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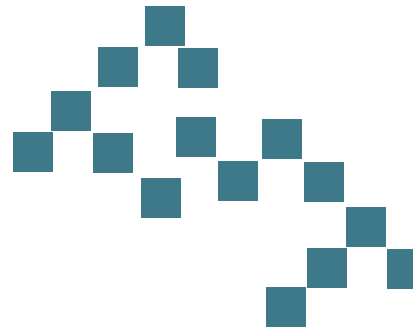

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Tax Incentives for Food Donations – a General Overview

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tax incentives

Abstract: The study analyses tax law regulations in force in Poland and in selected European Union countries which may influence attitudes of entrepreneurs (taxpayers) in taking actions aimed at preventing food waste. This analysis demonstrates that all countries investigated in this study have made attempts to develop and implement various measures to combat the problem of food waste. At the same time, it is worth noting that properly constructed tax preferences are an important factor in preventing food waste, which is part of the sustainable development strategy implemented by European Union countries. In this respect, actions must be long-term and they should be based on various legal measures. Further changes in this area will be determined by some key factors. These include the need to use tax law regulations or to determine economic and social trends. Directions of activities of the state, local government and non-governmental organizations for counteracting food waste will also set course for these changes. Achieving sustainable development also at the stage of using food already produced should be based on optimisation of all related processes, and thus also financial (mainly tax) processes. Therefore, attention should be paid in particular to the tax legislation in force in Poland and in selected European Union countries, i.e. the Act on tax on goods and services and the Act on corporate income tax.

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1. Introduction

Globalization of markets, including food markets (even in the European Union), which has been observed for many years, causes many changes in the sphere of food production and consumption. The positive aspects of globalisation are: new markets, access to new raw materials, a variety of products, access to processing technologies and increasing the availability of products. Negative changes include, above all, overconsumption and food waste[1].

Food wastage is one of the negative phenomena of the modern world and is becoming a multidimensional problem. It applies to every link in the agri-food chain[2]. It may be seen, for example, at the stage of processing, production, transport, storage, distribution and consumption. It should be emphasized that food waste is mentioned in Sustainable Development Goals[3], which were formulated by the United Nations[4]. Given the above, it should be stated that the problem of food waste consists of: food losses and wasting food, also referred to as food waste. Losses occur at the stage of storage, processing and primary production, while food waste occurs at the stage of trade, distribution and consumption[5].

International scientific research undertaken in this area points out that food that has already been produced but not consumed in its entirety means *de facto* that a country's natural resources are wasted. This, in turn, negatively affects the environment and is seen as unethical. It is stressed that

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1 Anna S. Tarczyńska, "Skala marnowania żywności wśród studentów uniwersytetu warmińsko-mazurskiego w Olsztynie," *ŻYWNOŚĆ. Nauka. Technologia. Jakość*, no. 28, 2(127) (2021): 121–122.

2 Maria-Georgeta Moldovan, Dan-Cristian Dabija and Cristiana Bianca Pocol, "Recources Management for a Resilient World: A Literature Review of Eastern European Countries with Focus on Household Behaviour and Trends Related to Food Waste," *Sustainability*, no 14.7.123(2022): 2–3.

3 Aleksandra Bednarczuk, Jerzy Śleszyński, "Marnowanie żywności w Polsce," *Zeszyty Naukowe Szkoły Głównej Gospodarstwa Wiejskiego, Problemy Rolnictwa Światowego,* vol. 19, no. 4(2019): 19.

4 United Nations, 2015; Eurostat, 2017; UN Global Compact, 2018.

5 Sylwia Łaba, Krystian Szczepański, Robert Łaba, "Definicje i wytyczne w obszarze strat i marnotrawstwa żywności jako podstawa prowadzenia badań," in *Straty i marnotrawstwo żywności w Polsce. Skala i przyczyny problemu,* ed. Sylwia Łaba (Warsaw: IOŚ–PIB, 2020), 9 and 13.

food waste should be reduced at every stage in the interest of sustainable consumption[6]. Solutions that could mitigate adverse effects of this problem should be systemic solutions. Counteracting the phenomenon of food waste also lies in the introduction of appropriate legal regulations, including in particular in the field of tax law. It seems natural to be able to take advantage of tax preferences, which in turn may affect decisions taken by, among others, business operators when distributing produced food, which, for example, is about to expire. It is necessary to remove legal barriers that prevent the counteracting of this negative phenomenon. We can already talk about the need to form "tax food law", based on the constructions of tax preferences provided for in the tax legislation (e.g. relief, exemptions, deductions), which should support actions intended to counteract food waste. In view of the above, the following regulations of Polish legal acts should be given consideration: the Act on tax on goods and services[7] and the Act on corporate income tax[8] and indirectly the Act on personal income tax[9]. The use of these mechanisms and tools at the stage of food donation is part of a number of social activities undertaken by various entities and organizations. In addition, the literature points out that by doing so it is possible to distribute surplus food to social groups affected by poverty[10].

It should be emphasized that although the problem of food waste has taken on an international character, there is no single universal definition of the concept of "food waste". The act of 19 July 2019 on counteracting

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6 Gerold Hafner, Jakob Barabosz, Felicitas Schneider, S. Lebersorger, Silvia Scherhaufer, Heiko Schuller, Dominik Leverenz, and Martin Kranert, *Determination of discarded food and proposals for a minimization of food wastage in Germany, Report for German Federal Ministry of Food, Agriculture and Consumer Protection*, (Stuttgart, 2012): 4 and 30, accessed July 23, 2022, https://www.researchgate.net/publication/262728113_Determination_of_discarded_food_and_proposals_for_a_minimization_of_food_wastage_in_Germanys.

7 Act on tax on goods and services of 11 March 2004, Journal of Laws 2022, item 931, as amended – hereinafter: the VAT Act.

8 Act on corporate income tax of 15 February 1992, Journal of Laws 2021, item 1800, as amended – hereinafter CIT Act.

9 Act on personal income tax of 26 July 1991, Journal of Laws 2021, item 1128, as amended – hereinafter: the PIT Act.

10 Beata Bilska, Marzena Tomaszewska, Danuta Kołożyn-Krajewska, Małgorzata Piecek, "Segmentation of Polish Households Taking into Account Food Waste," *Foods,* no. 9(379) (2020): 1.

food waste[11] assumes that this concept means withdrawing from the distribution stage of food that meets the requirements of food law, in particular due its approaching use-by date or the date of minimum durability or due to defects in the appearance of these foodstuffs or their packaging and destining them for disposal as waste. In turn, the European Union (hereinafter the EU) adopted a definition presented by the European Parliament in its Resolution of 19 January 2012 "How to avoid food wastage"[12]. Food waste should be understood as foodstuffs discarded from the agri-food chain for economic or aesthetic reasons or because of the approaching use-by date, which are still fit for consumption, but are intended for elimination and disposal, which in turn causes negative effects taking into account the impact on the environment, costs and lack of income for businesses.

It should also be noted that on 11 December 2019, the European Commission published a Communication on the European Green Deal[13], creating a new EU growth strategy. Its aim is for the EU to achieve climate neutrality by 2050. In 2020, the European Commission published another strategy entitled "Farm To Fork"[14], which aims to transform the EU's food system into a more sustainable, healthier, as well as environmentally friendly one. It is worth stressing that the first of the key tasks of this strategy is to set legally binding targets for reducing food waste across the EU by 2023. The aim of this strategy is the transition of the current EU food system to a sustainable model.

2. Scope of Research and Methodology

The aim of the research is to identify and verify the tax law regulations in force in Poland and in selected EU countries, which can be used as tools supporting entrepreneurs (taxpayers) in taking actions to counteract food waste or as tools preventing them from doing so. Therefore, the analysis

11 Consolidated text Dz. U. (Journal of Laws) of 2020 item 1645.

12 European Parliament resolution of 19 January 2012 on how to avoid food wastage: strategies for a more efficient food chain in the EU (2011/2175(INI)) *OJ C 227E, 6.8.2013, p. 25–32.*

13 The EU's goal of climate neutrality by 2050, accessed July 22, 2022, https://www.consilium.europa.eu/en/policies/green-deal/.

14 Farm to Fork Strategy. For a fair, healthy and environmentally – friendly food system, accessed July 23, 2022, https://food.ec.europa.eu/system/files/2020–05/f2f_action-plan_2020_strategy-info_en.pdf.

covers the tax legislation in force, primarily in the field of value added tax and corporate income tax, as well as relevant literature. This research is a preliminary, pilot study that will allow authors to formulate *de lege ferenda* conclusions and to create - in the next stage of their research – "tax models" that fit into the policy of "tax food law". These conclusions mainly refer to tax preferences related to the taxation of free transfer of food, both in Poland and in other, selected EU countries. The method of investigation of the law in force is used as the basic research method. It should also be pointed out that, regardless of whether the research concerned Polish legislation or the legislation of another EU country, the following terms were adopted: VAT Act for an act on value added tax and CIT Act for corporate income tax act.

3. Tax Concepts Relating to the Free Transfer of Food

As already indicated in the introduction, correct forming of tax law is one of the key elements limiting food waste. It should be noted that to a large extent it is tax issues that may constitute a significant barrier (or a supporting instrument) to the free transfer of food by entities producing or marketing it. This issue focuses mainly on two taxes: VAT and CIT.

The main problem in individual EU countries is that the harmonisation of VAT does not leave too wide a margin for action in terms of preferential burden on the gratuitous supply of foodstuffs. Directive 2006/112/EC[15] provides that the use by a taxable person of goods forming part of his business assets which are disposed of free of charge for non-business purposes where the VAT on such goods or parts thereof was wholly or partly deductible constitutes a supply of goods for consideration[16]. On the other hand, where a taxable person applies or disposes of goods forming part of his business assets, the taxable amount shall be the purchase price of the goods or of similar goods or, in the absence of a purchase price, the cost of production, determined at the time when the disposal of those goods takes place[17].

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15 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, *OJ L 347, 11.12.2006, p. 1–118 – hereinafter: Directive 2006/112/EC*

16 Article 16 Directive 2006/112/EC.

17 Article 74 Directive 2006/112/EC.

It should be noted, therefore, that the provisions of EU law are already a form of a barrier to the introduction of tax-wise beneficial regulations contributing to the reduction of food waste. Admittedly, the EU VAT Committee does offer some guidelines, such as guidance from December 2012. It stipulates that the above-mentioned provisions of the directive specifically define donation of foodstuff from a tax point of view. Nevertheless, "where the donation takes place close to the best before date or where goods are not fit for sale, that value should be fairly low, even close to zero. It does not address the grey area of the value of donated food close to its 'best before/use by' date" [18].

At the same time, it should be noted that EU Member States are introducing solutions to the value added tax construction on their own, which could neutralize tax barriers to food donations. On the basis of the legal regulations in force in EU Member States, the following concepts can be observed. The first is to maintain complete neutrality. This means that the Member State does not introduce any preference in the VAT system. This is mainly due to the fact that there is no EU delegation to apply preferential measures on the basis of VAT. In this case, the guidelines taken do not help either. One of them states that: "donation of foodstuffs to the poor, made by a taxable person free of charge, shall be treated as a supply of goods for consideration, in accordance with the first paragraph of Article 16 of the VAT Directive, unless this donation meets the conditions laid down by the Member State to be considered as a gift of small value within the meaning of the second paragraph of Article 16 of the VAT Directive"[19]. The main problem in this case is that food donation is carried out on a larger scale and will usually not fall within the concept of "gift of small value". Nevertheless, Greece has taken a conciliatory path in this respect, where in the construction of VAT on the basis of changes made in 2014[20], the con-

[18] See: Joint answer given by Mr Šemeta on behalf of the Commission. Written questions: E-003730/13, E-002939/13,accessed June 10, 2022, https://www.europarl.europa.eu/doceo/document/E-7–2013–002939-ASW_EN.html?redirect.

[19] Guidelines Resulting from the 97th Meeting of 7 September 2012. DOCUMENT C – taxud.c.1(2012)1701663 – 745 (1/1).

[20] Article 46, amendment of the regulations of law 2859/2000, law 113/2010 and law 3986/2011, accessed June 10, 2022, https://www.e-forologia.gr/lawbank/document.aspx?digest=1BF72D34FECFF3F8.28B4F588A6A8&version=2014/02/17.

cept of a gift (goods with a value of up to EUR 10) has been extended to include, *inter alia*, the free donation of food to a public benefit organization[21]. Another possible concept is the application of the VAT exemption on the food transferred with the right to deduct input tax. In this case, the condition for enjoying of this preference is that the food be donated, either directly (a public benefit organization that distributes it to those in need) or indirectly (a food bank that then donates it to specific charities for distribution). The latter is the case, for example, in Belgium, where, by way of exception, the free transfer of food to legally recognised food banks for distribution free of charge has been exempted from taxation[22]. However, this solution applies only to those food products to which reduced VAT rates apply. Another condition for benefiting from the exemption is that the object of the donation is such food (produced or purchased for further sale) that is unfit for sale in normal circulation, i.e. products with damaged packaging, surplus stock or food for which the use-by date is approaching. The rules relating to the exemption from VAT with the right to deduct input tax of only foodstuffs which are not placed on the market or unfit for placing on the market because of damaged packaging or defective labelling or the approaching use-by date also apply in Italy[23].

Another concept that may apply to the free supply of food is the imposition of a lower VAT rate. It should be noted, however, that in most countries, a reduced tax rate is already being imposed on basic food products. Consequently, the application of a second lower reduced rate is hardly a serious instrument to stimulate the desired behaviour of the taxable person. However, a significant incentive in such a situation would be the imposition of a 0% rate. It should be noted that, from the point of view of the operator

21 Article 7(2)(b) Value added tax code, accessed June 10, 2022, https://www.taxheaven.gr/law/2859/2000.

22 Decision of TVA, no E.T. 124.417, of 31 July 2013, accessed June 10, 2022, https://www.stradalex.com/fr/sl_src_publ_div_spffin/document/dec_divtva20130731.278604-fr.

23 Article 6(15) Law of 13 May 1999, no. 133, Provisions on equalization, rationalization and fiscal federalism. See more: Marco Allena, "Circular Economy and Sustainability Among Former Foodstuff, Surplus Food and Food Waste: Fiscal Issues," in *Circular Economy and Environmental Taxation*, ed. Antonio Felice Uricchio, Gianluca Selicato (Bari: Caccuci Editore, 2020), 65–89.

supplying food free of charge, the exemption with the right to deduct input tax has similar effects as the imposition of a zero VAT rate.

In the absence of clear legal regulations under Directive 2006/112/EC, EU member states are more willing to use appropriate instruments to encourage food donations on the basis of CIT. In a sense, they compensate for the need to pay VAT. It should be noted, however, that the introduction of tax preferences only on the basis of CIT does not constitute a full incentive to donate food free of charge to charity. It seems that in order to be able to say that the tax instruments used pass the exam, appropriate legal regulations should be introduced both on the basis of VAT and CIT. When it comes to tax preferences in CIT in the case of making a donation, the subject of which is food, it may take the form of a tax deduction or a tax credit. It should be emphasized that the legislator usually indicates in the construction of CIT that one of the two above-mentioned ways of reducing the tax burden may be used in the case of making a donation but he does not stipulate what its subject is. Thus, the legal regulations apply to in-cash and in-kind donations alike. At the same time, not only food may be the subject of an in-kind donation. Rarely does the legislator specify food as the subject of donation, with which the taxpayer acquires a specific preference. Even if this is the case, then next to food he lists other things that may be the subject of donation. Usually, legal constructions indicate entities for the benefit of which a free transaction should be carried out *inter vivos* and the purpose of this donation. Tax deduction in relation to donations made applies, for example, in Portugal. Donations, also in the form of food, made to entities enumerated in the Act, are treated as an expense and are deductible in the amount of 120%, 130% or 140% of the expenses incurred, depending on the institutions for which they were made. However, the legislator introduced a certain limit regarding the amount of deduction, which may not exceed 8/1000 of the volume of sales or services provided[24].

When it comes to France, the possibility of using a tax credit is granted to French taxpayers who make donations to entities who act as broadly understood public benefit establishments. Taxpayers who make a donation can reduce the amount of tax by 60% or 40%, depending on whether the threshold of €2 million in the value of the donations made is exceeded.

[24] Art. 62(1) and (2) Decree – Law no 215/89 of 1 July, Tax Benefits Statute.

It should be emphasized, however, that the French legislator introduced a limit. The amount of tax credit cannot exceed EUR 20,000 or 5/1000 of turnover. However, if the above limit is exceeded, the amount by which the limit has been exceeded can be deducted from tax in one of the next five tax years[25].

4. Legal Measures Provided in the Tax on Goods and Services

There are regulations in the construction of Polish VAT[26] on the basis of which a derogation from the main principle applies. This principle holds that the free of charge supply of goods used by a taxable person for purposes not related to his business activity, if the taxpayer had the right to deduct input tax from the output tax, is considered a taxable transaction - supply of goods for consideration.

The Polish legislator, in order to meet social expectations, introduced an exemption for the supply of goods whose subject is food[27]. This resulted from the desire to encourage taxpayers to donated to charity free of charge, as well as a sense of injustice among those taxpayers who donated food to charity free of charge, but had to pay VAT on this activity. The Polish literature argues that the introduction of the preference in question into the construction of the value added tax in question constitutes infringement of Directive 2006/112/EC. It is pointed out that this non-compliance was already known at the time of the work on the implementation of the exemption from taxation of the free supply of foodstuffs. The main reason given is the failure to include such supplies in the list of exempt transactions or transactions subject to the 0% rate, arguing that under the common VAT system the right to deduct is granted only in respect of acquisitions intended to carry out taxable transactions. In addition, it is argued that Poland has not been authorised to apply a special measure derogating from the provisions of Directive 2006/112/EC in this respect[28].

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25 Art. 238a General Tax Code.

26 Art. 43(1)(18) VAT Act.

27 It entered into force on 1 October 2013 by an amendment of Article 43(1)(16) of the VAT Act. Since that moment, all donors, that is producers, distributors and wholesalers, are exempt from VAT on foodstuffs given as donations.

28 Małgorzata Sęk, "Zwolnienie z prawem do odliczenia nieodpłatnego przekazania produktów spożywczych na rzecz organizacji pożytku publicznego z przeznaczeniem na cele

The preference adopted by the Polish legislator consists in exempting goods provided free of charge by the taxpayer, which are his business assets and in respect of which he was entitled, in whole or in part, to reduce the amount of tax due by the amount of input tax on the acquisition, import or manufacturing of those goods or their components. At the same time, it should be noted that a taxable person who transfers food free of charge is entitled to deduct input tax in respect of those goods and services which have been used to manufacture or acquire the food donated free of charge[29]. However, in order to benefit from this preference, certain formal conditions must be met. First, foodstuffs must be the subject of the supply. It should be remembered, however, that the exemption does not apply to a supply of alcoholic beverages with an alcohol content more than 1.2% and alcoholic beverages that are a mixture of beer and non-alcoholic beverages, in which the alcohol content exceeds 0.5%. It should be noted at this point that the provisions of Polish law do not condition the use of the exemption only to food for which its use-by date is approaching. This tax preference applies both to the free transfer of products with a long period of consumption, as well as to those whose expiry date is due in a short period of time. Secondly, in order for the foodstuffs supplied to benefit from the exemption, they must be given to a public benefit organisation for the purposes of the charitable activities carried out by that organisation. Under the regulations in force, the status of a public benefit organization may be granted to a non-governmental organization that meets the following requirements: it does not operate for profit, it does not belong to the public finance sector, it is not an enterprise, a bank, a research institution or a commercial law company that is a state or local government legal entity[30]. In addition, the status of a public benefit organization may be acquired by legal persons and organizational units that operate on the basis of the provisions on the relationship of the State to the Catholic Church, the relationship of the State to other

charytatywne," in *Polskie prawo podatkowe a prawo unijne. Katalog rozbieżności,* ed. Bogumił Brzeziński, Dagmara Dominik – Ogińska, Krzysztof Lasiński-Sulecki (Warsaw: Wolters Kluwer, 2016), 118–120; Adam Bartosiewicz, *Komentarz VAT* (Warsaw: Wolters Kluwer, 2022), 703–704.

29 Article 86(8)(3) of the VAT Act.

30 Article 20 of the Act on public benefit and volunteer work of 24 April 2003, Journal of Laws 2022, item 1327, as amended – hereinafter Public Benefit Act.

Churches and religious associations, provided that their statutory objectives include performance of public benefit activities. It should be emphasized that such a status will not be granted to these ecclesiastical legal persons and their organizational units if their public benefit activities are carried out only for the benefit of entities chosen on the basis of religious or faith-related criteria. The status of public benefit organizations is also acquired by capital companies (joint-stock company or limited liability company), as well as sports clubs that are companies that do not operate for profit and all their income is intended for the implementation of statutory objectives and that do not allocate their profit to be distributed between their shareholders and employees[31]. It should therefore be noted that the personal scope in this case is extremely wide and is not limited to only food banks or other charitable entities. In order to benefit from this tax preference, it is only required that the beneficiary have the status of a public benefit organization and for it to receive a donation in the form of foodstuffs.

It is worth noting that the legislator has expanded the circle of taxpayers who may enjoy the exemption in question. Until 30 September 2013, only food producers could benefit from this preference. However, in the current legal status, the exemption may be used by food producers and other entities that supply food products, including intermediaries in food trade, such as, for example, shops or wholesalers[32]. However, the amendment to the provisions of the VAT Act of 2013 imposed formal requirements that must be met in order to benefit from the exemption. For this purpose, a public benefit organization that obtains food as part of a free supply of goods, firstly, is obliged to keep appropriate documentation on the basis of which it will be possible to determine the purpose of the food received by it. Secondly, the goods obtained may not be used for purposes other than those of the charitable activities carried out by that organisation. Failure to meet at least one of the above conditions results in the loss of the exemption in the value added tax. It should be emphasized, however, that in such

31 See Jarosław Ruszewski, "Organizacja pożytku publicznego," *Państwo i Prawo*, no 7(2005): 81–94; Katarzyna Płonka-Bielenin, "Charakter prawny podmiotowości organizacji „non-profit"," *Administracja*, no. 4(2010): 45–70; Anna Surówka, "Działalność pożytku publicznego i wolontariatu w świetle Konstytucji RP," *Przegląd Sejmowy*, no 6(2004): 63–76.

32 Article (1)(a) of the Act on amending the act on tax on goods and services and certain other acts of 26 July 2013, Journal of Laws 2013, item 1027.

a case the obligation to pay the tax is not borne by the entrepreneur who provides food free of charge for charity, but by the public benefit organization that obtained food products free of charge. It is irrelevant in this case whether the organisation is a taxable person for the purposes of VAT or whether it is exempt (personal scope) on the ground that it does not carry out transactions subject to value added tax[33].

5. Legal Measures Relating to Food Donation in the Construction of Income Taxes

In the Polish tax law system, the burden of income tax is regulated by two legal acts. The principles of taxation of income obtained by legal persons are included in the CIT Act, while rules relating to natural persons are laid down in the Personal Income Tax Act. It should be emphasized that the Polish legislator includes appropriate regulations in the construction of CIT on the basis of which taxpayers may deduct donations made to charity from the tax base, which in principle is income. It should be noted, however, that the Polish tax law does not provide for specific regulations relating to food donations. Pursuant to the provisions of the Corporate Income Tax Act, the income constituting the tax base may be reduced by donations made for strictly defined purposes. This means that both in-cash gifts, which constitute the vast majority of gratuitous *inter vivos* transactions, and in-kind donations, are deductible from the tax base. However, in order for food (as well as any other donation) donated by a taxpayer who is a legal person to be deducted from the tax base in corporate income tax, two basic conditions must be met. First, the donation must be made for defined purposes. They are specified in the Public Benefit Act. These objectives include, among other things, social assistance, family support, charitable activities, activities for children and youth. Secondly, such a donation must be made to public benefit organisations, which are, similarly, entities mentioned when discussing the VAT exemption. In addition, the legislator extends the personal scope of the tax preference in question. In accordance with Polish regulations, the donation may also be made to organizations equivalent to Polish ones, specified in the regulations governing public benefit activities, in force in an EU Member State other than Poland or a country

[33] According to Article 113 of the VAT Act, a sale done up to the value of PLN 200,000 is exempt from tax.

belonging to the European Economic Area. However, it is required that these organizations carry out public benefit activities in the sphere of public tasks.

Nevertheless, the enjoyment of a deduction from the tax base (income) of a donation made to charity is not unlimited. The Polish legislator has introduced a limit according to which the taxpayer may deduct the value of donations whose amount does not exceed 10% of their income[34]. In the case of donations of food to charity, this value is determined on the basis of either the value of the production of foodstuffs or the value of their acquisition. In this context it should be noted that on the one hand the introduction of a percentage limit on the amount of donations made, which depends on the amount of income earned by the taxpayer, is by all means justified from the point of view of the tightness of the tax system, in particular when it comes to in-cash donations (although not only). On the other, in the context of donations involving food where the beneficiaries are charitable organisations or food banks that are actually distributing it, the regulation of 10% of the income generated should be disapproved. Regulations constructed in this way may constitute a significant barrier, discouraging business operators from making food donations. This will be the case in particular in relation to those taxpayers – food producers or entities trading in food - whose activities have low margins. Consequently, this may lead to a situation in which there will be no will at all to transfer food products with a close expiry date free of charge to charitable institutions. This will obviously lead to food waste, a failure to meet basic food needs of those in need, but also additionally to excessive exploitation of the environment in order to make up for possible shortages of foodstuffs that have been wasted. In this context, decisions should be made whether to introduce a tax preference into the very structure of CIT, which would allow a deduction of a donation whose subject is only food, either without limit, or with a limit higher than 10% of income. On the other hand, however, it should be noted that in Poland the legal regulations relating to the introduced limit, which at first glance may turn out to be unattractive, are in some way neutralized by two circumstances. First, as has already been pointed out in the construction of Polish VAT, there is an exemption for the supply of foodstuffs with the possibility of deducting input tax from the output tax. Secondly,

[34] Article 18(1)(1) of the CIT Act.

CIT introduced the possibility of classifying the value of a food donation as a tax-deductible cost. This measure is an exception. It should be noted that the provisions of Polish law prohibit, as a rule, deduction of donations in a situation where the taxpayer has included the value of the donation as tax-deductible costs[35]. In Polish tax law, in order for the expenses made by the taxpayer to be considered as a tax-deductible cost, there must be a cause-and-effect relationship between the expenditure made and the purpose for which it is incurred. This purpose should be generation of revenue, or possibly preservation or securing of a source of revenue. However, in certain circumstances the legislator stipulates that certain expenses, even if there is the above-mentioned cause-and-effect relationship, cannot be considered a tax-deductible cost. The construction of the Polish CIT includes a closed catalogue of such expenses. This includes, among other things, donations and offerings of all kinds. The legislator introduces an exception to this Polish rule, indicating that although donations and offerings of all kinds cannot be classified by the taxpayer as a tax-deductible cost, such costs are production costs or purchase price of food products to which the VAT exemption applies and which are intended exclusively for the purposes of charitable activities carried out by the recipient public benefit organizations[36].

It should be emphasized that the legislator also includes similar legal regulations in the Personal Income Tax Act. This means that taxpayers who are natural persons who conduct business activity may reduce the tax base by the amount of the donation. As in the CIT Act, there are also no detailed provisions relating only to donations whose subject is food. It should be noted, however, that the main difference between CIT and personal income tax is the amount of the statutory limit. In the PIT construction, taxpayers may deduct the value of the donation within a limit not exceeding 6% of the income obtained in the tax year[37]. As in the Corporate Income Tax Act, the construction of the personal income tax also provides for the possibility of including in tax-deductible costs of the cost of manufacturing or purchasing food products that were donated to a charitable organization[38].

35 Article 18(1k) of the CIT Act.
36 Article 16(1)(14) of the CIT Act.
37 Article 26(1)(9)(a) of the PIT Act.
38 Article 23(1)(11) of the PIT Act.

6. Conclusion

Recognising the complexity of the problem of food waste, and above all its transnational dimension and its link with the sustainable development strategy implemented in EU Member States, the following conclusions can be drawn.

Firstly, it should be noted that the proper formulation of tax law regulations plays a key role. The lack of appropriate tax preferences may inhibit the activity of food producers or entities trading in it. This applies in particular to those foodstuffs which, for objective reasons, cannot be sold at all. This is due to physical damage to packaging, an approaching use-by date, or the occurrence of excessive surplus food. Therefore, it should be postulated that such changes be introduced in the Polish (and EU) legislation that will support entrepreneurs at individual links of the agri-food chain to take action to counteract food waste. Special focus should be given to the possibility of using a donation to a public benefit organisation made by entrepreneurs and granting them appropriate tax preferences in this respect.

Secondly, it should be emphasized that the issue of removing tax barriers that hinder the donation of foodstuffs is complex. Attention should also be paid here to EU regulations. The construction of the EU value added tax poses serious difficulties. EU Member States should comply with Directive 2006/112/EC in implementing tax law. Unfortunately, as already mentioned, provisions of Directive 2006/112/EC clearly indicate that the free supply of goods, in this case food, in respect of which input tax was deductible in whole or in part is treated in the same way as a supply for consideration subject to VAT. Therefore, a consensus is required between the various decision-making groups, both European bodies and EU Member States, to make appropriate changes in this regard. It seems that the abolition of this tax barrier, even in breach of the construction rules of value added tax, is necessary. Eliminating this tax barrier should significantly reduce the problem of food waste in the future.

Thirdly, in the light of the analyses carried out herein, the most sensible solution would therefore be to introduce an exemption with deductibility of input tax where the taxable person supplies food products free of charge to charitable organisations which distribute such products to those in need. The secondary issue to be resolved is whether such supply would take place indirectly – through food banks supplying charities in contact with people

in need, or directly – through charities that directly donate food to those in need. However, it remains an open question whether Directive 2006/112/EC should limit the possibility of free supply of foodstuffs only to those products that for objective reasons have been withdrawn from the market (e.g. damaged packaging, approaching expiry date) or allow the exemption to be granted unconditionally as is the case in Poland.

Fourthly, the analysis of the tax legislation of selected EU countries carried out for the purposes of this study has shown that in some countries there is a concept to compensate for the inability to introduce tax preferences on the basis of VAT by introducing appropriate income tax relief. As discussed earlier, a taxpayer who has made a donation may reduce the amount of his tax burden by applying a tax deduction or a tax credit. It should be noted, however, that this is a partial solution to the problem in question. The key to removing tax barriers, and thus introducing incentives for the free donation of food to charity, is the existence of appropriate tax preferences both in terms of VAT and income taxes. Only in this way can taxpayers be offered an appropriate, comprehensive tax instrument that will encourage them to behave in a way that is desirable from the point of view of food waste prevention policy. At this point, when the discussed issue is slowly becoming noticeable in the EU Member States, the secondary issue is whether the use of the tax deduction or the tax credit in the CIT construction is an appropriate instrument. Certainly, from the point of view of the fiscal interests of each country, a more optimal solution is to introduce a tax preference, which will manifest itself in the use of a tax deduction. However, it should be emphasized that in order for this instrument to meet the expectations placed in it, i.e. stimulation of taxpayers to a certain behaviour, additional instruments must be introduced at the level of Directive 2006/112/EC, i.e. an exemption from VAT suggested by the authors with the possibility of deducting input tax.

In conclusion, it is worth referring to the tax law regulations in force in Poland. In this context, in terms of VAT and income taxes (CIT and PIT), it should be noted that they do not constitute a serious tax barrier that would discourage taxpayers from making free food transfers to charities. When it comes to VAT, the Polish legislator has introduced a fairly wide scope of subject matter and has not limited itself only to food products that, for objective reasons, are not suitable for marketing. Of course,

the above may raise concerns whether such regulations do not pose risks of VAT fraud. However, numerous formal requirements imposed on both the donor and the beneficiary, as well as the punitive obligation to pay tax by a public benefit organization in a situation where food products are not used as intended, seem to contradict this. Another issue is that the VAT regulations discussed apply only because the Polish legislator has disregarded the provisions of Directive 2006/112/EC. When it comes to income taxes (CIT and PIT), here also legal solutions seem to be appropriate and should not limit business operators from making food transfers. Perhaps a questionable issue is the introduced limit on the possibility of deducting a donation up to 10% and 6% of income obtained by the taxpayer in CIT and in PIT, respectively. It is therefore debatable whether the legislator should not increase this level only for donations that involve food. On the other hand, it should be noted that the value of food donated, in addition to the possibility of deduction from income, may additionally be classified as a tax-deductible cost, reducing revenue and thus affecting the amount of income earned by the taxpayer. In addition, the limits contained in the CIT and PIT construction are depreciated by the possibility of applying an exemption in VAT with the possibility of deducting input tax. It seems, therefore, that the regulations applicable in Poland may be the right direction for gradually introduced changes aimed at removing tax barriers that discourage taxpayers from making free supplies of food to charity.

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The EU proposal for a Carbon Border Adjustment Mechanism: an advanced tool to combat 'carbon leakage', a new EU own resource of 'moral suasion' for third Countries?

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Abstract: With the proposal for a Regulation of the European Parliament and of the Council establishing a Carbon Border Adjustment Mechanism (CBAM) adopted on July 14, 2021 by the European Commission, it begins to reach the heart of the global debate on the opportunity to adopt mechanisms to combat the phenomenon of 'carbon leakage', that is the attempt to evade existing carbon pricing systems through the delocalization of the most polluting activities. In this way, the European Union demonstrates its serious intention to strengthen actions against climate change and to identify customs taxation as an instrument to guide the choices of its trading partners and, therefore, of the major world economies. The precautions adopted in the application of the CBAM and the long transitional period before its entry into force, however, prevent the full appreciation of its potential repercussions (also) in terms of the new own resource of the European budget.

1. The EU proposal for a Carbon Border Adjustment Mechanism

With the proposal for a Regulation of the European Parliament and of the Council establishing a Carbon Border Adjustment Mechanism (CBAM) adopted on July 14, 2021 by the European Commission, the ambition of the European Union to assume a leading role in the field of environmental protection and the fight against climate change grows. The European

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strategy is also growing in quality since, in addition to experimenting with (new) good practices in regulation, it claims to take a leading role in a new phase of global action to combat emissions of carbon dioxide, according to the polluter pays principle.

The explanatory memorandum for the EU legislative acts confirm the European desire to favor a global approach on these problems, but also the awareness of the distance that separates the policies of the Old Continent from those of the most aggressive economies of the Planet. It is sufficient to read some passages of the Regulation COM (2021) 564 final, to appreciate the healthy ambitions of the European legislator[1]: the description of the reasons and objectives of the proposal contained in its accompanying report expresses a certain will to counter the phenomenon of the so-called 'carbon leakage'. Carbon leakage consists in the relocation outside the European territory of carbon emissions that would otherwise be affected by the emission control mechanism called Emission Trading System (ETS) which the EU has been using since 2005[2]. In this way, the CBAM would like to avoid that the greenhouse gas not produced within the European customs borders is however released into the atmosphere elsewhere.

This eventuality is very likely, since carbon pricing schemes[3] cover only one fifth of global emissions: the OECD estimates that around 60% of carbon emissions from fuel combustion are priceless.

Where older carbon pricing mechanisms are established, however, the price levels are very low (i.e. $ 3/ton of CO_2)[4]. On the contrary, according to the International Monetary Fund, before to 2030, this price is expected to rise to at least $ 75 /ton of CO_2.

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1 James Bacchus, "Legal Issues with the European Carbon Border Adjustment Mechanism," *Cato Briefing Paper*, August 9, 2021, Briefing paper no. 125 (August 2021): 1.

2 Paolo Dè Capitani Di Vimercate, "The Emissions Trading Scheme: accounting and tax aspects," *Diritto e Pratica Tributaria* (2010): 15.

3 Paul Elkins and Terry Baker, "Carbon Taxes and Carbon Emissions Trading," *Journal of Economic Surveys*, vol. 15, no. 3(2002): 325; Gilbert E. Metcalf, David Weisbach, "Design of a Carbon Tax," *Reg-Markets Center Working Paper,* no. 09–05, accessed January 8, 2009, https://ssrn.com/abstract=1327260.

4 World Bank, State and Trends of Carbon Pricing 2021, Washington, DC, accessed May 25, 2021: https://openknowledge.worldbank.org/handle/10986/35620.

Certainly, a possible global response to carbon leakage could consist in the introduction of a 'carbon price floor worldwide', according to some proposals already formulated by the IMF and OECD. It is quite evident, however, that the different sensitivities of the Governments and some wicked economic strategies pushed this goal away. The failure of COP 26 in Glasgow confirmed this feeling and suggested seeking alternative solutions in the short term.

The debate on the CBAM scheme proceeds along parallel lines to those on which the suggestive thesis of the Nobel Prize Prof. Nordhaus, according to which a global carbon pricing scheme applied uniformly in all Countries should be launched quickly[5]. The European approach, however, is more pragmatic, because it takes note of the existing difficulties (now made insuperable by the war in Ukraine and the instability of the prices of raw materials) and tries to give an 'extraterritorial' effectiveness to European environmental protection measures.

The legislative proposal is only apparently limited to the European juridical dimension; instead, its effectiveness in space immediately crosses the EU borders, without any need to reach an agreement with non-collaborative Countries. This choice can significantly reduce the time frame and provide a contribution, already in actuality, to the achievement of the ambitious objectives contained in the Paris Agreement and the further and even more ambitious commitments undertaken autonomously with the European Green Deal and with the related package of measures 'FitX55'[6].

One of the clearest confirmations of the EU ambition to drive change in the global environmental policies[7] and, above all, to influence the choices of the Countries that establish trade relations with the Member States can be found in art. 2 of the proposal of Regulation. This rule identifies the taxable

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5 OECD, *Environmental Fiscal Reform, Progress, Prospects and Pitfalls*, *Report for the G7 Environment Ministers*, 2017, accessed June 11, 2017, https://www.oecd.org/tax/tax-policy/environmental-fiscal-reform-G7-environment-ministerial-meeting-june-2017.pdf.

6 Alberto Majocchi, "Carbon pricing in Germany and the new European own resources," *L'Unità Europe*a (2020): 22, accessed May 28, 2020, https://www.mfe.it/unitaeuropea/index.php/collezioni-online/371-anno-2020/l-unita-europea-n-2020–3-maggio-giugno/4600-il-carbon-pricing-in-germania-e-le-nuove-risorse-proprie-europee.

7 Tatiana Falcão, "Toward Carbon Tax Internationalism: The EU Border Carbon Adjustment Proposal," *Tax Notes International* (June 1, 2020): 1047.

entities of the CBAM and provides for a complex system of exceptions based on the attitude held by their foreign jurisdiction. In this way, the convergence with the European choices on carbon pricing are rewarded with the exclusion from the CBAM of the emissions produced by the companies of the collaborative third Country.

For example, imports from Countries that have signed agreements with the European Union that provide for the obligation to apply European law in the electricity sector, including legislation on the development of renewable energy sources, as well as other regulations on energy, environment and competition are excluded from the CBAM. Not even imports from Countries that have shared with the Commission a "road map" for the adoption of measures with equivalent effects to those in Europe are not subject to the levy; or, again, imports from third Countries that have committed to achieving climate neutrality by 2050 are excluded from the CBAM.

There is more: the exceptions to the application of the CBAM are subject to the verification of concrete compliance with the commitments undertaken by the third Country. This leads to an unusual 'dynamic' dimension of cooperation between different jurisdictions. The European Union would reject the CBAM exemption when the third Country, in implementing the commitments undertaken, did not respect its own roadmap and did not demonstrate substantial progress towards aligning national legislation with Union law on action for the climate (see art. 2, par. 7–9, of the proposed Regulation).

In this way, a sort of improper sanction and an unprecedented control function for the European institutions against foreign authorities is configured.

Regardless of the effectiveness of the new mechanism, these elements give great interest and particular originality to a proposal which, at the same time, aims to establish a new own resource of the European budget with an estimated revenue of two billion euros per year[8] and to

[8] On these issues, Giovanna Petrillo, "Next Generation EU and new system of own resources: a decisive step towards the establishment of a new European tax model?" *Rivista di diritto tributario on line*, (2021): 2, accessed December 7, 2021, https://www.rivistadirittotributario.it/wp-content/uploads/2021/12/Petrillo.pdf.

suppress the controversial mechanism of free assignment of the ETS provided for by art. 10-bis of Directive 2003/87/EC.

And these are the reasons that probably have fueled a climate of skepticism and hostility in the institutions that govern the main world economies that have considered CBAM a tool to protect the European internal market. Precisely for this same reason, the interest of the international community for the institute has grown significantly in a few months, placing the European choice at the center of an animated debate that involves, at the same time, the mechanisms for implementing art. 6 of the Paris Agreement. It provides for a system, with voluntary adhesion and under national law, to reduce emissions, with the possibility of "buying" and using real carbon "credit certificates" generated elsewhere as a result of the greater reductions achieved by other countries (Internationally Transferred Mitigation Outcomes, or ITMO).

Therefore, although the final documents of the United Nations Conference held from 31 October to 13 November 2021 in Glasgow (Cop 26) did not foresee the adoption of a global mechanism for fixing the price of fossil fuels, important openings are beginning to be seen for legal experimentations in line with European choices. The debate also involves the hypothesis of a global application of a CBAM or similar tools, according to an approach that would mark a very significant progress in quality of the global strategy on the fight against climate change.

2. The classification of the CBAM in the system of customs law

Moving on to the analysis of the new European device, first of all we can appreciate the numerous points of contact between the customs legislation, fully harmonized by the unitary Customs Code established with EU Regulation no. 952/2013, and the CBAM application mechanism. In fact, the choice of regulating the price adjustment system with an EU Regulation identifies a first point of contact with customs matters and, at the same time, expresses the determination of the Commission in making the CBAM immediately operational, ensuring a direct application of the rules at the national level.

There are other points of contact between the CBAM and the European customs levy system that lead us to classify the new tool within those of a fiscal nature and, more precisely, among customs duties for environmental purposes. In fact, if this mechanism were applied, when some goods

originating in third Countries listed in Annex I to the Regulation were to cross the borders of the EU territory, EU Member States would require the authorized importer a sum of money (duty) or the transfer of shares of greenhouse gas emissions under the quota trading system already in use (the ETS). The value of these quotas or the amount of the duty should be calculated on the basis of the greenhouse gases released in the production process of the goods themselves, on the basis of a calculation that presents many profiles of complexity, although this measurement could be very complex and should therefore be simplified.

The list of goods whose import would be taxed by the CBAM is currently limited to the categories with respect to which the risk of circumvention of 'carbon pricing' is most felt, i.e. cement, electricity, fertilizers, steel in ingots and semi-finished products (with the exception of stainless steel and steel pipes), aluminum in raw and semi-finished form (including pipes) and other steel products. In the most recent agreement reached in June 2022 between the political forces of the European Parliament, the gradual expansion of CBAM to polymers, organic chemicals and hydrogen was also hypothesized.

The delimitation of the CBAM to these sectors responds, above all, to the need to ensure compliance of the CBAM with WTO commitments, which can constitute a serious limit to the exercise of European tax autonomy. Moreover, to allow an early verification of compliance of the new carbon adjustment mechanism with the agreements for the freedom of international trade, the European Union intends to adopt a transitional regime which risks further weaken the effectiveness of the CBAM: originally, in fact, its entry into operation would not take place before 2035; moreover, until 2025, the system would be implemented for mere experimentation and monitoring purposes. But only one year after its presentation, the mechanism continues to be the feared by the European business system, especially in this phase of strong instability in the prices of energy products. The hypothesis of a further deferral to 2027 (instead of 2026), with the elimination of free CO_2 quotas by 2032 (instead of 2035), has come down.

These reasons lead us to prefer the 'moral suasion' that the new rules can exercise on other legal systems, rather than the other effects expected from the proposed regulation. Their effectiveness appears, at least today,

weakened: first of all, due to the postponement over time of the entry into force of the CBAM which hinders the measurement of its impacts on the European budget and on the ETS system; moreover, since the levy mechanism on imports of polluting goods is destined to affect their final price, in a context of 'energy crisis' that European markets are facing and which in a few months has brought the average price of CO_2 to the ETS auctions, from 28 to 65 dollars per ton, with even higher peaks.

In other words, on the one hand, the simple proposal of the CBAM was able to develop an animated and constructive debate on the advisability of adopting anti-circumvention devices of the European and international agreements for the containment of global warming, and also on the possibility of experimenting a tax on a global scale, discouraging the use of fossil fuels; on the other hand, the application of the institutes envisaged by the proposed EU Regulation, does not seem to be able to achieve important results due to an excess of cautions, exceptions and postponements over time.

3. Brief notes on the procedure for applying the CBAM

These limits are the expression of a political choice, rather than a technical difficulty. In fact, the rules for implementing the carbon adjustment mechanism at borders, as well as being sufficiently defined by the Regulation, appear to be capable of immediate use, making use of the reference frameworks and the network of roles that have long been tested in the harmonized European customs law.

Art. 4 of the proposal, for example, establishes that goods can be imported into the customs territory of the Union "only by a declarant authorized by the competent authority" (so-called "authorized declarant"). Also the procedure and conditions of authorization of the declarant which are governed by art. 17 are mirrored to the customs law in force: this subject, in fact, may address the request for authorization to the competent authority pursuant to Article 5, paragraph 1, provided that he has not committed serious or repeated violations of customs and tax legislation and of the rules on market abuse and provided that he has not had a history of serious crimes related to his economic activity in the five years preceding the application. In addition, the declarant must document possession of sufficient financial and operational capacity to fulfill the obligations undertaken pursuant to

the Regulations. And also the system of financial guarantees provided for by paragraphs 6, 7 and 8 of the same art. 17 proposes solutions that have long been established in the collection of customs and excise duties.

The system of declaratory obligations (which, in the case of the CBAM, are established by art. 6 of the Regulations) is also already tested. The standard provides that by 31 May of each year the authorized registrant submits to the competent authority a summary declaration of the operations relating to the previous year ("CBAM declaration"), which contains, among other things, the following information: a) the total quantity of each type of goods imported during the calendar year preceding the declaration, expressed in megawatt hours for electricity and in tonnes for other goods; b) the total embedded emissions, expressed in tonnes of CO_2e emissions per megawatt hour of electricity or, for other goods, per tonne of CO_2e emissions and per tonne of each type of goods, calculated in accordance with Article 7; c) the total number of CBAM certificates corresponding to the total incorporated emissions, to be surrendered, after the reduction due on the account of the carbon price paid in a country of origin in accordance with Article 9 and the adjustment necessary of the extent to which EU ETS allowances are allocated free of charge in accordance with Article 31.

This is certainly not the place to examine the most peculiar cases that determine further declaratory obligations (i.e. the one in which the imported goods are "returned goods" pursuant to Article 203 of the Single Customs Code or the others identified by paragraphs 3, 4 and 5 of article 6). What has been said so far is sufficient to demonstrate the use in the CBAM discipline of institutes and rules directly drawn from customs law, with which the new Regulation must necessarily be linked, since both govern imports.

On the contrary, the mechanisms set up by the CBAM for the calculation and valuation of the embedded emissions do not correspond to the customs law, respectively drawn by Articles 7 and 8 of the proposed Regulation. These are very complex calculation methods, which are developed in Annex III to the Regulation, where we find separate rules for goods other than electricity and which adopts appropriate remedies (default values according to the methods of Annex III, point 4.1.) for the hypothesis in which it is not possible to adequately determine the real emissions.

The European Commission is responsible for adopting implementing acts regarding the detailed rules on these calculation methods, including "the determination of the system limits of production processes, the emission factors, the plant-specific values of the actual emissions and their application to individual goods, as well as the definition of methods to ensure the reliability of the data on the basis of which the default values are determined, including the level of detail and verification of the data". Furthermore, "if necessary", the implementing acts must provide that "the default values can be adapted to particular areas, regions of countries where specific characteristics prevail in terms of objective factors such as geography, natural resources, market conditions, energy mix, or industrial production".

The European Commission is responsible for adopting implementing acts regarding the detailed rules on these calculation methods, including the identification of the system limits of production processes, the presumable emission levels referring to the types of plant and goods. The European Commission is also responsible for defining methods to ensure the reliability of the data on the basis of which the default values are determined, including the level of detail and data verification. Furthermore, "if necessary", the implementing acts must provide that "the default values can be adapted to particular areas, regions or countries to take into account specific objective factors such as geography, natural resources, market conditions, sources prevailing energy or industrial processes".

The verification of the embedded emissions reported in the CBAM declaration must be carried out by special "accredited verifiers", pursuant to Article 18, with the rules set out in Annex V. In this regard too, the Commission will have the power to adopt specific implementing acts.

The CBAM "governance" system is described in Chapter III of the Regulation (articles 11–19) and is based on a network of Authorities designated by each Member State. These Authorities will be bound by a specific obligation to exchange information essential to the exercise of their functions and tasks and will be directly connected to the European Commission itself which will perform the role of "central administrator" responsible for keeping an "independent transaction catalog" to record the 'purchase, holding, return, repurchase and cancellation of CBAM certificates' and to ensure the coordination of the related national registers.

Chapter IV of the Regulations (Articles 20–24) regulates the sale, price, return, purchase and cancellation of CBAM certificates, while Chapter V is dedicated to the management of goods at the borders.

For the rest, the Regulation links and coordinates the new legal institutions and procedures with pre-existing customs procedures and with the ETS system.

Finally, in Chapter X, it identifies the transitional regime mentioned above and which, it should be confirmed, can constitute the real weakness of the innovative mechanism for reducing greenhouse gas emissions aimed, in the intentions of the European institutions, at producing effects outside the customs territory.

It will not be easy, in my opinion, to prevail over economic interests and the impudence through which some governments at the helm of the main world economies are used to paralyze the debate on concrete actions against climate change at United Nations conferences. Certainly, however, proposals similar to CBAM, precisely because they potentially affect the exports of strategic products and the stubborn use of fossil fuels, can help accelerate that difficult convergence between legal systems and the scientific community. The research is in fact sure of the relationships that link global warming to greenhouse gas emissions[9].

4. Conclusion

Waiting and hoping for a more serious discussion about a globally harmonized carbon pricing mechanism (e.g. linking emissions trading schemes, minimum carbon price agreements, multilateral reform of fossil fuel subsidies, etc.), the European CBAM presents profiles of significant interest. It keeps alive the debate on the need to overcome national and EU borders in the application of carbon pricing tools. At the same time, it constituted a possible 'green' evolution of the EU customs Code which, up to now, has scarcely considered the environmental component.

On the other hand, the proposal to adopt the European regulation on CBAM disappoints expectations in terms of the necessary and urgent

[9] Alberto Comelli, "Reflections on environmental taxation, at the time of the pandemic triggered by covid-19, in the perspective of a broad tax reform," *Diritto e Pratica Tributaria*, no. 1 (January 2021): 44.

strengthening of European own resources and the EU budget[10]. In fact, recent emergencies have given impetus to a revision of the system of European own resources to which the CBAM seems to contribute insufficiently.

The need to find the resources to finance the relief interventions of the Member States' economies during and after the Covid-19 emergency led to the adoption of the Next Generation EU plan. It was financed almost exclusively with bonds, which took advantage of the EU's high financial rating. At the same time, the weakness of the EU's tax autonomy has emerged. Even in an emergency phase, in fact, EU had difficulty in reaching an internal agreement to acquire its own resources according to the provisions of art. 311 TFEU[11].

For these reasons, in the policy mix created to combine the aims of economic recovery with the most ambitious environmental policies of FITx55, it was proposed to increase the EU budget with the revision of the ETS, with the revision of energy taxation and with the CBAM.

The mechanism examined so far has a strong media impact but a weak return in terms of revenues, nor is the timing of their income clearly predictable. As regards the most up-to-date estimates on the maximum revenue from this environmental duty, no more than two billion euros per year are expected. A significant part of these sums should finance the CBAM's operating procedures. Only the residual part could be freely used as a 'free resource' of the European budget, since no restrictions on its use have yet been envisaged (e.g. obligation to use it for environmental interventions or for funding research on renewable sources, on the reduction of emissions, on the CO_2 capture, etc.).

The main limit is the very long transitional period (experimentation), the political disagreement and the continuing uncertainty about the date of entry into force (according with the last prevision, no earlier than 2027). According to the last agreement reached on June 2022 by the three major political groups in the European Parliament, the reform of the EU's

10 Frans Vanistendael et alias, "European Solidarity Requires EU Taxes," *Tax Notes Int.*, 2020, accessed April 30, 2020, https://taxprof.typepad.com/taxprof_blog/2020/04/european-solidarity-requires-eu-taxes.html.

11 EU Treaty on the Functioning of the European Union (TFEU), Art. 311: "*The Union shall provide itself with the means necessary to attain its objectives and carry through its policies. Without prejudice to other revenue, the budget shall be financed wholly from own resources…*".

Emissions Trading System will provide that gradual elimination of free quotas for European industries between 2027 and 31 December 2032.Consequently, the CBAM would start to fully apply only from 2033 to replace the free allowances. It could be a problem, both in relation to its ability to collect revenue for the EU budget, and also for its concrete ability to affect the choices of Companies.

If the EU Institutions will not be able to shorten these terms, the CBAM will have to continue to perform only the noblest of its functions: the contrast to the hateful phenomenon of the *carbon leakage*.

The debate on international carbon pricing trends would continue on a parallel track.

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The Role of Energy Taxation in Terms of Achieving Climate Neutrality

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Abstract: The energy tax is a type of environmental tax. In addition to its ability to generate revenue for the central budget, it is important that it can have a major impact on the achievement of the European Union's significant but not legally binding objectives in the field of energy policy and climate change. The role of the energy tax is gradually increasing, partly due to the growing importance of environmental considerations in certain policies, on the other hand, the EU attaches great importance to the harmonization of these tax rules, as almost 75% of environmental taxes in integration come from the energy sector, so the role of energy taxes in environmental taxation and policy is also important. The EU wants to reduce its greenhouse gas emissions by 55% by 2030 and achieve full climate neutrality by 2050, as set out in the Green Agreement Communication. Aiming to achieve these goals, the European Commission has adopted the so called 'Fit for 55' package of proposals on climate protection, which, in addition to several measures, states the need of the amendment of the Energy Tax Directive (hereinafter: Energy Tax Directive, the Directive). The reason for this is that, in its current form, it is not in line with climate protection goals, as it does not encourage the reduction of greenhouse gas emissions and energy efficiency.

