ la morale fiscale n'est en Slovaquie pour le moment que dans ses débuts. Or je suis de tel avis que surtout dans le domaine des relations fiscalo-juridiques s'exprime manifestement la liaison de la conscience juridique et de la morale. Peu de problèmes dans la société sont autant sensibles et en même temps interdisciplinaires comme c'est le cas du rapport des sujets fiscaux envers l'Etat ou l'administration régionale autonome concernant le respect des obligations fiscales. Les sujets fiscaux les remplissent ou pas, il y existe la contradiction entre les intérêts fiscaux des personnes habilitées et les intérêts de la propriété sous le seing privé des personnes dues, les normes fiscalo-juridiques sont adoptées par les plus hautes autorités de l'Etat et deviennent obligatoires pour toutes les adversaires même ayant conscience du fait que dans la majorité des cas elles manquent l'aspect moral. Plus concrètement voir : BABČÁK, V.: Dane a daňové právo na Slovensku. [Les impôts et le droit fiscal en Slovaquie.] I., Aprilla, s.r.o., Košice, 2008, s. 97.

Le principe de la justice fiscale est une condition de base pour un système fiscal fonctionnel. La mesure de l'application de ce principe détermine le rapport des contribuables envers les impôts concrets. A cause de cela s'influence en même temps la qualité de la conscience fiscalo-juridique et l'acceptation des impôts à la fois par le public professionnel et laïc. La possibilité de fournir concrètement le principe de la justice fiscale est souvent dépendante non seulement des intentions et des buts de la politique fiscale de l'Etat, mais surtout de la qualité de la transposition des différents aspects dudit principe dans la législation fiscale.

La justice fiscale est atteinte lorsque toutes les personnes soumises à la fiscalisation contribuent au règlement des frais communs par une quote-part adéquate et proportionnée. Toutefois, il faut prendre en considération que tout ce qui se déroule dans le système fiscal est soit juste soit efficace ; c'est surtout l'avis des économistes. A la différence des politiciens, il ne me reste qu'à être d'accord avec cette opinion. Cependant, l'expression de « justice » n'est pas un terme économique. Dans le système fiscal plus juste est ce système, moins il est efficace. Le principe de la justice fiscale ne cherche pas la réponse à la question si la seule perception des impôts est juste. Pour ledit principe le plus important est que le mode de l'encaissement et de la perception des impôts soient les plus justes possibles. La justice se considère dans le sens horizontal, ainsi que vertical.

La justice horizontale exprime la condition pour que les mêmes objets de fiscalisation soient soumis à la fiscalisation de la même manière et par le même taux d'impôts. Ceux qui sont dans la même situation financière, devraient payer exactement les mêmes impôts.

La justice verticale signifie que le sujet de l'impôt qui a les revenus les plus élevés, les plus grands biens ou participe à la consommation des objets soumis à la fiscalisation en plus grand volume, doit proportionnellement à cela payer un impôt plus élevé, en maintenant la proportionnalité de la fiscalisation, c'est à dire en appliquant le même taux d'impôts. Ce principe a été formulé par R. A. Musgrave comme *la condition de la même victime*[8] *;*

Dans le cadre de la justice horizontale, on peut construire la charge fiscale en fait par le biais de deux modes. Le premier, c'est la fiscalisation progressive où l'impôt avec le revenu croissant croît avec un rythme plus rapide que le revenu seul, cela signifie que le taux d'impôts moyen croît. Le deuxième mode représente la fiscalisation proportionnelle où l'impôt croît avec le même rythme que le revenu, cela signifie que le taux d'impôts moyen est constant.

8 Concernant la question de la justice fiscale horizontale et verticale pour plus amples d'informations voir : MUSGRAVE, R. A. – MUSGRAVEOVÁ, P. B. Věřejné finance v teorii a praxi. [Les finances publiques en théorie et en pratique.] Management Press, Praha, 1994, s. 206 a nasl. [p. 206 et s.]

Selon la conscience fiscalo-juridique de la société, la perception de la justice est expressivement liée justement à la base de la justice verticale.

Le principe de la justice fiscale est le plus lié au principe de l'efficacité fiscale (de l'efficience des impôts), et ceci surtout à cause du fait qu'à première vue ils s'excluent mutuellement. Cela va surtout dans le cas de la fiscalisation progressive, si on était les défenseurs de l'idée que la justice fiscale devait être fondée sur la progressivité de la fiscalisation. Cependant, chez les personnes physiques la fiscalisation progressive conduit à l'absence de la motivation pour travailler, le cas échéant pour entreprendre. En ce qui concerne les personnes morales, la situation est analogue; les personnes morales entrepreneuses cherchent et utilisent des voies légales, ainsi que clandestines afin de faire abaisser l'abattement. La nomination commune de cette action est la conscience que tous les revenus ultérieurs sont fiscalisés encore plus que ceux précédents. En général, la fiscalisation élevée des revenus est considérée comme inefficace. L'efficacité fiscale nécessite bien au contraire l'extension de l'abattement et l'utilisation des taux d'impôts plus bas. Dans ce contexte, je suis même le défenseur de l'idée de la fiscalisation des revenus dégressive, cela signifie l'application de la thèse « plus élevé est l'abattement, plus bas est l'alourdissement des impôts ».

Toutefois, la justice fiscale n'est pas en contradiction avec l'efficacité fiscale ni dans le cas où on signale la nécessité de baisser, le cas échant d'éliminer les différents exceptions et libérations de la fiscalisation. Cela exige tant de la justice fiscale que de l'efficacité fiscale.

La base de l'efficacité fiscale repose sur le fait que les activités les plus bénéfiques ayant procédé à la fiscalisation devraient rester les plus bénéfiques aussi après la fiscalisation. S'il existe des différents dégrèvements, exceptions, libérations et régimes de la fiscalisation particuliers, cela « motive » automatiquement d'alloquer les sources justement dans de telles activités parce qu'au même rendement avant de procéder à la fiscalisation, leur bénéfice après la fiscalisation est plus élevé. Cela apporte l'inefficacité sociale à cause du fait que la production et la consommation ne sont pas influencées exclusivement par l'offre et la demande, mais aussi par les avantages dans le domaine des impôts.

On classe le principe de la simplicité fiscale (de la simplicité du système fiscal) parmi les principes sur lesquels le système fiscal moderne et fonctionnel doit être fondé. La simplicité de la fiscalisation n'est pas seulement un problème du nombre des taux d'impôts, mais porte surtout sur les questions de l'abattement, de sa détermination, de la largeur de cette détermination, ensuite de la reconnaissance ou de non-reconnaissance des frais fiscaux, des régimes de la fiscalisation particuliers qui ne peuvent certainement pas être considérés comme une mesure systématique (même si les politiciens s'expriment souvent de cette manière) ni, comme déjà

susmentionnées des autres différentes mesures non-systématiques (des exceptions, libérations, dégrèvements, etc.). Dans cette optique, la simplicité est aussi indissolublement liée à de telles exigences que la fonctionnalité du système fiscal, l'exigence administrative du système fiscal (du côté de l'administration fiscale ainsi que des sujets fiscaux) etc. Cependant, le paradoxe de notre droit fiscal reste dorénavant le fait qu'il est le privilège du groupe étroit des experts, malgré le fait que par son mécanisme fonctionnel il pousse sur la liberté matérielle et personnelle du nombre énorme des imposables.

Le contenu législatif de la fiscalisation linéaire

La fiscalisation des revenus linéaire (l'impôt égal) contient la loi n° 595 de 2003 du J.O. sur l'impôt sur les revenus qui est en vigueur depuis le 1er janvier 2004. Ladite loi modifiait la seule base de la fiscalisation des revenus. La loi facilitait la régulation sur la fiscalisation des revenus, supprimait différents dégrèvements, exceptions, régimes particuliers, limitait des cas de la libéralisation de l'impôt etc. d'une manière manifeste, qui avait causé le manque de transparence du système fiscal et avait créé l'espace pour les fuites fiscales. Le changement le plus essentiel se manifestait par l'introduction des taux d'impôts uniformes, à savoir de 19% pour les personnes physiques ainsi que pour les personnes morales. Les règles pour la détermination de l'abattement étaient formulées d'une manière beaucoup plus claire.

En ce qui concerne l'impôt sur les revenus des personnes physiques, la loi n° 595 de 2003 du J.O. sur l'impôt sur les revenus comparée avec la régulation antérieure[9] :

1. a supprimé la fiscalisation progressive des revenus des personnes physiques et a introduit le taux d'impôts uniforme, linéaire, à savoir au montant de 19%. En même temps, elle a supprimé 18 différents taux d'impôts particuliers qui étaient dans l'étendue de 1% jusqu'au 25%.

De quel changement essentiel s'agissait-il est démontré par la comparaison avec le § 13 al. 1 de la loi n° 366 de 1999 du J.O. sur l'impôt sur les revenus, selon lequel «l'impôt est de l'abattement abaissé conformément au § 12... :

de Sk	à Sk	
-	90 000	10 %
90 000	180 000	9 000 Sk + 20 % de la somme dépassant 90 000 Sk

9 Par la loi n° 366 de 1999 du J.O. sur l'impôt sur les revenus conformément aux énoncés des règles postérieures.

180 000	396 000	27 000 Sk + 28 % de la somme dépassant 180 000 Sk
396 000	564 000	87 480 Sk + 35 % de la somme dépassant 396 000 Sk
au-dessus de 564 000		146 280 Sk + 38 % de la somme dépassant 564 000 Sk.

Pour l'explication : selon le § 12, l'abattement s'est abaissé de plusieurs sommes que la loi n° 366 de 1999 du J.O. sur l'impôt sur les revenus avait qualifiées comme « les parties de l'abattement non soumis à la fiscalisation » (je vais encore parler de ces sommes).

Pour comparer quelle fiscalisation était appliquée à l'impôt sur les revenus des personnes physiques mensuellement avant 2004 et laquelle depuis 2004 on peut analyser le tableau :

Les bandes fiscales et le d'impôts marginal avant l'an 2004 et depuis l'an 2004			
Avant l'an 2004		Depuis l'an 2004	
La bande fiscale (Sk/mensuellement)	Le taux marginal (%)	La bande fiscale (Sk/mensuellement)	Le taux marginal (%)
au 3 230	0	Au 6 736*	0
3 230 – 10 730	10	au-dessus de 6 736*	19
10 730 – 18 230 20			
18 230 – 36 230 28			
36 230 – 50 230 35			
au-dessus de 50 230 38			

** indexé par la croissance de revenu minimum de vie*
La source : MF SR (Le Ministère des finances de la République slovaque)

A partir de ce tableau il est clair que le taux d'impôts sur les revenus des personnes physiques maximum avait à moitié baissé d'une juste moitié, en conséquence de quoi diminuait essentiellement la fiscalisation des revenus marginale. Avant 2004 étaient en vigueur les taux d'impôts progressifs, il y avait cinq bandes fiscales et le taux d'impôt oscillait de 10% à 38% ;

2. a fait baisser le taux l'impôt sur les revenus des personnes morales de 25% à 19%. Avant 2004, il existait une part du taux d'impôts de base (25%), les taux d'impôts baissés montaient à 15% et 18%. Ils s'appliquaient aux contribuables entreprenant en production agricole et aux imposables qui avaient employé des handicapés. Depuis 2004, tous les revenus des personnes morales sont soumis à la fiscalisation par le taux d'impôts uniforme de 19% ;

3. a supprimé l'impôt sur les dividendes. En vertu de la loi n° 595 de 2003 du J.O. sur l'impôt sur les revenus, les parts aux bénéfices ne font guère l'objet de l'impôt sur les revenus des personnes physiques. Il en va de même pour l'impôt sur les revenus d'une personne morale[10] car la part aux bénéfices, la part acquittée, la part aux restes d'une liquidation ou la part aux résultats de l'entrepreneur ne font pas l'objet de l'impôt à condition qu'ils soient payés par une personne morale. De ce point de vue, on peut constater que la régulation est plus favorable en ce qui concerne la fiscalisation des entrepreneurs à la régulation contenue dans la loi sur l'impôt sur les revenus antérieurs.
4. a introduit le nouveau système des parts de l'abattement non soumises à la fiscalisation. C'est justement ce système qui, dans une certaine mesure, fait que l'impôt égal n'est pas vraiment égal.

A ses origines, ledit système (en vigueur depuis le 1er janvier 2004) s'enchaînait à la loi sur l'impôt sur les revenus antérieurs dans le sens que celle-ci était construite sur l'existence des sommes fixes desquelles s'abaissait l'abattement avant d'être soumis à la fiscalisation. Il s'agissait de différentes sommes, dépendantes de la personne concernée (imposable, conjoint/conjointe, l'enfant alimenté, invalidité). Le résumé des sommes des parts de l'abattement non soumises à la fiscalisation qui étaient appliquées avant l'an 2004 et depuis l'an 2004, se trouve dans le tableau suivant:

Les parts de l'abattement non soumises à la fiscalisation pour la période de la fiscalisation annuelle

	2003	2004	2007
imposable (personne soumise à la fiscalisation)	38 760,- Sk	80 832,- Sk	95 616,- Sk
conjointe/ conjoint qui ne travaille pas	12 000,- Sk	80 832,- Sk	95 616,- Sk
enfant alimenté	16 800,- Sk**	-	-
imposable touchant le „ČID“	8 400,- Sk	-	-
imposable touchant le „ID“	16 800,- Sk	-	-
DDS, ÚS, ŽP	24 000,- Sk	24 000,- Sk	12 000,- Sk*

** depuis l'an 2005*

*** depuis l'an 2004 au lieu de la part non soumises à la fiscalisation est appliquée la possibilité de l'abaissement de l'impôt déjà calculé du bonus fiscal.*

ČID = la pension d'invalidité partielle

10 Voir le § 12, alinéa 7, lettre c) de la loi n° 595 de 2003 du J.O.

ID = la pension d'invalidité

DDS = les contributions à l'épargne retraite complémentaire

ÚS = les ressources financières pour l'épargne rationnelle

ŽP = les frais à l'assurances vie

Après l'accession du regroupement gouvernemental actuel, on est cependant arrivé au changement essentiel dans ledit système, ce que je vais traiter dans le texte suivant.

5. a introduit le bonus fiscal sur l'enfant. Le bonus fiscal représente la possibilité pour l'imposable d'abaisser l'impôt calculé de la somme indiquée sur chaque enfant alimenté vivant dans le domicile avec l'imposable. Le bonus fiscal représente actuellement la somme montant à 6 570 Sk annuellement[11]. L'imposable qui pendant la période fiscale (l'année civile) avait des revenus de l'activité dépendante, soumis à la fiscalisation montant au minimum de 6 fois le salaire minimum[12] ou qui avait les revenus de l'entrepreneur, de l'autre activité indépendante ou de la location soumis à la fiscalisation montant au minimum de 6 fois le salaire minimum et qui de ces revenus reléguait l'abattement (l'abattement partiel), a la possibilité de mettre en oeuvre le bonus fiscal. Toutefois, cette possibilité ne s'applique qu'à un imposable avec une obligation fiscale illimitée et avec un domicile fixe sur le territoire de Slovaquie;
6. a abrogé toutes des exceptions, des libérations et de régimes particuliers à la fiscalisation des revenus. Il faut cependant souligner que le regroupement gouvernemental actuel avait introduit certains nouveaux dégrèvements, par exemple le dégrèvement pour les allocataires d'aide à l'investissement[13].

Revenons au système des parts de l'abattement non soumises à la fiscalisation (point 4). J'ai déjà indiqué que le regroupement gouvernemental actuel avait changé ce système dans le sens que depuis le 1er janvier 2008 la valeur des ces parts a commencé à être liée à la croissance du revenu minimum de vie, tandis qu'à l'origine (depuis le 1er janvier 2004) les parts non soumises à la fiscalisation étaient exprimées par une somme fixe. La part non soumise à la fiscalisation annuelle sur un imposable et sur sa conjointe (sur son conjoint) qui n'a pas son propre revenu, a été définie comme le 19,2 multiple de la somme de revenu minimum de vie en vigueur. Le montant a été déterminé de cette manière pour que les imposables avec

11 Le montant du bonus fiscal est toujours régulé au 1er juillet dans le contexte de changement du revenu minimum de vie. Le montant total du bonus fiscal pour l'année 2008 (pour la déclaration d'impôts pour l'an 2007) était composé de 6 x 540 Sk = le bonus fiscal au 31.06.2007 + 6 x 555 Sk = le bonus fiscal depuis le 1.07.2007.

12 Le salaire minimum en Slovaquie est depuis le 1.10.2007 le montant de 8 100,- Sk.

13 Voir le § 30a de la loi n˚ 595 de 2003 du J.O.

des revenus bas ne soient pas influencés négativement par le changement du taux de l'impôt.

Il faut carrément dire que le système des parts de l'abattement non soumises à la fiscalisation en vigueur est une sorte de compromis à l'égard de l'intention antérieure du regroupement gouvernemental actuel de supprimer l'impôt égal et d'introduire l'impôt dit millionnaire. Heureusement, cela n'a abouti qu'à des proclamations des politiciens en la matière, fréquentes en 2006 et 2007, puis de plus en plus rares.

Pour faire une image des sommes qui abaissent l'abattement, je présente les postes essentiels des parts de l'abattement non soumises à la fiscalisation, qui font que l'impôt égal n'est pas aussi égal qu'il aurait pu le paraître:

– il s'agit de la somme correspondante à 19,2 multiple de la somme du revenu minimum de vie en vigueur[14]. L'abattement diminue de cette somme si pendant la période fiscale un imposable atteint l'abattement correspondant ou inférieur à 100 multiple de la somme de revenu minimum de vie en vigueur. Dans le cas où l'abattement est supérieur au 100 multiple de cette somme, la part de l'abattement annuellement non soumise à la fiscalisation sur un imposable est la somme correspondante à la différence de 44,2 multiple du revenu minimum en vigueur et un quart de l'abattement. Si cette somme est inférieure à zéro, la part de l'abattement annuellement non soumise à la fiscalisation sur un imposable correspond à zéro;

– il s'agit de la somme correspondante à 19,2 multiple du revenu minimum de vie en vigueur annuellement sur son conjoint (sa conjointe) quant à un imposable qui pendant la période fiscale concernée atteint l'abattement correspondant ou inférieur à 176,8 multiple du revenu minimum de vie en vigueur et son conjoint (sa conjointe) vivant avec l'imposable pendant cette période fiscale n'a pas son propre revenu. Je trouve que cette part de la somme non soumise à la fiscalisation relègue les effets démotivants pour chercher l'emploi chez ces femmes.

Les parts de l'abattement non soumises à la fiscalisation représentent une atteinte manifeste au principe de la justice fiscale parce que plus elles sont supérieures, plus des différences fiscales supérieures se produisent. En effet, la justice fiscale

14 Au 1er juillet 2007 le revenu minimum de vie en vigueur sur un individuel est de montant 5 130,- Sk, ce qui signifie que la part de l'abattement non soumise à la fiscalisation est de montant 98 496,- Sk annuellement. Pour la déclaration d'impôts pour l'an 2007 était toutefois encore appliquée la somme de 95 616,- Sk sur un imposable, cela veut dire que sur l'abattement de 498 000,- Sk parce que pour l'année 2008 on est parti de la somme en vigueur au 1er janvier 2007, c'est à dire en vigueur au début de la période fiscale. Pour l'année 2009 (pour la déclaration d'impôts pour l'année 2008) on va donc partir de la somme de 5 130,- Sk.

ne termine pas avec l'impôt égal. Justement, prenant en considération l'existence des parts de l'abattement non soumises à la fiscalisation, par exemple les premiers 95 616,- Sk, qu'un imposable avait gagnés en 2007, ne sont absolument pas soumis à la fiscalisation et tout ce qu'il avait gagné au-dessus de ladite somme était soumis à la fiscalisation par le taux d'impôts linéaire de 19%. Cela n'était cependant appliqué que dans le cas où pour la période fiscale 2007 l'abattement supérieur au 498 000,- Sk n'avait pas été relégué. Si un imposable avait eu en 2007 l'abattement supérieur au 498 000,- Sk, en vertu de la loi n˚ 595 de 2003 du J.O. sur l'impôt sur les revenus, il aurait perdu le droit à la part de l'abattement non soumise à la fiscalisation. Le tableau suivant montre comment s'affirme la progressivité de l'impôt égal est visible de la table suivante:

L'abattement	L'impôt	Le pourcentage de la fiscalisation
95 000,- Sk	0,- Sk	0 %
180 000,- Sk	16 033,- Sk	8,9 %
360 000,- Sk	50 233,- Sk	13,9 %

En dépit de cette progressivité qui se produit en prenant en considération la part de l'abattement non soumise à la fiscalisation, la fiscalisation marginale est pareille. En général, cela est considéré comme le plus grand avantage de l'impôt égal.

La conclusion

On pourra analyser les contributions complexes de l'introduction de l'impôt égal sur la distance de quelques années. Toutefois, on peut déjà constater qu'il s'agit d'un changement qui même à court terme relègue plus d'attributs positifs que négatifs. En ce qui concerne le long terme, ce principe devrait apporter des contributions univoques, surtout grâce à une amélioration du niveau de l'emploi, dû à une vague d'investissements provenant de l'étranger en Slovaquie. Le haut niveau de l'emploi qui peut prendre sa source à une vague plus large d'investissements directs provenant de l'étranger en Slovaquie, le cas échant de l'abaissement du clou fiscal („tax wadge")[15] pour les imposables avec de bas revenus. L'introduction de l'impôt égal était utile surtout pour les familles avec des enfants.

En 2004, la Slovaquie, qui a marqué la croissance la plus dynamique parmi les pays de l'Europe centrale, était au-dessus de la moyenne des pays de l'UE. L'économie (en comparant avec l'an 2003) a crû annuellement de 5,5 %. Naturellement, on ne peut pas constater d'une manière univoque que l'impôt égal et la réforme fiscale elle-

15 Le clou fiscal montre combien de pourcents des frais destinés au travail au total un employé ne reçoit pas.

même ont causé une plus grande croissance des revenus fiscaux car l'économie elle même avait commencé à croître beaucoup plus vite que les hypothèses ne l'avaient indiqué. Je suis cependant persuadé qu'elle a laissé sur cette croissance une trace significative.

L'impôt sur les revenus (des personnes physiques ainsi que des personnes morales) pour l'an 2004 était budgété par la somme de 62,2 mld. Sk. Le rendement réel de l'impôt sur les revenus était du montant de 73,5 mld. Sk, ce qui représentait le remplissage du budget à 118,2%. Or, le rendement d'impôt sur les revenus des personnes physiques de leur activité dépendante en ladite année atteignait le montant de 30,4 mld. Sk, ce qui était de 7,1 mld. Sk en plus à l'encontre du budget. En ce qui concerne le rendement d'impôt sur les revenus des personnes physiques de leur entrepreneur, celui-ci était en 2004 budgété au montant de 3,8 mld. Sk et le rendement réel atteignait la somme 4,7 mld. Sk.

Le rendement d'impôt sur les revenus des personnes morales atteignait en 2004 33,2 mld. Sk, ce qui était de 9,5 mld. Sk plus à l'encontre du budget. La haute croissance du bénéfice n'était pas au mérite du rendement plus élevé. C'était à cause de l'étendue de l'abattement. Alors qu'en 2004 le bénéfice a augmenté de 10%, l'abattement augmenté de 29%. En 2003, l'abattement était inférieur par rapport au bénéfice relégué dans les déclarations d'impôts de presque 30 mld. Sk, alors qu'en 2004, cette différence était limitée à 3,5 mld. Sk[16].

C'est naturel que la capacité de concurrence d'un Etat est déterminée aussi par d'autres facteurs que le système fiscal avec l'impôt égal. En outre, les impôts plus bas laissent à l'économie en cours plus d'argent et l'impôt égal renforce la discipline fiscale, toutefois les impôts plus bas peuvent aussi signifier les revenus fiscaux plus bas.

L'année 2004 était la première de la mise en place de l'impôt égal. Au cours de ladite année, les individus avec un salaire minimum ont été témoins d'une augmentation de leurs revenus réels de 3,1%, un couple avec le salaire minimum avec deux enfants gagnait presque 9% de plus. Ce sont les données disponibles pour le public. Depuis le changement du regroupement gouvernemental, aucune autre donnée officielle représentative sur l'impact de l'impôt égal et sur ses effets n'est malheureusement pas disponible. La logique des choses m'oblige à conclure que si l'impôt égal apportait des atteintes négatives au monde de macro et microéconomie, le public (slovaque ainsi qu'étranger) en aurait pris connaissance il y a longtemps.

La présence est marquée par la vue sur le monde globale et sur ses problèmes. De ce point de vue, il me semble tout au moins dépassé d'introduire la politique dans les domaines d'impôts au dessus d'un standard accepté en général. Je

16 Les données sont prises du site Internet: www.finance.gov.sk/ifp.

reconnais l'existence et le sens de la politique fiscale comme une partie de la politique budgétaire de l'Etat, toutefois je ne peux pas montrer mon accord avec l'utilisation des impôts comme un moyen politique pour faire prévaloir des objectifs politiques d'un regroupement gouvernemental. La politique fiscale doit réagir aux nécessités de l'évolution économico-sociale d'une société sur la base des faits et des évaluations objectives. Dans le cas contraire, elle peut se transformer facilement en la « politisation » fiscale et à cause de cela le domaine fiscal déjà instable deviendrait encore plus instable.

A mon avis, l'impôt égal a la capacité d'influencer l'économie d'une manière efficace. L'hypothèse de base de cela est cependant l'abaissement du taux d'impôts encore plus manifeste : plus bas sera le taux d'impôts, plus efficace peut devenir le système de la fiscalisation par le biais de l'impôt égal.

Streszczenie

We wprowadzeniu niniejszego opracowania opisano zmiany w zakresie podatku dochodowego, które miały miejsce od początku istnienia Słowacji. Główną reformę tego podatku wprowadzono w 2004 r. na mocy ustawy nr 595/2003. W dalszej części opisane zostały zasady, na których opiera się reforma podatku dochodowego (zasadach sprawiedliwości, skuteczności i prostoty systemu podatkowego). Kolejna część poświęcona została szczegółowemu opisaniu konkretnych rozwiązań prawnych. W podsumowaniu przywołano podstawowe dane statystyczne związane z wpływem reformy podatku dochodowego na słowacką gospodarkę.

Wojciech Bagiński

PROPOSALS FOR CHANGES OF TAX THRESHOLDS AND TAX-FREE AMOUNT AS ONE OF THE ELEMENTS OF THE REFORM OF TAXATION OF NATURAL PERSONS NOT CONDUCTING BUSINESS ACTIVITY

The discussion concerning the reform of the existing tax system has been taking place in Poland for many years. Particularly urgent discussions are held over changes, which are proposed by various groups, in natural persons income tax. The demand for a radical simplification of this tax through liquidation of all tax relieves and the introduction of one tax rate for all persons charged with this tax appear cyclically.

The aim of the propositions of the reforms is not only the desire to facilitate and simplify the tax system but also a very popular idea to reduce citizens' tax charges.

The belief that the only way of achieving the latter aim is the introduction of the linear tax, which is sometimes presented in the press, is untrue. The very reduction of the tax rates does not have to lead to the increase of the taxpayer's remuneration. In some cases such a reduction may even lower the remuneration. Such a result could be observed in the Czech Republic where the linear tax at the amount of 15 % was introduced.[1]

Thus, in reality not only the very tax rate of the income tax has the influence on the fact how much money rests in a taxpayer's pocket. The taxpayer's net income is also influenced by the existing tax relieves, as well as the height of the tax thresholds and the tax-free amount.

The existing legal status/situation

The basic legal instrument regulating taxation of natural persons not conducting business activity is the Act of 26 July 1991 on natural persons income

1 E. Maliszewska, The linear tax with relieves would be beneficial for Poland, "Gazeta Prawna", No. 126, 2008, p. 12.

tax.[2] Despite many amendments, the natural persons income tax still retains its progressive character. In consequence, with the increase of the taxation base, i.e. the rise in the subsequent income thresholds, the income rate is also increased (stage progression).

In accordance with the npita, the height of the income tax due is the product of the two amounts: the taxation base and a given tax rate. In 2008 three tax rates are binding 19, 30 and 40 %.[3] The additional elements which modify the height of the tax due are the following: the tax-free amount, tax thresholds within the progressive taxation model, tax deductions, deductions from the income, social security fees, etc.[4]

The tax thresholds which were established in 2008 for the rates 19, 30 and 40 % are: less than 44.490 PLN, between 44.490 and 85.528 PLN, more than 85.528 PLN respectively.[5]

The construction of the natural persons income tax also includes the tax-free amount. In 2008 the tax-free income is 3.091 PLN (the amount reducing the tax 586,85 PLN).[6]

From the beginning of the existence of npita the determined amounts of the tax thresholds were included. In 1992 the tax thresholds were determined at the following levels: less than 64.800.000 PLN, between 64.800.000 and 129.600.000 PLN, more than 129.600.000 PLN (amounts before the denomination). These amounts were increased by 2008 to 44.490 PLN, 44.490 – 85.528 PLN and 85.528 PLN respectively. In the years between 1992 and 2008 there were also periods when the tax thresholds were frozen. It happened in the following periods: 1992-1993 and 2001-2006. The freeze of the tax thresholds has been always related to the increase of the citizens' tax burden. In particular, in the period between 2001-2006 more and more citizens, after exceeding the height of the income stated in the act, had to pay tax according to the tax rates higher than the basic one. It was not related to the subsequent increase of the living costs and existing inflation. Thus, it evoked widespread critical opinions.

In 2007 the tax thresholds were increased to 43.405 PLN, between 43.405 PLN and 85.528 PLN and more than 85.528 PLN.[7] Moreover, to the regulations of npita a new reduced tax scale, which will be binding from 2009, was introduced. In

2 Natural Persons Income Tax Act of 26 July 1991 (i.e.: Journal of Laws of 2000, No. 14, item 176 with amendments, herein referred to as npita).
3 Ibidem, article 32 point 1.
4 A. Bartosiewicz, R. Kubacki, Natural Persons Income Tax Act. Commentary, Warsaw 2005, p. 1027.
5 Under the amendments introduced into npita from 16 November 2006 on a change of natural persons income tax act and some other acts (Journal of Laws No. 217, item 1588, herein referred to as an act on a change of npita)
6 The tax-free amount established on the basis of the existing tax scale.
7 A change introduced by provisions of the act mentioned in the footnote no. 6.

accordance with this scale, from 2009 two tax rates of 18% and 32 % will be binding and three tax sections will be replaced by -two: less than 85.528 PLN and more than this amount.[8]

Similar to tax thresholds, npita has always included the amount reducing tax stating the income from which the income tax from natural persons was not charged. Since 1992, when the amount was 864.000 PLN (before the denomination), it increased to 586,85 PLN in 2008 (the tax-free income 3.091 PLN). In the periods 1992 and 2003-2006 the tax-free amount was not increased, which evoked criticism.

It is surprising that together with the planned introduction of two tax rates in 2009 the tax-free amount was not increased. For 2009 the amount reducing tax is 556,02, which relates to 3.089 PLN of the obtained income. In comparison to 2008, when the amounts were 586,85 PLN and 3.091 PLN respectively, there was no increase of the tax-free income.[9]

Propositions of various groups and the chances of realization

The obtained solutions do not seem to be final. Various groups still come forward with various propositions of changes, which in their opinion will improve the solutions established in the income tax from natural persons.

Representatives of the government, Ministry of Finance, employers, tax advisors and other groups take part in the discussion. However, until now no homogeneous position has been established concerning the direction of possible changes in the income tax from natural persons.

Professor Leszek Balcerowicz, who proposed the introduction of the linear tax in 1998, belongs to the supporters of the simplification of the income tax from natural persons and liquidation of the tax thresholds.[10]

The supporter of the linear tax and liquidation of the tax thresholds is also Jeremi Mordasiewicz, the economic expert of Polska Konfederacja Pracodawców Prywatnych Lewiatan (Polish Confederation of Private Employers Lewiatan). However, he believes that people obtaining income below the minimum of the existence should not be charged with tax whereas the tax-free amount for each child should be retained.

8 Ibidem, art. 1 point 28.
9 The tax-free amount established in accordance with the existing tax scale.
10 L. Balcerowicz, The linear tax – lost chance?, "Businessman.pl", no. 7-8, 2008, p. 3.

There are also some critical opinions, which state, among others, that the introduction of the linear tax today would be beneficial mostly for high-ranking public officials and employees of the companies owned by the State Treasury of the higher and middle level of management. These people do not create new posts therefore they do not contribute directly to the development of the economy.[11]

Particularly active in proposing new solutions are political parties, which in particular during the pre-election campaign indicate changes within the scope of taxation of natural persons not conducting business activity which they would like to introduce in the future.

The election slogan of the leaders of the nowadays largest governing party "Platforma Obywatelska" (PO - *Civic Platform*)[12] was transformation of Poland into the "second Ireland." The way of achieving this was to introduce similar solutions in Poland, almost identical to those existing in Ireland. What are these "model rules" of taxation of natural persons, and is PO really aspiring to introduce them in Poland?

In Ireland personal income tax is paid according to two tax rates: 20% and 41% along with high tax thresholds.[13] For 2008 the tax thresholds were increased once more and the height of the various tax relieves was increased. It is estimated that as a result of these changes almost 900 thousand people will not pay the tax at all. It practically means that almost one in every three employees in this country will not be charged with tax. Even those who will pay the tax according to the accepted solutions will save at least 140 euro per year, even without benefiting from additional relieves. While benefiting from relieves and being married, a citizen of Ireland may save even over 1000 euro per year.

The height of the tax-free income in 2008 is 17.600 euro. However, it might be greatly increased by benefiting, for example, from a residential relief, refund of parts of the treatment costs, trade union fees or being married to an unemployed person or a person on a small income. In 2008 single people pay 41% tax from the income exceeding 35.400 euro per year, single parents 39.400 euro per year, married couples with one income from the remuneration higher than 44.400 euro per year, married couples in which both spouses work 70.800 euro per year. Theoretically, 41% tax should be paid by over one million of the Irish, however, the majority of them manage to avoid it by tax deductions for pension funds or real estate investments.[14]

Then, is PO going to introduce solutions accepted in Ireland after winning the elections to the parliament? It turns out that despite the pre-election declarations,

11 What do we need the linear tax for?, "Businessman.pl", no. 7-8, 2008, p. 76-80.
12 Herein referred to as PO.
13 E. Matyszewska, Ireland possesses a clear tax system, "Gazeta Prawna" a supplement "Tygodnik podatkowy", no. 234, 2007, p. A13.
14 B. Świąder, Ireland uses two tax rates, "Gazeta Prawna", no. 248, 2007, p. 20.

changes proposed by PO do not go as far as those which were introduced in Ireland. This party declared that it wanted to simplify the tax system maximally by overruling exemptions granting unjustified privileges to some tax groups and introducing one 15% tax rate (the linear tax), maintaining the tax-free amount from taxation for a taxpayer and each child (pro-family tax relief). Therefore, as a result of the introduction of these solutions the tax-free amount would be retained, but the tax thresholds would be liquidated.[15]

One may easily notice that propositions of PO are far from the solutions accepted in Ireland. PO does not consider the introduction of numerous tax relieves as in Ireland. Moreover, PO does not propose leaving two tax rates and tax thresholds related to them. In fact, the only shared solution is leaving the tax-free amount. However, it is difficult to estimate that this amount should be calculated as the amount corresponding to the Irish amount, i.e. 17.600 euro. In practice it means that even after potential implementation of PO's program, tax burdens of the employees in our country will be much higher than those of people working in Ireland.

One may notice as well that PO after the end of the election campaign in 2007 commenced to modify its previous propositions. Due to the opposition of other parliamentary parties the introduction of the linear tax was postponed.[16]

Polskie Stronnictwo Ludowe (PSL - *Polish Peasant Party*)[17], PO's coalition partner in an election campaign, did not accept the proposition of liquidation of the tax thresholds. PSL assumed that except for the taxes which charge the poorest citizens, the reduction of the height of the direct taxes is impossible in the future. This party proposed a gradual increase of the amount free from the income tax from natural persons up to the level of social minimum along with further maintenance of three rates of the tax scale. PSL allowed the possibility of introducing the zero tax rate for taxpayers whose income did not exceed 900 PLN per month (10,8 thousand PLN per year), maintenance of degressive tax-free amount for the taxpayers of the Ist tax group and deprivation of the taxpayers of the IInd and IIIrd tax group of this amount.[18]

Before the election PSL did not support partial or full liquidation of tax thresholds at all. It supported the increase of the tax-free amount but only for the least paid employees, and called for the dependence of its height on the height of the social minimum.

15 To have a better life. PO' s program, PO's website www.platforma.org of 28 May 2008.
16 Tusk: The linear tax in 2011, the website of TVN24 www.tvn24.pl/12692,1547823,wiadomosc.html of 26 May 2008.
17 Hereinafter referred to as PSL
18 Social and Economic Program of PSL, the website of PSL www.psl.pl of 28 May 2008.

The position of PSL politicians has been recently modified. Press releases show that now they do not exclude supporting propositions of PO provided that the tax-free amount and the pro-family relief for children are maintained.[19]

Other important parliamentary parties like "Prawo i Sprawiedliwość" (Peace and Justice) and "Lewica i Demokraci" (The Left and the Democrats) are not the supporters of the liquidation of tax thresholds and the introduction of one tax rate for all employees. They also do not agree to the possibility of liquidation of the tax-free amount.

"Prawo i Sprawiedliwość" was the initiator of the introduction of two tax rates: 18% and 32% in npita. This party does not consider changing solutions introduced previous year and finds them sufficient.[20]

"Lewica i Demokraci" is also the supporter of maintaining PIT rates at the current level. Additionally, it calls for the introduction of tax relief for social purposes, in particular for the development of culture, education and fighting social pathologies.[21]

There is no political as well as social (apparently) support for propositions of total liquidation of tax thresholds and the introduction of a homogenous tax rate for employees. There is also a lack of acceptance for the withdrawal from determining the tax-free amount. Such a solution is not proposed by any important political party. Even PO, at present the strongest party in the country and a great supporter of the introduction of the linear tax, supports the idea of maintaining the tax-free amount.

Due to the above, it is hardly possible to realize in practice the demands of introducing one universal linear income tax without tax thresholds, the tax-free amount and tax relieves. Such propositions should be considered as extreme. Thus, one may expect maintaining current solutions.

Propositions of solutions

To sum up, it is neither probable nor justified to resign from the progressive scale. The introduction of two tax thresholds and maintaining the tax-free amount from 2009 is reasonable. This solution is accepted by most political parties and has social support.

19 Pawlak: The linear tax but under one condition, the website of TVN24 www.tvn24.pl/12692,1548774,wiadomosc.html of 26 May 2008.

20 Efficient and friendly state taking care of its citizens, the website of Prawo i Sprawiedliwość www.pis.org.pl of 26 May 2008.

21 One hundred concrete terms. The program of Lewica i Demokraci, the website of Lewica i Demokraci www.sld.waw.pl of 28 May 2008.

At first glance, a system similar to the Irish solutions, which due to its pro-market character have also a lot of supporters in Poland, will be created. There will be two tax rates in Poland (like in Ireland) from 2009. In both countries the tax-free amount is also determined and tax relieves appear.

However, low calculation of the tax thresholds and the tax-free amount is not satisfying in our solutions. In this range our solutions are far from the Irish ones. 32% tax rate introduced from 2009 should be related only to the income of people who exceed the average remuneration several times. However, 32% tax rate from 2009 will concern the income of the amount higher than 85.528 PLN, i.e. about 7.100 PLN per month. This is the amount which does not exceed the amount of three average remunerations.[22] In my opinion, it is too low. That is why this solution is not going to favor the creation of the middle class in Poland, which is a sign of rich societies.

The tax-free amount calculated in accordance with the provisions of npita (in 2009 it is 3.089 PLN per year) is also definitely too low. One may not state that it was established rationally since it does not include such rates as minimum remuneration or the social minimum (in December 2007 it was about 820 PLN per month). In my opinion, the taxation of the income lower than the social minimum is not only morally but also economically questionable. People who do not have the social minimum are very often entitled to social benefits financed by the state mostly from taxes. Thus, first the state "takes" the money in the form of tax in order to "return" it in the form of social support.

It would be better to establish the tax-free amount as a product of 12 months and the social minimum or minimum remuneration. All taxpayers should be entitled to the amount calculated in such a way. Further modification in the direction of more rational taxation of families would be possible, i.e. spouses would be entitled to additional tax-free amounts depending on a number of children. To sum up, one may state that similar solutions successfully function in Ireland.

22 In accordance with the data of the Central Statistical Office published in Monitor Polski No. 4, item 348 the average remuneration in the first quarter of 2008 was 2.983,98 PLN

Streszczenie

Dyskusja na temat reformy istniejącego w Polsce systemu podatkowego toczy się od wielu lat. Systematycznie pojawiają się żądania radykalnego uproszczenia opodatkowania dochodów osób fizycznych poprzez likwidację ulg podatkowych i wprowadzenie jednej stawki. Celem propozycji zmian jest nie tylko uproszczenie systemu podatkowego, ale również obniżenie obciążeń podatkowych obywateli. Mogą być one osiągnięte także poprzez modyfikację progów podatkowych i podniesienie kwoty wolnej od podatku.

W artykule zostały przedstawione różne propozycje modyfikacji progów podatkowych i kwoty wolnej od opodatkowania w kontekście reformy dochodów osób fizycznych.

Zbigniew Czajka

INDIVIDUAL INTERPRETATIONS AS INSTRUMENTS FOR UNIFORM APPLICATION OF TAX LAW BY THE TAX ADMINISTRATION

One of Roman's legal principles state that *Leges ab omnibus intellegi debet* (statutes should be intelligible to all). The above mentioned postulate is of universal nature and may with full certainty be referred to the legislator who makes law within the scope of Public Finances. Undoubtedly, the problem of clarity and transparency of the law being made constitutes an important and practical issue in the 21st century in Poland and other European countries as well. However, we should have in mind that even the best act that takes into account the above principle, from the moment it becomes valid onwards, constitutes a certain "element" of the whole system of law. As a result, considering mutual relations between various regulations, dynamics of socio-economic changes in practice, there may occur various phenomena of different interpretation and application of law by the administration and citizens. In this situation, it seems to be necessary that some mechanism should function in financial law, which will allow elimination of or at least considerable limits to this phenomenon. In this paper the institution of individual interpretation has been outlined, based on the tax law example, that may serve to meet the goal indicated in the subject-matter.

The central authority of the tax administration in Poland, i.e. the Minister of Finance (MF) pursuant to the rules of the Tax Ordinance Act (TOA)[1], is obliged to take actions to ensure uniform application of the tax law by tax authorities and tax investigation authorities. TOA's regulations in force do not contain a closed list of methods, forms or means used to meet the above goal. In Art. 14a of the TOA, the legislator pointed out as an example only one of the methods of striving by MF for ensuring uniform application of the tax law by the tax administration. The above mentioned regulation of the TOA gives MF a responsibility to make general interpretations of the tax law. On such interpreting, MF in the process of

1 Act of 29 August 1997, Tax Ordinance (uniform text: Journal of Laws of 2005, no. 8, item 60, as amended, hereinafter referred to as TOA), entered into force on 1 January 1998.

interpretation should take into account judicial decisions of common courts of law and the Constitutional Tribunal as well as the European Court of Justice. Art. 14 i of the TOA charges the MF with a duty to publish a general interpretation in the Official Gazette of the MF without delay and to publish it in the Public Information Bulletin (BIP- an official electronic periodical). Publication of general interpretations in the MF Official Gazette is necessary to cause specific legal effects related to protection provided by the rules of law for interested entities that comply with the content of a general interpretation. The date of publication in an official gazette also sets the starting moment from which tax administration authorities should observe the general interpretation in consideration of tax cases with the purpose of uniform application of the tax law. Furthermore, publication of information in the MF official gazette makes it available for tax administration bodies and current and future taxpayers, tax remitters, tax collectors or other entities charged with various tax obligations. Publication of general interpretations in BIP makes them more available and this publication constitutes an additional official source of information on their contents for the fiscal administration and entities charged with tax obligations as well.

In the literature on the subject it is suggested that second instrument, beside general interpretations, that may unify application of the tax law by the fiscal administration, is the institution of individual interpretation regulated by Art 14b-14p of the TOA[2]. It should be noted, however, that the regulations of law in force do not indicate directly individual interpretations as a means serving uniform application of the tax law by tax authorities and tax investigation authorities. Pursuant to Art. 14b § 1 of the TOA, MF shall issue, at a written request of the interested party, a written interpretation of tax law regulations, i.e. individual interpretation. Depending on the contents of the request, the interpretation expresses a position of the MF on how to interpret and apply provisions of the tax law in an existing individual case of an interested party and with regard to individual facts of the case or in a situation in which the person submitting the request may be in the future.

The MF issues individual interpretations with regard to taxes the calculation and collection (investigation) of which fiscal administration bodies subordinated to MF are competent for. But as regards taxes the calculation and collection of which tax bodies of territorial self-government are competent for, individual interpretations are issued by these entities (i.e. commune head, mayor and town president, district governor or voivodeship marshal (Art. 14j §1 of the TOA)[3]). Individual interpretation contains an opinion of the MF or a territorial self-government authority of first

2 According to B. Brzeziński, M. Kalinowski, A. Olesińska, M. Masternak, J. Orłowski, Ordynacja podatkowa. Komentarz (The Tax Ordinance Act – Commentary), Toruń 2007, p. 76

3 In the present tax system in Poland territorial self-government tax bodies of first instance with the right to calculate and collect taxes are: commune head, mayor and town president. Therefore, in practice only these authorities will issue individual interpretations at the request of interested parties.

instance on how the regulations the interested party requests should be understood and how they should be applied to the individual current or future (possible) facts of the case. As a result, individual interpretation, as opposed to general interpretation, is not of general nature and the direct purpose of its issuance is not to unify tax law application by the fiscal administration but to inform an individual recipient how this administration understands and shall apply tax law regulations in the situation presented in the request. Whereas the interested party has a guarantee that if he/she complies with the individual interpretation, he/she shall not suffer negative consequences of such action as punishment for a tax offense or transgression, shall not pay default interest by virtue of a tax unduly paid or, in certain situations, shall be relieved from the duty to pay tax within the scope that is a subject of the interpretation.

It should be pointed out, however, that apart from general interpretations, also individual interpretations are published in BIP. Such duty results from Art. 14i §3 TOA, and an individual interpretation with a request to issue it, without identification data of the person submitting the request and other entities mentioned in the interpretation. Deletion of individual data of the person submitting the request and other entities will cause that individual interpretations, on publishing in BIP, will gain features of general interpretations[4]. As a result, taking into account easy access to individual interpretations published in BIP, tax authorities and tax investigation authorities in applying tax law and deciding individual tax cases undoubtedly will take advantage of interpretation directives they comprise. It may be presumed that the importance and scope of influence of individual interpretations on uniformity of application of the tax law by the fiscal administration will be differentiated depending on which tax authority is an author of the individual interpretation, i.e. MF or a territorial self-government tax authority of first instance, and which tax authority – subordinated to MF or not, like territorial self-government tax authorities – will seek interpretational directives in individual interpretations in application of tax law regulations. This differentiation is related to the system of issuing individual interpretations, introduced in Poland on 1 July 2007. Before this date, regardless of what tax[5] the request for a written interpretation referred to, in individual case of the requesting entity the competent tax authority to reply to make individual interpretation was in principle a tax authority of first instance. They were tax office heads and customs office heads as tax authorities of first instance – as regards taxes collected by these authorities – subordinated to MF as the central authority of the tax administration and commune head, mayor and town president, district governor or voivodeship marshal as territorial self-government tax authorities of

4 Compare, e.g.: B. Adamiak, J. Borkowski, R. Mastalski, J. Zubrzycki, Ordynacja podatkowa. Komentarz (The Tax Ordinance Act – Commentary), Wrocław 2007, pp.153-154

5 In broader terms: public impost

first instance within their competence. The presented model of issuance of individual interpretations was a centralized one. It was widely criticized because, due to a great number of tax authorities entitled to issue individual interpretations, in practice there were situations of discrepant or even contradictory interpretations with regard to similar facts. In the literature it is emphasized that such a system of issuance of individual interpretations led to territorial differentiation of tax justice[6], which in practice could lead to a situation that one person in a similar situation as regards legal fiscal facts of a case was charged with tax according to the interpretation by the tax authority, while the other for whom the competent was another authority, was not. Of course, such a situation cannot be accepted from the point of view of the constitutional principle of equality before the law expressed in Art. 32, exc. 1 of the Constitution of the Republic of Poland, pursuant to which: 'All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.'[7]

As a result, an accidental circumstance which is competence of a tax authority requested for an individual interpretation cannot shape tax rights and duties of entities applying for such interpretation. It should be noted that before 1 July 2007, in the Polish legal system a mechanism functioned that, at least within some scope, allowed for removal of contradictory interpretations from legal transactions, and by this to some extent in practice influenced uniformity of application of the tax law by tax authorities. Pursuant to Art. 14a §4 TOA in wording that was in force before 1 July 2007, giving interpretation with regard to the scope and manner of application of the tax law in individual case of the entity requesting, the interpretation was made in the course of an administrative act, i.e. a decision with the right to appeal. Appeal authorities (second instance authorities) had competences of appeal proceedings and supervision as follows: head of tax chamber with regard to interpretative decisions issued by head of tax office, head of customs chamber with regard to decisions of a customs office head, and self-government appeal council with regard to decisions of commune head, mayor and town president, district governor or voivodeship marshal.

The above mentioned authorities might change or repeal interpretative decisions of a tax authority of first instance in the course of a decision following an appeal lodged by the recipient of the decision. A condition for a change or repeal of an interpretative decision was determination by the appeal authority that the lodged appeal needed to be considered (Art. 14 b §1 TOA in the wording that was in force before 1 July 2007). In the second procedure used as a means of supervision, the appeal authority might commence *ex officio* (officiality principle) the procedure of

6 See: B. Adamiak, J. Borkowski, R. Mastalski, J. Zubrzycki, op.cit., pp 143-144

7 Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland) of 2 April 1997 (Journal of Laws of 1997, no. 78, item 483, as amended)

a change or repeal of a decision comprising interpretation if this decision was a gross breach of law, judicial decisions of the Constitutional Tribunal or European Court of Justice, or such lack of compliance of the interpretation with the law was a result of a change of legal status (Art. 14 b § 5 point 2 TOA in the wording that was in force before 1 July 2007). As a result, applying the two above mentioned procedures an appeal authority had the possibility of eliminating from legal transactions provisions comprising discrepant or contradictory interpretation of tax law provisions in similar factual situations. This was made by a decision in which an appeal authority decided about the merits of the case differently from the tax authority of a lower instance by changing the interpretative decision and presenting its own different point of view on the meaning of the provisions that were subject to interpretation. But a repeal of the decision of an authority of first instance constituted a decision of cassation nature, where an appeal authority did not interpret tax law provisions.

However, the removal of varying (contradicting) individual interpretations was (or could have been) carried out within the jurisdiction of an adequate second instance tax authority which was able to supervise and influence the content (explanation) of interpretations issued by first instance tax authorities located within its jurisdiction. The aforementioned procedures of eliminating incorrect interpretations, as well as the obligation of placing final interpretation resolutions and decisions on Internet pages of adequate fiscal or customs departments following the removal of the applicant's identification, allowed to unify the application of the tax law among at least first instance tax authorities subordinate to a given appeal authority. This visibly did not provide a final solution for the problem of peculiar "regionalisation" of tax interpretations, i.e. possibilities of various explanations of the tax law in similar or identical actual states.

It is possible to say that this was a shift of the problem to a "higher level", since while it is possible to unify the application of the law by first instance tax authorities in the property range of a given appeal authority, there is no guarantee of eliminating differing interpretations and unambiguous application of the tax law by first instance tax authorities subordinate to various appeal authorities. Also the legal explanation performed by appeal authorities in issued decisions amending interpretative resolutions could have been inconsistent, and in consequence the appeal authorities could have applied the tax law non-uniformly. The resulting situation could have seen the existence of at least two contradictory individual interpretations within the country, due to being issued by, e.g., different appeal authorities presenting inconsistent problem explanation to the regulation applicant. The aforementioned negative results of the significant existing number and variety of tax authorities empowered to issue individual interpretations, i.e. being a somewhat natural result of the decentralised system, can be eliminated by assignation of such empowerments to a single tax authority. It should be indicated that Polish legal regulations on issuing

individual interpretations binding prior to July 1 2007 also carried, although in a very limited range, a centralised model for issuing individual interpretations.[8]

On September 1 2005, the MF was equipped with competences of issuing written interpretations in individual cases, exclusively in the scope of agreement resolutions on evasion of double taxation and other ratified international agreements on tax issues. Within the aforementioned scope, this was the only main administration authority – with exclusion of first or second instance tax authorities – empowered to issue individual interpretations. In this case, the legislator recognized the demands presented in the literature regarding empowering the central authority, i.e. the MF, for execution of individual interpretations of the tax law (although in limited range), instead of first instance tax authorities.[9] At this time, i.e. since July 1 2007, there is a dual system of issuing individual interpretations effective in Poland. Individual interpretations for taxes subject to execution and collection by self-government tax authorities are issued by these first instance authorities. Therefore, in relation to these taxes (public levies), a decentralized model of issuing individual interpretations is still active. Contrarily to the previous procedure, the present procedure of issuing such interpretations excludes self-government appeal courts as second instance tax authorities. The binding legal state sees appeal authorities released of competences in the scope of instance control or in mode of individual interpretation supervision.

The literature indicates difficulty of implementing a centralized interpretation issuing model in relation to taxes collected by self-government tax authorities due to the peculiarity of such taxes, which are also formed by regional legal acts (on rates, tax exemptions).[10] While agreeing with this observation, it should be noted that, in relation to individual interpretations issued by self-government tax authorities, the problem of conflicting interpretations functioning within legal turnover remains unresolved, which may lead to territorial differentiation of tax justice. In consequence, due to the aforementioned real threats of issuing different individual interpretations by various self-government tax authorities, the influence of such interpretations, published in BIP, on the standardization of tax law applied by tax authorities may be limited. It seems that, in relation to individual interpretations issued by first instance self-government tax authorities, the legislator abandoned the possibility of their verification by appeal authorities, i.e. by self-government appeal courts, too hastily. While they are currently not executed as before in a form of a resolution, this change did not obstruct the self-government appeal courts from retaining the possibility

8 Compare, e.g.: Z. Czajka, Wiążące interpretacje prawa podatkowego Ministra Finansów w Polsce, in: . И.В. Гущин (editor), Финансовое правотворчество и правоприменение в государствах Центральной и Восточной Европы, Grodno 2006, p. 68.

9 E. Ruśkowski, J. Salachna, Problemy konstrukcji i stosowania przepisów o wiążących interpretacjach prawa podatkowego, in: H. Dzwonkowski (editor), Procedury podatkowe – gwarancje procesowe czy instrument fiskalizmu?, Warsaw 2005, p. 29

10 See, e.g. B. Adamiak, J. Borkowski, R. Mastalski, J Zubrzycki, op.cit., p. 154.

of changing or repealing individual interpretations. This solution, as shown above, was certainly imperfect, however, it allowed more effective (full) standardization of tax law application by self-government tax authorities than the one currently in place. This is because the legal system lacks a mechanism allowing elimination of contradictory interpretations at the activity level of fiscal administration. The possibility of appealing against individual interpretations issued by first instance self-government tax authorities to the administration court seems to be insufficient since judicial decisions may influence uniform application of the tax law by tax authorities only indirectly and with certain delay. Many interpretation problems could be solved during proceedings before the self-government appeal court, with no need to engage the court of law.

As previously pointed out, for taxes subject to execution and collection by self-government tax authorities, since July 1 2007, the tax authority issuing individual interpretations is the MF. In consequence, a centralized model of issuing individual interpretations was adopted here. However, it is noticeable that, in case of taxes collected by national government tax authorities, we are dealing with only a formal, not actual, concentration of individual interpretation issuing competences in range of a single central tax authority, which is the MF. In compliance with binding regulations, to assure uniformity of issuing binding (individual) interpretations and improvement of applicant service, the MF may, by way of a resolution, empower subordinate authorities to issue individual interpretations in its name and within a defined scope, simultaneously determining the material and local property of the authorities (Art. 14b § 6 O.p.). The MF exercised its empowerments and authorized four (of sixteen) fiscal department directors, i.e. in Bydgoszcz, Katowice, Poznan and Warsaw, to issue individual interpretations in its name.[11] Therefore the real tax authority issuing individual interpretations is not the MF as a central authority of fiscal administration, but the four second-instance tax authorities. In consequence, in such a case it is impossible to speak of full centralization of issuing individual interpretations, although the number of tax authorities empowered to issue such interpretations has been significantly limited.

In consequence, the danger of contradictory interpretations appearing in legal turnover has been greatly limited, although such situations cannot be excluded completely. A possible organizational solution to eliminate (or significantly limit) issuing of discrepant or contradictory individual interpretations by empowered fiscal department directors is to entrust the compilation of such interpretations to specialist cells active within the aforementioned fiscal departments, since the National Tax

11 Rozporządzenie Ministra Finansów z dnia 20 czerwca 2007 r. w sprawie upoważnienia do wydawania interpretacji przepisów prawa podatkowego - Decree of the Minister of Finance of June 20 2007 on empowerment of issuing interpretations of tax law regulations (Journal of Laws no. 112, item 770)

Information (KIP) offices have been founded in these departments.[12] The tasks of these offices, besides compilation of written interpretation of tax law regulations at the request of the interested party, specifically include: providing general tax information by phone or e-mail and cooperation with the Ministry of Finance and fiscal departments in monitoring uniformity of tax law application (§ 4 of the MF ruling). It should be noted that, during provision of phone information, the workers of such offices come into contact with various actual states. In order to guarantee information uniformity, they utilize a common application, i.e. the Handbook of Questions and Answers. Since the Handbook database is updated in real time, every employee has access to uniform information, regardless of their location. The database is complied by KIP employees, while questionable issues are handled by appropriate departments of the Ministry of Finance. The content of this application may also serve as the foundation for correctness verification and assurance of uniformity of issued individual interpretations. The aforementioned factors justify the assumption that the role of individual interpretations issued by the MF, in the scope of uniform application of the tax law, will be much more significant and effective than that of individual interpretations issued by first instance self-government tax authorities. The hierarchical subordination of national government tax authorities, which treat the explanation of legal regulations of individual interpretations as the official stance of the central authority of tax administration, will also be important in this case.

The binding legal regulations compel the MF to pursue assurance of a uniform tax law by fiscal administration, but do not limit this obligation to national government tax authorities. The content of Art. 14a O.p. provides the conclusion of this obligation also encompassing self-government tax authorities. Without a doubt, general interpretations are an instrument for the achievement of uniform application of the tax law by self-government tax authorities. The MF may also issue such interpretations in relation to taxes subject to execution and collection by self-government tax authorities. These authorities, while not hierarchically subordinate to the MF, may consider general interpretations issued by this central tax authority in decisions concerning tax cases. The factors for persuasion of self-government tax authorities to comply with general interpretations, may be their issuing authority and convincing arguments included in such interpretations.[13] In turn, the role of individual interpretations in the collection of MF resources for assurance of uniform application of the law by fiscal administration (even though this is not their main goal) will be limited to national government tax authorities. This is because the MF

12 Zarządzenie Nr 13 Ministra Finansów z dnia 20 czerwca 2006 r. w sprawie organizacji urzędów i izb skarbowych oraz nadania im statutów - Decree no. 13 of the Minister of Finance of June 20 2006 on organization of fiscal departments and offices and on providing them with legal status (Journal of Laws MF. no. 7, item 55 as amended, hereinafter referred to as the MF decree)

13 See P. Krawat, Kontrowersje wokół wykładni prawa podatkowego dokonywanej przez ministra finansów i organy podatkowe, in: H. Litwińczuk (editor), Prawo podatkowe przedsiębiorców, Warsaw 2006, p. 58.

is competent to issue individual interpretations only in the scope of taxes collected by these authorities. Consequently, in relation to self-government tax authorities, the MF will not be able to influence uniform application of the tax law by these authorities through individual interpretations due to a lack of adequate empowerments. Of course, the individual interpretations issued by self-government tax authorities may influence standardization of the tax law application by the tax administration, but this will occur without the involvement of the MF. Therefore, at their current legal state, individual interpretations of self-government tax authorities are not a resource for assurance of uniform application of the tax law in the scope of the MF fulfilling its imposed obligations.

Streszczenie

Przedmiotem niniejszego opracowania jest instytucja indywidualnych interpretacji wydawanych przez ministra finansów oraz w pierwszej instancji – przez samorządowe organy podatkowe w kontekście zapewnienia przez organy administracji podatkowej jednolitego stosowania prawa podatkowego. Należy bowiem pamiętać, że nawet najlepiej skonsturowana ustawa stanowi tylko „element" całego systemu prawnego razem z jej upoważnieniami. W rezultacie, uwzględniając wzajemne relacje różnych regulacji oraz zmiany społeczne i ekonomiczne, mogą zdarzać się przypadki różnych interpretacji i stosowania prawa przez administrację i obywateli. W tej sytuacji wydaje się niezbędnym wprowadzenie do systemu prawnego mechanizmu, który pozwoli znacząco eliminować takie przypadki. Narzędziem do osiągnięcia tego celu może być instytucja indywidualnych interpretacji.

Igor Dementyev

INDIVIDUAL LEGAL ACTS IN THE TAX LAW OF RUSSIA

The tax system cannot work efficiently without the interference of the special fiscal state authorities which control taxation and bring its violators to justice. Rating authorities formalize their decisions towards particular tax-payers in the form of individual legal acts. Individual legal acts are the jural facts that lead to the accrual, change or termination of the tax relationships. In this quality individual legal acts existed even during the Soviet period of the Russian history in the capacity of authoritative acts. But they were not numerous because taxation was not the main source of the budget formulation.

The building of the modern tax system began when the first part of the Tax Code of Russian Federation[1] (hereinafter referred to as the TC of RF) was passed in 1998. Since that moment we could have been speaking of the comprehensive whole of individual legal acts. The Tax Code of Russian Federation provides the closed system of individual legal acts. To exemplify the last we can name the tax notification (Art. 52), the conclusion of the collection of a tax, a charge, a fine out of the monetary funds of tax-payers' bank accounts (Art. 46), the determination of the collection of a tax or a charge at the expense of tax-payer's property (Art. 47), the requirement for the payment of a tax or a charge (chapter 10), the conclusion of the stoppage of the account transactions of a tax-payer (Art. 76), the conclusion of distress (Art. 77), the conclusion of the granting the right to pay by installments, deferment of payment, investment tax credit (articles 61-68), the conclusion of offsetting or repayment of the overpaid (overimposed) tax, charge or fine (articles 78-79), the conclusion of the field tax audit (Art. 89), and the determination of calling a tax-payer to the tax account (Art. 101).

These acts are provided by the law only – by the TC of RF, and cannot be brought by the Ministry of Finance of RF subordinate legislations.

Individual legal acts are passed during the taxation process. The evolution of individual legal acts follows the path of more and more accurate legislative regulation

1 Tax Code of Russian Federation of 31 July 1998 ("Sobranie Zakonodatelstva RF", N 31, 03.08.1998, Art. 3824)

in the procedure of their passing and realization. The first steps in this direction were done by the TC of RF that assigned some of the rules of passing such acts, their execution and realization as well as the appeals of these acts.

The science of tax law established that the direct legal effect display of law enforcement acts is their obligatoriness and invariability. Nevertheless, the obligatoriness of some individual legal acts is quite conditional. For example, if a tax-payer who is not a sole trader does not execute a decision of the rating authority on the tax, charge or fine collection voluntarily, the rating authority has to go to court with a recovery suit of the delinquent tax, charge or fine. If a tax-payer who is not a sole trader does not agree with a decision of the rating authority about the amercement, he has the right not to pay the fine while the tax authority is obliged to go to court with the recovery suit of a proper sum of the tax sanction from the guilty (Art. 48, Art. 101, 104, par. 7 Art. 114 of the TC of RF).

Individual legal acts are usually passed in order to control tax relations individually by means of tax principles of law. These tax relations are regulated generally by the law (by the tax laws and by-laws), but they need concretization and personification of a party or an object to the relationship. Individual legal acts are connected with the process of realization of a particular law or the obligation towards a particular case and situation rather than with the process of regulation. Individual legal acts are always concretized in time, space and public.

Individuality of the administration of the rules of an individual legal act consists of the fact that the bases for its publication are particular factual circumstances and particular rules of legal and social relations. Its contents are also individual as well as the consequences arising on its basis. Individual legal acts are addressed personally to particular tax-payers who are under the tax authorities' subordination.

The sphere of passing individual legal acts is quite extensive. These acts are passed at the different stages of the tax process: at the stage of the tax computation and paying (tax notification, request for the tax discharge, conclusion of granting the right to pay by installments, deferment of the payment, etc.), the stage of the tax control (conclusion of the field tax audit, of taking tax inspection arrangements, etc.), stages of calling to the tax account (conclusion of calling a tax-payer to the tax account, of refusal from calling a tax-payer to the tax account, of additional taking tax inspection arrangements).

Individual legal acts are passed by the state executives and judicial authorities, who carry out financing activities only, except local governments. Moreover, the circle of the state authorities and their officials who are authorized to pass individual legal acts is strictly bounded by the law. First of all, they are the rating authorities (Federal Tax Service of the Ministry of Finance of RF and its territorial bodies) which pass most of these acts provided by the TC of RF; custom authorities (Federal

Customs Service of RF and its territorial bodies) which make decisions on changes in terms of paying taxes-and-duties that are to be paid in connection with the relocation across the border of Russian Federation, and other acts that are passed in concordance with the tax law. For instance, custom authority makes a decision on the organization-tax-payer in concordance with Art. 77 of the TC of RF; authorities of the public off-budget funds which are authorized to make decisions on changes in terms of taxes-and-duties payments into the above-named funds, and other acts that are passed in concordance with the tax law; authorities that are authorized to handle payments of state due (courts, state interior bodies, etc.).

One of the most considerable problems is the terms of passing of individual legal acts. A term of passing of an individual legal act is a period of time established by the tax law since the beginning of the collection of evidential information proving the factual situation, which is connected with the publication of the act, to the moment of its passing calculated according to the procedure laid down.

On the basis of the analysis of tax law and judiciary law the following traits of terms of passing of individual legal acts may be distinguished.

1. Terms of passing of individual legal acts are specified only in the law – the TC of RF and cannot be set in other legal texts.
2. Terms of passing of individual legal acts have an imperative character and cannot be changed under the agreement between a tax authority and a tax-payer.
3. Terms of passing of individual legal acts possess a procedural character.
4. Terms of passing of individual legal acts are the jural facts that lead to the accrual, change or termination of the tax relationships.
5. Terms of passing of individual legal acts are fixed because the TC of RF unequivocally fix the duration of the time in which the bill should be published.
6. Terms of passing of fundamental individual legal acts may be characterized as compound ones, i.e. consisting of several particular durations.
7. Terms of passing of individual legal acts may be preclusive or organizational depending on the consequences of their non-observance.
8. According to the method of numeration, terms of passing of individual legal acts are subdivided into the term-period that are determined by the indication on the time period numerating in months or days, and term-moments that are determined by the indication on the moment in time designated as a calendar date or a particular event that is inevitable to come.

Individual legal acts have the internal and external form. The internal form of an individual legal act is its building and structure that organizes its contents (the splitting of the contents of a bill into paragraphs, parts, sections, etc.) The external form of an individual legal act is a written document. For some acts the TC of RF basic requisites, circumstances and questions which should be reflected in acts are fixed. Its details are regulated by the Code for such law enforcement individual legal acts as the resolution on tax responsibility charge (pt. 3, Art. 101, pt. 9 Art. 101.1 of the TC of RF); the demand of paying a tax or a duty (Art. 69 of the TC of RF). Forms for such acts are developed and approved by the Ministry of Finance of RF.

In the structure of an individual legal act the introductory, descriptive, preamble and resolute parts are distinguished. General requirements for all the individual legal acts are the requirements of legality, validity, rightfulness and reasonability. Unfortunately, consequences of the contradiction of individual legal acts to these requirements are not fixed in the TC of RF. The appropriate regulations in the Tax Code are absent. The legislative gap is being made up by the judicial tax practice. But, unfortunately, the criteria of legality of individual legal acts that are produced by the judicial practice are not uniform.

The uniformity is absent in such an element of the form as the name of an individual legal act. Most often in the TC of RF the term "conclusion" occurs as the name of a bill. Nevertheless, some individual legal acts are named as determinations. It seems to be logical to name all the individual legal acts published by the head of the tax authority and called conclusions as determinations.

It is reasonable to supplement the TC of RF with the article containing general requirements for the content and the form of individual legal acts as well as the consequences of non-observance of these demands.

The TC of RF does not create the opportunity for a tax authority to make changes in the individual legal act that has already been passed by it. But the superior tax authority (the common superior) can make changes in the individual legal act in the course of appealing (sub-paragraph 4 of the paragraph 2 of Art. 140 of the TC of RF). Nevertheless, there occur some cases in practice when the tax authority changed the resolution on the responsibility charge that had already been passed, for example re-qualified a deed of a tax-payer. Courts definitely interpret such actions of tax authorities as illegal because the TC of RF does not create the opportunity for a tax authority to make changes in the individual legal act that has already been passed.

There are two forms of judicial control of the publication of individual legal acts: a) preliminary and b) subsequent. The legal basis of the preliminary judicial control over the individual legal acts' passing is Art. 35 of the Constitution of RF, according to which a citizen cannot be deprived of his property anyhow but according

to the legal decision. That is why the determination concerning a tax and the duty of fine collection by the tax authority from a tax-payer who is not a sole trader is not absolutely obligatory for him. A tax-payer may not serve it, and in this case the tax authority is obliged to go to court with the recovery suit of arrears from the tax-payer. In this case the court verifies the legality and the validity of the decision of the tax authority that is expressed in the individual legal act. If a tax-payer who is not a sole trader does not agree with the decision of the tax authority to impose a fine, he has the right not to pay the fine, and the tax authority is obliged to go to court with the recovery suit of a proper sum of the tax sanction from the guilty (articles 48, 101, 104, paragraph 7 of Art. 114 of the TC of RF).

Consequently, the individual legal act does not possess a sign of obligatoriness until the court approves it. The disposition of the Russian Tax Law of the preliminary judicial control over the acts of jurisdiction corresponds with article 6 (the fair court examination right) of the Human Rights and the Fundamental Freedoms Convention in its interpretation by the European Human Rights Court. The court must have an opportunity to control the actions of the administrative bodies in questions of the suits and sanctions (the decision of 23.09.1998 in the case of Malige v. France, and of 23.10.1995 in the case of Gradinger v. Austria).

The subsequent judicial control is realized when judicial appealing of individual legal acts have already taken its legal validity and obligatoriness for a tax-payer.

According to the Tax Code of RF, there can appear some individual legal acts of a controversial nature in the tax law (the compact of the investment tax credit, conclusions of offsetting or repayment of taxes-and-duties). The enforcers wonder what the nature of these acts is, whether the civil law is pronounced for their regulation and what the limits are.

The research on such categories as tax enforcement, tax compact, the contents and form of individual legal acts, terms of their passing, and the burden of proof while passing individual legal acts, could provide a considerable contribution to the theory of financial law and the tax law in particular.

Streszczenie

Artykuł został poświęcony indywidualnym aktom prawnym wydawanym przez organy podatkowe w Rosji. Akty te są prawnymi faktami, które powodują powstanie, zmianę lub wygaśnięcie stosunków podatkowych. Rosyjski Kodeks Podatkowy wprowadza ich zamknięty system.

W treści opracowania autor definiuje indywidualne akty prawne organów podatkowych, analizuje ich strukturę, formy, procedury uchwalania, jak również dokonuje ich klasyfikacji.

Teresa Famulska

HARMONISATION OF VAT RATES IN THE EUROPEAN UNION COUNTRIES – THE ACTUAL STATE AND PERSPECTIVES

Fiscal solutions belong to the group of basic elements of public finance. Therefore, it is necessary to consider tax related issues while discussing any reform of public finance.

Value Added Tax (VAT) plays a significant role in contemporary fiscal systems. The tax is subject to harmonisation in the European Union[1]. VAT is also the only tax that was used to construct a universal fiscal model to be used in the whole European Union. Implementation of 'the pattern' was regulated by subsequently issued directives – altogether more than twenty. The harmonisation level of numerous VAT technical elements is considerable[2] (particularly concerning the entity, the subject, the base, the moment a tax liability emerges, the place of taxable transactions, exemptions, special principles of taxation, etc.). With reference to creation of the common market, i.e. abolishment of customs related barriers for the flow of goods in the member countries of the Community, a system of the so-called intra-Community transactions was introduced. The system in question is responsible for functioning of the VAT in compliance with binding principles in the target country. However, much more attention should be still paid to the issue of equalising VAT rates that are applied in the member countries of the European Union. The harmonisation level of the rates in question is deemed to be low.

