JACEK STASIAK

FINANCES OF LOCAL GOVERNMENT UNITS

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Introduction

As a consequence of the political reforms that were introduced in Poland at the end of the last century, first the municipalities appeared as the basic units of the local government that were reactivated after almost 50 years, and then the counties and provinces. The delegation of important public functions of local and regional importance to them was connected with the allocation of public funds, thus laying the foundation for the decentralisation of public finances. The territorial self-government units were given specific sources of public income, providing financial support for their budgets. Some of them are own sources, the rest are subsidies and grants from the state budget and other central funds. Sources of their own nature constitute primarily tax incomes, including: firstly, shares in state taxes (personal income tax and corporate income tax); secondly, so-called local government taxes (in particular, real estate tax, tax on transport, agricultural tax and forest tax on civil law transactions, inheritance and donation tax, or flat-rate income tax collected from private persons in the form of a tax card). The above mentioned sources of tax revenue are significant importance primarily in the case of local government, taking into account both the amount of financial resources collected on this account and the statutory scope of the tax authority (it refers to the possibility of forming certain structural elements). Tax revenues largely determine the financial strength and independence of a local government unit. All the above mentioned tributes are included, according to the Act of 13 November 2003, in the so-called own income. For years, this classification has caused a lot of controversy and discussion among both theoreticians dealing with local government finances and practitioners, mainly due to the very limited or total lack of direct influence of municipalities, counties and provinces on the construction of taxes collected by the state tax authorities. At the same time, they constitute, especially when taking into account shares in personal income tax, an important source of income for local government budgets in terms of fiscal efficiency. It should be noted that the structure of the indicated tax undergoes extremely frequent changes. In particular, the tax mitigating measures introduced in recent years have consequently reduced the revenue from this levy for both the state and local government budgets. Such a result has been achieved, among others, by extension of tax preferences for individuals bringing up children (the so-called pro-family tax deductible allowances),

significant financial consequences for territorial self-government units' budgets should be expected also after this year's amendment of the Personal Income Tax Act.

The structures of local government taxes are not subject to such significant modifications - they constitute a relatively stable source of income. However, only municipalities have the right to collect them. Counties and provinces are deprived of "own" taxes, which strongly limits their independence in terms of income. What is more, apart from property tax and agricultural tax (in rural municipalities), local government taxes are an inefficient income category. Thus, the lack of significant changes in legal regulations relating to these taxes is not beneficial for municipalities collecting them. For years, the need for systemic reform in the area of real estate taxation in Poland has been recognised and justified.

An important source of income for local government units is also local fees to which all levels of the local government structure are entitled. However, also with regard to this source of income, the autonomy of municipalities, counties and provinces is strongly diversified and limited to certain titles.

Apart from the analysis of the above mentioned formal and legal solutions in the field of tax revenues of local government, the following are invariably inspiring.

Act of 13 November 2003 on revenues of local government units (consolidated text in Dz. U. of 2018, page 1530 as amended) the research is the actual development of their size and dynamics, especially taking into account the influence of various factors influencing them. For this reason, the main research objective of this monograph has been focused, on the one hand, on the identification of the essence and properties of the most important tax revenues, and on the other hand, on the diagnosis of factors determining them. It is worth noting that the factors influencing the formation of local government tax revenues are not homogeneous in nature, the strength and direction of their impact vary, and above all, whether and to what extent a given local government unit has the ability to use them actively (in the case of a positive impact) or to reduce or eliminate them (in the case of a negative reaction). Therefore, among the factors shaping tax revenues one can distinguish:

- determinants of an objective nature, independent of the local government unit and its authorities, such as geographical location, natural resources, natural and climatic values, but also the size and structure of the population, economic prosperity;

- determinants on which the self-government has a limited influence, e.g. the level of local (in the case of municipalities and counties) or regional (in relation to the province'sself-government) socio-economic development;
- determinants dependent on the unit's authorities, such as management efficiency, tax policy

It is worth noting that - despite the fact that the issues concerning the income of the local government itself of a tax nature are relatively often taken up in the literature on the subject and considered from various points of view - this subject still remains highly topical, and its complexity, weight and application character justify the continuation of scientific research and development of research. The importance of the issue has been growing especially recently due to significant changes in legal regulations affecting the position of local government as an entity collecting and spending public funds. The effects of the introduction of new regulations are multi-faceted: some of them carry the risk of a reduction of local government revenues, others result in a modification of the income structure, reduction of own revenues and an increase in the importance of transfer sources (in the form of subsidies and grants). This is the basis for an intensified discussion on the properties of the local government income system, e.g. in terms of its inadequacy to the different operating conditions of individual units, but also to the scope of the tasks they perform. This monograph is part of the research on local government tax sources of income and the most important factors determining their fiscal efficiency, especially those that can be used in the framework of territorial self-government units' tax policy instruments. It combines theoretical knowledge with experience in practice, model deliberations with empirical verification, takes into account research results of representatives of various academic centres, representing economic disciplines and legal sciences. At the same time, an attempt was made to answer the question: can the system of tax sources of self-government budgets' income be considered rational; does it meet both the postulates of the theory and the expectations resulting from the constitutional principles of adequacy and independence? If so, in what direction should changes concerning the whole system and particular categories of tax revenues go?

The research on the basis of which this monograph was written had a multidimensional aspect. They included both legal regulations relating to local taxes and fees, as well as empirical data of an aggregate nature, covering all local government units in the country (most often municipalities as the basic units with the widest spectrum of tax revenue), and detailed data limited to entities located in the Lublin Province or even selectively to chosen munic-

ipalities. The temporal scope generally covers the period from 2004 to 2019 (although there are differences in individual chapters depending on the issues discussed and partial analyses carried out).

The interdisciplinary approach of the study required the use of a number of diverse research methods specific to economics, finance and law sciences. A review of the literature on the subject, doctrinal and comparative analysis of legal acts, basic methods of descriptive statistics and questionnaire research were used. The annual reports on the execution of the state and local government budget, the Internet statistical database of the Ministry of Finance and the statistical database of the Central Statistical Office, reports and post-control speeches of the Supreme Audit Office were used as sources of data for empirical verification.

The structure of the monograph includes an introduction, ten chapters and a conclusion. The first six chapters take into account mainly economic aspects, the next four focus on legal issues.

Many of the control speeches indicate numerous cases of official discretion in granting these allowances. Confidentiality and a certain procedural freedom is a key corruption-generating mechanism, in particular with respect to granting tax benefits, as decisions taken in these cases often concern significant property interests of individuals and legal entities applying for such benefits. The whole reflection is crowned with a conclusion, in which not only partial analyses and research were summarised, but also an attempt was made to outline the directions of desired changes in the area of territorial self-government units' tax revenues. Jolanta Szołno-Koguc, Joanna Śmiechowicz

CHAPTER 1.
BUDGET AND BUDGETARY MANAGEMENT OF LOCAL GOVERNMENT UNITS

1.1. Resolution on the discharge for the executive body of a local government unit - harmony or disharmony of statutory regulations

The principles and procedure for the preparation and adoption of a resolution on the discharge of the executive body of a local government unit (hereinafter l.g.u.) are regulated in several legal acts of statutory rank. These legal issues remain in a state of certain dispersion. Therefore, it is possible to make an attempt at a comparative analysis of the regulations contained in various acts in order to determine whether they form a system that is internally coherent and free of legal loopholes. Legal regulations concerning the discharge were created at different times and at different stages of the evolution of the local government system and the state financial system. The assumptions and concepts implemented in this field in the last quarter of the century have also influenced the structure and legal effects of the resolution on the discharge.

From the list of many problems related to the preparation and adoption of the resolution on the discharge for the executive body of the company, two important problems were selected and analysed, those concerning:

- to determine the status and significance of the materials and information deciding about granting or refusing to grant the discharge, and
- to determine the limits of freedom of the body constituting the l.g.u. when adopting a resolution on the discharge for the executive body in relation to the content of opinions, conclusions and positions formulated by other entities at stages preceding the adoption of the aforementioned resolution.

Materials and information necessary to understand the resolution on the discharge

The provisions of the so-called system about self-government acts[1], which are defined by the catalogue of exclusive competences of the body constituting the l.g.u., explicitly mention "considering of the report on the execution of the budget and adoption of a resolution on granting or not granting a discharge to the executive body on this account". By merely analysing the content of these regulations, one could conclude that the source of knowledge for the body constituting a l.g.u., which it uses before adopting the resolution on the discharge, is only the report on the execution of the budget of the l.g.u.. This conclusion could particularly confirm the final phrase used in each of these regulations, namely "discharge for the executive body on this account", i.e. for the execution of the budget[2] (the source of knowledge on the method of execution of the budget is the report on its execution). The legislator in the quoted regulations subjectively links the discharge to the execution of the budget, so it seems that other aspects of the executive body's activity not related to the execution of the budget, should not be taken into account by the body acting in the process of adopting this resolution.

As long as the Public Finance Act[3] of June 30, 2005 is in force, the above request could be additionally justified by the content of article 199 section 3 of this act. According to this provision, the body constituting the l.g.u. considered the report on the execution of the budget of the l.g.u. and adopted the resolution on the discharge for the executive body of the l.g.u. In the context of adopting the resolution on the discharge, only one document was referred, i.e. the report on the execution of the budget of the l.g.u.. In this period, there were consistent regulations of the system of self-government acts and the Public Finance Act in the sphere of the discharge for the executive body of the l.g.u.

The relations between the resolution on the discharge and the report on the implementation of the budget in the case law of the courts were reduced in this period to "planned implementation of the budget by the executive body of the l.g.u."[4] or even a very narrow, i.e. limited to the expenditure side of the budget, determination of "whether the numerical limits of expenditure

[1] Ustawa z dnia 8 marca 1990 r. o samorządzie gminnym, tekst jedn. Dz.U. z 2013 r., poz. 594 z późn. zm., dalej u.s.g.; ustawa z dnia 5 czerwca 1998 r. o samorządzie powiatowym, tekst jedn. Dz.U. z 2013 r., poz. 595 z późn. zm., dalej u.s.p.; ustawa z dnia 5 czerwca 1998 r. o samorządzie województwa, tekst jedn. Dz.U. z 2013 r., poz. 596 z późn. zm., dalej u.s.w.

[2] Uchwała RIO we Wrocławiu z dnia 2 czerwca 2004 r., 42/2004, LEX nr 127241.

[3] Dz.U. Nr 249, poz. 2104 z późn. zm., dalej u.f.p. z 2005 r.

[4] Wyrok WSA w Łodzi z dnia 13 listopada 2008 r., I SA/Łd 1127/08, LEX nr 528094.

have been properly implemented by the executive body "[5]. Similarly, in the literature, the discharge was related only to the execution of the budget, and it was considered illegal to combine discharge with the activity of the executive body in all other matters falling within its competence but not related to the execution of the budget [J. Kastelik, 2007, p. 145] that the legislature thus clearly defined the scope of the institution's discharge in question and, consequently, the limits of the decision to be taken in the discharge resolution [Paczocha, 2006, p. 5].

Despite the unambiguous way of drafting the content of the provision of article 199 of the financial regulations of 2005, one of the letters from the financial management supervision authority indicated a wider range of matters which should be considered by the authority acting prior to the discharge resolution. It was underlined that not only the report of the executive body on the implementation of the budget but also the proposal of the audit committee on whether or not to grant discharge, as well as the opinions of the regional chamber of auditors on the report and the proposal of the audit committee should be considered at the graduation session[6]. It can be stated that the supervisory authority anticipated the solutions which were finally included in the provisions of the act of 27 August 2009 on public finances[7].

Article 271 par. 1 of the 2009 financial regulation, as compared to article 199 of the 2005 financial regulation, lists more sources of knowledge which should be used by the l.g.u. authority before the discharge resolution is adopted. It should familiarise itself with the report on the execution of the budget of the l.g.u. and the annual financial statements, as well as with the auditor's opinion on the audit of the annual financial statements (in the l.g.u. where the number of inhabitants, as determined by the Central Statistical Office, on December 31 of the year preceding the year for which the report was drawn up, exceeds 150 thousand, is subject to audit by the auditor) and with the opinion of the regional chamber of auditors on the report on the execution of the budget, as well as with information on the condition of the l.g.u.'s assets and the position of the audit committee. According to the article 271 paragraph 2 of the 2009 financial statements of the j.s.p., the l.g.u. executive body may request additional explanations relating to the l.g.u.'s budget implementation report and the annual accounts.

[5] Wyrok WSA w Warszawie z dnia 6 października 2006 r., III SA/Wa 2504/06, LEX nr 276789.

[6] Pismo RIO w Warszawie z dnia 6 marca 2008 r., RIO-0717/70/08 (Obowiązki sprawozdawcze wynikające z art. 199 u.f.p.), www.warszawa.rio.gov.pl

[7] Tekst jedn. Dz.U. z 2013 r., poz. 885 z późn. zm, dalej u.f.p. z 2009 r.

The provisions of article 18 par. 2 pt. 4 MSGA (Municipality Self-Goverment Act), article 12 pt. 6 CSGA (County Self-Goverment Act) and article 18 pt. 10 PSGA (Province Self-Goverment Act), which define the exclusive competence of the body constituting the l.g.u. to adopt the resolution on the discharge, are not fully consistent with the provisions of article 270 and article 271 of p.f.a. of 2009. In the above mentioned local government legislation, the phrase 'processing of the report on budgetary execution' was used. However, no other documents were mentioned which would also be considered by the l.g.u. body article 270 paragraph 4 of the p.f.a. of 2009, stipulates that the l.g.u. body shall not only consider but also approve the financial statements of the l.g.u. together with the report on implementation of the budget, by 30 June of the year following the financial year. Therefore, there are different provisions in the above mentioned regulations. First, in the material aspect, since article 270 paragraph 4 of the p.f.a. of 2009 consolidated financial statements mentions, in addition to the report on the implementation of the budget, the financial statements of the EEU. Second, in the competence aspect, since, it is not only within the powers of the constituting authority, to examine the abovementioned statements but also to approve them. Moreover, it follows directly from this provision that approval should be preceded by consideration of these reports. In the literature there is a statement that the approval of these reports means at least a confirmation of their reliability and compliance with the law, but it does not oblige the executive body to grant discharge to the l.g.u. unless the report confirms full compliance of the budget implemented with the adopted budget. However, the l.g.u. body cannot grant a discharge in a situation when it has refused to approve the report on the execution of the budget [Sawicka, 2010, p. 136].

Considering the provisions of article 18 par. 2 pt. 4 of MSGA, article 12 point 6 CSGA article 18 point 10 PSGA the supervisory authority in financial matters of the l.g.u. analysed the scope of competence of the body constituting the l.g.u. and clearly stated that these regulations not only do not require but also do not allow for adopting resolutions on the adoption or non-adoption of the report on budget implementation. The condition for adopting a resolution on the discharge, in the light of these provisions, is only the consideration of the report, and not its adoption or non-adoption[11]. A similar position in this period, i.e. before the entry into force of the provisions of the 2009 p.f.a., was presented in the literature [Paczocha, 2006, p. 8]. Therefore, there is currently no state of coherence between the regulations of the local government system laws and the provisions of article 270 par. 4 and article 271 of the p.f.a. of 2009. The 2009 regulations of the f.p.a. provide the l.g.u. body with a broader

scope of competence, both in the subject matter aspect (the body also reads other documents and not only the report on implementation of the budget) and in the functional aspect (the l.g.u. body also approves the financial statements of the l.g.u. together with the report on implementation of the budget after examination).

Role of opinions, positions and conclusions in the graduation procedure

An important role in the graduation procedure, at the stages preceding the adoption of a resolution on discharge by the body constituting the l.g.u., is performed in particular by two entities, i.e. the audit committee of the body constituting the l.g.u. and the regional chamber of auditors (hereinafter r.c.a.). In accordance with the relevant provisions of the local government system laws, the audit committee gives its opinion on the implementation of the budget of the l.g.u. and makes a request to the body acting as a discharge authority to grant or not grant discharge to the executive body. The request for discharge is subject to the opinion of the r.c.a. (art. 18a par. 3 u.s.g., art. 16 par. 3 u.s.p., art. 30 par. 3 u.s.w.). It was assessed that a possible failure of the Audit Committee to fulfil its obligation to submit a request to the body acting as a discharge authority for the executive body would be a breach of law, which may result in an appeal by the body acting as members of the Audit Committee. However, doubts arise as to how to proceed in a situation where the next Audit Committee will not be able to make a proposal on the discharge [Krawczyk, 2000, p. 73].

It is the exclusive competence of the Audit Committee to give its opinion on the overall implementation of the budget and to make a formal proposal to the discharge authority on whether or not to grant discharge[8] . It is considered that the body acting as the l.g.u. must take into account the views of the audit committee when adopting a resolution on discharge. At the same time, it was clearly stressed that only the body constituting the l.g.u. has the right to decide on the content of this resolution.[9] This view is justified in the light of the provisions of article 271 par. 1 point 6 of the p.f.a. of 2009, according to which the body constituting the l.g.u. shall only "take note" of the position of the audit committee.

The legal position of the audit committee as defined by the legislator indicates that it is subordinate to the l.g.u. body and does not have any powers

[8] Wyrok WSA w Poznaniu z dnia 20 stycznia 2005 r., I SA/Po 856/04, OwSS 2005, z. 3, poz. 74; uchwała RIO w Lodzi z dnia 9 czerwca 1997 r.,
XV/54/97, OwSS 1997, z. 3, poz. 97.

[9] Wyrok WSA w Poznaniu z dnia 17 lutego 2011 r., I SA/Po 921/10, LEX nr 842917.

over that body. The position of the audit committee is assessed as "strong" in the case law of the courts in the graduation procedure[10], but it is clearly stressed that it cannot impose the content of the resolution to be adopted by the body constituting the public limited liability company. The tasks of the audit committee include providing an opinion on budget execution, and thus a measurable manifestation of this is the submission by the committee to the body constituting the public limited liability company of an appropriate graduation application, but without the right to bind the body constituting the public limited liability company to the content of this application. The motion of the audit committee to grant or not to grant the discharge has the value of a non-binding proposal of discharge to the body constituting the l.g.u., not an instruction addressed to this body[11].

The position of the audit committee should be the result of the financial statements, the report on the implementation of the budget of the l.g.u. being considered according to the provisions of article 270 paragraphs 2 and 3 of the p.f.a of 2009. In the case where the l.g.u. is obliged to have its financial statements audited by a statutory auditor (its population, according to the Central Statistical Office, exceeds 150,000 inhabitants), the opinion of the audit committee is also considered. The audit committee shall submit to the body constituting the l.g.u., by 15 June of the year following the financial year, a proposal for discharge to the executive body. The literature expresses the view that it is the duty of the audit committee to formulate an unambiguous conclusion on the implementation of the budget. This conclusion cannot be presumed from the findings made by the audit committee [Paczocha, 2006, p. 5].

It was correctly underlined that this proposal is derived from the opinion on the implementation of the budget. The assessment of the budget implementation in the form of an opinion is a necessary condition precedent to the review committee's proposal on the discharge of the l.g.u. executive. [Lenczuk, 2012, p. 1131]. These documents should be coherent with each other in a logical sense, so in the case of a positive opinion, the motion should also include the wording of the discharge request. The opinion on the execution of the budget and the motion for discharge to the executive body should remain in a mutual cause and effect relationship. The proposal of the Audit Committee is the result of the opinion on the implementation of the budget and the opinion is the justification for this. These two activities of the Audit Committee cannot be treated as separate activities which have nothing in common [Miemiec, 2000, p. 30]. If a positive opinion was followed by

[10] Wyrok WSA w Poznaniu z dnia 19 września 2007 r., I SA/Po 1179/07, LEX nr 355259.
[11] Wyrok NSA z dnia 2 lipca 2008 r,, II GSK 225/08, LEX nr 490091.

a motion not to grant discharge, it could give the impression that the audit committee was guided by other considerations, e.g. of a political nature and not a substantive one [Salachna, 2013, p. 1053].

When regulating the competences of the audit committee in the graduation procedure, the legislator uses different terms to designate the documents drawn up by the committee. In Article 270 par. 3 of the 2009 p.f.a., the term 'motion for discharge' was used, while in Article 271 par. 1 point 6 of the p.f.a., the term 'position of the audit committee' was used. However, it is the same document, i.e. a motion (position) of the audit committee concerning granting or not granting discharge [Salachna, 2013, p. 1055]. The body constituting the l.g.u. is only familiar with the position (proposal) of the audit committee. This document "in itself" is not subject to a vote, but is only intended to enhance the image and knowledge of the body acting as the l.g.u. about the degree of implementation of its own budget[12]. Councillors do not vote on the audit committee's proposal, but make an alternative choice for and against discharge[13]. In the run-up to the entry into force of the 2005 p.f.a. legislation, the r.c.a. jurisprudence and the literature emphasised that the proposal voted in the discharge session should be in line with the audit committee's proposal (e.g. to grant discharge or not to grant discharge) and the possible voting against the audit committee's proposal qualified as a breach of the local government's statutory provisions [Paczocha, 2007, p. 72][14]. This opinion was also confirmed in subsequent years [Paczocha, 2007, p. 72].

In the graduation procedure, an important document is also the opinion of the r.c.a. on the audit committee's motion on the discharge and the opinion on the resolution of the municipality council not to grant the discharge to the head of the municipality (mayor, town president)[15]. The Regional Chamber of Accounts is a professional body which supervises the activities of local government in budgetary matters. Its opinion is therefore an objective position of the professional body that examines the report of the executive body on the implementation of the budget. For this reason, non-professional bodies, such as the acting authority or its internal body, the audit committee, should

[12] Wyrok NSA z dnia 12 lipca 2002 r., 1 SA/Lu 525/02, „Finanse Komunalne" 2003, nr 2, s. 60; wyrok NSA z dnia 14 kwietnia 2000 r,, I SA/Wr 1798/99,
LEX nr 49428.

[13] Wyrok WSA w Poznaniu z dnia 17 lutego 2011 r., I SA/Po 921/10, LEX nr 842917.

[14] Uchwala RIO w Lodzi z dnia 13 czerwca 1997 r., XVI/55/97, OwSS 1997, z. 4, poz. 145; uchwala RIO w Opolu z dnia 8 czerwca 1999 r., 10/75/99, „Finanse Komunalne" 2000, nr 3, s. 27.

[15] Art. 13 pt.8 ustawy z dnia 7 października 1992 r. o regionalnych izbach obrachunkowych, tekst jedn. Dz.U. z 2012 r., poz. 1113 z późn. zm.

take into account the opinion of the r.c.a.'s composition on the implementation of the budget and the opinion on the request of the audit committee not to grant discharge. This does not mean that these bodies must fully share the conclusions of the r.c.a.'s opinions, but they should respond to these conclusions - they must not omit them at all[16]. The opinions expressed by the r.c.a.s. formations are not binding on the body acting as a l.g.u., but should at least be taken into account when formulating evaluations on matters relating to budget implementation[17]. Such opinions conclude only a specific stage of the procedure for assessing the implementation of the local government budget. They are in fact an "act of knowledge" intended to provide information useful for the assessment by the decision-making authority of the local government unit. Presenting such opinions is not a manifestation of exercising supervisory and authority competences, but should be equated with exercising preliminary control [Kmieciak, 1997, p. 37], [Krawczyk, 1999, p. 38]. Despite the fact that the opinion of r.c.a. is not binding on the decision-making body of the unit, but it is not permissible to adopt a resolution on discharge without the prior preparation of an opinion by r.c.a. and getting acquainted with this act by the decision-making body [Zielińska, 1997, p. 55].

In the absolute procedure, three types of opinions are issued by r.c.a., i.e. on the report on the execution of the l.g.u.'s budget, on the motion of the audit committee on the discharge of the l.g.u.'s executive body and on the resolution of the Municipality council not to grant the discharge to the head of the municipality (mayor, city president). The provision of article 271 par. 1 of the p.f.a. of 2009 does not mention the opinion of the r.c.a. on the motion of the audit committee concerning the discharge among the documents which require the body constituting the l.g.u. to read them. However, such an obligation results directly from article 28a of the p.f.a. Before adopting a resolution on the discharge, the Municipality council should read both the opinion of the audit committee on budget execution and the opinion of the r.c.a. on the motion of the audit committee concerning the discharge[18]. The opinion of the r.c.a. panel on the proposal of the audit committee of the Municipality council on the discharge constitutes an assessment of the legality of the proposal issued by the audit body of the Municipality council[19].

[16] Wyrok WSA w Gdańsku z dnia 25 października 2010 r., I SA/Gd 782/10, LEX nr 748060.

[17] Wyrok WSA w Warszawie z dnia 18 stycznia 2006 r., III SA/Wa 3368/05, LEX nr 201445.

[18] Uchwala RIO w Łodzi z dnia 24 sierpnia 2011 r., 28/122/2011, OwSS 2011, z. 4, poz. 105.

[19] Uchwała RIO w Bydgoszczy z dnia 6 lipca 2011 r., XV/42/2011, OwSS 2011, z. 4, poz. 104.

Provisions with the relevant content are not included in the CSGA and the PSGA. However, taking into account the importance of the opinion of the r.c.a.s. and the principles of praxeology, it was considered necessary to extend this obligation also to the opinions of the composition adjudicating on the proposals of the audit committee of the county and the local government province, because there is no substantive justification to deprive the body which constitutes the opportunity to get acquainted with the opinion on the proposal which is subject to the vote on the discharge [Sawicka, 2013, p. 65], [Budner-Iwanicka, 2011, p. 55], One of the rulings of r.c.a. explicitly states that before adopting a resolution on the discharge of the management board, the county council should have at its disposal not only the opinion of the audit committee on the execution of the budget and the opinion of the r.c.a. board on the report on the execution of the budget submitted by the management board, but also the opinion of the r.c.a. on the motion of the audit committee on whether or not to grant discharge to the county council. The adoption by the council of a resolution on the discharge without an opinion of the r.c.a. on the motion of the audit committee was qualified as a material breach of law [Sawicka, 1999, p. 9], [Krawczyk, 1997, p. 149], if this opinion could significantly change the decision of the county council in this case[20]. Only if the county council considers the matter of dismissal of the management board due to failure to grant a vote of acceptance to the management board, at a session convened not earlier than 14 days after the adoption of a resolution on failure to grant a vote of acceptance to the management board, the county council shall read the opinion of the audit committee on the execution of the county's budget and the opinion of the r.c.a. on the motion of this committee to grant or not to grant a vote of acceptance to the management board[21].

It is clear from the provisions of the above mentioned local government system regulations as well as from the regulations of the p.f.a. of 2009 that the exclusive competence of the body constituting the l.g.u. includes the adoption of a resolution on the discharge of the executive body of the l.g.u. for the execution of the budget. The resolution on the discharge in question is related to the execution of the budget by the l.g.u. executive body, but the catalogue of documents that the body constituting the l.g.u. should be familiar with prior to the adoption of this resolution is broader and significantly exceeds the framework of the report on the execution of the l.g.u. budget.

[20] Uchwala RIO we Wrocławiu z dnia 26 kwietnia 2000 r., 66/2000, OwSS 2000, z. 2, poz. 55.

[21] or. art. 30 w związku z art. 16 par. 3 u.s.p.

The content of the report on the execution of the l.g.u.'s budget, as well as the content of other documents drawn up and presented to the body constituting the l.g.u. at particular stages of the graduation procedure (opinions, motions, positions) is not binding for that body, and thus does not limit its exclusive competence to adopting a resolution containing a given type of decision (granting discharge or refusing to grant discharge).

However, it should be underlined that the legal provisions do not lay down rules for assessing the regularity of budget implementation. This means that it is left to the judicial authority which adopts its own criteria for assessing the implementation of the budget to qualify the weaknesses identified as material or insignificant. If the formal requirements are met, the l.g.u. body will assess the implementation of the budget which deviated from the planned one and therefore will not grant a discharge to the executive body, such a position falls within the competence of the l.g.u. body as defined in the statutory provisions of the self-government laws.[22].

The body constituting the l.g.u. may not, however, adopt a graduate resolution without first familiarising itself with the documents listed in the article 271 of p.f.a. of the 2009 and in the statutory provisions of local government acts regulating the material and procedural aspects of the discharge. The obligation to familiarise oneself with those documents by the constituting body has been formulated by the legislator in an unambiguous manner. Failure to comply with this obligation therefore means a gross violation of the provisions governing the absolute procedure, resulting in the invalidity of the resolution adopted in this case[23].

The body constituting the l.g.u. has a relatively large scope of freedom to adopt a discharge resolution for the executive body. In particular, it is not bound by the content of conclusions and positions formulated by the audit committee and by the r.c.a., but it is obliged to familiarise itself with their content before passing the resolution on the discharge. However, it is not entitled to claim that the body constituting the l.g.u. votes "on the discharge", and the content of the resolution arises only as a result of this vote. The content of the resolution should be formulated even before the very act of voting, because the councillors should know what content the resolution is voted on[24].

[22] Wyrok WSA w Łodzi z dnia 13 listopada 2008 r., I SA/Łd 1127/08, LEX nr 528094.

[23] Wyrok NSA z dnia 14 kwietnia 2000 r., 1 SA/Wr 1798/99, LEX nr 49428.

[24] Wyrok WSA w Gdańsku z dnia 4 grudnia 2012 r., 1 SA/Gd 984/12, LEX nr 1235433.

Public finances of local government units

The answer to the question whether the statutory regulations concerning the preparation and adoption of the resolution on the discharge for the executive body of the l.g.u. create a coherent (harmonious) or an incoherent (disharmonious) arrangement is not clear. In the system regulations of the local government acts, the adoption of a resolution on the absolute value is only connected with consideration of the report on the execution of the budget of the l.g.u. In the provisions of the p.f.a., the adoption of such a resolution should be preceded by the body constituting the l.g.u. becoming acquainted with a more extensive catalogue of documents (the report on the execution of the budget, the financial statement and the opinion on the audit of this statement, the opinion of the r.c.a., information on the condition of the assets of the l.g.u. and the position of the audit committee). Differences in the conceptual framework used in individual statutory regulations are also characteristic, e.g. in the local government system laws it is specified that the body constituting the l.g.u. only 'examines' the report on the implementation of the budget, whereas in the provisions of the public finance acts of 2009 the abovementioned body only "acquaint itself" with this report and other documents indicated in article 271 of this act. The legal status in force can therefore be described as relatively harmonious or relatively disharmonious, so it is not ideal. It requires changes in the provisions of law, the aim of which is to bring about a more complete coherence (harmony) of the regulations contained in the local government system laws with those contained in the public finance act.

1.2. Discharge for the implementation of the budget of a local government unit

The subject of this study is a reflection on the course of the graduation procedure and the role and tasks of the constituting and executive body in this process. The study has taken into account the systemic position of both of the above mentioned territorial self-government units and the role of the audit committee has been presented as an obligatory committee of the unit constituting the territorial self-government unit, having strictly defined competences assigned to it in the graduation process.

When analysing the graduation procedure, most important elements were taken into account: the role of the audit committee in the discharge process, the manner and scope of evaluation of budget implementation by the body constituting the territorial self-government units, the subject of graduation voting and the result of this voting.

Considerations concerning the act of discharge for the territorial self-government unit executive body in relation to budget implementation shall also take into account the tasks that were assigned to the regional chambers of auditors with respect to the opinion on budget implementation reports and the audit committee's conclusions on discharge.

Concept of discharge

Local government units perform public tasks to satisfy the collective needs of the local community, doing so in their own name and on their own responsibility based on the principle of financial autonomy.

Financial independence means granting local government units the right to carry out financial management within the framework of the rights set out in the Constitution and in the Acts in the scope of collecting income, obtaining returnable income, making expenses and creating and executing the budget, and its elements are, in particular, the statutory transfer of own income, the right to establish and apply financial regulations, the right to take out loans, loans and bond issues, the right to independently decide on the directions of expenditure and the choice of the public procurement procedure, the right to adopt the budget procedure, multiannual financial forecast, budget and its changes, the right to transfer and block expenditure, create reserves and dispose of them, as well as the right to independently execute the budget and evaluate the activities of the executive body by means of the institution of discharge [Glumińska-Pawlic, 2013, p. 132],

The graduation procedure is a process related to the act of internal control of budget implementation which determines the responsibility of the executive body of a local government unit for the implementation of the budget, carried out by the body acting (with the help of an audit committee), which culminates in the adoption of a resolution on granting or not granting discharge by the body acting in accordance with the procedure[1] laid down in the local government system laws.

In the legal and financial literature the institution of discharge is defined in various ways, drawing attention to its individual elements [Dębowska-Romanowska, 1995, p. 181; Miemiec, 1997, p. 347]. This is because granting discharge has the character of a public-legal acceptance of the executive body's activity. However, this acceptance concerns only the sphere of budget execution. It constitutes an act of the body adopting the budget, confirming that the executive body has implemented the budget in a lawful manner, thus closing all discussions related to the implementation of the budget. This act is the expression of the powers, laid down by law, vested in the constituting

authority, which shall be activated annually, to assess the legality and regularity of the financial management of the budget adopted by the executive body. The control performed within the discharge institution is of a follow-up nature due to the fact that it takes place after the end of the budgetary year, and documentary, as it is based on statutory specified documents that shows data on budget implementation for the previous year and allow verification of their accuracy [Sawicka, 2013, p. 90]. The close relationship between budget execution and the institution of discharge results from article 18 section 2 paragraph 4 of the act of Municipality self-government, article 12 paragraph 6 of the act of county self-government and article 18 paragraph 10 of the act of Province self-government, as their content clearly indicates that discharge is granted to the management board by the decision-making body for budget implementation.[25][26]. The control, which is carried out in the graduation process, is limited to the substantive assessment of the implementation of the budget and evaluation of the executive body's activities in this context.

The graduation procedure is characterised by a high level of formalisation. The subject matter of this procedure is - as mentioned above - control and evaluation of budget execution carried out by way of a resolution on discharge adopted by a body constituting the l.g.u.. On the other hand, the participants of the graduation procedure are: the constituting body, the executive body, the audit committee consisting of representatives of the constituting body and the regional chamber of auditors, which exercises strictly defined by the provisions of law the competences for the substantive assessment of budget execution by the executive body and the correctness of the graduation procedure.

The course of the graduation procedure

The public finance act of 27.08.2009[3], which came into force on 1.01.2010, changed the graduation procedure in local government units (SGU). This issue was regulated in article 267-271 of the act on public finance. In accordance with article 267 of the act on public finance, the commencement of the graduation procedure shall be affected by the territorial self-government units' management board presenting the year following the financial year to the territorial self-government units' constituent body by 31 March:

1) the annual report on the execution of that unit's budget, containing a statement of incomes and expenses resulting from the closures of

[25] Ustawa z dnia 8 marca 1990r. o samorządzie gminnym (Dz. U. z 2013r. poz. 594 z późn. zm.), ustawa z dnia 5 czerwca 1998r. o samorządzie powiatowym (Dz. U. z 2013 r. poz. 595 z późń. zm.), ustawa z dnia 5 czerwca 1998r. o samorządzie województwa (Dz. U. z 2013r. poz. 596 z późn. zm.).

[26] Zob. wyrok WSA w Białymstoku z 21.09.2005r. (SA/Bk 206/05), LEX nr 172073.

territorial self-government units' budget accounts, in detail not less than in the budget resolution;

2) the report referred to an article 265, paragraph 2 of public finance act., i.e. the annual report on execution of financial plans of independent public health care units, self-government cultural institutions and other self-government legal persons established under separate acts in order to perform public tasks (excluding, on self-government land, commercial companies), in detail not less than in the financial plan, which shall be submitted by 28 February of the year following the financial year to the competent territorial self-government unit executive body;

Information on the status of territorial self-government units' assets, including:

a) data concerning the ownership rights of the territorial units,
b) data concerning:
   - other than ownership rights, including particular limited property rights, perpetual usufruct, receivables, shares in companies, shares
   - ownership
     a) data on changes in the state of Municipality property, to the extent specified in points (a) and (b), since the date of submission of the previous information,
     b) data on income obtained from the exercise of property rights and other property rights and from the exercise of possession,
     c) other data and information on events affecting the territorial self-government units' property.

The annual report on budget execution shall also include a list of self-government budget units carrying out activities defined in the act of September 7, 1991 on the education system[4], which collect on a separate account the revenue specified in a resolution of the body constituting a given L.G.U. adopted in accordance with article 223 of the public finance act.

The annual report on L.G.U. budget execution presented by the implementing body is a different report from the report prepared under the provisions of the Regulation of the Minister of Finance of 3 February 2010 on budget reporting. It is distinguished by a different scope, purpose, addressees and date of preparation [Glumińska-Pawlic, Sawicka, 2002, p. 274], This report should be correct in formal and accounting terms, reliable and should reflect the actual situation. The Act does not specify its content, merely indicating that its detail cannot be less than that of the budget resolution.

The detail of the budget resolution in the area of income and expenditure requires the forecasted income of a local government unit to be included according to the sources and divisions of classification in a breakdown into income:

current and property, and expenditure broken down into sections and chapters of expenditure classification, with the distinction of current expenditure, in particular expenditure of budgetary units (including salaries and contributions calculated from them, expenditure related to the performance of their statutory tasks), subsidies for current tasks, benefits for natural persons, expenditure on programmes financed with the share of funds from the EU budget, aid from EFTA Member States and other non-returnable funds from foreign sources, in the part related to the performance of tasks of the local government unit, payments on account of sureties and guarantees granted by j.s.t, falling due in a given financial year, debt service of a local government unit, as well as property expenses. The detail of the report on the execution of the budget may not be less than the detail of the budget resolution adopted by the constituting body, but it may be more extensive and include also other information. The scope of data included in the report is decided by the executive body of the l.g.u., taking into account, of course, the minimum data required by the public finance act. The doctrine postulates that reports should be drawn up in as much detail as possible and that a descriptive part should be included in the report, including a discussion of the level of implementation of budget revenues and expenditures, the reasons for discrepancies between the amounts planned in the budget resolution and the amounts actually implemented, as well as a description of changes made to the budget by the executive body within the framework of the statutory powers vested in it and on the basis of the authorisations granted by the constituting body [Paczocha, 2006, p. 3].

In comparison with the regulation contained in Article 199, paragraph 1 of the public finance act of 30 June 2005, which was in force until 31 December 2009, a novelty in this respect is the obligation for the territorial self-government units' executive bodies to attach to the annual budget execution report detailed information on the condition of Municipality property. In comparison with the regulation contained in Article 199, paragraph 1 of the Public Finance Act of 30 June 2005, in force until 31 December 2009, a novelty in this respect is the obligation for the territorial self-government units' executive bodies to attach detailed information on the condition of Municipality property to the annual budget execution report. Until currently Public Finance Act in force came into force, this information was attached to the draft budget of territorial self-government units for the following year. The above solution should be considered reasonable. The report on budget execution is a document illustrating the activities of the executive body in terms of financial management of the entity. Property management is also an element of this economy, especially real estate management, which has a direct impact on L.G.U. budget income level.

The information provided in the above document enables the councillors to assess the executive body's activities in this respect, thus contributing to a more comprehensive assessment of budget execution.

The scope of the materials presented in the information on the condition of the corporate assets should be adjusted to the conditions and needs of a given local government unit [Srocki, 1996]. The literature postulates that the information on the condition of Municipality property should include at least information on the methods of development and use of the property from the point of view of the main own tasks of the local government unit, an analysis of financial expenses and expenditures related to maintaining the property in a proper condition, detailed information on the condition of debts and receivables of the local government unit, a discussion of the relations between the draft budget and the changes in the condition of the Municipality property, including indication of expenditure on the purchase of property and income from the sale of property, estimation of the impact of investment expenditure on the value and structure of Municipality property, presentation of expenditure necessary for the planned modernisation [Gilowska, 1998, pp. 142-142].

On the basis of the Public Finance Act and local government system laws, two basic functions of information on the condition of Municipality property can be indicated, i.e. a strictly informative function and a management function. The information on the condition of Municipality property is an important source of data for the r.c.a. and the stationing body of a local government unit. For councillors, this information constitutes a basic source of knowledge about the scope and forms of Municipality economy, which is especially important for making financial decisions for the following year in the context of the relationship between the financial situation of the unit and the state of its property [Jóźwiak, Kopczyńska, 2004, p. 54]. The information is also the basis for the assessment of "the correctness of the connection of proceeds from sales and other forms of management of the components of the Municipality property with the planned budget revenues". [Glumińska-Pawlic, Sawicka, 2002, p. 199]. Accessibility of the document to the local community is also a manifestation of openness and transparency in the management of local government public funds, although the regulations do not directly establish an obligation to publish it. The management function of information on the condition of Municipality property, containing reliable, up-to-date and appropriately detailed data, allows for making rational decisions on the optimal current and long-term use of this property [Kotlińska, 2005, p. 63].

The legal characteristic of the information on the condition of Municipality property resulting from the act requires that this document shall be treated as informing about the property and not constituting the basis for management of the property of a local government unit, indicating activities to be carried out in the next reporting period and the manner of using its individual parts. When formulating the scope of data required in the information, the legislator limited himself to events which influenced the execution of the budget in a given financial year (ex post character). However, there are no ex post data, which would make the information on the condition of Municipality property a more complete justification for a part of the revenues and expenses of the budget of a local government unit for the following year (e.g. there are no data on real estate for sale, perpetual usufruct or demolition as of the date of the information) [Kotlinska, 2005, pp. 69-70], the information on the condition of the estate should be prepared taking into account the following rules:

- complete, obliging to include in the information all data required by paragraph 1 point 3;
- descriptive - the information on the condition of property shall contain a concise description of the rights vested in the local government unit, include the reasons for changes in the condition of the property and - possibly - a forecast of changes that may occur in the financial year;
- transparency, the observance of which is facilitated by grouping, according to clear criteria, the rights vested in the local government unit in relation to property and carrying out internal systematics;
- reliability, in the light of which the information presented should be consistent with the data resulting from the accounting records and the facts [Jóźwiak, Kopczyńska, 2004, p. 64].

While performing further comparative analysis of the provisions of the public finance act, it should be noted that there was also a change in the deadline by which the report has to be submitted to the body constituting the territorial self-government units and the regional chamber of accounts - for the purpose of issuing an opinion. According to the current regulation, it should be submitted by 31 March of the year following the financial year and not as stipulated in the Public Finance Act of 2005 - by 20 March of the year following the financial year.

According to the terms of article 269 of the public finance act, the report on the implementation of territorial self-government units' budgets shall be drawn up on the basis of data from the budget accounting records. It shall include in particular:

- incomes and expenses of territorial self-government units' budget in detail as specified in the budget resolution;
- changes in the plan of expenditure for the implementation of the programmes financed with the participation of funds from the budget of the European Union and non-reimbursable funds from the aid granted by the member states of the European Free Trade Association (EFTA) as well as from non-reimbursable foreign sources other than mentioned above;
- the degree of advancement of the implementation of multiannual programmes, which is a novelty in relation to the regulations contained in the public finance act of 2005, which is a consequence of the introduction under article 226 of the obligation for the body constituting the L.G.U. to adopt a resolution on the multiannual financial forecast.

This document, together with information on the condition of Municipality property, is subject to the opinion of the regional chamber of auditors. The content of both documents is not limited to the presentation of numerical values, as in the case of statistical reports drawn up on the basis of the above mentioned Ordinance of the Minister of Finance, but at the same time it contains a discussion of the reasons that influenced the level of execution of particular elements of the budget, the necessity to make changes in it or the progress of long-term projects.

The opinion on the report on the execution of the budget is one of the documents which should be read by the Audit Committee before the conclusion on the discharge is reached. Therefore, the issue of such an opinion gives rise to the necessity to check whether the annual report on the implementation of the budget and information on the condition of Municipality property submitted for an opinion meets the requirements set out in the Public Finance Act. Moreover, the usefulness of the material prepared in this way is also analysed from the point of view of the assessment of the budget execution and possible reasons for its incomplete execution, as well as the causal link between these deviations and the activity of the executive body in this respect. With particular interest, the composition adjudicating in the opinion on the budget implementation report should refer to the implementation of revenues, expenses, revenues and expenditures, paying attention to possible overruns of the expenditure plan, the level of liabilities charged to the budget, including liabilities due at the end of the reporting year, the level of debt of the entity and its debt ratio.

The opinion on the report on the implementation of the budget may be either positive or negative, and a positive opinion with observations may be given if the panel finds minor irregularities in the documents consulted.

This opinion shall not be binding either on the audit committee or on the appointing authority. However, both the acting authority and the audit committee should take account of the fact that this is a document issued by an apolitical and objective body which contains an expert opinion both on the report itself as a document assessed from a formal and legal point of view and on the content of the report from the point of view of its usefulness for the assessment of budgetary implementation by the acting authority. Therefore, the opinion on the report on the implementation of the budget constitutes valuable material for the evaluation of the implementation of the budget.

A new requirement in the context of the largous graduation procedure for the pfocesus of the budget implementation control act, defining responsibilities and all decisions preceding that act [Krawczyk, 1994, p. 21], shall require the implementing body of a territorial unit to submit by 31 May of the year following the financial year the financial statements of that unit, which, under the provisions of Article 270 par.2 and 4 of the p.f.a., shall also be submitted for consideration by both the audit committee and the unit constituting the territorial unit. In the case of a territorial unit where the number of inhabitants determined by the Central Statistical Office at 31 December of the year preceding the year for which the report has been drawn up exceeds 150 000, the annual accounts shall be audited by a certified auditor. This opinion shall also be considered by the auditing committee, being one of the documents to be reviewed by the body constituting the territorial self-government unit, which shall be subject to consideration and approval during the graduation session in addition to the annual report on budget implementation.

The duration of the graduation procedure has also been extended in relation to the previous legal regulations. As mentioned above, apart from submitting the annual report on budget execution together with information on the state of Municipality property to the territorial self-government unit by 31 March of the year following the financial year, the executive body should submit the annual financial report by 31 May. In accordance with the regulation contained in article 270 par. 3 of the p.f.a., after reading and considering the above documents, the audit committee shall submit a proposal of discharge to the L.G.U. by 15 June of the year following the financial year. Subsequently, in accordance with articles 270 paragraph 4 and 271 paragraph 1 of the p.f.a., the constituting body shall consider and approve the accounts of the territorial unit together with the report on implementation of the budget by 30 June of the year following the financial year and adopt a resolution on discharge. Adoption of the above resolution shall be preceded not only by familiarisation with the above mentioned documents and their consideration, but also by the body acting as the authority:

- the opinion of the regional chamber of auditors on the report on the implementation of the budget, issued in accordance with article 13 par. 5 of the Act of October 7, 1992 concerning regional chambers of auditors [27],
- information on the state of Municipality property of territorial self-government units,
- the position of the audit committee.

The documents that the council should become acquainted with during the graduation process also include the opinion of the regional chamber of auditors on the proposal of the audit committee, issued in accordance with article 13 paragraph 8 of the Act of r.c.a.. The obligation to submit the above-mentioned application for an opinion results from the provisions of local government system acts, i.e. from:

- article 18a par. 3 sentence 2 of the Act of 8.03.1990 about Municipality self-government [28],
- article 16 par. 3 sentence 2 of the Act of 5.06.1998 about County self-government [29],
- article 30 par. 3 sentence 2 of the Act of 5.06.1998 about Province self-government[30];

Although the opinion of the Regional Chamber of Auditors on the request of the audit committee was not mentioned in the catalogue of documents referred to in Article 271 par. 1 of the p.f.a. referred to above, this position is supported by reasons of expediency. As indicated by the Supreme Administrative Court in Warsaw, opinions of the Regional Chamber of Accounts should be taken into account, as they come from a professional body appointed to audit territorial self-government units' financial management. Therefore, they can be very helpful for councilors when evaluating budget execution [Chrapusta, Chlipała, 2005].

The activities of the audit committee in the context of its opinion on the discharge proposals and the role of the regional chamber of auditors in this process

As mentioned above, the graduation procedure shall begin by submitting a report on the implementation of the budget drawn up by the implement-

[27] Ustawa z 7.10.1992 r. o regionalnych izbach obrachunkowych (tekst jedn.: Dz.U. z 2012 r. poz. 1113 ze zm.), dalej: u.r.i.o.

[28] Ustawa z 8.03.1990 r. o samorządzie gminnym (tekst jedn.: Dz.U. z 2013 r. poz. 594 ze zm.), dalej: u.s.g.

[29] Ustawa z 5.06.1998 r. o samorządzie powiatowym (tekst jedn.: Dz.U. z 2013 r. poz. 595 ze zm.), dalej: u.s.p.

[30] Ustawa z 5.06.1998 r. o samorządzie województwa (tekst jedn.: Dz. U. z 2013 r. poz. 596 ze zm.), dalej: u.s.w.

ing body of the L.G.U. This report shall be analysed by an audit committee, which shall de facto take the most important steps preceding the resolution of the discharge case.

The Audit Committee shall be appointed to control the activities of the territorial self-government unit executive body and self-government organisational units and, in the case of the Municipality self-government, also of the auxiliary units of the municipality. It shall also perform other control tasks delegated to it by the body constituting the L.G.U. It is worth emphasising that only the body constituting the territorial self-government unit may delegate control tasks to the audit committee. It is also clear that the representing body cannot commission its own audit committee with tasks for which it is not competent [Szewc, 2005, p. 184].

The competences of the Audit Committee are defined by law in the self-government system laws. This includes giving an opinion on the implementation of the budget (the evaluation of the implementation of the budget should be carried out by the audit committee from the point of view of legality, purposefulness, reliability and economy) and submitting a request to the body acting as discharge authority. The exclusive competence of the Audit Committee in this respect was confirmed by the Province Administrative Court in Poznan in its judgment, stating that "the exclusive competence of the Audit Committee (...) is to give its opinion on the overall execution of the budget and to make a formal request to the council on whether or not to grant discharge. What is important is that the committee gives its opinion on the implementation of the budget and not on the report on its execution (as the report only provides information on the execution of the budget). Therefore, the committee, when assessing the implementation of the budget, should also take into account in this process the positions of the other committees of the decision-making body adopted on the implementation of the budget. In addition, the evaluation of the implementation of the budget may also be based on the findings of the audit committee during or after the financial year on the implementation of the budget resulting from the audits carried out by the committee in this respect. The audit committee's work should result in an opinion on the implementation of the budget which relates solely to the activities of the executive body and its departments in this respect. An important element of such an evaluation, especially in the case of incomplete budget implementation, shall be the findings of the reasons for this and those responsible for it. A negative assessment of budget execution may be formulated by the audit committee only if the executive body or the organisational units supervised and subordinate to it can be blamed for incomplete budget

execution. Although the opinion of the audit committee is not binding on the decision-making body, as a document containing a substantive assessment of the implementation of the budget, it has an important role in the discharge decision. The committee's opinion on the implementation of the budget is at the same time a justification for the proposal on the discharge, which is addressed to the constituting body and to the regional chamber of auditors for an opinion according to article 13 par. 8 of the act of r.c.a. Since there is a causal link between the opinion on the implementation of the budget and the content of the proposal for discharge, the content of the proposal should be consistent with the assessment of the implementation of the budget. The positions of the Audit Committee should therefore be unambiguous, especially since the formulation of the motion for discharge is the sole responsibility of the Audit Committee. In view of the above, the assessment of the above conclusion made by the Regional Chamber of Accounts as an independent entity lying in the control of territorial self-government units' financial management becomes extremely important. It should be emphasised that the evaluation of the audit committee's application by the Regional Chamber of Accounts is carried out exclusively according to the legality criterion [Stec, 2010].

It refers both to formal aspects to be met by the application - i.e. whether it contains a justification, whether the application itself was clearly and unequivocally formulated - and also to substantive issues, which focus primarily on determining whether the audit committee's evaluation contained in the application refers only to issues concerning budget implementation and whether it concerns the role of the executive body in this process. Furthermore, it seems that the Regional Chamber of Auditors, when giving its opinion on the audit committee's proposal, should take into account the previously issued opinion on the budget implementation report, especially in the context of the report as a document to assist in the budget implementation assessment process.

The opinion on the Audit Committee's proposal is not binding on the body constituting the L.G.U. However, as in the case of the opinion on the report on the implementation of the budget, the body acting as the opinion on the report on the implementation of the budget should bear in mind that it comes from a body specialised in the control and supervision of financial management, which assesses in an apolitical and impartial manner the activity of the audit committee in evaluating the implementation of the budget by the executive body in terms of its usefulness in taking decisions in the discharge authority.

Approve the implementation of the budget and adopt a resolution on discharge

Submission by the Audit Committee to the territorial self-government unit of a motion to grant or not to grant a discharge to the Management Council together with a justification resulting from the opinion on budget implementation shall start the second stage of the graduation procedure.

Article 270 paragraph 4 of the p.f.a. shall require the body responsible for examining and approving the accounts of the territorial self-government units together with the report on implementation of the budget by June 30. The joint consideration of these documents shall result from their interconnection. The financial statements confirm the data on budget implementation resulting from the accounting books. The decision on the approval or refusal to approve the statements should be expressed in a resolution adopted by the decision-making body. When considering the reports, the constituting body shall obtain the knowledge that is necessary for proper control of the territorial self-government unit executive body's activities in the scope of budget implementation in the previous year. Consideration and approval of both reports shall be preceded by a resolution on discharge, which shall be a separate act adopted in accordance with art. 271 of the p.f.a., after the constituting body has familiarised itself, with the documents specified in that provision, including the indicated reports. In the context of the adopted regulations, it is important to determine the consequences of both the approval and non-approval of the reports for the act of granting discharge. The act does not refer to this issue at all. First of all, it should be decided, what possible premises justify the approval of financial statements, bearing in mind that the assessment of the executive body by the body being a territorial self-government unit is made by the act of granting or not granting the discharge. Therefore, approval of the reports referred to the article 270 paragraph 4 of the p.f.a. may only mean confirmation of their reliability and compliance with the law, but it shall not oblige to grant a discharge to the territorial self-government unit's management. On the other hand, the constituting body cannot grant a discharge in a situation when it refused to approve the report on budget execution, because in such a case there is no basis for evaluation of financial management conducted by the management board on the basis of the budget resolution [Sawicka, 2013, p. 97].

The last element of the graduation procedure is adoption of a resolution on the discharge by the body constituting the L.G.U. Such a resolution shall be adopted by 30 June of the year following the financial year to which the graduation procedure relates.

In accordance with Article 271 par. 1 of p.f.a., the resolution on the discharge shall be preceded by a body representing the territorial self-government unit familiarising itself with the contents of all documents whose consideration is the basis for the Audit Committee to formulate a motion for discharge, i.e. not only the report on budget implementation and financial statements, but also information on the status of territorial self-government units' assets and the auditor's opinion on the audit of financial statements (if there is a statutory obligation to obtain such an opinion) on the year i.e. the report on budget implementation and information on the status of assets. It is necessary for the audit committee to take a decision on the discharge of the financial statements. The key role in the act of resignation is to familiarise the Council (Seimik) with the position of the audit committee, its opinion on budget execution and the proposal for resignation formulated on the basis of this opinion.

In addition, under the provision of Article 271 paragraph 2 of the p.f.a., the body constituting the L.G.U. may request further explanations by the Management Council concerning the accounts and the report on implementation of the budget. However, the provision of Article 271 par. 1 of the p.f.a. does not mention the opinion of the r.c.a. on the motion of the audit committee on the discharge among the documents requiring the constituting body to familiarise itself with their contents. Such an obligation towards the Municipality councils was formulated in article 28a.1 of the CSGA, whereas, neither the Act on County Self-Government nor the Act on Province Self-Government, contains such regulations. Due to the fact that the opinion of the r.c.a. is a document accompanying the motion of the audit committee on the discharge, the body which is familiar with the content of the motion, at the same time, acquires knowledge about the opinion of the r.c.a. on this motion. Any attempt to diminish the significance of the opinion of the r.c.a. on the motion of the audit committee on the discharge against the background of the regulation of Article 271 paragraph 1 of the p.f.a. is unjustified. Therefore, for reasons of expediency, the constituting authority should consult the opinion of the r.c.a. on this subject.

In consideration of the formalised discharge procedure to be followed ([SAC judgment of 3.11.2000]. (III SA 1765/00, OwSS 2001/1, p. 32)), judgment of the Supreme Administrative Court of 28.09.2005(III SA/Wa 2371/05), www.nsa.gov.pl the discharge proposal put to the vote of the Councillors should be in line with the content of the proposal of the Audit Committee [judgment of the PAC in Poznan of 20.01.2005 (I SA/Po 856/04), OwSS 2005/3, p. 74, judgment of the Province Administrative Court in Wroclaw of

3.11.2009. (III SA/ Wr 475/09), LEX No 588232], this view is justified by the relevant provisions of the acts on the local government system, which delimit the powers of the body constituting the territorial self-government unit and its audit committee in the procedure for approving budget implementation. However, it should be noted that the case law on the role of the Audit Committee's proposal in this procedure is not uniform. This role is sometimes limited to the material used only to enrich the image and broaden the knowledge of the body constituting the territorial self-government units' performance. With this approach, the motion of the audit committee "in itself" is not subject to a vote [SAC judgment in Lublin of 12 July 2002]. (I SA/Lu 525/02) "Finanse Komunalne" 2003/2, p. 60, judgment of the Province Administrative Court in Poznan of 17.02.2011 (I SA/Po 921/10) LEX No. 842917], It seems appropriate to state that it is the determining authority that decides on the content of the proposal for discharge to be voted on during the session. Such a position requires critical assessment as it is not anchored in the legal regulations of the graduation procedure. The provisions of article 18a par. 3 of MSGA, article 16 par. 3 of CSGA and article 30 par. 3 of PSGA indicate the audit committee as this entity, which is required to issue an opinion on the implementation of the budget and to make a profit on whether or not to discharge the Management Committee. Therefore, the legislator has unambiguously appointed an audit committee as competent to formulate a graduation proposal. The competences of the audit committee defined in this way remain complementary to the competences of the state body to which the final decision on granting or not granting discharge to the executive body belongs. In taking this decision, the determining authority is therefore obliged to take a position on the request that has been addressed to it.The fulfilment of this task requires, first of all, consideration of the report on the execution of the budget and then adoption of a resolution on granting or not granting discharge to the management authority in this respect. This is how the competences of the body constituting the L.G.U. in the graduation procedure are defined in the regulations of art. 18. par. 2 point 4 of MSGA, article 12 par. 6 of CSGA and article 18 par. 10 of PSGA. They do not give any reason to argue that it is up to the determining authority to formulate a proposal for discharge, which will be voted on in session, since this power was granted to the audit committee. Neither does Article 271 par. 1 of the p.f.a., where the position of the audit committee is listed among the documents with which the constituting authority is obliged to acquaint itself prior to the adoption of a resolution on the discharge of the management council, which might suggest that it is not necessary for the constituting authority to consider the proposal of the audit committee. However,

this does not mean that the position of the audit committee is determinant for the final decision of the discharge authority. The audit committee is a subordinate body of the constituting authority and has no powers over it. The legislator wishes to make an opinion on the implementation of the budget and to propose to the discharge authority whether or not to grant discharge to the management board, but this is the end of its powers. The appointment of the Audit Committee as the competent body to submit an appropriate proposal for discharge to the council (Sejmik) is simply a matter of reason. Since it is the task of the audit committee to provide an opinion on budget execution, a tangible manifestation of this is the submission by the committee of an appropriate graduate motion to the executive body, but without claiming to be bound by the content of the body's resolution constituting the content of the motion [Sawicka, 2013, p. 98].

Resolutions on the discharge are adopted by an absolute majority of votes of the statutory composition of the constituent body (art. 28a par. 2 MSGA, art. 30 par. 1a of CSGA. and art. 34 par. la PSGA.). The legal regulations concerning the effects of the results of the vote on whether or not to grant discharge to the management board are the same in the case of counties and provinces, where the rule that rejection of the resolution on granting discharge in the vote is equivalent to the adoption of a resolution not to grant discharge to the management board (art. 13 par. 2 of the CSGA and art.19 par. 3 of the PSGA), and others in the case of municipalities, where the current provisions of such rule do not prevail. In accordance with the current provisions of the municipality's political system act, the content of the resolution on the discharge for the municipality's executive body cannot be presumed. According to article 28a par. 2 of the MSGA, an absolute majority of votes of the statutory composition of the municipality council is required for the adoption of a resolution both on granting and not granting discharge. The content of this provision does not give grounds for adopting the view that rejection of the absurd motion of the audit committee of the Municipality council means adoption of a resolution with a content contrary to this motion [SAC judgment of 2 July 2008 (II GSK 225/08), LEX No 490091], Therefore, in the case of rejection of the resolution on granting the discharge in the vote, it is not possible to presume adoption of a resolution with a content contrary to the one that was the subject of the vote.

In the case of counties and provinces there is a presumption that a resolution not to grant discharge is adopted in a situation when the motion to grant discharge has been rejected (art. 13 par. 2 of the CSGA and art. 19 par. 3 of the PSGA). Rejection of the resolution on granting the discharge excludes the re-

quirement of an absolute majority of votes, because otherwise the existence of the institution of rejection of the resolution would be pointless, as the absolute majority of votes cast in granting the discharge means adoption of a resolution not to grant discharge by an absolute majority of votes [judgment of the PAC in Warsaw of 12 November 2007 (V SA/Wa 2258/07), LEX No 342365]. Thus, subjecting the resolution on granting the discharge to a vote always leads to a final decision, and thus to adopting a resolution on granting the discharge with the content confirmed by the result of the vote obtained [judgment of the PAC in Warsaw of 11.12.2007 (V SA/Wa 2258/07), LEX No. 342365],

On the other hand, if the subject of the vote is a resolution not to grant discharge and it does not obtain the required absolute majority of votes, the question of discharge is not resolved.

All resolutions of territorial self-government units' bodies concerning the discharge are subject to supervisory proceedings, and resolutions not to grant discharge are additionally subject to advisory proceedings r.c.a. The obligation to issue opinions on such resolutions is related to the procedure of dismissal of the territorial self-government unit executive body as a consequence of failure to grant discharge.

1.3. Consequence of the income structure of local government units

The representation of public funds leads to the separation of the state and local government finance system. One of the basic elements of this structure is the division of revenues, which mainly concerns tax revenues. In this system, state and local taxes are separated. This diversification is to ensure the financial independence of local government units, mainly municipalities, whose budgets are affected by local taxes and fees. Financial independence at this level does not mean self-sufficiency of territorial self-government units.

The security of municipalities' financial independence and stability is their income defined as their own. However, according to the current classification, this group of income includes not only income from local taxes and charges, but also shares in personal income tax and corporate income tax. The structure in this group of municipalities' income is changing, as the tax authority's tax liability in relation to local taxes, to a limited extent, but takes place and is in the hands of the municipalities and the shares in state tax revenues are imposed on local government units by the central government. Under these conditions, the question is justified: how does the changing structure of own income affect the possibilities of implementing the fiscal policy of local gov-

ernment units and the possibilities of satisfying the needs of the local community? This is the main idea behind the following arguments.