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1. Introduction

The energy tax is one of the environmental taxes, in addition to taxes on transport, pollution, and resources.[1] Member States' regulations on energy taxation, which are largely different, have developed through long and cumbersome processes. An energy tax is a financial instrument to influence the production and supply of energy. Taxes on energy products optimally reduce the demand for these products, thereby reducing the emissions associated with their consumption. The energy tax provides an opportunity to reconcile the incentive role of taxes with their revenue-generating potential, but a flexible and comprehensive approach to energy taxation is not enough, but its uniform regulation is also important.[2]

The establishment and development of EU energy tax regulation are significantly influenced by the economic, historical, and cultural implications in the Member States.

In the beginning (and still to this day, but not to the extreme extent) as the many Member States had as many regulations and numerous reports on the concept of energy tax.

The Energy Tax Directive has clarified the meaning of this definition by designating as a common denominator the tax, which is still coal, natural gas, and electricity. According to many, this legislation was not a step forward as it only recorded an existing situation. It should also be noted that the scope of the Directive to date does not cover the taxation of heat production or the special use of energy products and electricity.

Regulatory standardization has been preceded by serious professional and scientific debates in Europe, the main reason for which many factors have influenced and continue to influence its design and development, including the regulation of the EU internal market, the liberalization, and deregulation of the energy sector, the importance of energy security, environmental policy, and other political processes.[3]

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1 István Simon, *Pénzügyi Jog II* (Budapest: Osiris Kiadó, 2012), 236 – 238.

2 Zoltán Nagy, "Az adópolitika szabályozási eszközei szolgáltatási szempontból," in *Közszolgáltatások megszervezése és politikái*, ed. Tamás Horváth M. and Ildikó Bartha (Budapest-Pécs: Dialóg Campus, 2016), 220 – 221.

3 Nagy, "Az adópolitika szabályozási eszközei szolgáltatási szempontból, " 225 – 228.

The taxation of the energy sector in the Member States of the European Union began to show a common picture with the adoption of Council Directive 2003/96/EC, but problems and difficulties persisted after the adoption of this legislation.[4] One such difficulty is that taxation is a fundamental sovereign right of the EU Member States, making it difficult to reach a joint decision on it. In connection with this, the problem of the harmonization of excise duty related to energy products in the European Union can be mentioned, as it started in the 1970s, but only in 1992 (Directive amended in 2008), it takes legal form.[5] Harmonization covers the range of products, exemptions, minimum tax rates, and the movement of products between the Member States. To date, efforts have been made to increase harmonization in this area for the single market to function properly, as the minimum level of excise duties has not achieved the desired approximation effect, and there are still large differences between the Member States.[6] The Energy Tax Directive is a vertical directive of EU excise duty, but it is also a specific environmental tax that affects not only production but also services.

The importance of the institution of energy taxation, in addition to its revenue-generating capacity and its influence on market processes, is given by the fact that the achievement of the European Union's important but not legally binding objectives in the field of energy policy and climate change may be greatly influenced by its regulation. I would like to examine the significance of the latter further.[7]

2. The connection between energy taxation and climate protection

Climate protection considerations are key in the regulation of energy taxation in the European Union, as this type of tax can make a significant contribution to achieving environmental goals. The United Nations has held annual conferences in the fight against global warming since 1992, which

4 Nagy, "Az adópolitika szabályozási eszközei szolgáltatási szempontból," 234.

5 Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (O.J.E.C. L9, 14 January, 2009).

6 Annamária Kazainé Ónodi, *A nemzetközi adózás vállalatgazdasági problémakörei* (Budapest: Budapesti Corvinus Egyetem Vállalatgazdaságtan Intézet, 2008), 13– 15.

7 Valeria Andreoni, "Enviromental taxes: Drivers behind the revenue collected," *Journal of Cleaner Production,* no. 221(2019): 17–26, https://doi.org/10.1016/j.jclepro.2019.02.216.

have resulted in several forward-looking agreements (such as the Paris Agreement).[8]

After the 2000s, the European Union began to work on these international instruments, setting out a joint commitment with the Member States. Integration envisages meeting the targets set in international instruments on climate protection by working with the Member States. In addition to international conferences and documents, its Green Papers have already addressed the growing urgency of the Community's energy dependency and the shortcomings of its energy and environmental policies. For example, the 2006 Green Paper feared that by 2030, the Union's energy addiction would increase to at least 60% if processes that did not protect the environment were to continue. To avoid this, it has already sought to identify solutions, such as sustainable development or the diversification of the energy mix and has emphasized the promotion of renewable energy sources and energy efficiency.[9]

The European Union has already recognized that economic growth is placing an increasing environmental burden on the Earth, which is why environmental policy regulation is becoming increasingly important. The state, as well as the European Union, must regulate market conditions aiming to protect the environment, and indirect regulatory instruments are becoming increasingly important within this environmental policy framework. I classify environmental taxes, such as energy taxes, as indirect regulatory instruments (as opposed to, for example, legislation that is a direct instrument).[10] The European Union currently has 27 Member States, where the role of energy taxation is gradually increasing, partly due to the growing importance of environmental considerations in certain policies, and partly because the Union pays close attention to the harmonization of these

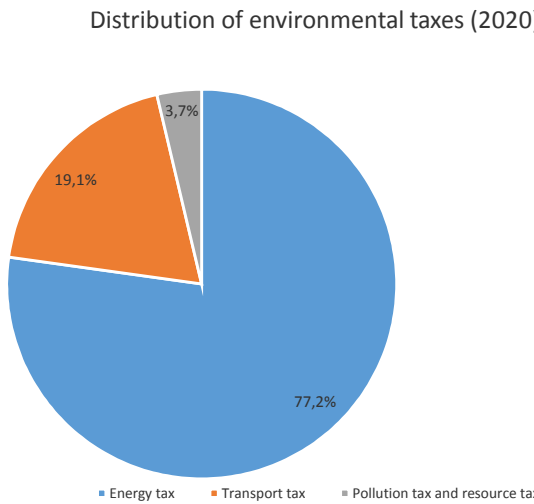
8 Tibor, Faragó, "Új nemzetközi éghajlatvédelmi megállapodás,"*Magyar Energetika*, XXII, 5–6 (2015): 58–61, DOI:10.21867/KjK/2017.1.6.

9 Comission of the Europen Communities, Green Paper, A European Strategy for Sustainable, Competitive and Secure Energy, COM/2006/105.

10 Ildikó Bartha and Zoltán Nagy,"Energiaadó vagy valami más? A környezetvédelmi közterhek hatásmechanizmusáról," *Közjavak folyóirat*, 2017/3 (2017): 7–10.

tax rules as 75% come from the energy sector,[11] so energy taxes also play a significant role in environmental taxation and policy.[12]

There are the following types of environmental taxes in the European Union system: energy taxes (including carbon tax), transport taxes, pollution taxes and resource taxes.[13]



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11 "Annual greenhouse gas emissions in the European Union (EU-27) from 1990 to 2020, by sector," Statista, accessed May 1, 2022, https://www.statista.com/statistics/1171183/ghg-emissions-sector-european-union-eu/.

12 Károly Kiss, "Környezetvédelmi adóreform Nyugat-Európában – és néhány hazai vonatkozás," in *BKÁE Környezettudományi Intézetének sorozata 11*, ed. Sándor Kereskes and Károly Kiss (Budapest: Aula Kiadó,2002), 33–60.

13 Orsolya Rónay, "Az Európai Unió energiaadó rendszere," *Journal of Agricultural and Environmental Law*, special student's edition (June 2012): 37–52.

14 "Total environmental tax revenue by type of tax and tax payer, EU, 2019 and 2020," Eurostat, accessed June 1,2022, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Total_environmental_tax_revenue_by_type_of_tax_and_tax_payer,_EU,_2019_and_2020.png.

Revenue from environmental taxes is illustrated in the table below between 2016 and 2020 (million euro).

Type	2016	2017	2018	2019	2020
Energy tax	3135	3258	3176	3015	2781
Transport tax	1924	1929	1917	1987	1729
Pollution and Resource tax	58	46	26	18	11
Total	5117	5232	5119	5020	4520

Sources: CSO Ireland

The table shows that the income from environmental taxes decreased between 2016 and 2020. This supports the need to amend the current European Union regulations.

3. On the road to unified energy taxation

The European Union has taken the view that energy policy, and in particular tax policy, had to consider four aspects of its regulatory environment to facilitate the renewal of energy supply in the European Union and the country. Service quality and safety, sustainability, environmental protection, competitiveness, and energy efficiency must be taken into account.

In terms of the characteristics of an energy tax, a single-phase, indirect tax, so the person liable for payment, is not the actual taxable person. In connection with this instrument, the taxable person is the first identifiable user or consumer of the product (purchase from a distributor, energy import, production for own use).[15] As the development of EU tax provisions was aimed at the smooth functioning of the single market, the harmonization of indirect taxation was earlier and more thorough than that of direct taxation. This is since indirect taxes play a greater role than direct taxes in the proper functioning of the internal market, with the result that the highest degree of approximation achieved by directives has taken place in the field of value-added tax and excise duties mentioned above.[16] One

15 Gábor Földes, *Adójog* (Budapest: Osiris Kiadó, 2004), 286.

16 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (O.J.E.C. *L 347, 11 December 2006).*

of the most controversial points in the drafting of the uniform energy tax regulation was that the energy tax regulations of the individual Member States, and thus the energy prices, differed from each other, significantly differentiating the conditions of competition.[17]

As early as the early 1990s, the Commission took several initiatives to introduce a common carbon or carbon tax, which is a tax on energy in addition to electricity and natural gas. One of the most important milestones is the Commission's 1992 proposal on ǧ taxation, which the Member States considered being suitable for combating climate change, yet they failed to find a common denominator and no EU legislation was adopted. In 1997, another unsuccessful proposal was made to establish a three-step framework for the taxation of Community energy products for harmonization purposes. However, the objectives of this initiative also included environmental protection, encouraging modal shift, energy tax-funded job creation, and fiscal harmonization.[18] On 20 March 2003, the Member States finally agreed on the rules for the proposed energy tax, an EU act that contains only framework rules to date. It must extend the scope of taxable products from the mineral oil regulated so far to natural gas, coal, and electricity, so the scope of the Directive has become wider than that of previous rules.[19]

The EU internal market has been an influential aspect of the Directive, as appreciable differences in the national energy tax rates applied by the Member States may prove detrimental to its proper functioning. Furthermore, the liberalization and deregulation of the energy sector, energy security, environmental policy, and other political processes have also played a role. The Directive aims to enable the European Union's single energy market to function smoothly and to avoid distortions of trade and competition resulting from major differences between national tax systems. Furthermore, the taxation of energy products and, where appropriate,

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17 Károly Kiss, "Energiaadók az Európai Unióban (környezetgazdasági elemzés)," *Budapesti Közgazdaságtudományi és Államigazgatási Egyetem Környezettudományi Intézetének tanulmányai*, no. 13(2002): 12.

18 Zoltán Szabó, *Az államháztartás ökoszociális reformjának szüksége és lehetősége* (Budapest: Levegő Munkacsoport, 2007), 258 – 265.

19 Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils (O.J.E.C. *L 316, 31 october, 1992).*

electricity is one of the means of achieving the objectives of the Kyoto Protocol, which the Union undertook in the 2000s.[20]

However, it should be noted that the Energy Tax Directive did not bring about any significant changes in the functioning of the internal market, but rather fixed the status quo by including the minimum tax in a binding act.[21] Although the main objectives of the Directive includes the proper functioning of the internal market, the harmonization of Member States' energy tax rules, the setting of certain energy management targets, and the protection of the environment, no major progress has been made.[22]

Another problem is that the Directive sets mandatory minimum levels of taxation at a very low level and exempts energy-intensive users extensively from taxation. Unfortunately, the Commission's proposal for carbon taxation was not accepted either. The Energy Tax Directive only partially serves environmental policy purposes, although tax policy and climate protection objectives must be consistent. Perhaps the Commission's communication on the 2019 Green Agreement will succeed, at least in part.

4. Case-law of the Court of Justice of the European Union on energy taxation

The case-law of the Court of Justice of the European Union on energy taxation, which is of great importance in the field of Community tax law, should also be highlighted. Most of the legal cases related to energy tax raise problems related to the issue of tax benefits and exemptions.[23] The specific provision for the energy tax is not included in the primary sources of law but is regulated by EU directives.

Dániel Deák, analyzing several eco-tax judgments of the Court of Justice of the European Union (for example the Frohnleiten, Kernkraftwerke

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20 Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (O.J.E.C. *L 283, 31 november, 2003).* Preambulum (2)-(7).

21 Council Directive 2003/96/EC.

22 Sirina Withana, Patrik ten Brink, Andrea Illes, Silvia Nanni and Emma Watkins, *Enviromental tax Reform in Europe: Opportunities for the future* (London: Institute for European Environmental Policies-Final Report, 2014), 3–33.

23 Gabriella Erdős, Gábor Földes, Tamás Őry and Mária Véghelyi, *Az Európai Közösség Adójoga* (Budapest: KJK-Kerszöv, 2000), 34–36.

Lippe-Ems or the British Aggregates Association decisions), stated that the interests of the internal market and freedom of competition always prevail when conflicting with the principles and values of environmental policy. In his opinion, the weaknesses of the European Union's regulations are reflected in the resolution of such conflicts.[24] From my point of view (seeing the latest cases of the CJEU in 2020 or 2021), environmental requirements are starting to come to the fore, which is supported by the progress of the efforts to revise the Energy Tax Directive in this aspect.[25]

Directive 2003/96/EC lays down framework rules, so it is up to the Member States to lay down detailed rules. This is the reason why in many cases the transposition of a provision of a directive by a Member State before the Court of Justice has required interpretation. As the cases I have analyzed show, most of the issues arise concerning tax exemptions and reductions and the avoidance of double taxation. In the following, I would like to highlight just a few examples of the small number of CJEU judgments.

In the Fendt case, the scope of the exemption provision of Directive 2003/76/EC has been disputed. In its decision, the EU institution stated that a Member State could not be restricted from imposing a consumption tax on lubricating oils which were not intended for use as heating fuel or fuel, since the relevant directive did not provide a precise list of those energy products.[26] The Directive does not prohibit national legislation which imposes a tax on lubricating oils if they are not intended for use as fuel or are not offered for sale or use in that way.[27]

In Flughafen Köln, the question was whether a taxable person could rely on the exemption provided for in the Harmonized Energy Tax Directive if a Member State failed to transpose the Directive by the deadline

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24 Hua Qin 1, Martha Bass, Jessica D. Ulrich-Schad, David Matarrita-Cascante, Christine Sanders and Barituka Bekee, „Community, Natural Resources, and Sustainability: Overview of an Interdisciplinary and International Literature," *Sustainability*, *no. 12.* (2020): 1–14. https://doi.org/10.3390/su12031061.

25 CJEU Judgment of 7 March 2018, Cristal Union kontra Ministre de l'Économie et des Finances, Case C31/17, ECLI:EU:C:2018:168. 34.; CJEU Judgment of C465/15 sz. Hüttenwerke Krupp Mannesmann ügy ECLI:EU:C:2017:640. 26.

26 CJEU Judgment of 5 July 2007, Fendt Italiana Srl kontra Agenzia Dogane – Ufficio Dogane di Trento, Case C-145/06 et C-146/06, ECLI:C:2007:411., 34–44.

27 Dániel Deák,"Környezeti adóharmonizáció és versenykonform szabályozás az Európai Unió Bírósága gyakorlatának fényében," Pro Futuro no 1 (2017): 105.

and thus subsequently introduced a tax on the use of diesel for electricity generation. According to the Court, the wording of the obligation to exempt energy products (which are used to generate electricity) is sufficiently precise and unconditional, so that individuals have the right to invoke an exceptional rule of a directive before a national court against incompatible national legislation.[28] In the IRCCS case, the question was whether the charges to cover the overhead of the electricity system constituted taxes and, if so, whether the reimbursement of costs to energy-intensive companies in the processing sector was compatible with Community law. In the Court's view, the Directive allows Member States to make a distinction so that the tax advantage granted to such undertakings is permissible under the 2003 Act (it did not address the issue of prohibited State aid).[29]

In the Kernkraftwerke Lippe-Ems case, the Court answered several questions. On the one hand, the Court has held that the exemption provided for in Article 14 of the Energy Tax Directive cannot be applied by analogy to the fissile material tax. On the other hand, according to the court, there is no direct and inseparable link between the use of fissile material and the consumption of electricity produced in the reactor of a nuclear power plant, so the tax in question cannot be harmonized because it is neither an excise duty nor any other indirect tax.[30]

As only the production of electricity using fissile material is covered by the law of a Member State, it does not fall within the scope of the Directive.[31] Furthermore, in the absence of selectivity, the disputed Member State tax does not constitute prohibited State aid within the meaning of Article 107 (1) TFEU, because the tax law of the Member States also makes no distinction between the tax rate and the taxable person, nor is it contrary

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28 CJEU Judgment of 17 July 2008, Flughafen Köln/Bonn GmbH kontra Hauptzollamt Köln, Case C-226/07, ECLI:EU:C:2008:429., 32–33.

29 CJEU Judgment of 24 April 2015, Istituto di Ricovero e Cura a Carattere Scientifico (IRCCS) – Fondazione Santa Lucia kontra Cassa conguaglio per il settore elettrico and Others, Case C-189/15, ECLI: C:2015:17.

30 CJEU Judgment of 04 Juni 2015, Kernkraftwerke Lippe-Ems GmbH kontra Hauptzollamt Osnabrück ügy, Case C-5/14., ECLI:EU:C:2015:354.

31 "A hasadóanyagadó összeegyeztethető az uniós joggal - Az Európai Unió Bírósága ítéletet hozott," Az Európai Unió Bírósága, accessed May 8, 2022, http://www.jogiforum.hu/hirek/34205.

to the fact that it does not constitute a charge having equivalent effect to a customs duty.

Article 14 (1) of the Directive defines the permissible exemptions exhaustively.[32] The provision cannot be interpreted broadly. There are two exceptions, the environmental derogation and the third subparagraph of Article 21 (5) of the Act, a kind of loophole (if small electricity producers are exempted, the energy products used to produce that electricity must be taxed).[33] The 2003 Directive aims to avoid double taxation, but the Member States may also tax energy products used to generate electricity for environmental reasons. A judgment handed down in 2018 also draws attention to this.[34]

France has postponed the transposition of the Energy Tax Directive until 1 January 2009 but has continued to apply some of its provisions during the transitional period, allowing small electricity producers to be exempted from tax while requiring them to pay tax on energy products used to generate electricity. An earlier judgment had already provided that, during the transitional period, France was bound only by the obligation to maintain minimum rates.[35] This period should be interpreted restrictively so that there was only the possibility to restructure the entire system of taxation of electricity, so there is no possibility to change the taxation of energy products used to produce electricity. According to Article 1 of the Directive, Member States are required to tax the electricity produced and to exempt energy products used for its production, as a consequence of which double taxation can be avoided.[36]

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32 CJEU Judgment of 5 July 2007, Fendt Italiana Srl kontra Agenzia Dogane – Ufficio Dogane di Trento, Case C-145/06. et C-146/06, ECLI:C:2007:411, 36.

33 CJE CJEU Judgment of 04 Juni 2015, Kernkraftwerke Lippe-Ems GmbH kontra Hauptzollamt Osnabrück ügy, Case C-5/14., ECLI:EU:C:2015:354.51.

34 CJEU Judgment of 25 July 2018, Messer France SAS kontra Premier ministre és társai, Case C103/17, ECLI:EU:C:2018:587.

35 CJEU Judgment of 25 July 2018, Messer France SAS kontra Premier ministre és társai, Case C103/17, ECLI:EU:C:2018:587. 23.

36 CJEU Judgment of 7 March 2018, Cristal Union kontra Ministre de l'Économie et des Finances, Case C31/17, ECLI:EU:C:2018:168. 30.; CJEU Judgement of 27 Juni 2018, Turbogás Produtora Energética SA kontra Autoridade Tributária e Aduaneira, Case C90/17, ECLI:EU:C:2018:498.; CJEU Judgement of 27 Juni 2018, Turbogás Produtora Energética SA kontra Autoridade Tributária e Aduaneira, Case C90/17, ECLI:EU:C:2018:498. 35.

The legislation allows the Member States to exempt electricity produced by small producers and used by them on their own, provided that (for environmental purposes) the energy products used to produce the energy are taxed.[37] In addition, energy products used to generate electricity are exempt from taxation.[38] The Court ruled that the French State could not grant an exemption to producers because it had not set up a tax system following the Electricity Directive by 1 January 2009. It could not apply the exemption rules for small electricity producers under the Directive, while, by way of derogation from the same Directive, levied a tax on energy products used to produce that electricity.[39]

Recent CJEU judgments have already reflected greater consideration of environmental objectives.[40] The legal act from 2003 aims to complete the internal market and avoid distortions of competition by setting minimum levels of taxation.[41]

Under the Directive, Member States may impose a reduced rate of excise duty on gas oil used for regular passenger transport, even if it does not cover non-scheduled passenger transport. It is also in favor of permissibility that more people choose scheduled flights, reducing diesel consumption (less self-sufficient), as a consequence of which environmental goals can be achieved.[42]

5. Attempts to reform regulation

In addition to the goal of tax harmonization, the objectives of Directive 2003/76/EC include environmental policy. The European Union promotes energy efficiency in line with its objectives (under Article 6 of the Treaty

37 CJEU Judgement of 27 Juni 2018, Turbogás Produtora Energética SA kontra Autoridade Tributária e Aduaneira, Case C90/17, ECLI:EU:C:2018:498. 36.

38 CJEU Judgment of 7 March 2018, Cristal Union kontra Ministre de l'Économie et des Finances, Case C31/17, ECLI:EU:C:2018:168. 28.

39 CJEU Judgment of 16 October 2016, UPM France, C270/18. ECLI:EU:C:2019:862, 50–54.

40 CJEU Judgment of 3 December 2020, Case C44/19. ECLI:EU:C:2020:982.; CJEU Judgment of Case C513/18. ECLI:EU:C:2020:59.

41 CJEU Judgment of 7 March 2018, Cristal Union kontra Ministre de l'Économie et des Finances, Case C31/17, ECLI:EU:C:2018:168.29.

42 CJEU Judgment of 12 September 2019, Autoservizi Giordano società cooperativa kontra Agenzia delle Dogane e dei Monopoli - Ufficio di Palermo, Case C513/18, ECLI:EU:C:2029:59. 30–35.

on the European Union, environmental protection requirements must be integrated into the definition and implementation of other Community policies) and under the Paris Agreement. The main goal is to reduce dependence on imported energy products and reduce greenhouse gas emissions. In an effort to protect the environment, Member States have the right to grant tax advantages to companies that take concrete steps to reduce their emissions.[43]

However, there is a need to see some contradiction between the EU's environmental policy and its objectives of reducing energy dependency. After all, it is clear that the promotion of renewable energy sources and the frequent exclusion of them from market rules, on the one hand, and targeted solutions in the field of energy efficiency, on the other, will not be able to compensate for the growing energy demand in the current structure. This is evidenced by the growing dependence on energy from third States. Today, fossil fuel prices are much lower than renewables, but their long-term costs could far exceed those of more environmentally friendly varieties, as addiction from politically sensitive suppliers, could put the European Union in an unpredictable position. We can also experience this during the Russian-Ukrainian conflict. Thus, an increased tax on fossil fuels could steer the Member States and thus the EU even more towards increasing renewable energy sources and thus energy security.

Before the adoption of the Energy Tax Directive, differences in the levels of energy taxation applied by the Member States to energy products in the European Union harmed the functioning of the Union's internal market. As a result, the 2003 Directive sets separate minimum levels of taxation applicable to products used for heating, electricity generation, and fuel, based primarily on the amount of energy used. However, in addition to these minimum tax rates, Member States are free to set and adapt to their national circumstances and national tax rates they deem appropriate above the EU rate (principle of flexibility).[44] The problem is that the Directive sets mandatory minimum levels of taxation at a very low level and exempts energy-intensive users extensively from taxation. Unfortunately, instead of

43 Council Directive 2003/96/EC preambulum.

44 Zoltán Nagy, *A környezeti adózás szabályozása a környezetpolitika rendszerében* (Miskolc: Miskolci Egyetem ÁJK, 2012), 128 – 173.

taxation based on carbon content, the obligation to pay is determined on the basis of volume, although a method adapted to the previous one would achieve greater protection of the environment.

Due to the increase in oil prices since 2005, the Commission already writes in its 2007 Green Paper that changes to the energy tax regime are needed, so more attention should be paid to environmental protection.[45] A year later, an EU directive called on the Member States to set national energy efficiency targets.[46]

As a result of climate protection research and the failure of climate peaks, the Commission issued a follow-up to its Green Paper in 2009 to help the EU adapt to climate change, raising the issue of reducing the negative effects of climate change in the European Union. This was followed by the Europe 2020 Strategy (published in 2010), which required the Member States to increase the share of energy efficiency and renewable energy sources in general to 20% and to reduce greenhouse gas emissions by the same amount.[47]

At the UN Climate Change Conference in Cancun in 2010, it was also stated that an energy tax could also contribute to sustainable development and encourage a more efficient, greener, and competitive resource economy.[48] As a result, the Commission presented a proposal for a revision of the Energy Tax Directive in 2011, which was also part of the Europe 2020 Strategy. The Commission's proposal paves the way for better quality budget revenues, in line with the Europe 2020 strategy and the need for proper economic recovery and job creation.[49] The proposal points out that the strategy is incomplete, as the European Union has set significant but non-binding targets for energy policy by 2020. According to the institution,

45 "A környezetszennyezés ára – Ismét napirendre kerülhet a bizottságban az energiaadó „zöldítése"", Jogi Fórum, accessed June 9,2022, http://www.jogiforum.hu/hirek/22145.

46 Directive the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC (O.J.E.C. L 114, 27 April, 2006).

47 Tekla Sebestyén Szép, „Energetikai konvergencia az Energia 2020 Stratégia tükrében," *Közgazdasági Szemle*, no. LXIII (2006): 564–568.

48 "The European Parliament & Cancun," European Parliament, accessed May 13, 2022, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20101203-FCS06288+0+DOC+XML+V0//HU.

49 European Comission, EUROPE 2020. A strategy for smart, sustainable and inclusive growth, COM (2010) 2020.

energy taxation can play an important role in achieving the objectives of the 2020 Strategy, which requires that this type of tax be brought into line with the European Union's energy policy and climate change objectives.

The Commission proposes that the current Energy Tax Directive is inadequate, as it does not address the more ambitious goals set by the European Union in the field of energy and climate change policy. It also needs to be reviewed to address the problems that have arisen in the internal market and to resolve the anomalies that exist between the Directive and the European Union Emissions Trading Scheme (ETS). The elaborated proposal, therefore, reveals the problems that will already exist in energy taxation by 2011 and identifies the expected areas for regulatory change.[50]

According to the Commission, energy taxation would be appropriate if it changed in terms of carbon content. After all, linking the level of the tax to the energy content would be a great incentive to increase energy efficiency in all sectors. The creation of an EU ǧ tax framework will avoid diversity of Member States' green tax policies, leading to greater legal certainty and lower compliance costs for businesses. The proposal makes a clear distinction between sectors participating in and outside the EU Emissions Trading Scheme, which helps to avoid double taxation.[51]

In addition, Member States may choose to reform their tax systems to promote growth, i.e. to reduce the tax burden on labor in line with the increase in taxes on energy products[52] (in line with the Europe 2020 Strategy).[53] The legislation on energy taxation in the Member States is extremely diverse, one of the reasons being that the current Directive allows for several alternative exemptions and reductions, which, among other things, is a problem for companies present in more than one Member State at the same time. The initiative would also narrow the scope of these

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50 "A környezetszennyezés ára – Ismét napirendre kerülhet a bizottságban az energiaadó "zöldítése"", Jogi Fórum, accessed June 9, 2022, http://www.jogiforum.hu/hirek/22145.

51 Ralf Martin, Laure B. de Preux, Ulrich J. Wagner, "The impact of a carbon tax on manufacturing: Evidence from microdata," *Journal of Public Economics,* no. 117(2014): 1–14.

52 Chi ManYip, „On the labor market consequences of environmental taxes," *Journal of Environmental Economics and Management,* no 89 (2018): 136–152.

53 European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on Smarter energy taxation for the EU: proposal for a revision of the Energy Taxation Directive, COM(2011) 168.

exemptions. However, the European Parliament decided in the plenary in 2012 not to support the European Commission's proposal to revise the Energy Tax Directive.[54] Almost seven years later, the Commission has addressed the issue again and in 2019 published the European Commission's Communication on a Green Agreement. It already refers to an environmental review of the energy tax soon.

6. Towards more efficient, greener energy taxation

The European Union wants to reduce its greenhouse gas emissions by 55% by 2030 compared to 1990 and to achieve full climate neutrality by 2050, with the goal of the so-called Described in the European Climate Regulation, which is part of the Green Agreement. However, this requires forward-looking action by the Member States, so the European Commission has identified 17 sort of interventions[55] that it considers necessary to achieve the 2030 targets, as part of a package of climate protection proposals called 'Fit for 55', which included a proposal to amend the Energy Tax Directive.[56]

The current Directive is not in line with climate protection objectives, as it does not provide sufficient incentives for reducing greenhouse gas emissions and energy efficiency. In order to properly influence economic processes, it would require a higher tax rate than the current minimum from 2023 (implementing the increase over a period of ten years). Most importantly in the proposal, it would no longer apply taxation based on quantity but on energy content, which would eliminate one of the biggest flaws of the current Energy Tax Directive. Another outstanding innovation would be the extension of the subject matter of the tax (for example biogas) while abolishing several discounts and exemptions. In parallel, the new legislation will allow support for the energy-poor social group through redistribution. In general, we can talk about energy poverty if an individual

54 "Magas gázolajárakat hozhat az EP szerint az új energiaadó," Jogi Fórum, accessed May 22, 2022, http://www.jogiforum.hu/hirek/27562.

55 "Commission launches the Fit for 55% Package," Interreg Europe, accessed May 05, 2022, https://www.interregeurope.eu/news-and-events/news/commission-launches-the-fit-for-55-package.

56 European Commission, Proposal for a Council Directive restructuring the Union framework for the taxation of energy products and electricity (recast), COM(2021) 563.

is unable to heat their home to the right level, and proper heating is a disproportionate burden.[57]

Interestingly, the third and then fourth energy packages also address this issue, as it is more of a social issue, as it depends on the definition of the (government-defined) threshold as to who and how many are among the energy-poor, so it depends on subjective political considerations.[58]

To support vulnerable groups (and energy-efficient investments), the 'Fit for 55' package would create a €72.2 billion Climate Fund with a Member State's contribution and share (gross national income index, ǧ emissions, and population in need, would be different). Achieving climate neutrality would adversely affect the Central and Eastern European countries most dependent on fossil fuels, but redistribution through the Climate Fund will eliminate this imbalance. The Member States would have a margin of discretion concerning redistribution, so it is up to their subjective consideration to support the lower strata of society or to extend it to the middle and possibly upper classes. Furthermore, it is questionable what effect this charge on energy products will have on the market price of energy, as it is likely to increase. From Hungary's point of view, this could lead to the unsustainability of the overhead reduction measure. However, in the long run, there are significant benefits to be gained from achieving climate neutrality and energy security.

7. Conclusion

According to my findings, which are supported by European Union documents and relevant UN studies (for example the Stern Review), economic incentives such as energy taxation are needed to achieve the European Union's goals in the field of energy and climate change. An energy tax is a financial instrument that can effectively influence energy production and use and make energy users interested in achieving energy efficiency.

My conclusion is that energy policy is becoming increasingly important in the European Union. The current EU tax base for energy taxation is

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57 Orsolya Fülöp and Adrienn Lehoczki-Krsjak,"Energiaszegénység Magyarországon," *Statisztikai Szemle*, no. 8–9 (2014): 820–831.

58 European Commission, Commission staff Working paper an energy policy for consumers SEC (2010) 1407.

provided by Council Directive 2003/96/EC, but literature research and other studies have revealed the problems that have arisen since the adoption of this legislation in the 2011 Commission proposal to revise the Directive and the 2019 Green Agreement is also shown. The Directive aims to enable the European Union's single energy market to function smoothly and to avoid distortions of trade and competition resulting from major differences between national tax systems. Furthermore, the taxation of energy products and, where appropriate, electricity may be one of the most important means of achieving the objectives of the Paris Agreement.

However, the Directive is currently unable to achieve these objectives effectively, and it is negative that it does not address the more ambitious goals set by the European Union in the field of energy and climate change policy. It is also problematic that it cannot adequately address the problems that have arisen in the internal market and that its scope is not in line with the scope of the EU Emissions Trading Scheme (ETS). Optimally, an energy tax not only serves to protect the environment but is also good for helping economic growth and addressing social tensions. The justification for environmental taxes, such as energy taxes, still rests on a market basis, while we are seeing increasingly unfavorable signs of climate change produced by a market economy. The European Union cannot achieve these goals alone, but it also needs the significant involvement of the Member States. The difficulties mentioned here are, for example, that the design of the tax structure and the choice of tax instruments fall within the sovereign competence of the Member States, and that only the Member States are able to reduce emissions. However, the European Union also has a long way to go in these areas, so regardless of these difficulties, it must adopt and implement strict targets. Overall, the European Union's goals in the field of energy and climate change can only be achieved through close cooperation between the Member States and the European Union, often by relinquishing part of the sovereignty of the Member States. In the 'Fit for 55' climate package, one of the main aims of which is to amend the Energy Tax Directive in the way needed to achieve climate neutrality. The two most important proposals in this regard are to increase the minimum tax rates, which have remained virtually unchanged since 2003, from 2023, and to extend the scope of the Energy Tax Directive. This would increase the price of fossil fuels, making renewables even more desirable. This is important

because these energy sources are important not only for achieving climate protection goals but also for reducing the EU's energy dependence. Reducing the scope of exemptions and reductions would also serve this purpose, as many fossil fuels used in transport currently benefit from discounts. Several countries do not agree with the reforms, so it is doubtful that this part of the 'Fit for 55' climate package will be adopted. A key social aspect of the proposal is that it would provide support to vulnerable people through the redistribution of a climate fund. However, energy poverty is more of a social issue, as it depends on the definition of the (government-defined) threshold as to who and how much is energy poor, so it depends on subjective policy considerations. Thus, it may depend on the subjective policy considerations of a given Member State whether it supports the most vulnerable or redistributes a higher income group with lower exposure.

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The Alignment of Taxation and Sustainability: might the Digital Controls of Non-Financial Information Become a Universal Panacea?

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Abstract: There are certain trends that are already affecting –or will soon inevitably affect, the evolution of the tax law everywhere. These are the digitalization processes started by many tax administrations and the current challenges experienced by accounting and auditing institutions to provide reliable non-financial information. Both may offer new opportunities for fairer taxation in the search for sustainable development. In the middle of digital and green transformations, would it be possible to better adjust the tax treatment deserved by the taxpayers in accordance with their real impacts on sustainability? Regional and global organizations are devoting efforts to ensuring some degree of homogeneity in the measures to adopt. The purpose of the following pages is to open the discussions for in-depth research in the future. The dogmatic-legal and analytical methods have been used to supplement the comparative one in carrying out the review of the current state of the art and proposed changes.

1. Introduction

There are certain trends that are affecting – or will soon inevitably affect, the evolution of tax law all over the world. One is quite clear; the other is subtle. First, the sustained digitalization processes started by many tax

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administrations allow mobilizing domestic revenues, by stimulating voluntary compliance, fighting fraud, etc[1]. Up to date, their efforts have been mainly focused on a relatively limited perspective: the financial one. They strive to raise revenue and governments thus make attempts to face growing public expenditure after the economic crisis.

Nowadays, with new means, it should be also possible to devise better controls in order to adjust the future tax treatment deserved by the taxpayers in accordance with the real impact of their distinct economic activities on sustainability. In business practice, the tax and finance functions are already playing a greater role in helping their organizations address their Environmental, Social and Governance (ESG) objectives[2].

This clearly implies the necessary adoption of an additional extra-fiscal perspective when establishing and applying tax legislation. Quite often tax administrations do not feel comfortable with this expanded mission, as they depend on reinforced cooperarion with various specialized institutions in each specific field of action (e.g., environmental authorities[3]) to properly implement regulatory taxes[4].

Undeniably adequate funding for all the ongoing digital and green transformations[5] requires more reliable data. Thus, a second trend shows

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1 OECD, *Tax Administration 3.0: The Digital Transformation of Tax Administration* (Paris: OECD, 2020) https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/tax-administration-3–0-the-digital-transformation-of-tax-administration.pdf; OECD, *Tax administrations continue to accelerate their digital transformation*, (Paris: OECD, 2021) https://www.oecd.org/tax/forum-on-tax-administration/news/tax-administrations-continue-to-accelerate-their-digital-transformation.htm; OECD, *Towards Seamless Taxation: Supporting SMEs to Get Tax Right*, OECD Forum on Tax Administration. (Paris: OCDE, 2022) https://doi.org/10.1787/656c89ab-en.

2 "Tax Executives Embrace ESG & Tax Transparency," BDO TAX OUTLOOK SURVEY, 15, accessed July 10, 2022, https://insights.bdo.com/rs/116-EDP-270/images/TAX_2022-Tax-Outlook-Survey.pdf?aliId=eyJpIjoiTVFGbkRHb0lHVjdoUkN3ciIsInQiOiJRK1FBRDlWUnZLZWdIOTkrUXRPV3VnPT0ifQ%253D%253D.

3 United Nations, *Handbook on Carbon Taxation for Developing Countries. United Nations Committee of Experts on International Cooperation in Tax Matters* (New York: UNDESA, 2021), accessed June 10, 2022, https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2021–10/Carbon%20Taxation.pdf.

4 Reuven S. Avi-Yonah, "The Three Goals of Taxation," *Tax Law Review* 60, no. 1(2006): 1–28.

5 There are significant efforts to mitigate and adapt to climate change both in the public and private sector EY, Climate Cash and Tax Barometer, accessed July 10, 2022, https://

how the accounting and auditing institutions are currently experiencing enormous challenges to rapidly and timely provide them. As it is critical to carry out sound evaluations of policy objectives and management in times of scarcity, both on the public and private side, revealing all this information and exploiting its full potential is of utmost importance.

The availability of non-financial information – whose quality is being gradually enhanced, will probably result in some expected changes in the design of future tax rules to truly meet the sustainable development goals (SDGs). For instance, regarding tax incentives – many of them under scrutiny[6], specific requirements could be accurately approved and supervised. This calls for relevant metrics and procedures established for both companies and administrations. The Global Tax Expenditures Database "provides timely and consistent information on preferential tax treatments such as exemptions, deductions, credits, deferrals and reduced tax rates that are implemented by governments worldwide to promote different policy goals"[7].

This is not a purely domestic problem. Different approaches are often found in a comparative analysis. Various regional and global organizations in charge of verification are aware of the complicated existing situation. So, they are uniting their efforts to allow the comparability of the measures to adopt, to be carefully collected and integrated at a later stage. This initial movement should serve to deliver, as a consequence, a fairer quantification of taxes and benefits.

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www.ey.com/en_gl/tax-guides/ey-climate-cash-and-tax-barometer.

6 United Nations Conference on Trade and Development, "The Impact of a Global Minimum Tax on FDI," in *World Investment Report* (New York: UNCTAD, 2022), 99–130. See: *María* Amparo Grau Ruiz, "Perfiles de la fiscalidad empresarial venidera: de los incentivos que podrían subsistir o no en el caso de las grandes multinacionales a la propuesta de modificación del ecosistema de las pymes," *Revista Técnica Tributaria* vol. 2, no. 137(2022): 7–18.

7 More information is available at Flurim Aliu, Agustín Redonda, Christian von Haldenwang *The Global Tax Expenditures Database (GTED) Progress Report*, Deutsches Institut für Entwicklungspolitik - (DIE) & Council on Economic Policies (CEP), accessed April 13, 2022, https://gted.net/2022/04/the-global-tax-expenditures-database-gted-progress-report/; Christian Von Haldenwang, Agustín Redonda, Flurim Aliu, *Shedding Light on Worldwide Tax Expenditures. GTED Flagship Report 2021*, Deutsches Institut für Entwicklungspolitik - (DIE) & Council on Economic Policies (CEP), accessed August 23, 2021, https://gted.net/2021/05/shedding-light-on-worldwide-tax-expenditures/.

In the European Union, several initiatives have been debated and implemented in recent years to promote sustainability[8]. The European the European Financial Reporting Advisory Group (EFRAG) has been charged with the task to develop a common framework to allow fluent communication and dialogue among all the stakeholders (tax administrations included). The present lack of certainty creates undesirable imbalances when assessing genuine progress towards the SDGs. Hopefully, with the new technological means and the readiness of supplementary information, this will improve.

Hence, the main research goal of this contribution is to find out novel coordinated ways to help in the achievement of the difficult alignment of taxation and sustainability[9]. With that purpose in mind, the reader will notice that the research conducted has made use of several methods: comparative, dogmatic-legal and analytical. The hypothesis is that the generalized implementation of digital controls in tax matters combined with the expansion of the available amount and quality of non-financial information might have the potential to become a universal panacea, only if both are coherently developed –by linking these issues so that they converge to increase the effects of taxation on sustainability and vice versa. Let us check whether the maturity level of the modifications in each field and the interaction between them can really support the objective of devising more SDGs friendly tax systems.

2. Automation and Taxation

The state-of-the-art is here shown with a summary of valuable contents and facts described in recent publications. On average, every year it becomes easier for a medium-sized domestic company to fulfill its tax obligations,

8 María Amparo Grau Ruiz, "Corporate Social Responsibility and taxation in regulation: the EU perspective," in *Fair Taxation & Corporate Social Responsibility,* ed. Karina Kim Engholm Elgaard, Rasmus Kristian Feldthusen, Axel Hilling, and Matti Kukkonen (Copenhagen: Ex tuto publishing, 2019), 201–227.

9 Frans Vanistendael, "Reflections on sustainable taxation," *Revista Técnica Tributaria* vol. 4, no. 127(2019): 137–147.

because of increased automation[10]. It allows compliance to be monitored more efficiently, even in real-time.

Evidently, the introduction of electronic tax filing and payment systems has reduced tax compliance times globally. Electronic filing (e-filing) and electronic payment (e-payment) are the processes by which tax returns and payments are submitted online via the Internet. Many economies have those systems for VAT. They have the potential to reduce the compliance burden on taxpayers, reduce fraud and provide governments with better information. Some tax administrations in the European Union and other countries have adopted standardized formats for reporting tax information[11]. Although they make use of technology and provide a more secure and reliable system for the exchange of data between tax administrations and taxpayers, they are usually not integrated systems and add an additional step to the transmission of data between taxpayers and tax authorities. Moving to real-time systems (Level III, which requires close integration of taxpayers' and tax administrations' technological solutions) can lead to greater control over taxpayers' data and improved fraud prevention. An example can be found in Spain with real-time SII [Immediate Information Supply] invoices[12]. These systems require significant investment in design and implementation. Some economies are considering or piloting the next technological level (Level IV). The European Commission's

10 PWC *Paying Taxes 2020* offers the changing landscape of tax policy and administration across 190 economies. In the 190 economies covered, there has been a 16% drop in the number of payment indicators since 2012 and, over the same period, the average time taken by the company in our case study to fulfill key tax obligations has decreased by 10%. More information at https://www.pwc.com/payingtaxes, accessed July 11, 2022. The World Bank Group's *Doing Business* Paying Taxes ranking indicator includes three components in addition to the Total Tax & Contribution Rate. These estimate compliance costs by looking at hours spent each year on tax work and the number of tax payments made in a tax year, and evaluate and score certain post-filing compliance processes.

11 The SAF-T or Standard Audit File for Tax is based on a model developed by the OECD, which can be implemented as a 'push' or 'pull' system by countries.

12 Antonio Fernández de Buján y Arranz, "Robotization in Excise Duties: Has It Arrived with the Immediate Supply of Accounting Books (SILICIE)?" in *Interactive Robotics: Legal, Ethical, Social and Economic Aspects*, edited by María Amparo Grau Ruiz(Cham: Springer, 2022), 130–134.

Directorate-General for Taxation and Customs has explored the use of blockchain technology as a potential basis for the digital single market. The security and reliability offered by this technology are very attractive for VAT administration, but a solution has yet to be developed. In theory, this technology could be used for non-financial information as well[13].

Obviously, the tax administrations need to assess which level of technology is appropriate for them[14], depending on the complexity of their tax system, the availability of IT infrastructure and the level of sophistication of their taxpayers. There may be several obstacles: lack of funds or political will to invest in new systems, insufficient telecommunications infrastructure, or cultural reluctance to abandon paper-based systems.

Doing Business 2020 has collected new data on the implementation of some of these reforms, including the use of pre-filed tax returns, electronic invoices and the existence of a comprehensive online tax administration portal. E-invoices have several advantages over paper ones: they are less prone to errors, reduce the possibility of fraud and reduce processing costs. Tax administrations may choose to use platforms that allow trading partners to exchange electronic documents over a specific network (e.g., Pan-European Public Procurement Online). Another option is to use XML formats and transmit them via an online portal (like in Italy). Finally, tax administrations may use online cash register initiatives, whereby retailers are required to use OCR software to instantly upload sales data to the tax administration portal (the Republic of Korea and the Russian Federation use this system). The use of big data created by e-invoicing systems has led to improvements in the use of information for compliance purposes and the amount of VAT collected by tax administrations.

All tax administrations in the OECD High Income Group, South Asia, Europe and Central Asia use online tax portals. Tax administrations in Sub-Saharan Africa, East Asia and the Pacific lag behind.

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13 Virginia Martínez Torres, "Intelligent Management and Control of Data Contained in Non-financial Reporting," in *Interactive Robotics: Legal, Ethical, Social and Economic Aspects*, edited by María Amparo Grau Ruiz (Cham: Springer,2022), 185–191.

14 Rita de la Feria, María Amparo Grau Ruiz, "The Impact of Robotics in Tax Administration," in *Interactive Robotics: Legal, Ethical, Social and Economic Aspects*, ed. María Amparo Grau Ruiz (Cham: Springer,2022), 115–123.

The time taken by tax administrations to refund VAT or approve a Corporate Income Tax (CIT) adjustment may also have a cultural dimension, depending on how taxpayers are assessed from a risk perspective and on the prevailing ethos of tax administrations (i.e. facilitation or enforcement). Improvements in technology make the refund process faster and less susceptible to fraud. Technology has accelerated the VAT claim and CIT adjustment processes.

For tax administrations and taxpayers to reap the full benefits of online systems, proper implementation and management are crucial. Sometimes their advantages have not been fully exploited because they are not used by most taxpayers.

Recent surveys show that many organizations are feeling the duty of transforming themselves, at a time when the pace of regulatory change is accelerating. In these circumstances, data and technology may help them. Some companies reallocate part of the tax and financial budget from routine activities (such as tax compliance) to strategic activities (in tax policy, planning and litigation), or invest simultaneously in strategic internal activities, such as data management. Access to up-to-date data and technology is critical to achieving transparency in a changing global tax landscape. The tax and finance staff often need to strengthen their technical tax skills with some data, process and technology skills. Investment in tax technology remains a top priority for the tax department (in data analytics, business intelligence software, tax provision software and tax automation)[15]. Some companies build in-house tech capabilities. Others partner with a vendor or follow a hybrid approach. For instance, in Vietnam, more companies are using advanced accounting software, which allows them to calculate taxes using data automatically uploaded from accounting systems.

Last, but not least, computation and tax experts should pay attention to the work of different oversight institutions. It is essential to monitor the effects of technologies and data on the tax law, taxpayers and society. To that end, supervisory bodies have a decisive role to play. However, they are also

[15] Investing in tax technology remains a top priority for the tax department. BDO (2022) The 2022 BDO Tax Outlook Survey, p. 13. The full report is available at: https://insights.bdo.com/tax-outlook.html.

obliged to undergo transformation processes of their own that enable them to perform their tasks efficiently[16].

3. Sustainability and taxation

"The next ten years will be driven by a sustainability and stewardship mindset that prioritizes the needs of all stakeholders while accelerating digital innovation to create lasting business value"[17]. In the corporate world, the adoption of ESG measures has gone from best practice to business imperative. Building the business sustainably is the responsibility of the entire organization, including the tax department.

Corporate tax transparency has emerged as a central ESG issue, long the focus of the OECD and recently the subject of a new Global Sustainability Standards Board standard. It is also a clear mandate for tax managers.

Notwithstanding this, data collection and analysis are still problematic, highlighting an underlying problem of tax data governance and fragmented systems. This problem is not the lack of reporting standards, but a lack of clarity on which standards and which ESG framework bodies to follow. The existing alternatives to meet the current obligations and voluntary commitments, in both the private and public sectors, are reviewed in the following paragraphs concerning the Spanish experience[18].

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16 In the U.S. different oversight institutions have made continuous assessments of the efforts made by the Internal Revenue Service (IRS) when adopting new technologies to better perform its functions and provide a better service to taxpayers. They show which steps have been succesful, in which ones there have been some downsides, the reason for said downsides and proposals to overcome them. Thus, the reports prepared by the Treasury Inspector General for Tax Administration (TIGTA) and the United States Government Accountability Office (GAO) are of great interest. See: María Amparo Grau Ruiz, "Fiscal Transformations Due to AI and Robotization: Where Do Recent Changes in Tax Administrations, Procedures and Legal Systems Lead Us?," *Northwestern Journal of Technology& Intellectual Property,* vol. 19, no. 325 (2022): 325–363.

17 Wayne Berson, "The 2022 BDO Middle Market CFO Outlook Survey". Accessed August 23, 2022, https://insights.bdo.com/cfo-survey.

18 The author has tried to synthesize here the main discussions in the AudIT-S Research Seminar *Fiscalidad, digitalización y medioambiente ante los inminentes cambios en contabilidad y auditoría* [Taxation, digitisation and the environment in the face of imminent changes in accounting and auditing] held on the 29th of June 2022 at the Instituto de Estudios Fiscales, Spanish Ministry of Finance, in Madrid. She is very grateful to the speakers that pointed out these relevant topics in their fields of expertise: Elisa García Jara, José Muñoz Jiménez,

3.1. Non-financial information in private companies

The commitment to sustainable development requires consistent decisions by companies in the exercise of their economic activity, and by regulators. In view of the current differences between accounting criteria and tax criteria for determining the economic profit of companies, how can taxation be improved by aligning it with pro-sustainability strategies?

From an accounting point of view, basic standards are being developed for the presentation of non-financial reporting by certain companies. At both the national and European levels, stakeholders are demanding greater fiscal transparency and reporting on sustainable development. For example, some environmental expenses incurred by companies may be considered deductible if they correspond to a plan formulated by the taxpayer and accepted by the administration (as in Article 14.4 of the Corporate Tax Law). Otherwise, they would be subject to a positive adjustment in the accounting result before tax to arrive at the tax base, increasing it. The Spanish Law 13/1996 incorporated in Article 35 of the Corporate Income Tax Act a deduction of 10% of the gross tax payable on investments in tangible fixed assets that were earmarked for environmental protection, but to be able to apply this deduction, a certificate from the corresponding environmental body was required. Since Law 35/2006, this type of incentive has been reduced, until repealed by Law 27/2014 due to the existence of specific environmental regulations[19].

Law 11/2018 establishes that certain companies must present a statement of non-financial information that must contain the profits obtained

Antonio Prado Martín (Accounting Professors), José Manuel López (Auditor in Grant Thornton) and Santiago Martínez Argüelles (Professor and Spanish Court of Auditors). The recording in Spanish: accessed August 23, 2022, https://zoom.us/rec/play/x0oVc7KdGjXttyI_i_f2gEoHlQYbzqq8loUB7rIgg9XeNfKs-yA0fiGYCXdotDWXny1SzdapO3_7oxo._1jfwGsqfOTnyVW-?startTime=1656491514000&_x_zm_rtaid=rfN-ywmWTdmL-5R8OKAv88A.1658834767274.e558e761280bd37022ec28d3047728ff&_x_zm_rhtaid=591.

[19] Ley 13/1996, de 30 de diciembre, de Medidas Fiscales, Administrativas y del Orden Social. BOE No. 315, 31/12/1996. Ley 35/2006, de 28 de noviembre, del Impuesto sobre la Renta de las Personas Físicas y de modificación parcial de las leyes de los Impuestos sobre Sociedades, sobre la Renta de no Residentes y sobre el Patrimonio. BOE No. 285, 29/11/2006. Ley 27/2014, de 27 de noviembre, del Impuesto sobre Sociedades. BOE No. 288, 28/11/2014.

by each country, the taxes on profits paid and the public subsidies received[20]. Further work is needed to bring the quality of financial reporting in line with that of non-financial reporting, so that it provides insight into economic performance, risks and opportunities in environmental, social and governance aspects. Only on the basis of reliable data can effective fiscal policies be implemented that truly lead to fair taxation for sustainable development.

There are several international frameworks with which to prepare non-financial information, such as the universal, sectoral and thematic GRIs. The Directive 2013/34 indicated that non-financial information should be included in the management report, which should include key sustainability indicators. The Directive 2014/95 indicated which type of companies should prepare their non-financial statements and what information should be provided. The Commission published a communication setting out the methodology for producing such reliable, relevant, complete and clear non-financial information. Materiality (what is important in determining what information is provided) is not defined, there is no unified format for non-financial information statements and there is no breakdown of the impacts of the company's activity on the environment and of the environment on the company.