From the theoretical point of view, only one standard VAT rate to be used in all member countries (the same in the whole European Union) would be the most beneficial solution that would increase effectiveness of the homogeneous common market. In practice, such deep VAT harmonisation has turned out not to be feasible so far. Despite the fact that VAT harmonisation related efforts were undertaken for the first time as early as in 1967[3], some resolutions that referred to the level of rates

1 J. Głuchowski, Polskie prawo podatkowe, Warsaw, 2006, p. 208.
2 B. Brzeziński, M. Kalinowski, Prawo podatkowe Wspólnoty Europejskiej, Gdańsk, 2005, p. 89.
3 I Directive of the Council 67/227/EEC of 11 April 1967. on the harmonisation of legislation of Member States concerning turnover taxes (Journal of Laws - EU Official Journal 1967, L. 71).

appeared in 1992, in the Council Directive[4] that came into force on the 1st of January 1993, i.e. since the homogeneous internal market was introduced. As far as the rates are concerned, it was decided that in each member country only one standard rate was to be in use and its minimal level was to amount to 15%. In case of some goods and services, member countries were also permitted to apply one or two reduced rates that would not go below 5%. Such a solution was considered transitional and it was supposed to be in force till the end of 1996. In practice, the very transitional nature of the solution in question has been retained. The above principles were firstly prolonged to be still binding till the end of 1998[5], then till the end of 2000[6], whereas all resolutions that referred to reduced rates were decided to be binding indefinitely. Another prolongation of the minimal standard VAT rate amounting to 15% to be applied in all member countries was made for the period of five years, i.e. 2001-2005[7], and then for another five years, i.e. till the end of 2010[8]. The requirement to set a minimal standard VAT rate is met by all member countries (see Table 1). However, it is necessary to note down that there is a considerable difference – amounting to 10 percentage points - between the rates binding in countries of the European Union. Denmark and Sweden are countries where the highest standard VAT rates amounting to 25% are applied. The lowest rates (15%) are enjoyed in Cyprus and Luxemburg. It is assumed that differences between standard rates that are binding in particular member countries should not exceed five percentage points. Such diversification does not generate any disturbances in the way the common market functions, e.g. in case of the so-called trans-border acquisitions. Decreasing the difference in question will be a long lasting process and must be carried out gradually. Difficulties experienced while balancing the amount of the standard rate that would be appropriate for a particular country are clearly confirmed by the analysis of rates that were subsequently applied in countries of the Community[9]. In some countries the rates in question were changed many times (e.g. in Ireland – 11 times, in Holland and in Italy – 8 times, in France and in Germany – 7 times). It is now necessary to emphasise that a so-called "trial and error approach" is frequently applied to deal with the problem of rates. For instance, France subsequently experienced increasing followed by another increasing, then decreasing, decreasing again, increasing,

4 Directive of the Council 92/77/EEC of 19 October 1992 supplementing the common system of value added tax and amending *Directive* 77/388/EEC (approximation of VAT rates), (EU Official Journal 1992, L. 316).

5 Directive of the Council 96/95/EC of 20 December 1996 amending the Directive 77/388/EEC with regard to the level of the standard rate of value added tax (EU Official Journal 1996, L. 338).

6 Directive of the Council 1999/49/EC of 25 May 1999 amending the Directive 77/388/EEC on the common system of Vat with regard to the level of the standard rate of VAT (EU Official Journal 1999, L. 139).

7 Directive of the Council 2001/4/EC of 19 January 2001 amending the Directive 77/388/EEC on the common system of VAT, with regard to the length of time during which the minimum standard rate is to be applied, (EU Official Journal2001, L. 22).

8 Directive of the Council 2005/92/EC of 12 December 2005 amending the Directive 77/388/EEC with regard to the length of time during which the minimum standard rate is to be applied (EU Official Journal 2005, L. 345).

9 T. Famulska, Teoretyczne i praktyczne aspekty funkcjonowania podatku od wartości dodanej, Katowice, 2007, pp. 48-49.

increasing once more and finally decreasing again. In case of Denmark, Ireland and Sweden the difference between the highest and the lowest rates applied amounted to even more than ten percentage points.

Table 1. List of VAT rates applied in the Member States (1.01.2008)

Member States	Super Reduced Rate	Reduced Rate	Standard Rate	Parking Rate
Belgium	-	6 / 12	21	12
Bulgaria		7	20	
Czech Republic	-	5	19	-
Denmark	-	-	25	-
Germany	-	7	19	-
Estonia	-	5	18	-
Greece	4.5	9	19	-
Spain	4	7	16	-
France	2.1	5.5	19.6	-
Ireland	4.8	13.5	21	13.5
Italy	4	10	20	
Cyprus	-	5 / 8	15	-
Latvia	-	5	18	-
Lithuania	-	5 / 9	18	-
Luxembourg	3	6 / 12	15	12
Hungary	-	5	20	-
Malta	-	5	18	-
Netherlands	-	6	19	-
Austria	-	10	20	12
Poland	3	7	22	-
Portugal	-	5 / 12	21	12
Romania		9	19	
Slovenia	-	8.5	20	-
Slovakia	-	10	19	-
Finland	-	8 / 17	22	-
Sweden	-	6 /12	25	-
United Kingdom	-	5	17.5	-

Source: VAT Rates Applied in the Member States of the European Community, European Commission, Brussels2008 (DOC/2412/2008-EN).

Some difficulties are also observed in case of harmonising reduced rates. The Directive that outlines the European Union VAT model[10] not only stipulates that member countries are allowed to apply one or two reduced rates that are not lower than 5% but also points to goods and services whose provision may be subject to protectionist VAT rates. The list of the goods and services mentioned above includes, among others, foodstuffs, water, pharmaceuticals, passenger transportation and social housing. Preferences may also be granted to other selected goods of social nature and goods that are related to culture, healthcare and sport. Moreover, the European Union regulations allow member countries to apply transitionally reduced VAT rates in case of services that are highly human labour intensive.

Comparative research into European VAT rates may lead to the conclusion that apart from the countries that extensively use reduced rates (e.g. Cyprus, Poland or Great Britain), there are also some countries where reduced rates are not applied so willingly (e.g. Bulgaria, Denmark or Slovakia). Numerous countries managed to negotiate the right to introduce solutions that are different than those imposed by the European Union directives, i.e. the right to apply rates that are lower than 5%, to use more than two reduced rates or to protect other goods than those listed in a particular directive. For instance, in some countries (Belgium, Denmark, Finland, Ireland, Poland or Great Britain) the 0% VAT rate is applied in case of daily newspapers, other magazines or books. Despite temporary nature of all these exceptions, there is less interest of countries involved in prolonging application of the exceptions in question. A good example is provided by the fact that in 2006 the right to apply reduced rates in case of five categories of human labour intensive services (including, e.g., redecoration of flats, hairdressing or household care) was prolonged till 2010[11]. This privilege was used by nine countries of the 'old' European Union, i.e. Belgium, France, Greece, Spain, Holland, Luxembourg, Portugal, Great Britain and Italy. Other member countries are also entitled to enjoy the preference discussed. However, they have to obtain the Council's permission to do so.

Comparing Polish solutions related to VAT rates with those binding in other countries of the European Union, it should be generally stated that the standard rate applied in Poland is extremely high. Simultaneously, the subject scope of applying reduced rates is really wide. In Poland the standard rate was set on the level of 22% in compliance with the European Union requirements. The 7% reduced rate was introduced as well. At the same time, as a result of pre-accession negotiations, Polish authorities were granted the right to apply transitional preferential rates that amounted to 0% and 3%, i.e. they were lower than the rates permitted by the European

10 Directive of the Council 2006/112/EC of 28 November 2006 on the common system of VAT (EC Official Journal 2006, L. 347).

11 L. Oręziak, Konkurencyjność podatkowa i harmonizacja podatków w ramach Unii Europejskiej. Implikacje dla Polski, Warsaw, 2007, pp. 151-165.

Union regulations. Furthermore, Poland was also entitled to apply a reduced rate in the scope that was not provided for by the directive (see Table 2 that demonstrates the major scope of applying reduced VAT rates).

Table 2. The scope of applying reduced VAT rates in Poland

Rate	The scope of application	
	subject	time
7%	– goods and services (groups of goods and services) listed in the Appendix No. 3 of the Act including some foodstuffs, chemical products, healthcare related products, transportation services or culture and sport related services; – goods and services listed in the Appendix No. 1 of the Decree including some foodstuffs; – some fertilisers and fodder.	indefinite
7%	– catering services (with exceptions)	till 31.12.2010
7%	– construction and assembly related works along with housing maintenance; – housing related buildings or their parts excluding business establishments.	till 31.12.2010
7%	– services related to repair of bicycle, footwear and other leather products, clothing and textiles for personal use, hairdressing.	till 31.12.2010
3%	– goods and services (groups of goods and services) listed in the Appendix 6 of the Act including unprocessed and lowly processed agricultural produce.	till 31.12.2010
0%	– books and specialised magazines	till 31.12.2010

Source: Own elaboration on the basis of the Act of 11 March 2004 on Goods and Services Tax (Journal of Laws - Dz. U. No. 54, item 535, with subsequent changes), Ministry of Finance Decree of 27 April 2004 on execution of certain provisions of Goods and Services Tax Act (Journal of Laws - Dz. U. No. 97, item 970, with subsequent changes).

Transitional period for some preferences expired at the end of 2007 and in case of the 3% rate on the 30th of April 2008. As a result of further negotiations, Polish authorities were granted the right to prolong the transitional period till the end of 2010, which was manifested in the change of the Directive 2006/112[12].

Since 1994 – every two years - the European Union authorities have been making an overview of the scope of reduced rates. Experience obtained so far has clearly shown that VAT preferential sectors are strongly determined by the internal policies of public authorities in a particular country. Some decrease in diversification

12 Directive of the Council 2007/75/EC of 20 December 2007 amending the Directive 2006/112/EC with regard to certain temporary provisions concerning rates of VAT (EU Official Journal 2007, L. 346).

of reduced rates in particular member countries will be labour intensive and quite complicated. However, some efforts have already been undertaken in order to eventually eliminate reduced VAT rates in all member countries since 2011. The Commission formulated such a proposal in July 2007 on the basis of the special report that analysed economic effects of the rates in question thoroughly[13].

Conclusions

The level of harmonisation of VAT rates including both standard and reduced rates is low in the European Union member countries. There is considerable diversification of standard rates and in case of reduced rates and their level, volume and scope, the diversification in question is even higher. From a perspective of desired effectiveness of the common market, it is necessary to aim at equalising VAT rates in particular European Union countries, which is definitely not going to be easy. VAT takes particular fiscal functions that are diversified in particular countries. Therefore, while considering harmonisation of the VAT rates, it is necessary to pay much attention to economic results of the harmonisation in question. In countries where the highest VAT rates are in use, some reduction in the very rates would mean some decrease in budget revenues, which would simultaneously involve a necessity to look for supplementary sources to support the budget financially – mainly by means of increasing other fiscal burdens. On the other hand, in countries that apply low rates some increase in the rates in question would result in some increase in the level of prices.

VAT harmonisation has always been and still is a painstaking, labour intensive and sophisticated process. Further developments in the harmonisation will definitely be difficult, which mainly results from the European Union enlargement of 2004 and 2007 when so many new countries entered the Community. The European Union is now characterised by a more complex fiscal system since fiscal systems of particular countries and their internal functions are highly diversified. The principle of being unanimous while making the Community fiscal law is more difficult to follow in a group of twenty seven countries as compared to the 'old' fifteen. Directives do not always turn out to be effective regulations while trying to reach harmonisation related objectives.

Fiscal harmonisation including VAT related issues is obviously not supported by local authorities' inclinations to retain fiscal autonomy. A tax is one of the most important instruments that are used by public authorities while realising pre-defined economic and social goals. Fiscal suggestions are also attractive elements

13 VAT Reduced Rates, European Commission, Brussels, 5.07.2007 (IP / 07 /1017), (http://europa.eu/taxation).

of a political game. That is why there are better perspectives for harmonising more detailed solutions than those of elemental nature including such transparent solutions like tax rates. Development that involves equalising VAT rates is one of the 'critical points' of harmonisation.

Further European Union harmonisation of VAT rates aims at liquidating reduced rates before 2010. If such harmonisation succeeds, it will strongly affect Poland where the scope of applying reduced rates is really wide. In the aspect of anticipated changes within the system of the European Union VAT rates, it is already possible to consider a variant that would be some alternative to the present one, i.e. a very high standard rate and a complex system of preferences should be replaced with a lower standard rate and limited protectionism. On the one hand, such a solution would contribute to simplification of the VAT system (among other with reference to classification related issues). On the other hand, the solution in question would mean some increase in prices in case of many goods and services of the first need. The very issue of reducing standard rates remains still open since it requires some more sophisticated assessments. The VAT perspective is not sufficient here. VAT related receipts are a derivative of consumption related expenditures – they increase when consumption rises. Therefore, potential decreases in standard VAT rates should also be evaluated in connection with forecasts concerning a particular economic situation. The tax in question is a fundamental source of the State's budget revenues in Poland. That is why, while discussing the problem of rates, it is impossible to forget about the problem of budget equilibrium along with effectiveness and policy related to other taxes including income taxes in particular.

Streszczenie

Referat koncertuje się na problematyce harmonizacji podatku od wartości dodanej (VAT) – jednym z najważniejszych w Unii Europejskiej. W jego treści uwzględniono stawki tego podatku, porównano różne rozwiązania stosowane w poszczególnych krajach (szczególnie w Polsce), jak również przedstawiono planowane kierunki zmian i oczekiwanych rezultatów w zakresie standaryzacji stawek.

Małgorzata Faryna

SELECTED PROBLEMS OF THE EFFECTIVENESS OF ADMINISTRATIVE ENFORCEMENT AND WAYS OF SOLVING THEM IN POLAND

In the Polish legal systems there are two execution systems which make it possible to recover financial debts from an obligor who fails to perform his or her obligations. In the case of civil-law obligations, a creditor is entitled to execute the obligation by court execution performed by common courts and court enforcement officers. Regulatory liabilities, on the other hand, towards the Treasury and local government units are executed by way of administrative enforcement. The act which regulates the rules and ways of recovering such liabilities[1], lists many executive bodies entitled to such execution. Authorities which have the power to employ coercive measures towards people who fail to perform their public obligations are both government administration bodies as well as local government bodies, though the greatest powers in recovering liabilities and their securing were put into the hands of heads of tax offices.

The efficiency of recovering public liabilities by way of administrative coercion is one of the elements which impact the condition of the Polish state in terms of public control it exerts. Quick and effective administrative response, should there be a failure to perform an obligation, influences the degree in which individuals, legal persons and other organization units perform their obligations voluntarily. The role of enforcement proceedings is not only to recover debts but also to educate. The nature of the proceedings is that people who do not pay their debts for various reasons may face proceedings during which enforcement bodies are entitled to use coercive measures. The employment of such measures may result in depriving such people of the right to manage their assets, as well as in forfeiting their ownership rights. Inevitability of enforcement shapes the attitudes of such people.

The Constitutional Tribunal, in its decision of 26 November 2007[2] praised the legal solutions regarding the formation of legal instruments facilitating security and

1 Act of 17 June 1966 on enforcement proceedings in administration (Journal of Laws of 2005, no. 229, item 1954 as amended.)

2 Tribunal's decision of 26 November 2007, case reference no. P 24/06

enforcement of regulatory liabilities; it pointed out that the Polish legislator granted the Treasury and local government units the most privileged status in enforcement proceedings as compared to other creditors who have to use court enforcement, which is more formalized, time-consuming and costly than administrative enforcement. Because it is a privilege to commence administrative enforcement and security on the basis of an enforcement order (order of security) issued by the creditor who is at the same time an enforcement body, obtain information on the real estate and ownership rights by way of a proper statement filed by the taxpayer, and then to have the possibility to secure the execution of debt recovery on the assets of other people that the taxpayer, be it his or her spouse, third parties can also be jointly liable for tax arrears of the tax payer with all their assets in the cases determined in the Tax Ordinance Act[3].The act also introduced the possibility of securing tax liabilities in the forms indicated by the taxpayer, on his or her initiative.

The legal instruments indicated above, used at the right moment during control, security and enforcement proceedings are, in the opinion of the Constitutional Tribunal, a sufficient guarantee to enforce the taxpayer's performance of his or her fiscal duties.

Despite these legal solutions, the effectiveness indicators of administrative enforcement in the case of tax arrears, which are state budgetary revenue, are not satisfactory. In the recent years, there was a downward tendency, and in 2003-2007 they amounted to respectively: 28.58%, 25.38%, 23.18%, 23.39% and 24.22%[4].

There are many negative factors which directly impact the effectiveness of administrative enforcement in Poland. The limited space of this paper makes it impossible to discuss them in detail. Therefore only the most important of them will be covered.

When analysing enforcement effectiveness (security) two groups of factors which impact the effectiveness indicator must be mentioned. The first group consists of internal factors; eliminating them lies in the power of public administration bodies (as part of changes in the organization, or actions initiating legislative changes in regulations determining the system, tasks of enforcement bodies, or regulations changing or introducing new legal instruments). There are also a number of external factors in Poland which do not fall under the influence of the public administration organs. They exist irrespective of actions undertaken by these bodies and are the result of deteriorating economic and financial situation of debtors, who are unable to perform their public obligations. Such a situation stems from economic and social changes which took place in Poland in the 1990s. At that time many companies were

3 Act of 29 September 1997 Tax Ordinance (Journal of Laws of 2005, No. 8, item 60 as amended)
4 Statistical data of the Finance Dept., www.mf.gov.pl

liquidated or stopped trading. Liabilities of these entities became very difficult to enforce due to the cessation of legal existence of such entities or lack of assets which could undergo administrative enforcement.

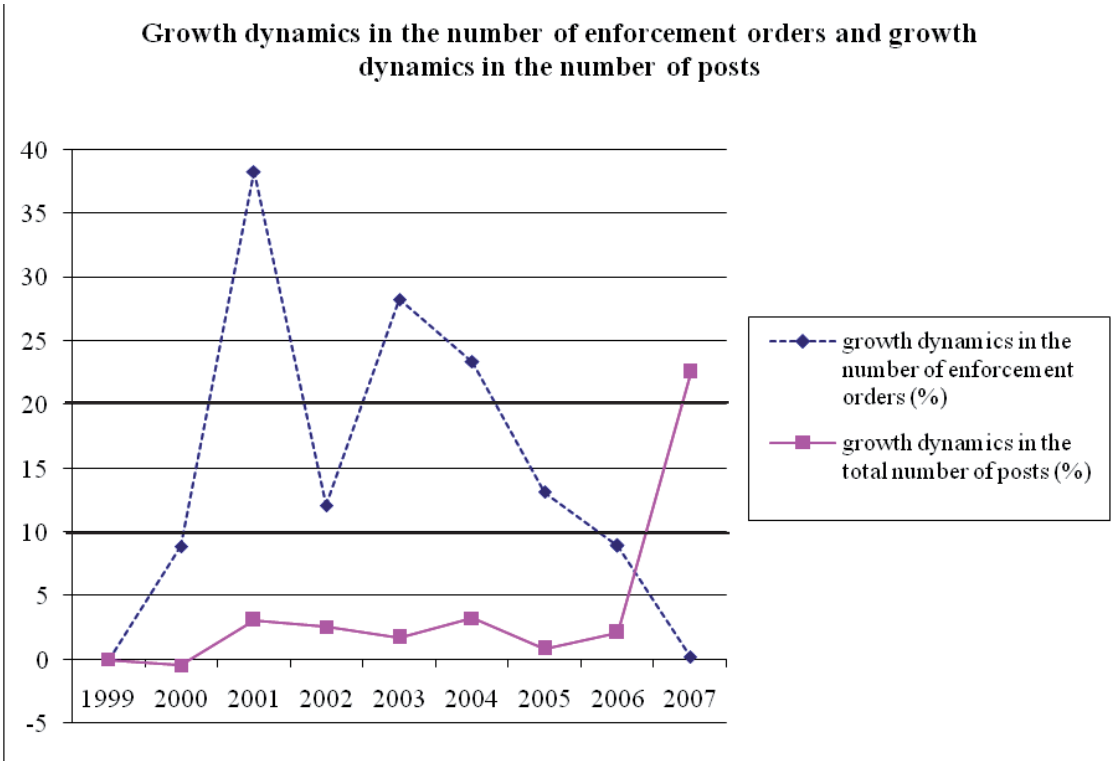
Recently, more and more cases have been recorded of running a business activity with the use of movable property which is not owned by the obligor but belongs to a third party with whom e.g. a leasing contract was signed. In such cases it is impossible to commence enforcement against assets held by the obligor.

In the case of natural persons the main reason for the decline in effectiveness of administrative enforcement are frequent changes in the place of residence or stay or the place of running a business (also abroad) without updating address data. Such people are considered "difficult debtors", who require an intensive search of assets in the whole country and undertaking a number of time-consuming steps in this respect.

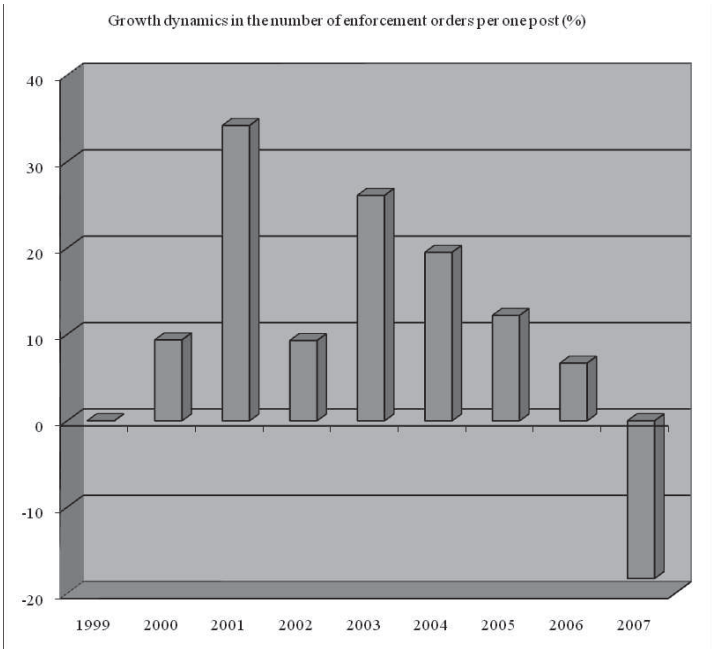
Another important reason for low effectiveness of enforcement against natural persons is the absence of assets to be executed. This is confirmed by reports prepared by enforcement bodies on the property status and by the results of court proceedings on disclosure of property. Also, garnishment of salary, bank account and other cash liabilities is futile as obligors usually collect salaries and benefits in exempt amounts. In the case of attachment of non-exempt property, it turns out that it has no auction value. Frequently, in the case of non-exempt property, a bank lien is established on real estate (particularly on obligor's production facilities) and this effectively makes execution against the asset impossible or difficult.

In the case of real estate of a significant market value, one of obligor's most attractive assets from the perspective of administrative enforcement, the legal framework of an enforcement measure against real estate does not allow it to be used at any time in the course of proceedings. The provisions of the act on enforcement proceedings in administration allow for significant nuisance caused by this enforcement measure to an obligor, and they allow real estate to be executed upon only if the use of other enforcement measures is impossible or turns out to be ineffective. Enforcement against this asset is then delayed, and consequently bringing the obligor to the compulsory performance of public obligations takes years.

The main problem of administrative enforcement, which remains in the realm of competences of relevant authorities, is the significant increase in the number of enforcement orders as compared to the number of posts in enforcement services, which is confirmed by the graphs below.



Taking into consideration the data from 1999-2007, it should be noted that while the growth dynamics of posts in administrative enforcement was 39.46%, the growth dynamics of enforcement orders in the same period was 229.67%. To illustrate this negative phenomenon it should be pointed out that at the beginning of the period in question, i.e. 1999, each employee had 1 792 enforcement orders to carry out, whereas in 2007 the number went up to 4 478 (in 2006 – 5 183 enforcement orders).



The reason for the fall in effectiveness of enforcement services was the lack of a staff policy which would ensure a larger number of posts while taking into consideration a significant growth in the number of tasks of enforcement services caused, among others, by changes in law which resulted in transferring more and more new liabilities from court enforcement to administrative enforcement, which formed the revenue of state budget and local government units.

Another obstacle in the proper, quick and effective operation of enforcement authorities were legal barriers laid down by the act on enforcement proceedings in administration. The act was introduced more than 40 years ago, and despite numerous amendments, it still contains solutions inadequate to the current social and economic development. The procedures regulated by the act are complicated and the provisions which regulate them raise a lot of interpretation doubts. Also provisions regulating the security of regulatory obligations and strictly formulated premises for security are an obstacle in implementing this legal instrument, despite the fact that it is a guarantee of performing public obligation in the future, should the need to commence enforcement proceedings arise. The data provided in the table below clearly indicate the disproportion between the low number of cases in which security was established and the number of cases with enforcement proceedings conducted at the same time.

Period	Number of enforcement proceedings	Number of security proceedings
2003	12 800 000	1509
2004	15 747 569	3246
2005	17 797 665	4820
2006	19 333 369	5310
2007	19 337 246	6220

Effectiveness of administrative enforcement is also subject to the impact from legal solutions included in other legal acts, imposing on heads of tax offices the duty to carry out other tasks within the scope of regulations on the enforcement proceedings in administration, such as seizure of moveable assets by the Treasury on the basis of courts and prosecutors' decisions, elimination of uncollected deposits, cases of securing the inheritance and inventory instigated by court orders, security on property of suspects upon the request of prosecutors and courts.

Internal barriers in the effectiveness of administrative enforcement also include the lack of direct information on the property subject to enforcement and its location or the place of obligor's stay. Enforcement bodies have no access to data bases of external institutions, registers of means of transport, real estate, population, business

activity as well as land and mortgage registers which would illustrate the legal state of real estate in Poland. Obtaining information from these data bases takes time and requires the preparation of written inquiries to a variety of institutions, whereas long time of awaiting replies has an adverse impact on the speed and efficiency of the operation of the enforcement body.

What is more, IT systems at enforcement departments are insufficient in terms of current and fast service of enforcement services, nor are they adapted to ever-changing legal provisions.

Consequently, due to the number and constant growth of tasks performed by enforcement bodies, and most of all due to the significant growth in the number of enforcement orders in the recent years, it is necessary to determine the directions of actions in terms of changes in the organization, system and legislation, which would result in improved recovery of debts unpaid to the Treasury and local government units.

I. Undoubtedly, increasing the staff number in enforcement services will contribute to faster and more effective enforcement proceedings, and will eliminate the necessity to selectively deal with cases. It will also be possible for enforcement authorities to look for obligor's non-exempt assets. In 2007, the number of tax office employees working in the enforcement of tax arrears was significantly raised and it brought measurable results in the form of a higher indicator of enforcement effectiveness in the whole country.

Regardless of the necessity to undertake immediate measures in this respect, it is also important to create such conditions that the staff performing administrative enforcement tasks is properly qualified. Carrying out enforcement tasks, as well as issuing decisions in the enforcement proceedings, requires not only the knowledge of provisions regulating the principles and ways of performing administrative enforcement, but also the knowledge of other law branches, e.g. civil law, civil proceedings, law on bankruptcy and rehabilitation.

Coercive measures (enforcement measures) which indirectly limit the citizen's ownership right and can even lead to their deprivation of such a right should be implemented with particular diligence and with the best legal knowledge in order not to expose the person against whose property enforcement is performed to damage resulting from unlawful instigation or performance of administrative enforcement. This is why the claims of E. Ruśkowski[5] to conduct the policy of education and financing the education of staff in fiscal administration, including establishing a fiscal school with accreditation of a higher learning institution are still valid.

5 E. Ruśkowski, Wybrane problemy efektywności administracji skarbowej w świetle przeprowadzonych badań, (in:) Przyjazna administracja skarbowa, Warsaw, 2007, p. 25 and the following page.

Another important step is to implement changes in the payroll system of the enforcement department employees depending on the amount and quality of work, which would allow for the work load and effort put in dealing with a case.

II. To improve the effectiveness of administrative enforcement it is also necessary to change the rules of law in simplifying administrative enforcement and increasing its effectiveness, e.g. enforcement against common assets of spouses and against things and property rights which are the subject of property security (compulsory mortgage and tax lien), making the use of enforcement measure against real estate more efficient and ensuring a proper cooperation between enforcement bodies and creditors who apply the enforcement orders for implementation. Changes in the rules of law regulating administrative enforcement should take place in a much wider scope, taking into account e.g. the fast development of capital market in Poland. It would also be necessary to create new legal instruments – enforcement measures, as well as legal basis for securing regulatory liabilities in a much wider scope. In the opinion of M. Staniszewski[6], a measure which would enforce performance of tax obligations much more effectively would be the introduction of orders which would enforce the performance of the obligation. Repayment of the liability in instalments would be an enforcement measure and would allow eliminating arduous and costly proceedings ending with a decision issued as part of administrative recognition. Another solution would also be the introduction of bans, e.g. with respect to running a business activity by such entities whose liabilities keep growing, where as an obligor who fails to pay a fixed penalty notice would lose his or her driving licence.

III. It would also be necessary to introduce system solutions providing the enforcement staff with computer access to data bases of external institutions holding information about the obligor's assets, e.g. Central Vehicle and Driver Register, National Court Register, mortgage register, or facilitating obtaining information about the obligor's assets at e.g. accounting bureaus with respect to clients, banks with respect to credit contracts and their collaterals. It would also be helpful to create an IT data base about tax payers and their assets, or e.g. a central register of bank accounts.

IV. The priority task of authorities responsible for effective operation of enforcement services is changing the IT system of enforcement services in the shortest time possible. Work in this respect is crucial in order to adapt the system to the current needs of administrative enforcement with the use of modern technologies, through its development and improvement, so that it is possible to comprehensively deal with enforcement and securing proceedings as well as other tasks performed by enforcement units the result of which is to increase revenue of the state budget.

6 M. Staniszewski, Zasada efektywności opodatkowania w działalności administracji podatkowej w Polsce, Jarocin, 2007, p. 176 and the following.

Simultaneously with the computerization of enforcement departments, it is necessary to provide the employees with modern computer equipment, palmtops or laptops which would allow them to supply information on actions taken in the field, KalWin software and portable payment terminals.

Another thing that has been considered is the concept of separating administrative enforcement from tax offices and creating an independent department of public administration – offices of administrative enforcement, which would take over the tasks of all administrative enforcement bodies (heads of Social Security Offices, directors of customs chambers, bodies of communes with the status of a town and communes which are part of Warsaw district as well as other authorities performing tasks of administrative enforcement).

Streszczenie

Niniejszy artykuł poświęcony został głównym problemom organów egzekucji administracyjnej, których podstawowym zadaniem jest dochodzenie realizacji zobowiązań tych osób, które posiadają zaległości podatkowe w zakresie podatków państwowych oraz samorządowych. Analiza czynników, które bezpośrednio negatywnie wypływają na efektywność egzekucji administracyjnej można podzielić na czynniki wewnętrzne, których eliminacja jest możliwa w ramach działań samych organów administracyjnych, oraz czynniki zewnętrzne, które są powodowane pogarszającą się finansową i ekonomiczną sytuacją dłużników i która wynika z gospodarczo-społecznych przemian w Polsce w latach dziewięćdziesiątych. Identyfikacja problemów utrudniających egzekucję administracyjną jest warunkiem wstępnym do wprowadzenia nowych rozwiązań w całym systemie.

Izabela Felczak

INCREASE OF INITIAL CAPITAL OF A JOINT STOCK COMPANY IN THE LIGHT OF THE AMENDMENT OF POLISH TAX LAW

The increase of initial capital of a joint stock company in accordance with its Articles and the provisions of the Commercial Companies' Code [1] may be conducted by means of the issue of new stock, the transfer of the generated net profit to this capital and by transferring other reserve funds and supplementary capital to the initial capital. The increase of initial capital with respect to tax law is governed by the provisions of the Corporate Income Tax Act of 15th February 1992 [2] and the Goods and Services Tax Act (VAT) of 11th March 2004 [3]. Despite the fact that the tax classification of expenses associated with the increase of initial capital plays a significant role in the decision-making process of managing bodies, it still causes a number of problems for them. It must be stressed that there is no unanimity between the academic world and tax practice as to the interpretation of tax rules regarding the increase of the initial capital of a joint-stock company.

Increase of initial capital by means of the issue of new stock

In accordance with the regulations in force until the end of 2006, that is, with Article 15 (1) of the cited Corporate Income Tax Act, allowable expenses were only deemed to be expenses borne for the sole purpose of generating revenue (with the exception of expenses listed exhaustively under Article 16 (1) of the cited Act. According to the uniform view of tax law doctrine, in order for a company expense to be recognized as an expense for generating revenue, there must be, inter alia, a close causal connection between the expense in question and the generated revenue of this type, so as the bearing of the expense resulted in the generating or increase of revenue. The amended provision of Article 15 (1) of the Act provides

1 Journal of Laws No. 94, item 1037, as amended
2 Journal of Laws No. 21, item 86, as amended
3 Journal of Laws No. 54, item 535, as amended

that allowable expenses are expenses borne for the purpose of generating revenues or for maintaining or securing the source of revenue. The expanded definition of allowable expenses introduced in 2007 is of a technical nature, and merely involves the accurate definition of the expediency of bearing costs [4], as understood in already existing case-law and tax law doctrine.

By invoking the wording of the above provision, one can define the conditions which must be satisfied for an expense to be classified as allowable expenses[5]:

1. The tax-payer has incurred the expense and it is genuine;
2. The expense borne by the tax-payer is closely connected with the subject of the conducted business;
3. The expense is borne for the purpose of generating revenues, or for maintaining or securing the source of revenue, as well as that it may have an impact on the magnitude of yielded revenues.

Therefore, bearing the above in mind, may expenses associated with the issue of stock, that is, financial consultancy and legal expenses, administrative expenses associated with the preparation of an issue prospectus (certified accountants' analyses) and the expenses of conducting the whole issuing procedure incurred by the company, be classified as the company's allowable expenses?

When a company decides to issue stock as one of the forms of financing the capital of its assets, it intends to solicit funds that are indispensable for achieving the planned targets (capital expenditures), which will enable, inter alia, an increase of the sales of products and the acquisition of new markets by the company. The achievement of this target involves the solicitation or securing of the company's source of revenue. Therefore, the soliciting of funds by means of the issue of new stock is also associated with the company's business, the results being taxable.

Until the end of 2006, numerous problems and divergences existed in the interpretation of tax law, both in case-law, as well as among the representatives of tax law doctrine, which were noticeable in numerous decisions issued by tax authorities at the taxpayers' motion.

Tax authorities had often refused the classification as allowable expenses of expenses associated with the preparation and implementation of increasing initial capital by means of issuing new stock, invoking, inter alia, the wording of Article 12 (4) (4) of the Corporate Income Tax Act, according to which revenues do not

4 Hellwing, *Zmiany w podatku dochodowym od osób prawnych (Changes in corporate income tax)*, Monitor Podatkowy (Tax Monitor), 1/2007, p. 11.

5 R. Kubacki, *Koszty uzyskania przychodów w podatkach dochodowych (Allowable costs and income taxes),* UNIMEX, Warsaw 2005, p. 23.

cover the so-called revenues received for the purpose of creating or increasing initial capital. Therefore, the expenses incurred as a result of issuing stock are not allowable costs, as they are associated with revenue not subject to income tax. [6] Unfortunately, this view is still held by some tax authorities. [7] To the author's mind, this view is misguided, as if one were to follow up on this analysis, it would have to be assumed that, for example, expenses associated with the obtaining of a loan facility by the company should not be classified as allowable expenses because the funds obtained under a loan facility are not classified as revenue subject to taxation.

For quite some time, the interdependence of the issue of stock and the business has been noted by a growing number of tax authorities. An example is the just decision of an appeals body, delivered even before 2007[8], where it was held that pursuant to Article 15 (1) of the cited Act, one may classify as allowable expenses all expenses that are both indirectly and directly associated with generating revenue under the stipulation that the company (tax-payer) shall demonstrate its connection with the conducted business, and the bearing of said expenses has or may have an impact on the magnitude of the achieved revenues. Moreover, the authority in question noted that the increase of the initial capital performs an economic function, as it provides a basis for securing creditors' rights, and for example, a guarantee of repayment of loan facilities granted to the company, which may genuinely cause increased revenues for the company.

The purpose of the amendment introduced in 2007 (which merely accurately defined the concept of allowable costs in Article 15 (1) of the cited Act) was to limit disputes regarding the classification of a wide range of expenses indirectly associated with future revenues achieved by the company – as allowable costs. Has this indeed happened?

Following an analysis of a number of decisions delivered since 2007 regarding the interpretation of tax law, and concerning the possibility of classifying expenses associated with increasing initial capital by means of issuing new stock as allowable costs, one can observe a constantly increasing uniformity. The amendment dated 29th August, 1997, of the Tax Code (Journal of Laws No. 8, item 60, as amended) is also worth mentioning insofar as individual interpretations of tax law are concerned. The main premise of the introduced system is a centralization of providing binding written interpretations of tax rules. This will allow for the elimination of existing discrepancies in assessments of applying tax law in identical factual situations by the various tax authorities. Therefore, as tax interpretations did not form a uniform

6 Decision of the Second Mazowiecki Fiscal Office in Warsaw dated 28th June, 2006, ref. 1472/ROP1/423-162/205/06/PK.

7 See also: Decision of the Third Mazowiecki Fiscal Office in Radom dated 09th August, 2007 ref. 1473/952/KDO/423/60/07/JŻ.

8 Decision of the Fiscal Chamber in Łódź dated 17th December, 2006, ref. III-3/4407int-75/VAT/06/TK.

system of tax law interpretation, the legislature transferred the duty of delivering them to the central authority, that is, the competent minister for public finance. However, the legislature provided for an option of derogating from the total centralization of delivering interpretations, by authorizing the Minister of Finance to issue by way of a regulation, authorizations to subordinate authorities to deliver tax interpretations on behalf of the central authority. The Minister of Finance has exercised this right and authorized four Fiscal Chambers: in Bydgoszcz, Katowice, Poznań and Warsaw. It must be stressed that the authority which delivers an interpretation has the statutory duty to take into account the case-law of courts, the Constitutional Court and the European Court of Justice.

Unfortunately, problems also exist with the interpretation of the Goods and Services Tax Act (hereinafter, VAT). They concern the possibility of deducting input tax during the purchase of goods and services associated with the issue of stock. Polish tax practice has also failed at unanimous interpretation in this case. As an example, by its decision, the Fiscal Chamber in Lublin has held [9] that a company cannot exercise its right of deduction of input tax, as, pursuant to Article 86 (1) of the VAT Act, one is entitled to it insofar as the goods and services are used to perform taxable transactions. "The issue of stock is neither a supply of goods or providing of services within the territory of the state within the meaning of Article 7 (1) and Article 8 (1) of the cited Act". This being the case, issue of stock does not fall under transactions subject to the VAT tax.[10]

In a similar factual situation, the Fiscal Chamber in Wrocław delivered a different decision.[11] According to the statement of reasons, the issue of stock does not fall under the subject matter of the cited Act, and it is not a delivery of goods or providing of services within the meaning of Article 7 (1) and Article 8 (1) of the VAT Act. However, in accordance with Article 86 (1) of this Act, "In principle, the taxpayer is entitled to decrease the amount of the output tax by the amount of the input tax" in connection with the use of purchased goods and services for conducting taxable transactions. To the Chamber's mind, it is essential that there is a relevant connection (both direct and indirect) between purchases and the conducted business, the effects of which are taxed under the VAT Act. [12] Therefore, it is to be understood that the above connection also pertains to such transactions – which despite being exempt from tax liability – are necessary for the conduct of the taxpayer's statutory business.

The cited example and the method of analysis of the above-cited rules are just. If the issue of stock had a clear connection with the subject of business, and its

9 Decision of the Fiscal Chamber in Lublin dated 20th June, 2005, ref. PP2/4407-92/05.
10 Ibidem
11 Decision of the Fiscal Chamber in Wrocław dated 27th October, 2006., ref. PPII443/781/2006/PK
12 Ibidem

purpose was company development, then the expenses associated with such business operations bear an impact on the company's future revenue. It must also be stressed that the decision of the Fiscal Chamber in Wrocław, which made it possible for the tax-payer to exercise his right of deduction of input tax, is in line with the judgment of the European Court of Justice in Case C-465/03 *(Kretztechnik AG v Finanzamt Linz).*[13]

Increase of initial capital by means of capitalization of reserves

The capitalization of reserves involves the increase of initial capital by a transfer of funds from other capitals, that is, either from the company's supplementary capital or reserve capital. In this case, the amount by which the initial capital will be increased – in accordance with Article 10 of the Corporate Income Tax Act – constitutes income for the stockholders from sharing in the profits of corporations. Apart from the aforementioned net profit, another source of creating the supplementary capital may also be the surplus resulting from the issue of stock, which constitutes the difference between the issue price of the stock and the price for which the stock has been taken over, and it is this form of increase which is most controversial in tax law practice.

According to Article 24 (5) (4) of the Corporate Income Tax Act, "*income from sharing in the profits of corporations is also the income which constitutes the value of amounts transferred to the initial capital from other capitals of the corporation*." Therefore, tax authorities are of the view that "it is irrelevant as to how the supplementary capital has been created." Every transfer of funds from the supplementary capital to the initial capital gives rise to tax liability for the current stockholders.[14] The Supreme Administrative Court has expressed this view in its ruling dated 20th January, 2005.[15]

However, the prevailing view in tax law doctrine – upon invoking the wording of Article 12 (4) (11) of the cited Act – that the amounts which constitute a surplus above the stock's nominal value (so-called agio or premium), received at the time of their issue and transferred to the supplementary capital – are not classified as revenue.[16] It must further be recognized that "*income equal to the value of amounts transferred to the initial capital from other capitals of the corporation*, may only be treated as income from sharing in the profits of corporations if it falls within the concept of

13 Judgment of the European Court of Justice of 25th May, 2005 in Case C-465/03 *Kretztechnik AG v Finanzamt Linz*

14 Letter of the Ministry of Finance dated 10th March, 1997, ref. PO 4/AS-822-112/97, Biul. Skarb.(Treasury Bulletin) 3/2003, p. 39-42

15 Judgment of the Supreme Administrative Court dated 20th January, 2005, File no. FSK 1065/04

16 J. Marciniuk, Podatek dochodowy od osób prawnych (Corporate Income Tax), editor, CH BECK, Warsaw 2005, p. 168

income *actually derived from this sharing*", and therefore when the transfer of funds from supplementary capital may be deemed to be a form of stockholder participation in the entity's profits. [17] For this reason, agio cannot be classified as funds which constitute profit generated by the company, as these are funds originating from its stockholders. The Supreme Administrative Court shares this view [18] and held that the increase of share capital by means of capitalizing reserves only gives rise to tax liability if the supplementary capital originates from undistributed company profits during previous years. In the justification of this judgment, the Court rightly draws attention to functional considerations. Pursuant to the provisions of the Commercial Companies' Code, supplementary capital is supplied by the so-called issue agio, and in accordance with Article 16 (1) (8) of the Corporate Income Tax, expenses for taking over stock are covered from the profit, after taxes. By the same token, the issue surplus is created from funds which constitute profit after taxes. The taxation of the very same funds with income tax would effectively lead to double taxation of the same income. It must further be stressed that in light of Article 26 (1) of the Corporate Income Tax Act, the company will be the payer of the tax in this instance. It follows from Article 8 of the Tax Code that the payer is responsible for calculating the amount of the tax, its collection from the stockholders and for paying it to the tax authority. This is most difficult, especially in the case of companies which issue bearer shares, or which have very dispersed stockholders or in the case of public companies. [19] Accordingly, the performance of the company's duty to collect the tax from stockholders is impracticable.

The increase of initial capital is a process conducted by a great number of joint stock companies. Despite the above, Polish companies still face grave problems in connection with implementing this process, and ask themselves numerous questions against the background of tax law. This is caused by a lack of a uniform position on part of tax authorities in tax practice, as well as in case-law. A lack of communication between tax practices applied by tax authorities and representatives of tax law doctrine is a most adverse phenomenon. Despite critical opinions expressed by tax practitioners and tax law doctrine, solutions introduced by the legislature are not amended. Until 2007, tax law interpretations were delivered by over 400 tax institutions, and the assessment of applying tax law in identical factual situations significantly differed. However, as of 2007, four tax chambers were authorized to deliver tax interpretations, which have had a positive impact on the quality and uniformity of assessing the application of tax law, which will allow taxpayers to make a closer evaluation of the advantages resulting from their choice of the form of financing assets.

17 D. Strzelec, Podwyższenie kapitału zakładowego w drodze kapitalizacji rezerw (Increase of initial capital by means of capitalizing reserves) , Monitor Podatkowy (Tax Monitor) 11/2006, p. 29.

18 Judgment of the Supreme Administrative Court dated 5th July, 2002, File No. ISA/Kr 1625/00

19 Ibidem

Streszczenie

Podwyższenie kapitału początkowego spółki akcyjnej zgodnie z przepisami prawa spółek handlowych może być przeprowadzone poprzez emisję nowych akcji, transfer wygenerowanego zysku netto na rzecz tego kapitału oraz transfer innych funduszy rezerwowych i kapitału uzupełniającego na rzecz kapitału początkowego. Pomimo faktu, że czynności dokapitalizowania są dosyć częste, polskie spółki stają przed poważnymi problemami dotyczącymi obowiązków podatkowych w tym zakresie. Klasyfikacja kosztów dla celów podatkowych związanych ze wzrostem kapitału początkowego odgrywa znaczącą rolę w procesie podejmowania decyzji przez organy zarządzające spółek i ciągle powoduje wiele problemów.

Celem opracowania jest zaprezentowanie wstępnej oceny zmian ustawy o podatku dochodowym o od osób prawnych i Ordynacji podatkowej wprowadzonych w tym zakresie w 2007 roku.

Irina Glazunova

REFORMING OF TAX LAW ENFORCEMENT IN MODERN RUSSIA

The first stage of the taxation reform in Russia at the turn of the 20th and 21st centuries was marked by the acceptance of Part 1 and Part 2 of the Tax Code of the Russian Federation and global reorganization of the Russian tax legislation. The accumulated experience of application of this updated legislation leads both politicians and scientists to a conclusion about the necessity of correction of separate institutions of the modern Russian fiscal law. We ought to refer to one of these rather important institutions, i.e. the institution of tax process, which is the system of procedural norms providing tax law enforcement.

Undoubtedly, the acceptance of Part 1 of the Tax Code of the Russian Federation became a major step on the way to the provision of formal clarity of tax rules of law. Meanwhile, the points of order in the first edition of the Code were settled extremely poorly. This situation allowed tax bodies to make use of an excellent possibility to strain powers in the process of law enforcement.

The President of Russia in his messages to the Russian parliament in 2002 and 2005 paid attention to the existence of excessive administrative pressure upon business and even "terrorism" on the part of supervising bodies. In reply to these reasonable remarks the Russian parliament accepted the Federal Law No. 137-FZ of 27.07.2006. The majority of provisions of this law were procedural ones; they seriously changed the procedure of tax law enforcement fixed in the Tax Code of the Russian Federation. At the same time, many provisions of the given law did not so much offer some decisions as generated new collisions. Procedural regulation of tax law enforcement in Russia has not achieved a respectable level yet.

The research carried out by Ernst & Young at the end of 2007 showed that 54 % of foreign companies characterized the influence of the Russian taxation system on an investment climate in the country as "negative". As the respondents believe, in order to improve the tax regime it is necessary to specify separate tax procedures and to eliminate ambiguous formulations allowing tax bodies to apply the legislation

electively[1]. Ilya Trunin, Director of the Tax and Customs Tariff Policy Department of the Ministry of Finance of Russia confirms that the basic complaints of taxpayers do not so much concern the tax system arrangement as the practice of law enforcement in Russia[2].

Let's try to understand the reasons for the described situation and possible ways of reforming of the procedural tax legislation in Russia.

It is necessary to note that procedural powers of tax bodies in Russia were defined neither in the independent normative legal act nor even in a separate section of the Tax Code of the Russian Federation[3]. Therefore, revealing of the regularities of law enforcement activity of tax bodies and formulation of the purposes and the common principles of tax process are essentially complicated. Undoubtedly, this situation hinders the application of the law in a uniform procedural form.

Meanwhile, the world experience shows that only uniform rules can assure the greatest guarantee against abuses of authority. Thus for example in Switzerland, there is the Federal law of administrative procedures as well as certain laws of administrative procedures of the cantons which are establishing the procedures of adopting, changing and canceling the enforcement authorities' orders and their appeal, and formulating common procedural principles[4].

In the Tax Code of France the procedural aspects of the activity of tax bodies (including tax control) are clearly contained in "The Book of Tax Procedures", which in essence represents the Tax Procedural Code[5].

The fact that tax procedural rules are not systematized in Russia causes absence of consolidation of principles of law enforcement activity of tax bodies at a legislative level, which has a negative effect on the uniformity of law enforcement practice and state of legality in the tax sphere. Thus, it is highly necessary to develop the concept of tax procedures in Russia and systematize them in the Russian legislation.

We believe that law enforcement activity of tax bodies can be effective and provide balance of individual and public interests only under the condition of its conformity to the generally recognized principles of a tax process.

Principles of procedural activity are stated in the legislation of many foreign countries. In French tax laws this is the principle of economic feasibility, equality

1 Refer to: *С. Сухова* Не мытарьте! // Itogi. 2007. No. 50(600). P. 37.
2 Ibidem P. 40.
3 Refer to: *А.А. Копина* К вопросу о соотношении понятий «налоговый процесс» и «налоговая процедура»// Finansovoe Pravo. 2005. No. 10. P. 17; *Т.Ю. Сащихина* Понятие и признаки налогово-правовых процедур // Finansovoe pravo. 2005. No. 11. P. 7.
4 *К. Экштайн, Р. Шафхаузер, С. Вершинин* Как упорядочить отношения гражданина и чиновника? Административные процедуры на примере законодательства Швейцарии. Moscow 2000. P. 9.
5 *Н.А. Попонова* Налоговые органы во Франции // Finansy. 2002. No.1. P. 75.

of the parties and some other[64]. In German - the interdiction of abuse of imperious powers (any executive body cannot appoint or carry out any measures which are within the framework of its imperious powers but serve exclusively the purposes of infliction of injury on the citizen), the principle of proportionality and some other[7].

In the law of the USA a predominating procedural principle is the principle of "proper legal procedure" (obligatoriness of strict and exact observance of the procedures fixed in the legislation and impossibility of exceeding the limits of such procedures)[8].

Principles of administrative procedures received a detailed regulation in the legislation of Switzerland. The common procedural principles are classified as the constitutional principles; the principles fixed in laws (so-called "written procedural principles"); unwritten common procedural principles (such principles which by virtue of their evidence to all citizens did not find reflection in the law)[9]. Some separate subprinciples elicited by the Federal Court of Switzerland from the constitutional principle of equality are of interest. In particular, these subprinciples are the prohibition of an abuse discretion (the decision is arbitrary if it obviously contradicts a basic sense of the law, is self-contradictory or obviously contradicts a principle of justice) and the principle of belief and trust.

In our opinion, introduction of some specified principles in the Russian legislation can be effective in suppression of unconscientiousness of tax bodies and can promote further strengthening of a mode of legality.

Only at present time many of the generally recognized procedural principles were fixed in the norms regulating tax process[10]. The principle of legality is indirectly reflected in Item 1 of Article 32 of Part 1 of the Tax Code of the Russian Federation, which speaks about the duty of tax bodies to observe the legislation on taxes and tax collections. The principle of procedural equality is elicited from the content of Item 9 of Article 32 of Part 1, Item 2 of Article 101 of the Tax Code of the Russian Federation: tax bodies are obliged to inform the taxpayer on time and place of consideration of his/her case, to send him/her copies of the tax inspection act and the tax body decision. The principle of the presumption of innocence according to which nobody can be considered guilty of a tax offence while his/her guilt is not

6 *Н.А. Попонова* Ibid. P. 73, 76.

7 *К Гюнтер* Контроль за решениями, принимаемыми в рамках административного усмотрения: германский опыт / Edited by S.G. Pepelyaev. Moscow, 2006. P. 185-186.

8 С.В. Берестовой Налоговые процедуры в Российской Федерации и Соединенных Штатах Америки: Сравнительно-правовой анализ. Synopsis of a thesis ... of the Cand. Sc. (Law). Moscow, 2005. [WWW document] // Juridical Russia – Educational legal portal// URL: http://law.edu.ru/script/cntSource.asp?cntID=100080616 (February 10, 2007).

9 *К. Экштайн, Р. Шафхаузер, С. Вершинин.* Ibid. P. 11-15.

10 *В.Н. Иванова* Соотношение правовых категорий "налоговый процесс" и "налоговое производство" и особенности их реализации в Налоговом кодексе РФ // Yurist. 2001. No. 2. P. 67.

established under a valid judgment, was directly fixed in Item 6 of Article 108 of the Tax Code of the Russian Federation before 2006. Now the content of this rule of law has been changed, which causes reproaches in its anti-constitutionality: now guilt of the person in commitment of a tax offence is established not by the court decree but by the tax body decision.

Separate aspects of the principle of distribution of the burden of evidence are realized in other rule of law of Item 6 of Article 108 of the Tax Code of the Russian Federation, which says that "the tax bodies are entrusted with the responsibility to prove circumstances confirming the fact of a tax offence and guilt of the person who has committed it". The principle of superformalism interdiction was fixed in Item 14 of Article 101, Item 12 of Article 101.4 of the Tax Code of the Russian Federation. Therefore not any infringements of procedural rules of the Tax Code of the Russian Federation but only those which are determined by the law or court in a specific case as essential can be considered the basics for a cancellation of the decision of the tax body. Some principles are reflected not in the legislation but in judicial practice. For example, in Item 3 of the Decree No. 14-P of July 16, 2004 the Constitutional Court of the Russian Federation formulated a principle of inadmissibility of excessive application of measures of the tax control[11].

Introduction of other principles of tax law enforcement in practice will promote a correct solution of legal cases and removal of social intensity in relations between taxpayers and tax administration. For example, official application of the principle of belief, trust and safety would allow excluding inconsistent or "unclear" explanations of tax and financial bodies by inquiries of taxpayers about application of some or other provisions of the legislation on taxes and tax collections. For example, Russian Tax Code as well as laws in the USA and in France oblige tax bodies to give written answers to the questions of a taxpayer, who can use these answers for the protection against possible penalties. Meanwhile, very often it is a case in practice that a tax or financial body answering a concrete question of a taxpayer is limited to citing the Tax Code of the Russian Federation or using some general words not allowing receiving precise and unambiguous interpretation of a disputable norm. Such actions are not formally forbidden by the Russian legislation but, obviously, contradict the principle of belief and trust of tax relations participants.

In Russia the official application of the principle of belief and trust would also allow to oblige tax bodies to inform a taxpayer on forthcoming field inspection (if it cannot impede carrying this inspection out). Such duty is established in many countries as a normative but is not known to the Russian tax laws. Thus, in France

11 Постановление Конституционного Суда РФ от 16.07.2004 г. № 14-П «По делу о проверке конституционности отдельных положений части второй статьи 89 Налогового кодекса Российской Федерации в связи с жалобами граждан А.Д. Егорова и Н.В. Чуева» // Code of Laws of the Russian Federation. 2004. No.30. Article 3214.

a taxpayer should be warned about a forthcoming inspection at least 8 days before it, in Germany - 1 week, in Canada - 5 days. Such notice is not made only in case if there are authentic data that the enterprise evades payment of taxes[12].

It is also necessary to fix the principle of publicity in the Russian tax laws. One aspect of this principle is the duty of tax bodies to inform taxpayers of all revealed circumstances and possible consequences, if it does not damage the purposes and a course of the check. Such duty is established, for example, in Germany[13]. This principle is quite necessary as in Russia tax bodies do not very often inform taxpayers even about fulfillment of control measures during the inspection, for example about the purpose of expert examination. Accordingly, a taxpayer is deprived of the opportunity to assert his/her procedural rights and to supervise the observance of procedure in taking such control measures.

Some researchers reasonably consider that it is necessary to fix the principle of legality in legislation as the basis of tax bodies' activities because the actions of tax bodies beyond the frameworks of their powers are frequently proved by the fact that there is no any corresponding interdiction in the legislation[14].

Non-application of the principle of legal certainty in the Russian legislation has a negative influence on the term of field tax inspections. Practically the terms of field inspections in Russia are not limited as they include only the time of actual presence of inspectors on the territory of a taxpayer, which actually cannot be defined. What is more, a tax body has the right to stop the inspection unrestricted number of times. It is necessary to notice that in the majority of other countries with developed legal systems (for example in France, Germany and Canada) such terms are precisely fixed (but in France this has noting to do with large taxpayers)[154].

We should estimate positively the innovations of the Federal Law No. 137-FZ of 27.07.2006 which stated that it is necessary to provide a person in respect of whom the act was made with a possibility to participate in the consideration of materials personally and (or) through a representative, as well as with a possibility to present explanations. In case these rights are not provided, a decision of the tax body is certainly subject to cancellation. Such position is in consonance with one of the rules of the principle of just procedure: nobody should be condemned unheard. This principle is widely applied in Great Britain[16].

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12 *М.А. Суворов* Процессуализация налоговых проверок: проблемы и пути совершенствования. Moscow, 2007. P. 75-79.

13 Ibid. P. 78.

14 *М.В. Гуров* Конституция РФ и решения Конституционного Суда РФ – основа совершенствования нормативного регулирования отношений в сфере налогового контроля / Tax law in decrees of the Constitutional Court of the Russian Federation of 2004 / Edited by S.G. Pepelyaev. Moscow, 2006. P. 201.

15 *М.А. Суворов* Ibid. P. 75-79.

16 Административное право зарубежных стран: учебное пособие. Moscow, 1996. P. 52.

The attention of developers of the Federal Law No. 137-FZ of 27.07.2006 to the procedure of pre-judicial administration of complaints of taxpayers deserves approval. The stage of the pre-judicial appeal (which becomes obligatory since 01.01.2009 in Russia) allows realizing a principle of observance of the rights and legitimate interests of the participants of tax legal relations, providing efficiency of supervising activity of tax bodies and optimizing work with taxpayers[17]. Besides pre-judicial consideration of disputes, it helps to reveal the most typical infringements in work of tax bodies. At the same time points of order of pre-judicial administration of complaints in the law mentioned above are not reflected sufficiently enough.

In this aspect the experience of foreign countries is quite interesting, for example of Great Britain, where the whole mechanism of consideration of tax disputes by the General and Special Commissioners (quasi-judicial bodies) is in details registered in statutory acts, which practically excludes extensive interpretation of the rules of law and provides effective guarantees of observance of the rights of taxpayers. The stage of the process of tax disputes resolution in Great Britain consists of the following procedures settled in details: 1) preparation of hearings; 2) coordination of documents; 3) preliminary hearing; 4) hearing of a case; 5) rendering of decisions; 6) notification of the parties on awarded decision; 7) revision of awarded decisions; 8) the appeal of awarded decisions; 9) execution of the Commissioners' decisions[18].

Such order of activity is quite logical and provides the right of taxpayers with effective legal protection. Consolidation of this scheme seems correct and well founded in the subordinate legislation, which would be especially devoted to the procedural order of administration of taxpayers' complaints if not in the Tax Code of the Russian Federation.

Nevertheless, it should be said that the state realizes the importance of this issue and undertakes attempts of ordering the form of action of law enforcement activity of tax bodies as evidenced by the fact of adoption of the Federal Law No. 137-FZ of 27.07.2006.

At the same time, it is necessary to note that during preparation of the project of the given law, the offers which seem positive and are directed at the achievement of a reasonable balance between individual and public interests in tax process were discussed but were not embodied in the final text of the law for undefined reasons[19].

17 С.В. Гвоздев Правовые формы контрольно-надзорной деятельности налоговых органов. Synopsis of a thesis ... of the Cand. Sc. (Law). Moscow, 2004. [WWW document] // Juridical Russia – Educational legal portal // URL: http://law.edu.ru/script/cntSource.asp?cntID=100072011 (February 10, 2007).

18 И.А. Гончаренко Механизм разрешения налоговых споров в Великобритании и ЕС. Synopsis of a thesis ... of the Cand. Sc. (Law). Moscow, 2001. [WWW document] // Juridical Russia – Educational legal portal // URL: http://law.edu.ru/book/book.asp?bookID=103518 (February 10, 2007).

19 Refer to: Пояснительная записка к проекту Федерального закона "О внесении изменений в часть первую Налогового кодекса Российской Федерации в связи с осуществлением мер по совершенствованию налогового администрирования"// Reference retrieval system "Konsultant-Plus".

In particular, among the offers on the tax administration system reforming prepared by a working group of the administration of the President of the Russian Federation were the following ones: "In the frameworks of the Federal Tax Service of the Russian Federation a vertical of the appeal commissions will be built, which will consider taxpayers' complaints against decisions of tax bodies before court proceedings. However, each subordinate commission will submit not to the head of tax inspection but higher appeal commission. The supreme appeal commission will be formed by the Ministry of Finance to which this vertical will be subordinated as a whole. Moreover, it is supposed that the inspection of any significant additional charges of taxes concerning any payer should be carried out by the head of the higher inspection"[20]. It is thought that the given offers should be estimated positively as this detailed elaboration of the procedural form of tax control proceeding and procedure on appeal of decisions substantially promotes the increase of responsibility of officials of tax bodies in the realization of law enforcement activity.

Creation of the system of appeal commissions independent of divisions of Federal Tax Service of Russia would promote realization of the above mentioned principle of just procedure, which is widely applied in Great Britain. The second important rule of this principle says that "nobody can be judged in his/her own case", in other words, it is inadmissible that the supervising body estimates the legality of actions of its employees. In the existing organization of pre-judicial appeal in Russia there is the situation which cannot provide effective protection of the rights of taxpayers. If there are no changes, the introduction of a duty of pre-judicial appeal since 2009 will not lead to the reduction of load on the courts, but will only entail additional charges of taxpayers for the protection.

Thus, reforming of the tax process in modern Russia should not be limited to the acceptance of the Federal Law No. 137-FZ of 27.07.2006.

Development of the concept of tax procedures in Russia and their systematization in the Russian legislation should become an obligatory and priority element of the tax reform. It is necessary to pay special close attention to the analysis of procedural principles used in European countries and their reasonable incorporation in Russian legal system during the process of taxation reforming.

20 Refer to: *Г. Ляшенко* В налоговую пришли с инспекцией // Kommersant. March 4, 2005. P. 8.

Streszczenie

Artykuł został poświęcony problemom przestrzegania prawa podatkowego w Rosji. Analizie poddano stan obecny oraz możliwe sposoby przeprowadzenia reform w tym zakresie. Jednym z podstawowych założeń tych reform jest przebudowa istniejących regulacji podatkowych i ich systematyzacja. Należy również zwrócić uwagę na zasady proceduralne funkcjonujące w krajach europejskich i rozważyć ich wprowadzenie do rosyjskiego systemu podatkowego.

Anna Kierzkowska

CHANGES IN THE AUDIT OF ACCOUNTS REGULATIONS IN POLAND AND THE GUARANTEES OF FREEDOM TO CONDUCT A BUSINESS

The commencement of the Act on Freedom of Business Activity[1] as well as the act – Provisions introducing the law on freedom of business activity[2] undoubtedly aimed at strengthening the guarantees of freedom to conduct a business, also by means of legal empowerment of the audited entrepreneur against the audit of accounts authorities. As the authors of the act pointed out, its main purpose was to introduce regulations facilitating business activity, with particular reference to strengthening the guarantees of economic liberty and protecting the entrepreneur from excessive audit of accounts. For the first time the act has introduced regulations over the audit of accounts of entrepreneurs. Therefore, this reform was of crucial importance with respect to changing the perception of relations between the state and its citizenry. Though it was made clear that the passed act was incomplete and not able to fulfil expectations, it should be still considered a critical law in terms of perception of auditing business entities. All previously adopted regulations of auditing were of a more general nature and focused only on the financial inspectors and their powers.

The provisions of the Act on The Freedom of Business Activity set up a framework for the actions performed towards the entrepreneurs by the taxation and auditing institutions. The current legal situation empowers the public administration (fiscal) institutions to intervene in the realm of a business' activity as guaranteed by virtue of the Constitution (Art. 20 thereof). Such an intervention may be conducted solely and exclusively to the extent stipulated by the law in force.[3] In the event of an audit, the basis of such intervention may be the Act on The Freedom of Business

1 Ustawa z dnia 2 lipca 2004 r. o swobodzie działalności gospodarczej (t.j. Dz. U. z 2007, Nr 155, poz. 1095 ze zm.) hereinafter referred to as the act on freedom of business activity.

2 Ustawa z dnia 2 lipca 2004 r. - Przepisy wprowadzające ustawę o swobodzie działalności gospodarczej (Dz. U., Nr 173, poz. 1808 ze zm.).

3 Wyrok Wojewódzkiego Sądu Administracyjnego w Lublinie z dnia 4 kwietnia 2008 r. (sygn. akt I S.A./Lu 795/07).

Activity – the defining general principles of taking and conducting an audit of accounts - as well as the provisions of specific acts, as addressed in Art. 77 section 2 of the Act on The Freedom of Business Activity. The Tax Ordinance[4] shall be considered a specific act in this respect. Such wording of the regulations suggests that the provisions of the Act on Freedom of Business Activity constitute the core of regulations pertaining to the above. In fact, the provisions of both the act on audit of accounts and the tax ordinance act contain far more regulations pertaining to the aforementioned. It consequently addresses the majority of issues concerning relations between entrepreneurs and the financial inspectors. The provisions of any and all specific acts must not be contrary to the stipulations of the Act on Freedom of Business Activity. In a draft amendment to the Tax Ordinance Act, (prepared by the Ministry of Finance), further emphasis of the role of stipulations of the Act on Freedom of Business Activity was suggested. Art. 282 § 2 should be amended to "Audit of business accounts shall be conducted pursuant to the principles stipulated in the Act on Freedom of Business Activity". A draft explanation reads that the purpose of the amendment was to explicitly underline the nature of provisions in the Act on Freedom of Business Activity so as to define the general principles applicable to each and every audit of accounts. The introduction of this provision shall not alter the powers of the audited entity, under Art. 77 of the Act on Economic Liberty. It may only facilitate recognised complete legal regulation concerning the rights and obligations of the audited entity towards the audit institution.

Art. 79 shall set forth a requirement to make an actual audit following a previously presented duty card and authorisation for that audit. A similar stipulation can be found also in the Tax Ordinance Act – Art. 284. Both provisions assume that the necessary premise to conduct an audit of accounts is (simultaneously) an authority to carry out an audit and the presentation of a duty card. There is no significant meaning in the order in which the two actions are to be performed, although this creates a discrepancy between the two acts. Nevertheless, the two actions should be performed one immediately after the other, at more or less the same time. In exceptional cases, an audit may be taken solely after presenting a duty card. The Act on Freedom of Business Activity refers to the specific laws as the power to seize control (Art. 79 section 1 thereof). In the event of a financial audit the legal basis shall be Art. 284a of the Tax Ordinance. It shall also authorise an audit within shortest possible time period – three days. In the event of neglecting and non-performance of that duty, both due to the reasons attributable to the audit institution and to actions of the audited entrepreneur, it shall be deemed that the audit has not taken place; any already collected material shall be deemed invalid as accounting evidence. The provisions of the Act on Freedom of Business Activity as well as the stipulations of

4 Ustawa z dnia 29 sierpnia 1997 r. – Ordynacja podatkowa (t.j. Dz. U. z 2005 r., Nr 8 poz. 60 ze zm.) hereinafter referred to as Tax Ordinance.

the Tax Ordinance Act are therefore flawed. They inadequately address the situation when, for example, due to the absence of the audited entrepreneur, it is impossible to carry out an audit. Neither of the two acts provide for the possibility to suspend an audit. Only in the event of the impossibility of identifying the details of the audited entity, will the three-day term not be binding. In each and every other event, inclusive of the situation when the audited entrepreneur avoids meeting financial inspectors, this term shall be binding.

The provisions of the Act on Freedom of Business Activity shall not prescribe who should be presented with the duty card and authorisation to make an audit. This particular issue is addressed under the Tax Ordinance Act with Art. 284 thereof stipulating that the abovementioned actions shall be carried out affecting the audited entrepreneur personally or another natural person, appointed and duly authorised to represent him during the audit as a result of authorisation submitted to the residing local Head of the Tax Office, under the corporate income tax (Art. 281a thereof).

The authorisation to conduct the audit is usually submitted personally, although the acts do not exclude other forms of submittal. It is generally assumed that personal submittal of the authorisation to conduct the audit may include an element of surprise. However, it should be noted that this element of surprise is not always necessary. The purpose or the circumstances of conducting the audit may justify the need to notify the tax payer of the planned audit in advance.[5] The regulations pertaining to the above shall be included in the newest draft amendment to Tax Ordinance, which is currently being negotiated. The draft shall include Art. 282b, which transfers the existing power of notification of the intention to conduct an audit. As argued in the draft explanation, the suggested amendments should positively influence public confidence in the financial authorities, they should promote the voluntary disclosure of tax returns and should enable an audited entrepreneur to organize work properly during the audit of accounts. There is no doubt that receiving the notification of the planned audit of accounts shall be of substantial importance in terms of the preparation of proper documents, and shall facilitate the active participation of the audited entrepreneur in all related activities, either personally or by means of his duly authorised representation. It should be noted that the principle of notification in advance of the planned audit of accounts should not be of unlimited nature, in particular due to the possibility of the entrepreneur's disappearance or covering up of the evidence of a committed crime. It should not also influence the pace of operations by the audit of accounts authorities.

Duty cards should be presented and the authorisations should be carried by the financial inspectors. Art. 79 section 3 of the Act on Freedom of Business Activity indicates that personnel changes to the inspectorate shall only be possible

5 C. Kosikowski , Ustawa o swobodzie działalności gospodarczej. Komentarz, Warsaw 2008, p. 363.

by means of a separate authorisation. Issuing a new authorisation may not prolong the audit period. When making personnel changes to the inspectorate, the financial authority may not prolong the audit period. The fact that the new inspector must get acquainted with previous findings and the collected documents is of no importance. The provisions of sections 1 and 3 shall have a role of guarantee for the audit related tasks to be performed solely by the duly authorised persons and in the event of audit of accounts, the persons are obliged to keep the identity of the official as well as the financial details confidential, subject to criminal liability.

Art. 79 section 4 of the Act on Freedom of Business Activity defines the minimum items to be included in the authorisation to conduct the audit. These shall be as follows:

1. legal basis,
2. indication of the financial authority,
3. date and place of issuing the authorisation,
4. name and surname of the employee of audit of accounts authority duly authorised to conduct the audit as well as the number of his/her duty card,
5. the company name of the audited entrepreneur,
6. the subjective scope of the audit,
7. indication of the initial date and the anticipated final date of audit,
8. the signature of person giving the authorisation inclusive of his/her position or function,
9. information on rights and obligations of the audited entrepreneur.

The items authorising audit are also stipulated in Art. 283 § 2 of the Tax ordinance. Both combinations are very similar to each other. However, it should be noted that the Tax ordinance provides authorisation for inclusion of an indication of the audited entity without defining how it should be indicated. Yet, the Act on Freedom of Business Activity explicitly stipulates that the authorisation should include at least the company name of the audited entrepreneur. The company name in the meaning thereof shall be referred to as name and surname of the audited entrepreneur, if a natural person, company name, if a legal entity, and in the event of partnership also the name and surname of at least one partner – in the view of wording of Art. 79 section 4 as well as Art. 20, 21 and 27 of the Act on Freedom of Business Activity.[6]

6 C. Kosikowski , Ustawa o swobodzie działalności..., p. 367.

One of the elements included in the authorisation to conduct a audit shall be indicating the subjective scope of the audit, by means of defining the precise area to be audited. The scope of audit of accounts should be determined quite precisely, within the competence of the audit authority, under the regulations of its both local and material competence. The audit related activities shall not exceed the time and subjective scope provided for in the authorisation. Each and every additional activity to be conducted shall require the issuing of additional authorisation (e.g. in the event when the subjective scope of the audit has been referred to as "the audit consisting in assessment of the correctness of the indicated amount of VAT return for April 2008" the settlements to be audited shall be limited to the related VAT and for a given month (accounting period) only, even though the amount of return results from the amounts brought forward as indicated in the previous months).

It should also be noted that the act, although defining the elements necessary to conduct an audit, shall not define the consequences in the event of existence of defects in the authorisation. This should be considered as its disadvantage.