Distribution of public funds

Social and economic considerations determine the division of public authority into government and local government. The consequence of such an arrangement is, on the one hand, to separate the tasks assigned to these two segments of power and, on the other hand, to secure funds for their implementation. The assumption that "The effectiveness of local self-governments' activities, proper allocation of funds for current and investment purposes may dynamise and optimise the economic development is the basis of such a system. This message is complemented by the need to take into account the diverse capabilities of particular local government units. For this reason, it should be assumed, "(...) that certain tasks should be performed by the territorial union which is able to perform them effectively".[3132].

The starting point for considerations focused on the issue of public pay-as-you-go is public revenue, especially taxes.

The competence of the State and local and regional authorities with regard to taxation is :'(...)

- competence to legislate on taxes,
- competence to receive tax revenue,
- competence to manage taxes[33].

It should be noted that the competences listed in the first place concern almost exclusively the country. In this context, the question arises: could this be the responsibility of local and regional authorities? A clear answer is not possible. It is mainly because giving local governments the power to legislate in the field of taxes could result in significant differences in taxation, resulting in different possibilities of development of particular areas of the state. However, this does not mean that some limited tax powers for local governments would not be desirable to a greater extent than is currently the case. This limited scope of powers for local self-governments does not eliminate the need to separate tax sources between the State and local governments. Self-governments take over receipts from specific tax sources, using the funds from them for the needs of local communities. The point here is that decisions concerning social needs should be taken close to the place where they are

[31] A. Borodo, *Samorząd terytorialny. System prawnofinansowy,* Wydawnictwo Prawnicze LexisNexis, Warszawa 2004 s. 19.

[32] *Ibidem,* s. 17.

[33] *Ibidem,* s. 20.

implemented. For this reason, a local government can be defined as a part of public authority, which makes it very specific. The basic features of local government include

- having an independent authority,
- competence to make their own laws,
- independence in property cases and own sources of income[34].

When analysing these characteristics in detail, it is noted that in practice local governments have many limitations. This applies both to their power, which is usually politically determined, and their ability to legislate. Realistically, the property management feature is most fully implemented and own sources of income are guaranteed. This does not, however, indicate what their scope and constituent elements are to be. In this respect, there are different solutions in the world, and mainly in Europe, based on many models which differ from each other, on the one hand, in an uneven income catalogue and, on the other, in their structure. In countries such as Austria or Denmark, local taxes have an advantage, and in countries such as the Netherlands they play a minor role. It should be noted that the dominance of local taxes gives local authorities considerable independence from the state, which to a large extent contributes to the possibility of their stabilised development.

However, the distribution of sources of supply to local government units may take different forms. From the point of view of the possibility of implementing the principle of balanced development, the division into own and equalisation resources is most appropriate. Own income is generated as a result of the distribution of public funds. The problem, however, is whether these funds can fully cover expenses, and if so, what consequences this will have[35]. This is closely related to the question whether local and regional authorities should have financial autonomy.

Financial autonomy is based "(...) on a model for supplying local governments' budgets that separates the sources of revenue collected at the central level from those collected at the local level. This model assumes complete independence of local authorities from central authorities. Any form of vertical redistribution, such as grants or subsidies, results in a kind of dependence on central bodies. They therefore constitute a restriction on the autonomy of local authorities'.[36]. In practice, autonomy understood in this way does not occur, if only because it is necessary to level out differences between regions.

[34] M. Kosek-Wojnar, K. Surówka, *Finanse samorządu terytorialnego,* Wydawnictwo Akademii Ekonomicznej w Krakowie, Kraków 2002, s. 13.

[35] Por. M. Kosek-Wojna, K. Surówka, *Podstawy finansów samorządu terytorialnego,* WN PWN, Warszawa 2007, s. 68.

[36] *Ibidem,* s. 22.

Alongside the concept of autonomy, there is the concept of financial autonomy, most often referred to as income autonomy. In this approach, it means "(...) the right of local authorities to dispose of financial resources, but also to determine and obtain them"[37].

Apart from income independence, expenditure independence is distinguished, which means freedom of decision concerning the tasks performed by local government units and the amount of funds allocated to them[38]. Taking a formal approach to the essence of financial independence both in terms of income and expenditure, it should be assumed that "The financial independence of local government units is the right of these units to run their own financial economy within the limits set by the regulations of the Constitution and the laws"[39]. Financial decision making by local government units is limited by the applicable law. From the economic point of view, when analysing the above mentioned types of financial autonomy, taking into account the division into income and expenditure autonomy, it is necessary to indicate the need to carry out their hierarchy. First, it is necessary to accumulate income, and then to determine the directions of its spending. This means that income independence should be given a higher rank than spending independence. Regardless of this distinction, it is necessary to indicate that financial independence allows the units of the tertiary government to implement a specific fiscal policy.

For this purpose, it's divided:

- the amount of the budget,
- the economic structure of budget revenues,
- the economic structure of budgetary expenditure,
- the size of the budget deficit"[4041],

The execution of public tasks requires adequate protection of financial resources. The literature indicates that this can be done using three methods: historical, task-based and compensatory. In the last method, the level of compensation is determined by the profitability of a given local government unit.

In the context indicating what role the incomes of local government units play, one should pay attention to the notion of "own income potential" of local government units, which was formulated in the literature by T. Lubinska and co-authors[42].

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[37] K. Surówka, *Samodzielność finansowa samorządu terytorialnego* Polsce, PWE, Warszawa 2013, s. 22.

[38] Por. *ibidem,* s. 25.

[39] *A. Borodo, Samorząd terytorialny..., op. cit., s. 26.*

[40] M. Kosek-Wojnar, K. Surówka, *Finanse..., op. cit.,* s. 29.

[41] *Ibidem, s. 20.*

[42] *T. Lubińska, S. Franek, M. Będzieszak, Koncepcja własnego potencjału dochodowe-*

Thus, incomes that make up their own income potential become a particularly interesting group of incomes, as they not only determine the quality of educational, Municipality or social care services, but will also affect the size of investment expenditures. The group of such income should be made an area of special interest for the bodies constituting and executive bodies of municipalities"[43].

The specificity of incomes constituting the own income potential of local government units is that they constitute, on the one hand, a stable source of income and, on the other hand, are the basis for economic and social development. In this case, it is important to separate the own investment potential, which (...) stands for the means at the disposal of the authorities after financing all current expenses and after the repayment of instalments of credits, loans, redemption of securities included in the outgoings.[44].

The considerations carried out indicate not only that the process of public funds' repartition is important, separating the revenues of the state and local government units, but also that the division and structure of revenues of local government units and paying special attention to revenues classified as own revenues play an important role.

Specificity of income distribution of local government units

The income of local government units consists of the following types:

- own income potential,
- general subventions,
- targeted grants,
- other current revenue,
- property income,
- extra-budgetary revenue (Union funds).

The above division is based on different criteria, and therefore does not have a classification character, but indicates a multitude of revenue sources on which the level of the local government unit has different influence. For this reason, another grouping of revenues is important, affecting the current and prospective situation related to the development of local government units. In this arrangement, the division between current budget revenues and investment budget is important. The former include: taxes, public-law charges, special and general subsidies, income from assets excluding in-

go i potencjału inwestycyjnego ocenie zdolności wydatkowej samorządów w świetle badań porównywanych, [w:] Podsektor samorządowy w sektorze finansów publicznych warunkach akcesji polski do unii Europejskiej, redaktor naukowy L. Patrzałek, Wydawnictwo Wyższej Szkoły Bankowej w Poznaniu, Poznań-Wrocław 2006, s. 187.

[43] *Ibidem,* s. 188.

[44] *Ibidem,* s. 194.

come from sales. In the second arrangement, income from the sale of assets, income from investment grants, income from loans and credits, transfers from the current budget.[45].

There are two categories of income in the presented classification, which differ in the type of permanent or periodic provisioning. The first is non-reimbursable income, which includes all the income that supports the investment budget, which includes income from the sale of assets, income from investment grants and transfers from the current budget. The second group consists of income back in the form of loans and credits and proceeds from the issue of securities.

Surveys conducted in three Polish cities have shown, "(...) that one can invest not only when one achieves high property income (...) but also by shaping stable current income, i.e. one's own income potential[46].

Local government units should not be self-financing units, therefore it is necessary to distinguish own and compensatory income in their income. At the same time, it should be pointed out that in this respect, own income is not the one that the above discussed own income potential is.

Own income, separated in this division, arises "(...) as a result of the repartition of sources of supply (and thus the repartition of all resources) available to the public sector between individual institutions (links) of this sector. Revenues from individual titles, e.g. taxes, fees, assets are assigned by law as sources of supply for individual investments, e.g. budgets (state, local governments), public funds, etc."[47].

Own revenues are insufficient to carry out the tasks assigned by law to local government units; therefore it is necessary to supplement them. This takes place in two forms: vertical redistribution and horizontal redistribution.

"Vertical redistribution, which is carried out within the public sector, consists of a free and non-returnable transfer of money between institutions in this sector (...). The instruments to be used for this purpose are mainly targeted, compensatory grants"[48].

On the other hand, horizontal redistribution consists in transferring funds between local government units of the same level. The system of compensatory incomes results from the implementation of the objective of limiting the economic diversification of local government units and is supposed to foster the equalisation of the quality of public services.

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[45] M. Kosek-Wojnar, K. Surówka, *Finanse..., op. cit.,* s. 52.

[46] T. Lubińska, S. Franek, M. Będzieszak, *op. cit.,* s. 197.

[47] *Ibidem,* s. 56.

[48] *Ibidem,* s. 57.

Regardless of the above mentioned features, revenues in the form of compensatory revenues are imposed by the state authority on local governments. This concerns both their level and design. For this reason, the level of coverage of expenditures of local government units with owns revenues are a measure of their financial independence[49].

In addition, it should be pointed out that "Making independent decisions concerning the establishment of public levies collected in a given area, and therefore having not full tax authority by local authorities, is a solution which leads to full autonomy of these entities"[50]. That leads to a lack of coherence across the country.

The biggest problem, however, concerns the question: at what level should the income of local government units be compensated? It seems that the most important criteria to be followed in this case is the possibility of performing tasks delegated to the local level. For this reason, it is necessary for the local government to have financial power and to be able to shape the policy of implementing public tasks. "The sense of financial authority of local government lies in the fact that local government can perform its own and commissioned public tasks provided for by the acts on its own account. Lack of sufficient elements of self-government's financial independence leads to rejection of the civil society principle."[51]

The role of own revenues in the structure of budgets of local government units

Considerations devoted to the own income of local government units require an economic and financial approach, and not only a formal and legal one. It is important to consider whether it is advisable to include in own income a share in income taxes, indicating what are their specific features and how they differ from other parts of own income. It is also important to analyse the development of proportions between these groups and what consequences this has. According to the current classification, the own income of local government units includes both tax and fee income, income from assets, as well as shares in personal income tax and shares in corporate income tax. In the case of shares in personal income tax, the place of residence of the taxpayer, and not the place of work, is decisive. With respect to corporate income tax, however, the division is made in proportion to the employment in a given area (in the case of spatial distribution of the taxed entity). It should be added to this that in both cases the index is determined by the central authority, establishing certain rights over which the local authority has no influence. It therefore remains to

[49] M. Kosek-Wojnar, K. Surówka, *Podstawy..., op. cit.,* s. 89.

[50] *Ibidem,* s. 79.

[51] A. Borodo, *op. cit.,* s. 36.

be discussed whether both sources of income, i.e. taxes and fees and shares, are justified together. In this respect, tasks are divided. According to a statement "The system of tax shares, which can be called a system of common taxes, is a developed and modern form of distribution of basic income between the state, municipalities and other communities"[52]. However, without denying the above statement, it should be pointed out that the treatment of shares as own income raises doubts. They are contained in the statement that "The amount of income tax revenue from both natural and legal persons is a symptom of the economic development of a given area. LGU should participate in the distribution of the national income generated in a given area also in the part that is redistributed to the central budget. The question arises, however, as to what form of money should it take. (...) participating, local authorities have no major influence on the volume of budget revenue. The funds due to local authorities are calculated automatically. The legislator decides on the amount of the shareholding. (...) However, this revenue does not have an incentive function (...)"[53].This is due to the inability of local authorities to influence their level, the system of obtaining and the possibility of influencing e.g. business entities. A separate issue is the fact that shares refer only to direct taxes. Indirect taxes are not taken into account, the shares of which depend not only on the activity of business entities, but also on the size of citizens' purchases, including those made in a given area[54]. This undoubtedly requires discussion.

Coming back to the main thread of the discussion, which is the issue of calculating the share of income taxes to the own income of local government units, it should be stated that the need to apply this instrument is unquestionable. However, it should be treated separately and not included in the category of own income. This is mainly due to the fact that local authorities do not have any influence on the shares, and the financial independence of local government units is focused on taxes and fees in relation to which, although limited, local authorities, in particular municipalities, have an influence. The measure of the extent of autonomy is the structure of income of budgetary units and its changes over time. Need to present data illustrating this phenomenon and to draw conclusions, concerning the possibilities of conducting a rational pro-development policy by local government units. In this context, it is worthwhile to look at the structure of own income, taking into account the income currently included in it, and then to analyse the structure of income is also taking into account repayable income.

[52] *Ibidem,* s. 29.

[53] K. Surówka, *op. cit.,* s. 65.

[54] M. Kosek-Wojnar, K. Surówka, *Podstawy finansów..., op. cit.,* s. 74.

The characteristic trends that have taken place since Poland's accession to the European Union concerning the structure of revenues of local government units have consequences for the scope of financial independence of this sector of public finance.

Own income in relation to total income exceeded 50% at the beginning of the period and then remained below 50%. It is specific that income from taxes and fees in relation to own income since 2004 has decreased from 16.5% to 13% in 2012, while income from grants and subsidies, if taken together, increased from 48.5% in 2004 to 51.0% in 2012 in relation to total income.

Table 3.1. Structure of budget revenues of local government units (in %)

	Year			
	2004	**2010**	**2011**	**2012**
total revenue	100,00	100,00	100,00	100,00
total own revenue	51,5	48,4	48,9	49,1
in this: shares in income tax	21,9	20,3	21,2	21,2
tax and fee revenues	16,5	12,5	12,6	13,0
income from assets	4,2	3,9	3,8	3,8
targeted grants	14,3	22,8	22,9	22,4
general subsidy	34,2	28,8	28,2	28,6

Source: Report on the activities of Regional Chambers of Accounts and budget execution by local government units in 2011, National Council of Regional Chambers of Accounts, Warsaw 2012, p. 158; Report on the activities of Regional Chambers of Accounts and budget execution by local government units in 2012. , National Council of Regional Chambers of Accounts, Warsaw 2013, p. 154.

As shown in the Report on the activities of the Regional Chambers of Auditors and the execution of the budget by local government units for 2011, the planned own revenues differ from the actual ones. In municipalities, the largest differences concern income from assets, and the smallest ones relate to CIT shares.[55].

Moreover, it should be pointed out that the level of own income was influenced by decisions to reduce the upper rates of local taxes together with the granted reliefs and exemptions. The reduction of the rates in 2011 was the most significant for rural municipalities and resulted in the reduction of their

[55] Sprawozdanie z działalności Regionalnych Izb Obrachunkowych wykonania budżetu przez jednostki samorządu terytorialnego 2011 roku, Warszawa 2012, s. 211.

own income by 7.8%, while the introduced reliefs and exemptions resulted in the reduction of own income by 2.3%.[56].

The presented state of the income structure of local government units in Poland has specific consequences; they are as follows:

- a decrease in the share of own revenues in the revenues of local government units results in a limitation of financial independence;
- The increased role of transfers from the state budget leads to "financial nationalisation" of local governments[57];
- The significant role of shares in income taxes in the budgets of local government units means that a significant part of revenues included in own revenues is not influenced by local authorities;
- The tax decisions taken by local authorities show that tax governance is used, which in effect involves the implementation of local budgetary policies and is evidence of local government ambiance in this sector;
- The most important element that should be taken into account in structuring the income structure of local government units is to preserve its authentic self-government. Otherwise, the division of public finances into the government and local government sectors is not justified, as the limitations of local governments in their self-determination in the shape of their own financial policies eliminate their essence.

1.4. General subsidy and payments by local government units to the state budget as elements of the financial compensation mechanism

Payments made by local government units to the state budget, as well as the parts financed by them balancing the general subsidy for municipalities and counties and the regional part of the subsidy for local government provinces together form a specific compensation mechanism. On the one hand, it serves to eliminate the unequal access of particular local government units to potential sources of income, and on the other hand, it aims to eliminate the unequal burden of expenses resulting from the implementation of the public tasks imposed on municipalities, counties and local government provinces, classified as own tasks. In this way, payments to the state budget and parts of subsidies financed by them supplement own income, which is the basic source of financing own tasks. However, the legal regulation of the payments in question and the parts of

[56] *Ibidem* s. 221.

[57] *Por. M. Poniatowicz, Wpływ Kryzysu gospodarczego na systemy finansowe jednostek samorządu terytorialnego,CeDeWu, Warszawa 2014, s. 35.*

subsidies financed by them is critically evaluated in the literature. These assessments concern primarily the institution of contributions[1]. However, the parts of the subsidy that are financed by them are analysed slightly less frequently.

Both elements of the financial compensation mechanism are accused of dysfunctionality, i.e. ineffectiveness, as a mechanism for horizontal compensation of financial resources between self-government units of a given level, and systematic and unconstitutional aspects [Bogucka-Felczak, 2013, p. 92 and 98], The basic accusation is directed against the excessive amount of payments, which violate the independence of units obliged to make them in the disposal of their own income for financing their own tasks.

The provisions regulating the institution of payments and the parts of the subsidy financed by them have also been the subject of decisions of the Constitutional Tribunal on several occasions. Generally speaking, the Tribunal, pointing out the shortcomings of the analysed regulation, found it to be compliant with the provisions of the basic state law[58]. However, in its judgment of 4 March 2014[59] ruled that the regulations of the Act on the Income of Local Government Units regulating the payments of the province's self-government[60] to the state budget and the regional part of subsidies are unconstitutional to the extent that they do not guarantee that these local government units retain a significant part of their own income to carry out their own tasks. This does not mean that the concept of a horizontal compensation mechanism is questioned in principle. Nevertheless, the normative approach to this mechanism, not only with regard to the the province's self-government, but also to the municipality and the county self-government units, will require changes[61].

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[58] Zob. wyrok Trybunału Konstytucyjnego, sygn. akt K 14/11, oraz wyrok Trybunału Konstytucyjnego z dnia 25 lipca 2006 r., sygn. akt K 30/04, lex nr 198685. Por. także uzasadnienie postanowienia Trybunału Konstytucyjnego z dnia 26 lutego 2013 r., sygn. akt S 1/13, lex nr 1312888, wydanego w trybie art. 4 par. 2 ustawy z dnia 1 sierpnia 1997 r. o Trybunale Konstytucyjnym, Dz.U. nr 102, poz. 643 ze zm.

[59] Sygn. akt K 13/11, lex nr 1436061.

[60] Ustawa z dnia 13 listopada 2003 r., t.j. Dz.U. z 2010 r. Nr 80, poz. 526 ze zm.

[61] Należy zwrócić uwagę, iż punktem odniesienia do oceny regulacji ustawowych normujących finansowanie województw samorządowych, jako jednostek samorządu regionalnego, są przepisy konstytucji z dnia 2 kwietnia 1997 r., Dz.U. Nr 78, poz. 483 ze zm. Natomiast oceny regulacji ustawowej dotyczącej tej materii w odniesieniu do gmin i powiatów należy dokonywać dodatkowo z uwzględnieniem przepisów Europejskiej Karty Samorządu Lokalnego, umowy międzynarodowej sporządzonej w Strasburgu 15 października 1985 r., Dz.U. Nr 124, poz. 607, sprost. Dz.U. z 2006 r. Nr 154, poz. 1107, formułujących analogiczne, ale bardziej szczegółowe niż ustawa zasadnicza państwa, wzorce regulacyjne. Ustawodawca polski w przepisach obowiązującej ustawy o dochodach jednostek samorządu terytorialnego przyjął jednak zbliżone rozwiązania dotyczące poziomego mechanizmu wyrównawczego w odniesieniu do jednostek samorządu szczebli lokalnych i szczebla regionalnego.

Bearing in mind the content of the Constitutional Tribunal's decision, the analysis of the institution of payments by local government units to the state budget should take into account not only the effects of these payments on the finances of municipalities, counties and provinces of local government obliged to make them. The importance of the balancing part and the regional subsidy part as a source of financing of own tasks should also be taken into account. Therefore, the subject of analysis should be the horizontal balancing mechanism as a whole, including both the payments and the indicated parts of the subsidy. The financial compensation mechanism supplements local government units' own revenue for financing their own tasks. The analysis in question cannot, therefore, abstract from the broader context, which is the problem of providing local government units with an appropriate share in public revenues and the adopted model of their own revenues used to finance their own tasks.

Subsidy, contributions and distribution of public resources between government and local government administration

It should be noted that the condition of the ability of municipalities, counties and provinces of self-government to perform the tasks assigned to them is to ensure that these self-government units have an adequate share in public income[62]. At the same time, the need to properly finance the tasks performed by the government administration must not be lost. Both self-government tasks and those implemented by the government administration are financed from the same resource. Its basic source is public income. The division of responsibility for the implementation of public tasks between municipalities, counties, self-government provinces and government administration bodies, in accordance with the provisions of the basic law of the state, therefore[63], requires an appropriate division of public revenue between these entities[64].

The condition of the appropriateness of income distribution in relation to the division of tasks should be examined at two levels, i.e.: systemic and fiscal. The distribution of public revenue at the systemic level requires that the self-government's own tasks should be financed in the form of own revenue transferred to self-government units of particular levels. Own tasks require financing from sources characterised by an appropriate scope of

[62] One bowiem, wraz z zasobami mienia, stanowią materialną podstawę realizacji zadań publicznych.

[63] Zob. art. 167 par. 1 i 4.

[64] Zob. art. 167 par. 1 i 4 Konstytucji.

freedom[65], especially as regards the allocation of financial resources for their implementation[6667] [Niezgoda, 2012, p. 127] therefore, the source of financing own tasks should in general not be targeted subsidies, significantly limiting the freedom to perform the tasks financed by them. On the other hand, in the fiscal area, the distribution of income is appropriate for tasks if at least two conditions are met. Firstly, the financial efficiency of own revenue sources transferred to local government units corresponds to the expenses that individual municipalities, counties and self-government provinces are obliged to incur for the implementation of their own tasks. Secondly, the frequency of obtaining the income must refer to the frequency of expenditures related to the implementation of these tasks.

It is difficult to meet the first of the above mentioned conditions by means of the system of own revenues of the local government, based on the model of distribution of revenue sources between the individual levels of local government and the government administration. It may even be impossible. The difficulties result from subjective and objective premises. The subjective premise is to leave the most efficient public taxes as sources of state budget revenues. This trend continues despite the transfer of successive public tasks, which in the past belonged to the government administration to municipalities, counties and local government provinces. The objective aspect, however, is the uneven distribution of the tax base across the country [Swianiewicz, 2004, p. 44], Apart from the competences of local government units, there is also the difference in the factors influencing the fiscal efficiency of local government revenue sources in relation to the factors determining the amount of expenditure that are associated with the implementation of own tasks in individual units.

Therefore, in order to ensure that local government units participate in public resources in accordance with their tasks, own revenues as a source of financing their own tasks should be supplemented by a compensatory mechanism of vertical and horizontal transfers. The first should take place between the resources of the government administration and self-government. The second: on the other hand, between the resources of territorial self-govern-

[65] Zadania własne to takie, które - jak stanowi art. 16 par. 2 ustawy zasadniczej państwa - jednostki samorządu wykonują we własnym imieniu i na własną odpowiedzialność, czyli w sposób samodzielny i kreatywny. Por. uzasadnienie wyroku Trybunału Konstytucyjnego z dnia 25 lipca 2006 r., sygn. akt K 30/04.

[66] Finansowanie zadań własnych z dochodów własnych jest jedną z gwarancji samodzielności samorządu. Por. uzasadnienie wyroku TK z dnia 25 lipca 2006 r., sygn. akt K 30/04 oraz z dnia 9 czerwca 2010 r., sygn. akt K 29/07, lex nr 583728.

[67] Co wynika z art. 9 par. 7 Europejskiej Karty Samorządu Lokalnego.

ment units of a given level. The resources obtained by self-government units under the compensation mechanism serve to finance their own tasks, therefore their legal regulation should take the form of an act and the structure should be based on objective criteria, i.e. not discretionary. This is because only then the requirements of an appropriate distribution of public income at the systemic level will be met.

Functions of the horizontal compensation mechanism

The vertical compensation mechanism, aimed at supplementing the self-government resources from the sources of state budget revenues, is the compensation part of the general subsidy for municipalities, counties and provinces and the educational part in the system of financing the local government in Poland. On the other hand, the horizontal adjustment mechanism, which performs the function of correcting the unequal access of particular self-government units to sources of income and the unequal burden of expenditure related to the implementation of own tasks[68], consist in total of: payments of self-government units to the state budget and balancing parts of the general subsidy for municipalities and counties as well as the regional part of the subsidy for self-government provinces[69]. The basis for the indicated functions of the horizontal compensation mechanism is the assumption that in formal terms the scope of own tasks of self-government units of a given level is the same. Taking this assumption, one should strive to provide them with a similar access to sources of financing for these tasks. However, expenditures on the implementation of individual own tasks are in fact different, therefore, due to the different economic situation and needs of local government communities, it is also necessary to provide additional resources in these units, which have to bear higher expenditures [Niezgoda, 2012, p. 254].

It should be noted that by transferring subsequent sources of public revenue to the individual levels of local government, the need to supplement local government resources from the resources collected by the government administration could be eliminated. In such a situation, vertical adjustment mechanisms, i.e. general subsidies from the state budget[70], would be unnecessary. The subjective reason that justifies it would be lost.

However, it does not seem possible to eliminate the horizontal compensation mechanism from the local government financing system. Its functions

[68] Na tę funkcję mechanizmu wyrównawczego, o której mowa wskazuje *ekspressis verbis* art. 9 par. 5 Europejskiej Karty Samorządu Lokalnego.

[69] Unormowane przepisami ustawy o dochodach jednostek samorządu terytorialnego.

[70] O których wprost mowa w art. 167 par. 2 Konstytucji.

are conditioned by objective premises which cannot be removed without a fundamental change in the whole model of income distribution between the government administration and local government units, as well as local government[71] tasks and the scope of autonomy of local government units. The integrity of the horizontal compensation mechanism, which includes, as mentioned above, payments by municipalities, counties and provinces of self-government to the state budget and the parts balancing subsidies for local government units[72] and the regional part for the province'sself-government, financed from these payments, should also be emphasised.

From a methodological point of view, justified by the function of the mechanism in question, it is therefore necessary to consider as incorrect the separate payments of local government units to the State budget and the parts of the subsidies financed by them[73]. For the same reason, the examination of the horizontal compensation mechanism should be assessed negatively only from the point of view of local government compensation[74]. This is because, as indicated above, it serves the current law purpose both to compensate the access to potential sources of income as well as the unequal burden of expenditure.

The shortcomings of the horizontal compensation mechanism

The literature points to a number of shortcomings in the horizontal compensation mechanism. The manifestations of dysfunctionality include, first of all, a situation in which local government units obliged to make payments at the same time receive financial resources in the form of balancing parts or parts of regional subsidies, plus incorrect calculation of tax revenue ratios based on data that are too distant in time [Miesztalski, 2012, p. 194-195]. In addition, due to the functioning of this mechanism, a defective, disproportionate, income provision of local government units is perpetuated. On the other hand, the horizontal compensation mechanism is systematic in that it deprives local government units which are obliged to make payments of their own income, especially if, as a result of making the payment, the local

[71] W literaturze przedmiotu, na podstawie rozwiązań normatywnych przyjmowanych w różnych krajach, wskazuje się kilka modeli podziału dochodów płynących z danin publicznych między władze centralne i lokalne. Należą do nich m.in.: model konkurencji podatkowej, model rozgraniczenia źródeł daninowych, dodatków do podatków oraz udziałów samorządowych w podatkach państwowych [Borodo, 2008, s. 24 i nast.]. W Polsce przyjęto, jak wiadomo, system mieszany łączący elementy modelu rozgraniczenia źródeł oraz udziały samorządowe we wpływach z podatków państwowych [Hanusz, 1991, s. 103].

[72] Tj. gmin i powiatów.

[73] Czego przejawem jest dość powszechne używanie terminu: „podatek janosikowy".

[74] Por. pt.4.3.2 uzasadnienia wyroku TK z dnia 31 stycznia 2013 r., sygn. akt K 14/11.

government unit would find itself in a financial situation similar to that of the recipient of the payment [Kamińska, Nelicki, 2012, p. 171]

In the context of the above mentioned weaknesses of the compensation mechanism, accusations are formulated as to the inconsistency with the Constitution of the provisions of the Act on the Income of Local Government Units, which regulates the institution of payments and the balancing part and part of the regional subsidy. It is argued that the Basic Law of the State, in art. 167 par. 2, provides for financing of the general subsidy exclusively from the State budget. It thus excludes the admissibility of the horizontal compensatory mechanism, the elements of which are payments by local government units to the State budget and the balancing and regional parts of the subsidy. Moreover, the incompatibility of the payments with the Basic Law of the State is to result from the fact that they deprive local government units of revenues which are constitutionally guaranteed to them [Bogucka-Felczak, 2014, pp. 99-100].

Some of the quoted critical remarks concerning the provisions of the Act on the Income of Local Government Units regulating payments and the indicated parts of subsidies should be divided. This concerns the method of determining the tax revenue ratios which determine the obligation to make payments which are the basis for calculating their amount. It refers to the data on the amount of income from the year previous to the base year[75], i.e. by two years previous to the year for which the payments are calculated. During this period, significant changes in the economic situation may occur, which will result in the amount of payments determined on the basis of distant data in time being excessive in relation to the current income potential of a given local government unit[76]. However, taking into account the above mentioned systemic context, it has to be concluded that this is an argument in favour of modifying the way the indicators are established, rather than eliminating or reducing the amount of contributions. The changes in the amount of income, and thus in the ability to finance public tasks, resulting from the above mentioned reasons, affect all local government units of particular levels, as well as the government administration to a similar extent.

First of all, however, the institution of payments should be standardised taking into account its function, which is to eliminate excessive differences[21]

[75] Zob. art. 32 par. 1 i 2 ustawy o dochodach jednostek samorządu terytorialnego.

[76] Taki też był jeden z argumentów przytoczonych przez Trybunał Konstytucyjny w powołanym wyżej wyroku z dnia 4 marca 2014 r. przemawiający za stwierdzeniem, iż kwota wpłat jednostek samorządu wojewódzkiego na finansowanie części regionalnej subwencji jest zbyt wysoka, naruszająca warunek zachowania przez województwa istotnej części dochodów własnych na finansowanie własnych zadań.

in the access of local government units of a given level to own income[22]. The amount of contributions should therefore relate to the level of differences in the income potential of each level. It should also be noted that the defects in the way the indicators are determined, which means that they do not present the income potential of particular self-government units in line with the reality, are also connected with the construction of own income. This does not apply to municipalities which have their own sources of income to the largest extent, apart from their shares in income tax receipts, also the taxes that only contribute to their budgets. For example, there is a regulation contained in the provisions of the Act on Local Taxes and Fees[23]consisting in the adoption of a maximum rate of property tax at one level across the country. It artificially inflates the income potential of rural and urban-rural municipalities [Gołębiewski, 2014, p. 115]. This reduces the amount of the basic compensatory part of the subsidy received by these municipalities from the state budget, and thus reduces their ability to finance their own tasks.

It should also be noted that the constitution does not assign specific sources of own income to local government units, or guarantee the exclusive right to use the sources provided by law. In art. 167 par. 1 and 4, on the other hand, it guarantees them a share in public income according to their tasks. Taking into account the requirements arising from the constitutional principle of self-government autonomy, the legislator shall therefore provide municipalities, counties and local government provinces with appropriate sources of own income and shall grant the bodies of these local government units the powers to conduct their own fiscal policy. However, one cannot a priori exclude the admissibility of taking over part of the revenues from the sources of own income of particular self-government units which have a much higher income potential than the remaining ones, in order to finance their own self-government tasks, if it is justified by the principle of solidarity.

To sum up, therefore, one should share the view expressed in the Constitutional Tribunal's jurisprudence that, as a rule, the horizontal compensation mechanism in the form resulting from the provisions of the Act on Income of Local Government Units is justified in the context of constitutional standards. However, this does not mean that all solutions adopted by the legislator in this aspect are optimal. On the contrary, they require changes. This applies first of all to the method of calculating tax revenue ratios and the criteria for the division of the balancing part of the subsidy for local government units and the part of the regional subsidy for local government provinces.

With regard to the point of view of the current law indicators, it should be postulated that they should be modified in such a way as to take into ac-

count the actual and current income potential of particular local government units. Therefore, they should refer to sources of own income that are efficient and provide stable income in the long term [Niezgoda, 2014, pp. 124-125], Changes in legal regulations concerning this matter should also be related, at least in relation to municipalities, to changes in the tax structure of own income sources that go in the same direction, i.e. making the income potential realistic and ensuring stability.

As regards the rules for the distribution of the abovementioned parts of the subsidy, it should be requested that they be linked to the most financially important own tasks. The use of other criteria for the selection of tasks, e.g. their importance for social or economic policy, from the point of view of the function of the horizontal compensation mechanism may be considered unjustified.

A separate issue is the amount of payments. With regard to municipalities and counties, the Constitutional Tribunal stated that the current regulation in this field does not constitute an excessive interference in the financial independence of these local government units. On the other hand, the legal regulation of payments of self-government provinces, despite the fact that it is less effective than in the case of counties, in the opinion of the Tribunal, and does not guarantee the regional self-government units to retain a significant part of their own income for the performance of their own tasks. It should be noted that the analysis of this issue requires taking into account two competing principles, to which the basic law of the state refers. One is independence, the other is solidarity. The former encourages the reduction of contributions, while the latter has the opposite effect. For this reason, any solution adopted in this regard will be subjective and may cause misunderstanding. Taking into account the functions of the financial compensation mechanism as well, it should be pointed out that there is a need to search for an optimal legislative solution that clearly distinguishes between the question of the amount of payments and the problem of indicators used to determine the income potential of local government units. It seems that the main reason for the problems of the horizontal compensation mechanism in the form resulting from the legal regulations in force is the way of calculating the income potential of particular municipalities, counties and self-government provinces, and not the amount of payments.

1.5. Educational grants for entities other than local government units in the context of coordinated control of regional chambers of account and amendments to the Education System Act in 2013

Public and non-public schools and kindergartens run by entities other than local government units shall receive grants from the budget of a local government unit according to the rules laid down in articles 80 and 90 of the Act of September 7, 1991 on the Education System respectively.

According to article 80 par. 4 and article 90 par. 4 of the Act, the body constituting the local government units shall determine the procedure for awarding and settling grants, as well as the procedure and scope of control of the correctness of their use, taking into account, in particular, the basis for calculating the grant, the scope of data which should be included in the application for awarding the grant and in the settlement of its use, and the date and manner of its settlement.

In 2012, the Law set out the rules for calculating grants as follows:

- on the base of budgeted current expenses of the municipality or county concerned, respectively, provided for or incurred in schools of the same type and type per pupil;
- in case there is no kindergarten/school run by the municipality/ county respectively - current expenses incurred by the nearest municipality/ county; on the basis of the amount provided per one student of a given school type in the educational part of the general grant for a given local government unit or units.

The current activity of the subsidised public entity according to article 80 of the Act or a non-public entity under article 90 of the Act, for which the educational grant is intended, have been specified in the provision of article 80 par. 3d and with the authorised institutions - article 90 par. 3d of the Act respectively. In the legal status in force from 22.04.2009 to 31.12.2013, grants are intended to co-finance the performance of tasks of a school, kindergarten or institution in the field of education, upbringing and care, including social prevention, exclusively to cover current expenditure.

The Act on the Education System does not define the notion of "current expenditure and uses different terminology in the scope of such expenditure, i.e. "budgeted expenditure", "budgeted expenditure [...] incurred. It also does not specify the term 'school of the same type and kind' - while no such distinction is made for kindergartens. Moreover, the Act does not specify the method of determining the number of pupils attending the schools run by the local authority necessary to calculate the amount of current expenditure per pupil (planned or

incurred) and the number of pupils of the schools for which the grant is granted, nor does it specify the method of determining the amounts provided for in the educational part of the general grant for a local authority.

Changes in the Act on the Education System in 2013[77] mainly concerned kindergartens and introduced, among other things, the principle of reducing current expenditure, which is the basis for calculating grants for public and non-public kindergartens, by fees for the use of pre-school education and meals, which constitute revenue for the municipality budget. Moreover, on the basis of article 5 of the Act of December 6, 2013 amending the Act on the Education System and some other acts[78] the formulation: "[...] in the educational part of the general grant for local government units" has been changed everywhere from plural to singular: "for local government units".

The introduced changes have not eliminated interpretation doubts as regards the calculation of grants for educational units. Under the new regulations, subsidies provided by municipalities may be spent on:

- to cover current expenses of schools, kindergartens, other forms of pre-school education and establishments, including any expenses incurred for the purposes of school, other form of pre-school education or establishment, including remuneration of an individual running a school, kindergarten, other form of pre-school education or establishment, if he or she respectively holds the position of headmaster of a school or establishment or provides classes in other form of pre-school education, except for expenses on investments and investment purchases, purchase and acquisition of shares or contributions to commercial companies;
- purchase of fixed assets and intangible assets, including:
  (a) Books and other library collections,
  (b) Teaching materials for the teaching and educational process in schools, kindergartens and establishments,
  (c) Recreational and sporting equipment,
  (d) Furniture,
  (e) Other fixed assets and intangible assets with a value not exceeding the amount specified in the corporate income tax regulations, for which amortisation charges are recognised as a tax deductible cost in 100% of their value at the time of commissioning.

Controls of financial management of local government units and questions addressed to regional chambers of account both by the l.g.u. and entities

[77] Ustawa z dnia 13 czerwca 2013 r. o zmianie ustawy o systemie oświaty oraz niektórych innych ustaw (Dz.U. z 2013 r. poz. 827).

[78] Dz.U. z 2014 r. poz. 7.

receiving educational grants indicate that the application of the provisions of the Act on the Education System raises serious problems of interpretation and leads to the adoption of significantly different methods of determining the amount of grants due in individual units.

As part of the audit of the financial management of the l.g.u., in 2013, the regional chambers of auditors carried out a coordinated audit in the scope of "Granting grants from the budgets of local government units to educational units for which entities other than local government units are the managing authority", the aim of which was to check how local government units carry out the tasks entrusted to them in the scope of non-public grants and public schools and kindergartens run by entities other than local government units.

In accordance, with article 5 par. 1 of the Act of Regional Chambers of Auditors, the controls were carried out on the basis of the criterion of legality and compliance of the documentation with the actual state of affairs and concerned the educational grants paid by local government units for 2012[79].

The inspections were carried out in 86 local government units in total, including 75 municipalities and 11 counties. For 2012, the controlled local government units provided grants to kindergartens, primary schools, junior-high schools and high schools educating children and youth in the total amount of 230,380,926 PLN, of which 112,463,737 PLN were audited, representing 48.8% of the grants provided in the controlled units.

The irregularities detected during the audit are:

1. Ignoring all current expenditure on the functioning of schools and kindergartens as the basis for calculating of the grant, including:
   a) accepting only current expenditure classified in the chapter of the budgetary classification appropriate for the given unit (e.g., when calculating the grant for a primary school, only expenditure from Chapter 80101 "Primary schools" was accepted, despite incurring and classifying expenditure related to the functioning of these schools in other chapters) - in the case of 21 grants for public kindergartens and kindergarten branches at public schools by 11 l.g.u., 57 grants for non-public kindergartens and kindergarten branches at non-public schools by 28 l.g.u. and 23 grants for public schools by 12 l.g.u.;
   b) not including all expenses related to the operation of schools and kindergartens, in particular:

[79] Szczegółowe wyniki przeprowadzonych kontroli przedstawiono w publikacji Krajowej Rady Regionalnych Izb Obrachunkowych, Sprawozdanie z działalności regionalnych izb obrachunkowych w 2013 roku, Warszawa 2014.

- for teachers' further education and training, school cafeterias, allowance for the company social benefit fund for retired teachers, renovations – in the case 30 grants to public kindergartens and kindergarten wards at public schools by 15 C.I.C., 76 grants to non-public kindergartens and kindergarten wards at non-public schools by 36 C.I.C. and 29 grants to public schools by 16 C.I.C,
- related to financial and accounting services provided to schools and kindergartens by a separate organisational unit or office of l.g.u. - in the case 24 grants to public kindergartens and pre-school establishments attached to public schools by 12 l.g.u., 49 grants to non-public kindergartens and pre-school establishments attached to non-public schools by 26 l.g.u. and 24 grants to public schools by 12 l.g.u..
  a) not taking into account expenditure of all kindergartens, kindergarten branches or schools of a given type and type operating on the territory of a given unit (e.g. liquidated during the financial year, operating in groups of schools) - in case of 3 grants for kindergarten branches at public schools by 2 l.g.u., 1 grant for non-public kindergarten by 1 l.g.u. and 4 grants for public schools by 3 l.g.u.;
  b) not taking in calculating of the grant for kindergartens, the expenditure incurred for the functioning of kindergartens attended by disabled students is not taken into account – in the case 3 grants for kindergartens.
  c) the exclusion of current expenditure included in a single budget classification division concerning various units (kindergartens, kindergarten branches, primary schools, secondary schools) proportionally per pupils of particular units – in the case of grants for 3 kindergarten branches at public schools by 1 l.g.u., 12 grants for non-public kindergartens and kindergarten branches at non-public schools by 5 l.g.u., 6 grants for public schools by 6 l.g.u.

2) Taking into account the calculation of current expenditure on the functioning of schools and kindergartens, according to different states, including on the basis of the grant calculation:
   a) a draft budget, in the case of 2 grants to non-public kindergartens (1 l.g.u.) and 2 grants to public schools (2 l.g.u.);
   b) planned at the beginning of the year - in the case of 21 grants to public kindergartens and branches of public schools (10 l.g.u.),

50 grants to non-public kindergartens and branches of non-public schools (25 l.g.u.) and 18 grants to public schools (9 l.g.u.);

c) plans for another specific day (e.g. December 5, despite subsequent changes to the budget expenditure schedule) – in the case of 7 grants to public kindergartens and branches of public schools (4 l.g.u.), 22 grants to non-public kindergartens and branches of non-public schools (10 l.g.u.) and 11 grants to public schools (6 l.g.u.);
d) realised in the previous year – in the case of 6 grants for non-public kindergartens (5 l.g.u.);
e) planned for the beginning of the year to calculate grants from January to August and planned for the beginning of September to calculate grants from September to December - in the case of 3 grants for kindergarten branches at public schools (2 l.g.u.) and 4 grants for public schools (2 l.g.u.);
f) on the basis of expenditure for December 31, 2012 (planned or executed) - 4 grants to public kindergartens and branches of public schools (4 l.g.u.), 21 grants to non-public kindergartens and branches of non-public schools (10 l.g.u.) and 4 grants to public schools (4 l.g.u.);

3) Assuming for the purpose of calculating the grant, in a situation when a kindergarten or a kindergarten branch is not running a kindergarten or a kindergarten branch, the current expenditure of the nearest municipality, according to various states, including: on the basis of information about the expenditure at the beginning of the year – in the case of 7 grants for non-public kindergartens and kindergarten branches at non-public schools (4 l.g.u.);
   a) on the base of information on expenditure incurred in the previous year – in the case of 3 grants for non-public kindergartens (2 l.g.u.);
   b) without updating at the end of the year - in the case of 6 grants for non-public kindergartens and branches for non-public kindergartens (3 l.g.u.);
   c) accepting for the calculation of grants the expenditure of schools, kindergartens and kindergarten branches of various types and kinds, including:
   d) calculating current expenses for a kindergarten students - based on expenses incurred for kindergarten classes or calculating current expenses for a kindergarten class student based on expenses incurred in kindergartens or a student of a kindergarten department based on current expenses of kindergarten and primary schools - in the case of 7 grants for kindergarten departments at public schools (7 l.g.u.),

13 grants for non-public kindergartens and kindergarten departments at non-public schools (4 l.g.u.);

e) taking into account in the calculation base of the grant for a primary school located in a rural area (below 5 000 inhabitants) the expenses of primary schools run by the l.g.u. also in the area above 5 000 inhabitants (or vice versa) - in the case of 3 grants for public schools (3 l.g.u.).

4) Accepting for the calculation of grants different ways of determining the number of pupils::
   a) schools and kindergartens run by l.g.u.:
   b) according to data of the Educational Information System (EIS) of the 30th of September 2011 - 14 grants to public kindergartens and branches of kindergartens at public schools (7 l.g.u.), 45 grants to non-public kindergartens and branches of kindergartens at non-public schools (22 l.g.u.) and 13 grants to public schools (8 l.g.u.),
   c) by number of students at the beginning of 2012 - 3 grants to branches of kindergartens at public schools (1 l.g.u.), 8 grants to non-public kindergartens (5 l.g.u.) and 8 grants to public schools (2 l.g.u.),
   d) by number of students at the beginning of 2012 - for the period January-August and as of 1 September 2012 - for the period September-December - 3 grants to branches of kindergartens at public schools (2 l.g.u.), 1 grant to public school (1 l.g.u.), average for 2012 calculated in a different way - in the case of 6 grants to public kindergartens and branches of kindergartens at public schools (4 l.g.u.), 7 grants to non-public kindergartens (4 l.g.u.) and 4 grants to public schools (2 l.g.u.);
   e) granted schools and kindergartens:
      - as at 30 September 2011 - in this case 5 grants to kindergarten branches at public schools (2 l.g.u.), 4 grants to non-public kindergartens and kindergarten branches at non-public schools (2 l.g.u.) and 5 grants to public schools (4 l.g.u.),
      - in other cases - by number of students in particular months of 2012.

5) Non-uniform methods of calculating the amount per pupil in part of the general educational grant:
   a) most frequently, the amount per pupil in the educational part was calculated as the sum of the items of the grant amount for 2012. (row 1 in the metric - SOA school tasks)[80], relation to the number of students listed in line 1 and selected items of school tasks from lines 4-30 of the

[80] Kwota bazowa części oświatowej wediug finansowego standardu A podziału części oświatowej na realizację zadań szkolnych.

(SOB)[81] calculated on the basis of the number of pupils in each line relating to the subsidised unit; where the subsidised school was attended by disabled children, the grant amount for these children was increased by the product of the number of disabled children in the given category (P2-P5)[82] in the subsidised school and the amount shown in the line corresponding to the disability group in question per child;

b) other methods and data adopted to establish the amount per pupil for the education part of the general grant:
   - not taking into account the number of students resulting from the report for 2012, including accepting the number of students according to the data reported to the SIO as of September 28, 2011, or the number of students resulting from the report reduced by 4.7% (provided for in the regulation on the method of dividing the educational part of the general grant for local government units in 2012) - for 18 grants to non-public schools (13 l.g.u.),
   - not taking into account the data concerning the amount per student resulting from the 2012 record, including establishing the amount per student as the sum of the total amount of the educational grant and the total number of students -14 grants for non-public schools (10 l.g.u.),
   - taking into account in the calculation of the amounts provided for non-school tasks (rows 31-44 of SOC), 50 grants for non-public schools (30 l.g.u.), or not taking into account the amounts for these tasks - 35 grants for non-public schools (18 l.g.u.), regardless of the tasks performed by the schools..

6) Other methods used to calculate grants:
   - calculation of the grant for pre-school branches on the basis of the amounts provided for in the education grant per school pupil, instead of on the basis of the current expenses of branches at schools provided by the municipality - 3 grants for pre-school branches at public schools (1 l.g.u.), 3 grants for pre-school branches at non-public schools (3 l.g.u.),
   - transfer of grants in the amount determined by the executive body of the l.g.u., without reference to current expenses and the number of students
   - 3 grants to kindergarten branches at public schools (2 l.g.u.), 2 grants to non-public kindergartens (1 l.g.u.) and 1 grant to public school (1 l.g.u.),

[81] Kwota uzupełniająca części oświatowej według wag P zwiększających finansowy standard A na realizację zadań szkolnych.

[82] Patrz załącznik do rozporządzenia Ministra Edukacji Narodowej z dnia 20 grudnia 2011 r. w sprawie sposobu podziału części oświatowej subwencji ogólnej dla jednostek samorządu terytorialnego w roku 2012 (Dz.U. Nr 288, poz. 1693 z późn. zm.).

- calculation of grants for kindergartens in proportion to the time of the operation of the kindergarten (5, 6, 9 hours) - 2 grants for public kindergartens (2 l.g.u.), 4 grants for non-public kindergartens (2 l.g.u.),
- not provided grants for all students (e.g. students aged 1-4 years attending a kindergarten branch at a primary school run by a municipality or students of kindergarten branches operating at school complexes are not included)
- 7 grants for pre-school units at public schools (4 units), 1 grants for the pre-school units at non-public schools (1 units) and 1 grant for public schools (1 l.g.u.),
- establishing grants for public schools based on data from the metric, although current expenditure was higher than the amount per pupil in the educational part of the general grant - 10 controlled grants (4 l.g.u.),
- calculation of current expenditure per pupil separately in each school run by the l.g.u., and then their average based on these amounts - 1 grant for the public kindergarten (1 l.g.u.), 2 grants for non-public kindergartens (2 l.g.u.) and 2 grants for public schools (2 l.g.u.).

The regulations contained in the Act of the Education System regarding the determination of grants for schools and kindergartens run by authorities other than local government units are insufficient and inconsistent, and as a result different methods of determining the amounts of grants are applied.

It is necessary to introduce provisions allowing the application of unified and unquestionable principles of their calculation, in particular:

a) defining the concept of "current expenses", because using - for the purposes of calculating grants - a very wide range, defined in the Public Finance Act and its secondary legislation, results in divergent interpretations;
b) specify which expenses should be the base for determining the grant per pupil of the granted school or kindergarten, i.e. the expenses planned, i.e. included in the budget or in the financial plans of the units, or incurred, i.e. executed in a given financial year; the expressions contained in the Act "receive for each pupil [...] in the amount equal to the expenses planned [...]". Some l.g.u. refer to the expenditure planned in l.g.u. budgets and this is reasonable for determining the planned amount of the grant for the financial year, but many l.g.u. take the erroneous view that the expenditure originally planned (unchanged) they are the basis for establishing the grant payable for the financial year, and changes to the plan (reductions or increases) made do not involve a corresponding adjustment to the amount of the grant payable for the financial year; another doubt concerns the issue of 'the expenditure of the nearest municipality or county', where

the phrase 'expenditure incurred' is used, which can be interpreted as having been effected in the financial year; the introduction of uniform concepts relating to the expenditure which forms the basis for determining the grant, while specifying which expenditure forms part of the basis for determining the grant (of a permanent nature, relating to care, education and training, defined in such a way as to preclude different interpretations, and it would be inappropriate to indicate specific headings and chapters of the budgetary classification, in view of the possibility of classifying expenditure incurred for the functioning of schools in different budgetary classification headings);

c) used in the regulations referring to the expenditure of the nearest municipality/ county, the singular: expenditure on "running a kindergarten", expenditure on "running a public school" gives rise to divergent interpretations as to how the basis for the grant is determined;
d) the change made by the law on the 13th of June, 2013 introduced the principle of reducing current expenses envisaged/incurred per one student in public kindergartens run by a municipality by fees for the use of kindergarten education and for food, which constitute revenue for the municipality's budget, without implementing such a principle in the event that there is no kindergarten run by a municipality on the territory of the municipality, where the basis for determining the amount of grant is the current expenses incurred by the nearest municipality for running public kindergartens; this issue was also ignored when calculating the amount of current expenses constituting the basis for calculating the amount of grant for public schools;
e) the possibility of excluding certain current expenditure, including, for example, the financing of union programmes, from the basis for determining grants to schools;
f) to define the basis for determining the level of grants for kindergartens and kindergarten branches, as some l.g.u. do not accept the position of the Ministry of National Education that grants for kindergartens should be determined exclusively on the basis of the expenses of kindergartens and grants for kindergarten branches exclusively on the basis of the expenses of kindergarten branches;
g) introduction of a unified method of determining both the number of students of schools run by the l.g.u. for calculating the grant base and the number of students of subsidised units where it is transferred in a given financial year (planned for a given year, actual, averaged, on a specific day, resulting from the SIO);

h) defining the concepts of 'schools of the same type and kind' and introducing this division also for kindergartens;
i) indication how to determine in detail the amount provided per pupil in the educational part of the general grant, including per pupil with disabilities in the school, when to take into account the amounts seen in the grant for non-school activities, and how to proceed in a situation where the grant does not provide for disability-related amounts and such pupils attend schools in a given year, or where the grant provides for such amounts but for a smaller number of pupils with disabilities in a given year;
j) indication of the specific provisions of the law in which, by the term 'school' - should also be understood as a kindergarten, in connection with the wording of art. 3 par. 1 of the Act of the Education System.

1.6. Credit and loan as debt titles classified as debt of a local government unit

On the 1st of January 2011, the content of the statutory delegation, contained in article 72 par. 2 of the Act of 27 August 2009 of Public Finance (i.e. Journal of Laws of 2013, pos 885 as amended; hereinafter referred to as: the Act) has changed. The Minister of Finance was not only obliged - as it was the case so far - to classify debt titles classified as state public debt, but also to indicate the types of liabilities classified as such. Using this option, the authority clarified the meaning of the terms "credit" and "loan". At the same time, it has given them a scope that goes significantly beyond the existing understanding of these terms. This change has caused a leap in the debt of some local government units. Taking into account the fiscal rules which limit the level of Municipality debt, this resulted in limiting their development opportunities. Thus, local government units were "surprised" by the new classification of debt titles. Therefore, it is not surprising that it met with criticism coming from the local government sector. It included, among other things, the allegation that the new classification of debt titles violated the provisions of the basic act.

The aim of the study is to present the motives behind the Minister of Finance's change in the classification of debt titles classified as state public debt and to indicate how this change affected the possibility of further indebtedness of local government units. The author will also attempt to answer the question whether the regulation actually violates the provisions of the basic act. To achieve the aim of the study, a legal-dogmatic analysis and a dynamic analysis, i.e. research methods commonly used in legal sciences, were used. Constitutional and statutory legal framework.

Article 216 par. 5 of the Constitution of the Republic of Poland of the 2nd of April 1997 (Journal of Laws of 1997 No 78, page 483 as amended; hereinafter: the Constitution) introduces into the Polish legal order a quantitative fiscal rule, according to which the state public debt may not exceed 3/5 of the gross domestic product (hereinafter: GDP). However, this rule is not applicable in practice. The legislator does not define the terms "sovereign public debt" and "gross domestic product", which are key to determining the disposition of the standard under article 216 par.5 of the Constitution. It only includes in the statutory matter the principle of calculating the value of both these categories. Thus, it is the legislator who should fill in the constitutional fiscal rule. The rules for calculating the value of the GDP have been defined in the Act of the 26th of October 2000 on the method of calculating the value of the annual gross domestic product (Journal of Laws of 200, No. 114, page1188 as amended), and the state public debt in articles 72 and 73 of the Act.

The concept of "sovereign public debt" is defined by the legislator in art.72 par.1 of the Act. This regulation contains a closed catalogue of debt titles being the source of liabilities taken into account when calculating the debt of particular public finance sector units, including local government units. Taking into account the economic and legal aspects of these titles, they can be divided into two groups. The first one consists of liabilities resulting from credits and loans taken out, deposits accepted and securities issued, provided that they are based on cash benefits. These titles can be included in the common name of a public loan, whose constitutive feature is its repayable character [Drwiłło, 1989, p. 14].

According to art.72 par.1 of the Act, the second group of debt titles included in the state public debt consists of due and payable liabilities resulting from separate acts, final court decisions, final administrative decisions, and recognised as undisputed by a competent public finance unit being the debtor. The obligations become payable when the debtor fails to perform within a specified period of time (the maturity date) or the jurisdiction of the obligation, and when the period of performance is not specified, immediately after the creditor calls for performance [Czachórski et al, 2002, p. 333]. However, titles of public debt do not include non-monetary liabilities. This means that under art. 72 of the Act, the term "debt" has a meaning that differs from that given to it in civil law. For example, when calculating the amount of the state public debt, based solely on statutory provisions, we should omit liabilities with deferred payment dates. However, it is not so obvious in the context of the classification of debt titles made by the Minister of Finance, which depart-

ed from the dichotomous division of liabilities into due and not due. Shape of debt titles classification

Until the end of 2010, art. 72 par. 2 of the Act authorised the Minister of Finance to determine, by way of a regulation, detailed classification of debt titles classified as state public debt, including the debt of the State Treasury. As of 1 January 2011, this provision received a new wording. The Minister of Finance was additionally authorised to indicate the types of liabilities included in the debt titles classified as state public debt. This solution poses a real danger of violation of the constitutional norm which includes the method of calculating the value of the state public debt into the statutory matter. The Minister of Finance, when determining the types of liabilities included in the debt titles, may influence the scope of this debt, and thus its size. Thus, he obtained a real influence on the final version of the fiscal rule contained in art.216 par.5 of the Constitution. However, by changing the scope of the notion of "sovereign public debt", the minister of finance would exceed his competences, entering into the matter reserved for the bodies of the constituting authority.

On the 23rd December 2010, the Minister of Finance, using the authorisation contained in art. 72 par. 2 of the Act, issued the Ordinance of the 23rd December 2010 on the detailed method of classification of debt titles classified as state public debt, including the debt of the State Treasury (Journal of Laws of 2010 No. 252, page 1692). A year later, it was replaced by the ordinance of the minister of finance on 28th December 2011 on the detailed method of classification of debt titles classified as state public debt (Journal of Laws of 2011, No. 298, page 1767; hereinafter referred to as the Ordinance).

In the Ordinance, the Minister of Finance classified the debt titles classified as sovereign public debt based on the subject, maturity and type of creditor. In the case of the former classification, liabilities considered as individual debt titles were also listed. The Minister of Finance, referring to art. 72 par. 1 of the Act, divided them into the following:

- securities other than shares, excluding derivative rights, admitted to organised trading;
- credits and loans, including public-private partnership contracts which affect the level of public debt, securities whose negotiability is restricted, sales contracts where the price is paid in instalments, leasing contracts with a producer or financier where the risks and rewards of ownership are transferred to the lessee, and unnamed contracts with a maturity of more than one year relating to the financing of services, supplies, works which have economic effects similar to a loan or credit agreement;

- deposits accepted, understood as liabilities resulting from deposits accepted by a public sector entity, being a means of financing the needs of the entity, in particular repayments of previously contracted liabilities or shortage of funds of the entity;
- matured liabilities shall be understood as undisputed liabilities whose maturity has expired and which are neither time-barred nor written off.

Analysing the classification of debt titles made by the Minister of Finance, it should be emphasised that until the end of 2010 the terms "loan" and "credit" referred to in art. 72 par. 1 of the Act were not defined by the financial law. The gap in the law regarding these institutions, derived from private law, was filled by referring to the provisions of civil and banking law [Ofiarski, 2009, p. 262], however, the Minister of Finance in the Ordinance broke with this practice, giving the terms "loan" and "credit" a much broader scope. On the basis of this implementing act, they include not only a loan and credit within the meaning of art.720 § 1 of the Civil Code Act of the 23rd of April 1964 (i.e. Journal of Laws of 2014, page 121; hereinafter referred to as the Civil Code) and art.69 par.1 of the Banking Law Act of the 29th of August 1997 (i.e. Journal of Laws of 2012, page 1376, as amended), but also many other agreements that have similar economic effects. This raises a question about the motives that were followed by the Minister of Finance when forming the content of the Ordinance [Panfil, 2014, p. 195].

Reasons for reclassification of debt titles

Financial independence of local government units is guaranteed by the Polish Constitution and art.9 of the European Charter of Local Self-Government (Journal of Laws of 1994 No. 124, page 607 as amended). It manifests itself, among others, in the access to the national capital market, where local governments can obtain repayable budgetary funds necessary to finance investment outlays. However, such activities are regulated by the legislative solutions in force, which in various ways limit the possibility of indebtedness of local government units. The possible insolvency of these units would result in the disruption of benefits due to members of local communities, the possibility of the crisis being transferred to other units, as well as an increase in state budget expenditures related to the need to provide assistance to the local government sector.

Until the end of 2013, the financial stability of local communities was guarded primarily by solutions contained in art.169 and art. 170 of the Act of 30th June 2005 on Public Finance (Journal of Laws of 2005 No. 249, page 2104 as amended). The first of those regulations limited the amount of debt of

a local government unit in an indirect way, by setting the permissible amount of expenditures and costs of debt service. On the other hand, art. 170 of the above mentioned Act introduced a quantitative fiscal rule relating directly to the debt level. Starting from 1st January 2014, these provisions were replaced by the solution contained in art. 243 of the Act, which by virtue of transitional provisions entered into force on that date. It is based on the same assumption of indirect limitation of debt of a local government unit as art.169 of the Public Finance Act of 2005. Article 243, par. 1 of the Act limits the amount for a given financial year (year x):

- repayments of liabilities incurred through public borrowing to finance the budget deficit, debt refinancing and advance financing of tasks financed from the budget of the European Union,
- interest and discounts on these liabilities, as well as on liabilities incurred to finance the transitional deficit,
- potential repayments of amounts resulting from guarantees and sureties granted by local government units.

The total amount of these items in terms of planned budget revenue (for year x) may not exceed the arithmetical average of the ratio of its current revenue, calculated over the last three years (years x-1, x-2, x-3), plus revenue from the sale of assets, less current expenditure, to total revenue. The addressees of the restrictions resulting from art.243 par. 1 of the Act are local government units, which cannot adopt a budget in the form that breaks the relationship described above.

In practice, local government units have quite quickly developed a way to "circumvent" the restrictions resulting from art.169 and 170 of the Public Finance Act of 2005. It consisted in incurring liabilities by means of instruments which could not be classified as any of the debt titles listed in art.72 par. 1 of the Act, while limiting the use of a classic loan or credit agreement. An example of this is a forfaiting agreement, which is classified as an unnamed commercial agreement. The essence of the agreement is that the forfaiter acquires a monetary receivable due to a specific entrepreneur for the sale of goods or services in exchange for an amount corresponding to the receivable less a certain commission (discount). The function of a forfaiter is performed by a specialised financial institution (e.g. a bank).It should be noted that in the case of local government units, it was they who most often initiated the use of a forfaiting agreement. From their point of view, the economic consequences of the applied solution were similar to those of a loan and credit agreement. Certain expenses were financed from the funds of the forfaiter, whose debtor, as a result of the assignment of receivables, became a local government unit. Such actions led to

the creation of hidden debt. It was not included in official statistics concerning the state public debt, but it significantly influenced the long-term financial situation of particular local government units [Panfil, 2011].