[20] In Spain, Royal Decree Law 18/2017, in view of a possible fine, transposed the directive and was subsequently approved as Law 11/2018. Ley 11/2018, de 28 de diciembre, por la que se modifica el Código de Comercio, el texto refundido de la Ley de Sociedades de Capital aprobado por el Real Decreto Legislativo 1/2010, de 2 de julio, y la Ley 22/2015, de 20 de julio, de Auditoría de Cuentas, en materia de información no financiera y diversidad. BOE No. 314, 29/12/2018. It is worth noting that in the European Union since 2011 there have been continued efforts (two communications, a resolution of the European Parliament, then two directives, a communication on guidelines on methodology, etc.). The Directive 2014/95/EU – also called the Non-Financial Reporting Directive (NFRD) – lays down the rules on the disclosure of non-financial and diverse information by certain large companies. This directive amends the Accounting Directive 2013/34/EU. In June 2017 the European Commission published its guidelines to help companies disclose environmental and social information. In June 2019 the European Commission published guidelines on reporting climate-related information, as a supplement to the existing ones. Detailed information can be found here, accessed August 23, 2022, https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en.

In the next four years, the EU intends to cover what has been done in financial reporting since Fra Luca Pacioli in order to generate non-financial information that is useful to users (investors, non-governmental and governmental institutions, or consumers). The 2017 and 2019 attempts to improve non-financial information made by the European Commission have not improved its quality. In the Green Deal, there are challenges, such as zero greenhouse gas emissions, maintaining natural capital and improving the quality of life, which are linked to the availability of this information. In order to improve sustainability information at the lowest possible cost, the proposal for a Directive of 21 April 2021 has been presented[21]. The Commission has mandated EFRAG to develop a reporting framework for large companies and, from 1 January 2026, small and medium-sized companies that are part of public-interest companies should include in their management report the following points: a brief description of the company's business model and strategy on sustainability issues; a description of the sustainability-related objectives set by the company and the progress made by the company in achieving these objectives; a description of the role of the administrative, management and supervisory bodies with regard to sustainability issues; a description of the company's policies in relation to sustainability issues; a description in relation to sustainability issues of the due diligence process, negative impacts and preventive measures; a description of the main risks for the company related to sustainability issues and relevant indicators. In addition, companies must also disclose information on intangible assets, including information on intellectual, human or social and relational capital. Companies will communicate the process undertaken to determine the information they have included in the management report taking into account short-, medium- and long-term horizons. The information shall be forward-looking and backward-looking, as well as qualitative and quantitative. Where appropriate, the information shall contain data on the company's value chain, its operations, and its

[21] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting. COM/2021/189 final. The text of this proposal can be found here, accessed August 23, 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0189.

business relationships, among others. The information shall contain a reference to other information contained in the management report and to the amounts reported in the annual financial statements. Member States may in exceptional cases allow this information to be omitted provided that the undertaking justifies that it may cause damage or affect its commercial position. Where the undertaking is a subsidiary, it shall be exempted from presenting this information if it is already included in the consolidated report of the parent undertaking. The Commission shall establish rules for the presentation of non-financial information for small and medium-sized companies, the information shall be presented in a single electronic format, shall be published within a reasonable period of time – not exceeding 12 months, the information shall be understandable, relevant, representative, verifiable, comparable and give a true and fair view. The Commission will specify – by reviewing it every 3 years, the information that the company is required to present on environmental, social and governance factors. For example, environmental factors include climate change mitigation, climate change adaptation, marine waters and resources, resource use and the circular economy, pollution, biodiversity and ecosystems.

In April 2021, EFRAG has published a draft – under public exposure for 6 months, with the purpose of organizing the reporting of relevant information on sustainability issues, fostering maximum comparability across sectors, and ensuring a balance between sector-agnostic and sector-specific and company-specific information and facilitating navigation through the reported information.

These European sustainability reporting standards are organized by categories of three types: cross-cutting standards cover the general provisions that apply to sustainability reporting and disclosure requirements; thematic standards cover a specific sustainability topic or sub-topic (e.g., policies, objectives, actions and action plans, resources adopted by the company on a given topic or sub-topic, as well as the corresponding performance measures for each topic or sub-topic). Sectoral standards are foreseen but are not yet developed and are therefore not included in the consultation. The thematic standards address, first, environmental issues on climate, pollution, water and marine resources, biodiversity and ecosystems and on circular economy. Second, social issues such as labour or value chain labour, impact on local communities and on end-users and consumers. The third

thematic group is on governance, risk management and internal control and on business conduct.

Most of the information proposed as mandatory by the new directive was already included in 2018 in the transposition process. Although the previous directive did not require the verification of non-financial information, Law 11/2018 already required its verification by an independent expert. In practice, for the user of this non-financial information, it is very complicated to compare different indicators, and companies can make use of interpretations. The typology of non-financial information right now comprises the statement of non-financial information because of Law 11/2018, the sustainability reports of listed companies from 2010–2011 and the integrated report that started in 2012–2013 (where the aim was to integrate non-financial information and forward-looking positions). As of 1 January 2021, the threshold has been lowered from 500 to 250 employees, so more Spanish companies are already experiencing this obligation to present non-financial information, in contrast to the rest of Europe. However, the small and medium-sized companies in Spain continue to be left out of the obligation to formulate the statement of non-financial information. Law 11/2018 equated the statement of non-financial information to the annual accounts, at a point in the shareholders' meeting where the company's shareholders must approve it and have to be formulated by the administrators. Companies can either include it within the management report or prepare it as a separate document (this would be preferable because it is required to be presented on the website, and failure to do so may lead to the closure of the Register). When a subsidiary of a company whose parent company is in another EU Member State in which such a non-financial information statement is prepared, then it is obliged in Spain to submit a complementary document when some details have to be added to fulfill the stricter requirements of the Spanish legislation if that is the case.

The verification of the non-financial information statement is mandatory. The verifier may be an independent expert. According to the ICAC consultation, auditors can be verifiers of both audited and non-audited companies. They cannot prepare the statement of non-financial information and verify it because there would be an incompatibility. The verification of the non-financial information as a whole is done in accordance with an ISAE 3000, which is an international limited assurance standard, not an audit.

Verifiers of non-financial information are asked to perform an assurance where the procedures to be performed are more limited than in reasonable assurance. It is also not a validation of a management system that special certifiers perform (e.g., carbon footprint). The materiality used by the verifier of the non-financial information statement does not necessarily have to be the same as that determined by the company. S/he analyzes the scope, relevance and completeness of the content of the information included in the statement. The compilation process that a consolidated company has, deserves special attention because the data may be generated differently and must be homogenized. The verifiers conduct tests on sample selections of certain indicators, both quantitative and qualitative. At the end, they can issue four conclusions: favourable, qualified, unfavourable – when everything verified would be wrong and denied –when they have not had enough information to be able to verify.

3.2. Non-financial information in the public sector

In Spain, in FY20 the public sector committed expenditure of almost 490 billion euros and 683 entities make up the state public sector. Being aware of its magnitude, one can question to what extent it is addressing sustainability issues[22], not only due to the clear need to play an exemplary role but also due to its wide impact on society. It is worth noting that its commercial companies are affected by Law 11/2018 and are subject to the presentation of non-financial information as well, while public administrations are explicitly excluded.

The General Budgetary Law[23] requires reporting on objectives associated with expenditure budget programmes, expressing indicators (in the

[22] Various authors. "Especial sostenibilidad", *Revista Española de Control Externo*, vol. XXIII, No. 67 (January 2021): 5, accessed August 22, 2022, https://recex.tcu.es/tribunal-de-cuentas/export/sites/nuevo-recex/.galleries/pdf/Revista-67.pdf.

[23] Several articles of the Spanish *Ley General Presupuestaria* foresee non-financial aspects in budgeting, management and accountability. Arts. 36–37 establish an annual objectives report for each expenditure programme, art. 37 mentions reports (two on impact and one alignment). Art. 69 objectives and results as a management principle, arts. 70–72 management by objectives, multiannual programmes with a system of objectives, results-based budgeting, management report and evaluation. Art.125 states that the IGAE is responsible for principles and criteria for monitoring objectives. Art.126 deals with the information system for monitoring objectives. Art.128 in the annual accounts stresses the degree

2021 budget there were 400 budget programmes). From a formal point of view, the programmes contain the definition of policies, the analysis of risks on which they intend to act, the definition of objectives and propose indicators for monitoring and evaluation. One problem is that the relevance of the indicators is not always appropriate, but the biggest problem is that the collection, capture and verification of the data associated with these indicators are complex and not always reliable.

Progress is being made, and the information contained in general budgets is of increasing quality. It is mandatory to introduce three reports accompanying the draft General State Budget: Gender impact report, Report on the impact on children, adolescents and families, Report on the alignment of the General State Budget with the SDGs of Agenda 2030[24]. The latter is an excellent starting point as a regulatory framework for presenting non-financial information to facilitate international comparability. The United Nations and INTOSAI (the international umbrella organisation of supreme audit institutions) have established methodologies for developing internationally agreed indicators for audits of these types of information. The budget alignment report together with the systematic monitoring by INE of the available information on the 232 indicators of the Sustainable Development Goals[25] is a unique opportunity for the presentation of non-financial information on the activity of the public sector.

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of achievement of objectives, costs and physical and financial deviations. Ley 47/2003, de 26 de noviembre, General Presupuestaria. BOE No. 284, 27/11/2003.

[24] The blue series contains a cross-cutting vision of the General State Budget, accesed August 22, 2022, https://www.sepg.pap.hacienda.gob.es/Presup/PGE2022Proyecto/MaestroDocumentos/PGE-ROM/N_22_A_Z.htm, https://www.sepg.pap.hacienda.gob.es/sitios/sepg/es-ES/Presupuestos/InformesImpacto/IA2022/IAPGE2022/Paginas/Inicio.aspx. United Nations General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development. Resolution adopted by the General Assembly on 25 September 2015. A/RES/70/1.

[25] "The 2030 Agenda for Sustainable Development is made up of 17 goals and 169 targets. In order to monitor them, 232 indicators were designed that can be measured through the statistical data collected here. The updating of these indicators, which constitute a statistical operation included in the current Annual Programme, is continuous and includes information from both the INE and other official sources that will be incorporated progressively", accessed July 10, 2022, https://www.ine.es/dyngs/ODS/es/index.htm.

Since 2015, the audit function of the Spanish Court of Auditors has included transparency, environmental sustainability and equality[26]. In the area of environmental sustainability, air quality, water management, desertification and fire prevention are being analyzed. There is a cross-cutting issue in all the audits since 2015, it is verified that all the objectives established in the law on transparency and good governance and the obligations of the administrations are fulfilled. It has been approved as an audit that is going to be carried out this year and there is the design of everything that has to do with fraud prevention plans and conflict of interest in the management of Next-generation funds.

The annual accounts must include a management report on the degree of achievement of objectives, deviations, and costs. Administrations must take this type of information into account in the budget, in management and when preparing the general account of the State. In the recent Court of Auditor's statement on the 2020 account in Parliament, it is highlighted that in the management report, which is where the information about monitoring and fulfillment of all these objectives and indicators should be placed, it does not appear, and this imposes a very serious limitation in terms of monitoring and evaluating the performance of the public sector this year.

Since the Declaration on the 2017 General State Account, the Court of Auditors includes a paragraph on compliance with the duty to prepare non-financial information statements by companies in the public business sector[27]. The public corporate sector is obliged to prepare its non-financial information statement, although there is diversity in compliance. As

[26] In accordance with the art. 9.1 of the Ley Orgánica 2/1982 (Ley Orgánica 2/1982, de 12 de mayo, del Tribunal de Cuentas. BOE No. 121, 21/05/1982. The new wording was added by the Ley Orgánica 3/2015. Ley Orgánica 3/2015, de 30 de marzo, de control de la actividad económico-financiera de los Partidos Políticos, por la que se modifican la Ley Orgánica 8/2007, de 4 de julio, sobre financiación de los Partidos Políticos, la Ley Orgánica 6/2002, de 27 de junio, de Partidos Políticos y la Ley Orgánica 2/1982, de 12 de mayo, del Tribunal de Cuentas. BOE No. 77, 31/3/2015), the audit function of the Court of Audit shall refer to the submission of the economic-financial activity of the public sector to the principles of legality, efficiency, economy, transparency, as well as environmental sustainability and gender equality.

[27] 4.90 The CAGE 2020 report does not include the balance sheet and management report (...) which implies (...) to a certain extent, a breach of the duty to evaluate spending policies,

each company chooses the used framework, this generates problems of comparability. Verifications may be different depending on who the entity is. The accounts of any public entity in the state sector can be viewed on the IGAE website[28]. However, it is organized mostly in financial terms, not yet ready for the non-financial information reports. The lack of explicit reference does not mean that the public sector company has not prepared its report. In the public administrative sector, a journey in integrated reporting is starting and the margins for improvement are still significant. The SDG framework can be an interesting accelerator for standardizing and implementing integrated public sector reporting[29].

4. Conclusion

The aspiration for a fair distribution of taxes and benefits in our societies may become true in the new context of the useful tools and metrics developed to advance in the achievement of Sustainable Development Goals. At least, the means that are being introduced or modified in the functioning of our economies could be designed with that perspective in mind, both in the private and the public sector. Surely, the integration of non-financial information with the financial one and the efficient treatment of the data with the available technologies opens an avenue of possibilities for greater tax justice, but only if properly supervised.

The difficult alignment of taxation and sustainability can be effectively achieved by the Governments and Parliaments through the actual incorporation of non-financial information when drafting and passing tax

provided for in Article 72 of the General Budgetary Law. Statement CGE 2020 (Tribunal de Cuentas, 2022).

28 Registro de cuentas anuales del sector público, accessed July 10, 2022, https://www.igae.pap.hacienda.gob.es/sitios/igae/esES/Contabilidad/ContabilidadPublica/CPE/rcasp/Paginas/inicio.aspx.

29 The European Organisation of Supreme Audit Institutions (EUROSAI) and the European Confederation of Internal Audit Institutes (ECIIA) are working together to promote good governance, accountability and audit across the European public sector. A common project tries to determine the extent to which Integrated Reporting has been, or is expected to be, adopted in the European Public Sector. Accessed July 10, 2022, https://www.eciia.eu/2021/07/integrated-reporting-in-the-european-public-sector-its-time-to-act/, https://www.eurosai.org/handle404?exporturi=/export/sites/eurosai/.content/documents/Integrated-Reporting-in-the-European-Public-Sector.pdf.

rules, and obviously by ensuring their adequate application in administrative routines. The frequent additional efforts required tax administrators to leave their comfort zones when managing non-revenue goals through extra-fiscal measures (either with taxes or tax incentives) could be minimized if significant data concerning legally accepted sustainability indicators were included in streamlined digitalized procedures. As previously explained, the current technologies already allow the automatic feeding of many data within the tax management systems, so this strategy could be rationally extended to some sustainability data. This fact should no longer be ignored and cause the necessary adaptation of the legal order. In practice, by establishing channels to weigh the financial information with the non-financial one, the tax rules could be more accurately connected to real life. This would avoid poor objective estimates in the assessment of taxes and tax expenditures, quite anachronic in this century.

The comparative, dogmatic-legal and analytical research conducted here shows that the proposed approach is feasible. In the moment of the reception or update of the digital technologies, the legislature should pay attention (and consequently reflect this priority in the final design of the tax rules) not only to the treatment of financial data for purely collection purposes increasing the tax revenue but also to the co-benefits of taking into consideration all the relevant details in each case to reinforce sustainability – as they could be derived from the newly accessible non-financial information. *De lege ferenda* these basic criteria should guide the next steps of policymaking everywhere to ensure universal sustainable development.

Certainly, automation has demonstrated a key impact on the easier fulfillment of tax obligations and the efficient monitoring of compliance. Understanding a broader meaning of compliance calls for assessing the achievement of all the goals stated in the tax law (collecting revenues, redistributing and other constitutionally protected ones that promote sustainable development). Accordingly, the standardized formats for reporting tax information should consider both financial and other relevant non-financial data. Like that, the pertinent non-financial data might be swiftly considered by tax administrations to evaluate the claims for VAT refunds or CIT adjustments, where they were related to actions impacting sustainability – in the event that the legislation foresees them.

Nowadays, many taxpayers may have the impression that the digitalization progress is somehow biased towards the gain of tax administrations, as it mostly serves to enhance the control over financial movements to secure the payment of taxes[30]. This limited vision could be augmented and, in addition, offer them the opportunity to learn that, at least, some of their pro-sustainability actions will be counted. They could be definitively taken into consideration when assessing the tax debt. The taxpayers' interest in the use of online systems could thus increase, as they could experience this benefit.

An online tax administration portal could be connected to other portals created, for instance, by environmental authorities –if automation runs in parallel in both sectors. The tax administration is usually pioneering the technological transformations, but to meet the Paris Agreement objectives many different processes are being implemented by other administrations (e.g., to measure GHG emissions). This could reduce costs, and eventually fraud. As already mentioned, each country should assess which level of technology is appropriate for achieving a tax system aligned with the sustainable development goals. Anyway, it seems a wise policy decision to fund the investment in IT infrastructure and prudently inform the taxpayers of their obligations and, of course, their rights to avoid any possible mistrust (i.e. in case of initiatives regarding software to instantly upload data or use of platforms to exchange various electronic documents) substantive changes in accounting to cover non-financial information[31] and their proper accommodation in accounting software used for tax purposes will surely make a difference.

Corporate tax transparency is a central ESG issue and requires that relevant information for tax purposes be subject to scrutiny. This comprises financial and non-financial data that may be contemplated in the taxable event, the tax base, allowances, credits, or deductions, among others. However, the reporting standards on sustainability data are still not very clear. So, the following distinction in reporting is critical: what should be

30 Mercedes Navarro Egea, "The Digitalization of Relations Between Citizens and Tax Administrations," in *Interactive Robotics: Legal, Ethical, Social and Economic Aspects*, ed. María Amparo Grau Ruiz (Cham: Springer,2022), 124–129.

31 Rutger Hoekstra, *How Natural Capital Accounting Contributes To Integrated Policies For Sustainability* (New York: UNDESA, 2020), 8, accessed August 23, 2022, https://seea.un.org/content/how-natural-capital-accounting-contributes-integrated-policies-sustainability.

configured as an obligation or left as a voluntary commitment? Which thresholds could apply?

In the private sector, there is a clear demand for tax experts who are aware of the need of making real ESG progress and, at the same time, be capable of using data and technology. The same request is emerging in the public sector, but the rhythm of adaptation to the new circumstances seems to be a bit slower. Due to the magnitude of the undergoing transformations, the supervisory bodies competent in each field have a decisive role to play and should constantly keep an open dialogue among them to ensure the collection of data with sufficient quality (as it is actually happening in the International and the European Organization of Supreme Audit Institutions, or the European Confederation of Internal Audit Institutes, for example).

How does the information that the private and public companies are presenting (or will present) serve to establish taxes coherently with the SDGs? It is time to prioritize the task of selecting the specific ESG contents to include in the companies' or States' accounts (under a voluntary or mandatory option) to better fit the need for fairer tax rules. And simultaneously reconsider their traditional design, which often leaves aside or considers in a too rough manner the data that can have an impact on sustainability. The silo thinking must be exiled to finish with these fragmented systems. The changes affecting substance (because non-financial information can offer a complete view) and form (technological means allow reasonable exploitation of the data) permit a sound reorientation of policymaking in tax matters to promote sustainability-consistent decisions by all the stakeholders in the exercise of their activities.

In the middle of a transitional period, pervaded with uncertainty, the main problem lies in the materiality and comparability of the information to be reported. This is observable in the nature of the document to be presented (particularly complicated in the case of a subsidiary whose parent company is in another EU Member State, for instance) and the degree of verification of the non-financial information statement (yet a limited assurance standard in many places, not an audit). These differently generated and validated data should be homogenized. The EU is pushing forward, but the pace of implementation of standards varies across countries and in different sectors.

Therefore, the current exchange of information in tax matters can solely focus on financial data, probably due to the uneven situation affecting non-financial information and the lack of connectivity with financial information within the same territorial scope. This picture could change in the long term, especially if some immediate information supply mechanisms are applied and enlarged to cover some sustainability data in real-time.

Once the non-financial information reaches a point of growth equivalent to the financial one and gets sophisticatedly integrated with it, the tax authorities will, in fact, be forced to consider it. In the interim, despite the complexities, a progressive inclusion of the data associated with sustainability indicators specifically chosen for tax purposes should be made through the legislation when technological progress facilitates it. Hopefully, sharing and analyzing further experiences on their capture, verification and use will be extremely useful to align taxation and public spending with sustainability (like the Spanish legislative modifications to introduce a mandatory Report on the alignment of the General State Budget with the SDGs, the extension of the audit function of the Court of Auditors to environmental sustainability or the Declaration on the General State Account regarding the compliance with the duty to prepare non-financial information statements by companies in the public business sector). Ambitious sustainability objectives require different choices when designing and implementing taxes and tax benefits, taking advantage of all currently (or soon) available resources, like the non-financial data and the technological tools to correctly process them.

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Tax withholding by the remitter based on the example of the lump-sum corporate income tax (WHT) – selected issues

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corporate income tax, withholding tax, pay and refund, tax remitter, non-resident passive income

Abstract: This article deals with the role and responsibility of the remitter in corporate income tax with respect to the so-called "withholding tax" (WHT) levied on income earned by non-residents. The authors focused their considerations on establishing the relationship between the statutorily defined standard obligations of the remitter and the implemented activities of this entity in relation to WHT. The subject is important due to international aspects of taxation of cross-border income not only on the basis of Polish corporate income tax regulations, but also with double taxation treaties and exemptions in withholding tax implemented from EU directives in mind. The answer to the research questions posed included tax, fiscal and penal, as well as international and EU aspects. The research thesis is that the obligation to collect tax under the WHT constitutes for the remitter "sui generis" right to perform this collection, and does not have the character of an absolute obligation constituting its subjectivity as a remitter. The analysis of the legislation, case law and literature, through the application of the legal-dogmatic method, has shown that the failure of the tax remitter to collect the tax is not a barrier to the filing a tax refund or overpayment claim by the tax remitter, and in fact constitutes an active legitimacy. The findings of the article

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are of practical significance for non-residents from the EU and third countries (from outside the EU) obtaining so-called passive income in Poland.

1. Introduction

According to the definition of a remitter stipulated in the Tax Ordinance[1] that the status of this passive entity is determined by the obligations imposed on it by tax law. The construction of these obligations implies that, in addition to the obligation to calculate the tax amount and ultimately to settle it in a timely manner, an element of tax collection is also necessary[2]. This, in turn, translates into the scope of the tax remitter's responsibility[3], which, as the judicature rightly points out, is not responsible for the tax remitter's tax liability, but is responsible for his own actions, and specifically for the proper performance of his duties under the Tax Ordinance, i.e. for calculating, collecting tax from the taxpayer and paying it to the tax authority on time[4]. It is also seems appropriate to mention that the tax liability of the tax remitter is supplemented by penal fiscal regulations[5]. The failure to collect tax by the tax remitter is considered a punishable act. In addition, attention may also be drawn to the powers of the Minister of Finance, but also of the tax authorities, relating to the possibility to exempt tax remitters from the obligation to collect tax or advance tax payments[6]. Based on the above, it seems that the obligation of the tax remitter to withhold the tax (in abstracto) and the performance of this obligation

1 Art. 8 of the Act on Tax Ordinance of 29 August 1997 consolidated text: Journal of Laws of 2021, item 1540, hereinafter: TOA.

2 Marta Joanna Czubkowska and Justyna Siemieniako, "Odpowiedzialność płatnika w prawie podatkowym," in *Stanowienie i stosowanie prawa podatkowego w Polsce,* ed. Beata Kucia-Guściora (Lublin: Wydawnictwo KUL, 2021), 138.

3 See Art. 30 in connection with Art. 8 of the TOA.

4 Provincial Administrative Court in Warsaw, Judgment of 8 July 2020, Ref. No. III SA/Wa 2343/19 SIP LEX No. 3099933.

5 Art. 78 of sec.1 of the Act Penal and Fiscal Code of 10 September 1999, consolidated text Journal of Laws of 2020, item 859 hereinafter PFC.

6 Art. 22 par. 1, item 2 and par. 2 of the TOA in connection par. 15 sec. 1 item 1 of Ordinance of the Minister of Finance on The Properties Of Tax Authorities of 22 August 2005, consolidated text, Journal of Laws of 2022, item 565, hereinafter: Regulation on Properties.

(in concreto) are immanently linked, since the relevant "consent" of the authorities is necessary for the tax not to be withheld, and if the tax remitter arbitrarily refrains from withholding the tax, they are subject to fiscal or penal-fiscal liability.

The purpose of this article is to examine and evaluate several parallel issues relating to the role and responsibility of the remitter in corporate income tax in terms of the so-called tax "at source". In order to achieve this objective, it is necessary to answer key questions. First of all - is it really always the role of the tax remitter to withhold tax from the taxpayer, and what is in fact the legal significance of the tax remitter's obligation to withhold tax in corporate income tax? Secondly, does the order in which the tax remitter chooses to act, i.e. collection and payment of tax, matter? And relative to this; is it possible to reverse the order of execution, i.e. to make a payment and then collect the tax from the taxpayer, or to settle the tax without collecting it from the taxpayer? What are the legal implications of this? Thirdly, is it possible for the tax remitter, despite not having collected the tax, not to be held liable, either for fiscal or penal-fiscal purposes, but to become an entity actively entitled to submit a claim for an acknowledgment of overpayment, or a claim for tax return, in the event that the tax has been paid unduly, or in an amount greater than that due?

The fundamental doubt, therefore, is to understand the statutorily defined obligation towards the remitter relating to tax collection, and to determine whether the failure to fulfil this obligation without negative legal consequences does not violate (or even nullify) the legal construction of the tax remitter institution. Based on the analysed research material, one could formulate a thesis that in fact the obligation of the tax remitter to collect tax specified in Art. 8 of the Tax Ordinance, does not create a mandatory norm (ius cogens) towards the tax remitter, but it provides for a kind of tax remitter's right, constituting a relatively binding norm (ius dispositivum). It can be argued that the tax remitter is such a statutorily designated entity, but one of its duties: the duty to collect tax, although it defines it, in fact only designates a certain amount of freedom and power to the remitter, creating a sui generis power to collect tax, and the essence of its duty is to pay tax to the tax authority in the correct amount and on time.

It should be noted that this article is an attempt to resolve the above doubts only on the basis of the tax remitter's obligations to

calculate the collection and payment of the lump-sum corporate income tax - the "withholding" tax (known as WHT), without referring to its status in other tax constructions. From the legal point of view, the research topic is multifaceted and takes into consideration the significant potential that Poland has for foreign investments, or a wide range of the so-called royalties[7], as well as changes in national legal regulations in the discussed scope. Tax issues seems to be a good topic for analysis both on the national and international level, including the EU one.

2. Obligations of the tax emitter in corporate income tax with regard to the so-called the "withholding tax" (WHT)

The starting point for analysing the status of a tax remitter of corporate income tax is to present that the role of this passive entity is related to the withholding of tax due from taxpayers with limited tax liability[8], i.e. without a registered office or management in the territory of the Republic of Poland[9]. As for certain types of income obtained in the territory of the Republic of Poland by non-residents, the obligation to deduct tax lies with the Polish entity making the payment of the amount due being the source of such income[10]. The relevance of correctly fulfilling tax remitter's duties is significant for the development of foreign investments[11] or ensuring the freedoms of capital movements, as they mainly concern cross-border (international) income such as interest, royalties, and dividends[12]. Legally speaking, the im-

7 Błażej Kuźniacki, *Rzeczywisty beneficjent a podatek u źródła* (Warszawa: Wolters Kluwer S.A.,2022), 36.

8 Art. 3 sec. 2of the Act on Corporate Income Tax of 12 February 1992 Journal of Laws of 2021, item 1800, hereinafter: CITA.

9 Individual interpretation of 9 July 2019, Ref. No. 0111-KDIB2–3.4010.102.2019.2.KK, pub. http://sip.mf.gov.pl

10 Art. 21, sec. 1 and in Art. 22 sec. 1 of the CITA. Individual interpretation of 9 July 2019, Ref. No. 0111-KDIB2–3.4010.102.2019.2.KK, pub. http://sip.mf.gov.pl.

11 Anna Białek-Jaworska and Lyubov Klapkiv, "Does withholding tax on interest limit international profit-shifting by FDI?," *Equilibrium. Quarterly Journal of Economics and Economic Policy*, no. 1(2021): 11–44.

12 Zee Howell H., "Retarding Short-Term Capital Inflows Through Withholding Tax," *IMF Working Paper* no. 00/40, (March 2000), Available at SSRN: accessed May 18, 2022, https://ssrn.com/abstract=879419); Lejour, van't Riet, M. A common withholding tax for the EU. (2020), accessed May 18, 2022, https://www.feps-europe.eu/resources/

plementation of these obligations in a direct way requires reference not only to national regulations, but also to the implemented provisions of EU directives[13], as well as the provisions of double taxation conventions[14].

The obligations of the tax remitter in the aforementioned area are regulated in Art. 26 of the Corporate Income Tax Act. However, it should be noted that, by the Amendment Act[15], from 1 January 2019 amendments concerning the tasks of the remitter were introduced to the Corporate Income Tax Act.[16] In the light of those provisions, legal persons, organizational units without legal personality and natural persons who are entrepreneurs, and who make payments of amounts due under the titles listed in Art. 21, sec. 1 and Art. 22, sec. 1, up to the amount not exceeding the total amount of PLN 2,000,000 to the same taxpayer, in the tax year relevant at the remitter of such dues, shall be obliged, as tax remitters, to withhold the lump-sum income tax on such payments on the day of making said payment. However, in the event that income is allocated to increase the share capital, or the participation fund in case of collectives, the tax shall be collected by the tax remitters within 14 days of the date, on which

publications/749-a-common-withholding-tax-for-the-eu.html; Izabela Andrzejewska-Czernek, Gergely Czoboly, Trevor Glavey, Mantas Juozaitis, Katarzyna Knawa and Ivo Vanasaun, "Jak wy to robicie? Podatek u źródła w różnych państwach Europy, cz. 1. Litwa, Irlandia, Węgry, Estonia," *Przegląd Podatkowy*, no. 1(2022): 41–50; Izabela Andrzejewska-Czernek, Elina Belouli, Cristiana Bulbuc, Daniele Conti, Katarzyna Knawa, Moritz Muelhausen and Iulian Panfiloiu, "Jak wy to robicie? WHT w różnych państwach Europy, cz. 2. Wielka Brytania, Włochy, Niemcy, Grecja, Rumunia," *Przegląd Podatkowy*, no. 2(2022): 33–43; Izabela Andrzejewska-Czernek, Domingo Jesús de L'Hotellerie-Fallois, Pierre-Antoine Klethi and Katarzyna Knawa, "Jak wy to robicie? Podatek u źródła w różnych państwach Europy (3): Hiszpania, Luksemburg, Polska," *Przegląd Podatkowy*, no. 4(2022): 28–38.

13 Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (Recast) O.J.E.L. of 2011 No. 345, p. 8 as amended. Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States O.J. E.L of 2003 No. 157, p. 49 as amended.

14 Art. 21 sec. 2 of the CITA.

15 The Act amending the Personal Income Tax Act, the Corporate Income Tax Act, the Tax Ordinance Act and several other acts of 23 October 2018, Journal of Laws of 2018, item 2193.

16 Art. 26 of the CITA. Cf. Dawid Strzała, "Nowe zasady poboru podatku u źródła – mechanizm walki z optymalizacją podatkową czy patologia podatkowa?" *Doradztwo Podatkowe*, no. 8(2019): 25–32.

the decision of the registry court to register the increase in share capital becomes final, or of the date on which the general meeting resolves to increase the share capital, or in cooperative societies - of the date on which the General Meeting resolves to increase the participation fund[17]. Different rules apply to remitters who are entities that operate aggregate accounts. In the case of payments of interest due on securities recorded on securities accounts or on aggregate accounts, the income[18] derived from securities recorded on securities accounts or on aggregate accounts paid to taxpayers - non-residents, the entities maintaining the securities accounts or aggregate accounts shall collect lump-sum income tax on the day the due amounts are placed at the disposal of the holder of the securities account or the holder of the aggregate account. It has to be reiterated that the payment referred to in the aforementioned regulations means the performance of an obligation in any form whatsoever, including by payment, deduction or capitalisation of interest[19].

With regard to the withholding of tax by tax remitters, there is also a provision to waive the obligation to withhold tax or for the possibility to withhold tax at a lower rate by applying the tax rate resulting from the relevant double taxation treaty[20]. This requires, among other things, the taxpayer's residence for tax purposes to be documented by a certificate of residence obtained from the taxpayer[21]. Furthermore, no tax is withheld in a situation where income from dividends and other income from shares in the profits of legal persons is earmarked for statutory purposes or for other purposes specified in relation to tax exemptions[22], upon submission to the remitter, no later than on the day of payment, of an appropriate statement that the income has been earmarked for the aforementioned

17 See Art. 26, sec. 2 of the CITA.

18 Art. 7b sec. 1 item 1 (a), (b), (e) and (g) of the CITA.

19 Art 26 sec.7 of the CITA.

20 Kunka Petkova, "Withholding tax rates on dividends: symmetries versus asymmetries or single versus multirated double tax treaties," *International Tax and Public Finance* no. 28(2021): 890–940, https://doi.org/10.1007/s10797-020-09637-y.

21 See a.o. Mikołaj Jabłoński and Marek Wołyński, "Podatek u źródła," in *Uszczelnienie w systemie podatkowym w CIT- najważniejsze regulacje*, ed. Joanna Henzel, Mikołaj Jabłoński and Marek Wołyński (Warszawa: C.H. Beck, 2021), 195.

22 See Art. 17 sec. 1 of the CITA.

purposes. The exemption from tax collection also applies to income from interest or discount on mortgage bonds and bonds with a maturity of no less than one year, as well as those admitted to trading on a regulated market or introduced into an alternative trading system[23] in the territory of the Republic of Poland or in the territory of a state which is a party to a double taxation treaty concluded with the Republic of Poland, whose regulations specify the principles of taxation of income from dividends, interest and royalties. Non-collection of tax in the latter case is subject to the condition that the issuer makes a declaration to the tax authority that the issuer has exercised due diligence[24] in informing its related parties[25], of the terms of the exemption[26], which applies when the taxpayer holds, directly or indirectly, together with other related parties within the meaning of these provisions, less than 10% of the nominal value of these bonds[27].

Another controversial derogation from the tax obligation of withholding of remitters is the failure to withhold due to the receipt of a written statement that the conditions for benefiting from the exemptions introduced to income tax on the basis of EU directives are fulfilled with regard to the payments made[28]. For certain types of passive income[29], a written statement is required to indicate that either the company or the foreign permanent establishment is the beneficial owner of the amounts paid[30].

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23 As defined in the provisions of the Act on trading in financial instruments of 29 July 2005, Journal of Laws 2022, item 861.

24 Jabłoński and Wołyński, "Podatek u źródła," 177.

25 Within the meaning of Art. 11a, sec. 1 item 4, or Art. 23m, sec. 1 item 4 of the Act on Personal Income Tax of 26 July 1991, Journal of Laws of 2021, item 1128 as amended, hereinafter: PITA.

26 Art. 17, sec. 1, item 50c of the CITA.

27 Art. 26, sec. 1aa and 1ab of the CITA.

28 See Art. 21, sec. 3a and 3c or Art. 22, sec. 4 item 4 of the CITA. See: Maciej Wiśniewski, "Czasowy częściowy brak efektywnego opodatkowania przychodów z tytułu udziału w zyskach osób prawnych i należności uzyskiwanych przez nierezydentów podatku dochodowego od osób prawnych," *Przegląd Podatkowy*, no. 9(2019): 34–40.

29 See Art. 21, sec. 1 item 1 of the CITA.

30 Cf. Art. 26, sec. 1f of the CITA. Cf. Joanna Kiszka, "Instytucja rzeczywistego właściciela należności - jej źródła i znaczenie praktyczne," *Doradztwo Podatkowe,* no. 2(2020): 43–46; Mateusz Raińczuk, "Warunki zwolnienia z podatku zryczałtowanego od niektórych przychodów osiąganych przez nierezydentów. Glosa do wyroku WSA z dnia 11 marca 2020 r., I SA/Wr 977/19," *Przegląd Orzecznictwa Podatkowego,* no. 6(2020): 437–446.

The option for tax remitters paying claims to taxpayers, who are mutual investment vehicles, not to withhold tax provides for a similar solution relating to the need to submit a declaration of beneficial ownership status and a tax residence certificate[31].

The withholding tax obligation for part of the dues was based on the *pay and refund tax* construction[32]. If the total amount of dues paid for the reasons listed in Art. 21, sec. 1 and Art. 22, sec. 1 exceeds the amount of PLN 2,000,000.00, legal persons, organisational units without legal personality and natural persons who are entrepreneurs are obliged, as remitters, to withhold, on the day of making the disbursements, according to the basic tax rate for a given payment specified in Polish regulations, from the excess over the amount of PLN 2,000,000.00. In the case of dividends, it is possible to apply the deductions set out in the Act[33]. On the other hand, excluded in this mechanism is the possibility not to withhold tax on the basis of the relevant double tax treaty and without taking into account exemptions or rates resulting from special provisions or double taxation treaties, which is important for non-residents.

However, this substantial limitation relating to amounts paid, exceeding PLN 2,000,000.00 is subject to exception. The possibility to waive the withholding tax applies to remitters who are exclusively legal persons and entities without legal personality, provided that the right to the exemption is confirmed by an opinion on the application by the remitter of the exemption from the lump-sum withholding tax, from the dues paid to the taxpayer referred to in Art. 21 sec. 1 point 1 or Art. 22 par. 1, or the application of the tax rate resulting from the relevant agreement on the avoidance of double taxation, or the non-application of the tax in

31 Art. 26, sec. 1g of the CITA.

32 Jacek Wojtach, "Changes to Poland's pay and refund withholding tax regime from 2022" *International Tax Review* November 25, 2021, accessed May 18, 2022,https://www.proquest.com/scholarly-journals/changes-poland-s-pay-refund-withholding-tax/docview/2614042261/se-2?accountid=11796; Thabo Legwaila, "When Caesar Must Pay, Caesar Must Pay-The Withholding of Tax Refunds by The South African Revenue Service Rappa Resources (Pty) Ltd v CSARS (20/18875) 2020 ZAGPPHC (5 November 2020), "*Journal of South African Law* no. 1(2022), 191. Gale Academic OneFile. https://link.gale.com/apps/doc/A694952864/AONE?u=anon~b01bb198&sid=googleScholar&xid=a9d4d8cd.

33 Art. 22, sec. 1a - 1e of the CITA.

accordance with such agreement. This opinion shall be issued by the tax authority upon request of the taxpayer, the remitter or the entity disbursing the amounts due through entities maintaining securities accounts or aggregate accounts in accordance with the requirements set out in Art. 26b of the CITA[34].

In addition, it should be pointed out that it is legally possible not to withhold tax if the remitter fulfils the conditions laid down in Art. 26, sec. 7a of the CITA. Pursuant hereto, the obligation to withhold the tax in the case of making payments exceeding the amount of PLN 2,000,000.00 does not apply, if the remitter submits an appropriate statement that it possesses documents required by the tax law regulations, in order to apply the tax rate or exemption or not to withhold the tax resulting from special regulations or double taxation avoidance agreements, and does not possess any knowledge justifying the assumption that there are circumstances excluding the possibility of applying the tax rate or exemption or not withholding the tax resulting from special regulations or double taxation avoidance agreements[35]. The declaration shall be made by the head of the body[36], or, where the body is headed by a group of persons, by a designated person being a member of that body, but shall not be made by proxy. The remitter is obliged to submit said statement to the tax authority not[37] later than on the day of the tax payment for the month in which the amount of PLN 2,000,000.00 was exceeded, however, performing this obligation after the payment is made does not release the remitter from the obligation to exercise due diligence before making it.

It is worth noting that the wording of the provisions under review makes a clear literal distinction between the moment of tax collection and the moment of payment of the lump-sum tax deducted "at source". Tax remitters transfer the tax amounts by the 7th day of the month following the month, in which the tax was collected to the account of the appropriate tax office[38], which, according to the executory order, is the Lublin Tax Of-

34 Art. 26, sec. 2g in fine of the CTIA.

35 Art. 26, sec. 7a of the CITA.

36 See Art. 3, sec. 1 item 6 of the Act on accounting of 29 September 1994, Journal of Laws of 2021, item 217.

37 Art. 28b, sec. 15 of the CITA.

38 Art. 26, sec. 3 of the CITA.

fice in Lublin[39]. Based on the presented statutory regulations it stands to reason that the obligation to collect the tax arises, generally speaking, on the date of making the payment, i.e. fulfilment of the obligation, including by way of payment, deduction or capitalisation of interest, as well as on the date of transferring the due amount to the disposal of the holder of the securities account or the holder of a aggregate account, or in the case of an increase in the share capital, within 14 days from the date on which the decision of the registry court on making an entry on the increase of the share capital becomes final, or in the case of no requirement to register the increase of the share capital - from the date of adoption by the general meeting of a resolution on the increase of the share capital.

From the standpoint of tax remitter status, the exemptions from the withholding tax obligation, which are subject to a number of conditions, can also be considered relevant. The analysis of the content of the provisions of the Corporate Income Tax Act may lead to the conclusion that these conditions should be understood as a specific instrument aimed at excluding *de jure* the obligation to pay the tax. The same applies to the exemption under *the pay and refund tax* regulations in connection with obtaining a preference opinion or submitting a declaration by the [40]remitter. These *de facto* solutions amount to the exclusion of the obligation not only to collect the tax, but in fact to pay it to the tax authority.

It is seem appropriate to emphasize here that the above-mentioned provisions of substantive tax law provide, on the one hand, for the collection of tax by entities recognized as remitters. On the other hand, the exceptions to that rule, which are in fact intended to exclude the obligation to pay the tax, show that it is not the collection but only the payment of the tax that constitutes the expected fulfilment of the remitter's task as an intermediary in collecting the tax for its active subject. On the other hand, the statutory moment of tax collection determines the remitter's right (competence) to collect the amount due. It does not, however, bear the significance of a mandatory obligation under the legislation.

39 See Art. 121, sec. 4 of the Regulation on the Properties.

40 Art. 26, sec. 7a of the CITA.

It can be concluded that from the institution *(pay and refund tax)* enabling to obtain a refund of the tax[41] subject to prior mandatory payment by the remitter, and the admissibility of not withholding the tax by the remitter on the basis of the so-called preference opinion, the provisions of substantive law legitimize obtaining of benefits in connection with the so-called gross-up of the tax remitter[42]. This is a situation where, *de facto* not withholding tax by the remitter occurs, but at the same time there is payment of this tax to the tax authority, with the remitter providing proof, of bearing the economic burden of the tax deducted "at source". Provincial Administrative Court in Warsaw stated unequivocally that the right to file a request for an opinion is, as a rule, vested in the taxpayer who has generated/is generating taxable income in accordance with the provisions of the above-mentioned Act., and as for the remitter - in the event that the remitter makes the payment from its own funds and bears the economic burden of the tax[43]. It should also be mentioned that another amendment to the Corporate Income Tax Act, introduced as part of the so-called "Polish Order", effective 1 January 2022, excluded the requirement regarding the remitter's obligation to prove its withholding, i.e. the remitter's bearing the economic burden of the tax deducted "at source"[44]. Although the amendment does not constitute a clarification of the previously adopted solution regarding the remitter's standing to sue, but rather a new legislative solution, it does not affect the fact that the remitter will still have

41 Art. 28b o the CITA.

42 See the foreign literature on this very topic: Viki Anjarwati and Veny Veny, "Perbandingan Pajak Penghasilan Pasal 21 Metode Gross Up, Gross, Dan Net Basis Terhadap Pajak Penghasilan Badan," *Journal of Public Auditing and Financial Management* vol. 1 no. 2, (2021): 101–108; Anisa Fitria, Islamy and Ervina Deasy, "Analisis Penerapan Metode Gross Up PPh Pasal 21 sesuai PSAK 46 untuk meminimalkan Pajak Penghasilan Badan (Studi Kasus pada PT. XYZ), " *Journal of Finance and Accounting Studies* vol. 3, no. 1(2021): 13–25.

43 Provincial Administrative Court in Warsaw, Judgment of 25 November 2020, Ref. No. III SA/Wa 1062/20, LEX No. 3114035.

44 Art. 26b, sec. 1 amended by the Art. 2 item 56 a of the Act amending the Personal Income Tax Act, the Corporate Income Tax Act and several other acts of 29 October 2021, Journal of Laws. of 2021, item 2105. See Aleksandra Szczęsny, "Zmiany w poborze zryczałtowanego podatku dochodowego (tzw. podatku u źródła), *Doradztwo Podatkowe,* no. 12(2021): 105–107.

the possibility under, i.e., the gross-up clause to bear the economic burden of the tax paid[45].

It is worth mentioning that the possibility of obtaining a tax refund by both the taxpayer and the tax remitter resulting from Art. 28b, sec. 2 of the CITA is closely related to the tax paid under Art. 26, sec. 2e of the CITA. At the same time, a tax remitter may apply for a tax refund, provided it paid the tax with its own funds and bore the economic burden of the tax. This confirms that although the burden of lump-sum corporate income tax withholding from non-residents is generally borne by the taxpayer, it is often the case that it is the Polish resident withholding agent, who "takes on" the burden. In practice, such an option is provided for in the agreements concluded between the tax remitter and the taxpayer resulting from the existing capital, personal or functional relations (links) between them, or the terms of conclusion of the agreements, or the permitted methods of payment do not allow the deduction of the tax "at source" (e.g. concluding a contract electronically, card payment, etc.) [46].

In view of the above, one could argue that the tax remitter's duty to collect tax suffers a break that is already provided for in the substantive tax law provisions themselves. The tax law therefore allows the remitter to settle the amount due plus the due "withholding" tax under, i.e., a contractual gross-up clause. The obligation to withhold tax is therefore seen in this context as a right of the remitter rather than a sanctioned, absolute statutory obligation.

3. Tax and penal fiscal aspects of the remitter's liability

The situation of the remitter from the fiscal penal provisions perspective requires separate consideration. It follows from the Penal and Fiscal Code that a tax remitter who fails to withhold tax or does so in an amount lower

[45] Such a conclusion may be drawn based on the fact that no reference has been made to Article 28b 2 of the CITA and the introduction of the company's own catalogue of entities entitled to apply for an opinion on the application of the exemption.

[46] Natalia Stępień and Katarzyna Trzópek, "Z czyjej kieszeni powinien być zapłacony podatek u źródła," *Dziennik. Gazeta Prawna*, December 7, 2019, accessed May 18, 2022, https://podatki.gazetaprawna.pl/artykuly/1442573,podatek-u-zrodla-podatnik-danina-obowiazek-poniesienia-kosztow-wht.html

than due is liable to a penalty[47]. It is argued in the literature that the typification of conduct set out in Art. 78 of the Fiscal and Penal Code refers to one of the three obligations incumbent on the remitter set out in the Tax Ordinance, i.e. to withhold the tax from the taxpayer[48]. It is worth noting that the verb "does not withhold the tax" is defined in the Fiscal Penal Code[49]. Accordingly, the doctrine assumes that a failure to collect tax occurs when the person obliged to do so - the remitter - fails to collect the quantified monetary amount in whole or in part, and a financial loss actually occurs. The prohibited act typified by Art. 78 of the Penal and Fiscal Code is therefore, as assumed in the literature, of an effectual nature, as it is connected with causing financial loss[50]. It is also worth noting that the adopted penal law solution raises some doubts in the literature. It should be recalled that, from the perspective of tax construction of the tax withholding obligation, it is not at all necessary for the failure to comply with that obligation to result in a financial loss. This is because it is already unfulfilled at the time of the expiry of the time limit set for the collection of tax, and not only at the time of payment of the tax collected[51]. At the same time, it is necessary to distinguish the scope of penalisation set out in the provisions of Art. 77 and Art. 78 of the Penal and Fiscal Code. Pursuant hereto, it may be assumed that the latter provides for the penalisation of the remitter's failure related to tax collection, regardless of their cause, while the provision of Art. 77 of the Penal and Fiscal Code provides for criminal liability of the remitter for failing to fulfil the obligation to make payment for the (actually) collected tax. This dual division corresponds to the regulation of the tax liability of the tax remitter provided for in Art. 30 of the Tax Ordinance Act, according to which it is liable for tax not collected or tax collected but not transferred[52].

47 Art. 78 of the PFC.

48 Grzegorz Łabuda "Commentary to Art. 78," in *Kodeks karny skarbowy. Commentary,* ed. *III,* ed. Piotr Kardas, Tomasz Razowski and Grzegorz Łabuda (Warszawa: Wolters Kluwer, 2017), 873–876.

49 Art. 53, par. 29 in conjunction with 27 of the Penal and Fiscal Code.

50 Łabuda, "Commentary to Art. 78," 875

51 Łabuda, "Commentary to Art. 78," 874

52 Jarosław Zagrodnik, "Pojęcie „pobranie podatku" w kontekście odpowiedzialności karno-skarbowej płatnika," *Palestra*, no. 12(2017): 45–52.

When considering the issue in question in terms of the remitter's liability for uncollected and unpaid tax[53], i.e. the principles of liability formulated in the Tax Ordinance, it may be noted that the tax remitter's liability is twofold: for failure to collect tax and for collection and non-payment of tax. The judicature emphasizes that, in contrast to third-party liability decisions, the object of adjudication on the liability of the tax remitter is monetary dues and not merely the existence of certain prerequisites for liability[54]. When issuing a decision on the liability of the remitter, the tax authority shall determine the amount of the liability for uncollected or collected but not paid tax. In fact, however, the non-collection of tax must be accompanied by non-payment of tax in order to discuss the due amount assigned by the decision to the taxpayer.

The above analysis may also indicate that in the case of lump-sum withholding tax, the liability of the remitter may only relate to the tax that is not actually paid to the tax authority. Failure to withhold the tax is in fact, as shown above, a *sui generis* option of the remitter, its right vis-à-vis the taxpayer to recover an amount of tax, corresponding to the amount of tax calculated and payable by the taxpayer, from the taxpayer, and at the date resulting from the statutory time dedicated for withholding the tax.

It is argued in the doctrine that, as a rule, no element of sanction is associated with the liability of the remitter based on the norms of the tax ordinance[55]. Such liability shall be limited to restitution, that is to say, to enabling the authority to recover dues, which the tax remitter has failed to pay, despite being under an obligation to do so, by the due date[56]. However, an additional tax liability may apply to the withholding tax remitter[57]. This is only possible if a decision on the liability of the remitter is made[58], which will not be possible without establishing the loss of tax due by the remitter. In addition, it is an essential prerequisite for the application of the additional tax liability that the declaration referred to in Art. 26, sec. 7a or 7g

53 Art. 30 of the TOA.

54 Provincial Administrative Court in Warsaw,of 15 June 2020 Ref. No. III SA/Wa 1529/19, LEX No. 3085009.

55 Art. 30 of the TOA.

56 Czubkowska and Siemieniako, "Odpowiedzialność płatnika w prawie podatkowym", 137.

57 Art. 58a, par. 1, item 5 of the TOA.

58 Art. 30 of the TOA.

of the CITA, was not factual, the remitter did not perform the required verification or the verification undertaken by the remitter was inadequate in terms of nature and scale of the remitter's business. This issue is related to the widely commented issue of abuse of law, the discussion of which goes well beyond the scope of this paper[59].

4. Issues of overpayment and refund of withholding tax

The issue in question also needs to be considered from the point of view of the provisions of the Tax Code relating to overpayment of tax. This is because the remitter has the possibility to apply for a acknowledgment of WHT overpayment and recover the amount paid in part or in full - in situations where the withholding tax paid was not due at all, or was paid in an amount higher than due. Therefore, the rules stipulated in the Fiscal Code for obtaining an overpayment by the remitter at its request, support the thesis that the right not to collect tax by the remitter was introduced into the legal and tax order. It should be noted that since bearing the economic burden of the tax by the remitter is a statutory requirement for the application of the institution of establishing the overpayment, then the failure to collect the tax by the remitter fully justifies the remitter's request for acknowledgment of the overpayment.

When considering the issue of overpayment, it is necessary to also bear in mind that, as of 1 January 2019, the legislation provides for two, non-competitive to each other, modes of "recovery" of WHT. The first one is the procedure for obtaining a refund under the provisions of Art. 28b

[59] CJEU Judgment of 26 February 2019 r., N Luxembourg 1 (C115/16), X Denmark A/S (C118/16), C Danmark I (C119/16), Z Denmark ApS (C299/16), ECLI:EU:C:2019:134. Joachim Englisch, "The Danish tax avoidance cases: New milestones in the Court's anti-abuse doctrine," *Common Market Law Review* vol. 57, issue 2, (2020): 503–538, Filip Majdowski, "Planowanie podatkowe z wykorzystaniem zagranicznych podmiotów holdingowych - koniec pewnej epoki? Kilka uwag na tle ostatnich wyroków Trybunału Sprawiedliwości w sprawie dyrektyw podatkowych dotyczących tzw. pasywnych płatności," *Przegląd Podatkowy*, no. 10(2019): 29–40; Monika Lewandowska and Adrian Stępień, "Trybunał Sprawiedliwości o nadużyciu zwolnienia z podatku u źródła: zaskakujące rozczarowanie czy przewidywalny kierunek interpretacji? Polskie regulacje niezgodne z prawem UE?,"*Przegląd Podatkowy,* no. 8(2019): 12–20; Monika Boniecka, ""Look through approach" w kontekście nowego mechanizmu poboru podatku u źródła," *Przegląd Ustawodawstwa Gospodarczego,* no. 3(2020): 21–27.

of the CITA (*pay and refund tax*). The second one is the procedure for applying for an acknowledgment of overpayment under the Fiscal Code[60]. With the first mode according to the Regulation of the Minister of Finance, Development Funds and Regional Policy[61] in practice can be used by WHT remitters and taxpayers only from 1 January 2022, and is applicable only if the threshold of PLN 2,000,000.00 of payments made by the remitter to the non-resident taxpayer is exceeded, while the remitter, who has borne the economic burden of the tax paid, may apply for this refund[62]. On the other hand, the second procedure regulated in the Fiscal Code may be applied by the remitter, when requesting the declaration of WHT overpayment, provided that the provisions regulating the tax refund under Art. 28b o the CITA. However, much like a refund under Article 28b of the CITA, the taxpayer may do so only if it pays the tax amount from its own funds, i.e. it bears the economic burden. It hard to oppose the view expressed in the literature that the two modes are consistent with each other and point out that if the tax has been unduly paid, it should be returned to the entity that bore the economic burden[63].

