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

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

Keywords: civil control, professional control, public finance control, public funds, public money, Supreme Audit Office (NIK)

Introduction

This article is another stage of scientific research on modern problems of public finance control in Poland. In 2000 a work, was published, regarding financial control in the public sector, treated in scientific circles as a kind of encyclopaedia in the scope of the above-mentioned problems¹. Since then, the doctrine of finance and financial law has limited itself to discussing selected types of financial control², including special attempts to reform it³. There has also appeared an Anglo-Saxon understanding

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

of control deviating from the French model, whose carrier in the changing law system has been internal audit and management control. E. Ruśkowski tried to organise the new system of notions in a recently published work: *Control of public finance in Poland*⁴. In it, he suggests replacing the current notion of “financial control in the public sector” with “financial control in the narrow sense (so-called initial control)”, “performance control” and “compliance control” in the understanding close to ISSAI 100 from 2013⁵. New understanding of control of public finance also includes particular aspects of management control and internal audit where they do not concern supervision and management, but they regard public finance.

Besides considerations on notions, the main part of the work has been devoted to the characteristics of the financial control system and its internal division in Poland. The Author has proposed numerous suggestions for further research concerning modern phenomena of public finance control. Other works also contain various suggestions in this scope⁶. Indicated materials have been the basis to determine in this article priority research problems (including their aims) in the scope of public finance control. These suggestions have not been further consulted and are individual ideas of the Author, based on his own research.

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

The terms “public money” management and “public funds” management are very often used interchangeably in journalism, and the doctrine has dealt with the latter many times, leaving the first one as obvious. However, they need to be considered as different terms. “Public money” management is a broader term in relation to “public funds” management due to also covering in its scope the activity of state and local-government legal personalities, which are not units of public finance sector, as well as the activity of other organisational units, and economic entities (typically private) in the scope in which they use state or municipal assets or resources and comply with their financial obligations to the state. Article 203(1) and (3) of the Constitution indicate NIK’s control prerogatives and the fact that it is about auditing “public money” management by NIK⁷ is beyond dispute. For these reasons, the terms

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

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

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

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

“public money” management and “public funds” management should be clearly distinguished.

While the term “public money” management is not present in the Polish legal system, but the notion of “public funds” management is of profound importance. Despite numerous publications on the above topic, there are still no answers to several key questions, what hinders not only logical functioning of the doctrine but also public administration bodies and the judiciary. These problems also appear at most in the processes of public finance control. One of the essential issues is the problem of the moment of losing public character of the funds in the situation when they leave public finance sector. The view that it happens when the funds are paid outside the public finance sector⁸ is untenable, since it concerns only a part of public funds⁹ and is contrary to the interpretation of the Act on Public Finance¹⁰, as well as the intention of a reasonable legislator¹¹. In Poland there is no concept of “public function”, which connects funds with the aim or public function of their allocation¹², although Article 216(2) of the Constitution indicates “financial resources for public purposes”¹³. It should be verified in the research whether public funds maintain their character till the moment of their definitive settlement, and the degree of public character may be regarded as gradable (in the light of binding and proposed provisions)¹⁴.

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

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

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

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

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

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

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

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

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

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

Tribunal. Therefore, they are of interest to many fields of legal sciences, with different intensity. For instance, NIK's activity is mainly researched by constitutional law but also by financial law, while the Constitutional Tribunal is the main focus of constitutional law and only additionally of financial law. Monitoring a part of classic types and forms of functional public finance control leads to a conclusion about their evolution and even the disappearance of some forms of activity. The confirmation and establishment of the causes should be the subject of interest of financial law. A few issues need to be emphasised, such as, e.g., some powers of control (especially tax) of the Commissioner for Human Rights have been limited¹⁵, also the Constitutional Tribunal has reduced control of public finance in the recent years and there have been no clear arrangements from several Sejm Committees of Inquiry regarding public finance control.

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

Having regard to the Polish reality during the last several years in the scope of public finance control, it may be stated that new types and forms have emerged, which include in the chronological order: management control¹⁶, control in government administration (as a separate control system)¹⁷, and National Revenue Administration (KAS)¹⁸. Despite their description in the subject literature, it should be stated that none of the mentioned types of control have been thoroughly evaluated by the science. From the point of view of public finance control, management control and audits within KAS deserve special attention. The evaluation of management control was to be positively influenced by the reform of the activity-based budget, which so far has not taken place, and will not happen in the nearest future. However, five years of KAS operation (and audits conducted by this institution) seem to provide sufficient grounds to assess this reform.

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

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

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

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

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

The protection of “common good” by NIK is on the one hand universal (constitutional) and on the other hand of current (involved in the political game) value. NIK’s experience from the period of transformation has indicated that especially its independence and prestige serve the protection of “common good”, and the good reputation about its work is confirmed both in Poland and abroad¹⁹. Due to the above reasons, it seems urgent to start research whose aim would be to indicate the crucial factors of NIK’s independence and high prestige as well as to eliminate threats in these fields. Interest of the science in the mentioned values, excluding current personal and political relations, would be a positive phenomenon and a sign of the protection of NIK’s interests, since it is an important institution of the state. This could lead to a certain intellectual paradox, very positive for the society, when independent science (especially the science of financial and constitutional law), performing citizen control of public finance, defends constitutional rights of NIK as the main body of institutional control of public finance.