In an attempt to stop this process, the Minister of the Interior and Administration, at the request of the Minister of Finance, obliged the regional chambers of auditors to pay attention to the correctness of the classification of liabilities resulting from the postponement of payments for services, works or supplies by local government units. He underlined that in certain situations this type of liability shows features analogous to a loan and should therefore be classified as local community debt [MSWiA, 2008], This led the regional chambers of auditors to take unnamed contracts, including forfaiting contracts, into account when calculating the limits set out in articles 169 and 170 of the 2005 p.f.a.. This approach was, however, challenged by the administrative courts, which held that the statutory catalogue of debt titles is closed and cannot be extended by way of interpretation[83]. Finally, this resulted in a change in the classification of debt titles by the Minister of Finance.

Conclusions

Changes in the classification of debt titles were opposed by local government units, which were "surprised" by the new regulations. For some of them, this meant a leap in the debt level and - in the context of the fiscal rules binding on them - a limitation of the possibility of further financial liabilities. Further, it reduced the development opportunities of some local governments, which were forced to postpone the planned investment expenditures. However, the charges of unconstitutionality of some of the regulations contained in the Ordinance, raised in the course of disputes between local government units and regional chambers of account, were not taken into account by courts. The rulings made stated that this act does not contain an additional catalogue of debt titles, but only specifies the already existing ones according to the criteria indicated in the statutory delegation[84]. But it is impossible to agree with this reasoning. The Minister of Finance, by indicating in the Ordinance the liabilities included in the individual debt titles, significantly extended the subject matter of the terms "credit" and "loan", affecting the method of calculating the sovereign public debt. Such a situation should be considered unacceptable under art.216 par. 5 of the Constitution. The Minister of Finance, as one of the addressees of the restrictions resulting from the constitutional fiscal rule, cannot influence its final version. The current state

[83] Np. uchwala RIO we Wrocławiu z dnia 25 listopada 2005 r., 93/2009, OSS.2010.2.50.

[84] Np. wyrok WSA w Opolu z dnia 11 stycznia 2013 r., I SA/Op 445/12, KWANTUM 138014.

of affairs creates a dangerous precedent that threatens the credibility and thus the effectiveness of the rule. However, the intentions of the Minister of Finance are legally relevant. It is also difficult to agree with the practice of "surprising" local government units with unfavourable solutions that limit their financial independence and affect their development prospects.In particular, when such regulations are introduced through the execution of acts.

In the Ordinance, the Minister of Finance extended the subject matter of the notions of "credit" and "loan", thus responding to the practice of local government units, which by incurring liabilities under non-applicable agreements tried to "circumvent" the debt level limitations binding them. This change is fully justified and increases the financial stability of the local government sector. Nevertheless, the actions of the Minister of Finance should be considered unacceptable under art.216 par. 5 of the Constitution. The legislator explicitly stipulates that the calculation of sovereign public debt is a statutory matter. Thus, the discussed changes should be implemented by the legislator, by modifying the content of art.72 par.1 of the Act. Moreover, such an amendment should be linked to an appropriate transition period. The legislator, limiting the financial independence of local authorities, should give them time to adapt to the new regulations. A good example of this is the fiscal rule under art.243 of the Act, for which the transition period was more than four years.

Equalising income levels of local government units ("janosikowe") - directions of changes

"Janosikowe" is a mechanism regulated in article 21, article 2la, article 23, article 23a, article 25 and art. 29-31 of the Act on the Income of Local Government Units which consists in making payments to the state budget by local government units determined on the basis of statutory criteria, for the purpose of the balancing part (in the case of provinces - regional) of the general subsidy. In this way, the so-called horizontal compensation of revenues of local government units is implemented [Miemiec, 2010, p. 73], consisting in taking over the surplus of own revenues from some local government units, and then transferring the funds obtained in this way to units with a shortage of these funds [cf. Miemiec, Pest, 2013, p. 106].

The aim of the study is to present and investigate what guidelines the Constitutional Court indicated to the legislator as regards necessary changes in the horizontal compensation mechanism. The Tribunal dealt with the mechanism of horizontal compensation of revenues of local government units three times:

- in the ruling of 25 July 2006 [858687],
- in the ruling of 31 January 2013 [88] and the accompanying decision of 26 February 2013 [89],
- in the ruling of 4 March 2014 [90], in which he stated that art. 31 and art. 25 of the l.g.u. are regulated the mechanism of horizontal compensation of provinces' income is inconsistent with art. 167 paragraphs 1 and 2 in conjunction with art. 166 paragraph 1 of the Constitution of the Republic of Poland[91] to the extent that they do not guarantee that provinces retain a significant part of their own income to carry out their own tasks.

The subject of analysis in the present study are the decisions of the Constitutional Tribunal, to the extent to which the legislators indicate the guidelines for regulating the mechanism of horizontal compensation of income of local government units so that it is consistent with the Constitution of the Republic of Poland. The judgments of 2006 and 2014 concerned the horizontal compensation at the level of provinces, while the judgment and decisions of 2013 concerned this mechanism at the level of municipalities and counties. However, it seems that the de lege ferenda conclusions presented by the Constitutional Tribunal in its rulings are universal in nature and refer to the entire horizontal compensation mechanism, regardless of the local government level. For this reason, this study will discuss all the rulings and the conclusions that come from them for the legislator.

Decision of the Constitutional Court of 25 July 2006 (K 30/04)

For the first time the Constitutional Tribunal took up the horizontal compensation mechanism for provinces as a result of the motion of the Sejm of the Mazowieckie Province in its ruling of 25 July 2006.

In the justification of the judgment, the Tribunal first of all determined the type of compensatory payments in the system of income of local government units. The Court pointed out that the use of the term 'subsidy' in relation to payments from provinces is misleading, as they cannot be equated with State budget expenditure allocated to the general subsidy for local government

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86 Ustawa z 13 listopada 2003 r. o dochodach jednostek samorządu terytorialnego (tekst jedn.: Dz.U. z 2010 r. Nr 80, poz. 526 z późn. zm.), dalej: u.d.l.g.u.

87 Sygn. akt K 30/04, OTK 2006, nr 7A, poz. 86.

88 Sygn. akt K 14/11, OTK 2013, nr 1A, poz. 7.

89 Sygn. akt S 1/13, OTK 2013, nr 2A, poz. 22.

90 Sygn. akt K 13/11, www.trybunal.gov.pl

91 Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. (Dz.U. Nr 78, poz. 483 z późn. zm.), dalej: Konstytucja RP.

units. On this basis, the Tribunal concluded that the horizontal compensation mechanism is not part of the revenue of local government units referred to in art.167 par. 2 of the Polish Constitution, but a statutory exception to this regulation [cf. Dębowska-Romanowska, 2010, p. 244-245].

Next, the Court indicated the requirements that must be met for the horizontal compensation mechanism to be compatible with the Polish Constitution. The Court included:

- the statutory regulation of the obligation to make contributions and the rules for the distribution of the resulting funds in a systemic and categorical manner; the contributions are intended to be used for the needs of other local and regional authorities and not for national purposes[92];
- to determine the amount of payments in such a way as not to deprive the local government units of their own revenue to the extent that this revenue loses its essential character;
- giving payments a supplementary character, and not replacing other income of local government units indicated in art. 167 par. 2 of the Polish Constitution.

Analysing the above conditions, the Court found that the horizontal compensation mechanism is defined by law in an objective manner, and the contributions of the 'richer' municipalities are deliberate and are intended for the needs of the 'poorer' municipalities. However, the Court raised doubts as to whether, as a result of the compensatory payments, the local governments covered by the obligation to make them are able to carry out the own tasks imposed on them, and thus whether the principle of the basic nature of their own income is not violated. However, the Constitutional Court held that due to the short period of validity of the examined legal regulation, it is difficult to state unequivocally whether the introduction of compensatory payments made it impossible for the provinces covered by the obligation to make such payments to perform the tasks imposed on them by law. It is indicated in the literature on the subject that the ruling of 2006 actually reduced recognising of the basic part of the motion of the Sejmik of Mazowieckie Province as premature [Izdebski, 2013, p. 5][93]. The Court recognised, despite the doubts raised, the constitutionality of the then binding legal regulation of payments for the regional part of the general subsidy. For inconsistent with article 167 par. 1 and 4 of the Polish Constitution, only article 25 par. 8 and 9 were recog-

[92] Chodzi tu o celowość przeznaczenia środków pochodzących z wpłat wyrównawczych w budżecie państwa na część równoważącą lub regionalną

[93] subwencji ogólnej, a nie o konieczność celowego wydatkowania tych środków przez jednostki samorządu terytorialnego.

nised, which authorised the minister in charge of public finance to determine, by way of an ordinance, the method of dividing the amount constituting 30% of the regional part, in order to supplement the revenues in connection with the change in financing tasks.

Decision of the Constitutional Court of 31 January 2013 (K 14/11) and decision of 26 February 2013 (S 1/13)

The second ruling of the Constitutional Court concerning the mechanism of horizontal compensation of income of local government units was a result of the conclusions of the Warsaw City Council and the Krakow City Council. The subject of the complaint was not the mechanism of horizontal compensation, the constitutionality of which was not questioned by the applicants, but first of all the provisions containing the criteria for determining municipalities and counties obliged to make compensatory payments, the method of their calculation and the criteria for determining the beneficiaries of the part balancing the general subsidy.

Assessing the mechanism of horizontal compensation of the income of municipalities and counties, the Court found that the contested legal regulation of this institution meets the requirements set out in the ruling of 2006. The doctrine of the financial law rightly points out that the 2006 ruling concerned the constitutionality of levies for provinces, but the conditions set out in it can also be referred to the payments of municipalities and counties [Ruśkowski, 2012, p. 244-245]. The Constitutional Court stated that the payments made by municipalities and counties for the balancing part of the general subsidy are intended to satisfy the needs of local government units related to the financing of their own, rather than nationwide, obligatory tasks. Despite the fact that the horizontal compensation mechanism was deemed to be consistent with the Constitution of the Republic of Poland, the Court pointed out numerous shortcomings (dysfunctions) of this mechanism. This was reflected in a signalling decision issued on 26 February 2013 pursuant to art.4 par. 2 of the Act on the Constitutional Court. In accordance with this provision, the Court shall submit comments to the competent authorities acting in accordance with the law, on the identified deficiencies and loopholes in the law, the correction of which is necessary to ensure the consistency of the legal system of the Republic of Poland. In its decision, the Court signalled to the Parliament the need to continue legislative activities aimed at rationalising the amount of compensatory payments and the rules for the distribution of funds derived from those payments. The regulation identifies four disadvantages (dysfunctions) of the horizontal compensation mechanism:

- selective choice of criteria for determining local government units obliged to make compensatory payments,
- selective choice of criteria for determining territorial self-government units which are beneficiaries of the part balancing the general subsidy,
- no mechanism to correct the level of compensatory payments,
- the compulsory contributions exceed the compensatory needs.

Ad 1) The Court criticised the selective choice of criteria for determining the entities obliged to make compensatory payments. According to the provisions of the Act on the Income of Local Government Units, two criteria determine which local government units will be obliged to make compensatory payments: the number of inhabitants and tax revenue. According to the Court, both criteria have rights.

The first criterion, i.e. the number of inhabitants, does not take into account the specificity of large local government units, such as Warsaw and Krakow, as well as the demographic structure or seasonal population flow in cities attractive for tourism or treatment. It is worth pointing out that the conversion mechanism was already functioning in the Polish system of income of local government units on the basis of the Act on Income in force in the years 1990-2003[94]. Article 22 of this act provided, among others, a preference for municipalities with over 300,000 inhabitants. In this case the converted number of inhabitants was 354,000 plus 125% of the number of inhabitants over 300,000 [cf. Miemiec, Pest, 2013, p. 112-113], the Court also pointed out that according to art. 2 point 4 of the u.d.l.g.u., whenever the Act refers to the number of inhabitants, this is understood as the number of inhabitants actually resident in the area of a given local government unit or the area of the country, as at 31 December of the year preceding the base year, as determined by the President of the Central Statistical Office. Adoption of such a solution means that the number of inhabitants is calculated on the basis of data from two years ago in relation to the financial year.

On the other hand, in the case of the criterion of tax income, the Court did not agree with the position presented in the literature on the subject of the matter, which negatively assessed the limitation of the criteria identifying municipalities obliged to make compensatory payments only to selected tax revenues specified in article 20 par. 3 and article 22 par. 3 of the u.d.l.g.u. [Miemiec, Pest, 2013, p. 119]. In the Court's opinion, income from inheritance and donation tax is irregular, and in the case of the revenues from the fair and local fees, one can speak of an unknown number of events leading to

[94] Ustawa z 26 listopada 1998 r. o dochodach jednostek samorządu terytorialnego w latach 1999-2003 (Dz.U. Nr 150, poz. 983 z późn. zm.).

tax liabilities. However, the Court did not rule out the introduction of other solutions to determine the entities obliged to make compensatory payments, including a broader catalogue of income which would more fully reflect the tax and economic potential of local government units.

Ad 2) With regard to the criteria for determining the beneficiaries of the balancing part of the general subsidy, the Court pointed out that it would be more appropriate to take into account all the public-law own revenue of the local government units and all own expenditure of an obligatory nature. In the current legal status, the beneficiaries of the part balancing the general subsidy are determined only on the basis of selected expenditures and selected revenues of local government units of a given level.

Ad 3) In the Court's opinion, in certain situations it is justified to apply instruments correcting the amount of compensatory payments or, for example, to introduce a "prudential" limit to payments. The Court pointed to the example of a solution consisting in limiting the maximum level of the compensatory payment in relation to the tax revenues which constitute the basis for calculating the payment. The limitation of the maximum level of the levy is indicated in the study of financial law as the most important change which should be introduced in the horizontal levelling mechanism [Bogucka-Felczak, 2014, p. 103].

The necessity to introduce corrective instruments results from the fact that the obligation to make compensatory payments arises and the amount of these payments is related to the amount of tax revenues earned by a given local government unit in the year preceding the base year, i.e. on the basis of historical data from two years ago. In this period, the financial situation of a given local government unit may change significantly. The change in the economic situation, which has affected the global and Polish economy in recent years, has highlighted the weaknesses of the current method of determining the amount of compensatory payments. However, referring to article 19 of u.d.l.g.u. and article 114 par. 2.1 of the Public Finance Act[95] the Court pointed out that taking into account the tax revenues for the year preceding the base year to determine the obligation to make compensatory payments is necessary in view of the schedule regulated by law for drawing up the budget act, which determines the total amount of the general subsidy for local government units. Consequently, the data on the tax revenue of the municipalities and counties for the year preceding the base year are the most up-to-date data that can be used to calculate the general subsidy, and thus also the balancing part of it. Therefore, the Court held that referring to

[95] Ustawa z 27 sierpnia 2009 r. o finansach publicznych (Dz.U. Nr 157, poz. 1240 z późn. zm.)

data from the year proceeding the base year is not a violation of the constitutional principle of relevance.

It is noteworthy that in accordance with art. 21 of the Act on Income of Local Government Units, in the years 1999-2003, the data not for the year proceeding the base year, but for the first half of the base year were used to determine the tax income indicators of local government units. At first look, this solution allowed to base on more up-to-date data. It was, however, subject to justified criticism in the economic literature, which indicated that the second half of subsequent tax years became neutral for the calculation of tax revenues, although both the amounts of realised revenues, financial effects of lowering the upper tax rates and granted allowances, postponements, cancellations, exemptions and tax waivers were not evenly distributed in both halves [Miemiec, 2012]. The economic literature proposed then to carry out the applied calculations on the basis of data for the second half of the year preceding the base year and the first half of the base year [Walasik, 2003, pp. 24-26, 37].Ad. 4) As a dysfunction of the horizontal compensation mechanism, the Court also pointed out a situation in which the sum of funds allocated to the beneficiaries of the balancing part of the general subsidy is lower than the sum of the amounts paid to the state budget as part of the compensation payments. In the Court's view, this may indicate that the compulsory contributions significantly exceed the compensatory needs.

The Constitutional Court indicated in its decision to signalise that failure to take appropriate legislative action does not preclude the Court from reassessing the criticised regulations from the point of view of their constitutionality (on the basis of an appropriate application). In the Court's opinion, increasing dysfunctions in this respect, if the financial situation of local government units continues to deteriorate, may lead to a violation of the constitutional principle of appropriateness. The Court's statement has proved to be prophetic.

Decision of the Constitutional Court of 4 March 2014 (K13/11)

The horizontal compensation mechanism for provinces became the subject of examination by the Constitutional Court just over a year after the judgment on municipalities and counties. The applicant was again the Sejmik of Mazowieckie Province. In the judgment of 4 March 2014, the Court stated that articles 31 and 25 of u.d.l.g.u., which constitute the legal basis for the horizontal compensation mechanism for provinces, to the extent that they do not guarantee that provinces retain a significant part of their own revenues for the performance of their own tasks, are inconsistent with article 167 par. 1 and 2 in conjunction with article 166 par. 1 of the Polish Constitution.

In assessing the horizontal compensation mechanism, the Constitutional Court has paid attention to the change in the economic situation in relation to the moment of its creation. The legal regulation of payments for the regional part of the general subsidy was created in conditions of economic growth, and its construction does not take into account strong changes in the income of local governments resulting from cyclical fluctuations in the economy. The lack of adjustment of the mechanism to the conditions of the economic crisis became apparent when the payments of provinces for the regional part of the general subsidy increased significantly and at the same time there was a strong decrease in tax revenues which were the basis for calculating these payments. In the Court's opinion, when constructing horizontal compensation mechanisms, the legislator should take into account the cyclical economic boom and downturn phases, especially if the basis for own revenue of a given level of local government is tax revenue highly sensitive to such fluctuations. Referring to the requirement of the basic nature of own revenue and changes in the economic situation of local governments in the conditions of the economic crisis, the Court found it inconsistent with the Constitution of the Republic of Poland that the horizontal compensatory mechanism lacks any regulations protecting local government units against excessive loss of own revenue. The Court also pointed out that it is sufficient for the horizontal compensation mechanism at a certain level of local government to lead to a violation of the principle of autonomy or relevance in any entity, and the whole system should be assessed as unconstitutional. In the Court's view, since the horizontal compensation mechanism does not contain any 'prudential' barrier, and also in view of the need to rely on data from two years ago, with the current wording of the provisions identifying local governments obliged to make compensation payments in extreme economic conditions, a local government unit may be charged with payments higher than its own revenues earned in the financial year. Such a situation may lead to liquidation of the institution of own income in the financial resources of a Province, which is contrary to article 167 par. 2 of the Polish Constitution.

However, the Court did not question the constitutionality of the reliance on data from two years ago to calculate the income potential of local government units, thus sharing the position expressed in the 2013 ruling. However, it clearly stressed the drawbacks of this solution, especially in a situation of economic downturn.

Accordingly, it should be considered that the condition indicated by the Constitutional Court for the constitutionality of the horizontal compensation mechanism is the introduction by the legislator to this mechanism of a 'prudential' limit of payments, consisting in limiting the maximum level of com-

pensation payments. This is to ensure that local government units retain a significant part of their own revenues for the performance of their own tasks. The Court has already pointed to such a necessity in its rulings of 2013.

The second issue, to which the Court paid attention in the present case, was the criteria for designating local government units obliged to make compensatory payments and for determining the beneficiaries of part of the regional general subsidy.

The horizontal compensation mechanism contains other criteria for identifying local governments obliged to make compensatory payments, and others in the case of determining the beneficiaries of these payments. In the Court's view, there is a lack of symmetry in this area. The lack of reference in article 31 par. 1 and article 25 of the u.d.l.g.u. to the full financial situation of provinces, including both income and expenditure needs, was considered by the Court to be inconsistent with article 167 par. 1 and 2 in connection with article 166 par. 1 of the Polish Constitution. According to the Court, the legislator should formulate unified criteria for determining the entities obliged to make payments, as well as the beneficiaries of part of the regional general subsidy. The Court indicated that these criteria should take into account the full catalogue of revenues of local government units, as well as their spending needs, in order to reflect the income and economic potential of local government units as objectively and fully as possible.

In the case of calculating the income potential of a given local government unit, the Court indicated that the basis for the calculation should be the "full catalogue of income". Did the Court refer to all the income of local government units specified in Article 167 (2) of the Constitution of the Republic of Poland, i.e. own income, general subsidy and earmarked subsidies? It seems that this approach is too wide-ranging. When calculating income potential, all public-law own income should certainly be taken into account, but not property income [cf. Miemiec, Pest, 2013, p. 119]. The literature also points to the possibility of including in the income criterion income received under the compensatory and educational part of the general subsidy [Nelicki, 2014]. However, the income criterion should not include special purpose subsidies or funds obtained by local governments under European programmes [Nelicki, 2014].

On the other hand, in the case of the expenditure criterion, it seems that it should be all own expenditures of an obligatory nature at the level related to the national average, taking into account also the demographic structure of units (e.g. large cities) and the specificity of some localities (e.g. seaside and spa towns) [Miemiec, Pest, 2013, p. 125],

The analysis of subsequent judgements concerning the horizontal adjustment of revenues of local government units allows distinguishing two areas of potential statutory changes, indicated by the Constitutional Court. The first group is the changes that are necessary for the compensation mechanism to comply with the Constitution of the Republic of Poland. These changes must be introduced by the legislator within 18 months from the day on which the decision in case K 13/11 was announced. Their lack will cause that the horizontal compensation mechanism at the level of provinces will stop functioning after that date. The second group is the changes that the legislator should introduce, but their lack will not cause the legal regulation of this institution to be incompatible with the Constitution of the Republic of Poland.

Necessary changes include:

- Introduction of a horizontal "prudential" threshold limiting the maximum level of the compensation payments into the compensation mechanism,
- Forming unified criteria for determining territorial self-government units obliged to make compensatory payments and being beneficiaries of the balancing (regional) part of the general subsidy. These criteria should cover both the income potential and the expenditure needs of local government units, while the changes that the legislator should introduce, the lack of which will not, however, make the legal regulation of the horizontal compensation mechanism unconstitutional:
- Change of the population criterion by moving away from the actual number of inhabitants to the conversion number, which will allow taking into account the specificity of large cities,
- Abandoning the use of historical data (data from the year preceding the base year) when calculating the number of inhabitants of local government units and their income potential.

The indicated changes are necessary, as a result of the judgment of the Constitutional Court, directly only in the case of the horizontal compensation mechanism at the Province level. However, it seems that the legislator should use this opportunity to reform the whole horizontal compensation mechanism, also on the level of municipalities and counties, as stated by the Constitutional Court. The amendment of regulations concerning only provinces would probably end with another application submitted to the Court, this time by a municipality or a county. Such a motion would most probably lead to a statement that the horizontal compensation mechanism is unconstitutional also at these levels of local government. It only remains to appeal to the legislator not to risk another application to the Constitutional Court, but to use the opportunity to repair the whole mechanism.

1.7. Costs of financing the deficit of local government units as the subject of an opinion of the regional chamber of auditors

The foundation for the creation of local self-government, just after the end of 1989, was a common conviction for democratic countries that it was necessary to entrust the exercise of elements of public authority to local communities. This way of exercising state authority, flowing from positive law [Banszak, 2012, p. 138], was considered one of the ways of implementing the principle of national sovereignty [Balaban, 2003, p. 107]. The Constitution of the Republic of Poland, approved years later, consolidated the political independence of the local government, which means, in particular, the possibility to decide on one's own affairs within the framework of the law in force [Jagoda, 2011, p. 21].

Following the establishment and broad definition of the responsibilities of municipalities entrusted with activities in public matters of local importance not reserved by law for other entities[9697], the mechanism of their financing followed, which was intended to enable them to carry out their mission. The legislator was then accompanied by a conviction that the planned deficit was inadmissible, which was expressed in the wording of the provision, that Municipality budget expenditures could not exceed revenues[98]. However, since January 1991, this content has already been changed[99], autonomy of local government units, with legal personality and property, manifesting itself not only in the selection of priority tasks but also in the formation of the deficit and incurring liabilities to finance it, resulted in these units gaining access to the financial market, whose instruments they began to make extensive use of. The possibility of incurring liabilities in this respect was treated as a systemic element, the deprivation of which would violate the subjectivity of local government units [Glumińska-Pawlic, 2003, p. 150], This led not only to huge, beneficial social and civilisation changes in Poland, but also to disturbing phenomena, including the huge indebtedness of local governments, which is now part of the global trend of the excessive indebtedness of countries, including the local governments operating within them. To illustrate the scale

[96] *Konstytucja Rzeczypospolitej Polskiej* z dnia 2 kwietnia 1997 r. (Dz.U. z 1997 r. Nr 78, poz. 483 z późn. zm.).

[97] Art. 6 par.l ustawy z dnia 8 marca 1990 r. O *samorządzie terytorialnym,* (Dz.U. z 1990 nr 16, poz. 95 z późn zm.).

[98] Art. 57 ustawy z dnia 8 marca 1990 r. *O samorządzie terytorialnym,* (Dz.U. z 1990 nr 16, poz. 95 z późn zm.).

[99] Art. 74 pt.2 ustawy z dnia 5 stycznia 1991 r. *Prawo Budżetowe* (Dz.U. z 1991 Nr 4, poz.18 z późn. zm.).

of activity of local government units and the needs, it should be pointed out that, according to the available data, in 2012, there were 2975 local government units and their unions in total, whose income at that time amounted to over PLN 177 billion and expenditures over PLN 180 billion[100]. The level of debt of local government units in 2012 amounted to over PLN 67 billion, of which over 42 billion were liabilities under loans and borrowings and nearly 5 billion under debt securities issues.

In this context, one of the numerous threads related to the indebtedness of local government units is worth noting, which is the role of the opinion of the regional chamber of auditors in determining the costs of deficit financing. Therefore, one of the elements of opinions issued in accordance with art. 246 of the Public Finance Act will become the subject of consideration[101], i.e. the assessment of the cost of raising funds to finance the deficit. In 2012, the Regional Chambers of Accounts issued 1544 statements on the possibility of financing the deficit on the basis of the draft budget law, of which 42 were negative and 1966 statements on the possibility of financing the deficit on the basis of the budget law, of which 8 were negative[102].

Specificity of the activities of regional chambers of auditors

Independence is not an absolute value; hence the emergence of local government was accompanied by a discussion on developing a system of supervision, control and support for its financial management. Regional chambers of account have already been indicated in the Act on local government[103], as entities controlling the financial management of municipalities and their associations. Approved two years later, the Act on Regional Chambers of Accounts[104], it was ultimately the product of developing an original, Polish model of control and supervision [Stec (ed.), 2010, p. 43].

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[100] Sprawozdanie Krajowej Rady Regionalnych Izb Obrachunkowych z działalności RIO i wykonania budżetu przez jednostki samorządu terytorialnego w 2012 r., http://www.rio.gov.pl/html/sprawozdania_rio/2012/PDF/sprawozdanie_za_2012.pdf (dostęp 12 czerwca 2020).

[101] Ustawa z dnia 27 sierpnia 2009 r. finansach publicznych (Dz.U. z 2009 r. Nr 157, poz. 1240 z późn. zm.).

[102] Sprawozdanie Krajowej Rady Regionalnych Izb Obrachunkowych z działalności RIO i wykonania budżetu przez jednostki samorządu terytorialnego w 2012 r., http://www.rio.gov.pl/html/sprawozdania_rio/2012/PDF/sprawozdanie za_2012.pdf, s. 44 (dostęp 12 czerwca 2020).

[103] Art. 62 par.l ustawy z dnia 8 marca 1990 r. *O samorządzie terytorialnym,* (Dz.U. z 1990 nr 16 poz. 95 z późn. zm.).

[104] Ustawa z dnia 7 października 1992 r. *o regionalnych izbach obrachunkowych,* (tekst jednolity Dz.U. 2012 poz. 1113 z późn. zm.).

For further consideration, it is important to underline that control and supervision, in the traditional sense, are typically of an intrusive nature, and simple recourse to repressive instruments could cancel out that self-government's independence by imposing totally unacceptable solutions on the local community, while at the same time giving rise to illusory responsibility for their shortcomings. It has therefore become important to find a mechanism that can reconcile these values. The solution turned out to be the proper application of the regulations on the supervision of local government, according to the rules: proportionality in influencing local government; using repressive instruments as a last resort; moderation and precision [Dębowska-Romanowska, 2013, p. 14].

The role and importance of regional chambers of auditors can therefore only be correctly understood after an autonomous interpretation of their constitutional mandate[105][106]. Monitoring based on the criterion of legality over the political representation of the community must have a different content and character than the administrative or hierarchical supervision over administrative bodies [Dębowska-Romanowska, 2013, p. 16]. Moreover, supervision carried out by the regional chambers of auditors concerns the management of local government property, which operates within the limits of the law and independently, in accordance with political will, decides on its purpose [Dębowska-Romanowska, 2013, p. 14], Only the awareness of these elements of the specificity of the operation of regional chambers of auditors, as guardians of the state's interests, allows for proper consideration of their statutory functions.

Source of problems

As a consequence of the already marked system independence of local government units, a wide range of their duties, it became common to undertake very costly investments. With limited non-returnable sources of financing, this led to an increase in budget deficits and, as a consequence, the need to use the so called "repayable income", and thus to incur a whole range of liabilities under loan and credit agreements, bond issues, and a number of other instruments. The freedom of action of local authorities included not only the choice of priority objectives to be achieved, but also the choice of ways of promoting them, with often over-optimistic assumptions as to the amount of costs and the possibility of incurring them.

[105] Art. 171 Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U. z 1997 r. Nr 78 poz. 483 z późn. zm.).

[106] Ustawa z dnia 7 października 1992 r. *o regionalnych izbach obrachunkowych,* (tekst jednolity Dz.U. 2012 poz. 1113 z późn. zm.)

This led to the situation in which many local government units found themselves in a difficult situation. This difficulty results, first of all, from the inadmissibility of exceeding the statutory barriers limiting the level of indebtedness of particular local government units, additionally modified in the course of taking up and implementing the obligations already contracted. The second barrier started to be financial institutions, which are less and less willing to cooperate with those self-government units whose financial condition raises concerns about their actual creditworthiness, and thus about the possibility to meet their obligations in accordance with the agreement.

The need to be satisfied, while at the same time not being subjectively limited as to the provider of funds, has given rise to a worrying phenomenon of loans taken out by local government units in a difficult financial situation in the so-called parabank institutions with very high financial costs. This also became the subject of parliamentary question No. 25139[107] addressed to the Minister of Finance. The Ministry of Finance, on the base of information obtained from the Regional Chambers of Accounts, indicated that 16 local government units were in debt in these institutions for the total amount of nearly PLN 105.9 million and the interest rate was up to 12.94% per year.[108]. The key question is therefore whether the opinion of the regional chamber of auditors issued under article 246 of p.f.a. also includes an analysis of the costs incurred by the local authority to raise funds to finance the deficit and the specific of that opinion.

The subject and nature of the opinion

In accordance with article 246 par. 1 of the Public Finance Act, on the basis of a draft budget resolution, the Regional Chamber of Accounts presents an opinion on the possibility of financing the deficit presented by one local government unit. This solution also applies to the budget resolution itself.

The phrase used - the possibility of financing the deficit - within the meaning of the aforementioned provision, means not so much an agreement to finance, but an assessment of the capacity to fulfil the intention of covering the deficit. Consequently, a regional chamber of auditors, having at its disposal a draft budget resolution and the resolution itself, examines both the amount of the deficit, the chosen method of financing it and the costs which are associated with such financing. It is the costs of the chosen method of financing the deficit that are the key issue from the point of view of these considerations. In order to understand the subject of the opinion, it is important to consider its legal nature.

[107] http://orka.sejm.gov.pl/izo7.nsf/wwwl/i25139/$File/i25139.pdf (dostęp 14 czerwca 2020).
[108] http://prawo.rp.pl/artykul/1106260.html(dostęp 14 czerwca 2020).

The opinion, as one of the elements of substantive support for local government units, is in principle an assessment of facts with the use of subjective or statutory criteria of the evaluator [Ofiarska, Ofiarski, 2013, p. 249], In the letter of the subject matter [Ofiarska, Ofiarski, 2013, p. 249][109] is indicated on various features of the opinion, depending on the adopted criterion. It is therefore highlighted that: opinions shall be issued on the basis of and within the scope of the law; the subject matter of the opinion should fall within the scope of the opinion-giving body; they shall be addressed to entities outside the organisational structure of the regional chamber of auditors; the opinion shall, in principle, be obtained at the preliminary stage of the examination of the weld. It should be noted, however, that the person issuing the opinion is not a co-decision maker.

An important feature of an opinion is therefore freedom of expression, which must not be confused with freedom. This freedom is determined by the limits of the applicable law, the circumstances of the case, the principles of logical reasoning and the experience of the authority issuing the opinion. This logical, convincing, comprehensive justification of one's position after considering all the circumstances of the case under review is the real value of the opinion.

The opinion on the possibility of financing the deficit is therefore, among other things, the result of an analysis of the costs of financing as an element included in the budget, as indicated by the principles of completeness, unity and detail of the budget.

In that light, the question arises: how far, then, can a regional chamber of auditors carry out an analysis of the circumstances of a regional chamber of auditors in assessing the costs of obtaining funds to finance the deficit? According to what criteria should it operate? If the perception is based on the fact that the freedom of local and regional authorities, as already discussed, to assume obligations, including their costs, and the fact that the opinion of the regional chamber of auditors is essentially based on a criterion of legality, then the conclusion is that, as long as the mandatory legal provisions are not violated, a negative opinion should not be given because of the abnormally high costs of debt service. Such a conclusion, however, would be too broad and would leave the issue of examining the costs of financing the deficit, as a component of the budget, illusory.

The solution to the problem is to consider the legal form indicated by the legislator, in which the regional chamber of auditors is obliged to adopt its position and therefore its opinion. Its nature does not include instruments of exercising power over the content of the resolution; it does not limit independence in deciding on obligations. Since the opinion is an assessment and

[109] Oraz podana tam literatura.

an instrument of support for local government units, the analysis of both the actual situation on the financial market and the situation of an individual local government unit may induce the regional chamber of auditors to issue a negative opinion in a specific case when the projected or adopted cost of debt service is inadequate, too high in relation to the circumstances and possibilities of obtaining cheaper financing. Therefore, the assessment of the draft budget resolution contains an element of evaluation also of economy [Chojna-Duch, 2012, p. 296], in this element, a negative assessment of intentions reveals the foundation of the existence of regional chambers of auditors, which is a preventive measure. The advisory activity also in science is described as a preventive function [Glumińska-Pawlic, 2003, p. 233]. It should be noted that one of the principles determining the distribution of income is the principle of rationalisation of the costs of activities in the situation of limited resources [Glumińska-Pawlic, 2003, p. 412]. Therefore, it cannot be considered that the Regional Chamber of Accountancy would be limited in expressing a negative opinion on the planned or adopted amounts of the costs of financing the deficit if those costs were to be incurred at an inappropriate amount.

Although the opinions of the regional audit chamber are not binding, it should be taken into account that they represent the objective position of a professional body supervising the financial activities of local government units. Local government units do not always have to fully share the position contained in these opinions, but it should at least be taken into account[110]. It is difficult to underestimate their role and influence on the form of obligations in the situation of the obligation to publish them, as it openness is one of the important principles of public finance management [Gliniecka, Dzwonkowski, 2013, p. 150],

It should be remembered that the costs incurred in order to obtain the deficit financing are of a complex nature and are inextricably linked to the selected source of financing. These costs consist of a number of elements, including, depending on the financial instrument, among others: costs of rating, financial advisory, commissions, collaterals, fundraising, price of financial service, costs of experts, experts, fees for early repayment, costs of issue, purchase guarantee [Gonet, 2006, p. 145], [Filipiak, Dylewska, 1997, p. 23]. In this context, referring only to the interest rate of the funds is obviously insufficient. The analysis should cover all the costs of raising funds, including such costs as: commissions, fees, additional fees, and fees for early repayment of receivables, possibilities of changing the agreement, collaterals, and

[110] Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 18 stycznia 2006 r. III SA/Wa 3368/05.

contractual penalties. It should be emphasised that the Regional Chamber of Accountancy has the possibility to obtain source documents from which significant financing risks may directly result.

The reflection on this element is a cause for concern, since nowadays it is necessary to consider the introduction of statutory subjective restrictions on lenders of local government units, when the public authorities themselves do not notice the dangers of borrowing over PLN 100 million from entities whose funds have no clear provenance.

CHAPTER 2.
LOCAL TAXES AND CHARGES

2.1. Legal and functional issues of exclusions and exemptions from public charges

The structural element of the public charge is exclusions and exemptions whose functional meaning, although similar, is not identical. It is undoubtedly common to both situations that they do not involve the payment of a public charge. It is worth repeating that the exemption from the public charge is a state included in the scope of the charge, although eliminated from charging it on the basis of an explicit legal provision introducing such exemption. The exemption applies to situations which are not covered by the public charge at all. It follows from the mutual relation between exemption and exclusion that if a specific situation or state is subject to a single public charge, although it is exempt from it, then most often it will not be subject to charging other public charges. The exemption from charging one public charge does not exclude charging another public charge.

Exemptions from a public charge may be of a subjective or objective nature, each time determined by the objectives set out in the tax policy. For example, for social reasons, there may be exemptions from a public charge for people in a state of poverty. In the absence of a definition of the legal situation in which a person liable to pay a public charge must be considered to be in a state of poverty, it is possible, in the search for the meaning of the concept of an important interest of the person liable to pay the charge, including in particular the threat to his or her existence, to refer, in the alternative, to the directives contained in the judicial decisions[111]and in the provisions of the Social Assistance Act[112]. It follows from them that the right to social assistance is due, in particular, to poverty, so that a person who acquires the right to social assistance will not be required to pay a public fee. However, the state of poverty can be demonstrated in any other way, as all means of proof to that effect are admissible. It is also possible to exempt from the public charge persons whose state of poverty is undoubtedly known to the public authority collecting the charge in connection with their official activities.

[111] Por. wyrok NSA z dnia 13 listopada 1998 r., I SA/Lu 1121/97 (niepubl.).

[112] Art. 7 ustawy z dnia 12 marca 2004 r. o pomocy społecznej (Dz.U. Nr 64, poz. 693).

Exclusions and exemptions from stamp duty

The material scope of the stamp duty is influenced by a developed catalogue of exemptions, which - for the sake of clarity - can be grouped into several groups (of a social, political and economic nature) showing their functions. Exemptions of a social nature include making an official act, issuing a certificate and permission (permit) and submitting a document confirming the appointment of a proxy or proxy and their copies (excerpts), as well as other related documents, e.g. copies in the following types of cases. Firstly: maintenance, custody, guardianship and adoption[113]. Secondly, social security[114], health insurance[115], structural pensions, reliefs as defined in the special regulations for non-professional soldiers and conscripts on substitute service and their families, as well as entitlements for disabled persons and persons covered by the regulations on specific entitlements for veterans[116]. Thirdly, social benefits [117] and in matters dealt with under social welfare and social employment regulations. Fourthly: employment and remuneration for work[118]. Fifth: science, education[119] and after-school education and health. Finally, the social character of the exclusions from the subject of stamp duty of applications, official acts, certificates and permits in matters of housing construction, which, in the absence of a strictly defined catalogue of such matters, raises doubts as to the scope of this exclusion.

[113] Ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy (Dz.U. Nr 9, poz. 59) z późn. zm.

[114] Ustawa z dnia 13 października 1998 r. o systemie ubezpieczeń społecznych (Dz.U. Nr 137, poz. 887) z późn. zm.; ustawa z dnia 25 czerwca 1999 r. o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa (Dz.U. Nr 60, poz. 636) z późn. zm.; ustawa z dnia 20 grudnia 1990 r. o ubezpieczeniu społecznym rolników (tekst jednolity: Dz.U. z 1998 r. Nr 7, poz. 25) z późn. zm.

[115] Ustawa z dnia 27 sierpnia 2004 r. o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych (Dz.U. Nr 219, poz. 2135).

[116] Ustawa z dnia 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych (Dz.U. Nr 123, poz. 776) z późn. zm.; ustawa z dnia 24 stycznia 1991 r. o kombatantach oraz niektórych osobach będących ofiarami represji wojennych i okresu powojennego (Dz.U. Nr 42, poz. 371) z późn. zm.

[117] Por. pismo LK-PB-928/LM/JB/04 Ministerstwa Finansów z dnia 19 maja 2004 r., „Biuletyn Skarbowy" 2004 r., Nr 3, s. 20; ustawa z dnia 28 listopada 2003 r. o świadczeniach rodzinnych (Dz.U. Nr 228, poz. 2255) z późn. zm.; ustawa z dnia 25 czerwca 1999 r. o świadczeniach pieniężnych z ubezpieczenia społecznego w razie choroby i macierzyństwa (Dz.U. Nr 60, poz. 636) z późn. zm.

[118] Ustawa z dnia 14 grudnia 1994 r. o zatrudnieniu i przeciwdziałaniu bezrobociu (tekst jednolity: Dz.U. z 2003 r. Nr 58, poz. 514) z późn. zm.

[119] Por. pismo LK-1728/LM/BP/2001 Ministerstwa Finansów z dnia 20 września 2001 r., „Biuletyn Skarbowy" 2001, Nr 6, s. 29; pismo LK-1589/LM/JB/01 Ministerstwa Finansów z dnia 5 listopada 2001 r., „Biuletyn Skarbowy" 2001, Nr 6, s. 30.

Exemptions of a public nature cover the following types of cases. First - election of the President of the Republic of Poland [120][121], elections to the Seym, Senate [122], European Parliament [123] and local government bodies [124] and a referendum [125]. Secondly, the universal defence obligation[126], with the exception of decisions on granting consent to Polish citizens to serve in a foreign army or in a foreign military organisation. Thirdly - performing an official act and issuing a certificate in cases of changing the surname and first name(s) and establishing the spelling of the first name and surname of persons, who were unlawfully changed, as well as their descendants and spouses[127]. Fourthly - acquisition of Polish citizenship by repatriation and confirmation of citizenship acquired in this way [128], the residence of citizens of the Member States of the European Union and their family members on the territory of the Republic of Poland and the residence of citizens of the countries of the European Economic Area which do not belong to the European Union or countries which are not parties to the Agreement on the European Economic Area but, on the basis of agreements concluded with the European Community, enjoy freedom of movement for persons and their family members[129]; about granting the refugee status, granting asylum, permit for tolerated stay and in matters of temporary protection; compensation within the meaning of the Act of 8 July

[120] Por. wyrok NSA z dnia 18 grudnia 1995 r., SA/Wr 2211/95, „Monitor Podatkowy" 1996, Nr 9, s. 284.

[121] Ustawa z dnia 27 września 1990 r. o wyborze Prezydenta Rzeczypospolitej Polskiej (tekst jednolity: Dz.U. z 2000 r. Nr 47, poz. 544).

[122] Ustawa z dnia 12 kwietnia 2001 r. - Ordynacja wyborcza do Sejmu Rzeczypospolitej Polskiej i Senatu Rzeczypospolitej Polskiej (Dz.U. Nr 46, poz. 499) z późn. zm.

[123] Ustawa z dnia 23 stycznia 2004 r. - Ordynacja wyborcza do Parlamentu Europejskiego (Dz.U. Nr 25, poz. 219).

[124] Ustawa z dnia 16 lipca 1998 r. - Ordynacja wyborcza do rad gmin, rad powiatów i sejmików województw (Dz.U. z 2003 r. Nr 154, poz. 1547) z późn. zm.

[125] Ustawa z dnia 14 marca 2003 r. o referendum ogólnokrajowym (Dz.U. Nr 57. poz. 507) z późn. zm.

[126] Ustawa z dnia 21 listopada 1967 r. o powszechnym obowiązku obrony Rzeczypospolitej Polskiej (Dz.U. z 2002 r. Nr 21, poz. 205) z późn. zm.

[127] Ustawa z dnia 29 września 1986 r. - Prawo o aktach stanu cywilnego (Dz.U. Nr 36, poz. 180) z późn. zm.; ustawa z dnia 15 listopada 1956 r. o zmianie imion i nazwisk (Dz.U. z 1963 r. Nr 59, poz. 328) z późn. zm.

[128] Ustawa z dnia 15 lutego 1962 r. o obywatelstwie polskim (tekst jednolity: Dz.U. z 2000 r. Nr 28, poz. 353) z późn. zm.; ustawa z dnia 9 listopada 2000 r. o repatriacji (tekst jednolity: Dz.U. z 2004 r. Nr 53, poz. 532).

[129] Ustawa z dnia 27 lipca 2002 r. o zasadach i warunkach wjazdu i pobytu obywateli państw członkowskich Unii Europejskiej oraz członków ich rodzin na terytorium Rzeczypospolitej Polskiej (Dz.U. Nr 141, poz. 1180) z późn. zm.; por. pismo LK-835-34/MB/05/167 Ministerstwa Finansów z dnia 11 maja 2005 r., „Biuletyn Skarbowy" 2005 Nr 3, s. 23.

2005 on exercising the right to compensation for leaving real estate outside the current borders of the Republic of Poland[130].

Exemptions may also be of an economic nature and then include, firstly, the performance of an official act and the issue of a certificate in matters of direct payments to agricultural producers[131]. Secondly, the Agency for the Restructuring and Modernisation of Agriculture and the Agricultural Market Agency issue certificates and permits in matters relating to their performance of tasks under the Common Agricultural Policy and other tasks concern the organisation of agricultural markets, which, however, does not apply to tasks relating to the administration of foreign trade in agri-food goods. Thirdly - official activities in matters subject to regulations on real estate management[132]. Fourthly, a permit issued by the minister in charge of the environment or the Province governor for activities related to active nature protection.

Exemptions from stamp duty are of various nature: objective (for example: powers of attorney in criminal cases), subjective-objective (for example: exemption of notifications or applications for performing an official action or applications for issuing a certificate or permit or documents confirming the granting of a power of attorney or a power of attorney submitted by persons who prove that they benefit from social welfare benefits due to poverty) and subjective.

Subjective exemptions - with reference to the same example - cover four categories of entities.. They primarily concern foreign countries[133], their diplomatic representations[134], consular offices[135] and the armed forces, international organisations and institutions and their branches and agencies, but provided that they are such as to enjoy privileges and immunities under laws, agreements or generally accepted international custom[136]. This type of ex-

[130] Ustawa z dnia 8 lipca 2005 r. o realizacji prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami Rzeczypospolitej Polskiej (Dz.U. Nr 169, poz. 1418).

[131] Por. pismo LK-835-13/JK/05/22 Ministerstwa Finansów z dnia 11 lutego 2005 r., „Biuletyn Skarbowy" 2005 r. Nr 2, s. 24.

[132] Ustawa z dnia 21 sierpnia 1997 r. o gospodarce nieruchomościami (tekst jednolity: Dz.U. z 2000 r., Nr 46, poz. 543) z późn. zm.

[133] Por. W. Góralczyk, *Prawo międzynarodowe publiczne,* Warszawa 1999, s. 123 i nast.

[134] Por. Konwencja Wiedeńska o stosunkach dyplomatycznych sporządzona w Wiedniu dnia 18 kwietnia 1961 r. (Dz.U. z 1965 r. Nr 37, poz. 232).

[135] Por. Konwencja Wiedeńska o stosunkach konsularnych sporządzona w Wiedniu dnia 24 kwietnia 1963 r. (tekst jednolity: Dz.U. z 1982 r. Nr 13, poz. 98).

[136] Przykładowo, takie przywileje posiadają przedstawiciele Organizacji Współpracy Gospodarczej i Rozwoju na podstawie umowy zawartej między Rządem Rzeczypospolitej Polskiej a Organizacją Współpracy Gospodarczej i Rozwoju o przywilejach i immunitetach Organizacji, sporządzonej w Paryżu dnia 16 stycznia 1995 r. (tekst jednolity: Dz.U. z 2002 r. Nr 22, poz. 207). Podobnie Konwencja dotycząca przywilejów i immunitetów Narodów Zjednoczonych, zatwierdzona przez Ogólne Zgromadzenie Narodów Zjednoczonych (tekst jednolity: Dz.U. z 1948 r. Nr 39, poz. 286).

emption shall also apply to the staff of these entities and other persons treated as such. The exemption is not unconditional. It is applicable if the said entities are not Polish citizens and do not have their permanent residence on the territory of the Republic of Poland, and it is applied under the assumption of reciprocity. Subjective exemptions include - secondly - budgetary entities[137], and, thirdly, the local government units[138]. In the last case, exemptions from the fee are granted to municipalities, counties and local government Municipalities. However, it is not subject to activities carried out by associations of local government units (art. 64 of the Act of Municipality Self-Government[139], art. 65 of the Act of County Self-Government[140]) created in order to carry out their tasks together, which should be regarded as an erroneous and unintended legislative effect. It is clear that associations of local and regional authorities should enjoy the same rights as the entities that create them.

A subjective exemption is also granted to public benefit organisations if they report or apply for an official action or apply for a certificate or permit, or issue documents - exclusively in connection with gratuitous public benefit activity within the meaning of the provisions on public benefit activity and volunteerism[141].

Finally, individuals carrying out active species protection and individuals whose farm, forestry or fishing is exposed to damage caused by protected animal species not covered by State Treasury compensation are exempt from the levy in so far as they relate to subjects of the stamp duty related to nature protection.

The social function is performed in the stamp duty, in particular those subjective exemptions which include persons making an application or applying for an official act or applying for a certificate or permit (permit, concession), or submitting a document confirming the granting of full power of attorney or a power of attorney, or a copy (excerpt or copy) thereof, will present a certificate on the receipt of social assistance benefits due to poverty.

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[137] Por. pismo LK-1225/LM/BG/01 Ministerstwa Finansów z dnia 22 czerwca 2001 r., „Biuletyn Skarbowy" 2001 r„ Nr 4, s. 17.

[138] Por. pismo PO 6-B-8051-0383/92 Ministerstwa Finansów z dnia 31 grudnia 1992 r., „Rejent" 1993 r., Nr 1, s. 103; pismo LK-1364/LM/BG/01 Ministerstwa Finansów z dnia 25 września 2001 r., „Biuletyn Skarbowy" 2001, Nr 6, s. 31.

[139] Ustawa z dnia 8 marca 1990 r. o samorządzie gminnym (tekst jednolity: Dz.U. z 2001 r. Nr 42, poz. 1591) z późn. zm.

[140] Ustawa z dnia 5 czerwca 1998 r. o samorządzie powiatowym (tekst jednolity: Dz.U. z 2001 r. Nr 142, poz. 1592) z późn. zm.

[141] Ustawa z dnia 24 kwietnia 2003 r. o działalności pożytku publicznego i wolontariacie (Dz.U. Nr 96, poz. 873) z późn. zm.; ustawa z dnia 24 kwietnia 2003 r. - Przepisy wprowadzające ustawę o działalności pożytku publicznego i o wolontariacie (Dz.U. Nr 96, poz. 874) z późn. zm.

The preventive function is performed by exemptions from stamp duty for natural persons conducting active species protection and natural persons whose farm, forest or fishery is exposed to damage caused by protected animal species not covered by State Treasury compensation, as far as they relate to stamp duty subjects related to nature protection.

Exclusions from the consular fee

Exclusions from the scope of the consular fee [142] are broad in scope and include consular activities[143], made upon request or in the interest of the parties, which, like the exclusions from the scope of the subject matter of the stamp duty, can be grouped together, at the same time indicating their role.

A wide and justified group of exclusions from the consular fee is constituted by exclusions of activities undertaken by consuls in order to protect the rights of Polish citizens under local legislation, agreements and generally accepted international customs in case of violation of these rights by the authorities of the host country; activities consisting in taking minutes of hearing the parties, witnesses, experts and service or extraction of documents - at the request of Polish public administration bodies; activities undertaken at the request and on behalf of Polish public administration bodies; activities in matters regulated in the Act on repatriation[34] [144]; activities in favour of foreigners to whom the Polish authorities have granted asylum or have given the status of refugee, in the scope of matters related to their arrival on the territory of the Republic of Poland; in connection with granting diplomatic and service visas in diplomatic, service or ordinary passports, on the basis of reciprocity; in connection with granting visas to participants of conferences, scientific symposia, Polish language courses, anniversary celebrations and other events organised by Polish public administration bodies; activities undertaken in cases of medals of merit, benefits for participation in the war on war damages, compensation and reparation for Nazi, communist and other crimes constituting crimes against peace, humanity or war crimes, as well as in cases related to applications for documents submitted to the Institute of National Remembrance - Commission for the Prosecution of Crimes against

[142] Rozporządzenie Ministra Spraw Zagranicznych z dnia 14 sierpnia 2003 r. w sprawie opłat konsularnych (Dz.U. Nr 156, poz. 1530) z późn. zm.

[143] Ustawa z dnia 11 listopada 1924 r. o organizacji konsulatów i o czynnościach konsulów (Dz.U. Nr 103, poz. 944); ustawa z dnia 17 czerwca 1959 r. o uregulowaniu niektórych spraw konsularnych (Dz.U. Nr 36, poz. 225); ustawa z dnia 13 lutego 1984 r. o funkcjach konsulów RP (tekst jednolity: Dz.U. z 2002 r., Nr 215, poz. 1823) z późn. zm.

[144] Ustawa z dnia 9 listopada 2000 r. o repatriacji (Dz.U. Nr 106, poz. 1118) z późn. zm.

the Polish Nation[145]. This group of exclusions from the scope of the consular fee should also include activities undertaken by consuls in connection with evacuation from endangered areas.

The second group of exclusions of consular activities from the scope of the consular fee consists of educational exclusions, which cover issues related to the arrival and studies of scholarship holders directed from Poland to study abroad and scholarship holders of foreign citizens taking up studies in Polish secondary and higher schools or directed to internships in scientific and research institutions. The third group of exclusions is made up of exclusions related to employment and social and pension and immigration supply of employees of Polish offices servicing public administration bodies, delegated abroad on business or sent there to work, as regards matters directly related to their stay abroad. They also concern matters related to the claims of Polish citizens for compensation of damages resulting from an accident at work or an occupational disease, as well as claims for pension provision for employees and their families, war-disabled persons and veterans and their families, from social insurance or social welfare, and claims for alimony or for care and guardianship of a Polish citizen.

Finally, among the exclusions from the scope of the consular fee are those that can be described as social and include consular activities carried out on behalf of persons who have reached a certain age limit (70 years) on the date of application for the passport, as well as persons who are residents of social welfare homes or care facilities and whose stay abroad is related to long-term treatment or surgery.

The consular fee reliefs are also instrumental. They are granted for economic reasons (when the rate of the fee exceeds the payment capacity of a significant group of consular office stakeholders or in individual cases, justified by the personal situation of the party) or social reasons (pensioners, disability pensioners and invalids, as well as their spouses, who are their sole dependants; persons staying in social welfare homes or care facilities or benefiting from social welfare in the form of permanent benefits; veterans, as well as pupils and students).

Exclusions and exemptions from court fees in civil proceedings

Exclusions from the obligation to pay court fees in civil proceedings, being an important element of access to justice, fulfil a social function. Court fees are not charged on certain motions (for granting security, submitted in a let-

[145] Ustawa z dnia 18 grudnia 1998 r. o Instytucie Pamięci Narodowej - Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu (Dz.U. Nr 155, poz. 1016) z późn. zm.

ter initiating the proceedings; for accepting a declaration of recognition of the child, for giving the child a surname, for adopting the child, for taking away a person subject to parental authority or being under guardianship; for hearing a witness in an oral will, for opening and announcing the will and for releasing the executor of the will; which is the basis for the court to initiate proceedings ex officio, as well as on the letters submitted to the guardianship court in performance of a statutory duty or imposed by the court; for the restoration of lost or damaged files), certain complaints (against the court's decision refusing or revoking exemption from court costs and refusing or revoking the appointment of an advocate or legal adviser, as well as against the court's decision on the amount of the fee or the amount of expenses, against the order of the President to return the letter or against the order of the court to reject the appeal), certain complaints (against the decision of the court referendary on exemption from court fees and refusal to appoint an advocate or legal adviser) and against an action for compensation for financial loss suffered as a result of a restriction of freedoms and human and civil rights during a state of emergency[146].

Social (right to a court) as well as economic aspects, should be explained by the fact that no court fees are charged on the application, complaint and appeal of a minor in proceedings concerning minors.

In the catalogue of subjective exclusions from the obligation to pay a court fee in civil proceedings, including for example: a party claiming paternity or maternity and related claims; a party claiming maintenance; a party claiming to declare contractual provisions inadmissible; an employee bringing an action or a party appealing to the labour and social security court, it is worth paying particular attention to a solution that takes into account the material situation of economically weaker population groups.

A party may be exempted from court fees in its entirety by law or court order[147]. The court may grant a party partial immunity from legal costs if the party is only able to bear part of them. A partial exemption from costs may consist in waiving either a fraction or a percentage of the costs, or a specified amount thereof, or certain charges and expenses. It may also consist in granting relief in respect of a certain part of the claim or in respect of certain claims asserted jointly, which the court means in its decision to grant partial relief from court costs.

[146] Ustawa z dnia 22 listopada 2002 r. o wyrównywaniu strat majątkowych wynikających z ograniczenia w czasie stanu nadzwyczajnego wolności i praw człowieka i obywatela (Dz.U. Nr 233, poz. 1955).

[147] Por. uchwala SN z dnia 12 lipca 2006 r., III CZP 110/06; postanowienie Sądu Apelacyjnego w Białymstoku z dnia 19 września 2006 r., I ACa 571/06, „Orzecznictwo Sądu Apelacyjnego w Białymstoku" 2006, Nr 4 s. 23.

Exemption from court costs may be claimed by an individual who has declared that he is unable to bear them without prejudice to his subsistence and his family. Exemption from court costs may be granted to a legal person or an organisational unit which is not a legal person to which legal capacity is granted by law, if it has demonstrated that there are insufficient funds to pay them. Public benefit organisations are not obliged to pay court fees[148], except for cases concerning the business activity conducted by these organisations, as well as non-governmental organisations, legal entities for organisational units acting on the basis of the provisions on the relations between the State and the Catholic Church in the Republic of Poland[149], about the relationship of the State with other churches and religious associations and guarantees of freedom of conscience and religion, if their statutory objectives include conducting public benefit activities and associations of local government units - in matters concerning the implementation of the commissioned public task. The court may exempt from court costs social organisations whose task does not consist in carrying out economic activity, in their own cases carried out in connection with social, scientific, educational, cultural, charitable, self-help, consumer protection, environmental protection and social welfare. When deciding on this issue, the court considers first of all the statutory objectives of the organisation's activity and the possibilities and needs of achieving these objectives through civil proceedings.

The court shall refuse to grant an exemption from court costs to a party where the claim or the defence of rights is manifestly unfounded[150], and if he has doubts as to the real estate of the party claiming or benefiting from immunity from legal costs, he may order an appropriate investigation. The court shall revoke the exemption from legal costs if it appears that the circumstances on the basis of which it was granted did not or no longer exist. It shall be repressive in nature to order a party who is exempt from legal costs on the basis of knowingly giving false information not only to pay all prescribed fees and expenses but also a fine.

These solutions prove the protective function of court fees, which limit the abuse of justice institutions while respecting the right to a court. The implementation of the principle of equality before the law and the existence of real economic differences that shape the social situation of citizens impose an obligation on the state to provide the financially weaker party with procedural and legal assistance. For this purpose, it also uses exemptions from court fees.

[148] Ustawa z dnia 24 kwietnia 2003 r. o działalności pożytku publicznego i wolontariacie (Dz.U. Nr 96, poz. 873) z późn. zm.

[149] Ustawa z dnia 17 maja 1989 r. o gwarancjach wolności sumienia i wyzwania (tekst jednolity: Dz.U. z 2005 r. Nr 231, poz. 1965) z późn. zm.

[150] Por. orzeczenie SN z dnia 30 stycznia 1963 r., II CZ 3/63, OSPiKA 1963, Nr 11, poz. 286.

Exemptions and reductions in passport (visa) fees

Social, are exemptions from the passport fee for people who are 70 years old on the date of applying for a passport, and who are inmates of social welfare homes or care institutions, if they move abroad for long-term treatment or in connection with with the need to undergo surgery.

The incentive function of the passport fee is implemented through a widely used, both in the interwar and post-war period, discounting system. In the interwar period, the reduced rate of the fee was applied e.g. to encourage people to gain education abroad, go there for scientific research, take part in social gatherings, etc. For many years in post-war Poland, a passport fee reduced to half of the initial rate was applied to persons referred for treatment abroad by the Ministry of Health and Social Welfare and to young learners who intended to spend their summer holidays abroad, as well as to pensioners and pensioners.

Some reductions in the passport fee, e.g. for pensioners, disabled people[151], as well as spouses of such persons, their sole dependants, persons staying in social welfare homes or care institutions or receiving social assistance in the form of permanent benefits, war veterans - participants of group trips organised by war veterans' associations, going to the places of fighting or extermination and members of the closest family of fallen participants in the fights of the anti-Hitler coalition, going to visit their graves[152], as well as pupils and students, cannot be used as tools to influence their decisions. In these cases, reliefs do not have an incentive effect. They are given for social reasons.

The instrumental character can be found, however, in the reliefs (in the amount of 50% of the rate) applied in the fees for issuing and exchanging the residence card, the Polish travel document for a foreigner or the Polish identity document for a foreigner[153]. They can be included in two groups, the first of which is of an economic nature and is motivated by the difficult financial situation of a foreigner, and the second one is educational and can be used by those foreigners whose purpose in staying on the territory of the Republic of Poland is to study at a post-gymnasium school and a higher education institution or participate in trainings and professional internships implemented under European Union programmes.

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[151] Ustawa z dnia 27 sierpnia 1997 r. o rehabilitacji zawodowej i społecznej oraz zatrudnianiu osób niepełnosprawnych (Dz.U. Nr 123, poz. 776) z późn. zm.

[152] Ustawa z dnia 24 stycznia 1991 r. o kombatantach oraz niektórych osobach będących ofiarami represji wojennych i okresu powojennego (Dz.U. z 2002 r. Nr 42, poz. 371) z późn. zm.

[153] Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 18 sierpnia 2003 r. w sprawie opłat pobieranych od cudzoziemców za wydanie i wymianę karty pobytu i innych dokumentów w sprawach cudzoziemców (Dz.U. Nr 151, poz. 1472).

On the basis of the previously formulated observations, it can be concluded that public levies are a traditionally used instrument for the implementation of the tax policy. A public-private association (state or local government unit) uses public charges as a powerful form of public revenue in pursuit of various objectives, and uses various public charges to achieve a specific objective.

The scope of functions performed by charges in the system of public revenue and the effectiveness of their impact through them are varied.

The public charges function is carried out by means of their appropriate legal structure. The influence of a public-private entity on decisions (behaviours, attitudes) charged with a public charge results primarily from appropriate determination of its object and amount, but also from exemptions and exemptions from the charge.

Operating with the construction of the object, but also with exclusions and (reliefs) exemptions from public charges affects the scope and effectiveness of their functions (fiscal and intervention). It is the simplest and least complicated form of influence, the effectiveness of which depends on the degree of accuracy of the differentiation of exclusions and (reliefs) exemptions from public charges. In the Polish system of sovereign public revenue there are both public charges, which are an expression of correct differentiation of these elements of their legal structure from the point of view of their functions (e.g. stamp duty), and charges in which the differentiation of these elements is insufficient for the public charge functions to be fully executed (e.g. passport charges).