The issue of the possibility of obtaining a WHT refund, despite the remitter's failure to include a gross-up clause, in a situation where the remitter bears the economic burden of the tax, has been clarified by the Ministry of Finance in the draft clarification[64]. The draft clarification confirms that taxpayers will also have the right to request a refund of the WHT, provided the gross-up is not based on contractual provisions[65]. As the draft clarification is still not final, it may be noted that the remitter's obligation to collect the tax remains of interest to the tax authorities in terms of the obligation to

60 Art. 75, par. 2 of the TOA.

61 Regulation of the Minister of Finance, Development Funds and Regional Policy of 25 June 2021 amending the regulation concerning exclusion or limitation of the application of Art. 26, sec. 2e of the the Corporate Income Tax Act Journal of Laws of 2021, item 1159.

62 Art. 28b, sec. 2 item 2 of the CITA.

63 Stępień and Trzópek, "Z czyjej kieszeni powinien," accessed May 11, 2022 https://podatki.gazetaprawna.pl/artykuly/1442573,podatek-u-zrodla-podatnik-danina-obowiazek-ponie-sienia-kosztow-wht.html.

64 Draft tax explanations of 19 June 2019. "*Zasady poboru podatku u źródła,*" 6, accessed May 11, 2022, https://www.gov.pl/web/finanse/konsultacje-podatkowe-w-sprawie-objasnien-do-przepisow-w-zakresie-zasad-poboru-podatku-u-zrodla hereinafter: Draft explanation.

65 Paragraph 4.2 of the Draft explanation.

settle it. The above indicates that, in fact, the legislator does not put emphasis on the collection of the tax, in terms of transferring a part of the property, expressed in monetary units, from the taxpayer to the tax remitter, but on its collection and settlement - payment, in the due amount, of the tax amount to the account of the tax authority.

When analyzing the remitter's right to an overpayment, it is necessary to point out the general rule, according to which the overpaid or unduly paid tax constitutes an overpayment[66] which arises, as a rule, on the day on which the remitter pays tax in an amount greater than the tax collected[67]. The remitter has the right to make a claim for overpayment if the tax paid has not been collected from the taxpayer[68]. It is therefore possible to assume the idea that the taxpayer's right to apply for a declaration of overpayment arises only where, as a result of its own errors, the taxpayer has paid tax in an amount greater than that due or in excess of the tax withheld, thereby depleting its assets.[69]

It has to be pointed out that currently the remitter has the right to submit a request for acknowledgement of overpayment, only if the tax paid has not been collected from the taxpayer, i.e. it concerns a situation when the remitter has financed the paid tax with own funds[70]. The right to make a claim for an overpayment will also arise if the remitter was not obliged to make a tax payment but made an undue payment, or if the remitter was obliged to make a payment but did not withhold tax and made a payment higher than due. The taxpayer's right to claim an overpayment would also be relevant when the tax was due on the date of payment, but became undue thereafter. This is the case, for example, when the remitter does not have, on the date of payment of a benefit to a taxpayer, the appropriate

66 Art. 72 of the TOA.

67 Art. 73, par. 1, item 4 of the TOA.

68 Art. 75, par.2 of the TOA.

69 See Jan Rudowski, "Commentary to art. 75," in *Ordynacja podatkowa. Commentary, ed. XI*, ed. Stefan Babiarz, Bogusław Dauter, Roman Hauser, Andrzej Kabat, Małgorzata Niezgódka-Medek and Jan Rudowski (Warszawa: Wolters Kluwer 2019), 522–531.

70 Supreme Administrative Court, Judgment of 16 March 2018 Ref. No II FSK 688/16m LEX nr 2471490, Cf. Jan Rudowski *Commentary to Art. 75*, and the administrative court decisions referred to therein.

documents, i.a. the taxpayer's certificate of residence[71], enabling it not to withhold the tax, and therefore pays the tax calculated from its own funds and subsequently obtains the required document, fulfilling the statutory requirements for not withholding the tax. In these circumstances, before the limitation period for filing an overpayment claim expires, it decides to file an overpayment claim in relation to the payment made with a charge against the remitter's own assets. According to the literature, depletion of the remitter's assets tends to occur when the remitter has collected tax from the taxpayer but has shown and paid more (the difference constitutes depletion of the remitter's assets), and when the remitter has collected nothing from the taxpayer and paid the whole amount himself (the whole amount constitutes depletion of the remitter's assets)[72].

It is quite clear that the essential boundary of the issue under consideration is determining whether the entity making the payment for the tax is, in fact, the tax remitter. The judicature has expressed the view that an entity which does not posses the statutory features of a remitter, by paying the tax carries out an undue benefit [73]. In this context, it must be pointed out that it is in fact the substantive law that determines whether an entity can become a party to overpayment proceedings. Thus, what matters here is the relationship of a given entity to a particular tax obligation or a particular tax liability. On the other hand, any rights or obligations of entities which do not have legal basis in tax law do not create a legal standing in tax proceedings.[74]

However, it is important to also consider the opinion expressed in case-law stating that since the taxpayer has the right to request refund of the overpayment only if it suffers a loss as a result of having paid more than the amount collected, it may submit such a request only after the value of the improperly collected tax has been returned to the taxpayer, because

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71 Wojciech Kawa, "Posiadanie przez płatnika certyfikatu rezydencji warunkiem skorzystania z opcji niepobrania podatku u źródła," *Monitor Podatkowy,* no. 12(2017): 7.

72 Rudowski, "Commentary to Art. 75," 528.

73 Supreme Administrative Court, Judgment of 17 December 2020, Ref. No. II FSK 2125/18, LEX No. 3113451.

74 Provincial Administrative Court in Lublin, Judgment of 9 July 2020 Ref. No.I SA/Lu 270/20, LEX No. 3038893

only then will it suffer the said loss[75]. The above makes it possible to look at the issue of tax collection also from the perspective of making a settlement between the remitter and the taxpayer and obtaining *post factum*, subsequent to the state of bearing the economic burden of tax. Based on the judgment of the Supreme Administrative Court of 21 September 2020, when it comes to the issue of defining a given entity as a remitter, it is important that the entity making the benefit (payment) acts in its own name and on its own account.[76] If an entity operates in this manner, then the fact that the economic value of the benefits (payments) made by this entity is compensated by another entity under a separate legal relationship is irrelevant to the issue of defining it as a remitter.

When combining the two modes of obtaining a tax refund, it can be pointed out that the procedure for claiming an overpayment and the WHT refund procedure (Art. 28b of the Corporate Income Tax Act) have something in common, namely the fact that in both types of proceedings the scope of proceedings is limited by the content of the application of the entitled entity, and in the course of the proceedings the tax authority analyses only the factual state specified by the entitled applicant. Therefore, in both types of proceedings, it is incumbent on the person claiming the overpayment (refund) to prove its case and to support it with relevant evidence. However, the prerequisite for triggering either of the two modes indicated is that the remitter must prove that it has borne the economic burden of the tax paid. The above, on the other hand, determines the statement that the legislator allows for a legal possibility of not collecting the tax by an entity, which by virtue of the act is a remitter, although pursuant to Art. 8 of the Tax Ordinance Act is, after all, also obliged to collect the tax.

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75 Supreme Administrative Court, Judgments of 10 July 2018, Ref. No. II FSK 1864/16, LEX No. 2537272; of 14 June 2018, Ref. No I FSK 1270/16, LEX No. 2510463; of 16 March 2018, Ref. No II FSK 688/16, LEX No. 2471490 Supreme Administrative Court, Judgment of 10 August 2006, II FSK 913/05, LEX No. 261969; Provincial Administrative Court in Gdańsk, Judgment of 15 July 2010, I SA/Gd 452/10, LEX No. 673160; Provincial Administrative Court in Warsaw, Judgment of 4 March 2010, Ref. No III SA/Wa 1713/09, LEX No. 606816.

76 Supreme Administrative Court, Judgment of 21 September 2020 Ref. No. II FSK 1195/18, LEX nr 3062309.

5. Conclusion

The Act defines the remitter status, in the sense that it is the entity that fulfils the indicated conditions *ex lege*. If another entity (which does not have these characteristics), fulfils the obligations of a remitter, its payments, even if it includes "tax" or "advance tax" as their title, do not constitute such benefits and are undue. Similarly, the provisions of tax law do not provide for a decision granting or denying an entity of its status as a remitter.[77] Thus, any tax proceedings initiated by entities whose rights or obligations do not have legal basis in the provisions of tax law, do not give those entities standing in tax proceedings, which *ab initio* renders the proceedings initiated by such entities to claim an overpayment groundless.

It is hard to disagree with the fact that according to the tax law the remitter is an entity whose functioning is dictated primarily by the need for efficient and effective implementation of tax obligations.[78] There can be no doubt, therefore, that the tax laws are aimed at effective tax collection. On the other hand, the mere fact of collecting tax by the remitter, although it constitutes an activity aimed at collecting due taxes, does not have to lead ultimately to a gain for the State Treasury. This view is particularly important in the context of tax due by non-residents, for whom the role of remitter becomes a kind of guarantee of efficiency of collection[79]. The obligations imposed on the remitter, as an intermediary entity, to pay the tax collected from the taxpayer, provide the remitter with legal instruments to fulfil its obligations. The above analysis shows, however, that although it is standard practice for the remitter to calculate, collect and pay the tax, from the point of view of fiscal interest it is in fact the final payment of the tax that is crucial. Thus, it can be concluded that the legal institutions regulating the legal situation of the remitter are oriented towards this phase of the remitter's activity. The tax remitter is the entity that, in a certain sense,

77 Supreme Administrative Court, Judgment of 17 December 2020, Ref. No II FSK 2125/18, LEX No. 3113451.

78 Czubkowska and Siemieniako, "Odpowiedzialność płatnika w prawie podatkowym,"137.

79 Joseph Van Wagstaff, "Income Tax Consciousness under Withholding" *Southern Economic Journal,* Part 1, vol. 32, no. 1(1965): 73–80.

secures the interest of the tax creditor for the most efficient procedure of collecting taxes due.[80]

Thus, if the legislator allows for the possibility of transferring the economic burden of the tax to the remitter, also under the gross-up formula, it clearly indicates that the even if the remitter fails to collect the tax, it is not a legal barrier to the remitter's right to apply a tax refund or overpayment claim, but is in fact legal standing. This confirms that the somewhat isolated obligation to withhold tax, in fact in the context of WHT corporate income tax, is a right of the remitter, and does not have the character of an absolute obligation, constituting its subjectivity as a remitter as it may be concluded, in the literal sense, based on the wording of Art. 8 of the Tax Ordinance Act.

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[80] Leonard Etel and Piotr Pietrasz, "Zaplata podatku (zaliczki) przez podatnika a wydanie decyzji w przedmiocie odpowiedzialności podatkowej płatnika," *Zeszyty Naukowe Sądownictwa Administracyjnego,* no. 4(2009): 10.

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The taxation of 'intangible' innovation: the Patent Box in Europe and the Italian case

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Abstract: "Patent Box" is a term for the application of a lower corporate tax rate to the income derived from the ownership of patents. This tax subsidy instrument has been introduced in several countries since 2000. This paper, through a comparative analysis, compares the Patent Box adopted in three different European jurisdictions, which are distinguished by the particular attractiveness of their tax systems, and then focuses on the peculiar case of the Italian Patent Box. Art. 6, D.L. of 21 October 2021, n. 146, in fact, introduces the new discipline of the Patent Box, a preferential taxation mechanism of income from the direct and indirect use of certain intangible assets which, only two months later, has already undergone further and important changes by art. 1, comma 10, of L. 30 December 2021, n. 234: this disruption requires considering the causes of the legislative intervention and, therefore, the structure of a tax promotion mechanism that has already received relevant consideration in the OECD.

1. Introduction

In a socio-economic context characterised by increasing globalisation and digitalisation in which the role of intangibles in value creation is becoming more and more central, IP regimes are becoming strategically important.

In modern economies, intangible property, consisting of intangible assets, is of decisive importance for business development. Intangibles, like

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tangible assets, have a capital content, differing from the latter in their high profitability and their intrinsic mobility, which leads individual legal systems to set up facilitative regimes in this specific business area.

In fact, it is the same states that, in an attempt to adapt their economies and legislations to the globalisation phenomenon, set up regimes that are attractive to taxpayers engaged in particular economic activities (e.g. the creation, development and sale of intangible assets) and to foreign income. Such measures, on the one hand, foster the phenomenon of tax arbitrage, on the other hand, they lead companies (mostly multinationals) to exploit the related opportunities by devising and implementing aggressive tax planning schemes, which, while not directly violating the tax rules of the various states, run counter to their underlying spirit.

The problems relating to the growing proliferation of sophisticated tax planning practices have also been the subject of study and in-depth analysis within the OECD: the Organisation for Economic Cooperation and Development has in fact been engaged for some time in a capillary work of rewriting the rules and principles of international taxation in which the frequent tendency of States to support companies with measures that are only apparently neutral is to be found. The international community has long been questioning the limits of harmful tax competition and the phenomenon of the erosion of tax bases, on which, in just a few years, an unexpected and positive convergence of efforts has been created under the auspices of the BEPS project.

The study of Patent Box inevitably intersects with the complex phenomenon of tax competition between states. Developed in the second half of the 20th century and then consolidated in the century in which we live, tax competition between States expresses a structure of international relations in which the tax lever is used as a tool to attract capital and the economic activities of, mostly, multinational companies. In this context, countries tend to apply facilitative tax regimes capable of 'convincing' economic operators to locate their productive initiatives in the territory of the State, compensating for the lower revenue by increasing other factors such as labour employment, the development of consumption, etc.

The apparent neutrality of these practices implemented by states collides with their increasingly frequent distorted use in relation to normal market logic. Thus, the notion of 'unfair tax competition' between States - harmful

tax competition - was developed, involving certain unfair tax practices and specific symptoms of 'harmfulness' such as excessively low tax rates, tax measures that lack transparency, and the lack of effective exchange of information between financial administrations. In 1998, the OECD, aware of the need for a joint effort, approved the document "Harmful Tax Competition: an emerging issue", in which it formulated recommendations aimed at outlining general principles for combating the spread of harmful tax regimes and practices.

At the same time, in the European legal system, the issue of harmful tax competition takes on its own specific relevance: with the adoption of the Code of Conduct on corporate taxation, tax practices are identified that are deemed incompatible with the general principles expressed in the Treaties, and that are capable of affecting the free competition of the market by altering its proper functioning. More precisely, the objective pursued by the Code of Conduct consists in contrasting tax practices that result in such substantial advantages that they lead to a level of taxation significantly lower than the level generally applied in the country concerned[1].

In light of the above, the subject of this research is a brief comparative analysis of the Patent Box regimes existing in three different jurisdictions (the United Kingdom, the Netherlands and Luxembourg) which are distinguished by the particular attractiveness of their tax systems. In this context, it should be noted that the United Kingdom is no longer a member state of the European Union as of 31 December 2020 (after Brexit), becoming a third Country. However, the centrality assumed by the relevant regime cannot be overlooked for the purposes of this analysis. This investigation also shows how the European Union looks to a common reference model only in the face of the eminently political (soft law) commitments

[1] The topic of harmful tax competition as market distortion has, for some time now, been at the centre of European and international debate. Many scholars, however, consider the phenomenon of harmful tax competition to be the root cause of (ever-growing) economic inequalities, in Italy as well as in Europe. There is therefore a need to direct the action of Member States against the most obvious tax distortions, not only with a view to market protection but also to the protection of social rights. On this topic see Franco Gallo, *Il futuro non è un vicolo cieco. Lo stato tra globalizzazione, decentramento ed economia digitale* (Palermo: Sellerio, 2019), 1–152; Antonio Perrone, *Tax competition e giustizia sociale nell'Unione Europea* (Milano: CEDAM, 2019), 1–191.

undertaken by Italy and Europe at the international level. The second part of the paper deals with the analysis of the Italian Patent Box which has, with Article 6, Law Decree No. 146 of 21 October 2021, undergone far-reaching changes, ranging from the substantial to the procedural dimension of the institute: this disruption requires considering the causes of the legislative intervention and, therefore, on the structure of a tax promotion mechanism that has already received relevant consideration in the OECD.

2. The Patent Box in Europe: a comparative perspective

In the face of the hoped-for approximation of the laws of the Member States under Article 115 TFEU, the states retain considerable scope for tax sovereignty, in potential competition with each other.

A comparison of European legislations aimed at attracting intangibles held abroad and, at the same time, incentivising the relocation of domestic ones, leads to awareness of the current state of relations, indirect taxation, between the EU Member States.

A "Patent Box" is a term for the application of a lower corporate tax rate to the income derived from the ownership of patents. This tax subsidy instrument has been introduced in a number of countries since 2000. The following table shows the complex and disjointed situation that exists in Europe: there is, in fact, no general model of a facilitative regime on intellectual and industrial property applicable in the Member States of the European Union. It is therefore evident that there are profound differences between the different regimes, which essentially concern the extent of the benefit, the manner in which the relief is granted, and the objective scope of application.

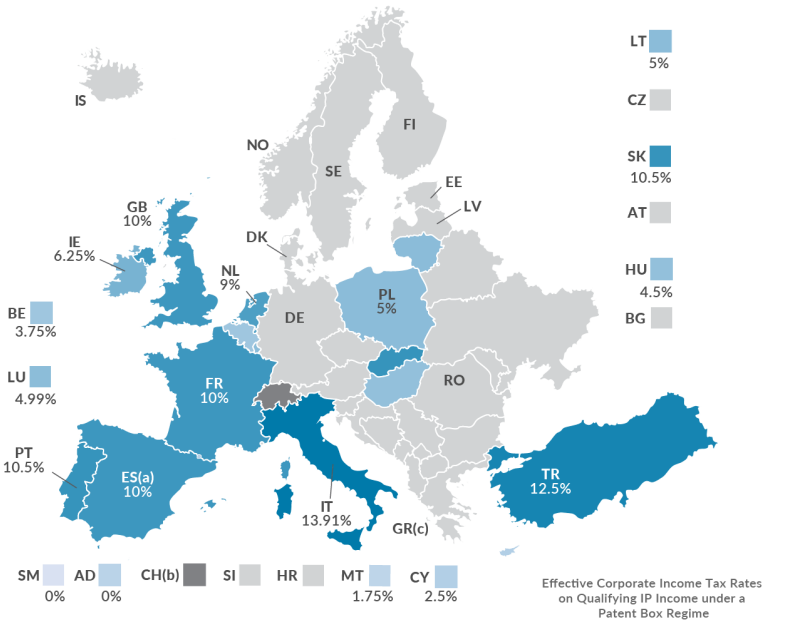
In the following, we will examine the most significant European facilitative regimes concerning the income proceeds from the exploitation of certain intangible assets: the benefits under consideration, in fact, incentivise the so-called 'risk to success[2]'. by focusing on the output, i.e. the activity

[2] See William J. Baumol, Sue Anne Batey Blackman, Edward N. Wolff, *Productivity and American Leadership: the long way* (Cambridge: MIT Press Ltd, 1991), 1–408, in which the authors formulated a proposal on how to use tax breaks to incentivise companies to innovate. The argument was based on a simple, if seemingly counterintuitive assumption: it is certainly more effective to increase the risk premium, and thus the innovator's profits, than to reduce risk by reducing the cost of investment. And this benefits the entire economy.

of exploiting the intangible. In other words, these facilitative measures do not only stimulate the creative phase in the strict sense of the intangible asset considered *„but also that of efficient functionalisation that translates into the use of the intangible asset created and, therefore, in the production of other goods or services, according to an efficientistic logic that rewards successful intangibles*[3]*".*

Patent Box Regimes in Europe

Effective Corporate Income Tax Rates on Qualifying IP Income under a Patent Box Regime, as of July 2021



Notes: Andorra, Malta, and San Marino also have patent boxes but cannot be depicted in this map due to their country size.

(a) The two Spanish regions "Basque Country" and "Navarra" have separate patent boxes.

(b) Switzerland's patent box regime operates at the cantonal level. As a result, effective tax rates differ.

(c) Greece has a three-year exemption for profits from the sale of self-manufactured goods based on an internationally recognized patent.

Source: Sources: OECD, "Corporate Tax Statistics: Intellectual Property Regimes;" Bloomberg Tax, "Country Guide;" PwC, "Worldwide Tax Summaries;" and EY, "Worldwide R&D Incentives Reference Guide 2021."

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[3] See Silvia Giorgi, *I beni immateriali nel sistema del reddito d'impresa* (Torino, Giappichelli, 2020): 369 – 370.

2.1. The UK Patent Box

The Patent Box regime was introduced in the UK in 2013 and, today is regulated in the Corporate Tax Act (CTA), Part8A. HM Revenue and Customs ('HMRC'), the non-ministerial government department in the UK that is primarily responsible for the collection of taxes in the UK, the administration of certain regulatory regimes and the payment of certain forms of government grants, has adopted guidelines on the application of the Patent Box contained in the Corporate Intangibles Research and Development Manual[4].

The tax incentive for intangible assets in force in England allows British companies to have a lower rate of taxation, 10% to be exact, compared to 19% as the corporate tax rate.

From a subjective point of view, companies owning the eligible patent or holding the exclusive license on the same intangible asset ('qualifying IP rights') are eligible; also are eligible companies that can demonstrate their active participation in the development of the invention and that has taken an active role in the innovation process (be a 'qualifying company') or in its application, in relation to the costs, time and effort expended, or by the value or impact of the contribution ('relevant IP profits')[5]

As is well known, following the reference standard defined by the OECD in Action 5 of the BEPS, the United Kingdom and Germany, on 11 November 2014, proposed the modification of the original version of the FHTP, with the adoption of the 'modified nexus approach': this differs from the 'classic' nexus approach due to the possibility granted to states to include in the calculation a flat-rate uplift that allows the costs of acquiring intangible assets and the costs of outsourcing research and development activities to be taken into account in the calculation. The traditional model proposed by the OECD, in fact, did not allow for the costs of outsourcing research and development functions within the corporate group to be considered and also excluded from the calculation of the relief those costs of acquiring

4 UK Government, HM Revenue & Customs, HMRC internal manual, "Corporate Intangibles Research and Development Manual", accessed March 11, 2016, https://library.croneri.co.uk/irm/cird.

5 On this subject, see Raul-Angelo Papotti, "The UK Patent Box," in *Patent Box,* ed. Maurizio Dallocchio, Raul-Angelo Papotti, Luca Pieroni (Milano: Digital Print Service, 2016), 171–172.

intangible assets that were not, in fact, attributable to research and development activities carried out by the taxpayer, but rather to the company transferring the intangible asset. The changes proposed and accepted with the publication of the OECD Report "Action 5: Agreement on Modified Nexus Approach for IP Regimes[6]" are to be considered in line with the fundamental freedoms of the European Union, which prohibit indiscriminate territorial tax incentives for research.

Receipts from the sale of products or services incorporating the patented invention, royalties, capital gains, as well as income derived from the infringement of industrial property rights in connection with the patented invention are among the income eligible for relief.

Despite the expected attractiveness of a preferential tax regime such as the British one, which taxes income from the exploitation of intangibles at a much lower tax rate than that applied in other legal systems, the Patent Box has not had the spread that was probably expected. According to the report accompanying the regulations governing the Patent Box, in fact, "it is estimated that approximately 650 companies claim the relief annually[7]": the preferential regime mainly invests in multinational companies, making it unattractive for small and medium-sized enterprises.

An emblematic example in UK is, in fact, the pharmaceutical giant Glaxo Smith Kline, which, using the Patent Box, has invested over £500 million in new plants, contributing to the creation of thousands of new jobs.

However, as mentioned in the introduction, the future scenarios of the UK Patent Box may, because of Brexit, change. In fact, although the Patent Box regime is incorporated within national legislation, the restrictions imposed by the European Commission on tax relief are also known (e.g. the type of relief available to SMEs is based on the EU definition of 'SME' and R&D relief for SMEs falls under EU state aid rules). It, therefore,

6 OECD/G20, *Base Erosion and Profit Shifting Project*, *Action 5: Agreement on Modified Nexus Approach for IP Regimes*, accessed February 20, 2015,https://www.oecd.org/ctp/beps-action-5-agreement-on-modified-nexus-approach-for-ip-regimes.pdf.

7 UK Government, Policy papers, "Corporation Tax: Patent Box - compliance with new international rules," accessed December 9, 2015, https://www.gov.uk/government/publications/corporation-tax-patent-box-compliance-with-new-international-rules/corporation-tax-patent-box-compliance-with-new-international-rules.

seems possible that many restrictions will be lifted following the UK's official exit from the European single market.

2.2. The Dutch Innovation Box

In the Netherlands, the Patent Box regime, the so-called Innovation Box, was introduced in 2007. Initially, the benefit was limited only to income from self-generated patents: these profits benefited from the reduced rate of 10%, later reduced to 5%. This is a considerable reduction if one considers the standard corporate tax rate in the Netherlands of 25%.

The scheme has been amended several times: the objective scope of application includes any intangible asset, with the exception of logos and trademarks.

However, only those entities in possession of patents declared to the Netherlands Patent Centre ("Agentschap NL OctroOICentrum") and research and development activities specifically recognised by means of a ministerial certificate may benefit from the relief.

Intangibles developed directly by the taxpayer are eligible for the preferential regime: in the event of an outsourcing research and development activities to unrelated third parties, the taxpayer does not forfeit the benefit if he proves that the risks and expenses are borne by him.

Taxable income includes that deriving from the sale or licensing of the asset, as well as 'implicit' income, i.e., for example, income due to savings resulting from the technological improvement of the production process. In order to simplify the procedure for identifying the same implicit components, an adversarial procedure with the tax authorities is provided in order to determine the share of income actually attributable to the innovation.

The Dutch Patent Box regime was from many sides regarded as particularly attractive compared to that adopted by its European 'brothers'; yet, it was never in the crosshairs of the European Commission, unlike the Luxembourg regime of the same name.

2.3. The Luxembourg Box

Luxembourg introduced its Patent Box in 2007, with Article 50bis of the loi del l'impot sur le revenue: in its original formulation, it consisted of the exemption of 80% of net income from qualified intangible assets. For

this reason, the Luxembourg scheme has been accused of having granted State aid.

It should be noted that the benefit in question was granted both in the case of 'self-production' of the intangible asset as well as in the case of purchase, as no further research and development activity was required of the advantaged party. The only limitation was found in the impossibility of using the Patent Box in the case of purchase of the intangible from subsidiaries or affiliates.

The rules delimiting the subjective scope of the application were clear: the benefit was attributed to resident entities and to permanent establishments of non-resident entities, provided that they held the ownership 'from a substantial point of view': the tax authorities have clarified this by distinguishing between 'legal ownership' and 'economic ownership'. If the two ownerships were not in the sphere of the same taxpayer, the relief measure would accrue to the holder of the 'economic' ownership.

Regarding the objective scope of application, not only patents, granted and/or in the process of being granted, were considered eligible for relief, but all intellectual property rights without any differentiation, including marketing intangibles and even image rights.

The application spectrum of the Luxembourg regime was extremely broad and indefinite: it is therefore not surprising that the national government chose in 2016 to repeal Article 50-bis. Consequently, a Patent Box was devised in line with OECD guidelines, limited to patentable inventions only, and entered into force as of 2018.

3. The Patent Box in Italy

The Patent Box[8] was immediately considered an innovative institution in the panorama of Italian tax relief[9]. It is an optional system of facilitated

[8] Albert De Luca and Joanne Hausch, "Policy forum: Patent Box regimes – a vehicle for innovation and sustainable economic growth," *Canadian Tax Journal/Revue Fiscal Canadienne*, vol. 65, no. 1(2017): 6514; *"Patent Boxes, otherwise known as innovation Boxes, intellectual property Boxes, and knowledge development Boxes, are designed to attract and retain companies operating patent-based businesses. They were pioneered by Ireland in the early 1970s and were key in attracting multinational companies to that country."*

[9] For an overview on the subject see Maurizio Dallocchio, Raul-Angelo Papotti, Luca Pieroni, *Patent Box Aspetti legali e benefici fiscali, ottimizzazione gestionale, patrimoniale*

taxation of business income deriving from the use and exploitation of certain intangible assets, lasting five years, renewable and irrevocable. It takes the form of an income tax reduction to a variable extent (from 50 to 100 percent) depending on whether the company intends to exploit a specific intellectual property or to sell it.

The use of the Italian Patent Box entails, first of all, an isolated treatment of the assets and liabilities attributable to intellectual property: it affects the calculation of the taxable base separately from other income, and with criteria specifically dedicated to them.

The international studies in the OECD on the subject are, therefore, the reference model for the implementation of the Italian discipline of the Patent Box, which implements peculiar tax principles, such as the nexus approach and substantial activity[10], relatively unknown to the domestic legal tradition, but evidently to be understood as external limits to the discipline of the concessionary institution.

In fact, only those who carry out an actual economic activity in the territory of the State that is substantiated by the maintenance, enhancement and development of the intangible asset can benefit from the tax relief in question: there must therefore be a 'substantial link' between the research and development activities, the intangible assets and the taxable income referable to them. The requirement of substantiality makes it possible to exclude from the benefits companies dedicated to the mere exploitation of intangibles, in the absence of an actual underlying research and development activity [11]:"*It is not the amount of expenditures that acts as a direct*

e finanziaria (Milano: EGEA, 2016), 50; Marco Greggi, "Patent Box (diritto tributario)," *Digesto Discipline Privatistiche (Sezione Commerciale),* (2017): 284; Silvia Giorgi, *I beni immateriali nel sistema del reddito d'impresa* (Torino, Giappichelli, 2020), 361.

10 On this topic see Robert J. Danon, "Tax incentives on research and development (R&D)," *Cahiers de Droit Fiscal International*: *The Hague, International Fiscal Association*, vol. 100a (2015): 17– 56.; Esperanza Buitrago Diaz, "Patent Boxes and the erosion of trust and in governance," *International Journal of Public Law and Policy*, vol. 6, no. 3 (October, 2019): 270–304.

11 See Paolo Arginelli, Francesco Pedaccini, "Prime riflessioni sul regime italiano di Patent Box in chiave comparata alla luce dei lavori OECD in materia di contrasto alle pratiche fiscali dannose," *Rivista di Diritto Tributario* (2014): 160; Caterina Manfredi Clarke, "Concorrenza fiscale e Patent Box: il caso italiano," *Diritto e Pratica Tributaria Internazionale* (2021): 500.

proxy for the amount of activities. It is instead the proportion of expenditures directly related to development activities that demonstrates real value added by the taxpayers and acts as a proxy for how much substantial activity the taxpayer undertook" [12].

The tax relief must therefore be directed to taxable income deriving from activities concretely exercised by the taxpayer and the scope of the benefit, as specified by the report, is not correlated to the absolute amount of the relevant expenses, but rather to the proportion of the costs directly related to the intangible asset. In other words, the portion of income eligible for italian tax on the income of physical persons (so called IRPEF)[13] or italian corporate income tax (so called IRES)[14], as well as for Italian regional tax on productive activities (so called IRAP)[15], must be carefully identified, making use of the indications contained in Article 9, paragraphs 2 to 5, of the Ministerial Decree of 28 November 2017 (hereinafter the 'Implementing Decree').

This share is derived from the product of the income attributable to the direct or indirect use of the intangible and the so-called 'nexus ratio', i.e., the ratio between the costs directly relating to the intangible asset (so-called qualified costs) and the 'total costs' incurred by the taxpayer for research and development activities, which will be discussed below. It should be noted that the costs to be considered for the calculation of the nexus ratio are those "relevant for tax purposes". meaning those costs incurred

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12 OECD/G20, *Base Erosion and Profit Shifting Project*, 25.

13 It's a direct, personal, progressive income tax and is the architrave of the Italian tax system. See Augusto Fantozzi and Franco Paparella, *Lezioni di diritto tributario dell'impresa* (Milano, CEDAM, 2019), 27; Antonio F. Uricchio, *Manuale di diritto tributario* (Bari: CACUCCI, 2020), 151.

14 It's a complementary tax to IRPEF. IRPEF and IRES, in fact, affect the same wealth of differenttaxpayers and have an apparatus of principles and rules common to both taxes, which are called general. Franco Paparella and Augusto Fantozzi, *Lezioni di diritto tributario* (Milano: CEDAM, 2021), 85.

15 It was introduced into the Italian legal system in 1996 to implement the reform of business taxation and represented an innovative way of taxing businesses. IRAP is a decentralised (regional) tax, levied exclusively on production, with a very broad tax base, a relatively low ordinary tax rate and has replaced a wide range of taxes levied on businesses and professionals. On this subject, see, Giuseppe Melis, *Manuale di diritto tributario* (Torino, GIAPPICHELLI, 2020), 813.

during the reference period, regardless of the tax regime and accounting treatment[16]. In particular, the qualified costs to be indicated in the numerator are the expenses relating to the research and development activity carried out directly by the taxpayer and/or outsourced; to quantify the costs to be indicated in the denominator, on the other hand, it is necessary to add to the former the additional costs for research and development activities outsourced to related parties and those, if any, for the acquisition of the intangible asset (including the cost incurred to obtain it by means of a licence).

The result of this ratio can finally be increased by an amount, defined as the up-lift, corresponding to the difference between the value of the denominator and that of the numerator, in any case within the limit of 30% of the latter.

Having thus determined the ratio that leads to the identification of the 'nexus ratio', one finally arrives at the quantification of the tax benefit under review, which consists of the exclusion from the overall income of the enterprise of 50% of the product between the nexus ratio itself and the portion of income that the enterprise derives precisely from the direct or indirect use of the intangible.

The nexus approach principle tends, therefore, to penalise taxpayers who outsource research and development activities within the corporate group, while rewarding, on the contrary, those who perform the same

[16] Through agreements with universities and research institutes or similar bodies, as well as by companies, including innovative start-ups, not belonging to the same group. See the OECD/G20, *Base Erosion and Profit Shifting Project*, *Action 5: Agreement on Modified Nexus Approach for IP Regimes*: 5, consistent with the OECD indications according to which: *"Qualifying expenditures will be included in the nexus calculation at the time they are incurred, regardless of their treatment for accounting or other tax purposes. In other words, expenditures that are not fully deductible in the year in which they were incurred because they are capitalised will still be included in full in the nexus ratio starting in the year in which they were incurred"*, *Action 5 - Final Report* 2015, cit., 27. The legal criterion for identifying the accrual basis is represented in our system by Article 109 TUIR, which constitutes, as specified by the Agenzia delle Entrate in Circular No. 11/E, *'a criterion applicable regardless of whether the beneficiary applies the same rule for the determination of its taxable income for income tax purposes. Accordingly, even entities that prepare their financial statements in accordance with international accounting standards must allocate costs to the individual taxable periods in accordance with the rules set forth in Article 109 of the TUIR'*.

activities on their own or outsource them to third parties. Similarly, the application of this principle does not allow the expenses incurred by the taxpayer for the acquisition of the intangible asset to be included in the qualified costs, as they are not directly linked to the maintenance and development of the intangible: *"[…] only the expenditures incurred for improving the IP asset after it was acquired should be treated as qualifying expenditures. […] Acquisition costs (or, in the case of licensing, royalties or license fees) are a proxy for overall expenditures incurred prior to acquisition"*[17].

The principle of the nexus approach was therefore deemed the most suitable criterion to counter the often-artificial relocation of taxable profits, while at the same time ensuring their uniform treatment in accordance with internationally agreed methodologies.

3.1. Attempts at simplification: the new preferential tax regime becomes front-end

As mentioned in the introduction, Article 6 of Decree No. 146/2021, is dedicated to new regulation of the Patent Box which, just two months later, has already undergone further important changes by Article 1, paragraph 10, of Law No. 234 of 30 December 2021. According to the current wording, in fact, business income holders can opt for a new facilitative regime that provides for a 110% increase of the deductible costs incurred for research and development activities of intangibles 'used directly or indirectly in the performance of their business activities': the intangibles considered are software protected by copyright, industrial patents, designs and models.

The option exercised by the enterprise has a duration of five tax periods, is irrevocable, renewable and is valid for both IRES and IRAP taxation. The regime applies to options exercised with respect to the tax period current on the date of entry into force of this decree and to subsequent tax periods.

To benefit from the tax relief, the taxpayer will have to 'indicate the information necessary to determine the increase by means of appropriate documentation', which will have to be prepared in accordance with the provisions of a specific order of the Director of the Revenue Agency. Also in this hypothesis, as already noted in the self-determination mechanism of

[17] OECD/G20, *Base Erosion and Profit Shifting Project*, 30.

the old Patent Box, failure to produce such documentation during the preliminary investigation will result in the imposition of the penalties ordinarily provided for unfaithful declarations.

These further innovations call for some reflections.

First of all, the object of the relief has changed, given that paragraph 4 of the aforementioned Article 6 considers as "eligible for relief" only the activities aimed at "the creation and development of the assets referred to in paragraph 3"; otherwise, Article 8, Ministerial Decree of 28 November 2017 (the so-called "Patent Box" decree) also included the activities aimed at "increasing the value" of the assets considered, in line with the original *voluntas legislatoris* to encourage the maintenance or relocation of intangible assets in Italy. This approach was consistent with the OECD Report of Action 5 of the BEPS, according to which it is not the numbers of expenses that represent the actual activity carried out by the taxpayer, but the proportion between those directly related to the development of the asset and the value added produced by the taxpayer that can actually demonstrate the substantial activity carried out to develop the asset.

Moreover, the new regime excludes from the benefit the *„processes, formulas and information relating to experiences acquired in the industrial, commercial or scientific field that are legally protectable*" - so-called know-how; this exclusion could penalise, on closer inspection, certain Made in Italy sectors, such as those of fashion or mechanics, endowed with highly recognisable know-how even if characterised by production innovations that are not always patentable.

Not included in the facilitating discipline are trademarks, already excluded from the "old" benefit by Article 56, paragraph 1, letter a) of Decree-Law no. 50/2017, in accordance with the standards shared at the OECD in the context of Action 5 of the BEPS: as a result of this change, the Italian Patent Box - as specified in the OECD Harmful Tax Practices - 2017 Progress Report on Preferential Regimes - can no longer be classified as potentially 'harmful', except for the grandfathering period during which taxpayers already admitted to the non-compliant regime were able to benefit from the tax exemption of income deriving from the exploitation of trademarks for a maximum period of five years (i.e. until 30 June 2021).

The specificities of trademarks, in fact, make elusive the connection between subsidised profits and research and development activities properly

incurred for the creative phase of the asset, and this is not compatible with the characteristics of the nexus approach.

It is also of great interest to know the type of research and development activities required to benefit from the new facilitating measure, including the expenses deemed eligible for aid in the case of trademarks. To this end, the implementing measure issued by the Director of the Revenue Agency must clearly indicate the characteristics that the expenses must possess in order to be covered by the new regime, so as to avoid the significant interpretative criticalities that have already emerged with respect to the R&D tax credit since its establishment[18].

In this regard, with respect to the repeal of paragraph 9 of Article 6, Decree-Law No. 146/2021, by the Budget Law of 2022, it should be noted that taxpayers who decide to opt for the new super-deduction will also be able to benefit cumulatively and for the entire duration of the option from the R&D tax credit in relation to the same costs with an increased deduction.

This requirement of the legislator is consistent with the new paragraph 10-bis, Article 6, Decree-Law No. 146/2021, introduced by the Budget Law 2022, according to which, *,if in one or more tax periods the expenses (referred to in paragraphs 3 and 4) are incurred with a view to the creation of one or more intangible fixed assets falling within those indicated in paragraph 3, the taxpayer may benefit from the 110% increase of these expenses*

[18] Despite the documentary burden required of the taxpayer, the correct use of the tax credit presents many application difficulties. In fact, the most critical issue encountered by companies concerns the identification of the activities eligible for tax relief, both from a qualitative and quantitative point of view, given the lack of an unambiguous qualification of the operations falling within the innovation process. The interpretative uncertainties highlighted expose applicants for the tax benefit to the risk of inspections certifying an eventual undue use of the tax credit 'for failure to comply with the conditions required': the Revenue Agency, in such a situation, will recover the relevant amount, plus interest and penalties in accordance with the law, without prejudice to any civil, criminal and administrative liabilities borne by the beneficiary company. On this subject, see Ivo Caraccioli, "Problemi interpretativi e applicativi dei reati di "indebita compensazione," *Il Fisco* (2018): 2961; Massimo Basilavecchia, "Il trattamento sanzionatorio dell'indebita compensazione," *Corriere Tributario* (2018): 2155; Filippo M. Pietrosanti, "Aspetti critici del regime sanzionatorio del credito d'imposta ricerca e sviluppo alla luce della perdurante distinzione tra credito inesistente e credito non spettante", in *Ricerca e sviluppo quali fattori di crescita e di promozione per le imprese*, ed. Andrea Quattrocchi and Pietro Boria (Napoli, Jovene, 2020), 215.

starting from the tax period in which the intangible fixed asset obtains an industrial patent title. The 110% mark-up may not be applied to expenses incurred before the eighth tax period to the one in which the fixed asset obtains an industrial patent right".

A recapture mechanism is thus introduced on an octennial basis that allows the unused benefit to be recovered exclusively in relation to R&D expenditure that, *ex post*, gave rise to an intangible asset: a similar device appears to be consistent with the old Patent Box, as it aims to incentivise and facilitate R&D activity in a different phase of development from the strictly 'start-up' phase, the privileged sphere of intervention of the R&D bonus[19].

The new Patent Box can therefore be availed of as of the tax period in which the industrial property right relating to the developed intangible is obtained.

The last issue to be addressed concerns the singular transitional regime: according to the current paragraph 10, art. 6, Decree Law 146 (as amended by the Budget Law 2022), the options provided for by art. 1, paragraphs 37 to 45 of Law no. 190 of 2014 and art. 4 of Decree Law 34/2019 are no longer exercisable. In other words, from the 2021 tax period, it is no longer possible to exercise the options for the Patent Box and the "self-liquidation" regime.

Subjects who have exercised or are exercising the Patent Box options relating to tax periods prior to the current one as of the date of entry into force of Decree-Law No. 146/2021 may choose, as an alternative to the opted regime, to adhere to the new Patent Box upon notice to be sent in accordance with the procedures established by the Revenue Agency. Excluded from this possibility are those who have filed an application for access to the procedure under Article 31-ter of Presidential Decree No. 600/1973, or filed an application for renewal, and have signed a prior agreement with the Revenue Agency at the conclusion of such procedures, as well as those persons who have adhered to the 'self-liquidation' regime under

[19] On the already asserted need for a coordinated reinforcement of what can (at present, could) be considered an 'organic system of public aid for research', please refer to Lucrezia V. Caramia, "Innovazione industriale e sostenibilità ambientale: alla scoperta del Patent Box," in *Circular Economy and Environmental Taxation*, ed. Antonio F. Uricchio and Gianluca Selicato, (Bari, CACUCCI, 2020), 288.

Article 4, Decree-Law No. 34/2019, converted with amendments by Law No. 58/2019.

4. Conclusion

Pulling the thread of the argument, the new relief seems to consider only the 'start-up' costs of innovation, in the manner of a front-end relief measure emptied of its original ratio.

The original Italian Patent Box, in fact, aimed not only to promote investment in research and development activities, but also to encourage the retention or reallocation in Italy of intangible assets otherwise held abroad, and also to hinder the artificial placement of intangible assets developed in Italy at low-tax foreign facilities.

The 'old' measure, therefore, did not aim to incentivise the incurrence of costs to a particularly significant extent, but pursued the main purpose of ensuring the coincidence between the person incurring such costs and the person benefiting from the income derived from them. This approach was in perfect harmony with the indications provided by the OECD in Action 5, in the context of the oft-mentioned BEPS Project.

Nor can certain perplexities be overlooked with regard to a potential breach of the taxpayer's legitimate expectations or, at the very least, of the expectation of legal stability, owing to a sudden repeal of an advantage projected over several years and which has certainly conditioned the investments and strategies of numerous companies that must now come to terms with the changed legal framework.

Ultimately, the Italian tax legislature, after seven years since the entry into force of a facility that was in line with international guidelines and that was beginning to produce important results, has fallen back on the national dimension of tax credits, thus espousing new priorities that favour the 'acceleration' of investments and the immediate use of tax reliefs. But not only does this approach seem to favour a short-term vision, not necessarily conducive to innovation and development: what is more, it loses focus, in the new arrangements, on the extremely delicate issue of harmful tax competition, which since 2015 has been at the centre of international policies aimed at developing models and tools to combat the erosion of tax bases.

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Personal Income Tax Law Changes and the Impact on Family Budget in Albania

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Abstract: Personal income tax is a tax on wages or salaries and other income a person earns during a calendar year. It is calculated on the income of all resident individuals and each government imposes personal income tax on earnings according to its fiscal package. The taxable incomes has been on focus of the latest fiscal package of Albanian Government approved by the end of December 2019 and starting from January 2020, changes effect a larger category of people. This paper is focused in analyzing the changes of personal income tax law and evaluating the impact on family budget. Considering the effects in the standard of living, this evaluation will show the need for other regulations. Interesting implications will be explored for policy makers and working persons in Albania.

1. Introduction

The objective of this study is to provide an overview of legal tax changes over the years in Albania, to reflect the changes of the economic transition, to analyze and evaluate the impact of these changes on revenue and especially on family budget with the main purpose, to determine what is the impact of legal changes on taxes in the household budget in Albania.

A tax is a compulsory financial charge or some other type of charge imposed on a taxpayer (an individual or a legal entity) by government in

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order to fund spending and various public expenditures[1]. Taxes are direct or indirect. Direct taxes are primarily taxes on natural persons (e.g., individuals), and they are typically based on the taxpayer's ability to pay as measured by income, expenditures or net wealth. Income tax is a direct tax charged to individuals or entities, paid directly to the government and is collected by central government. In Albania, taxes are imposed by government or local authorities. The most important sources of national income from taxation are corporate income taxes, *personal income taxes*, excise tax, value added tax, national taxes and other, which are all applied at national level. National income is also composed by customs duties and social insurance payments.

Considering law references, every person or entity that acquires a legitimate income, is a taxpayer. Income sources may be different for different people. Taxable incomes are distinguished in some categories. The sources of income in Albania but not only, according to the current law[2] are: current employment relationship income including wages, salaries and bonuses (excluding diplomatic relationships); income from bank interests ore securities; cultural or sport activities income as well as income from other personal activities in Albania; income from nonresident's activities through resident individuals; income from property right transfers considering realty of residents; income from real estate and accessories; income from the right for use of natural resources, minerals and hydrocarbon assets; income from shares and interest; income from dividends distributed by a resident legal entity; income from profit shares related to partnerships, income from copyright and intellectual property, rent or leasing as well as gambling revenue; income of nonresidents from rendering services to residents; other incomes non mentioned above. Some income are excluded, such as: Income earned as a result of insurance in the compulsory social insurance scheme and health, as well as economic assistance to low-income individuals; Student scholarships; Minimum wages; Income received, including income in cash or in kind, from owners as reward for

1 Charles E. McLure, et.al. "Taxation," Encyclopedia Britannica, accessed April, 21, 2021, https://www.britannica.com/topic/taxation.

2 Article no. 4 on "Income Sources", of Law No. 8438 date 28 December 1998 on "Income Tax" in Albania, Official Journal of Albanian Republic, No. 154, as amended.

expropriations made by the state for public interests; Income obtained as a result of financial compensation, for former owners and former convicts politics; Contributions made by the employer to ensure the life and health of employees; Compensation benefits, obtained through final court decisions, such as and certain reimbursements for court costs; Revenues excluded under international agreements ratified by the Assembly in Albania; Income obtained from state institutions for achievements in science, sports, culture; Transfer of ownership of agricultural land from a registered farmer to a farmer or natural or legal person carrying out agricultural activity; Contribution made by each member of a voluntary pension fund to the extent specified in the law on voluntary pension funds[3], as well as contributions made by the employer or any other contributor, in the name and on behalf of the member of the voluntary pension fund including capital gains from fund assets investments during the administration from the management company up to an amount determined by Law on pensions in force; Compensation received in cases of illness, disasters, in accordance with the provisions of legislation relevant in force. Considering different sources of income, taxation in Albania is applied according to Law No. 8438 dated 28 December 1998 on Income Tax, amended by the Albanian Parliament 45 time since first approval. The most recent change is the one of 23.12.2020, followed by the last normative act no. 20, dated 07.05.2021. These continuous changes during these years show the importance of the role of income taxation in the tax system applied in Albania. The system of collection is built in the way that taxes are collected and paid by the employer by withholding it in the source it is earned.

Considering the role of the government in ensuring social welfare for all the citizens, these changes show the endeavor to have a better distribution of tax burden in order to have the resources better distributed in terms of equality.

As long as income is the most important part of a budget, taxation is an important factor in income reducing. This means that the disposable income to cover the expenses is lower if tax rates increase. This has a very

[3] Article no. 88 on "Tax treatment of pension fund members'contributions", of Law No. 10 197, date 10.12.2009, "On voluntary pension funds," Official Journal of Albanian Republic, No. 185, as amended.

important impact in the standard of living of people affected by tax rates increase. This paper will analyze the law changes on personal income tax and will evaluate the impact on family budget.

2. Methodology

For the purpose of this study, secondary data are collected and used by reviewing and analyzing the contemporary literature, laws, reports, studies, and other data collected from official sources of information in Albania.

3. Literature review

Taxes are financial obligations to be paid by citizens or residents in a state, determined by governments as taxing authorities. Taxes are involuntary payments not linked to the provided services, paid on income from different sources, considering work income such as wages, real estate income from rent, income from sale transactions or capital gains. Literature on public finance classifies taxes in many various ways, depending on who pays the taxes. Personal income tax plays an important role in almost all national tax systems. It is the easiest tax to collect by withholding it in source it is earned. Personal tax income revenue is composed by different taxes but the one collected from wages represents a higher percentage and generates considerable revenue, particularly for countries in transition as one of the most important sources of national income from taxation. Determinants of tax revenues differ among countries. Personal income tax is one of the major taxes used by both developed and undeveloped countries (Gruber, 2005).

Evaluations on tax effects on household incomes are considered from different point of views over the years in literature and studies. These taxes are related to income inequalities and income reports from citizens. If countries see the effect of an income tax increase as a mean for reducing inequality among people, this policy may result ineffective because taxpayers may reduce the reported income in response to higher tax rates for increasing progressivity of tax system. The adverse effect may result for lower tax rates, as people tend to report higher incomes.[4] So, Personal Income Tax (PIT), like every other tax, effect people behavior and this results in

[4] Gerald Auten and Robert Carroll, "The effect of Income taxes on household income," *The review of economics and statistics*, no. 81(1999): 14.

efficiency implications. The impact is on both, labor supply and savings decisions. PIT may distort these decisions and the way how, is a central consideration in determining the rate and structure of this tax.[5] Different empirical studies show that this tax tends to reduce incentives of people to work in some cases and in other cases tends to have an adverse effect, as it makes people feel poorer and serves as an induction to work more. The extent, to which these effects eliminate each other, needs a very accurate calculation in order to evaluate the right tax rate to be applied and the impact on countries tax revenues.

High income countries have higher tax revenues and higher GDP per capita (Clausing, 2007) related to middle or law income countries. A large number of studies highlight the importance of an adequate tax system in stimulating economic growth and reducing income inequalities, as changes in the tax and benefit system have an immediate effect. Countries over the years have debated the benefits and drawbacks of progressive taxation over the flat-rate tax system. Literature on taxes shows a number of advantages and disadvantages of progressive taxation and flat-rate taxation as well. The most often mentioned advantage of progressive taxation is the positive effect on income distribution. According to Shapiro 1996[6], progressive taxation leads to much better fulfillment of the objective of social justice, considering that the people with a low level of income are taxed less than people with high level of income, which leads to the improvement of the living conditions for the individuals at the bottom of the distribution. Conessa and Crueger (2006) show that a progressive tax system enhances an equal distribution of economic welfare.

Albanian tax system has undergone different fiscal reforms over the years and both models, progressive taxation and flat-rate taxation have been applied. The current tax regime in Albania is the progressive taxation, set by the government by considering that individuals with low and medium personal income are negatively affected and individuals that gain more are favored by the previous flat tax. The flat taxation is considered as more

5 Howell H. Zee, "PIT Reform: Concepts, Issues, and Comparative Country Developments," *IMF Working paper* 05 no. 87 (April 2005): 1–59.

6 Robert J. Shapiro, *Why Fairness Matters: Progressive Versus Flat Taxes* (Washington DC: Progressive Foundation, 1996), 1–44.

favorable for the middle layer of population, but Albania maintains a large misbalance regarding the economic layers. Since individuals with low and medium income make up for the majority of both public and private sector, their contribution to the state budget revenues is greater. In Albania there have been two positive effects by applying the progressive taxation: according to official data, more than 300,000 employees are freed from the burden and charges and more income are accumulated for the state budget. But still, there are a lot of discussion related progressive taxation being fair.

4. An overview of fiscal legislation and tax law amendments in Albania

The concept of the personal income tax, or the individual income tax, until the early 1990s was not introduced in Albania yet. Personal income tax is a new policy in the Albania of 90-s. This concept includes both individual and corporate tax, but in this study, we are going to focus on individual personal income tax.