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

One of the key principles of public finance is the principle of public finance openness. It is of special importance to the control of public finance. Therefore, assumptions presented in the article “On the broad approach to the principle of openness of public finance”²⁰ seem important. E. Ruśkowski indicates in it the need to distinguish the principle of openness of public finance in the narrow sense, which is mentioned in Art. 33–38c of the Act on public finance as well as broad understanding of this principle (in the sense of Art 61 of the Constitution and the overall binding legislation). The current state of financial law science has correctly referred to the principle of openness of public finance in the narrow sense, which is evident in numerous scientific publications devoted to this subject²¹. On the other hand, the principle of openness of public finance in the broad sense has been ignored by legal and financial professional literature. Suggested research should verify the assumptions stated in the above-mentioned article and additionally, if they are

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

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

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

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

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

At the beginning of transformation some researchers thought that social control would be rendered irrelevant in the new system²². However, it turned out that at least some of its forms have survived and have even developed²³. In modern conditions it is called social or citizen control²⁴, or more consistently – citizen control²⁵. While institutions of citizen control are often in conflict with public authorities (e.g., investigative journalism, auditing think-tanks, or citizens' networks), monitoring their activities and often replacing or complementing professional control; however, the model of cooperation between citizen control and public authorities is spreading, for the public good. An example of this tendency is solutions from the Act of 11 January 2018 on changes of certain laws in order to increase the participation of citizens in the process of electing, functioning, and controlling certain public bodies²⁶. This act provides among other things: dissemination of the participatory budget; presentation of the annual report on the condition of municipality by a commune head (mayor, president of the city), with the possibility to remove the mentioned bodies during a referendum if they do not win a vote of confidence in following years two years; the obligation of representative bodies of municipalities, districts and voivodships to appoint a complaint, motion, and petition commission, as well as to determine the principle of their activity in the statutes; citizens resolution initiatives at all levels of local government. The period of pandemic delayed achievement of some objectives of the reform. That is why citizens' reaction to innovative solutions and scientific evaluation of this direction of citizen control is so important.

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

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

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

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

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

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

Without funding, any activity, including activity in public finance control, loses its reasonable possibilities. A part of the funds for the activity of “the third sector”, sometimes called the activity of the civil society, comes from public funds. A part of them concerns citizen control of public funds, implemented by this sector, and another part concerns professional control of allocation of funds to this sector. Science has been dealing with this phenomenon²⁷ for some time, but it has to include current results of the work of NIK and administrative judiciary. Novel solutions have been created in the discussed period, such as the Centre for the Development of Civil Society²⁸. While principles of its organisation have been described in literature²⁹, their functioning and effects need additional research. They should include professional control of the Centre, as well as a degree of inspiration for the development of public finance control by civil society.

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

On 1 July 2021, the European Public Prosecutor’s Office started its activity in the EU and on 17 December 2021 the Member States should issue implementing legislation regarding whistleblowers³⁰. In the first issue, Poland, with four other EU countries (Hungary, Sweden, Denmark, and Ireland) remains outside the structure of the European Public Prosecutor’s Office. For Poland, it is an open matter whether to sign agreements on cooperation or to enter the structure of this body in the future. Further scientific observation of this phenomenon is therefore obvious. On the other hand, establishing domestic regulations regarding whistleblowers has been a subject of interest of both public authorities and some civil society organisations for many

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

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

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

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

years³¹. Nowadays it is hard to tell what their impact on final legislative solution will be. That is why it is justified to start research on this topic.

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

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

Despite the necessity to conduct comparative research in different fields of social and economic life, one may risk a claim that their development currently encounters various obstacles. It is similar with comparative research regarding public finance control. Besides comparative research on NIK (i.e., the highest bodies of control)³², there are almost no such research in legal and financial science. That is why such initiatives should be supported, since they facilitate writing article and chapters in monographies as well as organising international conferences devoted to these problems³³.

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

The period of pandemic declared in Poland in March 2021 still continues. It does not prevent conducting research, but only complicates it a bit. The above assumption seems right if it is considered that the pandemic has caused extraordinary solutions, which (at least in the majority) will disappear after the pandemic stops. The task of the science is to note them, but it is doubtful to make them a priority subject of research. Very often solutions and their application practice during the pandemic cause irrational results which are not worth serious research³⁴. Exceptions prove the

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

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

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

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

rule³⁵. Maintaining some temporary pandemic solutions after the pandemic stops and the durability of their application seems to be a worthwhile subject for research. A special role of financial law science in this scope will be necessary, especially regarding jurisprudence of administrative courts, and some instruments of citizen control of public finance.

Conclusion

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

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

Identification of topics is accompanied with synthetic determination of the aims of the suggested research. Their implementation, similarly to other research topics whose list will always be disputable and evolving³⁶, may creatively contribute to the further development of the science of public finance control.

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

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

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

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