The Act on Freedom of Business Activity introduced another provision on the principle of conducting audit related activities in the presence of the audited entrepreneur or his duly authorised representative (Art. 80 of the Act on Freedom of Business Activity). It is undoubtedly a provision aiming at the active participation of the audited party in the audit of accounts, without forcing them to participate in the proceedings. The audited entrepreneur shall have a right, but not an obligation, to participate in audit related activities. This principle has been further detailed in the act – the provisions introduce the law on Freedom of Business Activity by means of introducing the duty to notify the audited entrepreneur (or his duly authorised representative) of the place and date of verification of the evidence by two witnesses and expert opinion at least three days in advance. In the legal situation up to 2004, such a notification could have been sent immediately before taking up the proceedings (at the moment the law allows notification of the audited entrepreneur only immediately before an inspection). It should be noted that under the provisions of Art. 80 section 3 of the Act on Freedom of Business Activity, the audited entrepreneur shall have a duty to appoint in writing a person duly authorised to represent them during the audit. In the event of non fulfilment of the duty, the audited entrepreneur shall be liable to fine of over PLN 1,000, under the Code of Offences (Art. 60' § 7 thereof[7]).

Tax ordinance, however, provides for the possibility to conduct activities related to audit without the participation of the audited entrepreneur (Art. 289 § 2, Art. 285 § 3 thereof). It seems that the legal ability to conduct audit related activities without prior notification of the audited entrepreneur shall be contrary to the general

7 Ustawa z dnia 20 maja 1971 r. - Kodeks wykroczeń (t. j. Dz. U. z 2007 r., Nr 109, poz. 756 ze zm.).

principle stipulated in Art. 80 the Act on Freedom of Business Activity, unless the premises as provided for in Art. 80 section 2 occur.

In Art. 80 section 1 of the Act on Freedom of Business Activity, the principle has been adopted and in section 2 numerous exceptions have been introduced. And just as the principle of active participation in audit related activities belongs to the rights of the audited entrepreneur, excluding participation shall not be mandatory in the event of those circumstances stipulated in section 2. The practice shows that the participation of the audited entrepreneur facilitates execution of an audit and shortens its term if statements are submitted and relevant documents are made available; they are also likely to substantially influence the particulars of the post-audit material itself as well as the involvement of the tax payer in order to negate potential charges and to reject those audit findings which are unbeneficial for the taxpayer. The exceptions presented in section 2 are wide ranging. Particular attention should be drawn to item 2 thereof. In fact, any audit may be considered essential to assist proceedings or an investigation conducted against the entrepreneur. The act does not define what kind of proceedings or investigation is to be conducted nor by whom. It is then possible to conduct an audit in relation to already conducted investigation pertaining to a crime under the fiscal penal act – conducted by the tax office. It should be noted, nevertheless, that this exception shall be of crucial importance. It provides for conducting audit related activities against the high risk entities and in relation to the matters requiring rapid operation of the authorities, due to e.g. the risk of losing the evidence. Section 3 item 3 provides, similarly to Art. 82 section 3 item 3 thereof, for the audit of accounts authorities to be granted special powers, subject to specific principles, stipulated in the act, in the event of audits conducted during the course of another audit proceedings.

The Act on Freedom of Business Activity sets forth another obligation on the entrepreneurs – the obligation to keep the audit logbook. The audit authority shall affect entries thereto concerning, in particular, initial and final dates of the audit and its subjective scope. The entries in the logbook should reflect the history of audits of accounts conducted in the company. The analysis of its content may influence the withdrawal by the authorities from conducting the audit, it may also constitute a premise for non conducting another audit at the same business due to the fact that the previous one has not been finalised or that the limits stipulated in Art. 83 of the Act on Freedom of Business Activity have been reached. The provisions of the act shall not define how long the audit logbook as well as the authorisations and audit reports should be kept.

A new solution introduced to the Polish law by means of Art. 82 the Act on Freedom of Business Activity was considered to be of crucial importance. The abovementioned provision introduced some restrictions on simultaneously

conducting more than one audit of accounts of the entrepreneur. The provision was aimed at protecting the entrepreneurs from the inconvenience resulting from conducting of more than one audit at a time. The binding restrictions, however, shall not be absolute. The adopted principle was later supplemented by the entire catalogue of exclusions, extended in comparison with the catalogue included in Art. 80 section 2 of the Act on Freedom of Business Activity.

In particular, it shall be possible to conduct another simultaneous audit in the event when it is related to the appropriateness of VAT return before affecting such a return. The return dates have been stipulated in the Act on Value Added Tax.[8] The entrepreneur, depending on the occurring premises and circumstances, shall be entitled to put forward a motion for a tax return for a 25-, 60- and 180- day period. The legislator, by means of introducing the exclusion in item 5 section 2 Art. 80 shall protect the entrepreneur's interest in the event of the necessity to evaluate the correctness of the tax settlements, resulting concurrently in the event of auditing procedures being initiated by the Head of the Tax Office. The doctrine also argues that this stipulation does not discipline fiscal institutions. The lack of such restriction should have a positive impact on decisions to initialise audit measures made by the heads of tax offices, those frequently being the momentous decisions. Such a view may be open to question. The concurrence of two audits at the same time is often incidental and may not have any connection with the needs assessment to conduct the audit which should be based on more rational premises and preceded by thorough analysis of the taxpayer's financial situation. It should also be noted that not implementing audit measures at a given time should not be understood as a retraction by the authority. It may, on the other hand, influence a decision on prolonging the return date, which would be disadvantageous for the entrepreneur. The restriction stipulated in item 6 shows that it shall be possible to take up and conduct the audit concurrently, when it results from the fulfilment of the Community Law on Competition or European Community financial interest protection. This provision shall express the principle of superiority of community law over the national law. In item 7 the legislator introduced the principle under which it shall be possible to conduct a concurrent audit: when it is related to the justification of a VAT tax return, under the regulations on the refund of some expenditure related to the residential buildings of natural persons.[9]

The seven premises of excluding the limitation as stipulated in Art. 82 section 1 of the act are obligatory in nature, i.e. in the event of occurrence of any premise, the authority shall be obliged to withdraw from further proceedings and to arrange a new audit date with the entrepreneur.

8 Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług (Dz. U. Nr 54, poz. 535 ze zm.).

9 Ustawa z dnia 29 sierpnia 2005 r. o zwrocie osobom fizycznym niektórych wydatków związanych z budownictwem mieszkaniowym (Dz. U. Nr 177, poz. 1468 ze zm.).

Apart from limits related to the number of audits conducted within one year, another type of limit is stipulated, related to the audit period in one calendar year. When arranging a new audit date the audit of accounts authority should also take into consideration those limits as stipulated in Art. 83, even though the entrepreneur gives his consent for the audit to be conducted. This issue has been addressed in the Ministry of Finance Bulletin of July 12, 2005, ref. no. SP1/768/033-235/1584/04/AA.[10]

Pursuant to the wording of art. 83 section 1, the audit period of any and all audits conducted by the audit of accounts authorities over the entrepreneurs shall not exceed:

1. One week in relation to sole proprietorships, small and medium enterprises – four weeks.
2. In relation to other entrepreneurs – eight weeks.

In section 2, the legislator shall indicate the limitations of the above principle. The catalogue shall include a new audit category in relation to the previous regulations – consisting of the verification of the correctness of the transfer prices agreement's execution. Pursuant to Art. 83 section 2 item 7 of the Act on Freedom of Business Activity, the audit period limitations shall not apply in the event of a decision by the proper authority (Minister of Finance) on the acceptability of the choice and the method applied to determine the transaction price between the affiliated entities. Such a decision would be made on behalf of those entities under separate regulations on transfer prices, – within the scope of the decision's execution.

The limit of audit measures shall be outlined for the authorities. Nevertheless, in the event of a change to the Head of the Tax Office during a calendar year, it should not mean this limit shall be calculated back from the start for the new institution. This issue has been addressed in the aforementioned Ministry of Finance Bulletin. It should be noted, however, that the legislator shall not define what happens in the event of an auditing authority exceeding the limits when conducting audit measures. It seems that exceeding the audit period limits by the authority shall not result in absolute preclusion of the audit outcome and the impossibility to pass an adjudication on the basis of the evidence collected during such an excessive audit.[11] It should be noted that the financial authorities, with reference to audit period limitations (which under the act shall not apply for audit proceedings), should focus on a particular aspect of the tax payer business in the vast majority, and every audit should be preceded by the thorough financial analysis of their business. It seems that the reform, although mainly focused on the tax payer, should also influence the

10 "Biuletyn Skarbowy Ministerstwa Finansów" of 2005 r., No. 4, p. 14
11 C. Kosikowski , Ustawa o swobodzie działalności..., p. 379.

actions performed by the fiscal authorities. The limitations introduced henceforth, despite numerous and wide exceptions, should make the fiscal authorities incline to change their means of operation, in particular their selection of entities to be audited. The decisions on conducting an audit should be carefully thought over and preceded by gathering applicable evidence. It shall be helpful in shortening the time necessary for the performance of particular measures during the audit.

As for the calculating the audit period, it seems that the initial date of the audit should be deemed as of the date indicated in the authorisation, under Art. 79 section 4 item 7 of the Act on Freedom of Business Activity. A more complex issue is the final date of the audit. It seems that the date should be calculated pursuant to the special provision of Art. 291 § 4 of the Tax ordinance and the final date of the audit shall be deemed as of the moment of transferring the audit report to the audited entrepreneur. The hindrances to understanding show that the regulations are unfinished.[12]

An instrumentality separate from non application of audit period limits shall be the instrumentality of omission of the audit period to the limits stipulated in Art.83 section 1 of the act. In the event when the outcome of the conducted audit of accounts disclosed a substantial breach of law by the entrepreneur, another audit of the same subjective scope shall be allowed to be conducted in the same calendar year. The legislator excluded the obligation to include the period of such an audit to the total audit periods in a given year. In such an event, considering the explanation included in the Ministry of Finance Bulletin of July12, 2005, and additionally when the audits were conducted by another Head of the Tax Office during the prior audits due to a change in local competence, the period of such an audit shall not be included in the limits as stipulated in section 1.

To conclude, it should be noted that the Act on Freedom of Business Activity introduced major changes to the exercising of the rights of the audited entity. Defining the general principles of auditing the entrepreneurs under the Act on Freedom of Business Activity has been an innovative solution in Polish legislation. The new regulations aimed at expanding the scope of rights granted to the audited entity, and facilitated the exercising of these rights. However, the aforementioned regulations should not be considered complete, when taking the solutions aimed at both the entrepreneur and the fiscal authorities into consideration. During the course of work over the draft of the act, unenforceable assumptions were adopted. The evaluation of the act is also affected by the fact that it indicates numerous obligations without determining the consequences of their non-performance. Nevertheless, the act is still considered a crucial step forward for the audit of accounts sector, in terms of exercising the freedom of conducting business activity.

12 See also: Pismo Ministerstwa Finansów z 12.07.2005 r., „Biuletyn Skarbowy Ministerstwa Finansów" 2005, No 4, p. 16.

Streszczenie

Niniejszy artykuł dotyczy analizy zmian w zakresie przepisów regulujących instytucję audytu księgowego w Polsce, zawartych w ustawie o swobodzie działalności gospodarczej. Podkreśla się w nim pozytywne aspekty reformy, np. zmiana przepisów dotyczących audytu polegająca na zapewnieniu jednostce kontrolowanej większego katalogu praw niż tylko obowiązków. Podejmowane są również negatywne jej strony, w szczególności niekompletność i nieprecyzyjność przepisów, które utrudniają ich stosowanie w praktyce.

Róża Kosińska, Piotr Woltanowski

PRINCIPES PREALABLES DE LA REFORME DE L'ADMINISTRATION FISCALE DANS LE PROJET DE LA LOI SUR L'ADMINISTRATION FISCALE NATIONALE ET LES CAUSES DE SON ECHEC

Comme il résulte de nombreux commentaires et opinions du Ministère des finances, ainsi que des employés de l'administration fiscale et des services douaniers, des syndicats, des contribuables, y compris les associations des entrepreneurs et experts en droit commercial, il existait et il existe la conviction unanime sur la nécessité de la réforme de l'appareil fiscal polonais.[1] C'est l'imperfection du marché des services financiers et douaniers face à la société du XXIe siècle, à l'époque du développement continu du monde de l'information et du commerce électronique, qui implique cette nécessité. Actuellement, à part les départements du Ministère des Finances, l'administration fiscale compte 16 Services des Impôts avec 12 filiales, 4 Bureaux de l'Information Nationale Fiscale, 401 Offices du trésor, y compris 20 Offices spécialisés (dénommés "grands"). Le service douanier est composé de 16 chambres douanières, 46 offices de douane et 161 centres douaniers, y compris 56 centres s'occupant des postes-frontière. A part l'administration fiscale, il y a 16 bureaux de contrôle fiscal. Une telle structure ne répond ni aux exigences ni aux standards de l'administration moderne, qui appuie le développement économique, et qui en même temps soit effective dans ses fonctions de base, c'est-à-dire, qui fournisse des moyens indispensables pour le fonctionnement de l'Etat. Il est difficile de parler de la standardisation du travail des chambres et des offices de douane et du trésor, à cause d'une grande diversification organisationnelle de l'administration fiscale et douanière. Le nombre des Offices du trésor assujettis aux Services du trésor, varie d'une région à l'autre. Il en est de même pour les services douaniers. Cette inégalité de la collocation des services et offices du trésor, ainsi que des services douaniers sur le territoire, la quantité différente des structures, des locaux, de l'aménagement et

1 cfr. Les opinions des fiscalistes sur le site www.skarbowcy.pl – actuelles – concernant les problèmes courants de l'organisation et du fonctionnement de l'administration fiscale ainsi que les opinions conservées dans les archives qui concernent la proposition de créer l'Administration Fiscale Nationale.

des ressources humaines provoque la disproportion du financement et rend difficile la gestion de ces institutions. Les unités organisationnelles respectives dépendent du Ministre des Finances et ont des foncions différentes. Cela cause l'existence interne de nombreux centres de décision qui sont concurrentiels entre eux, en faisant obscurcir les buts stratégiques du fonctionnement de l'administration fiscale.[2] C'est pourquoi on est arrivé à l'idée de la consolidation des services fiscaux et douaniers et de former une administration nouvelle du point de vue de la qualité, une administration fisco-douanière uniforme qui réponde aux exigences de l'administration moderne, effective et amicale. Cette nouvelle administration serait dénommée Administration Fiscale Nationale (AFN). L'objectif de la création de l'AFN était d'assurer une meilleure efficience pour la réalisation, de la part des organes de l'autorité publique, des tâches résultant des normes sur les donations publiques, l'uniformisation des structures de l'administration fiscale et douanière, et pour la formation des normes transparentes du fonctionnement des organes de l'autorité publique. La réforme proposée n'a pas été réalisée malgré les travaux préparatifs très avancés concernant le projet de la loi sur l'Administration Fiscale Nationale. L'analyse détaillée de ses objectifs et de principes préalables permet d'avancer une hypothèse que cette réforme aurait eu une influence incontestable sur l'état des finances publiques en Pologne.

Comme il résulte de la motivation du projet législatif mentionné ci-dessus, les objectifs stratégiques de la réforme qui aurait fait naître l'Administration Fiscale Nationale, étaient les suivants:

1. La haute qualité des services fournis par l'administration fiscale;
2. L'administration fiscale efficace et effective;
3. Le service fiscal fort et professionnel, et en même temps amical;
4. Les principes et les moyens modernes des services fournis avec la promotion de réalisation volontaire des devoirs fiscaux.[3]

La réforme proposée aurait dû apporter une division nette de la politique douanière et fiscale de l'administration, ce qui aurait dû influencer l'agrandissement du caractère apolitique de l'Administration Fiscale Nationale. On présumait aussi l'amélioration de la qualité du droit concernant le statut des Services et Offices fiscaux et douaniers. Après la consolidation, ils seraient devenus services de l'administration fiscale et bureaux de l'administration fiscale. On supposait que grâce

2 Voir J. Kapica, Krajowa Administracja Skarbowa. Teoria i praktyka. Uwarunkowania systemowe zmian, [dans:] Z. Gilowska, H. Izdebski, K. Raczkowski, Efektywna administracja skarbowa, t.1, Warszawa 2007, pages 181-195 et la motivation du projet de la loi sur l'Administration Fiscale Nationale du 14.05.2007 et la motivation de la loi introduisant la loi sur l'Administration Fiscale Nationale du 14.05.2007, disponible sur le forum Internet des fiscalistes www.skarbowcy.pl, cfr. projets portant le même titre, du 28.02.2007.

3 Projet de la loi sur l'Administration Fiscale Nationale et le Projet de la loi introduisant la loi sur l'Administration Fiscale Nationale du 14.05.2007 r. Disponible sur le forum Internet des fiscalistes www.skarbowcy.pl

à cette démarche on aurait créé des conditions plus favorables pour l'élaboration du droit fiscal et douanier de qualité meilleure, ainsi que des principes plus transparents et compacts concernant les décisions prises par l'Administration Fiscale Nationale. Grâce à la réforme proposée, on devait faire diminuer les frais du fonctionnement de l'administration consolidée. Comme il résulte du projet de la loi mentionnée, un autre objectif de l'unification de ces deux services c'était la gestion commune de leurs ressources humaines. Les objectifs principaux de la sanation de ces corps administratifs, dans le cadre de la réforme prévue étaient les suivants: obtenir la consolidation subjective des services fiscaux et douaniers dans le cadre des structures du Ministère et la consolidation objective dans le ressort, donner à l'Administration Fiscale Nationale la responsabilité d'agir dans le cadre des structures du Ministère des Finances, établir, pour toute l'administration réalisant les revenus budgétaires de l'Etat, une mission cohérente et des objectifs stratégiques uniformes, obtenir la satisfaction du contribuable et du fonctionnaire des services fiscaux, avec augmentation contemporaine d'accomplissement volontaire des devoirs fiscaux. On supposait que cette sanation aurait favorisé la réalisation d'une élasticité et adaptabilité plus grandes dans la gestion des moyens budgétaires, des ressources humaines et des ressources matérielles, ce qui aurait par conséquent porté à la possibilité d'obtenir une effectivité majeure du travail de l'administration douanière et fiscale, en tant que l'unité organisatrice possédant les compétences de disposer de la partie budgétaire. La formation d'une administration fiscale autonome, avec des compétences bien précises et avec un budget indépendant, aurait dû assurer la gestion effective et efficace de l'appareil fiscal. A cet effet, il était indispensable de garantir le respect des règles de l'autonomie politique, organisatrice, budgétaire et de l'autonomie des cadres. L'objectif principal de l'administration fiscale autonome aurait dû être la construction et le maintien du corps bien stable des cadres qualifiés possédant des compétences et des expériences convenables, exerçant ses tâches d'une manière efficace et effective. Comme il résulte de la motivation du projet de la loi sur l'AFN, la réforme aurait dû assurer un système adéquat de la rémunération des cadres de l'Administration Fiscale Nationale, lié à l'évaluation périodique du niveau de leur travail et à la rotation horizontale et verticale des employés et des dirigeants, à la base des critères précis, constituant une barrière efficace contre les manifestations de violation des principes de l'éthique professionnelle. On prouvait que le système synchronisé des cours de formation et l'augmentation des compétences (y compris la formation de l'Ecole Nationale de Fiscalité), le système de évaluation, le système de la promotion professionnelle lié avec le système de motivation à travers la diversification de la rémunération, seraient une garantie d'un niveau adéquat des fonctionnaires de l'administration fiscale. On soulignait que la gestion effective des cadres exigeait l'introduction d'un système interne efficace du contrôle à tous les niveaux de l'administration fiscale qui aurait permis le monitorage constant des éléments particulièrement exposés au danger de la pathologie et

l'élimination des phénomènes se caractérisant par la violation des principes de l'éthique professionnelle. On soulignait le fait qu'un système efficace de l'audit interne assurera la découverte et la définition du risque potentiel, le sondage et l'évaluation de la régularité et de l'efficacité des systèmes du contrôle interne et des processus de gestion dans les unités organisatrices de l'administration fiscale.[4]

L'Administration Fiscale Nationale devait être une administration amicale, efficace et moderne. Elle aurait dû avant tout créer par ses activités des conditions favorables pour l'obtention d'un niveau le plus élevé possible de la conscience juridique et fiscale des ses clients, c'est-à-dire des contribuables. Cela aurait dû à son tour faire abaisser les frais de la perception des impôts. On prévoyait d'obtenir un niveau élevé de l'accomplissement des obligations fiscales au fur et à mesure que la qualité des services fournis aux clients deviendrait meilleure, que la portée de l'exploitation de nouvelles technologies informatiques se diffondrait, et au fur et à mesure que les méthodes de la communication externe et interne se perfectionneraient. La réalisation des obligations fiscales et fortement influencée par la manière de fournir les services aux contribuables. La qualité des relations entre l'administration fiscale et ses clients dépend de nombreux facteurs, dont la plupart sont directement liés aux activités de l'administration fiscale. C'est pourquoi on prévoyait que l'administration fiscale fournirait des services de la meilleure qualité possible. Pour ces raisons, un des objectifs principaux de l'administration fiscale devait être l'aspiration à introduire les mécanismes de l'administration amicale, ce qui est lié au renforcement des services et des contrôles et exige de garantir aux contribuables le maximum de confort pour leur faciliter de remplir volontairement les obligations fiscales. Le caractère amical de l'administration fiscale devait faire croître son effectivité. En même temps, l'administration fiscale aurait dû se transformer en une administration moderne, entre autres à travers l'introduction du programme de l'informatisation générale. C'était indispensable pour obtenir les notions sur le risque possible existant et pour définir les mesures de prévenir et de s'opposer à la violation des obligations fiscales (douanières) d'une manière efficace et automatique. [5]

Vu qu'à l'heure actuelle il manque de formation spécialisée des cadres fiscaux, liée non seulement à l'augmentation des niveaux de formation, mais aussi capable de les préparer à fournir ses services, on a prévu d'instituer l'Ecole Nationale de Fiscalité, dépendant du Ministre des Finances. Dans ces circonstances, chaque fonctionnaire des services fiscaux aurait non seulement la possibilité de se préparer à l'exercice de la profession, mais aussi d'augmenter ses capacités est ses aptitudes professionnelles. Cette école garantirait la poursuite des études après la maîtrise ainsi qu'au niveau

4 ibidem
5 ibidem

supérieur. L'Ecole Nationale de Fiscalité devait constituer une base intellectuelle et scientifique de l'Administration Fiscale Nationale. Pour exploiter au maximum les ressources informatiques, et surtout les ressources investies dans les magasins des données, il était planifié de créer un Centre de l'Informatique dépendant directement du Ministre des Finances. En outre, on prévoyait l'élargissement des compétences de l'Information Nationale Fiscale actuelle. Elle fournirait des réponses concernant les demandes sur les droits de douane, tout en étant dénommée Information Nationale Fiscale. On présumait que l'administration fiscale consolidée serait composée des organes suivants au sein de l'Administration Fiscale Nationale: Ministre des Finances, Directeur des Services de l'Administration Fiscale, Directeur du Bureau de l'Administration Fiscale. La loi planifiée présumait la création d'un service fiscal uniforme et spécialisé. L'administration fiscale spécialisée fonctionnant en tant que l'Administration Fiscale Nationale (AFN) devait être subordonnée au Ministre des Finances. Ensuite, à l'Administration Fiscale Nationale devaient être soumis les Services de l'Administration Fiscale (SAF) dont la portée serait adaptée au nombre des voïévodies. Les grandes voïévodies, avec les agglomérations en développement dynamique (Varsovie, Trojmiasto, Katowice, Poznan) auraient eu plus un service fiscal. En plus, l'Administration Fiscale Nationale serait associée à une Information Fiscale Nationale. Dans les structures des services de l'administration fiscale auraient dû fonctionner les bureaux de l'administration fiscale avec les filiales et succursales. Le nombre et la portée de l'activité des bureaux de l'administration fiscale seraient indiqués par le Ministre des Finances. Les bureaux de l'administration fiscale devaient avoir des directeurs responsables de leur gestion.[6]

Les principes préalables de la loi étaient discutés pendent les séances des équipes indépendantes constituées pour cette occasion et pendent les rencontres de nombreux groupes de travail. Ils ont été consultés au cours des réunions des dirigeants du Ministère des Finances et aussi pendant les séminaires et les conférences, ainsi qu'à l'occasion d'un débat publique qui a été initié entre autres sous forme d'un „Forum" spécial ouvert pour ce motif sur le site Internet du Ministère des Finances.

Hélas, l'introduction de la réforme de la fiscalité n'a pas réussi, malgré l'existence d'un projet de modification qui était déjà formulé comme réponse à la nécessité de changement dans l'administration du ressort des finances. Parmi les causes de cette échec, il faut énumérer surtout le manque de moyens financiers adéquats ainsi que le manque de circonstances sociales et organisatrices favorables. Car il faut souligner le fait que ledit projet de changement des structures de l'organisation n'était qu'une mesure servant à obtenir un objectif plus important (conformément à la mission de l'administration fiscale – celle de percevoir les droits budgétaires à titre des droits de douane, impôts et paiements dont le montant soit juste selon les normes en vigueur,

6 Idem.

tout en cherchant de diminuer au maximum les frais de ces opérations, d'une manière qui suscite la confiance au sein de la société[7]). Il n'était pas possible d'obtenir le but plus important sans introduire en parallèle des changements au sein du système, de l'organisation et de la mentalité, ce qui n'a pas été garanti.[8] Les circonstances externes et l'atmosphère générale étaient essentielles pour la réalisation de cette réforme. En ce lieu il vaut la peine d'énumérer le manque d'une attitude constructive des travailleurs et des syndicats qui pourraient assurer un climat politique favorable pour la réalisation de la loi sur l'AFN. La désapprobation qu'ils ont exprimée et le fait que le projet a été défini comme un „produit inacceptable de mauvaise qualité", qui vise à endommager les droits des travailleurs sans garantir les droits acquis, tout cela a fortement influencé le climat politique qui accompagnait la réalisation du projet. En plus, il faut énumérer parmi les causes de l'échec de la réforme de la fiscalité: le manque de décisions prises d'une manière énergique qui rendent possible la réalisation des tâches prévues par la loi sur l'AFN, le manque de possibilité de concilier les besoins liés à la réalisation de la loi sur l'AFN avec les nécessités résultant des opérations à accomplir à l'heure actuelle, le manque d'une prospective claire d'une augmentation progressive de la rétribution dans l'appareil fiscal. Une cause importante de l'échec de la réforme en question, c'était aussi le manque de communication efficace et transparente interne entre les unités de l'administration fiscale, ainsi que le manque d'atmosphère favorable permettant de convaincre les clients de l'administration fiscale des avantages portés par la loi sur l'AFN.[9]

Une étude plus approfondie des principes et des solutions proposés par la loi sur l'AFN, avec les causes de l'échec de cette réforme, passe le cadre de ce travail, c'est pourquoi les auteurs se sont limités à signaler les problèmes les plus importants.

7 Op.cit. M. Szołucha, *Krajowa Administracja Skarbowa …,* p.153
8 Op.cit. J. Kapica, *Krajowa Administracja Skarbowa …*,p. 182
9 Cfr. M. Szołucha, *Krajowa Administracja Skarbowa. Spostrzeżenia, uwagi i wnioski* [w:] Z. Gilowska, R. Tadeusiewicz, J. Tchórzewski, *Nowoczesna administracja skarbowa,* t. 3, Warszawa 2007, s.152-165

Streszczenie

Obecna struktura polskiej administracji skarbowej nie sprzyja efektywnemu wypełnianiu jej funkcji fiskalnej i standaryzacji ich pracy - charakteryzuje ją nierównomierność finansowania i wyposażenia poszczególnych jej elementów oraz istnienie wielu konkurencyjnych ośrodków decyzyjnych. Sytuację tą zmienić miało skonsolidowanie służb skarbowych i celnych i utworzenie Krajowej Administracji Skarbowej. Miała być ona oparta o wykształconą kadrę, której jakość gwarantować miały właściwy system wynagrodzeń, powiązany z okresową oceną poziomu pracy i jasno określoną ścieżką awansu zawodowego, system szkoleń i utworzenie Krajowej Szkoły Skarbowości. W celu optymalnego wykorzystania zasobów informatycznych przewidywano utworzenie Centrum Informatyki podporządkowanego Ministerstwu Finansów. Wśród przyczyn niepowodzenia reformy wymienić należy przede wszystkim uwarunkowania zewnętrzne – zmianę na stanowisku ministra finansów i koalicji rządowej, negatywne nastawienie niedostatecznie poinformowanych pracowników i związków zawodowych, a także trudności z pogodzeniem reformy z realizacją przez aparat skarbowy jego bieżących zadań.

Paweł J. Lewkowicz

THE IMPACT OF THE EUROPEAN COURT OF JUSTICE CASE-LAW ON INDIRECT TAXES SYSTEM IN POLAND – SELECTED PROBLEMS

Directives and their implementation into our legal system as well as case-law of the European Court of Justice (ECJ) play a crucial role in the establishment and implementation of tax law in Poland. Those acts and judgments gained the significant meaning with the accession of Poland to the European Union. Unfortunately, new Polish tax acts, allegedly harmonized to Community regulations, after over four years of being in force, are still brought into question by the ECJ and the Polish legislator repeatedly delays or even ignores the rulings of the ECJ in the process of tax law establishment. In my opinion, even more objections should be raised against the actions of tax authorities (especially of the first of instance) in the scope of implementation of the Court judgments as these institutions most frequently ignore the judgments while making decisions pointing out the necessity of the application of domestic regulations. However, in compliance with Article 2 Part I of the Treaty[1] from the date of accession new member states shall be bound by the provisions of the establishing Treaties and the acts adopted by the Community institutions and European Central Bank before the day of the accession. Moreover, the fact that Community law is a part of Polish legal system is also proved by the provisions of Article 87 and Article 91 (3) of the Constitution of the Republic of Poland. These provisions introduce the structure of sources of law and application priority of international agreements and legislation of the international organizations with reference to domestic acts, as long as these acts cannot be co-applied.[2]

Additionally, as the regional administrative court stated in one of its rulings, the interpretation of the Community law contained in ECJ case-law is binding not only for courts giving decisions, but also for other member state institutions, which is concluded in Article 234 of the Treaty[3].

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1 Treaty on the Accession of the Republic of Poland to the European Union (OJ L 236, 23 September 2003)

2 See more in this scope wyrok WSA w Warszawie z dnia 25 maja 2007 r., sygn. akt III SA/Wa 240/07, LEX nr 309079.

3 See wyrok WSA z dnia 12 marca 2008 r., sygn. akt I SA/Ol 31/2008, nie publikowany.

Fortunately, the lack of the implementation of the Court judgments is not a rule, however, it constitutes an exception frequently made. Some crucial examples (in the author's opinion) of the partial or absolute lack of the implementation of the ECJ rulings in the scope of provisions establishment on indirect taxes in Poland will be presented.

The impact of the judgments on application of that law will be taken into consideration as well. Due to the essence of the issue and an extremely large extent of the Court case-law the article is confined to the examples only on value added tax and excise tax in Poland.

One of the most crucial interpretative problems on value added tax (especially at the eastern border of Poland), which was heard before the Court, was a possibility given to a taxable persons to apply a reduced rate 0% of VAT as a so-called VAT refund for travellers (Tax Free for Tourists). Pursuant to Article 126 (1) of the Act on VAT[4], natural persons who are not residents within the territory of the Community, shall be entitled to VAT refund paid on acquisition of goods within the territory of the country, which have been exported from the Community in an untouched state in the personal luggage of travellers. However, there are several conditions which have to be met to obtain the reimbursement, contained in other provisions of the Act. First of all, the acquisition of goods should take place by the registered taxable person who keeps records with a cash register and has drawn up the agreements on VAT refund for travellers. Moreover, the vendors must notify the head of tax authority that they are vendors, provide travellers with written information on VAT refund regulations in four languages, mark the retail outlets with a sign informing on the possibility to purchase good in these outlets and also inform the head of tax authority on the place where travellers can obtain a refund.[5] It is not the refund of the tax that is crucial to VAT reimbursement for travelers but the possibility to apply the reduced rate 0% of VAT by a taxable person on the supply of goods from which the tax refund has been made. Many conditions must be fulfilled to apply the rate 0% by a taxable person and as it seems they do not always depend on the taxable person's will and knowledge. Under Article 128 of the Act on VAT the presentation of the personal document (which includes the amount of tax paid at the moment of sale of goods) which was issued by vendor to the traveller constitutes the grounds for the tax refund. Goods exportation should be confirmed on this document with the border customs office's stamp. Customs office confirms the exportation after the exported goods have been presented by the traveller and the data included in the passport or other identity document have been checked. Moreover, in order to apply 0% tax rate the taxable person has to have the exportation document confirmed before the VAT return form

4 Ustawa z dnia 11 marca 2004 r. o podatku od towarów i usług, Dz. U. Nr 54, poz. 535 ze zm.
5 Article 127 of the VAT Act.

is submitted for a particular month. A legal question arose in the scope of these provisions and concerned both the exportation of goods outside the Community and stamps and signatures on TAX FREE document. The issue also resulted in doctrine disputes and differences in jurisdiction on the grounds of the 'old' Act on Value Added Tax and Excise Tax[6]. Tax authorities questioned the possibility of the 0%VAT rate application whenever one of these elements was defective (lack of signature, lack of stamp, a stamp was not genuine etc.). However, the regional administrative courts' standpoint was that a taxable person cannot be liable for the third parties' actions that were not familiar to him/her or which s/he could not have learned of despite his/her due diligence. The Regional Administrative Court's judgment of 11 December 2007[7] could be an example here, which states that even a lack of customs office border stamp does not prove that the goods have not been exported and as a consequence the taxable person may not be deprived of the right to apply the 0% VAT reduced rate only on that ground[8] The legitimacy of this case-law line, created thanks to the Regional Administrative Court case-law in Bialystok, was confirmed by the ECJ in 2008. The Court's judgment of 21 February 2008, case C-271/06 Netto Supermarket GmbH & OHG versus Finanzamt Malchin affirmed that Article 15(2) of Sixth Directive 77/388 must be interpreted as not precluding a member state from granting an exemption from value added tax on the supply of exported goods to a destination outside the European Community, when the premises for such an exemption are not met but the taxable person could not be aware (despite his/her due commercial diligence) that they were not met, due to the fact that the purchaser provided a forged export document.

The Court noticed that it would be contrary to the principle of legal certainty if a member state which has laid down the conditions for the application of the exemption of supplies of goods for export to a destination outside the Community (by prescribing, among other things, a list of the documents to be presented to the competent authorities and which accepted, initially, the documents presented by the supplier as evidence establishing entitlement to the exemption) could subsequently oblige the supplier to account for the value added tax on that supply, where it transpires that, due to the purchaser's fraud, of which the supplier had and could have had no knowledge, the conditions for the exemption were in fact not met.[9] Following the ECJ judgment administrative courts continued this line of case-law and started applying the Court's judgment during proceedings directly. A special attention must

6 See Article 21a-21e ustawy z dnia 8 stycznia 1993 r. o podatku od towarów i usług oraz o podatku akcyzowym, Dz. U. Nr 11, poz. 50 ze zm.

7 I SA/Bk 487/07, nie publikowany

8 See also wyrok WSA z dnia 12 grudnia 2006 r., I SA/Bk 312/06, nie publikowany; wyrok WSA z dnia 21 marca 2006 r., I SA/Bk 10/06, nie publikowany; wyrok WSA z dnia 29 czerwca 2005 r., I SA/Bk 128/05, nie publikowany; wyrok WSA z dnia 25 stycznia 2006 r., I SA/Bk 377/05, nie publikowany.

9 See more A. Bącal (red.), Orzecznictwo ETS a polska ustawa o VAT, Wrocław 2008, s. 575 i n.

be paid to 9 July 2008 judgment of the Regional Administrative Court[10], in which the Court affirmed that "taking into consideration Article 15(2) of Sixth Directive, the interpretation of this provision made by the ECJ in case C-271/06 of 21 February of 2008 and principles of Community law, without proving that the taxable person knew or even by exercising due commercial care could have known and should have become aware that there is no stamp mark of customs office on the issued TAX FREE document or the goods, mentioned in this document, have not been exported abroad in fact, s/he may not be deprived of the application for the reduced rate 0% of tax". Unfortunately, despite clear and reasonable indications from case-law courts and doctrine, the Polish legislator did not decide to make any changes in this matter when broad amendments of VAT Act were being prepared. No crucial changes in this scope [except the provision of Article 129 para.1 (2) in which the expression "before submitting the tax return form" was turned into "within the expiry date for submitting the tax return form"][11]were introduced in 7 September 2008 Act on the amendment of VAT Act and other acts.

Another crucial ruling of the ECJ to Polish VAT Act is the ruling which refers to the possibility of obtaining a refund of excess input tax over the due one within 60 rather than 180 days by taxable persons who have begun their business activity or keep it for period less than 12 months. According to Article 97 (5) of the Act on VAT the time limit of the refund of excess input tax over the due one shall be extended up to 180 days in the case of taxable persons who commence a taxable activity or taxable persons who have commenced taxable activities within the period of less than 12 months before the application for the registration for intra –Community transactions is submitted. It does not, however, apply to entities who left a deposit in the amount of 250,000 zlotys in the tax authorities. Nevertheless, the ECJ recognized those provisions to be contrary to European law. The Court stated in its judgment of 10 July of 2008[12] that "Article 18(4) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (Common system of value added tax: uniform basis of assessment, as amended by Council Directive 2005/92/EC of 2 December 2005) as well as the principle of proportionality oppose the national regulations on VAT which extend the time limit for the tax refund for new taxable persons from 60 to 180 days unless they leave a deposit to a value of PLN 250 000.

Such provisions cannot be considered as "special measures for derogation" intended to prevent certain types of tax evasion or avoidance within the meaning of Article 27(1) of the Sixth Directive 77/388." The amendment of the Act on VAT

10 I SA/Bk 162/08, nie publikowany
11 See Article 1 (62) of the amending act
12 Case C-25/07, Alicja Sosnowska versus Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu

mentioned above, which will come into force on 1 January 2009, seems to bring in a positive aspect as Art.97 items (5) to (7) has been deleted by the legislator and the basic time of 60 days for the refund with the possibility of its shortening to 25 days has been accepted. The legislator, however, maintained the time limit of 180 days (although it is not consistent with the Court ruling) as the basic time limit for the taxable persons who have not carried out activities being subject to tax in tax period. This time limit may be shortened to 60 days at the taxpayer's request, on condition of the security on his/her property.[13]

With reference to excise taxation, a special attention must be paid to judgments concerning excise tax assessment on second-hand vehicles imported and sold before their first registration. Under the Excise Tax, a ceiling rate was determined at 65% of the tax base pursuant to Article 75 (1) of the Act on Excise Tax.[14] It should be added that the rate has remained unchanged till today, but of course in connection with the rulings of the ECJ, it does not apply to passenger vehicles older than two years, acquired in other member states. The problem of application of this rate on the purchase of other harmonized goods, however, still exists. Under Article 90 of the Treaty no member state shall impose, directly or indirectly, on the products of other member states any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, this provision prohibits the imposition of (direct or indirect) internal taxes to protect products of the member state. The judgment of the ECJ of 18 September 2007 case C-313/05 was crucial in the scope of the imposition of excise tax on passenger vehicles older than two years. The Court in its ruling stated that the first paragraph of Article 90 of the Treaty is to be interpreted as opposing an excise duty with reference to the amount of the duty imposed on second-hand vehicles over two years old, acquired in a member state other than that which introduced such a duty exceeds the residual amount of the same duty incorporated into the purchase price of similar vehicles which had been previously registered in the member state which introduced that duty. It is for the national court to examine whether the legislation at issue in the main proceedings, in particular the application of Article 7 of the Ordinance of the Minister for Finance of 22 April 2004 on Lowering of the Rates of Excise Duty, has such an effect. This means that, in principle, a Polish act cannot impose higher taxes than those in the given country, because it could infringe the principle of the neutrality of taxes and constitute a specific duty on imports.[15] The thesis of that decision was confirmed in another the ECJ judgment of 17 July 2008, case C-426/07 Dariusz Krawczyński versus Dyrektor Izby Celnej w Białymstoku.[16] The rulings of the ECJ are also

13 See VAT w praktyce, pozycja wymienno kartkowa Warszawa 2008, aktualizacja listopad 2008, s. 8 i n.
14 Ustawa z dnia 23 stycznia 2004 r. o podatku akcyzowym, Dz. U. Nr 29, poz. 257 ze zm.
15 See K. Lasiński-Sulecki, glosa do wyroku TS z dnia 18 stycznia 2007 r., C-313/05, PP 2007, nr 4, s. 41
16 LEX nr 399225

reflected in case-law of regional administrative courts in Poland. For example, in the judgment of 25 May 2007 r. the Regional Administrative Court in Warsaw[17] affirmed that "with regard to guarantee function of Article 90 of the Treaty of Rome of 1957 establishing the European Community, under which it is unacceptable to impose higher taxes than those imposed on similar domestic products and methods of determining the excise tax on secondhand vehicles, which has come into force in the country and whose starting point is the declared price of the vehicle, the basis for calculating the excise tax payable should be the vehicle transaction price. The only upper limit of the tax should be the amount of excise tax included in the market value of similar vehicles, which were previously registered in Poland i.e. the residual excise tax". The similar position was taken by the Regional Administrative Courts in Poznan and Bialystok.[18] The consequence of settled line of case-law was the Act on Overpayment Refund of Excise Tax Paid for the Acquisition of Intra-Community Transactions or Import of a Passenger Vehicle.[19] However, it might be worrying that the act came into force after one and a half year from the first rulings of the Court, which means slow process of implementation of EU directives into the Polish tax system. This phenomenon should be evaluated as clearly negative. The fact, that the act concerns only the period from 1 May 2004 to 30 November 2006 and taxable persons of excise duty exclusively, must be emphasized. This, however, results in confusion in the scope of obtaining the excess refund by the taxable person who got rid of passenger vehicle, purchased within intra-Community transaction, before its first registration. The question of intra- Community acquisitions of passenger vehicles as well as import of those vehicles have been solved in a completely different way, probably due to the referred judgments, in the draft of new Act on Excise Tax. Chapter V of the draft, which entirely concerns the passenger vehicles acquisition (Art. 96 to Art. 108 of the draft)[20], includes very detailed regulations in this scope.

Summing up the above considerations, it can be concluded that the influence of the ECJ's rulings on tax law application in scope of indirect taxes in Poland is an extremely important and these rulings are fully used by the administrative judiciary. The application of the Court experience on the stage of first instance, in which case-law are used, are much worse. The discrepancies between Polish acts and Community provisions on the stage of tax law establishment are also slowly but systematically eliminated. Although some objections may be raised with the reference to the pace of the proceedings, the process should be regarded as undoubtedly positive.

17 sygn. akt III SA/Wa 240/07, LEX nr 309079

18 See wyrok WSA w Poznaniu z dnia 16 marca 2007 r., sygn. akt I SA/Po 518/07, „Monitor Podatkowy" 2008, nr 2, s. 23 oraz wyrok WSA w Białymstoku z dnia 30 lipca 2008 r., sygn. akt I SA/Bk 206/08, nie publikowany.

19 Ustawa z dnia 9 maja 2008 r. o zwrocie nadpłaty w podatku akcyzowym zapłaconym z tytułu nabycia wewnątrzwspólnotowego albo importu samochodu osobowego, Dz. U. Nr 118, poz. 745

20 See the Bill on Excise Tax of 6 October 2008 (druk sejmowy nr 1083)

Streszczenie

Wpływ orzecznictwa Europejskiego Trybunału Sprawiedliwości na stosowanie prawa podatkowego w zakresie podatków pośrednich w Polsce jest niezmiernie istotny i orzecznictwo to jest wykorzystywane w pełni przez sądownictwo administracyjne. Znacznie gorzej jest z korzystaniem z doświadczeń Trybunału na płaszczyźnie pierwszoinstancyjnej przez organy podatkowe, chociaż już zauważa się takie decyzje, w których to orzecznictwo jest wykorzystywane. Powoli, lecz systematycznie, likwidowane są także niezgodności polskich ustaw z przepisami wspólnotowymi na etapie tworzenia prawa podatkowego. Chociaż można mieć zastrzeżenia do tempa tego postępowania, sam proces należy uznać za jednoznacznie pozytywny.

Waldemar K. Łuczaj

ON THE NEED OF REFORM OF TAX ENFORCEMENT SYSTEM IN POLAND

Introduction

One of the characteristic features of public finances is the fact that, unlike in case of private finances, the state has got coercive means to secure revenues (tax collection) while it is not subject to such coercion as far as expenditure is concerned (i.e. there are no coercive means against the state in this respect)[1]. The situation is reversed in the case of private persons – they have no coercive measures to secure their income whereas they can be forced to pay back their debts [2].

The tax, as a public levy, is a charge characteristic of public finances. To secure a more or less regular budget income, the state supports a coercive apparatus ready to act in the case of refusal to pay this levy voluntarily – coercion is, in fact, inherent in tax systems. Therefore, to protect the state from the negative results of the indiscipline of taxpayers, tax authorities, acting in the capacity of public authority, are equipped with tax enforcement proceedings[3]. Due to numerous inconsistencies, casuistry, interpretation doubts, loopholes and inaccuracies of the regulations, these proceedings do not ensure effective tax enforcement. However, the problems with the application of the enforcement procedures are mostly due to the fact that the regulations, dating back to1966, are obsolete[4].

Despite the fact that the Act on Enforcement Proceedings in Administration has been amended several dozen of times and uniform texts of the act have been issued

1 P.M. Gaudemet, J. Molinier, Finanse publiczne [*Public Finances],* Polskie Wydawnictwo Ekonomiczne, Warsaw 2000, p. 24.

2 Ibid.

3 Currently in Polish Law, such proceedings are regulated by the Act of 17 June 1966 on Enforcement Proceedings in Administration (uniform text: Journal of Laws of 2005 No. 229, item 1594 with amds.) normalising the enforcement of pecuniary dues and non-pecuniary liabilities of public nature.

4 Z. Leoński, Administracyjne postępowanie egzekucyjne. Problemy węzłowe (*Administrative Enforcement Proceedings. Key Issues*), Wydawnictwo Wyższej Szkoły Bankowej w Poznaniu, Poznań 2003, p. 7.

three times, its basic structure has remained unchanged. This is why the undertaken actions cannot be considered as a reform of tax enforcement system. The changes, introduced to the Act of 17 June 1966, were short-term and fragmentary, adapting the proceedings to new political, social and economic conditions. They were also connected with the necessity to adjust the provisions of the act to the EU regulations after Poland's accession to the European Union. A reform, on the other hand, involves long-term and comprehensive actions that will not be interrupted at the end of the term of the Parliament. Such actions are still to be undertaken by Polish legislators.

Trends in legal regulations on tax enforcement at the turn of the 20th and 21st century in Poland

The currently binding Act of 17 June 1966 on Enforcement Proceedings in Administration, regulating among other things tax enforcement, continuously required amendments predominantly due to political and socio-economic transformation. It was in 1990, however, when a political transformation in Poland began, that the introduction of wider changes became a must – up to this moment there had been only three amendments of little significance. After 1990 the amendments were so numerous (two amendments of 1990) that a uniform text of this act was issued in 1991[5] and followed by new executive acts. Since then, the Act on Enforcement Proceedings in Administration has been amended several times. The most important amendments were introduced by the Act of 29 December 1998 on Amending Some Acts due to the Political Transformation of the State (Journal of Laws No. 162, item 1126), the Act of 8 December 2000 on amending the following acts: the Act on Enforcement Proceedings in Administration, the Local Taxes and Charges Act, the Act on State Subsidies to Interest on Some Kinds of Bank Loans, the Law on Public Trading in Securities, the Tax Ordinance Act, the Public Finances Act, the Corporate Income Tax Act, the Act on the Commercialisation and Privatisation of State Enterprises – related to adjusting Polish law to EU regulations (Journal of laws of 2001 No.122, item 1315) and the Act of 6 September 2001 on amending the Act on Enforcement Proceedings in Administration and some other acts (Journal of Laws No. 125, item 1368).

The most extensive and significant amendment in recent years was beyond doubt the Act of 6 September 2001 on amending the Act on Enforcement Proceedings in Administration and some other acts (Journal of Laws No. 125, item 1368). It aimed to adapt the above mentioned act to current social and economic reality, particularly in terms of enforcement of pecuniary dues, as well as to make certain regulations more precise.

5 Journal of Laws, No. 36, item 161.

Due to the currently binding Constitution, it was also essential to incorporate into the very act a number of regulations on executive bodies, fees and expenses, which up to then had been included in executive regulations only. Furthermore, it was necessary to contain within the Constitution regulations related to the appointment of tax chamber-registered property appraisals and tender procedures for the sale of movables.

These changes were primarily meant to improve the efficiency of tax enforcement system, which would consequently lead to the improvement of the condition of public finances sector, and finally cause the acceleration of economic growth. As a result, the regulation became an element of the middle-term financial strategy prepared by the Ministry of Finance.[6]

In order to implement these principles, the range of enforcement measures applied in enforcement proceedings related to pecuniary dues was extended, i.e. within the framework of the provisions specifying the enforcement of pecuniary dues from other pecuniary liabilities and property rights, new regulations were introduced to cover the amounts due from:

– rights stemming from securities registered in securities accounts,
– securities not registered in securities accounts,
– bills of exchange,
– copyright and related rights, as well as industrial property rights,
– shares in commercial companies and partnerships.

Moreover, a new enforcement measure, enabling to cover the amounts due from real estate, which was up to then reserved for court enforcement proceedings, was introduced. The underlying reasons for this step were both economic and organisational.

In addition to the changes listed here, the Act of 6 September 2001 on amending the Act on Enforcement Proceedings in Administration and some other acts introduced a series of other changes meant to make the enforcement of pecuniary dues more efficient. These changes were slightly less significant though.

6 For the justification of the bill of the Act of 6 September 2001 on amending the Act on Enforcement Proceedings in Administration and some other acts see the websites of the Sejm (Polish Parliament) http://www.sejm.gov.pl and the Senate http://www.senat.gov.pl.

Contemporary problems of tax enforcement in Poland

Frequent amendments to the Act on Enforcement Proceedings in Administration so far have not resulted in the expected increase of the efficiency of administrative enforcement of pecuniary means. On the contrary, in recent years we witness deterioration in the coercive enforcement of all pecuniary dues performed by the Heads of Tax Offices, which is explicitly shown in table 1[7]:

Table 1

Year	Number of writs of execution to be settled in the reporting period (along with the initial balance)	Number of writs of execution settled in the reporting period	Ratio of settled writs of execution in % (4:3)	Amount of arrears covered by writs of execution to be settled (in thousand PLN)	Amount of tax arrears enforced (in thousand PLN)	Enforcement ratio in %
2004	15 747 569	5 903 114	37,49%	11 832 215	2 541 508	21,48%
2005	11 797 665	6 396 698	35,94%	13 264 040	2 631 268	19,84%
2006	19 333 369	6 846 730	35,41%	14 443 137	2 808 170	19,44%

According to the Ministry of Finance, this poor performance is the result of the level of employment which is too low in comparison to the systematically growing number of writs of execution to be settled[8]. Table 2 depicts how the level of workload of tax enforcement services in tax offices changed in 2003-2006[9]:

Table 2

Period	Number of writs of execution to be settled	Dynamics (the previous period = 100)	Number of employees	Dynamics (the previous period = 100)	Average number of writs of execution to be settled by one employee	Dynamics (the previous period = 100)
1	2	3	4	5	6	7
2003	12 800 247	X	4 018	X	3 186	X
2004	15 747 569	123,03%	4 090	101,79%	3 850	120,86%
2005	17 797 665	113,02%	4 090	100,00%	4 352	113,02%
2006	19 333 369	108,63%	4 154	101,56%	4 654	106,96%

7 The answer of the undersecretary of the state in the Ministry of Finance, acting on behalf of the Minister, to the parliamentary question No. 7202 about raising the revenues from the collection of goods and services tax by tax offices. See the website of the Sejm: http://www.sejm.gov.pl.

8 Ibid.

9 Ibid.

A low increase in employment combined with a high rise in the number of writs of execution to be settled leads to a continuously growing workload in tax enforcement units of tax offices. For instance, the number of execution writs to be settled by one employee in 2006 increased by 46,08% compared with 2003. Consequently, although in consecutive years the enforcement services managed to settle more and more writs of execution, hence collecting more and more amounts due, the efficiency of tax enforcement has not improved[10].

Both representatives of doctrine and practitioners point to other factors that have impact on the deteriorating efficiency of enforcement of pecuniary dues[11], in particular such as:

- imputation of considerable tax arrears based on post-audit decision as a result of proving fictional transactions which cannot be subject to efficient enforcement proceedings (e.g. due to the failure of fiscal inspection authorities to submit applications for securing the satisfaction of tax liabilities prior to determining such liabilities),
- impossibility to collect tax arrears from debtor's assets that are subject to enforcement proceedings, e.g. lack of funds in the debtor's bank account, salaries received by a debtor lower than the amounts subject to enforcement, etc.,
- lack of assets that could be subject to enforcement proceedings,
- debtor's assets encumbered with a registered pledge to the benefit of banks resulting from bank loans taken out by a debtor,
- difficult to enforce tax arrears from previous reporting periods that were subject to enforcement proceedings that proved to be ineffective or that resulted in collecting only a very insignificant sum,
- rise in uncollectible arrears owed by business entities as well as by natural persons who no longer run privately-owned businesses,
- rise in the number of debtors whose assets are more difficult to determine, which in consequence significantly extends the length of proceedings,
- problems with establishing debtor's place of residence, the fact that debtors are abroad, both of which make the assessment of their assets impossible,

10 Ibid.

11 Ibid. and E. Ruśkowski, W. Grześkiewicz, Konieczna reforma systemu egzekucji zobowiązań podatkowych, (*Necessary reform of tax enforcement system)* Prawo i Podatki (*Law and Taxes)* 2006, Vol. 2, pp. 30-31.

- lengthy judicial proceedings to disclose debtor's assets and compulsory mortgages, as well as lengthy penal proceedings against the debtors who evade paying their tax obligations,
- low efficiency of judicial proceedings to disclose debtor's assets,
- division of marital property,
- growing number of enforcement proceedings conducted simultaneously by both courts and administration units, which considerably extends the length of proceedings,
- problems with covering tax obligations from property rights, in particular from shares and copyright, due to insufficient information on holding such rights by debtors;
- low efficiency of enforcement proceedings taken or reopened to collect tax arrears that due to the taxpayer's failure to meet the statutory requirements have not been cancelled in the course of previous restructuring proceedings,
- low efficiency of covering tax obligations from movables,
- unsatisfactory efficiency of covering tax liabilities from real estate,
- but also:
- problems with the application of the binding law by the employees of tax enforcement units of tax offices due to the inadequacy to reality, instability, and ambiguity of the regulations, as well as changing interpretations of the said regulations by the Ministry of Finance, tax chambers, and courts,
- insufficient level of knowledge and competence of enforcement employees resulting from no opportunities for their professional development, i.e. especially higher and post-diploma study programmes, apart from few opportunities of internal and departmental training courses,
- lack of adequate inspection over tax enforcement services, in particular lack of internal audit.

Conclusions

Our discussion proves that short-term and fragmentary solutions introduced to the regulations on tax enforcement system in Poland are definitely not enough to reform this system. To achieve the results that live up to our expectations, the changes must be comprehensive and concern not only legal regulations but also organisational issues. Therefore, according to the author of the present paper, we

should support the recommendations on the most important aspects of the reform of tax enforcement system, raised by some representative of the doctrine. These assumptions include[12]:

1. Organisation of regulations. With the above in mind, it is legitimate to call for a new act on enforcement proceedings in administration dealing exclusively with the enforcement proceedings of pecuniary dues, thus resulting in the separation of enforcement of pecuniary dues and non-pecuniary obligations. Such a solution seems to be well-grounded due to fundamental differences inherent to these two proceedings, e.g. different nomenclature, application of dissimilar means of execution, etc. Furthermore, we should insist that relevant regulations of the Tax Ordinance Act of 29 August 1997 (uniform text: Journal of Laws of 2005 No. 8, item 60, with amds.) be used in enforcement proceeding of pecuniary dues instead of the regulations contained in the Administrative Procedure Code of 14 June 1960 (uniform text: Journal of Laws of 2005 No. 98, item 1071 with amds) that have been applied so far, as the former would be more relevant to the nature of enforced dues. Still, these regulations should be adapted to the present socio-economic and political situation and aimed at simplifying the procedures.
2. Reorganisation of administrative enforcement services. The reorganisation should aim to establish executive bodies at the provincial level. Locating such authorities in the capitals of the provinces would facilitate concentrating in such cities, qualified and competent staff that would manage to deal with more difficult enforcement proceeding, including the collection of dues from real estate. Following the pattern of Polish regulations dating back to the early thirties of the previous century, we should also consider appointing two separate executive bodies for the tax enforcement and for the enforcement of other pecuniary dues respectively.
3. Establishing a departmental system of education for fiscal staff, taking into account the needs of enforcement services. The best instrument of the policy of educating fiscal employees would be establishing a specialised higher education institution in imitation of the solution adopted in Germany for instance. Currently, departmental institutions responsible for training courses fail to fulfil this function. At present, the requirements faced by the employees dealing with enforcement proceedings are by no means excessive. It is sufficient that the tax enforcement officer, also the head of the enforcement unit in a tax office, dealing with tax enforcement inter alia holds a higher education qualification whereas for other employees of the unit it is enough to have secondary education. Such requirements are incomparable with those

12 E. Ruśkowski, W. Grześkiewicz, op. cit., p. 31.

faced by court bailiffs, who need to hold a higher education qualification in law, serve a two-year pupilage, pass an examination for a bailiff, and, on top of these, work for at least two years as an assistant bailiff.

4. Making the institution of internal audit more widespread and operating better. The internal audit should be specialised in enforcement related issues and prepared to improve the performance of enforcement services by carrying out complex analyses of influential factors on and impediments to the functioning of enforcement apparatus, which would facilitate ex ante sanative actions.

To sum up, a real reform of tax enforcement system in Poland requires not only a new act regulating the administrative enforcement proceedings of pecuniary dues but also the one on the administrative system of enforcement authorities. Implementing the above mentioned recommendations, these acts should also introduce legal instruments to ensure fast, efficient and effective performance of administrative enforcement apparatus in current socio-political and socio-economic situation, at the same time complying with all standards necessary for the validity of legal system and ensuring the rights of its participants. Free of excessive formalisation, these regulations should introduce lucid principles governing the actions of enforcement authorities, creditors, debtors and other persons involved in the administrative enforcement proceedings as well as transparent rules determining the responsibility for taking action or failing to act.

The reform of tax enforcement system in Poland is of the outmost urgency as the efficiency of enforcing this public levy is one of the key factors influencing the financial condition of the state. Similarly, it plays a crucial role in the efficiency of state's public authority to exert influence both in cases when the debtors evade satisfying their obligations and on the extent in which individuals and legal persons voluntarily fulfil their obligations.

Streszczenie

Obecnie obowiązująca ustawa z dnia 17 czerwca 1966 r. o postępowaniu egzekucyjnym w administracji, regulując także egzekucję podatków, ciągle wymaga nowelizacji wynikających z politycznej i społeczno-ekonomicznej transformacji. Pomimo podejmowanych czynności nowelizacyjnych, nie mogą być one rozważane jako reforma systemu egzekucji zobowiązań podatkowych. Zapronowane zmiany okazały się krótkotrwałe i fragmentaryczne. Co więcej, nie przyniosły poprawy w zakresie wzrostu skuteczności podejmowanych egzekucji.

Artykuł ten dowodzi, że prawdziwa reforma systemu egzekucji podatków w Polsce wymaga nie tylko nowej ustawy regulującej samą procedurę, ale także nowych przepisów dotyczących całego systemu egzekucji administracyjnej.

Andrzej Melezini

INFLUENCE OF THE EUROPEAN COURT OF JUSTICE JURISPRUDENCE ON THE APPLICATION OF TAX LAW IN POLAND

I The European Court of Justice (hereinafter the ECJ), its full name being the Court of Justice of the European Communities, according to Article 7 of the Treaty establishing the European Community[1] (hereinafter the TEC) is one of the institutions of the European Communities (hereinafter the EC). As the chief judicial body of the EC, according to the Article 220 of the TEC, the ECJ ensures the observation of the law in the interpretation and application of the TEC. Its jurisdiction embraces legality control of the Community acts *(recours de la légalité)*, actions on responsibility *(recours de pleine juridiction)* and preliminary rulings *(renvois préjudiciels)*. The aim of ECJ's activity is to control and ensure the observation of the EC internal legal order, while on the grounds of tax law, the ECJ is to protect the taxable person against the lack of neutrality, certainty and stability of taxation. The ECJ's role is also to ensure uniform application of Community legislation, which is performed by giving preliminary rulings (Article 234 of the TEC), which directly bind the national courts. In the period 2001-2007, of the total number of 2891 direct actions, 246 of them, i.e. 8.5 %, concerned taxation matters. In 2007 alone, of the total number of 222 direct actions submitted to the ECJ, 48 of them concerned taxation matters (42 references for a preliminary ruling, 6 direct actions)[2]. There is no doubt that the rich jurisprudence of the ECJ serves the Member States as a signpost for changes in their internal legislation to match the EC pattern.

II The basic EU legal principle, i.e. the principle of supremacy of the EU law to national laws, came into force in Poland with Poland's accession to the European Union (hereinafter the EU) on May 1st, 2004[3]. All doubts which arose over the application of the EU law primacy principle on the grounds of Polish tax law, were dismissed by the ECJ judgement in the case Erich Ciola v Land Vorarlberg[4]. In that

1 Consolidated version of the Treaty on European Union (Official Journal C321 E/1, 29 December 2006)
2 ECJ Annual Reports published at www.curia.europa.eu
3 The Treaty of Athens of April 16th, 2003 (Official Journal L236, 23 September 2003)
4 ECJ Judgement of April 29th, 1999 in case Erich Ciola v Land Vorarlberg, ECR 1999, page I-02517

judgement, the Court rules, that all administrative bodies of each Member State are subject to the obligation as to primacy of Community law. The administrative court (in Poland: the Voivodship Administrative Court – as the court of first instance, and the Supreme Administrative Court – as the court of second instance) should reverse any administrative decision which is in conflict with Community law. Thus, no specific individual administrative decision that has become final and is in contradiction to Community law should be subject to enforcement. The aforementioned judgement includes another ruling of particular importance, i.e. the principle of supremacy of Community law is applicable not only to national laws laid down after the date of Poland's accession to the EU, but also to all legal acts which came into force before the date of accession. The thesis of the abovementioned judgement was presented by the ECJ as a preliminary ruling referring to the following question: "Does Community law, in particular the provisions on the freedom to provide services in conjunction with Article 10 of the TEC and Article 2 of the Act on the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, give the service provider, who is a resident in Austria, the right to assert that the prohibition issued by a specific individual administrative decision adopted in 1990 should not be applied in decisions of the Austrian courts and administrative authorities adopted after the date of accession".

The provisions of Polish national law should be consistent not only with the statutory law of the EC, but also with the EC common law and the ECJ case-law. One of the main principles governing the EU legal order is the procedural autonomy of the EC Member States[5], according to which the organisation of the judiciary is an exclusive competence of the Member States, and the provisions of Community law may not interfere with national systems of legal protection bodies ("it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law"). However, the separate and autonomous legal system of each EC Member State should be consistent not only with the constitution of that country, but also with Community law. In this case, the ECJ case-law acts as a link between national laws of the Member States and the model, primary Community law.

On the grounds of Article 10 of the TEC, and the ECJ judgement in *von Colson*[6] case, in the case of any inconsistency between the provisions of national

5 ECJ Judgement of December 16th, 1976 in case Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland, 33/76, ECR 1976, page 1989

6 ECJ Judgement in case Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, 14/83, ECR 1984, page 1891.

and Community laws, it ought to be eliminated through systemic interpretation of particular national law. Due application of national law with regard to Community law depends chiefly on the administrative courts and tax administration of each Member State, which should safeguard the observation of the rights and obligations under Community law. There is no doubt that the accession to such a macro-structure as the EU is, sooner or later means a need to reform and harmonise any country's domestic legislation with EU law in order to facilitate the application of tax law and prevent the Member States from being held responsible for failure to comply with the provisions of EU law. Unification of tax law among the EU Member States directly influences the strengthening of economic relations among them, which, in turn, translates into free movement of capital, intensified transborder activity of entrepreneurs, and overall improvement of economic conditions of the regions which are lagging behind.

III The adjustment process of Polish tax legislation to meet EU standards began at the point of our country's association with the EU[7] and has been continuing since. In order to ensure compliance of the provisions of Polish tax law with EU law, the first stage of harmonisation process regarded the amendment of customs law, banking law, accounting law, direct and indirect taxes. At the moment Poland entered the EU structure, the few still non-unified areas of tax law were covered by interim periods. The unification procedure results from Poland's membership in the EU and the obligations it involves.

The most advanced legislative changes, intended to introduce the provisions of Community directives and ECJ case-law, regarded the Polish Goods and Services Tax Act. Before Poland's accession to the EU, the Constitution of the Republic of Poland was the only legal act of supreme legal power to which taxpayers could refer. The opportunity to submit disputes arising from failed implementation of EU law to the European Court of Justice, forced a thorough reconstruction of the value added tax system. The new VAT Act included not only a modified subjective and objective scope of taxation, but also commencement date of tax obligation and the scope of tax exemptions.

Since Poland's accession to the EU, it has been more and more common and frequent for the Polish administrative courts to refer to the ECJ jurisprudence. The ECJ case-law sets legal precedents, thus indicating the direction of Community law interpretation. In consequence of the application of a specific ECJ ruling, after the tax proceedings have been completed and the administrative decision has come into force, it often turns out that the provisions of material tax law applied to date are contradictory to the EU legal order and should be amended. At such point, the ECJ role is of crucial importance, as it has all the powers to ensure a coherent and

7 European Agreement of December 16th, 1991 (OJ of 1995, No. 63 item 324)

uniform development of Community law through the internal legislations of the Member States.

IV Judicial control over the legality of tax administration actions is of utmost importance for the correct functioning of tax law[8]. Whereas, the tax administration itself should competently function in a multicentric law system[9], which, in place of a classic legal order based on the hierarchy of the sources of law, features two (or more) sub-systems deriving from different centres (Polish and EU). The legal interpretation applied by the ECJ directly influences the application of law and changes in law that is clearly visible in the following examples. The first one refers to the additional tax liability which is stipulated in the Polish tax law at 30% rate of: understated output VAT, overstated VAT refund or the overstated amount of the tax difference, i.e. the so-called VAT sanction[10]. Such a provision was intended by the legislator to motivate taxpayers to fulfil their tax obligations in a diligent and honest manner. It should be noted at the beginning, that on the grounds of the EU VAT Directives[11], there are no regulations concerning additional tax liability. As a new EU Member State, Poland enjoyed some derogations in tax law, which offered an opportunity to withdraw from the application of EU legal provisions in a specific period of time, as it was e.g. with the reduction of VAT rate for new housing until the end of 2007. However, the derogation provisions included no regulations regarding the VAT sanction. The Ombudsman approached the Constitutional Tribunal, which is empowered to adjudicate on the conformity of legal provisions to the Constitution, to rule on the non-conformity to the Constitution of the provisions regarding VAT sanction, as they were, in fact, of penal character. The Constitutional Tribunal ruled[12], that the abovementioned provisions did not conform to Article 2 of the Constitution[13] in the part, in which the referred provisions allow the application to the same person and same deed of both the administration sanction (described by the Act in question as "additional tax liability") and the "penalty for tax offences" (stipulated in the Penal Tax Code[14] - hereinafter the PTC). It should be stressed that inaccurate VAT return forms were also penalised under the abovementioned PTC. The Constitutional Tribunal ruled, that imposing double penalty on a natural person for the same deed did not conform to the Constitution, however, according to the

8 R. Mastalski, The Way Judicial Interpretation of Tax Law Changes after Poland's Accession to the EU, "Prawo i podatki" ("Law and Taxes"), No 9/2006, p. 29.

9 R. Mastalski, "The Application of Tax Law", Warsaw, 2008, p. 59.

10 Article 109 of the Goods and Services Tax Act of March 11, 2004 (OJ No 54 pos. 535 with amendments, hereinafter referred to as VAT Act), transferred from the preceding Act of January 8, 1993 on Goods and Services Tax and Excise Tax (OJ No 11 item 50 with amendments).

11 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L No 347 with amendments).

12 Judgement of the Constitutional Tribunal of April 29, 1998, Ref. K 17/97, published in "The Constitutional Tribunal Jurisprudence" 1998, No 3, item 30 – Professional Tax Service.

13 Article 2 of the Constitution of the Republic of Poland: "The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice".

14 Penal Tax Code Act of September 10, 1999 (consolidated version OJ of 2007, No 111, item 765)

Constitutional Tribunal, it was in line with the Constitution to penalise legal persons, i.e. commercial law companies, in such a way.

Article 27 of Sixth VAT Directive[15] provided for the possibility to introduce special measures by the domestic legislations of the Member States. However, such special measures could be taken only in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. A Member State wishing to introduce such measures should inform the Commission, which, having consulted the other Member States, should adopt a decision on the matter. It is difficult to state, that any of these conditions could be applied to the abovementioned VAT sanction. Since the sanction's character and the scope of its application were the subject of constant disputes in literature, the Voivodship Administrative Court (tax administration bodies have no right to refer to the ECJ) took interest in the matter and referred to the ECJ for a preliminary ruling on the interpretation of EU directives with regard to the provisions of VAT Act providing for the imposition of additional tax liability[16]. However, since the facts pre-dated the accession of Poland to the EU, the ECJ ordered[17] that it had no jurisdiction to reply to the question due to *ratione temporis* obstacle. In another attempt to settle the VAT sanction matter, the Supreme Administrative Court, in its order[18], referred to the ECJ for a preliminary ruling on the following questions: the possibility of imposing by a tax authority an additional tax liability on a VAT taxable person, and whether such an obligation is a "special measure" within the terms of Article 27(1) of the Sixth VAT Directive, and whether the power provided for in Article 33 of the Sixth VAT Directive encompasses the right to introduce the additional tax liability. It should be noticed that until the ECJ has ruled the case, Polish administrative courts are obliged to suspend proceedings in cases regarding decisions which include elements of VAT sanction construction. The abovementioned doubts expressed both by the administrative courts and in the legal doctrine, resulted in a necessity of reference for the ECJ preliminary ruling. It is the ECJ jurisdiction to assess the conformity of the application of Polish legal provisions to the EU law. What is more, the ECJ ruling in the aforementioned case is anticipated not only by the Supreme Administrative Court but also by the legislators, who are ready to amend the VAT Act and thus eliminate the provisions contradictory to EU Directives.

15 Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (77/388/EEC)

16 Order of the Voivodship Administrative Court in Łódź of February 15, 2006, Ref. ISA/Łd 1089/05, www.orzeczenia.nsa.gov.pl

17 ECJ Order of March 6, 2007, OJ of 2007, No C 96, p. 22.

18 Supreme Administrative Court Order of July 31, 2007, Ref. I FSK 1062/06, www.orzeczenia.nsa.gov.pl, issued on the grounds of Article 106 §2 and Article 162 of the Act of August 30, 2002 on the Proceedings Before Administrative Courts (OJ of 2002, No 153, item 1270 with amendments)

The rulings on the right to deduct input VAT are another example of the influence of the ECJ jurisprudence on Polish tax law. The provisions of the Polish VAT Act limit the right to deduct input VAT in several cases[19] (treating it as a privilege granted to the taxable person), e.g. there is no possibility to deduct input tax if the expenditure on purchase of goods or services could not be classified as tax-deductible costs within the terms of income tax acts[20], or when the taxable person carries out a legal transaction which lacks the form prescribed by the Civil Code[21]. It should be stressed that one of the fundamental principles of the value added tax is its neutrality. The rule of neutrality constantly strives to seek, implement and protect such legislative solutions, which will ensure that the amount of tax paid by the taxable person in the price of goods and services purchased and used for the purposes of conducting taxable activity will not constitute final cost for the taxable person[22]. In this scope, the ECJ case-law safeguards the observation of the aforementioned principle, stressing that the basic condition of the right to deduct input VAT is the relation between the tax and conducting economic activity, and that the only exception to the right to deduct input VAT is when the taxable person knew or should have known that by purchasing goods s/he was participating in a transaction connected with fraudulent evasion of VAT on the grounds of Community VAT system. Polish tax legislation was not the only one to have been criticised in the abovementioned scope[23]. At this point, the essence of the judgement in joined cases *Axel Kittel* and *Recolta Recycling*[24] is worth mentioning, in which Belgian tax authorities refused the right to deduct the VAT paid in transactions used in so-called carousel tax fraud[25]. The question the ECJ had to address was the following: "If the recipient of supplied goods is a taxable person who has entered into a contract in good faith without knowledge of a fraud committed by the seller, does that taxable person have the right to deduct input VAT?". In its judgement, the ECJ ruled that under civil law provisions taxable person cannot lose the right to deduct the VAT s/he has paid in the case when a taxable person did not know that the transaction was connected with a tax fraud, however, the contract of sale is found null and void. In such a situation, refusal of the right to deduct input

19 Article 88 (3a) of the Goods and Services Tax Act of March 11, 2004 (OJ of 2005, No 54, item 535)

20 There are two acts on income taxes in Poland: Personal Income Tax Act of July 26, 1991 (consolidated version OJ of 2000, No 14, item 176 with amendments), and Corporate Income Tax Act of February 15, 1992 (consolidated version OJ of 2000, No 54, item 654).

