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Some legal problems of state budget and the budget act in Poland

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Summary: The elaboration presents some selected legal problems concerning passing, range of application and detailed character of state budget and the budget act. There are current problems that require analysis and discussion leading to doubts or the need for a change in the legal system, including the Constitution. The article presents - in general overview - the following legal issues: the problem of the relation between budget regulations contained in the Constitution of the Republic of Poland and EU budget regulations, legal meaning of budget principles, the problem of state budget completeness and the range of the budget act, the issue of not passing a budget act before the beginning of a budget year, meaning of budget's detailed character for legal liability of entities implementing the budget.

Key words: budget act, budgetary principles, Constitution of the Republic of Poland.

Niektóre problemy prawne budżetu państwa i ustawy budżetowej w Polsce

Streszczenie: W opracowaniu przedstawione są niektóre, wybrane problemy prawne dotyczące uchwalania, zakresu i szczegółowości budżetu państwa i ustawy budżetowej. Są to problemy aktualne, wymagające analizy i dyskusji, powodujące wątpliwości lub potrzebę zmiany w systemie prawnym, w tym także w Konstytucji. W artykule przedstawione są - w ogólnym ujęciu - następujące zagadnienia prawne: problem stosunku regulacji budżetowych zawartych w Konstytucji RP do regulacji budżetowych UE, prawne znaczenie zasad budżetowych, problem zupełności budżetu państwa i zakresu ustawy budżetowej, kwestia nieuchwalenia ustawy budżetowej przed początkiem roku budżetowego, znaczenie szczegółowości ustaleń budżetowych dla odpowiedzialności prawnej wykonawców budżetu.

Słowa kluczowe: ustawa budżetowa, zasady budżetowe, Konstytucja RP.

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1. Introduction

State tasks and expenses are regulated by both constitutional and act regulations. Acts concerning state expenses include acts of general character, especially the act dated 27 August 2009 on public finances², as well as many specific acts prescribing tasks and range of competences of public authorities carried out with budget expenses, among others. As a result, the following relation of tasks - competences - expenses - forms of expenses are created. The last ones concern primarily subventions, expenses for purchasing goods and services, property and investment expenses, remunerations, salaries, scholarships and other personal expenses as well as expenses for paying off debts.

Financing state tasks is contained in the budget act, whose main component (although not the only one) is the state budget. The state budget determines revenue amount for a given budget year that state banking accounts should collect, authorizes government to make expenses (current, property and subvention ones, to purchase goods and services) as well as to finance a deficit and state loan needs.

For example, the budget act for 2018³, whose regulations are contained in 38 articles and 18 annexes to about a dozen of the act articles, comprises provisions on revenue amounts from taxes, charges, dividends, returnable revenues, deficit, paying off debts, expenses for state officers and officials. The act determines also the amounts of object, subject and task specific subventions as well as sums to calculate remunerations in the state budget sector, determines also state guarantees and loans from the state budget, finance elements of social insurance, percentage rates of two budget obligations, financial and economic indices. The budget act comprises regulations contained in compilations, listings and tables.

In order to implement the budget act as regards its amounts and other provisions, it is necessary to apply various expense, fiscal, loan and other procedures valid for that year and consisting of thousands of single acts and actions. Expense procedures consist mainly in concluding and realizing agreements (agreements on public tenders, subvention agreements)⁴.

The budget act is a complex and multi-aspect regulation of various contents with annexes of differentiated legal character. An annex determining state expenses dividing them into so called parts, divisions and sections is normative in character, legally binding and implies legal liability for breaching or exceeding such expenses. Other expenses, in contrast, do not have such legal power. The budget act contains provisions of general character and more specific ones as well as data that have the form of official information serving to conduct public financial economy⁵.

The budget act is influenced by determining of state finances both by means of a cash

² Vol. of Laws 2017, item 2077.

³ Vol. of Laws from 2018, item 291.