Personal income tax policy has gone through several series of reforms during 1991–2021, along with the reforms of democratic changes in Albania and it has become a progressively more important source of revenue and a policy instrument in Albania's fiscal taxation system.

Since 1992 with the initiation of adapting a fiscal regime after introducing the first fiscal package in 1991, fiscal facilities were provided as an instrument for promoting private enterprise, followed by a better comprehensive legislation. Some of the fiscal facilities were: tax on profit exceptions; exemptions from customs duties on investment goods; non-application of taxes on dividend, etc. This fiscal regime has evolved periodically. It is consolidated by Law No. 7786 dt.27.01.1994 meeting the threshold of 10,001ALL/month on wages and the modernization of legislation by law 8438 dt.28.12.1998 has followed. In the beginning of 1998, no tax relief is applied anymore. The new fiscal legislation consisted on a unique income tax rate for all types of activities at the rate of 30%, the average applied by OECD countries. The tax on withholding dividend at the rate of 10% is applied for residents (15% is applied for nonresidents). This rate of 10% is also applied to profit distribution, interest and payments on author's right and royalties. This new fiscal legislation also includes some deductible expenditure before profit calculations and taxation. On all machinery and equipment a depreciation rate of

20% is applied. There is no evidence and calculation that proves the positive effects of these fiscal changes or economical benefits. Effects of the implementation of the new fiscal policy have resulted in a significant increase in the state budget revenues from VAT and personal income tax, while budget revenues from economic and trade activity maintain the same descending trends related to GDP.

A new threshold set above 14,000ALL/month on wages by law 8841 dt.11.12.2001 and frequent changes of threshold for progressive taxation were applied since January 2008 (Table 1). A series of additional initiatives took place as part of tax legislation changes and were finalized with the approval of a new fiscal package in the second half of 2007. Some of these changes intended to stimulate business incentives and at the same time generate more tax revenues. Such reforms consisted of the change from a progressive to a 10% flat income (2007) and profit (2008) tax system excluding only law wages up to 30,000ALL/month by setting a threshold up to 10,000ALL/month and no threshold was used for wages over 30,000ALL (Albanian Ministry of Finance, 2008). All other exclusions and facilitations under the old tax system were eliminated[7]. A new amendment made by Law no. 107/2012, dt.15.04.2013 for all wages over 30000 ALL /month to be taxed by 10% without exclusion rate was approved. The burden of exemption from taxation of 0–10,000ALL for wages up to 30,000ALL also changed in 0–30,000ALL in 2012.

Table 1. Personal Income tax in Albania during 2005–2007

Monthly wage from (ALL)	to (ALL)	%
0	14000	+ 1% of the amount above 0
14000	+ 40000	140 + 5% of the amount above 14000
40000	+ 90000	1440+ 10% of the amount above 40000
90000	+ 200000	6440+ 15% of the amount above 90000
200000	+ And more	22940 + 20% of the amount above 200000

Source: Albanian Tax Law

[7] Gerti Shijaku and Arlind Gjokuta, "Fiscal Policy and Economic Growth: The case of Albania," *Working Paper,* no. 4(2013): 43.

In 2014, Albania adopted the progressive tax system for the taxes on personal income from employment with periodical amendments since December 2020 that is the last amendment in force. According to this system, upon the increase of tax base is also increased the tax rate. Three divisions are used for the calculation of personal income tax on wages and the rate of tax applied is different for each one. In Table 2, is shown the wage margin and tax rate in % for each division.

Table 2. Personal income from employment tax rate by division and calculation in Albania

Taxable income from employment _ monthly wage in ALL	Income tax
0 to 30,000	0%
30,001 to 150,000	13% of the gross amount over ALL 30,000
Above 150,000	ALL 15,600 plus 23% of the amount over ALL 150,000

Source: General Directorate of Taxation in Albania, 2021; Law 8438 dt.28.12.1998 (amended)

Actually, personal income tax in Albania is levied at a flat rate of 15% on gross income, excluding 8% on dividends and employment income which are progressively taxed at 0%, 13% and 23% as mentioned above. There are also exemptions from taxation of several categories such as scholarships, pensions, etc. and an exemption for self-employed with a turnover up to 8mln ALL.

As part of fiscal indicators of the state budget in Albania, Personal Income Tax revenues accounted for 9.4% of the total tax revenues in 2010, 9.2% in 2011 and approximately 9.8% during the last four years (2018–2021) as shown in Table 3.

Considering these figures, personal income tax relative to total tax revenues seems small in Albania but for developing countries and countries in transition where personal income is a very small part of revenue compared to developed countries, this is normal.

Table 3. Fiscal indicators regarding consolidated budget of 2018–2021

ITEMS	2018	In % to GDP	2019	In % to GDP	2020	In % to GDP	2021	In % to GDP
Personal Income Tax (PIT)	36,517	2.2%	46,124	2.7%	41,080	2.6%	41,000	2.4%
Total tax revenue (TTR)	419,333	25.7%	426,271	25.4%	408,045	25.8%	442,153	26.3%
PIT/TTR in %	8.7%		10.8%		10.07%		9.7%	

Source: Ministry of Finance, 2021

Tax policy role in macroeconomic management in Albania plays an important role, for this reason the government is engaged in considering a new economic stimulus package that might include possible increase of the threshold of taxable income. International practices of taxation have been usually used as a significant guidance for past reforms in Albania[8].

5. Importance of tax management in a family budget

All changes of personal income tax law has an impact on family budget. All budgets have almost the same components: income (monthly or annual income from any reliable source), fixed expenses (necessary expenses for the cost of living, including loan, rent, insurance, phone bills, etc.), variable expenses (cc payments, maintenance of car or property, groceries, etc.), discretionary expenses (not necessary expenses such as for entertainment purposes, eating at a restaurant or coffee at a bar) and personal financial goals (left over for savings, pension funds, vacations, furniture). Personal or family monthly budget is created by combining these elements. Family budgets for a modest standard of living have seven components: housing, food, child care, transportation, healthcare, other necessities such as clothing and entertainment, and *taxes.*

[8] Agim Binaj, Ilir Binaj and Irini Limaj, "Personal Income Tax Policy Analysis: Albania vs. United States,"*Interntional Journal of Economics and Financial Issues*, no 3(1) (2013): 42–49.

Taxes management is important for two main reasons: First, taxes have a budget impact, reducing it in 15% or more[9], if we refer to high rates or marginal rates of taxation on personal income and second, if we do not manage them effectively, the amount to be paid to the state will be higher than the obligation, this means less money for completing the aims and needs of an individual. For these reasons, it is important to have knowledge of the legislation and to take advantage of all the opportunities it offers us, in order to not pay more than required. While doing a financial plan for personal finances or family finances, everyone must be careful by evaluating every rule and law knowledge, in order not to conflict with fiscal legislation and to use all the advantages and opportunities it offers, for not paying more than required[10].

Taxes have a significant effect on family incomes, so each family must be careful to manage the taxable income, by reducing it according to allowed deductible expenses. Families in general, do not have much information on law changes and amendments, but there exist a lot of legislative techniques to be adopted in order to avoid over taxation, which is a legal form of reducing the taxable basis. This needs a lot of knowledge of fiscal code and adopted rules on personal income taxation. Avoiding taxes, means a reduced tax payment to state budget and more available money to spend, to save or to invest[11] by families, in order to increase their standard of living. Considering the opportune cost or the marginal rate of taxation, families can use better their income. Every family budget is influenced by the income of a family, the size and the composition of the family, occupation of family members, family goals, socio-economic status of the family, intercity differences and rewarding employment. In many countries, in order to calculate the taxes to be paid, you have to take into consideration

9 Article no. 4 on "Income Sources", of Law No. 8438 date 28 December 1998 on "Income Tax" in Albania, Official Journal of Albanian Republic, No. 154, as amended.

10 Arthur J. Keown, *Personal finance-turning money into wealth, Seventh edition* (Boston: Pearson, 2016), 101–120.

11 Long term investment in pension funds, considering the time value of money, making a good profit in the long term, even the amount is limited to 200,000 ALL, according to Albanian Law No. 8438 dated 28 December 1998 on Income Tax (changed) and Albanian Law No. 10 197, dated 10.12.2009 on Voluntary Pension Funds.

the marital status of an individual, because taxation differs when you are single, you are married or you have a family, divorced with children to take care of, widow/ widower, aged, with health problems or limited liabilities, among which single persons pay higher taxes than all the other categories.

In Albania, an independent taxation system is applied, where the individual is the basic unit of taxation and is taxed on the basis of his or her income independently of marital status.

Every year INSTAT makes a survey for calculating the incomes and the standard of living in Albania. This statistical survey is carried out at the household level and gives an overview of the socio-economic situation of the Albanian households. The last publication of the survey for 2020 shows the situation in Albanian families. If we refer to the most recent official statistical data of INSTAT, in 2018, the average monthly consumption expenditures of a household composed of 3.7 persons on average are 75,935 ALL. The estimation of the monthly average consumption expenditure of the household, in 2018 is 3.5 percent higher than in 2017 while in 2019 are 82,235 ALL, which is 5,6% higher than in 2018[12]. The growth of consumer prices in 2019 is 1.4% compared to 2018. In 2020, the average monthly consumption expenditures of a household composed of 3.6 persons on average are 83,475 ALL. The estimation of the monthly average consumption expenditure of the household, in 2020 is 1.5 percent higher than in 2019. The growth of the consumer prices recorded in 2020 compared to 2019 is 1.6 percent.

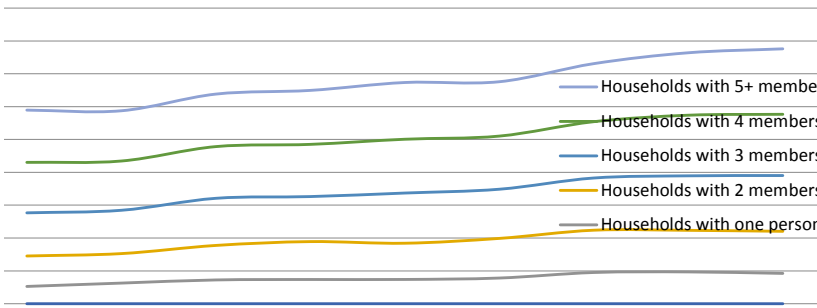

Figure 1. Monthly consumption expenditures, by household size INSTAT 2021

Source: INSTAT, 2021

[12] Albanian Institute of Statistics. "Household Budget Survey, 2020", *INSTAT* (2021): 1–11.

These figures show that monthly consumption expenditures have a positive trend over the years, which is partly connected to the inflation. Considering the trend of the monthly mean equivalised disposable income per capita in Albania during the same years, the figures show that these incomes positive growth makes less than 8% related to each previous year (Table 4), same as average middle wage trend during recent years (Table 5).

Table.4 Monthly mean equivalised disposable income

Monthly Mean equivalised disposable income per capita (ALL)			
2017	**2018**	**2019**	**2020**
24.526	26.144	27.849	30.169

Source: INSTAT, 2021(Income and Living Conditions Survey 2017, 2018, 2019, 2020)

Table 5: Average gross monthly wage per employee and approved minimum wage, 2018–2021(in ALL)

Description	IV/2018	2019	2020	2021
Average monthly wage per employee	52,312	52,376	53,787	57,182
Approved minimum wage	24,000	26,000	26,000	30,000

Source: INSTAT, 2021

Household structure of budget has more spending related to physiological needs, as food, clothing, etc. (Table 4).

Table 6: Household budget structure by the 12 main groups of consumption

Main groups	Viti / Year								
	2020	2019	2018**	2017	2016	2015	2014	2009	2007
Food and non-alcoholic beverages	41.6	41.3	44.7	44.1	45.2	48.7	44.3	49.4	47.6
Alcoholic beverages, tobacco	3.7	3.7	3.4	3.5	3.4	3.5	3.6	4.2	4.3
Clothing and footwear	4.6	5.2	4.2	4.3	4.8	4.9	5.1	5.4	6.2

Main groups	Viti / Year								
	2020	2019	2018**	2017	2016	2015	2014	2009	2007
Housing, water, electricity, gas and other fuels	10.0	10.1	10.3	10.9	10.2	10.3	10.2	9.0	7.4
Furnishing, household equipment and routine maintenance of the dwelling	6.9	6.7	6.3	4.8	5.0	4.8	5.4	4.9	5.9
Health	5.4	4.3	4.1	3.9	3.4	3.6	4.8	2.7	4.1
Transport	6.2	5.9	6.6	7.2	6.3	6.8	6.8	5.7	6.2
Communication	3.7	3.7	3.5	3.4	3.3	3.0	3.3	3.5	2.9
Recreation and culture	2.8	3.8	2.6	3.0	3.0	2.9	3.1	2.3	3.1
Education	3.1	3.1	3.0	3.9	4.4	2.1	4.2	2.0	1.7
Restaurants and hotels	5.6	4.9	4.6	5.0	4.4	3.6	3.2	5.0	5.0
Miscellaneous goods and services	6.3	7.3	6.7	6.1	6.5	5.8	6.0	5.8	5.5
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

** Household Budget Survey*

*** HBS 2018 data are revised due to methodological changes*

As people have more basic needs, the living standards of people tend to rise if they live with other people. When they pool resources or share goods and services, the cost per individual of a given lifestyle is lower. But this is not true when couples have children, because they have additional cost for raising them. Expenses rise as family size increases.

Table 7: Household monthly consumption expenditures, by household type

Household Type	Viti / Year								
	2020	2019	2018**	2017	2016	2015	2014	2009	2007
One person	46,150	48,417	47,529	39,093	36,935	36,876	36,192	31,397	26,308
Adult with children	69,419	68,650	68,152	55,795	55,485	61,093	50,308	49,821	43,973
Two adults without children	63,965	63,255	64,419	60,329	55,025	57,909	52,938	44,844	46,456
Two adults with children	86,270	85,413	81,607	74,218	74,000	73,727	74,408	63,400	67,744

Household Type	Viti / Year								
	2020	2019	2018**	2017	2016	2015	2014	2009	2007
Three or more adults without children	92,108	90,309	84,818	81,829	84,376	75,819	76,570	78,054	77,411
Three or more adults with children	99,376	95,451	88,110	82,669	86,552	82,611	81,016	77,702	81,916

Source: INSTAT, 2021

Considering all we mentioned above, with the inflation, the low average monthly wage growth and the tendency of increasing expenses, along with the government policy for social welfare, there is a need for good management of taxable income of a family, as personal income taxes make up to 23% of monthly income and this has an impact in decreasing people's standard of living.

5. Conclusion

Determining the appropriate level of personal income taxation in Albania is one of the most difficult challenges the governments have dealt with for decades and this is confirmed by the continuous law amendments over the years. Still, there are a lot of debates related personal income tax rates being right. Considering the law in force, we can see that employment tax rates go to the highest level of income taxation, at a rate of 23% on payroll, while small business is taxed 0–5%, dividend is taxed at a rate of 8% and other business taxes do not exceed 15%. We can see that resources are not better distributed in terms of equality in general, but only among law and high wages employees. A flat tax system, compared with the progressive system, is not right as well. This system is not in favor of the individuals with low and medium personal income and favors individuals that earn higher wages. Since individuals with low and medium income make up for the majority of both public and private sector, then their contribution to the state budget revenues is greater. Progressiveness should be more moderate in order to avoid or minimize artificial changes and formal wage cuts. Those who respect the progressive payroll tax are mainly state-owned entities and large taxpayers such as banks, insurance companies, multinational companies, large manufacturing and commercial companies, while there are many other companies of small or medium size, which do not declare all employees

or the real level of wages, working in informality. The government should review the tax rate as the personal income tax on employees is much higher than the business tax rate. The government must consider the change of tax burden from the point of view of the most affected people, because a low burden can be accompanied with a decrease of motivation of people to work for more money or to save more money, as the taxes to pay grow. The fair distribution of tax burden must be central to taxation policy and the solution is the finding of an optimal tax system to have social welfare for the citizens on one hand and to fight demoralization on the other hand. The more taxes an employee pays, the lower the disposable income to cover the expenses. This creates a negative impact in the standard of living and the economic growth as a consequence.

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Real Estate Acquisition Tax versus Real Estate Transfer Tax in the Czech Republic. Past or Future?

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Abstract: The real estate acquisition tax as a property transfer tax was part of the system of taxation of the Czech Republic until 25 September 2020.[1] It was a traditional historical tax forming a complementary element of the system of taxation. Since 1993, it was part of the system of taxation as a real estate transfer tax. As of 1 January 2014, due to the recodification of private law, extensive tax reform came into effect, the scope of which was unprecedented since the 1990s. As a result, a new tax was introduced by the Statutory Measure of the Senate No. 340/2013 Coll., namely the real estate acquisition tax, which replaced the former real estate transfer tax. The new tax regulation preserved the taxation of real estate transfers upon payment in the form of the acquisition of immovable property, reflecting the changes brought about by the recodification of private law and by the new Business Corporations Act. It redefined the taxpayer entity, reduced the administrative complexity of tax administration, including cases of mandatory submission of expert reports for the purpose of determining the tax base, and updated the cases of exemption from the real estate acquisition tax.

1. Introduction

The real estate acquisition (transfer) tax is categorized as a so-called transfer tax, which is usually classified in tax theory as a direct property

[1] Abolished by Act, Coll. 2020, No. 386 with effect from 26 September 2020.

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tax. Direct taxes in the Czech Republic are divided into taxes of the income type, represented by the income tax (Act No. 586/1992 Coll., as amended), and taxes of the property type, which currently include the real estate tax (Act No. 338/1992 Coll., as amended). For practical reasons, property taxes also include the road tax[2], which is not a typical property tax, although it resembles it in particular in the tax technique used (Act No. 13/1993 Coll., on the Road Tax, as amended).

Transfer taxes are imposed on the transfer of property, i.e. property "in motion", where there is a change in ownership, and it is not decisive whether it is a transfer or a transition of ownership. The most common cases are sale, inheritance, and donation. However, taxes also apply in the case of exchange, dispossession, etc.

One of the main reasons for the existence of transfer taxes is the stability of their revenues. The collection of these taxes is almost independent of the economic cycle.

The aim of the article is a legal analysis of the real estate acquisition tax, including an answer to the question whether the real estate acquisition tax has its place in the system of taxation or not. The time-period examined is 1918–2022. The work was based primarily on the relevant legislation. In terms of methodology, the methods of comparison, description and legal analysis were used.

2. Real estate transfers de lege historia

The Czechoslovak state was established in 1918 on the ruins of Austria-Hungary by Act No. 11/1918 Coll. of Acts and Regulations, on the establishment

[2] Michal Radvan et al., *Finanční právo a finanční správa – berní právo* (Brno: Masarykova univerzita, 2008), 369; similarly: Milan Bakeš, Marie Karfíková, Petr Kotáb and Hana Marková et al., *Finanční právo* (Praha: C. H. Beck, 2012), 241; Petra Hrubá Smržová and Petr Mrkývka. *Finanční a daňové právo (*Plzeň: Aleš Čeněk, 2020), 351; Petra Hrubá Smržová et al., *Daňové právo de lege lata* (Plzeň: Aleš Čeněk, 2022), 102. In contrast, compare with: Alena Vančurová and Lenka Láchová, *Daňový systém ČR 2018* (Praha: Vox, 2018), 267; See also the judgment of the Supreme Administrative Court of 18 May 2006, ref. no. 2 Afs 101/2005–67, where the road tax regulated by Act on the Road Tax, Coll. 1993, No. 16, constitutes a direct property tax. This means, inter alia, that taxation occurs regardless of whether or not the vehicle in question was used in the tax period.

of an independent Czechoslovak state. This Act adopted the tax regulations still in force, including the system of taxation[3].

The real estate transfer in Czechoslovakia[4] was first regulated by Act No. 74/1901 (Imperial Code) of 18 June 1901, on fees on the transfer of property, in its provisions of §§ 1–10. This Act remained in force until 1957, when it was abolished on 1 July 1957 by Act No. 26/1957 Coll. on notarial fees, which introduced, inter alia, a notarial fee on the real estate transfer.

The real estate transfer fee was regulated in the provisions of §§ 11–13 of Act No. 26/1957 Coll., which also regulated inheritance and gift taxes, and charges imposed on legal acts performed. The real estate transfer fee was imposed on immovable property which was in personal or private ownership and was transferred upon payment to other persons, or was transferred by sale or by granting a right of access in execution proceedings, by dispossession or by prescription. The real estate transfer fee was also payable if the real estate was transferred mainly upon payment from personal or private ownership to socialist ownership. The transfer (transition) of temporary buildings and the establishment and transfer (transition) of the right to build were regarded as a transfer (transition) to ownership of the real estate. For the purposes of chargeability, the price of property transferred between the same persons in the one-year period preceding the last transfer was aggregated. The real estate transfer fee was payable by the transferee, the transferor and the transferee's successor in title to the transferred property. This was also applied, mutatis mutandis, if the immovable property was transferred by sale in execution proceedings. In the case of real estate transfer into socialist ownership, the fee was paid by the transferor. If the real estate was transferred by granting a right of access in execution proceedings, by dispossession or by prescription, the tax was paid by the transferee as well as the successor in title to the property transferred, unless the transferee was a socialist legal person. Where two or more persons acquired or transferred the real estate together, they had

[3] More on that in: Petra Jánošíková,"The Tax System in the Czech Republic and Its Transformation in the 20th and 21st Centuries," in *System of Financial Law: System of Tax Law: Conference Proceedings,* ed. Michal Radvan (Brno: Masaryk University, 2015), 89–109.

[4] More on that in Marek Starý et al., *Dějiny daní a poplatků* (Praha: Havlíček Brain Team, 2009); František Picmaus et al., *Daně, odvody a poplatky v ČSSR* (Praha: Nakladatelství technické literatury, 1985).

the duty to pay the fee jointly and severally. However, the fee payer did not have the duty to pay more than the value of the share acquired or transferred. The fee was calculated on the general (selling) price of the property transferred and its accessories. In the event of exchange, the fee was calculated on the price of one of the properties exchanged; if they were not of the same value, it was calculated on the price of the property which was of a higher value. The rate of the fee was set at between 6% and 13% of the fee base. For transferees closely related to the transferor, the fee rate was set at between 1% and 5% of the fee base. For privately owned real estate, the rate of the fee was 2% higher. The fee was accessed by the state notary office and was payable until the registration of the transfer of the property (entry in the tax register). Act No. 26/1957 Coll. was abolished on 1 April 1964 by Act No. 24/1964 Coll. on notarial fees, which, like the previous Act, regulated the notarial fee on real estate transfer in addition to the notarial fee on inheritance, donation and legal acts performed.

The notarial fee on real estate transfer was regulated in the provisions of §§ 6–10 of Act No. 24/1964 Coll., on notarial fees. The fee was levied for the transfer (transition) of ownership of the real estate upon payment. If two properties were exchanged, the transfer of both properties was considered to be one transfer. The fee was levied on the transfer of the property on which the fee was higher. If the property was acquired from or into socialist ownership, no fee was levied. The base of the fee was the payment for the property. The fee rates were set by secondary legislation provisions[5] at between 6% and 13% of the fee base. If the previous owner of the property and its acquirer were closely related and if the acquisition of the property was not by dispossession or if the property acquired had not been sold in execution, the fee rate was set at between 1% and 5% of the fee base. The rates of the fee on the real estate transfer from or to private ownership were 3% of the fee base higher. For other transfers, a general rate of 6% to 13% was applied. The fee was paid by the transferor and guaranteed by the transferee. If the acquisition was by dispossession or by sale in execution, the fee was paid by the transferee. Where the fee was levied on the transfer

[5] Decree of the Ministry of Finance, Coll. 1964, No. 25, implementing the Act on Notarial Fees, as amended, namely Decree of the Ministry of Finance of the Czechoslovak Republic, Coll. 1972, No. 30 and Decree, Coll. 1958, No. 74.

of two properties exchanged, the transferor and the transferee paid the fee jointly and severally. The transferor and the transferee had a duty to notify the competent state notary office within fifteen days of the date on which they were notified of the transfer. They did not have that duty if the transfer was by registration of the contract, by dispossession or by sale of a property in execution of a judgment. In the case of late notification, a penalty of 1% of the fee for each month of delay was provided for by law.

Act No. 146/1984 Coll., on notarial fees, repealed the previous Act as of 1 January 1985. An implementing Decree of the Ministry of Finance No. 150/1984 Coll., as amended by Decree No. 237/1990 Coll. and Decree No. 153/1992 Coll., was also issued. The notarial fee on the transfer and transition of the real estate was regulated in the provisions of Sections 8–11 of Act No. 146/1984 Coll. The subject of the fee was the transfer or transition of ownership of the real estate upon payment and the transfer of the right of personal use of land upon payment. Where immovable property was exchanged, the mutual transfers were deemed to constitute a single transfer. The fee was levied on the transfer of the property on which the fee was the highest. The base of the fee was the ascertained price. The rate was progressive and depended on the degree of relationship between the transferor and the transferee. Act No 201/1990 Coll. added further provisions to the Act on Notarial Fees, in particular concerning fee exemptions and the division of persons for fee purposes. The rate ranged from 1% to 20%. The transferor was the fee payer and the transferee was liable for the fee. Where the acquisition was of property sold in execution, the fee was paid by the transferee. If the fee was levied on the transfer of the properties exchanged, the transferors as well as transferees had the duty to pay the fee jointly and severally. Both the transferor and the transferee were subject to a reporting duty to the competent state notary office within 15 days from the date on which they were notified of the transfer of the property. They did not have this duty if the property transfer was by registration of the contract or by sale of the property in execution of a judgment. If the transfer was not notified in time, the fee payer had to pay a penalty of 0.5% of the fee for each new month of the delay.

As of 1 January 1993, the notarial fee on the transfer of immovable property was replaced by a classic tax, namely the real estate transfer tax, which was regulated together with the inheritance and gift taxes in Act

No. 357/1992 Coll., on Inheritance Tax, Gift Tax and Real Estate Transfer Tax. This regulation, as amended and supplemented, was in force until 31 December 2013.

In most cases, the taxpayer of the real estate transfer tax was the transferor. The transferee was the guarantor. In the case of acquisition of immovable property by inheritance, execution of a judgment, prescription, insolvency proceedings following an insolvency decision or on the basis of a contract for the secured transfer of rights, the taxpayer was the acquirer. For tax purposes, the exchange of real estate was treated as a single transfer and the property of higher value formed the base. The subject-matter of the tax was the transfer upon payment or transition of ownership of real estate, the settlement and distribution of divided co-ownership and the mutual exchange of immovable property. In principle, the tax base was the price of the property ascertained in accordance with the special regulations in force on the date of acquisition of the property, even if the agreed price was lower than the ascertained price. For some transfers, the tax base was determined specifically, either according to the price set by the special regulation in force on the date of acquisition of the property under a financial lease agreement followed by the purchase of the leased property, or according to the actual price in the case of a transfer of real estate owned by a local self-governed authority or in the case of auction and execution of judgment, or according to the value determined by an expert report. The tax rate was uniform, proportional and linear, initially 3%, but later increased to 4% from 2013. The taxpayer had the duty to file a tax return by the end of the third month following the calendar month in which the entry in the Land Register was registered. Taxpayers also had the duty to calculate and pay the tax themselves by the deadline for filing the tax return.

3. Real Estate Acquisition Tax versus Real Estate Transfer Tax

The real estate transfer tax was regulated in Act No. 357/1992 Coll., on Inheritance, Gift and Real Estate Transfer Tax, as amended.

On 1 January 2014, the new Civil Code (Act No. 89/2012 Coll.) came into effect. On 9 October 2013, the Statutory Measure of the Senate No. 340/2013 Coll. on the Real Estate Acquisition Tax was adopted. The President of the Republic signed it on 17 October 2013. The first session of the newly established Chamber of Deputies of the Parliament of

the Czech Republic, which took place on 25–27 November 2013, confirmed the validity of this statutory measure through ratification. The Statutory Measure of the Senate on the Real Estate Acquisition Tax[6], comprising 59 sections and abolishing or amending 51 acts, came into effect on 1 January 2014.

The main objective of this Statutory Measure of the Senate was to take into account the extensive changes in the area of private law introduced by the new Civil Code and to adapt the existing regulations of the real estate transfer tax to this new regulation. In particular, it was a response to the introduction of the principle of "*superficies solo cedit*" and to the creation, modification or renewal of certain private law institutions, in particular, of the right to build, trust funds, property contributed to a company and changes in co-ownership. In relation with the above changes, Act No 357/1992 Coll. on the Inheritance Tax, Gift Tax and Real Estate Transfer Tax, as amended, was abolished and inheritance and gift tax were transformed into the income tax mode.

Act No. 357/1992 Coll. has been amended 52 times in the last twenty years[7]. The first amendment was from the period when the Act had not yet come into effect.[8] Approximately 491 court decisions can be found on this

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6 More on that in Eva Zemanová and Václav Toman, *Zákonné opatření Senátu o Dani z nabytí nemovitých věcí* (Praha: Wolters Kluwer ČR, 2015) or in Vladimír Pelc, *Daň z nabytí nemovitých věcí* (Praha: Leges, 2014).

7 Act on Inheritance, Gift and Real Estate Transfer Taxes, Coll. 1992, No 357 has been amended many times by the following regulations (52 in total): Act, Coll. 1993, No. 18; Act, Coll. 1993, No. 322; Act, Coll. 1994, No 42; Act, Coll. 1994, No. 72; Act, Coll 1994, No. 85; Act, Coll. 1994, No. 113; Act, Coll. 1995, No. 248; Act, Coll. 1996, No. 96; Act, Coll. 1997, No. 203; Act, Coll. 1997, No. 151 and 227; Act, Coll. 1998, No. 169; Act, Coll. 1999, No. 95; Act, Coll. 2000, No. 27; Act, Coll. 2000, No. 103; Act, Coll. 2000, No. 364; Act, Coll. 2000, No. 132 and 340; Act, Coll. 2001, No. 120; Act, Coll. 2001, No. 117; Act, Coll. 2002, No 148; Act, Coll. 2002, No. 198 and 320; Act, Coll. 2003, No. 420; Act, Coll. 2004, No. 669; Act, Coll. 2005, No. 342; Act, Coll. 2005, No. 179; Act, Coll. 2006, No. 245; Act, Coll. 2006, No. 230; Act, Coll. 2006, No. 186; Act, Coll. 2007, No. 270; Act, Coll. 2007, No. 261 and 296; Act, Coll. 2008, No. 476; Act, Coll. 2009, No. 215; Act, Coll. 2009, No. 281; Act, Coll. 2010, No 199 and 402; Act, Coll. 2011, No. 30; Act, Coll. 2011, No. 466; Act, Coll. 2011, No. 351; Act, Coll. 2011, No. 375; Act, Coll. 2011, No. 428 and 457 and 458; Act, Coll. 2012, No. 275 and 396 and 399 and 405 and 500 and 503.

8 Act, Coll. 1993, No. 18, of 21 December 1992 amending and supplementing Act, Coll. 1992, No. 357 of the Czech National Council on Inheritance Tax, Gift Tax and Real Estate Transfer Tax.

Act and an application was filed with the Constitutional Court by the Supreme Administrative Court to repeal the provisions in the Act related to the real estate transfer tax. However, the Constitutional Court rejected this application for repeal[9]. The subject of the tax was the transfer or transition of ownership of immovable property upon payment in the civil law sense, i.e. of land or a building as a thing connected to the ground by a fixed foundation in the legal sense[10], or a flat or non-residential space as a unit under the Act on Ownership of Flats[11]. The taxpayer was usually the transferor (seller) and the transferee was the guarantor. In special cases, the taxpayer was the transferee, in the case of an exchange the transferor and the transferee jointly and severally, and in the case of a community of property, each spouse half and half. The tax base was the price negotiated or ascertained in accordance with Act No. 151/1997 Coll., on the Valuation of Property, as amended, and always the higher one. The tax was 4% of the tax base. The tax exemptions were extensive, e.g. new buildings and contributions to the registered capital of companies and cooperatives were exempted.

The new real estate acquisition tax regulation [12] basically preserved the existing definition of the taxpayer. In the case of ordinary transactions based on sale and exchange contracts, the transferor remained the taxpayer, with the transferee, as in the old regime, being the guarantor. However, the parties to the contract were now allowed to choose the purchaser as the taxpayer in those cases, but the purchaser would not be the guarantor of the tax. This, however, required an active agreement of the contracting parties. In the absence of such an agreement, the taxpayer was, as under the old rules, the seller. In other cases where the purchaser was the taxpayer under

9 The Judgment of the Constitutional Court of the Czech Republic of 21 April 2009, file No. Pl. ÚS 29/08.

10 Section 119, Act on Civil Code, Coll. 1964, No 40.

11 Act on the Ownership of Flats, Coll. 1994, No. 72.

12 More on that in: Petra Jánošíková and Radka MacGregor Pelikánová, "The Danube Dynamics of Elevation of Real Estate Transfer Tax," *Danube: Law, Economics and Social Issues Review 44,* no. 4(1917): 191–206; Petra Jánošíková and Radka MacGregor Pelikánová, "The Heterogenous Diversity of the Real Estate Transfer Tax in the EU," in *Contemporary Trends and Challenges in Finance,* ed. Krysztof Jajuga, Lucjan Orlowski and Karsten Staehr (Cham: Springer, 2017), 247–255; Petra Jánošíková, „Daň z převodu nemovitostí versus daň z nabytí nemovitých věcí," in *Naděje právní vědy Býkov,* ed. Vilém Knoll, Kateřina Burešová, Kateřina Gvardová, Patrik Kurz and Zuzana Martínková (Plzeň: Aleš Čeněk, 2017), 403–408.

the old real estate transfer tax regime, the purchaser was also the taxpayer under the new Statutory Measure of the Senate on the Real Estate Acquisition Tax. It was easier for the tax authorities to collect the tax from the acquirer of ownership. Purchasers were more motivated to pay the tax. They were known to the tax administrator at the time of the tax proceedings, as they were recorded in the Land Registry as the owner and usually used the immovable property. In the event of non-payment of the tax, it was possible to enforce the tax by selling the immovable property owned by the purchaser.

In order to ensure continuity with the new Civil Code, which changed the concept of immovable property, the right to build was also newly subject to tax if it was acquired upon payment, since under the new Civil Code this right in rem is considered an immovable property. The subject of the tax was the acquisition of immovable property upon payment, not just the transfer. It was an acquisition tax. The subject of the tax was not only the acquisition of the right to build but also its extinction. Other rights in rem, such as security interests or easements, were not subject to taxation. The acquisition of immovable property by prescription, by the acquisition of immovable property in a trust fund and by the acquisition of a building built illegally on someone else's land were newly subject to taxation.

Acquisition of the right to immovable property through land improvements, transformations of business corporations or acquired as compensation for dispossession was excluded from the subject of the tax. A mutual donation between two or more entities was treated as a purchase or exchange for the purposes of the real estate acquisition tax. The reason was to prevent circumvention of the law by simulating two donations where they were in fact transfers upon payment. Thus, in the case of an exchange, both acquisitions of ownership of immovable property were now subject to taxation.

The Statutory Measure of the Senate reduced the number of cases in which the preparation of an expert report determining the ascertained price and its mandatory submission by taxpayers to the tax administrator was necessary for the determination of the tax base. An expert report was not required, in particular, for transfers of immovable property intended for housing, recreation and garages. For transfers of immovable property which formed part of commercial property, the duty to submit an expert report was maintained. The cost of the mandatory expert report was now a tax-deductible expense reducing the tax base.

The provision defining the tax base was also changed. The tax base was newly defined as the acquisition value, which could be reduced by the expenses demonstrably incurred for an expert report, but only in cases where the report was required as a mandatory attachment to the tax return. If the expert report was not a mandatory attachment to the tax return, only the acquisition value formed the tax base. The acquisition value could be the negotiated price, the comparative tax value, the ascertained price or the special price. For the purposes of determining the tax base, unlike the previous regulation, the negotiated price was not in all cases compared with the ascertained price according to the valuation regulations, but if the taxpayer chose, the negotiated price (the price agreed between the seller and the buyer) was compared with the so-called comparative tax value. For these purposes, the comparative tax value meant either 75% of the so-called guideline value or 75% of the ascertained price (the price according to Act No. 151/1997 Coll., on the Valuation of Property). The guideline value was a figure established by the tax administrator, based on the prices of immovable property at a given place and time, taking into account the type, purpose, location, condition, age, equipment and structural and technical parameters of the real estate. The procedure for calculating the guideline value was set out in Ministry of Finance Decree No. 419/2013 Coll., implementing the Statutory Measure of the Senate on the Real Estate Acquisition Tax. However, taxpayers were still allowed to have an expert report prepared if they wished. In such a case, for the purposes of determining the tax base, the comparison of the negotiated price against only 75% of the ascertained price stated in the expert report was now used. Simply stated, the tax base in cases where no expert report was required was the negotiated price, unless it was more than one third lower than the so-called guideline value, which essentially represented the normal price at that place and time. If the negotiated price was more than one third lower, the tax base was set at 75% of the guideline value, i.e. the normal price. In certain specific cases, in particular auctions, insolvency, sales of real estate in relation to inheritance, and contributions of real estate to business corporations, a special price was ascertained for the determination of the tax base. This could be, for example, the price of the immovable property obtained by auction, the price stated in the memorandum of association when the immovable property was contributed to a company, cooperative or limited company, the price determined by an expert when

valuing a non-capital contribution, or the price obtained by selling the immovable property in relation to insolvency or inheritance. If a specific price could be determined, the acquisition value was exclusively that price.

The possibility of applying the tax exemption was newly extended for all first acquisitions of the ownership right upon payment to new flats and dwelling houses, including the land of which they were part, if the first transfer took place within five years from the date from which the new building could be used according to the Building Act, which meant from the date of the occupancy permit issue, or from the date on which 30 days from the notification of the commencement of using the building had passed, unless the building control authority prohibited the use. In the previous regulation, this exemption was not conditional on meeting the time test, but on the fact that the building had not yet been used. However, proving or verifying that this condition had been met or breached was very administratively complicated and time-consuming. Therefore, all first acquisitions of specified immovable property upon payment made within the above-mentioned time period were now exempted. The first transfers upon payment of a dwelling in a new building or a dwelling resulting from an extension, addition or alteration were also exempted. This exemption was no longer conditional, as before, on the transferor being engaged in the business of building or selling flats. In practice, this meant that all first transfers of immovable property used for residential purposes were exempted, provided that the above-mentioned time test was met at the time of transfer. The Statutory Measure of the Senate eliminated the double taxation of finance leases, as it included an exemption for the acquisition of immovable property used under a finance lease agreement by its user at the end of the lease relationship. Before this Measure, finance leases were subjects to double taxation. Firstly, on the acquisition of the leased property by the leasing company and secondly, on the termination of the finance lease and transfer of ownership of the property to the lessee. In the new legislation, the exemption for transfers and transitions of ownership of immovable property in the context of privatisation of state property was abolished due to redundancy, as well as the exemption for contributions to business corporations and cooperatives.

The tax rate remained at the same level as in the previous regulation, i.e. 4% of the tax base. The deadline for filing the tax return was also

the same. As before, the tax return was submitted within three months of the end of the calendar month in which the entry of the ownership right in the Land Register was made. Unlike the previous regulation, the tax calculation was carried out by the tax administrator. In the tax return, the taxpayer simply calculated the tax, provided the data necessary to determine the guideline value of the immovable property and calculated the advance tax payment of 4% of the negotiated price. The calculated advance payment was rounded up to the nearest whole crown and was payable on the last day of the period for filing the tax return. If the tax authority accessed a higher tax than the advance payment, the arrears were due within 30 days of the receipt of the payment assessment.

Overall, the scope of documents that taxpayers were required to attach to their tax returns was limited. Mandatory attachments to the tax return no longer had to be notarised, but could be attached as plain paper copies or electronically. Simplification was also introduced for the sale or exchange of immovable property to the community property of spouses. Under the new regulation, each spouse no longer filed a tax return, but they became joint and several taxpayers. Thus, the tax was declared and paid by either of them and, if neither of them paid the tax, the tax office could claim the tax from either of them.

All tax duties and rights related to real estate acquisition tax arising prior to the effective date of the Statutory Measure of the Senate were governed by the old regulation, Act No. 357/1992 Coll., as amended, until the effective date of the new regulation.

The Statutory Measure of the Senate regulating the real estate acquisition tax was amended twice during its existence, by Act No. 254/2016 Coll. and Act No. 264/2019 Coll. The fundamental change was the provision on the taxpayer, who, since 1 November 2016, was only the acquirer of the ownership right to immovable property. The real estate acquisition tax was abolished by Act No. 384/2020 Coll. Since 26 September 2020, this tax has no longer been part of the Czech system of taxation.

The aim of the new real estate acquisition tax regulation, which replaced the real estate transfer tax, was primarily to reduce the administrative burden on taxpayers and tax administrators, increase the efficiency of tax collection, shorten the tax procedure and make the tax easier to enforce.

4. Real Estate Acquisition Tax and the Efficiency of Its Collection

The collection of real estate acquisition tax in the Czech Republic was ensured by a system of financial bodies[13]. The proceeds of the tax went to the state budget. The following table shows the state budget revenues that were generated from the collection of the real estate transfer tax and the real estate acquisition tax, including their yield, which is an indicator of the tax administrator's success.

Table 1 – The Development of total real estate transfer tax collection and total real estate acquisition tax collection in the Czech Republic (in millions of CZK)

Year	Tax Collection	Stipulated	Yield (%)
2007 Real estate transfer tax	9,774	8,993	109.4
2008 Real estate transfer tax	9,950	10,106	98.5
2009 Real estate transfer tax	7,809	7,936	96.3
2010 Real estate transfer tax	7,453	7,299	102.1
2011 Real estate transfer tax	7,362	6,900	106.7
2012 Real estate transfer tax	7,660	7,365	104
2013 Real estate transfer tax	8,894	8,581	103.6
2014 Real estate transfer tax	3,686	4,607	80
2014 Real estate acquisition tax	5,600	3,506	159.5
2015 Real estate acquisition tax	10,982	10,297	106.7
2016 Real estate acquisition tax	12,696.6	12,211.9	104
2017 Real estate acquisition tax	12,478.5	13,411.5	93
2018 Real estate acquisition tax	13,572.6	14,028.6	96.7
2019 Real estate acquisition tax	13,846.6	14,047.4	98.6
2020 Real estate acquisition tax	2,796.4	4,188.6	66.8

Source: In-house processing - data taken from the Financial/Tax Administration of the Czech Republic (2011–2020)[14].

[13] Act on the Financial Administration of the Czech Republic, Coll. 2011, No 456, as amended, establishes a system of financial bodies whose primary objective is to administer taxes and charges and other similar payments/monetary performance. The bodies of the Financial Administration of the Czech Republic are administrative offices and organisational units of the State. Only the General Financial Directorate is an accounting unit. The other bodies, the Appellate Financial Directorate, the Specialised Financial Office and the Financial Offices, are internal organisational units of the General Financial Directorate.

[14] Financial Administration of the Czech Republic, Information on the activities of the Financial Administration of the Czech Republic in 2020, accessed June 10, 2022, https://www.

Table 2 – Share of real estate transfer tax/real estate acquisition tax in total tax collection in the Czech Republic

Year	Tax Collection	Total Tax Payments*	Share (%)
2007 Real estate transfer tax	9,774	576,506	1.69
2008 Real estate transfer tax	9,950	606,665	1.64
2009 Real estate transfer tax	7,809	522,847	1.49
2010 Real estate transfer tax	7,453	548,477	1.36
2011 Real estate transfer tax	7,362	561,176	1.31
2012 Real estate transfer tax	7,660	583,569	1.31
2013 Real estate transfer tax	8,894	610,603	1.46
2014 Real estate transfer tax 2014 Real estate acquisition tax	3,686 5,600	639,007	1.45
2015 Real estate acquisition tax	10,982	670,216	1.67
2016 Real estate acquisition tax	12,696.6	690,878	1.84
2017 Real estate acquisition tax	12,478.5	788,968	1.60

financnisprava.cz/assets/cs/prilohy/fs-financni-sprava-cr/Informace_o_cinnosti_FS_CR_za_rok_2020.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2019, accessed June 10, 2022, https://www.financnisprava.cz/assets/cs/prilohy/fs-financni-sprava-cr/Informace_o_cinnosti_FS_CR_za_rok_2019.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2018, accessed June 10, 2022, https://www.financnisprava.cz/assets/cs/prilohy/fs-financni-sprava-cr/Informace_o_cinnosti_FS_CR_za_rok_2018.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2017, accessed June 10, 2022, https://www.financnisprava.cz/assets/cs/prilohy/fs-vysledky-cinnosti/Informace_o_cinnosti_FS_CR_za_rok_2017.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2016, accessed June 10, 2022, https://www.financnisprava.cz/assets/cs/prilohy/fs-financni-sprava-cr/Informace_o_cinnosti_FS_CR_za_rok_2016.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2015, accessed June 10, 2022, http://www.financnisprava.cz/assets/cs/prilohy/fs-vysledky-cinnosti/Informace_o_cinnosti_FS_CR_za_rok_2015.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2014, accessed June 10, 2022, http://www.financnisprava.cz/assets/cs/prilohy/fs-vysledky-cinnosti/Informace-o-cinnosti-FS-CR-za-rok-2014.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2013, accessed June 10, 2022, http://www.financnisprava.cz/assets/cs/prilohy/fs-vysledky-cinnosti/Informace_o_cinnosti_FS_CR_za_rok_2013.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2012, accessed June 10, 2022, http://www.financnisprava.cz/assets/cs/prilohy/fs-vysledky-cinnosti/Informace_o_cinnosti_DS_za_rok_2012.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2011, accessed June 10, 2022, http://www.financnisprava.cz/assets/cs/prilohy/INTERNET_Informace_o_cinnosti_DS_za_rok_2011.pdf.

2018 Real estate acquisition tax	13,572.6	842,222	1.60
2019 Real estate acquisition tax	13,846.6	901,941	1.50
2020 Real estate acquisition tax	4,188.6	832,353.7	0.50

Source: In-house processing - data taken from the Financial/Tax Administration of the Czech Republic (2007–2020)[15].

* Without Public Premiums

[15] Financial Administration of the Czech Republic, Information on the activities of the Financial Administration of the Czech Republic in 2020, accessed June 10, 2022, https://www.financnisprava.cz/assets/cs/prilohy/fs-financni-sprava-cr/Informace_o_cinnosti_FS_CR_za_rok_2020.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2019, accessed June 10, 2022, https://www.financnisprava.cz/assets/cs/prilohy/fs-financni-sprava-cr/Informace_o_cinnosti_FS_CR_za_rok_2019.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2018, accessed June 10, 2022, https://www.financnisprava.cz/assets/cs/prilohy/fs-financni-sprava-cr/Informace_o_cinnosti_FS_CR_za_rok_2018.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2017, accessed June 10, 2022, https://www.financnisprava.cz/assets/cs/prilohy/fs-vysledky-cinnosti/Informace_o_cinnosti_FS_CR_za_rok_2017.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2016, accessed June 10, 2022, https://www.financnisprava.cz/assets/cs/prilohy/fs-financni-sprava-cr/Informace_o_cinnosti_FS_CR_za_rok_2016.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2015, accessed June 10, 2022, http://www.financnisprava.cz/assets/cs/prilohy/fs-vysledky-cinnosti/Informace_o_cinnosti_FS_CR_za_rok_2015.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2014, accessed June 10, 2022, http://www.financnisprava.cz/assets/cs/prilohy/fs-vysledky-cinnosti/Informace-o-cinnosti-FS-CR-za-rok-2014.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2013, accessed June 10, 2022, http://www.financnisprava.cz/assets/cs/prilohy/fs-vysledky-cinnosti/Informace_o_cinnosti_FS_CR_za_rok_2013.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2012, accessed June 10, 2022, http://www.financnisprava.cz/assets/cs/prilohy/fs-vysledky-cinnosti/Informace_o_cinnosti_DS_za_rok_2012.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2011, accessed June 10, 2022, http://www.financnisprava.cz/assets/cs/prilohy/INTERNET_Informace_o_cinnosti_DS_za_rok_2011.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2010, accessed June 10, 2022, http://www.financnisprava.cz/assets/cs/prilohy/fs-vysledky-cinnosti/Informace_o_cinnosti10.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2009, accessed June 10, 2022, http://www.financnisprava.cz/assets/cs/prilohy/fs-vysledky-cinnosti/Informace_o_cinnosti09.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2008, accessed June 10, 2022, http://www.financnisprava.cz/assets/cs/prilohy/fs-vysledky-cinnosti/Informace_o_cinnosti08.pdf; Information on the activities of the Financial Administration of the Czech Republic in 2007, accessed June 10, 2022, http://www.financnisprava.cz/assets/cs/prilohy/fs-vysledky-cinnosti/Informace_o_cinnosti07.pdf.

The collection of the tax is associated with additional costs, and therefore, to assess its rate of return, it is not enough to quantify its collection, but it is necessary to measure the efficiency of their collection. The above shows that the tax administration of the Czech Republic was successful in ensuring tax collection, but the tax share in the total tax collection was small. The abolition of the tax has reduced the administrative burden of tax administration for taxpayers, who no longer have the duty to file tax returns or to spend money on professional assistance in filing returns or conducting tax proceedings. Savings have also been made on the part of the State, as it is no longer necessary to print tax return forms and invest in technical support for the administration of the tax. In the long term, cost reductions in the order of millions of CZK are expected.

5. Conclusion

The real estate acquisition tax used to be a transfer tax and could be characterised as a direct, random, irregular and unstable tax in terms of tax proceeds. This characteristic was the reason why all of its proceeds was state budget revenue in the Czech Republic, despite the very close link between the property and the place where it was located. As of 26 September 2020, this tax was abolished without replacement, although it had its place in the history of Czech statehood first in the form of a fee, then a real estate transfer tax and finally a real estate acquisition tax. The abolition of the tax simplified and made the tax system more transparent.

Moreover, the real estate acquisition tax was only a supplementary revenue of the state budget. Its proceeds amounted to approximately 1.5% of the state budget revenue. It was the low yield in relation to the costs of administering the tax that led to its abolition. The abolition of the tax also reduced the incentive to set up special purpose business corporations owning immovable property and to transfer shares in them for the purpose. The transfer of an interest in a business corporation could not be subject to the real property transfer tax. The benefits of the abolition of the tax are, in particular, the expected increase in investment in immovable property due to a reduction in acquisition costs and an increase in the State's revenue from other taxes, in particular the value added tax and income tax. In the light of these facts, a return of this tax to the Czech system of taxation cannot be expected in the near future.

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Tax changes in the Czech Republic in the COVID-19 pandemic

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Abstract: The covid-19 pandemic has since March 2020 led to declarations of several states of emergency, to shutting down of schools, restrictions on gatherings as well as many business activities, with the aim to stopping the spread and transfer of the virus. Apart from the program of compensation bonuses, program Antivirus, postponing of the electronic sales record and so on, the state has reacted to the situation through tax legislation. The presented paper defines some steps as a result of the pandemic that are connected to tax law, these being specifically real estate tax, road tax, value added tax and excise tax.

1. Introduction

The main purpose of tax reliefs in connection with the covid-19 pandemic in the Czech Republic was to provide help to persons struck by this pandemic with the aim to minimalize the impact on business activities or bankruptcies. The majority of tax relief were set either by the standard procedure that is by amendments to the appropriate legal acts or by an adaptation of a special act or by the decision of the minister of finance concerning mass tax remissions or it´s accessories based on section 260 of Act no. 280/2009 Coll., the Tax Code, as amended. All the decisions made by the minister of

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finance are in force after their publication in the Financial newsletter which is currently published only electronically and available free of charge on the Ministry of finance web site.

This article presents a description of selected tax changes in the following taxes: real estate tax, road tax, income tax, value added tax and excise tax resulting in various deductions. The article considers the time period of March 2020 up till December 2021. One of the biggest changes in taxes was also the full suspension of the real estate tax as of 26th September 2020 and that with a retrospective effect for cases in which the deposit of the legal right to the real estate was carried out in December 2019 or later.

Bearing in mind the limited extent of the article the authors are not able to carry out the analysis of the taxation and accounting methods of individual support programs such as ANTIVIRUS or compensation bonuses, that are a tax bonus for the compensation of selected business consequences connected with the restriction or prohibition of business activity as a result of actions enacted by government bodies in order to protect citizens and prevent the risk of further spreading covid-19. The above stated implies that the compensation bonus is exempt from the income tax in full.

2. The changes in real estate tax

It is Act no. 338/1992 Coll., real estate tax as amended that regulates the real estate tax in the Czech legal system. It is a property tax that is divided into the tax on land and tax on dwellings and non-dwelling units. According to section 4 item 1a) of the Act on budgetary determination of taxes the tax revenue from the real estate is an income of the municipality, in which the property is situated.[1] It is the only tax from the whole tax system for which the whole income goes into the budget of the municipality. As *Radvan* states, Anglo-Saxon countries, specifically the USA and the UK unambiguously have the highest quotient in the municipality budgets, where it accounts for the majority of tax incomes from municipal budgets.[2]

1 Section 4 item 1a) Act on budgetary determination of selected taxes of the municipalities and selected state funds (Act on budgetary determination) of 29 June 2000, Journal of Laws 2000, No. 243, as amended.

2 Radvan Michal, *Zdanění majetku v Evropě* (Praha: C. H. Beck, 2007), 34.

In the Czech Republic by no means the quotient reaches such values. Last year the total tax revenue from this tax accounted for 11.6 billion CZK and has hence increased annually by 6% or by 0.7 billion if you like.[3]

In connection with softening the impact of the covid-19 pandemic on the economy of the Czech Republic, the act on real estate was changed and has been in force since 1.7.2020 but as a result of Act no. 299/2020 Coll., that changed some tax law in connection with coronavirus SARS CoV-2 and act no. 159/2020 Coll., on the compensation bonus as amended (further on referred to as act no. 299/2020 coll.)