21 Civil Code Act of April 23, 1964 (OJ of 1964, No 16, item 93 with amendments)

22 K. Sachs Sixth VAT Directive, Warsaw, 2004, p. 417

23 ECJ Judgements: of 21 March 2000 in case C-110/98 Gabalfrisa SL and Others v Agencia Estatal de Administración Tributaria, of 8 January 2002 in case C-409/99 Metropol Treuhand Wirtschaftsstreuhandgmb H v Finanzlandesdirektion für Steiermark, J. Martini, Ł. Karpiesiuk VAT in the European Court of Justice Case-Law, Warsaw 2005, p. 390

24 K. Tetłak Gloss on the ECJ Judgement of July 6, 2006 on joined cases Axel Kittel v Belgium and Belgium v Recolta Recycling SPRL, Tax Review 2007, No 2, p. 47

25 A taxable person residing in Member State A sells goods to a taxable person residing in Member State B. Within the discussed taxation mechanism the exported goods are "VAT free" in their country of origin (A). Still, the supplier has the right to deduct input VAT. At the same time, the buyer should charge VAT at the rate prevailing in the country of destination (B).

VAT would violate an integral part of the Community VAT system. The principle of VAT neutrality precludes a rule of national law which results in the loss of the right to deduct the VAT paid, due to the fact that the contract of sale is incurably void as contrary to public policy. To summarise, one should state, that Polish regulations on VAT deduction do not comply with the principle of neutrality, thus are in contradiction to Community regulations[26]. Until they have been amended, the tax authorities and administrative courts, in this and any other case, should interpret the provisions of national law with regard to EU Directives. Should such a method of interpretation be impossible, national courts, under the principle of supremacy of Community law, are supposed to withdraw from the application of national law provisions. The reference to the ECJ for a preliminary ruling on the abovementioned case, made by national courts would be another option, undoubtedly speeding up the amendment process of these VAT provisions which do not comply with Community law.

The last example I would like to present in this article, to prove the undeniable role the ECJ plays in shaping Polish legal provisions, is the case of excise duty on imported cars. With the accession to the EU, Poland became a part of the Customs Union and, as a result, had to abolish duties on goods imported from other EU Member States. With the view to prevent Polish market from being flooded by second-hand cars, often old and in bad condition (dismantled for parts), The Excise Duty Act introduced the liability to pay excise duty on imported passenger cars older than two years (the older the car, the higher excise rate) and not registered in Poland[27]. Passenger cars imported from other EU countries (classified as non-harmonised goods) are subject to excise duty, the rate of which varies according to the age of the vehicle. In the light of EU law, such a procedure means imposing internal taxation in excess of that which is imposed on similar domestic products on the products of other Member States[28]. This case constitutes a breach of the principle of equal taxation, as second-hand vehicles being sold in Poland are not subject to excise duty. The Voivodship Administrative Court in Warsaw, while conducting proceedings in one of the cases on excise duty[29] levied on cars imported from other EU Member States, referred to the ECJ for a preliminary ruling on the case. In its judgement[30], the ECJ ruled that an excise duty such as that introduced in Poland (which does not affect passenger vehicles due to the fact that they cross the frontier) is not a customs duty on import or a charge having equivalent effect within the

26 J. Martini Invalidity of Legal Transaction and the Right to Deduct VAT Paid, Tax Jurisdiction 2007, No 1, pp. 83-84

27 Excise Duty Act of January 23, 2004 (OJ of 2004, No 29, item 257 with amendments)

28 R. Poździk, P. Sawczuk, Excise Duty on Second-hand Cars, European Court Review, 2005, No. 12, pp. 25-35

29 Judgement of the Voivodship Administrative Court in Warsaw of March 6, 2007, Ref. III SA/Wa 254/07, www.orzeczenia.nsa.gov.pl

30 Judgement of the ECJ of January 18, 2007 in case C 313-05, Brzeziński vs Dyrektor Izby Celnej w Warszawie, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0313:en:HTML

meaning of Article 25 of the EC. The ECJ also ruled that Article 90 of the EC is to be interpreted as the meaning that it precludes an excise duty, insofar as the amount of the duty imposed on second-hand vehicles, which are over two years old, acquired in a Member State other than that which introduced such a duty, exceeds the residual amount of the same duty incorporated into the market value of similar vehicles which had been previously registered in the Member State which introduced that duty. The ECJ found the Polish provisions contradictory to Community law since Poland joined the EU until the provisions ceased to be in force – i.e. November 30, 2006, when the defective provisions of the Excise Duty Act were amended[31]. In this particular case, the ECJ authorised the Voivodship Administrative Court in Warsaw to calculate the amount of overpayment, while in other cases it is for the Ministry of Finance of the Republic of Poland to prepare a detailed reimbursement procedure - having followed a series of unsuccessful attempts. The Excise Duty Reimbursement Act is most likely to come into force by the end of this year.

V The abovementioned examples only fragmentarily present the key role the ECJ plays in the shaping Polish legislation. It is obvious that the unification process of tax legislations within the entire EU is long and requires constant changes. Each ECJ ruling resulting in the withdrawal of legal provisions, which violate the rights and duties of EU citizens, is another step forward towards the development of common taxation model for all EU Member States. Making best use of the achievements and potential of each Member State, the ECJ serves the organisational purpose well by removing provisions in contradiction to Community law and by showing the directions in which tax legislations should develop. It should also be underlined, that the more accurate the Member States are in adapting their domestic legislations to EU standards, the more effective is their contribution in the process of harmonisation of EU taxation. The CCCTB – Common Consolidated Corporate Tax Base project is an example of cooperation of the Member States, initiated out of necessity to eliminate the phenomena, which influence the competitiveness in the whole EU in a negative way. In conclusion, it is worth stressing that the ECJ jurisprudence on the grounds of tax law chiefly contributes to the development of transborder standards, which should result in Europe's economic unification.

31 Order of the Minister of Finance of November 10, 2006 amending the order on the lowering of the rates of excise duty (OJ of 2006, No 210, item 1551)

Streszczenie

Artykuł został poświęcony roli i oddziaływaniu na polską legislację podatkową Europejskiego Trybunału Sprawiedliwości (ETS). Podstawowa zasada prawa Unii Europejskiej – zasada supremacji prawa UE nad krajowymi porządkami prawnym, zaczęła obowiązywać również Polskę z momentem akcesji do struktur wspólnotowych. Rozpoczęty proces przystosowania polskiego ustawodawstwa podatkowego do standardów UE stale jest kontynuowany. Istotnym elementem w tym procesie jest uwzględnianie orzecznictwa ETS w postępowaniu podatkowym i podczas wydawania decyzji. Z drugiej jednak strony okazuje się, że przepisy materialnego prawa podatkowego często stoją w sprzeczności z porządkiem prawnym UE i wymagają zmiany. W tym zakresie znaczącą rolę odgrywa Trybunał, ponieważ zapewnia on spójne i jednolite stosowanie prawa wspólnotowego w porządkach prawnych państw członkowskich.

Autor przedstawia także przykłady zmian w polskim ustawodawstwie podatkowym, które zostały wprowadzone pod wpływem orzecznictwa ETS.

Jarosław Poturnicki

THE INSTITUTION OF INDIVIDUAL INTERPRETATIONS OF TAX LAW AS PROVIDED UNDER THE AMENDED PROVISIONS OF THE TAX CODE

2005 marked the introduction of the institution of binding tax law interpretations into the Polish legal system. A period of less than THREE years of operation of these rules has demonstrated that these solutions ARE FAR FROM PERFECT. A number of deficiencies and weaknesses has made their practical application difficult for taxable persons, payers, collectors, legal successors of the taxable person, as well as for third parties responsible for tax arrears, and of course, the tax authorities. The case-law of administrative courts only confirms this state of affairs.

This institution has been amended in response to indicated problems, and entered into force in its modified form on 1st July 2007.[1] In this paper, we will present some of the solutions provided under the amendment with regard to individual tax law interpretations. An attempt of a partial assessment will also be made, based on the views of the academic world.

First of all, it must be stressed that the new system of providing individual interpretations was based on the following premises:

- centralization of providing written interpretations (apart from interpretations regarding local taxes),
- the interpretation as an autonomous (separate from an order) legal form of an administrative act,
- detailed definition of the application for an interpretation of tax law provisions,
- modification of the structure of the *rationae personae* and *rationae materiae* for the interpretation of tax law,

1 The Law of 29th August 1997 – The Tax Code (Journal of Laws of 2005, No. 8, item 60, as amended) – hereinafter: the T.C.

– direct (although not a quite) challenge of interpretations before an administrative court.[2]

In the author's opinion the amendment of the T.C. could be treated as a revolution in the sphere of tax law interpretation as it does not deprive tax payers from their hitherto privileges, and provides for more privileges at the same time. Moreover, it is directed at the elimination of the weaknesses arising from the previous provisions, which hindered reaching uniform decisions on the interpretation of tax law provisions by various tax authorities.

The T.C. amendment introduced a new chapter entitled "Tax law interpretations". The collection, practically, of all rules regarding binding tax information under a separate chapter resulted in quite a clear reorganization of this institution. The underlying reason for such a far-reaching reconstruction of rules governing the obtaining official information on the application of tax law by the applicants was the urgency of providing uniformity.

Based on the experience, the legislator made the assumption that the existing system of providing binding tax information failed to satisfy its requirements. The information provided to taxpayers was not uniform, and accordingly, they could not have been considered to be a credible and reliable source of knowledge on tax legislation. Frequent divergences in the legal assessment of identical facts presented by tax authorities in various regions of the country hardly served the purpose of building the taxpayer's trust of tax administration authorities. This, in turn, weakened the prestige of these authorities in the eyes of the taxpayers, which in some cases may have been a cause of their diminished effectiveness.

This situation made the reconstruction of the whole system of providing tax information to taxpayers a necessity. The Minister of Finance became the most important player of the institution of binding tax law interpretations being responsible for providing information to taxpayers ex officio, as well as upon their application instead of the authorities mentioned above. However, this does not pertain to interpretations regarding taxes, the collection of which is vested in local governments.

In accordance with the amended legislation – very much like before - two types of interpretations are to be provided: of a general nature, provided "ex officio", and individual interpretations, provided in response to a specific written query of the applicant. The consequences of taxpayer compliance with these two types of binding

2 M. Przewoźnik-Kurzyca, T. Rolewicz, Indywidualne interpretacje prawa podatkowego wydawane przez ministra właściwego do spraw finansów publicznych (Individual interpretations of tax law provided by the competent minister for public finance) Part 1, Monitor Podatkowy (Tax Monitor), 5/2007, p. 22.

tax law interpretations will cease to be differentiated.[3] We will only discuss the most important changes with regard to individual tax law interpretation.

The first primary change is the centralization of providing tax law interpretations. This is a direct result of the contents of the new provisions, according to which the competent minister for public finance provides a written interpretation of tax law legislation at the written application of the party concerned, with regard to this party's individual case.[4] This scheme differs from the previous regime, according to which interpretations regarding the scope and manner of application of tax law had been provided for the taxpayer by the competent tax authorities. The adoption of such a scheme of the legal regulation is directed at providing uniformity of the contents of replies provided for taxpayers. However, as it appears from the implementing regulation to the amended legislation,[5] in practice the directors of four tax chambers (Bydgoszcz, Katowice, Poznań and Warsaw) perform the Minister's duties. As regards local taxes, individual interpretations are provided by the prefect, mayor or the president of city. The Tax Code also provides that interpretations may be provided by the heads of counties and voivodeship marshals; however, as both the county and voiviodeship do not have any taxes of their own, in practice, these authorities do not possess such competences.

With the amendment of the T.C, taxpayers may benefit from the application template for a tax law interpretation – ORD-IN- developed by the Ministry of Finance, which resembles a traditional PIT (Personal Income Tax) return. The Minister of Finance defined the template by the Regulation of 20th June 2007 on the template of a tax law interpretation application and the manner the application fee is paid.[6] First of all, this template has enabled the applicant: to provide his/her identity details in a proper manner; to provide information whether the application refers to an existing factual situation or to future events; exhaustive and proper presentation of the facts or future event; and the appropriate presentation of the applicant's position regarding the case, accompanied by a legal assessment of the described factual situation or future event.

The amendment has also covered the expenses of providing interpretations. Presently, the fee has been increased to 75 PLN (payable within 7 days following the submission of the application) for each presented factual situation (or future event), even if they are included in one application.[7]

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3 M. Sobońska, Nowelizacja ustawy – Ordynacja podatkowa: omówienie najistotniejszych zmian (The Tax Code: discussion on the most important changes), Przegląd Podatkowy (Tax Review), No. 2 (190), February 2007, pp. 26-27.

4 Article 14b (1) of the T.C.

5 The Ordinance of the Minister of Finance of 20th June 2007 regarding the authorization for providing tax law interpretations (Journal of Laws of 2007, No, 112, item 770).

6 (Journal of Laws of 2007, No, 112, item 771).

7 The Ordinance of the Minister of Finance of 20th June 2007, *op. cit.*

An important element of the discussed amendment as regards the application is also the obligation of submitting a statement under of criminal liability for providing a false statement: that the elements of the factual situation covered by the application for an interpretation on the date of submitting the application, are not the subject of pending tax proceedings, tax audit, audit proceedings of a tax audit authority; and that to this extent the matter has not been resolved as to its merits by decision or order of a tax authority or tax audit authority. In the event of submitting a false statement, the provided individual interpretation shall have no legal effect.

According to the Ministry of Finance representatives, the RD-IN application template and the statement mark an improvement in the use of the institution of the interpretation of tax legislation by taxpayers, and simplify the processing of applications for an interpretation. On the other hand, the academic world is of the opinion that this is one more application form that will bear an adverse influence on the operation of the institution of the interpretation of tax law. [8]

The *rationae personae* and *rationae materiae* of the application has also changed. First of all, the group of entities that may apply for an individual tax law interpretation has been broadened. Apart from the entities that may submit an application, that is, taxable persons, payers, collectors, legal successors of the taxable person, as well as third parties responsible for tax arrears, such an application may also be submitted by an entities which, in the future, may have the status of taxable persons, payers, collectors, legal successors of the taxable person, as well as third parties responsible for tax arrears.

On the other hand, the subject of interpretation has been broadened by the already mentioned option of providing an interpretation regarding a future event. Apart from the legal assessment of an already existing factual situation, this solution is a great step in the taxpayer's favour. It is possible to apply for an interpretation of a future investment, and accordingly, make a realistic assessment of the tax safety when it is implemented. [9]

The form of an individual interpretation has also undergone a change, as it is now a letter of the Minister of Finance, addressed to the applicant with regard to his/her specific case (until 1st July 2007, this was an order or a decision). The said solution

8 Parliamentary question of 16th August 2007, No. 9238.
9 M. Sobońska, op. cit. p. 28.

was criticized consensually by both the academic world[10] and case-law[11], as under the pervious regime, written interpretations of tax law were delivered in the form of an order (possibly a decision of second instance authority). It has been stressed that the T.C. provisions created numerous interpretative problems, including, but not limited to, the determination in what form should the resolution of the second instance authority be delivered – a decision or order; and if in the form of a decision, then is this a decision of the first or second instance. The scheme adopted, which followed the 2007 amendment is to be deemed as correct, as it sets the question of tax law interpretation in order and explains its legal nature. One must share the views of that part of the academic world, and with some administrative court case-law, that acts of interpreting tax law cannot be considered as means of applying law, as the form of a decision or order is solely reserved for resolutions with a view of applying the law. [12]

A substantial change is also the lack of the binding force of the interpretation for the authority which has provided such an interpretation. However, this provision is mitigated by Article 19 of the T.C., which has set forth a general rule that compliance with an individual interpretation cannot have an adverse effect on the applicant in the event of a change of the interpretation or it is not given consideration in the resolution of the tax matter.

The deadline for providing an interpretation has also changed, as the Minister of Finance provides it without undue delay, within the3 months following the receipt of the application[13]. The scheme, according to which the 3-month time-period does not include periods that were necessary for performing certain acts, periods of a stay of proceedings or delays caused at the party's fault, or for reasons beyond the authority's control is a novelty. It is criticized by the academic world, as application proceedings may be substantially extended within the bounds of law if such a situation is justified by the Minister by numerous cases.

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10 See, inter alia, A. Bartosiewicz, R. Kubacki, Wiążące interpretacje podatkowe - fatalne zmiany (Binding tax interpretations – fatal modifications) , „Glosa" ("The Gloss") 2004, No. 11; G. Dźwigała, Wiążące interpretacje prawa podatkowego - problemy postępowania (Binding tax interpretations – procedural problems), „Przegląd Podatkowy" ("Tax Review") 2004, No. 11; W. Stachurski, Wiążące interpretacje przepisów prawa podatkowego w orzecznictwie sądów administracyjnych (Binding tax legislation interpretations in the case-law of administrative courts) –, [in:] Urzędowe interpretacje prawa podatkowego w Polsce i innych krajach Europy Środkowej i Wschodniej (Official tax law interpretations in Poland and in other states of Central and Eastern Europe) – „Białostockie Studia Prawnicze" ("Białystok Legal Studies"), 2006, pp. 72-84.

11 See, inter alia, the order dated 28th October 2005 of the Voivodeship Administrative Court in Warsaw, file No. III SA/Wa 2065/05 (unpublished), judgment dated 31st August 2005 of the Voivodeship Administrative Court in Białystok file No. I SA/Bk 178/05 (unpublished), order dated 21st June 2005, Voivodeship Administrative Court in file No. I SA/Łd 497/05 (unpublished).

12 G. Dudar, Skarga sądowoadministracyjna na pisemną interpretacje przepisów prawa podatkowego wydawaną w indywidualnej sprawie (The administrative court complaint against a written tax law interpretation provided in an individual case), Zeszyty Naukowe Sądownictwa Administracyjnego (Academic Journals of the Administrative Judiciary) , No. 3 (18)/2008, Warsaw 2008, p. 93.

13 Article 14d of the T.C.

The T.C. amendments which have been in force since 1st July 2007 also provide that a taxpayer, dissatisfied with the received tax law interpretation, may appeal to an administrative court. However, the authority which provided the interpretation must first be summoned upon in writing to compensate for the breach of law before the appeal to the Voivodeship Administrative Court of the appropriate competent jurisdiction is lodged[14]. The summons should be submitted within a 14-day period after the tax interpretation has been served. The summons is the equivalent of a remedy and is applicable in the situations, where there is no appeal authority that may make a decision as to the legality of a challenged resolution, within the bounds of its competence. In practice, this involves the necessity of another review of the matter by the Minister of Finance, and to be more precise, by the authorized four tax chambers. The necessity of summoning the Minister of Finance to review the matter once more is also provided under the provisions of the Administrative Courts Procedure Act.[15] As it has already been mentioned, the party dissatisfied with the contents of the written tax interpretation provided by the Minister of Finance – prior to lodging a complaint with the administrative court – must summon the Minister of Finance to provide a cure for the breach of law. The complaint may be lodged with the court only after the reply to the summons in question has been received, or when the period of 60 days of ineffective waiting for a response has expired.

It must be stressed that the omission of the summons stage to cure the breach of law results in the rejection of the complaint by the court, as it had been lodged prematurely. It is worth mentioning that in practice, it is also possible to submit a motion for the instigation of mediation proceedings before an administrative court, which, at least in principle, provides the taxpayer with the objective possibility of a genuine discussion with the Minister of Finance.

The amendments of the T.C. presented above, with regard to tax law interpretations, are the subject of substantial criticism from the academic world. These allegations, in principle, refer to all modifications introduced by the discussed amendment, due to their nature, designated as “unfriendly to the taxpayer”.

14 M. Sobońska, op. cit. p. 28

15 The law of 30th August 2002 - Administrative Courts Procedure Act (Journal of Laws No. 153, item 1270, as amended).

Streszczenie

Instytucja wiążących interpretacji prawa podatkowego do polskiego systemu prawnego została wprowadzona w 2005 r. Niespełna trzyletni okres jej funkcjonowania pokazał, że przyjęte rozwiązania są dalekie od doskonałości. Wiele słabych punktów w jej konstrukcji w znacznym stopniu utrudniło praktyczne zastosowanie przez podatników, płatników, inkasentów, następców prawnych oraz osób trzecich i oczywiście przez same organy podatkowe. Orzecznictwo sądów administracyjnych tylko potwierdza ten stan rzeczy.

Przepisy regulujące wiążące interpretacje zostały znowelizowane w odpowiedzi na pojawiające się problemy i weszły w życie z dniem 1 lipca 2007 r. Niniejszy referat przedstawia niektóre rozwiązania przewidziane w nowelizacji indywidualnych interpretacji prawa podatkowego. Autor częściową ocenę nowych rozwiązań dokonuje również w oparciu o poglądy doktryny w tym zakresie.

Michal Radvan

PROPERTY TAXES REFORMS IN THE CZECH REPUBLIC

On January 1, 2008, many new changes in the Czech tax legal regulation came into force mainly with the special act – the Act on Public Budgets Stabilization, informally called Topolánek's Rucksack. This act is comprised of 50 parts; every part brings new or amended regulations on particular institutions like taxes, health and social insurance, Czech General Health Insurance Company, many social and labour aspects, etc. It is not a very clear act and there is a question if one act can include so many different parts. The Constitutional Court of the Czech Republic (after many problems and with many alternative opinions) confirmed that[1].

This act introduced absolutely new, and in many aspects, revolutionary principles of income taxes. The tax rate of personal income tax is linear of 15 % only and the tax rate of corporate income tax is linear of 21 % in 2008, 20 % in 2009 and 19 % in 2010. Especially, the 15 % tax rate may sound great for employees[2]. However, the tax base (partial tax base) shall be defined as income from dependent activity or function benefits increased by sums of social security insurance premium, contribution to the state employment policy and general health insurance premium that must be paid by the employer according to special regulations.[3] The "social security" paid by employer is very high – 35 % of the gross income. It means that the tax is calculated like that:

Gross Income * 1,35 (Social Security) = Tax Base * 0,15 (Tax Rate) = Personal Income Tax.

Tax (gross tax) can be reduced to a large extent due to the tax reductions such as: the basic one of 24 840 CZK can be used for each taxpayer and the other reductions depend on social aspects (handicapped persons, students, spouses without incomes,

1 See the Judgment of the Constitutional Court of the Czech Republic no. 24/07.

2 Till the end of 2007 the tax rate was percentual progressive between 12 – 32 %, since the beginning of 2009 it will be 12,5 % only.

3 Till the end of 2007 the tax base was defined as income from a dependent activity or function benefits reduced by sums of social security insurance premium, contribution to the state employment policy and general health insurance premium that must be paid by the employee according to special act. The "social security paid by employee was 12,5 % of the gross income.

children). To calculate the net income of the taxpayer, it is necessary to deduct social insurance paid by employee of 12,5 % and tax from the gross income.

Thanks to these changes the state collects less money than before and transfers less money to the municipalities, too. Therefore, the legislators provided municipalities with new possibilities in the area of real estate tax to make compensation of redistributed incomes from income taxes.

Real Estate Tax

Historically, Czech municipalities did not have many possibilities to influence real estate tax. After the tax reforms in 2008 they have more powers to do that, but they still do not administrate this tax; it is administered by the state offices called financial offices.

And what are the possibilities of municipalities in the Czech Republic to influence real estate tax? Already several years, when eliminating consequences of natural disaster, a municipality may, by its generally binding ordinance, fully or partially (as a percentage) exempt the real estates, which are located within its area and which were affected by a natural disaster, from the real estate tax for a period of up to five years. The exemption can be effective not only for the year when the natural disaster occurred and for the following years after that, but even for the preceding taxable period. It is a problematic situation as the taxpayer is obliged to file his/her tax return by 31 January of the taxable period and in that case s/he has to file supplementary tax return. To tell the truth, this kind of exemption is not very popular and often applied. If there is a natural disaster, the municipality needs more money than usual and this exemption is not offered. Moreover, it is difficult to estimate which real estates were affected by a natural disaster (for example flats in the first floor were damaged, but flats in the fourth flour are all right).

The arable lands, hop-gardens, vineyards, orchards and permanent grass growths can be newly exempt by municipality's generally binding ordinance in 2009. This exemption cannot be applied to lands in developed area and municipal build-up area if the ordinance stipulates so and if these lands are marked in the ordinance by the parcel number and the cadastre area. Taking into consideration the reaction of many mayors it will not be used a lot: small villages with many lands that can be exempt would lose a lot of money and in cities there are not many lands like that.

Coefficient called location rent – a coefficient according to the number of inhabitants – is used only for several kinds of real estates: development lands, residential buildings, other structures that provide facilities for residential buildings, flats and non-residential premises not used for running business and garages. It

multiplies the standard tax rate. The basic value of the coefficient is set in the act and the municipalities have the right to increase or reduce a basic coefficient by means of a generally binding ordinance:

Table 1: Location Rent

Number of inhabitants / Municipality	Coefficient				
	Basic	Reduced			Increased
< 1 000	1,0	–	–	–	1,4
> 1 000 < 6 000	1,4	–	–	1,0	1,6
> 6 000 < 10 000	1,6	–	1,0	1,4	2,0
> 10 000 < 25 000	2,0	1,0	1,4	1,6	2,5
> 25 000 < 50 000	2,5	1,4	1,6	2,0	3,5
> 50 000 + Františkovy Lázně, Luhačovice, Mariánské Lázně, Poděbrady	3,5	1,6	2,0	2,5	4,5
Prague	4,5	2,0	2,5	3,5	5,0

This coefficient is used by many Czech municipalities and it has quite a long tradition especially due to its fiscal function. There were two more basic levels of location rent of 0,3 and 0,6 before the Act on Public Budgets Stabilization was introduced.

Municipal coefficient can be used for some buildings if the location rent cannot be used. i.e. houses and family houses used for individual recreation, other structures that provide facilities for houses and family houses used for individual recreation, garages, structures for business activities, non-residential premises used for business activities and garages. The municipalities have the right to set this coefficient by their generally binding ordinance for particular types of structures. The value of the coefficient is at 1,5 and it multiplies the standard tax rate. Due to its fiscal function this coefficient is quite common in the Czech municipalities.

The municipalities enjoy new rights to increase the real estate tax from the beginning of 2009. A local coefficient at 2, 3, 4 or 5 can be set under a generally binding ordinance for all real estates in their area. This coefficient multiplies the tax duty of the taxpayer for particular kinds of lands, buildings, non-residential premises and flats. As the mayors say, taxes are political questions and mayors want to be elected again. Therefore, they do not want to use this coefficient and increase the taxes twice, three times, four times or even five times. However, there are some villages and towns like Dukovany - where the nuclear power station is built or in Brno, where the ordinances on local coefficient are prepared.

The legal regulation of real estate taxation is still not perfect. We have to solve many problems not only with coefficients and exemptions. I have already written many times before, that the most urgent thing to do is to change the tax base – to replace existing unit taxation (taxes are calculated on units of the tax base, for example in m^2) to ad valorem taxation (taxes are calculated on the price of the tax base, usually in national currency, expressed as percents). The tax base should correspond with the market value of the real estate. The value should be set by municipalities that have the best knowledge about the prices in their territory without any experts or assessors. The value can be used for transfer taxes or inheritance proceedings, too. The municipalities can create the map of value zones for the purpose of the real estate tax base. Anybody who is not satisfied with the price of his/her real estate set by the municipality, should have the possibility to appeal to the local financial office like in Denmark or in Ireland. The municipalities should have the right to set the tax rate but some intervals should be included in the act (for example 0,05 – 0,5 %). The other (usually higher) tax rate should be applied to development lands and the real estates which serve business activity. Lower tax rates can be used for the real estates like family houses and flats. The municipalities should be the only real estate tax administrators. This solution would mean modern European system of the real estate taxation and easier orientation for the taxpayers. The most important is the taxpayer: in his/her tax returns s/he should complete just identification data necessary to set the tax base. The tax administrators' task should be to set the tax base, calculate the tax and assess it.

It seems that there is no political will to solve the problems mentioned above. Instead of changing and modernizing the elementary structural items, the government wants to abolish exemptions for newly-constructed residential buildings and flats in newly-constructed residential buildings owned by individuals[4] and exemptions for buildings which were reconstructed due to lower heat consumption. Especially the first change seems to be problematic and in my opinion it could even be unconstitutional: if an act gives me the right which is valid for a certain period (in this situation the right not to pay tax for fifteen years after buying e.g. a flat), can this right be abolished during this period?

Transfer Taxes

The most important change in transfer taxes (inheritance tax, gift tax and real estate transfer tax), introduced by the Act on Public Budgets Stabilization, is the exemption from inheritance tax and gift tax for persons in the first tax group (i.e. for direct relatives and spouses) and in the second tax group (i.e. other relatives and

4 Now it is 15 years after the acceptance certificate has been issued.

persons living with the decedent in one household for at least one year before the decedent's death and who took care of the common household or were dependent on the decedent's support). It means that inheritance and gift taxes are paid nowadays only by other natural persons and by legal entities, thus the administrative costs of the inheritance tax and gift tax are much higher than the revenue. The abolition of the taxes which include taxation of real burdens will be the next presumed step; real burdens were the subject to real estate transfer tax in 2007 and nowadays are taxed by the gift tax.

Taxation of Motor Vehicles

For many years the Czech legislator wanted the operators of new vehicles to fulfill ecological standards. The tax rate for vehicles in category EURO 2 was only 60 % and for vehicles in category EURO 3 and higher only 52 % of the standard tax rate. Every year this part of the act needed to be changed with respect to European regulations. However, during the discussions on the Act on Public Budgets Stabilization the question of the road taxation was completely forgotten. Therefore, the operators of new cars have no tax reductions now. The new rule of law compensating for existing situation is already signed by the President, but not published yet.[5] The tax reduction (48% for the next 36 calendar months from the date of their first registration, 40% for the period following the other 36 calendar months and 25% for the period following the other 36 calendar months) respects the date of registration and not the ecological limits. We must only believe that newly registered cars fulfill ecological and especially CO_2 emissions limits. This regulation is retroactive, as it can be used even for the 2008 calendar year.

The road tax will have to be paid for all the vehicles of the total weight of at least 3,5 tons (nowadays 12 tons) from the beginning of 2009.

Conclusion

To tell the truth, some changes are bad, some are better. Personally I agree with the new possibilities for municipalities to influence (increase or decrease) the real estate tax., however the most important problems have not been solved and I am afraid there is not enough political will to do that. The changes in the question of motor vehicles taxation are good, but coming a little too late. Many of the taxpayers have already paid advance payments and the tax administration will be (thanks to the legislators) more expensive, as tax offices will have to pay money back. The

5 30 June, 2008.

abolition of transfer taxes (inheritance and gift taxes) has been discussed for many years in the Czech Republic but I do not agree with it because these taxes are useful; on the other hand if the tax is unprofitable for the state, it is better to abolish it.

Streszczenie

Celem artykułu jest wskazanie i analiza zmian regulacji prawnych dotyczących opodatkowania mienia, które odnoszą się do nowych możliwości samorządów miejskich w kwestii wywierania wpływu na opodatkowanie mienia, nowych wyjątków od opodatkowania dziedziczenia i opodatkowania darowizn dla członków rodzin oraz tendencji do zniesienia tych podatków w zupełności, redukcji opodatkowania nowych pojazdów silnikowych etc. Na podstawie tych zmian widać wyraźnie, że opodatkowywanie mienia powoli traci efekty i funkcje fiskalne nie tylko w Republice Czeskiej, a coraz większego znaczenia nabiera funkcja regulacyjna.

Marina Karaseva-Sentsova

PROGRESSIVE TAXATION IN RUSSIA (LEGAL ASPECT)

Currently the Russian economy goes through the third stage of the tax reform. The first stage took place during the period from 1991 to 1998 and meant the transition to the market taxation. The second stage was connected with the adoption of the Tax Code of the Russian Federation in 1998 and the further development of the Russian tax system. The present stage of tax reforming in Russia is calculated for the period from 2008 to 2010. It is not so powerful as the first two stages. A main objective of tax reforming during the modern period is the adaptation of the tax laws of Russia to world economic processes.[1]

The tax system of Russia is three-level, which is caused by the federal system of the Russian State. It includes federal, regional and local taxes and charges. From the point of view of construction of tax rates the Russian tax system includes proportional (flat), progressive and regressive taxation. The central element of the Russian tax system is flat taxation. The progressive and regressive taxation takes the subordinated position.

Now in the European economic and legal science the question about the advantages and disadvantages of progressive and flat taxation is rather debatable. As for the tax law theory, in the European countries the problem of adequate legal construction tools in the personal income tax as proportional tax is actual. In this respect the Russian experience may be an object of certain interest.

1. Since 2001 the personal income tax in Russia has been constructed on a proportional (flat) scale of taxation. Today this tax is federal and established in the Tax Code of the Russian Federation (chapter.23). Before 2001 the personal income tax in Russia was progressive. This means the tax rate increased if the income of the individual increased.

It is important to note that the transformation of the personal income tax in Russia from progressive to proportional had both **social reasons and legal possibilities.** In

1 "The Basic directions of a tax policy of the Russian Federation for 2008 - 2010". Approved at meeting of the Government of the Russian Federation on March, 2nd, 2007.

other words, there were two factors, which allowed to transform the personal income tax in Russia. These were **social and legal factors.**

The social factor which resulted in the necessity for the transformation of the personal income tax from progressive to proportional was the fact that it was mainly paid by individuals with low salary. Accordingly, the only segment that "worked" was the bottom rates at the progressive scale of taxation. Those levels of population which received high incomes, in the conditions of transition economy attempted to avoid taxation. And it was possible for them because of the imperfection and inconsistency in tax laws as well as banking law, insurance law and other branches of the Russian legislation. In particular, the basic part of wages was paid without any documents, the employer developed different schemes of payment to the employee as a kind of insurance etc. As a result, the personal income tax turned regressive by 2000. In other words, the tax rate did not increase, and remained at the same level for the taxpayer with high income.

The legal factor which enabled to implement flat taxation in Russia resulted from the fact that the Russian Constitution and even the Tax Code of the Russian Federation did not set forth the principle of progressiveness of taxation. Thus, the Russian legislator in 2000 was legally free to change the progressive personal income tax into proportional.[2]

It is important to notice, that Constitutions of some countries of the European Union establish a principle of progressiveness in taxation. In Italy, according to article 53 (2) of the Constitution "the tax system has to conform to the principle of progression". In Spain, the principle of progressiveness is established in article 31 (1) of the Constitution: "Everyone shall contribute to the public expenditure in proportion to his financial means, through a just and progressive system of taxation based on principles of equality, which shall in no case be confiscatory in character". The Portuguese Constitution mentions the progressivity requirement with respect to the income tax. According to article 104 (1) "Personal income tax shall seek to reduce inequality and shall be a single, progressive tax that tares account of family needs and income". In France, the progressivity of taxation is considered consistent with the principle of equality before public charges and with the ability to pay rule (both principles are formally established in the French *bloc de constitutionnalité*).

It is necessary to note that modern discussions on the efficiency of flat taxation in the European Union have only rhetorical character. As for the desire to adopt a flat taxation in a number of the EU member-countries, their main problem would result from their legal systems.

2 M. Bourgeois, Constitutional framework of the different types of income in: The concept of tax 2005, p. 176.

2. From the point of view of understanding the principle of progressiveness it is possible to assert that the personal income tax in Russia is not progressive. The basic rate of personal income tax is 13 %. It is applied to the salary of the taxpayer as a kind of his income, to incomes of copyrights, to lease income etc.

At the same time it is necessary to have in view, that the Russian personal income tax is progressive in another sense. *This progressiveness can be formulated as follows: with the increase in the income the sum of the tax paid in the budget by the taxpayer also increases though the tax rate does not increase.*

How is such progressiveness reached? There are two ways:

– *the first way* consists in standard tax deductions,

– *the second way* consists in the establishment of special, raised and lowered rates on separate types of income.

Standard tax deductions in Russia somewhat relieve the tax burden of the taxpayer with low income. Practically, the taxpayer with low income, using standard tax deductions, pays the personal income tax under the rate of 13 %.

The basic, most widespread standard tax deduction for the taxpayer today is 400 roubles every month (slightly more than 10 euros). It is used by the taxpayer until his income has exceeded 20,000 roubles. The indicated tax deduction expires on the month in which the income of the taxpayer exceeded 20,000 roubles. For example, if the employee monthly receives wages (income) in the sum of 10,000 roubles the tax deduction will be applied within two months i.e. until his income reaches 20,000 roubles. Accordingly, in these two months the person will pay the tax under the rate of 13 % not from 10,000 roubles but from 9,600 roubles.

Besides, in the Tax Code of the Russian Federation (item 218) the tax deduction at the rate of 600 roubles monthly is provided. It acts until the income of the taxpayer has exceeded 40,000 roubles. This deduction concerns the taxpayer having children and extends on each child aged below 18 years. Besides, it holds in the case of the child being older yet below 24 and a student or a post-graduate student. This deduction supplies progressiveness of the personal income tax because actually it does not extend on the persons having the monthly income of 40,000 roubles and more.

The Tax Code of the Russian Federation provides other standard tax deduction. However, in our opinion, they cannot be considered as the deduction providing progressiveness of the personal income tax. The reason of this is that such deductions extend only on the persons having a certain social status (participants in the Great Patriotic War, people working at the liquidation of the Chernobyl accident etc.). Besides, these deductions are not limited. Thus, these deductions similarly can be

used by both people with high and people with low income, having the corresponding social status.

It is clear that the above-mentioned standard tax deductions (400 and 600 rubles) hardly provide progressiveness of the income taxation since they are too small. Unfortunately, the Government of the Russian Federation does not provide any increase in the given tax deductions, which would be useful to maintain progressiveness in the personal income tax.

However, the Government of the Russian Federation is likely to enter into the concept of «indexed tax unit» in 2009. This unit will be applied to the various indicators established in money terms. Its purpose is to minimize inflationary effect, including that on tax laws. According to the "Basic directions of a tax policy in the Russian Federation for 2008-2010" it is proposed to establish the indexed tax unit to size tax deductions under the various taxes established in money terms. It is obvious, that this indexed tax unit will be also applied to standard tax deductions. That is why it will provide progressiveness in the personal income tax. It is interesting to note, that the above-mentioned tax unit will be annually established in the federal law on the federal budget for the next fiscal year.

As it has already been noted, the progressiveness of personal income tax in Russia is provided by special, raised and lowered rates on separate types of income.

Thus, according to item 224 of the Tax Code of the Russian Federation the tax rate of 35 % is established for the following incomes:

– costs of any prizes and the prizes received as the result of competitions, games and other actions with the purposes of advertising goods, works and services, regarding excess of 4,000 roubles in the tax period;

– interest from bank investments. In this case the tax base is defined as the excess of the sum of the percent of interest from bank investments (according to the agreement between the bank and the individual) over the sum of interest, calculated according to the rate of the Central Bank of the Russian Federation). For example, the person has drawn 10,000 roubles according to the agreement on the bank deposit at the rate of 15 %. The rate of the Central Bank of the Russian Federation is 10 %. In this case the income of the taxpayer at the rate of the Central bank would make 6,667 roubles. Accordingly, the income exceeding the rate of Central Bank will make 3,333 roubles. That income (3,333 roubles) will be taxed at the rate of 35 %;

– the economy sums on percent if the taxpayer received a credit in the bank. In this case the tax base is defined as the excess of the sum of percentage towards the credit estimated proceeding from the three fourths of the current rate of the Central Bank of the Russian Federation over the sum of percent,

estimated proceeding from the conditions of contract. For example, a person has drawn, under the agreement of the bank credit, 20,000 roubles with the credit rate of 2%. The rate of the Central bank during the given period is 8%. Three quarters of the rate of the Central Bank is 6 %. Consequently, the interest rate of the person who has drawn the credit below three quarters of the rate of the Central bank is 4 % that makes 800 roubles. Proceeding from it, the taxpayer should pay the tax from 800 roubles under the rate of 35 %.

In the last two cases the raised tax rate (35 %) is established to preclude the taxpayer from avoidance of taxation if the employee receives wages in the form of bank contributions at high rate of interest and bank credits at the low interest due to the conspiracy with the employer.

The tax rate of 15% is established concerning the incomes which the taxpayer received in the form of dividends due to stockholding in the Russian enterprises. The taxpayer pays personal income tax at that rate if he is not a resident of the Russian Federation.

As a result of the above-mentioned conditions, the taxpayer having various incomes, i.e. incomes taxable at the rate of 13% and at the rate of 35%, pays the personal income tax on the average at a higher rate than 13%.

The lowered rate of the personal income tax is 9 %. It is applicable to the income in the form of dividend. The taxpayer pays the personal income tax at that rate if he is a tax resident of the Russian Federation.

As a result of the above-mentioned conditions the taxpayer having various incomes, i.e. incomes, taxable at the rate of 13% and at the rate of 9% pays the personal income tax on the average at a lower rate than 13%.

Thus, it is possible to assert, that the personal income tax in Russia is not literally proportional. It is progressive, though also poorly progressive. Progression of another kind occurs in this case. In theory such progression is called as indirect progression.

In modern conditions the personal income tax in Russia provides rather essential revenues for the budget. Consequently, the Government of the Russian Federation is not liable to change the flat rate of the personal income tax into the progressive rate.

As a whole, it is necessary to note that in the Russian tax system there are no direct progressive taxes, i.e. taxes in classical understanding.

Perhaps, the individual property tax is close to a progressive tax in classical understanding. It is established in 1992 and now its reforming is expected. Since

2009 the Government of the Russian Federation have been planning to replace this tax with the real estate tax.

Today the individual property tax can be considered as progressive because the tax rate grows along with the increasing in the cost of property. So, if the value of the property is below 300,000 roubles the tax rate amounts to 0,1%; if the value of the property is from 300,000 roubles to 500,000 roubles the tax rate amounts from 0,1 to 0,3%. If the value of property reaches over 500,000 roubles the tax rate extends from 0,3% to 2%.

In 2009 this tax will be replaced by the real estate tax. The object of the real estate tax will be a uniform object: a real estate consisting of a land area and a residence. The Government of the Russian Federation plans to make this tax progressive. The tax rates will be established by local governments since the tax is local.

In summary, it is necessary to underscore, that the absence of direct progressive taxes in the Russian tax system by no means belittles the efficiency of this tax system.

Streszczenie

Rosyjski system podatkowy charakteryzuje się trójpoziomowością, co jest spowodowane federalnym modelem. Składają się na niego podatki i opłaty federalne, regionalne oraz lokalne. Z punktu widzenia konstrukcji stawek podatkowych w rosyjskim systemie podatkowym funkcjonują stawki proporcjonalne (płaskie), progresywne i degresywne. Jednakże główne znaczenie posiada opodatkowanie proporcjonalne. Opodatkowanie progresywne i regresywne zajmują pozycję podrzędną.

Artykuł poświęcony został głównie podatkowi dochodowemu od osób fizycznych, który z zasady jest podatkiem proporcjonalnym, jednakże w jego konstrukcji występują takie elementy, które powodują, że pod wieloma względami posiada on cechy podatku progresywnego.

Natalia Solvyeva

SOME ASPECTS OF TAX REFORM IN THE RUSSIAN FEDERATION

Tax law is the youngest and most dynamically developing sub-branch of Russian financial law.

In July 1998 the first part of the Tax Code of the Russian Federation came into force. The system of taxes and fees as well as general principles of taxation in the Russian Federation were determined there. In August, 2000 the second part of the Tax Code containing the order of the collection of particular taxes came into force.

The Tax Code replaced the multitude of tax laws which were not systematized and compatible. Undoubtedly, the codification of tax legislation has mainly advantages, however, it is necessary to mark obvious incoherence in a number of tax regulations.

The present article discusses some aspects of the regulation of tax privileges and tax deductions.

A tax privilege has been defined for the first time in Article 56 of the Tax Code. The soviet and post-soviet period legislation did not provide for the definition of a tax privilege, although the post-period legislation specified the list of tax privileges.

The Tax Code, which is in force now, defines the tax privilege as an advantage granted to certain categories of taxpayers and fee payers and provided by the tax and fee legislation, on the contrary to other taxpayers and fee payers; such advantages include the possibility not to pay a tax or a fee or to pay them in a limited amount.

Tax privilege is an optional element of taxation, its assignment depends on the legislator's discretion, which could be concluded from the analysis of the Tax Code articles and confirmed by the decisions of the Constitutional Court of the Russian Federation.

The second part of the Tax Code provides the tax privileges for only two taxes: property tax on enterprises and common social tax. Therefore, it might be concluded

that the legislator tends to reduce the number of tax privileges assigned to particular taxes.

The analysis of the Tax Code articles proves, however, that the legislator has substituted the terms, which can be illustrated by the following example.

The chapter "Income tax" of the Tax Code provides four kinds of the tax deductions: standard tax deductions, social tax deductions, property tax deductions and professional tax deductions.

All of the tax deductions mentioned reduce the tax base for the categories of taxpayers stipulated by tax legislation. Each type of tax deduction is carried out in a special way, thus it could be assumed, on the basis of the essence of the tax deductions, that such tax deductions are tax privileges.

Moreover, a tax privilege has following essential attributes which distinguish it from other legal privileges.

- a tax privilege is always an advantage for a certain category of taxpayers in comparison to all other taxpayers;
- a tax privilege is always legal - based on the rules of law;
- a tax privilege is granted only to certain category of taxpayers. A category of taxpayers could be defined as a certain group of taxpayers sharing any common criterion (attribute) which distinguishes it from other taxpayers[1]. Some authors remark that the presence of a category of taxpayers to which advantages on tax payment are granted is exactly the core of the definition of privilege[2].
- a tax privilege always takes the form of special rule of law, which is applied only under the conditions determined by the legislation, "it is the subject to priority application in the determination of a particular person's tax duty"[3];
- a tax privilege is a right of taxpayers; according to the Tax Code, taxpayers have a right to refuse to use the tax privilege or to suspend it for one or several tax periods.

All the attributes of the tax privileges listed above are applicable and observed in tax deductions for income tax. It is also worth pointing out that the concept of tax deductions is a novelty in the tax legislation.

1 M. Титова, Налоговые льготы. Автореферат, St. Petersburg 2004, p 19.
2 А. Калинин, И. Николаев, О состоянии системы налоговых льгот "Финансовые и бухгалтерские консультации" 2004, № 1, p 42.
3 А. Зимин, Правовой режим налоговых льгот "Налоговые споры: теория и практика" 2005, № 11(23), p. 26.

Income tax deductions, however, are not the only tax deductions provided by the Tax Code.

Tax deductions for value added tax (VAT) and excises are regulated in Chapter 21 and Chapter 22 of the Tax Code. Tax deductions for indirect taxes mentioned above are certain amounts determined by the Tax Code for all taxpayers; they reduce the amount of the tax payable to the budget.

Obviously the rule imposed on all taxpayers cannot be defined as a tax privilege. In fact, the assignment of the tax privilege for all taxpayers means a change of general rules of tax collection.

Moreover, the rules on tax deductions for indirect taxes are not special rules which establish which taxpayers are privileged (which constitutes the essence of the tax privilege) but their application is the only possible order to calculate indirect taxes for all taxpayers.

The contradiction between tax deduction for indirect taxes and attributes of tax privilege allows to draw a conclusion that such tax deductions are not tax privileges but another element of the taxation.

The application of tax deductions established for indirect taxes which taxpayers make is a necessary action to calculate the amount of the tax payable to the budget.

As for the VAT, for example, the Tax Code provides that the amount of tax payable to budget shall be calculated on the basis of results of each tax period as the overall amount of the tax calculated according to the Tax Code, reduced by the amount of tax deductions fixed in the Tax Code (Article 173 of the Tax Code). Similar regulations are provided for excises. Therefore, it seems justifiable to relate tax deductions for indirect taxes to such an element of taxation as the order of tax calculation.

The Tax Code of the Russian Federation does not define the order of tax calculation. In the literature the order of tax calculation is stipulated as the procedure of calculation of the amount of the tax on the basis of application of the fixed tax rate to the tax base that was set during the tax period[4].

Moreover, tax deductions for indirect taxes are essential elements of the order of calculation of indirect taxes; without tax deductions indirect taxes will lose their significance and it will not be possible to calculate and pay them.

The place of tax deductions in the mechanism of indirect taxes confirms the above statement.

4 Финансовое право / Отв. ред. М. В. Карасева – М. 2007, p 328.

Indirect taxes are often perceived as consumption taxes that are included in the price of goods (services) and paid by an ultimate consumer[5].

Ms. Kudryashova E. points out that transposition of the tax is the most popular criterion underlying the definition of indirect taxes now and before[6].

Transposition of the tax can be defined as repartition of the tax between juridical subject of the tax (taxpayer) and virtual payer of the tax (tax bearer)[7].

VAT and excises are indirect taxes, the amount of which should be transposed to an ultimate consumer. Such transposition is possible if the law provides the opportunity to offset the tax that is paid for goods and services used in production.

According to the Tax Code, tax deductions for indirect taxes are amounts that are paid by taxpayers and the tax payable to budget is reduced by these amounts. The offset of the tax is neither more nor less than the result of excess of amount of tax deductions over the amount of tax payable (Article 176 and Article 203 of the Tax Code). Therefore, it could be affirmed that the transposition of the tax mentioned above occurs only by means of tax deductions.

Thus tax deductions for indirect taxes are not only an element of the order of the tax calculation but also the mechanism that allows to perform the transposition of the tax to an ultimate consumer and by that to assure the existence of indirect tax.

Unlike tax deductions for income tax (which are considered tax privileges and consequently an optional element of taxation) tax deductions for indirect taxes are an obligatory element of the order of tax calculation. As illustrated above, their assignment depends on the essence of indirect taxes and cannot depend on the legislator's discretion.

It could, therefore, be concluded that the Tax Code provides identical, legal term "tax deduction" for the legal concepts which are totally different by its legal nature and essence.

Such a situation could be explained in two ways:

1. The legislator could proceed from the polysemy of the legal "tax deduction". Some authors consider inadmissible to use polysemantic terms[8]. Nevertheless, both juridical theory and practice accepts the existence of legal terms which have several meanings, although, it was repeatedly marked that polysemantic terms lead to illegibility and vagueness of legal regulations. In any case, there

5 Г. Горина, Косвенные налоги и цены: Учебное пособие, М 2002, p. 88.
6 Е. Кудряшова, Правовые аспекты косвенного налогообложения: теория и практика, М. 2006, p 13.
7 Е. Кудряшова, Правовые аспекты косвенного налогообложения: теория и практика, М. 2006, p. 23.
8 Язык закона/ Под ред. А. С. Пиголкина – М 1990, p 107.

is an obligatory requirement to have normative definition of polysemantic terms in the text of the law. The legislator has not specified that.

2. The legislator has made a technical, legal mistake which was the designation of different legal concepts by the same legal term. This explanation seems to be the most probable. The technical, legal mistake could be described as a kind of legislative mistake that represents the break of rules of legislative technique by participants of legislative procedure as a result of their honest mistake; such mistakes are reflected negatively in the quality of legislative act[9].

Actually, there is an impression that the legislator used the term "tax deduction" in the cases stated above proceeding only from the common meaning of the word "deduction", understood as any reduction not taking into consideration the essence of each tax deduction.

In the author's opinion, the confirmation between the form and content of the legal terms and concepts used in the Tax Code of the Russian Federation is required in such a situation.

9 Б. Чигидин. Диссертация: Юридическая техника российского законодательства, М. 2002, p 120.

Streszczenie

Niniejszy artykuł prezentuje niektóre aspekty reformy podatkowej w Federacji Rosyjskiej, głownie w odniesieniu do przywilejów i potrąceń podatkowych. Pomimo, że obecnie obowiązujący Kodeks Podatkowy wprowadził wiele pozytywnych zmian w systemie podatkowym, pozostaje jednak niespójny z wieloma regulacjami podatkowymi. Wspomniane przywileje i potrącenia są przykładem takich niespójności. Potrącenia podatkowe są nowością w ustawodawstwie podatkowym i występują w podatkach dochodowym, od wartości dodanej oraz akcyzowym.

Celem artykułu jest przedstawienie różnych konstrukcji prawnych tej samej instytucji – „potrąceń podatkowych".

Vladimir Týč, Petr Mrkývka, Ivana Pařizková, Michal Radvan,
Dana Šramková, Libor Kyncl, Jan Neckár, Petra Schillerová

LA REFORME DE L'ADMINISTRATION FISCALE EN REPUBLIQUE TCHEQUE

La présente contribution est consacrée à certains aspects généraux de l'administration fiscale, qui apparaissent communs ou inspirateurs pour les Etats de l'Europe centrale et orientale et qui, au cours de la dernière décennie du XXe siècle, ont contribué aux changements socio-économiques menant au rétablissement de la démocratie, de l'état de droit et des principes de l'économie du marché. Un tournant suivant a été l'insertion graduelle des systèmes nationaux dans les structures européennes, aboutissant par l'accession à l'Union européenne.

La présente contribution représente une oeuvre commune des enseignants de la Faculté de droit de l'Université Masaryk en République tchèque: Petr Mrkyvka, Ivana Parizkova, Michal Radvan, Dana Sramkova et de leur étudiants en doctorat - Libor Kyncl, Jan Neckar et Petra Schillerova, tout ceci sous l'aimable patronage du Professeur Vladimir Tyc, qui a préparé la traduction en français et qui a été chargé de sa présentation.

1. La définition de l'administration financière et fiscale[1]

Le fonctionnement des finances publiques, l'administration de la monnaie et le fonctionnement des services financiers sont confiés, dans le cadre du pouvoir exécutif, à la compétence des organes du pouvoir public.

Il convient de faire la distinction entre l'administration publique au sens matériel, c'est-à-dire l'activité administrative spécifique exercée dans l'intérêt public, et l'administration publique au sens organisationnel, en tant que système des institutions exerçant l'administration publique au sens matériel. On accepte généralement le concept de l'administration publique comme une activité de

1 Auteur: Petr Mrkývka

pouvoir spécifique ayant le caractère du service public - un bien fourni dans le but de satisfaire les besoins publics et dans l'intérêt public par des institutions du droit public ou par l'intermédiaire des personnes, auxquelles ce service avait été confié par le pouvoir public.

L'administration des finances est l'une des parties de l'administration publique ayant une influence significative sur le fonctionnement du secteur public et de la société. L'administration des finances représente un conglomérat des activités administratives et des institutions les exerçant. Leur objet consiste en une gamme de relations pécuniaires spécifiques - les finances publiques.

Les soins de l'Etat et d'autres corporations de droit public consistent à assurer la production de la marchandise et des services pour satisfaire les besoins publics, ainsi que le fondement matériel pour cette production. Le fondement matériel de la production des biens publics consiste essentiellement en la propriété publique et l'argent public. Le soin du fondement matériel de la production des bien publics est l'un des attributs caractéristiques de l'administration financière. La propriété publique est la propriété de l'Etat ou utilisée par l'Etat, par les autres corporations de droit public et par les personnes du secteur public. La source de cette propriété sont les moyens publics, qui servent également a son entretien. Les profits de cette propriété, y compris sa vente, représentent les acquisitions des fonds publics pécuniaires. La destruction ou la perte de la propriété publique sont au détriment des moyens publics.

En ce qui concerne la catégorie de "l'argent public", il ne s'agit pas du synonyme des finances publiques. Les finances représentent une catégorie spéciale des relations sociales, dont l'objet est l'argent sous toute forme. Les finances sont par conséquent des relations impliquant l'argent : relations pécuniaires. Ces relations peuvent avoir des caractères différents car elles peuvent avoir lieu entre les personnes au même niveau, ou entre les sujets dont l'un jouit d'une position supérieure (position de pouvoir). Il peut s'agir des relations dont le but primaire est l'allocation des moyens pécuniaires dans le fonds, ceci sans une prestation réciproque de la part du sujet qui les a reçus. Il peut s'agir également des relations secondaires, dépendant de l'existence d'une autre relation. Le paiement peut aussi représenter le remboursement des services ou de la marchandise. Parfois, le paiement n'a aucune relation directe avec la prestation d'un service, mais constitue la condition pour sa prestation et peut être de nature à contribuer aux frais ou de l'abus du bien - typiquement il s'agit des droits (taxes). Il est important de prendre en considération

- la raison ou l'origine de leur existence,
- le statut des participants et des fonds, entre lesquels le transfert des finances est effectué,

– la nature de la relation - si elle est horizontale (sans élément de pouvoir public), verticale ou diagonale (par exemple relation entre le contribuable de la TVA et le consommateur) etc.

Si nous profitons de la division relativement claire des personnes et institutions dans les deux secteurs - public et privé, nous pouvons, en examinant les relations financières, conclure que même dans le cadre d'un ou deux secteurs, elles peuvent avoir la nature correspondante aux trois catégories susmentionnées. Par conséquent, il n'est pas possible d'assumer que les relations monétaires effectuées dans le cadre du secteur public appartiennent totalement à la catégorie des finances publiques, soit des finances au régime public. Les relations pécuniaires doivent être examinées également tenant compte de leur objet, c'est-à-dire la nature de l'argent, ou de leur liaison au fonds pécuniaire. Le fonds pécuniaire, établi selon la loi dans l'intérêt public, rassemblant les moyens financiers dans le but de satisfaire les besoins publics, est le fonds public. Dans le cas où les moyens destinés au fonds public sont l'objet de la relation pécuniaire, il doit s'agir des moyens que l'on peut dénommer l'argent public. Les relations monétaires dont l'objet est l'argent public appartiennent à la catégorie des finances publiques. Les finances publiques représentent donc les relations spécifiques, qui naissent, se réalisent et disparaissent dans le processus de l'établissement, distribution et utilisation des fonds publics. Les fonds monétaires publics sont les fonds, où l'argent public est alloqué dans le but de satisfaire les besoins publics.

Lorsque les finances publiques doivent être subordonnées aux ingérences relatives au pouvoir, cela s'effectue par l'intermédiaire des règles de droit public, en utilisant le droit des finances et le droit administratif. Il est parfois assez difficile d'identifier la limite exacte entre les deux branches du droit. Par conséquent, nous pouvons envisager l'existence d'un certain sous-système des règles de droit, situé à la limite des deux branches, c'est à dire du droit de l'administration financière ou du droit des finances administratif. En simplifiant ce problème, on peut constater que les règles de droit des finances sont applicables pour définir l'objet le l'administration des finances, et les règles de droit administratif régissent l'exécution des activités administratives dans l'administration des finances.

La nature des règles juridiques, les principes de leur réalisation, ainsi que d'autres problèmes relatifs à leur adoption, application et interprétation sont examinés dans les Etats membres d'une façon différente. La science juridique polonaise apparaît dans ce domaine la plus avancée.

Quant à la conception de l'administration des finances, elle ne représente pas un système cohérent des organes exerçant les activités administratives réalisant le droit des finances. L'administration des finances consiste par conséquent en un large conglomérat d'organes et institutions, où deux institutions relativement

indépendantes servent de chapeau. Il s'agit du gouvernement (Ministère des finances) et de la Banque centrale. Il existe de légères différences entre différents Etats quant à la conception de ces institutions, et également en ce qui concerne leur nombre, les formes et l'intensité de leur coexistence. On peut constater qu'il existe un niveau de l'administration gouvernementale des finances publiques et des biens publics et un autre niveau de la supervision indépendante du gouvernement du marché financier, souvent confié à la banque centrale. Il semble nécessaire de constater que dans les divers Etats, il n'existe pas d'interprétation unifiée de la notion de l'"organe." Par exemple en République tchèque et en Slovaquie, le Ministère des finances est considéré comme organe central de l'Etat, tandis qu'en Pologne cet organe est identifié au ministre des finances et son ministère lui est subordonné.

Le système de l'administration des finances est déterminé principalement selon le critère de l'objet de l'administration. L'administration financière *sensu largo* peut être divisée en éléments suivants:

a) l'administration des finances publiques,

b) l'administration des biens publics,

c) la supervision administrative du marché financier.

Si nous nous limitons à l'administration des finances *strictu senso,* c'est à dire à l'administration des finances publiques, il s'agit notamment de

a) l'administration des revenus publics,

b) l'administration des dépenses publiques,

c) le contrôle.

L'administration des revenus publics se concentre notamment à l'administration

a) des impôts,

b) des droits de douane,

c) des taxes et autres droits,

d) des autres revenus publics.

L'administration des dépenses publiques est confiée aux administrateurs des fonds publics particuliers et aux administrateurs des chapitres particuliers du budget national.

Le contrôle est réalisé dans le cadre des activités des institutions administratives et également par les institutions de contrôle spécialisées, particulièrement par l'institution suprême indépendante (en République tchèque l'Office de contrôle

suprême et en Pologne la Chambre de contrôle suprême). Le contrôle est effectué également par le Parlement, les organes de l'autogestion etc.

Nous allons maintenant nous concentrer sur l'administration des revenus publics sélectionnés : impôts, taxes et droits de douane. Parfois, la réglementation administrative a une tendance integrationnelle. Cette régulation commune trouve son expression dans les codes de procédure communs (en Pologne Ordynacja podatkowa, en Bulgarie et en Russie le Code des impôts, en République tchèque et en République slovaque la Loi sur l'administration fiscale). La création de ce code général n'entraîne pas automatiquement la création de l'administration intégrée des taxes et impôts dans le sens organisationnel. L'administration des segments particuliers de l'impôt dans le sens large se divise. Il est évident que l'administration est confiée aux organes qui réalisent l'acte taxé - organes administratifs (taxes administratives), cours et tribunaux (taxe de procédure judiciaire). Dans le cas des taxes et impôts *strictu senso* leur administration est divisée entre les organes territoriaux, l'administration des douanes et l'autogestion territoriale (taxes et impôts locaux).

La division de la compétence d'attribution dans le domaine de l'administration fiscale est réalisée selon leur type (impôts directs, TVA, taxes de consommation). L'administration des impôts directs est confiée aux organes territoriaux. Les taxes de consommation sont, par contre, administrées par l'administration des douanes. La raison est leur connexion étroite à la nomenclature du tarif douanier et au Code des douanes de la Communauté. La TVA est administrée également par l'administration des douanes comme taxe indirecte. Parfois, la compétence de l'administration des douanes est limitée à la TVA uniquement dans les cas de la prestation transfrontalière. Il convient de noter que dans la conception tchèque tout organe compétent pour l'administration d'un impôt ou d'une taxe *sensu largo,* qui constitue le revenu du budget quelconque ou fonds public (y compris le budget au niveau de l'autogestion), devient son administrateur, donc l'exécuteur de l'administration fiscale.

L'adhésion des nouveaux Etats à l'Union européenne, ainsi que l'élargissement subséquent de l'espace Schengen ont influencé d'une façon importante les activités de l'administration des douanes, particulièrement dans les pays n'ayant pas de frontière externe. Le potentiel libéré des administrations des douanes, en général bien organisées et munies du personnel qualifié, est exploité pour les activités de l'administration fiscale, par exemple l'exécution des taxes et impôts. D'autre part, il paraît assez peu effectif et peu économique de maintenir deux systèmes d'organes aux activités similaires. Pour cette raison, les réformes des finances publiques et de leur administration tendent à la fusion de l'administration des douanes et l'administration fiscale territoriale dans un seul système d'organes qui devrait

représenter une administration moderne, effective et amicale. (Voir partie 4 pour les détails.)

2. Les changements socio-économiques en Europe centrale et orientale après 1989 et leur influence sur l'administration fiscale[2]

Les impôts et leur collecte (c'est-à-dire leur administration) représentent un "métier" un peu plus récent que le métier le plus ancien. Tout renversement subit social lié au changement des conditions économiques de la société trouve sa réflexion dans l'organisation et moyens de l'administration fiscale. C'était également le cas des changements en Europe centrale et orientale au tournant des années 80 et 90. Les réformes de l'administration fiscale ont représenté le retour aux racines historiques de l'administration publique traditionnelle du temps de l'avant la Seconde guerre mondiale, c'est-à-dire le déclin de l'administration étatique centralisée du type soviétique. Elles ont également été fort inspirées des expériences de l'Europe démocratique, où l'évolution des administrations fiscales a procédé continuellement sans renversements subits. Pour illustrer le développement de l'administration fiscale dans les "nouvelles démocraties", nous pouvons utiliser l'exemple tchèque.

Après l'instauration de la République tchécoslovaque en 1918, l'administration des impôts et des douanes a été assurée par les institutions reprises de l'Empire Austro-hongrois. La première réforme des impôts a été effectuée en 1927 par l'introduction de la loi No. 76/1927. Cette loi a introduit certaines taxes directes, par exemple la taxe sur les revenus (impôt global couvrant tous les revenus des foyers), impôts sur l'immobilier, impôt sur le chiffre d'affaires, impôt successoral etc., ainsi que certains impôts indirects (taxes de consommation, taxes dans le domaine des monopoles fiscaux).

Pendant la Deuxième république (après l'Accord de Munich) a été appliqué le droit allemand. Après la libération de la Tchécoslovaquie en 1945, les décrets présidentiels ont restauré le système d'avant-guerre. A partir de 1947, suite à la nationalisation massive, les premières modifications importantes ont été introduites, par exemple la taxe sur les salaires. Les changements radicaux de tout le système de l'administration publique, liés à la prise du pouvoir par le parti communiste, n'ont pas évité l'administration fiscale et celle des douanes. En 1949, tous les organes de l'administration fiscale ont disparu et leurs compétences ont été transmises aux comités nationaux (organes de pouvoir local) de différents niveaux: comités de district (première instance) et comités de région (deuxième instance). L'administration des

2 Auteur: Michal Radvan

douanes a été en 1952 transmise des comités nationaux au Ministère du commerce extérieur, qui a créé l'Administration centrale des douanes.

Graduellement ont été introduits les impôts spécifiques correspondant au système socialiste. Il s'agissait de la taxe professionnelle (des commerçants et de l'artisanat), la taxe rurale, la taxe sur les activités littéraires et artistiques, l'impôt sur le chiffre d'affaires etc. Les taxes de consommation et des monopoles fiscaux ont été remplacées par l'impôt général. Les impôts spéciaux de la propriété (la taxe des millionnaires) ont été introduits en 1946 pour frapper les enrichissements excessifs pendant le Protectorat allemand et immédiatement après la guerre pour aider à corriger la dévalorisation de la monnaie pendant l'occupation allemande. En 1947, ces impôts ont servi de source pour neutraliser les dégâts dus à la sécheresse de cette année.

En 1952, un nouveau système de taxes et impôts a été introduit. La réforme consistait en sa simplification. L'organisation de l'administration fiscale a été modifiée en 1967. De nouvelles divisions ont été créées (celles des finances d´Etat) dans les comités nationaux. La compétence de ces divisions a été limitée aux impôts dont le revenu a été attribué au budget national. Ces divisions des finances d'Etat ont été transformées, en 1970, en administrations des finances, subordonnées uniquement au Ministère des finances.

Après 1989, à la suite des changements politiques, il a été nécessaire d'introduire des modifications considérables dans la législation des impôts. Cette législation a été largement réformée entre 1990 et 1993. Les nouvelles taxes ont été temporairement introduites (par exemple la taxe sur l'importation). La réforme radicale et définitive est entrée en vigueur le 1er janvier 1993. Les modifications ont concerné non seulement le droit matériel, mais également le droit procédural. Les taxes suivantes ont été introduites:

- taxe sur la valeur ajoutée (remplaçant la taxe sur le chiffre d'affaires),
- les impôts de consommation (concernant les huiles minérales, l'alcool et les tabacs),
- taxe sur le revenu des personnes physiques (remplaçant la taxe sur le salaire),
- taxe sur le revenu des personnes morales,
- taxe sur l'immobilier,
- taxe routière et autres.

En même temps, une nouvelle loi de caractère procédural a été adoptée. Il s'agissait de la loi sur l'administration fiscale. Cette nouvelle structure du système des taxes et impôts est en vigueur jusqu'à présent, avec certaines modifications.

Les changements subséquents ont été nécessaires, notamment dans le domaine des impôts indirects. En 2003, on a adopté une nouvelle loi sur les taxes de consommation qui a entre autres changé les noms de certaines taxes : par exemple la taxe sur les hydrocarbures est devenue taxe sur les huiles minérales. La TVA a été modifiée par la nouvelle loi en 2004. Le 1er janvier 2008 trois taxes énergétiques ont été introduites dans la législation tchèque: taxes sur le gaz naturel, sur les combustibles solides et sur l'électricité.

Dans le domaine de l'administration fiscale, il a été également nécessaire d'adopter des changements et de créer des organes capables d'effectuer une administration fiscale moderne et effective. En 1991 un nouveau système des organes fiscaux territoriaux a été établi. Ce système comprenait à l'époque 220 offices des finances de première instance et 8 offices de deuxième instance. Ces administrations fiscales territoriales sont chargées de l'administration de toutes les taxes (sauf les taxes de consommation) et également des autres revenus des budgets publics. L'administration fiscale est dirigée par la Direction centrale fiscale et financière, qui est conçue comme partie intégrante du Ministère des finances. On a créé également la Direction générale des douanes, qui est directement subordonnée au Ministère des finances et auquel les 8 directions des douanes et les offices de douanes sont subordonnés.

3. Le schéma général des administrations fiscales des pays de l'Europe centrale et orientale[3]

Comme il a été indiqué, les changements socio-économiques dans les pays de l'Europe de l'Est ont nécessité après 1989 une réforme de la structure des organes fiscaux et douaniers. Ces nouvelles administrations fonctionnent dans la plupart de ces pays sans changements de principe jusqu'à présent. Ce système paraît éprouvé et conforme aux exigences établies au moment de leur instauration. Par contre, il est nécessaire de constater que l'on ne peut pas éviter la modernisation, l'accroissement de l'effectivité et les expériences de leur fonctionnement.

Les différents pays de l'Europe ont créé plusieurs systèmes institutionnels de l'administration fiscale.

3 Auteur: Jan Neckár

1. Dans certains pays on peut rencontrer une administration unie et semi-autonome aux compétences larges embrassant la majorité ou même toute l'administration fiscale.
2. Une autre possibilité est la direction avec une autonomie minimale dans le cadre du Ministère des finances.
3. Le troisième cas est celui de plusieurs directions à une autonomie minimale dans le cadre des compétences du Ministère des finances.

Le choix de la variante de l'administration fiscale est influencé par les différences dans les structures politiques, le système de l'administration publique et sans doute également par les expériences historiques. Certains pays ont transmis aux organes de l'administration fiscale également l'exécution de l'assurance sociale, mais dans la plupart des pays cette compétence est confiée aux organes spécialisés. Dans certains pays on a fusionné l'administration des douanes et l'administration fiscale. Cette conception est à présent imitée par d'autres pays, notamment est-européens. En même temps, il existe une tendance de transmettre les tâches non fiscales aux organes de l'administration fiscale.

Dans la plupart des pays de l'Europe centrale et orientale, l'administration fiscale et douanière est conçue comme un système d'organes de plusieurs instances. A leur sommet se trouve le Ministère des finances. En République tchèque, ce système comprend trois instances. Le Ministère des finances tchèque en tant que l'organe central de l'administration fiscale et douanier est en même temps l'administration administrative à la compétence universelle. Dans la structure des organes, on distingue cependant la branche fiscale et la branche douanière, les deux étant autonomes.

L'administration fiscale est exercée par les organes de l'administration publique, compétents en ce qui concerne les mesures nécessaires pour déterminer la constatation, l'établissement et l'accomplissement des devoirs fiscaux par les contribuables.[4] Les compétences de l'administration des douanes dépendent du caractère de la taxe. L'administration des douanes est compétente en administration des taxes de consommation, des taxes énergétiques et d'une partie déterminée de la TVA. L'administration fiscale est, par contre, compétente en impôts sur le revenu, taxe de la propriété, TVA et autres taxes.

L'administration fiscale est donc exercée en République tchèque par les organes fiscaux et organes douaniers. Les offices des finances représentent la première instance dans le domaine fiscal. Ils sont dirigés par les directions des finances,[5]

4 Mrkývka, P. In: Mrkývka, P. a kol.: Financni pravo a financni sprava, 2e tome, Brno: Masarykova univerzita, 2004, ISBN: 80-210-3579-X, p. 10.

5 Il existe actuellement en République tchèque 199 offices et 8 directions des finances.

organes chargés de la révision des décisions des offices des finances rendues dans le cadre de la procédure fiscale (deuxième instance).

L'inconvénient de ce système institutionnel, en vigueur dans la plupart des pays de l'Europe centrale et orientale est sans doute la division de l'administration fiscale entre les organes financiers et douaniers dans le sens de deux systèmes institutionnels autonomes. Cette solution est source des doublements et de l'exploitation insuffisante du potentiel existant. Elle ne permet pas de profiter de la concentration de l'administration de tous les impôts dans un seul système institutionnel. Pour les sujets fiscaux, l'état actuel cause les frais administratifs élevés, dus à la double présentation des données similaires.