⁴ A. Bordo, *Procedury prawne w zakresie wydatków budżetu państwa (procedury wydatkowe)*[*Legal Procedures as regards State Budget Expenses (expense procedures)*], „Prawo Budżetowe Państwa i Samorządu” 2016, no 1(4), p. 9 i n.

⁵ A. Bordo, *Konstrukcja prawna ustawy budżetowej*, [Legal Construction of the Budget Act], Toruń 2017, p. 43 i n.

accounting and an accrual basis methods. Sum arrangements concerning the state budget are dealt with by cash accounting method, i.e. in accordance with payment deadlines of budget receivables. However, financial plans of state task oriented funds, state executive agencies and state legal persons (as contained in annexes to the act) determine the amounts of revenues and costs in the accrual basis system as receivables and due payments in accordance with the provisions of the act on accountancy, i.e. according to whether such operations have actually been realized.

Also many year arrangements that authorize to incur financial obligations for many years to come outside a specific budget year form an element of the budget act. They concern tasks, expenses, limits not only for a given year but also for following ones. Multi-year arrangements contained in the budget act are reflected mainly in programmes destined for many years.

One should consider whether the currently applied structure of the state budget and budget act, level of budget detail, including (or not) in the budget act of state task oriented funds as well as financial plans of state legal persons meet the requirements of the budgetary principles. There is also a legal issue of basic importance: the relation between the budget regulations contained in the Constitution of the Republic of Poland and national law to the EU law.

This elaboration aims to present some selected legal problems concerning the state budget and the budget act. There are current problems that require analysis and discussion leading to doubts or the need for a change in the legal system, including the Constitution. Below, one may find - in a general and synthetic overview - the following issues:

- budget regulations as contained in the Constitution of the Republic of Poland versus EU regulations,
- importance of budgetary principles,
- the problem of state budget completeness and range of the budget act,
- the issue of not passing a budget act before the beginning of a budget year,
- level of detail in determining state budget in the aspect of legal liability of budget executing entities.

Obviously, a very detailed analysis of all these issues goes beyond the framework and character of this article.

2. Budget regulations in the Constitution versus EU budget regulations. The problem of law primacy

One of the legal issues concerning state budget and budget act is the problem of congruence and potential collision between constitutional regulations with international law, and especially with EU law concerning budget issues.

The provisions of the Treaty on EU functioning as well as the regulations of the Treaty on stability, coordination and managing in the European Economic and Currency Union (“The Fiscal Pact”) made in Brussels on 2 March 2012 concern budget, economic, deficit and public debt issues. By the act dated 20 February 2013 the Sejm (Polish parliament’s lower chamber) gave its consent to ratify by the Polish

President of the Treaty on stability (“The Fiscal Pact”) and consequently the President ratified the Treaty on 24 July 2013⁶.

In the provisions of the Fiscal Pact one may see shifting of budgetary and economic decisions from member state bodies (governments, parliaments) to the level of community bodies (EU Commission and Council). The provisions of the Constitution on state budget and parliament’s and government’s budget entitlements come in conflict with those contained in the Pact. It is especially discernible in art. 219 par. 1 and 2 and art 221 of the Polish Constitution that determines budget competences of the Sejm and the Minister’s Council.

If the Pact’s provisions were to be considered as regulations that collide with constitutional provisions prescribing parliament’s and government’s entitlements as regards creation and passing of a budget act, then the question arises which law is superior: international law, including the EU law or the Polish Constitution.

The generally accepted opinion claims separate character and specific independence of the national and the EU law systems. The German specialist literature points out that European and national laws are two independent law orders⁷ and consequently it is observed that the EU law may be inconsistent with the German Constitution⁸. The Polish specialist literature recognizes also that the community law is a separate law system in relation to the national law⁹.