SAC, analysing the status of the budgetary unit in the resolution of 24 June 2013, examined the premises for recognising the entity as a taxpayer of value added tax. It focused mainly on organisational separation, principles of financial management of the budget unit and responsibility.

SAC in the resolution of 24 June 2013.[1] did not question the organisational separation of budgetary units. However, it considered that the financing of the entity's activity from the municipality's budget means that it does not bear any economic risk and cannot be considered as conducting economic activity independently. According to the SAC, the fact that an entity covers its expenses directly from the Municipality budget, 'does not have any income at its disposal', there is no 'financial result', and all activities are carried out in the name and on behalf of the municipality as part of the allocated funds and does not bear the risk related to its result, results in the fact that it cannot be considered a tax payer. Thus, that court assumed that, since a budgetary unit is financed entirely by the municipality, it could not be regarded as a taxpayer separate from the municipality because of the origin of those funds. However,

if you refer to article 15 of the Value Added Tax Act of 11 March 2004 [154][155] or the rules of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[156], it will be difficult to find a source of financing for the expenditure of an entity as a taxpayer. In the case of organisational units, it is indeed always the case that these entities are equipped with funds for their activities (share capital, subsidies, and contributions to the company). It is also necessary to equip public entities with means to perform statutory tasks. However, it is impossible to agree that the method of providing funds for activities may determine whether a given entity is considered a tax payer. If we assume that a given structure is organizationally separated in such a way that it manages the entrusted funds itself, the result of this economy (income, loss, lack of result) cannot affect the status of the taxpayer. Let us recall: article 9 par. 1 of Directive 112 states that a taxpayer is any person who independently carries out any economic activity anywhere, regardless of the purpose or results of such activity, i.e. any "result", including financial effect, has no meaning here.

On the other hand, the organisational separation and the specific financial autonomy do not yet create an independent taxpayer. After all, an organised part of an enterprise is not an independent entity (e.g. a branch of a legal entity). However, there is no doubt that a budgetary unit cannot be compared with a branch of a legal person because its independence is incomparably greater. This "lack of economic risk" is said to result from the method of financing. If there is an organisationally separate structure which has a certain degree of independence in its operations and doubts arise as to its status as a taxpayer, it is necessary to pay attention to whether it carries out taxable activities (for a fee). In the author's opinion, in such a case the key importance should be attached not to the source of financing expenses, but to the performance of taxed activities. This circumstance should be decisive.

The legal issue resolved by the SAC is very similar to that which was the subject of the CJEU judgment of 29 October 2009 in Case C-246/08 Commission of the European Communities vs Republic of Finland. The dispute in this case concerned the taxation of legal aid services provided by public legal aid offices. The legal aid was provided for a partial consideration which did not cover the costs involved. The Commission took the view that the exclusion from taxation of such activities by the offices is incompatible with

[154] Sygn. akt I FPS 1/13.

155 Tekst jednolity Dz.U. z 2011 r. Nr 177, poz. 1054 ze zm„ zwana dalej „ustawą z dnia 11 marca 2004 r.".

156 Dz. Urz. UE L 347 z dnia 11 grudnia 2006 r., s. 1, zwana dalej „Dyrektywą 112".

European Union law and distorts competition. The Finnish Government, on the other hand, submitted that the legal aid services provided by the public legal aid offices form an inseparable whole which cannot be regarded as an economic activity within the meaning of the VI Directive.[157]. The remuneration received did not cover all the costs associated with the services provided, they were essentially financed by public funds. Therefore, in the view of the Finnish Government, the performance of these activities did not involve the economic risks inherent in normal commercial activities.

The CJEU did not share either the Commission's or the Finnish government's position. It pointed out that 'the concept (economic activity) is defined in article 4 par. 2 of the Sixth Directive as covering all activities of producers, traders and persons providing services, and in particular the use of property rights in tangible or intangible goods for the purpose of continuously making a profit (see in particular the judgments: Case C-465/03 Kretztechnik [2005] ECR 1-4357, paragraph 18; Hutchison 3G and Others, paragraph 27). An analysis of these definitions shows that the concept of economic activity has a broad scope of application and its objective nature, which means that the activity is perceived as such, irrespective of its objectives or results (see in particular the judgments: Commission vs Greece, cited above, paragraph 26, and Case C-223/03 University of Huddersheld [2006] ECR 1-1751, paragraph 47 and the jurisprudence cited therein). In principle, an activity also qualifies as an economic activity if it is permanent and is carried out in return for the remuneration received by the author of the transaction (see judgments: Commission v Netherlands, cited above, paragraphs 9, 15; judgment of 13 December 2007 in Case C-408/06 Gotz [2007] ECR I-9481, paragraph 2. (see judgments in Case C-408/06 Gotz [2007] ECR 1-11295, paragraph 18)'. The CJEU further stated that 'given the objective nature of the concept of housekeeping activities, the fact that the activities of the State offices consist of performing functions conferred and regulated by law in the general interest and without any commercial or entrepreneurial purpose is irrelevant in this respect. In fact, Article 6 of the Sixth Directive expressly provides for certain activities carried out under a statutory authorisation to be subject to the VAT system (see, to that effect, the above-mentioned judgments: Commission v Netherlands, paragraph 10, Commission v Greece, paragraph 28)".

These theses deserve full approval. It follows from them that in order for a given entity to be considered a taxpayer, the circumstance of acting with-

157 Szósta dyrektywa Rady z dnia 17 maja 1977 r. w sprawie harmonizacji ustawodawstw Państw Członkowskich w odniesieniu do podatków obrotowych - wspólny system podatku od wartości dodanej: ujednolicona podstawa wymiaru podatku (77/388/EWG) (Dz. Urz. WE L 145 z dnia 13 czerwca 1977 r., s. 1.

in a specific legal framework (including that designated by public law), the economic account of the activity, or its purpose and result, is irrelevant. The decisive factor is the permanent performance of taxable activities in return for remuneration. Therefore, the key issue is the performance of taxed activities by an organisational unit, which in the case of budgetary units took place.

It is clear from the jurisprudence that the source of financing of expenditure has no impact on the right to deduct input tax resulting from the expenditure of funds received. Can it therefore have an impact on tax subjectivity? In the resolution of 24 October 2011[158] After all, the SAC ruled that events outside the scope of taxation do not affect the right to deduct input tax and are not included in the deductible tax rate. Obviously, the source of financing is not without significance for the tax, as some transfers create turnover (Art. 29 par. 1 of the Act of March 11, 2004. - as regards subsidies having a direct impact on the price of goods or services).

Public finances of local government units

What about responsibility? Is this a criterion for determining tax subjectivity? Yes, and no. If we refer to art. 15 par. 3 of the Act of 11 March 2004, it turns out that lack of responsibility towards third parties results in lack of tax subjectivity. However, such a thesis is no longer so obvious if we take into account art. 14 of this act: this provision concerns, among others, taxation of goods remaining after the dissolution of the civil partnership. This is a simple consequence of giving the civil partnership the status of a taxpayer of goods and services tax. Only that a civil partnership does not have an organisational separation, it finances its activities from the contributions of its partners, and moreover, it carries out every action as a taxpayer in the name and on the account of its partners - they remain responsible for all obligations of the partnership. It has neither legal capacity nor the ability to perform legal actions. It is an agreement under which partners (separate entrepreneurs) conduct business activity (no doubt). Obviously, legally separate company assets are created, but in legal and economic sense they remain under the control of the partners, but their freedom to dispose of these assets is limited. The reading of the justification to the SAC's resolution of 24 June 2013 leads to the conclusion that not only budgetary entities are not taxpayers, but also e.g. civil partnerships.

According to the author, the view expressed in this resolution is unjustified. The SAC focused unnecessarily on the sources of financing of activities, and paid too little attention to the fact that budgetary units performed activities subsidised as organisationally separate entities. This made them taxpay-

[158] Sygn. akt I FPS 9/10.

ers, not their financial result. In the light of the existing jurisprudence of the SAC and the CJEU, there was no justification for depriving budgetary units of their tax subjectivity.

2.2. Legal nature of the period for issuing a decision fixing the adiacency fee

Since the financial crisis of 2008, which had a direct impact on the state of public finances, including the amount of income, municipalities have started to use their powers to improve their financial situation. Recently, one of such "new" sources of income has become the Adiacenta tax. However, in practice, due to the imprecise definition of the time limit within which it is possible to issue a decision establishing the fee, there are discrepancies in the interpretation and application of the law in this respect, which is confirmed by the case law of administrative courts. Due to the complexity of the procedure for setting the adiacenta fee, the inconsistency of the jurisprudence is another obstacle for local government bodies in the correct application of law.

The aim of this study is to present and order the views of the doctrine and jurisprudence concerning the determination of the legal nature of the time limit for issuing the decision establishing the fee.

The basic research method of the conducted argumentation is the analysis of the jurisprudence and views expressed in the literature.

Legal nature of the Adiacente fee

The Adiacenta fee is a public tribute paid to the municipality, constituting its income. Due to the paid nature of the adiacenta fee, it cannot be regarded as a tax [M. Bielecki, 2010]. This view has been confirmed by the case law of the administrative courts[159]. The legal bases for establishing the adiacency fee are set out in Articles 98a, 107(1) and 144 of the Real Estate Act (REA).

The basic premise allowing the competent authorities of the municipality to determine the adiacency fee is the increase in the value of the property, which may occur as a result:

- Division of real estate by an administrative decision of the municipality's executive body or by a final judgment of a civil court (Article 98a REA),
- Real estate consolidation and division by way of a resolution of the Municipality council on the consolidation and division of real estate (Article 107 REA),
- Construction of technical infrastructure facilities (REA Article 144).

[159] Por. wyrok NSA z 20.12.2002 r,, sygn. akt I SA 342/01, Legalis.

In the case of an adiacency fee established on the basis of art. 107 of the REA the deadlines for paying the adiacency fees are set by the head of the municipality, the mayor or the president of the town, by way of an agreement with the persons obliged to pay them, by signing a memorandum of understanding. In the event of failure to reach an agreement, the date and method of payment is decided by the Municipality council, adopting a resolution on the merging and division of the property. However, the deadline set in the resolution cannot be shorter than the deadline for the construction of technical infrastructure facilities. The Adiacence fee is set by the head of the municipality, the mayor or the president of the city, by way of a decision, in accordance with the settlement or resolution on the merging and division of real estate (Article 107(4) of the REA). The regulation introduces a special method of setting the date of payment of the Adiacency Fee, ordering the executive body of the municipality to first attempt to settle the matter amicably and to set the date of payment of the Adiacency Fee with the participants in the merger, before adopting a resolution in this respect. The decision to set the fee is issued after the resolution on the merging and division enters into force. In this decision, the date of payment of the fee is determined on the basis of a settlement or on the basis of the aforementioned resolution [Wolanin, 2013, com. to art. 107]

Otherwise the time limit for the decision fixing the adiacency fee under articles 98a and 144 of the REA has been regulated. In the first case, under article 98a par. 1 of the REA, the adiacency fee may be fixed within three years from the date on which the decision approving the division of the property became final or the decision on the division became final. On the other hand, according to Article 145 par. 2 of the REA, a decision on the determination of the appraisal fee may be issued within three years from the date on which the conditions for connecting the real estate to particular technical infrastructure facilities were created or from the date on which the conditions for using the constructed road were created, if on the date on which those conditions were created a resolution of the Municipality council determining the percentage rate of the appraisal fee was in force. This means that in the case of adiacency fees issued on the basis of the conditions set out in articles 98a and 144 of the REA it is the act that sets the deadline for issuing a decision setting the adiacency fee and not a settlement or a resolution, which is the case with the adiacency fee issued pursuant to article 107 of the REA.

"Determination" of the Adiacency Fee and when the Adiacency Fee liability arises

The regulations cited above only seem to be unambiguous and have no doubt about their interpretation. In practice, however, they present quite a number of difficulties in their application, particularly with regard to meeting the three-year deadline for establishing and materialising the obligation to pay the Adiacenta fee. The most problematic is the interpretation of the notion of "determination", and in particular of the moment when this "determination" takes place and when the obligation to pay the Adiacent Fee arises. This is also due to the fact that the legislator has used different terms in all the regulations on the determination of the Adiacency Fee, indicating that:

- The adiacency fee may be fixed within three years (art. 98a par.1of REA),
- The decision to set the adiacency fee can be made within three years (art. 145 par. 2 of REA),
- The adiacency fee is fixed by decision, in accordance with the settlement or resolution on the merging and division of real estate (art. 107 par. 4 of REA).

While, as already indicated, the third case is of a special nature, it may be questionable whether the setting of the adiacency fee is the same as the decision to charge the adiacency fee. Basing the interpretation on the assumption that there is a rational legislator, it should be assumed that since two different terms are used in one normative act, the legislator did so intentionally. This in turn may lead to the conclusion that the determination of the Adiacency Fee is something different from the issuance of a decision on the determination of the Adiacency Fee, which in turn will result in a different moment in which the Adiacency Fee obligation arises, which may be important in order to meet the three-year deadline. Furthermore, in the first sentence of Article 98a par. 1 of the REA, the legislature stated that the municipality's executive body fixes the adiacency fee by means of an administrative decision, which, as a result of the application of the linguistic interpretation process, leads to the conclusion that, under Article 98a par. 1 of the REA, the fixing of the adiacency fee by means of an administrative decision may take place within three years. This means that in the case of an adiacency fee established on the basis of Article 98a par. 1 of the REA, the fee must be fixed by means of an administrative decision within three years, i.e. a final decision (i.e. a decision of the first instance authority against which the party has not lodged an appeal or a decision of the second instance authority), whereas in the case of an adiacency fee established on the basis of article 144 in conjunction with article 145 par. 2 of the REA, the mere fact that a decision on the fixing of the fee was issued by the first instance authority is sufficient to comply with the three-year period. Such a normative solution is not

beneficial from the point of view of the proceedings and the implementation of the principle of legal certainty, as well as the principle of citizens' trust in the law and public administration bodies. It is also not beneficial to the executive bodies of municipalities themselves, given the controversies appearing in the literature [Mzyk, 2012, p. 588] and above all in the case law of administrative courts. In the opinion of many of them, in order to meet the three-year deadline, of articles 98a par. 1 and 145 par. 2 of the REA it will be sufficient for the first instance authority to issue a decision on setting the adiacency fee before its expiry. However, that view cannot be accepted and the differences arising from the wording used by the legislature in article 98a (1) of the REA and Article 145(2) of the REA must be noted and taken into account in the interpretation of the law. This view was expressed by SAC in the resolution of 25.11.2013[160] taken by a court of seven judges, where the court stated that 'the grounds for the judgment of 11.01.2010 were duly noted.[161], delivered by the court of seven judges and the statement of reasons for the resolution of the court of seven judges of 27.07.2009[162], since the legislature uses different wording in these provisions to determine the expiry of a time-limit, this cannot be disregarded in the interpretation of these provisions. The aforementioned resolution of 27.07.2009 explains that the three-year period referred to in art. 145 par. 2 of the REA concerns the decision of the body of first instance on the determination of the adiaction fee. However, in the justification of the aforementioned judgment of 11 January 2010 it was explained that the determination of the fee referred to in art. 98a par. 1 of the REA should be made by a final decision before the expiry of the period indicated in that provision. The deadline by which the adiacency fee is to be determined on this account is a substantive law deadline.

The determination of the Adiacency Fee for the increase in the value of the real estate as a result of its division may be referred to when the determination, i.e. the final calculation of its amount, taking into account the rights and obligations of the parties and authorities resulting from the rules of procedure, took place in administrative proceedings concluded by a final decision, before the expiry of the deadline set out in art. 98a par. 1 of REA This means that the determination of this fee should take place before the expiry of the three-year deadline, by a final decision of the body of first instance and, if an appeal is lodged, by a final decision of the body of second instance'. This position of the court deserves to be approved and, despite the inconveniences indicated earlier, it should be fully shared.

[160] Sygn. akt I OPS 6/13, (ONSAiWSA z 2014 r. nr 2, poz. 18).
[161] Sygn. akt I OPS 5/09, (ONSAiWSA z 2010 r,, z. 3, poz. 143).
[162] Sygn. akt I OPS 4/09, (ONSAiWSA z 2009 r,, z. 5, poz. 84).

It is also difficult to determine when the decision under art. 98a (1) of REA becomes final, which makes it possible to meet the three-year deadline for setting the adiacency fee. Does the decision become final when it is signed by the authority, when the decision is dispatched from the seat of the authority or when it is effectively served on a party to proceedings? SAC Public finances of local government units in the resolution of 25.11.2013[163] ruled, answering a legal question: "Is the three-year period laid down in article 98a par. 1 of the REA for the fixing of the adiacency fee for the increase in the value of the property resulting from the division of the property, as referred to in article 98a par. 1 of the REA, to be determined by the date on which the final decision on the matter was taken (signed) or served on the party? Formulated in the decision of 16.04.2013164, that the three-year time limit for determining the adjudication fee for the increase in the value of the property as a result of the division referred to in art. 98a par. 1 of the REA, where the proceedings are terminated by decision of the appeal body, shall be determined by the date of the final decision of the appeal body and not by the date of service of that decision on the party.

As the SAC indicated in the justification to the above mentioned resolution, "various positions are presented on the grounds of REA as to whether the date of delivery of the final decision on the adjudication on the adjudication fee or the date of issuing (signing) such a decision is decisive in order to meet the three-year deadline for determining the adjudication fee for the increase in the value of the property as a result of its division. In the opinion of the panel hearing the case, on the basis of an analysis of article 98a par. 1 of the REA, it is possible to take the view that the fixing of the adiacency fee within three years from the date on which the decision approving the division of the property became final means that the final decision fixing the amount of the fee should be notified to the party before the expiry of that period. A decision as an act of intent by the authority to fix the adiacency fee becomes a decision within the meaning of law only when it is served on a party. However, a different position is also presented, according to which the three-year period for establishing the adiacency fee for the division of real estate is observed if before its expiry the authority issues a final decision on establishing the fee, since the moment of the decision is issued is not the date of service of the decision on the party but the date of its preparation, i.e. in the case of a written decision the date of signing the decision containing the legally required components. Each of these positions is reflected in the decisions of the administrative courts indicated in the grounds of the decision'.

[163] Sygn. akt I OPS 6/13.

[164] Sygn. akt IOSK 2666/12, CBOSA.

In the further part of the statement of reasons, SAC indicated that "while in the case of a decision setting the adiacency fee, issued by the body of first instance, there is no doubt that such a decision becomes final on the date of expiry of the time limit for lodging an appeal, there are doubts as to the date on which the decision of the appeal body becomes final. Although the question of the finality of the decision of the appeal body depends on its delivery to the party, this does not mean that the date on which the decision of the appeal body is final is the date on which the decision was delivered to the party, because the decision of the appeal body is final because it is not for appeal and not because it was delivered to the party. The appeal body serves the party with the final decision on a specific date, but until the decision has been served on the party, there can be no question of a decision. Notification of such a decision to a party has the effect that the decision enters into legal circulation as a final decision on the date of its adoption. If the determination of the adiacency fee for the increase in the value of the property as a result of its division is to be made by a final decision before the expiry of the limitation period referred to in art. 98a par. 1 of the REA, then in the case of termination of the proceedings by a decision of the body of first instance, that period is met if, before its expiry, the decision is issued, served on the party and the period for lodging an appeal against that decision expires, whereas in the case of termination of the proceedings by a decision of the body of appeal issued as a result of the appeal, that period is met if, before its expiry, the decision of the body of appeal is issued, even if the decision is served on the party after its expiry. What is decisive is that, while the date of finality of the decision of the body of first instance determines the date on which the time limit for filing an appeal expired, the date of finality of the decision of the body of appeal determines the date on which the decision was issued, provided that the decision was notified to the party.

The view quoted above, expressed by SAC in the quoted resolution of 25.11.2013 should be fully shared.

An interesting conclusion was reached by the SAC in the judgment of 18.03.2014[165], by stating that the three-year limitation period laid down in article 98a par. 1 of the REA, pursuant to article 123 par. 1 of the Law of 23 April 1964, was running - The Civil Code[166] in conjunction with art. 148 par. 2 of the REA, which is applicable to the determination of the adiaction fee for the increase in value of the property caused by the division of the property, interrupts the final decision of the authority determining the adiacent fee. In

[165] Sygn., akt I OSK 2666/12, CBOSA.

[166] Tekst jedn.:. Dz.U. z 2014 r. poz. 121.

the case of an appeal against the above mentioned decision to the administrative court, according to article 148 par. 2 of the REA in conjunction with article 124 par. 1 and 2 of the Civil Code, the limitation period runs again from the date on which the court's decision revoking the decision setting the adiacency fee becomes final. This view is favourable from the point of view of the authority setting the fee; however, it is controversial as the SAC indicates that provisions of a civil law nature should be applied to the material administrative term. The expiry of the material time limit setting the authority a period for undertaking certain actions results in the expiry of the possibility to undertake such actions and is not interrupted. The provision of article 148 par. 2 of the REA which refers to the Civil Code refers, however, to the time limits for the expiry of which a delay or delinquency in the payment of the Adiacency Fee is relevant, and not to the time limit within which the fee should be established. Therefore, this issue requires an in-depth analysis going beyond the scope of this study. However, due to the importance of the issue, it had to be presented.

Based on the above considerations, it must be concluded that the institution of the Adiacence Fee, regulated by articles 98a, 107 and 144 of the REA, despite its seemingly unified nature, has no identical solutions. As a result, its application is difficult and it is not fully exploited by municipalities. The legal examination of the solutions concerning the moment of setting the Adiacency Fee and, consequently, the deadline for the effective setting of the Adiacency Fee or the decision to set it is particularly complicated. In conclusion, it should be stated that:

- determination of the Adiacency Fee in connection with the increase in the value of the immovable property resulting from the division of the property, made by way of an administrative decision by the executive body of the municipality or by way of a final judgment of the civil court (Article 98a of the REA), may be made within three years from the date on which the decision approving the division of the property became final or the judgment on the division became final, and in order to determine it effectively it is necessary to make a final decision within the aforementioned three years. This means that the head of the municipality, the mayor or the president of the city, when issuing the decision establishing the division, must take into account the time for the decision to become a final decision of the body of first instance, i.e. "include" the period for effective delivery of the decision and 14 days for lodging an appeal against it, assuming that the appeal is not lodged. On the other hand, the appeal body, i.e. the local government appeal college, must issue its decision within the

aforementioned time limit, i.e. the members of the adjudicating panel must sign it, as the decision of the college becomes final due to the lack of possibility to appeal against it. In this case, the time limit for delivery of the decision is irrelevant to the effectiveness of its delivery;

- determination of the Adiacency Fee in connection with the increase in the value of immovable property as a result of the consolidation and division of real estate by way of a resolution of the Municipality council on the consolidation and division of real estate (Article 107 of the REA) must be made by way of a decision, in accordance with the settlement or resolution on the consolidation and division of real estate, which should specify the date and method of payment of the Adiacency Fee. In this case the determination is also made by means of a final decision;
- determination of the adiacence fee in connection with the increase in the value of immovable property as a result of the construction of technical infrastructure facilities (Article 144 of the REA) is effected by means of a decision to determine the adiacence fee

The above remarks show that the Adiacency Fee Regulation is inconsistent, which poses many problems with its application. This makes it an inefficient financial instrument. The lack of coherence is also expressed by doubts whether the provisions of the KPA or the Tax Ordinance should be used to determine the Adiacency Fee (the REA, depending on the individual actions of the proceedings, refers to both normative acts). As a *de lege ferenda* proposal, it should be proposed that the Adiacency Fee institution be regulated again and comprehensively in a separate act or in the Act of 12 January 1991 on local taxes and charges

2.3. Garage real estate tax - the need to unify the tax situation of owners

The direct aim of the legislator is to enforce the addressee's standard of behaviour in accordance with the instruction. The norms of tax law impose financial burdens on taxpayers, therefore they should not give rise to interpretation doubts. It is necessary for them to be precise enough to trigger the redistributive effect assumed by the legislator [Nykiel, 2010, p. 45]. Moreover, the construction of regulations must be as consistent as possible. It is necessary to evaluate negatively the differentiation of the tax situation of taxpayers who are obligated to pay tax on the same subject matter, depending on certain legal and factual situations, circumstances on which taxpayers do not always have influence. It is therefore necessary to formulate tax law provisions so

that they are clear, precise, and certain. A taxpayer should be able to predict the consequences of his civil law transactions, with which the legislature is bound by the tax obligation (judgment of the Constitutional Court of 7 January 2004, K 14/03, OTK- -A No 1/2004, item 1). Although these demands are commonly articulated by the judicature [judgment of the Constitutional Court of 7 January 2004, K 14/03, OTK-A No 1/2004, item 1; judgment of the Constitutional Court of 11 May 2004, K 4/03, OTK-A No 5/2004, item 41; judgment of the Constitutional Court of 21 March 2001, K 24/00, OTK No 3/2001, item 51; judgment of the Constitutional Court of 22 May 2007, SK 42/05, OTK-A No 6/2007, item 49] and the doctrine [Gomułowicz, 2010, p. liii n.; Szczurek, 2008, p. 70 and n.] their implementation is difficult.

One of the examples that substantiate this thesis is the disproportions in the real estate tax burden of garage owners. It seems that garage owners, if they do not carry out business activity, should be in one tax situation. Unfortunately, in the current legal status, the construction of the real estate tax regulations does not correspond to the actual situations and requires a thoughtful reform. In particular, a situation that is incompatible with the principles of social co-existence, the principle of tax justice and the principle of equality before the law is taxation at different rates of real estate tax on garages that are part of a residential building due to their separate ownership.

Regulations

According to Article 2 par. 1 of l.t.f.a. [Local Taxes and Fees Act of 12 January 1991], land, buildings or parts thereof and structures or parts thereof related to business activity are subject to real estate tax. It should be noted that the legislature has introduced into the Law on local taxes and charges a legal definition of the term 'building'[167], which is meaningfully identical to the definition of 'building' established for the purposes of the Law on Building Law [Law of 7 July 1994], In accordance with Article 1a par. 1 of l.t.f.a., the term 'building' used by the legislature means a building, within the meaning

[167] Zgodnie z art. 3 pkt 2 ustawy Prawo budowlane przez pojęcie budynku należy rozumieć taki obiekt budowlany, który jest trwale związany z gruntem, wydzielony z przestrzeni za pomocą przegród budowlanych oraz posiada fundamenty i dach. Przy czym termin „obiekt budowlany" jest znaczeniowo pojęciem szerszym bowiem obejmuje nie tylko budynki ale także budowle i obiekty małej architektury. Stwierdzić zatem należy, iż ustawodawca podatkowy powinien był się odwołać do rozumienia pojęcia budynku zgodnie z przepisami Prawa budowlanego, nie zaś wyłącznie do pojęcia obiektu budowlanego w rozumieniu przepisów Prawa budowlanego. Dzięki takiemu zabiegowi przepisy prawa podatkowego byłyby jaśniejsze, a ustawodawca nie sugerowałby różnego rozumienia pojęcia „budynku" na gruncie przepisów prawa budowlanego i u.p.o.l., a tożsamego rozumienia na gruncie tych ustaw pojęcia „obiekt budowlany".

of the provisions of the Law on Construction, which is permanently attached to the land, is separated from the space by building partitions and has a foundation and roof. Since the legislator creates a definition of "building" based on the concept of a construction object in the sense of the Construction Law, reference is made to this concept. Therefore, according to article 3 par. 1 of the c.l.a., a construction object is:

- the building with its installations and technical equipment,
- a structure constituting a technical and utility whole together with installations and devices,
- small architecture object.

It must therefore be assumed that a construction site is a building that is permanently attached to the ground, separated from the space by means of building partitions, has a foundation and a roof, the concept also covering technical installations and facilities. It seems important to broaden the definition of a building to include technical installations, so it should be pointed out that although the legislator does not directly define this concept, it is used to clarify the term 'building installation' (Article 3 par. 9 of the c.l.a.). It can therefore be concluded that technical equipment ensures that a building can be used for its intended purpose, such as connections, but also fences, crossings, parking areas, etc. In conclusion, it should be noted that the definition of a building is as broad as possible and includes not only the building and its parts but also the technical elements which enable the building to be used for its intended purpose.

Article 5 par. 1 point 2 of l.t.f.a. states that the Municipality council, by way of a resolution, shall determine the amount of real estate tax rates, among others, for buildings or parts thereof 1) residential, 2) connected with conducting business activity and for residential buildings or parts thereof occupied for conducting business activity, 3) connected with providing health services and 4) other, including those occupied for conducting payable statutory public benefit activity by public benefit organisations.

The concept of a garage has not been clarified under the property tax law, but it is generally accepted that it is a room adapted for storing motor vehicles. However, it should be noted that the term garage is used to describe at least three facts. Firstly, the garage may be a separate free-standing building located near residential buildings (both multi-family and single-family). Secondly, the garage may be a separate part of a single-family or multi-family residential building. Thirdly, in multi-family residential buildings, multi-storey garage halls are created in which a parking space can be purchased.

Differentiation of tax rates for garage taxation

The provisions of applicable law and practice indicate that the situation of garage owners is not equal [Judgment of the Province Administrative Court in Poznan of December 09, 2009, III SA/Po 768/09; Judgment of the SAC of October 12, 2011, II FSK 733/10; Judgment of the WSA in Bydgoszcz of September 08, 2010, I SA/Bd 578/10; Judgment of the SAC of November 28, 2011, II FSK 535/10]. Owners of garages constituting a separate building pay tax at a different rate than owners of garages built into the body of the building. However, it happens that, depending on the jurisdiction of the local tax authority, owners of garages constituting an integral part of a building pay real estate tax at different rate categories (as for residential buildings and parts thereof or as for other buildings). The tax situation of garage owners differs due to the legal and factual situation of the garage. Taxpayers who have purchased a garage as a separate property (the garage has its own land and mortgage register) are treated by the tax authorities as owners of the remaining buildings and their parts within the meaning of the Local Tax and Fees Act. Meanwhile, taxpayers who own garages as belonging to residential premises pay tax at the rate as for residential parts. Consequently, if the garage is a separate property, the tax liability of the owner is much higher. It seems that this situation should be assessed negatively, as it violates the fundamental principle of tax justice and equality before the law.

Doubts that arise around the taxation of garages with the correct rate of real estate tax have not been removed by the judicature, as it has not developed a unified line of rulings[168]. Moreover, they were even deepened by the issuance of a resolution of the SAC [SAC Resolution of 27 February 2012, II FPS 4/11], which somehow sanctioned the differences in the legal situation of taxpayers depending on whether a garage is an object of separate ownership.

The tax situation of garage owners is not unified, so it is necessary to consider individual cases and to determine the appropriate way of taxation for each of the facts. We will start our considerations with an analysis of the

[168] Z jednej strony, sądy opowiadają się za opodatkowaniem garaży, które stanowią część budynków mieszkalnych według stawki jak za mieszkalne budynki i ich części. Sądy przyjmujące takie stanowisko zwracają uwagę, że kluczowym elementem jest usytuowanie garażu w budynku mieszkalnym, por. np. wyrok WSA w Bydgoszczy z 28 lipca 2009 r., I SA/Bd 346/09, CBOSA; wyrok NSA z 22 lipca 2009 r., II FSK 460/08, CBOSA; wyrok NSA z 12 października 2011 r., II FSK 733/10, CBOSA. Drugi nurt w orzecznictwie przyjmuje pogląd przeciwny, uznając, że kwestię kluczową odgrywa zapis w ewidencji gruntów i budynków w przedmiocie funkcji jaką pełni garaż (odrębny lokal) - niemieszkalna. Por. np. wyrok WSA w Poznaniu z 09 grudnia 2009 r., III SA/Po 768/09, CBOSA; wyrok WSA w Białymstoku z 16 września 2009 r,, I SA/Bk 328/09, CBOSA; wyrok WSA w Białymstoku z 09

legal situation of the garage owner, who is a separate part of a single or multi-family residential building and the owner of a parking space in a multi-storey garage hall. The situation in these cases essentially boils down to the fact that there are rooms used as garages in the body of the residential building. It could therefore be assumed that the tax situation of the owners will be the same. Indeed, it is difficult to consider it as a deliberate distinction between the tax situation of owners of one subject of taxation - the garage - on the basis of the form of their ownership, or the technical design or architectural concept (sometimes constituting the implementation of a zoning plan).

Due to the fact that the regulations are not precise, the tax situation of owners who own a separate property - a garage (a separate land and mortgage register) and those who own the residential part of the building together with the associated room - a garage has become different. As a result, the owner of a 50-metre flat and a garage that constitutes a separate property may pay a higher tax than its neighbour - the owner of the 50-metre flat with a garage. Moreover, it is also possible that in the current legal status, the owner of a single-family house with a garage built into the body of the building will pay much lower tax on the garage than the owner of an apartment and a garage that constitutes a separate property, even though it is part of a residential building. It seems that such legal regulations which differentiate the tax situation due to the form of ownership are particularly negative and violate not only the principles of equality before the law and justice but also logic.

Unfortunately, it should be pointed out that the interpretation of the provisions differentiating the tax situation of garage owners was, in a way, sanctioned by a resolution of seven SAC judges [SAC Resolution of 27 February 2012, II FPS 4/11], in which the court found the above described practice to be correct. In the resolution in question, SAC indicates that the garage may constitute a separate room belonging to an independent residential unit or may constitute a separate property of the premises. SAC considers that, in the former case, the garage will not constitute a separate subject of taxation and should therefore be taxed as an apartment. It should be stressed that this will be the case, as indicated by SAC, in all cases where the ownership of the premises has not been legally separated, so this will be the case, for example, for a parking space in a garage hall. On the other hand, if, in the legal sense, a garage was separated as an independent real estate, thus the garage became a separate subject of taxation and it is justified to classify it as a category of buildings and their parts, and thus to tax it at a higher tax rate.

In principle, the arguments put forward in the SAC's resolution in question must be accepted as they result from the law. However, it seems that SAC

could have contributed to the unification of the legal situation of the garage owners by interpreting the law in accordance with the principles of social coexistence, equality before the law and fiscal justice. It should be stressed that strict adherence to the letter of the law when interpreting in a situation of lack of precision of tax law is an insufficient action [Mastalski, 2008, p. 74]. When interpreting the law, one should strive to achieve a compromise between the principle of legal certainty and the principle of justice, expressed among others in equal taxation [Mastalski, 2008, p. 74 et seq.].

By applying a purposeful interpretation by SAC that takes into account the principles of fiscal justice and equality before the law, a kind of absurdity that we are currently experiencing could be eliminated. We have to assume that, under the applicable provisions of law, a garage (a room intended for storing motor vehicles) simultaneously performs a residential function if it is an associated room and does not perform a residential function if it constitutes a separate property. In this respect, it should be noted that the case-law indicates that whether a property has a residential function is determined by the criterion 'satisfaction of the basic housing needs of the owner and persons close to him [SAC resolution of 22 April 2002, FPK 17/01; SAC resolution of 1 July 2002, FPK 3/02; SAC judgment of 17 February 2009, II FSK 883/08; SAC judgment of 22 September 2009, II FSK 524/08,]. As a result, the conclusion, unfortunately bearing the signs of absurdity that emerges from the analysis of the applicable regulations, the position adopted in the SAC resolution and the case law is as follows: whether the garage fulfils the residential function, i.e. satisfies the basic housing needs of the owner and persons close to him is determined by the legal criterion, the form of ownership - the fact of separating the real estate by establishing a separate land and mortgage register.

It seems that the form of ownership of the garage should not have any impact on the qualification of the application of the rate of taxation, the recognition of the garage as other buildings or parts of buildings. At the same time, it should be emphasised that the low standard of legislative technique, lack of precision in the formulation of real estate tax regulations does not in principle exclude other conclusions from the analysis of regulations. The legislator does not differentiate between the tax rates depending on the form of ownership of the real estate and the nature and function of the building. Moreover, the legislator does not define the notion of "part of a building", so it cannot be determined whether it concerns individual parts of real estate owned by a single owner, or rather it concerns parts of a building which constitute separate ownership [judgment of the PAC in Bydgoszcz of September 8, 2010, I SA/ Bd 578/10], Moreover, it is irreconcilable with the sense of

social justice to sanction a practice which differentiates the tax burden from the form of real estate ownership. In a situation where a garage is a separate property, it is classified as real estate subject to a higher rate of tax on other buildings and their parts. On the other hand, if the garage is part of a residential unit, it will be taxed at the rate for residential buildings and parts of buildings. This means that the circumstances of acquisition of the real estate and its legal status have an impact on the amount of the tax burden. As a result, it leads to situations where neighbours pay tax in different amounts from identical garages, which differ only in the form of ownership. Therefore, it seems that such a legal and factual state violates the constitutional principle of a democratic state of law. The legal situation which differentiates taxpayers in terms of taxation in an economically identical situation is also a violation of horizontal justice [Wojtowicz, 2007, p. 104 et seq.] and thus undermines the authority of tax authorities and the principle of conducting tax proceedings in such a way as to inspire confidence in tax authorities.

It should be noted that the abovementioned doubts about the tax treatment of the garage and the distinction between whether the garage is a separate property and whether it is a separate property are not the only ones under the real estate tax law. A garage under the real estate tax regulations may have a different status if it is a separate property. A garage may also constitute a separate, independent building. In this case, although we are dealing with another legal and tax situation, the interpretation of legal regulations is unambiguous. Since the garage constitutes a separate building, it belongs to the category of other buildings. It does not matter whether the building in question is located on the plot on which the residential building was built. The garage is not a residential building and, assuming that no business activity is conducted in it, it must be classified as a "residual building" and taxed at this rate.

To sum up, the tax situation of garage owners on the grounds of the current legal status is not unified. The independence of a building, often caused by an architectural vision or even by the requirements of a zoning plan, determines the necessity to apply an appropriate tax rate. Garages, which constitute a separate building, are taxed at the rate applicable to other buildings and their parts, while garages, which are built into the body of residential buildings, constitute an integral part thereof, and it seems that they should be taxed at the preferential rate applicable to residential buildings. However, under the provisions of the applicable law, as well as the practice of applying the law as shaped, inter alia, by a resolution of seven SAC judges, the tax situation of the owners of such garages varies depending on the legal and factual situation of the garage, whether it constitutes a separate property in the legal

sense. Such a situation should be assessed negatively; it would be desirable to unify the tax rates for the garages, all the more so as this subject of taxation is used in an identical manner by all owners. It would be desirable to unify this tax situation and to extend the preferential tax rate not only to residential buildings, but also to all buildings that are related to the residential function, such as independent outbuildings, storage rooms, garages, etc.

It seems that the differentiation in the level of taxation through the application of the tax scale indicates a distinction between 'ordinary' real estate ownership and the ownership of real estate related to the broadly understood business activity, which is assumed to be used to generate income and therefore subject to a higher tax rate [Smoleń, 2010, p. 338], Therefore, it seems advisable to extend the scope of the preferential rate to other facilities which serve the residents of buildings and perform functions complementary to the residential function.

Implementing tax regulations into legal transactions, the legislator should properly establish the fiscal and non-fiscal objectives it intends to achieve. Moreover, despite the fact that translating the set objectives into a legal provision is not an easy task, the legislator should make every effort to ensure that the provisions of the established law are clear and undeniable, constructed to the highest standards of legislative technique. One should be aware that it is necessary to select an appropriate legal language so that it can properly express the norms contained in legal regulations [Mastalski, 2010, p. 351], The result of the legislative process should be a situation where the addressee of a tax provision is able to assign the content of the regulations a meaning consistent with the intention of the legislator [Mastalski, 2010, p. 351], A taxpayer should be able to predict the tax consequences of his actions. This postulate does not seem to be fulfilled in view of uncertainties related to, for example, taxation of garages at the appropriate rate of real estate tax.

Diversification of the tax situation of garage owners depending on such factors as the distinctness of the building or the form of ownership (separate ownership of a garage or a garage belonging to a residential property) seems to be a solution which requires a change - unification of the tax situation of garage owners. It should be remembered that this is one subject of taxation and is used by its owners for the same purpose - storing motor vehicles.

Taking into account the above considerations, which are only an example [Glumińska- -Pawlic, 2012, p. 57 et seq.] of the inadequacy of property tax regulations to the current structure of social and economic relations, the conclusion seems obvious. The changes in the real estate tax law will be insufficient, a fundamental reform is necessary. The provisions of the real estate tax

law are based on an outdated structure [Glumińska-Pawlic, 2012, p. 57], they must be adjusted to the social and economic reality, so that the taxation of real estate at the appropriate rate is not questionable and taxpayers are sure of the tax burden they have to bear. Finally, the real estate tax should correspond to the fundamental principle of tax justice and equality before the law.

2.4. Preferential VAT taxation of services provided in the area of Polish seaports

Skillfully conducted tax policy in the area of determining the rules of taxation of services provided in sea ports - as a strategic sector of the maritime economy - could result in increasing their competitiveness and increasing their attractiveness for import enterprises, which after the amendment of the Act of 2007 started to bypass Polish ports, as the scope of application of the 0% rate was significantly limited. The application of the preferential 0% rate for services related to the service of means of transport and their cargoes was regulated in the Council Directive 2006/112/EC of 28 November 2008 on the common system of value added tax[169], which, through a system of exemptions for air and maritime carriers, provides the basis for similar solutions - in line with the objective of the Directive in national legislation.

The preferential rates, in addition to the tax exemptions, are a specific form of derogation from the standard rate, the purpose of which is to give tax advantages to certain groups of goods and services or to avoid distortions of competition and double taxation.

As regards the tax on goods and services, they constitute an exception to the general rule, which is the application of the standard rate [Maruchin, 2005, p. 287]. Consequently, as an exception to the principle of the universality of taxation, the scope of application of the reduced rate must be narrow, in accordance with the principle that exceptions should not be interpreted broadly [Bącal et al., 2010, p. 750][170].

The 0% rate, on the other hand, is of an exceptional nature, since its effect is not so much a reduction but the absence of any tax burden. However, unlike an exemption, it does not deprive the taxpayer of the right to deduct input tax. Thus, it may be concluded that it constitutes a special type of tax exemption [Nykiel, 2002, p. 65], since it excludes a particular category of transactions from the scope of taxation without depriving the taxpayer of his right to deduct.

[169] Dz.U. UE L nr 347, s. 1.

[170] Por. także wyrok WSA w Łodzi z dnia 3 lutego 2011 r,, sygn. akt: I SA/Łd 1352/10.

It should be pointed out here that the Directive does not provide for a reduced rate of 0%, but instead the construction of an exemption with the right to deduct input tax functions. Therefore, when implementing EU regulations assuming that a given type of goods or services are covered by the exemption, the 0% rate is applied in Poland, provided that the purpose of the regulation contained in the Directive is to enable the taxpayer to deduct input tax. The possibility of covering a given group of goods or services with an exemption or preferential rate depends on EU regulations, which results from the harmonisation of the common system of value added tax. Hence, member states have limited freedom in establishing them. National tax legislation must strictly comply with the provisions of the Directive. Moreover, it is necessary to point out the jurisprudence of the European Court of Justice (hereinafter: ECJ, now the Court of Justice of the European Union), which, among others, in its judgment of 15 June 1986 in case 348/87 Foundation Implementation Financial Actions (FIFA) emphasises that "the concepts for defining exemptions should be interpreted strictly as they constitute exceptions to the general rule that turnover tax is levied on all services provided for remuneration by a taxpayer".

As far as national regulations are concerned, it should be noted that despite the name of Chapter 4 of the Act, "Special cases of 0% rate application, one cannot speak of the special nature of this preference, because in fact, this provision statutes 0% rate as a rule, not an exception. This is evidenced, first of all, by the wide range of activities subject to the application of this rate, and secondly, the EU legislator also did not consider such cases as special [Bartosiewicz, 2014, p. 610].

The misleading nomenclature described seems to be derived from the previous Law of 8 January 1993 on Value Added Tax and Excise Duty [171], where article 50 par. 1 explicitly referred to the content of the ordinance in which the Minister for Public Finance could reduce the tax rates for certain goods or services. In the executive acts - regulations on the implementation of the provisions of the Act on Goods and Services Tax and Excise Duty from 21 December 1995[172], 15 December 1997[173], 22 December 1999[174], 22 March 2002[175] services in question included in the chapter on sales equalised with exports and reduction of the rate to 0% for certain goods and services. Hence, the nature of the reduced rate was exceptional, as it was contained

[171] Dz.U. Nr 11, poz. 50 z poźn. zra.
[172] Dz.U. Nr 154, poz. 797.
[173] Dz.U. Nr 156, poz. 1024.
[174] Dz.U. Nr 109, poz. 1245.
[175] Dz.U. Nr 27, poz. 268.

in a separate legal act, which introduced different regulations in relation to the Act on a fairly narrow scope of application. However, this cannot be said about the current regulations, which are contained in the section on the level of taxation, where the possibility of applying the 0% rate is included next to the general rates and exemptions, and the catalogue of goods and services subject to a reduced rate is very wide. What is more, the argument treating the rate reduction as a rule is supported by the fact that the legislator has regulated special cases of taxation of certain transactions in a separate chapter XII "Special procedures".

Importantly, the consequence of recognising that in fact the application of the 0% rate in the cases set out in article 83 of the Act is a principle, not an exception, is a way to resolve any doubts about its scope. While, according to general principles, in the case of preferential rates, it should be assumed that the exceptions should be interpreted narrowly, in the case in question, since the scope of the exemption cannot be narrowed down, all doubts should be interpreted in favour of the taxpayer [Modzelewski, Mularczyk, 2006] 0% rate for port services.

Initially, as already mentioned, the 0% preferential rate was still applied during the period of validity of the previous act under article 50, which was the statutory delegation for the regulations introducing "Cases of sales treated equally to exports and goods and services covered by the 0% rate". Originally, in the ordinance of 21 December 1995, § 66 section 1 point 4 provided for preferential taxation of services provided in the area of Polish seaports, related to international transport, consisting in the service of land and sea means of transport and comprehensive service of cargo and passengers in these ports. In a similar form, the provision was transferred to the VAT Act in force at present, with a separate provision introducing a preferential rate for other services serving the direct needs of means of sea transport and their cargoes, thus abandoning the concept of comprehensive cargo and passenger services, which should be considered a narrowing of the scope of preferences.

The regulations in force at that time contained regulations which were incompatible with the EU regulations, as Directive 2006/112/EC provides in Article 148 d), similarly to the previous VI Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover tax - Common system of value added tax: uniform basis of assessment[176], that: member states shall exempt from taxation the supply of services other than the supply, conversion, repair, maintenance, chartering

[176] Dz. Urz. WE L 154, rozdz. 9, t. 1, s. 23.

and hiring of vessels (intended for navigation on the high seas and carrying passengers for reward or used for commercial, industrial or fishing purposes, as well as rescue and assistance vessels at sea and coastal fishing vessels) and the supply, hiring, repair and maintenance of equipment, including fishing equipment, forming part of those vessels or used for their operation; for the immediate needs of those vessels and their cargoes.

First of all, it should be pointed out that the Polish legislator limited the preference only to services provided in Polish seaports; moreover, the provision concerned only services related to international transport, omitting domestic maritime transport.

In fact, it is not the entity to which the service is to be provided, but the fact that it is to be provided at the final stage of marketing, as it serves the immediate needs of the vessels. Therefore, the abovementioned judgment could not constitute the basis for the operation of the restriction on the application of the 0% rate only in the case of the provision of services directly to shipowners and in this respect it was a regulation which was incompatible with the Directive. Taxpayers who did not provide services directly to ship owners often tried to treat complex services related to cargo as "means of transport service", which made it necessary to assign a given service to a means of transport and to prove that it actually had as its object a means of transport and not a cargo. This was often difficult to prove and the assignment of services was ambiguous due to their complexity [Gorgoń (2010)]. In the case before the WSA in Gdansk concerning preparation of cargoes for transport, the taxpayer maintained that it is part of a comprehensive service involving the overall operation of a maritime means of transport, so it covers not only the cargo itself but also the ship. However, the court held that cargo preparation services are activities which have as their object cargo and not a means of transport and at the same time clearly distinguished between services consisting in handling land and sea means of transport and services consisting in handling their cargo. The above mentioned services were not provided to the shipowner; therefore the right to apply a preferential rate was refused.

In this context, the Act of 18 March 2011 amending the Value Added Tax Act and the Act - Law on measures [14], which entered into force on 1 April 2011. The preferential rate was then applied to services serving directly the needs of the cargoes, while defining their precise scope, including: loading, unloading, handling and other services performed on these cargoes necessary to perform the service of transport of these cargoes, with the exception of warehousing services, unless they do not exceed 20 days for storage of

cargoes carried in containers and 60 days for other cargoes. These changes should be assessed positively, although even before this amendment came into force, SAC interpreted the provisions aimed at adapting the Act to the regulations of the Directive and the ECJ ruling in case C-382/02. However, in this case, the provisions were not fully implemented properly. The judgment of 16 September 2004 in the case of CimberAir A/S did not apply to port services, but to services provided to aircraft used for domestic flights. The Danish legislation exempted services supplied to aircraft used mainly for international flights, while domestic flights were subject to the basic rate. The Court held that the exemption also covered the supply of goods and services to domestic flights. Pursuant to the above mentioned ruling, the legislator decided to extend the scope of services provided, not only related to international transport, but to maritime transport in general, which should be assessed positively, as the limitation of preferences to international transport only constituted a solution distorting competition and was rightly changed.

There was a change in this context in the Act of 18 March 2011 amending the Value Added Tax Act and the Act - Measurement Law[177], which entered into force on 1 April 2011. The preferential rate was then applied to services serving directly the needs of the cargoes, defining at the same time their precise scope, including: loading, unloading, reloading and other services performed on these cargoes necessary to perform the service of transport of these cargoes, except for storage services, unless they do not exceed 20 days for storage of cargoes carried in containers and 60 days for other cargoes. These changes should be assessed positively, although even before the entry into force of this amendment, SAC interpreted the provisions in accordance with the Directive, allowing for the possibility to apply a 0% rate to transhipment services (among others, judgments of the day: 28 September 2011 - Ref. no. 1 FSK 1559/10 and 1 FSK 1560/10).

The dispute in both cases revolved around the interpretation of the concept of 'handling of inland means of transport', since it was not defined by the legislature and it was therefore not possible to state unequivocally what falls within the scope and whether it could also cover activities directly related to the cargo of the vessel. The taxpayer carried out a number of additional activities in addition to loading and unloading the goods, i.e. storing containers, moving them within the terminal in order to fill, empty, clear customs and phytosanitary control. Both the tax authority and the WSA in Gdansk refused to apply the 0% rate (similarly to the case described above),

[177] Dz.U. Nr 64, poz. 332.

however, the SAC stated that the Polish regulations before the aforementioned amendment cannot be interpreted in isolation from the provisions of the Directive, which explicitly provides for the exemption of services serving the immediate needs of cargo. A similar view was expressed in the SAC judgment of 26 May 2011. (ref. no.: I FSK 832/10), breaking the unfavourable for taxpayers judgment of the SAC of 5 August 2010. (ref. no.: I FSK 1220/09), in which the court agreed with both the tax authorities and the WSA and did not refer to the interpretation of the provisions in accordance with the Directive. At this point it is worth mentioning the ECJ judgment of March 3, 2005 in Case C-428/02 FondenMarselisborgLystbadehavn, in which the ECJ stated that "in the absence of a definition of certain terms used in exemptions, it is necessary to refer to analogous exemptions in Directive 112 and this provision should be interpreted taking into account the context in which the exemption is included, its objectives, the scheme of the above mentioned Directive and taking into account the ratio legis of exemptions it provides for".

As part of the amendment, the circle of entities to which the services are provided was also extended, in addition to shipowners - to other entities carrying out transport by sea transport, thanks to which the possibility of using the 0% rate was significantly extended.

In addition, the possibility of applying a 0% rate to the provision of services not only in Polish ports but in all seaports was extended. This is important in the context of changes concerning the place of service provision, which entered into force on 1 January 2010 by the Act of 23 October 2009 amending the Act on Goods and Services Tax[178], according to which a Polish taxpayer, when purchasing services from foreign taxpayers in other ports, recognising the import of services from them, will not increase the payment for the services of the tax base itself, will be able to apply the 0% rate instead of the basic rate [Bartosiewicz, 2014, p. 614].[179].

To sum up, the 0% rate applies to the provision of services in the area of seaports, consisting in the operation of means of sea and land transport only for services related to international transport.

Problems with proper interpretation of the notion of "operation of means of transport" caused Polish seaports to significantly lose their economic attractiveness.

[178] Dz.U. Nr 195, poz. 1504.

[179] Por. także interpretację Dyrektora Izby Skarbowej w Warszawie z dnia 24 kwietnia 2012 r. nr IPPP3/443-59/12-4/LK.

This was due to the incorrect implementation of the Directive's provisions and the interpretation of national regulations without the EU context by tax authorities and most courts. It seems that the recent changes in the regulations on taxation of services provided in ports can be assessed positively, as regulations inconsistent with the Directive, significantly limiting the right to apply the 0% rate, have been eliminated, which should result in increased competitiveness of Polish ports.

CHAPTER 3.

SOURCES OF FINANCING FOR LOCAL GOVERNMENT UNITS IN MODERN LEGAL REGULATIONS

3.1. Construction of bonds as securities

The starting point for considerations on the legal nature of the bonds should be a statement that already in the context of the system of the Ordinance of the President of the Republic of Poland of 27 October 1933. - Code of obligations[1] showed an institutional distinction between various types of documents having only evidential value - such as receipts or other certificates of receipt of a benefit, or documents authorising the receipt of a witness (art. 221 of the Code of Obligations) - and bearer documents, which commentators of the time[180][181] included in a broader category of securities. However, if the notion of a security at that time usually existed in the legal language[182], in the legal language it was used quite occasionally and for this purpose without a clear legal definition (e.g. art. 217, art. 425, art. 507 or art. 514 of the Regulation of the President of the Republic of Poland of 27 June 1934) - Commercial Code[183]). On the other hand, the legislature tried to characterise bearer documents by describing their legal nature in such a way that it considered as not documents in which the issuer agreed to provide the benefit at the bearer's request, in such a way that the fulfilment of that obligation was to follow the return of the document and, in the case of partial benefit, with a reference to that fact on the document[184]. Thus, the doctrine of commercial law at that time described bearer documents as constructions to which marked property rights are attached, the existence or at least the investigation of which depends on the possession of the document itself. It was concluded that without a document, there is no right to demand the performance at all, and the issuer

[180] Administracji, Uniwersytet Kardynała Stefana Wyszyńskiego

[181] Por. np. J. Korzonek, I. Rosenbluth, *Kodeks zobowiązań. Komentarz,* t. I, Kraków 1934, s. 489.

[182] *Por. m.in. F. ZollL, Zobowiązania w zarysie według polskiego kodeksu zobowiązań, Warszawa 1948, s. 98 i nast.*

[183] Dz.U. Nr 57, poz. 502 ze zm.

[184] *Tak F. Zoll, Zobowiązania, op. cit., s. 98.*

is obliged to perform the performance at the request of any bearer[185], since, under article 228 of the Code of Obligations, the fulfilment of a service at the hands of the person holding the document was such that the debtor was discharged from the obligation, and in discharging the obligation, the debtor was not obliged to seek to ascertain whether the bearer was the legal holder of the document.

However, already in the 1960s, the legislator more and more often uses the term "security" in the legal language, an example of which are some of the expressions included in the provisions of the Civil Code (cf. e.g. art. 788 or art. 801 and art. 849 of the Civil Code). Therefore, also in the legal doctrine there is a discussion on the jury nature of a security. The first of the competing concepts narrowed the understanding of a security because it had to apply the criterion of circulation to it[186]. The above position did not take away the legitimacy that has so far been expressed by such a link between the law and the material medium that only the latter saw the only legally effective way of demonstrating entitlement, but indicated another qualifying feature, i.e. such a close link between the law and the medium that trading in it becomes one and the same (and not the same) trade[187]. The second concept, the so called realization of the law, assumed that the paper indicates such a construction in which the subjective right is so related to the material medium (document) that the realisation of this right is conditioned by the possession of the document[188].

The competition between these two concepts, which had been rivaling for some time, was resolved by the legislator in favour of a broader concept of securities, i.e. the concept of law enforcement, by introducing Title XXXVII of the Civil Code by way of an amendment of 28 July 1990, and in its Section II, entitled "Securities". Although the provisions of the Civil Code do not contain a legal definition of a security, it is generally accepted that in art. 9216 of the Civil Code, the legislator, in a manner representative for the institution of a security, described the relationship between the law and the medium in such a way that he included it in the convention on the enforcement of the law, the prerequisite for which is the possession of the document. As a result, taking into account the theory of law enforcement adopted by the Polish legislator with regard to securities, it is necessary to adopt the position that in

[185] Tak por. zwłaszcza F. Longchamp de Berier, *Polskie prawo cywilne. Zobowiązania,* Lwów 1939, s. 202.

[186] Tak zwłaszcza S. Grzybowski w: *System prawa cywilnego,* t. III, cz. 2, Warszawa 1976, s. 986.

[187] Por. m.in. M. Michalski w: M. Bączyk, M.H. Koziński, M. Michalski, W. Pyzioł, A. Szumański, I. Weiss, *Papiery wartościowe,* Kraków 2000, s. 544.

[188] Przede wszystkim por. Z. Radwański, *Prawo zobowiązań,* Warszawa 1986, s. 449 i nast.

the case of bonds we are dealing with a structure assuming the connection of a material medium, being a physical element with the property law in the form of receivables, in such a way that without the medium it is impossible to execute this right. Thus, it can be concluded that the bonds result in a liability relationship under which the issuer undertakes to provide a specified benefit - in cash (in the case of cash bonds) or in kind (in the case of non-monetary bonds) - within a specified period of time, while the bondholder holding the bonds provides a benefit of a monetary nature, consisting in providing the issuer with a specified sum of money. On this account, the issuer remains a debtor, while the first bondholder, or any of its successors in title, will be a creditor (each time a bondholder), i.e. entitled to receive the issuer's benefit.

In the context of the above mentioned arguments, it should be noted that, from the legal point of view, the legal basis of the bond - viewed in terms of securities - is the construction of a loan within the meaning of art. 720 of the Civil Code, as the first bondholder, by paying for the bonds in the issue process, thus grants a loan of a specified sum of money ("a specified amount of money") to the issuer of the bonds, while the latter is obliged either to return that sum of money within a specified period of time, or - through the construction of an alternate obligation (cf. art. 365 of the Civil Code) - to provide another benefit (e.g. to issue own shares or shares of a subsidiary), or possibly to return the sum borrowed. The return of the nominal amount, or alternatively the fulfillment of another non-monetary benefit is always the main obligation of the issuer, which, as a rule, should fulfil an incidental benefit in the form of interest payment at the interest rate specified in the terms and conditions of issue. In that context, it may be concluded that the reimbursement of the nominal amount, or the satisfaction of a convertible benefit on an equal footing with it, is the principal feature of a bond which gives the bonds the character of debt instruments, which is also justified by the fundamental economic function of the bond, which is the development function, since through that function the issuer obtains investment funds for its development and thus organises its financing from external sources. Bonds as a source of financing are placed in opposition to self-financing sources, because their economic essence boils down to the use of foreign capital, which results in the obligation to return it[189].

According to article 4 par. 1, a bond is a security issued in a series in which the issuer states that it is a debtor of the owner of the bond (the bondholder) and undertakes to pay a certain benefit to it. A bond is therefore a debt security, the issue of which involves the acceptance by the issuer of an obliga-

[189] Por. także S. Antkiewicz, *Akcje i obligacje w finansowaniu przedsiębiorstw,* Warszawa 2002, s. 14 i nast.

tion to provide a specified benefit. This allows classifying a bond as a security that encapsulates claims[190]. Therefore, they belong to the general category of creditor securities to which the legislator referred in article 921 of the Civil Code. The bond issuer's obligation may include either one witness (the main benefit) or, in addition to the main benefit, it may be obliged to provide additional benefits (ancillary benefit). In the light of Article 4(2) of the Code, the issuer's benefit may be in cash or in non-monetary form. Because, there is a category of non-monetary bond benefits, and cash benefits.

Between the issuer of bonds and the bondholder who is the first purchaser of bonds, an agreement is concluded under which the latter lends a certain amount of money to the former in exchange for which the issuer undertakes to provide a mutual benefit consisting in the return of the borrowed amount within a specified period of time, which is the bond redemption date, and to pay the interest due, the amount of which is one of the elements of the legal relationship established between the parties under the bond issue. According to the view prevailing in the doctrine of commercial law, the benefit from the bonds is non-transferable, i.e. it cannot be transferred by the issuer to another entity, because it is assumed that in the case of receivables embodied in the bonds, art. 356 § 2 of the Civil Code, which states that a creditor cannot refuse to accept a benefit from a third party, even if it acts without the debtor's knowledge, is not applicable.[191]. The specificity of a bonded loan, on the other hand, is expressed precisely in the fact that the borrower is obliged to fulfil the benefit, since only such a relationship allows taking advantage of the privilege that a formal legitimacy from the security, as it is the embodiment of the debt in the bond. On the one hand, we are dealing with the situation of a creditor who shows his claim in a simplified manner, while on the other hand, the interest of the debtor is secured because only when he fulfils the benefit to the hands of the person who is authorised by the contents of the bond document, will he be effectively released from the obligation. The targeting of the debtor's person is important here in that, by virtue of the general provisions on securities (cf. art. 921), only the state of good faith on his side will determine the possibility of effective release from the obligation by performing the benefit even if it is performed not to the hands of the person with whom the material legitimacy, i.e. the actual entitlement under the loan granted, remained. Therefore, it is clear from article 921 in connection with article 922 of the Civil Code that an issuer cannot trans-

[190] Por. R. Jurga, M. Michalski, *Obligacje w świetle ustawy z dnia 29 czerwca 1995 r.,* Przegląd Ustawodawstwa Gospodarczego 1996, nr 1, s. 3 oraz L. Sobolewski w: *Prawo papierów wartościowych,* pod red. S. Włodyki, Warszawa 2004, s. 342.

[191] Por. m.in. R. Czerniawski, *Ustawa o obligacjach. Komentarz,* Warszawa 2003, s. 41.

fer his debt from bonds to another entity. Therefore, the issue of bonds gives rise to a relatively permanent and permanent legal relationship of bond nature between the issuer and the bondholder. The parties to the relationship determine its content at their own discretion, in accordance with the principle of freedom of contract under private law, which is also expressed in the freedom of the parties to agree on the content of the contract, with the sole proviso that the limits of this freedom are determined by: the nature of the legal relationship, the law and the rules of social coexistence.

3.2. Listing rules for debt securities on the *Catalyst* market

The Catalyst bond market, which became operational on 30 September 2009, is a combined name for four financial instrument trading platforms operated by the Warsaw Stock Exchange ("WSE") and the WSE subsidiary BondSpot S.A. based in Warsaw ("BondSpot"). Contrary to its product name, it is not a trading market for bonds only. It would be more reasonable to define the Catalyst market as an organised trading in debt securities. Due to the growing economic importance of the so-called "debt market" in the modern free market economy, the present study is to serve the legal characteristics of the Catalyst market from the point of view of the type of financial instruments listed on this market. This issue may be of particular importance for local government units, due to the possibility of issuing and listing Municipality securities on the Catalyst market.