Les compétences communes principales des offices des finances et des douanes sont l'administration de la TVA, la réquisition des arriérés des impôts et des taxes de douane. Il existe également le problème de l'asymétrie entre l'administration douanière et fiscale. Par exemple, il existe en République tchèque, dans le cadre du Ministère des finances, la Direction centrale fiscale et financière, qui assure l'exécution de l'administration fiscale. Le lien étroit avec le Ministère montre que l'administration fiscale ne jouit pas de l'autonomie nécessaire qui rendrait possible l'indépendance du fonctionnement des organes fiscaux. Dans le domaine de l'administration des douanes, ce problème a été résolu dans le passé par la séparation de la Direction générale des douanes du Ministère des finances et par la création de l'administration des douanes en tant que système autonome subordonné au Ministère. La solution similaire pour l'administration fiscale n'a pas été réalisée, même si la coopération entre les deux administrations est essentielle.

Il reste un autre problème : celui de l'incompatibilité des systèmes d'information interne des deux administrations. Les systèmes utilisés sont très souvent différents. Par conséquent, l'administration fiscale manque de possibilité de contrôler les arriérés des taxes de douane et l'administration des douanes ne peut pas identifier les arriérés ou les surpaiements du contribuable des impôts. Cet état des choses est apparemment indésirable car il mène aux problèmes de l'application de la législation correspondante et cause l'accroissement inutile des difficultés liées à la collecte des taxes et par conséquent le décroissement de l'effectivité de l'imposition des impôts. Si un sujet contribuable doit présenter pour n'importe quelle raison le certificat de non existence des dettes (arriérés), il doit s'adresser aux deux organes. Ceci cause les frais inutilement augmentés pour les deux parties.

Ces inconvénients sont dans les pays concernés progressivement éliminés dans le cadre des réformes de la structure institutionnelle. Le but principal de ces réformes et de réduire la charge administrative pour les contribuables et pour l'administration. Plusieurs pays, principalement de l'Europe occidentale, ont déjà procédé à l'intégration des organes de l'administration fiscale et celle des douanes.

Cette approche représente une des principales solutions pour trouver la structure institutionnelle optimale. L'intégration de l'administration fiscale et des douanes apporte des économies pour tous les participants et élimine les doublements. Cette approche est avantageuse aussi pour les contribuables.

L'intégration de l'administration fiscale et des douanes a déjà été réalisée dans plusieurs pays européens et autres: Belgique, Danemark, Autriche, Pays-Bas, Lettonie et Australie. La réforme de ce type est envisagée également en Slovaquie et en République tchèque. Il faut cependant tenir compte du fait que les expériences de certains pays ne sont pas automatiquement transmissibles ailleurs en raison du système fiscal, du développement historique etc.

Les avantages de l'intégration des deux systèmes sont apparents et peuvent aller jusqu'à la réduction du nombre d'organes administratifs et par conséquent aux économies dans le budget national.

4. L'administration des douanes des pays de l'Europe centrale et orientale[6]

L'administration des douanes de la République tchèque, ainsi que les administrations des autres pays de l'Europe centrale et orientale, ont traditionnellement concentré leurs efforts sur deux tâches essentielles: la protection du marché national et communautaire par les taxes sur la marchandise importée et la supervision de cette marchandise afin d'éviter les menaces pour la santé des hommes, animaux et plantes, ainsi que la violation des droits de la propriété intellectuelle.[7] L'adhésion à l'Union européenne a apporté des changements exigeant la réaction de ces administrations dans tous les nouveaux pays. Il s'agissait non seulement de l'approximation des règles nationales à long terme aux standards européens, mais aussi des changements nécessaires au niveau fonctionnel et d'organisation.

On peut dire que tous les nouveaux pays ont dû s'adapter aux exigences de l'adhésion à l'UE qui représentait des interventions dans leurs compétences, activités et structure. Dans un certain nombre de cas, il s'est avéré nécessaire de réviser l'étendue des compétences de l'administration des douanes, entre autres du point de vue de l'exercice de ces compétences par un corps de sécurité, dont les activités exigent les frais supplémentaires.

En République tchèque, qui est un pays membre sans frontières externes (sauf les aéroports internationaux), on a aboli les contrôles aux frontières terrestres mais

6 Auteur: Dana Šramková

7 Voir La direction générale des douanes: L'administration des douanes tchèque contemporaine, Prague, 2005 (en tchèque).

l'administration des douanes doit assurer quelques nouvelles tâches. Ces tâches dépassent parfois le domaine des douanes dans le sens strict, mais concernent également d'autres domaines. Par exemple, c'est l'administration des douanes qui est désormais compétente du contrôle dans le domaine des transports de la marchandise par route et le péage routier électronique, le contrôle de l'exercice de la politique agricole communautaire commune ou le traitement de déchets. Il convient de rappeler que l'administration des douanes est composante de la force armée et ses organes ont la nature des organes de police, au moins dans certains cas (crimes selon le code pénal).

L'administration des douanes jouit également d'une position privilégiée, même dans le domaine fiscal, car dans plusieurs pays elle fonctionne comme administrateur exclusif des taxes de consommation et des taxes écologiques. Cela signifie que les organes de l'administration des douanes assurent la fixation et la collecte de ces taxes, non seulement dans les cas de l'importation, mais également au niveau interne.

On peut dire que les tâches mentionnées sont similaires dans d'autres pays. La raison est par exemple l'existence des laboratoires techniques spécialisés qui peuvent servir à déterminer la catégorie du tarif douanier de la marchandise, mais aussi à constater si la marchandise est soumise à la taxe de consommation.

Il est nécessaire de mentionner également le rôle des organes douaniers dans le domaine de l'administration de la TVA. Ici les organes douaniers n'exercent l'administration que dans les cas où il s'agit de l'importation des pays tiers.

On peut résumer que l'administration des douanes tchèque exerce actuellement, à part des taxes de douane, également les compétences dans l'administration des impôts indirects et dans le cadre de l'administration divisée aussi des activités de contrôle et de collecte des arriérés ou des sanctions imposées.

Elle est organisée comme un système de trois instances. Le niveau supérieur est représenté par la Direction générale des douanes, qui est l'organe administratif de compétence universelle. Le second niveau est représenté par 8 Directions des douanes dirigeant les offices des douanes (troisième niveau). En plus, hors de cette structure, il existe le Groupe d'intervention opérationnelle, qui s'occupe des activités spéciales pour appréhender les délinquants criminels.

La réforme envisagée est contenue dans le projet d'une nouvelle loi élaborée par le Ministère des finances. Cette loi devrait unir l'administration des douanes et l'administration des finances dans un seul système dirigé par la Direction générale fiscale et des douanes unique. Un peu plus tard, ce système devrait être complété par l'administration de la sécurité sociale. Les organes subordonnés devraient être

également unifiés, mais composés de divisions spécialisées.[8] Il paraît que le délai envisagé (2010) n'est pas réaliste et que cette réforme complexe ne sera réalisée que plus tard.

Pour l'exercice effectif des activités de l'administration des douanes, la coopération internationale joue un rôle crucial. Il convient de constater que les tâches principales dans le domaine de la protection du marché et de la sécurité du commerce international sont communs pour les administrations des douanes de tous les pays, car chaque transaction dans le commerce international concerne au moins deux administrations.[9] Les administrations des douanes de différents pays doivent coopérer étroitement. Ceci concerne particulièrement les administrations des douanes des pays membres de l'UE, non seulement sur la base des règles unifiées (règlements communautaires), mais aussi dans le sens plus large (Convention Naples II et Convention sur le système informatique des douanes). Les activités de l'Organisation mondiale des douanes sont également importantes.[10]

5. L'administration fiscale exercée par d'autres organes que ceux d'administration fiscale générale[11]

Le mode de la collecte des impôts et taxes est très important, ce qui a été noté déjà il y a 200 ans par Adam Smith. La collecte devrait être effectuée dans le temps le plus commode pour le contribuable et de la façon qui ne séquestrerait pas inutilement le contribuable. Tout ceci devait être pris en considération par la loi sur l'administration fiscale.[12]

L'administrateur fiscal est un organe de pouvoir public, qui a été chargé d'administrer un impôt ou une taxe quelconque. Les administrateurs fiscaux en République tchèque sont:

1. Ministère des finances
2. organes fiscaux et douaniers territoriaux (directions fiscales, offices fiscaux, directions des douanes, offices des douanes)
3. autres organes administratifs,
4. communes et mairies,

8 Razek, J.: Celnici zustanou celniky. In: CLO-DOUANE, juin 2008, p. 3 et s. ISSN 0323-0023 (en tchèque).
9 Voir GRC: Ceska celmi sprava soucasnosti, Prague 2005.
10 L'Organisation mondiale des douanes a été fondée comme Conseil de la coopération douanière en 1952. La Tchécoslovaquie est devenue membre en 1965. La République tchèque est devenue son membre au moment de son établissement en 1993.
11 Auteur: Ivana Pařizková
12 Voir Vancurova, A. a kol.: Danovy system CR 2004, Prague: VOX, 2004.

5. régions (départements) et leurs administrations,
6. tribunaux.[13]

Dans la catégorie des autres organes administratifs nous trouvons par exemple l'Office de la propriété industrielle (taxes relatives à l'enregistrement des droits de la propriété industrielle) et l'Inspection tchèque de l'environnement (taxes relatives au prélèvement des eaux souterraines, de l'écoulement des eaux usées etc.).[14]

Les communes et leurs mairies administrent les taxes locales (par exemple la taxe sur les chiens ou la taxe sur les déchets). Ces taxes peuvent être imposées par les communes, mais uniquement dans le cadre de la loi sur les taxes locales. L'arrêt de portée générale de l'administration de la commune constitue une base juridique de ces taxes. Leur collecte est régie par la loi sur l'administration fiscale.

L'administration des taxes des tribunaux (taxes relatives à la procédure judiciaire) est effectuée par les tribunaux.[15]

6. Coopération internationale dans le domaine de l'administration fiscale[16]

La coopération internationale dans le domaine de l'administration fiscale constitue un des éléments essentiels de la lutte contre la fraude fiscale.[17] L'échange d'informations avec les administrations fiscales étrangères contribue à la possibilité de repérer une quantité des données sur les contribuables inaccessibles pour l'administration nationale sans aide internationale. Son importance s'accroît avec la libéralisation et la mondialisation des économies nationales.

Avant l'adhésion de la République tchèque à l'UE, la coopération internationale dans le domaine de l'échange d'informations et de données n'a été effectuée que sur la base des accords internationaux. Il s'agit des accords sur l'évitement de la double taxation dans le domaine des taxes sur le revenu.

La plupart de ces accords contiennent la *clause large.* Cela signifie que les autorités des Etats membres effectuent l'échange d'informations nécessaires non seulement pour l'application de l'accord, mais aussi pour l'application des règles internes relatives aux taxes ou impôts faisant l'objet de l'accord. Les Etats membres sont donc obligés à fournir les données concernant les contribuables particuliers. La *clause étroite* n'oblige les Etats membres qu'à fournir les informations nécessaires

13 Mrkývka, P. a kol.: Financni pravo a financni sprava, Brno:, Masarykova univerzita, 2004, p. 122.
14 Bonek, V., Behounek, P., Benda, V., Holme, A.: Lexikon danove pojmy, Ostrava: Sagit, 2001.
15 Mrkývka, P. a kol.: Financni pravo a financni sprava, Brno: Masarykova univerzita, 2004, p. 134 .
16 Auteur: Petra Schillerová
17 Mrkyvka, P. a kol.: Financni pravo a financni sprava, Brno: Masarykova univerzita, 2004, p. 112.

pour l'application de l'accord, c'est-à-dire uniquement les données publiquement accessibles (accords conclus par la République tchèque avec l'Autriche et la Suisse).

Sur la base des accords mentionnés, il n'est pas possible de réaliser la coopération dans le domaine des impôts indirects. L'adhésion de la République tchèque à l'UE a changé cette situation. L'administration fiscale tchèque a joint le système de l'UE - échanges de l'information dans le domaine de la TVA et des taxes de consommation. Ce système est basé sur la directive 77/799/CEE qui a été transposée en loi No. 253/2000 sur l'entraide internationale concernant l'administration fiscale. Cette entraide couvre les impôts directs et l'organe de contact est le Ministère des finances qui peut déléguer sa compétence aux offices des finances ou des douanes.

L'échange d'informations est réalisé notamment par le courrier normal, rarement par voie électronique. Par contre, l'échange d'informations concernant la TVA est réalisé exclusivement par voie électronique. L'information doit être fournie "sans délai inutile", c'est-à-dire sans retard injustifié.

Les difficultés rencontrées lors de cette coopération internationale sont les suivantes:

- la langue - il semble être utile d'utiliser une seule langue officielle,
- les délais - il faudrait fixer les délais obligatoires pour la réponse,
- l'obligation de fournir certaines informations devrait être déterminée d'une façon positive,
- les "paradis fiscaux" – il faudrait les prendre en considération,
- l'exonération des taxes dans les cas de virements effectués par les institutions pécuniaires concernant l'exécution de certaines dettes,
- l'unification des sanctions relatives aux arriérés des taxes et impôts dans le cadre de l'UE.

La coopération internationale dans le domaine de l'administration fiscale doit être considérée essentiellement dans les cas concrets concernant les différentes branches de l'administration fiscale.

7. Systèmes d'information de l'administration fiscale[18]

Comme dans tous les domaines de l'activité humaine, l'administration fiscale utilise également les technologies d'information. Ici, la situation est plus compliquée,

18 Auteur: Libor Kyncl

car il s'agit du domaine strictement réglementé aux nombreuses limitations. Les organes de l'administration fiscale en tant qu'organes de l'Etat ne peuvent agir que dans les cas prévus par la loi. C'est la raison pour laquelle l'implementation des technologies d'information dans le domaine de l'administration publique est plus exigeante qu'en secteur privé.

L'administration fiscale tchèque a déjà commencé à utiliser partiellement les technologies d'information. Dans le cadre de l'administration fiscale, beaucoup d'actes internes sont effectués sous forme informatisée, par exemple le traitement des données dans le système informatisé des données personnelles VEMA et dans le Système d'information interne assurant la comptabilité, l'administration des biens et les enregistrements relatifs aux budgets publics. Ces systèmes sont utilisés par le Ministère des finances et des organes subordonnés (directions et offices des finances). Il existe également d'autres systèmes relatifs au budget national – par exemple ISPROFIN – Système informatique du financement programmé, CEDR – Registre central des subventions (les deux systèmes sont utilisés par les administrateurs du budget national).[19] Tous les systèmes d'information de l'administration fiscale sont en même temps les systèmes d'information de l'administration publique et sont par conséquent subordonnés aux attestations conformément à la loi sur les systèmes d'information de l'administration publique.

L'enregistrement des impôts et le dossier électronique pour l'administration fiscale sont fournis par le Système automatisé fiscal ADIS qui fonctionne en qualité d'application du support technique pour l'administration fiscale. Il contient plusieurs modules servant aux différents administrateurs des impôts. ADIS permet de recevoir les communications des personnes tierces participant sujets de la procédure fiscale. L'administration des douanes utilise son propre système d'information appelé IS CS. Ce système coopère avec d'autres systèmes et sous-systèmes dans le cadre de l'administration des douanes, par exemple les systèmes relatifs à l'exportation et l'importation (comportant les sous-systèmes ECS, AES et ICS dans le cadre du programme eCustoms au niveau de l'Union européenne). D'autres applications concernent la taxe de consommation. Les systèmes Intrastat CZ et autres systèmes européens (TARIC, QUOTA). Sauf exceptions, ces systèmes ne sont pas compatibles avec les systèmes utilisés par les organes des finances territoriaux.[20]

Les actes juridiques effectués sous forme électronique sont transmis à l'administration fiscale à l'aide du système EPO (dépôt électronique). Ce système fonctionne comme application utilisant les pages du web et les formulaires électroniques pour la communication avec les organes de l'administration fiscale à

19 Voir Markova, M., Bohac, R.: Rozpoctove pravo. Prague: C.H.Beck, 2007, ISBN: 978-80-7179-551-3, p. 109.

20 Voir Ministère des finances: partie B - Informace o cinnosti celni spravy CR za rok 2006, disponible au http//www.mfcr.cz/cps/rde/xchg/mfcr/xsl/dane_cla_32842.html

l'aide de la signature électronique. Le système EPO n'est pas compatible avec les systèmes de l'administration des douanes.

L'acte effectué le plus souvent sous forme électronique est la déclaration d'impôts. Ce système peut être utilisé également pour d'autres actes, par exemple le décompte de l'impôt sur le revenu et autres. Le système EPO fonctionne sur la base d'une boîte postale (compte personnel du contribuable).[21] Le nombre de communications électroniques accroît rapidement chaque année:

– 2002 - 311,
– 2003 - 7018,
– 2004 - 20205,
– 2005 - 48978,
– 2006 - 102866,
– 2007 - 147269.

Le changement décisif était causé par la baisse du prix de la certification de la signature électronique en 2005. Actuellement son prix est de 190 CZK (8 EUR).

Les autres registres publics (le registre des entreprises, le registre central des habitants, le cadastre de l'immobilier etc.) ne sont pas encore connectés aux systèmes de l'administration fiscale, mais le Ministère de l'intérieur prépare le projet de la loi qui permettra cette interconnexion.

Dans l'avenir proche, il est nécessaire de perfectionner les systèmes informatiques de l'administration fiscale afin de permettre leur utilisation plus rationnelle et plus effective. La connexion et la compatibilité des systèmes différents des organes et registres de toute l'administration publique permettra d'éviter l'utilisation de la forme classique (papier), ce qui la rendrait plus effective, plus rapide et contribuerait à la réduction des frais parfois inutilement trop élevés.

21 Pour davantage d'informations sur le système EPO, voir Ceska danova sprava: Elektronicka komunikace s ceskou danovou spravou http://cds.mfcr.cz/cps/rde/xchg/SID-3EA9846B=25AFD530/cds/xsl/dane_elektronicky_8157.html?year=0

Streszczenie

We wprowadzeniu niniejszego opracowania wyjaśniono podstawowe definicje z zakresu finansowej i podatkowej administracji oraz opisano społeczno-ekonomiczne przemiany w Europie Centralnej i Wschodniej i ich wpływ na administracje podatkową w Republice Czeskiej. W dalszej części przedstawiono szczegółowy schemat administracji podatkowej w Europie Centralnej i Wschodniej oraz wskazano użyteczność i konieczność połączenia administracji podatkowej i celnej, bowiem przykładowo w Republice Czeskiej organy celne po wejściu do strefy Schengen posiadają również pewne kompetencje z zakresu podatków. Podkreślono, że połączenie administracji podatkowej i celnej w Republice Czeskiej planowane jest w niedługiej perspektywie oraz że kluczową rolę dla efektywnego funkcjonowania administracji celnej odgrywa współpraca międzynarodowa w zakresie unikania podwójnego opodatkowania.

Barbara Wdowiak

CENTRALIZATION OF ISSUING THE BINDING TAX LAW INTERPRETATIONS

The current tax law interpretations have been functioning in the Polish tax law since January 1, 2005. The assessment of the two-and-a-half years' period of the principles regulating the binding tax law interpretations indicates that the solutions to this problem have not been ideal. The number of faults and imperfections hindered their practical application. The evidence for this situation is the jurisdiction of administrative courts. The system of issuing interpretations at the level of tax offices, however, led to many discrepancies within the same factual states which were to be assessed in the same way. A matter of question was also whether a tax organ could issue an interpretation related to the future of a hypothetical situation.

The necessity of complex reform of the entire institution, including even the elimination of its present standards from the legal relations, was also pointed at by the Constitutional Tribunal[1].

The cure for such disorder was supposed to be the amending law[2] of November 16, 2006 passed by the Polish Sejm, effective of January 1, 2007, excluding, inter alia, the regulations amending the system of issuing official tax law interpretations. The carried amending law (effective of July 1, 2007) transferred, issuing the binding interpretations of the tax law to the competencies of the Minister of Finances.

As the taxpayers filed tens of thousands of applications calling for interpretations every year, it was certain that the department of finances would not be able to deal independently with issuing such a great number of interpretations. The legislator had envisaged the situation then that the Minister of Finances could authorize by decree its subject organs to issue individual interpretations on the Minister's behalf, and within the specified scope, stating at the same time the material and local jurisdiction of the authorized organs.

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1 Wyrok Trybunału Konstytucyjnego z dnia 30.10.2006 r. P/36/05, OTK ZU 2006/9A poz. 129

2 Ustawa z dnia 16 listopada 2006 r. o zmianie ustawy – Ordynacja podatkowa oraz o zmianie niektórych innych ustaw (Dz. U. Nr 217, poz. 1590)

The Ministry of Finances took advantage of the possibility to transfer the issuing of interpretations into the hands of heads of some tax offices. According to the Ministry of Finances' decree[3] the heads of tax offices in Katowice, Poznań, Warsaw and Bydgoszcz were authorised to issue individual interpretations.

Article 14b § 6 of the Tax Law[4] therefore appoints the special mode of authorisation of tax organs to issue individual interpretations. It must be pointed out that including the said authorisations into the means undertaken in order to ensure uniformity of the aforesaid interpretations, is rather surprising, all the more that considering the fact that the change resulting in the transfer of competencies to issue individual interpretations to the Minister of Finances was justified by the need for standardisation of the law by the tax authority. The justification of the government bill draft on changing the Tax Law bill and on changing some other bills, implied that in the opinion of the authors of the draft "decreasing the number of offices authorised to issue the interpretations will contribute to the uniformity of law by the tax authority and will facilitate the general supervision of the matter for the Minister of Finances".

However, the change in the scope of jurisdiction of the organs authorised to issue individual interpretations did not comprise all tax organs. Such competence is still with the authority of local government officials, the mayors (city presidents), starosts or voiveodeship marshals, who issue the interpretations according to their jurisdiction.

The way of standardising of the mode of granting authorisation to issue individual interpretation in art. 14b § 6 of the Tax Law raises doubts about the real nature of the legal structure accepted in this law. The form of the act by which the authorisation is granted (decree of the Minister of Finances) as well as its statutory components seem to indicate that what is concerned here is the transfer of jurisdiction. Nevertheless, the authorized tax organ issues individual interpretations on behalf of the subject which granted the authorisation, but within the limits of local and material jurisdiction purposefully designated. The tax organ then issues those interpretations within its "own competency". Revoking the authorization granted according to art. 14b § 6 requires waiving the decree by which it had been originally granted.

Another decree by the Minister of Finances[5] introduced an application form to apply for interpretations in individual cases of tax payers and the way of payment for the application. This is a complete novelty in the Polish tax legislation which

3 Rozporządzenie Ministra Finansów z dnia 20 czerwca 2007 r. w sprawie upoważnienia do wydawania interpretacji przepisów prawa podatkowego (Dz. U. Nr 112, poz. 770)

4 Ustawa z dnia 29 sierpnia 1997 r. Ordynacja podatkowa (tj. Dz. U. z 2005 r., Nr 8, poz. 60 ze zm.)

5 Rozporządzenie Ministra Finansów z dnia 20 czerwca 2007 r. w sprawie wzoru wniosku o wydanie interpretacji przepisów prawa podatkowego oraz sposobu uiszczenia opłaty od wniosku (Dz. U. Nr 112, poz. 771)

deserves a positive assessment. A large number of applications submitted in the previous legal circumstances did not meet the elementary requirements for such applications. Taxpayers, in mostly handwritten applications, did not present the actual situation and did not include their own legal assessment of the given actual situation. Therefore, the applications for interpretation, being formalised, were complete and included all elements required by law. Undoubtedly this solution contributed to the facilitation of the process of granting interpretations by the Minister of Finances.

New regulations on interpretations are aimed at ensuring the uniformity of tax law applications. They enable to obtain the interpretation of the actual and future situation. Also the catalogue of people authorised to obtain individual interpretations was broadened. A third party in the understanding of art. 110-117a of the Tax Law may apply for the interpretation as well as a person who resides or lives out of the Republic of Poland.

After amending the law taxpayers may ask about not only the actual present situation but also about the tax interpretation of the business activities planned in the future.

It must be noted that the broadening of the scope of interpretation by the future events is in a way the expression of taking into account the doctrine which for a long time had indicated the purposefulness of such a regulation being introduced.

In the application for interpretation a tax payer must thoroughly present the actual situation, the situation which occurred or an event which will take place – as before – the taxpayer's own point of view in relation to the case. New interpretations are issued in one-instance proceedings. It might potentially accelerate the final settlement of the case by shortening the time between receiving an unfavourable interpretation and hearing the case by court. However, the applicants were left without the right to have their case re-heard by a higher instance.

The area of friction between the applicants and the Minister of Finances may be the possibility to prolong the period to issue an interpretation according to art. 139 § 4 of the Tax Law. In cases when the suspension period or the time for the applicant to carry out certain procedures is not included in the three-month period, the periods which prolong the proceeding should not raise any major disputes. Their length is determined in proper decisions and calls from tax offices. However, if the Minister of Finances intend to refer to the delay caused by the party or for reasons independent of the tax organ, there may appear disputes whether the delay was actually caused independently of the tax organ, and how long was the delay period independent of the minister of public finances.

A novelty in the proceedings related to issuing individual interpretation is the duty imposed on the taxpayer to make a statement under the threat of penalty for false testimony.

From July 1 to December 31, 2007 the Offices of National Tax Information (Biura Krajowej Informacji Podatkowej) received merely 10.233 applications. Not all of them, however, were replied to. Individual interpretations were returned to as many as 4.406 taxpayers. And it is still unknown of how long was the standard three-month period for issuing the interpretation prolonged. To make a comparison it can be added that in the first half of 2006 applications for interpretation were submitted by 32.674 taxpayers. The data provided leave out no illusions: taxpayers do not trust interpretations issued according to new principles.

A question arises whether and to what extent the major decrease in the number of applications and issued interpretations is due to the change of the organ and to what extent is it due to the changes introduced on July 1, 2007. These changes include, for example, the fees for application (PLN 75 for each actual situation).

In the view of the majority of legal experts, calling the tax interpretations binding at present is a joke. Prior to the expiry of the period of limitation there might be a check up at a company, interpretation may change and the company will have to pay the tax arrears. Therefore, as experts say, it is better not to file for an interpretation. And this all is due to the change in law which restricted the advantages of interpretations existing so far (i.e. prior to July 1, 2007), most of all due to the liquidation of the retroactive protection against tax payment and binding force for the tax organs. Prior to the change the interpretation was binding for the tax organ and did not allow any contradictory decisions.

In the new legal environment a tax organ holds the right not to take into account the interpretation while dealing with a tax case.

It does not mean, however, that the taxpayer can no longer take advantage of the protection provided by such an interpretation. The scope of protection, though, depends on the type of individual interpretation. The broader scope of protection is related to the interpretation of future actual situations.

The narrower scope of protection, which worries taxpayers, is provided by the interpretations of future situations.

According to experts, it is due to this change, inconvenient for taxpayers, that the tax interpretations, which three years before were thought to be the greatest achievement of the law on free business activity, lost their effectiveness and taxpayers' interest after July 1, 2007. Responsibility for the poor law was once again shouldered by the taxpayers.

Complying with the faulty interpretation which was subsequently changed results in tax payment exemption on two conditions:

1) The obligation was not correctly fulfilled due to the compliance with the interpretation which was later changed,

2) The tax consequences related to the event reflected by the actual situation being the subject of interpretation took place after the publication of the general interpretation following the delivery of the individual interpretation.

The change of faulty interpretation exempts the taxpayer from paying the tax only temporarily. The exemption in paying the tax due and not paid on the grounds of the faulty interpretation comprises the period of the tax calculation. For example, in the case of annual tax it is the period to the end of the tax year in which an altered general interpretation was published, the changed individual interpretation was delivered or the tax organ was provided with the copy of the administrative court decision in force waiving the individual interpretation.

What does this state of matters result in? The taxpayers have stopped applying for tax interpretations. The decreasing trend is growing. In the first quarter of 2008 only seven thousand applications were submitted. Also the significant increase in the application fee is also a case in point. Each application is subject to PLN 75 fee. It has to be paid within 7 days from the day of filing the application. The application for interpretation not paid for is left unattended. If the taxpayer presents in the application several actual situations to be dealt with, each situation must be paid for separately.

Another problem is a still increasing number of complaints on tax interpretations. This problem was dealt with in 2008 by Wojewódzki Sąd Administracyjny (Provincial Administrative Court) in Warsaw. It was all due to the changes in principles of issuing written interpretations. The proper organ to issue individual interpretations is the Minister of Finances, who transferred his competencies to four authorized heads of tax offices. However, it does not change the fact that just one court has the jurisdiction to deal with the complaint lodged in relation to the Minister of Finances' interpretation which is the WSA in Warsaw. Unfortunately, it soon turned out that the new interpretations cause a new problem. Within merely four months in 2008 Department III of the WSA in Warsaw was burdened with additional 237 complaints. It is the consequence of the regulation which makes one single organ, the Minister of Finances, to issue the interpretations . It clearly results from the general principles of the law *Prawo o postępowaniu przed sądami administracyjnymi*[6] (Law on proceedings before administrative courts).

6 Ustawa z dnia 30 sierpnia 2002 r. - Prawo o postępowaniu przed sądami administracyjnymi (Dz. U. Nr 153, poz. 1270 ze zm.)

However, these regulations cause problems both to taxpayers and tax officers. All complaints are dealt with by the WSA in Warsaw. It forces representatives of tax offices and taxpayers from all over Poland to come to Warsaw for trials. It might be a problem for courts, too for if there are too many complaints, the time of dealing with them by the WSA in Warsaw will be prolonged.

The Ministry can see the negative consequences of the centralization of issuing tax interpretations. It is considering pledging the President of Supreme Administrative Court to consider special solutions allowed by art. 13 item 3 of the law *Prawo o postępowaniu przed sądami administracyjnymi*. According to this article the President of the Republic of Poland May by his decree transfer hearing cases of specified nature belonging to the jurisdiction of another court to the provincial administrative court. Therefore, the needed change may take place without involving the Sejm. The introduction of changes in this matter is justified, especially that the Minister of Finances is the author of the interpretation only formally. In practice, they are actually prepared by the four tax offices.

There are a few possible solutions. The matter may be left as it is, but sooner or later it will lead to undesirable situations (i.e. prolonging the time of dealing with the case by the WSA in Warsaw). Having in mind the accessibility of the court to the citizen, it would also be possible to use administrative courts nearest to the complaining taxpayer's residence. The best compromise would be, however, to designate four WSAs, corresponding with the heads of revenue offices to whom the minister transferred his competences. This would allow to maintain the uniformity in judicial decisions as far as interpretations are concerned.

Almost always changes in regulations bring about consequences unforeseen by their authors. That was the case also with the interpretations. Dealing with all the cases in Warsaw means not only difficulties in participating in the trail. There arises a problem of the return of costs of tax administration functioning.

The Ministry of Finances indicates that in Warsaw there is an Office of Legal Services and Proceeding Substitution (Biuro Obsługi Prawnej i Zastępstwa Procesowego). Therefore it is possible to substitute without the necessity to delegate tax office employees, if the number of cases requires so.

However, a person who wants to appeal against the tax interpretation must go to Warsaw for a trial. It is hard to find a reasonable justification of this regulation.

The poor quality of the tax regulations and frequent changes cause problems to taxpayers, tax organs and administrative courts. Will the Polish taxpayer live to see the times when there is no need to issue tax interpretations? It would be so simple if a businessman could focus on running business activity and to calculate the tax and would only need to know the income.

Streszczenie

Celem regulacji standaryzujących wiążące interpretacje prawa podatkowego jest zapewnienie ujednolicenia stosowania przepisów prawa podatkowego. Obowiązujące od dnia 1 lipca 2007 roku zmiany w tym przedmiocie ograniczyły znaczenie funkcjonujących do tej pory interpretacji – przede wszystkim z powodu likwidacji ich retroakcyjnej mocy i wiążącego charakteru dla organów podatkowych. W obecnym stanie prawnym zakres ochrony przyznanej w ramach dokonanej wykładni zależy od rodzaju indywidualnej interpretacji. Szerszy zakres ochrony odnosi się do interpretacji okoliczności, które mogą zaistnieć w przyszłości. Zmiana w tym zakresie spowodowała, że podatnicy przestali wnioskować o interpretacje podatkowe. Odpowiedzialność za złe prawo została ponownie przerzucona na podatników.

Kazimierz Włodkowski

THE REFORM OF CUSTOMS SYSTEM IN POLAND

The accession of Poland to the European Union has evoked the necessity of extending the force of the valid EU customs regulations into our territory. The Polish sovereignty in its normative sense has been passed in the range of customs to the EU with few exceptions[1], but the sovereignty in its executive sense has stayed within the competence of the Polish customs authorities. The sovereignty in its normative sense means the possession of full powers in the scope of imposing customs duty as well as granting customs reliefs and exemptions. The essence of the sovereignty in its executive sense is, on the contrary, the fact that only state authorities are entitled to make decisive powers regarding customs duty in a certain area. The creation of structure of customs administration stays within the individual competence of member states. The only requirement is creating a body that would be able to implement acquis communautarie and cooperate with customs administrations of other member states.

While discussing the reform of customs system one should first of all think of the meaning of a customs system. The EU Customs Code defines customs authorities in a very general way – it says that they are authorities entitled, among other things, to use the regulations of customs law[2]. Before the accession of Poland to the EU the Director of the Customs Office and the President of the Central Customs Office used to be considered as customs authorities. In the course of preparations to the accession to the EU the President of the Central Customs Office lost his position as the main customs authority in the Polish administration and his competence was taken over, pursuant to the Act on transformations in the customs administration, including amendments to some acts, dated 20 March 2002, by the competent Minister of Public Finance and by the directors of customs chambers[3]. As a result

1 Compare The judgement of the European Court of Justice of 15 June 1999, case CV-394/97, Sami Heinonen v. Helsingin karrajaoikeus, H. Sylwestrowicz, E. Kalisiak, C. Wernic, Wspólnotowy i narodowy system zwolnień celnych, Szczecin 2005, p. 143.

2 Art. 4.3 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ L 302 of 19.10.1992.

3 Dz. U. Nr 41, poz. 365 z 2002r. z późn. zm.

of transformations, carried out in 2002, a new three-level structure of customs administration was created[4]:

- the main level of the Polish customs administration consists of the heads of customs offices along with the respective offices,
- the second level consists of the directors of customs chambers along with the respective chambers,
- the third level is the Minister of Finance along with the respective office[5].

The customs offices that existed before 30 April 2002 were transformed into customs chambers as bodies which accompanied the directors of customs chambers, and some of the customs divisions were transformed into customs offices as bodies accompanying new authorities in the structure of customs administration i.e. the heads of customs offices. As a result of the implemented changes 17 customs chambers and 67 customs offices were created[6]. Customs Divisions are subordinate to Customs Offices, and the units of customs administrations called the customs stations were liquidated. A similar, three-level structure of administration, in the scope of customs matters, may also be found in other member states of the EU, that is, in Germany, Austria, France, Italy, Lithuania and Latvia.

Under the 20 May 2003 Act on Formation of Voivodeship Boards of Revenue and including amendments to some acts (which established tasks, the authorities' competences and the organization of organizational units subordinate to the competent minister of public finance) the so far competent authorities (revenue offices and chambers) lost their competence in the scope of excise tax. The role of tax authority in this scope and partially in the sphere of goods and services tax, was passed onto customs authorities[7]. The act came into force on 1 September 2003. Hence, these authorities play a double role – the one of customs authorities, and some of them (although not all) simultaneously act as tax authorities.

It may be stated that the customs administration is undergoing a continuous reform. In 1999 the Customs Service Act was passed, which was meant to adapt that formation to function as a public service in the EU. It sets special requirements to the candidates for customs officers and to people already working as such officers. The

4 Ustawa z dnia 20 marca 2002r. o przekształceniach w administracji celnej oraz o zmianie niektórych ustaw (Dz. U. Nr 41 poz. 365 z 2002r.)

5 In S. Naruszewicz's opinion Minister of Finance cannot be considered as one of customs authorities. S. Naruszewicz, Wspólnotowe prawo celne, Warszawa 2004, p. 68.

6 Under the 9 April 2004 Ordinance of Minister of Finance (w sprawie utworzenia izb celnych i urzędów celnych oraz określenia ich siedzib) the number of customs chambers was decreased to 14, and customs offices –to 52. (Dz. U. Nr 82, poz. 747 z 2004r.)

7 Art. 11 ustawy z dnia 20 maja 2003r., o utworzeniu wojewódzkich kolegiów skarbowych (Dz. U. Nr 137, poz. 1302 z 2003 r.) See E. Giska, Przebudowa aparatu skarbowego, „Monitor Prawa Celnego" Nr 8, 2003, s. 345 and E. Giska, Dyrektor izby celnej i naczelnik urzędu celnego organami podatkowymi (część druga) „Monitor Prawa Celnego", Nr 9, 2003, s. 392.

public aspect of customs service is the fact that the actions of customs officers create the respect towards state authorities and trust on the side of the citizens. The official relationships of uniformed services are not of employment nature, but they are administrative relationships created when an officer starts his service. The specific nature of the uniformed service means, among other things, full availability for work and obedience towards the authorities, discipline when being on duty, fulfilling tasks within the unlimited time and in difficult conditions (which sometimes pose risk to health or life[8]) limited participation in political life, no possibility of a strike, prohibition to run own business, statutory limitation in having additional place of employment etc.

In January 2008 Poland faced a wave of protests made by the officers of Customs Service. Pursuant to Art. 33 Section 2 of the Customs Service Act, a customs officer must not participate in a strike or any activity that disturbs the work of a customs office. Due to that, customs officers used to go on sick leaves or asked their superiors for a day off to which they are entitled to, pursuant to the Labour Code. That spontaneous protest action of customs officers was caused, among other things, by the regulations included in the Customs Service Act, namely Art. 25 Section 1 Points 8a and 8b of that Act. This regulation introduced obligatory dismissal of a customs officer from his/her service in the case of a charge of deliberate commission of an indictable offence brought against him/her, or in the case of provisional detention. The General Trade Union of Customs Service in Poland questioned the above regulation stating, among other things, that it limits rights and freedom of officers in the way that is not justified in a democratic state. Furthermore, it states that the provisions do not include the possibility of restoration of a customs officer dismissed on the basis of an objective regulation on conditional discontinuance of criminal proceedings and on discontinuance of criminal proceedings[9]. The Constitutional Tribunal decided in its 13 February 2007 Judgment that the objective regulation is in accordance with the Constitution. In particular, it referred to the General Public Prosecutor's standpoint that the special rigours of customs service are compensated to the officers by granting them special retirement and pension entitlements. The paradox is that customs officers, as the only one uniformed service, are not covered by a retirement plan of uniformed services. In practice, Art. 25 Section 1 (8a) and (8b) of the Customs Service Act has started to be used by smugglers to intimidate customs officers.

8 The examination conducted at the border crossing points with the Kaliningrad Oblast has proved that about 70% of customs officers faced the threat of battery or denunciation of taking bribes, which pursuant to Art. 25 Section 1 Points 8a and 8b of the Customs Service Act, was equal to a dismissal from the service. A few officers were beaten up by unknown delinquents. See M. Kęskrawiec, „Monitor Prawa Celnego i Podatkowego" Nr 2, 2008, s. 65.

9 See wyrok TK z dnia 13 lutego 2007r., sygn. akt K 46/2005, System informacji prawnej LEX-Administracja Skarbowa nr 245355.

Another reason for the protest was a proposal made in the project of the KAS Act regarding the implementation of the so called zero option, that is, the dissolution of employment relationship with all customs officers and then re-appointment only some of them. Although the zero option is justified in the case of territorial self-government reform, it is an unsuccessful idea with reference to customs officers. The employer remains the same. Specific identified problems in the Customs Service should be fought with, and not only seemingly eliminated through the so called zero options. One-time action will not eliminate the phenomenon of corruption. Only creating mechanisms which would detect unfavourable phenomena will permanently clear the customs officers' environment from the so called 'black sheep'. The zero option will, on the contrary, strike both the corrupted customs officers and the honest ones. Another reason for a 'strike' is unequal treatment of customs officers in comparison with other uniformed services. Due to the liquidation of border crossing points in the South and West in 2004, the so called allocation of customs officers from the western border crossing points and inland organization units to customs chambers in the East of Poland took place. However, in December 2007 after our accession to the Schengen zone, the similar mechanism was not implemented in the case of the Border Guard with its many more officers. Such an unequal treatment of customs officers in comparison with other uniformed services may result from the fact that customs officers are commonly associated with a profession of negative emotional connotation and a very negative opinion in the social consciousness[10]. A new function of the customs service as a formation protecting the society against terrorism, drugs, epidemiological threats remains totally unnoticed.

In the course of the protest there were proposals to replace the Polish customs officers with the ones from other member states of the EU. It has to be categorically emphasized that there are no regulations that would allow to employ foreign citizens to protect the state. The on-duty acts on behalf of the Polish state may be performed within the territory of Poland exclusively by the customs officers who have the Polish citizenship[11]. The rule of exercising sovereign superior rights in the range of customs and protection of the Polish customs territory as a part of the EU customs territory is best guaranteed by performing customs service by its own citizens exclusively. As a matter of fact, the Ordinance of the Minister of Finance of 28 April 2004 was binding within the period from 1 May 2004 to 4 February 2005, which regarded the adaptation period and ability test in the course of proceedings regarding recognition of qualifications to perform the profession of a customs officer, acquired in member states of the EU[12]. It enabled customs officers of other member states to acquire

10 See W. Czyżowicz, „Monitor Prawa Celnego i Podatkowego" Nr 11, 2007, s. 423.
11 Exception is institution of common customs control. See W. Braś, Wspólne kontrole graniczne a wykonywanie suwerennych praw państwa i ochrona praw obywatelskich, „Państwo i Prawo" z. 1, 1970, s. 18.
12 Dz. U. Nr 101, poz. 1033 z 2004r.

recognition of professional qualifications, and thus to serve at the Customs Service in Poland. However, that regulation was inconsistent with the act of higher importance, that is, the Customs Service Act of 24 July 1999 which in its Art. 2 stipulates that such service may be performed by a Polish citizen[13]. In practice the above regulation was 'dead law' as no customs officer moved to the Polish Customs Service from another member state. The above regulation was annulled by the Regulation of the Minister of Finance of 11 January 2005[14].

As a result of the protest action the customs administration obtained pay rise in the amount of 244,45 Polish zlotys from the budget act and 245,55 Polish zlotys from the reserve fund no. 60, which gave total amount of 499 Polish zlotys for an employee[15]. From the statement made by the Chief of the Customs Service on 27 March 2008 on the forum of the Board of Administration and Internal Affairs and the Board of Public Finance it appears that the average salary in the Customs Service at its lower positions is higher than the one in the Border Guard. Why then do customs officers organize a protest action if they earn more than the Border Guard officers? It should be emphasized that a Border Guard officer is automatically promoted after the statutory period onto a higher position which includes pay rise, whereas many people in the Customs Service remain on the same position for a several dozen years, in spite of their high qualifications. It is closely associated with dramatic resignation of people from work in the Customs Service. At some border crossing points the newly admitted officers make only 30-40% of the staff. The customs officers who remain in the preparatory service are not entitled to serve goods movement and therefore the Customs Service may shortly face the problem of staff shortage, especially due to the fact that the number of crossing points at the eastern borders does not meet the needs of the border movement. Even if the customs officers do not organize protests, the queues at the border crossing points are up to a few dozen hours.

The customs officer is a hybrid of a uniformed public officer and a civil worker – s/he pays social insurance contributions in the same way as all civil workers do, but his/her sick leaves are of full remuneration whereas the ones of civil workers are only 80% of the total remuneration. S/he is not entitled to receive the uniformed retirement benefit, although s/he performs his/her duties wearing a uniform, and it has to be highlighted that s/he may be released from this obligation by his/her superior only in justified circumstances. In case of accidents and diseases connected with his/her service the customs officer is entitled to benefits that are established for the police officers. Comparing retirement benefits of the Rail Protection Service, which

13 Tekst jedn.: Dz. U. Nr 156, poz. 1641 z 2004r.

14 Rozporządzenie Ministra Finansów z dnia 11 stycznia 2005r. uchylające rozporządzenie w sprawie stażu adaptacyjnego i testu umiejętności w toku postępowania w sprawie uznania nabytych w państwach członkowskich Unii Europejskiej kwalifikacji do wykonywania zawodu funkcjonariusza celnego (Dz. U. Nr 13, poz. 99 z 2005r.).

15 See Biuletyn Komisji Administracji i Spraw Wewnętrznych oraz Komisji Finansów Publicznych z posiedzenia z dnia 27 marca 2008r. Nr 445/VI kad., s. 5.

may be treated as a state industrial guard, it seems that the refusal of uniformed benefits to customs officers is an unjustified discrimination of this occupational group. The division of persons employed in the customs administration into civil service and customs service, where there is no division into persons performing duties provided by the statute and representing public authority – and the persons who contribute to functioning of a particular organization unit, is not essentially justified. The people perform the same work in the same organization units, but are paid totally different salary. A border officer or a policeman working at his/her desk does not lose uniformed benefits if the activities performed by such people are fulfilled as duties provided by the Police Act or the Border Guard Act. Only in the Police, the positions where the duties are not directly related to performing statutory tasks of the particular service (like human resources, payments department, logistics or general departments) are treated as civil ones. As far as acting on behalf of the state is concerned, the public officer is supported by the authority of his/her uniform which emphasizes the power that s/he performs on behalf of the state. Moreover, such a person has to be distinguished in order to be easily identified by the citizens, which makes the public service more recognizable and signals clearly to the citizens that this person serves the society. The division in the customs system may be organized in a similar way with the emphasis on enabling the customs officers to change the customs service into the civil one. Performing customs service is dependent on meeting certain special requirements which, with the lapse of time, may not be fulfilled, either temporarily or permanently, by the officer, e.g. in cases of disability that does not entitle to disability benefit, or lack of full flexibility to work irregular hours for single parents who bring up minor children.

A fundamental question should now be raised – in what direction does the reform of the Customs Service go? The reform of the Customs Services aims at improving the effectiveness of its service towards the society. With regard to high rotation of staff the officers should obviously be ensured the salary at such a level that would make them resistant to corruption, but it would also be beneficial to organize psychological training courses on how to cope with corruption offers.

The draft of an act on the amendment to the Customs Service Act and on amendments to some acts of 14 March 2008 imposed new requirements on the customs officers[16]. Many solutions included in the draft of the act bring the Customs Service closer to uniformed services, e.g. possibility to move staff between uniformed services and the Customs Service, the establishment of similar ranks and bodies, legal protection, or bonuses for performing duties in special conditions. In the sphere of competence it grants the Customs Service entitlements to operational

16 Art. 18a of the draft of 14 March 2008 states that the Chief of the Customs Service may, in the situation of advanced alert, order the officer to perform duty in the so called crisis system which means that the officer is obliged to be at permanent availability of his superior.

and reconnaissance activities as well as the right to possess personal weapon. In the face of drafted amendments and imposing new obligations and restrictions on the customs officers, the Customs Service is explicitly becoming a service of requirements imposed on the uniformed services.

With the application of the restrictions typical for uniformed formations, the customs officers are simultaneously refused the privileges which should compensate the inconveniences resulting from serving the society. Furthermore, if the state imposes greater requirements on the customs officers, it should itself act loyally towards them. On the other hand, mechanisms fighting negative phenomena should be created for the Customs Service, and that could be e.g. granting the control services powers to use provocation towards those officers who are suspected of corruption. One of the best solutions that would ensure the officers' resistance to corruptive factors would be the introduction of state retirement, lost in the case of proving the officer gaining the financial benefit related to the function performed.

Streszczenie

Problemy związane z reformą systemu celnego w Polsce można podzielić na dwie grupy: pierwsza związana jest z przebudową administracji skarbowej, druga odnosi się do pozycji celników jako urzędników służby cywilnej. W rezulatcie zmian przyjetych w 2002 r. wprowadzono trójpoziomową strukturę polskiej administracji celnej:

– główny poziom objemuje naczelników urzędów celnych razem z odpowiednimi urzędami,
– drugi poziom składa się z dyrektorów izb celnych razem z odpowiednimi izbami,
– trzeci poziom jest tworzony przez ministra finansów razem z kierowanym przez niego ministerstwem.

Od 2003 r. organy celne odgrywają podwójną rolę – z jednej są właściwe w sprawach z zakresu prawa celnego, z drugiej – jednocześnie są organami podatkowymi (choć nie wszystkie).

Marian Żukowski, Helena Żukowska

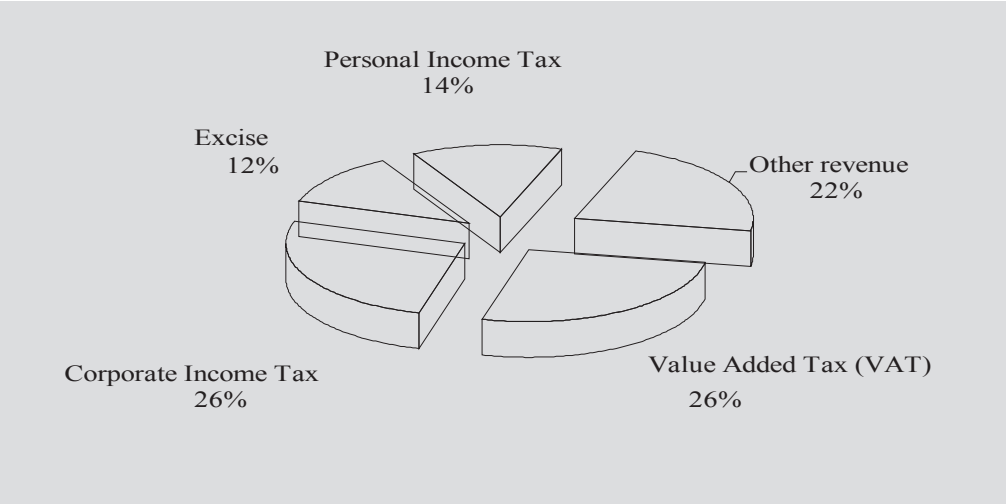
TAX REFORMS IN RUSSIA

Prerequisites for reforms of the tax system in Russia after 1990

Russia is a state to be reckoned with economically and politically in the world. It has multiple ties with the world's economy. Many countries are interested in economic cooperation with Russia as a strategic supplier of natural resources and energy carriers. Furthermore, Russia is an important and ready market for consumer goods and investment goods.

At the end of the 1980s and the beginning of the 1990s Russia launched economic reforms of the market character. The scale of deformation of the Russian economy after the Communist period was so large that despite the objective conditions which made the reforms inevitable, the process of change encountered many obstacles. They emerged among originators and executors of reforms, the society, and in the economic system under reform, with its deep-rooted bureaucracy. After years of functioning in the Communist system, the society, on the one hand, expected market reforms to bring many favourable changes, but on the other hand had serious and, as it turned out, justified fears for the future of the economy and for its own well-being. If we add to these the reluctance and resistance of bureaucracy, it is no wonder that the reform process in Russia has not been easy.

Figure 1. The structure of tax yield of the consolidated budget of the Russian Federation in 19991



Source: M. Żukowski, H. Żukowska, Reforma systemu podatkowego w Federacji Rosyjskiej, [in:] „Polski system podatkowy. Założenia i praktyka". The publishing house of Maria Curie-Skłodowska University, Lublin 2004, pp. 536-543.

The public finance sector was an important area of the economic system reform in Russia after 1990. The persistent deficit of the federal budget led to an increase in the internal and external debt of the state. The Russian government adopted the simplest method of financing the budget deficit: it issued more and more treasuries (mainly short-term bonds). Even though those securities were popular among domestic and foreign entities owing to their high profitability, the demand for them collapsed at the beginning of 1998. According to international ratings agencies, treasuries issued by the Russian government were burdened with an increasing risk. Simultaneously, costs of the internal debt servicing were progressively growing. The ratings for Russia were falling, and at the same time several financial crises occurred on emerging markets in Asia, Argentina and Mexico. Foreign investors were losing confidence in Russian securities, and as a result many of them decided to sell their securities and withdraw from the Russian market. Further issues of state bonds were increasingly difficult to sell. In the middle of 1998 there was a collapse of the currency market, the securities market and the interbank market. Internal and external insolvency was officially declared and restrictions on currency operations for residents were introduced. A 90-day moratorium on the purchase of Russian public debt obligations was announced. The 1998 crisis, affecting the whole banking system and the economy, brought about numerous and extensive negative consequences for the economy and the society. The real earnings of the society were

1 The reform of the tax system in Russia: logic and expected results (30 June 2000), the Bureau of Economic Analysis BEA, www.beafnd.org/russian/activity/library/sprav.htm, p. 4.

going down, the budget deficit was increasing, and inflation was soaring. Depositors were withdrawing their deposits from bank accounts in panic. In consequence, many banks lost their liquidity and suspended payment of deposits.

The slump gave rise to another recession wave in the Russian economy. Nevertheless, the crisis became also a kind of a turning point in economic changes: it made the acceleration of reforms necessary and led to decisions which later proved to be conducive to the quicker transformation and reconstruction of the economy after the slump. It also partly contributed to the fundamental reform of the tax system.

The tax system of the Russian Federation, similarly as the whole economic system after 1990, demanded radical reforms, whose main objectives were: to create favourable conditions for effective performance of enterprises and investors (also from abroad), to ensure due collection of taxes, as well as to bring the tax system in Russia closer to solutions adopted in developed states.[2] Experts described the tax system in Russia before the reforms as highly complicated, too expanded, and marked by a high level of the state fiscalism. The right of the regional and local authorities to levy taxes was frequently misused and, in consequence, the number of mandatory taxes and charges in the Russian Federation increased from 41 at the beginning of the 1990s to about 200 in 1996. Further weaknesses of the tax system, proving the need for reforms, were: low efficiency of tax authorities, leakiness of the tax system, and a large-scale informal economy. The inefficiency of the tax system in Russia is clearly illustrated by the examples below. The tax liabilities of several major Russian companies from the sector of producers and exporters of oil and gas, compared to the level of their discharge, were as follows in July 1998:[3]

- Łukoil paid to the budget 24.3 million out of due 672 million USD (3.6%),
- Sidanko discharged only 2.2 million out of due 740 million USD (0.3%),
- ONAKO paid only 0.5 million USD out of due 215 million USD (0.23%),
- Sławnieft discharged 3.8 million USD out of due 341 million USD (9.3%).

In 2000 the government of the Russian Federation decided to undertake the tax system reform. The following goals of the reform were planned:[4] simplifying the tax system, restricting the scope of the informal economy, improving the performance of tax administration, reducing direct tax rates, and relieving tax burdens. As part of the tax system reform, the following measures were suggested:

2 More in: M. Żukowski, H. Żukowska, *Reforma systemu podatkowego w Federacji Rosyjskiej*, [in:] „Polski system podatkowy. Założenia i praktyka". The publishing house of Maria Curie-Skłodowska University, Lublin 2004, pp. 536-543.

3 L. Makarewicz, Kryzys postsowieckoj bankowskoj sistiemy. Moscow 1999, pp. 45 - 47.

4 The reform of the tax system in Russia: logic and expected results (30 June 2000), the Bureau of Economic Analysis BEA, www.beafnd.org/russian/activity/library/sprav.htm

1. adopting a single rate of personal income tax and excluding expenditure on healthcare and education from the tax base,
2. transforming many different elements of the social insurance contribution into a single unified social tax dependent on income,
3. changing the rules of determining the tax base for enterprises,
4. raising excise rates on oil-based products, alcoholic beverages and tobacco,
5. reform of turnover tax,
6. abolishing some VAT deductions and paying the entire VAT to the federal budget,
7. replacing real estate tax with property tax and land tax (cadastral tax),
8. introducing regional road tax which would replace the tax on owners of transport means and taxes on particular forms of transport.

The reform of the tax system in Russia aimed at introducing the basic tax rules: universality, equality, clarity, freedom of establishment, non-transferability, and non-retroactivity. It was decided that amendments to the tax law provisions should come into force on 1 January of the year following their passage, but not earlier than one month after the date of publication. Moreover, the idea emerged in the reform plans that all ambiguities and doubts shall be settled to the benefit of the taxpayer.[5]

Russian tax system after 2000

The basic legal act governing the tax system in the Russian Federation after 2000 is the Tax Code, which consists of two parts. Part I of the Tax Code, which became effective on 1 January 1999, defined the basic taxation rules, described in detail the procedures to be followed by the tax service, and determined rules of liability for infringing tax laws. On 1 January 2001, additional four sections reforming VAT, excise, personal income tax, and unified social tax (the way of calculation of social insurance contributions)[6] were introduced by Part II of the Tax Code. Corporate income taxes, goods and services tax, and natural resources tax have been in force since 1 January 2002, and transport tax since 31 August 2002. A positive tendency in the Russian tax legislation is a growing recognition of international regulations.

5 The tax system of the Russian Federation, www.conseco.ru/abc/tax/adm1.html p. 1 (20 January 2002).
6 Part II of the Tax Code of the Russian Federation (the Act of 5 August 2000, No. 118 FZ).

Table 1. Major changes in PIT, CIT and VAT in the Russian Federation

PIT	CIT	VAT
1992: 3 rates 12, 20, 30%	1992: standard rate 32% and other rates depending on sector	1992: VAT with 28% rate, lower rates for food products
2001: flat rate of 13% and abolition of many deductions	1994: to 37%, then reduced to 30%	1993: standard rate reduced to 20%, reduced rate 10%, numerous exemptions
	2002: rate reduced to 24%, deductions and exemptions abolished	1994: additional turnover tax of 3%
		2001: reduction of exemptions

Source: M.H. Grabowski, Reform of Tax System In Transition Countries, Transition Studies Review, Springer-Verlag 2005, No. 12 (2), pp. 293-213.

After 2000 in Russia the three-tier tax system was established,[7] consisting of: federal taxes and charges, regional taxes, and local taxes. They all function on the basis of the federal legislation, but as regards the latter two categories of taxes, the regional and local governments are entitled to determine their rates and relevant procedures. There is a binding rule that the authorities of a lower tier cannot permit deductions in taxes of a higher category, even though a considerable part of revenue generated by these taxes goes to regional and local budgets, similarly as with the profits tax. The regional authorities can only permit the reduced regional rate of income tax (a reduction not exceeding 4%) with respect to some groups of taxpayers.

Federal taxes are: value-added tax (VAT), excise tax (on alcohol, tobacco, oil and oil-based products), corporate income tax (basic rate 35% - 11% to the central budget, 19% to a regional budget and 5% to municipal or district budgets), securities transaction tax, customs duty and customs charges, natural resources tax, charge for restoration of natural resources (for exploiting and polluting the natural environment), water tax, personal income tax, road user tax, inheritance and gift tax, tax on purchase of transport means and production of fuels, charge for using the words „Russia" and „Russian Federation", fee for licence and permission to produce and trade in alcoholic beverages, tax on gambling, and social insurance contributions (unified social tax).

Local taxes are: individual property tax (2%), land tax, registration fees for setting up a business, tax on industrial plants in health-resort areas (protected

7 Finansowoje i bankowskoje prawo, Moscow 2000, p. 143.

regions), tourist fee, charge for retail trade permit, fee for trade in alcoholic beverages (legal persons: 50 times of the minimum salary, natural persons: 25 times of the minimum salary), targeted district charges for maintaining the police, public goods and education, tax on advertising (5% of the value of an advertisement), charges on selling cars, information technology equipment and computers, licensing fee for the right to organise auctions and lotteries, parking fee, charge for the right to use local symbols (e.g. in Moscow 12.5 times of the minimum salary every year), fee for hippodrome races, charge for stock-market operations, charge for shooting movies, charge for participation in horse races, fee for cleaning building sites, tax on dogs (except for working dogs), charge on foreign exchange operations, fee for residency registration, charge on winnings in games and lotteries, fee for setting up a gambling business (at least 205 times of the minimum salary), charge on winnings in sports competitions, and charge on persons participating in games of chance.[8]

Regional taxes are: corporate property tax, forest tax, tax on total revenue, educational fee.

The Ministry of Taxation is responsible for calculating and collecting taxes. It cooperates with the Ministry of Finance, responsible for revenue of the state budget, and with the Federal Agency on Economic and Tax Crimes at the Ministry of Interior. The Agency took over the responsibilities of the Tax Police on 1 July 2003 and was granted wide powers with respect to revealing tax frauds. In the recent years the Tax Police and the Agency on Economic and Tax Crimes have intensified their actions against major financial oligarchs who were charged with tax offences on a huge scale and with substantial diminishing of the state revenue. However, it is true that until recently both natural and legal persons in Russia were persistent in tax evasion. This encouraged treating tax obligations as a mere formality, not enforced by the state. Nevertheless, it seems that the authorities are determined to change this attitude and to reduce the problem of tax evasion considerably.

Both personal income tax and corporate income tax are particularly important for the state budget. The Tax Code of the Russian Federation (Part II) introduced a flat personal income tax. Since 1 January 2001 personal income tax has generally been reduced to 13%. The consequences of the reduction turned out to be astonishingly favourable to the budget,[9] with annual budget revenue growing by 50% every year since 2001.[10]

8 www.coneseco.ru/eng/abc/tax/adm2_1.html (22 January 2002), also: G. D. Czernikow, Nałogi, Moskwa, Finanse i statistika, 1999, pp. 39-40.

9 S. Synelnikow-Muryliew, S. Batkibiekow, P. Kadocznikow, D. Niekipiełow, *Ocienka rezultatow reformy podochodnogo nałoga w Rossijskoj Fiedieracii* [in:] „Woprosy Ekonomiki" 2002, No. 6, pp. 61–64.

10 „Argumenty i Fakty", 23 April 2003. Interview with G.I Bukayev, the Minister of Taxes and Fees of the Russian Federation, p. 2.

In some cases, higher rates of personal income tax are applied. The highest rate of 35% applies mostly to specific income, i.e. winnings and prizes received in competitions and games, or paid by organisers of lotteries and other gambling games (including gaming machines).

Since 1 January 2002 the basic rate of corporate income tax, corresponding to the Polish corporate income tax, has been reduced from 35% to 24%. The revenue of the state from this tax is divided among the budget tiers: 76% goes to the federal budget, up to 16% (but not less than 12%) goes to the regional budget, and 2% to the local budget. The tax covers income of Russian legal persons earned in Russia and abroad, as well as income of foreign legal persons generated in the territory of Russia.[11]

Another tax collected in Russia is related to payment of remunerations. Part II of the Tax Code introduced the so-called unified social tax. This tax is calculated according to the rates declining from 35.6% to 2% with an increase in the total sum of remuneration of an employee, and paid by employer. Since the beginning of 2002, social tax paid to the federal budget has been reduced by the sum of the mandatory pension insurance. Remunerations of foreigners who are temporarily residing and employed in Russia are exempt from this insurance. The radical changes in the Russian tax system implemented in 2000 and 2001 aimed also at reducing burdens from earnings-related contributions.

Table 2. Social tax rates structure before and after reform

	Before reform (2000)		After reform (2001)	
Legal incidence	Income range	Marginal rate	Income range	Marginal rate
Employee	All	1	All	0
Employer	All	38,5	Below 100 000	35,6
			100 000 – 300 000	20
			300 000 – 600 000	10
			Above 600 000	5 (from 2002:2)

A. IVANOVA, M. KEEN AND A. KLEMM, The Russian 'flat tax' reform, Economic Policy July 2005 , The Institute For Fiscal Studies, Great Britain 2005.

Sale of goods and services in Russia and import of goods to Russia are subject to value-added tax (VAT; Russian: NDS, short for *Nałog na Dobawliennuju Stoimost*). This tax concerns sellers of goods and services and importers of goods. The basic rate of VAT is 18%. There is a group of goods and services covered by the reduced

11 A. Wasiliewa, E. Gurwicz, W. Subbotin. Ekonomiczieskij .op. cit. p. 49 and the following.

rate of 10%, as well as goods and services exempt from the tax (zero rate). In the tax structure (without charges and fees) VAT accounts for 36.5% of total taxes. After 2008, the government intends to reduce the basic rate of VAT even to 10%.[12]

Another tax, excise, is charged on the sale of particular consumer goods, such as: spirit beverages, wine, beer, tobacco, cars, fuels, engine lubricants, and natural gas. Excise tax is paid at selling goods manufactured in the territory of Russia, at importing some kinds of goods, at making in-kind contributions with such goods to the initial capital of a company, using them for the producer's own needs, and in other similar situations. If producers use goods subject to excise as raw materials for manufacturing other excise goods, they can recover the tax paid at purchasing these goods, having fulfilled certain conditions. Excise tax is usually paid by manufacturers. Excise on imported goods is charged and paid together with customs charges. Excise stamps must be affixed to some goods subject to excise, such as beverages, alcohol and tobacco. The rates for all excise goods, except for natural gas, are expressed as a sum in ruble for a given unit of measurement, for example excise on 1 litre of alcohol equals 16.2 RUB, on 1 litre of beer: 4.60 RUB, and on 1 tonne of petrol: 2190 RUB (about 100 USD).[13]

Transport tax is a new tax, introduced on 1 January 2003, levied by regional governments. The sum of this tax is usually dependent on the engine capacity of a vehicle. Rates of the tax are determined by regional authorities, within the limits set by federal laws.

Taxes, customs duties and other charges paid to the budget are imposed on the basis of legal acts and can be changed only in this manner.

Representative agencies and branches of foreign enterprises operating in Russia are subject to taxation under the same rules as Russian companies. Establishing the tax base, expenses born by foreign enterprises can be deducted from their income in accordance with the same rules as those binding for Russian companies.[14]

All entities with an organisational unit in the territory of Russia are subject to the tax liability. This can be a branch, a subsidiary, a representative office, an agency or any other structure, adopted by a foreign company to conduct business. Foreign entities which conduct business through an agent are also regarded as having a permanent structure in the territory of Russia. An agent may be a Russian natural or legal person that represents the interest of a foreign entity on the basis of a contract, acts on its behalf, and is authorised to conclude and negotiate agreements on behalf of the foreign enterprise.

12 A speech by Dmitry Medvedev, Krasnoyarsk. Economic forum. 15 February 2008. http://news.yandex.ru/yandsearch?.gazeta-unp.ru/%26id%3D6973

13 O.Wrubliewskaja, M. Romanowskij, *Biudżietnaja sistiema Rossijskoj Fiedieracii,* Moscow 2003, p. 162.

14 The part on taxes was prepared on the basis of: *Rosyjska Federacja*, Unido, Warsaw 2003, pp. 89-98.

Evaluation of changes in the tax system in Russia after 2000

Analysing the outcomes of the tax reform in Russia in the few recent years, we should note that the economic situation is constantly improving, as a result of some other factors than transformation of the economy. This situation is favourably affecting the condition of public finance. The most important stimuli to growth of the Russian economy are factors of both external and internal character: a significant growth in prices of energy resources on international markets, economic growth, structural reforms implemented in the economy, and good financial condition of a considerable number of economic entities.

The favourable situation in foreign trade and in the economy is conducive to the stabilization of public finance, makes the realization of budget revenue possible, and results in a surplus of budget revenue over expenditure. The problem of the Russian Federation government is the rational use of the strong flow of „petrodollars," as well as securing against a decline in prices of energy resources (creating financial reserves), and, at the same time, curbing the inflationary pressure triggered by this inflow of resources from exports.

To sum up, it should be stated that the major issue faced by Russia at the moment is taking advantage of a boom on the resources markets and financing intensive factors of the internal development with acquired funds. Russia does have money and must decide how to allocate it: for consumption or investment in economy. Currently, the majority of money is spent on consumption and the minor part on investment. This is not a good policy, as it does not lead to a permanent upward trend, based on internal factors of economic growth.

On 1 January 2004 the Government of Russia established the Stabilization Fund. Its aim is to secure the balance of the state budget in a situation of a considerable reduction in prices of energy resources (oil and gas) dominant in the Russian exports. The Fund supports the stabilization of the economic development of the state, is one of the basic instruments of absorbing the excessive liquidity, lessens inflationary pressure, reduces the dependence of the Russian economy on unwelcome changes of prices on foreign markets and volatility of earnings from energy resources export on the level of foreign exchange reserves of the state. The Fund's resources are generated from imposing additional customs duty on exported oil and taxes on the output of natural resources when oil price is higher than the established base price, that is 27 USD per barrel (*Urals* type), as a part of the state budget.

In December 2007 the Fund had on its bank account 157.38 billion USD,[15] which constituted about 11.7% of GDP.

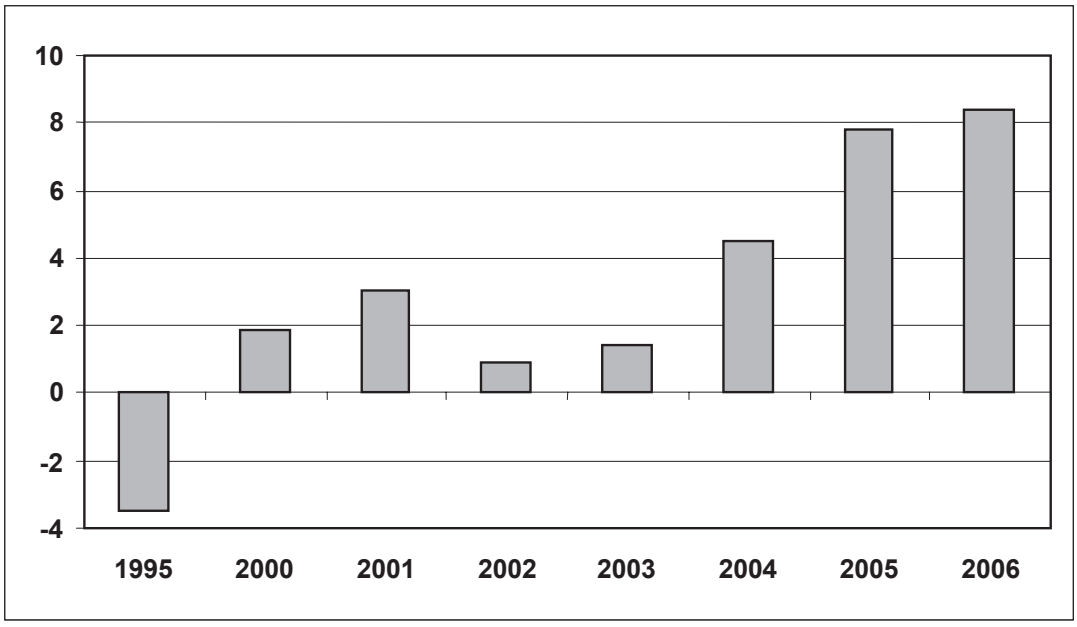
15 The Ministry of Finance of the Russian Federation, http://www1.minfin.ru/ru/stabfund/statistics/volume/ (16 March 2008).

On 1 January 2008 the Stabilization Fund was split into two parts: the Reserve Fund managing the resources of 56.9 billion USD and the National Welfare Fund having at its disposal 125.0 billion USD.[16]

The statistics of the Bank of Russia and the Ministry of Finance of the Russian Federation present the budget of the Federation in three forms: as the consolidated budget, the federal budget and the consolidated budget of entities of the Russian Federation.[17] The consolidated budget system in Russia encompasses the following units: the federal budget, budgets of republics, budgets of territories, budgets of provinces, the budget of Moscow and the budget of Saint Petersburg, budgets of autonomous districts, municipal budgets of cities, and budgets of rural regions.

After 2000, following the reform of the tax system and other circumstances favourable to Russia (including an increase in prices of energy resources), the situation of the Russian budget has considerably improved. Since 2000 there has been a surplus of budget revenue over expenditure. In 2004 the budget surplus accounted for more than 4%, and in 2005 for almost 8% of GDP. In 2006 the surplus of revenue over expenditure of the federal budget exceeded 8% of GDP.

Figure 2. Ratio (deficit – 1995) – proficit of the consolidated budget of Russia to GDP (in %)



Source: Data of the Russian statistical office (Rosstat). Moscow, 2007.

16 The Ministry of Finance of the Russian Federation http://www1.minfin.ru/ru/reservefund/statistics/volume/index.php?id4=5796 data as at 12 February 2008.

17 Biulletien bankowskoj statistiki. CBRF, Moscow 2002, No. 10 (113), p. 8.

In 2007 the federal budget revenue equalled 7,779.1 billion RUB and expenditure 5,983.0 billion RUB. The surplus of the federal budget was 1796.1 billion RUB (about 50 billion EUR) against the planned sum of 912 billion RUB.[18] The consolidated budget revenue in 2007 equalled 13,250.7 billion RUB, expenditure: 11,245.8 billion, and the surplus of the consolidated budget of 2,004.9 billion RUB accounted for 6.1% of the GDP in Russia. Thus, a surplus of budget revenue over expenditure occurs both at the level of the Federation budget and of the consolidated budget (the sum of all other budgets) of Russia.