The Constitutional Tribunal in its decision dated 11 May 2005¹⁰ recognized the primacy of the Constitution over the provisions of international law (and EU law as forming part of it). The Tribunal pointed out that “The Constitution remains - due to its special power - «the supreme law of the Republic of Poland» in relation to all international agreements that bind Poland. It also concerns ratified international agreements on transferring competences «in some matters» Due to the primacy of legal power resulting from art. 8 par. 1 of the Constitution, it enjoys on the territory of the Republic of Poland such priority in application”¹¹.

Constitution of the Republic of Poland may not be recognized as inferior law in relation to international and EU law and the provisions of the Constitution support such understanding. Art. 8 par. 1 says that: “The Constitution is the supreme law of the Republic of Poland”. Also the provisions on the source of law - art. 87, art. 88, art. 89, art. 90, art. 91 of the Constitution confirm this. According to art. 188 par. 1 item 1 of the Constitution, the Constitutional Tribunal judges in cases concerning “the congruence of international acts and agreements with the Constitution”.

The Constitution of the Republic of Poland introduces a qualified procedure of passing an act expressing consent to ratify an international agreement as prescribed

⁶ Text of the Treaty was published in the Volume of Laws in 2013, item 1258.

⁷ Compare R. Uerpmann-Witzack, *Europäische Integration*, [in:] I. Münch, P. Kunig (ed.), *Grundgesetz Kommentar*, Munich 2012, p. 1625.

⁸ *Ibidem*, p. 1567.

⁹ A. Gryniuk, *Kontrowersje wokół pojęcia „system prawa”*, „Studia z zakresu nauk prawnoustrojowych. Miscellanea” 2016, no 6, p. 45.

¹⁰ K 18/04, Vol. of Laws No 86, item 744.

¹¹ Przyjęcie przez Trybunał Konstytucyjny stanowiska o nadrzędności konstytucji RP budzić może jednak wątpliwości z punktu widzenia doktryny mówiącej o pierwszeństwie prawa unijnego, por. A. Kustra, *Przepisy i normy integracyjne w konstytucjach wybranych państw członkowskich UE*, Toruń 2009, p. 308.

in art. 90 par. 1 of the Constitution i.e. concerning transferring in some cases of the competences of authorities bodies (e.g. the Sejm) to international organizations. To pass such a bill in both chambers of the parliament, obtaining two thirds of votes is necessary. Establishing by the legislator of such majority of votes points out to the desire that such act allowing to ratify an international agreement of a certain type should result from achieving a wide consensus¹².

In the above mentioned decision dated 11 May 2013, the Constitutional Tribunal remarked that: “The Polish constitutional legislator, aware of the importance of agreements on shifting of executive competences of public authorities bodies «in some cases» to international organizations or international legal bodies, introduces some important protection against too easy or not enough legitimized shifting of such competences outside the system of state authorities of the Republic of Poland. Such protection concerns all cases of shifting such competences to the Community and the European Union”.

The constitution of the Federal Republic of Germany¹³ in art. 23 par. 1 states that Germany cooperates in the development of the European Union with keeping of certain rules, including the rule of subsidiary character. In order to change or complete the provisions in German Constitution - made by changes in the EU regulations - it is necessary to change the Constitution by two thirds of *Bundestag* and two thirds of *Bundesrat* members. Moreover, (according to art. 23 par. 1a of the German Constitution) *Bundestag* and *Bundesrat* have right - following violating by the EU law of the rule of subsidiarity - to file a complaint to the European Tribunal of Justice.

The issue of the collision between constitutional and international regulations, especially the EU regulations, concerning budget entitlements of the parliament and government should be more clearly emphasized in the Constitution than it is done now. In the case of finding contradictions between constitutional provisions and the EU law, the Constitution should point out to the primacy of constitutional norms as well as to a procedure aimed at eliminating such contradictions.