The Catalyst market, as mentioned above, is a combined name for four financial instrument trading platforms operated by the WSE and BondSpot. It is worth noting that the adopted formula for organising trade in financial instruments means *de iure:*

- trading in the alternative trading system (within the meaning of art. 78 in connection with art. 21 par. 2 TFI (Trading in Financial Instruments) [192]) either
- Trading on an OTC regulated market (within the meaning of art. 14 in connection with art. 15 TFI).

The ATS organiser is obliged to provide:

- concentration of supply and demand for financial instruments traded in a given alternative trading system in order to shape their general price,
- secure and efficient transaction flow, as well as
- disseminating unified information on exchange rates and trading in financial instruments which are traded in the given alternative trading system.

[192] Ustawa z dnia 29 lipca 2005 r. o obrocie instrumentami finansowymi (Dz.U. 10 Nr 211 poz. 1384) (dalej zwana ObrlnFinU).

On the other hand, the regulated market, which has a highly formal character, is defined in art. 14. par. 1 of TFI as (yerba legis) a system of trading in financial instruments admitted to this trading which operates on a permanent basis and provides investors with universal and equal access to market information at the same time when matching offers to buy and sell financial instruments, as well as equal conditions for buying and selling those instruments, is regulated and subject to supervision by a competent authority on terms specified in the provisions of the Act, as well as is deemed by a Member State to meet those conditions and is indicated to the European Commission as a regulated market.

The regulated market on the territory of the Republic of Poland includes (i) exchange market and (ii) OTC market (Article 15.1 of TFI). The form of an OTC regulated market is used for the Catalyst market in question, for two of the four platforms for trading in financial instruments.

It is also worth noting that according to § 1.2 of the "Catalyst Rules", the adopted structure of this market does not mean the creation of a separate (new) form of organised trading and should not be formally identified with a legally defined form of organised trading within the meaning of Article 3.9 of the TFI.

As a consequence, the aforementioned trading in debt financial instruments is carried out within an alternative trading system or an OTC regulated market, which together (functionally, operationally and productively) is called the Catalyst market.

According to § 1.1 of the "Catalyst Rules", this market is a trading system for debt financial instruments.

It is prima facie noted that the 'Catalyst Rules' refer to 'financial instruments' and not 'securities' with regard to determining the type of assets which may be traded on the Catalyst market.

Financial instruments which do not have a legal definition under the "Catalyst operating rules" are defined in article 2 par. 1 TFI. It follows from this definition that they are a broader concept than the concept of securities within the meaning of article 3 par. 1 of TFI. Financial instruments are both securities and instruments which are not securities (e.g. options, futures contracts, swaps).

Thus, it should be noted that the product (marketing) name Catalyst used by the trading organisers and the mass media as a "bond market", being a type of non-equity securities, is a misleading name, both from the point of view of the provisions adopted in the internal regulations and the actual spectrum of values being the subject of trading on this market.

Therefore, it seems that the presentation of Catalyst as the so-called bond market is aimed solely at distinguishing this form of organised trading from

the stock market, which is the dominant (though not exclusive) type of financial instrument on the WSE main market.

In other words, the contemporary needs of social communication and a certain conciseness of the marketing message have forced the Catalyst market to be assigned to bonds, which is an oversimplified concept.

The regulations adopted by the WSE and BondSpot (both the alternative trading system and the OTC regulated market), which constitute a specific "normative basis" for trading on the Catalyst market, are also not unified in this definition area.

They either use the term "debt financial instruments" without a separate legal definition, or indicate certain types of financial securities (e.g. bonds, mortgage bonds), or introduce the concept of "debt instruments" (see § 14 par. 1 of the Rules of Trading on the OTC regulated market organised by the BondSpot, according to which debt instruments, i.e. non-equity securities within the meaning of art. 4 par. 10 of the Act on Public Offering, may be traded on the debt instruments market[193] and other negotiable securities incorporating property rights equivalent to those arising from the debt incurred).

In conclusion, it should be stated that:

a) soft law regulations, regulating the rules of the Catalyst market, allow for the possibility of trading in broadly understood financial instruments, not securities, under this legal formula, which, by the way, is consistent with the concept of trading in the ATS and the OTC regulated market provided for in the TFI Regulation;
b) the product (marketing) name of the Catalyst market as a bond market is misleading, which should be explained by modern standards for a concise ("slogan") communication.

Although the above mentioned "Catalyst Rules of Operation" provide the possibility of trading in financial instruments on this market, although undefined, the current shape of the Catalyst market allows for the the thesis that it is a market for trading primarily in debt securities.

It is worth mentioning that a debt security embodies the property rights specified therein (incorporated), which are so closely related to the security that only possession of the security is the only legally effective way to legitimise the person entitled to receive benefits resulting from it[194].

[193] Ustawa z dnia 29 lipca 2005 r. o ofercie publicznej i warunkach wprowadzania instrumentów finansowych do zorganizowanego systemu obrotu oraz o spółkach publicznych (Dz.U. 09 Nr 185 poz. 1439).

[194] I. Weiss, *Obligacje,* [w:] *Prawo papierów wartościowych,* System Prawa Prywatnego (t. 19), (red. A. Szumański), Warszawa 2006, s. 374.

In the literature this type of securities is also referred to as creditor securities, which is due to the fact that the rights embodied in them constitute claims of their buyers.

However, whether the term debt or creditor securities is used, it should be noted that such securities relate to a debt relationship that includes a specific debt claim and, at the same time, specific obligations (debt) of the issuer.[195].

One of the mentioned functions of debt (credit) securities is also their lending character.

In this context, it is possible to characterise the Catalyst market as an organised secondary debt market (on the one hand) and the area of primary funding acquisition by issuers (on the other hand).

Indeed, the primary economic function of the Catalyst market is the raising of capital by issuers of securities who offer to acquire these securities to potential investors using the organised market, in the form of initial offers of securities.

Nevertheless, the Catalyst market also allows secondary trading in debt securities, with the proviso, however, that such trading is carried out until the specific redemption of such securities.

Debt securities listed on Catalyst

Currently, the following debt securities are listed on the Catalyst market:

a) so-called corporate bonds, issued by commercial law companies on the basis of the Bonds Act (denominated both in Polish zloty and euro);
b) so-called cooperative bonds, issued by cooperative banks;
c) mortgage bonds, issued by mortgage banks;
d) public mortgage bonds issued by mortgage banks;
e) Municipality bonds, issued by local government units;
f) Treasury bonds, issued by the State Treasury.

Particular attention is paid to the latter two categories of securities, which will be discussed below.

The key elements for this type of debt security are maturity and interest rate.

This is because the debt financing function is to raise so-called 'payback capital' for the purpose of carrying out the business, which is linked to the issue by the issuer of debt securities, which are evidence of certain rights of the buyer (creditor) and obligations of the issuer (debtor).

[195] Więcej na temat papierów wartościowych związanych ze stosunkami zobowiązaniowymi w: P. Machni- kowski, *Kodeks cywilny. Komentarz,* (red. E. Gniewek), Warszawa 2006, s. 1385.

The purchaser of the debt security is therefore entitled to a claim against the issuer for the repayment of the borrowed capital at par value at a given maturity, plus a consideration for the temporary provision of the funds.[196].

In the presented presentation, the maturity date specified in the terms and conditions of issue of a debt security is the date of performance of a specific service. However, the remuneration due to the purchaser of a security for using the funds made available is a type of legal benefits within the meaning of article 54 of the Civil Code[197].

The benefit will therefore be both interest accruing on the nominal amount of the debt security and (alternatively) a discount provided for in the design of a specific security, allowing the acquisition of the security *ab initio* at a price lower than its nominal amount, with the issuer committing it to redeem the security already at the nominal amount.

It is also worth noting that according to art. 24 of the Bond Act, upon redemption the bonds are subject to redemption. As a result, bonds traded on the Catalyst market are subject to sale transactions before their redemption date. Therefore, it is worth emphasising that art. 2 of the Bond Act is the legal basis for the issue of the so-called Municipality bonds, although a more appropriate term would be the concept of local government bonds.

The notion of "Municipality" is prima jacie connected primarily with cities, whereas the Act of 27 August 2009 on public property (Journal of Laws No 157, page 1240) uses a broader scope of the notion of bonds issued by local government units, and what is more, specific rights to issue bonds result from the provisions of the so-called local government acts, which define the principles of operation of municipalities, counties and local government provinces.

In the view of article 2 par. 2 of the Bond Act, the following municipalities, counties, provinces, as well as associations of these units and the capital city of Warsaw have the capacity to issue such securities.

The legal basis for the issue of bonds by individual local government units, including the determination of detailed terms and conditions/rules related to such an issue, are provided by the following:

a) Resolution of the municipality council - art. 18 par. 1 pt. 9 of the Act of 8 March 1990 on Municipality self-government (Journal of Laws 01 No. 142 page 1591);
b) Resolution of the county council - art. 12 par. 8 of the Act of 5 June 1998 on County Self-Government (Journal of Laws 01 No. 142 page 1592);

[196] M. Romanowski, *Zagadnienia ogólne papierów wartościowych,* [w:] *Prawo papierów wartościowych,* System Prawa Prywatnego (t. 18), (red. *A. Szumański),* Warszawa 2005, s. 11-12.

[197] E. Gniewek, *Kodeks cywilny. Komentarz,* (red. E. Gniewek), Warszawa 2006, s. 118.

c) Resolution of the Province Assembly - art. 18 par. 19 of the Act of 5 June 1998 on the Province Self-Government (Journal of Laws 01 No. 142 page 1590).

It is also worth noting that in the context of art. 28 sec. 1 of the Act on Bonds, a "self-governing" issuer is obliged to indicate the purpose of the issue, and moreover, it cannot use the funds from the issue of bonds for other purposes.

In the case of local government units, this principle of purpose allocation and acquired funds is correct in that the funds coming from the sale of securities (the so-called revenues of local government units' budgets) are classified as public funds within the scope of article 5 of the Public Finance Act and are subject to separate regulations of public law nature.

Treasury bonds issued by the State Treasury are also listed on the Catalyst market. On behalf of the State Treasury, the Minister of Finance acts as a fiscal herd and may issue the so-called treasury securities, which include: treasury bills (art. 99 of the Public Finance Act), treasury bonds (art. 100 of the Public Finance Act) and treasury savings papers (art. 101 of the Public Finance Act).)[198][199].

In the view of article 95 of the Public Finance Act, it should be considered that treasury securities have a debt character [11]. Therefore, in this type of securities, claims are incorporated, which constitute the basis for the creditor's demand from the debtor (the State Treasury) to perform a specified service within a specified period of time (art. 95 par.1 of the Act on Public Finance).

The State Treasury states that it is a debtor to the owner of such paper and undertakes to provide a specified benefit to him.

In the case of the Treasury securities in question, the cash benefits consist in the payment of a sum of money consisting of an amount equal to the capital made available to the issuer at the time of the acquisition of the debt security (nominal value) and, normally, an amount constituting remuneration

[198] Państwo jako *fiscus* wykonuje bowiem za pomocą swoich jednostek organizacyjnych *(stationesfisci),* niemających osobowości prawnej, swoje zadania społeczne i gospodarcze *[dominium),* także w sferze stosunków cywilnoprawnych o charakterze majątkowym (tak G. Bieniek, *Reprezentacja Skarbu Państwa i jednostek samorządu terytorialnego w postępowaniu cywilnym,* Warszawa 2003, s. 7). Innymi słowy, Skarb Państwa jest o tyle specyficzną osobą prawną, iż nie posiada klasycznych organów, natomiast działa poprzez państwowe jednostki organizacyjne nieposiadające osobowości prawnej *(stationesfisci)* (tak E. Gniewek, *Kodeks cywilny. Komentarz,* Warszawa 2006, s. 84).

[199] *Verba legis:* Skarbowy papier wartościowy jest papierem wartościowym, w którym Skarb Państwa stwierdza, że jest dłużnikiem właściciela takiego papieru, i zobowiązuje się wobec niego do spełnienia określonego świadczenia, które może mieć charakter pieniężny lub niepieniężny (art. 95 par. 1 ustawy o finansach publicznych).

(benefits of law) for the buyer of such security, for the temporary 'provision of capital'[200].

A functional application of treasury bonds is to ensure short-term financing (credit) of the state budget deficit.

In this context, Treasury bonds are securities issued on the approximate Catalyst market, which enables the issuer (the State Treasury represented by the Minister of Finance) to raise funds also in this type of organised market formula.

Treasury bonds, which are a type of Treasury securities, are a type of Treasury bonds characterised by greater flexibility (see the extended possibility of offering Treasury bonds at home and abroad and allowing the construction of Treasury bonds based on both interest rates and a specific discount). Moreover, according to Article 96 of the Public Finance Act, a treasury bond is a medium- and long-term treasury security, where the time period defined by the legislator is a year - understood as (not less than) 365 days.

Treasury bonds can also be either wholesale (limited to financial institutions) or retail (wide range of addressees).

Treasury bonds offered on foreign markets are issued on the basis of the Ordinance of the Minister of Finance of 15 December 2010 on the conditions of issuing Treasury bonds offered on foreign markets (Journal of Laws No. 244 page1630).

The contemporary reality of functioning of modern free market economies shows a significant problem of permanent indebtedness, both in the public and legal dimension (state and local government budget) and in the private dimension (indebtedness of entrepreneurs and households).

Thus, there is a separate economic category, referred to as the so-called debt market, which allows for the satisfaction of the permanent borrowing needs of certain entities, which, like other economic areas, is subject to certain mechanisms of the play of supply and demand, as well as increasing competition from 'debt issuers'.

The steady growth of the importance of the Catalyst market discussed in this study for the Polish financial market is therefore a confirmation of the continuous need to obtain short- or medium-term financing for the activity of issuers of debt securities. The form of issue of non-equity securities (as opposed to the stock market) is interesting for their issuers in that it does not require the simultaneous participation of the entity providing financing in the ownership sphere of the issuer, which may be undesirable or legally impossible (see: no possibility for issuers of treasury bonds, Municipality bonds or cooperative bonds to issue shares).

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Therefore, the Catalyst market makes it possible to obtain financing from a wide range of issuers and at the same time, due to specific rules of organised trading (information transparency, authorised trading participants, clearing and settlement system organised by the National Depository for Securities, etc.), it is a relatively safe and transparent market for trading participants.

3.3. Issue of Municipality bonds on the Catalyst market as a source of financing for local government units.

In September 2009, a new securities trading platform called Catalyst started operating in the structure of the Polish capital market. It is a joint venture of the Warsaw Stock Exchange S.A. (WSE) and its subsidiary BondSpot S.A. The intention of the organisers of Catalyst was to create an organised market for trading in debt financial instruments, ensuring flexible rules for issuers and investors. Catalyst is intended to fill a gap on the Polish capital market, which has so far been used primarily as a place of issue and trading of Treasury and equity securities. The organisational and legal solutions applied on Catalyst enable the issue of financial instruments on the organised market also to entities for which the Warsaw Stock Exchange floor in particular has not been available so far, i.e. cooperative banks, limited liability companies, and local government units (territorial self-government units).

The purpose of this study is to present the rules of operation of the Catalyst market and the procedure of issuing Municipality bonds on that market. Local government instruments are present on Catalyst from the first day of the market's operation; however, they achieve the smallest share in the total value of the issue.

Catalyst is a trading and debt securities authorisation system consisting of four trading platforms: two markets organised by the WSE, i.e. the regulated market and the alternative trading system (ATS), addressed to retail investors, and two markets operated by BondSpot S.A., also the regulated market and the ATS, addressed to wholesale investors (i.e. the minimum transaction value is at least PLN 100,000). All Catalyst sub-markets are intended for trading in Treasury bonds and non-Treasury debt instruments issued by companies, cooperative banks and local government units. The organisational structure of Catalyst and the scope of regulations in force on particular sub-markets enable raising capital by a wide group of issuers having different needs and expectations in terms of parameters of issuing debt financial instruments [Mosionek-Schweda, Panfil, 2014, p. 155],

The legal basis for the functioning of Catalyst is contained in the document: The rules of operation of Catalyst, which is a framework regulation concerning, among others: general rules of market operation, terms and procedure of securities authorisation, disclosure obligations of issuers, rules of introducing bonds to trading on particular segments of Catalyst and rights and obligations of market participants. However, detailed regulations concerning the functioning of each of the four sub-markets are contained in the regulations adopted by their organisers. The provisions of the acts concerning the Polish capital market also apply here (see Table 16.1).

Debt instruments may be present on the Catalyst market through [Huczek, 2010, p. 25]:

- Receiving authorisation for a given issue of securities, but without applying for admission/trading on any Catalyst sub-market;
- Directing the issue to organised trading on selected Catalyst segments.

Table 16.1 Legal basis governing the Catalyst market

Catalyst operating rules adopted under resolution of the Exchange Management Board dated 27 January 2010 (as at 1 October 2012)	
Regulated markets	Alternative Trading Systems
The Exchange Rules as adopted by Resolution No. 1/1110/2006 of the Exchange Supervisory Board dated 4 January 2006, as amended.	The Alternative Trading System Rules, together with 7 appendices, in the version adopted by the Exchange Management Board Resolution No. 147/2007 of 1 March 2007, as amended.
Rules of trading on the regulated OTC market as adopted by Resolution No. 22/13 of the Supervisory Board of 9 May 2013, as amended.	Regulations of the Alternative Trading System in the version adopted by Resolution No. 103/09 of the Management Board of BondSpot S.A. of 4 November 2009 approved by Resolution No. 27/0/09 of the Supervisory Board of BondSpot S.A. of 5 November 2009, as amended.
Act of 29 June 1995 on Bonds Act of 29 July 2005 on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organised Trading and Public Companies Act of 29 July 2005 on Trading in Financial Instruments	

Source: Own study.

In the first case, the issuer shall not apply for the admission/ introduction of financial instruments to organised trading, but shall merely obtain authorisation for them. In practice, this means registration of these assets in the public information system Catalyst and an obligation for the issuer to provide current and periodic information in accordance with the regulations applica-

ble on that market. The authorisation can be applied for both for a new issue of bonds and for securities already traded among investors. Dematerialisation of these instruments is also not required [WSE, 2010, Chapter IX].

Having an authorisation for financial instruments means numerous advantages for their issuers resulting from their presence on a prestigious, organised market without the need to fulfil all obligations imposed on entities whose securities have been introduced to trading. Despite the undoubted advantages of the authorisation, this form of presence on Catalyst does not enjoy the interest of issuers. According to data as of 30 June 2014, only 16 bonds series issued by six issuers have been authorised, including in particular the territorial self-government units (territorial self-government units): the Jaroslaw county (3 series), Oswiecim (1 series), Tczew (3 series), Turek (1 series), Zabki (3 series) and 5 series of corporate bonds of Remedis S.A. [WSE, 2014a, pp. 3-5],

Issuers who apply for the referral of debt instruments to organised trading on Catalyst shall comply with formal requirements set out separately for each sub-market. The structure of Catalyst enables the following solutions with respect to the presence of securities in the quotations [WSE, 2010, Chapter III]:

- Admission of the issuer's instruments to trading on both regulated markets operated by the WSE.
- Admission of the issue to trading on the regulated market of the WSE and its introduction to the ATS BondSpot S.A;
- Introduction of bonds to the WSE ATS and admission to the regulated market of BondSpot S.A;
- Introduction of instruments simultaneously to the ATS organised by the WSE and the ATS BondSpot S.A.

In justified cases, at the request of the issuer, it is possible to obtain from the consent of the market organisers for the admission/ introduction of instruments to each of the sub-markets or only to one of them [WSE, 2010, § 10.2]. The choice of trading platforms is strictly dependent on the possibility of the issuer meeting the admission/entry criteria applicable on a given sub-market. Catalysts have both regulated markets and more liberal alternative trading systems. These platforms differ significantly in terms of formal conditions of admission/insertion of instruments, but also in terms of the scope of disclosure obligations of issuers and costs incurred both in the process of issuing bonds and later in the presence of instruments on the market.

The choice of the regulated market requires the completion of all procedures related to the preparation and execution of the public transfer of se-

curities (including the drawing up of the prospectus, which is subject to the approval of the Financial Supervision Authority[201]). The condition for admission to trading on the regulated exchange market is also the minimum nominal value of the introduced bonds, which must be at least 4 million PLN [WSE, 2006, § 40]. In the case of alternative trading systems, the sale of bonds may take place by way of a so-called private placement, addressed to a maximum of 149 investors, which does not require the preparation of an issue prospectus, but a so-called information document not subject to the approval of the PFSA. The private sale does not involve an investment company acting as an offeror. Therefore, it is a much faster and cheaper form of issuing financial instruments than the public offering.

Other differences, significant for issuers, concern the scope of disclosure obligations. The most simplified disclosure requirements are those applying only for authorisation of instruments in the Catalyst system. In this case, the content and timing of information disclosure is governed by the provisions of Chapter II of the Catalyst Rules. The scope of information provided by issuers of bonds introduced to trading in the WSE ATS or BondSpot S.A. is much wider and more precise. Detailed regulations can be found in the attachments to the ATS rules. Local governments whose bonds are listed in the ATS are obliged to publish in a current report information including: :establishment of new significant sources of income or abolition of the existing significant source of income, with specification of the impact of this event on the entity's budget revenues; negative opinion of the Regional Chamber of Accountancy (RCA) on the report on LGU budget execution or on the half-yearly report on budget execution; declaration by the RCA of invalidity of the budget resolution in whole or in part, with specification of the impact of this event on LGU; establishment of new significant sources of income or abolition of the existing significant source of income, with specification of the impact of this event on the entity's budget revenues; negative opinion of the Regional initiation of proceedings aiming at establishment of a commissary board or a government commissioner and on establishment of a commissary board or a government commissioner [SE, 2007, Attachment no. 4, § 7], In case of periodical reports, LGU are obliged to submit only annual report on budget execution together with RCA opinion [SE, 2007, Attachment no. 4, § 16].

[201] W odróżnieniu od przedsiębiorstw, LGU kierujące emisję instrumentów dłużnych do obrotu zorganizowanego nie muszą sporządzać prospektu emisyjnego, a jedynie dokument informacyjny, nawet w sytuacji ubiegania się o wprowadzenie obligacji do obrotu na rynku regulowanym [Ustawa o ofercie publicznej, art. 7 pt.2],

The most stringent disclosure requirements have been set for issuers active on Catalyst regulated markets, who under the provisions of the Act on Trading in Financial Instruments, are obliged to simultaneously provide the FSA, the company operating a given regulated market and the public with both current and periodical information and inside information within the meaning of art. 154 of that Act. The scope, type, form, frequency and dates of submission of current and periodic reports are regulated by the Regulation of the Minister of Finance of 19 February 2009 on current and periodic information submitted by issuers of securities and conditions for recognising as equivalent information required by the laws of a non-member state (Journal of Laws No. 33, page 259, as amended). In case of current information, the situations specified in this Regulation, which LGU must inform about in the form of a current report, shall be the same as those in force in the ATS. A significant difference concerns periodic reports. On the regulated market, territorial self-government units shall also submit only annual reports, however, their scope is strictly defined by the aforementioned regulation (§ 91 par. 1-5 and par. 12)

Process of issuing and introducing Municipality bonds on Catalyst

Municipality bonds are issued under the Bond Act of June 29, 1995 (i.e., Journal of Laws of 2001, No. 120, item 1300, as amended), which attributes to them the value of a security and determines their legal structure. The self-government system acts and the Public Finance Act of 27 August 2009 (Journal of Laws No. 157, item 1240, as amended) are also important in the process of these instruments. The regulations contained in these acts shall determine competences of particular territorial self-government units' bodies in the process of contracting financial obligations. Additionally, provisions of the Public Finance Act define the purpose of funds obtained through the issue of Municipality bonds and introduce certain restrictions concerning their construction [Mosionek-Schweda, Panfil, 2014, p. 153],

The process of issuing Municipality bonds and introducing them to trading on Catalyst can be divided into four stages [Huczek, 2010, pp. 17-25]:

- Analysis of issue possibilities - this includes determining whether the bond issue will be the best source of funds for territorial self-government units, and then determining the basic parameters shaping the entire issue program: purpose of issue, amount, maturity, interest rate, division into tranches and series, interest rate and other conditions of issue.
- The resolution on the issue of bonds - the issue of Municipality bonds requires legal activity of the body constituting the LGU. Two solutions

are possible here. Based on the provisions of political system acts, the council or the local government council may adopt a separate resolution on the issue of Municipality bonds or, pursuant to Art. 212 par. 2 pt. 1 of the Public Finance Act, it may include in the budget resolution an authorisation for the territorial self-government unit executive body to contract financial obligations, including through the issue of Municipality bonds [Mosionek-Schweda, Panfil, 2014, p. 153],

- Placing of the issue and raising funds - the resolution on the issue of bonds does not give rise to a financial liability by itself, but is a formal authorisation for the territorial self-government units' executive body to incur debt in the form of a bond issue [Huczek, 2010, p. 22], The sale of bonds may be carried out by way of a private placement or public offering. The decision in this regard shall not only determine the organisational and legal aspects of the issue process and the associated costs, but shall also be relevant to the stage of introducing bonds to trading on Catalyst and the choice of the quotation markets. Furthermore, issuers may take advantage of the possibility to sell financial instruments using the WSE IT system. In this case, the sale process is managed by the Exchange which has the possibility to form a bond distribution consortium composed of brokerage houses which are WSE members, which increases the circle of bond buyers [wider: WSE, 2014b].
- Introduction to trading on Catalyst - instruments introduced to trading are registered with the National Depository for Securities (NDS). For this purpose, the issuer shall submit an application to the NDS together with attachments, including, but not limited to, a resolution on the issue and a so-called bond booklet containing key information about the bonds. In the case of applying only for authorisation, neither dematerialisation of the bonds nor their registration with the NDS is required. The issuer then only applies for an ISIN or CIF[202] code. Debt instruments shall be introduced to trading on Catalyst upon the issuer's application. The decision should be made by the organisers of Catalyst within 5 business days from the date of submitting a complete application. In case of a positive decision, the issuer's debt instruments should be traded within 5 business days [WSE, 2010, § 15].

The process of issue and introduction of bonds on Catalyst is not complicated and the time and cost outlays related thereto depend on many factors,

[202] Kod ISIN - *International Securities IdentificationNumber* oraz kod CFI - *Classification of Financial Instruments* służą do międzynarodowej identyfikacji papierów wartościowych i instrumentów finansowych.

including first of all the efficiency of activities undertaken as part of LGU's preparatory work for the issue and the selection of the bond sales procedure. Formal issues concerning registration of instruments in the NDS and subsequent submission and consideration of applications for introduction and admission to trading may be completed within 4-8 weeks. If bonds are introduced to trading in alternative trading systems of Catalyst, issuers may seek assistance of so-called authorised advisors. These are entities providing services related to business trading, including financial, legal or financial audit services [WSE, 2007, § 18.1]. The list of these advisors is published in the Catalyst dedicated portal.

An issue of bonds on Catalyst may be a more advantageous and flexible source of capital raising for local self-governments than a bank loan, as it is the local government that decides about the size of the issue, repayment terms and redemption dates. Bonds are also perceived as more modern instruments than credits and loans, therefore the use of bonds to finance activities may be treated as a manifestation of modernity in LGU management. Moreover, the placement of bonds in organised trading forces the local government to pursue a transparent information policy, which in turn affects its credibility in the financial market and enables further capital rising on more favourable terms. Additionally, presence on the capital market and the related information policy may become an important element of LGU promotion. Despite unquestionable benefits related to the bond issue, this is not an optimal form of financing in every case. The decision on its application should always be preceded by a detailed analysis of self-government needs and capabilities.

3.4. Issue of income bonds as a source of financing Municipality investments

Despite the impressive scale and growing importance of Municipality investments in the last 10 years after Poland's accession to the European Union, the level of Municipality infrastructure still falls short of European standards. Therefore, it is necessary to continuously modernise the existing infrastructure and build new one. The scope and high costs of these undertakings, combined with insufficient own income of local government units, are the reason for their search for external sources of financing. These needs will increase due to the need for local government to provide funds to cover its own contribution to projects co-financed from EU funds under the financial perspective 2014-2020.

On the one hand, the European funds available under the new financial perspective represent a unique opportunity to reduce the "infrastructure gap",

while on the other hand, their absorption may encounter barriers resulting from the processes of public finance consolidation in post-crisis conditions. With regard to the local government sector, the most significant limitation may turn out to be the new fiscal rule under art. 243 of the Act of 27 August 2009 on Public Finance, in force since the beginning of 2014[203] establishing an individual limit of expenditure on debt service of a local government unit. In these circumstances, one should expect an increase in the role of income bonds as those sources of external financing whose service costs are not taken into account when calculating the above limit.

Income bonds are not a new, but still underused instrument for financing Municipality investments in Poland. Despite their undoubted benefits from their issue and the passage of 14 years from their introduction to the Polish law system, they are of marginal importance on the Municipality bond market. The purpose of this study is to analyse the legal structure of income bonds, their advantages and disadvantages and to indicate the reasons for their inadequate role in financing Municipality investments in relation to potential opportunities. The conclusions will present the *de lege lata and de lege ferenda* postulates, the implementation of which may contribute to the growth of importance of these instruments in the future.

The implementation of the adopted objective requires the use of legal research methods, in particular the general theoretical and formaldogmatic methods.

Financing of Municipality investments

Investment activity of local government units results from the scope of their own tasks. From the content of article 166 par. 1 of the Constitution[204] It can be deduced that these are tasks serving the self-government community needs, which as a result of division of public tasks between the state and self-government were not reserved for the government administration by virtue of the Acts and are implemented by territorial self-government units from their own resources. An open catalogue of territorial self-government units' own tasks was included in article 7 par. 1 of the Act of 8 March 1990 on Municipality Self-Government[205], art. 4 par. 1 of the Act of 5 June 1998 on County Self-Government[206] and article 14 par. 1 of the Act of 5 June 1998 on the Province Self-Government[207]. These include, among others, issues in the

[203] Tekst jedn. Dz.U. z 2013, poz. 885 z późń. zm.

[204] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U. Nr 78, poz. 483 z późń. zm.).

[205] Tekst jedn.: Dz.U. z 2013, poz. 594 z późń. zm.

[206] Tekst jedn.: Dz.U. z 2013, poz. 595 z późń. zm.

[207] Tekst jedn.: Dz.U. z 2013, poz. 596 z późń. zm.

field of: road infrastructure, water and sewage, waste management, real estate management and housing, water management, environmental protection and public transport. The implementation of these tasks requires continuous investment expenditures on the Municipality infrastructure.

The term "Municipality investments" is rarely defined in the doctrine of law in economic literature, and moreover, it is used interchangeably with such terms as: "local investments", "municipality, and county province investments «, » infrastructure investments «,» local government investments or public investments". [Hermaszewski, 2011, p. 4], One of the few definitions of "Municipality investments", by M. Graczyk, presents them as "technical instruments for stimulating sustainable development (integrated order) (...) their implementation affects the general improvement of the state of the environment (ecological order) and the quality of life of the inhabitants (social order), and at the same time significantly affects the economic development of the municipality (economic order)". [Graczyk, 2008, p. 48], This characteristic exposes the stimulative and at the same time stabilising function of Municipality investments, also emphasised by other authors [Zioło, 2012a, p. 917; Kłuza, 2011, p. 21], However, it omits important features of such investments.Part III.

Sources of local government financing

In view of the above, the most appropriate approach should be considered to combine investments with the Municipality economy, where public service tasks are carried out in order to ensure that the collective needs of the population are met on an ongoing and uninterrupted basis through the provision of universal services.[208]. It includes, in particular, such activities as: water supply and energy sources, running a sewage system and sewage treatment plant, maintenance of local roads, lighting, fire protection, as well as protection and maintenance of housing substance [Byjoch, 2000, p. 25-26; Bałdyga, 2004, p. 21]. It should be noted that, in accordance with Article 2 of the Municipality Managment Act, these tasks may be carried out by local government units, in particular in the forms of a local government budget establishment or commercial law companies. The last ones are not included in the public finance sector[209], hence the concept of "Municipality investment" has not only a clearly defined material scope, but also a wide range of entities,

[208] Por. definicja legalna gospodarki komunalnej z art. 1 par. 2 ustawy z dnia 20 grudnia 1996 r. o gospodarce komunalnej (Tekst jedn.: Dz.U. z 2011 Nr 45, poz. 236).

[209] *A contrario* art. 9 pkt. 14 ustawy z dnia 27 sierpnia 2009 r. o finansach publicznych (Tekst jedn.: Dz.U. z 2013, poz. 885 z późn. zm.).

going beyond the catalogue of public finance sector units. Taking into account the above, it should be assumed that "Municipality investments" are outlays incurred for the construction, extension and modernisation of Municipality assets serving the proper performance of public utility tasks, the purpose of which is the current and uninterrupted satisfaction of the collective needs of the local government community.

The investment activity in the area of Municipality infrastructure, as any form of economic activity, should be characterised by rationality. The rationalisation of financing of Municipality investments is connected with decisions aimed at reducing both the costs of obtaining sources of financing and the risk related to a given source and structure of financing. It manifests itself in particular in the activities calculated on the basis of the following reducing the costs of financing from external sources, ensuring their appropriate structure and their transfer to subsidiaries [Zioło, 2012b, p. 763-764], e.g. to local government commercial law companies issuing income bonds.

Income bonds as an alternative source of external financing

Local government units finance their investments from their own income supplemented by external funds, of which the main non-returnable source is the EU budget, while the returnable source is income from bank loans. This catalogue of financing sources is supplemented by revenues obtained by local government units from bond issues. Municipality issues are based on both private law regulations, in particular art. 2 par. 2 of the Act on Bonds of June 29, 1995.[8], as well as public - including article 89 p.f.a. Detailed standards of competence which grant the authorities the authority to adopt resolutions on the issue of bonds are specified for the municipality in article 18 par. 2 pt. 29 b of m.s.g.a., for the county - article 12 par. 8(d) of c.s.g.a., for the Province - article 18 par. 19b of p.s.g.a.

The concept of "Municipality bonds" is not of a normative nature, as it was neither defined nor even used in the content of the above mentioned legal acts. However, it is a nominative notion indicating the issuer, which is a local government unit. Municipality bonds, just like corporate bonds, have all the distinctive features of bonds in the general sense [Wójcik, 2012, p. 749], Referring to the statutory definition of bonds contained in art. 4 par. 1 of the a.o., it can be assumed that a Municipality bond is a security issued in a series in which the issuer, being a local government unit, states that it is a debtor to the owner of the bond (the bondholder) and undertakes to provide a specific service to it.

Local government units may issue bonds under the general terms and conditions set out in the a.b., either directly - as Municipality bonds or through

Municipality companies - as corporate bonds. There is another possibility, so far rarely used, namely the issue of income bonds on the basis of the provisions of articles 23a-23b of the a.b.

Origin of income bonds and the current state of the primary market for these instruments in Poland

The income bonds were based on a revenueborids construction. The origin of this instrument comes from the United States of America, where it is commonly used to finance public utility projects in the field of: electricity, gas, water, sewage and solid waste management, education, health care, sport and road, rail, sea and air transport [Święcicki, 2006, p. 30 et seq.]. The issuers of revenuebonds on the American market are entities operating hospitals, schools, seaports, airports and other utilities [Cern, 2005, p. 866].

The institution of income bonds was introduced into the Polish legal system on the basis of articles 23a-23c of the Act of 29 June 2000 amending the Act on Bonds and some other acts[210]. Despite 14 years of these regulations in force, income bonds have not gained popularity and currently do not constitute a significant source of financing Municipality investments. So far, only 6 projects financed with income bonds have been completed in Poland, from which a total of PLN 1,219,000 was raised [Hogan Lovells (Warsaw) LLP, 2014, p. 2]:

- in 2005 - Miejskie Wodociągi i Kanalizacji w Bydgoszczy Sp. z o.o.: a bond issue programme up to PLN 600 million (first issue of income bonds in post-war Poland and Central Europe;
- in 2006 - Miejskie Przedsiębiorstwo Komunikacyjne Łódź Sp. z o.o.: a bond issue program up to PLN 166 million (Lodzki Tram Regionalny project);
- in 2010 - Zakład Komunikacji Miejskich w Gdańsku Sp. z o.o.: a bond issue programme up to PLN 60 million (bus transport project);
- in 2010 - Zakład Komunikacji Miejskiej w Gdańsku Sp. z o.o.: a bond issue program up to PLN 220 million (tram transport);
- in 2012 - Przedsiębiorstwo Wodociągów i Kanalizacji w Gnieźnie Sp. z o.o.: a bond issue programme of up to PLN 28 million (project to modernise the sewage treatment plant and build a sewage system);
- in 2014 - Tram Fordon Sp. z o.o. with its registered office in Bydgoszcz: a bond issue programme up to PLN 145 million (transport).

In each of the above mentioned cases, the issuer was a commercial law company (sp. z o.o.) with the Municipality capital. This instrument has not

[210] Dz.U. Nr 60, poz. 702.

been issued so far by companies with the participation of a county or Province government, nor directly by local government units of any level.

Characteristics and legal structure of income bonds in Poland

A typological feature of income bonds (revenuebonds) enabling their distinction from general bonds (general bondsbonds) is the right of the bondholder to satisfy its claims with priority over the issuer's other creditors: from all or part of the income or from all or part of the assets of the projects which were financed with funds obtained from the issue of bonds, or from all or part of the income from other projects specified by the issuer (art. 23a par. 1 of the a.b.). Meanwhile, other bonds belong to the category of securities incorporating liabilities paid from the total income of the issuer. As indicated in the explanatory memorandum to the Act of June 29th 2000 amending the Bonds Act and certain other acts, "the essence of income bonds is to ensure that the bondholders have priority rights to satisfy themselves from certain objects of the issuer, as well as from certain assets of the issuer; in order to implement these standards, the regulations prohibit the disposal of certain assets by the issuer, as well as the procedure to be followed in the event of enforcement, liquidation, bankruptcy and other changes to local government units". [Reason, 2000, p. 8].

No less important feature of income bonds is related to the responsibility of the issuer. As a general rule, the legal position of an issuer is based on its unlimited liability extending over all assets (art. 8 par. 1 of the a.b.). Meanwhile, the essence of income bonds is to limit the issuer's liability for the obligations arising from these bonds to the amount of income or the value of the project assets to which the bondholder has a priority right under the rules set out in article 23a of the a.b. (article 8 par. 2 of the a.b.). The above feature becomes more important if the income or assets from the project prove insufficient to meet the issuer's obligations towards the bondholders. The effect of the adopted solution is to transfer the risk associated with the implementation of the project to the bondholders and make the satisfaction of creditors' claims dependent on the success of the investment project to be financed in this way [Hogan Lovełls (Warsaw) LLP, 2014, p. 9]. Therefore, the doctrine indicates that the risk of insufficient revenues from future periods is transferred to the creditors. Therefore, income bonds are considered a type of securities with limited liability [Poniatowicz, 2005, p. 22].

Another feature of income bonds is their deliberate nature. According to article 23 par. 3 of the a.b. on the issue of income bonds, the resolution on the issue of income bonds should specify the type and purpose of the project; it

should also be indicated in the content of such a bond if it has not been dematerialised (par. 4). Although this is not an exclusive feature of this type of bond, because with respect to the purpose it also applies to other Municipality bonds (art. 28 par. 1 of the a.b.), in connection with the above mentioned features revenuebonds create their specificity. It restricts the issuer's freedom to subsequently allocate the funds obtained from the issue, as well as the freedom to choose the source of satisfaction of the bondholder's claim. The Bond Act does not provide for any restrictions as to the purpose of issuing income bonds. It should be stressed in particular that the admissibility of the issuer's indication of income from projects other than those financed with the proceeds from the issue of bonds as a source of satisfaction of the bondholders' future claims creates an opportunity for local government units to finance unprofitable investment projects, e.g. in the area of culture, education, sport and recreation. It can be stated that the catalogue of objectives of the bond issue is open and its indication in the terms and conditions of the issue and the content of the bond (if it has a material form) is of an obligatory nature and serves as information.

In order to correctly determine the essence of income bonds, the terms "venture", "venture income" and "venture assets" should be interpreted. None of these notions have been defined in the a.b.

The notion of "venture" is of key importance in this context. The legislator uses it in many legal acts, in some of them defining it for the purposes of a specific regulation. However, none of these definitions are suitable for use in relation to revenuebonds. It is commonly understood that an undertaking is 'an object, intended, decided, implemented' and also 'intention, decision'. [Doroszewski (ed.), 2000], However, the meaning of this concept is too general to be useful in the interpretation of the analysed regulations. Applying the indications of a systemic and functional interpretation, it should be assumed that an undertaking within the meaning of articles 23a-23c of the a.b. is a financially separable part of the issuer's activity related to the performance of specific public service tasks aimed at the continuous satisfaction of the collective needs of society, which may constitute an efficient source of income in future periods. According to article 23a par. 1 of the Act on the issue of income bonds, the project described in the resolution on the issue of income bonds, which gives the bondholder priority of satisfaction, may be a project financed from the issue proceeds (point 1) or another project specified by the issuer (point 2). There is also no obstacle for the issuer to indicate several such undertakings.

On the other hand, future non-returnable financial streams coming from the issuer's separate activity for a fee, accumulated in a bank account, ex-

clusively designated to collect them and make payments to the bondholders, as provided for in art. 23b par. 1 of the a.b. may be treated as income from the project. At the same time, the Act on Bonds does not specify the criteria allowing qualifying certain income as coming from the execution of a project. Such criteria should be specified in the resolution on the issue of income bonds (art. 23a sec. 3 of the a.b.), the content of the bonds (art. 23a sec. 4 of the a.b.), possibly in the terms and conditions of the issue (art. 11 of the a.b.). The data will be based on the data which will enable potential purchasers to gain an overview of the effects of the project (art. 10 par. 1 pt. 8 of the a.b.) [Spyra, 2001, p. 18]. The revenues from the project should be efficient enough to satisfy all the claims of the bondholders, i.e. to redeem bonds and pay the coupon (interest). The income from the project is subject to legal protection using the instruments described below.

In the absence of a statutory definition of "project assets", it should be assumed that it is a legally protected, separable set of assets used to perform public utility activities conducted as part of the project. Therefore, it may be both the property of a project that was financed with funds obtained from the issue of bonds (art. 23a par. 1 point 1 of the a.b.) and the property of another project whose proceeds serve to satisfy the claims of the bondholder with priority over other creditors (art. 23a par. 1 point 1 in connection with par. 7 of the a.b.). The assets of the project are subject to special protection using the instruments described below.

The above analysis allows for the formulation of a definition of a revenue bond. It is a type of bond of a purposeful nature, giving the bondholder priority to satisfy its claims over other creditors of the issuer with respect to the amount of income obtained from a particular project or to the value of assets of that project, while limiting the issuer's liability to the amount of income or assets from that project.

Issuers of income bonds

The closed catalogue of entities entitled to issue income bonds is specified in article 23a par. 2. However, due to the purpose of this study, the author will limit himself to indicating that it includes entities related to the Municipality economy, such as:

1. local government units, unions of local government units, the capital city of Warsaw;
2. joint-stock companies or limited liability companies in which the entity referred to in point 1 holds such a number of shares or stocks that provides it with more than 50% of the total number of votes at the general meeting

of shareholders, provided that the sole object of the company's activity is to satisfy the needs of local communities or perform public utility tasks;
3. joint-stock companies or limited liability companies whose sole object of activity is to perform public utility tasks on the basis of an agreement concluded with a local government unit, an association of local government units or the capital city of Warsaw and which will perform these tasks for a period at least equal to the maturity of the bonds;
4. joint-stock companies which, on the basis of a statutory authorisation or on the basis of a concession or permit, will perform tasks in the field of public utility or provide services in the field of transport or communication and maintenance and development of communication or transport infrastructure for a period at least equal to the maturity period of bonds.

The common feature of the above mentioned issuers is that they perform, directly or indirectly, public utility tasks related to meeting the needs of local communities. A mechanism for collecting and spending revenues and securing them

Given that bondholders' claims can be satisfied from a specific source such as a specific project, the flow of funds both for its financing and from the revenue it generates should be transparent.

The control of the bondholders over the cash flow from the project is possible due to the provisions of the Act imposing informational obligations on the issuers. Analysing their scope as defined in art. 23a par. 5 and 6 of the a.b., it should be proposed to exempt issuers from the obligation to publish in two daily newspapers, including at least one national daily newspaper, information about the total amount of debt on account of income bonds and to indicate the project. The implementation of such an obligation should be limited in subject matter to the obligation to provide the value of the issued bonds, subjectively to the bondholders, and should take place in any form, which will allow for the reduction of around issue costs.

The specificity of income bonds is connected with a particular source of funds earmarked for the performance of bond benefits, therefore, the mechanism of their collection and security specified in art. 23b and 23c of the a.b. should be analysed. As a rule, all revenues from the project should be credited to a bank account intended exclusively for collecting them and making payments to the bondholders. Consequently, the legislator also introduces a relative prohibition to withdraw funds from this account for purposes other than to satisfy bondholders' claims. If provided for in the terms and conditions of issue, the prohibition does not cover funds exceeding an amount sufficient to satisfy their claims arising from the bonds during the next 12 months.

The interest of creditors in respect of the funds held in the abovementioned bank account is secured by:

1. In relations with the issuer's creditors - a prohibition on deducting other debts from them (art. 23b par. 2 of the a.b.),
2. In enforcement proceedings - exclusion from enforcement up to the amount of the issuer's liability towards the bondholders (art. 23b par. 4 of the a.b.),
3. In bankruptcy proceedings - exclusion from the bankruptcy estate of issuers of income bonds with bankruptcy capacity (art. 23c par. 2 of the a.b.).

At the same time, the legislator introduces measures to safeguard creditors' interests with regard to the assets of the undertaking:

- In enforcement proceedings conducted from the assets of the project - their exclusion from enforcement of the amount necessary to satisfy the claims of the bondholders (art. 23b par. 5 of the a.b.), Public finances of local government units
- In bankruptcy proceedings - holders of income bonds have priority of satisfaction from the assets of the enterprise, with priority over other creditors of the bankrupt (art. 23c par. 4 of the a.b.).

The solutions described above lead to the legal separation within the issuer's assets of assets protected against set-off, enforcement for creditors other than the bondholders of income bonds and bankruptcy of the issuer. The application of the mechanism provided for in the Act on the collection of funds for the satisfaction of the bondholders' claims not only ensures transparency to the extent enabling control of creditors, but also creates a method of securing creditors specific to this type of bonds.

Costs of servicing debt due to issue of income bonds and fiscal rule from article 243 of Public Finance Act

The legal structure of income bonds, based, on the one hand, on the separation of the source of income or assets of the undertaking for the purpose of providing benefits incorporated in the content of the bonds, and on the other hand, on the limitation to these income or assets of the scope of the issuer's liability, is immanently connected with the benefit in the form of exclusion of this instrument from the operation of the fiscal rule specified in article 243 of the p.f.a.

The issue of income bonds enables to obtain off-balance-sheet financing [Hogan Lovełłs (Warsaw) LLP, 2014, p. 13]. Fulfillment of bond benefits, if the issuer is a Municipality company, does not burden the budget of a local government unit, and the obligations of the entity organising the issue (under the same assumption) are not included in the public debt. Moreover, by virtue of

article 23b par. 7 of the a.b., the funds accumulated in the income account and the issuer's benefits due to the bondholders from the issuer of the bonds in the performance of the obligations arising from those bonds shall not be taken into account when determining the limits of indebtedness of local government units referred to in article 243 of the p.f.a. This applies equally to situations where the issuer is a local government unit and a Municipality company.

Some doubts as to the validity of this exemption were raised by the legal status before 1 January 2014, when the new fiscal rule under art. 243 of the p.f.a. came into force, and after 1 January 2010, when under art. 24 of the Act of 27 August 2009.- Provisions implementing the Public Finance Act[211], the reference from article 23b par. 7 of the Public Finance Act of 30 June 2005 has been changed from article 169 of the Public Finance Act[212] under article 243 p.f.a. At the same time, under article 121 par. 8 of the above mentioned introductory provisions, in the years 2010-2013, article 169 of the Act of 30 June 2005 on Public Finance was temporarily in force. An unintentional effect of these changes by the legislator doubted the possibility of applying after 1 January 2010 to the fiscal rule lay down in article 169 of the Public Finance Act of 30 June 2005 an exemption from article 23b par. 7 of the Act. These doubts were resolved positively both in the literature [Chabasiewicz, 2011] and in the explanations of the Regional Chambers of Accountancy [RIO in Wrocław, 2011].

The experience gained from 14 years of regulations being in force, which constitute the legal basis for the issue of income bonds, shows that despite their potential attractiveness to issuers and investors, this instrument was used to finance Municipality investments to a marginal extent. The low popularity of Polish revenuebonds both on the part of local governments and financial institutions results, on the one hand, from the lack of sufficient legal and economic knowledge on the potential benefits and risk factors which may be associated with the issue of income bonds and, on the other hand, from certain features of this instrument which have their origin in its design in Polish law.

The undoubted advantages of income bonds as a source of Municipality investment financing include:

- flexibility of financing - the possibility for the issuer to freely shape the basic parameters of the issue: such as the value of the issue, bond redemption date, interest periods, type of interest rate, etc., as well as the purpose of the issue;
- relatively low cost of financing - resulting, on the one hand, from a mechanism specific to income bonds to secure the interests of the

[211] Dz.U. Nr 157, poz. 1241 z późń. zm.

[212] Dz..U. Nr 249 2104 z późń. zm.

bondholders, and, on the other hand, from the credibility of self-government units as debtors and the certainty of the sources of their revenue, such as projects of public utility character;

- Benefits for issuers resulting from the provisions of public law - lack of taking into account the liabilities from income bonds when determining the debt limitations of local government units referred to in art. 243 of the p.f.a. and lack of application of the provisions of the Act on Public Procurement Law when selecting entities providing financial services in connection with the issue of bonds (art. 4 par. 3 pt. j. of the same Act). Income bonds allow for a different distribution of risk factors between the issuer and the bondholder, compared to ordinary bonds.The limitation of the issuer's liability (art. 8 par. 2 of the a.b.) is accompanied by solutions minimising the risk for bondholders. An example of such solutions is the priority of satisfaction from the income or assets of the project (art. 23a par.1, 23c par. 4 of the a.b.), the relative prohibition to dispose of and encumber the assets of the project (art. 23b par. 7 of the a.b.), as well as the prohibition to make an assignment to receivables which are the source of income from the project (art. 23b par. 8 of the a.b.). Such solutions perfectly fit into the post-crisis tendencies to limit the scope of responsibility of the issuers of bonds belonging to the general government sector in case of threatening their insolvency.

At the same time, the priority of satisfaction of the bondholders from certain income or assets of a specific project, which is included in the essence of income bonds, combined with the limitation of the issuer's liability to such income or assets, is one of the reasons for insufficient use of these instruments in financing Municipality investments. The undertakings which constitute the basis for satisfying the bondholders' claims must constitute a source of revenue which is sufficiently efficient to enable them to accumulate, on a separate account, sufficient funds to fulfil their obligations (redemption and interest).

When searching for solutions leading to a wider use of income bonds, it is worth pointing out two categories of their nature:

- information - it is advisable to carry out an information campaign addressed to local governments, which could be financed partly from public funds, partly from funds from financial and legal advisers involved in the issue of Municipality bonds,
- legislative - it should be postulated that the provisions constituting the basis for the issue of income bonds be reviewed with a view to re-educing restrictions which are not necessary from the point of view of the essence of this instrument, e.g. exempting issuers from the need to indicate the

purpose of the issue in a situation where the interests of the bondholders are sufficiently protected by the obligation to indicate, in the resolution on the issue, the type of project from which the income or assets are to be used to satisfy bondholders' claims.

3.5. Bonds as an instrument for financing public tasks of local government

Efficient performance of public tasks (own and assigned) of local government is conditioned by the economic potential of particular local government units. However, the sources of income guaranteed to them by the provisions of the Constitution are usually insufficient to ensure an appropriate level of implementation of an increasingly wider range of tasks, corresponding to the growing expectations and needs of local communities. Therefore, obtaining external sources of financing - first of all returnable income - is an important element of territorial self-government units' functioning. The purpose of this argument is to draw attention to the role and importance of bonds as an instrument for financing territorial self-government units' public tasks in the context of possibilities of obtaining co-financing of projects from the European Union, conditioned by the necessity to make the so-called own contribution in the conditions of limitations resulting from the new fiscal rule under article 243 of the Public Finance Act.

Basic restrictions on the contracting of commitments by territorial LGU

The freedom of obtaining funds by local government units is limited by the provisions of the Act of 27 August 2009 on Public Finance (consolidated text in Journal of Laws of 2013, item 885, as amended; hereinafter referred to as: p.f.a..), which rationalises both the nominal amount of debt and the purpose and form of liabilities incurred. According to the article 89 of p.f.a., local government units may take loans and borrowings and issue securities in order to:

- Covering the budget deficit of a local government unit occurring during the transitional year;
- Financing the planned budget deficit of the local government unit;
- Repayment of previously contracted liabilities arising from the issue of securities and loans and credits;
- Pre-financing of activities financed from the European Union budget.

The amount of repayments made by the LGU in a given financial year from 2014 shall be limited using the parametric equation indicated in the Act. In article 243 of the p.f.a., the legislator introduced an individualised maximum

rate of repayment of liabilities in a given financial year for individual territorial self-government units.Thus, the formula of a universal and rigid limit expressed in the value of 15% of the local government unit's planned income for a given financial year (Article 169 of the Act of 30 June 2005 on Public Finance, Journal of Laws, Dz. 2005 No. 249, item 2104 as amended) and the limit of the total indebtedness of territorial self-government units at the end of the financial year, which could not be higher than 60% of the planned income of this unit in a given year (art. 170 par.1 of the Act of 30 June 2005 on Public Finance). At present, the maximum debt repayment limit for particular territorial self-government units is set by an individual indicator calculated on the basis of the relation of current income, income from assets and current expenditure from the last 3 years previous to the year for which the limit is set.

The individual debt ratio does not include liabilities incurred for bridge financing, i.e. pre-financing the part of the project to be reimbursed from the budget of the European Union, provided that the repayment of the loan or borrowing or the redemption of securities takes place no more than 90 days after the completion of the programme, project or assignment and that the reimbursement is received from those funds (art. 243 par. 3 of thep.f.a.). The debt limitation also does not apply to the redemption of securities, repayment of instalments of credits and loans together with due interest and discount, issued or incurred to finance the (national) own contribution, provided that the project or task is financed in at least 60% from the funds referred to in article 5 par. 1 pt. 2 of the p.f.a.

What is important is that the individual debt ratio discussed above limits only the amount of repayments of liabilities indicated by the legislator in a given financial year, while it does not limit the amount of debt of LGU [Walczak, 2014, p. 56].

The choice of the financing instrument, apart from the limitations mentioned above, is also limited by article 92 par. 1 of p.f.a. and article 93 of p.f.a., according to which the LGU may contract only such obligations where the service costs are incurred at least once a year, the bond discount does not exceed 5% of the nominal value and no capitalisation of interest is foreseen, and the nominal value due on the maturity date, expressed in PLN, is known on the transaction date[213].

[213] Trzy pierwsze ograniczenia nie dotyczą jednak obligacji emitowanych w celu pokrycia przejściowego deficytu JST. Wyjątki w zakresie możliwości zaciągania zobowiązań w walucie obcej wprowadza rozporządzenie Rady Ministrów z dnia 17 grudnia 2010 roku w sprawie przypadków, w których nie stosuje się ograniczeń dotyczących zaciągania niektórych zobowiązań finansowych przez jednostki sektora finansów publicznych, z wyjątkiem Skarbu Państwa (Dz.U. Nr 250, poz. 1678).

It is estimated that in the context of the above mentioned restrictions, and in particular the new debt limit mechanism, the share of Municipality bonds in the financing of LGU tasks will increase, and in the medium and long term also income bonds, issued not only by Municipality companies. The bonds are a flexible instrument allowing obtaining considerable amounts of repayable funds and at the same time to adjust the redemption dates to budget possibilities. Revenue bonds, on the other hand, constitute a form of off-balance sheet financing, and therefore have a neutral impact on the debt ratio under article 243 of the p.f.a.

Public purpose bonds

The basic legal act regulating the issue of bonds is the Act on Bonds of 29 June 1995 (consolidated text: Journal of Laws of 2001, No. 120, item 1300, as amended, hereinafter referred to as the a.b.). The Act defines a bond as a security issued in a series, i.e., representing property rights divided into a specified number of equal units, in which the issuer states that it is a debtor of the bond owner (the bondholder) and undertakes to pay a specified monetary or non-cash benefit to it. Bonds issued by local government units and their associations are referred to as Municipality or Municipality bonds. This term is currently of purely doctrinal nature[214]. Sometimes the concept of Municipality bonds also includes securities issued by companies formed by LGUs[215]; however, this seems highly controversial and incorrect in the context of the criterion of division distinguishing different types of bonds (treasury, Municipality, corporate). The provisions of the Act on Bonds concerning LGU do not apply to Municipality commercial companies. Undoubtedly, the bonds issued by Municipality companies are an instrument for financing public tasks of local government.

Taking into account the principles resulting from the Regulation of the Minister of Finance of 28 December 2011 on the detailed method of classification of debt titles classified as state public debt [Journal of Laws of 2011, No. 298, item 1767], among the bonds used to finance local government tasks one can distinguish:

- Municipality bonds, with limited marketability, classified as loans and borrowings;
- Municipality bonds in organised trading;

[214] W okresie międzywojennym pojęcie obligacji komunalnych (w nawiązaniu do ustawodawstwa niemieckiego i austriackiego) określało papier wartościowy o konstrukcji bankowych listów zastawnych zabezpieczonych na zobowiązaniach gmin (dawn. niem. *Kommunalobligationen* obecnie: *ÓffentlichePfandbriefe).*

[215] Tak np. Betlej, 1997, s. 4; Chełchowski, 1995, w. 8; pośrednio: Kozuń-Cieślak, 2008.

- Municipality income bonds;
- Unbound LGU bonds issued by companies established by them, including in particular the income bonds of these companies.

A characteristic feature of these categories is the purpose of the funds raised through the issue and the associated formal requirements for determining the purpose or project to be financed by means of bonds.

Resolution on the issue of Municipality bonds

The basis for the issue of Municipality bonds is the legal act of a local government unit. Adopting resolutions on LGU property issues, exceeding the scope of ordinary management, concerning the issue of bonds and defining the rules of their sale, purchase and redemption are the exclusive competence of the constituting body. Alternatively, according to article 212 par. 2 pt. 1 p.f.a., the budget resolution of the LGU may contain an authorisation for its executive body to undertake financial obligations, including the issue of securities [Mosionek-Schweda, Panfil, 2014, p. 2], the relation between the provisions of p.f.a. in this aspect and the provisions of the system laws may raise doubts. In the opinion of the doctrine, if the authorisation is included in a budget resolution, adopting additional resolutions for the purpose of issuing bonds by the body constituting it seems excessive formalism [Sawicka, 2010, p. 548], However, in the opinion of the Arbitral Council of the RCA in Bydgoszcz, it is necessary for the authorisation contained in the budget resolution to have appropriate legal authority to adopt a resolution by the council or the Sejmik setting out the rules for the sale, purchase and redemption of bonds [Resolution No. 14/B/2012], Given the doubts that have arisen, it would be reasonable for the legislator to make appropriate adjustments to the competence provisions contained in the local governmental acts. The scope of the content of the resolution on the issue of Municipality bonds is not precisely defined in the law. It seems that the resolution should contain all information which the issuer is obliged to make available under art. 10 par. 1 of the Act on Bonds, i.e., in particular, information about the purposes of the issue; the size of the issue; the nominal value and the issue price of the bonds or the manner of its determination; the terms and conditions of redemption; the terms and conditions of interest payment; the amount and form of the possible security and designation of the entity granting the security; data enabling potential purchasers of bonds to be aware of the effects of the project to be financed from the issue of bonds and the issuer's ability to meet its obligations arising from the bonds, if the project is specified.

According to article 28 of the Polish Bonds Act of June 29th 1995 [consolidated text in Journal of Laws of 2001, No. 120, item 1300, as amended], an issuer who is a local government unit, an association of such units or the capital city of Warsaw is obliged to indicate the purpose of the issue and may not use the funds from the issue of bonds for other purposes. In the absence of statutory regulations, the degree of concretisation of the purpose of the issue may be questionable. On 26 February 2014, the RCA College in Bydgoszcz declared the resolution of the Municipality Council invalid, considering the term "to cover the planned deficit and previously contracted liabilities" to be too general and not meeting the requirements of the Act [Resolution of the RCA College in Bydgoszcz VI/13/2014], In the opinion of the RCA, the resolution should specify precisely what amount from the issue is intended to finance investment tasks and what amount is intended to repay previously contracted liabilities. The deficit may concern various investment expenditures: „The purpose of a bond issue is the project to be financed by the proceeds of the issue. It shall be presented in a clear and specific manner and shall specify the use to which the proceeds of the Municipality bond issue are to be put. Earlier, a similar opinion was expressed, among others, by the Regional Chamber of Accounts in Zielona Gora [Resolution of the RCA college in Zielona Gora of 16 February 2011, No. 101/2011], however, this position was not shared by the Province Administrative Court in Gorzów Wlkp., considering that the determination of "financing of the planned budget deficit of the County" does not violate Article 28 of the Bond Act [Judgment of the PAC in Gorzów Wlkp. of 1 June 2011, II SA/ Go 240/11]. In practice, such general determination of the purpose of the issue is very common[216], which increases the financial flexibility of the LGUs, but may raise questions in the context of the drive for transparency and discipline in the use of repayable funds.In the author's opinion, the implementation of the requirement under art. 28 of the Bond Act, in the case of deficit financing and bridging financing of measures reimbursed from the EU budget, should consist in indicating the task(s) to which the funds obtained through the issue will be allocated.

On the basis of article 11 par. 1 pt. 3 of the Act of 7 October 1992 on Regional Chambers of Auditors [Journal of Laws No. 85, item 428, as amended] resolves on the issue of bonds subject to examination by the RCA in supervisory proceedings. Moreover, on the basis of article 91 par. 2 of the p.f.a., the

[216] Zgodnie z analizą emisji obligacji komunalnych notowanych na poszczególnych platformach obrotu rynku *Catalyst* od momentu jego utworzenia (30.09.2009 r.) do końca 2013 roku, w większości przypadków cel emisji dotyczył finansowania deficytu oraz spłaty wcześniej zaciągniętych zobowiązań z tytułu kredytów, pożyczek czy emisji papierów wartościowych [Mosionek-Schweda, Panfil, 2014].

possibility of redemption of bonds is subject to an obligatory opinion. The opinion of the RCA is not binding. However, its presentation constitutes an information obligation of the issuer.