In 2007 the detailed structure of revenue and expenditure of the consolidated budget was as follows:

Table 3. The consolidated budget of the Russian Federation in 2007[1]

Specification	Billion RUB	% of GDP
I. Total revenue of consolidated budget	13250.7	40.2
of which:		
1. Corporate income tax	2172.0	6.6
2. Personal income tax	1266.6	3.8
3. Unified social tax	656.7	2.0
4. Value-added tax (VAT):		
- on goods (services) manufactured and sold in the Russian Federation	1390.6	4.2
- on goods brought into the Russian Federation	871.1	2.6
5. Excise on goods:		
- manufactured in the Russian Federation	288.2	0.9
- brought into the Russian Federation	26.2	0.1
6. Total income tax	141.8	0.4
7. Property tax	411.2	1.2
8. Taxes, one-off charges and regular charges for exploitation of natural resources	1235.1	3.7
9. Revenue from economic activity abroad	2408.3	7.3
10. Revenue from use of the state or municipal property	525.0	1.6
11. Charges for occasional use of natural resources	82.4	0.2
12. Tax on gifts	17.7	0.1

18 Resources of the website: http://www.regnum.ru/news/758243.html (downloaded on 13 January 2007).

13. Taxes on revenue from conducting business or from other gainful activity	112.3	0.3
II. Total expenditure of consolidated budget	11245.8	34.1
of which:		
1. General state expenditure	1166.7	3.5
- of which: service of state and municipal debt	175.2	0.5
2. Defence	834.0	2.5
3. National security and administration of justice	864.4	2.6
4. National economy	1560.4	4.7
of which:		
- fuel and energy industry	33.5	0.1
- agriculture and fisheries	147.0	0.4
- transport	580.7	1.8
- communication and information technology	36.8	0.1
- basic scientific research	62.9	0.2
- other expenses of national economy	589.9	1.8
5. Public utility and housing expenditure	1101.4	3.3
6. Social and cultural expenditure	5692.3	17.3
Surplus of consolidated budget	2004.9	6.1

[1] *The data include budgets of the state non-budget funds.*

Source: Rossija w cifrach 2008, Kratkij statisticzeskij sbornik, Federalnaja Służba Gosudarstwiennoj Statistiki, (Rosstat), Moscow 2008.

The surplus of revenue over expenditure (or budget proficit), occurring in the consolidated and federal budget of Russia for several years, triggers mixed reactions. Some regard it as beneficial, but experts increasingly point to the fact that a substantial and long-lasting surplus of revenue over expenditure hampers economic growth. Therefore, there is an intention to reduce considerably the scale of the budget surplus in the plans for the Russian budget for the years 2008-2010. Nevertheless, it can be assumed that the budget proficit will still be fuelled by such factors as: a growth of industrial production and improved financial condition of enterprises, situation in the international trade – favourable for Russia, and growing prices of Russian export commodities, economical financing of budgetary expenditure in fear of pushing up

inflation, and controlling the financial policy with respect to realization of budget revenue and an increase in tax collection.[19]

Necessary changes in the tax system of Russia

A picture of the tax system in Russia, illustrated for instance by sources of state budget revenue, reveals the need for further reforms. The tax system after the reform is still rather complicated, there is a large variety of taxes and charges, serious problems with collection of taxes, and corruption in tax offices.

In the following years, the goals of the tax system reform in Russia should be:

1) improvements in the tax law aimed at its simplification, stabilization of tax rules, reduction in tax burdens for honest taxpayers,
2) elimination of contradictions between the tax law and the civil code,
3) elimination of opportunities for tax evasion,
4) enhancement of the efficiency of tax administration.

Further reductions in tax rates are planned. According to experts,[20] VAT should be cut down to 15%, while social insurance contributions to 30% and ultimately to 25%. Advocates of this approach argue that, in accordance with the interpretation of Laffer curve, reductions of tax rates in Russia in recent years have always resulted in the increased budget revenue.

There are plans to introduce new solutions soon with respect to the taxation of SMEs in Russia. The basic rate of income tax shall be 6% of revenue tax or 15% of income tax after deduction of revenue-earning costs.[21] Moreover, the government intends to launch a simplified taxation system for micro-enterprises starting their business activity. Only when these changes are introduced, the tax system reform can be deemed completed.[22] Nevertheless, the proper implementation of the budgetary policy is a significant factor in achieving the pursued goals of the public finance reform. The primary task of the budgetary policy within the framework of the economic policy is the financial security of the discharge of public liabilities by the state.[23]

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19 W. Mau, Ekonomiczieskaja polityka 2007 goda: uspiechi i riski. In: Woprosy Ekonomiki, No. 2/2008, pp. 5-8.

20 The opinion of Arkadiy Dvorkovich, the Minister of Economic Development and Trade of the Russian Federation, „FinNews", 5 November 2002.

21 A speech by Gennady I. Bukayev, the Minister of Taxes and Fees of the Russian Federation, at a meeting of the Heads of Tax Administration of the Baltic region, 26-27 October 2002.

22 Based on: M. Żukowski, H. Żukowska, *Reforma systemu podatkowego w Federacji Rosyjskiej*, Lublin 2003, manuscript, pp. 14–19.

23 G. Kołpakowa *Biudżietnaja sistiema Rossijskoj Fiedieracii. Finanse, dienieżnoje obraszczenije, kriedit,* Moscow 2002, pp. 125-150.

The effectiveness of the budgetary policy in Russia has been extremely low in recent years, which is shown by the following phenomena:

– persistent failure to discharge its liabilities by the state,

– the weakness of the tax system which is unable to perform either its fiscal or regulatory functions efficiently (which is proved by the mass tax evasion),

– the „expensive" state, as a result of ineffective actions of the administration which aims at seizing maximum sums from the right of redistribution of economic resources, which in consequence leads to unequal competitive conditions and makes the protection of ownership rights impossible.

Thus, it can be argued that the budgetary policy in Russia is inefficient and that maintaining such a condition is one of the major obstacles to the steady economic growth. Apart from the implemented tax system reform which is improving the situation of the state budget, other key steps in the budgetary policy should include:

1) achieving a balance between liabilities of the state and possibilities of their discharge;

2) discharging liabilities of the state to lenders and creditors, and settlements with debtors;

3) calculating the liabilities taken on by the state and associated budget expenditure;

4) auditing the performance of budgets at all levels.

The government should aim at covering the liabilities of the state to various social groups and at reducing the foreign debt. A negative phenomenon is a growing pressure of regions and other „beneficiaries" seeking increased donations from the central budget. The key objective of the changes in the pursued budgetary policy should be the establishment of permanent institutional mechanisms encouraging regional and local authorities to carry out structural reforms of the public finance system. The achievement of this goal would facilitate the discharge of the government's liabilities and would guarantee equal access of citizens to basic social services and benefits. The factors supporting the attainment of these goals include:

a) modernisation of the economy;[24]

b) decentralisation of the budget system, with simultaneous transfer of the liabilities of the national character to the federal level, and providing appropriate sources for financing the federal needs;

24 Sorokin D. E. Wosproizwodstwiennyj wiektor rossijskoj ekonomiki. Woprosy Ekonomiki. 2008/4, pp. 98-100.

b) radical changes in revenue and expenditure of local budgets, assuming a departure from the distribution of tax revenue between budgets of particular tiers, and preferring the rule: „one budget – one tax";

c) co-financing „priority" investments also with funds from regional budgets.

However, we can doubt whether the attainment of these goals is possible in a short period of time. Without passing the necessary legislation, conflicts and „rough and tumble" between the central budget and regional budgets will not be terminated. Taking into consideration the implementation of the adopted plans in the years to come, the government of Russia should introduce the following changes:[25]

a) adopt the minimum flat rate of personal income tax (12%) and at the same time raise the tax-free minimum of income and abolish the majority of tax deductions;

b) establish one social tax, reduce the rates and set up the upper ceiling of taxable income;

c) abolish turnover tax and compensate for the reduced income with the introduction of the local tax mentioned above, and with an increase in excise duty on oil products;

d) abolish the majority of deductions in VAT;

e) change the rules of imposing excise tax on alcoholic beverages and oil products in order to transfer the maximum amount of the tax burden into the consumption area;

f) replace real estate tax with property tax and land tax,

g) undertake steps aimed at improvements in the performance of administration and tax offices.

Conclusions

Hence, all reforms, including tax ones, should contribute to the transformation of the state into a productive tool which serves the society and fulfils its responsibilities efficiently for the benefit of citizens, institutions and economic entities.

To sum up, the Russian economy and the tax system should undergo further changes, for a number of reasons. Firstly, due to their large-scale incompatibility with the tax systems of developed countries. Secondly, owing to natural changes occurring in all areas of the business life and the tax system, and the more so in the

25 E. Strojew, *Ekonomiczieskije reformy w Rossii: wzgliad w buduszczie*, „Woprosy Ekonomiki", 2001/6, pp. 4–12.

realities of Russia. These changes should aim at ordering the tax law, simplifying the tax system, limiting the range of taxation, and thus improving the situation of enterprises and, through tightening up the tax system, restricting the scope of the informal economy.[26]

26 Rossija i mir. Nowacja epocha. Ed. by S. Karawanow. Moscow. 2008, pp. 13 – 18.

Streszczenie

Niniejszy artykuł przedstawia reformę rosyjskiego systemu podatkowego. Zawarto w nim opis struktury dochodów podatkowych zasilających skonsolidowany budżet Federacji Rosyjskiej, jak również zarys całego systemu podatkowego wraz ze stawkami podatkowymi. Autorzy szczegółowo analizują podstawowe rodzaje podatków oraz przesłanki reform rosyjskiego systemu podatkowego.

PART V
SOCIAL SECURITY AND HEALTH PROTECTION

Sviatlana Ahiyevets

FINANCING PUBLIC HEALTH SERVICES IN THE REPUBLIC OF BELARUS

Introduction

State expenditure is one of the elements of financial public activity. The maintenance, structure and size of state expenditure are defined by problems and requirements expressed in the forecasts of development of a public economy, and specific targets set at a given stage of development. Public health services financing takes an important place in total state expenditure. Therefore, jurisprudence traditionally focuses on the issues of efficiency of providing access to medical resources and the perfection of mechanisms of formation of financial resources in public health services. A search for the effective system of financing of public health services is the State's aim. At present we may talk about two ways of financing of the state system of public health services in the Republic of Belarus: budgetary and off-budget. The basic source of financing of public health services are the means of the state budget allocated according to the specification of budgetary security of expenses on public health services calculated per one inhabitant. Specifications of budgetary security of expenses on public health services are prepared and approved of on statutory basis. In the specification of the budget and in the course of its execution in connection with changes of terms of payment, the prices for the goods and services in the planned assignments are subject to indexation (without actual increase of expenses on public health services organizations).

Off-budget sources of financing of public health services are:

1) receipts from rendered medical services above permitted standard;
2) means from rendered payable services to the population;
3) means allocated with local executive and administrative bodies for the realization of actions that are not set forth in budgetary financing of target programs;

4) means received on account of reimbursement for treatment of individuals who are trauma victims, suffer from poisoning or diseases connected with manufacturing process;

5) other receipts not contradicting the legislation on legal and natural persons.

All above listed additional financial assets are not taken into consideration in defining the size of assignments from the budget calculated under the specification of budgetary security.

According to Ministry of Health of the Republic of Belarus, in 2007 the share of off-budget means in the total financing amounted to 5,8 %[1]. Considering the importance of the expenses incurred from the budget for resolving problems and maintaining state functions in the sphere of public health services from a legal point of view, it is necessary to search for the optimum system of financing of the public health services, including redistribution of resources of public health services according to priorities, their more rational use, re-structuring of medical aid volumes at the level of their provision, perfection and improvement of medical aid quality. The problem of fuller satisfaction of the population's requirement for qualified medical aid and the maintenance of its equal availability at all levels of the population should be resolved too.

Basic part

Budgetary expenses on public health services take a special place in the state expenditure. Health protection and improvement are the most vital needs of an individual. Public health care is understood as a dynamic process of protection and development of biological, physiological and psychological functions of separate individuals, collectives of workers and entire population of the country, the maintenance of optimum work capacity and social activity of people at the maximum life expectancy. Actually, the principle of general availability of medical aid in the Belarus State is provided by the state system of public health services through budgetary financing. With reference to domestic conditions, when there is no system of obligatory medical insurance, the principle of partnership of the state and citizens in medical aid financing is now being realized. Any civilized state bears responsibility for a state of health and sanitary well-being of the citizens as their health is a question of national safety of a country. The analysis of practices of the organizations of public health services in various countries allows to draw a conclusion that there are now three basic models of financing of the system of

1 Пресс-релиз «Об итогах работы органов и учреждений здравоохранения в 2007году и основных направлениях деятельности на 2008 год» // www.minzdrav.by/med/.

public health services: insurance-based, private and state (budgetary). None of these models are realized in a "pure" form. There is usually a combination of all three ways of financing, with one of them as a prevailing one:

1. The insurance-based system of financing of public health services takes a form of financial resources at the expense of premiums paid by workers and employers with an insignificant financial participation of the state.
2. The private public health services model assumes full absence of the system of obligatory state insurance. The state pays for medical treatment and services of the elderly and other citizens that are not protected by financing from target programs. Basically, medical treatment and services are paid through the system of private insurance.
3. The system of budgetary financing of public health services assumes that the budget becomes a basic source of financing of public health services. Therefore it is not necessary to equate various forms of the state budgetary financing of public health services as they differ depending on a degree of centralization. Budgetary financing can be carried out both by direct state financing and on the basis of special government programs. Direct state financing remains a primary form of the organization of the system of public health services in the Republic of Belarus. A basic organizational and legal form of public health services in the Republic of Belarus is rendering medical and social help at the expense of the means from the state budget, which allows to raise social security of all citizens irrespective of their financial conditions. Within the limits of a given form, financing of official bodies of public health services and their divisions is carried out by the Republic of Belarus according to the Constitution in a form of free medical treatment and services provided for the citizens of the Republic of Belarus as well as the population constantly living in the territory of the Belarus State and migrants.

It should be noticed that apart from the state system of public health services in Byelorussia there is a private system of public health services, which covers all medical organizations and units established by natural persons. Medical services are provided by these organizations on the basis of the conclusion of civil law contracts for rendering medical services. The private system of public health services is of a great value but it does not guarantee social protection for the citizens. This system acts as a means of attraction of additional resources in public health services; it is a part of the financial system of a socially focused market economy where medical services are provided for individuals with high level of income, which allows them to use the option offered by medical institutions and medical services over the guaranteed level.

Today there are three organizational and legal forms of rendering medical aid in the Republic of Belarus. The basic form providing social security to the population in the sphere of public health services is rendering medical aid at the expense of the means from the state budget by the state organizations of public health services. The independent organizational and legal form is rendering payable kinds of medical aid and services, where medical aid is paid by the citizens from their personal income or from employer's profits. Rendering medical aid at the expense of the means from voluntary medical insurance is also an independent organizational and legal form whose purpose is to strengthen citizens' health by making employers and citizens economically interested in health protection.

In the system of budgetary financing of public health services the budget becomes a basic source of financing of public health services. Therefore it is not necessary to equate other forms of the state budgetary financing as they differ depending on a degree of centralization. Budgetary financing can be carried out both by direct state financing and on the basis of special government programs. Direct state financing is the primary form of the organization of the system of public health services in the Republic of Belarus.

The analysis of the process of transformation in the CIS countries, including Russia, has convincingly shown that transition to medical insurance has caused a set of negative consequences. The Republic of Belarus has kept accessible and free medicine. Official units of public health services perform and maintain the guaranteed volume of free medical aid. Thus according to the legislation socially fair distribution of budgetary funds is carried out. However, public health services appear to depend both on a condition of the state budget, the economic forecast and a condition of public health as a whole. Due to the state budget deficiency, competition and other numerous problems, scheduled means intended for public health services development often appear focused on momentary expediency rather than on long-term interests of business. Therefore, social branches may develop successfully only together with other forms of financing.

Let's consider the features and principles of the organization and functioning of budgetary financing of public health services as its volume makes the basic share of expenses of the state on public health services. It is caused by the fact that, on the one hand, the right to health protection is guaranteed by the Constitution (under the Constitution of the Republic of Belarus, the citizens have the right to free medical treatment and services in official units of public health services). Thus the state is obliged to grant necessary volume of medical aid to each inhabitant in official units of public health services. On the other hand, in the Republic of Belarus two systems of public health services operate: state and private. At the same time the overwhelming majority of stationary (hospitals, clinics, medical centers) and out-

patient-polyclinic units are state-owned, and their functioning is provided at the expense of budgetary expenses. For this reason, in budgetary functional classification of expenses, public health services financing is defined as an independent section of expenditure of means for the performance of the state functions. Among subsections which concretize a direction of means for the realization of the state activity in the subject area there are: applied scientific research, scientific and technical programs and projects in the field of public health services that are named «other expenses in the field of public health services», «medical aid to the population», «sanitary-and-epidemiologic supervision»[2].

Since 2001, in Belarus, the indicator of the level of the State expenditure on public health services has been defined in relation to the gross domestic product. The consolidated budget of public health services in 2007 amounted to 4,2% GDP. The specification of budgetary security of expenses on public health services is calculated per one inhabitant[3]. The specification of budgetary security of expenses on public health services calculated per one inhabitant is estimated annually in the budget prepared for a scheduled year and established annually by the Law of the Republic of Belarus "On the Budget of the Republic of Belarus" for a scheduled year[4].

The specification of budgetary security of expenses on public health services is established for a year without divisions into quarters or months, and it is a basis for defining volumes of financing of expenses on public health services at the expense of the means from the budget for a scheduled year. The specified order of calculation of the specification of budgetary security of the expense on public health services calculated per one inhabitant is then applied.

Ministry of Health of the Republic of Belarus estimates indicators of the specification of budgetary security of expenses on public health services for a fiscal year pursuant to the Law of the Republic of Belarus **"**On the Budget of the Republic of Belarus" for a scheduled year on the basis of the volume of financing of expenses, taking into account its specification within a year and actual financed expenses spent on middle aged citizens.

Ministry of Health carries out monthly analyses of a course of actual financing of expenses on public health services both in the absolute sum and calculated per

2 Закон Республики Беларусь от 5 мая 1998г. «О бюджетной классификации Республики Беларусь» №158-3 в ред. от 29 декабря 2006г. №189-3// Национальный реестр правовых актов Республики Беларусь. – 2007. №4.

3 Постановление Министерства здравоохранения Республики Беларусь и Министерства финансов Республики Беларусь от 29 сентября 2000 г. об утверждении положения о порядке исчисления норматива бюджетной обеспеченности расходов на здравоохранение в расчете на одного жителя, N 40/101 // Национальный реестр правовых актов Республики Беларусь. – 2000. №105.

4 Закон Республики Беларусь от 26 декабря 2007г. "О бюджете Республики Беларусь на 2008 год» №303-3 // Национальный реестр правовых актов Республики Беларусь. – 2008. №4.

middle aged citizens of a given administrative and territorial unit in comparison with the confirmed quarterly list of expenses on the basis of the operative information. The control estimation of a course of financing of expenses on public health services is carried out quarterly and following the results of a year on the basis of data of the official financial reporting.

For 2008 the minimum specification of budgetary security of expenses on public health services per one inhabitant in the Republic of Belarus (taking into account the means for the liquidation of consequences after the accident at the Chernobyl atomic power station) is established at a rate of RUB 503.041.

The order of the use of financial assets of the organizations of public health services is defined by the estimate of expenses on the basis of territorial programs and medical aid volumes.

Realization of expenses of the state budget is based on principles of efficiency and economy. Therefore, the budgetary funds allocated under the estimate of expenses to the organizations of public health services and saved as a result of introducing highly effective and less expensive medical technologies, new forms of work organization and other actions assuring economical use of resources, remain at the disposal of public health services organizations. Saved financial assets are assigned for operational expenditure, strengthening resource base, including purchase of medical equipment, as well as materials stimulating work of medical workers[5].

The system of financing of public health services in the conditions of creation a socially focused market economy in Byelorussia is based on the following principles.

1. The principle of addressing and a special-purpose character of use of budgetary funds. The specification of budgetary security of expenses on public health services is calculated per one inhabitant.

2. The principle based on a "joint liability" rule. A prominent feature of market economy is an individual's freedom to choose to accept various decisions. Well-being of a person depends on his initiative and activity. Each person is, first of all, responsible for themselves when it comes to a question of insurance against risk of a general character. But there are situations in life when an isolated person is deprived of the joint help of other people and thus his existence may become endangered. Advanced public systems protect individuals in difficult situations regardless of the principle of personal

5 Постановление Совета Министров Республики Беларусь о 10 августа 2000г. «О совершенствовании механизма финансирования здравоохранения» №1225 // Национальный реестр правовых актов Республики Беларусь. – 2000. №80.

responsibility. There are certain social and ethical obligations of a society towards an individual. The "joint liability" principle is one of them.

3. The principle of creation and expansion of organizational forms of the system of public health services. Systems of public health services existing nowadays in developed countries are the results of long-term development. Their formation occurred evolutionary from simple forms and low levels of social safety to more perfect and stronger economic, social and political bases. The increased volumes of state financing followed the growth of economic power of the state.
4. The alternativeness principle in the creation of the system of public health services. This principle is expressed in maneuvering freedom in the creation of the system of public health services on the basis of a combination of its separate components: financing, organizational structures, a group of individuals that are subject to the guaranteed health services, volumes and health services forms.
5. The principle of uniform (general) social partnership. The state develops uniform (general) standards of social protection of the population, provides minimum guarantees in the field of payment, provision of pensions, grants, medical treatment and services, formation and ecological protection to all citizens of the country by the creation of a corresponding legal base.
6. The principle of separation of powers. Financing is carried out on all republican and local levels. On the other hand, it can be carried out by the state and at the level of an enterprise or a private person.
7. The principle of «participation in costs». Financing of certain medical programs is carried out with the assistance of personal means of citizens.
8. The guardianship principle. Financing of medical services at the expense of taxes with orientation to individual needs.

Conclusions

Thus financial maintenance of the system of public health services is the obligation of the Republic of Belarus. At the same time disproportion between necessary volume and quality of medical aid and available resources for its rendering creates an effective mechanism of financing of public health services at the expense of attracting new sources of financing by the branches whose purpose is not replacement but strengthening of the state guarantees for the provision of medical aid to the citizens. Different variants of the organization of medical aid provided for

the citizens and organizational and legal forms of financing should assure the most simple and effective way of realization of the right to medical aid, which would enable to provide each citizen with the best possible and rational medical aid. In the Republic of Belarus it is generally possible to present basic sources of financing of public health services as follows: budgetary expenses, voluntary medical insurance, means of natural and legal bodies, medical organizations' own means.

Streszczenie

Finansowanie systemu opieki zdrowotnej na Białorusi należy do zadań państwa. Jednocześnie występująca dysproporcja pomiędzy potrzebami co do zakresu i jakości świadczeń zdrowotnych a dostępnymi zasobami, tworzy efektywny mechanizm finansowania opieki zdrowotnej poprzez zaangażowanie nowych instytucji z różnych obszarów, których celem nie jest zastępowanie, ale wzmacnianie państwa przy gwarantowaniu dostarczania usług medycznych obywatelom.

Różne modele organizacji opieki zdrowotnej, organizacyjne i prawne formy finansowania powinny zapewnić najprostszy i najbardziej efektywny sposób realizacji zadań z tego zakresu, który sprawi, że usługi medyczne będą świadczone na najbardziej optymalnym i racjonalnym poziomie. Na Białorusi można wskazać następujące źródła finansowania opieki zdrowotnej: środki budżetu państwa, dobrowolne ubezpieczenia zdrowotne, środki pochodzące od osób fizycznych i prawnych, środki organizacji medycznych.

Agnieszka Zemke–Górecka

THE REFORMS OF FINANCING THE SYSTEM OF HEALTH PROTECTION IN POLAND

Introduction

According to the WHO's report, the concept of the health system (called the system of health protection) comprises by its scope all organizations, institutions and resources that are intended for health activities[1]. The health system in Poland covers a group of institutions whose aim is to organize, finance and, most of all, provide health services and promote health. After the World War II the system of health protection in Poland was based on the Beveridge's model, the so called procurement model, which was called health service. As a result of the reforms carried out in the last decade in Poland we are dealing with a mixed model of financing health services. On the one hand the Bismarck model is binding, which is the so called insurance model based on a premium paid by an insured person or the state budget, and on the other hand, a certain scope of health services (highly specialized) is financed by the state budget. Since 1999 the health care has been supported from several sources of finance. The largest revenue thereof come from health insurance premiums which are collected by the National Health Fund. The state budget is the second largest source of public finance followed by the budgets of local self-government units whose income comes from taxes and local charges, state budget transfers and out-of-budget target funds, and, to a certain minor extent, from social organizations' resources, e.g. foundations which supply the system of health care with financial means. Incomes of households, working places funds, private health insurance funds and charitable organizations' funds play an important role among private sources of financing health care[2]. A problem of financial resources is a key element of all and any considerations connected with the health care reform.

1 The Health World Report 2000, Health's Systems Improving Performance WHO 2000, p. XI.
2 Zielona Księga finansowania ochrony zdrowia w Polsce, Warsaw 2004

The structure of the health system and its finance in 1945–1989

After the World War II a socialist system of health service started to be introduced. Already in 1944 it was announced in PKWN's manifesto (the Polish Committee of National Liberation) that it was absolutely necessary to provide working masses with medical care. After the War the State played a role of a sole organizer of health care. In effect, all units of health care as well as pharmacies were nationalized, and medical workers' self-government was liquidated. In 1952 labor health care was incorporated in the state health service administration[3] and since then the state budget financed health care from general taxes and other budget incomes. In the light of the provision of Art. 60 of the Constitution of 1952[4] the State was obliged to undertake any actions in order to prevent illnesses and provide help in the event of illness.

A centralized character of the state authority and liquidation of local self-government had a negative effect on health care functioning in Poland. Formed structures of health care derived means for their operation from the state budget. Financial management in health service was based on the so called section-by-section plan of the national planned economy system. Budgets of social institutions of health service and other budgets in the scope of health care and illness prevention were worked out and established centrally. In collaboration with competent ministers, the Minister of Health made a project of financing a detailed economic plan in the scope of health service indicating appropriate financial plans which were to cover the expenditure (state budget, local self-governments' budgets, social insurance institutions' budgets, units' own resources coming from charges paid by people who were using the units' services, etc.). The Budget Act centrally determined allocation of resources into individual provinces and departments. For fifty years health care finance was based on the so called subjective system, which is also called a procurement system. In this system the costs of a health service unit's support were financed. The level of the state budget donation had nothing in common with the costs estimation carried out on the basis of a size, structure and quality of performed services because it depended on the expenses born in a previous budget year by the unit. Therefore, it was not a number of performed tasks that decided about the level of finance but administrative, medical and any other needs demonstrated by a health service unit. The State financed investment tasks, including the purchase of equipment and medical devices for hospitals and surgeries. This system was anti-motivational in its nature. Moreover, the Act on Social Units of Health Service

3 The Act of 15th December, 1951 on Joining the Organization of Labor Medical Treatment to the National Administration of Health Service, Journal of Laws - Dz. U., No. 67, item 446.

4 The Constitution of the People's Republic of Poland, Journal of Laws - Dz. U. of 1952 No. 33, item 232.

specified that if the institutions supporting social units of health service would have to bear expenses connected with the performance of tasks resulting from the realization of health service provisions which exceed their financial capacity, they receive appropriate support from the State Treasury in a form of credits envisaged for this purpose in the budget. The rules on providing local self-governments with support were set forth on the basis of Art. 4 (2) of the 9th March 1948 Act on Self-Government Compensating Fund[5], whereas Minister of Health established it with reference to other institutions in collaboration with the Secretary of the Treasury.

A post-war system of health care presumed patients' co-payment for services they were provided with. The rules on making payments were regulated by the Act of 7th April, 1949 on Covering Charges in Hospitals Being Health Service Social Units[6]. This Act set forth that patients paid charges for treatment if special provisions did not specify otherwise. The Act regulated the issue of payment for treatment by specifying rates of subsidies, which were dependent on established income thresholds. It regarded medical treatment of patients who permanently lacked sufficient means to satisfy the necessities of life and due to their age or health condition were fully unemployable or unfit to work to an extent which prevented them from satisfying the necessities, as well as the patients who temporarily lacked sufficient means to satisfy the necessities of life due to temporary inability to be employed; the charges were paid by people who were obliged to pay alimony under civil law. In the event of the lack of subjects obliged to make payment, it was covered by poviat self-government and urban and rural municipalities where the patient was entitled to social welfare by virtue of the Act of 16th August, 1923 on Social Welfare[7]. Moreover, it was established that the municipality of the capital city of Warsaw and of the city of Łódź as well as urban municipalities of subdivided cities cover payments in full whereas urban municipalities of non-subdivided cities and rural municipalities cover 30% of due payments for medical treatment, the remaining 70% was paid by local poviat self-governments that were territorially competent for those municipalities. In the case of people who were not entitled to social welfare in any municipality, the charges were paid by the State Treasury. Persons running agricultural farms who did not possess any property that was subject to a real estate tax and who did not obtain any income and did not perform any additional activities that were subject to business or income tax were exempted from hospital charges provided the estimated revenue on their farm did not exceed 10 q annually. If farmers had to be treated in hospitals where higher charges for treatment than those in poviat hospitals were established, the State Treasury was burdened with the obligation to subsidize a full rate of higher charges. Ministers of Public Administration and Health could grant reductions /allowances

5 Journal of Laws - Dz. U. of 1948 No. 16, item 111 with amendments
6 Journal of Laws - Dz. U. of 1949 No. 25, item 174 with amendments
7 Journal of Laws - Dz. U. RP of 1923 No. 92, item 726 with amendments

for hospital charges in a form of a regulation in collaboration with the Secretary of the Treasury and competent ministers and with the State Council's consent, for sea fishermen and craftsmen and their families within the entire territory of Poland or those areas where it was economically justified, as well as specify the terms of awarding allowances, their rates for individual hospitals and areas where they were going to be applied as well as the rules of subsidies coverage. The State Treasury covered hospital charges for people entitled to medical treatment at the cost of the State Treasury under special provisions (e.g. those who were subject to mandatory treatment in the case of infectious or venereal diseases unless they were entitled to medical support on the basis of provisions on social insurances). The people covered by social insurance under the Act of 28th March, 1933 on Social Insurance[8] did not pay for medical treatment. In 1976 as a result of the amendment of Art. 70 of the Constitution, a rule of free medical help for all employees and their families was introduced. As the catalogue of persons entitled to free medical treatment within social insurance expanded, at the beginning of the 1990s almost all citizens were covered by health care, and even though the provisions concerning payment for medical treatment were repealed only in 1997, they became a dead letter much earlier. The establishment of sector rules of health care for individual professional groups (uniformed services as well as Polish National Railway employees enjoyed health care on completely different rules than other citizens) was a characteristic element of post-war health care.

Institutional and organizational changes of the health system after 1989

In 1989, together with the political system transformation in Poland, a debate on health care reform started. The need to undertake works on the change of the existing rules of health care for citizens arose as a result of the system's insufficiency as well as increasing expenditure thereon which did not bring expected results. The Polish Round Table's settlements were not detailed enough to create a certain foundation of objectives and perspectives of the health system in Poland. Therefore, a debate on health care reform started. At that time two projects of health care reform were established: social[9] and proprietary[10]. The first one presumed a declaration of support for a certain system of values where patient's and health care worker's subjectivity was of crucial importance[11]. According to it, a patient had a right to choose

8 Journal of Laws - Dz. U. of 1933 No. 51, item 396.
9 The project of the reform of the system of health care, MZiOS Warsaw 1989.
10 W interesie zdrowia społeczeństwa (The project of the reform of the system of health care), Biuletyn Instytutu Gospodarki Narodowej 1990.
11 W. C. Włodarczyk: Reforma opieki zdrowotnej w Polsce, Kraków 1988, p. 171.

a physician and a health care unit. At the same time it was s/he who was supposed to be a medium/carrier of financial means connected with his medical treatment. The social project envisaged the appointment of Health Insurance Fund which would have been based on a health insurance premium. The Fund's objective was to cover health services costs. A possibility of introducing a minimum lump-sum payment that was to be collected from a patient was also taken into consideration. The proprietary project envisaged the introduction of common health insurances whereas the State's financial share in the costs of health care was to be limited, e.g. with reference to specific health programs.

The Act of 1991 on Health Care Institutions (the Act on HCI), which broke off with a former concept of the national and social health service and introduced a new nomenclature: public institutions of health care, was of an essential importance for developing a new health system. The subject legal act severed a sole monopoly of the State on running health care institutions. Since the Act was passed on, public health service has been able to function in three forms: as a budget unit, a budget entity or a public independent health care institution. The Act on HCI was a breakthrough in the principles of operation of budget units and entities specified by the budget law[12]. In contrast to other budget units and entities, health care institutions could keep at their disposal 70% of budget resources that were not used in a given year if they were run in a form of a budget entity, and 70% of the payment intended for the budget if they were run in a form of a budget unit or other form of out-of-budget management.

A change of the model of financing health services into health insurance

In 1994 several meetings with representatives of various parliamentary and non-parliamentary groups and representatives of trade self-governments, trade unions and invited experts were held. The so called documents from Jachranka were drawn up, which recommended the acceptance of the Insurance Act awarding rights to health services and assuring equal access to them. Those services were divided into those which should be provided for by public means and other which should be paid for. Therefore, premiums were to become a basic source of finance. Moreover, another document called "Strategy for Health" [13] was created, which formulated four objectives concerning the improvement of society's health, assurance of common access to health services and equal rights as to the scope and quality of health care, an

12 The Act of 5th January, 1991 Budget Law, uniform text: Journal of Laws - Dz. U. of 1993 No. 72, item 344 with amendments

13 Strategia dla zdrowia, Antidotum 1994, No. 9 –10, p. 3.

increase of health care system's efficiency and improvement of quality of provided services as well as assurance of appropriate sources of their financing.

In December 1994 the presumptions of a new legal act were presented, which was to replace a procurement system of health care with a health insurance system financed by premiums. It was to be common and obligatory, demonstrate social solidarity, provide the State guarantees for citizens' health safety, provide contracts for health services under market rules through common health insurance funds. They were to provide self-financing of health services except for institutions' investment expenses, medical staff education and improvement, and financing didactic and scientific research activity.

A catalyst of changes connected with health services financing was the Act of 6th February, 1997 on Common Health Insurance[14], which specified *vacatio legis* for nearly two years. The aim of this Act was, most of all, a transfer from the budget system of health care financing into an insurance one. It should be emphasized that the first version of health insurance did not come into force due to the Cabinet change (after 1997 election) an extensive amendment was issued, which introduced a regional division of Health Care Funds. Common health insurance was based on general principles such as social solidarity, self-government, self-financing, equal access to services, economical management and purposefulness of action, the right to a free choice of a service provider and a Health Care Fund, and non-profit activity of Health Care Funds. The Act determined the collection of premiums from people who were subject to mandatory insurance, which were intended for the provision of periodic health services.

Under the Insurance Act, 16 regional Health Care Funds were appointed as well as the Uniformed Services Health Care Fund. The Health Care Fund was to be a self-governing institution representing the insured. The independence of Health Care Funds was of a double dimension, namely, the autonomy of organizational self-formation and independent action within the frames of an entrusted function of a remitter. According to general principles of the constitutional order, basic functions of coordination and protection in the scope of health protection belonged to legislative and executive authorities. In order to protect the insured's interests the Health Insurance Supervision Office was appointed, whose aim was to control Health Care Funds as well as service providers to a certain extent.

It should be emphasized that before the Act on Common Health Insurance was introduced, in 1998 a provision on the State's responsibility in the scope of execution of the provision of Art. 68 of the Constitution was removed. In connection with this, the problem concerning a legal status of Health Care Funds arose. Initially, according

14 Journal of Laws - Dz. U. of 1997 No. 28, item 153.

to the prevailing tendency, the Health Care Fund was neither a state organization entity[15] nor a public administration body[16], and the resources at its disposal were not public resources. It was very comfortable for administrators of these resources because no one had to justify the way of they were managed, moreover, it was easier to make corrections and withdraw from erroneous decisions. Only the amendment, made in 2000, of the Act of 26th November, 1998 on Public Finance[17] clearly specified that Health Care Funds, the Polish National Association of Health Care Funds and public independent health care institutions belonged to the public finance sector. The health insurance premium is a specific parameter of the health protection system. The mechanism of premiums' calculation is very complicated and is carried out in a dynamically changing economic environment. An increase of health protection being financed from the premium occurs together with a decrease of financing from the state budget. The expenditure of the local self-government units in the area of health protection comprises three kinds of activities: health protection, public health and social welfare. After the introduction of the health insurance system, poviats and self-government provinces became burdened with the biggest responsibility for the fulfillment of tasks in the area of health protection, which results from the fact that they perform a function of founding bodies for health care institutions.

The presumptions of the reform of financing health protection system of 1997 distinguished four stages:

Stage I – until the end of 1998 – health care institutions were to become independent; building Health Care Funds' structures and carrying out an operation of health services contracting for 1999;

Stage II – until the end of 1999 – a computer system of Health Care Funds as well as monitoring and settlement of health services were to be developed, the application of productivity measure and standardized principles of costs evaluation were to be implemented, accreditation of health care institutions was to be disseminated, standardized principles of medical services quality control were to be applied, health care institutions' offers were to become competitive;

Stage III – until the end of 2001 – this stage was to strengthen the system leading to a common application of productivity measure and standardized principles of costs evaluation as well as prepare common health insurance to the conditions of insurance institutions' competitiveness;

15 The Supreme Court's resolution of 27th April, 2001, OSNC 2001, No. 11, item 161.
16 The Supreme Court's decision of 17th November, 2001, OSNAP 2001, No. 14, item 473.
17 Journal of Laws - Dz. U. of 2000 No. 48, item 550.

Stage IV – since 1st January 2002, the health insurance market was to open together with a possibility of realizing health insurance obligation in other institutions than the Health Care Fund.

The fact that the Act on Common Health Insurance came into force on 1st January, 1999 meant the acceptance of a new health system model based on the so called insurance system that derived from the tradition of the classic Bismarck model of financing health services connected with the risk of a loss of health, where financial resources coming from the premiums paid in different proportions by an employee and an employer are gathered in the Health Care Funds – institutions independent of public administration. This Act distinguished a function of a remitter and a service provider whereas the system-internal bonds were based on the service agreement for the provision of health services. Health Care Funds and the Ministry of Health played a role of a remitter, moreover, self-governments could grant orders for health services. As a centralized public fund the state budget serves the purpose of money collection in connection with the functions realized by the State[18]. Since 1999, in Poland, highly specialized medical procedures, health programs, first aid service, public blood service and sanitary inspection have been financed from the state budget. Some of those expenses are transferable in nature because a part of health insurance premiums of the people who do not obtain income is financed from the state budget.

A new version of health insurance

It turned out that the next stage of the reforms would not proceed in accordance with earlier presumptions. In 2001-2002 the Cabinet decided that it was necessary to break off with the past and lead to the Health Care Funds' liquidation, which should be replaced with the National Health Fund. This institution was founded by virtue of the Act of 23rd January, 2003 on Common Health Insurance in the National Health Fund[19].

The National Health Fund was appointed to repair the system of health protection in Poland. Previous Health Care Funds were transformed into one Polish national fund with headquarters in Warsaw and with 16 provincial branches; the Uniformed Services Health Care Funds were replaced by the Department for Uniformed Services included in the National Health Fund's head office represented by departments for uniformed services in individual branches. Under the Act patients

18 S. Owsiak, Finanse publiczne. Teoria i praktyka, Warsaw 2005, p. 102 and next, as well as K. Piotrowska – Marczak, Obciążenia finansów publicznych z perspektywy ochrony zdrowia, [in]: W kręgu prawa finansowego i finansów publicznych, Księga dedykowana profesorowi Cezaremu Kosikowskiemu w 40 – lecie pracy naukowej, Lublin 2005, p. 293 – 300;

19 Journal of Laws - Dz. U. of 2003 No. 45, item 349.

insured in the Health Care Funds automatically retained a status of the insured in the National Health Fund. According to the propaganda-oriented assumption, a uniform fund was to be a more effective solution than previous Health Care Funds. The National Health Fund took over a function of a remitter in the system of financing health services from the Health Care Funds. It became a sole administrator of health insurance premiums transferred through ZUS (National Insurance Agency) and KRUS (Farmers' Social Security Fund), and therefore it remained a monopolist awarding contracts for medical and health services for the subjects executing them. However, it failed to influence standardization/unification of rates.

The system of common health insurance after the Constitutional Tribunal's judgment K. 14/03

The legal regulations included in the Act on Common Health Insurance in the National Health Fund arose social dissatisfaction, which led to a submission of constitutional complaints. The objection raised at that time concerned the fact that the Act had not introduced any, even intermediary, possibility of a control over public money expenditure to be exerted by the insured. Health insurance premium was treated as a public tribute/levy equal to payment in its nature, which was inconsistent with the essence of health insurance being of an insurance nature. The applicants called the public means obtained from the insurance out-of-budget target fund. They stressed that depriving citizens of the right to control the money coming from the premium violated the so called rule of the acquired/vested rights protection resulting from Art. 2 of the Constitution. The Act on the National Health Fund made the Fund entirely dependent on Minister of Health. By virtue of the judgment of 7th January, 2004, K 14/03[20], the Constitutional Tribunal ruled that Art. 36 (1) of the Act of 23rd January, 2003 on Common Health Insurance in the National Health Fund in connection with the provisions therein concerning the National Health Fund's organization and rules of action (Chapter 1 and 4), principles of securing health needs and organization of health services provision (Chapters 5, 6, 7 and 8), finance management (Chapter 9), principles of supervision and control of performing tasks by the National Health Fund (Chapter 13) were inconsistent with Art. 68 in connection with Art. 2 of the Constitution of the Republic of Poland "because by creating a public institution in a shape that prevents its reliable and efficient action, they violate the rule of law in the state in the scope of citizens' constitutional right to equal access to health care services financed from public resources"[21]. The above mentioned provisions, and practically speaking almost the entire Act, would have

20 The Constitutional Tribunal's Judgment of 7th January, 2004 K 14/03, OTK ZU 2004, No. 1A, item 1.

21 The Constitutional Tribunal ruled that a legal structure of the National Health Fund cannot be classified under any legal structure as a whole.

become null and void as of 31st December, 2004. The Constitutional Tribunal's judgment acknowledging the inconsistence of the Act on Common Health Insurance in the National Health Fund with the Constitution effected in the need to work out a new comprehensive regulation specifying terms and scope of using health care by citizens.

On 27th August 2004 the Act on Health Care Services Financed from Public Resources was passed[22]. This legal act was created on the so called fast legislative track. The above mentioned Act refers to the insurance model of health protection. However, it arises numerous objections. Modifying the insurance system, the legislator included in its scope administrative mechanisms (which are grossly inconsistent with an obligation-type nature of a legal relationship) which should be based on the subjects' autonomy, the freedom of choice and the freedom of agreements[23]. This Act is a result of political conditions connected with the need to retain health insurance structure due to limited resources of financial means that can be designated for health protection, whereas at the same time this model became entangled in a system of dependencies originating from administrative law, where government administration plays a leading role, where basic management instruments are: decision, official order and supervision. Moreover, the Act includes numerous incoherencies and fails to specify tasks and ensuing responsibility in a precise way.

Conclusions

The system, organized in 1948, functioned in an unchanged form until the beginning of the political system transformation in Poland. Alternatively, patients paid partially for medicines. According to estimations, expenditure born by households on health care amounted then to 12 – 14 % of all source of financing[24]. It should be emphasized that pursuant to Art. 70 of the previously binding Constitution citizens were entitled to the right to use free health service. A transformation from the budget-insurance-self-government system that existed in the 1940s to the budget system in the 1970s was smoothly carried out thanks to the fact that more and more people were covered by social insurance.

The first signs of the crisis in budgeting health service appeared in the middle of the 1980s. A basic cause of disintegration of that system of health care was undeniably too expanded infrastructure of health service units. It was evident that

22 Journal of Laws - Dz. U. No. 213, item 2161.
23 J. Jończyk, Czwarta wersja powszechnego ubezpieczenia zdrowotnego, PiZS 2004, No. 11, p. 3.
24 A. Windak, Podstawowa opieka zdrowotna, stan obecny i perspektywy reform w Polsce, in: collective work edited by S. Poździoch and A. Ryś, Zdrowie publiczne. Wybrane zagadnienia. Kraków 1996, p. 282.

rational management of their resources did not exist. In Poland thee was no need then to integrate the health care system functioning within 49 provinces into one framework which could supplement medical facilities shortages in one province with another province's infrastructure. There were situations, before 1990, where unequal division of resources flowing from the state budget for health protection resulted in the excessive development of infrastructure in some provinces (most frequently the most industrialized ones) and negligence in others.

In conclusion, there was the state monopoly on health service in the post-war Poland until 1999. Fr many years health service was made to be seen as ideal in the Polish system by strengthening beliefs in free health care; as a possibility of satisfying all needs and the absolute role of the State as both an organizer and a remitter of health services. It was possible to look at the state monopoly from two perspectives, namely:

– the monopoly of financing health service by the expenses from the state budget;

– the monopoly of health protection organization in a form of public units of health care.

Main features of financing health care by the state are: "zero price for the patient at the moment a service is bought, a lack of direct interdependence between the amount of taxes paid by a patient and a number of health services he or she purchases, the surplus of demand over supply of health services results in waiting long for medical services and the need to ration them out". This model envisages that a main source of financing is the state budget which is integrated regionally because the sources of financing remain at the disposal of a local administrator of health care, e.g. a provincial physician who concludes contracts with health care units[25].

In 1999–2004 the health protection reform was carried out at the level of service providers and a remitter of medical services. The foundation for transformations in the health system was separation of a body which establishes a unit (i.e. the owner) from the administrator of financial means. The transformation of budget entities' structures into independent institutions occurred, the privatization of services was introduced, family doctors practices and group practices of specialist doctors were established on a scale that had not been seen before. The second level of changes concerned a sphere of financing new subjects with the help of contracts that replaced a previous budget financing. Government administration continued to play a role of a remitter only in the scope of highly specialized health services.

25 K. Kissimova – Skarbek in: edited by S. Poździoch, A. Ryś, Zdrowie publiczne. Wybrane zagadnienia, Kraków 1996, p. 155

Local self-government units are obliged to finance health services within the frames of prophylactic health programs. Pursuant to the Act on Work Medicine Service[26] employers provide employees with specified health services therein. What is more, insurance companies were created, which within life insurance or commercial health insurance buy out health insurances insuring their clients outside the system of health insurance. A reasonable system of health care should guarantee a limited package of high quality benefits for everyone and at the same time enables a voluntary health insurance for those who cannot afford it> With reference to other people, clearly specified rules of providing health services should be laid down and the criteria of availability should be pointed out.

Valid legislation introduces a mixed system of public financing of health services independent of the patient's admissible share. Apart from the institutions appointed solely to such finance in a form of Health Care Funds - now NFZ (National Health Fund), acting on the basis of the premium paid by the insured, some health services are paid directly from the state budget. These are mainly highly specialized services. Moreover, there are also services connected with infectious diseases and withdrawal treatment (24 hour institutions of withdrawal treatment are to be organized by the province council whereas the other – by the Starost office). Financing health protection in Poland appears to be quite distinct depending whether a medical services provider belongs to the public or non-public sphere. With regard to public entities unfavorable polarization of financing sources can be noticed as opposed to diversification of non-public sector's revenues[27]. In Poland public funds are a very varied group of sources of financing health care services, the greatest role being now played by the central target fund – the National Health Fund[28]. A health insurance premium is an instrument to obtain revenue by the Fund. Another important public source is the state budget as well as local self-government units' budget, whereas out-of-budget target funds, e.g. Labour Fund, play a certain role in financing health care as well[29]. A share of private funds is increasing, and not only those coming from households but also those coming from employers' funds through the so called medical subscriptions. In the solution introduced by the Act of 6th February, 1997 on Common Health Insurance as well as solutions introduced by the Act of 23rd January, 2003 on Common Health Insurance in the National Health Fund "a common insurer – and strictly speaking a premium in this insurance, was joined with natural persons' income tax. Hence, this kind of approach refers to the tradition of health insurance as social insurance and presumes commonness of personal income tax[30]". J. Sobiech assumes that due to that fact health insurance cannot be considered common since

26 Uniform text: Journal of Laws - Dz. U. of 2004 No. 125, item 1317.
27 A. Sieńko, Prawo ochrony zdrowia, Warsaw 2006, p. 74
28 J. Rój, J. Sobiech, Zarządzanie finansami szpitala, Warsaw 2006, p. 38.
29 Ibidem
30 Ibidem, p. 39

it depends on employment. Premiums for health insurance are collected by ZUS and KRUS whereas revenues on premiums are not subject to repartition between the NFZ's branches, therefore, this eliminates a possibility of mutual incomes and expenses[31]. A health insurance premium (target tax) is important as far as its fiscal, redistribution and allocation aspects are concerned. A fiscal function is certainly of an essential importance since efficiency in this scope depends on a tax capacity of households (directly) and entrepreneurs (indirectly) as well as the structure of a health insurance premium. J. Sobiech indicates that a fiscal capacity of a health insurance premium depends on the total financial burden as well as the taxation structure and the condition of the economy (including public finance) [32]. It is difficult to talk about redistribution importance when only the National Health Fund is authorized to collect premiums and the system lacks private insurers that could use the premium. The allocation function is imbalanced too because a relation between the premium and service does not exist in the present system.

The reforms carried out so far have still failed to decide about a crucial issue for the health protection system functioning. There are no clear criteria dividing services into basic ones, financed by public resources (from health insurances) and secondary ones (financed from private resources).

31 Ibidem, p. 40
32 Ibidem, p. 40

Streszczenie

W rezultacie reform przeprowadzonych w minionej dekadzie, w Polsce funkcjonuje mieszany model finansowania usług medycznych. Z jednej strony występuje model, w których środki finansowe pochodzą ze składek osób ubezpieczonych lub z budżetu państwa, z drugiej – również z budżetu państwa finansowana jest określona grupa świadczeń (świadczenia wysokospecjalistyczne). Od 1999 r. finansowanie systemu opieki zdrowotnej opiera się na kilku źródłach. Największym z nich są składki na ubezpieczenie zdrowotne gromadzone w Narodowym Funduszu Ochrony Zdrowia; następnie środki publiczne pochodzące z budżetu państwa i w dalszej kolejności z budżetów jednostek samorządu terytorialnego, kończąc na pozabudżetowych funduszach celowych oraz w najmniejszym zakresie – środki organizacji społecznych, m.in. fundacji działających w tym zakresie. Ponadto ważną rolę w finansowaniu ochrony zdrowia ze środków prywatnych stanowią zasoby gospodarstw domowych, specjalistyczne fundusze tworzone w zakładach pracy oraz organizacje charytatywne. Generalnie finansowanie jest kluczowym zagadnieniem reformy opieki zdrowotnej wobec pozostałych problemów.

Róża Kosińska, Piotr Woltanowski

RÉFORMES DU SYSTÈME DE FINANCEMENT DE LA PROTECTION SANTÉ EN POLOGNE

Le système de financement de la protection santé en Pologne continue à changer depuis 1989. Le système qui fonctionnait dans la République Populaire de Pologne, qui consistait à financer le secteur directement par les moyens budgétaires n'était pas adéquat dans la nouvelle situation économique. On lui a reproché particulièrement le manque d'analyse de l'effectivité des coûts et de l'efficience de l'activité des unités de prévention sanitaire, le fait de favoriser des investissements excessifs et irrationnels en construction de bâtiments dans le secteur de la santé publique, le manque de coordination dans la politique d'investissements, le fait de causer l'acquisition irrationnelle et sans contrôle des instruments et matériaux médicaux, l'effectivité insuffisante de l'administration, le manque d'une gestion financière rationnelle dans les hôpitaux et autres institutions des soins de santé, ainsi que leur endettement toujours croissant, l'augmentation continue des dépenses à titre de financement des médicaments subventionnés et le fait de forcer la participation du patient à couvrir les frais des soins médicaux.[1] Depuis le 1 janvier 1999, on a introduit en Pologne les caisses des malades, ce qui devait rendre ce secteur autonome et indépendant des décisions politiques arbitraires, dictées partiellement par des groupes de pression et partiellement par le besoin de faire équilibrer le budget et de garantir l'augmentation prévisible des moyens publics destinés à cet objectif. Le principe de base de la réforme était d'admettre un système mixte budget-assurances pour subventionner les soins de santé. Le budget de l'Etat devait financer entre autres les programmes de la politique de santé ainsi que les programmes de prophylaxie, la lutte contre l'alcoolisme, la prévention de la toxicomanie et du SIDA. Seize caisses des malades régionales et la Caisse des Malades pour les fonctionnaires en uniformes, ont assumé la fonction des payeurs, en associant les assurées assujettis à l'assurance obligatoire ou volontaire. Presque tous les citoyens étaient assujettis à

1 Vide: Relation du Réprésentant du Gouvernement pour l'Introduction du Système Public des Assurances, une année après l'entrée en vigueur de la loi sur les assurances maladies, envoyée par le Maréchal du Parlement de la République de Pologne Maciej Plazynski, n° 2413, site Internet du Parlement de RP du 1 juin 2008, www.sejm.gov.pl

l'assurance obligatoire. Ceux qui n'étaient pas assurés en vertu de la loi, pouvaient choisir une assurance volontaire. Les frais des personnes qui n'étaient pas assurées et ne pouvaient pas couvrir les frais des traitements médicaux, étaient couverts par les fonds de l'assistance sociale. Formellement, on garantissait aux assurés l'accès gratuit à presque tous les genres de services de santé. Dans les contrats stipulés par les Caisses des Malades avec les fournisseurs des soins de santé, on définissait les droits, les obligations et les responsabilités des sujets fournissant ces soins. Les assurés avaient le droit de choisir la Caisse des Malades à laquelle ils voulaient appartenir.

Le système du financement présenté ci-dessus a été modifié par la loi du 23 janvier 2003 sur l'assurance générale auprès du Fonds national de la santé[2]. Les caisses des malades ont été remplacées par le Fonds national de la santé formé de la Centrale et de 16 succursales de voïévodie, selon la nouvelle division territoriale de l'Etat. La protection de la santé est actuellement financée par les moyens publics et privés. Les plus importants sont les revenus provenant des cotisations accumulées dans le Fonds national de la santé. Les moyens provenant du budget national et des budgets des unités des autonomies locales jouent un rôle moins important. En plus, le système de protection de la santé perçoit les moyens pécuniaires privés, payés par les patients, par leurs établissements de travail, par les assureurs privés et par les organisations caritatives. Le système de l'assurance maladie qui fonctionne actuellement en Pologne est basée sur les principes de l'universalité et de leur caractère obligatoire. Le devoir de payer l'assurance maladie et son caractère universel résultent de l'article 68 alinéa 2 de la Constitution de la République de Pologne, qui garantit que les autorités publiques assurent de la même manière l'accès aux prestations et soins médicaux financés par les moyens publics à tous les citoyens, sans tenir compte de leur situation matérielle.

Depuis l'introduction du système de financement de la protection de la santé par l'intermédiaire des caisses des malades et du Fonds national de la santé, on observe une diminution nette du financement par le budget de l'Etat. Ceci implique la limitation de la portée du financement des programmes de la politique de santé, des programmes d'action publique pour la protection et la restructuration, ainsi que le passage d'une part des compétences de la protection de santé et de santé publique administrée par le gouvernement au financement dans le cadre général de l'assurance maladie. En même temps, il y a une tendance a abaisser les dépenses patrimoniales destinées à la protection de la santé qui, en 2003, ne comprenaient que 60% des dépenses analogues de l'an 1999.[3] Le non-investissement en locaux et équipement résulte du fait que les moyens obtenus grâce aux contrats ne sont

2 Journal Officiel n° 45, position 391 avec mod.
3 S. Golinowska (red.) – Raport – Finansowanie ochrony zdrowia w Polsce – Zielona Księga, Warszawa 2004

pas toujours suffisants pour couvrir les frais courants des procédures médicales. En Pologne, on ne destine à la protection de la santé qu'un peu plus de 6% du PIB, pendant que dans les pays de OECD on y destine en moyenne 8-9% du PIB. Le Fonds national de la santé, en disposant des moyens tellement limités, contracte les prestations en dessous de la demande, ce qui provoque des queues toujours plus longues, la limitation des prestations dues aux patients et la croissance du phénomène du "marché gris" des prestations médicales (prestations privées, entièrement payées par le patient, mais dispensées en utilisant les appareils et les équipements payés avec de l'argent public). Les moyens destinés aux rémunérations constituent un élément base de la structure des frais de la plupart des établissements des soins médicaux – l'augmentation de salaires, qui est indispensable, approfondira encore la crise financière dans ce secteur.

Du front à l'inefficacité du système public de financement de la protection de la santé, on observe le développement du marché des assurances maladie privées. Elles prennent forme des "paquets" d'abonnements, offerts par les entreprises fournissant des soins médicaux, ainsi que la forme des assurances maladie sensu stricto. Les premiers embrassent actuellement 400-500 milles salariés et comprennent les prestations de la médecine de travail ainsi que les prestations ambulatoires. La valeur du marché de ces abonnements est estimée à 200-300 millions de zlotys polonais4. En Pologne, ce n'est que le commencement des paquets des assurances maladie et leur valeur de marché est sensiblement plus basse par rapport aux abonnements médicaux. La barrière principale du développement des assurances maladie en Pologne est à l'heure actuelle le manque des régulations juridiques qui rendent possible cette activité, le niveau matériel peu élevé de la société, ainsi que le manque de conscience sociale limitant la disponibilité à prévenir le risque des dépenses futures pour la santé. D'autres facteurs qui influencent d'une manière négative le développement des assurances sont : le manque d'espace pour l'activité assicurative – le système universel garantissant (en théorie) toutes les prestations au niveau mondial le plus élevé, l'offre du "marché gris", le manque de réseau efficace des fournisseurs des soins de santé et le manque de régulations juridiques transparentes qui appuient le développement du marché.5

Les directions de la réforme actuellement initiée, qui concerne le financement de la protection de la santé, ont été déterminées par les projets antérieurs irréalisés. Dans *Analyse de la situation et programme des changements de système dans le secteur de la protection de la santé en Pologne*[6], on postulait de définir le panier des

4 Informations plus détaillées: Rola dobrowolnych ubezpieczeń zdrowotnych w kontekście zmian systemowych sektora opieki zdrowotnej w Polsce, dokument zespołu roboczego ds. ubezpieczeń zdrowotnych Polskiej Izby Ubezpieczeń, passim.

5 Ibidem, p. 3

6 M. Boni, A. Kraszewski et M. Grajek, Analiza sytuacji i program systemowych zmian w sektorze opieki zdrowotnej w Polsce, le site Internet du Parlement de la République de Pologne du 1 juin 2008, www.sejm.gov.pl

soins garantis, d'introduire de petits paiements pour les prestations dans le système public, et d'introduire les assurances volontaires supplémentaires. Ces propositions ont été développées et précisées dans le document *Augmentation du rôle des assurances maladie volontaires dans le financement de protection de la santé en Pologne.*[7] Dans le projet des *Programmes de Santé des Travailleurs*[8] on postulait de tels changements dans le système des impôts, pour que les assurances maladies de corporations puissent êtres considérées comme dépenses déductibles. Le projet du Syndicat Professionnel Polonais des Médecins *Système Rationnel de protection de santé*[9] prévoyait la démonopolisation des fonctions du payeur, les subventions des soins médicaux, l'élaboration d'un panier des prestations garanties et des assurances privées. Le projet de la loi sur le financement des prestations des soins de santé[10] prévoyait l'existence des fonds de santé autonomes, possédant la personnalité juridique. Initialement, on ne pensait qu'aux institutions nationales, agissant sur des territoires définis, mais qui depuis l'an 2007 auraient la possibilité d'agir sur tout le territoire de la République de Pologne. Depuis l'an 2007 il existerait aussi la possibilité de créer des fonds de santé de caractère privé, agissant à la base de la loi et du code des sociétés commerciales, en tant que sociétés par actions. Le document *Assurances non publiques en Pologne*[11] indiquait la nécessité d'introduire les assurances de santé non publiques, de définir le panier des prestations garanties et de standardiser les procédures médicales. Les postulats semblables ont été présentés par un groupe d'experts convoqué par le Médiateur.[12] *Le Sommet Blanc* recommandait l'introduction du paiement d'une petite somme pour une partie des soins de santé et des prestations auxiliaires[13], la création d'un panier positif des prestations garanties, l'introduction d'un système d'assurances privées supplémentaires – complémentaires, et dans le futur, une concurrence libre des assureurs, ainsi que l'égalisation des obligations des agriculteurs et des autres assurés.[14]

Les propositions présentées, ainsi que le paquet des projets de loi qui procède actuellement au Parlement, et dont l'objectif est d'introduire une nouvelle réforme de protection de la santé[15], devaient favoriser la réalisation de trois objectifs principaux:

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7 Zwiększenie roli dobrowolnych ubezpieczeń zdrowotnych w finansowaniu opieki zdrowotnej w Polsce, le site Internet du Parlement de la République de Pologne du 1 juin 2008, www.sejm.gov.pl

8 A. Jacaszek, Pracownicze Programy Zdrowotne, document de la Confédération des Employeurs Polonais

9 Appuyé entre autres par la Chambre Nationale de Commerce polonaise (Krajowa Izba Gospodarcza) et par le Centre Adam Smith

10 Élaboré sous direction du ministre de la santé précédent – prof. Z. Religa

11 Niepubliczne ubezpieczenia zdrowotne w Polsce, document de Chambre d'Assurances Polonaise, le site Internet de la Chambre d'Assurances Polonaise du 1 juillet 2007, www.piu.org.pl

12 Site Internet du Médiateur (Rzecznik Spraw Obywatelskich) du 1 juillet 2007, www.rpo.gov.pl

13 Y compris les frais du logement et de l'alimentation des patients

14 Reccomandations de la conférence du Sommet Blanc du 19 mars 2008, "Puls", revue mensuelle de la Chambre Régionale des Médecins à Varsovie, 2008 n° 4, page 6 et les suivantes.

15 Projet de la loi normes introductives concernant les lois en matière de protection de la santé – bulletin n° 294, projet de la loi sur les établissement des soins médicaux – bulletin n° 284, projet de la loi sur les assurences

– Augmentation du niveau de financement des soins de santé,

– Définition de la portée de la protection de la santé financée par les moyens publics,

– **Introduction des mécanismes motivant les fournisseurs des prestations à rationaliser les dépenses couvertes par les moyens pécuniaires publics** (y compris un contrôle efficace et la définition de la portée des soins de santé qui sont dus dans le cadre de l'assurance maladie).

Entre les propositions discutées actuellement, ayant pour but d**'augmenter le niveau de financement des soins de santé** il faut énumérer:

– Introduction du système des prestations supplémentaires,

– Augmentation des cotisations de l'assurance maladie,

– Introduction du copaiement de la part des patients.

Parmi les projets de changement dans le système de financement de la protection de la santé, c'est l'introduction dans le système des assurances maladie de la possibilité de stipuler les contrats de l'assurance maladie en conformité avec la loi de l'activité assicurative, c'est-à-dire la stipulation **d'une seconde assurance maladie volontaire,** qui a la meilleure chance de réussite. Dans le projet de la loi, on a défini deux genres d'assurances maladie volontaires: assurance maladie supplémentaire et assurance maladie complémentaire.

Dans le cadre de **l'assurance maladie supplémentaire,** l'établissement d'assurances privées devrait fournir à l'assuré l'accès aux soins de santé garantis, pendant que l'assuré devrait renoncer à l'assurance parallèle dans le Fonds national de la santé. Il semble que les assurances supplémentaires, au cas où elles seraient introduites, ne pourraient pas jouer de rôle d'une source supplémentaire du financement des soins de santé qui leur était attribué par les auteurs de ce projet. Les personnes le plus exposées à la nécessité de profiter des soins de santé ne choisiraient point cette forme d'assurance, vu le montant des cotisations qu'ils auraient dû payer. En cas des personnes à petit risque assicuratif, les sommes provenant des cotisations assicuratives resteraient dans l'établissement de l'assureur sans être destinées aux fournisseurs des soins de santé. Au cas où l'on accepterait la possibilité de déduction de la cotisation de l'impôt ou de la cotisation obligatoire, c'est en pratique le budget national ou l'assureur public qui en aurait supporté les frais. A côté de ce phénomène de segmentation subjective du risque, on observerait probablement un autre phénomène: les assureurs se limiteraient à des procédures rentables en laissant les autres activités à l'assureur public.

volontaires supplémentaires – bulletin n° 293, le site Internet du Parlement de la République de Pologne du 1 juin 2008, www.sejm.gov.pl

En cas de **l'assurance maladie complémentaire,** l'établissement des assurances devrait permettre à l'assuré l'accès aux soins de santé non garantis ou bien le financement d'une partie des frais des soins partiellement garantis, selon des principes définis par la loi. En cas d'un contrat de l'assurance maladie complémentaire, la prestation de l'établissement d'assurances consisterait à couvrir la différence entre le prix de la prestation financée par les moyens pécuniaires publics et le prix de la prestation établi par le fournisseur des soins de santé. Il faut toutefois souligner qu'il y a déjà en Pologne des assurances qui fonctionnent d'une manière semblable et la régularisation de ce segment du marché, toute utile qu'elle soit, n'augmentera probablement pas l'intérêt pour ce type d'assurances. La pratique actuelle de leur fonctionnement montre que l'assureur ne sera pas intéressé à la qualité élevée des prestations qu'il offre, particulièrement en ce qui concerne le remboursement des frais supportés par les établissements des soins de santé pour les traitements médicaux des patients, mais destinera plutôt les fonds à la promotion de ses services à travers la publicité.

On peut avoir l'espoir **en l'augmentation des moyens provenant des cotisations et du budget de l'Etat.** Selon les communications annoncées par le Président du Conseil des Ministres, la cotisation pour l'assurance maladie sera augmentée en 2010 de 9 a 10%, et les dépenses budgétaires pour la protection de la santé devront augmenter de 5 milliards de zlotys polonais.[16] Toutefois, les informations de ce type énoncées par les chefs des gouvernements précédents contribuent à faire refroidir l'optimise exagéré. Hélas, il ne faut pas penser à la réussite d'une décision socialement impopulaire, comme par exemple celle de **copaiement limité de la part des patients.** Et pourtant, l'acceptation de cette solution garantirait non seulement l'affluence des moyens au système, mais surtout influencerait une certaine rationalisation des comportements des patients et des fournisseurs des soins de santé. Il faut souligner que les montants de copaiements devraient être bas, et le système de l'aide financière (fonctionnant selon le principe de remboursement) devrait faire disparaître les difficultés à obtenir les prestations accessibles aux personnes possédant moins de ressources.

Le montant des moyens destinés au financement du système de protection de la santé exige une définition de la portée des soins de santé auxquels on a le droit dans le cadre de l'assurance maladie. C'est le Tribunal Constitutionnel qui l'a souligné dans la sentence du 7 janvier 2004, en disant que le droit sur lequel est fondé le système de protection de la santé devrait préciser d'une manière univoque la portée des prestations financées par l'assuré. Selon les exigences constitutionnelles (art. 68 alinéa 2), la loi devrait définir d'une manière positive ou négative **le panier des soins garantis.** Dans le projet de la loi sur le changement de la loi sur la prestation

16 Paroles de D. Tusk publiés dans "Puls – Miesięcznik Okręgowej Izby Lekarskiej w Warszawie" 2008, n° 4, p. 6

des soins de santé financés par les moyens publics et des autres lois, on présume que le panier négatif sera introduit en forme d'une disposition du Ministre de la Santé, ce qui est motivé par la "possibilité de réagir d'une manière élastique aux changements dans le domaine du développement de la science et de la médecine". Dans la loi du 27 août 2004 sur la prestation des soins de santé financés des moyens publics (actuellement en phase de rédaction), on indique dans l'article 17 les prestations exclues du financement public. Toutefois, c'est une régulation fragmentaire qui ne définit pas la façon de prendre des décisions sur les prestations des soins de santé qui ne seraient pas couvertes dans le cadre de l'assurance maladie obligatoire, ce qui est une condition indispensable de transparence du financement des prestations des soins de santé. C'est l'Agence d'Evaluation des Technologies Médicales qui doit s'occuper de la qualification des prestations de soins de santé en tant que partiellement garantis ou non garantis. Selon le projet, elle le fera d'office ou sur demande. Cette Agence fonctionne actuellement à la base de la normative du Ministre de la Santé et elle doit effectuer la valutation des prestations des soins de santé, examiner les demandes concernant la qualification des prestations des services de santé, et son Conseil de Consultation doit recommander au Ministre de la Santé les décisions à prendre, en ce qui concerne la collocation d'une prestation donnée dans le panier des prestations de soins de santé. Le Ministre de la Santé est tenu par la recommandation émise au non-financement de la prestation donnée. Le projet définit aussi les principes de fonctionnement, l'organisation et les tâches de l'Agence d'Evaluation de la Technologie Médicale. Celle-ci sera une unité organisationnelle nationale possédant la personnalité juridique, surveillée par le ministre compétent pour les affaires de la santé, agissant à la base de la loi et du statut octroyé par la disposition du Ministre de la Santé. La norme de l'article 4 du projet de la loi a une importance essentielle, en obligeant le Ministre de la Santé à émettre une disposition contenant la première liste des prestations garanties et non garanties 6 mois avant l'entrée en vigueur de la loi.

Le panier des prestations consultées actuellement avec les milieux médicaux est lié à l'introduction d'un système des groupes uniformes des patients, qui rationalise les dépenses publiques dans cette matière. Le payeur effectuera les règlements des comptes avec l'hôpital selon les tarifs forfaitaires attribués aux cas des maladies qui restent uniformes du point de vue des frais, de la diagnose ou des procédures médicales effectuées, et forment des groupes précis dénommés GUP – groupes uniformes des patients. Le calcul des frais de traitement du patient consiste à le classer selon les procédures effectuées et à le mettre dans un groupe défini. Il est basé sur les procédures du rang le plus important, sur les procédures supplémentaires, la diagnose principale et coexistante, l'âge du patient et la durée de l'hospitalisation. Les avantages fondamentaux de ce nouveau système sont la simplification des principes du financement et leur corrélation avec les coûts réels de la prestation. En

plus, l'introduction de ce système rend possible d'effectuer une analyse des frais crédible[17].

Les changements dans l'organisation du système des assurances planifiés par le Ministère de la Santé, comprennent l'introduction d'autres payeurs des soins de santé, à part le Fonds national de santé (FNS), qui seraient financés avec des cotisations publiques, ainsi que la division du FNS en plusieurs assureurs concurrentiels. Comme dans le "Projet de Religa", on prévoit, à l'étape finale de la réforme (prévue pour l'an 2012), d'introduire sur le marché des assureurs privés. Il est pourtant difficile de partager l'opinion de Madame la Ministre de la Santé, qui souligne que le nouveau système permettra de s'éloigner des prestations de santé limitées. Laisser cette question aux assureurs comporterait une probabilité trop élevée du phénomène de segmentation subjective du risque qui a déjà été mentionné.

Pour garantir une surveillance efficace des assurances volontaires, la Commission de Surveillance Financière a été élargie, et comprend en plus le Ministre de la Santé ou son représentant. Vu l'introduction de nouvelles assurances maladie (à part les assurances obligatoires), le projet présume aussi la convocation d'une nouvelle unité – Bureau de Surveillance des Assurances Maladie, compétente pour le contrôle du système de l'assurance maladie générale et l'activité des établissement des assurances concernant les assurances maladie volontaires. Sa tâche consistera à protéger les intérêts des patients et des assurés. La Surveillance de ce Bureau (conduite selon le critère de légalité, sincérité et intentionnalité) concernera l'activité du Fonds, des fournisseurs des prestations, des pharmacies (le remboursement des médicaments) et des établissements d'assurances qui mènent leur activité sur le territoire de la République de Pologne en fournissant des assurances maladie volontaires. Il semble que le projet de la loi sur les assurances maladie volontaires, qui est actuellement élaborée par le Parlement, exige encore certaines modifications. La Surveillance de la part du Président du BSAM ne sera pas, malgré l'attribution des compétences très étendues, très efficace en cas des pharmacies. Il est indispensable que cet organe possède la possibilité d'infliger des sanctions sensibles : en conformité avec l'article 188 du projet, au cas où la pharmacie n'éliminerait pas dans le délai prévu des irrégularités constatées, le Président du Bureau de Surveillance peut infliger une peine pécuniaire dont le montant équivaut à la rétribution moyenne de trois mois.[18]

La transformation préannoncée de tous les hôpitaux, sauf les cliniques et les unités du ministère, en sociétés de droit commercial a pour objectif de rationaliser les dépenses publiques grâce à la prévention de leur endettement dans le futur.

17 Cfr. J. Paszkiewicz, Jednorodne Grupy Pacjentòw – przewodnik po systemie "Menedżer Zdrowia" 2008, n 6, page 2 et suivantes

18 Dans une situation analogue, le Président du Bureau inflige au fournisseur des soins de santé une peine pécuniaire dont le montant équivaut à la valeur du contrat mensuel stipulé entre ces fournisseurs et le Fonds, qui regarde l'irrégularité en question.