3. Importance of budget principles and whether budgetary principles should be legal norms

State budget should be created and passed in accordance with budgetary principles such as, for example, the principle of completeness, balance, openness, their detailed and annual character as well as specialisation. A budget that is not compatible with the budgetary principles (e.g. not complete, too general or unbalanced) may be a sign of some irregularities or power abuse. The issue of importance and functions of budgetary principles is a part of the science of financial and constitutional law and are related to the position of state's budget's political system. With the development of state's financial practice and social, political, economic changes that have been going

¹² B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2012, p. 523.

¹³ BGBl. I 2009, p. 2248.

on for decades, the role and understanding of budgetary principles is undergoing a change.

Budgetary principles should be, however, regarded as institutions that actually shape budgetary content, its range and procedure. They may not be mere “facade decoration” described in coursebooks but should have also importance in the practice of state’s functioning.

Budgetary principles should be prescribed in a constitution. They would have to be then included in annual budget bills. The government - by creating budget drafts - would have to be obliged to apply the provisions of the constitution concerning the budget, including those connected with implementation of such budgetary principles. One may find an interesting solution concerning budgetary principles in the regulation applied in Germany. The budgetary principles there are introduced directly by the Constitution of Germany in art. 110, which introduces the principle of previousness, periodicity, completeness, unity, gross budgetting, specialisation, transparency, truthfulness, openness and balance¹⁴.

Elements constituting state budget and budgetary procedure result from the constitutional regulations, even when the constitution does not explicitly define the content of a budget and budgetary principles. According to the Polish Constitution from 1997 the budget act is to determine state revenues and expenses, should be properly detailed and allow for some state budget deficit. Also the constitutional regulations influence the legal construction of a budget act that deal with state organization, structure and competence range of various authorities bodies (including the parliament, state president, minister’s council or ministers) as well as decentralization of public authorities (i.e. organization and tasks of local self-government).

Constitutions of some countries contain provisions relating in a special way to state budget. These are regulations concerning the principle of budget completeness, other budgetary principles (detailed character, unity, balance), provisions on task-oriented funds, finances of social protection¹⁵.

Potential changes or amendments in the Polish Constitution concerning its budget and the budget act should go in the direction of introducing regulations dealing with budgetary principles, especially the principle of budget completeness. The budgetary principles should be of normative (and not postulative) character.

4. The Problem of the state’s budget’s range and budget act

Budget act should comprise all revenues and expenses that state bodies and agencies have at their disposal in accordance with the principle of budget completeness. Incomplete budget act puts into question the political system of the Sejm (parliament’s lower chamber) and the Senate (parliament’s upper chamber).

¹⁴ M. Heintzen, *Das Finanzwesen, Grundgesetz Kommentar*, Munich 2012, p. 1230.

¹⁵ Compare: *Constitutional relations in some selected countries*, [in:] A. Bordo, *Współczesne problemy prawne budżetu państwowego*, Toruń, 2014, p. 17 i n.

The constitutional bodies should pass budget act (bill) that comprises the whole state budget and not only some selected elements of state's finances.

Currently in Poland establishing and functioning of task-oriented funds that are conducted by *Bank Gospodarstwa Krajowego* (state bank) and are not contained in the budget act is a special issue connected with the legal construction of the budget act. Most of the state task-oriented funds (over 25 funds) are funds included in the budget act, whereas some funds (such as the National Road Fund, for example) are funds not covered by the budget act provisions.