This amendment of the act changed only one statute, that being section 17a of the act on real estate, into which the headline *"Pardon in case of emergency situation"*. In section 17a item 1 of the real estate tax the first words "natural disaster" were replaced by "emergency, mainly natural incidents" and the words "natural disasters" were replaced by the words "emergency situation". It was item 4 in section 17a of the real estate tax that was added and that enabled the municipality to issue a generally binding decree concerning pardon for all real estate in the territory of the municipality effected by the emergency situation or individual real estate effected by the emergency situation as stated by the law for example in the case of the land stated by register reference number with the name of the land registry where it is situated. Should the pardon concern individual real estate then it is obvious that the act demands clear denomination of the real estate and that directly in the municipality binding ordinance. For example, it will not be sufficient to mark the real estate in question in the drawing, but the act on real estate demands a binding way of delimitation. Without a doubt this step is taken in order to higher the legal certainty of the tax-payers.[4]

The motivation of this change is clear with the aim to allow the municipalities to solve not only the results of natural disasters but also results

[3] "State final account for 2020", accessed September 10, 2021, https://www.mfcr.cz/cs/verejny-sektor/statni-rozpocet/plneni-statniho-rozpoctu/2020/statni-zaverecny-ucet-za-rok-2020-41689.

[4] Koubovský Petr,"Novela zákona o dani z nemovitých věcí a další zajímavosti ze zdanění vybraných nemovitých věcí na rok 2021," accessed September 10, 2021, https://www.aspi.cz/products/lawText/7/291326/1/2?vtextu=Covid%2BCoronavirus%2BKoronavirus%2B%22SARS%20CoV-2%22%2BSARS-CoV-2%2Bkdy#lema0.

of emergency situations such as the pandemic. For the purpose of the act emergency situations are then mainly floods, heavy storms, and extreme drought, regulations caused by the emergency measures by Act no. 240/2000 Coll., on emergency management and on changes of some acts (emergency act) as amended or industrial disaster[5].

In the scheme of the directive this provision is slightly ill-conceived as it is placed out of the pardon of the tax on land as well as out of the pardon of the tax on dwellings and non-dwellings.[6] The above described statute was not largely used by the municipalities in the past. *Radvan* states that in case of natural disaster the municipalities cannot afford to lose the revenue from real estate tax as it is in these times that they need the money to deal with the results of damages to the municipal property.[7]

To be complete it is necessary to state that the pardon is limited to a maximum time-period 5 years and the pardon of the tax on real estate can also be calculated for the past tax period. The generally binding ordinance must be issued so that it came into force by 31st March of the year following the tax period in which the emergency situation happened. Based on the act on real estate it is also possible to be partially pardoned, that being expressed by a percentage.[8]

The tax-payer whose real estate tax is pardoned by the municipality must claim an exemption and apply for it in their tax return or in

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5 The generally binding ordinances that state the coefficients for the calculation of the tax on real estate, pardon of some land that is part of the agricultural land resources, real estate that were hit by an emergency situation and pardon of the tax on real estate in preferential industrial zones. Metodický materiál odboru veřejné správy, dozoru a kontroly Ministerstva vnitra, accessed September 10, 2021, https:// www.mvcr.cz.

6 Procházková Jana, *Komentář k dani z nemovitých věcí s příklady* (Bohuňovice: Účetní Portál a.s., 2021), 158–159.

7 Radvan Michal, "Možnosti obcí ovlivnit daň z nemovitostí," in *Europeanization of the national law, the Lisbon Treaty and some other legal issues,* ed. Pazderová Sabina, and Michal Janovec (Brno: Tribun EU, 2008), 521–526.

8 Koreček Jan, "Osvobození od daně z nemovitých věcí v případě mimořádné události," accessed September 9, 2021, https://www.dauc.cz/clanky/44/osvobozeni-od-dane-z-nemovitych-veci-v-pripade-mimoradne-udalosti.

the supplementary tax return. This is then based on the fact whether the municipality does so by the ordinance of the real estate for those periods that have passed.[9]

Based on our own analysis of notice boards of 200 randomly selected municipalities of the Olomouc region not a single municipality was found to have informed the tax-payers of the tax exemption through the public notice board neither in 2021 nor retrospectively for the year 2020. From this it can be deduced that this possibility was not collectively used in the observed time period by other municipalities. The authors believe that this is also connected with the fact that this tax is still relatively low in the Czech Republic so the municipalities did not feel the need to interfere in this way. The quotient of the revenue of the real estate tax on total tax revenue (including social and health insurance) is in comparison with other EU countries one of the lowest ones. For example in 2019 the tax revenue accounted for 0,5% while the EU average was 3% (this does not include the UK which had left the EU by then). The revenue of the real estate tax that is singularly an income of the municipal budgets reached in 2020 11,6 billion CZK, the year-on-year increase reached 6%. In 2021 the income reached 11,9 billion CZK. Based on that we can easily deduce that no significant tax exemption took place.[10]

In accordance with section 13 item 1 of the Act on real estate tax the tax payer has to hand in tax return to the appropriate tax authority by 31st January of the tax period. In connection to the pandemic it has been decided for the year 2021 by the ministry of finance to alter this duty. On one hand the fine for handing in the tax return or the partial tax return late was pardoned for the year 2021, in that case the tax return is to be handed in by the 1stApril 2021 at the latest. The above mentioned also extends the modification of the real estate tax based on which the tax-payer should have a duty to hand in the tax return or the supplementary tax return and hands it in

9 "Osvobození od daně z nemovitých věcí v případě mimořádných událostí", accessed September 9, 2021, https://www.financnisprava.cz/cs/dane/dane/dan-z-nemovitych-veci/informace-stanoviska-a-sdeleni/2020/osvobozeni_od_dane_z_nemovitych_veci_v_pripade_mimoradnych_udalosti-10785.

10 "State final account for 2020," accessed September 10, 2021, https://www.mfcr.cz/cs/verejny-sektor/statni-rozpocet/plneni-statniho-rozpoctu/2020/statni-zaverecny-ucet-za-rok-2020-41689.

after the deadline without being summoned by the tax administrator, there is no duty for the tax payer to pay a fee for a late tax claim. This has not touched on the deadline to pay the real estate tax which is due on 31st May at the latest in the case the sum does not exceed 5000 CZK. Should it exceed this sum it is possible to pay it in two tax instalments.

3. Changes in the road tax

The road tax in the Czech Republic is regulated by Act no. 16/1993 Coll., on road tax as amended and all the revenues go into the State fund for transport infrastructure that secures financing of its administration and the construction of transport infrastructure.[11] It is the single tax of the Czech tax system that is purposeful that is that the aim and purpose of the revenue from the tax is known beforehand. When it comes to the revenue of this tax, last year, the year 2020 the revenue was circa 6.4 billion CZK.[12]

The legislation of this tax was also affected last year by the coronavirus. As of 1st January 2020 the yearly rates of the road tax were lowered for all vehicles with the exemption of passenger cars and other vehicles with the highest allowed weight not over 3.5 tons.[13] Considering the construction of the rates of the tax it was also taken into account that vehicles with their weight under 3.5 tones are not subject to the electronic system of toll fares and further on they are not subjects of a minimum amount of road tax based on the EI community legislation.[14] Regardless of the number of axles the road tax for cars with max weight over 3.5 tones was lowered by 25%.

In the Czech Republic it is section 10 of Act no. 6/1993 Coll., on road tax as amended that regulates the payment of the tax, and that in four advanced instalments. These instalments are always due by 15th April, 15th July, 15th October and 15th December. It is the instalments f 15th April and 15th of July 2020 that are connected with the decision of the minister of finance to

11 Janoušek Karel, *Daň silniční* (Praha: Wolters Kluwer, 2008), 8.

12 "State final account for 2020," accessed September 10, 2021, https://www.mfcr.cz/cs/verejny-sektor/statni-rozpocet/plneni-statniho-rozpoctu/2020/statni-zaverecny-ucet-za-rok-2020–41689.

13 Act on amending certain tax laws in connection with the occurrence of the coronavirus SARS CoV-2 of 16 June 2020, Journal of Laws 2020, No. 299, as amended.

14 Directive (EC) of the European Parliament and of the Council No. 1999/62 on the charging of heavy goods vehicles for the use of certain infrastructures (17 June 1999).

pardon the tax and the accessories of the tax as a result of the emergency situation, based on which the payers were allowed to pay the advance on the road tax by 15th October 2020 without sanction. Despite that the majority of the road tax-payers paid the advances in the original amount. If the payer paid in advance more, the difference was automatically used against the other advances on taxes or as a payment of the actual road tax for 2020. The advances will be disbursed in this way gradually until the difference is depleted. If even after the assessment of the road tax for 2020 a part of this difference will not be used, it will turn into a returnable overpayment and the tax-payer can either ask for its return or it can be used for the advance payments in the year 2021.

On 14th October 2020 another decision was made to pardon tax, accessories to the tax and advances to the tax as a result of the emergency situation. This concerned the tax subjects for which the predominant part of their income between 1st June 2020 and 30th September 2020 came from one or more activities that were from 14th October 2020 prohibited or limited by the cabinet resolution such as for example running restaurants and bars, musical, dancing or gaming and similar social clubs or discos and for those all the road tax advances for the whole year 2020 were pardoned. The condition being that the tax subject announces this fact to the competent tax administrator but this decision does not pardon the actual payment of the tax. On 26th October 2020 a new resolution was made about the pardoning of the accessories to tax and advances to the tax as a result of the emergency situation. It was due to this decision that also pardoned the advances for the road tax for the year 2020 for selected subjects. These subjects are those for which the predominant part of their income was made within 1st June 2020 and 30th September 2020 from retail or sale and provision of services in workshops, with the exemption of those whose activity were allowed by the cabinet resolution concerning the emergency measures from 21st October no. 1079 that were allowed with the condition that they announce this fact to the competent tax authority.[15]

The last so called general pardon is the Decision to pardon the accessory to the tax and advances to the tax and administrative fee as a result

[15] Mikuš, Martin, Václav Pikal, and Naděžda Slavíková, *Komentář k dani silniční a k dani spotřební* (Bohuňovice: Účetní Portál a.s., 2021), 11–12.

of an emergency situation no. 34159/2020/3901–2, which was published on 21st December 2020 in Finanční zpravodaj (Financial newsletter) no. 38/2020. This general pardon also concerns the pardoning of the advance on road tax and that for the tax period of 2021 and applies to selected tax subjects.

To the tax subjects to which was allowed to wait with the tax payment or to spread their payment of the advances in connection with SARS-CoV-2 based on the individual application in accordance with section 156 of the tax code the interest on late payment based on section 252 of the tax code and based on section 157 of the tax code was pardoned should it have occurred in the period of 12th March 2020 to 31st December 2020.

Concerning the deadline to hand in the tax return, the penalty based on section 250 item 1 of Act no. 280/2009 Coll, tax code as amended for late handing in of the tax return for the road tax for the year 2020 was pardoned with the condition that the tax return will be handed in at the latest by 1st April 2021. As it has already been stated above, in the Czech Republic the 31st January following the period in question is the due date to hand in the road tax return in accordance with section 15 item 1 of act no. 16/1993 Coll., on road tax as amended.

The above-mentioned changes in connection with the economic downturn in 2020 resulted in a slump in the road tax revenue whereupon the main reason for that was the shift of the due date for the advances on the tax into the year 2021 as a result of specific government measures. The tax revenue towards the State fund of the transport infrastructure amounted to 17,8 billion CZK against the 20, 5 billion CZK in 2019. In 2021 this income amounted to 18, 3 billion CZK. In order to fully understand these numbers it needs to be stated that part of these incomes also consists of 9% of the tax on mineral oils. The National account does not provide concrete numbers for the year 2021 but mentions there was a slump in income compared to that of 2020.[16]

4. Changes in the income tax

[16] "State final account for 2021," accessed September 10, 2021, https: // https://www.mfcr.cz/cs/verejny-sektor/statni-rozpocet/plneni-statniho-rozpoctu/2021/statni-zaverecny-ucet-za-rok-2021–47400.

It is Act no. 586/1992 Coll, on income tax that regulates the income tax of individual and legal entities in the Czech Republic. Last year the revenue of the income tax amounted to

231.7 billion CZK from which 77.7 billion CZK was transferred into the regional budgets and 154.1 billion was the revenue of the state budget.[17]

One of the most significant changes with the impact on the income tax revenue is the abolition of the so called "supergross salary" as a basis for income tax from employment income. It is not the "supergross salary" as a basis for tax anymore. Up till the end of 2020 the "supergross salary" consisted of gross salary and deductions for social (24, 8% of gross salary) and heath care (9% of "supergross salary") insurance and was the basis for the income tax. This has been abolished as of 2021. Another important change in connection with this tax is the increase of the basic default tax credit to 27.840 CZK from the original 24.840 CZK. Both these changes led to a dip in the state budget of 56.7 billion CZK.[18]

The other area of changes that we would like mention in connection with the pandemic is the pardon of sanctions connected with the late submission of the tax returns and late tax payments. In this case there is no actual change in the legal deadline for handing in the income tax return for individual or legal entities. Considering the year 2019, the so-called liberating package pardons the fee for the late handing in of the tax return and the interest due on late payment, should the tax subjects hand in the tax return and paid the tax by the latest to 18th August 2020. This possibility did not include tax subjects whose tax administrator is the specialized financial office such as banks, saving banks or credit cooperative, businesses with a turnover over 2 billion CZK. It can also no doubt be looked at positively that the stated sanction free period applies also to tax subjects which missed the period for handing in the tax return as of 1st April or to tax subjects that are due to hand in the tax return within a prolonged period as of 1st July in cases they are being handled by a tax advisor or by an attorney. But in the case of missing the deadline of 18th August 2020 by

17 "State final account for 2020," accessed September 10, 2021, https://www.mfcr.cz/cs/verejny-sektor/statni-rozpocet/plneni-statniho-rozpoctu/2020/statni-zaverecny-ucet-za-rok-2020–41689.

18 "State final account."

the tax subjects, both sanctions were as of the original legal deadline that is 1st April 2020 or 1st July 2020. In 2020 the advance on income tax for 2020 that was due by 15th July 2020 was also pardoned.

Same as in 2020 this year the due date for handing in the tax return without sanctions has been prolonged. The tax-payers who wanted to hand in the income tax return in paper form physically to the financial office or by post were allowed to do so by 3rd May 20201. Persons who prepared an electronic form of communication and handing in of the tax return had the deadline as of 1st June 2021.

Amendment of the act on income tax no. 299/ 2020 coll. gave businesses an opportunity to retroactively apply the tax loss which was something new. The running of business ventures was rather strictly limited in connection with the accepted measures which led to the fact that the businesses lost a large part of their revenues. This amendment then tried to react to the situation by providing the possibility to use the tax loss as a deductible item from the tax base also for the tax period that is prior to the tax period for which the tax was calculated. The tax-payer can then newly apply the tax loss in two tax periods previous to the tax period in question or the period in which the tax return is handed in. The legislator must have assumed that the positive tax duty obligation set in the past (after the retroactive application of the tax loss as a deductible item from the tax base) will be in the end – either fully or partially – represented as an overpayment of income tax. It is not then a discharge of the tax payment obligation but it's a different distribution in time, when it is possible to apply the tax loss as a deductible item from the tax base in a retrospective manner. The aim of the legislator is then the possibility to gain back financial means for an already paid tax in previous tax periods and hence achieve the fact that the tax payer will get the financial means in the times when it is needed the most – the amount of tax loss that can be applied to the previous time period is limited to 30 million CZK (the limit is set as a sum for both previous time periods in which the tax loss would be applied). The retrospective application of the tax loss is then possible based on the additional tax return (the possibility to hand it in together with the tax return for the period in which the tax loss occurred).

Based on the qualified estimation of the ministry of finance, this change has led to a dip in tax revenue in 2020 for the employment income tax of 2

million CZK and in the income tax of legal entities of 98 million CZK. For the year 2021 the dip for legal entities was quantified to be 1,137 billion CZK and 23 million in the case of personal income tax. Concerning other changes for which the possible impact on the state budget can be quantified the authors believe that it's the pardon of the tax advance on personal income tax that led to the dip of 1,66 billion CZK and 13,7 billion CZK in the case of corporate income tax in 2020. In 2021 the impacts of individual requests to adjust the advance on corporate income tax were quantified to be 22,222 billion CZK.[19]

As another example of the changes in the income tax by which the state tried to support the entrepreneurs we can add the possibility of the so called exceptional amortisation and that for the assets in the first and second group that were purchased from 1st January 2020 to 31st December 2021. The amortisation is a part of the input price that the tax-payer can apply as a tax applicable item in one year. This exceptional amortization concerns tangible assets classed in the first depreciation group that is attachment no. 1 to the act on income tax and for which the tax-payer who is its first owner can write-off equally without interruption the whole 100% of the input price within 12 months. The first depreciation group contains for example computers, machines or office equipment and the classical depreciation period is 3 years. Further on the exceptional amortization is also applied in the second depreciation group based on attachment no. 1 of the act on income tax for which the tax payer who is its first owner can write off without interruption 100% of its input price within 24 months (while for the first 12 months the write-offs are equal up to 60% of the input price of the tangible asset and in the following 12 months the write-offs are equal and up to 40% of the input price of the tangible assets. The second depreciation group contains for example personal and freight vehicles or machines that are classically depreciated within the 5 year period.

In the area of legal jurisprudence of the assets the limit for write-offs for tangible moveable assets and technical appreciation was raised from 40.000 CZK to 80.000 CZK. This increase was possible to optionally use

[19] "State final account for 2021," accessed September 10, 2021, https: // https://www.mfcr.cz/cs/verejny-sektor/statni-rozpocet/plneni-statniho-rozpoctu/2021/statni-zaverecny-ucet-za-rok-2021–47400.

also for the tangible assets and for technical appreciation of assets finished and put into the normal state of use from 1st January 2020 to 31st December 2020. The tangible assets purchased from 1st January 2021 and technical appreciation of the assets finished and put into the normal state of use from 1st January 2021 are subjects to this increase in all cases.

5. Changes in the value added tax

The domestic jurisprudence of the value added tax is based on Act no. 235/2004 Coll., on value added tax as amended. The value added tax in the Czech Republic is as well as in other EU member countries fundamentally affected by the jurisprudence of the EU. The tax revenue is in this case divided into the regions with 9,78%, municipalities with 25,84% and the rest goes into the state budget.[20]

In the Czech Republic there are three VAT rates applied. The basic rate of the value added tax is 21 %. Apart from this basic rate the legislation also sets two lower rates, the first lower rate is 15% and the second lower rate is 10%. The goods and services that are subject to the lower rates are regulated in the attachments of the act on value added tax.[21] Bearing in mind that the government measures in connection with the prevention of the spreading of the coronavirus has strongly hit mainly accommodation providing services, cultural events, sport events and sport services, the legislator then decided to lower the tax duty for these services. Before the amendment these services belonged to the first lower group with the value added tax of 15%. As a result of the change the accommodation providing services, entrance authorisation for sport and cultural events, catering services, use of sport facilities as well as personal transport by ski lifts were moved into the second lower group with the value added tax of 10%.

The measures in connection with the coronavirus can then be divided into several areas them being process benefits such as a waiver of the interest on the delay of overdue VAT payments for the set time-period, use of the institute of delay based on the decision to pardon the tax payment and

[20] Act no. 243/2000 Coll., on budgetary determination of selected taxes of the municipalities and selected state funds (Act on budgetary determination), as amended.

[21] Hochmannová Olga, *Komentář k dani z přidané hodnoty s příklady* (Bohuňovice: Účetní-portál a.s., 2021), 112.

administration fees for the reasons of the emergency situation. The pardon of the tax is applied practically to a free of charge service of providing the fulfilment of basic needs brought about by an emergency situation which the coronavirus pandemic is. These basic needs are mainly the test kits or machines and tools used to diagnose covid-19, masks, respirators, protective gear, disinfectants, and others. In 2021 the pardon of VAT for vaccinations and tests has cost the state 1 billion CZK and 367 million in the case of respirators based on the qualified calculations of the ministry of finance. The condition for the pardon of the VAT is a free of charge delivery of the specified goods of provision of specified services to selected subjects. These subjects are for example the providers of health care or emergency services. Another area in which the VAT is pardoned in exchange for free of charge delivery of listed goods and provision of free of charge services for selected subjects and pardon of the VAT for import of selected goods.

In 2020 the whole state revenue from this fiscally most important tax amounted to 426,4 billion CZK based on the data of financial and customs offices, that represented a yearly decrease by o 1,2% (that is 5,1 billion CZK). The drop in the collection was primarily caused by the slump in the economy as a result of the rampant spread of covid-19, discriminatory measures and measures aimed at alleviating the impact of covid-19. Among other quantifiable impacts of the above-mentioned changes in 2020 it can also be mentioned the postponement of the tax that led to a drop of 714 million CZK and the factual shift in due date leading to a drop of 294 million CZK. For the year 2021, the postponement of the tax was then calculated to amount to 547 million CZK.[22]

6. Changes in the excise tax

The need to amend Act no. 353/2003 Coll., on excise tax as amended was also brought about by the covid-19 pandemic. Comparatively hyped was the so-called tax on spilled beer that we would like to present in the following text. As a result of the first above mentioned amendment of the excise tax the tax administrator was allowed, in justified cases, to allow the operator of the warehouse to return the beer already liberated into free tax circulation back into the regime of conditional pardon from the excise tax

[22] Hochmannová, *Komentář k dani,* 112–113.

for the purpose of liquidation or recycling. Return of the excise tax can then help the operator of the warehouse to compensate the shortfall of sales that was the result of the coronavirus.[23] The new statute section 89 item 4 of the Act on excise tax had only a limited effect that being until 31st December 2020. In December 2020 the senators finally in the second attempt authorized in the state of legislative emergency the amendment of the act on excise tax that as of 1st January 2021 allowed the breweries to return the unconsumed beer designated for liquidation or for recycling back to the regime of conditional pardon indefinitely. This fact must be substantiated to the tax administrator by which a claim rises for the brewery to get the already paid excise tax back.[24]

Regarding this tax it needs to be added that the revenue from beer does not represent the most significant type of goods within excise taxes. That is represented by the tax on mineral oils with the revenue of 84,9 billion CZK for the year 2020. The tax on beer is in comparison very small and amounted to 4, 9 billion in 2020. In comparison to 2019 there was not a significant decrease in the collection of this tax amounting to a decrease of 0,2 billion (that is around 4, 2%). Though beer consumption was also hit by the long-term closure of restaurants and pubs who are the largest purchasers of barrelled beer, the impact on the collection of this tax on beer was not as noticeable as in the case of spirits. This might be attributed to the way the breweries reacted to the situation by increasing the production of beer stored in other ways such as glass bottles, plastic bottles, cans, and the fact that the covid-19 situation probably resulted in an increase in the consumption of beer at home.

A more significant change in the tax was the decrease from 10, 95 CZK per litre to 9,95 CZK per litre in the case of diesel fuel in connection with the pandemic as of 1.1.2021. This led to a decrease of 4,727 billion CZK.[25]

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23 Procházková Jana, *Komentář k majetkovým daním, dani silniční a sani spotřební s příklady* (Bohuňovice: Účetní portál a.s., 2020), 121.

24 Slavíková Naděžda, "Koronavirové" změny zákona o spotřebních daních," accessed September 9, 2021, https://www.ucetni-portal.cz/koronavirove-zmeny-zakona-o-spotrebnich-danich-1703-c.html.

25 "State final account for 2021," accessed September 10, 2021, https: // https://www.mfcr.cz/cs/verejny-sektor/statni-rozpocet/plneni-statniho-rozpoctu/2021/statni-zaverecny-ucet-za-rok-2021–47400.

7. Conclusion

It is clear that all the impacts of the covid-19 pandemic on public budgets in both 2020 and 2021 were enormous as well as realistically incalculable. The impacts on revenues and expenditures of the public budgets can be in both above mentioned years labelled as the main cause of record deficits in the state budget management. The governmental measures lead by the endeavour to limit the spread of covid-19 as well as the help they provided to those sectors of the economy that were hit as well as individuals, the social and health care system, have in its result lead to an unprecedented drop in the gross domestic product accompanied by a drop in public budget revenues as well as a vast increase in public expenditures.

In 2020 the state budget faced a deficit of 367,4 billion CZK. The tax revenues including social and health insurance in 2020 reached 1 258,7 billion which represented a drop of 57,0 billion CZK (4,3%) compared to 2019.

The year-to year drop influenced by the limitation of the output of the economy and the established discretionary measures effected mainly the collection of the corporate income tax (-15,1 billion CZK), social and health insurance (- 11,1 billion CZK), abolishment of the real estate tax (- 11,1 billion CZK), the personal income tax (-7,5 billion CZK) and excise duty on mineral oil (-6,9 billion CZK). Considering the taxes that bring in the most income to the state budget there was only the change in year-to-year collection of excise tax on tobacco (+ 3,6 billion CZK) and personal income tax instalment (+0,4 billion CZK) that increased. Through the contributions to the municipalities received 13,4 billion CZK which was designed to soften the impact. [26]

The state budget management for the year 2021 ended up with a deficit of 419,7 billion CZK. The overall estimated negative impact reached 87,7 billion CZK. A special part of the so-called tax package was also an alternation in budgetary determination of taxes to the advantage of the municipalities (from 23,58% to 25,84%) and regions (from 8,92% to 9,78%) concerning income tax and VAT. There were also two important changes in the personal income tax. Two tax rates 15% and 23% were introduced and

[26] "State final account for 2020," accessed September 10, 2021, https://www.mfcr.cz/cs/verejny-sektor/statni-rozpocet/plneni-statniho-rozpoctu/2020/statni-zaverecny-ucet-za-rok-2020–41689.

the increase of the tax credit per payer by 3 000 CZK with the estimated negative impact of 11,7 billion CZK. The revenue side was then negatively impacted by the awaited impact of the compensation bonus that is technically a tax refund. For these reasons, the estimation of the collection of personal income tax was lower by 25,4 billion CZK than that calculated in the public budget. Further measures within the tax package which had an impact on tax collection was the implementation of the so-called exceptional amortisation for tangible assets in the 1st and 2nd amortisation group with the negative predicted impact of 11,1 billion CZK on the budget and an increase in the limit for the entry price for tangible assets to 80 000 CZK with the estimated negative impact of 2,4 billion CZK on the public budget. The impact of the earlier abolished real property tax for the year 2021 was estimated to be 13,9 billion CZK.[27]

This analysis has also discovered that the legislative change of the possibility to free the payer from the duty to pay real estate property tax has hardly had any impact on the collection of this tax, when the collection of this tax has shown an increase in both reviewed years. Regardless of the fact that the total numbers are not known it can be assumed that the use of the possible exemption was for the municipalities very small which the authors have verified by their own research with the sample of 200 randomly selected municipalities in the Olomouc region out of which no municipality used this possibility. More serious impacts were brought about by the administrative and other tax measures concerning income tax when there was a large drop in tax revenue for the public budget. The concrete numbers that can be quantified were mentioned in the text above. In this context the authors would like to point out the large increase in the consequences of the possibility of a retroactive exercise of a tax loss for corporations. The results of this for the year 2021 were 98 million CZK but in 2022 they have so far reached 1,137 billion CZK based on the available data. Considering that there was also a significant drop in tax revenue for VAT and road tax as a result of the legislative changes connected with the pandemics as established in the text. Nevertheless with the VAT for the year

27 "State final account for 2021," accessed September 10, 2021, https: // https://www.mfcr.cz/cs/verejny-sektor/statni-rozpocet/plneni-statniho-rozpoctu/2021/statni-zaverecny-ucet-za-rok-2021–47400.

2021 there can be seen an increase in the tax revenue by 8,7% in comparison to the previous year (37,2 billion CZK) whereas the actual total state revenue of this fiscally most significant tax was 463,7 billion CZK.[28]

The last but not least analysed tax was the excise tax and it was the widely publicised change concerning beer for which the actual quantification is very difficult if not impossible to calculate. Nevertheless, in terms of tax revenues this tax is insignificant. On the other hand, the decrease by 1 CZK for diesel in connection with the pandemic in 2021 lead to the decrease in tax revenue of 4, 727 billion CZK.

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[28] State final account for 2021, accessed September 10, 2021, https: // https://www.mfcr.cz/cs/verejny-sektor/statni-rozpocet/plneni-statniho-rozpoctu/2021/statni-zaverecny-ucet-za-rok-2021-47400

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Experiences od open and closed list local taxes in Hungary with special regard to the effects of the COVID19 pandemic

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financial autonomy,
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Abstract: Local taxes account for a significant share of the revenue of Hungarian local governments. In the system developed after the transition to democracy in 1990, local governments were granted the right to set a tax on a closed list, which was supplemented in 2015 by a right to set a tax on an open list. In the case of traditional local taxes, the tax capacity of local government differs greatly, that generates a significant issue in the self-government system. In addition, we can see differences within local taxes, as the role of the business tax is much stronger than other taxes. Dealing with the different resource-generating capabilities that are essential to provide public tasks of the same quality is a systemic regulatory problem. With the introduction of the settlement tax in 2015, Hungarian self-government expected to be able to increase their own revenues and thus their financial independence. But it soon became apparent that in practice there were several regulatory obstacles to achieving this, so the hopes diminished. By now, it has also become clear that the settlement tax did not introduce a significant change in this area, even more, it has damaged the previous revenue structure. The measures adopted during the pandemic in the past year and a half required new regulatory solutions, that also affected the system of local taxes.

This study, on the one hand, examines the development of Hungarian local taxes in recent years and, on the other hand, focuses on the regulatory innovations arising from the COVID 19 epidemic. Namely, the legislation of

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the Hungarian Government during the epidemic has affected the revenues of local governments in several respects, some revenues have been centralized, and the right to local taxation has been restricted.

1. Introduction

In Hungary, local taxes can be classified into four types. We can distinguish between property-type taxes, such as construction tax, land tax, communal taxes, such as communal tax of individuals and tourist tax, and activity-type taxes, such as local business tax (hereinafter referred to as: HIPA). The fourth category includes the atypically-regulated settlement tax, that can be quite varied as far its type is concerned. The most important Hungarian rules on local taxes are contained in Act C of 1990 on Local Taxes (hereinafter referred to as: LTA).

Hungarian local taxation has never been without limits, as the law stipulates the type and amount of tax that can be levied, the upper limit of the tax rate, and the benefits and exemptions that can be granted.[1] This method is called a closed-list local tax assessment system,[2] which refers to the fact that the autonomy of local governments to impose taxes is essentially limited to deciding on the introduction or non-introduction of the particular taxes, as the choice is provided only between the centrally defined tax types, not to mention that their chargeable event is also different. International practice shows that this type of taxation is used in most countries, and there are far fewer examples of open-list taxation, that, of course, to a large extent depends on the distribution of local governmental competencies.[3] By the latter open-list taxation, we mean that the local government is free to set taxes in its own competence, i.e. it is empowered not only to determine the rate, but the persons and events that are subjected to

1 Etelka Gregóczki, "A helyi adók és a gépjárműadó – a helyi adók tervezése, beszedése, gazdasági szerepe," in *Adózási pénzügytan és államháztartási gazdálkodás – közpénzügyek és államháztartástan II.,* ed. Csaba Lentner. (Budapest: Nemzeti Közszolgálati Tankönyvkiadó, 2015), 703–730.

2 Gábor Kecső, "A kúria kibontakozó gyakorlata a települési adóval kapcsolatban," *Új Magyar Közigazgatás*. special issue (2016): 19–25.

3 See: Gábor Kecső and Csaba Tombor, A *helyi adók szabályozása és joggyakorlata magyarországon külföldi kitekintéssel – különös figyelemmel az iparűzési adóra és a helyi vagyonadók arányosságára* (Budapest: DHKFA, 2020), 22–35.

taxation can also be regulated at the local level. The Hungarian settlement tax also belongs to this type as a local tax with atypical regulation.

From January 1, 2015, local governments are provided with the opportunity to introduce such a settlement tax or settlement taxes in their area of competence, that is if it is not prohibited by other laws. The local government may impose a settlement tax on any tax subject, provided that it is not subjected to public charges regulated by law. Furthermore, the state, local government, organization or, by virtue of its nature, an entrepreneur, shall not be subjected to settlement tax.[4] In essence, outside of these three legal limits, the municipal council is free to exercise the opportunity for open list tax assessment. The LTA does not establish any other tax restrictions. The new regulatory solution has been widely criticized since its adoption, not the least because, in addition to its primary purpose, it provides an overly broad and open power for taxation, that, as it will be discussed later, could become unfettered and unpredictable.[5]

One of the purposes for the introduction of the settlement tax in 2015, as it was communicated by the legislator, was to provide the settlements with the opportunity to create financial resources in the transformed resource structure, that could cover the costs of locally voluntary tasks or could facilitate the mandatory tasks at a higher level of quality. All this with the limitation that the revenue from the settlement tax can only be used for development purposes and to finance social services.[6]

The hypothesis of the present study is that, on the one hand, the Hungarian local tax regulation is not able to handle regional differences, on the other hand, the settlement tax has not become significant in practice, especially due to its outlandish regulation method. However, it may be significant in a way that it dismantled the former local tax system and was interpreted by some municipalities as an empowerment to regulate local living conditions.

As part of our research which served as the basis of this study, on the one hand, the legislation was examined using a legal analysis method, and on

4 Article 1/A. of the Hungarian Act C of 1990 on Local Taxes (LTA).

5 See: Lóránt Csink, "Az önkormányzati adóhatóság teljhatalma, avagy a települési adó alkotmányellenessége," P*ázmány Law Working Papers*, no. 10(2016): 1–11.

6 Article 1/A (5) of the LTA.

the other hand we also examined, the budget data collected by the Hungarian State Treasury, the Hungarian Central Statistical Office (CSO) and the State Audit Office on local taxes were analyzed, also, the case law of the Local Government Council of the Curia in relation to the settlement tax. This paper focuses on the period between 2015–2020 and seeks to reflect on the impact of the pandemic in early 2020 and the measures taken during of the state of emergency related to it.

2. Theoretical foundations and practical issues in the Hungarian local tax system

The international literature agrees that own revenues are very important sources of income when it comes to local financial autonomy, but at the same time, they are present in different proportions in each country. The importance of own revenues is also highlighted by theories of financial federalism, such as the fact that it can contribute to the cost-effective implementation of local tasks.[7] Basically, the studies highlight increasing the proportion of own resources as a goal, that would be able to increase efficiency through financial autonomy while incorporating considerations of transparency and accountability. At the same time, there is no consensus on the size of local own revenues, as not only the revenue structure but also local financial regulations affect the performance of tasks and the autonomy of local governments. While some argue that determining the share of local revenues should be based on resources sufficient to finance the expenditures of the highest-income municipalities,[8] academics researching the revenue side agree that for efficient performance, municipalities, as far as it is possible, should provide the minimum resource costs through their own revenues.[9] In this context, however, the standpoint of Sandford is worth noting,

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7 Richard Musgrave, *The theory of public finance* (New York: MCgraw Hill, 1959), 15–49; Wallace Oates, "An essay on fiscal federalism," *Journal of Economic Literature*, 37, no. 3 (September 1999): 49.

8 Richard Bird, "Threading the fiscal labyrinth: some issues in fiscal decentralization," *National Tax Journal,* no. 2(1993): 207–272.

9 Gábor Kovács, "Helyi önkormányzatok: a saját bevételek szerepe a finanszírozásban," in *Növekedés és egyensúly: a 2013. június 11-i kautz gyula emlékkonferencia válogatott tanulmányai,* ed. Anikó Tompos and Lívia Ablonczyné Mihályka (Győr: Széchenyi István Egyetem, 2014), 45–52.

who set out seven criteria for the introduction of local taxes. These criteria are the following: the basis for the local tax should be broad and relatively evenly distributed, the tax burden should affect the local population, the tax collected should provide as high and as constant return as possible, the tax collection should be economical, fair, transparent and it should facilitate accountability at the local level. Although he does not mention it, it can be formulated as an important expectation that the tax shall not be charged to someone else, i.e. the ban on tax exporting shall apply.

In the Hungarian system, local taxes, namely, the business tax, accounted for and still represent the largest own resource among the own revenues for local governments. However, in terms of its distribution, this also favors the more developed settlements with better economic performance. Reviewing the statistical data, the tax revenues of the capital and the cities with county rights (urban counties) have always been the highest, and while cities/towns do not lag far behind, the villages have quite low revenues.[10] What is the reason for this? Primarily, due to the fact that enterprises engaged in industrial and commercial activities have settled in the cities and the industrial parks located near them, especially in Budapest, not only due to the concentration of skilled labor, but also due to the higher level of development of infrastructure.

The explanatory memorandum to the draft law that introduced the settlement tax in 2014 stated that after the adoption of the law the already wide-ranging power of taxation of local governments – at least according to the memorandum – would be further expanded by becoming entitled to introduce settlement taxes in addition to local taxes within their area of competence.[11] Both the intention of the legislature and the expectations of the municipalities suggested that local governments were provided a significant opportunity that would actually provide assistance to address the lack of resources. Therefore, it is necessary to examine how effectively this has been achieved in practice and how the new regulation has affected the previous financial structure.

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10 "Hungarian State Treasury: information on the rules of the introduced local taxes," accessed June 15, 2021, https://hakka.allamkincstar.gov.hu/letoltes.aspx.

11 Draft No. T/1705 on the amendment of certain tax laws and related laws, and the Act CXXII of 2010 on the National Tax and Customs Administration.

In order to shed light on the processes and to understand the potential purpose of the settlement tax, it is necessary to briefly review the processes that have taken place in the structure of local revenues.

On the one hand, it can be emphasized that the shortage of local government revenues has been evident since the financial support system was introduced in 1990, but it peaked in the 2000s. In many cases, neither government transfer payments nor own revenues were sufficient to perform public tasks. This was largely due to the disproportionate nature of task deployment, but the low level of local resource generation capacity also contributed to it. On the other hand, the previous system was not able to fully address the differences between municipalities, and the budget deficit was remedied by borrowing, followed by running up debt, and then debt consolidation. The new financing structure that emerged after 2011,[12] i.e. the introduction of task financing and the centralization of the most costly local tasks (education, health care, social care), laid the foundations for a new kind of budget management for local governments. With the decline of local financial autonomy, the role of own revenues, especially local taxes, has increased in proportion, even though a number of new restrictions have been introduced on the levying of taxes and the use of revenues from them.

In 2017, the introduction of the so-called solidarity contribution, paid by richer municipalities to the central budget brought some changes to the equalization of resources between settlements. From 2021, this means a payment obligation for local governments with a tax capacity of more than HUF 22,000 per capita, which is a response to the local business tax revenues that were reduced as a consequence of the COVID-19 epidemic.

Furthermore, from 2021 onwards, the so-called system of supplementation is to be applied, the purpose of which is to provide a general foundation for the mechanism of equalization with regards to inequalities between settlements arising from local tax capacity.[13] As part of the supplementation, settlements with lower tax capacity will receive a normative subsidy supplement of between 20–50%. These corrections were partly intended to

12 Péter Bordás, "Feladatfinanszírozás-e a feladatfinanszírozás? A magyar önkormányzatok támogatási rendszerének értékelése," *Közjogi Szemle,* no. 2. (2017): 56–64.

13 Act XC of 2020 on the Central Budget of Hungary in 2021, II. 2.2.2.1.

address the effects of the pandemic, according to the memorandum from the ministry, but as we can see, the problems started sooner.

3. The impact of the COVID19 epidemic on local revenues

During the state of emergency that was declared after the appearance of the coronavirus in the beginning of 2020, several regulatory solutions were adopted that affected local governments as well. The obligation to pay tourist tax was temporarily suspended, 40% motor vehicle tax that used to remain with the municipalities became a resource for the Pandemic Fund [in Hungarian: Járványügyi Alap], while certain self-governments lost considerable revenues due to the introduction of free parking on public premises for almost a year and the decreasing local business tax revenues caused by the shrinkage of the local economies. In response to this, the Government introduced supplements from the central budget through various compensational mechanisms. On the basis of all this, it seems quite legitimate to ask the following question: if the Government wished to compensate for the lost or missing revenues, for what purpose had they been withdrawn in the first place and what could be the result of this?

Among the changes concerning the system of self-government, Government Decree 135/2020. (IV. 17.) needs to be highlighted here, which allowed the establishment of special economic zones on the pretext of controlling or combating the pandemic.[14] At this point, it should be noted that, according to the Act on local business tax, if an area and its immediate environment achieve a special status, the geographically responsible and competent body of representatives at the county level get the right to introduce the local taxes there, while the municipal government loses its right to exercise its powers to levy taxes.[15] The first example for this designation occurred through Government Decree 136/2020. (IV. 17.), that designated a special economic zone in the public administration area of the city of Göd (more specifically, the premises of the company Samsung

[14] If the institution has declared a total investment of at least HUF 100 billion as a priority investment from the perspective of the national economy, and its purpose is to avoid the massive loss of jobs with economic importance affecting a significant part of the county's territory, or to implement a new investment or expansion.

[15] Ordinance of the Government of 17 April 2020, Journal of Laws 2020, No 79. item 2071.

SDI Magyarország Zrt.). As a result, the ownership of the public roads, squares and parks was passed on to the county, which became entitled to levy and collect local taxes according to the effect of the decree mentioned above.[16] The city of Göd filed a constitutional complaint against this decision; however, the Constitutional Court acting on this basis also confirmed that this ruling was not unconstitutional.[17]

According to a government decree that entered into force on May 21, 2020, the tourist tax does not have to be paid by the taxpayer after the guest nights spent during the emergency until 31 December 2020, nor in 2021, also, the person obliged to collect the tax does not have to collect it, but at the same time, the established but uncollected tax needs to be declared to the tax authority.[18] The local governments received a promise from the Government for a non-refundable subsidy from the central budget, to the same amount as the tax declared but not paid by the taxpayers of tourism tax. In the meantime, the settlements have also lost the central support issued previously as support for holiday resorts [in Hungarian: üdülőhelyi támogatás].

At the end of 2020, a range of new restricting regulations were introduced for the year 2021 on halving the maximum rate of the business tax and on freezing the introduction of new local taxes and municipal taxes (that will later remain in force in 2022).[19] By reducing the business tax burden, the Government intended to relieve the enterprises and businesses that had gotten into a difficult situation. However, in terms of its effect, it cannot be neglected that the loss of revenues affects mostly the major cities, which are typically governed locally by the opposition, and had largely exhausted their reserves b 2020. As we have seen before, according to the data issued by MÁK [Hungarian State Treasury], the most significant local tax revenue is the business tax, that constitutes almost 80% of such revenues. And, as it has been mentioned above, its distribution is rather unequal.

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16 Dóra Lovas, "Nem alaptörvény-ellenes a gödi különleges gazdasági övezet kijelölése," *KÖZ-JAVAK*, no 1. (2021): 48–50.

17 Decision no. IV/839/2020. of the Hungarian Constitutional Court.

18 Ordinance of the Government of 21 April 2020, Journal of Laws 2020, No 82. item 2136.

19 Ordinance of the Government of 1 December 2020, Journal of Laws 2020, No 265. item 8726.

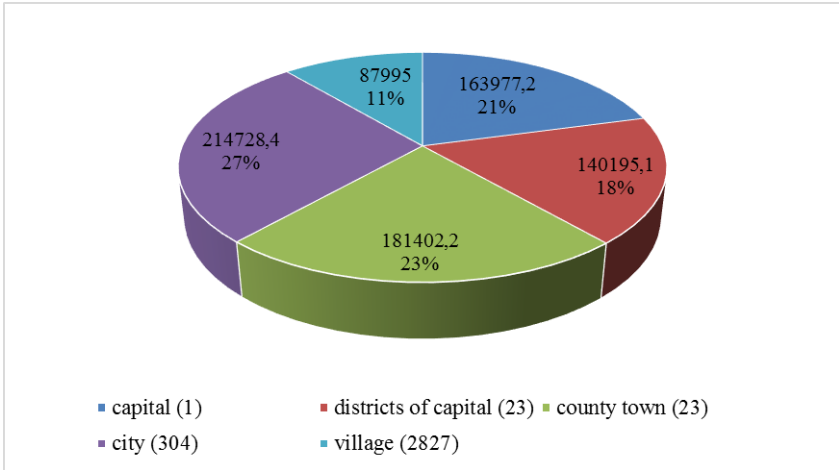

Figure 1. Distribution of revenues (in million HUF) from local business tax (HIPA) by settlement categories (2020)

Source: Edited by the author based on the data from the Hungarian Ministry of Finance, State Audit Office and Hungarian State Treasury

Figure 1 illustrates the unequal proportion and distribution of local business tax between each of the settlement categories. In the legend, the number of municipalities in the given category is shown in brackets behind each of the categories. In 2020, almost one quarter (23%) of the total revenues from HIPA were collected by cities with county rights, while another quarter, or slightly more than a quarter (27%) by other towns/cities.[20] Furthermore, the majority of the municipalities levied the maximum tax rate allowed, which is 2%. According to the data of the State Treasury, almost HUF 703 billion of tax revenue was generated from HIPA in 2020, that may halve in 2021 due to the halving of the tax rate, and may lead to a loss of HUF 2–300 billion from the budget of the municipalities.

While the government took away resources with one hand, it provided extra subsidies to some municipalities with the other one. The government

[20] Ilona Németh and Katalin Halkóné Berkó, ed. *A helyi önkormányzatok adóztatási gyakorlata. Az állami számvevőszék elemzése,* (Budapest: Állami Számvevőszék, 2021), 19–20.

determined individualized subsidies for several municipalities based on a set of criteria that had not been communicated in advance.[21] cities with county rights, which are of key importance as far as the local business tax is concerned, were particularly affected by this subsidy, as 17 of the 23 county towns received such subsidies, including all 12 municipalities led by the governing party. A total of HUF 23.7 billion individualized subsidies were distributed from the central budget among the cities with county rights, that obviously does not cover the expected loss of revenue of hundreds of millions of forints by local governments. The question is whether this will result in the emergence of additional individualized subsidies or whether it foreshadows another possibility of municipal indebtedness.

4. The role of the settlement tax in the revenue structure

As far as the power to levy local taxes is concerned, it can be stated that in 2020, at least one local tax or settlement tax was introduced in 3156 of the 3178 settlements, and only 22 of the local governments did not exercise this option.[22] In other words, there are hardly any municipalities existing today that have not been forced to use this source of revenue.

Let us examine how large sources of revenue the settlement tax constitutes, and within that, what is the proportion of each type of local tax. Figure 2 shows the development of local tax revenues between 2015 and 2020, and clearly demonstrates the significance of the local business tax and its size compared to other taxes.

First of all, it is clear that HIPA is the most significant type of tax, accounting for an average of 70–80% of local tax revenues, while in comparison, the second most important construction tax contributed to only around 10–15% of the total revenues on average. It can be determined that the revenue from HIPA has been growing steadily in the past years, but has fallen from HUF 788 billion to HUF 702 billion as a result of the pandemic in 2020, which shows the extent of its exposure to economic effects. In contrast, for example, revenue from construction taxes increased from HUF 127 billion in the previous year to HUF 131 billion in 2020. As far as

21 Ordinance of the Government of 24 December 2020, Journal of Laws 2020, No 290. item 10779.

22 Németh and Halkóné Berkó, *A helyi önkormányzatok,* 19–20.

the tourist tax is concerned, we can see a significant decrease (from HUF 16 billion to HUF 3.9 billion), which was partly due to the absence of tourists coming from abroad, but largely due to the fact that from 26 April 2020, the tourist tax was paid by the central budget instead of the obligee, so it appeared in the budget of local governments not as local tax revenue, but as a subsidy.

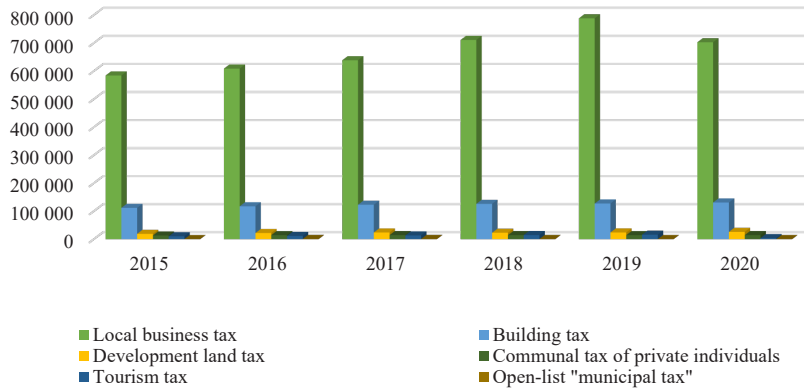

Figure 2. Local government tax revenues in Hungary (2015–2020, in million HUF)

Source: Edited by the author, based on the 2015–2019 data of Central Statistical Office of Hungary and the 2020 data of Hungarian Ministry of Finance.

At the same time, it is worth drawing attention to the inequality between the settlements. According to the analysis published in 2021 by the State Audit Office, 34.8% of the budget revenues of the county towns were local tax revenues in 2019, and in terms of proportions, 80.4% of this came from HIPA. In the case of municipalities with exceptionally high local business tax revenues, local taxes can account for over 60% of their revenues. In contrast, the operation of villages is the least dependent on local tax revenues; according to the Audit Office, the proportion of local tax revenues was below 5% in almost half of the villages. Of course, this dependence is also relative, as in many villages this small portion can also be necessary for daily operation, and, the income lost because of the epidemiological measures can be difficult to make up for, and the central support is

not necessarily sufficient to compensate for this either.[23] In contrast, there are some smaller settlements with greater economic potential (where, for example, a multinational company is established) where the per capita tax revenues are highest on the national level.

Thus, the distribution of local taxes is not uniform, just as the method of distribution of the individualized central support described above differs significantly, if we take into account offsetting and compensation. Let us examine how the municipal tax was integrated into the local tax system from 2015, partly aimed at equalizing financial resource differences and increasing local revenue capacities. According to the data of the Hungarian State Treasury, 9 settlements had a decree on settlement tax in force in 2015, 62 in 2016, 100 in 2017, 102 in 2018, 104 in 2019, 108 in 2020, and 101 in 2021.

First of all, it can be concluded that there is no accurate data about how many municipalities used this option in a given year as statistical data was published with different content. The figure above is based on the statistical reports submitted to the State Treasury, while the local tax decrees published in the National Legislative Gazette (hereinafter: NJT) show slightly different numbers. Moreover, in the first years, with the repeal of the incorrectly established local tax regulations (the practical experience of which will be discussed later), this figure was constantly changing. In any case, it may still be suitable to illustrate the proportions. It can be clearly seen that in the last five years, although the number of local governments levying the local tax has steadily increased, it has affected only 0.03% of the local governments, so it can be described as insignificant. By 2021, the slow growth had come to a halt. Although, according to the NJT, 22 new municipalities would have exercised this option, their local decree had to be repealed due to new central regulations related to the COVID 19 epidemic. This is due to the fact that by the end of 2020, new restrictive decisions were made for 2021, halving the maximum rate of business tax and freezing the introduction of new local and municipal taxes.[24] Furthermore, it can be stated from the data of the State Treasury that typically the villages and partially the towns exercised this option. According to the examination of

[23] See Ordinance of the Government of 14 January 2021, Journal of Laws 2020, No 8. item 109.

[24] Ordinance of the Government of 1 December 2020, Journal of Laws 2020, No 265. item 8726.

the State Audit Office, this means that 52.9% of all settlement tax revenues were generated by villages and 39.0% by other towns, while the remaining two were shared by two districts of the capital and county towns.[25]

The introduction of the new open list tax assessment gave rise to the question of exactly what (taxable events/objects) municipalities could tax in practice. Therefore, the subjects of taxation (objects or events) that municipal councils have declared are also worth examining. Under local decrees in effect on January 1, 2021, the majority of municipalities have introduced an agricultural land tax (where the tax is based on the area or the Gold Crown value, i.e. the economic productivity of the land).[26] In addition, we may encounter more interesting tax subjects in each case, such as agricultural tractor, slow moving vehicle, heavy equipment, domestic wastewater storage, fishpond, high buildings, water vehicles, or even a semi-finished structure. Examining the aspects of the taxation procedure, it can be identified that the town clerk of the municipality - as a local government tax authority - typically establishes the local tax, that usually has an annual payment period, and half of the decrees also establish some kind of exemption.

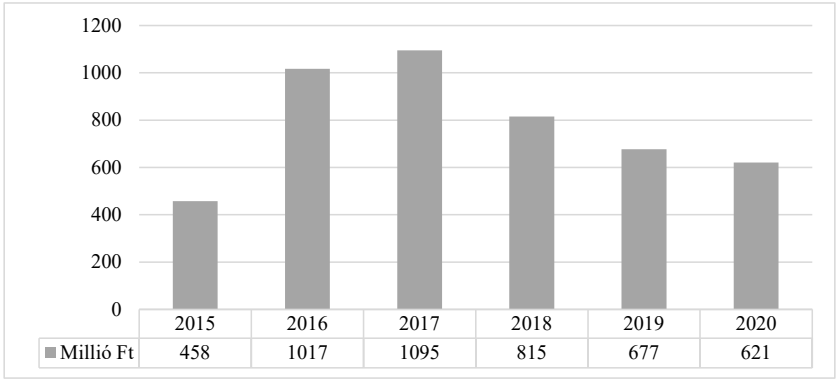

Figure 3. Revenues from settlement tax between 2015–2020 (in million HUF)

Source: Regarding 2015–2019 the figure is based on the data of the Central Statistical Office; as of 2020 the figure is based on the data of the Ministry of Finance. Edited by the author.

[25] Ilona Németh and Katalin Halkóné Berkó, *A helyi önkormányzatok,* 15.

[26] The gold crown value is a measurement unit of the quality of arable land in Hungary.