Municipality bonds in circulation

Most of the bonds issued by the LGU are not admitted to organise trading. In line with the already mentioned Ordinance of the Minister of Finance on the detailed method of classification of the debt titles attached to the state public debt, liabilities under Municipality bonds, whose transferability is limited, are classified as loans and credits. In the Manual for the compilation of quarterly reports Rb-Z [Attachment No. 9 to the Regulation of the Minister of Finance on reports of public finance sector entities on financial operations, Journal of Laws of 2010 No. 43, item 247 as amended]. it was indicated that these securities are not admitted to organised trading, i.e. there is no liquid secondary market for them. According to the Act of 29 July 2005 on Trading in Financial Instruments [consolidated text in Journal of Laws of 2014, item 94, as amended, hereinafter: u.o.i.f.], organised trading is trading in securities or other financial instruments carried out on the territory of the Republic of Poland on a regulated market or in an alternative trading system.

The market for Municipality bonds has existed since 2009 Catalyst. It is an authorisation and trading system for debt financial instruments, consisting of a retail segment operated by the Warsaw Stock Exchange S.A. and a wholesale segment operated by its subsidiary Bond- Spot S.A. (formerly: MTS-CeTO). Both segments include a regulated market[217] and the Alternative Trading System (ATS). From the issuer's point of view, the differences between the Catalyst segments mainly consist in differences concerning the admission (introduction) criteria and the scope of reporting obligations. Listing rules on regulated markets and ATS are identical, while the differences concern the manner of concluding block trades. Apart from listing on Catalyst, it is also possible to authorise bonds. Obtaining authorisation on Catalyst for a given issue of debt financial instruments means registration of the issue in the Catalyst information system and the issuer's commitment to perform duties related to the provision of current and periodic information [GPW SA, 2010], Those who do not have such intentions, including those whose issued bonds have not been dematerialised [GPW SA, 2010], Local government

[217] Rynek regulowany to działający w sposób stały system obrotu instrumentami finansowymi dopuszczonymi do tego obrotu, zapewniający inwestorom powszechny i równy dostęp do informacji rynkowej w tym samym czasie przy kojarzeniu ofert nabycia i zbycia instrumentów finansowych oraz jednakowe warunki nabywania i zbywania tych instrumentów, zorganizowany i podlegający nadzorowi właściwego organu (art. 14 u.o.i.f.)

units wishing to direct the issue to organised trading are in such a privileged situation in relation to companies that, regardless of the market to which they wish to introduce their bonds, they do not have to draw up a prospectus, but only a much simpler so-called "prospectus" in its construction the information document, which is much simpler in its construction.

From September 2009 to the end of the first quarter of 2014, 31 local government units were Catalyst market participants[218]. At the end of Q1 2014, 60 series of Municipality bonds issued by 19 LGU were listed on Catalyst: 35 series on the Bond-Spot regulated market, 51 series on the WSE regulated market and 8 series in the WSE Alternative Trading System. The total value of listed Municipality bonds in Q1 2014 was PLN 3.178 billion. Eleven series of Municipality bonds of 5 issuers with a total value of PLN 30 million were authorised.

Until the creation of Catalyst, Municipality bonds were issued only on the over-the-counter (OTC) market. At present, the majority of the offer to buy Municipality bonds by way of a closed issue is still made to the general banks which are the organisers of such issues. On the primary market, the banks include bonds issued by LGU at the issue price equal to the nominal value by accepting the offer made by the issuer. The bonds are traded on the OTC interbank market. It should be noted that due to the rules of qualification of debt titles classified as public debt, it is not possible to estimate the entire Municipality bond market on the basis of reports of local government units.

According to Fitch Rating's estimates, there are just over 17% of Municipality bonds in organised trading. In Q1 2014, the value of the entire Municipality bond market was PLN 18,330 million. The market share of this segment in non-Treasury debt securities was 14.56% [Fitch Rating, 2014]. According to the NBP data, at the end of April 2014, the total value of Municipality bonds in the banks' own and their clients' portfolios was PLN 14,621.47 million [NBP, 2014], which is PLN 9,612 million more than in 2010 [NBP, 2010].

The interest coupon of the bonds is usually lower than the loan interest rate, which is justified by the easy transferability of the instrument. Nevertheless, Municipality bonds, even those admitted to trading, are characterised by very low liquidity. For example, no buy and sell orders have been issued in relation to the bonds of the City of Krakow present on Catalysl, covered by Pekao S.A. bank. Spreads between the price in the sale order and the price in the purchase order on the organised Municipality bond market reach even 7%.

[218] Obliczenia własne na podstawie statystyk rocznych oraz bieżących notowań rynku *Catalyst* publikowanych na stronie: www.gpwcatalyst.pl

Municipality revenue bonds

Following the American model, the legislator introduced into the Polish legal system the so-called revenue bonds [Lasak, 2006]. The essence of these bonds is to allocate the funds obtained through the issue to the implementation of the project (the type and purpose of which will be defined in the resolution on the issue) and to limit the issuer's liability to clearly identified sources - the amount of income or the value of the assets of the project(s) implemented from the funds obtained through the issue of bonds, or other funds indicated by the issuer, with the right of priority satisfaction being granted to the bondholders.

The obligation to collect income from an investment financed with income bonds in a separate bank account (not linked to the LGU budget account) serves to minimise the risk of income bondholders. These funds are not subject to enforcement, and up to the amount of the issuer's liability to the bondholders are excluded from deductions. In addition, the issuer is forbidden to dispose of and encumber the assets of the project, except for a situation where the disposal takes place within the framework of a proper economy, without causing a significant decrease in the value of the project (art. 23b par. 7 of the a.b.). The receivables creating income cannot be secured by a pledge or an assignment (art. 23b par. 8 of the a.b.).

Article 23a of the Act on Bonds indicates a closed catalogue of issuers of income bonds, including local government units, the association of such units and the Capital City of Warsaw. Subsidiaries are also authorised to issue income bonds, where the above mentioned entities hold more than 50% of the total number of votes at the General Meeting of Shareholders or Shareholders' Meeting, provided that the sole object of the company's activity is to satisfy the needs of local communities or perform public utility tasks. Revenue bonds may also be issued by special purpose vehicles (joint-stock or limited liability companies), whose sole object of activity is to perform public utility tasks on the basis of an agreement concluded with the LGU, the association of LGU or the capital city of Warsaw, and these tasks will be performed for a period at least equal to the bond maturity period. Also entitled to issue are joint stock companies, which on the basis of a statutory authorisation or on the basis of a concession or permit will perform tasks in the scope of public utility or provide services in the scope of transport or communication and maintenance and development of communication or transport infrastructure for a period at least equal to the bond maturity period. In view of the subject matter of the activities of these entities, the purpose of issuing revenue bonds is always to finance a public service task or a public purpose investment. The

issue of income bonds determines the purpose for which the issuer wishes to raise funds.

The main advantage of revenue bonds is that they make it possible to obtain so-called off-balance sheet financing. According to article 23b par. 7 of the Act on Bonds, funds accumulated in the income account and benefits of the issuer due to bondholders from the issuer of bonds in the performance of obligations arising from these bonds are not taken into account when determining the limits of indebtedness of local government units referred to in article 243 of p.f.a. This is related to a significant feature of income bonds which is that the liability of the issuer is limited to the amount of income or the value of the assets of the project to which the bondholder has a priority right. It is not possible not to include in the debt limit liabilities due to bonds for which the LGU bears unlimited liability - such bonds cannot be considered as income bonds within the meaning of article 8 par. 2 of the Act on Bonds. Despite the advantages of the construction of income bonds, it is not an instrument willingly used by local government units. The first and only resolution in Poland on the issue of income bonds by the LGU was adopted in March 2014 by the Lublin City Council [Resolution No. 1000/XXXIX/2014], the funds obtained from the bond issue were to be used to finance the complex of indoor swimming pools. It was planned that the bonds would be issued by the end of 2015 and their final redemption date would be the end of 2023. The Regional Chamber of Auditors in Lublin, in the course of the supervisory proceedings, questioned and then invalidated part of the said resolution, regarding the provisions which indicated that the responsibility of the city as issuer is not limited [Resolution No. 74/2014], on 15 May 2014. The Lublin City Council decided to appeal this supervisory decision to the Province Administrative Court [Resolution No. 1059/XLI/2014].

Revenue bonds of Municipality companies

The revenue bonds have been used several times to finance the tasks of the local government delegated to those created in accordance with art. 9 of the Act of 20 December 1996 on Municipality Management (consolidated text: Journal of Laws of 2011, No. 45, item 236, as amended). The level of indebtedness of the company does not formally affect the legal possibilities of incurring liabilities by the LGU. These companies are separate legal entities from the LGU, excluded from the public finance sector in the meaning of p.f.a. (art. 9 point 14 of the p.f.a.). According to article 40 § 1 and 3 of the Civil Code, in the absence of a separate provision, the LGU is not responsible for the liabilities of self-governing legal persons, while self-governing legal

persons are not responsible for the liabilities of the LGU. The level or form of indebtedness of the company is not subject to limitations (except for those resulting from the Commercial Companies Code). In the case of issuing income bonds, the formal issuer is a Municipality company. The liability from the bonds is limited to undertakings to which the company has been established.

The first issue of this type in post-war Poland and in Central and Eastern Europe was carried out in 2005.It was a non-public issue of registered, 24-year income tax bonds of Miejskich Wodociągów i Kanalizacji w Bydgoszczy sp. z o.o. [Resolution No.XXX/692/04]. The funds obtained in this way were allocated for partial financing of the project "Bydgoszcz Water and Sewage System II" completed in 2013[219]. The coupon from MWiKB bonds is paid twice a year, and its interest rate is 6mWIBOR+3.2%.

In 2006 the program of issuing revenue bonds up to the amount of 166 million PLN was used by Miejskie Przedsiębiorstwo Komunikacyjne - Łódź sp. z o.o. with co-financing from the European Regional Development Fund for the project "Łódź Regional Tram". [PAP, 2006] (The bonds bear interest at 1Y WIBOR + 4.5%).

In 2010, two emission programmes were launched by Zakład Komunikacji Miejskiej w Gdańsku sp. z o.o. The proceeds from the bonds are used to finance bus transport (program up to PLN 60 million) and tram transport (program up to PLN 220 million) [Fitch Rating, 2013]. From the revenue bonds issued in 2012 by Przedsiębiorstwo Wodociągów i Kanalizacji w Gnieźnie (28 million), a project to modernise the sewage treatment plant and build a sanitary sewage system in Gniezno is also underway [PAP, 2012]; the bonds are currently being issued in Bydgoszcz. The program of issuing bonds of the special purpose vehicle Tramwaj Fordon sp. z o.o. up to the amount of 145 million PLN was to be used to finance the construction of a tram line to the Fordon county with reconstruction of the road system in Bydgoszcz [Tramwaj Fordon sp. z o.o., Polska Kasa Opieki S.A, 2012], All issues were carried out in a private placement procedure. Municipality companies which issued revenue bonds were parties to long-term agreements with the founding entities of local government units - ordering certain services, e.g. transport, which guarantees a constant source of revenue throughout the entire period of bond service. Attention should also be paid to support agreements between the LGU and companies in which the LGU undertakes to make certain payments to the company, usually in the form of an increase in share capital. The consequence of the construction of these agreements is that the LGU actually bears the burden of paying off the obligation - while these payments

[219] Zob. Raport z realizacji projektu „Bydgoski System Wodny i Kanalizacyjny II".

do not affect the level of the ratio of article 243 p.f.a. (if they take the form of contributions to the company - they will also not - as property expenses - affect the amount of the operating surplus) [Bitner, 2014, p. 244], Unlike debt from other titles, the issue of income bonds by Municipality companies, due to their specificity, cannot be considered as an element concealing the actual state of public finances.

In the financial perspective 2014-2020, Poland remains the largest beneficiary of the EU budget. However, due to the economic slowdown and the need to take measures to correct the excessive budget deficit, the amount of funds available for financing the own contribution is decreasing. Debt-taking reduces the need to observe fiscal discipline. In this context, the transfer of debt outside a local government unit and the use of the potential of the capital market, namely bonds as an instrument for more effective management of the unit's debt, are increasingly discussed. Although in the last 4 years there has been an increase in the interest of local government units in issuing Municipality bonds, still de facto few units introduce them to quotations on the organised capital market. The capital city of Warsaw stands out positively in comparison with you, where the share of Municipality bonds admitted to the regulated - domestic and foreign - capital market constitutes over 50% of the unit's debt structure.

3.6. The security of buyers of Municipality bonds

Transactions on the capital market are associated with specific risks. Trading in financial instruments, especially Municipality bonds, is an attractive way of investing free funds for investors and an alternative solution for local government issuers to raise capital. In order to minimise the risk and encourage future bondholders to acquire a specific group of assets, Municipality issuers may decide to establish their security[220]. The purpose of this study is to assess the performance of the guarantee function through the established collateral for Municipality bonds.

Risks associated with the acquisition of Municipality bonds

Buyers of Municipality bonds as financial market participants have to account for the risk involved in the purchase of such assets. Among the most

[220] Należy rozróżniać pojęcia zabezpieczenia obligacji komunalnych od zabezpieczenia emisji obligacji komunalnych. Zabezpieczenie emisji obligacji związane jest z ewentualnym niedojściem emisji do skutku. Zabezpieczenie procesu emisyjnego polega na zawarciu umowy underwritingowej.

significant types of this risk one should indicate: credit risk, liquidity risk, foreign exchange risk.

Credit risk is a state of uncertainty for the bondholders that the issuer of Municipality bonds will not meet the obligations arising from the securities. The consequence of credit risk may be a delay in payment, failure by the issuer to redeem the bonds, redemption below par or redemption at maturity. The level of this risk largely depends on the legal nature of the issuer. It is commonly believed that the safest assets are those issued by the State Treasury, while corporate bonds are the most exposed to credit risk. However, credit risk may be minimised by establishing appropriate collateral.

An indicator that allows investors to assess the level of credit risk is primarily the ratings of issuers, which indicate their actual financial condition[221]. Ratings determine the financial credibility and ability of Municipality issuers to meet their financial obligations in a timely manner. The rating of local government entities is therefore derived from the analysis of institutional, administrative, socio-economic and political factors. In the process of assigning a rating, the indices of the local government's budget concerning, among other things, its revenue, expenditure or debt level are also important [Mayorga, Kamińska, 2006].

The bondholder of Municipality bonds is also exposed to the risk of losing the liquidity of the acquired assets. This type of risk is connected with difficulties in selling or purchasing bonds without an adverse impact on their price due to market changes. However, the literature indicates that, in principle, investors can relatively easily recover the capital invested in the Municipality bonds. However, in situations of temporary difficulties on the financial market, bondholders may take loans and borrowings under their pledge [Wajda, 2009, p. 14],

The foreign exchange risk results from the existence of instruments denominated and settled in foreign currencies [Jastrzębska, 2009, p. 169]. Changes in the currency exchange rate cause that rates of return expressed in different currencies are not the same [Kozuń-Cieślak, 2008, p. 116][222].

[221] Największymi agencjami ratingowymi są : Fitch Ratings, Moody's i Standard &Poor's

[222] Artykuł 93 par. 1 ustawy o finansach publicznych (Dz.U. Nr 157, poz. 1240 z późn. zm.) wprowadza generalną zasadę, zgodnie z którą jednostki sektora finansów publicznych, a więc także jednostki samorządu terytorialnego nie mogą emitować papierów wartościowych, których wartość nominalna należna do zapłaty w dniu wymagalności, wyrażona w złotych, nie została ustalona w dniu zawierania transakcji. Oznaczałoby to, że samorządy terytorialne nie mogą emitować obligacji w walutach obcych. Od powyższej regulacji istnieją jednak odstępstwa wprowadzone rozporządzeniem Rady Ministrów z dnia 17 grudnia 2010 r. (Dz.U. Nr 250, poz. 1678), w sprawie przypadków, w których nie stosuje się ograniczeń dotyczących zaciągania niektórych zobowiązań finansowych przez jednostki sektora finansów publicznych, z wyjątkiem Skarbu Państwa. Należy zatem stwierdzić, że ryzyko kursowe może wystąpić w odniesieniu do papierów wartościowych emitowanych przez l.g.u.

Guarantee function of Municipality bonds collateral

The possibility of securing bonds performs one of the most important functions of securities, namely the guarantee function. This function is made concrete by ensuring that the issuer will fulfil the benefits resulting from the content of the bonds [Jóźwiak, 2010, p. 28]. The literature distinguishes the guarantee function in formal and material terms. The guarantee function in formal terms comes down to the ability of the bondholders to effectively pursue their claims [Wacławczyk, 2003, p. 54][223][224]. In material terms, the guarantee function refers primarily to the level of risk associated with the execution of bond receivables. Due to the lack of bankruptcy capacity of local government units, the risk related to Municipality bonds seems to be low. The lack of bankruptcy capacity does not mean that a local government issuer will always be solvent and its liabilities will be serviced on time [Kozun-Cieślak, 2008, p. 111].[3].

According to article 8, par.1 of the Act on Bonds [225] the issuer is liable for the liabilities arising from the bonds with all its assets[226]. The above regulation is supplemented by the provision of art. 24 par. 3 of the a.b., which provides that in the event of the dissolution or division of a local government unit, an association of such units or the capital city of Warsaw which are bond issuers, liability for liabilities resulting from the issue of bonds shall be borne jointly and severally by the local government units or their associations which took over the issuer's property.

The material strengthening of the guarantee function is the possibility to establish additional forms of security for Municipality bonds. It should be pointed out, however, that the secured values are usually less profitable in comparison with those unsecured. Local government units deciding to raise capital by issuing bonds enter the sphere of private law. Thus, legal relations between the issuer and the bondholders will be resolved on the basis of civil law norms. Therefore, one should share the view that Municipality issuers

[223] Postępowanie nakazowe uregulowane w art. 484-497 k.p.c.

[224] Zgodnie z art. 167 par.l i par. 2 Konstytucji (Dz.U. Nr 78, poz. 483 z późn. zm.) jednostki samorządu terytorialnego mają zapewniony udział w dochodach publicznych odpowiednio do przypadających im zadań, a ich dochodami są ich dochody własne, subwencje ogólne i dotacje celowe; ustawy samorządowe wskazują natomiast na mienie komunalne; przepisy ustawy o finansach publicznych wprowadzają limity zadłużania l.g.u., co również realizuje funkcję gwarancyjną

[225] Ustawa z dnia 29 czerwca 1995 r. o obligacjach, tekst jedn.: Dz.U. Nr 120, poz.1300 z późn. zm. (dalej: u.o.).

[226] Wyjątek stanowią obligacje przychodowe, co do których emitent może ograniczyć swoją odpowiedzialność za zobowiązania wynikające z tych walorów, do kwoty przychodów lub wartości majątku przedsięwzięcia

may, as a rule, freely choose the form of securing the liabilities arising from the bonds they issue.

Types of Municipality bonds collateral

One of the obligatory elements of bonds is to determine the scope and form of collateral or information about its absence[227]. Therefore, an analysis of the provisions of the Bond Act gives rise to the conclusion that the establishment of bond security is only optional. However, if the issuer decides to secure claims arising from the issued shares, it is obliged to provide information on: the amount, form and designation of the entity which provides such security[228]. The information in question should result either from the bond document, if it is in paper form or from the terms and conditions of issue, in the case of bonds and dematerialised bonds[229][230]. It is clear that the extent and manner in which the securities are secured is a decisive argument for future bondholders when deciding to purchase certain securities. Indeed, it is generally considered that additional security for the bonds reduces the risk of loss of capital for the bondholders.

In the literature, based on the criterion of the extent of the collateralisation provided by the issuer, fully secured, partially secured and unsecured bonds are indicated. The total collateralisation of the bonds concerns both the nominal value and the interest rate [Kozun-Cieślak, 2008, p. 61]. Partially secured bonds protect buyers only to the extent of specific benefits incorporated in a given security [July -Warzecha, 2010, p. 209]. With regard to fully or partially secured bonds, the provision of art. 15 of the a.b., according to which bonds may not be issued before the securities provided for in the terms and conditions of issue are established, apply. The above solution is primarily aimed at protecting the bondholders, as well as ensuring stability and security of trading in securities [July-Warszawa, 2010, p. 207]. As a consequence, the necessity to establish a security for bond receivables occurs either before the relationship of obligation arises or under a condition precedent, i.e., when the issue takes place [Ptak, 1996, p. 436], The important thing is that bondholders of bonds of the same issue should have the same rights resulting from the bonds. Therefore, it is unacceptable that only some bonds of a given issue is secured, or that the bonds are secured in a different way or to a different extent [July-Warsawa, 2010, p. 217].

[227] Zob. art. 5 par. 1 pkt. 9) u.o.

[228] Zob. art. 10 par. 1 pt.6 u.o.

[229] Art. 5 par. 1 pt.9 u.o. oraz art. 5b u.o.

[230] Przepis art. 15 u.o. nie ma zastosowania do emisji obligacji niezabezpieczonych. Nie oznacza to jednak, że zabezpieczenie roszczeń z obligacji niezabezpieczonych nie może zostać ustanowione później, np. po wydaniu obligacji lub po dokonaniu zapisu w ewidencji.

The creditor's satisfaction with the collateral provided shall be updated when the debtor fails to perform. The form of the security and the nature of the claim shall determine the manner in which the creditor's claims are pursued. Satisfaction may be effected by set-off, seizure of the object of the security and court enforcement [Heropolitan, 2014, p. 56].

Among the collaterals available to local government issuers, the material and personal collaterals should be indicated. The material collaterals include, among others, a general pledge, registered pledge, mortgage, security deposit, bank account blockade. A creditor secured in kind has the right to satisfy him/her from specific assets, regardless of whose ownership they have become, with priority over other personal creditors. This means that the problem of the issuer's solvency concerns the bondholders only if the subject of the security is not sufficient to cover their claims arising from the Municipality bonds. The in-kind collateral established by a local government may also prove attractive due to the high value of fixed assets of Municipality issuers [Kozun-Cieślak, 2008, p. 111].

Revenue bonds can be indicated as a special form of collateral for receivables. Although the issuer limits its liability for the obligations arising from these securities to the amount of income or the value of the assets of the project, the bondholder has the right to satisfy its claims with priority over other creditors of the issuer. Therefore, it seems justified to state that the income bonds constitute a type of limited liability securities [Poniatowicz, 2005, p. 21].

Guarantee

Guarantee as a civil law institution is regulated in art. 876- 887 of the Civil Code[231]. The essence of the guarantee is the guarantor's commitment to the creditor to perform the obligation in case the debtor fails to perform. The guarantor's declaration must, on pain of invalidity, be made in writing.

The Act on Bonds provides for special legal solutions in the area of granting guarantees by Municipality entities, securing liabilities arising from bonds. The analysis of the provisions of this Act allows to state that local government units and the Capital City of Warsaw may grant guarantees only to entities enumerated in the Act and only up to a certain amount. In accordance with the provisions of article 6 of the a.b., the territorial self-government units and the Capital City of Warsaw may grant sureties to.

[231] Jednostki samorządu terytorialnego mogą udzielać poręczeń również na podstawie ustawy z dnia 28 kwietnia 1936 r. Prawo wekslowe Dz.U. Nr 37, poz. 282 z późn. zm.(dalej: pr. weksl.). Zob. szerzej. W. Gonet, *Zakres...,* s. 134-135

In addition, local government units and the Capital City of Warsaw may guarantee liabilities arising from bonds issued by limited liability companies or joint stock companies in which a given local government unit or the Capital City of Warsaw holds more than 50% of votes at the shareholders' meeting or the general meeting, respectively, as well as those issued by companies for which the founding body is a local government unit or the Capital City of Warsaw. The quantitative limitation is introduced by a provision establishing a limit for guarantees to be granted, which may not exceed 15% of the local government unit's income planned in the year in which the guarantee is granted.

In principle, the guarantor is a joint and several debtors[232]. When the debt becomes due, the creditor may demand repayment from each of them separately or jointly. In the context of the recovery of claims, it is important that the creditor is not obliged to demonstrate that the debtor's assets are insufficient to satisfy his claim [Heropolitan, 2014, p. 159], but he should inform the guarantor immediately of the delay in the performance of the claim[233].

If the guarantor does not want to voluntarily fulfill the benefit, the creditor must bring an action for payment against him. Only after obtaining the writ of execution, the enforcement of benefits may take place. The type of enforcement depends on the choice of the creditor [Jurga, 1998, p. 30]. The simplified procedure of claim enforcement applies only if the guarantor has submitted to enforcement in a notarial deed. Then, pursuant to Article 777 § 1(4) and (5) of the Code of Civil Procedure[234] a notarial deed constitutes an enforcement title, which, after the enforcement clause has been granted, becomes an enforceable title.

Bank guarantee

A bank guarantee is an institution regulated by banking law[235] pursuant to article 81 par. 1 of bank law. A bank guarantee is understood as a unilateral undertaking by the guarantor bank that once the eligible entity (the beneficiary of the guarantee) meets certain payment conditions which can be established by means of documents which the beneficiary attaches to the request

[232] Art. 881 ustawy z dnia 23 kwietnia 1964 r. Kodeks cywilny Dz.U. Nr 16, poz. 93 z późn. zm. (dalej: k.c.) Należy jednocześnie nadmienić, że strony mają możliwość ukształtowania odpowiedzialności poręczyciela jako subsydiarnej, co jednak w przypadku dochodzenia roszczeń może okazać się niekorzystnym rozwiązaniem dla beneficjenta zabezpieczenia.

[233] Art. 880 k.c.

[234] Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, tekst jedn.: Dz.U. Nr 43, poz. 296 z późn. zm., (dalej: k.p.c.).

[235] Ustawa z dnia 29 sierpnia 1997 r. Prawo bankowe, tekst jedn.: Dz.U. z 2002r. Nr 72, poz. 665 z późn. zm. (dalej: pr. bank.).

for payment made in that form, the bank will perform a cash payment to the beneficiary of the guarantee, either directly or through another bank. The correct declaration of the claim by the beneficiary of the guarantee is a necessary element of the performance of the guarantee. The content of the guarantee agreement should indicate in detail the requirements to be met by the beneficiary. Importantly, a prerequisite for liability towards the beneficiary is the fact that the third party has not performed the specified performance. The occurrence of the damage and its extent are therefore irrelevant for the payment of the bank guarantee in the specified amount.[236]. In conclusion, it should be concluded that the claim under the bank guarantee is quick and does not require any complicated evidence, which makes this type of collateral very attractive to bondholders.

Surety and guarantee of the State Treasury

A special security for the performance of obligations arising from the bonds is a surety and guarantee provided by the State Treasury[237]. On behalf of the State Treasury, a surety or guarantee is granted by the Council of Ministers, at the request of the minister in charge of public finance, the minister in charge of public finance or Bank Gospodarstwa Krajowego[238]. The surety or guarantee is granted at the request of the issuer of the bond. If the number of purchasers of bonds covered by a surety or guarantee of the State Treasury is higher than 15, the performance of obligations under the surety or guarantee granted shall take place at the request and through a representative bank within the meaning of the Act on Bonds[239]. In the case of forced enforcement, the provision of article 1060 of the Civil Procedure Code, which specifically regulates enforcement against the State Treasury, applies.

Bill of exchange

A bill of exchange is a document having a specific form, and placing a signature on it is the basis and reason for the bill of exchange obligation [Mojak et al., 2000, p. 196], Signatures on behalf of local government units are, as a rule, placed by executive bodies. It is disputed whether the affixing of the countersignature of the treasurer is a necessary element for the effectiveness of a bill of exchange [Heropolitan, 2014, p. 71], When a debtor fails to pay the

[236] Wyrok SN z 20.12.1996 r. I CKU 30/96, LEX nr 1095807.

[237] Zabezpieczenia te uregulowane są w ustawie z dnia 8 maja 1997 r. o poręczeniach i gwarancjach udzielanych przez Skarb Państwa oraz niektóre osoby prawne, tekst jedn.: Dz.U. z 2003 r. Nr 174, poz. 1689 z późn. zm. (dalej: u.p.g.s.p.).

[238] Art. 12 par. 1 u.p.g.s.p.

[239] Zob. art. 17 par.lu.p.g.s.p.; art. 29 par.lu.o.

amount of the bill of exchange on time, the holder may direct a reverse search against the indosants, the issuer and other debtors of the bill of exchange[240]. The condition for asserting the rights of a blank bill of exchange is that it has been filled in correctly, in accordance with the bill of exchange declaration. The holder may pursue claims under the bill of exchange against one, several or all debtors without the need to maintain the order in which they have committed themselves[241].

The basic way of pursuing claims on a bill of exchange in court is by means of injunction, provided that the bill of exchange is duly filled in and its authenticity and content does not raise any doubts[242]. Claims under the bill of exchange may also be pursued by writ of payment.

Assignment of receivables as collateral

An assignment of a claim as collateral is an agreement whereby a creditor, without the debtor's consent, transfers the claim to a third party[243]. The essence of the assignment of receivables is the transfer to the assignee of all the rights vested in the existing assignor creditor, who is excluded from the obligation relationship between him and the debtor[244]. A creditor secured in this way can satisfy his claim in two ways. Firstly, by obtaining a benefit from the debtor of the claim and secondly, by obtaining a benefit from the debtor of the securing claim [Rytwińska, 2007, p. 19]. The literature emphasises that this is convenient collateral for creditors in terms of claim recovery. Creditors do not have to perform additional actions to satisfy themselves from the object of the collateral, and this makes the collateral assignment a convenient, quick and effective means of collateral [Rytwińska, 2007, p. 19].

Mortgage

A mortgage is a right in rem on real estate under which a creditor can claim satisfaction from the real estate, regardless of whose ownership it has become and with priority over the personal creditors of the real estate owner. A mortgage secures a claim resulting from a specific legal relationship[245]. Special regulations concerning mortgages securing claims resulting from Municipality bonds were introduced by the Bond Act in art. 7. According

[240] Art. 43 pr. weksl.

[241] Art. 47 zd. 2 pr. weksl.

[242] Art. 485 § 2 k.p.c.

[243] Zob. art. 509 k.c.

[244] Zob. wyrok SN z dnia 05.09.2001 r. I CKN 379/00, LEX nr 52661.

[245] Art. 65 ust. 1 ustawy z dnia 6 lipca 1982 r. o księgach wieczystych i hipotece, tekst jedn.: Dz.U. z 2001 r. Nr 124, poz.1361 z późn. zm. (dalej: u.k.w.h.).

to the content of this provision, the establishment of a mortgage which will secure the claims of the bondholders is already done by the mere declaration of will of the property owner. However, the entry in the land and mortgage register must indicate: first, the issuer's resolution or statement on the issue of bonds and its date, second, the amount for which the mortgage is established, third, the number, numbers and nominal value of bonds, fourth, the method and interest rate of the bonds, if any, and fifth, the dates and method of redemption of bonds. Moreover, the land and mortgage register does not mark bondholders by name, which undoubtedly facilitates trading in these values. The establishment of security by way of a unilateral declaration of the will of the real estate owner is derogation from the general rule that security is established on the basis of a contractual relationship [Ptak, 1996, p. 432].

Prior to the commencement of the bond issue, the issuer shall be obliged to conclude a written agreement with a mortgage administrator who shall exercise the rights and obligations of the mortgage creditor in his own name but on behalf of the bondholders. In this case, art. 68 of the Act on Land and Mortgage Registers and Mortgage shall not apply to the mortgage administrator. The basis for deleting a mortgage established in order to secure the bondholders' claims is the redemption protocol of redeemed bonds, drawn up by a notary public. Article 245 of the Civil Code shall not apply to the transfer of bonds secured by a mortgage. When deciding to establish a security in the form of a mortgage, a local government must take into account numerous restrictions resulting from separate acts. Namely, real estate owned by local government units, designated for road investments[246], soils covered by flowing water[247], public airports[248], flood control structures[249], , may not be the subject of mortgage or transfer of ownership as security [Gonet, 2011, pp. 120-121].

A mortgage creditor may be satisfied only by way of judicial or administrative enforcement proceedings[250]. The enforcement of claims under the mort-

[246] Zob. art. lid par. 9 ustawy z dnia 10 kwietnia 2003 r. o szczególnych zasadach przygotowania i realizacji inwestycji w zakresie dróg krajowych (tekst jedn.: Dz.U. z 2008 r. Nr 193, poz. 1194 z późn. zm.).

[247] Zob. art. 14 par. 2 ustawy z dnia 18.07.2001 r. Prawo wodne (tekst jedn.: Dz.U. z 2005 r. Nr 239, poz. 2019 z późn. zm.).

[248] Zob. art. 7 par. 5 ustawy z dnia 12 lutego 2009 r. o szczególnych zasadach przygotowania i realizacji inwestycji w zakresie lotnisk użytku publicznego (Dz.U. Nr 42, poz. 340 z późn. zm.).

[249] Zob. art. 7 par. 8 w zw. z art. 7 par. 7 pt.1 ustawy z dnia 8.08.2010 r. o szczególnych zasadach przygotowania do realizacji inwestycji w zakresie budowli przeciwpowodziowych (Dz.U. Nr 143, poz. 963 z późn. zm.)

[250] Zob. art. 75 u.k.w.h.

gage must be preceded by obtaining an enforcement order and initiating enforcement proceedings[251]. It must therefore be concluded that the recovery of claims secured by a mortgage may prove to be significantly extended over time. For the beneficiaries of the mortgage collateral, a laborious and lengthy process will significantly weaken the guarantee function of the collateral in question.

Security transfer

An assignment by way of security consists in the fact that the creditor obtains ownership of the goods while at the same time committing himself to a return transfer of ownership of the goods after payment of the debt[252]. The manner and conditions of satisfying the creditor's claims from the item assigned should be regulated in detail in the contract of assignment[253]. Unless the parties have agreed otherwise, the creditor has the right to satisfy himself/herself of the assigned thing at his/her own discretion, in any way, provided that it is not contrary to the content of the legal relationship between the parties or to the rules of social coexistence[254]. In the case under discussion, the creditor may be satisfied by selling the goods, giving the goods for use to a third party for a fee, and by keeping the goods in the possession of the creditor [Gałczyński, 2004, p. 220]. As it is crossed out in the literature, the creditor cannot satisfy his claims by way of court execution from the assigned thing, as he is the owner of this thing [Heropolitan, 2014, p. 328]. A creditor does not have to initiate often long and costly court and enforcement proceedings.

Pledge

A pledge regulated by the Civil Code is a limited river law that secures the execution of claims arising from a designated claim. A pledge is an incriminating right on movable property, under which the creditor will be able to claim satisfaction from the property regardless of whose ownership it has become and with priority over the personal creditors of the owner of the property, except for those who have a special priority under the law[255]. The pledgee shall be satisfied with the encumbered item in accordance with the regulations on court enforcement proceedings.[256]. A contractual reservation under which

[251] Wyrok WSA w Lublinie z dnia 7 kwietnia 1994 r., I ACr 77/94, LEX nr 9202.

[252] Zob. wyrok SN z dnia 3 czerwca 2009 r. IV CSK 511/08.

[253] Możliwość ustanowienia przewłaszczenia na zabezpieczenie przez emitentów komunalnych doznaje określonych ograniczeń wynikających z odrębnych ustaw. Uwagi dotyczące ograniczeń ustanawiania hipoteki odnoszą się również do przewłaszczenia na zabezpieczenie.

[254] Wyrok SN z dnia 27.06.1995 r,, I CR 7/95, OSNC 1995/12/183.

[255] Art. 306 § 1 k.c.

[256] Art. 312 k.c.

the pledgee would independently sell the pledged asset and satisfy himself of the sale price would be invalid [Dadańska, 2012, p. 310][257].

However, the pledgee may submit to enforcement in a notarial deed, in which case the creditor will only be obliged to obtain a court enforcement clause and initiate enforcement proceedings.

Registered pledge

A registered pledge is created by entering into a pledge agreement between the person entitled to dispose of the pledged object (pledger) and the creditor (pledgee) and by entering into the pledge register[258]. A registered pledge securing claims arising from debt securities issued in a series may be created in favour of all creditors without a named indication thereof[259]. In such a situation, it is necessary to establish a pledge administrator on the basis of an agreement between the issuer and the pledge administrator[260]. As a rule, the pledgee shall be satisfied from the pledged objects by way of court enforcement proceedings[261]. Satisfaction of the creditor without judicial and enforcement proceedings is allowed only within the limits resulting from the provisions of the Act on Registered Pledge and Pledge Register[262] and only if it is clear from the pledge agreement. Moreover, in addition to the enforcement, the satisfaction of the pledgee is possible if another creditor does not previously refer the execution to the object of the pledge [Heropolitan, 2014, pp. 450-451].

Deposit

A deposit is an unnamed agreement consisting in the deposit of a certain amount of money by the debtor or a third party, which is to secure the creditor in the event of failure to pay the debt on time, the creditor undertakes to return it to the depositor upon fulfilment of the claim [Heropolitan, 2014, p. 458], and the creditor becomes the owner of the funds deposited in the form of a deposit [Gołaczyński, 2002, p. 41], The realisation of the security will therefore consist in full or partial cancellation of the debt of the debtor-contractor [Niezbecka i inni, 2000, p. 423], whereas if the debtor does not fulfil the obligation resulting from the secured legal relationship, the object of the security deposit is retained by the creditor [Gołaczyński, 2002, p. 42].

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[257] Przedmiotem zastawu mogą być zarówno rzeczy ruchome, jak i prawa.

[258] Art. 2 par.l ustawy z dnia 6 grudnia 1996 r. o zastawie rejestrowym i rejestrze zastawów, tekst jedn.: Dz.U. z 2009 r. Nr 67, poz. 569 z późn. zm. (dalej: u.z.r.r.z.).

[259] Art. 4 par. 3 u.z.r.r.z.

[260] Art. 4 par. 4 u.z.r.r.z.

[261] Art. 21 u.z.r.r.z.

[262] Art. 22-27 u.z.r.r.z.

Blocking of funds deposited on a bank account

The subject of the blockade is the debt, not the cash accumulated on the bank account. The blockade deprives the account holder of the right to dispose of and use the account during the term of the collateral [Gołaczyński, 2002, p. 46], therefore the Bondholder accepting the blockade as collateral for his claim should demand a power of attorney to dispose of the blocked bank account. Only then will the buyer of the bonds have a real possibility to satisfy his claim from the funds deposited in the issuer's bank account.[263]. The power of attorney should include the right to collect the amount of unpaid debt [Heropolitan, 2014, p. 459]. The literature indicates that blocking a bank account is one of the less safe and effective safeguards.

In summary of the considerations to date, the claims of purchasers of Municipality bonds can be secured in various ways. Restrictions on the establishment of collaterals result from the Bond Act and relate to the need to establish a security before issuing a bond document or making an entry in the records. In addition, the Act on Bonds formulates a prohibition to differentiate the rights of the bondholders of a given issue, which also applies to the form and scope of the established collateral. Therefore, it will not be permissible for some bondholders to have a collateral in kind in the form of a mortgage, while for others a personal collateral in the form of a surety.

It should be stated that the guarantee function in formal terms is most fully performed by such securities as: bank guarantee, transfer of receivables as collateral, deposit, bill of exchange, transfer of ownership as collateral. The remaining collaterals subject to analysis do not sufficiently perform the guarantee function, mainly due to the necessity to assert claims resulting from them before the court. This means that the satisfaction of the bondholder from the established collateral is usually extended in time and requires additional costs associated with the conduct of court proceedings and then enforcement proceedings.

3.7. Borrowing of financial liabilities by local government units on non-market conditions

The rules for financial commitments by the LGU and public finance entities, including the conclusion of loan agreements, are set out in Chapter 4,

[263] W jednym z orzeczeń NSA wyraża pogląd, że ustanowienie zabezpieczenia roszczeń poprzez ustanowienie pełnomocnictwa do rachunku podstawowego budżetu l.g.u. jest niedopuszczalne. Jak argumentuje NSA, osoby trzecie nie są ani wykonawcami, ani dysponentami środków budżetowych. Zob. wyrok NSA z dnia 5 listopada 1998 r,, SA/Kr 824/98, FK 1999/2/58.

of p.f.a. [1] and the provisions of Public procurement law (p.p.l.).[264] The repayment of the capital of borrowings is expenditure in the LGU's budget and the repayment of interest on borrowings is expenditure. Article 44 par. 3 of the p.f.a. provides that public expenditure should be made in accordance with the rules: to obtain the best results from the expenditure concerned, to choose the methods and means best suited to achieving the objectives set, in such a way as to enable the tasks to be carried out in a timely manner, at the level and within the deadlines resulting from commitments previously made.

The purpose of the study is to analyse the compliance with the p.f.a. of the conclusion of loan and credit agreements by the LGU with interest rates higher than market rates, and with total costs (interest and commissions) higher than market rates, where for an open/limited tender the cheapest bid submitted contains higher total costs, including interest rates than market rates commonly used for other LGUs, only one bid has been submitted and the total costs proposed by the recipient are higher than market rates for other LGUs, in negotiations with the announcement (art. 55 par. 1 pt.1 of p.p.l.)/ without announcement (art. 62 par. 1 pt.1 of p.p.l.) the cheapest offer was selected, offering total higher costs than the market for other LGU and in a negotiated contract (art. 67 par. 1 pt.4 p.p.l.) a loan/borrowing agreement has been concluded at much worse price terms than other LGUs.

Entities with which local government units may conclude a loan or borrowing agreement

The provisions of the p.f.a. do not contain provisions indicating with which entities of the LGU and other public finance sector entities may conclude loan and credit agreements, i.e. be borrowers and other borrowers respectively.

The loan may be granted by the bank (art. 5 par. 1 pt.3 b.lof .(Banking Law)[265]), credit institution (art. 4 par. 1 pt.17 of b.l.), State Treasury (art. 6 par. 2 of p.f.a. in conjunction with art. 113 par. 2 pt.5 of p.f.a. and art. 115 of p.f.a.), earmarked public funds (art. 90 p.f.a.) and cooperative savings and credit unions (art. 3 par. 1 a.c.s.c.u.(Act on cooperative savings and credit unions)[266]), whereby the LGU cannot enter into a loan agreement with a cooperative savings and loan fund, as it operates on behalf of its members, which cannot be the LGU (a contrario of Article 10 a.c.s.c.u.). Loan agreements between the LGU with the SP and the sovereign wealth funds are concluded

[264] Ustawa z 29.01.2004 r., Prawo zamówień publicznych, tekst jednolity Dz.U. z 2013 r., poz. 907 ze zm.

[265] Ustawa z 29.08.1997 r. Prawo bankowe, tekst jednolity Dz.U. z 2012 r., poz. 1376 ze zm.

[266] Ustawa z 5.11.2009 r. o spółdzielczych kasach oszczędnościowo-kredytowych, tekst jednolity Dz.U. z 2013 r., poz. 1450 ze zm.

on conditions other than market conditions, i.e. the total costs are low and will therefore not be subject to the remainder of the article.

The loan for the LGU may be granted by a legal person, an organisational unit without legal personality, e.g. partnerships under commercial law, and natural persons, as the provisions of article 720-724 of the Civil Code[267] do not contain any restrictions as to who may be the lender. Granting individual loans to LGU by legal persons, organisational units and entrepreneurs does not necessarily have to be connected with the financial service activity conducted by these entrepreneurs, although it will most often be so as a result of the requirements set by the LGU in tenders, negotiations with the announcement etc. The lender for the LGU may be a state special purpose fund (art. 29 par. 7 of p.f.a.), SP (art. 6 par. 2 p.f.a in conjunction with art. 113 par. 2 pt.5 p.f.a. i art. 115 p.f.a.) and another LGU (art. 240a par. 5 pt.3 p.f.a.). It follows from this provision that if an LGU does not implement the recovery programme referred to art. 240a of p.f.a., it may lend to another LGU. The loan agreements between the LGU and the SP, the SPE and other LGUs are concluded on non-market terms, i.e. they usually have low interest rates and will therefore not be further developed.

On market terms, LGUs can obtain loans from banks and credit institutions, and loans from legal persons, natural persons, and organisational units without legal personality. Reasons for taking loans and credits by local government units on conditions worse than market ones

Local government units obtain financing in the form of loans, issue of securities, loans bearing interest at the WIBOR rate plus a margin. The cost of this financing may also be a commission. Usually the margin is low for most LGUs, as they are considered safe debtors. The commission on a loan or loans is also low or not charged. However, there are cases where LGUs take out a loan or borrowing when the margin is very high, i.e. not only higher than the average margin for all LGUs, but also higher than for commercial entities, i.e. entrepreneurs. This also applies to interest. This situation may be due to significant indebtedness of the LGU, liquidity problems, i.e. LGU's indebtedness to repay existing debt (debt rollover), the occurrence of maturing liabilities and the existence of grounds for initiating a recovery programme under art. 224-225 of p.f.a. or 240a of p.f.a. Banks are the largest creditors of the LGU and are willing to grant loans to the LGU and to authorise the issue of Municipality bonds together with the granting of guarantees to cover the bonds concerned. However, the banks are not interested in providing further financing to the LGU in a situation where the entity has difficulties in repay-

[267] Ustawa z 23.04.1964 r. Kodeks cywilny, tekst jednolity Dz.U. z 2014 r., poz. 121.

ing its existing debt, approaches the debt limit set out in art. 243 of p.f.a., applies for a new loan to restructure its debt, i.e. inter alia to obtain a loan for a long repayment period in order to repay its short-term debt, or the LGU loan is to finance a recovery programme. Likewise, banks treat LGUs that fail to meet their obligations to contractors and suppliers selected on the basis of public procurement who have properly performed the work or deliveries and have not received remuneration even though the funds to pay the remuneration should be realistically planned in the budget. A local authority with financial difficulties no longer remains a credible debtor to banks, even if it receives a positive opinion from the Regional Chamber of Accounts (hereinafter RCA) about the possibility of paying the planned debt. Banks apply their own methodologies for assessing creditworthiness, the principles of which are based on economic and not legal criteria set out in article 242-244 of p.f.a. Moreover, financing of unreliable debtors usually requires banks to create a reserve for a part of the credit exposure, which results in decreasing profitability of the transaction for the bank, despite the possibility of granting a credit for a higher margin and commission than for other LGUs. Situation of a local government unit that did not receive planned revenues from banks.

The debt assumption by the LGU is based on the amount of revenue specified in the budget resolution. The failure of the LGU to raise revenue in banks, as adopted in the budget resolution, leads to difficulties in balancing the budget, i.e. income plus revenue is less than expenditure and expenses. In order to balance the budget, the LGU may try to obtain loans from non-bank entities or reduce expenditure. The latter solution is relatively easy to rebalance if it concerns giving up property expenses for investments that the LGU has not yet started, or if the LGU gives up optional current expenses, such as organising cultural events, supporting public benefit organisations, etc. Worse is the situation of an LGU that needs to balance the budget with revenue due to property expenses related to investments already started and under way. In such cases, it is not always advisable and possible to give up property expenses, especially if this is the final stage of the investment, the completion of which was planned, e.g. from subsidies not received by the LGU. Moreover, postponing the completion of the investment usually increases the total expenditure. Even more difficult is the situation of the LGU, which needs to raise revenue in order to realise the expenditure, i.e. to pay off in a given year all due instalments of loans and borrowings, to redeem the bond tranches with interest on this debt. Failure to raise revenue for expenses may, in extreme cases, lead to enforcement by existing creditors and thus to difficulties or even limitations in the performance of public tasks by the LGU, e.g. if bank

accounts are seized by a bailiff to carry out enforcement for several months, resulting in an almost complete cessation of expenses and the performance of many tasks by the LGU.

It also happens that the LGU, by means of loans from legal entities other than banks, carries out debt restructuring, i.e. it repays maturing debt on which interest is charged overdue. The total cost of borrowing, i.e. interest plus commission, is usually higher than the overdue interest that accrues on maturing debt. However, it may happen that the cost of a loan will be lower than the interest on the outstanding debt.

The principles of incurring public expenditure and incurring high cost obligations by LGU

Legal persons (entrepreneurs) with whom the LGU conclude loan agreements in a situation where they have not previously found a bank or special purpose fund willing to grant a loan or a loan at interest rates as for other LGUs take advantage of the fact that the LGU in the procedure provided for in the p.p.l. may award a contract either directly or through negotiations without publication and the entrepreneurs in question offer a loan at a much higher cost than for other LGUs. This also applies to banks, which, knowing that they are the only players on the market willing to accept a higher risk of financing for an LGU in financial difficulty, make an offer to award a loan in an open, restricted, negotiated with/without announcement, with a negotiated contract at a higher cost than that of an LGU in good financial standing.

The amount of the cost of the loans and borrowings, i.e. the margin on WIBOR and the commissions that the LGU take on depends on their financial situation and the risk of repayment of the funds. This is the standard behaviour of any entity granting a loan or credit. It is normal behaviour on the part of those who wish to finance LGUs in a worse financial situation than most LGUs to expect to be rewarded more for the greater risk of their financing. The answer to the question of whether LGUs should take advantage of these only offers and enter into a loan agreement or a high cost loan is not obvious.

When answering the last question, it should be borne in mind what financial effects will be achieved by the LGU as a result of concluding a loan or credit agreement with a high cost than is the case for LGUs with no difficulty in obtaining a low cost credit in an open public tender procedure. Public expenditure, such as interest, should be incurred in a cost-effective and targeted manner, while maintaining the principles of obtaining the best possible results from the expenditure concerned, optimal choice of methods and means to achieve the objectives set (art. 41 par. 3 pt.1 of p.f.a.). The appropriateness of

incurring expenditures means ensuring the compliance of the LAG's measures in the scope of making expenditures with its statutory objectives, optimisation of the methods and measures applied their adequacy for the achievement of the assumed objectives and the adopted criteria for the assessment of the tasks implementation[268]. The advisability also means that the LAGs choose the way of financing the tasks which leads to the most efficient management of public funds. Effective spending of public funds is to lead to obtaining an optimal relation between the set objectives and tasks and the achieved effects of their implementation[269]. The effectiveness of public spending also means optimisation in the selection of methods and ways to achieve the assumed objectives, with purposeful and economical expenditure[270]. The expenditure incurred by the LAGs must ensure cost efficiency, i.e. the efficiency and effectiveness of public spending in relation to the implementation of the tasks[271]. Rationalising costs means striving for the greatest cost savings, with comparable effect[272].

The LGU's high cost borrowing indicates that it is in a worse financial situation than other entities that do not have difficulties in obtaining low cost loans. Account should be taken of what the LGU intends to achieve as a result of obtaining high cost loans. Where this is the completion of an investment or the repayment of a creditor who threatens to pursue enforcement action against the LGU, which may result in the temporary cessation of the LGU, it can be assumed that it would be acceptable and consistent with art. 41 par. 3 pt.1 of p.f.a., if, in the longer term, the financial situation of the LGU were improved on a sustainable basis and not further reduced. The reasoning for borrowing, high cost loans by high cost LGUs in such situations can be seen in the pursuit of the timely fulfilment of the public tasks of the LGU, including assets, if other means of obtaining financing in the form of loans, bonds, low cost loans have not been successful and there will be no deterioration in the financial situation of the LGU in the long term. Expenditures on high interest and commissions on loans and credits, although they do not meet the savings criterion, allow timely completion of tasks and can be considered reasonable.

High cost LGU loan and credit agreements should not be used to temporarily solve the problem of a worsening financial situation by postponing

[268] L. Lipiec-Warzecha, *Ustawa o finansach publicznych. Komentarz,* Warszawa 2011, s. 210.

[269] *J. Stankiewicz,* Prawozamówieńpublicznychjako instrument racjonalizacjiwydatków, *[w:] J. Głuchowski, A. Pomorska, J. Szołno-Koguc (red.),* Ekonomiczneiprawneaspektyracjonalizacjiwydatkówpublicznych, *t. 1, Lublin 2005, s. 231.*

[270] L. Lipiec-Warzecha, *op.cit.,* s. 211.

[271] *Ibidem,* s. 211-212.

[272] *Ibidem,* s. 212.

a definitive solution to this problem. High cost loans should not be used to restructure short-term debt on the appearance of a short-term debt restructuring without seeking to balance the budget, i.e. ensuring a reduction in total expenditure plus expenditure that is equal to revenue without the need for new revenue. Debt rollover cannot be an end in itself, as an increase in the interest rate of the debt, i.e. an increase in the cost of debt service, is unreasonable in view of article 41 par. 3 pt.1 of p.f.a. If an LGU enters into a high cost loan or credit agreement only to postpone the problem of worsening liquidity over time, this is an unreasonable measure as it does not serve to save money and there will be a problem with the timely repayment of a high cost loan or credit. This difficulty is likely to be solved by the LGU through a low-interest and free-of-charge loan taken out of the State budget to implement the recovery programme (Article 224 of p.f.a.). In this way, the burden of solving the financial difficulties of the LGU taking out loans and high cost loans is borne not only by the inhabitants of the unit but by the State. If the financial situation of the LGU deteriorates as a result of the conclusion of the high cost loan or credit agreement, the expenditure related to this interest will be unreasonable and therefore incompatible with the rules set out in art.41 par. 3 pt.1 of p.f.a.

The conclusion of high cost loan and credit agreements by LGUs and other public sector entities, including stand-alone public health care institutions (SPHCI), should be the exception and must not lead to deterioration in their financial situation. The rationale for concluding high cost loan and credit agreements between LGUs, SPHCI and other public finance entities with different entities can be found in ensuring the timely fulfilment of public tasks, provided that this does not lead to permanent financial difficulties for these entities.

Practice shows the different effects of the LGU, SPHCI and other high cost public sector lending and borrowing with different entities. Public finance units try to use these loans to carry out unsuccessful debt restructuring or to improve liquidity on an ad hoc basis. In the long term, the financial situation of the LGU, SPHCI and other public finance entities does not improve but deteriorates, inter alia, by increasing the cost of debt service, which is not compatible with the provision of art. 41 par. 3 pt.1 of p.f.a. Entities that decide to enter into loans from the LGU, SPHCI and other public finance entities with high total costs, i.e. interest plus commission, take advantage of the difficult financial situation of these entities and are not interested in a genuine restructuring of the debt of the LGU, SPHCI but in a further deterioration of their financial situation in order to offer and provide loans on even worse

financial terms in the future. The providers of high cost loans and credits to the LGU and SPHCI are aware that, in the long run, as the financial difficulties of the LGU and SPHCI accumulate, these entities will receive support from the State budget in the form of low-interest loans or grants to repay their creditors. This leads to a situation where the costs of paying the expensive debt incurred by the LGU and SPHCI are borne by the State budget. This is partly due to irresponsible financial management in the LGU, SPHCI and other public sector entities, but also to too liberal treatment of this problem by supervisory and control bodies, i.e., inter alia, the Supreme Audit Office and the RCA, which do not react to the infringement in advance article 41 par. 3 pt.1 of p.f.a. The problem of indebtedness of LGUs, SPHCI and other public finance entities to entities other than banks and credit institutions cannot be solved by prohibiting the conclusion of loan agreements with entities other than banks and credit institutions. The conclusion of loan agreements by LGUs, SPHCI and other public finance entities with entities other than banks and credit institutions should be allowed, but the total cost of these loans should not significantly exceed the costs applicable to other LGUs, SPHCI.

CHAPTER 4.

PROBLEMS AND ISSUES FROM LOCAL GOVERNMENT UNITS AND NGO'S PRACTICE

4.1. Implementation of the Inter-Communal Waste Disposal Complex in the Świecie Municipality (Kujawsko-Pomorskie) by way of waste management pursuant to the "waste" act

A change in the approach to waste management was forced by Poland's accession to the European Union and thus the adjustment of national legislation to the EU regulations. For this purpose, the Act on Maintaining Cleanliness and Order in Municipalities, commonly referred to as the "Waste Act" or the "Cleanliness Act", was amended."[273][274].

The Świecie Municipality was also confronted with the tasks resulting from the Waste Management Act as its statutory obligation. Construction of the Inter-Communal Waste Disposal Complex (ICWDC) is not an easy undertaking. Difficulties result, among others, from the territorial range - the ICWDC will serve a much larger area than only the Świecie Municipality[275]. Moreover, the construction costs of ICWDC are very high and constitute the largest and most expensive investment in the Municipality of Świecie in recent years..

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[273] Dyrektywa 2008/98/WE, Parlamentu Europejskiego i Rady w sprawie odpadów, dyrektywa 99/31/WE w sprawie składowania odpadów, dyrektywa 2000/76/WE w sprawie spalania odpadów, dyrektywa 96/61/ WE w sprawie zintegrowanego zapobiegania i ograniczania (kontroli) zanieczyszczeń - IPPC, dyrektywa 94/62/WE w sprawie opakowań i odpadów opakowaniowych, dyrektywa 2004/8/WE w sprawie wspierania kogeneracji w oparciu zapotrzebowanie na ciepło użytkowe na rynku wewnętrznym energii.

[274] Ustawa z dnia 13 września 1996 r. o utrzymaniu czystości i porządku w gminach (Dz.U. 1996 nr 132 poz. 622).

[275] Zakres terytorialny określony jest w uchwale Sejmiku Województwa Kujawsko-Pomorskiego z dnia 24 września 2012 r., nr XXVI/434/12 w sprawie uchwalenia „Planu gospodarki odpadami województwa kujawsko-pomorskiego na lata 2012-2017 z perspektywą na lata 2018-2023", Załącznik do Uchwały Nr XXVI/434/12 Sejmiku Województwa Kujawsko-Pomorskiego z dnia 24 września 2012 r. Municipality Świecie należy do 1 regionu, który obejmuje 324 102 mieszkańców na terenie powiatów grudziądzkiego, sępo- leńskiego, świeckiego, tucholskiego. W regionie 1 powstaną 3 regionalne instalacje przetwarzania odpadów komunalnych (RIPOK) w Sulnówku w Gminie Świecie, Zakrzewie oraz w Bladowie.

Waste management by the municipality in the context of Polish legal regulations

The legal basis for waste management by local government units (LGU) of the lowest level, i.e. the municipality, was regulated in several normative acts. According to the catalogue of sources of law applicable in the Republic of Poland, the highest ranked normative act in this hierarchy is the Basic Law[276]. In accordance with article 163 of the Constitution of the Republic of Poland, the local government performs public tasks not reserved by the Constitution or by the Acts for bodies of other public authorities. Moreover, art. 164 of the Constitution of the Republic of Poland states that a municipality performs all the tasks of local government not reserved for other local government units. Although the quoted provisions do not directly refer to waste management as a task performed by municipalities, they constitute the constitutional basis for their activities, which are important from the point of view of their waste management tasks.

Waste management is regulated in the Act on Municipality Self-Government[277], which is a clarification of the municipality's tasks in this respect. Art. 7 par. 1 pt.3 Article 1 of the above mentioned Act states that satisfying the collective needs of the community belongs to the community's own tasks. In particular, the community's own tasks include: water supply and water supply, sewage system, removal and treatment of Municipality sewage, maintenance of cleanliness and order and sanitary facilities, landfills and disposal of Municipality waste, supply of electricity, heat and gas. Undoubtedly, the most important legal act regulating the essence of the subject is the Act on maintaining cleanliness and order in municipalities. According to article 1 of the Act, the scope of its application includes the tasks of the municipality and the obligations of the property owners concerning the maintenance of cleanliness and order, the conditions of performing the activity of collecting Municipality waste from the property owners and managing such waste, the conditions of granting permits to entities providing services within the scope regulated by the Act. Whereas, art. 3 of the "Cleanliness Act" states that maintaining cleanliness and order in municipalities is one of the municipalities' own obligatory tasks.

The change in the "Waste Act" has imposed additional obligations on municipalities. Article 3b of this normative act states that municipalities are obliged to achieve by 31 December 2020:

[276] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U. Nr 78, poz. 483).

[277] Ustawa z dnia 8 marca 1990 r. o samorządzie gminnym (Dz.U. z 1996 r. Nr 13, poz. 74), Szerzej: Z. Bukowski, T. Jędrzejewski, P. Rączka: *Ustrój samorządu terytorialnego,* Toruń 2011.

- a level of recycling and preparation for re-use of the following Municipality waste fractions: paper, metals, plastics and glass of at least 50% by weight;
- a rate of recycling, preparation for re-use and recovery by other non-hazardous methods of construction and demolition waste of at least 70% by weight.

Moreover, Article 3c of the same Act imposed an obligation on municipalities to limit the weight of biodegradable Municipality waste transferred for storage:

- by 16 July 2013 - up to not more than 50% by weight of the total weight of biodegradable Municipality waste sent to landfill;
- by 16 July 2020 - up to not more than 35% by weight of the total weight of biodegradable Municipality waste transferred to landfill - in relation to the weight of such waste produced in 1995..

In accordance with Article 4 of the "Cleanliness Act", the municipality creates regulations for maintaining cleanliness and order in its area. This article states that the Municipality Council, after consultation with the state county sanitary inspector, adopts the rules of maintaining cleanliness and order in the area of the municipality, hereinafter referred to as the 'rules'; the rules are an act of local law[278]. Moreover, Article 6c stipulates that municipalities are obliged to organise collection of Municipality waste from the owners of properties where the residents live. The Municipality Council may, by way of a resolution, decide to collect Municipality waste from the owners of properties where the residents do not reside but where Municipality waste is produced.

An important and significant change in the Act on maintaining order and cleanliness in municipalities is a catalogue of penalties imposed on TV municipalities when a municipality fails to meet its obligations described above. Article 9 of the Act states that a municipality organisational unit which:

- collects Municipality waste despite the prohibition to carry out the activity referred to in Article 9k - prohibition, collect Municipality waste from

[278] Rada Gminy w Świeciu podjęła taką uchwałę w dniu 4 listopada 2010 r. - uchwała Rady Miejskiej w Świeciu nr 355/10 w sprawie „Regulaminu utrzymania czystości i porządku na terenie Gminy Święcie®, która została uchylona uchwałą Rady Miejskiej w Świeciu nr 190/12 w dniu 5 grudnia 2012 r. w sprawie „Regulaminu utrzymania czystości i porządku na terenie gminy Świecie® i opublikowaną w Dzienniku Urzędowym Województwa Kujawsko -Pomorskiego poz. 3607 z dnia 12 grudnia 2012 r. Następnie zmieniona uchwałą Rady Miejskiej w Świeciu nr 242/13 w dniu 13 czerwca 2013 r. w sprawie zmiany Uchwały Nr 190/12 Rady Miejskiej w Świeciu z dnia 5 grudnia 2012 r. w sprawie «Regulaminu utrzymania czystości i porządku na terenie gminy Świecie® i opublikowaną w Dzienniku Urzędowym Województwa Kujawsko-Pomorskiego poz. 2205 z dnia 20 czerwca 2013 r.

property owners - is subject to a fine in the amount of PLN 5000 for the first month of carrying out the activity despite the prohibition and PLN 10 000 for each subsequent month of carrying out the activity despite the prohibition;

- mixes selectively collected Municipality waste with mixed Municipality waste - subject to a fine in the amount of PLN 10 000 to PLN 50 000.

The amount of penalties to which municipalities are subject may be severe, the construction or participation in the construction of a waste disposal complex may therefore be beneficial for municipalities. Construction of a modern facility of this kind is therefore a necessity.