The act dated 27 October 1994 on paid motorways and the National Road Fund¹⁶ prescribes the ways of financing of domestic roads, including motorways, from the resources of the National Road Fund. The fund was established by way of the above act as a Fund functioning in *Bank Gospodarstwa Krajowego* (BGK). The Fund's resources come from fuel fees, motorway fees, other fees, foreign sources, means from credits or loans incurred for the Fund's benefit by *Bank Gospodarstwa Krajowego*, income coming from bonds issued for the benefit of the Fund by *Bank Gospodarstwa Krajowego* and subventions from the state budget. The main source of income for the Fund is a fuel fee imposed on internal combustion engine's fuels from the group of fuels and gas introduced on the domestic market. BGK prepares a separate financial plan of the Fund, whose project is then presented for agreement to relevant ministers (relevant ministers responsible for transport and public finances). The National Road Fund has no legal status as a legal person and I do not think that it can be recognized as an element of a legal entity such as BGK. The National Road Fund offers resources of budgetary character. It finances public tasks (road tasks) and its main source of income are public levies. It is closely related to tasks, competences and activities by relevant ministers and operations by the General Management of Domestic Roads and Motorways. It is therefore necessary to locate the Fund in the system of the budget act as an element of its legal structure. Its connection with BGK operations is not a sufficient basis to consider the Fund as "BGK finances" as it is a fund of the budgetary system.

Besides the National Road Fund, BGK holds also other task-oriented funds, such as Railway Fund, Inland Water Sailing Fund, Fund of Thermo-dynamization and Renovation. Their financial plans should be introduced within the budget act in accordance with the budgetary principles.

5. Solutions in the case of not passing a budget act before the beginning of a budget year

Pursuant to art. 219 par. 4 of the Polish Constitution if a budget act has not become effective on the day marking the beginning of a new budget year (i.e. on the first of January), the Minister's Council will conduct financial economy according to a submitted draft of a budget bill. As a result, a budget will not be a binding act (bill passed by the parliament) but the government's draft. If the Minister's Council

¹⁶ Vol. of Laws from 2017, item 1057.

have to conduct financial economy according to budget bill's draft then it is meant to be the draft as submitted to the Sejm by the government and not the one after all changes introduced by both parliament's chambers (the Sejm and the Senate) within the legislative proceeding¹⁷.

Making the government's draft effective is a solution that is doubtful from the point of view of the legal conception of state's budget and history of its origin connected with shaping the parliament's right to determine state budget. It is also a situation when the parliament does not determine revenues nor expenses for a specific budget year when the government's draft is "in force" (i.e. in the first weeks or months of a budget year). Keeping such budgetary draft "in force" till the budget act is passed considerably weakens the importance of the budget act as well as political position of legal bodies passing state budget (the Sejm and the Senate).

In the case when a budget is not passed before the beginning of a new budget year, many constitutions introduce so called institution of a budget prerogation that consists in the fact that at the beginning of a year a budget passed by a parliament in the previous year and concerning financing of previous (past) year's tasks comes into force

In my opinion the present solution contained in the Polish constitution (that allows for a government's draft to be applicable) should be changed. The institution of budget prerogation should be applied in a broader way as well as a more complex budget procedure should be introduced that would involve, among others, the higher chamber of the parliament (the Senate) and the President in determining the budget. Some significant examples can be found in Poland of the interwar period or in France¹⁸. Constitution should introduce a procedure taking into account both entitlements and potentials of various participants of the legislative process.

The Constitution of the Republic of Poland from 17 March 1921 may serve as an example¹⁹ as it prescribes in art. 25 budget entitlements of the Sejm, the Senate, the president and government. It says that the president declares the budget as a bill having the following content:

- a. approved by the Sejm's voting if the Sejm and the Senate have discussed the budget in a prescribed period and the Sejm has either passed or rejected the Senate's amendments,
- b. approved by the Sejm or the Senate if the Sejm or the Senate have passed the budget in the prescribed time,
- c. government's draft, if neither the Sejm nor the Senate have taken resolutions in the prescribed times. The last solution, however, is not applicable if the Sejm has rejected in whole the budget's draft presented by the government.

The regulations of the Constitution from 1921 introduced also - when the parliament was dissolved - the possibility of applying a provisional budget and government's right to make expenses and take revenues within the limits of last year's budget.

¹⁷ B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2012, p. 1063.

¹⁸ A. Bordo, *Współczesne problemy*, op. cit., p. 139-141.

¹⁹ Dz. U. Nr 44, poz. 267, zm., Dz. U. z 1926 r., Nr 78, poz. 442.