With the examination of the aggregated data received from the municipal tax, shown in Figure 3, we can draw some important conclusions. According to the budget reports, the settlement tax revenue in the past year of 2020 was HUF 621 million, that accounted for 0.02% of the budget revenue of all local governments. First of all, we can establish that this is not a significant source of revenue compared to local taxes, and its size has been steadily declining over the past three years. It reached its highest level in 2017, when the affected local governments reported HUF 1,095 million in revenue. If we project this to the roughly 100 settlements, we can essentially talk about HUF 10 million a year, and in 2020 only HUF 6 million per settlement. Of course, this can be spent on several useful tasks in smaller settlements, but it is hardly enough for any significant investment and strengthening financial autonomy. As we have seen, overall, the settlement tax did not even account for 0.1% of local revenues. So it cannot serve as an alternative to classic local taxes, especially the HIPA, nor can it compete with them.

Finally, it should be noted that the Government Decree 535/2020 (XII. 1.) on the local tax measure necessary to mitigate the impact of the coronavirus pandemic on the national economy entered into force on December 2, 2020, and declared that the rate of local taxes and the settlement tax cannot be increased in the tax year of 2021, the local government shall continue to provide tax exemptions and tax relief in accordance with what is stipulated in its tax decree, and the local government shall not introduce any new local tax for the year of 2021 (the regulation has been extended to 2022). This will certainly lead to a stagnation or decrease in revenues, thus sealing the fate of the settlement tax. If only, because of the loss of revenue caused by the epidemic, 22 municipalities planned to introduce a new municipal tax from 2021 on the basis of the NJT data, that had to be repealed after the adoption of the above provision.

5. Interpretation of the settlement tax with respect to the norm control procedure initiated by Local Government Council of the Curia

After the budget analysis of the settlement tax, it is worth examining what regulatory challenges local governments have encountered or may encounter when introducing a new municipal tax. The norm control of local decrees, and thus of tax regulations, i.e. the examination of whether the local

government decree collides with other legislation specified in Article T (2) of the Fundamental Law of Hungary, falls within the competence of the Local Government Council of the Curia (Supreme Court of Hungary). As the regulation of the municipal tax is rather short-spoken, the decisions of the Curia play a decisive role in terms of legal practice, and at the same time shed new light on why the introduction of the settlement tax could not become systemic.

As a reminder, according to §1/A of the LTA, local governments may, by decree in their area of competence, introduce a settlement tax or settlement taxes that are not prohibited by other law. Furthermore, a settlement tax may be imposed on any tax subject, provided that it is not subjected to public charges regulated by law. Finally, the state, local government, organization or, by virtue of its nature, an entrepreneur, shall not be subjected to settlement tax.[27] Within this regulatory framework, the Local Governmental Council has made several landmark decisions. Between 2015 and 2020, a total of twenty decisions on settlement tax were made, of which eight are substantive decisions, therefore, their detailed analysis is worthy from the point of view of legal practice. The following is a short summary of the case-law on the settlement tax, without the detailed description of the facts of each case.

In most cases, the Curia examined a settlement tax decree that established a tax on agricultural land. In this context, the court examined whether double or multiple taxation existed, i.e. it determined which payment obligations constitute a public burden that precludes the taxation of agricultural land (Hungarian Curia Judgments No. Köf.5035/2015., Köf.5028/2016/4. Köf.5069/2015/4., and Köf.5068/2015/4.). Several decrees that can be said to be 'more creative' compared to the agricultural land tax, also became the subjects of the examination of the Curia, which also shows the local government strive for the purpose of the regulation.

In one case, the Curia annulled the settlement tax decree of the Municipality of Alsónémedi.28 As far as the decree is concerned, the obligation to pay the municipal tax covertly affected only a narrow social group, after the number of days spent in the settlement (typically Romanian guest workers living

27 Article 1/A of the LTA.

28 Hungarian Curia Judgment No. köf.5028/2017/4.

in the settlement, who, according to the municipal council, were behaving inappropriately in the settlement). In the context of this decree, which was essentially adopted for law enforcement purposes by the local authority, the Curia stated that, taking into account the cases of tax exemptions and the system for determining the relevant certificates, the definition of the taxable person was extremely targeted. Thus, the Curia expressed that the local government implements an arbitrary distinction prohibited by the Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities, if the tax legislation determines the extent of the obligations against the ability of the persons to bear the burden- or, in case of the legislation examined, in the opposite way to - without a legitimate aim.

Similarly to the previous decision, judgement No. Köf.5027/2017/4. can also be highlighted, where the Curia annulled the decree of the Municipality of Veresegyház on the infrastructure development settlement tax. According to the decree, a one-time settlement tax of half a million forints had to be paid for each newly built apartment.[29] The Curia expressed, that the LTA stipulated the construction tax for the taxation of residential real estates, therefore, any tax object that is already subjected to any local taxes specified in the LTA cannot be subject to settlement taxation.
Thirdly, the findings of the judgement No. Köf.5037/2017 can be emphasized, where the case was based on the fact that the municipal council of Balatonfüred established an agricultural land tax with which it was intended to force owners of the neglected properties to behave differently, i.e. to make them to keep their lands in order.[30] In this case as well, the Local Governmental Council considered that the realization of the desired goal, that is, local authority law enforcement through taxation was incompatible with the nature of the tax, as taxation is supposed to be a general payment obligation, not a sanction-type obligation.

It should be emphasized, therefore, that the high extent of freedom provided with regards to the declaration of the rules in details shall not result in the broad interpretation of the general limits, and the introduction

[29] Municipal Decree No. 1/2017 (III.3.) of the Municipal Council of the Municipality of Veresegyház on the Urban Infrastructure Development Settlement Tax.

[30] Municipal Decree No. 30/2014 (XI. 28.) of the Municipal Council of Balatonfüred on Settlement Taxes.

of the settlement tax shall not be aimed at covertly regulating local living conditions beyond taxation. It is clear from the two examples above that in addition to the goals communicated by the legislator, some local governments interpreted the authorization as an option to introduce a quasi 'punitive tax', and the local government would have regulated the local living conditions with local authority law enforcement purposes. [31]

The question arises as to whether the legislator deliberately formulated the regulation in the LTA without restrictions, or does the practice attempt to take advantage of this opportunity? In any case, based on the case law, it can be seen that the regulation of the open list tax assessment requires much more attention from local governments, and there is a higher risk that the purpose of the local decree is different from the objectives set out in the LTA.

6. Conclusions

The Hungarian local tax system has undergone a change in recent years, which has not strengthened the financial independence of local governments. Although the introduction of the settlement tax in 2015 was preceded by high expectations, we can state that it did not become significant either in the number of levying municipalities or in the volume of revenues from it.[32] In fact, it has not become a means of replenishing and equalizing financial resources, and its economic efficiency has fallen short of expectations. A negligible part of the local governments levied the local tax, and the revenue from it is dwarfed compared to the classic taxes. In my opinion, all of this can be traced back to several reasons. One of them is that the short-spoken regulation of the municipal tax requires creativity on the part of the local government, while the room for maneuver of the local governments is limited due to the exemption of businesses from the tax. Secondly, the burden on the population is already high, and the imposition of another local tax could pose a public policy risk (see, for example, the fact that in several cases, individuals tried to initiate a norm control procedure before the Curia because of the high public burden). Thirdly, the practice of the Local Governmental Council has also shown that it is necessary to take into account

31 This is supported by the satement of Gábor Kecső and Csaba Tombor, A *helyi adók*, 85.

32 Gábor Kecső and Csaba Tombor, A *helyi adók*, 90.

several additional aspects within the already narrow framework, including the definition of the subject group and the avoidance of double taxation, which uncertainty also discourages the introduction of the settlement tax. The government measures taken during the coronavirus epidemic did not favor the spreading of the municipal tax either, in spite of the fact it was exactly in this period of limited resources when the mood to introduce new taxes could have increased. Open-list taxation could not fit into the previous tax structure, and when it comes to its result, it also had a negative effect on the system of own resources, so, for example, usage constraints appeared in the context of other local taxes as well. Thus, the open-list tax assessment alone could have created an opportunity for equalization of resources, but within such a regulatory framework - taking into account the peculiarities of the Hungarian local government system - the real and unexpected purpose of the settlement tax became separated from each other.

The role of the business tax among local taxes, was growing steadily, which was halted by the COVID 19 epidemic. This way, the epidemic affected not only local businesses, but also local task and budgetary management, forcing some municipalities into a forced path. But it can also be seen that, even in these circumstances, there are winners of the current mechanism of withdrawing and allocating resources, that reinforces the practice in recent years of breaking the central task funding mechanism through individualized central budgetary support granted through individual and targeted, less transparent mechanisms.[33]

Instead of seemingly effective but only sound sources of revenue that reinforce local dissensions and have no real content, it would be necessary to even out the territorial differences in financial resources in order to create financial stability and to perform public services adequately, especially in times of economic challenges caused by the COVID19 epidemic.

[33] The paper was prepared in the framework of Project no. 134499 titled 'Increasing government intervention in market regulation' has been implemented with the support from the National Research, Development and Innovation Fund of Hungary, financed under the K_20 „OTKA" funding scheme.

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Regional investment aid in Poland and Czechia

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Poland,
Czechia

Abstract: The European Commission aims to ensure the transparency of aid granted by individual member states, and the simplest and most transparent instrument of support, next to grants, are tax relief. In both Czechia and Poland, investment incentives for new investments include regional aid in the form of tax relief in income tax – this includes income tax exemptions in Poland, and income tax relief in Czechia, as well as property tax exemptions in both countries. The purpose of this article is to compare the scope and conditions for receiving regional investment aid by entrepreneurs in these countries.

The adopted research methodology is based on analysis of legislation in force with a reference to views expressed by legal commentators.

1. Regional investment aid- sources of law in the European Union

First of all, it should be pointed out that the European Union (EU) has the exclusive power to determine conditions for the implementation of state aid, and its control. The European Commission, as a supranational body supervises state aid granted by Member States, upholding the interest of the European Union as a community[1]. Accordingly, at the level of EU law, there is a significant number of legal acts of a different nature, all regulating

[1] Bartłomiej Kurcz, "Komentarz do art. 107," in *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom II*, ed. Krystyna Kowalik-Bańczyk, Monika Szwarc-Kuczer and Andrzej Wróbel (Warszawa: Wolters Kluwer Polska, 2012), 423 ff.

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state aid. However, given the nature and subject matter of this article, only the most important legal acts related to the provision of regional aid will be considered for the purposes of below analysis.

The most important and basic act regulating the issue of state aid is the Treaty on the Functioning of the European Union[2], where from Article 107 (1) a general prohibition of state aid can be directly derived. At the same time, Article 107 (2) and (3) of the Treaty indicates the conditions when state aid could be possible. In turn, Article 109 of the Treaty contains the authorization for the European Council to issue any appropriate regulations for the application of Article 107 and Article 108 of the Treaty.

As part of the implementation of the Treaty in the field of state aid, extensive executive regulations have been issued in the secondary law of the European Union, concerning the definition of forms and types of state aid, sectors of special treatment and procedures for control by the European Commission. In particular, exercising the power granted in Article 108 (4) of the Treaty, the European Commission adopted the General Block Exemption Regulation via Commission Regulation (EU) No. 651/2014 of June 17, 2014, declaring certain types of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty[3], stating categories of state aid that may be exempted from notification under certain conditions. The categories of aid exempted from notification under Article 1(1)(a) of Regulation 651/2014 notably include regional aid. Regional aid is regulated in Section 1 of Chapter III of Regulation 651/2014.

It should be noted that in addition to the sources of primary law (the Treaty) and secondary law (Regulation 651/2014, issued on the basis of the Treaty), the issue of regional aid is also addressed by non-legislative acts in the field of soft-law – notably, communications of the European Commission. The first of these is the communication of the European

[2] The Treaty on the functioning of the European Union, Official Journal of the European Union C 326.

[3] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, Official Journal of the European Union L 187/1, 26.6.2014; hereinafter: Regulation 651/2014; hereinafter: "The Treaty".

Commission - Guidelines on regional state aid[4]. Although the Guidelines do not constitute binding law under Article 288 of the Treaty, and therefore do not have direct effect and are non-binding on Member States, they are greatly important because they contain the Commission's position on granting the regional aid. The Guidelines provides guidance to individual Member States to facilitate the preparation of aid programs that comply with EU law. Adhering to the Guidelines increases the likelihood that the Commission will declare state aid compatible with the internal EU market. In the Guidelines, the Commission defined the essential elements of regional aid, its types, conditions of admissibility or criteria for distinguishing areas in terms of permissible aid intensity. The Guidelines refer both to regional aid, which is exempted from notification to the Commission if consistent with the requirements set by Regulation 651/2014, and to aid requiring approval of the Commission, e.g. due to the higher value of the aid.

The European Commission also published horizontal communication, which does not apply only to regional aid, but to any type of state aid. This is the Commission's notice on the concept of state aid within the meaning of Article 107(1) of the Treaty, aimed to allow for an easier and more consistent application of the concept throughout the European Union. In this notice on the concept of state aid the European Commission stressed that this clarification was based on the jurisprudence of the EU courts, which is always a fundamental point of reference in the interpretation of the Treaty. In principle, the Commission is bound by the communications it issues when discussing state aid supervision, as long as they do not deviate from the standards of the Treaty and to the extent that they are accepted by the Member States[5].

The presence of numerous regulations of different nature creates a comprehensive, but complex legal framework for regional aid. However, if the same scope of substantive matter has been regulated differently

4 Communication from the Commission Guidelines on regional State aid (2021/C 153/01), Official Journal of the European Union C 153/1, 29.4.2021.

5 Igor Postuła, Aleksander Werner, *Prawo pomocy publicznej* (Warszawa: LexisNexis, 2008), 115.

under the Commission's communications and Regulation 651/2014, priority should be given to the latter.

2. Legal basis for granting tax preferences in Czechia and Poland

The act setting the direct grounds for granting regional aid for investments in Poland is the Act of May 10, 2018 on Supporting New Investments[6]. According to Article 1 of the Act on Supporting New Investments, the Act sets the general principles of providing support to entrepreneurs in new investments, the authority competent to support new investments, its scope of authority and mode of operation, as well as tasks of area managers responsible for supporting investors. Also, the executive regulations implemented on the basis of this Act will be of utmost importance, notably the Ordinance of the Council of Ministers of August 28, 2018 on public aid granted to certain entrepreneurs for the realization of new investments[7], which determines, among other things, the conditions for granting public aid, and the Ordinance of the Council of Ministers of December 14, 2021 on the determination of the regional aid map for 2022–2027[8].

At the same time, entrepreneurs implementing a new investment can take advantage of real estate tax exemption, but this depends on independent resolutions of the authorities of individual local government units (municipal councils) adopted under Article 7 paragraph 3 of the Act on Local Taxes and Fees[9].

The act setting the general rules for investment incentives in Czechia is Act No. 72/2000 Coll., on Investment Incentives and on Amendments to Certain Acts (Investment Incentives Act), as amended by Act No. 450/2020 Coll. This Act sets the procedure to be followed in the granting of investment incentives, and the exercise of related state administration in order to

6 Act on Supporting New Investments of 10 May 2018, Journal Laws 2020, item 1752, as amended.

7 Ordinance of the Council of Ministers of 28 August 2018 on public aid granted to certain entrepreneurs for the realization of new investments, Journal of Laws 2018, item 1713, as amended.

8 Ordinance of the Council of Ministers of 14 December 2021 on the establishment of the regional aid map for 2022–2027, Journal of Laws 2021 item 2422, as amended.

9 Act on Local Taxes and Duties Act of 12 January 1991, Journal of Laws 2019 item 1170, as amended.

promote the economic development and employment creation in Czechia. Then, Regulation No. 428/2021 Coll., of the Government of Czechia, on the Permissible Level of Public Aid in the Cohesion Regions of Czechia[10] sets forth the permissible aid intensity for individual regions.

Legal basis for Property tax exemption for a period of five years in special industrial zones is Act on Real Estate Tax, No. 338/1992 Coll., as amended by subsequent acts.

3. Definition of the regional state aid

As indicated by Katarzyna Pamuła-Wróbel and Beata Grzegorzewska[11], state aid is an action of the state aimed at realization of a specific economic intention, and by this objective, state aid can be divided into: regional aid, sectoral aid[12] and horizontal aid[13]. Given the focus of this article, the definition of one of the types of state aid is particularly important, which is state (regional) aid. Characteristic to the regional aid is that it is closely linked to the fact that the beneficiary conducts economic activity in a particular area (region), which in turn allows for targeted and localized increases in economic effectiveness and boosts growth.

In formulating the definition of regional aid, it should be noted that recital 31 of Regulation 651/2014 states that regional aid promotes the economic, social and territorial cohesion of Member States and the European Union as a whole, and aims to assist the development of disadvantaged areas by supporting investments and job creation in the context of sustainable development. Thus, the objective of regional aid is to reduce the disparities in socio-economic development between the various regions of the European Union by supporting the least economically developed regions. By

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10 Regulation No. 428/2021 Coll., of the Government of Czechia, on the Permissible Level of Public Aid in the Cohesion Regions of Czechia.

11 Katarzyna Pamuła-Wróbel and Beata Grzegorzewska ,"Podstawowe pojęcia i system źródeł prawa pomocy publicznej," in *Pomoc publiczna dla przedsiębiorców. Wybrane zagadnienia*, ed. Adam A. Ambroziak, Katarzyna Pamuła-Wróbel, Robert Zenc (Warszawa: Wolters Kluwer Polska, 2020), 31.

12 The granting of sectoral aid is dependent on the beneficiary's activity in a specific field or industry.

13 Horizontal aid is directed to all entrepreneurs, regardless of the area in which they conduct business and the field of their activites.

reducing disparities in the level of development of individual EU regions, EU economic and social cohesion is achieved. By targeting regional aid toward the least developed (most disadvantaged) regions in the EU, the impact on trade and competition is minimized. The main objective of regional aid is to promote the investments in regions where the level of economic development is below a certain EU average.

The aforementioned Guidelines on regional state aid indicate that the main objective of state aid control in respect of regional aid is to ensure that the aid intended to contribute to regional development and territorial cohesion does not adversely affect the terms of trade between Member States.

Out of the 15 aid categories it is regional investment aid that is one of the most relevant in all of the Visegrad countries and preserved its dominant role as of 2009 to 2016: on average with a relative share of 48% in Czechia and 21% in Poland respectively. As regards the forms of aid, the most typical is absolutely the cash grant in these countries, with a share of over 70% among the aid instruments on average followed by tax benefits (deferral, reduction or even exemption) with a share of around 20%. The other forms of aid (equity participation, guarantee, soft loan) are less significant. The dominance of cash grants and tax benefits in Poland and Czechia is not unique – it fits the European trend with similar proportions[14].

4. Rules for granting public aid- Poland and Czechia

A necessary condition for granting support is that the entrepreneur makes a new investment, i.e. an investment in tangible or intangible assets, in the territory of Czechia or the Republic of Poland respectively.

Regional investment aid in the form of exemption or relief from income tax may be granted in the entire territory of Poland and, respectively, Czechia. At the same time, the conditions for these tax preferences vary between both countries and their regions, depending on how certain areas of the country are classified. Areas eligible for regional aid and defined in the regional aid map in accordance with Article 107(3)(a) of the Treaty,

[14] Gábor Potvorszki, "State Aid in the Visegrad Countries: Similarities and Differences," *Club of Economics in Miskolc*, TMP 14, no. 2(2018): 65,67, http://dx.doi.org/10.18096/TMP.2018.02.05.

usually referred to as 'a' areas, are usually those which are considered as the most disadvantaged in the EU in terms of economic development and are the regions with the greatest needs. Areas defined in the regional aid map under Article 107(3)(c) of the Treaty, usually referred to as "c" areas, are also disadvantaged, but to a lesser extent. The division of regions is due to the fact that regional investment aid can only play an effective role if it is used sparingly and proportionately and is concentrated on the most disadvantaged regions of the European Union. In particular, the permissible aid ceilings should reflect the relative seriousness of the problems affecting the development of the regions concerned[15].

According to Annex I, Regional aid coverage 2022–2027 by Member States to the Regional State Aid Guidelines, the following areas of Poland are "a" areas: małopolskie, śląskie, zachodniopomorskie, lubuskie, opolskie, kujawsko-pomorskie, warmińsko-mazurskie, pomorskie, łódzkie, świętokrzyskie, lubelskie, podkarpackie, podlaskie and the Mazowieckie regional region. In Czechia, on the other hand, Severozápad, Severovýchod, Střední Morava and Moravskoslezsko were classified as 'a' areas. The Wielkopolskie and Dolnośląskie voivodships in Poland, as well as Střední Čechy, Jihozápad and Jihovýchod have been preliminarily defined as "c" areas (former "a" areas) due to positive economic developments.

The difference in investment conditions is that in 'c' areas, compared to 'a' areas, the situation of large enterprises changes, as these can only receive public aid after prior notification to the European Commission, unless they start a new economic activity in the area as part of a new investment. The assessment is made on the basis of the NACE classification at the 4-digit level of the NACE code[16]. This is because large enterprises are less

[15] Magdalena Kogut-Jaworska, "Regional Aid and its Importance in the Context of Total Public Aid in the European Union," in *Proceedings of the international scientific conference Hradec Economic Days 2019 part I,* ed. Petra Maresova, Pavel Jedlicka, Ivan Soukal (Hradec: University of Hradec Kralove, 2019), accessed August 9, 2022,https://digilib.uhk.cz/bitstream/handle/20.500.12603/119/KOGUT-JAWORSKA.pdf?sequence=1&isAllowed=y.

[16] Article 2(50) of Regulation 651/2014 provides a definition of the term "same or similar activity" as an activity falling within the same class (designated by a four-digit numerical code) of the statistical classification of economic activities NACE Rev. 2, as defined in Regulation (EC) No. 1893/2006 of the European Parliament and the Council of December 20, 2006 on the statistical classification of economic activities NACE Rev. 2 and amending Council Regulation (EEC) No. 3037/90 and certain EU regulations on specific statistical domains.

affected by regional restrictions than a small or medium-sized enterprises when investing in an area that fulfils the conditions of Article 107(3)(c) of the Treaty. Large enterprises operating in the Wielkopolskie and Dolnośląskie voivodships and the Střední Čechy, Jihozápad and Jihovýchod regions will not be able to receive support for new investments which consist of, among other things, increasing the production capacity of an existing establishment or fundamentally changing its production process.

New investment in both countries may consist in the creation of a new establishment (greenfield investment), i.e. a spatially, organizationally and functionally distinct unit, with a high degree of autonomy and above all, not reliable on the technical resources of other establishments of the enterprise[17]. There may be several establishments (plants) within a single enterprise, even if they are located in different places. Other cases which can be considered as new investments are investments increasing the production/service capacity of an existing establishment, diversification of the production of an establishment by introducing new products or services, or a fundamental change in the production process of an existing establishment.

In addition, in Poland, the acquisition of assets of a plant that has been closed or would have been closed if the purchase had not taken place (provided the entrepreneur acquiring the assets must not be related to the seller) can also be considered new investment. However, the mere acquisition of shares in an existing enterprise is not considered new investment.

In Poland, state aid is granted on the basis of a decision on support and takes the form of exemption from corporate or personal income tax. Regional investment aid can be granted for new investments in the industrial sector and in the service sector (with certain exemptions).

In Czechia, the investment incentive can be granted for ongoing investment projects in the industry sector of manufacturing, including strategic manufacturing investments, investments with high technological demands, or production of strategic medical products. The supported investments also include investments in technology centres (where a such centre focuses on applied research, development and innovation of technologically

[17] Robert Zenc, "Regionalna pomoc inwestycyjna," in *Pomoc publiczna dla przedsiębiorców. Wybrane zagadnienia*, ed. Adam A. Ambroziak, Katarzyna Pamuła-Wróbel, Robert Zenc (Warszawa: Wolters Kluwer Polska 2020), 156.

or otherwise advanced products, technologies and production processes, including the creation and innovation of software) and business support centres. Notably, business support centres can take the form of:

- a software development centre, focusing on the development of new software or innovation in existing software,
- a data centre, focusing on the storage, sorting and management of data,
- a repair centre, focusing on the repair of high-tech equipment, or
- a shared services centre, focusing on taking over the management, operation and administration of internal operations from a controlling or controlled person or from contractors for whom this activity is not their usual business.

In Poland, the decision on support is issued by the 'area manager', i.e. the manager of a given Special Economic Zone in its respective area on behalf of the Minister of Development and Technology. The decision on support is issued autonomously by the area manager, without consulting any entity. As a result, the entire procedure to receive state aid for a new investment takes 30 days, regardless of whether the investment consists of setting up a new plant or investing in an existing plant.

In Czechia, in the case of expansion of a Czech entity, the process of issuing an investment incentive decision can take about 7 months and this period can be extended to as long as 10 months if the applicant and the recipient of investment incentives are different entities. Once an application for an investment incentive decision has been submitted to the Czech Investment and Development Agency, the Agency evaluates the provided supporting documentation within 30 days before submitting it to the Ministry of Industry and Trade together with the documentation on the requested investment incentive. The application is first assessed by the Ministry of Industry and Trade, after which the Ministry of Labour and Social Affairs, the Ministry of Finance, the Ministry of Agriculture and the Ministry of the Environment examine whether the general and specific conditions for granting investment incentives could be met before issuing a binding opinion approving or opposing the granting of investment incentive. The assessments of the individual ministries can take a total of approximately 3 months. The Ministry of Industry and Trade submits a proposal for the approval of an investment incentive to the Government before issuing a decision on the offer to grant the investment incentive.

The Government then makes a decision on the Ministry's proposal for the approval of the investment incentive within 3 months.

Interestingly, in Czechia, the same application procedure applies for income tax relief, grants for the creation of new jobs, retraining and training of employees, financial assistance for the acquisition of tangible and intangible assets for a strategic investment project or when applying for the transfer of land and technical infrastructure at a reduced price, as well as when applying for exemption from property tax. This is certainly a convenience for entrepreneurs, who submit their applications to a single authority. However, due to the fact that one entity handles all the applications for investment incentives, it significantly increases the waiting time for obtaining a decision.

In Poland, if an entrepreneur is interested in obtaining a grant for creating new jobs, an investment grant or a grant for employee training, they must apply to a completely different entity, which is the Polish Investment and Trade Agency. If an investor wants to take advantage of the real estate tax exemption, then the executive authority – usually the mayor or president of the municipality where the new investment is located – is competent in this matter.

In both Poland and Czechia, the investment cannot be commenced prior to the submission of an application for a decision on support / investment incentive decision. In Poland, expenses related to the new investment which were incurred after the application for a decision on support was submitted, but before the date of obtaining the decision on support, do not constitute eligible costs of the new investment. In Czechia, all expenses incurred after the date of application are considered eligible costs of the new investment.

In Poland, the validity period of the decision on support, i.e. the period in which entrepreneurs can benefit from the income tax exemption granted to them, depends on the location of the new investment and is 15 years in areas with an aid intensity of 50%, 12 years in areas with an aid intensity of 30–40% and 10 years in areas with an aid intensity of up to 30%. In Czechia, corporate income tax relief is granted for 10 years, regardless of the aid intensity in a given region.

In Czechia, the maximum state aid for a large enterprise is set at 20–40% of eligible costs, depending on the region. In Poland, on the other hand,

the maximum aid intensity for large enterprises is set between 25–50%. In both countries, if the investment project is carried out by a small or medium-sized enterprise, the permissible state aid intensity is increased - by 20% for a small enterprise, and by 10% for a medium-sized enterprise. Differences in the intensity of available aid proves that the system of investment incentives is generally perceived as an advantage by which governments may influence the localization decisions of companies in favour of targeted regions to attract and accumulate capital in their territory to support their economic growth[18].

Eligible costs in Poland as well as in Czechia can be incurred by purchase of fixed assets (e.g. land, buildings, machinery and equipment) and intangible assets (e.g. licences and know-how), or gross salaries of employees for 24 months in newly created positions. In Czechia, at least half of the assets acquired by the entrepreneur must be new (i.e. manufactured at the earliest 2 years prior to their acquisition by the entrepreneur) - this rule applies to all entrepreneurs, regardless of size. In Poland, all fixed assets acquired by a large entrepreneur must be new.

In Poland, it is necessary to meet quantitative criteria (by incurring eligible costs) and qualitative criteria. Eligible costs incurred by an entrepreneur for a new investment build up the amount of public aid available to the entrepreneur in the form of tax exemption of income gained from business activities conducted on the basis of the decision on support. The limit of the public aid available to the entrepreneur is progressively increased by subsequent expenditures incurred by the entrepreneur, constituting eligible costs of the new investment. The maximum amount of tax exemption to which an entrepreneur is entitled is, as a rule, calculated as a product of the maximum intensity of regional investment aid and the sum of eligible costs incurred by the entrepreneur.

The amount of eligible costs required to be borne by the entrepreneur depends on the size of the enterprise, the level of unemployment in the area and the industry in which the investment is made.

A large entrepreneur is required to incur minimum eligible costs, which in case of an industrial investment are between PLN 10-100 million

[18] Petr Blaschke, "Investment Incentives in the Environment of the Czech Republic," *E&M Economics and Management* 25, no. 1(2022): 6, https://doi.org/10.15240/tul/001/2022-1-001.

(EUR ca. 2,12–21,22 million[19]) depending on the level of unemployment in the area. These values are reduced by 98% in the case of activities carried out by micro-entrepreneurs, by 95% in the case of activities carried out by small entrepreneurs and by 90% in the case of medium-sized entrepreneurs. In case of certain new investments in the area of business support services, eligible costs of a investment which an entrepreneur is obliged to incur are reduced by 95% for large and medium-sized entrepreneurs. This can be the case if the investment is related to software and consultancy in the field of IT and related services, data processing, hosting, financial auditing, head offices and management consultancy services, accounting, architectural and engineering services, technical testing and analysis, specialist design, environmental consultancy, call centres or repair and maintenance of computers and communication equipment.

As indicated above, entrepreneurs interested in obtaining a decision on support, in addition to quantitative criteria are also required to meet qualitative criteria. In the case of new investments in areas with an intensity of up to 30%, entrepreneurs are required to meet a minimum of 6 qualitative criteria. The minimum for an investment in regions with an intensity between 30 and 40% is 5 criteria and for an intensity of 50% - 4 criteria. There is a total of 13 qualitative criteria from which the entrepreneur can choose, which are:

1. investment regards projects supporting industries in line with the current development policy of the country or investments within sectors compliant with smart specializations of the region,
2. using the potential of human resources (e.g. professional activation by establishing a company nursery or kindergarten),
3. establishing regional links via cooperation with suppliers and cooperators as part of the implementation of a new investment,
4. robotization and automation of processes carried out as part of the new investment,
5. National Key Cluster membership status,
6. conducting research and development activity (R&D costs exceeding 1% of total costs), or employment of additional R&D employees

[19] 1 PLN = 0,21 EUR

(2% of the equivalent working time of all employees is allocated to R&D works).
7. investments regards renewable energy sources,
8. status of micro, small or medium entrepreneur,
9. creation of high-paying and stable workplaces (created workplaces – except for management – require special qualifications, proven by relevant certificates or documents of authorization e.g. an university degree / vocational education; furthermore, at least 80% of staff should be employed under an employment contract)
10. focus on low environmental impact of the investment,
11. the new investment is located in certain underdeveloped areas or with high unemployment level,
12. support of employees to acquire educational and professional qualifications and cooperation with vocational schools, e.g. through:
    – incurring the costs of training or education in the amount of PLN 1,000 (ca. EUR 212) per employee per year for at least 50% of employees, or
    – conducting student apprenticeships or internships, offering pupils or students out-of-school educational activities aimed at obtaining, supplementing or improving skills and professional or general qualifications, or
    – handing over machines and tools for the needs of the school, practical training center or university, or
    – creating a patronage class or laboratory, admitting pupils or students for practical vocational training.
13. offers of benefits to employees (participation in additional health care programs, additional employee benefits in the field of various forms of recreation, cultural and educational activities, sports and recreation activities, insurance, health care programs, the costs of employee care benefits should be at least PLN 800 (ca. EUR 170) per employee per year).

In Czechia, the amount of available regional investment aid is based on the amount of eligible costs incurred by an entrepreneur up to EUR 50 million, and for the amount of eligible costs exceeding this threshold, the aid is reduced to half of the original intensity. If the investor plans to engage an even higher amount of funds, the aid is further reduced and moreover,

its availability is then subject to the approval of the European Commission. For the calculation of the available support, all investments made by related investors in one region for three years are always assessed together.

As regards investments in a manufacturing industry, manufacturing industry with high technological demands, and production of strategic medical products, the eligible costs of an investment carried out by a large entrepreneur must amount to CZK 40 million or CZK 80 million (EUR ca. 1,62–3,23 million[20]) in assets, depending on the region. These values are reduced, and for a medium-sized entrepreneur its either CZK 20 million or CZK 40 million (EUR ca. 0,81–1,62 million), and for a small entrepreneur - CZK 10 million or CZK 20 million (EUR ca. 0,40–0,81 million).

In addition, for some regions, entrepreneurs must fulfil the added value condition. This means that the wages of at least 80% of the employees must be equal to the average gross monthly wages for the region, and at the same time: at least 10% of the employees must have a university degree, and there must be a cooperation agreement concluded with a research organization or college/university for R&D activities amounting to at least 1% of the anticipated eligible costs of the project; at least 2% of the employees must be involved in R&D activities; or the investment in assets that will be used in R&D activities must amount to at least 10% of the anticipated eligible costs.

For investments in manufacturing industry with high technological demands, there is an additional condition that the investment is carried out in one of the specified sectors of pharmaceutical products and preparations, computers, electronic and optical devices, aircraft and aircraft engines, spacecraft and related equipment, and the implementation of R&D using key enabling technologies.

For investments in the manufacturing industry, to be considered a strategic investment, the value of investment must exceed CZK 2 billion (EUR ca. 80,8 million) for all entrepreneurs (regardless of size), and include the creation of a minimum of 250 new jobs. It is also necessary to meet the condition of higher added value in more developed regions.

As regards investment in technology centres, a large entrepreneur must invest the minimum amount of CZK 10 million (EUR ca. 0,40 million) into assets, while a medium-sized entrepreneur – CZK 5 million

[20] 1 CZK = 0,040 EUR

(EUR ca. 0,2 million) and a small entrepreneur – CZK 2.5 million (EUR ca. 0,10 million). An additional condition is that 20 new jobs must be created by the large entrepreneur and 10 jobs by the medium and small entrepreneur. For strategic technology centres (R&D), the investment must amount to at least CZK 200 million (EUR 8,08 million) and the creation of 70 new jobs. For the creation or development of business support services centres, the key requirement is the creation of new jobs and the provision of services in at least 3 regions. If the investment is carried out by a large entrepreneur, the number of new jobs to be created is in the case of:

– software development centre - 20
– data centre - 20
– high-tech repair centre - 50
– shared-services centre - 70

If the investment is carried out by a medium-sized or small entrepreneur, the required number of jobs is halved.

For strategic high-tech repair centres, the eligible costs of the new investment must be a minimum of CZK 200 million (EUR 8,08 million) and 100 jobs must be created.

The types of qualitative criteria in Poland and the condition of higher value added in developed regions in Czechia indicate that the objective of regional investment aid in Poland and Czechia is to create new, stable, high-paying jobs for qualified employees, develop innovative technologies and increase the competitiveness of goods and services produced in these countries or regions, which has a direct impact on economic development and growth.

It is worth noting however that in Czechia, in case of investments in the service sector and in manufacturing industry for strategic investments, a minimum number of new jobs must be created by the entrepreneur. In Poland, the legislator has chosen not to be this specific, and in each sector, the creation of even two jobs is sufficient to obtain income tax exemption. Thus, in Poland, unlike in Czechia, it is not required to create a large number of new jobs to be eligible for investment incentives.

5. Conclusion

The analysis of the EU regulations relating to state aid, as well as the Guidelines on regional state aid, lead to the conclusion that both Poland and

Czechia have a system of granting regional state aid in line with the EU law. The presented support systems within the framework of regional investment aid, which consist in granting preferences in the area of taxation, constitute an important and effective tool to encourage entrepreneurs to invest in Poland and Czechia.

However, given the differences, clear advantages can be spotted. The strong suit of the Polish incentive system is the speed of the decision on support procedure, in which the decision can be obtained in 30 days compared to 7–10 months for Czechia. However, the advantage of Czech investment incentive system is the possibility to apply for tax preferences and subsidies within the same procedure, where in Poland there are three different entities responsible for granting different support instruments under their specific procedures.

Czechia has introduced investment incentives to their legal system much later than Poland, due to the Government's optimistic view about a stable currency, inexpensive and educated labour force and good infrastructure[21].

In Poland, from 1994 until August 2018, receiving tax preferences was only possible in Special Economic Zones, which accounted for 0.07% of the country's total area. The support system organized in this way exacerbated disparities in regional development, as regions with a strong position in the country attracted the most investments due to tax preferences[22]. The current regulations aim at sustainable economic growth and territorially balanced development. Hence, the regulations aim to remove barriers and include regions struggling with difficulties of a restructuring and adaptation nature, medium-sized cities losing socio-economic functions and towns and villages with high unemployment in the development processes. The differentiation of investment conditions depending on the specific characteristics of the regions is intended to eliminate the socio-economic disproportions between the various areas of Poland, giving them possibly equal growth opportunities. In the future, it will be possible to even out

21 Claudia Guagliano, Stefano Riela, "Do Special Economic Areas Matter in Attracting FDI? Evidence from Poland, Hungary and Czech Republic," *ISLA Working Papers 21* (2005): 9.

22 Adam A. Ambroziak, *Krajowa pomoc regionalna w specjalnych strefach ekonomicznych w Polsce* (Warszawa: Szkoła Główna Handlowa w Warszawie, 2009), 417.

the significant economic and social disproportions between the regions of Poland, thanks to the granting of state aid (which has so far only been available within the Special Economic Zones) on terms favouring the less developed regions and deepening existing differences.

Notably, the differentiation of the minimum thresholds for investments depending on the size of the enterprise, and the increase in the maximum intensity of regional aid in relation to SMEs should be regarded as a positive solution, as it evens out investment opportunities for small and medium-sized entrepreneurs.

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The Proposed Polish Advertisement Levies – An Efficient Source of Public Income or Instruments of the Political Battle?

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digital services tax, digital advertising tax, contribution on advertising services, media protest

Abstract: This article analyses the bill of 2nd February 2021 on additional revenues of the National Health Fund, the National Fund for the Protection of Historical Monuments and the establishment of a Fund for the Support of Culture and National Heritage in the Media Area. The draft legislation, the announcement of which has triggered an unprecedented blackout protest in private media as well as a mass anti-government protest on the Internet, provides for the introduction of new public levies called advertisement contributions and the establishment of a new state special-purpose fund – the Fund for the Support of Culture and National Heritage in the Media Area. The aim of the article is to identify and present those provisions of the draft act which have evoked most controversies and have given rise to the stiff social resistance to the proposal. The first part of the paper is devoted to the assessment of the regulations within the context of the objective of the bill that was declared by the drafters in the legislative rationale. The analysis carried out has supported the assumption that providing adequate finances for those special-purpose funds that are strongly involved in remedying the consequences of the SARS CoV-2 epidemic was not a genuine purpose of the bill. It also leads to the conclusion that there is no constitutional justification for such a special-purpose levy. In the second part, the controversies over technical components of the advertising levies have

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been presented and analysed. On the basis of this analysis, it is possible to conclude that some of the qualitative and quantitative elements of the so-called advertisement contributions may give rise to interpretative doubts. The implementation of the research objectives made it possible to formulate a thesis that the advertisement contributions, as drafted, would not be efficient instruments of fair taxation of digital economy but rather would form instruments for achieving certain political objectives.

1. Introduction

The challenges associated with fair and efficient taxation of the digital economy were identified several years ago, yet at the international level, solutions to these problems are still being sought. On 2nd February 2021, the Polish Ministry of Finance announced a bill on additional revenues of the National Health Fund, the National Fund for the Protection of Historical Monuments and the establishment of a Fund for the Support of Culture and National Heritage in the Media Area[1]. The draft act provides for the introduction of the so-called advertisement contributions, which can be viewed, at least in part, as a kind of digital tax. The announcement of the bill has resulted in an unprecedented blackout protest in the private media sector as well as in a mass anti-government protest on the Internet[2]. In consequence, the government has suspended the legislative procedure by sending the proposal to social partners. It does not mean, however, that the plans to introduce some kind of digital tax have been abandoned altogether, especially bearing in mind that part of the political opposition is supporting such plans[3].

1 "Media pomogą w zwalczaniu skutków COVID-19. Przepisy o składce reklamowej w prekonsultacjach", Google, accessed February 8, 2021, https://www.gov.pl/web/finanse/media-pomoga-w-zwalczaniu-skutkow-covid-19-przepisy-o-skladce-reklamowej-w-prekonsultacjach, [henceforth cited as: the bill].

2 On 10th February 2021, many private Polish TV channels and radio stations fell silent and newspapers and internet sites ran black front pages to protest against the planned levy. Top news websites had black front pages with the slogan "media without choice".

3 See: parliamentary draft act on tax on some digital services and the establishment of Digital Technology Fund, parliamentary print No 1376.

The aim of the article is to identify and present those provisions of the draft act which have evoked most controversies and have given rise to stiff social resistance to the proposal, as well as to verify the hypothesis that the advertisement levies, as drafted, would not be efficient instruments of fair taxation of the digital economy but rather instruments for achieving certain political objectives.

2. The Objective of the Bill

The draft legislation provides for the introduction of new public levies called advertisement contributions and the establishment of a new state special-purpose fund, namely the Fund for the Support of Culture and National Heritage in the Media Area (CNHSF). According to the legislative rationale for the proposed bill, the purpose of the act is to "introduce into the legal order levies on online and conventional advertising the proceeds of which will accrue to special-purpose funds that are strongly involved in remedying the consequences of the SARS CoV-2 epidemic"[4]. The thing that is most striking about the content of the legislative rationale is the fact that – unlike the European Commission, foreign governments and most scholars – the Polish government does not consider the levy on digital advertising as a measure designated to ensure fair taxation of digital corporations or as a kind of equalisation tax. Not only does the rationale completely disregard the key argument for digital service taxes, which is applying them as a method to tax local "user-created value" or economic rents earned by digital platform companies in a particular location[5], but it also leaves out

[4] See "The legislative rationale for the bill on additional revenues of the National Health Fund, the National Fund for the Protection of Historical Monuments and the establishment of a Fund for the Support of Culture and National Heritage in the Media Area", accessed February 1, 2021 https://www.gov.pl/web/finanse/media-pomoga-w-zwalczaniu-skutkow-covid-19-przepisy-o-skladce-reklamowej-w-prekonsultacjach, [henceforth cited as: the legislative rationale].

[5] See Marcel Olbert, Christoph Spengel, "Taxation in the digital economy: Recent policy developments and the question of value creation," *ZEW Discussion Papers*, no. 19-010 (2019): 15–22; Wei Cui, "The Digital Services Tax: A Conceptual Defense", *Tax Law Review*, no. 73(2020): 24–26; Wei Cui, "The Digital Services Tax on the Verge of Implementation," *Canadian Tax Journal*, no. 67(4) (December 2019): 1135–1139; Tereza Čejková, "Tax Absence in Relation to Taxation of Digital Services", *Public Governance, Administration and Finances Law Review*, vol. 5, no. 2(2020): 5–16.

other essential aspects of digital taxation, such as rebalancing tax inequity between digital and traditional businesses as well as between local and international companies or counteracting tax avoidance and profit shifting[6].

The analysis of the text of the proposal in the context of the aforementioned purpose leads to the following observations. First, the proceeds from the levies are to be assigned to three entities of the public finance sector, i.e.: the National Health Fund (NHF), the National Fund for the Protection of Historical Monuments (MPF) and the newly created CNHSF. In line with the wording of the draft act, 50% of the proceeds shall be allocated to the NHF, while 15% and 35% respectively shall go to the aforementioned state special-purpose funds. In this context, it should be noted that the NHF is a state organisational unit with legal personality[7], whereas state special-purpose funds do not have legal personality. In fact, they are funds held on separate bank accounts at the disposal of the minister or any other authority designated in the statue establishing the fund[8]. This means that the introduction of new levies earmarked for purposes other than general budget ones undoubtedly deepens the process of the so-called 'debudgetisation', which, in the opinion of most scholars, creates many threats to the security of public finance[9].

Second, contrary to the media coverage of the bill and despite unquestioned similarities of the contribution to a tax, the so-called advertisement

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6 Georg Kofler, Julia Sinning, "Equalization Taxes and the EU'a 'Digital Services Tax,'" *Intertax*, vol. 47, issue 2 (2019): 183–200; Rigó Csaba Balázs, András Tóth, "The Symbolic Significance of Digital Service Tax and its Practical Consequences," *Public Finance Quarterly*, no. 4(2020): 51–-526; Kim Young Ran, "Digital Services Tax: A Cross-Border Variation of the Consumption Tax Debate," Alabama Law Review, no. 131(2020): 141–145.

7 Art. 96 of the Act of 27 August 2004 on Publicly Financed Healthcare Services, Journal of Laws 2020, item 1398, as amended [henceforth cited as: Health Care Act].

8 Art. 29 of the Act of August 2009 on Public Finance, Journal of Laws 2021, item 305, as amended [henceforth cited as: Public Finance Act].

9 See Janusz Stankiewicz, *Debudżetyzacja finansów państwa* (Białystok: Temida2, 2007), 37–40; Jolanta Szołno-Koguc, *Funkcjonowanie funduszy celowych w Polsce w świetle zasad racjonalnego gospodarowania środkami publicznymi* (Lublin: Wydawnictwo UMCS, 2007), 347–353; Cezary Kosikowski, "Reforma finansów w Polsce w świetle nowej ustawy o finansach publicznych," *Państwo i Prawo*, no. 12(2009): 12; Krystyna Sawicka, "Formy prawno-organizacyjne jednostek sektora finansów publicznych," in *System prawa finansowego*, t. II, *Prawo finansowe sektora finansów publicznych*, ed. Eugeniusz Ruśkowski (Warszawa: Oficyna Wolters Kluwer business, 2010), 39–40.

levy is not a tax within the meaning of Polish tax law. Under the Tax Ordinance Act, a tax is a gratuitous, compulsory, non-repayable pecuniary performance made under public law for the benefit of the State Treasury or local government units (a province (*województwo*), district (*powiat*), commune (*gmina*)), arising from statutory tax law[10]. What follows from the wording of the definition is that only pecuniary contributions made for the benefit of the State Treasury or local government units may be qualified as taxes. Although the term 'contribution' (*składka*) has been used in respect to the proposed levy, it also does not bear the characteristics of contributions. The term "contribution" has not been defined in Polish legislation. Nevertheless, it is stressed in legal literature that this notion means a levy in exchange of a certain performance, which is connected with the contribution payer becoming eligible for public services[11]. Pursuant to the provisions of the draft act, beneficiaries of the CNHSF shall include, inter alia, entities liable for the advertisement levy[12]. Nonetheless, payment of this levy is not associated with acquisition of the right to any public benefit[13]. In view of this, the so-called advertisement contribution should be categorized as a public levy within the meaning of Art. 217 of the Constitution of the Republic of Poland[14] that is neither a tax nor a contribution but rather a new special-purpose levy (a quasi-tax) arising from a separate act. In this context, it should further be noted that, as it has been adopted both in the jurisprudence of the Polish Constitutional Tribunal and legal literature, special-purpose levies (designated for specific uses) shall be considered as permissible. Nevertheless, their permissibility, as public levies other than taxes within the meaning of Art. 217 of the Constitution of the Republic of Poland, is as a general rule conditional upon

10 Art. 6 of Act of 29 August 1997 – Tax Ordinance, Journal of Laws 2021, item 1540.

11 See Beata Kucia-Guściora, "Commentary to art. 5", in *Ustawa o finansach publicznych. Komentarz*, ed. Paweł Smoleń (Warszawa: Wydawnictwo C.H. Beck, 2014), 99; Anna Hornowska, "Commentary to art. 5", in *Ustawa o finansach publicznych. Komentarz*, ed. Agnieszka Mikos-Sitek, (MIASTO:SIP Legalis 2021) 9 and references cited therein.

12 Art. 30 of the bill.

13 Art. 31 and 32 of the bill.

14 Act of 2 April 1997 – Journal of Laws 1997, No. 78, item 482, as amended.

their extraordinary rather than regular nature[15]. The legal literature also indicates that special-purpose levies, unlike taxes, are not a constant and primary source of state income. In consequence, they shall be introduced only as far as it is necessary, and their introduction has to be constitutionally justified[16]. It is stressed that the objective of the introduced levy should directly refer to constitutional values or constitutional rights whose pursuit is a total or partial responsibility of the state in such a manner as to justify a permanent or interim specific and separate allocation of the funds and, at the same time, these funds not being allocated to the general budget[17].

Third, although the declared objective of the draft act is to provide adequate finances for those special-purpose funds that are strongly involved in remedying the consequences of the SARS CoV-2 epidemic, the analysis of the laws governing those funds does not allow the conclusion that it was the genuine purpose of the bill. Destination of the revenues from the advertisement levy is determined by statutory tasks of those units to which the revenues are to be allocated. It is also worth noting that the draft act does not contain provisions amending those tasks. In the Polish legal system, the tasks of the NHF have been laid down in the Act on Publicly Financed Healthcare Services. Under the Act, the Fund shall administer public funds, including revenues from national health insurance contributions, intended to finance healthcare services. The scope of activities of this unit also includes other tasks in the field of healthcare, in particular determination of the quality and availability as well as cost analysis of healthcare services insofar as necessary for the correct conclusion of agreements on the provision of healthcare services[18]. It is beyond doubt that the NHF plays a central role in the healthcare system. Nevertheless, it should be pointed

15 See Constitutional Tribunal, Judgment of 15 July 2013, Ref. No. K 7/12, published OTK ZU 6A/2013, item 76; see also: Teresa Dębowska-Romanowska, "Pojęcie podatków i innych danin publicznych w świetle Konstytucji," in *Księga jubileuszowa Profesora Ryszarda Mastalskiego. Stanowienie i stosowania prawa podatkowego*, ed. Wiesława Miemiec (Wrocław: Wydawnictwo UNIMEX 2009), 117.

16 Teresa Dębowska-Romanowska, *Prawo finansowe. Część konstytucyjna wraz z częścią ogólną* (Warszawa: Wydawnictwo C.H. Beck 2010), 124 and 134.

17 Ibid. 134. See also: Constitutional Tribunal, Judgment of 9 September 2004, Ref. No. K 2/03, published OTK ZU 8A/2004, item 83 and Judgment of 10 September 2010, Ref. No. P 44/09, published OTK ZU 7A/2010, item 68.

18 Art. 97 of the Healthcare Act.

out that as estimated by the Ministry of Finance, the revenues from the advertisement levy could reach approximately 800 million in 2022[19]. This means that the NHF would receive about PLN 400 million, whilst the costs resulting from the tasks of this unit (without administrative costs) have been planned for 2021 in the amount exceeding PLN 103 billion (PLN 103 022 215 000)[20]. The financial impact of the revenues from the advertisement levy would therefore be negligible (0.38%) in relation to the costs resulting from the tasks of the Fund. This, in turn, might call into question the need for the creation of a new special-purpose levy.

As indicated earlier, the National Fund for the Protection of Historical Monuments is another proposed beneficiary of funds derived from the advertisement levy. According to schedule 13 to the Budget Act for the year 2021, the statutorily prescribed activities of the Fund are expected to cost up to PLN 824 thousand[21]. It is also worth noting that, within the existing legal framework, the revenues of the Fund are administrative penalties imposed on the basis of the Act on the Protection and Care of Historical Monuments, which are projected in 2021 in the amount of PLN 700 thousand. Earmarking 15% of the funding derived from the advertising levy to the Fund would increase the revenues of this unit by approximately PLN 120 million. In the case of this Fund, the income from the proposed levy would constitute not so much additional as a principal source of its revenues. What is striking, however, is the fact that the draft act does not provide for the extension of the scope of tasks entrusted to the Fund. In consequence, the funds would have to be allocated exclusively to cover expenditure necessary for the execution of conservation or restoration work on historical monuments listed in the Heritage Treasure List, expenditure necessary for the execution of conservation, restoration or construction work on historical monuments listed in the Historical Monuments Register as well as operating expenses of the Fund[22]. In view of these considerations, the question arises whether

19 See Google, "Media pomogą."

20 See "Financial plan of the NHF for the year 2021 NFZ", Google, accessed May 2, 2021, https://www.nfz.gov.pl/bip/finanse-nfz/.

21 Act of 20 January 2021, Journal of Laws 2021, item 190, Annex no. 13, Table 5 – Financial Plan of National Fund for the Protection of Historical Monuments.

22 Art. 83b of the Act of 23 July 2003 on the Protection and the Care of Historical Monuments, Journal of Laws 2021, item 710.

the MPF may be considered as a state special-purpose fund that is strongly involved in remedying the consequences of the SARS CoV-2 epidemic. The legislative rationale for the draft act does not provide clarification on that issue but limits itself to the following statement: "Additional financing [of the fund] will contribute to increasing tourist attractiveness of places with undisclosed and untapped tourist potential"[23]. This demonstrates that, in contrast to the objective stated, the advertisement levy has not been exclusively designated as a measure aimed at obtaining the funding to combat the effects of the epidemic.

One of the most controversial changes provided for in the draft law is the creation of a new state special-purpose fund, which would be the third beneficiary of the advertisement levy. According to the draft law, the CNHSF shall receive 35% of the proceeds from the levy, which means that, as estimated by the Ministry of Finance, it would possess an amount of PLN 280 million. Under the provisions of the bill, the scope of the activities of the Fund includes: (1) improving knowledge and awareness of the public of risks associated with the media, particularly digital media; (2) creation of platforms for exchanging information and analyses of content appearing in the media, particularly in digital media; (3) creation and development of information channels and platforms (television and radio broadcasts, internet portals) addressed to those who do not have high digital competences; (4) promotion of Polish cultural achievements, national heritage and sport; (5) supporting research in the field of the media; (6) supporting the development of radio broadcasting and cinematography in the field of Polish national heritage and sport; (7) supporting efforts to increase the share of Polish content in the media area[24].