Stages of implementation of the Inter-Communal Waste Disposal Complex in the Swiecie Municipality

The process of construction of the Inter-Communal Waste Disposal Complex for Świecie and Chełmno counties was initiated by the resolution of the Town Council in Świecie of 25 October 2007 on the conclusion of an inter-communal agreement to build and manage the Inter-Communal Waste Disposal Complex for Świecie and Chełmno counties.[279]. The resolution was a result of an inter-communal agreement with the municipalities: Bukowiec, Chełmno - town, Chełmno - municipality, Dragacz, Drzycim, Jeżewo, Kijewo Królewskie, Lisewo, Lniano, Nowe, Osie, Papowo Biskupie, Pruszcz, Stolno, Świekatowo, Unisław and Warlubie in order to build and manage the Intercommunal Waste Disposal Complex for Świecie and Chełmno counties. For this purpose, the Świecie Municipality shall take over the rights and obligations related to the task implementation. The justification of the Resolution is that pursuant to the Resolution of the Council of Ministers of 29 December 2006 regarding the "National Waste Management Plan 2010"[280] the basis for Municipality waste management should be waste management plants (WMP) with a capacity sufficient to receive and process waste from an area inhabited by a minimum of 150 thousand inhabitants, meeting the criteria of the best available technique in technical terms.

In order to implement the project "Inter-Communal Waste Disposal Complex for Świecie and Chełmno counties", the Świecie City Council adopted

[279] Uchwała Nr 90/07 Rady Miejskiej w Swieciu z dnia 25 października 2007 r. w sprawie zawarcia porozumienia międzygminnego w celu wybudowania i zarządzania Międzygminnym Kompleksem Unieszkodliwiania Odpadów' dla powiatów' świeckiego i chełmińskiego.

[280] Uchwałą Rady Ministrów Nr 233 z dnia 29 grudnia 2006 r. w sprawie „Krajowego Planu Gospodarki Odpadami 2010" (M.P. z 2006 r. Nr 90 poz. 946).

the resolution of 24 January 2008[281] decided to establish a company operating under the name of Przedsiębiorstwo Unieszkodliwiania Odpadów "EKO-Wisła" Limited Liability Company, whose shareholders were to be the Świecie Municipality and the Chełmno Municipality.

As the municipality of the city of Chełmno did not take steps to set up the company 'EKO-Wisła', on 27 March 2008 the Świecie City Council adopted a resolution to set up the Waste Neutralisation Company 'EKO-Wisła' Limited Liability Company[282][283], repealing at the same time the resolution of 24 January 2008.

The next stage was to update the "Environmental Protection Programme of the Municipality of Świecie [284] and update of the "Waste Management Plan of the Świecie Municipality[285]" through the resolution of the Municipality Council of 28 May 2009.[286]„ The "Environment Protection Programme of Świecie Municipality" was updated by the resolution of the Municipality Council of 27 February 2013.[287]

Subsequently, the agreement between the municipalities on the implementation of the ICWDC was reinstated [288] - on this time between Świecie municipality and Chełmno municipality, Jeżewo municipality, Osie munic-

[281] Uchwała nr 112/08 Rady Miejskiej w Swieciu z dnia 24 stycznia 2008 r. w sprawie utworzenia spółki działającej pod Firmą: Przedsiębiorstwo Unieszkodliwiania Odpadów „EKO-Wisła" Spółka z ograniczoną odpowiedzialnością.

[282] Uchwała nr 128/08 Rady Miejskiej w Swieciu z dnia 27 marca 2008 w sprawie utworzenia spółki działającej pod Firmą: Przedsiębiorstwo Unieszkodliwiania Odpadów „EKO -Wisła" Spółka z ograniczoną odpowiedzialnością.

[283] Zgodnie z art. 136 ustawy o odpadach zarządzającym gminnym składowiskiem odpadów nie może być jednostka sektora finansów publicznych. Municipality może utworzyć podmiot niebędący taką jednostką w celu prowadzenia gminnego składowiska odpadów lub powierzyć wykonywanie praw i obowiązków zarządzającego gminnym składowiskiem odpadów podmiotowi niebędącemu jednostką sektora finansów publicznych na zasadach określonych w ustawie z dnia 20 grudnia 1996 r. o gospodarce komunalnej.

[284] Załącznik nr 1 do uchwały 242/09.

[285] Załącznik nr 2 do uchwały 242/09.

[286] Uchwała Nr 242/09 Rady Miejskiej w Swieciu z dnia 28 maja 2009 r. w sprawie aktualizacji „Programu Ochrony Środowiska Gminy Świecie" i aktualizacja „Planu Gospodarki Odpadami Gminy Świecie", załącznik nr 1 i 2.

[287] Uchwała Nr 219/13 Rady Miejskiej w Świeciu z dnia 27 lutego 2013 r. w sprawie „Aktualizacji Programu Ochrony Środowiska Gminy Świecie na lata 2012-2015 z Perspektywą do 2019 r.", załącznik do uchwały.

[288] Uchwała nr 125/12 Rady Miejskiej w Świeciu z dnia 19 stycznia 2012 w sprawie zawarcia porozumienia międzygminnego pomiędzy gminą Świecie a gminą miasto Chełmno, gminą Jeżewo, gminą Osie i gminą Pruszcz dotyczącego wspólnej realizacji zadania pn. „Budowa Międzygminnego Kompleksu Unieszkodliwiania Odpadów Komunalnych dla powiatów świeckiego i chełmińskiego w Sulnówku".

ipality and Pruszcz municipality. These municipalities have entrusted the Świecie municipality with the task. Thus, the previous resolution on the agreement expired. Eventually, the agreement was not reached because the Chełmno municipality, after the change of the "Waste Management Plan for the Kujawsko-Pomorskie Province", was excluded from region no. 1, while the remaining municipalities withdrew from the agreement.[289]. As a result, the entire financial and organisational load of building the ICWDC rested on the municipality of Swiecie.

According to article 3a of the "Waste Act", the municipalities, performing the tasks consisting in ensuring the construction, maintenance and operation of regional installations for processing Municipality waste, are obliged to:

- to carry out a tender to select an entity to build, maintain or operate a regional Municipality waste treatment installation, or
- to select an entity which will construct, maintain or operate a regional Municipality waste treatment installation, under the rules laid down in the Act of 19 December 2008 on Public-Private Partnership, or
- to select an entity which will build, maintain or operate a regional Municipality waste processing installation, under the rules specified in the Act of 9 January 2009 on Concession for Works or Services.

On 6 August 2013, the tender for the implementation of the ICWDC construction project was awarded to Przedsiębiorstwo Budownictwa Górniczego i Energetycznego "EGBUD" Sp. z o.o. from Bogatynia. The works will last until 30 September 2014. The company "EGBUD" gave a 3-year guarantee for the facility, and the Municipality of Swiecie has 270 days to report possible defects. The cost of the investment is 37 452 145, 99 PLN.[290].

The Intercommunal Waste Disposal Complex in Sulnówek will include a modern sorting plant, a composting plant, warehouses and a waste treatment plant for construction and dismantling of bulky waste.

Sources of financing for the construction of the Inter-Communal Waste Disposal Complex in the Świecie Municipality

On 24 June 2010 the Świecie City Council adopted a resolution on taking a loan (loan of PLN 5 000 000 to be repaid over 5 years with a one-year

[289] Gminy nie są zainteresowane partycypowaniem w kosztach budowy, gdyż municipality która realizuje RIPOK zobowiązana jest do przyjęcia odpadów od pozostałych gmin znajdujących się na terenie regionu.

[290] Koszt netto gdyż gmina odlicza VAT od tej inwestycji. Gmina Swiecie ogłosiła pierwszy przetarg na wykonanie MKUOK w Sulnówku w formule „projektuj i buduj" (tzw. Żółty FIDIC) w 2011 r. Jednak między gminą a wykonawcą, który wygrał przetarg powstał spór co przyczyniło się do wydłużenia realizacji instalacji.

grace period) from the Province Fund for Environmental Protection and Water Management (PFEPWM) for the implementation of the project entitled "Construction of the third landfill site for non-hazardous and inert waste - Stage I of the construction of the Municipality Intercommunal Waste Disposal Complex in Sulnówek"[291].

The next stage was the adoption by the Municipality Council of a resolution on taking another loan from the PFEPWM to implement the ICWDC [292] (loan of PLN 11,600,000, of which PLN 5,700,000 in 2012 and PLN 5,900,000 in 2013. The loan will be repaid within 10 years with a 36-month grace period). Eventually, the Świecie Municipality signed the loan agreement on 03 June 2014 for the amount of PLN 11 957 060.

In addition, the Świecie Municipality has received a balance sheet from the European Regional Development Fund (ERDF)[293] within the Regional Operational Programme of Kujawsko-Pomorskie Province for 2007-2013. Priority axis 2 - "Preservation and rational use of the environment", measure 2.2 "Waste management" in the amount of PLN 12 840 577, 25. Balancing from the state budget funds under the project entitled "Construction of the Inter-Communal Waste Disposal Complex for the Świecie and Chełmno counties in Sulnówek" in the amount of PLN 2 265 984.22[294]. A combined total of PLN 15 106 561,47 and represents 50 % of expenditure[295].

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[291] Uchwała Nr 321/10 w sprawie zaciągnięcia pożyczki z Wojewódzkiego Funduszu Ochrony Środowiska i Gospodarki Wodnej na realizację przedsięwzięcia pn. Budowa trzeciej kwatery składowiska odpadów innych niż niebezpieczne i obojętne - I etap w ramach budowy „Międzygminnego Kompleksu Unieszkodliwiania Odpadów Komunalnych w Sulnówku". Pierwsza kwatera wysypiska śmieci powstała w latach 1992-1993, natomiast druga w roku 2002. Zgodnie z uchwałą budżetową na rok 2014 gmina Świecie spłaciła do tej pory 3 021 372 zł wraz z odsetkami.

[292] Uchwała nr 163/12 Rady Miejskiej w Świeciu z dnia 28 czerwca 2012 w sprawie zaciągnięcia pożyczki z Wojewódzkiego Funduszu Ochrony Środowiska i Gospodarki Wodnej w Toruniu na realizację przedsięwzięcia pn. „Budowa Międzygminnego Kompleksu Unieszkodliwiania Odpadów Komunalnych".

[293] Europejski Fundusz Rozwoju Regionalnego ma na celu wzmocnienie spójności gospodarczej i społecznej Unii Europejskiej poprzez korygowanie dysproporcji między poszczególnymi regionami. Szerzej: http://ec.europa.eu/regional_policy/thefunds/regional/index_pl.cfm[dostęp: 20.05.2020], C. Kosikowski: *Prawo Finansowe w Unii Europejskiej,* Bydgoszcz-Warszawa 2008, s. 139-140, C. Kosikowski: *Finanse i Prawo Finansowe Unii Europejskiej,* Warszawa 2014, s. 141-142.

[294]

[295] Wydatki kwalifikowane - to koszty poniesione podczas prowadzenia projektu, które kwalifikują się do refundacji w ramach udzielonego dofinansowania. Szerzej: Krajowe wytyczne dotyczące kwalifikowania wydatków w ramach funduszy strukturalnych i Funduszu Spójności w okresie programowania 2007-2013, Warszawa, 20 kwietnia 2010 r.

The Świecie Municipality took actions to build ICWDC already in 2007. However, as a result of changes in waste management regulations and programmes, the situation during the project implementation was prolonged. The main problems resulted from the construction costs, which turned out to be incurred by the Świecie Municipality itself. After deducting EU subsidies from the ERDF and after deducting the loans with interest that have to be repaid, the Świecie Municipality has to allocate about PLN 20 000 000 for the plant construction. Taking into account the investments which take place in 2014 in the municipality (including the construction of a modern library at a cost of over PLN 5,400,000, a thorough modernisation of the indoor swimming pool at PLN 15,200,000 and the continuation of the construction of streets and bicycle paths), the above amount is a significant burden. It is worth mentioning that in the Ordinance of the Mayor of Swiecie dated 26 May 2014 regarding the amendment of the Świecie Municipality budget for 2014, the municipality's revenues will amount to PLN 132 494 038, expenditures will amount to PLN 162 494 038 and the planned deficit will amount to PLN 30 000 000. This deficit will be financed with loans and credits and free funds.[24]. The same regulation states that the municipality will allocate PLN 57,535,820 from the 2014 budget for investment and investment purchases. The presented data show the scale of investments that are currently taking place in the Świecie municipality and thus affect the implementation of ICWDC.

Ms Edyta Kliczykowska (Head of the Department of Agriculture, Environmental Protection and Municipality Economy of the Świecie Municipality) should be thanked for her valuable guidance during the implementation of the publication.

4.2. Negative financial consequences of the acceptance of a contribution in kind in the form of an in-kind contribution of land ownership rights by companies managing special economic zones

The aim of the study is to indicate the advantages and disadvantages of accepting a contribution in kind in the form of an in-kind contribution of land ownership rights from a local government unit by a company managing a special economic zone. Despite obvious advantages, such as the increase in assets, which in the perspective means the possibility of converting them into cash, accepting such a contribution may have significant negative consequences, making such a transaction ineffective. The scientific problem will be characterised using case studies and statistical methods.

Special economic zones in Poland - characteristics and effects of operations

A special economic zone (SEZ) is an administratively separate area where entrepreneurs conducting business activity obtain preferences. Historically, the most important mentions of special areas which have been characterised by preferences for entrepreneurs conducting business activity there are Gibraltar (1704), Singapore (1809), Hong Kong (1848), Hamburg (1888) and Copenhagen (1891). Currently, SEZs worldwide are mainly located in Asia Pacific, Latin America, the Middle East, North Africa and Central and Eastern Europe [Dohrmannhttp, 2008], and are particularly important in developing countries. In them they are becoming one of the important tools contributing to economic growth. They ensure the inflow of foreign direct investment, decreasing unemployment and, consequently, closing the gap between these countries and more developed ones.

While explaining the specific nature of Polish SEZ, it should be noted that they are one of many types of SEZ operating worldwide. The following SEZ types can be found in the literature [SEZ REPORT, 2008]:

- free zones, primarily free zones, oriented towards the services of storage, warehousing, distribution, transhipment;
- free trade areas - industrial areas focused on servicing foreign markets;
- enterprise zones, the aim of which is to revitalise the separated areas through a system of grants, tax reliefs and other incentives;
- freeports - larger areas where various activities take place (duty-free zones, industrial zones, tourist zones, free trade zones), offering a much wider range of incentives;
- zones focused on individual companies offering a system of incentives for individual companies, regardless of their location;
- specialised zones, including technology parks, science parks, petrochemical, logistic and other parks.

According to World Bank data, there are currently about 3000 SEZ located in 135 countries, where about 68 million people have found employment [Akinci, Farole, 2011].

The design solutions of Polish SEZs are based, among others, on the Irish Shannon SEZ established in 1959, and were initiated by the Act of 20 October 1994 on Special Economic Zones (Journal of Laws of 2007 No. 42, item 274 as amended; hereinafter referred to as the Act). According to the provisions of the Act, the main objective of establishing SEZs is to accelerate the economic development of part of the country's territory through:

- development of specific business activities,
- development of new technical and technological solutions and their use in the national economy,
- the development of exports,
- increase the competitiveness of the products manufactured and services provided,
- development of existing industrial assets and economic infrastructure, creation of new jobs,
- the use of unused natural resources in an environmentally sustainable manner.

As of May 31, 2014, there were 14 special economic zones in Poland, i.e.: Kamienna Góra, Katowice, Kostrzyn-Słubice, Kraków, Legnica, Łódź, Mielec, Pomerania, Słupsk, Starachowice, Suwałki, Tarnobrzeg, Wałbrzych and Warmia-Mazury.

Polish SEZs are defined as administratively separate parts of the territory of Poland where entrepreneurs carrying out new investments may benefit from regional aid in the form of income tax exemption on income from activities specified in the permit.

From the entrepreneur's point of view, an important condition for starting up a business within a SEZ is to obtain benefits. As of 31 May 2014, an entrepreneur who meets the conditions specified in the permit will be able to receive regional aid in the form of tax exemptions for:

- the costs of the new investment (the minimum amount of investment costs must be EUR 100 000 and activities in the SEZ must be carried out in accordance with the terms of the permit and the retention of ownership of the assets to which the investment expenditure was related for 3 to 5 years. Additionally, the condition for granting aid for a new investment is the share of the entrepreneur's own funds, understood as funds which were not obtained under the aid granted to him, amounting to at least 25% of the total investment costs;
- creation of new jobs (exemption from income tax on account of the creation of new jobs is granted starting from the month in which the entrepreneur started incurring the labour costs until the admissible regional aid is exhausted, provided that the newly created jobs are maintained for a period not shorter than 3 to 5 years.)

It should be clearly emphasised here that regional public aid granted for carrying out the activities covered by the permit within the SEZ is limited and results from the regional aid intensity map. This map defines the Member State regions which are eligible for national regional investment power

under EU state aid rules and the maximum aid levels for companies in the eligible regions. The adoption of the regional aid map guarantees continuity of regional policy. The new map will apply from 1 July 2014 to 31 December 2020. Under the new map, areas with a GDP per capita of less than 75% of the EU average - 86.3% of the Polish population - will continue to qualify for regional investment aid with a maximum aid intensity of between 25% and 50% of the eligible costs of the relevant investment projects. The Mazowieckie Province - which is home to 13.7% of the Polish population - will be eligible for maximum aid intensities ranging from 10% to 35%, as its GDP per capita already exceeds 75% of the EU average and the least favoured European regions should benefit from regional aid [EuropeanCommission, 2014],

One of the important concepts characterising Polish SEZ is their effectiveness. It is presented in the following terms [Kisłowska, 2006]:

- number of valid permits - a parameter determining the effectiveness in creating investment projects,
- value of completed investments - a parameter defining the amount of investment contributions of entrepreneurs conducting economic activity based on the permit,
- number of jobs broken down by new and maintained - parameters indicating the number of jobs in enterprises conducting business activity based on a permit.

When characterising SEZ in Poland, it should be mentioned that as of 31 December 2013 the area of all zones exceeded 16,000 hectares (compared to 20,000 hectares under the SEZ Act in Poland). According to current regulations, the zones will operate until the end of 2026.

Ways of extending the area of special economic zones

When characterising SEZ in Poland, it should be mentioned that as of 31 December 2013 the area of all zones exceeded 16,000 hectares (compared to 20,000 hectares under the SEZ Act in Poland). According to current regulations, the zones will operate until the end of 2026. Ways of extending the area of special economic zones

The guidelines for extending the boundaries of the SEZ result from 2 legal acts, i.e. the Act (art. 5) and the Regulation of the Council of Ministers on the criteria whose fulfilment makes it possible to cover certain land with a special economic zone (Journal of Laws of 2008 No. 224, item 1477 as amended). It follows from these provisions that a SEZ can generally be established on land owned by the managing authority, the Treasury or the LGU. However, there are exceptions to this rule (art. 5 par. 2 and 3 of the Act) specified in

the Regulation on the criteria which allow to cover certain land with a special economic zone, concerning the establishment of SEZs on private land.

Each of the solutions presented above has advantages and disadvantages. They will be considered from the point of view of the manager and presented in Table 24.2.

Table 24.2 presents the most frequent possibilities of extending the boundaries of SEZ. Here, attention should be paid to the existing possibility of splitting the ownership title to land and the SEZ area. This is particularly evident in variants 2 and 3, in which a different entity than the manager appears as the owner of the land. In variant 1, such a split does not occur as the owner of the land is the manager.

While performing a detailed analysis of variant 1 it is worth noting the activities resulting from the provisions of art. 8 pt. 2 of the Act, i.e. the possibility to dispose of the manager's ownership rights to real estate and perpetual usufruct located within the SEZ but obtained by accepting a non-cash contribution in the form of an in-kind contribution of land ownership rights. This situation is quite common. LGUs are often unable to accumulate sufficient funds to prepare land for potential investors and therefore they transfer them in the form of a contribution in kind in the form of an in-kind contribution of the land ownership right to the manager who will carry out such works. Of course, the LAGs thus dispose of part of the revenue they could obtain from the sale of the property, but do not have to make significant investment outlays. Taking into account the manager's point of view, it is worth stressing that in general (provided they have the cash to adapt the property to the needs of potential investors) it is a good solution. Among its advantages one can mention:

- possibility of obtaining revenue from the sale of real estate,
- the possibility of obtaining cash inflows in excess of the capital expenditure on preparation

However, it should be noted that accepting such a contribution in kind may involve the risk of a capital freeze if, for example, the investor postpones the purchase of the property, e.g. as a result of a global change in investment policy. Additionally, accepting such a contribution may mean negative financial consequences. This is the case when the part of the real estate that is a contribution in kind has been developed and financed by EU funds. Acceptance of a contribution in kind from a local government unit - case study

In 2013, SEZ and LGU managers intended to sign an agreement to include a separate LGU area in the SEZ status. In one point of the agreement, the LGU undertook to make a non-monetary contribution to the manager in the form of a contribution in kind of land ownership rights. In return for the

transfer of land ownership, the LGU was to obtain shares in the company managing the SEZ, but the constructed infrastructure was to remain the property of the LGU. Some of the land was acquired (acquisition of the right of perpetual usufruct) and some of the infrastructure works were carried out. Both the acquisition of the ownership right and the construction of the infrastructure were financed, inter alia, from the EU funds under ROP 2007-2013. The following doubts appeared in this context:

- whether a change in the nature of ownership may have an impact on the nature and objectives of the project (so-called sustainability),
- whether the contribution in kind may involve an unjustified advantage.

The first doubt was dispelled by a thorough analysis of the proportionality of the manager's objectives resulting from the SEZ Act and the objectives of the project implemented under the ROP. The goal of the manager and the project is economic development; therefore it was assumed that the change in the nature of land ownership has no impact on the character and objectives of the project and the conditions of its exploitation.

However, it was also stated that the in-kind contribution of land in exchange for shares (even if the contribution is made on market terms, i.e. the number of shares subscribed for by territorial self-government units will be proportional to the real value of the contribution) may result in the necessity to return the grant received by the territorial self-government units together with interest.

As a result, in case of making a contribution in kind, the LGU was called upon by the ROP Managing Authority to return the obtained public aid, i.e. an amount equivalent to the return of funds together with interest on account of making a contribution in kind (in-kind contribution), calculated in accordance with guidelines of the Regional Operational Programme Managing Authority. As a result, the territorial self-government unit, while analysing outlays and effects of making in-kind contribution in the form of in-kind contribution of land ownership rights, proposed an agreement to the managing authority, in which it would transfer costs of reimbursed public aid to it.

The adoption of such conditions would mean for the manager:

- increase in fixed assets,
- reduction in the area of SEZ development,
- cash outflow, i.e. an amount equivalent to the return of funds together with interest on the contribution in kind.
- the need to achieve the rate of newly created jobs and the risk of paying an amount equivalent to the financial correction with its interest.

After an in-depth analysis of the risk of acceptance by the manager of the in-kind contribution in the form of a contribution in kind of land ownership, the agreement was not signed.

Acceptance of a contribution in kind in the form of a contribution in-kind of land property is a common form of SEZ enlargement. These real estates become assets of SEZ managers. They are armed and then sold to investors. This reduces unemployment and increases tax revenues (value added tax, personal income tax or property tax). However, each transaction of accepting such a contribution should be prepared in detail, assessed in terms of various business risks.

A standardised approach to accepting a contribution in kind may have negative financial consequences for the SEZ manager.

4.3. Municipality economic zones - the case of the city of Rzgów

The increasing interest in the creation of Municipality Economic Activity Zones results primarily from the weakness of the local government financing system in Poland. One of its basic drawbacks is the lack of predictability of the level of income, which translates into the possibility of making rational decisions, first of all of an investment nature, but related to the satisfaction of the inhabitants' needs. Unfortunately, however, the SELF-GOVERNMENT, through almost a quarter of a century of changes in the principles of financial management, becomes self-government. Relation: TASKS = COMPETENCES = FINANCIAL MEASURES (i.e. as many tasks as competences and financial means) has transformed into: TASKS > COMPETENCES > FINANCIAL MEASURES, which no longer requires comment. At the same time, there is a very positive social and political phenomenon, consisting of a high level of responsibility of the municipalities' administrators (heads of villages, mayors, presidents, councils, etc.), which at the beginning of the 1990s was not a common phenomenon (it seems obvious - due to the new quality of civic life). There is a growing awareness of the inevitability of changing the rules of financing from the European Union funds (by name - there will be an end to financing on such a scale), and many municipalities have started to look for solutions that will allow a smooth transition to national funding, including their own. Only some municipalities in Poland, e.g. the Kleszczów municipality, can finance their needs in full with their own funds. However, there they also realise that the income from the located mine and power plant will end at some point and measures have been taken to amortise the decrease in this income.

In this context, the question arises: what are the municipalities that were not lucky enough to lie on lignite deposits, or that were not fortunate enough to be fed by power stations, etc.? Municipalities whose inhabitants have every right to expect that their needs will be met at a similar level as elsewhere in Poland?

Public finances of local government units

Answer: find alternative sources of funding for their needs. Only that such an answer does not solve anything, as finding alternative sources to the EU borders on a miracle rather than on real possibilities. The legislator, wishing to maintain the greatest possible control over local government in Poland, has deprived it of efficient sources of financing, and those which it has granted are not in any case subject to significant influence on shaping income. In short: municipalities do not have any instruments for conducting real tax policy, or more broadly, income policy.

The subject of consideration is the application of a solution resembling Special Economic Zones in the Municipality conditions. This subject does not result from the need for specific solutions, as such solutions require a separate procedure and are fully applicable, but first of all from the assessment of such possibilities, expected actual or illusory benefits, forms of application and how such solutions were introduced in reality and what effects they brought. The latter aspect will be presented on the example of the city of Rzgów, located in the Łódź agglomeration and bordering with Łódź.

Analysis of the sources of income of municipalities from the point of view of the possibility of influencing their size

The constitutional legislator has divided the income of local government units (lgu), including municipalities, into three groups: own income, general subsidies and targeted subsidies. Nevertheless, the detailed list of incomes could have been dictated by the municipalities' previous experience, which was rather bad, and was supposed to protect local government units against the authorities' arbitrariness in limiting their income. It seems, however, that the effect, if not the opposite, is certainly not favourable to the local government and its financial economy. The detailed development of the constitutional provision, which has been amended many times, in the Act on the Income of Local Self-Government Units concerns own income. Only in this catalogue it is possible, to a small extent, to undertake activities shaping municipalities' income (this does not apply to other units in principle).

Own income of municipalities

In article 3 par. 1 of the Act on Income of Local Government Units [1] (further ailgu) the revenues are listed in constitutional terms. In par. 2 of the same article [296]

There is a peculiar provision that "Within the meaning of the Act, the own income of local government units also includes shares in income from personal income tax and corporate income tax". The peculiarity of this provision lies in the fact that it is a classic public-law transfer from the state budget, identical to a general subsidy, although, as it seems obvious, calculated differently, but included in the group of own income. In both cases, local government units do not have the possibility of shaping it. These transfers are simply due, as this is the case under the law. In par. 3 art. 3 lists the funds which may be income of l.g.u., are foreign funds, mainly from the European Union.

The second chapter of the presented act (ailgu) is devoted to the sources of income of local government units. Article 4 lists the sources of municipalities' own revenues. The Act provided the following revenues:

1) tax revenue:
   a) from real estate,
   b) agricultural,
   c) forest,
   d) from means of transport,
   e) income from natural persons, paid by means of a post-paid card,
   f) from inheritances and donations,
   g) from civil law transactions;
2) income from fees:
   a) the treasury,
   b) the trade fair,
   c) local, spa and dog ownership,
   d) in exploitation - in the part specified in the Act of 4 February 1994. - Geological and Mining Law,
   e) other revenue of the municipality, paid under separate regulations;
3) revenue received by Municipality budgetary entities and payments from Municipality budgetary entities;
   a) income from the assets of the municipality;
   b) inheritances, legacies and donations to the municipality;
   c) income from fines and penalties as defined in separate regulations;

[296] Ustawa z dnia 13 listopada 2003 r. o dochodach jednostek samorządu terytorialnego (Dz.U. 2003 Nr 203, poz. 1966 z późn. zm.).

d) 5.0% of income obtained for the benefit of the state budget in connection with the implementation of tasks in the field of government administration and other tasks commissioned by acts, unless separate provisions provide otherwise;
e) interest on loans granted by the municipality, unless separate regulations provide otherwise;
f) interest on late payments of receivables constituting the municipality's income; interest on funds accumulated in the municipality's bank accounts, unless separate regulations provide otherwise;
g) subsidies from the budgets of other local government units;
h) other income due to the municipality under separate regulations.
i) The share in the income tax revenues from the personal income tax from taxpayers residing in the municipality amounts to 39.34%, subject to Article 89.
j) The share in the income from the corporate income tax from taxpayers with registered offices in the municipality's area is 6.71%.

To assess the significance of particular sources in the shaping of municipalities' income, the data contained in the table entitled Budget revenues of municipalities in 2013 included in the Report on the activities of the RCA and the execution of the budget by local government units in 2013.[297] Unfortunately, like any statistical solution of this type in Poland, it is largely aggregated and does not allow for detailed analyses. It is necessary to simplify things, but still it

Thus, the State controls more than 2/3 of the municipalities' budget revenues directly. However, the scope of that 'control' is wider, as it is made up of rules laid down by the State under which the municipalities may generate other own revenues. For the purposes of these considerations, they are referred to as RECOGNISHED OWN REVENUE[298]. As indicated in the presented table, it is composed of income from taxes and Municipality fees and other, mainly property-related, income. At this point, it should be noted that this item of budget revenue is lower than it could actually be. This is due to the applica-

[297] Sprawozdaniu z działalności RIO i wykonania budżetu przez jednostki samorządu terytorialnego w 2013 r., KR RIO, Warszawa 2014, www.rio.gov.pl

[298] W cytowanym Sprawozdaniu... na stronie 241 w komentarzu stwierdza się: „Poziom dochodów własnych zapewnia swobodę w kształtowaniu polityki finansowej gmin. Udział dochodów własnych w strukturze dochodów powinien być jak najwyższy". Z tym komentarzem należy się w pełni zgodzić. Jednakże dalsze wywody muszą wywołać protest, bowiem do dochodów własnych zalicza się udziały w podatkach dochodowych. Jak do tej pory nikt nie wykazał, że gminy, czy inne jednostki samorządu terytorialnego mają jakikolwiek wpływ na tę pozycję dochodów.

tion of lower tax rates. The Report presents the effects of lower upper tax rates and reductions, deferrals, cancellations and exemptions granted.[299]. The data for 2013 shows that the total results amounted to PLN 4,013.3 million, which was composed of the reduction of the upper rates - PLN 3,128.3 million and granted discounts, deferrals, amortisation - PLN 884.9 million. It should be noted that almost half of these effects were caused by rural municipalities and the least - by urban municipalities. The lack of detailed data, which has already been pointed out before, does not allow for an in-depth analysis, but it can be assumed that the tax reductions and other titles result from a lower level of wealth of rural community residents and a greater "translation" of voters into Municipality authorities, although this is a paradoxical situation from the point of view of satisfying the residents' needs, as lower rates mean lower income and fewer opportunities to satisfy the needs. Another reason for lowering the upper tax rates cannot be omitted at this point either, which is active tax policy. It is often assumed that lowering tax rates should contribute to increasing budget revenues in the future. However, such a "philosophy" is very poorly set in reality and such undertakings do not increase budget revenues, or even generate additional losses (e.g. due to the impact on the level of general subsidy). The research carried out sometimes shows the opposite effects to those intended. For example, in 2006-2008 three cities with county rights: Krakow, Poznan and Wroclaw had different tax policies. The city of Poznań applied the maximum tax rates (mainly in real estate tax) set by the Minister of Finance, whereas in the other two cities these rates were reduced. In assessing the translation of such policies into increased entrepreneurship, it was only in Poznań that the number of newly established enterprises increased.[300]. The possibilities of active influence on the sources of income granted to municipalities are generally small and also varied. Transfers (general subsidy, special purpose subsidies and shares in income taxes) have already been mentioned. The remaining sources of own income can be evaluated in the following way: Tax revenues are differentiated and depend on the specific tax and situation of the municipality. The most important for the vast majority of municipalities is the property tax, which is visible in urbanised municipalities - urban and urban-rural. The municipalities have a specific scope of tax authority (setting tax rates, applying exemptions, discounts, deferrals, cancellations and exemptions). The agricultural tax, which was supposed to play such a role for rural municipalities as for the other real estate tax, is a comparable source of income to the tax on non-residence for

[299] *Ibidem,* s. 248 i 249.

[300]

a very small percentage of these municipalities, as it depends on the land's discount class. The catalogue of tax authority activities is similar to that of the real estate tax. The forest tax, even in very forest municipalities, is of little importance. The scope of the tax authority is identical as for the two previously discussed taxes. This observation is also valid for the tax on means of transport, although there may be municipalities where large transport companies are registered. However, due to the leasing of most of the transport fleet, this taxation has nothing to do with the seat of the transport company, only the leasing company. The comments on the tax authority in this case are identical to those for previous taxes. Another source of tax revenue is income from personal income tax, paid by means of a tax card. This tax structure is related to the principle of cheapness of taxation and its fiscal significance is small, and besides, the municipalities have no possibility to influence this tax. The same is true of the inheritance and donation tax. Moreover, this tax is not only chimerical and unpredictable, but due to the possibility of benefiting some of the taxpayers from the first group of relatives from the exemption from this tax, it has completely lost its significance, reducing, without compensation, the municipalities' budget revenues. The tax on civil law transactions is also not subject to the Municipality tax authority, regardless of its role in the structure of Municipality budget revenues.

Revenues from fees are low in fiscal terms in the vast majority of municipalities, regardless of the allocated scope of the tax authority. The greatest possibilities of shaping tax rates, which translate into budget revenues, are in the trade fair fee[301], but only in those areas where there is significant market trade, for example in Rzgów, Tuszyn, some border towns [302]. On the other hand, the amount of proceeds from the exploitation fee does not depend on any interference from the municipality. The income obtained by the Municipality budget units and the payments from the Municipality budget units are of little fiscal significance and are, in a sense, the resultant of activities in this area.

[301] Niestety, ale oficjalna sprawozdawczość statystyczna nie przewiduje takiej pozycji. W sprawozdaniu Rb-PDP z wykonania dochodów podatkowych z opłat zawarte są tylko skarbowa i eksploatacyjna.

[302] „Należy podkreślić, że relatywnie wysokie wpływy z tytułu opłaty targowej były związane przede wszystkim z rozwojem handlu odzieżą na terenie targowiska „Ptak" oraz „Polros-Cholaś", w mniejszym zaś stopniu dochody z opłaty targowej były uzależnione od lokalnej polityki podatkowej w zakresie opłaty targowej. W związku z faktem, iż w badanym okresie [1999-2006 - przyp. J.M.] nie występowały zmiany dziennych stawek opłaty targowej, trudno jest się doszukiwać skutecznego bodźcowego oddziaływania na rozwój handlu na lokalnych targowiskach". K. Płuciennik, *Wpływ instrumentów samorządowej polityki podatkowej na kształtowanie się bazy dochodowej gmin na przykładzie gmin: Andrespol, Brojce oraz Rzgów,* Uniwersytet Łódzki, Łódź 2008, maszynopis, praca magisterska, s. 263.

The income from the municipality's assets may become an important source of the municipality's income, but there are many limitations here. However, it should be noted when assessing the possibilities of shaping the budget income by the municipalities, as the municipalities may optimise their assets in an appropriate way, e.g. in spatial development plans.

Inheritances, bequests and donations to the municipality are irrelevant income, except in incidental cases. Municipalities have no influence not only on the amount of income from this source, but also on its launch.

Another source of Municipality budget income is income from fines and penalties specified in separate regulations. Some municipalities have made this source the main provider of budget revenues (speed cameras), however, such use of this source is pathological and short-term.

The remaining sources have no significant fiscal significance and can be shaped by municipalities to a small extent.

The above review shows that the municipalities' ability to generate their own income is limited to property tax and Municipality property tax. Both sources of Municipality budget revenue generation are closely related. And both sources are connected with Municipality centres (centres, zones, etc.) of economic activity. However, they are not always sufficient.

Municipality enterprise zone

The creation of a Municipality business zone is within the limits of all Municipality regulations. There are no special legal acts, unless created by the municipality, under local law. The establishment of such a zone depends exclusively on the will of the municipality concerned and, obviously, its relevant authorities. The main purpose of such a zone is to increase the income base of the municipality. However, given that there are almost 2,500 municipalities in Poland and each of them would like to create such a zone at home, this can be successful in very few cases. Creating such a zone requires a specific idea, around which economic entities will develop. It is extremely important to prepare a very precise scenario, taking into account various options, including failure.

It is believed that one of the basic sources of success is the location of the municipality. Municipalities where **strategic communication routes** intersect have a definite advantage over other municipalities, including those lying only by one such route. An example can be the Strykow municipality, where two motorways intersect: A1 and A2. The second source of success is the **preparation of the land use plan**. The quoted Strykow municipality is covered in 100% by such a plan. A very important, but not the most important source of

bitches is the appropriate technical infrastructure. However, more important are competent and available Municipality services serving the investors.

The development of the land use plan should be preceded by an inventory of the resources. On its basis, a development strategy for the municipality is developed. The strategy for the development of the municipality should be prepared on the basis of it. Unfortunately, not everyone is aware of that. Some of the Municipality development strategies, if implemented, would be defeat strategies. With the Municipality business zone is like with Silicon Valley. All over the world, such projects are being developed, but they are very rarely successful. That is why it is very important to carry out a study of the project of such a zone, a feasibility study, which, if it is actually carried out reliably, can save the municipality from financial disaster.

The scale of the difficulties of such a project and the necessity of continuous action in this respect can be proved by the example of the Rzeszow Business Zone.

Rzgówska zone of enterprise - Multifunctional Zone of Economic Activity

The Multifunctional Economic Activity Zone was established on the basis of the Rzgów Municipality Development Strategy for 2000-2010 in 2004.[303]. Its creation was the result of several coincidences. The basic one was the location. RSP was established in the immediate vicinity of the National Road No. 1, on which the average daily traffic in each direction was about 30,000 vehicles in 2010. A very busy route from Pabianice to Tomaszow Mazowiecki also runs through Rzgów. By a lucky coincidence, spontaneous markets were created in neighbouring Tuszyna and more to the south of Gluchow, which at one point also supplemented Rzgów, creating a certain logistic supply chain affecting a significant area of the country. Another coincidence was that the entrepreneurs who started their business as innkeepers were to be found at these marketplaces. Another factor that is difficult to describe as a coincidence was the authorities of the Rzgów municipality, which decided to reinstate the town's Municipality rights. Under such conditions, the first Development Strategy for the Rzgów Municipality was created, which exhausted its potential after 10 years, but also in connection with the new situation after Poland's accession to the European Union, the dynamically changing legal states and the developing economy. However, the basic steps were the inventory of the resources held and the possibilities of their use. Measures were taken in 2002-2003 to develop a land use plan, concentrating the areas desig-

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nated for specific activities and transforming the poorly discounted soils into business activities. This resulted not only in "civilisation" of fair and trade activities, but also attracted many companies from the automotive industry and construction chemicals and others. Noteworthy is the decision taken by the Municipality authorities not to apply any tax preferences. The municipality pursued a traditional tax policy. However, over time some disturbing phenomena began to appear in the area of stagnation of entrepreneurship and actions were taken, which led to the development of a new Development Strategy for the Rzgów Municipality (Development opportunities and barriers[304] in December 2013). The analysis of this Strategy allows for some conclusions to be drawn. First of all, nothing is given forever. It is necessary to constantly adapt to the changing reality, because important phenomena and processes can be overlooked. In the Rzgów municipality there will be one of the most important road junctions: the Al motorway and the S8 expressway to Wroclaw. This does not mean, however, that without appropriate measures, the municipality will be able to draw high income from such location. Tax policy has also changed. Due to the very dynamically developing Lodz Special Economic Zone (ŁSEZ), the Rzgów City Council adopted in October 2010 a resolution on real estate tax rates and other local fees.[305]. The resolution presents a proposal to reduce real estate tax rates for the period of 15 years (for the first 5 years the rate is 10% of the maximum rate, for the next 5 years 50% and for the last 5 years 70% of this rate), exemption from the trade fair fee in this Zone on condition of maintaining employment under certain conditions (employment contracts) for this time 20 employees.

Financial effects of the Rzgów municipality in relation to the Multifunctional Economic Activity Zone

The establishment of the MEAZ in Rzgów in 2004 should result in certain economic effects, primarily an increase in budget revenues related to economic activity. It should be remembered that these effects are also influenced by other factors, e.g. political (decisions of central authorities) - the introduction of visas for citizens of Russia, Belarus and Ukraine who made large purchases in shopping centres, economic, e.g. the economic situation and crises of the housekeeper, or the expansion of the ŁSEZ, other, e.g. communication difficulties,

[304] http://bip.rzgow.pl/usrfiles/117_2/strategia_rozwoju_gminy_rzgow.pdf

[305] Uchwała Nr LX/473/2010 Rady Miejskiej w Rzgowie z dnia 27 października 2010 r. w sprawie obniżenia stawek podatku od nieruchomości i innych opłatach lokalnych, http://bip.rzgow.tensoft.pl/uchwaly/1917a41 b3ccf74b 17cdac0dbe3d64336_2/lx_473_2010.pdf

The property tax in the examined period represented at least 30% of the total budget revenues in the Rzgów municipality, and in 2012 it exceeded 37%. This means that the importance of this tax is crucial for budget revenues.

Municipalities are obliged to publish data characterising the effects of the reduction of the upper tax rates granted by the municipalities on allowances, exemptions, postponements, cancellations and abandonment of collection. In Rzgów Municipality such effects have also appeared. They mainly included the property tax and the tax on means of transport, but they concerned the effects of lowering the upper tax rates.

In the view of the analyses carried out, it appears that the organisation of communal business zones, if well carried out, can bring the expected effects in the form of an increase in budget revenues. The development of the spatial development plan by the authorities of the Rzgów municipality resulted in a kind of "tax optimisation" consisting in increasing tax revenues from real estate tax by increasing the tax areas with higher rates, at the same time attracting investors and entrepreneurs. Undoubtedly, the main driving force behind the Multifunctional Economic Activity Zone are the "Ptak" and "Polros" shopping centres, which together constitute the largest commercial area of this type in the country and this part of Europe. As of 31 December 2012, there were 1260 registered business entities in Rzgów as regards trade, construction, transport, production, including: public sector - 13 business entities, private sector - 1247 business entities, including: 985 natural persons conducting business activity, - 96 commercial companies, - 43 commercial companies with foreign capital participation. There are cooperatives, foundations, associations and social organisations operating in the municipality. (...) There are numerous production plants and wholesalers for the needs of markets. An important place in the municipality's economy is occupied by the automotive industry, employing almost 400 employees at all levels, represented by such brands as: SCANIA, VOLVO, TOYOTA, AUTOTRAPER, RENAULT TRUCKS, KIA, and SUZUKI. The construction industry is a company: KERAKOLL POLSKA Sp z o.o., GEALAN, CABLEX, FOL-KUL, SAI-POL, and ROL-BUD, which together employ several hundred employees. The food industry is mainly: Z.P.M. "GROT", "OVOVITA". Other industries are: horticulture, production of medicines "AFLOFARM".

The municipality authorities are planning to delineate new areas for business activities both near the current Zone and near the traffic junction, expecting increased interest in the area.

4.4. The responsibilities of municipalities for the care of homeless animals

According to the World Declaration on Animal Rights, adopted in 1997 in London by the International Federation of Animal Rights, "every animal has the right to expect human beings to respect, care for and protect" and "the abandonment of an animal is a cruel and despicable act". This declaration, although it has no binding force, forms the basis for further legislation, adopted by individual states, to ensure respect for animal rights. It sets out the basic principles on which national solutions are based, in particular by creating a catalogue of humanitarian principles and values to be respected in relations with animals.

The fundamental rights of animals most often include the right to life and the right to freedom from suffering. An animal needs to be treated humanely, taking into account its natural needs. The inhumane killing and abuse of animals is prohibited. Higher demands are made on domesticated animals which have lost the ability to survive independently in their natural environment. According to the Declaration, pain and suffering is also inflicted on the animal through abandonment by the owner or another person under whose care the animal remains.

In the light of the Animal Protection Act of 21 August 1997 [306][307] "an animal, as a living being, capable of suffering, is not a thing. Man owes him respect, protection and care". Thus, every animal has the right to expect people to understand, treat and even respect them according to moral standards. All legal measures taken with regard to animals should be guided by their welfare and above all by the right to exist [308].In Poland, the broadly understood protection of animals is regulated by acts of statutory rank and relevant executive acts by regulations. They are the implementation of regulations established within the European Union and an expression of the need to regulate issues related to animal protection in national law. To the widest extent, the tasks related to the provision of care for homeless animals lie with Municipalities. The legislator, by way of subsequent amendments to the acts, has imposed a number of obligations on them, however, without ensuring appropriate sources of funding for these obligations and with their improper definition. As a result, at present

[306] Taką kwalifikację porzucenia przyjmują też polskie sądy, por. wyrok Naczelnego Sądu Administracyjnego z 3.11.2012 r,, (II OSK 1628/11).

[307] Ustawa z dnia 21 sierpnia 1997 r. o ochronie zwierząt (tekst jednolity Dz.U. 2013 poz. 856).

[308] Por. wyrok Wojewódzkiego Sądu Administracyjnego w Poznaniu z dnia 6 czerwca 2013 r., (IV SA/Po 165/13),

the system of care for homeless animals does not always correspond to the values expressed in the Declaration and does not actually solve the problem of homeless animals[309]. Paradoxically, even though there is a lack of appropriate resources to prevent homelessness among animals, they are often spent incorrectly, irrationally and even in violation of public finance discipline.

The problem of abandonment of animals, especially dogs and cats, leading to homelessness is growing in size. In shelters for homeless animals the number of animals kept there is constantly increasing. The aim of the study is to discuss legal regulations related to the prevention of homelessness among animals within the scope of duties of Municipalities and to present a proposal of de lege ferenda changes aimed at improving the currently existing legal regulations and thus improving the fate of hundreds of thousands of homeless animals.

Taking care of homeless animals as the municipality's own task

Pursuant to article 166 par. 1 of the Constitution of the Republic of Poland, the own tasks of local government units are such public tasks that serve to satisfy the needs of the local government community. Their purpose is to satisfy both the collective and individual needs of the inhabitants of a given area, who by law form a local government community. These tasks can be divided into obligatory tasks, for which municipalities must ensure adequate financing in the budget for a given year, and optional tasks, the degree of implementation of which depends on the amount of public funds at the commune's disposal and the needs of the local municipality.

The basic acts regulating the issue of homeless animals within Municipalities are the Act on the Protection of Animals and the Act of 13 September 1996 on Maintaining Cleanliness and Order in Municipalities[310]. The former concerns the care of animals, while the latter relates to the prevention of homelessness. Therefore, the scope of the laws is not the same, they regulate two different, although related, situations.

The term "homeless animals" is defined in art. 4 pt.16 of the Act on the Protection of Animals, according to which homeless animals are understood as domestic or farm animals that have escaped, got lost or were thrown away by a human being and it is not possible to determine their owner or another person under whose care they have remained permanently. This definition is based on three elements:

[309] Ł. Smaga, *Ochrona humanitarna zwierząt,* Białystok 2010, s. 236 i nast.

[310] Ustawa z dnia 13 września 1996 r. o utrzymaniu czystości i porządku w gminach (tekst jedn. Dz.U. 2013, poz. 1399).

1. only a pet or farm animal can become a homeless animal,
2. the cause of homelessness can be caused by an animal running away, an animal getting lost or being abandoned by humans,
3. it is not possible to identify the owner of the animal or the person under whose care the animal has been permanently kept.

Homeless animals are not cats that are free to live, have not had an owner or guardian since birth and usually do not need such care as cats that are homeless, lost or abandoned by their previous owners.

Art. 3 of the Act on Maintaining Cleanliness indicates that the duties (obligatory own tasks) of Municipalities include preventing the homeless animals from becoming homeless according to the principles set out in the regulations on animal protection and ensuring the collection, transport and disposal of the corpses of homeless animals or their parts, including through cooperation with entrepreneurs undertaking activities in this area. The above provision was amended by the Act of 16 September 2011 on the amendment of the Act on animal protection and the Act on maintaining cleanliness and order in municipalities[311]. The earlier version of the provision introduced an obligation to protect against homeless animals. It seems that the change in the formulation of the provision deserves approval, assuming that prevention of homeless animals also includes the obligation to protect against homeless animals. It cannot be assumed that the change of the provision released the Municipalities from this obligation, also in the context of the European Court of Human Rights case-law. In the case of Georgel Stoicescu and Georget Stoicescu vs Romania, concerning compensation from local authorities in Romania for biting the applicant by homeless dogs, the ECHR held that protection from homeless animals is a matter for the relevant public authorities[312]. It is also the responsibility of the municipality to mark areas affected or threatened by infectious animal diseases. For this purpose, the municipality council, by way of a resolution, shall designate the areas that are subject to mandatory deratinisation, and at the same time set deadlines for its implementation. The Act on the Protection of Animals, in article 11, introduces another Municipality task, consisting in providing care to homeless animals and catching them. Implementation legislation requires that stray animals should be placed in shelters. The statutory task of a municipality "to provide care" does not result in the obligation to maintain shelters that can be run by other entities. The same article states that social organisations whose statutory objective is to protect ani-

[311] Ustawa z dnia 16 września 2011 r. o zmianie ustawy o ochronie zwierząt oraz ustawy o utrzymaniu czystości i porządku w gminach (Dz.U. 201 lnr 230, poz. 1373).

[312] Wyrok Europejskiego Trybunału Praw Człowieka z dnia 26 łipca 2011 r. (9718/03).

mals may provide care to homeless animals and to this end run animal shelter, in agreement with the competent local government bodies. The municipality is obliged to provide the homeless animal with a place in the shelter without a time limit in it[313]. Even the lack of a hostel in the municipality concerned or the lack of places does not exempt from this obligation[314]. The resolution should also indicate the address of the shelter to which the homeless animals trapped in the municipality are directed. [315].

The Act does not define the concept of care, does not indicate its scope and functions. There are no standards of living for animals that would provide care (even to the basic extent that has been introduced for livestock and farm animals), such as housing, density, feeding, etc. Only the general and undefined obligation resulting from article 6 of the Act on the Protection of Animals to provide a room to protect against cold, heat and precipitation, with access to daylight, allowing free change of body position, provision of adequate food and permanent access to water is applicable. It seems that the lower limit is only such conditions that would fulfil the prerequisites for animal abuse (Art. 6 of the Animal Protection Act). However, there is a significant area between suitable, humane conditions and those that can be described as abuse. This results in some of the homeless animals being kept in conditions that are far from their basic needs but are slightly above the threshold of abuse. Nor are such standards introduced by the veterinary supervision of shelters, as they focus on sanitary and epidemiological safety, i.e. reducing the risk of adverse effects of shelter animals on humans. To a much lesser extent, they concern the living conditions of animals, although in practice this supervision also controls this aspect of the functioning of shelters.

The obligation to catch homeless animals consists in their capture by an authorised person. In order for the resolution on catching homeless animals to be valid it is necessary to agree on a draft resolution with a district veterinarian and to consult an authorised representative of a social organisation whose statutory goal is to protect animals. On the basis of the law, an agreement is different from an opinion. The agreement with the district veterinarian is binding for the Municipality, without it it it is not possible to pass the resolution effectively. The opinion is of an advisory nature, but not obtaining it may lead to a defective resolution of the municipality council.

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313 Por. wyrok Wojewódzkiego Sądu Administracyjnego w Kielcach z dnia 29.05.2012 r. (II SA/Ke 249/12), wyrok Naczelnego Sądu Administracyjnego z dnia 6.03.2012 r. (II OSK 2622/11).

314 Por. wyrok Wojewódzkiego Sądu Administracyjnego w Szczecinie z dnia 28.11.2013 r. (II SA/Sz 612/13).

315 Por. wyrok Naczelnego Sądu Administracyjnego z dnia 27.10.2011 r. (II OSK 1667/11).

The procedures that must be followed when catching animals are specified in the Ordinance of the Minister of Interior and Administration of 26 August 1998 on the principles and conditions for catching homeless animals. It defines the basic conditions for catching animals, including the ban on using such devices and measures that would pose a threat to the life and health of animals and cause them suffering. In addition, the transport of animals should take place under appropriate conditions and only by means adapted for that purpose. For example, the legislator has defined the requirements to be met by means of transport. An important requirement is that the animals must be transported immediately to a shelter or to a place where they are to be kept before being transported to the shelter, once the measures are completed. The Municipality is not obliged to catch homeless animals on its own. For this purpose, it may conclude an agreement with an entity running a shelter or an entrepreneur running a business activity within the meaning of the Act on Freedom of Economic Activity. It is necessary to inform the public, in a manner customary in a given commune, about the date of catching animals, the borders of the area where they will be caught, the address of the shelter with which the animals have been agreed to be placed, and to indicate the person who will carry out these activities. This information should be announced at least 21 days before the planned start of the activities[316][317].

Homeless animal care programme

Elements of the programme for care of homeless animals and prevention of homelessness of animals are defined in article 1 of the Act on animal protection. It includes:

- providing homeless animals with a place in an animal shelter,
- taking care of free-living cats, including feeding them,
- trapping homeless animals,
- mandatory sterilisation or castration of animals in animal shelters,
- looking for owners for homeless animals,
- putting the blind litters to sleep, indicating the farm to provide space for farm animals,
- providing round-the-clock veterinary care in the event of road incidents involving animals.

The programme should include an indication of the amount of funds allo-

[316] Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 26 sierpnia 1998 r. w sprawie zasad i warunków wyłapywania bezdomnych zwierząt (Dz.U. 1998 Nr 116, poz. 753 z późn. zm.).

[317] Barczak A., Zadania samorządu terytorialnego w zakresie ochrony środowiska, Warszawa 2006.

cated for its implementation and how these funds were spent. All costs related to the functioning of the programme and its implementation shall be borne by the Municipality from its own resources. Additionally, the program may include optional elements such as a plan for marking animals in the commune (with the use of so-called chips - integrated circuits implanted under the animal's skin, allowing for its identification). Some of the tasks may be entrusted by the commune to entities running the animal shelter.

The program is consulted by the county veterinarian and social organisations whose statutory goal is to protect animals operating in the commune and the lessees or managers of hunting districts operating in the commune. Although the Municipalities are free to define the programme, it should at least include the elements indicated in the Act, and it cannot go beyond the statutory delegation. One of the most common prohibited provisions is the charging of animal owners for catching and keeping animals in a shelter.

Shelters for animals are, in accordance with art. 4 pt.25 of the Act on Maintaining Cleanliness in Municipalities, a place of care for pets meeting the conditions set out in the Act of 11 March 2004 on Protection of Animal Health and Control of Infectious Diseases of Animals (consolidated text: Journal of Laws of 2008 No. 213, item 1342, as amended). They may be carried out by social organisations or by an entrepreneur who has a relevant permit from the mayor (mayor, town president), as well as by the municipality itself. The application for a permit should include, among other things, a specification of the technical means at the disposal of the applicant for a permit to conduct the activity covered by the application and information on the technologies used or intended to be used in the provision of services within the scope of the activity covered by the application. When issuing the permit, the municipality may carry out a control check of the facts given in the permit application in order to determine whether the entrepreneur meets the conditions for performing the activity covered by the permit. It should specify the requirements concerning the sanitary standard of service provision, environmental protection and the obligation to keep appropriate documentation of the activity covered by the permit. If an entrepreneur who has obtained a permit to operate a shelter does not meet the conditions set out in the permit, the authority that issued the permit calls on him/her to immediately stop violating these conditions and, if the conditions continue to be violated, withdraws the permit by decision without compensation. Thus, the manner of running the shelters is subject to the control of the mayor (wójt, mayor).

The importance of animal homelessness

The number of homeless animals in shelters is still increasing. In *2011 there were 100 265 dogs and 20 470 cats in shelters*[318]. Often the shelters where the animals are kept are overcrowded and adequate living conditions, including care and health protection of animals, are not maintained. Refuges are sometimes not equipped with adequate infrastructure, the animals are deprived of protection from the weather and their food does not meet basic physiological needs. There are also cases of lack of documentation of animals, including keeping records, description of the animal, species, age, sex, colour, marking, quarantine, vaccination, preventive treatments and causes of death of animals, including by putting them to sleep. This leads to many doubts of not only financial but also ethical nature.

As mentioned above, it should be considered that it is the municipalities that have the obligation to protect against homeless animals, despite the amendment of the provisions of the Animal Protection Act. Thus, they bear the risk of events involving these animals, which may even lead to liability for compensation for improper provision of this protection. On the other hand, many municipalities do not take any actions to limit the population of homeless animals, thus increasing the compensation risk.

The performance to date of the municipalities' responsibilities for the care of homeless animals should be considered as insufficient. Often they do not introduce a program of care for homeless animals and do not take any actions to prevent homeless animals. They do not ensure appropriate procedures for catching animals, including by not providing them with a place in shelters or by commissioning the catching to entities without appropriate permits to perform these activities.

However, the most serious problem is the lack of control over housing conditions. Although there are shelters in which animals are given appropriate care, there are also shelters in which the animals are kept in inhumane conditions. When Municipalities handing over an animal to a shelter, they do not control the conditions in which they are kept, how they are treated and even whether they are not killed against the provisions of the Animal Protection Act. However, such an obligation can be derived from the very nature of care. There are situations when municipalities do not even keep records of animals staying in shelters. When signing contracts with entities which have been commissioned with activities related to catching or keeping animals, it is not always verified that they have appropriate permits. In

[318] Raport roczny z wizytacji schronisk dla zwierząt za rok 2011, dostępny na stronie http://www.wetgiw.gov.pl/

many cases, the obligation to provide care for homeless animals is treated marginally or even neglected.

These disadvantages are to some extent due to the fact that the obligation to provide care for homeless animals, imposed on Municipalities, was introduced without the State providing funds for its implementation. Municipalities do not have the right to impose charges for trapping animals, including reimbursement of the costs of their housing and treatment, even if the owner is found. As it has been repeatedly pointed out in the jurisprudence, the act on animal protection does not provide for participation in the costs of implementation of the homelessness prevention programme and care for homeless animals by animal owners. It is different to indicate the amount of financial resources and the way of spending those resources and it is completely different to determine the rules of co-financing (granting subsidies) of specific fugitives for the benefit of animal owners[319]. It is also not permitted to impose other charges for this purpose, e.g. a sanitary fee[320].

The problem with providing appropriate care for homeless animals is most widespread in small municipalities, which do not have adequate facilities to carry out tasks related to stray animals, mainly because of the lack of shelters and the lack of funding for their construction and maintenance. The solution to this problem for some municipalities is to create associations of municipalities or to conclude agreements under which animals from the district of municipalities will be transferred to one shelter, maintained for a fee by one of the municipalities or a private entity.

In the author's opinion, the most serious problem is the lack of a comprehensive solution to the problem of homeless animals, in particular by marking them, conducting educational actions or promoting the so-called adoption. Relatively few municipalities allocate funds for the above purposes, as they are optional and do not have to be determined in the care programme for homeless animals. The very definition of conditions for catching and keeping animals in shelters not only does not solve the problem but sometimes leads to pathological behaviour. In contract causes, setting a specific rate for catching a homeless animal, sometimes leads to the situation, where the same animals are "thrown" to different municipalities by dishonest contractors. This could be prevented by the introduction of a register of animals. A better solution, however, is the introduction of "chips" of animals, allowing establishing their

[319] Por. wyrok Wojewódzkiego Sądu Administracyjnego we Wrocławiu z dnia 6.12.2012 r. (II SA/Wr 686/12).

[320] Por. Rozstrzygnięcie Wojewody Podkarpackiego z dnia 30.04.2012 r. P-II.4131.2.40.2012, Podka.2012/1157.

identity and owner. This not only makes it possible to find the animal, but also reduces the number of animals abandoned by owners who are aware that their identity can be easily established. Similarly, it is important to organise educational activities, including for school children and young people. Often the reason for abandoning an animal is that the parents buy it on impulse, as the child wishes. Developing a sense of responsibility for an animal contributes to reducing the number of such cases. Educating residents is a long-term activity and can take place through such forms of education as conferences, training courses, workshops, information campaigns, educational activities, publications, films, folders, posters, exhibitions etc. Educational materials may be made available and distributed through clinics and veterinary clinics, pet shops, shelters, social associations and organisations with a statutory aim of protecting animals. It is also important to promote the adoption of animals from shelters. Searching for new owners and conducting actions and promoting attitudes aimed at encouraging residents to adopt dogs is one of the most effective ways to prevent homelessness of animals. The problem of homelessness of dogs cannot be solved without the help and support of residents, therefore Municipalities should aim at introducing all mechanisms encouraging adoptions.

All the above measures should aim to reduce the number of animals in shelters and the length of time they are kept there. Records and checks on the condition of animals in refuges should be properly maintained. It should be emphasised that the expenses for keeping a dog in shelters are enormous and amount to several tens of thousands of zlotys per one dog, which is a significant burden on the municipality budget[321]. Thus, appropriate prevention programmes can bring significant savings for Municipalities. At the same time, failure to meet formal requirements results in public funds being spent in violation of public finance discipline. Ordering anybody to catch homeless animals without a prior resolution is a clear violation of the law. It is also forbidden to catch homeless animals without a prior resolution of the commune council on the manner of dealing with the captured animals or concluding agreements with entities without the relevant permits. In practice, however, the violation of financial discipline is extremely frequent, and illegal or irrational spending of public funds occurred in as many as 36% of cases controlled by the Supreme Chamber of Control in 2012[322].

[321] Niektóre z gmin (np. Starachowice) zawierały umowy, w których koszt przetrzymywania psa wynosił do 30 zł dziennie. Biorąc pod uwagę to, że niektóre ze zwierząt przetrzymywane są nawet przez kilka lat, całościowy koszt jest znaczny.

[322] Por. Informacja o wynikach kontroli „Wykonywanie zadań gmin dotyczących ochrony zwierząt" przeprowadzonej za lata 2017-2018, dostępna na stronie http://www.nik.gov.pl/

Ensuring proper care of homeless animals is one of the tasks of the municipality. In practice, it is limited to meeting only the most current needs, often by commissioning other entities to solve the problem, without first checking their ability to perform the commission. It often causes irregularities and even pathologies, the victims of which are the animals under the communal care. It is rare to take wider measures, including education, dog tagging or support for adoption. In public funds this results are being spent in an uneconomic, unreasonable, and sometimes in violation of public finance discipline. The results of the NIK audit presented in this study are alarming - 36% of municipalities' expenditures are made in an irregular manner.

The problem for Municipalities is to provide adequate sources of financing for care of homeless animals. Attempts to introduce various types of fees have turned out to be illegal, due to the lack of statutory delegation in this respect. Therefore, it is necessary to postulate the introduction of the possibility of setting fees for the costs of care of animals, collected from their owners or other fees allowing for financing tasks related to the care of animals, by amending article 11a of the Act on animal protection. Standards for running animal shelters should also be defined, in a way that allows for their verification. Currently, these standards are too general and the control is discretionary. These standards should specify both the requirements for the infrastructure of the shelter and ensure appropriate conditions for housing, feeding and veterinary care. It would also be appropriate to make labelling mandatory for all dogs and domesticated cats, with the provision of financial resources (or the possibility of obtaining these resources from, for example, local fees).