6. Detailed character of state's budget and liability for breaching the provisions concerning expenses

The provisions of annual budget act concerning detailed character of budget expenses are regulated by means of dividing a budget into following parts: parts (e.g. ministries), divisions (areas of state's activities), and budget allocations (i.e. organizational units or detailed areas of activities), whereas as regards the revenues into parts and divisions of the budget (art. 116 of the act on public finances from 2009). Expense provisions are connected with budget allocations. It is not therefore a full detailed division that is necessary to realize a budget by state entities of lower rank. The budget act does not contain expense arrangements in the system of budgetary sections that as a form of expenditures amount to a few hundred in numbers. Among the expense sections the following may appear: personal expenses (remunerations, salaries), subventions, expenses to buy goods and services, investment expenses.

Arrangements concerning the division of expenses into budgetary sections occur within financial plans of state budgetary entities, such as for example - state agencies, military entities or police entities. According to the act on public finances, persons managing the budgetary parts (ministers), within 10 days from the date of issuing a budget act, transfer to their subordinate entities information on the amounts of revenues and expenses. The subordinate entities prepare then a financial plans in order to ensure congruence with the budget act and activity of preparing financial plans may be considered as actions of further (fully detailed) budget determination. Heads of the state budgetary entities make financial plans for such them, especially as regards parts, division, allocations and sections, i.e. they divide the expenses into sections.

Describing the content of a financial plan and reasons behind making changes of such plan is of specific importance for determining liability for breaching the discipline of public finances²⁰. The financial plan describes (in accordance with official interpretation of the Main Adjudicating Commission) the range of authorisation for making expenses from public means, indicating aims and limits of such expenses²¹.

A question arises whether a financial plan made by a subordinate entity that is to be in accordance with a budget act is a legal act or an actual activity and whether its breach as regards expenses contained in the sections is an activity that should be subject to legal liability. In the view of art. 11 dated 17 December 2004 on liability for breaching discipline of public finances²² it is a breach to make an expense without the authorisation as prescribed by a budget act, budget resolution or a financial plan. Applying sanctions for breaching expense provisions of the budget act is beyond doubt. However, it is not the case when we deal with breaching of provisions of a financial plan made by the subordinate organizational entity. The further question arises whether the latter may be liable for breaching one's own financial plan that

²⁰ L. Lipiec-Warzecha, *Odpowiedzialność za naruszenie dyscypliny finansów publicznych. Komentarz*, Warszawa 2012, p. 44.

²¹ Compare: M. Bitner, [in:] Misiąg, *Ustawa o finansach publicznych. Ustawa o odpowiedzialności za naruszenie dyscypliny finansów publicznych, Komentarz*, Warszawa 2017, p. 172.

²² Vol. of Laws from 2017, item 1311.

may be changed by way of transferring expenses between sections.

It seems that such doubts would not exist or they would be diminished if division of expenses into sections was made in a budget act (which seems very difficult due to technical and organizational reasons) or if the division into sections was determined by a minister in the form of a normative act (in a way of a executive ordinance).

7. Ending

The elaboration presents only few, selected legal problems concerning state budget and budget act.

Beyond the considerations presented here are such issues as, for example: reform issues (new structure) of the budget act, issues of budget accountancy, including the question whether there are any legal differences as regards cash accounting and accrual basis determinations in the budget act, issues of multi-year arrangements in state budget and its importance from the point of view of constitutional principle of the annual character of the budget, issues of so called “task-oriented budget” (i.e. creation in the course of budget realizations of relevant tasks and meters of object and quantitative character), issues of various forms of legal liability for breaching budgetary provisions, issue of what kind of budget arrangements may be subject to legal regulations at all (among others, character of regulations on so called expense principle).

Specific legal issues connected with budget finances are related with changes regarding financial regulations, research on the science of law and finances and should be constantly examined and evaluated.

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