Les irrégularités dans la gestion économique et financière de ces centres doivent être découvertes suite à l'audit effectué avant leur passage sous la gestion des autonomies locales. Il y a ici une question controversée, celle du désendettement des établissements autonomes publics des soins de santé. Ce processus doit se dérouler d'une manière progressive et graduelle et il devrait consister à convertir leur endettement en papiers de valeur à long terme.[19] C'est pourquoi on doit former un fonds de restructuration. Les autonomies locales, après avoir repris les hôpitaux, devront décider de leur privatisation.[20] En plus, le projet de la loi Normes introductives de la loi sur la protection de santé prévoit l'acceptation d'une solution qui introduise le mécanisme assurant l'intérêt constant de l'unité de l'autonomie locale pour la situation économique de l'établissement autonome public des soins de santé. Dans la loi sur les finances publiques on doit introduire une clause stipulant que dans le cas de l'unité de l'autonomie locale qui fonde un établissement autonome public des soins de santé, le montant total des dettes d'une telle unité ne peut pas dépasser à la fin de l'année budgétaire 60% du revenu total produit par cette unité au cours de la même année budgétaire, diminué du montant des charges de cet établissement exigibles à la fin de l'année budgétaire.

Pour éliminer les abus qui regardent la prescription des médicaments remboursés, le ministère de la santé prévoit l'informatisation entière du système de remboursement. Les changements concernant cette matière deviennent une charge pour les médecins, qui auraient de nouvelles obligations à remplir, mais, ce qui est plus important, ils seraient très coûteux pour les établissements des soins de santé, qui devraient être munis de lecteurs spéciaux des cartes magnétiques et de programmes appropriés. Cela a provoqué des contestations de la part des médecins. De même, les solutions temporaires consistant à introduire de nouveaux modèles d'ordonnances avec le système de sécurité divisé en six niveaux, imprimés par la société Entreprise Polonaise des Papiers de Valeur (Polska Wytwòrnia Papieròw Wartosciowych), ne trouve pas l'acceptation.[21] C'est tout à fait compréhensible, vu que selon le projet du ministère, les frais des changements en question passeraient à la charge des médecins qui auraient dû acheter des formulaires d'ordonnances, tandis que l'introduction des systèmes de sécurité n'éliminerait pas les abus qui consistent avant tout à émettre des ordonnances d'une manière fictive par certains médecins, au nom des personnes ayant droit au remboursement total, ce qui porte à extorquer la somme remboursée. En plus, il est assez facile d'éliminer ce problème à travers le contrôle de la personne qui achète les médicaments remboursés prescrits par un médecin donné, de celui

19 Selon les propositions du Ministère de la Santé – les obligations du Trésor. L'Association des Managers des Soins de Santé STO-MOZ dans la déclaration du 14 mars 2008 propose l'émission des obligations de la part des unités de l'autorité locale.

20 Il y a une analyse intéressante de ses propositions dans: E. Szarkowska, M. Stańczyk, Samorządy zdecydują o przyszłości zadłużonych szpitali, „Puls Medycyny" 2008, n° 9, p. 4-5

21 Cfr. M. Stankiewicz, Recepty niczym banknoty, "Gazeta Lekarska" – Pismo Izb Lekarskich 2008, n° 6 p. 18

pour lequel le médicament est prescrit et de celui qui les vend. Il existe une question encore plus urgente, celle d'élaborer des méthodes transparentes qui permettent de vérifier la liste des médicaments remboursés. Actuellement, elle rend possible l'activité de lobbing de la part des entreprises pharmaceutiques. La portée de cette activité est énorme. La procédure en cette matière devrait être strictement formalisée et surveillée : il est inadmissible que sur ces listes existent des médicaments qui sont hors production ou bien des produits qui ont été retirés du marché (cette année on a supprimé de la liste 140 produits de ce genre), que les demandes d'inscription sur la liste attendent des années[22], ainsi que l'inscription des médicaments qui ne possèdent ni recommandation ni valutation convenables.

Pour conclure, il faut souligner que les réformes actuelles introduites dans le système du financement du secteur de la santé doivent constituer un élément d'un plan plus large, échelonné sur plusieurs années. Il est nécessaire d'établir d'une manière claire un modèle-cible du financement ainsi que l'indication des délais de l'introduction des changements successifs, ce qui rendra possible une discussion constructive sur les principes préalables de la réforme, éliminera le manque de sûreté et permettra de préparer au changement les travailleurs du secteur de protection de la santé. Les projets des lois qui déterminent les cadres juridiques du futur système devraient être formulés dans le Ministère de la Santé, et non présentés par les députés. Cela limitera l'influence des entreprises des assurances et des propriétaires des pharmacies dont les résultats sont déjà plus que visibles à la lecture des projets.

22 Comme constate M. Stankiewicz dans la publication citée – cela concernait 374 demandes qui restaient sans réponse même jusqu'à 6 années.

Streszczenie

Przeprowadzane od 1999 r. głębokie reformy instytucjonalne systemu finansowania ochrony zdrowia nie rozwiązały problemu niedofinansowania - w Polsce na opiekę zdrowotną przeznaczanych jest nieco ponad 6% PKB. Skutkuje to narastającymi kolejkami, bezprawnym limitowaniem świadczeń medycznych dla pacjentów i rozwojem tzw. szarej strefy usług medycznych (świadczeń prywatnych, pełnopłatnych, jednak z wykorzystaniem aparatury medycznej zakupionej z pieniędzy publicznych). Procedowany w Sejmie pakiet projektów ustaw służyć ma zwiększeniu poziomu finansowania świadczeń opieki zdrowotnej, określeniu zakresu finansowanej z pieniędzy publicznych ochrony zdrowia (projekt tzw. koszyka świadczeń gwarantowanych jest konsultowany obecnie ze środowiskami medycznymi) i wprowadzeniu mechanizmów motywujących świadczeniodawców do racjonalizacji wydatków (w tym skutecznej kontroli i określenia zakresu świadczeń opieki zdrowotnej przysługujących w ramach ubezpieczenia zdrowotnego). Przekształcenie wszystkich szpitali poza klinicznymi i resortowymi w spółki prawa handlowego również ma na celu racjonalizację wydatków publicznych poprzez zapobieżenie ich zadłużaniu się w przyszłości. Aby wyeliminować nadużycia w zakresie wypisywania leków refundowanych resort zdrowia planuje docelowo pełną informatyzację systemu refundacji.

PART VI
OTHER PROBLEMS

Katarzyna Boratyńska

FORFEITURE OF PROPERTY IN THE LIGHT OF AMENDMENTS TO THE FISCAL PENAL CODE

The regulations concerning the fiscal penal law date back to the times of regaining independence by Poland . Nevertheless, the fiscal penal law was codified as late as September 10, 1999. The Fiscal Penal Code came into force to adjust the fiscal penal provisions to the following constitutional regulations: the right to hearing (Art. 45 of the Constitution of the Republic of Poland), according to which everyone shall have a right to a fair and public hearing of their case by an impartial and independent court, the principle of court administration of justice (Art. 177 of the Constitution of the Republic of Poland), which shows that the administration of justice in all matters shall be implemented by court, and the principle contained in Art. 46 of the Constitution of the Republic of Poland which reads that the property may be forfeited only by virtue of a final court judgment.

The above amendments were significant since until the year 1999 liability for fiscal offences or misdemeanours had been determined by financial authorities, therefore it is them who determined guilt or innocence against the above – mentioned constitutional provisions. However, the legislatative body left the financial authorities a possibility to fine for fiscal misdemeanours within the fine proceedings.

It seems that codifying the penal law closed the chapter of numerous amendments to the fiscal penal provisions. There is nothing more erroneous. The Fiscal Penal Code was amended 25 times within eight years and the majority of these amendements were introduced with the amendments to other acts. The exception are the amendments introduced by the Act of 24.7.2003 amending the Act - Fiscal Penal Pode , which introduced, for example, liability for the offences committed abroad affecting the financial interests of European Communities, and also extended the concept of „tax" and „taxpayer", as well as the Act of 28.7.2005 amending the Act - Fiscal Penal Code and some other acts , which covered about 70% of the Fiscal Penal Code provisions.

Despite its broad scope the July amendments mostly adjusted the provisions of Fiscal Penal Code to the provisions of financial, currency and general penal law.

Besides, the law-maker emphasised the priority of law enforcement over repression in the Act and strengthened the fine enforcement by imposing an obligation of auxiliary liability . These additional changes were designed to increase the effectiveness of counteracting the most dangerous fiscal crimes by imposing a penalty of deprivation of penalty by the law as well as by removing current ambiguities and irregularities regarding the legal doctrine and practical application of the fiscal penal law.

An in-depth analysis of the whole amendment from July 28, 2005 does not lie within the scope of this study and thus the focus is on the amendments related to penal remedies in the form of forfeiture of property (Art. 22 §2 item 4 in conjunction with Art. 33 of the Fiscal Penal Code) and collection of pecuniary equivalent of the property subject to forfeiture (Art. 22 § 2 item 4a of the Fiscal Penal Code). This choice is not accidental since the structure of provision contained in Art. 33 of the Fiscal Penal Code was changed by way of the aforementioned amendment and its purpose was to adjust it to the solutions contained in Art. 45 of the Penal Code, which in the general penal law regulates the issue of forfeiture of property. Secondly, a new kind of facilitation of proof was introduced where it was the perpetrator of a fiscal offence who was to bear the burden of producing evidence relevant to determine the origin of specific property. Thirdly, the application of the penalty of forfeiture of property toughened since the option was replaced with the obligation and the equivalent in the form of pecuniary penalty was admitted. Besides, this regulation is supported by yet another fact in the form of act of February 22, 2008 amending the Penal Code Act, the Fiscal Penal Code Act, the Code of Penal Proceedings Act, the Penal-Executive Code Act and the Press Law Act, where the instrument of property forfeiture is subject to further changes.

The forfeiture of property has as its aim to show that committing fiscal crimes is not profitable because of the obligatory decree of forfeiture of the property obtained, even indirectly, from the commission of a fiscal offence which is not subject to forfeiture. The last version of Art. 33 of the Fiscal Penal Code held that the court could decree the forfeiture of property obtained even indirectly from a fiscal offence in the case of conviction related to the penalty toughened under Art. 37 § 1 item 2, that is using fiscal crime as a steady source of income, or under item 5, that is acting in an organized criminal group or organization (Art. 33 § 1 of the Fiscal Penal Code), and that the provisions of Art. 31 § 4 (Art. 33 § 2 of the Fiscal Penal Code) shall apply respectively.

Thus, what do the amendments to Art. 33 of the Fiscal Penal Code concern? The Act of July 28, 2005 introduced the instrument of pecuniary equivalent in place of the forfeiture of property obtained from crime, which under the Polish fiscal penal law is more concordant with the penal remedy of collecting pecuniary equivalent of the property forfeited under Art. 22 § 2 item 3 of the Fiscal Penal Code. Apart from

that, as mentioned before in Art. 33 § 2 and 3 of the Fiscal Penal Code the legislative body introduced two proof presumptions. The first one concerns the financial benefit obtained from the commission of a fiscal offence related to the fact of possessing or having a legal title to the property during (or after) the time of committing the offence. The other relates to the ownership of property and property rights. The issues of seizing property and security on property were also regulated and a provision was introduced saying that if the property subject to forfeiture is co-owned, then the property share owned by the perpetrator shall be forfeited. Nevertheless, the penal remedy in the form of forfeiture of property or its pecuniary equivalent shall not be declared if the financial benefit is subject to restitution to another entitled entity. Additionally, unlike in the Penal Code which lets court choose between „the forfeiture of property and equivalent of its value" (Art. 45 § 1 of the Penal Code), the Fiscal Penal Code specifies that the pecuniary equivalent shall be collected only if the forfeiture of property is impossible.

Coming back to the issue of facilitation of proof it should be pointed out that the earlier regulations concerning the fiscal penal law provided for it, including Art. 167 of the Fiscal Penal Act from 1960 as well as Art. 166 § 2 of the Fiscal Penal Act from 1971, which referred to Art. 134 § 1 and 2 of the Penal - Executive Code from 1969. These regulations were withdrawn as a result of amendments to the 1971 Fiscal Penal Act from 1971 which took place in July 1998.

Current legal presumptions result directly from the provisions of the Fiscal Penal Code and are applicable without reference to any other legal regulations.

According to Art. 33 § 2 of the Fiscal Penal Code in the case of conviction for a fiscal crime from which the perpetrator obtained, even indirectly, financial benefit of substantial value, the property the perpetrator received or took possession of or received any kind of title to during or after the time of committing a fiscal offence, until passing even a non-final judgment, shall be deemed to be the financial benefit obtained from a fiscal crime, unless the perpetrator or another interested party presents evidence to the contrary thereof.

The financial benefit from the commission of an offence shall be a financial benefit obtained by the use of resources from a prohibited act and the one where legal resources are involved. In other words, the financial benefit from the commission of the offence is all property obtained from the offence, and not only the profits. Therefore, it does not seem proper to calculate the costs the perpetrator involved in a crime and then deduct them from the value of the benefit obtained.

It should be pointed out that the above-mentioned presumption is connected with the conviction for a fiscal crime from which the perpetrator gained financial benefit of substantial value (both public law, object of an offence or financial benefit liabilities), that is compliant with Art. 53 § 15 of the Fiscal Penal Code, the amount

exceeding at the date of an offence 500 times the minimum wages in the meaning of the Minimum Wages Act .

This solution is thus different from the regulation contained in Art. 45 § 2 of the Penal Code, which refers the presumptions to the „benefit of considerable value ", the concept not defined by the Code since Art. 115 § 5 of the Penal Code specifies the concept of property of considerable value, according to which it is the property whose value at the moment of committing a prohibited act exceeds 200 times the amount of the lowest minimum wage . Nevertheless, the amount of financial benefit is specified in „ordinary" evidence proceedings. A similar procedure applies to taking possession or receiving any other legal title to it during or after the time of committing an offence to the moment of passing at least a non-final judgment. Taking possession of property may appear in the form of autonomous or dependent ownership (Art. 336 of the Civil Code) or holding (Art. 336 of the Civil Code). When it comes to receiving another legal title it concerns any kind of entitlement to property, which may be the right in property or bonds and the property items may not be held by the perpetrator. On account of the fact that the legislative authority did not specify in Art. 33 § 2 of the Fiscal Penal Code that it concerns the first non-final judgment, the presumption also encompasses the property obtained by the perpetrator on passing the first judgment . It should be emphasized here that the presumption does not concern the perpetrator's guilt which must be proved in keeping with all the procedures.

Another facilitation of proof contained in Art. 33 § 3 of the Fiscal Penal Code shall apply only to the perpetrator who gained from a fiscal offence, even indirectly, the financial benefit of considerable value and it is highly probable and justified by the circumstances that this criminal benefit was transerred onto another entity. It is obvious then that the regulation provides that the benefit specified was gained during or after the time of committing a fiscal offence which is the object of proceedings, and provides for a connection, direct or indirect, between the fact of transferring the financial benefit of considerable value and taking possession of it by another entity, and the fact of committing at the specified time a fiscal crime the benefit was gained from.

The provision shall prevent the frequent phenomena of transferring the property gained from an offence onto other persons to avoid a possible forfeiture. An essential issue is to specify a „degree of probability". It should be assumed that it is estimated in the light of evidence-based proceedings, thus it should be supported by the evidence material . Only substantiating that the degree of probability is high could give a basis for the presumption. It should also be emphasized that whether the transfer of property was free of charge or not, temporary or permanent, is insignificant. Nevertheless, if a person onto whom the perpetrator transferred the

property items derived from an offence sold them to another person, then in relation to that person the presumption under Art. 33 §3 of the Fiscal Penal Code shall not apply since the forfeiture of property shall apply solely to the perpetrator and the provision of Art. 33 § 2 of the Fiscal Penal Code requires for the transfer to be made by the perpetrator.

In view of similar provisions contained in Art. 45 § 3 of the Penal Code it may be deemed that also Art. 33 § 3 of the Fiscal Penal Code shall be of mixed, that is of substantive and procedural nature. The procedural nature of the provision arises from regulating the procedure related to the issue of legal presumption provided for in it and the way of rebutting it, and the substantive nature is revealed in the grounds for presumption (commiting an offence referred to in Art. 33 § 2 of the Fiscal Penal Code, high probability of transferring onto another entity the financial benefit gained from crime by the perpetrator) and their request (the property held by another entity belongs to the perpetrator).

The legal presumptions contained in Art. 33 § 2 and 3 of Fiscal Penal Code are challengeable and thus may be rebutted by presenting the so-called counterevidence. It should be pointed out here that it is the perpetrator who is to show the origin of specific property and prove that it does not come from criminal activity. The reversal of burden of proof is admissable in the light of international regulations. They are provided for in, for example, Art. 5 and Art. 7 of the United Nations Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances from December 20, 1988 and Art. 12 paragraph 7 of the United Nations Convention from November 15, 2000 Against Transnational Organized Crime . Nevertheless, the above-mentioned conventions do not impose an obligation to introduce these provisions and to ensure their compliance with the internal laws of the parties to the Convention. Additionally, they make a reservation that the adopted presumption may not infringe the property rights of third parties claiming interest in the property subject to forfeiture.

Coming back to the issue of rebutting the presumption, pursuant to Art. 33 § 2 of the Penal Fiscal Code, in order to challenge the presumption contained therein it is essential to present counterevidence. The requirement of presenting evidence means that one cannot recall the civil law presumption of lawful possession and it is not only substantiating a lawful possession of specific property items that is required but also about proving its lawfulness.

As far as the presumption contained in Art. 33 § 3 of the Fiscal Penal Code is concerned, it may be challenged if a person or another legal entity presents evidence of lawful possession of property. The evidence of lawful possession shall be the evidence of lawful acquisition by the perpetrator, that is the acquisition of property for the resources not coming from a fiscal crime . In the case if a person or organisation recalls a purchase, they should indicate the source of purchase and

prove the origin of resources necessary to purchase it (Art. 28b § 2 of the Penal - Executive Code).

To sum up, counterevidence may be presented by the perpetrator or another natural person or legal entity, or an entity without legal personality on the condition that the decree of forfeiture of property refers to their rights and liabilities. Besides, in the context of substantive truth the obligation to determine all circumstances related to the instrument of legal presumption shall rely on the court and public prosecutor. It means that if the said authorities take possession of the information related to the circumstances challenging the presumption, it must be considered, which in consequence means that the presumptions are inadmissable, and in the case of, say, substantiating by the defendant the origin of property from legal sources, it will be necessary to rebut this evidence by a proceedings authority. What is more, the subject – related resources show that the presumption may not replace evidence where we have doubts regarding the thesis in question.

The facilitation of proof contained in Art. 33 § 2 and 3 of Fiscal Penal Code shall also apply to the seizing or securing of the property to be forfeited as well to the implementation of this remedy. Nevertheless, an individual or institution the presumption concerns may bring action against the State Treasury concerning the reversal of this allegation - until the case is settled by final judgment the whole execution proceedings shall be liable to suspension.

In conclusion, it should be pointed out that the current facilitation of proof in the form of presumptions of law were to effectively counteract the fiscal penal crime. However, as mentioned before a bill of the so-called extended forfeiture appeared. It turned out that in the opinion of bill authors the binding provisions are not sufficient to achieve the goal they were created for, that is to effectively deprive perpetrators of the property held by them or passed by them onto third parties. The proposed changes introduce, for example, the forfeiture of property from illegal sources or acquired for illegal funds. Besides, to effectively deprive perpetrators of the property they brought into conjugal community the application of presumption and forfeiture was proposed.

While evaluating these changes it should be emphasized that relying on presumption carries the danger of potential breach of substantive truth and constitutionally protected property rights. Counteracting the fiscal penal crime may not be conducted „at every cost", regardless of the interest subject to legal protection.

Streszczenie

Opracowanie traktuje o instytucji przepadku korzyści majątkowej oraz ściągnięcia równowartości pieniężnej korzyści podlegającej przepadkowi w prawie karnym skarbowym. Skupiono się na przedstawieniu nowelizacji przepisu art. 33 Kodeksy karno skarbowego, której celem było dostosowanie go do rozwiązań zawartych w art. 45 Kodeksu karnego, który w prawie karnym powszechnym reguluje kwestię przepadku korzyści majątkowych. Analizie poddano rozwiązanie polegające na wprowadzeniu do prawa karnego skarbowego ułatwień dowodowych w postaci domniemania prawnego polegającego na tym, że na sprawcę przestępstwa skarbowego przerzucono ciężar dowodu w zakresie wykazania pochodzenia określonych składników majątkowych. Wskazano także na projekt nowelizacji instytucji przepadku korzyści majątkowej, w którym, między innymi w celu skuteczniejszego pozbawiania sprawców przestępstw mienia, które wnieśli oni do wspólności małżeńskiej, zaproponowano stosowanie do tego mienia domniemań oraz przepadku.

Larisa Bugaian, Eugenia Busmachiu

PRIVATE – PUBLIC DIALOGUE TO IMPROVE BUSINESS ENVIRONMENT

Introduction

The Republic of Moldova increasingly recognizes that high-quality regulation at the national and regional level is an essential precondition for the effective response to a range of fundamental trends of the country: legislative harmonization with acquits communitarian of the European Union, increased competition, decreased state aid transfers, increased global trade, domestic private sector development, SME promotion, regional and environmental policies, enhancement of social and labor market policies, improved investment climate, etc. An important element to improve the quality of regulatory policies is that the state should elaborate and adopt new policies and normative acts as well as create a new institutional framework based on its efficient activities.

However, this is not sufficient – new capacities need to be implemented and enforced; only then ultimately delivered results will be deemed successful. The political will need to be tested in the face of social opposition, especially from private interests. The institutions need to have human and financial resources necessary to apply appropriate policies and create necessary tools. The second stage of testing focuses on the policy and the question whether the inputs have produced regulations of a better quality. Finally, the institutional framework needs to implement and enforce the tools to achieve specific results for individuals and businesses. These would lead to positive consequences related to an increased amount of investments, economic growth, better environment and welfare, etc.

Regulatory Reform's objectives

The essence of the regulatory reform provided in the Republic of Moldova consists of a well-balanced approach of drafting and implementing regulations. Such

a balance is reached by analyzing the problem, possible solutions and interests of all parties that will be impacted by new regulations – the State, business and the general public. A regulatory impact analysis may lead to a conclusion that there is no need for adopting a new regulation, and if existing normative acts are inefficient, then adopting a new one requires identification of costs, benefits and impact for the State, individuals and business. The necessity to give up most of the existing regulations and elaborate a new foundation might be crystallized after the regulatory impact analysis. This new foundation will also serve as a starting point for the transition period until the creation of an adequate legal and institutional framework.

Taking into account the realities of the Republic of Moldova, the main objective of the regulatory reform is the substantive decrease of entrepreneurial dependence on excessive administrative regulations, reduction of financial and time costs run by entrepreneurs spent on opening and maintaining business, which requires obtaining licenses, authorizations and permissions. The expenditures are paid for services provided by bodies having supervising and inspection authority. The ultimate goal of the regulatory reform is the development of new state policies. It includes elaboration of new norms as well as development of new regulatory mechanisms based on the regulatory impact analysis. The new legal and institutional framework shall be subject to an efficient state supervision for the fructification of expected results.

It has to be mentioned that in order to ensure efficiency of new policies implementation, media coverage shall be a must in order to reflect the public opinion. This approach is of a psychological nature as well – participation of the large public, especially of business representatives, gives confidence that the regulation is their own product. Therefore the chances that new regulations will be observed are increasing whereas requests for modifications will not be submitted.

Being a complex process, the regulatory reform includes the institutional reform as an indispensable element. In this context, it is intended to revise the structures, functions, and procedures in the activity of certain ministries and departments as well as other bodies, which have a role to play in the elaboration of state policy regarding the entrepreneurial activity. Motivation of public authorities as well as the trend to modify their approach in dealing with entrepreneurs is of the utmost importance. As to the legal framework, the regulatory reform establishes top priorities in the economic and political agenda:

1. Improvement and optimization of the activity of authorities with inspection and supervising functions, including:
   – elaboration and implementation of a single law framework concerning control and inspections;

- modification based on the above law of all normative acts in the field;
- optimization of the State control and supervision system;
- optimization of numbers of non-fiscal controls;
- creation of an automatic informational system for evidence of supervision and control activities (State Register).

2. Streamlining of paid services to economic agents having as objective:
   - avoidance of the conflict of interests;
   - elimination of excessive services;
   - assurance of loyal competition regarding paid services provision;
   - optimization of paid services based on the market economy;
   - facilitation and minimization of the costs of doing business.
3. Optimization of the authorization system for company start-ups and continuing operations resulting in:
   - combining more procedures (registration, authorization, licensing, etc) in one single process One Stop Office;
   - analyzing the necessities and establishing criteria for obtaining licenses, authorizations, permissions and respective costs;
   - restriction of authorized system by obtaining activity license;
   - reducing practices allowing the possibility to obtain double licenses based on other permissions or authorization documents;
   - minimizing costs and time supported by entrepreneurs for obtaining licenses, authorizations, permissions.

Competitiveness Enhancement and Enterprise Development project role in the Regulatory Reform Process

The overall objective of the Competitiveness Enhancement and Enterprise Development (CEED) USAID project is to create a business environment and investment climate that stimulates, supports and rewards competitive enterprise performance. This objective can be implemented by accelerating the business environment improvement process in the three CEED target sectors, focusing on those initiatives that will stimulate competitive economic growth, promote increased exports and attract investment (foreign or domestic). For this purpose CEED started to build strong working relationships with key private and public sector stakeholders

gaining a place in the business environment improvement process. This aim came after the discussion with private companies. Talking to private companies' owners and managers you would encounter the same complaint - they are not "heard" by the public sector. Their proposals on better conditions for business development expressed at the meetings with governmental bodies' representatives were always left aside. As a result, entrepreneurs were left to solve their problems alone, while the public sector representatives remained with their vision unchanged. It led to low level of trust on part of entrepreneurs in interventions or proposals to change the situation and contribute to business environment improvement, and growing dissatisfaction with current state of affairs.

USAID project came up with a series of initiatives to improve the situation to enable the effective public-private dialogue in Moldova. The suggested mechanisms including focus groups, task forces and company attachments provided trustful and respectful environment to discuss and share ideas. The initiated activities went in line with the newly adopted Law on basic principles regulating entrepreneurial activity, No. 235-XVI as of July 20, 2006, so called "guillotine process".

In order to assist public sector reforms in the first year of the activity, CEED investigated existing legal and regulatory impediments and barriers which limit business growth and competitiveness in its target sectors, particularly those which affect the operational, trade and investment activities of companies. CEED began this activity by analyzing existing assessments and reports and discussing with leading businesses, associations and key representatives from the three target sectors the regulatory business environment in Moldova and the legal and regulatory environment impediments that are preventing the growth of CEED's target sectors. To obtain an independent opinion of the private sector's view of business environment constraints and imperfections, as well as to validate findings revealed during the initial desk research and discussions with private sector, CEED conducted focus group research in each of the three target sectors. As a result, CEED has developed a list of the industry-specific legal and regulatory impediments, which presents a common voice and opinion of businesses in those sectors. This document served as a starting point for initiating business environment improvement actions and developing further dialogue between the public and private sector.

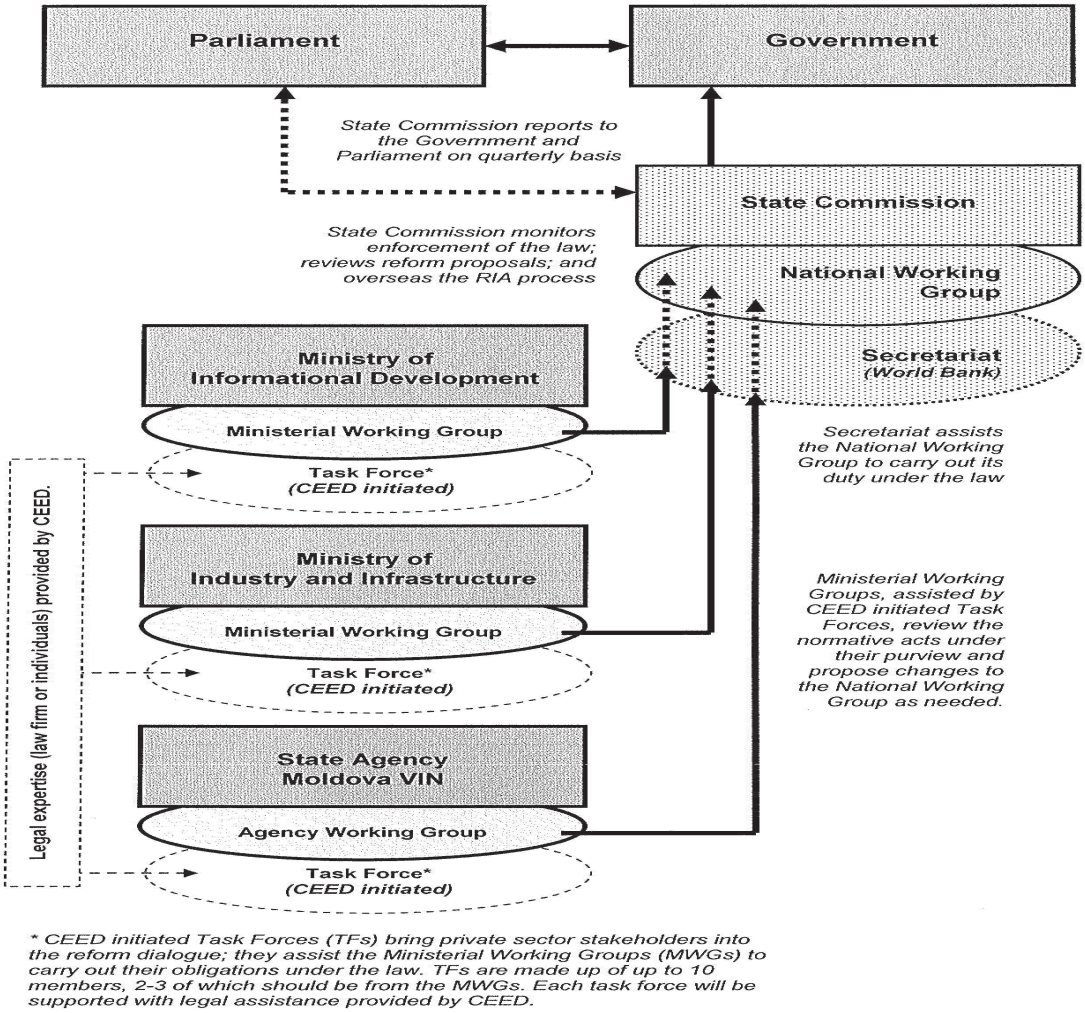
The key task of the project assistance refers to complementing and providing input into the regulatory reform process articulated in Law on basic principles regulating entrepreneurial activity. This law calls on all specialized central bodies of public administration and the unsubordinated administrative authorities of the Government to complete an inventory of all relevant laws and regulations under their review, to recommend to the State Commission for regulating entrepreneurial activity those that require modifications or amendments, and thereafter to take

measures to introduce the necessary reforms to the State Commission for referral to the Parliament for adoption.

CEED project decided to focus attention on the public-private dialogue effectiveness improvement by strengthening the capacity of leading industry associations to advocate effectively for the interests of their constituents. Strengthening key associations and other organizational partners such as task forces, one for each sector, composed of 7–10 interested parties from the private and public sectors, ensured that business has the institutional framework to expand, grow and remain an effective advocate for enterprise partners.

The first step of joint work with public sector bodies (Ministry of Industry, Ministry of Information Development and Moldova Vin Agency, see figure below) on the recommendations provided by private sector in order to prove them and assist drafting recommendations initiatives to State Commission for regulating entrepreneurial activity.

Figure 1. The mechanism of the Regulatory Reform process



These activities were in line with Article 20, mechanism of review of normative acts of Law on basic principles regulating entrepreneurial activity No. 235-XVI as of 20/07/2006. During September – December 2006 the Task Force members assisted the sector Ministries and Agency to draft modifications and amendments to the normative acts in their area of activity in compliance with nominated law and according with the list of priorities for modifications proposed by Private Sector.

The second step was dedicated to the presentation of the Reform Proposals to all cluster representatives in an open forum. This event had the purpose to expose in media the recommendations proposed for the whole sector/cluster members and industry stakeholders and get their feedback on the proposals made. Also at this stage, the Reform Proposals were approved for submitting to the State Commission for regulating entrepreneurial activity for consideration. To this moment the

authorities submitted to the State Commission drafts and information notes for review, and concomitantly presented to the Parliament a report on the review results of normative acts at the respective stage.

As third step the Task Forces members worked with the State Commission and Secretariat organized by the Ministry of Economy and Trade to validate issue reviews and asses the regulatory impact of draft normative acts on the sector competitiveness and growth. Finally, after this process, the Task Force members worked with public sector bodies to accomplish the final draft and information notes based on the Commission's review.

Today, when indigenous companies strive to compete locally with international companies, one of the key strengths these companies ought to acquire and capitalize in order to survive is the ability to advocate their interests. In lobby and advocacy process it is important to establish a transparent and open dialogue between the Parliament & Government and Business & Civil Society. From our recent experience in facilitating this dialogue, there emerged a concerning fact that local NGOs are not ready to take advantage of the openness of Moldovan Parliament proposed to the civil and business society by adopting the Concept of Cooperation between the Parliament and Civil Society.

Following this opportunity, when the draft of the proposed modifications was submitted to the Moldovan Parliament, it was decided to use the opportunity provided by the International Business Association Business Parliament (IABP), one of the CEED project partner. The IABP offers an internationally recognized protocol aimed at enhancing the relationship between MPs and business community in a transparent and non-corrupt way, informing legislative process. This collaboration results in a dialogue, which helps identify the needs of the business community for the purpose of developing legislation and policies, which achieve maximum benefit and have minimal unintended consequences.

All three industries, ICT, apparel and wine legal frameworks as well as Law on basic principles regulating entrepreneurial activity No. 235-XVI are very complex, therefore it is pivotal for MPs to get an in-depth understanding of key regulatory issues of the proposed modifications and respective industries legal frameworks so that better informed public policies are developed and eventual negative consequences are minimized or eliminated.

CEED and IABP assisted the organization of the so-called "company attachments" activity, which has the goal to assist an in-depth understanding of a particular aspect of the business sector. The company attachment program was tailored to the needs of the MP and used the learning through involvement approach. The scope of this program lied within the broader regulatory framework of the mentioned Law and aimed at informing MPs about the challenges ICT, apparel

and wine industries currently face. Company attachments give Members of the Parliament an opportunity to learn more about a particular industry by pairing them with a willing business for a period of time in order to understand the practical concerns faced by the businesses.

The event started with company visit, then the MPs and representatives of the top management discussed the key topics addressed in the Draft of the Laws modification and on the impact of these issues on company business. Members of the Parliament had an opportunity to see the impact of their decisions on business. Company attachments helped both parties know more about each other and speed up the process of improving the business environment. The challenges concern various issues that were approached in the set of the proposed modifications starting from licensing down to the specific issues that are critical for companies, and the regulators were discussed with three companies per one from each sector that hosted the MPs.

Results

In result of the Competitiveness Enhancement and Enterprise Development assistance, all 37 legislative initiatives, jointly developed by public-private sectors representatives, were approved by the Parliament, and consequently led to the modification of 11 laws and normative acts. As an effect, the activity of software developers does not require licensing, and a number of conditions for getting it have become significantly decreased for winemakers. The latter also benefited from the simplified grapes suppliers declaration and producers' registration documents. Entrepreneurship regulation functions are now separated from the control ones in all sectors of Moldovan economy. The constructive dialogue established by USAID enabled the private sector to have a stronger and more effective voice in business environment improvement. "It is for the first time that managers were involved directly and their opinions were not only listened to, but also introduced in the proposals on the legislative framework modification," comments the Association of Light Industry (APIUS) President.

Streszczenie

Jednym z celów działań Amerykańskiej Agencji do Spraw Rozwoju Międzynarodowego na rzecz Mołdawii (projekt USAID/Moładawia) jest wsparcie politycznych i prawnych reform w tym kraju. Wstępna ocena dokonana przez przedstawicieli Agencji wskazała, że przemysł stoi przed wieloma prawnymi barierami, włączając w to ograniczenia sektorowe. Należy zauważyć, że rząd Mołdawii został już zobowiązany przez OECD do wsparcia przedsiębiorczości w ramach programu „Regulatory Reform", jednakże niekoniecznie objął on całe środowisko biznesowe. Dlatego też dla wsparcia całego sektora prywatnego Agencja zaproponowała usprawnić działania rządu w tym zakresie, które są realizowane w ramach „procesu Guillotine".

Niniejszy artykuł przedstawia proces reform legislacyjnych w Mołdawii, zarówno na poziomie centralnym jak i samorządowym w odniesieniu do rozwoju całego środowiska biznesowego.

Petr Havlan, Jan Janeček

TRANSFORMATION OF ALLOWANCE ORGANIZATIONS TO STANDARD PUBLIC SECTOR NON-PROFIT ORGANIZATIONS

Introduction

Transformation of allowance organizations to standard public sector non-profit organizations (in fact, their transformation to independent public institutions) presents one of the basic problems of the Czech public finance at the beginning of the 21st century. The core of the matter lies in particular in the absence of any more or less self-contained concept of the transformation. Solving this complex matter, with the necessary cooperation of representatives of theory and praxis – economists and lawyers - has still not been achieved. It would be very hard to find any corresponding concepts, specific rules and recommendations for future legislation or implementation of specific steps of transformation due to lack of such cooperation .

At the beginning the article deals with the issue of nature of allowance organizations and presents reasons why they are outmoded as forms of "non-profit subjects". As an aside a short discussion of the concept of "public institution" follows, supplemented by introduction of "non-profit subjects" as the subjects of property rights. Further, the first attempts of legal regulation of new non-profit subjects forms in Czech are appraised. At the end of the article the points defining the process of transformation *pro futuro* are stressed.

The Nature of Allowance Organizations

In the Czech Republic, the allowance organizations represent "traditional" and still the most common non-profit subjects. The allowance organizations occur in one of two possible forms – as allowance organizations of state or allowance organizations of local government. The Czech legislation treats a state allowance organization as

a "temporary" one. These organizations act in all legal relations in their own names and on their own responsibility, at the same time they do not have (unlike in the past) their own title deeds or other property rights and all "their" property (tangible or intangible) is considered state property. Moreover, the state allowance organizations are not entitled any longer to the specific "right to dispose of property" any longer (in Czech "právo hospodaření"). They are just entitled to manage a defined set of state property. The current, weakened position of state allowance organizations as legal entities might be defined in brief like this: they do not have (unlike in the past) the capacity to own property; according to current legislation they are not entitled to any other right concerning the property they are managing, actually they do not own any property. The fact that state allowance organizations are legally bound to meet the obligations resulting from their activities and those pertaining to the property they manage, appears to be quite interesting in this context.

The regulations currently in force allow local governmental units to establish allowance organizations which are "legal entities that in most of their activities operate as non-profit". The temporary nature of this form of legal entity is not indicated, unlike in the case of state allowance organizations. The allowance organizations of local governmental units are legal entities *sui generis* and have almost the same characteristics as state allowance organizations. It means, they are incapable of ownership[1], they do not own any tangible property, they are incapable to do so, they are just entitled to a specific "right of management" (in Czech "správa") relating to a defined set of local governmental property. Their main characteristics, concerning the rights of property, constitute in fact so called "other entities" (in the sense of section 18(2)(d) of Czech Civil Code) which have their own capacity in relation to property. The capacity allows them just to manage their founder's property and manage the property owned by their founder (the local governmental unit in question). "The tool" which allows the allowance organization to manage and administer the property, the so called "right of management", is in fact a special proprietary provision of public law (unlike the management of someone else's property based on private law). This special provision of public law is unfortunately poorly and insufficiently regulated, which results in some confusion. We can add that the allowance organizations belonging to local governmental units are usually established to carry out duties which fall under the competence of their establishers (which, as already mentioned above, are usually non-profitable and their scope, structure and complexity demand legal subjectivity)[2].

1 We regret to say that the upcoming amendment to Act no. 250/2000 Coll. of 7th July 2000 on Budgets of Local-Governmental Units (in Czech "zákon č. 250/200 Sb., o rozpočtových pravidlech územních rozpočtů"), which was supposed to express (by its new section 27(2)) this fact explicitly by words "an allowance organization does not have its own property; it manages property of its establisher and acquires property for its establisher", was withdrawn.

2 The detailed information on the definition, nature, establishment, alteration and cancellation, as well as on legal activities of state allowance organizations and allowance organizations of local governmental unit might be found

The Concept of "Public Institution" (in Czech "veřejný ústav")

First of all, it is necessary to point out that the concept of "public institution"/ "independent public institution" in the Czech Republic is defined just by doctrine and not by law. It means that it serves "only" as a kind of common denominator for several legally defined legal entities, typified by their non-profitable nature

It is necessary to mention, in connection with the definition of symptomatic attributes of public institutions presented later, that it concerns just the basic attributes which might be more or less acceptable according to the contemporary Czech doctrine (another point is the individual assessment of importance of any single "symptomatic feature"). A public institution might be defined as a unit which is:

- a legal entity established by law or by an administrative act based on the law, which at the same time defines the range and the character of its legal capacity,
- established to fulfill a public purpose,
- without a member base, so the question of its potential local governmental character is "overshadowed", which makes it different from public corporations – customary establishers of public institutions (state, local governmental unit),
- organized in a hierarchical manner,
- focused on long-lasting fulfillment of public services aimed at an unspecified group of entities (possible users who are legally entitled to such service) who are not obliged to cooperate actively, yet their cooperation is not precluded,
- in principle, with a focus on non-profit activities, which makes it different from a "public enterprise" (in Czech "veřejný podnik").[3, 4]

in P. Havlan, Majetek státu v platné právní úpravě, Prague, 2006, pp. 55-69, and in P. Havlan et all, Majetek obcí a krajů v platné právní úpravě, Prague, 2008, pp. 35-44 and 49-51.

3 There is a widespread agreement in theory, that it is possible to establish so called "dependent public institutions" (see for example D. Hendrych, in D. Hendrych et all, Správní právo. Obecná část, Prague, 2006, p. 108 and literature cited therein), which represent mere organizational units (facilities) without a legal personality. The organizational units mentioned might be, according to the Czech legal regulation in force, established as "state organizational units" (in Czech "organizační složka státu") or as "organizational unit of local governmental unit" (in Czech "organizační složka územního samosprávného celku"). For more information on their definition, nature, establishing, alteration and closure, as well as on their legal activities see P. Havlan, Majetek státu v platné právní úpravě, Prague, 2006, pp. 34-43, and in P. Havlan et all, Majetek obcí a krajů v platné právní úpravě, Prague, 2008, pp. 27-35. However, the mentioned "dependent public institutions" are not the subject matter of this paper.

4 The fact that there are doctrinal definitions of a "public institution", as well as of, for example, "public enterprise" does not automatically mean that they will be realised in law. In this context, it is possible to mention the recent situation in France, where a cursory glance at two basic types of public institutions shows that one of them,

Non-profit Subjects as Proprietary Subjects

Legal subjects of so called private law as well as legal subjects of so called public law might be non-profit subjects ("organizations"). Foundations (in Czech "nadace a nadační fondy") according to Act no. 227/1997 Coll. of 3rd Septemper 1997 (in Czech "zákon č. 227/1997 Sb., o nadacích a nadačních fondech") present a typical example of private law non-profit subjects accumulating property for the given generally beneficial aims. These subjects might be established both by natural or legal persons. Foundations come into being on the day when they are entered into the Register of Foundations (in Czech "nadační rejstřík"). A foundation is managed by the council entitled to dispose of the profit from foundational property to fulfill the purpose for which the foundation was established. The council also manages the other property belonging to the foundation. All the property of the foundation is employed towards its particular beneficial aims. The core of the matter is, that it is the foundational property and other property of a foundation itself what constitutes the non-profit subject of this type. "A company for the provision of beneficial services" (in Czech "obecně prospěšná společnost") is as a second example of a non for profit organization subject to private law regulated by Act no. 248/1995 Coll. of 28th September (in Czech "zákon č. 248/1995 Sb., o obecně prospěšných společnostech"). This non-profit subject provides generally beneficial services based on predefined conditions, to everyone on equal basis. It might be established, as the act says, by a natural person, the Czech Republic or another legal person. Likewise, this organization comes into being on the day when it is entered into the appropriate register. The statutory body of this organization is its council, the other bodies are director and supervisory board (in Czech "dozorčí rada"). Corporation assets comprise initial deposits of founders, received donations and inheritance, corporation's funds and subsidies.

Finally, let us turn our attention to the legal subjects mentioned above, specifically to legal subjects of so called public law - non-profit ("organizations"), subjects of public-law especially to the most typical of those – "public institutions". In particular we would like to appraise the first attempts to incorporate other types of independent public institutions into the Czech legal system, especially those that would be different from those incapable to own property, thus "handicapped" allowance organizations.

"administrative public institution" (in French "établissement public administrative"), is in fact a body subject to public law, on the other hand the other, "public industrial and commercial institution" (in French "établissment public industriel et commercial"), is a body subject to private law. These two institutions have several characteristics in common: they are legal entities owning property and they have their own budgets.

On New Forms of Non-Profit Subject of the Czech Law

"Educational legal entity" (in Czech "školská právnická osoba") represents a transitional type of legal entity which entered the Czech legal system on 1st January 2005, when the new Schools Act of 24th September 2004 (in Czech "zákon č. 561/2004 Sb., školský zákon") came into force. This *sui generis* legal subject proves that the concept of a "legal subject" is more a "product" of legislation – a concept created and afterwards recreated and changed by legislation - than a construct of theoretical exploration ("a prior concept"). Taking this into account, it is not surprising that from the theoretical point of view the question is whether "educational legal entity" meets the "parameters" of a "public institution". On the other hand, it is necessary to appreciate that this entity shows at least few "embryonic" features of a modern public legal subject. Section 140 of the Schools Act is worth bearing in mind in this case. It states that "educational legal entity" for the purposes of its own activities uses its own property and the property borrowed from or hired by its establisher or another entity. Further, the principles of approbation and control mechanisms are laid down for the cases where state or local governmental units (or municipal unions) are the establishers of an "educational legal entity" [see section 129(2) and 136(3) of Act on Schools].

The start of the "journey" to modern types of "public institution" might be traced to Act no. 341/2005 Coll. of 28th July 2005 (in Czech "zákon č. 341/2005 Sb., o veřejných výzkumných institucích"), coinciding with the emergence of a "public research institution". "Public research institution" emerged as a part of Czech legal system (on the basis of transitory provision of section 31 of Act no. 341/2005 Coll. mentioned above) on 1st January 2007, which meant that the transformation of more than 70 state allowance organizations operating in the field of scientific research and of two established by local government regions, which is of high significance[5], was completed. Especially the capacity of "public research institution" to own property is, from our point of view, quite a significant feature of this legal entity. Thus, this kind of public institution is not just competent to manage the defined set of the state tangible property, as state allowance organizations are, or just entitled to the specific "right of management" relating to the defined set of local government property, as allowance organizations of local governmental units are, but it directly owns tangible assets. In other words, a "public research institution" is the first step towards the

5 For the sake of precision, it should be noted that the transformation of the above allowance organizations, concerned "Institution for the Conservation of Archaeological and Historical Sites in Brno" (in Czech "Ústav archeologické památkové péče Brno"), on the basis of decision no. 397/05/Z6 made on 8th November 2005 by the Regional Assembly of South Moravia (in Czech "Zastupitelstvo Jihomoravského kraje") and "Institution for the Conservation of Archaeological and Historical Sites in North-west Bohemia, allowance organization" (in Czech "Ústav archeologické památkové péče severozápadních Čech, příspěvková organizace") on the basis of decision no. 20/8Z/2005 made on 26th October 2005 by Regional Assembly of Ústí region (in Czech "Zastupitelstvo Ústeckého kraje").

concept of new peculiar public legal entity fulfilling the functions of recent allowance organizations and which is, at the same time, fully capable of owning property. In theoretical or practical argument with those, who in fact attempt a "privatisation" of public forms of legal entities, by replacing them with private law forms (typically as trading companies), it is insufficient to say that "public legal entities are just and useful". Such an argument would be rejected (often just on ideological grounds). In such a polemic, it is necessary to bring theoretical concepts of new progressive public legal entities (for example of "public institution", as discussed here) and, what is more, it is necessary to turn theory into practice, in other words to enact them. From this point of view the legislative steps taken from the concept of allowance organizations to "public research institutions" appear small, but positive.

To define "public research institution" a little more precisely we should add the following: research and provision of infrastructure for research represent the scope of "public resource institution" activities as defined by section 2(1)(a) and section 2(2)(f) of Act no. 130/2002 Coll. of 14th March 2002 on Support of Research and Development (in Czech "zákon č. 130/2002 Sb., o podpoře výzkumu a vývoje"). Their main activities aim at research supported from public sources in compliance with Art. 87 and 89 of the EC Treaty. "Public research institution" might be established by the Czech Republic or by a territorial local governmental unit. Legal obligations between "public research institutions" and between a "public research institution" on one side and a state or a local governmental unit or a public university on the other, are governed by Commercial Code, if the obligation concerns main, additional or another activity of the "public research institution". Legal obligations between a "public research institution" and entrepreneurs which concern main, additional or another activity of the "public research institution" and, mutually, business activity of entrepreneurs are governed by the Commercial Code as well. The establishment of a "public research institution" bears upon the release of the deed of establishment by the establisher. This institution comes into being on the day when it is entered into the "Public Research Institution Register", as the law prescribes.

Discussing the competence of the "public research institution's" establisher, we might say that it is defined in a way which is "up-to-date". The founder cannot directly interfere in activities of a "public research institution", on the other hand the establisher might, via a "supervisory council", supervise the property which has been invested. Also the founder might, via a "supervisory council", supervise whether the purpose for which the institution was established is pursued. The establisher's capability to restrict disposal of the institution's property (besides performance of the establisher's functions) expresses its direct influence upon the "public research institution". Under the law, the establisher's approval of legally defined set of acts in law is required, but first these acts in law might be approved in writing by the "supervisory council" of the institution.

"Public research institution" has the following bodies: the "director", the "council of the institution" and the already mentioned "supervisory council". Within the scope of unified management, steps are taken to balance these three factors - self-governing management, influence of experts and justified interests of the establisher. The director is entitled to act independently in operational matters, but several tasks defined by law (property management, budget, internal norms) should be solved in cooperation with the "council of the institution". The "council of the institution" is designed as a self-governing (research) management and at the same time as an executive council. In that way the "council of the institution" has a crucial influence on the institution's performance and its long-term development strategy. The "council of the institution" does not interfere in operational matters of day to day management. This is the "director's" duty. The "supervisory council" then forms a body which was designed to supervise any property "transferred" to the institution, as well as to supervise the management of property and finance obtained for attaining the purpose that the institution was established for.

As far as the law is concerned, it is crucial for property management of "public research institution" to use assets to accomplish its main tasks (research or infrastructure). The property might be used for other or extra activities only in the cases specified by law. "Additional activity" ("další činnost" in Czech) is defined as an activity executed on request of a competent "state organizational unit" or a local government unit, on condition that such an activity is in public interest and supported by public resources in accordance with special regulations. "Other activity" ("jiná činnost" in Czech) is defined as an economic activity executed to gain profit. There is an important rule saying that costs of "additional activity" or "other activity" of a "public research institution" cannot be covered from public sources determined to support research and these activities must be executed in compliance with conditions set by law (see section 21(3) of cited legal act). If by the end of accounting period the trading result from "other activity" or "additional activity" is a loss, then the institution is obligated to cancel such activity immediately[6].

Nowadays it is clear that the positive development outlined above, presented by Act no. 341/2005 Coll., in respect to the category of "public research institution", will not be straightforward, if at all. For example, the way a "public non-profit institutional health facility" (in Czech "veřejné neziskové ústavní zdravotnické zařízení") got constituted proves it. At that point, the sphere of health services seemed to be hopeful to continue the trend which started with the adoption of the

6 More information on institutions in question can be found in P. Havlan, Veřejné výzkumné instituce, Právní zpravodaj, 12, 2005, p. 10. For more information on finance management of "public research institutions" and on their taxation see H. Marková, Veřejné výzkumné instituce – pojem, právní postavení, hospodaření a zdaňování v České republice, In Sborník "Aktuální otázky vybraných institutů práva neziskového sektoru" (Z. Hudcová, – ed.), Olomouc, 2007, pp. 1005-112.

Act on "public research institution". The legislative design of the Act on health facilities was rather promising, presenting the concept of a so called "public health organization" (in Czech "veřejná zdravotnická organizace"). In particular, the fact that "public health organization" was designed as a "complete" legal entity owning its own property and managing it, showed potential. Its designed structure, composition of its bodies and several aspects of its management and supervision invoked the expectation of constituting a modern "public institution". The end result, however, was different. Act no. 245/2006 Coll. of 21st April 2006 on "public non-profit institutional health facility" and on amendment to some acts (in Czech "zákon č. 245/2006 Sb., o veřejných neziskových zdravotnických ústavních zařízeních a o změně některých zákonů") was passed on the basis of an MP's bill. This act, more than anything else, discredits, due to low quality of its legislative works,, the principles on which the above mentioned legislative design of Act on health facilities was based. Act no. 245/2006 Coll., in its section 40, constituted an unallowable mechanism of transforming the provision of health services (by business companies), which was after all annulled by the Constitutional Court of the Czech Republic[7]. The codified existence of two various forms of property treatment is another thing to be criticical of. In fact, property vested by the establisher in "public non-profit institutional health facility" might remain (on the basis of a deed of foundation) the property of the establisher, or it might become the property of the "public non-profit institutional health facility". Property acquired from the activity of the "public non-profit institutional health facility" shall always be owned by this subject [see section 13(2)(a) and (b) of above cited Act][8].

The attempts to transform faculty hospitals as they are defined by section 93 of Act no. 111/1998 Coll. of 22nd April 1998 on Universities (in Czech "zákon č. 11/1998 Sb., o vysokých školách"), (faculty hospitals provide clinical and practical teaching in the sphere of medicine, pharmacy and other health disciplines, as well as scientific research and development activities; faculty hospitals are established by the Ministry of Health as state allowance organizations) into "university hospitals", represents an "unhealthy" development in the field of health services, as well as in the field of higher education. These "university hospitals" are designed to be joint-stock companies, instead of "complete" (full-fledged, capable to own) independent "public institutions" (even thought under the circumstances it suggests itself).

7 See the decision of The Constitutional Court of the Czech Republic no. PL ÚS 5106 (published under no. 483/2006 Coll.) of 27th September 2006. As far as the authors know, till today no "public non-profit institutional health facility" was established. The "Register of public non-profit institutional health facility" as defined in section 27(7) of Act no. 245/2006 Coll. was not established till today either, which is very significant.

8 On difficulties of such a solution see P. Havlan et all, Majetek obcí a krajů v platné právní úpravě, Prague, 2008, pp. 44 and 45.

Transformation – "*Pro Futuro*"

A certain shift in concepts of non-profit subjects ("independent public institutions"), especially expressed by the codification of "public research institution", does not mean that the above mentioned concept of "public legal entities" is becoming reality in the Czech Republic. We are still lacking a universal (not defined just for specific spheres of public administration[9]) legal form of "public institutions", which would comprise "complete" (full-fledged) subjects [capable of] of ownership, not just "executors" of their establisher's property rights, regardless of whether they still remain partially dependent on their establishers concerning proprietary matters. None but a legal subject based on this proprietary basis might really effectively operate and its effective financing, managing and supervising might be assured. None but these non-profit subjects are able to fulfill their social function of stabilisation and development.

9 From that point of view the recent practice of establishing ministerial commitees for transformation of allowance organizations operating just in a specified sphere of public administration seems to be an unfortunate step.

Streszczenie

Przedmiotem rozważań w niniejszym opracowaniu jest charakter organizacji przyznających pomoc socjalną i ich forma działalności, którą należy uznać za przestarzałą wobec współcześnie funkcjonujących organizacji non-profit. Rozważania dotyczą między innymi definicji „publicznej instytucji" i przedmiotu jej działalności, podnoszone są krytyczne uwagi wobec ostatnio wprowadzonych regulacji prawnych w tym zakresie, podkreślając jednocześnie potrzebę zmian w przyszłości.

Aksana Shupitskaya

THE REASONS OF ECONOMIC OFFENCES IN BELARUS AND METHODS OF STRUGGLE AGAINST THEM

The Republic of Belarus is at a transitive stage of development. In spite of the fact that since the date of the independence declaration of Belarus more than 15 years have passed, the reforming of the legal system still remains one of actual problems of the Republic of Belarus on the present stage of its functioning.

The sphere of economy is a major segment of the state of Belarus. Its main part is the financial system is represented by set of various spheres of financial relations, in the process of which funds of money resources are formed and used. According to item 132 of the Constitution of the Republic of Belarus the financial credit system of the country includes the budgetary system, the bank system, the financial assets of off-budget funds, enterprises, establishments, organizations and citizens.

One of the problems the legal system of the modern Belarusian state faces, which demands a decision, is an increase in the number of offences committed in the sphere of budgetary law, monetary and credit system, taxation and customs. The analysis of the reasons for their commitment enables to reveal effective ways of struggle against them.

Financial offences represent a version of social financial deviations in the legal sphere, connected with the infringement of the financial legislation and the integrity of financial law relations.

Tax offences concern the sphere of financial offences, customs delicts, illegal acts in business. Responsibility for the specified offences is provided by the Code of the Republic of Belarus about administrative offences, statutory acts of the President of the Republic of Belarus, the Criminal Code of the Republic of Belarus.

Financial offences result from several objective and subjective factors, circumstances and reasons. Causality usually understands a genetic relation between separate conditions, kinds and matter forms in processes of their movement and development.

The causal explanation of socially negative phenomena assumes a multilevel approach. The antisocial behavior in the financial sphere is ultimately caused by the position of the individuals in social strata, as well as contrasts existing in society.

The source of antisocial deviations lies in contradictions in social, economic and public processes. Thus, the stagnation in the economic life of the 1970s and 1980s entailed the spread of such forms of deviant acts as the plunder of public property as well as private companies and citizens, gambling, contraband, illegal business, other forms of shadow economy.

The modern condition of the former Soviet republics including Belarus, is characterized by such a negative process as the split of society into the prosperous and the poor. The formation of the well-to-do layer is connected with grave crimes, above all economic, but also violent. The collapse of the standard of living of an overwhelming part of the population is caused by a sharp rise in prices for foodstuff and essential commodities, reduction of state housing subsidies, the fall of import, and sharp inflationary processes.

At the analysis of conditions and the reasons for social deviations in the financial sphere it is necessary to note the contradictions of various social strata and groups. The modern society is not free from aggravations and conflicts of interests which can arise in the course of interaction of particular enterprises, branches of a national economy, and the society as a whole.

Errors and distortions in management of the various spheres of public relations, infringements of law, democracy and justice principles became a source of negative phenomena in the financial sphere.

Another source of contradictions is the absence of an accurate concept of development financial law relations in the state. Imperfection of the legislation regulating financial relations, in particular, is the evidence thereof. Thus, on the territory of the Republic of Belarus the General Part of the Tax Code is installed though the Especial part of the specified statutory act is absent till now. The legislation in monetary and credit policies, customs and taxation often varies. Quite often legal norms accepted by various lawmaking subjects, contradict each other. The validation of retroactive effect of laws doesn't promote the effectiveness increase of their operation either. The specified reasons of social deviations concern a category of the reasons considered at level of a society, i.e. at macro level. At individual level as the general reason of socially deviating behavior in sphere of a financial system of the state the mismatch of interests of the person and the requirements of a society expressed in social norms act. The occurrence of this mismatch depends both on deformations of the person, and from features of influence of environment on daily behavior of the subject.

Objective lacks and difficulties of economy, life, and the organizations of a public life, subjective errors and miscalculations are the reasons of many standard offences in financial law relationships.

The essential role in the definition of the individual's form of behavior is also played by insufficiently high level of his/her sense of responsibility and consciousness.

One more factor is the criminalization of a considerable part of society, the presence of the organized crime operating in the sphere of economic law relations.

One of the characteristics of today's stage of development of public relations in the Republic of Belarus is also the fact that the reasons for antisocial behavior recede in consciousness more and more. That is why all of them come under to influence more hard, all of them are more difficult to predicti and eliminate.

At ordinary level to the reasons for the committment of tax offences, customs delicts, forms of the behavior treated as «commercial swindle», i.e. the plunders made by a deceit or breach of confidence, assignment, waste or abusing office position, legalizations of money resources or other property got illegal by, illegal reception of the credit, malicious evasion from repayment of creditor debts, illegal use of a trade mark, deliberate or fictitious bankruptcy, etc., concern deformations in a way of life of individuals which decline them to fulfilment acts. The specified deformations can be connected with the sphere of work and manufacturing, as well as with the sphere of everyday life and free time. In the sphere of acquisition of labour skills, for example, it is they to whom concern insufficient professional skills, neglecting simple work, orientation to submission of labour interests prestigious or mercenary. In the sphere of requirements, interests of deformation are connected with unjustified overestimate of vital inquiries of is material-household character.

The correct position is expressed in the scientific literature about struggle with the economic offences. According to this view struggle against social deviations in legal sphere can expresses and should be carried out in following directions: information, preventive (or preventive), retaliatory (i.e. application of sanctions) and medical and biologic.

The first three methods could be used for the struggle against financial offences.

The use of the information method of struggle against financial offences is based on the following assumption: the committment of currency, tax or customs delicts is connected with ignorance of rules of law. Thereupon significant distribution to a society of the legal information, legal education and legal formation is represented. Legal knowledge of citizens is provided with various means. To number of sources of legal knowledge carry the direct text of the statutory act, the special notice of

interested persons and establishments, and the message of the text of the legal document through mass media or the reference to the expert. The level of legal knowledge of a concrete person is defined by the quality of the legal information, timeliness and efficiency of its reception.

The prevention of financial offences includes the general, special and individual preventive maintenance of their committment. The general prevention in this case assumes activity of the state, societies, their institutes, directed on resolution of conflicts in sphere of economy, a social life, moral-spiritual sphere. Special prevention is a purposeful influence on the factors connected with separate kinds or groups of social deviations. Individual preventive maintenance – activity concerning the concrete persons which behavior enters the conflict to social norms. Social and economic, legal, cultural-ideological reforms urged to promote elimination of the reasons for committing financial delicts. Economic measures for the prevention from anti-social acts in the financial sphere are an improvement of the national economy as a whole, economic protection of the population's well-being, and the introduction of scientifically proved living wage. The measures positively influencing various social institutions concern social measures: the creation of a cult of family as well as the development of local government. Ideological actions are directed towards the formation moral consciousness in the members of society on the basis of universal values.

In the conditions of the modern legal policy of the Belarus state in the most effective way of struggle against social deviations in the financial sphere admits applications of sanctions. The operating Code of the Republic of Belarus about administrative offences contains interdictions for a large quantity of offences in tax laws, currency regulation, and the monetary and credit and customs policy. As measures thereof administrative-legal influence penalties in the large sizes, deprivation of the special right, confiscation are widely provided. The criminal code of the Republic of Belarus contains section 8 providing the criminal liability for crimes against the property and a procedure of economic activities. They are: illegal opening of accounts outside of the Republic of Belarus, failure to return foreign currency from abroad, defrauding credits or grants, illegal business activity or failure in the indemnification to the creditor attract application to infringers of penalties or right deprivation to occupy certain posts or to be engaged in certain activity, restriction of freedom or its deprivation. Variety of crimes in economic sphere is counted among serious ones and as a unique measure of punishment provides imprisonment, even without possibility of application for suspension or conditional non-use of punishment.

In this case it is necessary to recognize a state position correct in this sphere. Running, businesses is always connected with certain risk. Besides, the danger of

economic offences lies, first of all, in a damage which they can cause. Accordingly, the position of the legislator providing for economic (including financial) crimes property measures of punishments would look defensible. In 2005 an article has been included in the Criminal code of the Republic of Belarus 88, according to which «the person who has committed a crime, the entailed causing of a damage of a state ownership or to property of the legal person, the share in statutory fund which fund belongs to the state, or essential harm to the state or public interests and not interfaced to an encroachment for a life or health of the person, can be released from criminal responsibility in an order established by the act if it has voluntary indemnified the caused loss (harm), and also has satisfied other conditions of clearing of the criminal liability, provided by the act».

However, the aforesaid article has not been widely used. Besides, this use substantially is at a loss that the named norm can be applied only at a stage of preliminary investigation of crimes, assumes the personal reference with the petition addressed to the President of the Republic Belarus, does not contain instructions for terms of consideration of the petition for clearing of the criminal liability.

The effective utilization of sanctions for the committment of delicts in economic sphere assumes the debugged work law enforcement bodies, having the right of realization of the financial control in the Republic of Belarus. The Committee of the State Control of the Republic of Belarus, first of all, concerns their number, its structure division – Department of financial investigations, the Ministry of Taxes and Tax Collection, its inspections on places, the Ministry of Finance and its bodies on places, National bank, customs bodies, bodies of Office of Public Prosecutor and legal agencies. Perfection of activity of the specified establishment's contacts accurate regulations of their powers, definition of procedure, remedial rules of acceptance them of decisions, the competent personnel selection providing both effective selection and placement of personnel, and increase of their professional level.

The universal way of struggle against social deviations in the sphere of currency, monetary and credit regulations, customs and tax law relationships does not exist. However, it is obvious, that use named above actions in complex will allow substantially to lower level corresponding kinds of delicts, and, means, will promote strengthening of social and economic and legal system of the state.

Streszczenie

Jednym ze współczesnych problemów białoruskiego systemu prawnego, który wymaga rozwiązania, jest wzrastająca liczba przestępstw o charakterze ekonomicznym (gospodarczym) popełnianych w obszarze prawa budżetowego, monetarnego i systemu kredytowego, podatkowego oraz celnego. Źródłami takiego stanu rzeczy są sprzeczności wynikające z przekształceń społeczno-ekonomicznych. Ekonomiczna stagnacja, która nastąpiła w latach siedemdziesiątych i osiemdziesiątych była przyczyną rozprzestrzeniania się naruszeń polegających na uszczupleniu majątku publicznego zarówno przez firmy jak i osoby prywatne, hazardzie, nielegalnej działalności gospodarczej oraz innych form szarej strefy. Analiza źródeł przestępstw gospodarczych umożliwia wskazanie efektywnych sposobów walki z nimi. W sferze prawnej powinna ona skupić się na: informowaniu, zapobieganiu, działaniach sanacyjnych (tj. stosowaniu sankcji).

Ewa Szóstak

CREATING PUBLIC AID MODEL IN POLAND

The term *public aid* is relatively new in Poland and was brought to life due to a need for adjusting to the Community law. The first bill, dated on June 30, 2000. concerning limit conditions and controlling public aid for contractors took effect on January 1, 2001.[1] It stated who is eligible to benefit from and provide public aid. Soon, however, this bill was replaced with a new one dated on July 27, 2002 determining limit conditions and controlling public aid for contractors[2]. Since January 1, 2007 new de minimis regulations have been in force (European Commission regulation in force to the end of 2013).

Most important changes concern increasing the limit of public aid up to 200.000 euros granted within 3 years without the necessity of reporting it to the European Commission. The regulation also concerns traffic transport sector which was included to de minimis aid. However, in this case, maximum aid limit cannot exceed 100.000 euros and must not be used to purchase vehicles.

The regulation also concerns processing agricultural products as well as bringing them into circulation, which so for was regulated separately.

Apart from the minimis aid one should also consider other regulations bringing changes for horizontal and regional aid such as:

– European Commission guidelines for domestic regional aid within 2007-2013[3],

– European Commission regulation № 1628/2006 for using investment regional aid[4],

– guidelines concerning state help to support small business in the access to venture capital[5],

1 Dz. U. z 2000 r., Nr 60, poz. 704
2 Dz. U. z 2002 r., Nr 141, poz. 1171 ze zm.
3 Dz. Urz. UE z 04.03.2006, C 54/13
4 Dz. Urz. UE z 01.11.2006, L 302/29
5 Dz. Urz. UE z 18.08.2006, C 194/2

– guidelines for a state to support research and development[6],

– guidelines for a state to support agricultural and forest sectors within 2007-2013[7].

Public aid procedures for Polish contactors (?) have changed since Poland joined the European Union. Now Poland is to obey European regulations and decrees, the European Court of Justice (ECJ) and a court of first instance. What is more, the European Union law is superior to domestic regulations in case it comes to contentions issues[8].

Public aid is a legal issue as well as economic and public finances. Therefore, granting public aid is directly connected with the following problems:

– competition protection;

– using public aid effectively as an economic policy instrument;

– using public means to finance public aid effectively including European Union funds.

The application of the European Union public aid law in practice means to control granting a contractor, which brings to competition protection. The basis of granting public aid is domestic law regulations, which, within European law margin, determine the execution of economic aims using public aid most effectively.

The problem of granting allowance to a contractor was regulated by the tax law of August 29, 1997[9]. There are some types of using allowances by a tax body. The first type concerns tax allowance that is not treated as a public aid. It is granted because of the importance of the taxpayer's interest or public interest.

The second type deals with granting tax allowance within "de minimis aid". The third type deals with granting allowances that are controlled by and included in European Union regulations.

The main aim of this article concerns domestic and EU regulations for public aid. What is characteristic of these regulations, especially at the European community level, is their dynamism. They often change, which is caused by public aid policy reforms. Therefore, some issues of this paper are focused on public aid institutions and problems that may occur while proceeding and monitoring the above-mentioned aid.

In a word, the study focuses on:

6 Dz. Urz. UE z 30.12.2006, C 323/1
7 Dz. Urz. UE z 27.12.2006, C 319/1
8 Dz. U. z 1997 r., Nr 78, poz. 483 ze zm.
9 Dz. U. z 2005 r. Nr 8, poz. 60 ze zm.

1. rules of permitting public aid;
2. types of public aim
   a) de minimis aid,
   b) types of horizontal aid,
   c) sector aid.

A paradox in the European Union law is that it is not possible to find a definition of public aid there. It may not have been included on purpose, to avoid a situation in which EU countries would evade the regulations. On the other hand, the existance of such a definition would enable the European Commission and the ECJ to interpret the term in too flexible a way. That is why estabilishing the European Community definition banned granting public aid. According to this regulation any state help is against the common market as it may privilege some companies or some production sectors simultaneously ruining competition.

What may be concluded out of the aforesaid idea is that either public or state aid brings financial benefits to a particular contractor. And nothing is wrong about this fact as long as the following conditions are not fulfilled:

1. it comes directly from public financial means (e.g. writing off an estate tax that makes commune budget income). State aid may be granted by administrative organ (at the national, regional and local level) and public or private organs that have been granted the right to manage and control public financial means;
2. a contractor benefits because of a better price than a free market price (e.g. a contractor rents a real estate that is owned by a commune at a lower price than a market price);
3. is a selective kind, which means that makes some contractors or some goods production privileged (e.g. writing off a real estate tax in case of protected working place);
4. endangers competition and influences trade exchange among EU countries.

The European Union wants the idea of equal chances for all contractors to function in real world. Otherwise, some of them take advantages over their contracting parties. Still, the rule of disagreement does not mean "no public aid grant". European Community law characterizes some spheres, aims and types of help which can be granted after meeting certain requirements.

There are two exceptions to the aforesaid rule, namely:

1. authomatic aid, which means legally acceptable with common market rules:

a) social aid for individual consumers on condition that it does not discriminate the origin of product;

b) aid granted to eliminate damages caused by natural disasters or other unexpected situations.

In both cases the contractor cannot benefit more than social and only social aid in the first case and just reconstructing damages in the second one;

2. conditional aid, which requires estimation from the European Commission. This case concerns conditional exemption of "no public aid grant" as a way to disturb competition and influencing trade exchange among European Union countries. In return one may get help classified in the following categories:

   a) regional help,

   b) horizontal help,

   c) sector help.

European Commission distinguishes such kinds of public aid:

– subsidy;

– bank credit interest excess;

– reimbursement;

– writing off a tax;

– tax deduction;

– base tax decrease or tax fee decrease;

– other expenses connected with budget departments functioning or following their statute tasks;

– payment exemption;

– giving up charging a tax;

– giving up charging a payment;

– writing off tax arrears along with interests;

– writing off interests on tax arrears;

– writing off payment and interests on payments;

– writing off financial penalties;

– giving to a contractor properties owned by the treasury or local government at more profitable conditions than market ones;

– selling off the treasury or local government properties at more profitable conditions than market ones;
– capital contribution to a campany receivables conversation to stocks and shares,
– preference loans;
– loans written off conditionally or financial punishment;
– making one pay tax arrears on the installment plan.

Regardless of the sort of public aid, gross or net, subsidy equivalent needs to be calculated in order to state the sum to be granted.

The gross subsidy equivalent is the amount of money that one may be granted as a subsidy without taking income tax into account in contrast to the net subsidy equivalent when income tax is taken into account. The ways to calculate gross and net subsidy equivalents are stated in the Cabinet decree dated on August 11, 2004[10].

According to the regulation of the Commission nr 1998/2006 dated on December 15, 2006 concerning de minimis state aid[11], an entity applying for such an aid is obliged to present an application form as well as all the documents proving de minimis financial subsidy granted within three years[12].

The entity of state aid is a contractor who, according to the bill dated on July 2, 2004[13], is a private person or a legal person running a business. The aforesaid bill also defines the term "running a business", or in other words, economic activity: it is a paid commercial manufacturing, building or service activity and a mining industry and also a professional activity performed in an organized and permanent way.