All local initiatives to provide adequate care for homeless animals should also be supported. This applies in particular to small Municipalities. The establishment of municipality associations, associations or agreements makes it possible to combine the resources of individual municipality to develop a system to prevent homelessness of animals, leading to synergies. Such programmes are usually more comprehensive and effective, solutions are more effective and entities providing services related to care of homeless animals provided at a higher level.

4.5. Controversy related to the implementation of the Natura 2000 programme in Poland, for example inland navigation and inland waterways. Selected legal, social and financial aspects

At one point, the European Union saw a catastrophic state of the environment, which, in the clash with thoughtless and absolutely priority industrial-

isation and the so-called "economic development" of the last two centuries, has declined, and in places has been degraded or destroyed. The picture of this catastrophe is complemented by further animal species that have disappeared irretrievably over the last two centuries or are in a state of significant threat to the survival of the species, which, it should be added, has not always been associated with bad human activity, at most with a lack of: attention, commitment, due diligence, or simply knowledge. It was decided to stop this dangerous process, and even the negative phenomena that were already progressing, which could have irreversible consequences. The highly developed countries of Western Europe have taken various measures to protect the environment, including water resources, and numerous related areas of life and economy. The successive EU directives, projects, programmes, actions taken have taken on an impressive scale and, it must be acknowledged, have achieved equally impressive results. However, the problem has been very different after the 'big enlargement', i.e. the adoption of ten and then two more Central and Eastern European countries. In many of these countries, there has also been and is much to be done in the field of environmental protection, but there is a fundamental difference resulting from the economic development of the new EU Member States, although perhaps a more accurate statement would be - lack of development, compared to the former Community Member States. They would like to start building their economic future just as dynamically, but the directives and other EU legislation mentioned above are often an obstacle not only to intensive but also to any economic development. On the one hand, the new EU Member States often lack elementary infrastructure resources in many areas, including inland navigation and inland waterways. On the other hand, they do not have the opportunity to remedy these shortcomings, due to the destructive effect of EU law. This manifests itself in many forms, ranging from the difficulties of lengthy consultation procedures, costly environmental impact studies, and countless protests by a large number of 'green' organisations, to the considerable, often absurdly high cost of compensatory measures, to a total ban, making any action absolutely impossible, in some areas.

In Poland, unfortunately, it is not better or even worse in many aspects. Starting from the often poorly translated EU law in this area, to its overinterpretation and even tightening in relation to EU requirements in many places, as well as legislative errors, especially in the Act on Spatial Planning, where huge rights of destruction were given to accidental groups claiming to care for the environment, basically deprived of responsibility for their activities. These are problems that are commonly known, raised continuously by local

government units and their associations, as well as important representative NGO[323], which show their non-viability, poor implementation, over representativeness in procedures that do not represent any organisation and lack of any responsibility for damage caused by their irresponsible actions. This state of affairs and the resulting problems are unfortunately ignored by the central administration and successive Polish governments.

In this paper, this problem will be traced mainly on the example of inland waterways and inland navigation, where the problems mentioned earlier are particularly cumulative. The state of affairs after Poland's accession to the European Union

The EU is developing in accordance with the principle of sustainable development. It is also a principle, and of constitutional rank, guiding the development of Poland.

The EU is implementing a programme for the development of inland waterway transport aimed at creating a European waterway network (AGN) which, following EU enlargement, has entered a new phase of realisation of inland waterway connections with Member States from Central Europe and, through them, with Eastern Europe. The Trans-European Transport Network (TEN-T) and the European Action Programme for Inland Navigation NAIADES also play an important role in the development of inland navigation in the EU.

The solution to make the use of this form of transport more attractive and to adapt inland waterways to modern needs is to create a network of waterways for combined transport and logistics centres, transhipment and forwarding hubs with a comprehensive service for potential customers of all modes of transport, in both river and sea ports.

An extension of this formula is the inclusion of inland waterways and, above all, inland navigation in the system called "sss" (from shortseashipping) using the inland fleet also for maritime coastal navigation. In a nutshell, it can be said that the EU is trying to highlight and make special use of the most important advantages of inland waterway transport and the need to use it is, in turn, the justification for maintaining and developing inland waterways, which, as can be seen, creates a kind of self-perpetuating mechanism. It should also be noted that the regulation of river corridors related to inland waterway transport is also important in the complex of flood safety issues, on which the EU places considerable emphasis.

[323] Patrz np. publikacje pokonferencyjne w części dyskusja: T. Sowiński (red.), *Zagospodarowanie dolnej Wisły szansą rozwoju społeczno-gospodarczego regionów,* Tczew 2006; T. Sowiński (red.), *Wisła dla wszystkich,* Nieszawa 2005; T. Sowiński, *Program Wisła 2020 - kwestie społeczne, inwestycje, finanse,* Pismo społeczno-gospodarcze Profile 19/1840 3-18 listopada 2005.

The imposition of modern, time-based and more importantly, shipping, freight forwarding and tourism infrastructure in the form of modern inland ports, shipping and transport hubs, logistics and administrative facilities, as well as hotel and service facilities and the maintenance of a coherent network of inland waterways complements the current directions and trends in the development of EU inland navigation and inland waterway policies[324].

Unfortunately, the discussed areas are extremely badly perceived by the central administration in Poland, practically since the 1970s, and in the context of the possibilities offered by the "inscribing" of Polish inland waterways into the above described road network in Europe, negative and even destructive actions can be observed since the mid-1990s and the whole period of the 21st century to date. A particularly negative approach of the central authorities can be observed to the postulate, which is actually commonly expressed by all the circles associated with inland navigation, that Poland should join the AGN programme.

Lack of problems of inland waterways and inland navigation in Polish strategic documents [325] resulted in its omission from the process of planning budgetary resources for these purposes and deprived it of the possibility of broadly applying for funds from the EU and other non-budgetary sources. Who was supposed to do it, if not the institutions set up to implement water management? The claim that there are no funds for these purposes directly indicates the entities and institutions responsible for this state of affairs.

Maintaining a position of reluctance towards the implementation of AGN has effectively blocked all government activities in the field of inland navigation and waterway development in Poland in recent years. Maintaining it in the future will continue to hinder inland waterway development. This position must be changed if serious thought is given to reversing the trends of inland waterway collapse and degeneration. It is also an unfortunate finding that not only does Poland not meet any of the conditions of the EU's inland

[324] *T. Sowiński,* Ocenauwarunkowańmiędzynarodowych, *[w:]* Program rozwojuinfrastrukturytransportuwodnegośródlądowego w Polsce, Część 1. Analizafunkcjonowaniatransportuwodnegośródlądowegoorazturystykiwodnej w Polsce, C. *Gołębiowski, M. Mironowicz (red.), Rotterdam, Warszawa 2011, s. 125.*

[325] Takich jak na przykład: Narodowy Program Rozwoju, Narodowe Strategiczne Ramy Odniesienia, Narodowa Strategia Spójności, a także w przygotowywanej rządowej strategii gospodarki wodnej do roku 2030 (Koncepcja Przestrzennego Zagospodarowania Kraju), w której pierwszej wersji w ogóle nie znalazła się żegluga śródlądowa i rozwój śródlądowych dróg wodnych, z powodu, jak to stwierdzono, braku sprzyjających okoliczności i koniunktury (politycznej) dla przedsięwzięć tego typu.

waterway and inland waterway policy in 2014, but it is also doing a great deal to make sure that it does not meet them[326].

A real example is the exclusion of the River Vistula in 2013 from the Trans-European Transport Network (TEN-T), due to the lack of compliance with even minimum requirements in this area. In the decision-making circles, especially those connected with the Ministry of the Environment, AGN arouses controversy, or in fact reluctance, although it has no justification.

It should also be clearly stated that the above state of affairs is unambiguous with the impossibility for Poland to obtain extremely attractive and, in addition, significant funds allocated by the EU for years to support the revitalisation of inland waterways and development of inland navigation. This is not only incomprehensible, but also harms Poland's interests in the EU and more broadly in Europe and, worst of all, deprives us of the possibility of obtaining significant EU funds, in the absence of which the previously described negative position of central authorities regarding Poland's involvement in the described area is justified.

It should be clearly and emphatically stated that this is not only incomprehensible, not only detrimental to Poland's current and future interests, but fatal in terms of public finances. It is difficult to estimate the losses that the state budget has suffered because of this, but this is not about millions, but about billions of Euros, which we could not only obtain, even if we did not try to apply for them[327].

Thus, on the one hand, we have an argumentation justifying Poland's inaction to AGN, referring to the lack of funds for purposes which, on the other hand, would have been able to apply for those missing funds thanks to accession, and this on a scale of financial involvement that undoubtedly exceeds the sum of the Polish State's involvement in the last 44 years.

Environmental Directives and the Natura 2000 Programme

There are not many areas of EU law that raise so much negative emotions, but also so much controversy, misunderstanding and conflict, as environmental directives. Many myths have already grown around them, as this is probably the way to define the attitude and positions of various entities in Poland related to them. The reasons for this state of affairs have already been mentioned in the first point of these considerations. Now is the time for an attempt to de-mythologise this area.

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[326] Patrz szerzej: K. Wojewódzka-Król, *Stan i perspektywy rozwoju żeglugi śródlądowej w Polsce,*MTiGM, Warszawa 2003.

[327] Zostało to publicznie przyznane po połączeniu Ministerstw Rozwoju Regionalnego i Infrastruktury.

The most important legal regulations concerning environmental protection related to inland waterways and inland waterway transport in the EU include:

- Water Framework Directive 2000/60/EC (WFD) of 23 October 2000. (hereinafter - the Water Framework Directive),
- Directive 79/409/EEC on the conservation of wild birds (hereafter Birds Directive),
- Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (hereafter - Habitats Directive),
- A set of directives forming the Natura 2000 network,
- Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks (hereafter - Floods Directive).

This is complemented by a number of legislative acts, often of a requirement or guideline nature, concerning standards and technical parameters related to inland waterways and inland navigation, which are not relevant for this study. However, it would be worth mentioning some, despite the lack of space, in order to illustrate the EU's commitment to this issue[328].

However, returning to the EU's environmental action, it could, in a way of simplification, be presented in stages, the first of which was probably, of course, apart from ignorance, disregard for the issue, then came the time for far-reaching declarations, and finally almost an overflow of environmental action, often in places where there was nothing to protect anymore.

Environmental protection has also become one of the ways of political and economic play, especially in highly developed countries, which have contributed most to its degradation. They often force strict rules of its observance in many areas, effectively blocking competition from countries that entered the path of dynamic economic development much later. In this way they make them pay for their mistakes.

Various solutions related to environmental protection, such as the well-known Natura 2000 programme, are protested by many countries and environments (e.g. almost common criticism of this programme, and especially of the way it is introduced and implemented, by local governments in Poland). This often involves a provident interpretation of these solutions and an inappropriate and undemocratic and chaotic or even disgraceful way of implementing them. Individual provisions of directives (e.g. the so-called Bird and Environmental Directives), torn out of the context of the whole regulation,

[328] Na przykład: 1. Rozporządzenie Rady (WE) Nr 718/1999 z dnia 29 marca 1999 r. w sprawie polityki w zakresie zdolności przewozowych floty wspólnotowej w celu wspierania żeglugi śródlądowej;

have become a weapon in the hands of various organisations that are "ecological" and often have little in common with ecology. There is even a tendency that only those organisations which demonstrate that they protest against many solutions in a demonstrative way, often against the law, are considered to be ecological, and those organisations which care for the environment in a quiet, quiet way, in accordance with the constitutional principle of sustainable development are omitted.

It should also be stated clearly and firmly at the outset of this thread, as if anticipating its content, that neither the Birds Directive, nor the Habitats Directive, let alone the Water Directive, hampers and especially does not block the development of water management and inland waterways, but, on the contrary, considers them to be the right direction for the development of the EU and points to many practical and legal solutions to conflict situations.

It should be noted that the development of hydroelectric power[329], development of inland waterways, and in particular the issues that often coincide with both of the above mentioned directions of development, i.e. broadly understood flood safety issues, are an absolute priority and a clear reason for the existence of many derogations, even the most restrictive legal provisions of the above mentioned directives. This could be summarised in a general principle common to all derogations from the various, even restrictive provisions of the directives, but probably also simply a concern for the law and not only in the EU: where there is a threat to human health and life, the absolute priority is to protect and save it.

It is worth noting that "Transport Policy" was one of the first common Community policies to create a Community transport acauis and is still of particular importance in the European integration process. It strives to create fair conditions for competition between the different modes of transport within a model of sustainable development, which assumes an integrated approach to the optimisation of transport, its organisation, and safety, reduction of energy consumption and reduction of environmental impacts. The Union envisages improving the competitiveness of environmentally friendly modes of transport and creating integrated transport networks used by two or more modes of transport.

In this context, inland waterway transport, which is safe, environmentally friendly and cheap, has an important position in sustainable development policy.

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[329] *Na przykład problem kaskady dolnej Wisły. Szerzej patrz: W. Majewski,* Współczesne problemy zagospodarowania Dolnej Wisły w myśl zasady zrównoważonego rozwoju, *[w:]* Zagospodarowanie dolnej Wisły szansą rozwoju społeczno-gospodarczego regionów, *T. Sowiński (red.), Tczew 2006, s. 14-21.*

The common feature of the directives discussed below, especially the Water Framework Directive, the Birds Directive, the Habitats Directive and the Natura 2000 Programme, is the fact that they indicate the various restrictions on waterways imposed by these directives also in the provisions of national law, including those concerning the protection of Natura 2000 areas. This requires from later planners and designers, as well as investors, and even after the execution of the investment, from the entities responsible for exploitation, to exercise particular care in the selection of the place of investment, its scope, the method of selection of technical means and solutions, execution, exploitation. Previously, however, often extensive and arduous public consultations, which cannot be treated only as a kind of "formal requirement", but an important element of the procedure of individual mentioned activities. Often the possibility to move to the next stage of the above mentioned activities depends on the result of research on the impact of the planned solutions on the environment, the undertaken countermeasures and measures aimed at minimising the negative effects, as well as taking actions to compensate for possible environmental losses (losses) in the way indicated in the directives and in Polish law.

In the case of application of the derogation clauses, it is also required to precisely define the scope of actions, their necessity, expected positive effects and possible negative effects. Moreover, each time such cases are reported to the European Commission and the awareness of special supervision over activities using the derogation not only by the EC, but also by the ECJ[330].

The main idea of the Water Framework Directive is that: "...water is not a commercial product like any other, but rather an inherited good that must be protected, defended and treated as such...". The main reason for the Water Framework Directive was the intention to create a framework for Community action in the field of water policy and water management in Europe. The Water Framework Directive is a response to the Community's longstanding efforts to improve water protection by establishing an integrated European water policy based on a transparent, efficient and coherent legislative framework.

Through the implementation of the provisions of the Directive, the aim is to achieve an adequate level of protection and improvement, or at least to maintain the current status of aquatic, terrestrial and wetland ecosystems directly depending on aquatic ecosystems.

An important novelty introduced by the Directive is the shift of focus from viewing water resources as part of the water management system to a habitat-forming element. It is also important to point out that the impact of

[330] T. Sowiński, *Ocena op. cit.,* s. 129.

habitats, or rather their proper management, is a factor that significantly affects their status within the entire catchment area. This element of the Directive is unfortunately over-emphasised and is indicated as making it practically impossible to manage water resources in the water management sphere.

The main objective of the Birds Directive is to maintain (or adapt) the populations of bird species at a level that meets ecological, scientific and cultural requirements. The Directive indicates a minimum standard of protection for birds in areas belonging to the EU Member States, which means that individual Member States may apply more stringent bird protection methods.

An important element of the Directive from the point of view of the needs of water management is a number of derogations from the protection rigours contained in the Directive. It enumerates 6 cases of derogations:

- In the interests of public health and safety;
- In the interests of air traffic safety;
- To prevent serious damage to crops, livestock, forests, fish farming and water;
- To protect flora and fauna;
- In view of the needs of research and teaching and the necessary repopulation, reintroduction and propagation;
- To permit, under conditions of close surveillance and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

The scope of the content of the reasons for derogations is broad, but the Directive prescribes very prudent application and provides that derogations may be applied where 'there is no other satisfactory solution'. Each case of application of derogation must be introduced by an individual decision of the authorised administration, indicating the species covered by the derogation and the scale of its use, the means authorised and the methods of implementation, with a precise indication of the circumstances, time and place and the persons authorised to do so.

In any case of practical use of derogations, a report on their use must be submitted annually, the content of which will make it possible to assess the measures and their possible risks to the achievement of the objectives of the Directive.

The Habitats and Wildlife Directive, on the other hand, was adopted 13 years after the Birds Directive and is more detailed and covers more issues than the Birds Directive. Together with the Birds Directive, it forms the basis of the European nature protection system Natura 2000. The Directive lists "Europe-wide" plant and animal species and habitat types for which Member States are required to establish areas of conservation (Natura 2000 sites), are required to be protected by strict species protection and subject to economic use, which may however need to be controlled.

The concept and principles of creation and functioning of the NATURA 2000 network were introduced by the Habitats Directive. However, it refers in many places to the content of the Birds Directive, which contains some provisions, especially concerning the rules of selection for the protection of habitats important for birds.

NATURA 2000 is a coherent European Ecological Network comprising:

- Special Protection Areas (SPAs) created for protection:
  - of natural habitats,
  - Habitats of plant and animal species.
- Special Protection Areas (SPAs) established under the Birds Directive for the protection of bird habitats, connected as far as possible by landscape fragments managed in such a way as to permit the migration, spread and genetic exchange of species.

The NATURA 2000 system should cover in each EU Member State the areas of habitats and the habitats of the species indicated in the Habitats Directive, in proportion to their representation on its territory. The NATURA 2000 network is formed individually by the authorised authorities of the public administration of the country in which it is located. It is also important that they are also authorised to adjust its borders if there is a justified need.

The Floods Directive entered into force on 26 November 2007. It is equivalent to the Water Framework Directive (WFD) and its content is consistent with that of the WFD. It is equivalent to the Water Framework Directive (WFD) and its content is consistent with that of the WFD. The aim of the Directive is to establish a framework for the assessment and management of flood risks in order to limit the negative consequences for human health, the environment, cultural heritage and economic activity in flood-related areas. The Directive introduces new definitions of floods and, particularly importantly, 'flood risk'.

"Flood" means the temporary covering of land that is not normally covered by water. "Flood risk' means the combination of the probability of a flood and the potential adverse consequences for human health, the environment, cultural heritage and economic activity associated with it.

Member States shall prepare preliminary flood risk assessments and flood hazard maps and flood risk maps at the most appropriate scale for specific areas.

The Floods Directive is closely linked to the implementation of the Water Framework Directive and the timetables for the implementation of the two Directives are fully synchronised.

The purpose of the EC's guidelines was to identify ways of working to ensure that the development and management of inland waterways is in line

with EU environmental policy and legislation in particular. Particular importance was given in the guidelines to explaining how to implement integrated projects that take into account the ecological processes associated with rivers at an early stage of their design and, where possible, seek solutions that are beneficial for both inland waterway transport and biodiversity. The guidelines also discuss the procedures to be followed in carrying out the relevant assessment required under Article 6 of the Habitats Directive. In particular, some key aspects related to the approval process for inland waterway projects are clarified. Experience shows that delays in the authorisation process are very often caused by the poor quality of the environmental impact assessments, which makes it impossible for the competent authorities to clearly determine whether the proposed plan or project should be authorised.

The guidelines have been developed primarily for authorities and persons responsible for the development of inland waterway infrastructure development projects, as well as for consultants preparing impact assessments, persons managing Natura 2000 areas and other professionals involved in the development, design, implementation or approval of plans and projects relating to inland waterways. The EC expects that the guidelines will also be of interest to other organisations, for example NGOs and international environmental bodies, which will gain a better understanding of the need for proper management and development of inland waterways.

The European Commission explicitly states in the Guidelines that inland waterways play an important role in freight transport in many regions of Europe. Every year more than 500 minutes of commercial goods are transported in this way. With a waterway network of more than 40,000 km in length, inland waterways connect industrial and commercial nodes and provide essential access to the sea and thus to the rest of the world.

Inland waterway transport is considered as a safe, energy-efficient and more environmentally friendly mode of transport. The EU has for some time recognised the great potential of inland waterway transport and recognises its important role within the whole transport system.

In the Commission's White Paper[331] "Roadmap to a Single European Transport Area - Towards a competitive and cost efficient transport system" identified inland waterway transport, rail transport and short sea shipping as key to sustainable public finances of local and regional authorities in view of the environmental benefits they can bring. The overall objective for transport

[331] Biała księga 2011: Plan utworzenia jednolitego europejskiego obszaru transportu - dążenie do osiągnięcia konkurencyjnego i zasobooszczędnego systemu transportu. 28 marca 2011 r., COM (2011) 144 finał.

modal shift is that by 2030 30% of all current traffic on routes of more than 300 km will be transported by rail and waterborne transport, and this percentage will increase to 50% by 2050. In light of the need to decarbonise the transport sector as a whole, given that it consumes 57% of Europe's oil.

The Commission wants to facilitate the exploitation of the potential of inland waterway transport and increase integration within the intermodal transport chain. To achieve these objectives, the inland waterway infrastructure must be improved in an environmentally friendly and sustainable way. River systems and their dynamics are an integral part of functioning ecosystems. These dynamics are to a large extent shaped by the different activities carried out on the rivers themselves and in the ecosystems surrounding them. Therefore, planning the development of inland waterway infrastructure is a complex issue. An integrated, interdisciplinary approach and multi-stakeholder involvement is important here, which should be taken into account at an early stage of the planning process. Good practices that have brought benefits for both inland waterways and the environment should be taken as a benchmark.

As with all other river uses, inland waterways are developed and managed within the limits set by EU environmental legislation.

In the guidelines on inland waterway transport and Natura 2000, the EC clearly states that Natura 2000 sites are not designed as tamper-proof zones and new projects on their sites are not excluded. However, their classification within the Natura 2000 network means that all management measures must comply with the requirement to protect the species and habitat types for which the site has been designated[332].

It has therefore been emphasised by the EC that the directives clearly serve to protect waters, bird species habitats, etc., but they do not constitute in themselves a categorical prohibition to take any action, but only the need to take special care when planning and implementing their use.

The EC also highlighted the importance of inland waterway transport, as the most environmentally friendly mode of development preferred by the EC. To sum up, let me conclude with a little pictoriality that inland waterway transport is also a preferred asset which should be protected among other Member States' infrastructure activities and investments and developed as a particularly environmentally friendly one. If we add to this hydroelectric power plants producing clean, ecological renewable energy, actively counteracting floods but also the effects of drought, promoting the development of agriculture, tourism, creating multimodal centres. All this means new and permanent jobs, development of riverside areas, and as a consequence, apart from social objectives, also

[332] Wytyczne..., op. cit., *s. 6, 7.*

measurable economic benefits and strengthening of the state budget resources and budgets of local government units, the revitalisation and development of inland waterways and inland waterway transport should be an absolute priority in the activities of EU member states, and thus also Poland.

4.6. Financial and non-financial forms of cooperation between local government units and NGOs on the example of the Metropolitan City

The aim of the study is to present selected forms of cooperation between local government units and NGO's within the framework of the 2013-2014 research task (WPAiSM/DS/6/2013) "Legal and financial aspects of cooperation of local government units with non-governmental organisations and other non-public entities in the implementation of public tasks on the example of the municipality - metropolitan city (Krakow) and small city municipality (Kalety)", financed from the statutory funds of the Faculty of Law, Administration and International Relations of A.F. Modrzewski Krakow Academy. The study was based on literature, analysis of normative acts, including local law acts of M. Krakow and consultations with representatives of specific bodies of the Office of M. Krakow and data from these bodies.

Reasons for cooperation between LGU and NGOs

While performing public tasks, especially their own tasks related to current activities aimed at satisfying the local community's needs in the era of growing public debt, municipality organisational units try to obtain funds from various sources, including cooperation with non-public entities. This leads to the optimisation of expenses, thanks to the possibility of using NGOs' own resources, including possibly the European funds they receive. This mainly concerns such domains of activity as social welfare, sport and recreation, health care, education and upbringing and culture. On the other hand, this cooperation is an expression of the implementation of the broadly understood principle of subsidiarity (subsidiarity).

Metropolitan Cities[333], as the largest agglomerations, have specific problems and implement them in a similar way. In such way appeared the idea of creating the Union of Polish Metropolises[334], which includes M. Krakow.

[333] W rozumieniu wielkiego miasta stanowiącego centrum powiązanego z nim funkcjonalnie bezpośredniego otoczenia, wyróżniającego się koncentracją potencjału politycznego i kulturalnego.

[334] Unia Metropolii Polskich powstała w 1990 r. W Unii współdziała 12 miast (Białystok, Bydgoszcz, Gdańsk, Katowice, Kraków, Lublin, Łódź, Poznań

Legal basis and forms of cooperation

The legal basis has undergone many changes [Czaja-Hliniak, 2014, pp. 207-217] and is contained in several normative acts. They are an expression of the principles contained in the European Charter of Local Self-Government [European Charter, 1994], and in particular the principle of subsidiarity (subsidiarity), according to which the implementation of tasks should take place as closely as possible to the citizens (art. 4) and the adequacy, according to which the amount of financial resources should be adjusted to the powers granted (art. 9 par. 2). The subsidiarity principle was expressed in Article 164 of the Constitution [Constitution, 1997], which states that the commune is the basic LGU and the adequacy principle in Article 167 providing the LGU with a share in the public revenue in accordance with its tasks. The Act on Municipal Self-Government [Act, 1990] in Article 7 containing a rich catalogue of own tasks in points 17 explicitly mentions cooperation and activity for non-governmental organisations and other entities[335]. Article 9, which states that in order to perform its tasks, a municipality may conclude agreements with other entities, including non-governmental organisations, is of significant importance. The act does not contain regulations concerning financial and non-financial forms of cooperation. In the case of metropolitan cities, the Act on County Self-Government [Act, 1998] is also applicable, especially since these cities also benefit from the funds available to counties [Glumińska-Pawlic, 2013, p. 45 ff., 81 ff.]. The legal and financial basis for the cooperation is provided for in the Act on Public Finance [Act, 2009], which in Article 221 provides that special purpose subsidies may be granted from the LGU budget to entities not included in the public finance sector and not operating for profit, for public purposes related to the implementation of the tasks of this LGU, as well as to co-finance investments related to these tasks.

The main legal basis for the transfer of tasks by the LGU to be implemented [Ofiarska, 2012, p. 375] is the Act on Public Benefit Activity and Volunteerism [Act, 2003]. The tasks may be transferred to two categories of entities: non-governmental organisations and other entities. Non-governmental organisations include entities which do not belong to the public finance sector and do not operate for profit, including foundations and associations. Other entities include, in particular, entities operating on the basis of the provisions on the relationship between the state and churches and religious associations, if they carry out public benefit activities, and a number of other entities meeting statutory requirements, such as sports clubs (Article 3). The Act regulates a very wide range of commissioned tasks as well as types of cooperation. The

[335] W znaczeniu ustawy o działalności pożytku publicznego, NGO's - o czym dalej.

commissioning of tasks may take the form of entrusting the performance of public tasks, together with granting subsidies for financing their implementation, or supporting the performance of public tasks, together with granting subsidies for financing their implementation [Ofiarski, 2012, p. 384]. The Act provides in Article 5a an obligation for the municipality body, after consultations with NGOs, to adopt an annual cooperation plan with these entities, the obligatory element of which is to determine the amount of funds planned for the implementation of the programme and the principle of issuing opinions in open tenders. LGUs may also adopt multiannual programmes. Commissioning of public tasks, i.e. supporting them or entrusting them, in principle takes place through an open tender, unless separate provisions provide for another commissioning procedure (Article 11 par.1 and 2). Moreover, non-governmental organisations and other entities may, on their own initiative, submit an application for the implementation of a public task, including one that was previously implemented in another way (Article 12). Exceptionally, on the basis of an offer submitted by the NGO's, the executive body may commission a public task of a local or regional nature without an open tender, provided that the amount of co-financing or financing does not exceed PLN 10 000 and the implementation period is not longer than 90 days (Article 19a).

For the cooperation with NGOs, the regulation of the institutions of the so-called local initiatives in relation to specific public tasks, including those of an investment nature, is important[336]. The Act also provides for the possibility of appointing Public Benefit Activity Councils (Article 41e).

Obviously, the cooperation is to a large extent based on the provisions of the local law, which in particular result in non-financial forms of cooperation.

Financial forms of cooperation of M. Krakow

The cooperation, both financial and non-financial, is carried out by organisational units of the City Hall (Municipality Miejska Kraków - GMK) but also by specially established units. In the structure of the Office, the cooperation is implemented, coordinated and acted for the benefit of strengthening civil society by the Department of Social Affairs, and in particular, the Department of the City Centre for the Support of Social Initiatives (MOWIS) [Ordinance, 2011]. As a separate organisational unit there is e.g. the City Social Welfare Centre (MOPS)[337][338].

[336] Art. 19b-19h.

[337] Wchodzi w skład Systemu Pomocy Społecznej Gminy Miejskiej Kraków [Uchwała, 1999].

[338] Por. współpracę w latach 2006-2011 [Czaja-Hliniak, 2012],

Due to the framework of the study, only the most important directions of cooperation will be signalled on the example of 2013. Krakow has implemented, on an optional basis, the Multiannual Programme of Cooperation with NGOs for the years 2012-2014 [Resolution, 2012] and the annual Cooperation Programme for 2013 [Resolution, 2012a]. The results were reflected in the relevant report of the President of the City of Krakow [Report, 2014], an extremely detailed report was included according to the units of the City Hall cooperating with NGOs's (14 units)[339].

Implementation of forms of financial cooperation with NGOs [340] was subject to control of the implementation of public tasks in places where projects are carried out and control of the implementation of the material and financial scope of tasks through the analysis of reports submitted by the NGO's on the implementation of public tasks.

The scale of cooperation in various aspects was very large and amounted to: number of NGOs (including those cooperating also non-financially, e.g. benefiting from promotional or content-related support) - 1164; number of persons who were addressees of public tasks commissioned to NGOs - 920,509; funds allocated for commissioning public tasks (grants) - 57,820,057.48 PLN; funds allocated by NGOs for implementation of public tasks - 34,146,855.07 PLN; number of partnerships concluded[341] with NGOs - 46.

The significant financial participation of NGOs in the implementation of the Programme in comparison to the amount of grants awarded is particularly noteworthy. This is an indisputable proof of the ongoing optimisation of expenditures on public tasks through cooperation with NGOs. The grants themselves also increased by PLN 3,895,714.16, i.e. by 7.22%, compared to 2012.

Two types of indicators are used to assess the outcome of the main objective of the Programme: for financial cooperation - so-called hard indicators, for non-financial cooperation - soft indicators. Evaluation for financial cooperation: commonplace tender[342] achieved 22.62; rate of utilisation of funds for grant implementation[343]- 98.63;

[339] Wydziały: Spraw Społecznych, Kultury i Dziedzictwa Narodowego, Sportu, Rozwoju Miasta, Bezpieczeństwa i Zarządzania Kryzysowego, Kształtowania Środowiska, Informacji, Turystyki i Promocji Miasta, Edukacji oraz: Biuro ds. Ochrony Zdrowia, Kancelaria Prezydenta M. Krakowa, Kancelaria Rady Miasta i Dzielnic Krakowa, Zarząd Budynków Komunalnych, Grodzki Urząd Pracy, Zarząd Infrastruktury Sportowej.

[340] Zwanymi też podmiotami trzeciego sektora.

[341] Współpraca pozafinansowa.

[342] Stosunek liczby podmiotów przystępujących do konkursów ofert do liczby NGO's zarejestrowanych na terenie GMK.

[343] Stosunek przekazanych dotacji do zaplanowanej kwoty dotacji w budżecie Miasta.

effectiveness of the use of funds[344] - 99.29; level of implementation of tasks covered by the Programme[345] - 50.

Cooperation with NGOs has clearly developed in relation to 2011. The following numbers are worth mentioning: concluded agreements and annexes to multiannual agreements - 582 (increase by 6.98%); entities applying for funding - 808 (by 12.53%); offers applying for GMK funding - 914 (by 10.25%); persons who were addressees of public activities - 920,509 (by 43.22%); NGOs participating in the implementation of the Programme - 1164 (by 0.52%).

Financial cooperation was implemented mainly through open competitions. Additionally, in the field of social assistance, including assistance to families, there were also competitions for the tasks of districts of M. Kraków. There were also competitions for tasks carried out by means of applications submitted by NGOs for the implementation of the task, and then announced competitions for offers, as well as those carried out without an open offer competition.

Against the background of a detailed list of competitions for offers and tasks, the role of MOPS in implementing social assistance tasks is clearly emphasised [346] and MOWIS as a coordinator but also as a performer of specific tasks.

Non-financial forms of cooperation of M. Krakow

This area of the City's cooperation with the third sector is extremely rich, and it is often underestimated. Currently, it takes place in very different planes, like: Establishing partnerships with NGOs in order to carry out tasks for the benefit of the inhabitants of Krakow; providing assistance in establishing regional, supra-regional and international cooperation between NGOs; providing information on planned directions of activities and implemented tasks; carrying out consultations of local law acts concerning the statutory activities of NGOs and annual and long-term cooperation programmes; providing technical, organisational and content-related support; running a municipal internet portal for NGOs and several portals thematically related to cooperation with NGOs in the field of physical culture and activities for the benefit of people with disabilities; running an electronic database (portal) of schools and public and non-public institutions run by NGOs; awarding titles: "Philanthropist of Krakow" and "Friend of Sport", or making NGO's available by

[344] Wartość rozliczonych dotacji do wartości przekazanych dotacji (na koniec roku).

[345] Liczba zadań zrealizowanych do liczby zadań zaplanowanych.

[346] Realizacja zadań publicznych przez MOPS była przedmiotem wcześniejszych badań [Czaja-Hliniak, 2014a, s. 532-546],

means of a tender at preferential rates or by means of an open invitation to tender from municipal resources and the premises of the Nicolaus Copernicus Office in order to hold meetings and implement projects serving the residents.

Another form of cooperation is the cooperation of the GMK with the Krakow Council for Public Benefit Activity (KCPBA), which consists of 8 representatives of NGOs, and with 3 Civic Dialogue Committees operating at the substantive departments of the Nicolaus Copernicus University.

The evaluation of non-financial cooperation was also based on result indicators (soft indicators). 1 such as: the number of draft local legislation subject to consultation was 15; the number of NGOs participating in consultations was 38; the number of comments made by NGOs or KCPBA on the draft local legislation consulted was 71; the number of NGOs benefiting from promotional, organisational and substantive support was 190; the number of activity reports of the Civil Dialogue Commission was 14.

Within the framework of non-financial cooperation, partnership agreements were also concluded with civic organisations for the implementation of 2 projects: PI NAWIKUS innovative method of monitoring social services and WIP - cooperation and participation of NGOs in the GMK space. Five tasks were also implemented: the list of NGOs covering the full range of public tasks listed in the Act on Public Benefit Activity was updated; the Nicolaus Copernicus University meetings with NGOs were organised; information activities for NGOs were undertaken on documents in force in the GMK; the municipal internet portal for NGOs was expanded; the activities of MOWIS were extended, including the centre's premises available for NGOs. There are 3 tasks in progress: defining the mode and criteria for evaluating applications for the implementation of a public task as part of a local initiative; analysis of tasks implemented by public entities in terms of their transferability to implementation by NGOs; development of the Social Entrepreneurship Development Programme for GMK (Think Socially - Act Economically).

Especially developed and multi-faceted cooperation is conducted by MOWIS. Apart from the already mentioned programmes such as: Let's share the warmth, Senior Friendly Place, Support at the Start - creating a network of volunteers for foreigners, Kraków Develops Social Consultations, School of New Technologies for Małopolska's non-governmental organisations, Seniors decide - civic dialogue of seniors.

The running of project offices and free renting of training rooms (conference, office and computer rooms) for NGOs in the MOWIS building should be emphasised. Numerous trainings for NGOs were also conducted. In the so-called BUS TV (on TV screens in public transport buses), an information

campaign was organised to inform about the possibility of transferring 1% of income tax to the NGO's.

There were also partnership projects carried out in cooperation between GMK - MOPS and NGOs: Second chance of homelessness service; Project in cooperation with the Association of Good Hope concerning social integration in solving the problem of social exclusion and Project in cooperation with the Centre for Prevention and Social Education PARASOL concerning socio-professional activation of people at risk of social exclusion.

Of course, this cooperation also involves financial resources of M. Krakow and NGO's and brings substantial benefits to its beneficiaries.

Municipalities performing public tasks, in the era of growing public debt, try to obtain funds from various sources, including within the framework of cooperation with non-governmental organisations, which leads to the optimisation of expenses, thanks to the possibility to use also NGOs' own resources.

The Act of Municipality self-government explicitly mentions among its own tasks the cooperation and activity for the benefit of non-governmental organisations and other entities. The legal and financial basis for the cooperation is the Act on Public Finance, which provides that earmarked subsidies may be granted from the LGU's budget to entities not included in the public finance sector and not operating for profit, for public purposes, related to the implementation of the tasks of this LGU, as well as to co-finance investments related to these tasks. The main legal basis for the transfer of tasks by the LGU is the Act on Public Benefit Activity and Volunteerism, which defines the types of cooperation. Delegation of tasks may take the form of entrusting the performance of public tasks, together with granting subsidies for financing their implementation, or supporting the performance of public tasks, together with granting subsidies for financing their implementation.

Commissioning of the implementation of public tasks, in principle, takes place through an open tender. Exceptionally, on the basis of an offer submitted by the NGO for the implementation of the task, the executive body may commission a public task of local or regional character without an open tender.

The cooperation, both financial and non-financial, is carried out by organisational units of the City Hall, but also by specially established units. In the structure of the Office, the cooperation is carried out by the Department of Social Affairs, and in particular the Department of the City Centre for the Support of Social Initiatives (MOWIS). The City Social Welfare Centre (MOPS) functions as a separate organisational unit. The scale of cooperation in various aspects was very large. The financial cooperation was carried out mainly through open competitions.The amount of funds allocated

in 2013 for commissioning the implementation of public tasks (grants) was PLN 57 820 057,48; the amount of funds committed by NGOs was PLN 34 146 855,07.

This significant financial participation of NGOs in comparison with the amount of grants awarded is particularly noteworthy. It is an indisputable proof of the ongoing expenditure optimisation.

The domain of the City's non-financial cooperation with the third sector is extremely rich. Particularly developed and multi-faceted cooperation is promoted by MOWIS. A significant role is played by MOWIS providing the premises and organising training courses. Another form of cooperation is the cooperation of GMK with the Kraków Council for Public Benefit Activity. As part of the post-financial cooperation, numerous partnership agreements were concluded for the implementation of many programmes, e.g. those implemented by MOPS.

4.7. Cooperation of Tarnogórski LGU with NGOs. Conclusions from the research

The aim of the study is to present selected conclusions from the implementation of the research task entitled "The development "Legal and financial aspects of cooperation of local government units[347] with non-governmental organisations and other non-public entities in the implementation of public tasks on the example of the municipality - metropolitan city (Krakow) and the municipality - small city (Kalety)", no.: WPAiSM/DS/6/2013, financed from the statutory funds of the Faculty of Law, Administration and International Relations of A.F. Modrzewski Krakow Academy.

The nature of local authorities as the first criterion for selecting applications

Selected conclusions, which were presented in the study, concern a fragment of the mentioned research task, namely the cooperation of Kalety and other municipalities of the Tarnogórska district with non-govemmental organisations, [in short: NGO's] and other non-public entities. They also partly refer to Kraków.

This choice is not accidental, as the three-tier structure of the LGU, apart from the regional province, consists of two local levels: municipality and county [Kulesza, 2012, p. 12], and the summary of Article 7 par. 1 pt.19 of the Act of 8 March 1990 on municipality self-government [i.e. Journal of

[347] Dalej: JST.

Laws of 2013, item 594 as amended] with Article 4 par. 1 pt.22 of the Act of 5 June 1998 on county self-government [i.e. Journal of Laws of 2013, item 595 as amended, hereinafter: the Act on county self-government] leads to the conclusion that the powers of the municipality and county within the scope of the duties of cooperationNGO's overlap. Therefore, the two-tier structure of local self-government is irrelevant when it comes to cities with district rights such as Kraków - Article 92 par. 2 of the act on county self-government [Glumińska-Pawlic, 2013, p. 20]. As a result, a thesis has been put forward that a county consisting of several communes should complement their activities so that the level of tasks performed in them can match those of large urban agglomerations. Therefore, it was decided to extend the original subject of the research, which was Kraków and Kalety, to include the district of Tarnogórski, in which Kalety and the other municipalities forming it are located[348].

However, most counties are not as urbanised as Tarnogórski, so it was decided to extend the research further to include the rural municipalities located there, thanks to which the conclusions drawn would make it possible to compare the dimension of cooperation between a large urban agglomeration and a small town with NGO's against the background of all the municipalities forming Tarnogórski county, which would ultimately enable a comprehensive comparison of the models of cooperation in local government in the form of an integrated (city with district rights) and a two-tier - county and its constituent municipalities [Klimek, 2014a, p. 269-278].

Furthermore, it should be noted, based on Article 166 par. 1 and Article 164 par. 3 of the Constitution of the Republic of Poland of 2 April 1997. [Journal of Laws No 78, item 483 as amended, hereinafter: Constitution], that in accordance with the so-called subsidiarity principle tasks should be performed at the lowest possible level of the LGU, i.e. mainly of communes [Kornberger-Sokołowska, 2013, p. 13]. Therefore, the competencies of the different levels of LGU should not overlap. Otherwise, the provisions of the acts, including the Constitution, are contradictory.

However, as far as cooperation of municipalities and counties with NGOs is concerned, this contradiction can be eliminated by a systemic interpretation. Article 167 par. 1 and 4 of the Constitution regulates the so-called principle of

[348] County tarnogórski wydawał się szczególnie predysponowany do takich badań, gdyż Tarnowskie Góry są jednym z największych miast w Polsce niebędącym miastem na prawach powiatu (61 002 mieszkańców), a ponadto tworzą go jeszcze trzy inne: Kalety, Miasteczko Śląskie i Radzionków (łącznie: 33 293 mieszkańców), co po uwzględnieniu całkowitej populacji powiatu (138 770 mieszkańców), pozwala stwierdzić, że charakteryzuje się on wysokim (ok. 68%) wskaźnikiem urbanizacji [Departament Metodologii, Standardów i Rejestrów, 2013, s. 139].

adequacy, being a consequence of the subsidiarity principle [Miemiec, 2005, p. 77], which is only applicable to relations between the government administration and LGU, guaranteeing their independence [Kornberger- -Sokołowska, 2013a, p. 27], Article 43 of the Act of 27 August 2009 on Public Finance [Journal of Laws No 157, item 1240, as amended, hereinafter: the Public Finance Act] provides, however, that the right to perform tasks financed from public funds is vested in all entities. Therefore, article 5 par. 1 and 2 in connection with Article 5a par. 1and 2 in connection with Article 11 par. 1 and 4 of the Act of 24 April 2003 on public benefit activity and volunteerism [i.e. Journal of Laws of 2010 No 234, item 1536 as amended, hereinafter referred to as the Public Benefit Act], allows the LGU, after the adoption of the annual programme of cooperation with NGOs, to select those organisations that may receive support in the implementation of the public task. As a result, the basis for the functioning of the NGO's is the principle of subsidiarity understood differently than in relation to the LGU, assuming in this case that the implementation of public tasks should take place not only at the lowest possible level of the LGU, but also at the lowest social level. On the other hand, if it turns out that the resources of the LGU for cooperation with the NGO's are not adequate for the task, then the NGO's do not have to apply for its implementation. Nor is there any competition between the NGOs seeking to obtain LGU funds, and between the LGUs seeking to delegate or support the NGO's tasks, provided the competition is fair in accordance with Article 5 par. 3 of the Act on Public Benefit.

Since the cooperation of Kraków, as a metropolitan city, with NGO's has been analysed by Czaja-Hliniak, the scope of the study was limited to Tarnogórski LGU, complementing to some extent the theses it put forward [Czaja--Hliniak, 2013, p. 89-98; Czaja-Hliniak, 2014, Rationalization..., p. 532-546; Czaja-Hliniak, 2014, Ewolucja..., p. 207-217].

Financial situation of local governments as the second criterion for selecting applications

In the course of the research, under Articles 242, 243 and 244 of the Public Finance Act, in connection with Article 121 of the Act of 27 August 2009 introducing the Public Finance Act [Journal of Laws No 157, item 1241] new regulations on LGU debt limits came into force, which forced over-indebted LGUs to increase their current income or reduce their current expenditure or to dispose of their property against payment [Klimek, 2013, p. 165-166]. Therefore, an increase in current expenditure on cooperation with NGOs with an overall reduction in its level can be considered a rationalisation of expenditure [Klimek, 2013, p. 166].

Nevertheless, this rationalisation has not always proved necessary due to the good situation of some of the analysed LGUs, including first of all small towns, such as Kalety, Miasteczko Śląskie and Radzionków and small rural municipalities, such as Krupski Młyn and Ożarowice [Klimek, 2014a, p. 273], while indebtedness up to the permissible limits turned out to be primarily a problem of metropolitan and large cities, such as Kraków or Tarnowskie Góry and the Tarnogórski district [Klimek, 2013, p. 169; Klimek, 2014, p. 549-551; Klimek, 2014a, p. 274], A temporary solution to this problem brought the possibility to exclude for the purpose of setting the debt limit in 2014-2018 the liabilities taken over by the LGU after Independent Public Health Care Centres transformed under the principles of the Act of 15 April 2011 on Medical Activity [i.e. Journal of Laws of 2013, item 217 as amended] resulting from Article 36 of the Act of 7 December 2012 on the amendment of certain acts in connection with the implementation of the Budget Act [Journal of Laws, item 1456 as amended]. However, this does not apply to counties as regards the obligations of liquidated hospitals. Therefore, in order to maintain the debt limit, the Tarnogórski County was forced to develop budgetary surpluses in the coming years [Klimek, 2014, p. 552]. Nevertheless, it should be noted that the financial situation of all LAGs is likely to deteriorate due to the increased absorption of European funds [Sierak et al., 2013, p. 9].

Conclusions on the nature of local authorities and the dimension of their cooperation with NGOs

Despite the fact that small municipalities such as Kalety, Ożarowice and Tworóg exceeded the deadline for adopting the annual programme of cooperation with NGOs by 30 November preceding the financial year, they did not face any consequences for this reason [Klimek, 2014a, p. 271], because, as the NSA noted, although failure to meet this deadline "constitutes an infringement of the law, (...) it does not deprive the authority acting as a petitioner of the right to adopt a resolution on the programme of cooperation with NGOs and does not justify the annulment of such a resolution". [NSA's judgment, 2012], In the annual programme of cooperation with NGOs it is necessary to include the level of funds planned for its implementation, which must correlate with the budget resolution and the multiannual financial forecast, and these must be taken by 31 January of the budget year due to Article 230 par. 6 in connection with Article 239 of the Public Finance Act. Therefore, it is worth considering changing article 5a par. 1 of the Act on Public Benefit Activity and the extension and correlation of the deadline for adopting the annual programme of cooperation with NGOs with the maximum deadline for

adopting the budget and the multiannual financial forecast. On the other hand, the representatives of the NGO's believe that the preparation of the applications requires an appropriate time between the announcement and closing of the tender [Klimek, 2014, p. 554].

In addition, the body constituting the LGU may adopt a multiannual cooperation programme with NGOs. Literal interpretation of Article 5a par. 1 and 2 of the Act on Public Benefit clearly indicates, however, that this programme cannot replace the annual one. In practice, however, in Krupski Młyn and Zbrosławice cooperation with NGOs was and is based on multiannual programmes. As a result, the lack of a legal basis for providing grants to NGOs may prove problematic. So far, however, the Silesian Voivode has not issued supervisory decisions in this respect [Klimek, 2014a, p. 272].

Small municipalities undertake financial cooperation with NGOs only within the scope of priority tasks, such as dissemination of physical culture and sport and health protection and promotion (in Kalety), while within the scope of non-financial cooperation they sometimes provide them with premises [Klimek, 2013, p. 170-171]. In Ożarowice, on the other hand, the cooperation includes only tasks in the field of physical culture and sport, and in Tworogu, this task and environmental protection. The minimisation of expenditure on cooperation with NGOs is therefore particularly relevant for rural municipalities, and therefore correlates with the type of municipality [Klimek, 2014a, p. 275-277], Moreover, this cooperation concerns only entities that have been carrying out these tasks for years and are closely related to their home municipalities [Klimek, 2013, p. 171-172]. What is more, small municipalities prefer to carry out tasks of public benefit by Municipal Social Welfare Centres and sociotherapeutic day-care centres, the latter may be co-financed from Regional Social Policy Centres and spend the funds covered by the programmes: prevention and solving alcohol problems and counteracting drug addiction, the level of which often matches the funds included in the annual cooperation programmes of small municipalities with NGOs [Klimek, 2013, p. 172 and 173-174]. Therefore, it is worth considering whether art. 4 in connection with article 18 of the Act of 26 October 1982 on upbringing in sobriety and counteracting alcoholism [i.e. Journal of Laws of 2007 No. 70, item 473 as amended] and article 5 par. 1 in connection with art. 10 par. 3 of the provisions of the Act on Counteracting Drug Addiction of November 25th 2005 [i.e. Journal of Laws of 2012, item 124], which require that all fees obtained under the issued permits for the sale of alcoholic beverages be transferred for the purposes specified therein, are not too restrictive for small municipalities.

Tarnów Gory, as a large town, supports NGOs to the greatest extent possible; including those based in other LGUs, and allocates significant resources to it. As a result, three sociotherapeutic day-care centres operate in the city almost 8 times bigger than Kalety [Klimek, 2014, p. 557], while the Tarnogórski county cooperates with NGOs to a large extent but allocates scarce resources to it, although it also supported those NGOs that were not willing to be supported by their local municipalities, such as the Social and Cultural Association in Kalety [Klimek, 2014, p. 558]. This, however, does not allow us to state that it complements the expenses for cooperation with NGOs of its constituent municipalities up to the level of a large urban agglomeration [Klimek, 2014a, p. 270], Moreover, cooperation in the non-financial area of the county and NGO's included providing them with premises, and it was noted that, despite the small expenses, it should be more of a coordination and integration nature [Klimek, 2014, p. 558],

As for the reports on the implementation of annual cooperation programs with NGOs, according to Article 5a par. 3 and 4 of the Act on Public Benefit, the way they are drawn up has not been formalised as the way they are adopted. Therefore, in large cities and counties, they take a more extensive form, and in smaller municipalities, e.g. funds spent outside of competitions for offers are often not included in them. Moreover, in small communes, such as: Kalety, Krupski Młyn, Świerklaniec and Zbrosławice, the obligation to publish these reports in the BIP was not fulfilled until 30 April following the end of the financial year [Klimek, 2014a, p. 272],

Important institutions supporting the cooperation between the LGU and NGOs are the Public Benefit Activity Councils, which perform advisory and consultative functions. However, their appointment is optional, and if it does not take place, then, according to local government units, Article 5 par. 5 of the public benefit act, a different way of consulting with NGOs should be established. The councils were established only in Tarnogórski County and near the County itself. In small municipalities, however, the reason for not appointing councils is that the number of NGOs' representatives participating in the work of Tarnogórski councils is usually similar. Moreover, there are several other councils in Tarnogórski County Social Council for Persons with Disabilities and County Social Council for Culture, and in Tarnowskie Góry, Radzionków and Miasteczko Śląskie sports councils. However, apart from many advantages, the institution of the council for public benefit activities also has disadvantages, as in LGUs where many NGOs or the community is in conflict; their appointment may give the impression of a special preference to the representatives of NGOs sitting in them and in extreme cases limit ac-

cess to information for representatives located outside them[349]. The same is true of the aforementioned sports councils, which are mostly dominated by representatives of football clubs, yet the implementation or support of tasks in the area of physical culture and sport should not concern only one discipline [Klimek, 2014, pp. 553-554]. In Radzionków this function is connected with the promotion of the city. In the remaining Tarnogórski LAGs there is no such entity [Klimek, 2014, p. 554]. Moreover, just as the Municipal Centre for Cooperation and Local Initiatives was established in Kraków, the Centre for Support of Non-Governmental Organisations was established in Tarnogórski County and its objective is to act for the benefit of NGOs, including substantive assistance in formalities such as preparing competition applications [Klimek, 2014, p. 554-555].

Conclusions on the financial situation of local governments and the dimension of their cooperation with NGOs

The only small town in Tarnogórski County that can afford to cooperate extensively with NGOs and spend significant funds on it is Miasteczko Śląskie - although with a low acceptable "individual repayment rate", it is the least indebted, with a budget surplus and relatively high per capita income [Klimek, 2014, p. 559]. Interestingly, however, the financial situation of Kalet and Radzionków, which do not allocate such funds to this cooperation, but are characterised by high 'individual repayment rates', is rated higher. [Ranking, 2012, p. R16; Ranking, 2013, p. S4], In addition, rural municipalities, such as Krupski Młyn and Ożarowice, despite the highest per capita income in Tarnogórski County, spend the least in relation to total expenditures on cooperation with NGOs [Klimek, 2014a, p. 278]. What is more, e.g. in Kalety, the city authorities highly evaluate the effectiveness of the activities of the City Social Welfare Centre, the City House of Culture and socio-therapeutic day-care centres, thus failing to see the need to rationalise current expenditure through cooperation with NGOs. Against this background, the situation in Radzionków is interesting, where expenditures on cooperation with NGOs are combined with the highest expenditures on promotion of the city in Poland. What is more, the local parish was supported there in renovating the historic St. Adalbert's Church, thus supplementing the reduced subsidy of Tarnogórski County [Klimek, 2014, pp. 553 and 557], which once again confirms that the county does not sufficiently support the cooperation of Tarnogórski municipalities with NGOs.

[349] Dlatego też można przyjąć, że brak rad pożytku publicznego w małych gminach jest pewnego rodzaju zaletą i jednym z nielicznych w Polsce przejawów demokracji bezpośredniej [Klimek, 2014a, s. 271],

On the other hand, highly indebted metropolitan and large cities, such as Krakow and Tarnowskie Góry, must look for various possibilities to reduce current expenditure, including through cooperation with NGOs. Thus, the scope and size of rationalisation of expenditures through cooperation with NGOs's correlates not only with the type of LGU, but also with the number of inhabitants and the level of debt - despite the significant and growing debt, large cities spend more on this purpose. On the other hand, in small towns, rationalisation of expenditures through cooperation with NGOs is understood as their minimisation with simultaneous implementation of public benefit tasks through own organisational units.

The tasks of the commune may be carried out not only in cooperation with NGOs, but also with entrepreneurs, who may be encouraged to do so by minimising the fees associated with running a business meeting the needs of the community. A good example of such cooperation is the bus transport between Kalet districts and neighbouring municipalities [Klimek, 2013, pp. 172-173], it is worth quoting because, in contrast to large urban agglomerations, Kalet has significantly rationalised public transport spending.

If the LGU is obliged to quickly reduce the debt taken over, there can be no question of rationalising expenditure through cooperation with NGOs. Then all expenses are reduced, regardless of their potential effectiveness. The example of the Tarnogórski County makes the authorities and treasurers in small municipalities afraid of balancing at the debt limit, as in the case of another amendment to the regulations this could mean the necessity to significantly reduce all expenses..

As far as the proposal of K. Klimczak - Deputy Director of the Department of Social Affairs of the Municipality of Krakow - to restore an NGO's plenipotentiary in a large urban agglomeration such as Krakow [Czaja-Hliniak, 2013, pp. 92-93] is concerned, this proposal should be complemented by considering appointing a single plenipotentiary in smaller municipalities, who could coordinate the cooperation of municipalities and districts with NGOs, contribute to avoiding negligence, such as replacing annual cooperation programmes with multi-annual ones, or failing to prepare and publish reports on their implementation in the BIP. Otherwise, there may be unhealthy competition between LGUs trying to delegate their tasks, e.g. by setting a consultation date for the county's annual cooperation programme at the same time as in one of its constituent cities.

The degree of expenditure rationalisation by delegating the implementation of NGO's tasks in Tarnogórski rural communes is lower than in small towns, in fact so low that one may wonder where the boundary of claiming

that the LGU's obligation to cooperate with NGOs is fulfilled lies. However, one may also wonder whether the limit of the minimum and obligatory dimension of LGU's cooperation with NGOs should be attempted. After all, each local community has its own specificity, which cannot always be defined by legal standards. On the other hand, it is hard not to notice a paradox that the Tarnogórski municipalities with the highest per capita income - i.e. Krupski Młyn and Ożarowice - spend relatively least on cooperation with NGOs.

Conclusion

The research carried out in this monograph has focused on the key, from the point of view of fiscal efficiency, tax sources of local government (mainly municipal) income, i.e. shares in personal income tax, non-residential tax, selected local charges. In-depth consideration was given to tax revenue as a whole, as well as to separately defined categories of revenue, such as local taxes or the aforementioned fees (e.g. the local charge). For the purposes of a multi-level analysis of tax revenues of local governments, a wide range of factors influencing their size, structure, dynamics and role in the creation of effective and stable sources of budgetary supply was taken into account. The results of research and discussions presented in particular chapters allow for the formulation of several final reflections and recommendations. Some of them constitute a reassumption of the role and importance of the analysed categories of tax revenues, the others refer to the impact of the identified factors shaping the mentioned revenues.

First of all, the financial independence and ability to perform tasks, especially by municipalities, which are the most numerous group of local government units in Poland, depends on the size and nature of the tax revenues made available to them. The main role is played by the personal income tax. In the period covered by the research (primarily the years 2011-2017), the revenues from the municipalities' shares gradually increased. It is worth noting that the position of the aforementioned tax in the creation of local budgets varies depending on the type of municipality - the most important is in the case of cities with county rights (up to approx. 40% of own income), while the smallest is in rural municipalities (33%). It is worth noting that it is in rural and urban-rural municipalities that the rate of growth of income from shares in personal income tax was the highest. The huge disproportion between incomes from income tax as compared to other tax revenues determines that in the current legal and economic conditions municipalities would not be able to cope with the tasks imposed on them if it was not for the funds transferred in the form of state taxes, especially personal income tax. Shares in income taxes also play a very important role in creating budgets of other local government units. Therefore, any change in legal regulations concerning personal income tax, consisting in lowering its rates, introducing new tax exemptions and reliefs, unfortunately causes negative consequences in the financial system of

local government units. Frequent amendments to the regulations governing income taxes, instability of the adopted solutions, and lack of compensation for the lost income in the form of other sources of budgetary support make it difficult for local governments to function efficiently and to carry out their tasks properly.

Secondly, local government taxes, including local taxes, are characterised by relatively low fiscal efficiency. This assessment also applies to property tax. It is worth noting, however, that this tax is a predictable source of income with a constant growth rate, and thus can and should be used to stabilise municipality budgets. The survey results presented in this publication show that - contrary to the popular opinion about the lack of public acceptance for the introduction of the cadastral tax - in the group of respondents it was considered fairer. The current construction of this tribute, with a considerable spread and differentiation of rates, causes justified controversy. The structural weaknesses of the Polish property tax determine not only the limitation of its fiscal potential, but also its usefulness as an instrument for shaping effective spatial policy and local economic development.

Among the external factors determining the tax revenues of local governments, their geographical location and demographic trends require special attention. Due to the fact that the main source of own income of LGUs is the share of income tax paid by natural persons living in a given municipality, county or province, individual decisions on a possible change of actual or at least declared place of residence are of key importance for local government budgets. More and more people, for various reasons, decide to move from the city-centre to the municipalities located around it (e.g. due to calm and environmentally friendly living conditions, offered preferences in local taxes and charges). Such a situation improves the finances of the latter, but negatively affects the level of income of the city, whose infrastructure and services are usually still used by the outflowing population, thus generating expenses of the city-centre, but not contributing to the creation of a profitable side of the budget. Additionally, in towns located in the first ring of the city's influence, the inflow of new, mostly wealthy inhabitants results in an additional phenomenon: the demand on the market of non-agricultural property encourages the transformation of agricultural land into building and industrial plots. As a result, the income structure in the communes adjacent to the city-centres takes on features typical for large cities. The locational rent is not only the share of the so-called bagel municipalities. Its beneficiaries are also units located in the buffer zone of national parks, tourist areas or those equipped with natural resources.

The scope of the LGU's internal possibilities of shaping its tax revenues results from the statutory authority. This issue particularly concerns fees as an important category of local government revenue. Many of them are of a tributary nature; with regard to some of them the local governments have some authority. Some of the fees are optional and it is up to the competent local authorities to collect or not to collect certain fees (e.g. for most of the fees for the use of the infrastructure). Some of the fees are incorrectly described in legal regulations, as their payment is not related to the performance of an official act, provision of a service or use of facilities belonging to the municipality (e.g. advertising fee). Among the charges there are also those which, although they are included in the own income of an oblige-tory character, do not allow for free spending of the funds collected on account of them (this refers to the charges connected with the permission to sell alcohol). The local charge is of an optional nature, although also within its scope, the municipal authorities have very limited power of tribute. However, the rulings issued by the Regional Chambers of Accounts show that the municipal authorities often exceed their powers, e.g. by introducing a local charge in a given locality; they simultaneously apply subjective and subjective exemptions, which are only allowed by statutory solutions.

Significant problems in connection with granting tax exemptions by the municipalities' tax executive bodies are also highlighted by the results of the NIK audit. It turns out that decisions in this respect are often made without clear definition of criteria, are of discretionary nature, and their verification is insufficient both in terms of official and social control. This situation creates a risk of corrupt behaviour, leading to a distortion of freedom of competition within a local government unit. The lack of precise legal criteria for making tax decisions is conducive to improper phenomena. The prerequisites set forth in the Tax Ordinance which entitle the tax authority to grant reliefs from the payment of tax liabilities, especially with respect to the redemption of tax arrears, are vague (public interest or important taxpayer's interest) and allow to justify almost every decision of the tax authority.

In the context of the above reflection and conclusions, important recommendations are made not so much with respect to the necessary modifications of the current system of revenues of the local government, but to a thorough reform of the system. The effectiveness and efficiency of such a comprehensive, broad approach to change requires a redefinition of the position of local government in the structure of public authority, a redefinition of its role in the context of the assigned tasks, and only against this background of the target distribution of public revenues between state and local government au-

thorities. Significant changes should include, in particular, the principles of participation of local governments at all levels in public levies and rationalisation of property taxation. The new system of local government revenues, including both own and transfer sources, should be constructed in such a way that it flexibly adapts to the changes taking place in the settlement system of the country, guaranteeing stable and balanced development of all local government units.

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