The analysis of the catalogue listed above leads to the conclusion that some of these tasks are normatively assigned to other already existing entities of the public finance sector. The first thing to be noted is the fact that activities consisting in promoting and supporting Polish cultural achievements are the responsibilities of the Culture Promotion Fund, which is a state special-purpose fund established by the Gambling Act and administered by the minister in charge of culture and national heritage protection.

23 Legislative rationale, 12.

24 Art. 30 of the bill.

The Fund's revenues are surcharges to stakes, ticket prices or other documents of participation in gambling games covered by state monopoly[25]. This means that there is already a special-purpose levy earmarked for the promotion and support of Polish cultural achievements. The next category of public tasks, that is tasks consisting of supporting cinematography in the area of Polish national heritage projects, are conducted by the Polish Film Institute, which is a state organisational unit with legal personality operated on the basis of the Cinematography Act and supervised by the minister in charge of culture and national heritage protection. The main source of revenues of this entity consists of proceeds from the separate compulsory levy that is imposed on cinema operators, film distributors, television broadcasters, digital platform operators, cable television operators and entities providing audiovisual media services on demand[26]. In this context, it should also be mentioned that, although the levy does not constitute a tax within the meaning of the Tax Ordinance Act, insofar as it concerns audiovisual media services, it is regarded as a kind of a digital tax in legal literature[27]. The next thing to consider is the fact that some of the tasks aimed at improving knowledge and awareness of the public of risks associated with digital media are carried out by the Fund for Solving Gambling Problems since it is the Fund that undertakes information and education activities as well as prepares expert opinions and reports on non-substance addictions[28]. The Fund is a state special-purpose fund which operates on the basis of the Gambling Act and is administered by the minister in charge of health. The main source of revenues of this entity includes proceeds from the aforementioned surcharges to stakes in gambling games covered by state monopoly. Another issue that deserves special attention is the fact that some of the tasks assigned to the newly created Fund for the Support of Culture and National Heritage in the Media Area fall under the heading

25 Art. 87 of the Act of 19 November 2009 on Gambling Games, Journal of Laws 2020, item 2094, as amended [henceforth cited as: Gambling Act].

26 Art. 7–10 of the Act of 30 June 2005 on Cinematography, Journal of Laws 2021, item 257.

27 See "What European OECD Countries Are Doing about Digital Services Taxes", Tax Foundation, accessed July 6, 2021, http://taxfoundation.org/digital-tax-europe-2020/; Daniel Bunn, Elke Asen, Cristina Enache, "Digital Taxation around the World", accessed July 6, 2021, https://taxfoundation.org/digital-tax/.

28 Art. 88 of the Gambling Act.

of the broadly understood 'media education', whereas media education is the responsibility of the public media and shall be carried out as part of the public service remit[29]. It is also worth mentioning that those activities are funded from the proceeds of the broadcast receiving licence, which is a separate public levy laid down by the Act on Broadcast Receiving Licence and designated for specific uses[30]. Last but not least, it should be noted that most of the CNHSF's tasks could be financed directly from the state budget, for example in the form of programmes implemented by the minister in charge of culture and national heritage protection. Against the above considerations, the question arises whether the catalogue of tasks assigned to the CNHSF provides sufficient grounds for establishing both the new state special-purpose fund and the new special-purpose levy. Undoubtedly, and clearly contrary to the stated objective of the bill, the CNHSF cannot be also considered as a fund particularly involved in counteracting the effects of the epidemic.

While examining the draft legislation in the context of its declared objective, the rules and procedures for managing proceeds from the advertisement levy should also be taken into consideration. Under the draft act, the CNHSF shall award grants. The proposed provisions do not specify the nature of these grants; however, in the view of the provisions of the Public Finance Act, grants to finance statutorily defined tasks, including tasks in the field of state patronage of culture, carried out by units other than units of local government, constitute targeted grants[31]. The CNHSF grants shall be awarded through an open call, in which the entities liable for the advertisement levy would also be able to participate[32]. Since the scope of the tasks assigned to the CNHSF coincides to some extent with the tasks performed within the public service remit, it cannot be excluded that public broadcasting units would be beneficiaries of those funds. It basically means establishing a new source of public funding for public broadcasters. When the principle of public finance transparency is taken into consideration,

29 Art. 21 sec. 1a clause 11 of the Act of 29 December 1992 r. on Radio and Television, Journal of Laws 2020, item 805, as amended.

30 Act of 21 April 2005 – Journal of Law 2020, item 1689.

31 Art. 127 of Public Finance Act.

32 Art. 31 sec. 1 and 3 of the bill.

attention should also be drawn to the fact that the draft act does not set any criteria that should be employed by the Commission responsible for examining grant applications[33]. In particular, it was not indicated that the anticipated effects of a given project, as well as the financial and economic conditions for its implementation, should be taken into account. The above reservations seem to be even more important in view of the fact that under the draft legislation, the Commission shall be composed exclusively of government administration representatives: to be more precise, three representatives of the minister in charge of culture and national heritage protection and one representative each appointed by the minister responsible for informatisation and the minister in charge of public finance[34]. According to the bill, the Commission is also not obliged to seek advice from outside experts. It may raise a concern that the decisions to award a grant would be based not only on the merits of a given project but also on political issues, worldviews and ideological attitudes.

Another issue that needs to be highlighted is the fact that the bill does not contain any provision specifying the source from which the operating costs of the CNHSF are to be covered. According to the draft legislation, the resources of the Fund shall serve to cover banking costs of this unit, as well as operational costs of the Commission responsible for examining applications for grants awarded by the Fund. The draft act also states that the administrative support of the Commission shall be provided by the office serving the authorizing officer of the Fund, who is the minister in charge of culture and national heritage protection. It is clear from the wording of these provisions that, contrary to the standard practice, the operating costs of the Fund shall not be covered with the resources of this unit. In the case of the CNHSF, the appropriations of the Fund should only be assigned to cover its banking costs and travel expenses of the Commission members[35]. This means that if new posts were necessary, they would be financed from the state budget, from part 24 – Culture and national heritage protection. In consequence, despite the earmarking of PLN 280 million

[33] It would be possible to adopt such criteria as cognitive, educational or artistic values of a given project.

[34] Art. 32 sec. 2 of the bill.

[35] Art. 32 of the bill.

annually to the CNHSF, the operational costs of the Fund would place an additional financial burden on the state budget, which raises concerns in view of the principles of management. In order to justify the above definition, the drafters invoked the Austrian and French provisions; however, those provisions are significantly different[36]. In Austrian advertisement tax (*Werbeabgabe*), the taxable base shall include consideration (*Engelt*) within the meaning of § 4 of the Value Added Tax Act (*Umsatzsteuergesetz*)[37] which the person accepting the order enters on an invoice, whereby the advertisement tax is not a part of the assessment basis[38]. In the case of the French tax on publishers and distributors of television services (*taxe sur les éditeurs et distributeurs de services de télévision*), the taxable amount includes, inter alia, amounts paid by advertisers and sponsors for the distribution of advertisements and sponsor messages, including catch-up TV services, net of value added tax[39]. Nevertheless, it should be stressed that the substantive scope of this tax is not limited to advertising services, and thus the tax base also includes other amounts, for instance TV subscription fees.

As proposed, the basis for calculation of the contribution on conventional advertising shall be the total revenue in a calendar year from a given source of revenue. Additionally, four sources of revenue have been indicated, i.e.: (1) advertising through television, radio, cinema and outdoor advertising media, except advertising of qualified goods; (2) advertising of qualified goods through television, radio, cinema and outdoor advertising media; (3) advertising through the press, with the exception of advertising of qualified goods; (4) advertising of qualified goods through the press. The basis for the calculation of the contribution does not include revenue covered by the contribution on digital advertising, nor does it include

36 See legislative rationale, 3.

37 § 4 (1) Gesamte Rechtsvorschrift für Umsatzsteuergesetz 1994, Google, accessed September 6, 2021, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10004873.

38 § 2 (1) Gesamte Rechtsvorschrift für Werbeabgabegesetz 2000, Google, accessed September 6, 2021, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20000689.

39 Art. L115–7 Code du cinéma et de l'image animée, Google, accessed August 2, 2021, https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000020908868/LEGISCTA000020907745/#LEGISCTA000020908833.

revenues covered by the fee applying to alcoholic beverage advertisements. As already mentioned, the levy on traditional advertising would be imposed if the value of the revenue exceeded certain limits and would be calculated on the excess of these limits[40]. Since the advertising of qualified goods constitutes a separate source of income, the question arises whether the limits shall be applied separately to revenues from advertising of such goods[41].

The amount of the levy depends on the subject matter of the advertisement, the medium of communication used and the amount of the revenues realized. In regard to the subject matter of the advertisement, the category of the so-called qualified goods has been distinguished. This category includes medicinal products, food supplements, medical devices and beverages with sweeteners[42]. It has not been explained in the legislative rationale what grounds led to the adoption of this catalogue. Nevertheless, it seems that the intention of the drafters was to impose a greater burden on those products which are widely advertised and, when consumed in excessive amounts, could be harmful. The rates for television, radio, cinema and outdoor media advertising shall be 7.5% of the portion of the assessment basis that is less than PLN 50 million and 10% of the excess of the assessment basis over PLN 50 million. Rates of 10% and 15% respectively are to be applied to revenue resulting from advertising of qualified goods. If the revenue is from press advertising, the rates shall be 2% of the portion of the assessment basis that is less than PLN 30 million and 6% of the portion of the assessment basis exceeding PLN 30 million. In the case of press advertising of qualified goods, the rates shall be 4% and 12% respectively. The thing that may give rise to controversy in that respect is the fact that cinema advertising is not treated any differently from advertising through television and radio, whereas cinema operators have suffered severely from the restrictions imposed due to the COVID-19 outbreak.

The technical components of the contribution on digital advertising have been set out separately. The analysis of these provisions leads to the conclusion that the obligation to pay the contribution on digital advertising

40 Art. 6, 7 and 9 of the bill.

41 See P. Rochowicz, "Podatek od reklam: niejasności w projekcie problematyczne dla podatników i skarbówki," *Rzeczpospolita*, 8 February 2021.

42 Art. 7 of the bill.

arises under the following conditions. First, the digital advertising service has to be provided on the territory of Poland. Second, the entity providing the service must meet conditions relating to the level of revenues.

As defined by the proposal, "digital advertising" means a digital service which enables the service user to direct the advertisement to the recipient, in particular by displaying or playing audiovisual material or sound on the recipient's device. The targeting of the advertisement must depend on data related to the recipient. The term "digital advertisement" should also be understood to cover all other services that are relevant to directing the advertisement to the recipient, in particular: (1) building the recipient's advertising profile; (2) data sale; (3) advertising auctions[43]. As the scope of meaning of the term 'digital advertising' is wide, some activities have been excluded from the substantive scope of the levy. The regulations do not apply to telecommunication services within the meaning of the Telecommunication Law[44], digital services provided by an entity belonging to a consolidated group for financial accounting purposes to another entity in that same group, as well as to gambling games.

According to the draft act, a person liable for the contribution on digital advertising shall mean an entity meeting both of the following conditions: (a) the total amount of the worldwide revenues reported by the entity or a consolidated group to which the entity belongs for the relevant financial year exceeds EUR 750 million; (b) the total amount of the revenues resulting from digital advertising services obtained by the entity or a consolidated group to which the entity belongs within Poland during the relevant financial year exceeds EUR 5 million. The digital advertising service is deemed to take place in Poland if at the time of receiving the advertisement, the recipient is located on the territory of Poland. The assessment whether the recipient is located in Poland shall be made by determining the place where the recipient's device is being used[45].

The basis for calculation of the contribution on digital advertising is equal to the worldwide revenue resulting from digital advertising multiplied by the share (percentage) of recipients located in Poland in the total

43 Art. 13 of the bill.

44 Act of 17 July 2004 – Journal of Laws 2021, item 576, as amended.

45 Art. 15 and 16 of the bill.

number of recipients of advertising services provided by the entity or a consolidated group to which the entity belongs[46]. It is clear that in determining the proportion of the revenue obtained in Poland, the drafters made use of the French experiences (the so-called French presence ratio)[47]. Such a formula undeniably constitutes a simplification measure since there is no need to calculate the amount of revenue earned by digital platform companies from a particular location. The term "revenue" has been defined as everything which constitutes consideration in return for the advertisement services, net of value added tax. In respect of the assessment base for the contribution on digital advertising, the draft act also explicitly states that revenue shall be recognized as having been obtained at the time when it falls due; it is therefore not relevant whether the amounts have actually been paid.

Prima facie such provisions seem to be clear; however, a closer examination leads to the conclusion that they would create difficulties in their implementation. It should be noted that, in light of the broad legal definition of 'digital advertising', there is a risk of double taxation of the same amounts. Remuneration for services other than internet publishers' services, for example for building the user's advertising profile, is usually calculated in the amount which the service user has to pay for the provision of the whole service finalised by the advertisement being displayed on a web page. Since providers of such services are also liable for the contribution, the proposed levy might distort the market due to its cascading effects and may make consumers rather than the targeted multinational corporations the actual payers of the contribution. In view of the above, the concept of gross margin taxation might be put into consideration, that is the taxation of net revenue from the advertising services after the deduction of the remunerations paid to the entrepreneurs providing services to the entity liable for the advertisement levy and to intermediaries. It is worth noting that such a tax base has been adopted in the Austrian digital tax (*Digitalsteuer*). Under the act on digital tax, the basis of assessment shall

46 Art. 18 of the bill.

47 See "France issues comprehensive draft guidance on digital services tax", Ernst&Young, accessed May 1, 2021, https://www.ey.com/en_gl/tax-alerts/france-issues-comprehensive-draft-guidance-on-digital-services-tax.

be the consideration (*Engelt*) which the entity providing digital advertising services receives from a customer minus expenses for preparatory work done by other entities in the field of digital advertisement, if they do not belong to the taxpayer's group[48].

The rate of the contribution on digital advertising is 5%[49]. In contrast to the contribution on conventional advertising, the amount of the levy is not based on revenues obtained from advertising services or on the subject matter of the advertisement. Therefore, and in view of the fact that the so-called qualified goods are widely advertised on the Internet, the following question arises: why higher rates of the digital advertisement contribution have not been imposed on such goods? Needless to say, it is another issue that has not been clarified in the legislative rationale for the bill.

3. Conclusions

Taxation of digital business activities undoubtedly poses a challenge for adequate regulation. In spite of the fact that it is unclear whether national digital taxes can overcome challenges stemming from the increasing digitalisation of the economy, such instruments have been either proposed, announced or implemented by numerous governments worldwide, including Poland. The analysis of the bill leads to the following conclusions.

First, as it is frequently the case with quasi-taxes, the advertisement levy has not been designated as a tax for political reasons. Nevertheless, one can attribute certain features and functions of a digital tax to this levy. Although the term "contribution" has been used, the levy also does not bear the characteristics of a contribution but rather constitutes a new special-purpose levy within the meaning of Art. 217 of the Constitution of the Republic of Poland.

Second, the analysis of the bill supports the assumption that providing adequate finances for those special-purpose funds that are strongly involved in remedying the consequences of the SARS CoV-2 epidemic is not a genuine purpose of the bill. In the case of the NHF, the financial impact

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48 § 3(1) Gesamte Rechtsvorschrift für Digitalsteuergesetz 2020, Google, accesssed September 9, 2021, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20010780.

49 Art. 20 of the bill.

of the revenues from the advertisement levy would be negligible, whereas the MPF cannot be at all considered as a state special-purpose fund that is strongly involved in repairing the consequences of the epidemic. The proposal to establish a new state special-purpose fund seems even more controversial since most of its tasks have been normatively assigned to other already existing entities, including the public media, or could be financed directly from the state budget.

Third, despite the fact that the provision of the bill mirrors to some extent the proposal for a Council Directive on the common system of digital advertising tax on revenues resulting from the provision of certain digital advertising services, the structure of rules on the technical components of the advertisement levies may give rise to interpretative doubts. There are controversies relating to both the qualitative and quantitative elements of the levies, including: the subjective scope of the advertising contributions, revenue thresholds, special rules on advertising of qualified goods and the bases for calculation of the contributions.

In light of the above considerations, the conclusion can be drawn that there is no constitutional justification for such a special-purpose levy. The accomplishment of the research objective allowed for the formulation of the thesis that advertisement contributions, as drafted, would not be efficient instruments of fair taxation of the digital economy, but they would rather form instruments for achieving certain political objectives.

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A Gloss to the Judgment of the Appellate Court in Warsaw of 28 May 2013 (VI Aca 785/13)

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Abstract: In the glossed judgement, the Appellate Court examined the possibility of declaring the respondent unworthy of succession should he have committed the offence of avoidance of the duty of maintenance of the testator (Article 209 PC) or the offence of abandonment of the testator (Article 210 PC). The court's considerations were purely hypothetical, as in the course of the proceedings, it was not proven whether the heir had actually committed these offences. The court allowed the recognition of the heir as unworthy if he had committed the offence of persistent avoidance of the duty of maintenance, but only if it could be proven. The court's position raises certain doubts. Any conduct that violates familial nexus, in particular, should be verified for the existence of grounds for exclusion from succession, since this bond, in the legal sense, has its source in the relationship of marriage, consanguinity, and affinity, and these determine the legal title to inheritance. In particular, it is not understandable why persistent failure to fulfil family obligations, even if it is not an offence that a civil tribunal could additionally qualify as serious, does not actually produce legal consequences for the parent if the other party to the family relationship is a minor. It seems that wherever we are confronted with malicious and intentional failure to perform family duties, it should be assumed, provided that the statutory criteria of this specific type of offence are met, that *in abstracto* a serious offence has taken place.

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The reviewed judgement of the Appellate Court in Warsaw was delivered in a case concerning unworthiness to inherit. The female testator's mother brought an action for declaring her father unworthy to succeed. The regional court of the first instance dismissed it. The claimant appealed against the judgement. The appeal was also dismissed. The circumstances of the case were as follows.

The testator was a daughter of the parties to the proceedings. After her birth, the parents got divorced. The claimant took care of the minor, and the respondent was ordered to pay maintenance allowance. For several years, the father did not maintain any contact with his daughter, nor did he provide a livelihood for her on a regular basis. The minor's mother never decided to claim maintenance due to her daughter through enforcement. However, when the testator grew older, she voluntarily decided to re-establish contact with her father. She would pay him regular visits. She had her own room in the respondent's house; she would overnight there at times. She was often invited to family reunions at the defendant's house, including Christmas and Easter. She celebrated the respondent's 80th birthday and gave him a very thoughtful gift. The defendant also visited his daughter. The father offered the testator an amount of money equivalent to the maintenance due for a period of almost four years; after that, she released him from the obligation to incur further provision payments.

The decision of the Appellate Court in Warsaw, just like the facts that the decision was rested upon, deserve special attention for several reasons. Certainly, they pertain to the key question of legal succession in the event of death. This is of key importance because it determines whether potential heirs will become the actual successors. In the discussed case, this is the testator's father, who holds a legal title to acquire an inheritance. Of crucial importance are also the reasons that could deny the respondent the right to succeed, namely his failure to perform his obligations arising from the blood relationship. This problem needs to be carefully examined also because the legal provisions governing such cases are likely to be amended soon. Amendments to the Civil Code being drafted by the Ministry of Justice[1] broaden the list of grounds for unworthiness to inherit and include such heir's conduct that meets the criteria of persistent failure to

[1] Draft law of 15 December 2021 amending the Civil Code and some other acts (UD 222).

perform maintenance obligations towards the testator or persistent evasion of the obligation to exercise guardianship over the testator. *De lege lata* failure to perform the aforesaid obligations may lead to the obligated person's exclusion from succession but only if their conduct, usually taking the form of omission, meets the statutory criteria of a specific type of crime defined in the Penal Code (Article 928§1(1) of the Civil Code; "CC").

The legal effects of remaining in a specific type of relationship governed by the Family and Guardianship Code ("FGC"), i.e. marriage (Article 1 FGC), consanguinity (Article 61[7] FGC), and affinity (Article 61[8] FGC) do not refer to its duration only. In property terms, the legal status of a party to such a relationship is also relevant after this status has been discontinued, i.e. after the death of one of the parties. For it is decisive for the legal title to inherit.[2] The mere holding of the legal title to succession, ranked among the positive grounds for the acquisition of an estate, is assessed only based on a formal criterion. Such a criterion seems to be legitimate, as it takes account of the familial nexus manifesting itself, in this case, in consanguinity,[3] and easily verifiable. However, the special status of the parties to a relationship under family law has evolved based on the legislator's assumption of a certain model of such a relationship, where the legal bond corresponds to the actual one based on intimacy, mutual support, and care for one another. Unfortunately, circumstances in which there is a discrepancy between the legal status, meaning the formal existence of a specific legal bond between parties, and the facts whereby the real bond is not only significantly loosened or even severed, but the conduct of one party towards the other is socially intolerable or even deserves a penal sanction. Sometimes such a bond has actually never been established. In the

[2] For more, see Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (LexisNexis: Warszawa, 2013): 45–51. See also Hanna Witczak, Agnieszka Kawałko," Obowiązek alimentacyjny," in *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. Magdalena Habdas and Mariusz Fras (Wolters Kluwer: Warszawa, 2021): 657–671. In the law of succession, the benefits of maintaining in a specific relationship under family law can be seen primarily in the sphere of inheritance. For example, it is demonstrable that a marriage relationship and consanguinity in a specific line and degree also determines the group of individuals entitled to a reserved portion (Article 991§1 CC). The latter can also underlie quasi-maintenance claims (Articles 938 and 966 CC).

[3] Jacek Wierciński, "Uwagi o teoretycznych założeniach dziedziczenia ustawowego," *Studia Prawa Prywatnego*, no. 2(2009): 84.

discussed circumstances, the legal status of the party should be adjusted after the "model" or "pattern" adopted by the legislator by depriving that party to the relationship under family law of certain benefits because these benefits should stem not only from the mere formal and legal existence but also from the maintenance by the parties of a specific and real relationship under family law. Otherwise, the effects related to being a party to a relationship under family law, including with regard to succession, would be unfair.[4] This unfairness is to be counterbalanced by institutions known as negative grounds for the acquisition of an inheritance. They are a list of events under civil law that result in exclusion from succession.[5] Certainly, these institutions have their ethical justification and are intended to prevent situations in which the heir, who persistently and deliberately fails to meet their family obligations towards the testator or committing a crime against him or her, would benefit either from succession or as a result of the testator's death.[6] Consequently, it helps avoid situations in which the general sense of justice would be denied due to the established order of succession.[7] In Polish law, the effect of exclusion from succession to the estate of a deceased person for the above-mentioned reasons may result, first, from a constitutive court's decision and, second, from the testator's will. The constitutive judgements denying an inheritance to an heir include a judgement on unworthiness to succeed (Article 928§2 CC) and a judgement passed under Article 940 CC, excluding the testator's spouse from

4 Cf. Hanna Witczak, "The legal status of minor testator´s parents deprived of parental authority in intestate succession. Some remarks on the solutions in Polish, Russian, and Italian law," *Review of European and Comparative Law*, no. 4(2021): 108-110 and Jacek Wierciński, "Uwagi o teoretycznych założeniach dziedziczenia ustawowego," *Studia Prawa Prywatnego*, no. 2(2009): 84.

5 Hanna Witczak, "Skutki wyłączenia od dziedziczenia," *Rejent*, no. 3(2009): 73–75.

6 Such a distinction, i.e. the acquisition of a certain benefit from an estate or as a result of the testator's death, is necessary, in particular because, for example, the acquisition of the object of a specific bequest is not tantamount to the acquisition of a benefit from an estate, and often, taking into account the objective scope of the institution in question, it is can be a considerable pecuniary benefit. The law explicitly provides that the provisions on unworthiness to inherit be applied *mutatis mutandis* to the provisions on specific bequest (Article 981^5 CC).

7 Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (LexisNexis: Warszawa, 2013), 16.

intestate succession. On the other hand, the testator may draw up a will that provides for disinheritance (Article 1008 CC), thus depriving the entitled persons of the right to a reserved portion of the estate.

Although the institutions outlined above differ in many respects (in particular regarding the subjective aspect), discussing these discrepancies at this point seems inadvisable because in the state of affairs subject to analysis only one of them was considered implementable. It is understandable because the testator did not draft a will where (and only where) she could have disinherited her father. Moreover, during the proceedings to establish unworthiness to succeed, the testator and the respondent were no longer married. These two circumstances significantly limit the option of resorting to the institutions falling within the group of negative grounds for the acquisition of an estate, where ethical considerations preclude certain individuals from succeeding to the testator.

Grounds for unworthiness to inherit are included in a closed list contained in Article 928§1 CC. There can be no doubt that in the analysed circumstances, where no will has been drawn up or contested, the reasons behind the violation of the testamentary freedom do not apply. The testator's conduct may, however, be assessed from the viewpoint of a wilful and serious offence against the testator (Article 928§1(1) CC). This was actually the claim filed in the lawsuit: to declare the deceased's father unworthy to inherit under Article 928§1(1) CC.

Given that the case sought to examine the viability of two reasons for unworthiness to inherit, each of them should be addressed separately: one being the father's (the father acting as the respondent in the proceedings to establish unworthiness) failure to fulfil his maintenance obligation towards the testator until she reached the age of majority and the other being her abandonment also in the age of minority. The plea of non-payment of maintenance to the daughter was examined against Article 209 of the Penal Code ("PC") and the plea of her abandonment against Article 210 PC.

The grounds for the occurrence of unworthiness to succeed indicated in Article 928§1(1) CC demand a specific sequence of actions to take place: first, the fact of the potential heir committing an offence should be established, followed by the determination of his wilful fault, and finally the offence should be assessed for the degree of gravity. Due to the fact that the testator's father was not convicted of any offences under Articles 209

or 210 PC (and no criminal action was brought against him in connection with the inheritance proceedings), the civil court was forced to make its own findings as to whether the respondent had committed an offence under Article 209 PC or Article 210 PC and with regard to his wilful fault.[8] If the court's findings had not been in favour of the respondent, it would have been necessary to assess whether the offences attributed to the respondent in the unworthiness proceedings were "serious" within the meaning of Article 928§1(1) CC, because only then, the court would have been capable of excluding him from succession.

Referring to the plea of the respondent committing the offence of persistent avoidance of the duty of maintenance of the testator, it should be noted that before the deceased had reached the age of majority, the defendant did not regularly pay for her maintenance, despite being obliged by force of a judicial judgement to pay her PLN 900 a month. Only this period can be subject to assessment in the context of the claimant's claim because, after the testator's coming of age, the parties reached an agreement on any outstanding and possible future maintenance allowances.

The court assessed the testator's father's conduct in the period until the girl reached the age of majority for whether the conduct met the statutory criteria of the offence under Article 209 PC. The court was right to rely on the provisions of the Penal Code in force at the time of making the judgement, i.e. the Act of 6 June 1997 the Penal Code.[9] Clearly, the respondent's actions examined in the unworthiness proceedings occurred when the Penal Code of 1932[10] and the Penal Code of 1969 were still effective.[11] However, in accordance with the binding Article 4§1 PC, if a different law is in force at the moment of sentencing than that which was in force during the perpetration, the new should be applied. The previous law should only be applied if it is more favourable to the perpetrator. It is also obvious that the provisions of Articles 209 and 210 PC 1997 were used

8 Cf. Article 11 CCP. See, for example, Judgement of the Court Appeal in Białystok of 10 April, file ref. I ACa 2013 r., *LEX*, no. 1307390 and Judgement of the Court Appeal in Warsaw of 11 August 2017, file ref. VI ACa 1914/16, *LEX*, no. 2490254.

9 Journal of Laws No. 88, item 553 as amended.

10 Ordinance of the President of the Republic of Poland of 11 July 1932 the Penal Code (Journal of Laws No. 60, item 571 as amended).

11 Act of 19 April 1969 the Penal Code (Journal of Laws No. 13, item 94 as amended).

by the court as a benchmark in the form in force at the time of sentencing. This observation is relevant due to the fact that the Act of 23 March 2017 amending the Penal Code and the Act on Assistance to Maintenance Creditors[12] amended the provisions of the Penal Code also in the area concerning the offence of avoidance of the duty of maintenance. Therefore, the statutory elements of this offence should be assessed against the legal circumstances in force before the amendment of the 2017 PC. The normative framework of the offence in question changed as a result of the amendment to the Penal Code,[13] and *de lege lata* its statutory constituent elements do not overlap with those examined by the court in the analysed case.

In the legal circumstances in force at the time of sentencing, the actual offence of avoiding the duty of maintenance consisted in persistent avoidance of the duty of care charged to the person by force of law or of a judicial judgement by failure to maintain the next of kin or another person and thus exposing them to the inability to satisfy their basic needs.[14] In line with the interpretation of the criterion of persistence, which prevails in the literature and case-law and focused on the objective and subjective aspects, two elements can be highlighted. The first one is the subjective conduct of the perpetrator, which is marked by a specific mental attitude that manifests itself in tenacity, ill will, and deliberate avoidance of the duty

12 Journal of Laws, item 952.

13 *De lege lata* the Penal Code provides for the common form (Article 209§1 PC) and the aggravated form of the offence of avoidance of the duty of care (Article 209§1a PC). The common type of the offence is of formal character and covers (i) non-payment of the maintenance allowance whose amount has been determined a judicial judgement, a settlement agreed before a court or another body or by another agreement, as the equivalent of at least three allowances or (ii), if the allowance is other than periodic, a delay in payment of the allowance for at least three months. The aggravated form of the offence is of consequential nature, namely as a result of delays in fulfilling the maintenance obligation, the delay exposes the entitled person to the inability to meet their basic needs.

14 Judgement of the Supreme Court of 11 July 2012, file ref. II KK 179/12, *LEX*, no. 1219289; Judgement of the Supreme Court of 4 September 2008, file ref. II KK 221/08, *LEX*, no. 449029 and Judgement of the Supreme Court of 29 May 2012, file ref. II KK 106/12, *LEX*, no. 1223801. As already pointed out elsewhere, *de lege lata* the constituent element of exposure of the person to the inability to meet their basic needs is not one that belongs to the elements of the common form of the offence of avoidance of the duty of maintenance (Article 209§1 PC).

of maintenance despite being offered the possibility of performing it,[15] the desire to get your own way (for whatever reasons), refusal to change your mind in spite of attempts to change the perpetrator's position (e.g. initiation of enforcement proceedings under civil law).[16]

As for the criterion of exposing the entitled person to the inability to satisfy their basic needs, it was assumed that there were no grounds to penalize the perpetrator's conduct when, despite his persistent avoidance of the duty of maintenance, the wronged person's needs were satisfied in a different manner.[17] So, whenever the child's needs are fully satisfied by one of the parents, who enjoys such a good financial position that any maintenance allowances from the other would not significantly improve the entitled person's life quality, the mere persistent avoidance of the duty of maintenance does not meet all the criteria of the offence under Article 209§1 PC because of the absence of the element of exposing the child to the inability to meet their basic needs.[18] On the one hand, given the criteria of the prohibited act so defined, the conclusion is justified. On the other, it is difficult to reconcile it with the objective that the norm contained in Article 209§1 PC should counteract attempts to ignore the maintenance obligation. For it is the debtor's conduct that should be penalized and not the effect since a third party could have prevented this effect; therefore, non-occurrence of the effect of exposing the entitled person to the inability to meet their basic needs would have been independent of the maintenance

15 Judgement of the Supreme Court of 3 July 2003, file ref. II KK 125/03, *LEX,* no. 151989. For more, see: Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (LexisNexis: Warszawa, 2013), 257-258 and the case-law and literature referenced therein.

16 See, in particular, Decision of the Supreme Court of 9 June 1976, file ref. VI KZP 13/75, *LEX,* no. 19141: 11. See also Judgement of the Supreme Court of 3 July 2003, file ref. II KK 125/03, *LEX,* no. 151989. More about the criterion of persistence in Danuta J. Sosnowska, *Alimenty a prawo karne. Praktyka wymiaru sprawiedliwości* (LexisNexis: Warszawa, 2012), 121-143 with the literature referenced therein.

17 So in, for example, Decision of the Court Appeal in Katowice of 12 January 2005, file ref. II AKo 1/05, *LEX*, no. 147197.

18 Cf. Andrzej Wąsek, Jarosław Warylewski, "Komentarz do artykułów 117–22," in: *Kodeks karny. Część szczególna. Tom I*, ed. Andrzej Wąsek, Robert Zawłocki (C.H. Beck: Warszawa, 2010), 1251, Nb. 60; Aleksander Rypiński, "Przestępstwo uchylania się od obowiązku alimentacyjnego (art. 186 k.k.)," *Nowe Prawo*, no. 3(1972): 463 and Resolution of the Supreme Court of 9 June 1976, file ref. VI KZP 13/75, *LEX*, no. 19141: 11.

debtor's conduct. The discussed example clearly demonstrates that reference to the institutions and provisions of penal law may, oddly enough, remove the option of applying a private penalty, i.e. recognizing one of the parties of the family relationship unworthy to inherit as a consequence of their persistent and malicious failure to fulfil obligations falling under such a relationship. Meanwhile, this type of sanction should be a standard in the circumstances in question.

The answer to the question of whether it is possible to recognize the offence of persistent avoidance of the duty of maintenance as grounds for unworthiness to inherit in the legal setting existing at the moment of sentencing is far from straightforward. As noted above, the finding of the offence of avoidance of the duty of maintenance proven will take place only in the case of the occurrence of all the statutory constituent elements of the act prohibited under Article 209 PC. The mere reprehensible and intentional conduct of the heir will not suffice if it does not expose the testator to the inability to meet their basic needs. And these needs can be satisfied by another entity on the daily basis. Indeed, this does not exclude the negative assessment of the heir's conduct; still, it does not lead to the determination of the cause of unworthiness to inherit, i.e. committing a specific type of offence.[19] Moreover, even if this conduct meets the statutory criteria of the offence under Article 209 PC, the question of its "seriousness" within Article 928§1(1) CC remains debatable. It is worth noting that the existing case-law in this area is very scarce. It is yet another reason why the glossed judgement deserves attention. In fact, the only discussed court's decision was the judgement of the Appellate Court in Gdańsk of 14 June 2000 (I ACa 262/00).[20] The judgement was passed on the basis of specific facts. The debtor's avoidance of the duty of maintenance occurred underf special and additionally aggravating circumstances. The minor testator's mother brought an action for declaring the father unworthy to inherit. Two years before his death, the minor testator was involved in a car accident in which he sustained a spinal trunk injury. After that, he was unable to perform

19 Cf. in particular, Judgement of the Supreme Court of 10 December 1999, file ref. II CKN 627/98, *LEX*, no. 1231370 and Judgement of the Court Appeal in Katowice of 16 June 2016, file ref. I ACa 139/16, *LEX*, no. 2115433, thesis 1.

20 *Legalis,* no. 52667.

regular vital functions independently and required permanent assistance. Not only did the minor's father help the plaintiff with taking care of his son, but he refused to pay for his maintenance, too. It should be noted that the respondent had also failed to provide for his son before the accident. The father was sentenced by a criminal court to the penalty of one year and six months' imprisonment, with a conditional suspension of execution for a probation period of three years, for persistent avoidance of the duty of maintenance for his son. In the same judgement, he was obliged to settle the maintenance debt within two years and to fulfil his maintenance obligation towards the minor regularly. Because the defendant continued to refuse to pay for his son's maintenance, the court ordered that the sentence be carried out. The openly negative assessment of the minor's father's conduct by the civil court was attributed not only to its disapproval of the father's persistent failure to discharge his maintenance duty, but also, and perhaps in particular, to the fact that the father refused to change his attitude and conduct also after the minor's accident, after which he required constant care. The court clearly underlined that the defendant's misdemeanour following the accident, i.e. when the minor required particular care, had been particularly reprehensible. The degree of culpability in the defendant's conduct clearly determines the reason for unworthiness to inherit, i.e. a wilful and serious offence against the testator. Any other assessment of the defendant's acts would have produced effects contrary to the elementary sense of justice. Meanwhile, doubts raised in the doctrine as to the recognition of the offence of avoidance of the duty of maintenance as a reason for unworthiness to inherit revolved around the gravity element. At that time, some authors expressed the view that the court "might have apparently and *de lege lata* extended the content of Article 928§1(1) of the Civil Code."[21] For a serious offence within Article 928§1(1) CC cannot be one with such a low level of statutory penalty.[22] Meanwhile, the opposite conclusion seems almost obvious based on the facts. First of all, it should be

[21] Jacek Wierciński, "O przestępstwie jako przyczynie niegodności dziedziczenia," *Kwartalnik Prawa Prywatnego*, no. 2(2010): 568.

[22] Ibidem. Cf. Hanna Witczak, "Komentarz do art. 928," in *Kodeks cywilny. Komentarz. Tom IV. Spadki (art. 922–1087)*, ed. Magdalena Habdas, Mariusz Fras (Wolters Kluwer: Warszawa, 2019), thesis 21.

emphasized once again that the source of the maintenance obligation is a relationship under family law; in the discussed case, it is based on consanguinity. As mentioned earlier, although this relationship determines the statutory title to succeed, the effective acquisition of an estate is contingent not only upon the positive grounds for succession, such as proof of the title to inheritance, but also upon the absence of negative grounds on the part of the potential heir. Failure to perform the obligations resulting from this relationship may effectively eliminate the acquisition of an estate in a situation where, in specific circumstances, it can be deemed justifying negative grounds for succession. It has already been mentioned elsewhere that considering only the formal criterion may prove unfair; equally unfair is to assume that the legal position of the parties to the given legal relationship should be the same, regardless of whether they fulfil the obligations intrinsically linked to that relationship (in other words, the rights embedded in the content of consanguinity should be exercised by the parties regardless of whether and how they perform their obligations imposed by the law in a relationship between the next of kin related along a specific line and to a certain degree). Besides, the issue of performance, or rather non-performance, of the duty of maintenance should produce consequences in the area of the law of succession. Clearly, the assessment covers the period from before the opening of the succession. *De lege lata* the legislator does not refer to the duty of maintenance in any of the provisions of Book IV of the Civil Code;[23] nor does it mention the possible consequences of its non-performance for the benefits that are available to parties in a conjugal relationship, consanguinity in a specific line and degree, or affinity in a specific line and degree under the law of succession. There is no doubt, however, that intentional avoidance of the duty of maintenance may be penalized not only under the provisions governing unworthiness to inherit but also under those concerning disinheritance. Moreover, as already noted, the statutory penalty for a given type of offence is only one of

[23] But cf. Article 938 and 966 CC. For more, see Józef S. Piątowski, Hanna Witczak. Agnieszka Kawałko, "Dziedziczenie ustawowe," in *System Prawa Prywatnego. Tom 10. Prawo spadkowe*, ed. Bogudar Kordasiewicz (C.H. Beck: Warszawa, 2015), 179, especially footnote 528.

the circumstances (and not a decisive one) taken into account by the court when assessing the gravity of the offence.[24]

Going back to the facts of the analysed case, the defendant in the unworthiness proceedings, i.e. the testator's father, failed to maintain her until she reached the age of majority, despite she had been awarded maintenance. However, the claimant (the mother) did not manage to demonstrate that the respondent's conduct had been persistent, i.e. that he was capable of paying maintenance, but he refused to perform as determined in the judicial judgement, wilfully, maliciously, and with the intent of exposing his daughter to the inability to satisfy her basic needs. The mere fact of irregular maintenance payments is not enough to conclude that the father committed an offence against his daughter. In this respect, there are no grounds to challenge the decision of the court. In contrast, the position expressed in the justification of the judgement is by far debatable, namely even if it were recognized that "the defendant committed a wilful offence under Article 209 of the Penal Code, ..., then...there are no grounds to assume that it was a serious offence. When assessing whether the offence meets the criteria of a serious one within Article 928§1(1) of the Civil Code, ...the civil court should take account of not only the type of the committed offence but also the circumstances of the case, e.g. the degree of heir's ill will, cruelty, willingness to humiliate or embarrass the testator in a way that was particularly poignant for her."[25]

It is appropriate to find that to assess whether the offence committed by the heir is "serious" within the meaning of Article 928§1(1) CC it is necessary to consider not only the type of the offence assessed from the point of view of the limits of statutory penalties (crime or misdemeanour)[26] but

[24] Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (LexisNexis: Warszawa, 2013), 178–206.

[25] Justification of the glossed judgement

[26] Certainly, it can be assumed that offences with a severe statutory penalty, i.e. those which penal law regards as crimes *in abstracto*, constitute grave offences, but this is only a preliminary assessment in the context of the provision of Article 928 § 1(1) CC. The circumstances of the case discussed in the article may cause that an act qualified as a crime within the meaning of the provisions of penal law will not be regarded as a serious offence for the purposes of the aforesaid provision and cannot therefore constitute grounds of adjudging unworthiness to inherit. Also, a reverse situation can take place, namely that under certain circumstances, a misdemeanour may also become a serious offence. See Judgement of

also the circumstances of the offence, including, in particular, the perpetrator's motives and how he acted. And yet, when making an independent assessment of whether the offence committed by the heir against the testator in this specific case has the qualities of "gravity," the civil court takes into account the perpetrator's motives (the intent to humiliate or embarrass the testator in a way that is particularly poignant for her) and the manner of committing the offence (cruelty, a particular level of ill will). However, the criteria for assessing the gravity of the offence are not limited to those listed in the justification of the judgement. In my opinion, the object of executive action and the extent of the wrong should be stressed.[27] I am convinced that in cases where the object of executive action is a minor, especially if in a specific relationship under family law, the offence should be ranked as serious within Article 928§1(1) CC because it is committed against the minor and is linked to failure to perform family obligations under this relationship by the closest relative of the wronged person. Children suffer differently (and certainly more) when being wronged, especially by parents, which should not be ignored when assessing the gravity of an offence in a specific case. The intentional and deliberate conduct of a person obligated to provide maintenance, especially when the entitled person is unable to maintain him or herself, also deserves a private penalty. And due to the fact that disinheritance due to persistent failure to fulfil family obligations is out of question if the testator does not have the testamentary capacity (Article 944§1 CC), e.g. due to being under the age of majority, the capability of denying succession should be guaranteed by the institution of unworthiness to inherit. *De lege lata* the options of penalizing failure

the Administrative Court in Gdańsk of 14 June 2000, file ref. I ACa 262/00, *LEX* no. 51706 with the glosses of Czesław Paweł Kłak, *Orzecznictwo Sądów Apelacyjnych,* no. 9(2005): 81–90 and Michał Niedośpiał, *Orzecznictwo Sądów Apelacyjnych,* no. 6(2006): 76–88. See also Jacek Wierciński, "O przestępstwie jako przyczynie niegodności dziedziczenia," *Kwartalnik Prawa Prywatnego,* no. 2(2010); for more, see Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (LexisNexis: Warszawa, 2013), 213–215.

27 See, in particular Elżbieta Skowrońska, "Przegląd orzecznictwa z zakresu prawa spadkowego (za lata 1989–1990)," *Przegląd Sądowy*, no. 9(1992): 43; Maksymilian Pazdan, "Komentarz do art. 928," in: *Kodeks cywilny. Tom II. Komentarz. Art. 450–1088. Przepisy wprowadzające*, ed. Krzysztof Pietrzykowski (C.H. Beck: Warszawa, 2021), *Legalis*, Nb 14 and Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (LexisNexis: Warszawa, 2013), 178–206.

to fulfil parental obligations towards a minor under the law of succession are limited, especially in the case of persistent and culpable conduct. This state of affairs is far from satisfactory.[28] Especially in the case of minor individuals, this type of behaviour should be particularly condemned, not only in moral terms but also, and perhaps above all, legally, and should produce pecuniary consequences as well as depriving the offenders of protection of their financial interests both while the injured party is alive and after their death.[29] Hence, it would seem that offences against minors should deserve a special place among serious offences. Harming the life or health of children, both physical and mental, is extremely abhorrent. Therefore, in those cases where the wronged person is a minor, the character of the type of offence in terms of gravity should not raise interpretation doubts.

In addition, as noted above, because the criteria of the offence under Article 209§1 PC, i.e. persistent avoidance of the duty of maintenance "have a pejorative overtone and prove a clearly ill will of the alleged perpetrator, who persistently ignores the maintenance obligation,"[30] this offence should be one of the reasons for unworthiness to inherit as a serious one. Notably, the criterion of the offence of failure to fulfil parental obligations in the form of "avoidance" is construed as "a negative mental attitude of the person obliged to provide maintenance, causing that he or she fails to

[28] For more, see Hanna Witczak, "The legal status of minor testator´s parents deprived of parental authority in intestate succession. Some remarks on the solutions in Polish, Russian, and Italian law," *Review of European and Comparative Law,* no. 4(2021): 107–134.

[29] Undoubtedly, the argument that the daughter cannot disinherit her father based on his persistent failure to perform family duties towards her is less compelling in the analysed case. The testator was able to do so after reaching the age of majority. However, she did not. In contrast, and this will be further discussed below, the relationship that she established with her father after reaching the age of majority and how this relationship developed proves that the testator had forgotten the harm suffered as a result of her father's conduct and attitude when she was a child, even though she might have still experienced a sense of it. In the legal sense, such behaviours are tantamount to pardon, which obviously makes any action for unworthiness to inherit inadmissible (Article 930§1 CC).

[30] Judgement of the Supreme Court of 27 February 1996, file ref. II KRN 200/95, *LEX* (25594) and Judgement of the Supreme Court of 3 July 2003, file ref. II KK 125/03, *LEX* (371270).

fulfil the obligation imposed on them, despite being objectively capable of fulfilling it."[31]

A comparative analysis of several legal systems shows that some of them directly refer to the non-performance of the maintenance obligation in the provisions on unworthiness to inherit or disinheritance.

Russian law offers the option of penalizing the conduct of heirs who maliciously avoid the statutory[32] obligation to maintain the testator. Pursuant to Article 1117(2) of the Russian Civil Code ("RCC"), the court may find such individuals unworthy of succession.[33] Interestingly, the literature on the subject points out that courts follow a broad understanding of the term "avoidance of the duty of maintenance." Not only does it cover an unjustified refusal to pay maintenance allowances but also (i) concealment by the debtor of their actual income, (ii) changing jobs or place of residence in order to avoid deductions through enforcement, (iii) avoiding profit-making activities to reduce the amount of maintenance, as well as (iv) any conduct that would indicate the party's ill will with regard to securing the means of subsistence. Undoubtedly, the very malicious intent to

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31 Decision of the Supreme Court of 17 April 1996, file ref. II KRN 204/96, *Prokuratura i Prawo,* no. 11(1996), item 4.

32 The maintenance obligation exists in the relationship between parents and children (Article 80, 88 of the Russian Family and Guardianship Code); spouses (Article 89 of the Russian Family and Guardianship Code); siblings (Article 93 Russian Family and Guardianship Code); grandparents and grandchildren (Articles 94 and 95 of the Russian Family and Guardianship Code) and between stepchildren and stepfather or stepmother (Article 97 of the Russian Family and Guardianship Code), who are heirs at law. Regarding the source of the maintenance obligation in Russian law, see more in Алла В. Вишнякова, *Семейное и наследственное право* (Москва 2010); Анатолий П. Горелик, Наследственное право (Москва – Воронеж 2011): 91–92 and Hanna Witczak, *Wyłączenie od dziedziczenia na mocy orzeczenia sądu* (LexisNexis: Warszawa, 2013), 305–307. See also Радик Юрьевич Закиров, Яна Сергеевна Гришина, Минзия Миннахметовна Махмутова, *Наследственное право* (Москва 2012), 23; Павел Владимирович Крашенинников, в: *Постатейный комментарий. Гражданский кодекс Российской Федерации*. Часть 3, ред. Павел Владимирович Крашенинников, Издательство Статут, (Москва 2011), 26-30 oraz Марина Викторовна Телюкина, *Наследственное право. Комментарий Гражданского кодекса Российской Федерации*. Издательство дело (Москва 2002), 22–26.

33 See, for example, Алексей Н. Гуев, *Постатейный комментарий к части третьей Гражданского кодекса* (Москва 2006): 33–34; Инна Л. Корнеева, *Наследственное право Российской Федерации* (Москва 2011), 332.

avoid the duty of maintenance is a concept subject to separate assessment. The assessment covers, in particular, the duration of the heir's avoidance of the duty of maintenance imposed by the law, the reasons for non-payment of maintenance, and the financial position of the parties. The malicious avoidance of payment of maintenance may be evidenced by, but not only: failure to pay maintenance despite relevant reminders; the need to search for the debtor who hides their place of residence; re-offending against the person entitled to receive maintenance as provided for in Article 157 of the Russian Penal Code ("RPC").[34]

In order for the heirs' malicious avoidance of the duty of maintenance of the testator to underlie exclusion from succession, the case must be resolved in court proceedings. The occurrence of malicious avoidance by the heir of their maintenance obligation may be confirmed by a sentence of a criminal court (Article 157 RPC); a court judgement acknowledging liability for delayed payment of maintenance (Article115 RPC) and other evidence.[35]

All in all, it should be noted, as pointed out elsewhere, that legislative work is underway at the Ministry of Justice that is very likely to result in a modification to the list of grounds for unworthiness to inherit, namely persistent avoidance of the duty of maintenance of the testator or persistent avoidance of the duty of care for the testator will be added. In the justification to the draft, the drafters pointed out that "the proposed new reason for unworthiness to inherit will be complementary to the one provided in Article 928§1(1) CC, and it will ensure that in order to find a person unworthy of succession the fact that they have not maintained for testator will not be required to be confirmed by a final court's judgement." This approach is by far debatable given that *de lege lata* confirmation by the court of the commitment a specific type of offence is not a necessary criterion for recognizing the defendant as unworthy of succession. On the other hand,

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[34] Борис А. Булаевский, "Комментарий к статье 1117," in *Комментарий к Гражданскому Кодексу Российской Федерации части третьей*, eds. К. Б. Ярошенко, Н. И. Марышева (Москва 2011), thesis 5. Cf. Алексей Н. Гуев, *Постатейный комментарий к части третьей Гражданского кодекса* (Москва 2006), 34.

[35] Клавдия Б. Ярошенко, в: "Комментарий к статье 1117," в: *Комментарий к Гражданскому Кодексу Российской Федерации части третьей*, ред. Н. И. Марышева, К. Б. Ярошенко (Москва 2001), thesis 5.

the statement about the complementary nature of this reason for unworthiness is right as the new wording of the provision clearly determines that persistent avoidance of the duty of maintenance is equivalent in its effects to the commission of a wilful and serious offence against the testator. If the drafted changes become law, there will be no more doubt as to whether an individual persistently ignoring the obligation to provide for a child may be declared unworthy to inherit. It seems that the amendment proposed by the Ministry of Justice deserves a positive assessment. It will allow for penalizing under the law of succession of such heir's conduct that, after the amendment of the Penal Code, would not fulfil the statutory criteria of the prohibited act under Article 209 PC, however, they could not be denied the attribute of reprehensibility and general unacceptability from the public point of view.

Going back on the main track of the discussion, the plea of the testator's father offence of abandonment of the testator (Article 210 PC) was also completely misguided given the facts. Although the testator's father decision to abandon her shortly after birth and cease to maintain and care for her is morally reprehensible, still it does not meet the statutory criteria of an offence and cannot provide grounds for unworthiness to inherit.[36] Representatives of the doctrine emphasize that abandonment should be understood as in common parlance, i.e. "a withdrawal from the life of a person who requires care, unjustified by the existing circumstances and without providing him or her with assistance from other individuals or institutions."[37] The Supreme Court found that abandonment meant "leaving a person who should be cared for on their own; it is not only about withdrawal from taking care of a minor or a person rendered helpless but also about preventing such a person from accessing immediate support."[38] Leaving someone under guardianship of another person is not the offence of abandonment.[39] The respondent's decision to divorce his first wife and

36 See note 20.

37 Lech Gardocki, *Prawo karne* (C.H.Beck: Warszawa, 2021), 291. Cf. Julia Kosonoga, "Komentarz do art. 210," in: *Kodeks karny. Komentarz*, ed. Ryszard A. Stefański (C. H. Beck, Legalis 2021), theses 3–4 and Agnieszka Kilińska-Pękacz, "Przestępstwo porzucenia dziecka," *Prokuratura i Prawo*, no. 4(2016): 25–26 with the literature referenced therein.

38 So the Supreme Court in Resolution of 4 June 2001, file ref. V KKN 94/99, *Legalis,* no. 51270.

39 Cf. Judgement of the Court Appeal in Białystok of 11 July 2014, file ref. I Aca 206/14, *Legalis*.

leave their child under her care certainly does not constitute the offence of abandonment (Article 210 PC).

Given the facts subject to analysis, one more issue needs to be addressed (hypothetically). Even if the proceedings demonstrated that the respondent's conduct could be regarded as containing grounds for unworthiness to inherit under Article 928§1(1) CC, and even if we assumed that the heir had committed a serious and wilful offence against his daughter, the legitimacy of upholding the claim would have raised obvious doubts as to the existence in this case of negative grounds for unworthiness of succession. Pursuant to Article 930§1 CC, the heir cannot be considered unworthy if the testator has pardoned them. It should be kept in mind that the testator voluntarily, as an adult woman, re-established contact with her father and was eager to maintain it. This cordial and regular contact between the testator and her father continued until her death. Based on the testator's behaviour and her improving relations with the father, there is no doubt that an effective pardon was granted in the analysed circumstances.[40] They show that the testator did not harbour resentment towards her father, she pardoned him for his indifference and leaving her under the mother's care as a child.

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[40] For more, see Hanna Witczak, "Komentarz do art. 930," in *Kodeks cywilny. Komentarz. Tom IV. Spadki (art. 922–1087)*, ed. Magdalena Habdas, Mariusz Fras (Wolters Kluwer: Warszawa, 2019), theses 1–8.

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