According to the rules of competiton policy public financial aid may be granted most of all to small and mean contractors. Apart from that a new definition for a microcontractor was introduced. And the term describes a contractor who within last two years:

1. hired not more than 10 workers and,
2. reached a net turnover not higher than 2 million euros.

A small contractor is the one who within last years:

1. hired not more than 50 workers and,
2. reached a net turnover not higher than 10 million euros.

10 Dz. U. z 2004 r. Nr 194, poz. 1983
11 Dz. Urz. UE z 28.12.2006, L 379/5
12 Dz. U. z 2004 r., Nr 123, poz. 1291 ze zm.
13 Dz. U. z 2004 r., Nr 173, poz. 1807 ze zm.

A mean contractor is the one who within last years:

1. hired not more than 250 workers and,
2. reached a net turnover not higher than 50 million euros.

Horizontal help is divided into:

a) one used to keep workplaces or creating new ones (European Community regulation no 1976/2006 dated on December 20, 2006 dealing with a workplace state aid)[14];

b) one used for environmental protection[15];

c) restructuring aid[16];

d) one used for research and development activity[17];

e) one used to support small and medium companies[18];

f) ones used for professional training.

Sector aid is regulated by the European Union law and divided into particular sectors:

b) postal,

c) public media (radio and television),

d) audiovisual,

e) coal mining industry,

f) synthetic fibres,

g) ship building industry,

h) steel and iron industry,

i) moto industry,

j) electropower industry.

14 Dz. Urz. UE z 23.12.2006, L 368/85
15 Dz. Urz. UE z 03.02.2001, C 37/3
16 Dz. Urz. UE z 01.10.2004, C 244/2
17 Dz. Urz. UE z 17.02.1996, C 45/5
18 Dz. Urz. WE z 23.12.2006, L 368/85

Streszczenie

Obecnie prawo Unii Europejskiej stanowi podstawę dla udzielania pomocy publicznej. Przepisy polskiej ustawy dotyczą jedynie kontroli procedur jej przyznawania i koordynacji działań właściwych organów, mianowicie prezesa Urzędu Ochrony Konkurencji i Konsumentów oraz organów UE.

Stały szybki rozwój Polski powoduje, że środki publiczne powinny być wydawane w sposób jak najbardziej efektywny, co oznacza, że nie mogą być wykorzystane do krótkoterminowych politycznych celów albo być przeznaczone na cele socjalne lub lokalne.

Co więcej, pomoc finansowa przyznana przedsiębiorstwom powinna stymulować rozwój technologiczny i ekonomiczny. Jak również – co wydaje się oczywistym – powinna być związana ze stałą długookresową polityką ekonomiczną.

Katarzyna Wójtowicz

THE EVOLUTION OF STATE AID POLICY IN POLAND IN THE LIGHT OF EXPERIENCE OF EU MEMBER STATES

General Remarks

The problem of aid awarded to enterprises from public funds has aroused controversy in Poland for a long time. The growing interest in these issues was caused by the accession negotiations and then by Poland's entry into the European Union. The rules of awarding and monitoring the state aid turned out to be one of the most crucial areas of negotiation. Support for private enterprises from state funds is controversial because beneficiaries of such aid are always in a privileged position in relation to the other entities operating on a given market. For that reason, such an interference in the market mechanism has to be well-thought out and planned each time, and carried out only when it is justified by some important economic or social interest. This issue appears to be more essential as the practice of various forms of state intervention in economy of Poland is extremely widespread, which, on the one hand, is a legacy of the previous economic system, while on the other it is the reaction to the adverse social effects of transformation processes. Consequently, it is of utmost importance to plan and conduct the policy of State aid appropriately, and especially to determine the optimal amount, purpose and forms of this aid, and the efficacy of utilization of the awarded financial support.[1] After Poland's accession to the European Union, these problems must be considered in the context of the need to harmonize the Polish provisions concerning the procedures of awarding and monitoring State aid with the EU standards.[2]

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1 See P. Jasiński, Priorytety polityki pomocy publicznej w Polsce (in:) Priorytety pomocy publicznej w Polsce, (eds.). P. Jasiński, E. Kaliszuk, E. Modzelewska - Wąchal, A. Lubbe, Polskie Forum Strategii Lizbońskiej, Gdańsk 2003.

2 See inter alia: E. Czerwińska, Pomoc publiczna dla przedsiębiorców a konieczność dostosowania prawa polskiego do prawa Unii Europejskiej, Information No. 713. Biuro Studiów i Ekspertyz, Warsaw 2000. A. Kamieński, pomoc publiczna dla przedsiębiorców – aspekty prawne, "Glosa" No. 11/2004. A. Werner, Polskie postępowanie notyfikacyjne dotyczące udzielenia pomocy publicznej, "Glosa" 10/2004. R. Zajdler, Procedury udzielania pomocy publicznej, "Prawo Unii Europejskiej" No. 7-8/2004. I. Postuła, A. Werner, Pomoc publiczna, Wyd. LexisNexis, Warsaw 2006.

On account of the origin of term 'State aid'[3] as well as the source of regulations that underlie it, the natural reference to the description of State aid policy in Poland is the experience of the other EU Member States in this field.[4] They are the basis for the assessment of the current practice of awarding State aid in Poland, including first of all its level, structure and the degree of implementation of the adopted objectives.

Determinants of State Aid in the System of Community Law and their Evolution

The Treaty Establishing the European Community (hereinafter the TEEC) showed the conditions that must be met so that a given financial support can be regarded as State aid. In particular, four main criteria are distinguished: [5]

1. aid has to be granted by a Member State or from public funds regardless of the form,
2. the result of aid is the distortion of competition manifested in the obtainment of economic advantages that cannot be obtained without such support,
3. aid has a selective character, therefore it applies only to selected regions, sectors, industries or enterprise,
4. aid influences trade between Member States.

At the same time, under the TEEC, aid measures that meet the aforementioned criteria were found to be incompatible with the common market rules. The rule of incompatibility, however, is not identical with a total prohibition because exceptions (derogations) to this general rule have been introduced, both automatic and conditional as long as the adverse results of State aid might be compensated for by their positive consequences.[6]

The group of *automatic exemptions* includes aid for the following purposes: socially targeted at individual consumers (on condition it is granted without restriction as to the origin of goods), intended to compensate for damage due to natural disasters,

3 What the European Community calls State aid is termed 'public aid' in Polish. This aid has not been directly defined in the Community law, but only by showing some prerequisites that allow us to assess whether or not a given form of State intervention constitutes aid. Various definitions of the term can be found in numerous publications on the subject, e.g.: S. Dudzik, Pomoc państwa dla przedsiębiorstw publicznych w prawie Wspólnoty Europejskiej: między neutralnością a zaangażowaniem, Kantor Wydawniczy "Zakamycze", Krakow 2002. P. Pełka, M. Stasiak, Pomoc publiczna dla przedsiębiorców w Unii Europejskiej i w Polsce, Difin, Warsaw 2002. E. Modzelewska - Wąchal, Pomoc publiczna dla przedsiębiorców i jej nadzorowanie, LexisNexis, Warsaw 2003.

4 P. Jasiński, Priorytety polityki…, op. cit., p. 11.

5 Art. 87 section 1 of the Treaty Establishing the European Community (consolidated text – EU Official Journal of 24 December 2002. C 235), henceforward TEEC

6 Art. 87 (2) Art. 87 (3), TEEC

and awarded to Germany's regions especially affected by the division of Germany[7]. The goal of State intervention in these cases is to prevent adverse social-economic effects or restore the state that existed prior to the occurrence of circumstances (natural disasters or any other extraordinary events) that brought about these adverse phenomena. [8]

Conditional exemptions, however, apply, inter alia, to: aid awarded to support economic development in especially backward regions or those hit by high unemployment, i.e. regional intervention. This group also includes aid for the implementation of projects of all-European importance or for the elimination of serious disruptions to the economy of the Member States. Additionally, the aid is also admitted to facilitate the development of certain forms of activities, including small and medium-sized enterprises. Conditional exemptions also apply to aid targeted at the promotion of culture and preservation of cultural heritage.

The foregoing exemptions show that Community law distinguishes three principal purposes of State aid: *horizontal, sectoral and regional* objectives.[9]

Horizontal aid does not depend on where beneficiaries conduct business activity or which sector they belong to. It may be targeted at all entrepreneurs, who, owing to State support, will implement strictly defined goals, which include rescuing and restructuring[10], the support for small and medium-sized enterprises, research and development, training, and environmental protection..

A characteristic feature of sectoral aid is that it is targeted under an assistance program at a specific group of entrepreneurs to whom the State wants to grant aid because they belong to a particular sector. It most often applies to the so-called 'sensitive sectors', which are characterized by surplus production capacity and capital-intensive investments. Difficulties that occur in these sectors constitute justifiable grounds for granting aid but with a reservation that this must not lead to a serious distortion of competition and a privileged position of its beneficiaries in relation to the other entrepreneurs. These sectors include, above all, the automotive sector, steel and coal sectors, textile sector, and shipbuilding.

The regions entitled to obtain regional aid are those with the GDP per capita level lower by at least 25% than the overall Community average[11], and additionally, in the regions where the unemployment rate exceeds the EU average by 10%, this difference has been increased to 15%. Furthermore, the aid can also be awarded

7 Art. 87 (2) TEEC
8 P. Pełka, M. Stasiak, Pomoc publiczna dla przedsiębiorców..., op. cit., p. 33.
9 E. Czerwińska, Pomoc publiczna dla przedsiębiorców…, op. cit, p. 3.
10 Communication from the Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty, EU OJ, 1 October 2004. C244
11 Communication from the Commission: Community guidelines on national regional aid, EU OC, 19 March 1998. C 74.

to the so-called problem areas defined on the basis of national indicators proposed by Member States. Three kinds of aid are available here: aid for initial investment, aid for the creation of jobs, or operational aid earmarked for covering current costs of the functioning of enterprises operating in the regions with particularly severe socio-economic problems. The European Commission's guidelines on regional aid indicate that it should focus on the economically most underdeveloped regions in the EU while the national policies of regional aid should be consistent with the objectives implemented on the level of the whole Community within the framework of structural funds.

At the same time, the European Commission has special powers to decide whether a given aid measure qualifies to be excluded, while each Member State is obligated to notify the Commission about the planned forms and kinds of aid measures prior to the commencement of their implementation (the so-called ex ante notification). Nor can the State implement aid measures until they have been approved by the Commission (the so-called principle of suspension). All assistance granted without the Commission's consent is automatically deemed illegal and has to be returned. In order to simplify procedures pertaining to the notification of State aid, the Commission recently adopted five regulations exempting certain categories of aid from the duty of prior notification. These apply to the aid to small and medium sized enterprises[12], the aid for employment[13], the training aid[14], the regional investment aid[15], and *de minimis* aid.[16]

As regards the forms of State aid preferred in the European Union, i.e. the manner of transferring public funds to entrepreneurs, Community law permits two kinds of intervention: direct and indirect ones. In the former case, the aid consists in direct reallocation of funds from the public finance sector to the beneficiary, e.g. granting credit or loan on more favorable terms than on the market, or granting a subvention. This kind of aid is active and pro-development and it is directly implemented through the system of public expenditure whereas we can speak of indirect aid in the case of

12 A small enterprise is one that employs fewer than 50 employees, its annual turnover not exceeding 10 million euros, while a medium-sized one – under 250 employees with a turnover below 50 million euro. Commission Regulation no. 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises OJ. L 10 of 13.01.2001.

13 Commission Regulation No. 2204/2002 of 5 December 2002 on application of Articles 87 and 88 of the EC Treaty to State aid for employment. OJ L 337 of 13.12.2002.

14 Commission Regulation No. 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid, OJ L10 of 13.01.2001.

15 Commission Regulation No. 1628/2006 of 24 October 2001 on the application of Articles 87 and 88 of the EC Treaty to national regional investment aid, OJ L 302 of 1.11.2006 .

16 The de minimis aid is a gain granted to the entrepreneur over three consecutive years up to the amount of 200 thousand euros (in the road transport sector – up to 100 thousand euro). This rule applies regardless of the enterprise size, consequently, it is especially beneficial to small and medium-sized businesses, moreover, granting de minimis aid is not conditional upon the classification of it into one of the aforementioned exceptions to the general prohibition of State aid. Commission Regulation No. 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid. OC L 379 of 28.12. 2006.

omission to collect (despite the fact that there is a legal obligation to do so) specific public funds and leaving them in the entrepreneur's possession, e.g. remission of tax arrears or tax deferrals. This aid tends to be termed as 'forced aid' because it is passive and consists in the reduction of due budgetary receipts due.

A certain specification of the aforementioned guidelines of the Community law on the policy of State aid in the EU territory are the conclusions contained in the Lisbon Strategy adopted in 2000[17] as well as the conclusions and suggestions formulated by the European Commission at the half point of the Strategy implementation in 2005.[18] They emphasized the need to reduce the GDP share of State aid gradually in individual Member States and the need to redirect this aid especially for horizontal objectives, including cohesion. At the same time it was accentuated that what should be reduced first of all is the aid that has a particularly distortive effect on competition and the aid whose efficacy is the lowest, which was expressed as a maxim 'less aid but a better targeted aid.' Consequently, State aid in EU countries should focus first of all on such areas as: developing economy based on knowledge that takes into account the development of information society, promotion of research and innovation processes, education and training, development of small and medium-sized enterprises, and the environmental protection. Another priority directed this aid towards the creation of conditions conducive to the development of entrepreneurship, inter alia stimulation of high-risk capital investment. An important objective of assistance can also be a better targeting of regional support for sustained development and modernization as well as improvement of the European social model. The Commission also specified its stance on so-called public services, which play a crucial role in the provision of social and territorial cohesion. A very important issue was also the improvement in the efficacy of aid granted and the wider application of *ex ante* and *ex post* assessments to aid schemes from the perspective of verifying the effectiveness of support and its effect on competition. The emphasis was also laid on the need to amend transparency rules of awarding aid and to improve monitoring and reporting in this field.

17 The Lisbon Strategy adopted in March 2000 is the socio-economic program of the European Union whose aim is to make the EU the world's leading economy in the perspective of 2010. For more on this document see the Internet, e.g. , www.pfsl.pl for Poland.

18 Communication from the Commission to the Council and the European Parliament, Common Actions for Growth and Employment: The Community Lisbon Program, COM (2005) 330 final, SEC (2005) 981. Brussels 20.07.2005.

Comparative Presentation of State Aid granted in EU Countries and in Poland

The comparative analysis of the empirical data contained in the European Commission's annual reports on State aid awarded in the EU Member States and in the Office of Competition and Consumer protection reports on State aid in Poland allows us to formulate several general conclusions[19].

Firstly, the average amount of State aid in the Community is gradually reduced both in absolute values and relative to GDP (see Tables 1 and 2).[20] What is also characteristic is that the downward trend continued even after the accession of ten new states to the Community in 2004. However, there are considerable disparities between EU Member States regarding the amount of funds earmarked for support: the share of aid to GDP (apart from agriculture, fisheries and transport) in 2006 ranged from 0.13% in Luxemburg to 1.77 % in Malta (Table 2). In Poland, in turn, the level of aid in 1998-2003 clearly increased, which was connected with both the need for such a support resulting from the economic crisis and a growing imbalance of the public finance sector, and with the wish to take advantage of the last opportunities in this field before the accession to the Community.[21]

Table 1. Amount of State aid and as percentage of GDP in EU and in Poland in 1998-2006 *)

Specification	1998	1999	2000	2001	2002	2003	2004	2005	2006
State aid in Poland in PLN billion	6.8	9.1	7.7	11.28	10.3	28.6**)	16.4	4.8	5.9
State aid in Poland as % of GDP	1.15	1.40	1.06	1.47	1.31	3.50	1.90	0.50	0.60
State aid excluding transport in Poland in PLN billion	N/A	N/A	N/A	N/A	N/A	N/A	8.8	3.6	4.5
State aid excluding transport in Poland as % of GDP	N/A	N/A	N/A	N/A	N/A	N/A	1.00	0.40	0.43
average State aid in EU -15 excluding agriculture, fisheries and transport in EURO billion	50.2	40.3	42.6	45.9	50.6	41.6	43.7	44.2	44.7

19 See Report State Aid Scoreboard –Autumn 2007 Update–Brussels, 13.12.2007 COM(2007) 791 final and Raport o pomocy publicznej w Polsce udzielonej przedsiębiorcom w 2003 r., UOKiK [OCCP], Warsaw, November 2004 and Raport o pomocy publicznej udzielonej przedsiębiorcom w 2006. Warsaw , October 2007. [Raport on State aid in Poland awarded to entrepreneurs in 2003., and Report on State aid in Poland awarded to entrepreneurs in 2006].

20 Figures for State aid in Poland and EU are not fully comparable because before 2004 there were significant methodological disparities in reporting, manifested in that the European Commission reports do not take into account the funds earmarked for, inter alia, transport, including railways, which constituted a sizable volume of State aid in Poland.

21 B. Woźniak, Zasady funkcjonowania i zakres publicznego systemu finansowego (in:) System finansowy w Polsce, (ed.). B. Pietrzak, Z. Polański, B. Woźniak, PWN 2004.

average State aid in EU -15 excluding agriculture, fisheries and transport as % of GDP	0.55	0.43	0.43	0.46	0.50	0.41	0.42	0.42	0.41
average State aid in EU -25 excluding agriculture, fisheries and railway transport in EURO billion	-	-	-	-	-	-	47.5	47.3	47.9
average State aid in EU -25 excluding agriculture, fisheries and transport as % of GDP	-	-	-	-	-	-	0.44	0.43	0.42

**) Figures for Poland in the Table are not fully comparable because in 1999-2000 State aid awarded in agriculture was not taken into account, while starting from 2004 State aid is taken into account excluding transport, in accordance with EU methodology*

***) on account of the fact that 2003 was the year preceding Poland's entry into the EU, endeavors were made to take the "last chance" to award a considerable, one-time subsidy to the coal sector before this aid would be subject to evaluation by the European Commission, for conformity with the Community law.*

Source: Report State Aid Scoreboard –Autumn 2007 Update–Brussels, 13.12.2007 COM(2007) 791 final and Raport o pomocy publicznej w Polsce udzielonej przedsiębiorcom w 2003 r., UOKiK, Warsaw November 2004 and Raport o pomocy publicznej udzielonej przedsiębiorcom w 2006 r., Warsaw October 2007.[see footnote 19 for translation)

From 2004 on one can observe a positive phenomenon consisting in the systematic reduction of the amount of aid, which is consistent with the recommendations set forth in the Lisbon Strategy. In 2006 the percentage of State aid (excluding transport) in GDP (0.43%) basically corresponded to the average for the whole EU-25 (0.42%) and it was considerably lower than the average for the ten new Member States (0.52%).

Table 2. Amount of State aid and its share in GDP in EU Member States in 2006

Country	State aid excluding railway transport in EURO billion	State aid excluding railway transport as % of GDP	State aid excluding agriculture, fisheries and railway transport in EURO billion	State aid excluding agriculture, fisheries and railway transport as % of GDP
EU -25	66.7	0.58	47.9	0.42
EU-15	61.1	0.56	44.7	0.41
EU-10	56	0.91	3.2	0.52
Belgium	1.2	0.39	0.9	0.28
Czech Republic	0.8	0.66	0.6	0.51
Denmark	1.3	0.59	1.0	0.46
Germany	20.2	0.87	16.0	0.69

Estonia	0.1	0.41	0.0	0.08
Ireland	1.0	0.57	0.5	0.28
Greece	0.6	0.26	0.3	0.15
Spain	4.9	0.50	3.9	0.39
France	10.4	0.58	7.4	0.41
Italy	5.5	0.37	3.8	0.26
Cyprus	0.1	0.76	0.1	0.48
Latvia	0.3	1.80	0.0	0.15
Lithuania	0.1	0.54	0.1	0.23
Luxemburg	0.1	0.32	0.0	0.13
Hungary	1.4	1.57	0.8	0.93
Malta	0.1	2.29	0.1	1.77
Netherlands	1.9	0.35	1.3	0.24
Austria	2.3	0.90	1.6	0.60
Poland	2.3	0.85	1.2	0.43
Portugal	1.5	0.93	1.4	0.91
Slovenia	0.3	0.83	0.1	0.48
Slovakia	0.2	0.51	0.2	0.45
Finland	2.6	1.53	0.6	0.35
Sweden	3.5	1.15	2.9	0.94
United Kingdom	4.2	0.22	3.1	0.16

Source: Report State Aid Scoreboard –Autumn 2007 Update–Brussels, 13.12.2007 COM(2007) 791 final

Secondly, the analysis of the structure of overall State aid objectives in the European Union (Table 3) shows that the greatest percentage goes to horizontal aid, accounting for almost 85% of total aid volume in EU-25 countries and to circa 78% of EU-10 members, while horizontal aid also comprises regional aid accounting for 19% of total aid granted in the whole Community. The share of sectoral aid in EU amounted to 15% in 2006 (in EU-10 - 22%).

Table 3. Structure of State aid by objectives in EU Member States in 2006

Country	Horizontal objectives								Sectoral objectives				
	Total aid for horizontal objectives	Environmental protection	Regional development	R&D	SMEs	Training	Employment	Other	Total aid for sectoral objectives	Manufacturing	Coal industry	Services	Other
	in %												
EU -25	85	29	19	14	11	1	7	4	15	2	7	5	1
EU -10	78	2	34	9	9	3	17	4	22	15	7	0	-
Belgium	98	20	18	20	31	3	3	3	2	2	-	0	-
Czech Republic	100	3	44	27	18	2	6	-	0	0	-	0	-
Denmark	96	34	0	7	0	0	51		4	0	-	0	-
Germany	85	50	19	11	3	0	0	1	15	0	14	1	-
Estonia	100	4	19	28	8	7	3	32	0	-	-	-	-
Ireland	80	1	25	14	16	3	7	15	20	11	-	8	-
Greece	90	6	65	2	8	-	5	5	10	-	-	8	1
Spain	72	5	29	15	9	1	4	9	28	0	27	0	0
France	97	1	19	23	26	1	19	8	3	3	-	1	-
Italy	96	3	21	19	33	6	7	6	4	0	-	4	0
Cyprus	96	0	9	5	18	12	-	51	4	-	-	4	0
Latvia	100	8	67	-	23	1	-	0	0	0	-	-	-
Lithuania	100	18	30	11	30	6	5	-	0	0	-	-	-
Luxemburg	100	6	16	29	33	-	-	16	0	0	-	-	-

Country	Horizontal objectives								Sectoral objectives				
	Total aid for horizontal objectives	Environmental protection	Regional development	R&D	SMEs	Training	Employment	Other	Total aid for sectoral objectives	Manufacturing	Coal industry	Services	Other
	in %												
Hungary	52	2	25	7	4	1	6	7	48	43	5	-	-
Malta	7	-	-	0	1	3	-	3	93	92	-	1	-
Netherlands	97	68	2	21	1	0	1	5	3	2	-	0	-
Austria	51	20	7	10	12	0	1	1	49	0	-	49	-
Poland	85	1	33	3	7	4	37	0	15	2	13	0	0
Portugal	14	0	3	0	5	3	3	0	86	0	-	86	-
Slovenia	88	3	31	13	20	1	11	8	12	3	2	-	-
Slovenia	95	0	76	2	10	4	1	1	5	3	2	-	-
Finland	97	36	12	27	6	0	7	7	3	1	-	2	-
Sweden	99	86	5	4	0	-	0	4	1	-	-	-	-
United Kingdom	90	35	19	18	5	4	1	8	10	0	1	0	9

Source: as above

In Poland horizontal aid also dominates in the structure of State aid, amounting to almost 50% in 2005-2006 (see Table 4). It should be noted that by the end of 2003 these proportions were entirely different and almost 70% of the aid was earmarked for sector objectives (first of all for the coal industry). At present, in most EU countries, horizontal aid is directed mainly (apart from environmental protection objectives) for research and development and for small and medium-sized enterprises. Like in the other EU-10 countries, the support for employment and regional aid is of great importance in Poland. In the structure of sector aid, a comparatively great role is still played by the aid earmarked for the coal industry. Unfortunately, in the light of the data on the deteriorating condition of this economic sector in Poland, and of many press articles pointing to the pathologies attendant on this form of aid, the efficacy and efficiency of this kind of support can be regarded as extremely dubious.

Table 4. State aid by objectives in Poland in 2003 and in 2005-2006

Aid objectives	2003		2005		2006	
	Amount of aid in PLN m.	Share as %	Amount of aid PLN m.	Share as %	Amount of aid in PLN m.	Share as %
TOTAL	28627.5	100.0	3 646.2	100	4 468.4	100
Horizontal aid:	2840.8	9.9	1 821.7	49.9	2 183.1	48.9
R&D	105.6	3.7	153.1	8.4	127.6	5.8
environmental protection	346.0	12.2	31.3	1.7	55.5	2.5
small and medium-sized enterprises	146.6	4.7	304.5	16.7	322.6	14.8
employment	296.1	10.4	1 230.3	67.6	1 440.0	66.0
training	66.0	2.3	89.3	4.9	210.1	9.6
aid for rescue	1750.3	61.6	4.6	0.3	11.3	0.5
aid for restructuring	144.9	5.1	8.5	0.5	16.0	0.7
Sectoral aid:	20214.9	70.6	1 048.5	28.8	699.8	15.7
shipbuilding sector	456.7	2.3	184.7	17.6	103.6	14.8
coal sector	17488.5	86.5	863.8	82.4	596.2	85.2
Regional aid	863.7	3.0	763.6	21.0	1 558.3	34.9
OTHER	32 754.4	16.5	12.4	0.3	27.2	0.5

Source: Raport o pomocy publicznej udzielonej przedsiębiorcom w 2006 r., Warsaw October 2007 (Compare figures for 2003 from Report on State aid in Poland awarded to entrepreneurs in 2003, UOKiK, Warsaw November 2004).

The figures in Table 5 show that in 2004-2006 both in Poland and in the EU the dominant ones were direct forms of support, first of all as grants whose share stood at circa 50%. This phenomenon should be positively assessed because the grant is the most transparent instrument of aid. Compared to, in 1997-2004, indirect forms of aid were of key importance in the structure of State aid in Poland (Table 6). It should be noted that this situation was characteristic of most acceding States and was the effect of the weak condition of the enterprise sector, especially of large State-owned companies that had problems with discharging their public obligations, and from the weak condition of public budgets plagued by deficits, in which it was difficult to find funds to cover directs grants.

Table 5. Forms of State aid in EU and in Poland in 2004-2006

Specification	Share of each aid type in total aid as %					
	grants	tax subsidies	capital-investment subsidies	soft loans	payment deferrals	guarantees
EU-25	50	43	1	3	2	2
Poland	52	41	0	3	0	4

**) Share calculated on the basis of the average amount of aid granted in the manufacturing and services sectors in 2004-2006*

Source: as above

Table 6. The Structure of State aid in Poland by support forms

Specification	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
	in %									
Direct support forms	31.3	34.5	34.9	47.3	25.8	38.0	9.7	37.7	77.1	78.5
Indirect support forms	68.7	65.5	65.1	52.7	74.2	62.0	90.3	62.3	22.9	21.5

Source: Raport o pomocy publicznej udzielonej przedsiębiorcom w 2006 r., Warszawa October 2007

Final Conclusions

While assessing the evolution of State aid policy in Poland, we should first of all emphasize that after its accession to the Community, Poland has been faced with considerable problems in adjusting its policy to EU standards.

Firstly, the amount of State aid granted shows a clear downward turn, and in 2006 it was even reduced to the level corresponding to the average for the whole EU (relative to GDP). This is in line with the Community recommendations but it should be taken into account that under the specific Polish conditions we should not accept Community guidelines uncritically and follow the wealthier countries of the "old" European Union, which are better adapted to compete on the common market. A decrease in the amount of aid awarded should be a long-term goal, which should, however, be attained gradually, taking into account the repercussions it may have for Polish economy, especially for the domestic entrepreneurs, who need support during the process of restructuring and making up for technological delays.

Secondly, it was possible to redirect the awarded aid from sector objectives towards horizontal and regional ones. Consequently, most funds have recently been earmarked towards projects for employment, small and medium-sized enterprises, as well as for R&D, and investment support. This tendency should be positively assessed because it will contribute to the improvement of competitiveness of Polish firms, especially the sector of small and medium-sized enterprises, which constitute the majority of economic entities in Poland and play a significant role in the process of economic development and job creation. We should have in mind, however, that in the EU Member States these changes were introduced successively as the objectives of aid were achieved, while the present low share of aid for 'sensitive sectors' is a consequence of earlier restructuring and modernization activities, which Poland has not yet completed. For that reason, it is also desirable in Poland that the aid should be redirected successively rather than by fits and starts so that the adopted objectives will contribute to the satisfactory improvement of the economy in Poland and bridging of the development gap between Poland and EU countries.[22]

Thirdly, the forms of aid awarded were also changed. Tax concessions, exemptions, and remissions of public law obligations that were overwhelmingly applied until recently, have been replaced by direct budget expenditures in the form of grants. This is the most convenient and most effective form of aid. Although it has to be used in accordance with its purpose, it allows beneficiaries a certain flexibility of action and enables them to increase the capital investment greatly. On the other hand, from the standpoint of public authorities, the reduction of aid in the form of various tax exemptions is highly desirable because it enables the acquisition of

22 E. Modzelewska – Wąchal, Pomoc publiczna w Polsce…,p. 70

funds necessary for financing aid for the enterprises that appear promising enough to use this aid effectively and eventually improve their economic performance (which may also contribute in the long run to an increase in public budget revenue from taxes they will pay).

To sum it up, we should stress once again that while adjusting the state policy in Poland to the rules and practices of the EU countries, we should not disregard its specific determinants in Poland, which are: firstly – the scarcity of public funds earmarked for aid (which results in strong competition between various objectives and beneficiaries), and secondly, - a great number of social and economic needs that require state intervention (those result from high unemployment rate, the structural weakness of the small and medium-size enterprise sector, or incomplete restructuring processes).[23] The foregoing conditions unequivocally show that the principal indicator of aid granted from public funds should be its efficacy and efficiency. In particular, it is necessary to develop a long-term strategy that would take European Commission recommendations into account and embrace these processes on the national scale, first of all in the context of the impact of granted aid on the expenditure of the public finance sector.

23 Ibid, p. 68.

Streszczenie

Artykuł jest próbą oceny rozwoju polityki pomocy publicznej w Polsce po akcesji do Unii Europejskiej. W szczególności prezentuje prawne determinanty tej pomocy począwszy od klauzul zawartych w Traktacie ustanawiającym Wspólnotę Europejska i regulacjach Komisji Europejskiej. Obejmuje także charakterystykę porównawczą pomocy publicznej przyznanej w krajach UE i w Polsce pod względem wielkości wsparcia, jej przedmiotu – pomoc horyzontalna, regionalna i sektorowa, czy też ze względu na jej formy - bezpośrednią i pośrednią. Główny wniosek płynący z rozważań stanowi, że po akcesji do UE, Polska szeroko przystosowała politykę pomocy publicznej do standardów prawa unijnego i do praktyki innych państw członkowskich.

Oceniając postęp Polski w tej dziedzinie, nie powinno się lekceważyć specyficznych czynników, do których należą: po pierwsze - niedobór środków publicznych przeznaczonych na wsparcie, co skutkuje silnym współzawodnictwem pomiędzy różnymi podmiotami i beneficjentami; po drugie – wielki zakres potrzeb o charakterze socjalnym i ekonomicznym, które wymagają finansowania ze strony państwa i które skutkują wysoką skalą bezrobocia, osłabieniem strukturalnym sektora małych i średnich przedsiębiorstw lub niekompletnym procesem restrukturyzacji.

INFORMATION AND PROCEEDINGS

Jerzy Pielaszek

SCIENTIFIC CENTER OF THE POLISH ACADEMY OF SCIENCES IN PARIS

(Centre Scientifique de l'Academie Polonaise des Sciences à Paris)

For both up-and-coming research grant holders from Poland and Internationally-renowned Polish researchers, the address Rue Lauriston 74 in Paris symbolizes the very best tradition of scholarly ties between Poland and France

The Scientific Center in Paris has a history now stretching back more than 115 years - having been first established in affiliation with the Polish Library in Paris on 3 May 1893 under a decree from the President of France dated 2 July 1891. The center therefore emerged as the only independent Polish scientific unit abroad, during the very period when Poland itself lost its Independence as a country.

The illustrious émigré tradition

Polish institutions in Paris have a long tradition, dating back to the Great Emigration after 1830. One such Polish establishment is the Historical and Literary Society, which, together with the Polish Library in Paris, was granted the status of an "institution of public utility" by a decree of Napoleon III (1866). Somewhat later, the Historical and Literary Society established close ties to the Polish Academy of Arts and Sciences (PAU), which had then been set up in Kraków. In 1891 the collections of both the Historical and Literary Society and the Polish Library in Paris were taken over by the PAU, after long and difficult negotiations necessitated by the political situation in Europe. Before the official opening of the Scientific Center in Paris, the President of the PAU wrote that its main objective would be "not only to facilitate the studies of Polish scientists in Paris, but also to facilitate scholarly relations of French scientists with the Academy and with the Slavic scholarly world". After Poland regained its independence after WWI, the Scientific Center became the largest foreign scientific unit in Paris.

However, the Second World War brought great destruction and the Center was among the most heavily damaged scholarly and cultural institutions in France. The book collections, except for the most precious items that had been hidden away, were seized and taken away to Germany. After the war, a great number of these books returned

to Paris (owing to significant help on the part of the National Library in Warsaw), and the Polish Library and the Scientific Center were then re-opened.

In 1947 the Scientific Center and the Polish Library became separate entities. Under a resolution passed by the PAU General Assembly, the Center was thenceforth meant to "serve the needs of all the divisions of the Academy" (which in those days were limited to a Philological Division and a Historical-Philosophical Division), In 1949 a portion of the building at 74 Rue Lauriston in Paris was turned over to the PAU Scientific Center, and after 1951 the entire building was taken over by the then newly-established Polish Academy of Sciences. The 74 Rue Lauriston address thus became a familiar one to nearly all Polish scientists present in Paris as well as to the French scientists collaborating with them.

Another interesting aspect of the Center is the history of its headquarters building: erected in 1908, it was originally owned by the family of Prince Clermont-Tonnerre, who were close to Marcel Proust - a fact that is marked by commemorative plaque in the hall, noting that the author of Remembrance of Things Past attended salons at the Lauriston palace. The palace was likewise frequented by the eminent Polish pianist and politician Ignacy Paderewski. Later days palace became the property of Prince Sanguszko, and in 1919 it served as headquarters for a delegation sent by Józef Piłsudski to the Versailles Conference. In the interwar years the building once again had a French owner, but it was bought back by the Poles after WWII. Nowadays it belongs to the Polish Academy of Sciences.

The political circumstances underpinning the Center's operations drastically deteriorated in the 1950s, with a certain improvement only coming after 1956. In 1957, the first agreement between the Polish Academy of Sciences and the CNRS (Centre National de la Recherche Scientifique) was signed in Warsaw, and in 1959 Poland signed a cultural and scientific cooperation agreement with France. This facilitated the gradual development of research and cultural contacts between the two countries.

Contacts and collections

Over the many years of the Center's activity, both the Polish Library building and the Rue Lauriston building have been visited by many French and Polish scholars and celebrities, hosted as guests and lecturers. Since 1970 the Center has likewise administered the buildings of the former "Polish School" at 11-15 Rue Lamandé.

The Paris Scientific Center's colorful history, replete with dramatic events, has to date been the subject of the monograph *Polska Stacja w Paryżu w latach 1893-1978 (The Polish Scientific Center in Paris in 1893-1878),* published by Ossolineum

in 1982, authored by Danuta Rederowa, Bohdan Jaczewski and Waldemar Rolbicki, with a foreword by Andrzej F. Grabski.

The first director of the Center was Prof. Stanisław Wędkiewicz, who was succeeded by the following professors: Paweł Szulkin, Witold Stefański, Feliks Widy-Wirski, Paweł Nowacki, Bolesław Kalabiński, Leszek Kasprzyk, Wiesław Skrzydło, Jerzy Borejsza, Henryk Ratajczak and (since 2004) Jerzy Pielaszek. The Scientific Center's objective, as set forth in its Statues is "to facilitate the development of scientific, R&D, and cultural cooperation between the Republic of Poland and the Republic of France". Its activities are very diverse - it hosts and helps organize scientific conferences those inspired by programs of Polish-French (as well as European) international scientific cooperation, as well as lectures, scientific seminars, and popular-science meetings.

The Center works to foster contact between Polish and French scientific establishments and between individual scientists themselves, providing information and organizational assistance. Such efforts have given rise to successive programs of scientific cooperation. The diversity of the Center's activities is demonstrated by the variety of institutions it has cooperated with in Poland as well as in France, including the universities of Paris I, Paris II, Paris IV Sorbonne, Paris VI Pierre et Marie Curie, Paris VII, Orsay, Versailles, École Normale Supérieure de Cachan, Lille II, Rennes, Strasbourg, Toulouse, Nancy, Orléans, Marseille, Grenoble and Bordeaux. The Center likewise works together with the Polish Institute in Paris and the prestigious Literary Institute in Maisons-Laffitte in addition to the Polish Historical and Literary Society.

The Center's library collection, which began to be amassed anew in the late 1970s, now consists of around 13,000 volumes of books and 100 scientific journal titles – in Polish, French, and other languages. The library is frequented by Polish scientists in France, by grant and apprenticeship holders, and by French readers and visitors from other countries interested in Poland-related issues, including journalists preparing television or radio stories on such topics.

The Center activities are showcased in the published Annuals of the PAN Scientific Center in Paris, now entering its 11th volume (for 2008). Ongoing events and information can be found on the Center's website: www.academie-polonaise.org (e-mail: sekretariat.parispan@free.fr).

MINUTES OF THE VII SCIENTIFIC FINANCIAL CONFERENCE "THE BASIC PROBLEMS IN PUBLIC FINANCE REFORMS IN THE 21ST CENTURY IN EUROPE", PARIS, 16-17 SEPTEMBER, 2008

The VII international science conference "Fundamental Problems in Public Finance Reform in 21st century Europe" was held on September 16-17, 2008. It was organized by the Faculty of Law at the University of Białystok, the branch of The Polish Academy of Sciences in Paris and The Centre for Information and Research on Public Finance and Tax Law of Central and Eastern Europe. The session took place in historical rooms of the Station of Polish Academy of Science in Paris, at 74 rue Lauriston.

The conference was opened by Professor Eugeniusz Ruśkowski, President of the Board at the Centre for Information and Research on Public Finance and Tax Law of Central and Eastern Europe, who welcomed participants from five European countries representing several dozen academic centres. He also expressed many thanks to the Director of the branch of The Polish Academy of Sciences, Professor Jerzy Pielaszek, as well as to the staff of the branch for their remarkable efforts in the organising the conference. Professor Ruśkowski also stressed that the fundamental aim of the conference was to highlight the most important public finance reforms introduced in 21st century Europe. Amongst others, these reforms apply to the programme budget in many countries, and to the transition from progressive to proportional tax in some Central and Eastern European countries. The presented papers and the discussion during the three sessions were dedicated precisely to these issues.

The first session was chaired by Professors Cezary Kosikowski (University of Białystok) and Jan Głuchowski (The Catholic University of Lublin). In an inaugural paper entitled "*La nouvelle gouvernance financiere de l'État en France*", Professor Michel Bouvier from the University of Paris presented the rationale as well as the basic assumptions behind public finance management reform in France. He emphasised that LOLF of 1 August 2001 completely changed the picture of public finance management in France, increasing the responsibility on civil servants for the effectiveness use of public resources. However, during the discussion of the paper, it was stressed that it is insufficient to deal with the public financial crisis in France alone.

Professor Teresa Lubińska from the University of Szczecin in her paper entitled" Performance Budgeting in Poland: achievements and future perspectives"

presented previous experience in Poland in works over task budget, emphasising the importance of their continuation in spite of the change in government. The paper proves that Poland is just at the conceptual stage of introducing the task budgeting and that the comparisons to other countries that already went through this stage (e.g. France), are of the utmost importance.

The second session was chaired by Professors Valentina Sentzowa (Karasieva) from the National University in Voronege and Vladimir Týč from the Masaryk University in Brno. During this session, Professor Marie – Christine Esclassan from the University of Paris presented the paper entitled "*L'adoption des contrôles financiers publiques á la nouvelle gestion publique*" emphasising the important achievements in public financial management in France, as well as the fundamental weaknesses of the introduced reforms. It was emphasised in the paper and also in the discussion that the reforms under consideration cannot be considered complete while the philosophy of the system of legal responsibility is not adapted to the new managerial requirements of "new public management."

A paper presented by Dr. Radim Boháč from the Charles University in Prague entitled "Reform of public finance in the Czech Republic" (by Professor M. Karfikova, associate Professor H. Markova and Dr. R. Boháč) related to the assumptions of public financial reforms in the Czech Republic and to their critical analysis. It emphasised that previous initiatives aimed at the stabilization of public finances in the country, and it is hard to justify calling them a reform, though further efforts in this direction are most advisable.

The second day sessions were chaired by Professors Jan Głuchowski (Catholic University of Lublin) and Eugeniusz Ruśkowski (University of Bialystok). In her paper entitled "Progressive taxation in Russia (legal aspects)", Professor Marina Sentzowa (National University in Voronege) advanced a thesis concerning a change in approach to the concept of "progressive tax"; she stated that with this form of taxation, an increase in the basic rate of tax results in a higher amount tax being paid despite a flat tax rate (proportional tax). The paper evoked a long and lively discussion especially within the large Russian delegation.

In a collaborative paper from the Masaryk University in Brno (Vladimir Týč, Petr Mrkývka, Ivana Pařizková, Michal Radvan, Dana Šramkova, Libor Kyncl, Jan Neckář, Petra Schillerova) entitled "*La reforme de l'administration fiscale dans la République Tchèque et dans certains pays de l'Union Européenne*" Professor Vladimir Týč comprehensively set out the problems of fiscal reforms in the Czech Republic and other countries of Central and Eastern Europe, emphasising the bi-directional influence of these solutions. The discussion over the paper focused on the special character of fiscal administration within the public administration system.

Concluding the conference, Professor Ruśkowski announced the publication of the proceedings in a book and invited the participants to take part in the VIII international conference "Centrum" which will be held in September 2009 in Ukraine.

Ewelina Leja

INFORMATION AND RESEARCH CENTER OF THE PUBLIC FINANCE AND TAX LAW OF CENTRAL AND EASTERN EUROPEAN COUNTRIES – AN ASSOCIATION AT THE FACULTY OF LAW, THE UNIVERSITY OF BIALYSTOK

The Information and Research Center of The Public Finance and Tax Law of Central and Eastern European Countries is an association at the Law Faculty of the University of Bialystok. It is registered in National Court Register in the XII Department of the District Court in Bialystok, under no. 0000136524.

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

The Scientific Council of the Association is comprised of the following members: Prof. Cezary Kosikowski (Poland) - President of the Council, Doc. Lilia Abramchik (Belarus), Prof. Vladimiŕ Babčak (Slovakia), Prof. Elżbieta Chojna-Duch (Poland), Prof. Andrzej Drwiłło (Poland), Prof. Jadwiga Glumińska-Pawlic (Poland), Dr Edward Juchniewicz (Poland), Prof. Marina Valentinovna Sentsova (Russia), Prof. Jerzy Małecki (Poland), Dr Jarosław Marczak (Poland), Prof. Wiesława Maria Miemiec (Poland), Dr Petr Mrkývka (Czech Republic), Oksana Muzyka-Stefanchuk (Ukraine), Prof. Zbigniew Ofiarski (Poland)

Prof. Alicja Elżbieta Pomorska (Poland), Doc. Maria Żuk (Belarus).

The President of the Association is Professor Eugeniusz Ruśkowski, Vice President – Professor Leonard Etel, Secretary – Agnieszka Stryjewska.

So far, the Association has initiated several scientific international conferences. It organized (jointly with the University of Finance and Management in Bialystok) an international conference "Methods and Instruments of Limiting Public Debt and Budget Deficit in Countries of Central and Eastern Europe" which, was held from 19 to 21 September 2002 in Bialystok, and a conference "Tax and Local Fees Reforms – Polish and Selected European Countries Experiences" (Bialowieza, November 26-27, 2002). The materials from the conferences were published in a book-form after the events.

In 2003, the next initiative of the Association undertaken jointly with the Law Department of the University in Brno, was the organization of an international conference "Problems of Public Finance and Tax Law in Central and Eastern European Countries before the accession to the European Union". In the event scholars from six countries of the Central and Eastern Europe participated and exchanged their views on problems with application of the tax law in their countries.

The Association also cooperated in the organization of the IIIrd international finance conference of Central and Eastern European countries, which took place on September 23-24, 2004 in Vilnius, and examined the problems of the financial law evolution in our region of Europe. The IVrd scientific conference of the same scope took place on August 29-30, 2005 at Šafarik University in Košice (Slovakia), and it was devoted to the current problems of public finance and tax law in Central and Eastern Europe. Successive conferences were organized in Grodno (Bielarus) and Voronezh (Russia).

Beginning from 2002 the Association has coorganized with the Ministry of Finance and the Regional Chamber of Audit in Bialystok annual conferences concerning local taxes and fees (in Bialowieza and Augustow).

In the first quarter of 2004, the Board of the Association initiated the process of achieving the status of a public benefit organization. In consequence, such a status on April 30, 2004, which means that the "Center" can apply for funds supporting its activities from the local governments as well as from the European Union. The public benefit organization status also allows receiving funds from individuals who can pass 1% of their yearly income tax to such organizations.

In addition, the members of the Association conduct a number of research projects, the last of which was implemented in 2005-2006. It concerned the problems of the development and application of tax law in Poland with particular stress on the control of these processes. The research was carried out by about 30 members of the Association and financed by the State Committee for Scientific Research (currently – the Ministry of Science and Higher Education). Two conferences were strictly connected with this project. The first one – an international conference which took place on September 16-17, 2006 at the University in Grodno (Belarus) was

titled: "Establishing and implementation of financial law in Central and Eastern European countries". The second one – "The control of tax law establishment and implementation under the Constitution of the Republic of Poland" summarized the research mentioned above and was held at the Faculty of Law at the University of Bialystok on October 27, 2006. The main conclusions of the research were presented in a publication of the same title, edited by prof. E. Ruśkowski (Wolters Kluwer Press, Warsaw 2006).

Moreover, the Association supported and participated in negotiations on contracts of cooperation between the University of Bialystok and Safarik University in Kosice, Masaryk University in Brno, and the Lithuanian University of Law in Vilnius.

The "Center" also actively helps its foreign members by: enabling them to publish in Polish scientific periodicals, journals and books, distributing Polish professional financial magazines abroad and preparing scientific research scholarships and grants in Poland.

In 2006/2007, the Board of the Association, apart from its regular activity, introduced other new initiatives, in particular:

- admitted new members to the "Center" from the countries of Central and Eastern Europe, which haven't represented in our organization before;
- actively attended the VIth international finance conference of Central and Eastern European countries in September 2007 at the State University in Voronezh (Russia).
- Similar tasks are being performed in the academic year 2007/2008 as well as the Board introduced other new initiatives:
- admitted new members to the "Center" from the countries of Central and Eastern Europe, which haven't represented in our organization before;
- together with Scientific Center of the Polish Academy of Sciences in Paris actively participated in organization of the VIIth international finance conference of Central and Eastern European countries, which took place in Paris on September 16-17, 2008, titled "The Basic Problems of Public Finance Reforms in the 21st Century in Europe";
- began negotiations on the organization of the next international scientific conference, which is going to take place in September 2009 at the Faculty of Law of Ivan Franko National University of L'viv (Ukraine).

Opracował: Marcin Tyniewicki

Janusz Stankiewicz

Debudżetyzacja finansów państwa

(De-Budgeting of the State Finance)

Temida 2, Białystok 2007, 299 pages

The structure of the thesis reviewed is clear, logical, complete and correct in its merits. The introduction presents the subject and the aim of the thesis, the research hypothesis, methodology and sources used in the thesis. The First Chapter has a general character and considers the theoretical aspect. It refers to the definition, premises, effects and forms of de-budgeting of public finance. The Second Chapter shows the evolution of legal links between the state budget and organizational units of the public finance sector. It contains: the political and economic basis of observance of the budgetary principle of completeness; the genesis, premises and effects of variable links between the state budget and commercial units in the period of 1918-1939 and after the World War II in the light of German and French developments; the description of budgetary units (principal budgetary units) as the primary organizational form of the state's gross budget management; the description of budgetary institutions (budgetary companies), auxiliary units serving the purposes of the principal bodies and special purpose resources (special purpose accounts) as the main means of making state's budgetary management more flexible.

The Third Chapter of the thesis reviewed is its largest section (95 pages) and considers the state special purpose funds as the main instruments of de-budgeting of public finance. It consists of five sections describing: the main features of the state's special funds and motives of their creations; the system of the state's special funds in the light of the regulations of the Public Finance Act; the financial and legal results of reforming social insurance special funds; the analysis of state's financial policy in the matter of special funds in 1991-2006; the perspective of creating new state's special purpose funds. The following chapter (chapter IV) refers to the state's agencies as instruments of de-budgeting of public finance. It offers descriptions of: the legal status, competencies and tasks of state's agencies; the phenomenon of creating state's agencies in the era of economic and political transformations in Poland. This chapter also reviews the rationale of creating state's agencies, and their impact on the phenomenon of de-budgeting of public finance. Other organizational units of the

public finance sector, like other forms of de-budgeting of public finance, have been presented in the Fifth Chapter of the thesis. The typology of the organizational units, the organization and financial management of science and education units, healthcare units, the state's cultural units; public law foundations; other state's organizational units carrying out special state tasks, supervised by supreme state administrative organs are presented there. The Sixth Chapter describes the cases of rationalizing public finance de-budgeting in relation to public finance reforms. Finally, the thesis contains the Conclusions, a Bibliography, a List of Tables, and a List of Sources of Law with reference to the merits of the thesis.

Many theses presented in the reviewed book are valuable and acceptable. In particular it refers to research hypothesis that de-budgeting of public finance should have an objective character. The above mentioned hypothesis was fully proved in the reviewed book. One of the most valuable arguments formulated there is that de-budgeting of public finance derives mainly from the necessity of releasing some of units from the strict, rigid "corset" of classic budgetary management in the name of effectiveness and rationality of public money management. It is worth mentioning that the doctrine, as well as the financial policy, seem to accept too easily the above phenomena. The legislator should find the appropriate limits to the desire of "clearing up" public finance. Reasonable actions in this sphere should aim to find an optimal balance between budgeting and de-budgeting. The process of forced elimination of some de-budgeting forms without considering the necessity of its existence, will ultimately fail (the case of elimination of two special state funds followed by the creation of several new ones) or will be in reality only a superficial action (e.g. the elimination of previous "special purpose means" followed by the creation of "own revenues accounts" and motivation funds of principal budgetary units).

The reviewed thesis, like other scientific works, invokes doubts, awakes questioning and inspires to present contrary opinions. This is an eminent feature of any scientific discussion and a necessary base for scientific development. In my opinion, however, the weak side of the book is that the criteria for judging the present system and future reforms of de-budgeting are not clear enough. The rationalization (objectivism) of de-budgeting in a particular place and time is the term used mostly often by the author, it is not, however, explained. One may venture to say that one of the criteria for judging this sphere could be a variable policy of state governments or variable individual policy of Ministries of Finances, whose average period in government has reached a "magic" few months in recent years. A good question here could be – Should appropriate limits of de-budgeting be stated in the Constitution? Does our Constitution state these limits already? In my opinion this sphere should be regulated through the Constitution in the future.

Eugeniusz Ruśkowski

Cezary Kosikowski

Financial Law of The European Union

Temida 2, Białystok 2008, 228 pages

The publication reviewed is worthy of attention for a number of reasons. This is mainly due to its, on many levels, innovative nature. First of all, this is a unique item on the scientific publishing market, which comprehensively treats topics of financial law of the European Union. Despite Poland's four-year presence in the EU structures, Communities' finance – with some exceptions – have not so far been subject to in depth legal research (this is mostly Prof. Kosikowski's domain). Economic essays are much more common. Obviously, there are some legal publications which extensively deal with tax harmonization, the Economic and Monetary Union, the European System of Central Banks as well as the single financial market of the EU; but the issues concerning the general budget of the EU, the Union funds or EU law of public finances are in reality discussed to a limited extent. In my opinion, this state of affairs, in the context of Poland's membership in the EU, needs to be improved as soon as possible, and the reviewed book is a milestone in the right direction.

Secondly, at the beginning of the first chapter the author introduces the categorisation – the systematization of EU financial law according to its scope, i.e. what subjects (Communities, member states) comply with legal provisions in the acts under three pillars of the EU. Nobody upholding the doctrine has so far attempted a theoretical review of such systematization except perhaps for the author's previous publication *(Prawo finansowe w Unii Europejskiej i w Polsce, Warszawa 2005)*. Prof. Kosikowski suggests a distinction between two areas of financial law of the EU. The first one is the internal financial law, aimed mainly at Community institutions and Communities which themselves constitute separate legal entities. Its scope includes provisions concerning monetary law and the European System of Central Banks, EU finance which consists of, in particular: income (so-called own resources), expenditures, creation of a multiannual strategy of financial and budgetary planning in the EU, EU general budget (including establishment procedures), implementation and control, EU funds and other financial instruments, budgetary discipline, system of financial control, protection of the EU financial interests.

The second area, the external financial law of the EU, includes provisions concerning member and associated states' duty to bring domestic law into line with EU law. Its scope encompasses the following issues: public finance sector, calculation of gross domestic product and gross national income, budgetary convergence criteria, monitoring and preventing excessive budget deficit, tax harmonization, and the single financial market of the EU.

This division (into external and internal financial law) is reflected in the structure of the book. Having discussed the suggested classification in chapter I, the author concentrates on the analysis of particular issues within the two areas of EU financial law. This aspect fully emphasizes the complexity of the publication and is its major asset. Obviously, as it seems, the author's intention was not exhaust all topics (the publication has 228 pages) as, due to extensive and complex subject matter of financial law of the EU, this would be an impossible task - the author repeatedly stresses this. Nevertheless, each chapter contains a concise description of particular issues together with sources – legal acts, literature, case-law of the Court of Justice of the European Communities. Where certain aspects have proven problematic, this is at the very least indicated by the author. The number and the variety of legal Community acts referred to in the book must be commended. The book, in this respect, is of practical value as it enables to find legal provisions in respective fields - such provisions in fact, constitute part of the domestic, binding legal order and which are in many cases directly applicable.

The structure of the publication allows for its comprehensive use in teaching and as a source for lectures, seminars etc., not only in the faculties of Law or Economics, but also in related fields, e.g. in administration or in increasingly popular European studies. In addition, the book was published in two languages – Polish and English, and therefore is perfectly suited for academic classes conducted in these languages. In particular, it is an invaluable research aid for students on scholarships under the LLP – Erasmus scheme. The publication may also be recommended for practitioners and staff, e.g. employees in public administration, legislators, legal advisors and judges, due to direct application of Community law in member states.

There is no doubt that the subject matter of financial law of the EU, undertaken by the author, is a discipline that will be further developed by deepening of the integration processes, either in an objective aspect (regulating new areas of life by Community provisions) or in a subjective one (EU enlargement by new states) although, as it was mentioned before, this is completely underestimated. Therefore, Professor Kosikowski's book is of precursory nature and it cannot be ignored by subsequent publications in this field.

Marcin Tyniewicki

ORZECZNICTWO DOTYCZĄCE PODATKÓW POŚREDNICH W DYREKTYWACH UE – WYBÓR

Wyrok Trybunału Sprawiedliwości z dnia 15 stycznia 2009 r. (C-502/07)

(K-1 sp. z o.o. przeciwko Dyrektorowi Izby Skarbowej w Bydgoszczy)

1. Wspólny system podatku VAT nie stoi na przeszkodzie, by państwo członkowskie przewidziało w swym ustawodawstwie sankcję administracyjną, która może być nakładana na podatników podatku od wartości dodanej, taką jak „dodatkowe zobowiązanie podatkowe" przewidziane w art. 109 ust. 5 i 6 ustawy z 11 marca 2004 r. o podatku od towarów i usług.

2. Przepisy, takie jak zawarte w art. 109 ust. 5 i 6 ustawy z 11 marca 2004 r. o podatku od towarów i usług, nie stanowią "specjalnych środków stanowiących odstępstwo", mających na celu zapobieganie niektórym rodzajom oszustw podatkowych lub unikaniu opodatkowania w rozumieniu art. 27 ust. 1 szóstej dyrektywy 77/388, ze zmianami.

3. Artykuł 33 szóstej dyrektywy 77/388 nie stoi na przeszkodzie utrzymaniu w mocy przepisów, takich jak zawarte w art. 109 ust. 5 i 6 ustawy z 11 marca 2004 r. podatku od towarów i usług.

Wyrok Trybunału Sprawiedliwości z dnia 17 lipca 2008 r. (C-426/07)

(Dariusz Krawczyński przeciwko Dyrektorowi Izby Celnej w Białymstoku)

1. Artykuł 33 ust. 1 szóstej dyrektywy Rady 77/388/EWG z dnia 17 maja 1977 r. w sprawie harmonizacji ustawodawstw państw członkowskich w odniesieniu do podatków obrotowych – wspólny system podatku od wartości dodanej: ujednolicona podstawa wymiaru podatku, zmienionej dyrektywą Rady 91/680/EWG z dnia 16 grudnia 1991 r. należy interpretować w ten sposób, że nie sprzeciwia się on podatkowi akcyzowemu takiemu, jaki jest przewidziany w Polsce przez ustawę z dnia 23 stycznia 2004 r. o podatku akcyzowym, któremu podlega każda sprzedaż pojazdów samochodowych przed ich pierwszą rejestracją na terytorium kraju.

2. Artykuł 90 akapit pierwszy WE należy interpretować w ten sposób, że sprzeciwia się on podatkowi akcyzowemu takiemu jak będący przedmiotem postępowania przed sądem krajowym w zakresie, w jakim kwota podatku, któremu

podlega sprzedaż przed pierwszą rejestracją pojazdów używanych sprowadzonych z innego państwa członkowskiego przewyższa rezydualną kwotę tego podatku zawartą w wartości rynkowej podobnych pojazdów, które zostały zarejestrowane wcześniej w państwie członkowskim, które nałożyło podatek. Do sądu krajowego należy zbadanie, czy uregulowanie sporne przed sądem krajowym, a w szczególności stosowanie § 7 rozporządzenia Ministra Finansów z dnia 22 kwietnia 2004 r. w sprawie obniżenia stawek podatku akcyzowego, ma takie skutki.

Wyrok Trybunału Sprawiedliwości z dnia 10 lipca 2008 r. (C-25/07)

(Alicja Sosnowska przeciwko Dyrektorowi Izby Skarbowej we Wrocławiu, Ośrodek Zamiejscowy w Wałbrzychu)

1. Artykuł 18 ust. 4 szóstej dyrektywy Rady 77/388/EWG z dnia 17 maja 1977 r. w sprawie harmonizacji ustawodawstw państw członkowskich w odniesieniu do podatków obrotowych – wspólny system podatku od wartości dodanej: ujednolicona podstawa wymiaru podatku, zmienionej dyrektywą Rady 2005/92/WE z dnia 12 grudnia 2005 r., oraz zasada proporcjonalności sprzeciwiają się uregulowaniu krajowemu, takiemu jak to sporne w sprawie przed sądem krajowym, które – celem umożliwienia kontroli niezbędnych dla zapobiegania unikaniu opodatkowania i oszustwom podatkowym – wydłuża z 60 do 180 dni, licząc od dnia złożenia przez podatnika deklaracji na podatek od wartości dodanej, termin, którym dysponuje krajowy organ podatkowy celem dokonania zwrotu nadwyżki podatku od wartości dodanej danej kategorii podatników, chyba że złożą oni kaucję w kwocie 250.000 PLN.

2. Przepisy, takie jak te sporne w sprawie przed sądem krajowym, nie stanowią „specjalnych środków stanowiących odstępstwo" służących zapobieganiu niektórym rodzajom oszustw podatkowych lub unikaniu opodatkowania w rozumieniu art. 27 ust. 1 szóstej dyrektywy 77/388, zmienionej dyrektywą 2005/92.

Wyrok Trybunału Sprawiedliwości z dnia 21 lutego 2008 r. (C-271/06)

(Netto Supermarkt GmbH & Co. OHG przeciwko Finanzamt Malchin)

Artykuł 15 pkt 2 szóstej dyrektywy Rady 77/388/EWG z dnia 17 maja 1977 r. w sprawie harmonizacji ustawodawstw państw członkowskich w odniesieniu do podatków obrotowych - wspólny system podatku od wartości dodanej: ujednolicona podstawa wymiaru podatku, w brzmieniu zmienionym dyrektywą Rady 95/7/WE z dnia 10 kwietnia 1995 r., należy interpretować w ten sposób, że nie sprzeciwia się on przyznaniu przez państwo członkowskie zwolnienia od podatku od wartości dodanej związanego z wywozem towarów poza terytorium Wspólnoty Europejskiej, gdy przesłanki tego zwolnienia nie są spełnione, lecz gdy podatnik nie mógłby sobie

z tego zdawać sprawy nawet przy dołożeniu wszelkiej staranności sumiennego kupca ze względu na sfałszowanie dowodu wywozu przedstawionego przez nabywcę.

Wyrok Trybunału Sprawiedliwości z dnia 18 stycznia 2007 r. (C-313/05)

(Maciej Brzeziński przeciwko Dyrektorowi Izby Celnej w Warszawie)

1. Podatek akcyzowy, taki jak ustanowiony w Polsce ustawą z dnia 23 stycznia 2004 r. o podatku akcyzowym, który nie jest nakładany na pojazdy osobowe w związku z przekroczeniem przez nie granicy, nie stanowi cła przywozowego ani opłaty o skutku równoważnym w rozumieniu art. 25 WE.

2. Artykuł 90 akapit pierwszy WE należy interpretować w ten sposób, że sprzeciwia się on podatkowi akcyzowemu w zakresie, w jakim kwota podatku nakładana na pojazdy używane starsze niż dwa lata, nabyte w państwie członkowskim innym niż to, które wprowadziło taki podatek, przewyższa rezydualną kwotę tego podatku zawartą w wartości rynkowej podobnych pojazdów, które zostały zarejestrowane wcześniej w państwie członkowskim, które nałożyło podatek. Do sądu krajowego należy zbadanie, czy uregulowanie sporne w postępowaniu przed sądem krajowym, a w szczególności stosowanie § 7 rozporządzenia Ministra Finansów z dnia 22 kwietnia 2004 r. w sprawie obniżenia stawek podatku akcyzowego, ma takie skutki.

3. Artykuł 28 WE nie znajduje zastosowania do deklaracji uproszczonej, takiej jak przewidziana w art. 81 ust. 1 pkt 1 ustawy z dnia 23 stycznia 2004 r. o podatku akcyzowym, a art. 3 ust. 3 dyrektywy Rady 92/12/EWG z dnia 25 lutego 1992 r. w sprawie ogólnych warunków dotyczących wyrobów objętych podatkiem akcyzowym, ich przechowywania, przepływu oraz kontrolowania nie sprzeciwia się takiej deklaracji, jeżeli sporne uregulowanie można interpretować w ten sposób, że deklarację tę należy złożyć z chwilą nabycia prawa do rozporządzania samochodem osobowym jak właściciel, nie później jednak niż z chwilą jego rejestracji na terytorium kraju, zgodnie z przepisami o ruchu drogowym.

Postanowienie Trybunału Sprawiedliwości z dnia 6 marca 2007 r. (C-168/06)

(Ceramika Paradyż sp. z o. o . przeciwko Dyrektor Izby Skarbowej w Łodzi)

1. Trybunał Sprawiedliwości WE nie jest właściwy do udzielenia odpowiedzi na pytanie, czy art. 2 ust. 2 Pierwszej Dyrektywy VAT w związku z art. 2, art. 10 ust. 1 lit a) oraz art. 10 ust. 2 Szóstej Dyrektywy VAT wyłącza możliwość nałożenia przez państwo polskie obowiązku zapłaty przez podatnika podatku VAT dodatkowego zobowiązania podatkowego w tym podatku oraz czy zobowiązanie to stanowi środek

specjalny, którego nakładanie dozwolone jest na podstawie art. 27 ust. 1 Szóstej Dyrektywy VAT.

2. Trybunał nie jest właściwy w zakresie wykładni dyrektyw wspólnotowych dotyczących VAT, jeżeli chodzi o okres rozliczeniowy sprzed przystąpienia państwa członkowskiego do Unii Europejskiej.

Uchwała Sądu Najwyższego z dnia 21 grudnia 2006 r. (III CZP 127/06)

Sąd przyznaje biegłemu będącemu podatnikiem w zakresie podatku od towarów i usług wynagrodzenie bez uwzględnienia tego podatku.

Uchwała Sądu Najwyższego z dnia 21 lipca 2006 r. (III CZP 54/06)

Podwyższenie z dniem 1 maja 2004 r. stawek podatku od towarów i usług za roboty budowlane, dokonane ustawą z dnia 11 marca 2004 r. o podatku od towarów i usług (Dz. U. Nr 54, poz. 535 ze zm.) nie uzasadnia – bez zmiany umowy zawartej przed 1 maja 2004 r. – obowiązku zamawiającego zapłaty wynagrodzenia netto powiększonego o podatek od towarów i usług według podwyższonej stawki.

Wyrok WSA z dnia 30 lipca 2008 r. (I SA/Bk 206/08)

1. Zgodnie z art. 2 aktu o warunkach przystąpienia, stanowiącego część Traktatu, Polska od dnia przystąpienia związana jest postanowieniami Traktatów założycielskich i aktów przyjętych przez instytucje Wspólnot Europejskich i Europejski Bank Centralny. Oznacza to, że od dnia 1 maja 2004 r. na obowiązujący w Polsce porządek prawny składa się nie tylko prawo krajowe, ale także cały system prawa wspólnotowego. Zatem przy dokonywaniu przez sądy administracyjne kontroli aktów organów administracyjnych, obowiązkiem sądów jest obecnie zbadanie zaskarżonego aktu także, co do jego zgodności.

2. Art. 90 akapit pierwszy WE należy interpretować w ten sposób, że sprzeciwia się on podatkowi akcyzowemu takiemu jak będący przedmiotem postępowania przed sądem krajowym w zakresie, w jakim kwota podatku, któremu podlega sprzedaż przed pierwszą rejestracją pojazdów używanych sprowadzonych z innego państwa członkowskiego przewyższa rezydualną kwotę tego podatku zawartą w wartości rynkowej podobnych pojazdów, które zostały zarejestrowane wcześniej w państwie członkowskim, które nałożyło podatek.

Wyrok WSA z dnia 9 lipca 2008 r. (I SA/Bk 162/08)

Biorąc pod uwagę regulacje zawarte w art. 15(2) Szóstej Dyrektywy, ich interpretację dokonaną przez ETS w orzeczeniu z 21.02.2008 r. w sprawie C-

271/06 i zasady prawa wspólnotowego, bez wykazania, iż podatnik wiedział lub przy zachowaniu należytej staranności - wszelkiej staranności sumiennego kupca mógł i powinien zdawać sobie sprawę, że na wystawionym przez niego dokumencie TAX FREE nie znajduje się odcisk stempla urzędu celnego lub też wymieniony w tym dokumencie towar nie został faktycznie wywieziony za granicę, nie można go pozbawiać prawa do zastosowania 0% stawki podatku.

Wyrok WSA z dnia 2 lipca 2008 r. (I SA/Bk 147/08)

Biorąc pod uwagę regulacje zawarte w art. 15(2) Szóstej Dyrektywy, ich interpretację dokonaną przez ETS w orzeczeniu z 21.02.2008 r. w sprawie C-271/06 i zasady prawa wspólnotowego, bez wykazania, iż podatnik wiedział lub przy zachowaniu należytej staranności - wszelkiej staranności sumiennego kupca mógł i powinien zdawać sobie sprawę, że na wystawionym przez niego dokumencie TAX FREE nie znajduje się odcisk stempla urzędu celnego lub też wymieniony w tym dokumencie towar nie został faktycznie wywieziony za granicę, nie można go pozbawiać prawa do zastosowania 0% stawki podatku.

Wyrok WSA z dnia 11 grudnia 2007 r. (I SA/Bk 487/07)

1. Bez wykazania, że sprzedawca (podatnik) wiedział lub przy zachowaniu należytej staranności mógł i powinien przypuszczać, że wymieniony w tym dokumencie towar nie został faktycznie wywieziony za granicę lub też na wystawionym przez niego dokumencie TAX FREE nie znajduje się odcisk stempla urzędu celnego, nie można go pozbawiać prawa do zastosowania 0% stawki podatku. Tylko taka wykładnia przepisów art. 21c ust. 2 i 3 oraz art. 21d ust. 1 pkt 2 i ust. 2 cyt. ustawy o VAT, może być uznana za zgodną z zasadą demokratycznego państwa prawnego urzeczywistniającego zasady sprawiedliwości społecznej, wyrażoną w art. 2 Konstytucji RP.

2. W państwie prawa rozstrzygnięcia organów państwa nie mogą być zaskakujące i nieprzewidywalne, nie mogą stanowić pułapki dla obywateli (patrz wyroki TK: z 20 listopada 1996 r., sygn. K 27/95, opublikowany w: OTK 1996/6/50 oraz z 3 czerwca 2002 r., sygn. K 26/01, opublikowany w: OTK-A 2002/4/40). Trybunał Konstytucyjny nie kwestionując swobody ustawodawcy w kształtowaniu systemu podatkowego zwraca jednocześnie uwagę, że obciążanie podatników następstwami zdarzeń, na które nie mieli oni wpływu, narusza zasadę sprawiedliwości społecznej w rozumieniu art. 2 Konstytucji RP (wyrok z 27 lutego 2002 r., sygn. K 47/01, opublikowany w: OTK-A 2002/1/6). Uzasadnione jest, zatem twierdzenie, że podatnik nie może ponosić negatywnych konsekwencji zdarzeń całkowicie od niego niezależnych. Wszelkie natomiast pojawiające się w sprawie wątpliwości, powinny być rozstrzygane na korzyść podatnika.

Wyrok WSA z dnia 25 maja 2007 r. (III SA/Wa 240/07)

Ze względu na funkcję gwarancyjną art. 90 Traktatu Rzymskiego z 1957 r. o ustanowieniu Wspólnoty Europejskiej, zgodnie z którym niedopuszczalne jest nakładanie wyższych podatków od tych nakładanych na podobne produkty krajowe oraz sposób ustalania podatku akcyzowego od samochodów używanych, który obowiązuje w kraju, a którego punktem wyjścia jest zadeklarowana cena pojazdu, podstawą wyliczenia należnego podatku akcyzowego powinna być cena transakcyjna pojazdu. Jedynie górną granicę tego podatku powinna stanowić kwota podatku akcyzowego zawarta w wartości rynkowej podobnych pojazdów, które zostały zarejestrowane wcześniej w Polsce, czyli rezydualny podatek akcyzowy.

Wyrok WSA z dnia 5 kwietnia 2007 r. (III SA/Wa 223/07)

1. Polskie przepisy akcyzowe, obowiązujące w okresie od 1 maja 2004 r. do 1 grudnia 2006 r., w zakresie opodatkowania wewnątrzwspólnotowego nabycia samochodów osobowych starszych niż dwuletnie – były niezgodne z art. 90 Traktatu Ustanawiającego Wspólnotę Europejską. Wspomniana niezgodność nie dotyczy samochodów młodszych niż dwuletnie.

2. W konsekwencji, jeżeli podatnik nabył wewnątrzwspólnotowo samochód młodszy niż dwuletni i zapłacił od niego akcyzę według stawki przewidzianej w przepisach akcyzowych, nie przysługuje mu zwrot tego podatku.

Wyrok WSA z dnia 16 marca 2007 r. (I SA/Po 518/07)

Niezgodne z prawem wspólnotowym są te postanowienia polskiej ustawy podatkowej, według których kwota podatku nakładana na pojazdy używane starsze niż 2 lata, nabyte w państwie członkowskim innym niż Polska, przewyższa rezydualną kwotę tego podatku zawartą w wartości rynkowej podobnych pojazdów zarejestrowanych wcześniej w państwie członkowskim, które nałożyło podatek.

Wyrok WSA z dnia 29 czerwca 2005 r. (I SA/Bk 128/05)

Brak na dokumencie „Tax Free For Tourists" podpisu podróżnego lub brak daty dokonania zwrotu podatku podróżnemu nie może pozbawiać podatnika możliwości wykazania okoliczności istotnych z punktu widzenia jego prawa do stawki podatku 0% innymi dowodami (art. 129 i 128 ustawy z dnia 11 marca 2004 r. o podatku od towarów i usług, Dz. U. Nr 54, poz. 535 ze zm.).

Opracował: Paweł J. Lewkowicz

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Opracowała: Urszula Kinga Zawadzka