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Nature of Charge for Breach of Budgetary Discipline from Czech Perspective

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Keywords

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Abstract

This article is focused on the issue of the imposition of the charge for the breach of the budgetary discipline and its nature as a criminal sanction for the purposes of the application of articles 6 and 7 of the European Convention for the Protection of Human Rights and Fundamental freedoms. The author familiarizes the reader with the basics of the Czech regulation, pointing out the specific issue related to the recipients of public subsidies. In this case, the Czech legislator must deal with the issue of the competed public authorities because particular breach of the budgetary discipline can be sanctioned also by a fine levied by the Office for the Protection of Competition. Otherwise, the current regulation of the charge for the breach of the budgetary does not necessarily be in accordance with the principle *non bis in idem* pursuant to article 4 of the Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental freedoms, if the nature of the charge and fine is criminal. Therefore, this article is also devoted to the application of the Engel criteria to the charge for the breach of the budgetary discipline to provide an answer whether this charge is a criminal sanction, and finally, it describes from the perspective of the application of the *non bis in idem* principle, how negatively the imposition of this charge could be affected if its

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nature is identified as a criminal one. The scientific methods used are the analysis, induction, deduction and description.

JEL Classification: K34, K14, H26

I. Introduction

The question, why it is necessary to examine the nature of the charge for the breach of the budgetary discipline, was catalysed by the contemporary development of the European Court of Human Rights' case law regarding the application of the *non bis in idem* principle in tax matters. In the Czech Republic, we were witnesses of the breakthrough decision of the Czech Supreme Administrative Court dealing with the issue of what is the nature of the tax surcharge pursuant to the sec. 251 of Act No. 280/2009 Col., Tax Procedure Code (*hereinafter referred just as 'Tax Procedure Code 2009'*). This decision caused the fundamental revision of the understanding of what is the nature of the tax surcharge under the Tax Procedure Code 2009, mainly as a sanction or punishment for illegal activity of a taxpayer.[1] Also, this decision was an inevitable consequence of the mentioned European Court of Human Rights' case law devoted to the assessment of the nature of the sanction imposed by the national public law authority as a criminal sanction for the purposes of the application of articles 6 and 7 of the European Convention on Human Rights (*hereinafter referred just as 'European Convention'*) and possible existence of the barrier *non bis in idem* pursuant to article 4 of the Protocol No. 7 to the European Convention.

It is indisputable, that a recent development of the case law in a tax field will affect the administration of taxes. However, some European jurisdictions does not constitute the own procedural regulation for every branch or sub-branch of law such as the Czech Republic legal order and these states use the tax procedural regulation as well for the administration of other sanctions imposed pursuant to the substantive regulation of other branch or sub-branch of law. For instance, in the Czech Republic, some budgetary instruments regulated by budgetary law are administered under the Tax Procedure Code 2009, therefore these instruments could be subjected to such European Court of Human Rights' case law regarding the application of the *non bis in idem* principle in tax matters. However, this regulatory approach does not mean that the charge for the breach of the budgetary discipline and related penalty are tax surcharges in the narrow sense, because the

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Tax Procedure Code 2009 subject every payment obligation, which is a source of revenue of public budget, since it is covered by the legislative abbreviation tax pursuant to the sec. 2 par. 3 of the Tax Procedure Code 2009 (Karfíková, 2017: 111-113).

For these reasons, the main aim of this article is to evaluate and detect the possible applicable problems, which could be caused by a competing competence of some Czech public law authorities. With such purpose, the aim of this article is to get its reader familiarized with the basics of relevant Czech regulation, to summarize the grounds of the European Court of Human Rights' case law regarding the nature of the sanction for the purposes of an application of *non bis in idem* principle, to apply these ground on the Czech regulation of the charge for the breach of the budgetary discipline and to point out the possible pitfalls of the regulation of the charge for the breach of the budgetary discipline in the light of an analysed case law. The basic hypothesis the author aims to confirm is that the Czech regulation of the charge for the breach of the budgetary discipline is not in accordance with the principle *non bis in idem*, as it is interpreted by the European Court of Human Rights in the case of the sanctioning of the subsidy recipient. The scientific methods used are the analysis, induction, deduction and description. Since this issue is mostly the national problem, there is not any complex publication devoted to this topic known to the author.[2]

II. Basics of Czech Regulation

The regulation of revenues and expenses of the state budget and the financial management of state organizational units, other state facilities with the similar status, state public benefit organizations and other persons managing parts of the state budgetary fund is mainly concentrated in the Act No. 218/2000 Col., on budgetary rules (*hereinafter referred just as 'Budgetary Rules Act 2000'*). The Budgetary Rules Act 2000 also regulates the definition of the breach of the budgetary discipline which is defined among other things as an unauthorized use of state budget funds, an unauthorized use or detention of funds provided from the state budget or a breach of the obligation laid down by law, decision or agreement on the provision of the subsidy or repayable financial assistance (Budgetary Rules Act 2000, sec 44). If someone breaches the budgetary discipline (e.g. organizational unit of the state or the recipient of the subsidy) by the illegal activity (e.g. using purpose-bound provided subsidy for a different purpose), he

[2] For example, there exist recognized monograph Roman Seer and Anna Lena Wilmset al, *Surcharges and Penalties in Tax Law* (1st edn, IBFD, Amsterdam 2016) 854. Nevertheless, this monograph is focused strictly just on tax surcharges in the narrow sense; moreover the opinions of selected national professionals are questionable.

is obliged to pay the charge for the breach of the budgetary discipline and penalty via a local tax authority (Budgetary Rules Act 2000, sec 44/1, 44/2, 44/3 and 44/10). The amount of the charge for the breach of the budgetary discipline could be regulated by the rules of the subsidy; otherwise the amount of this charge shall be the amount of the funds affected by the breach of the budgetary discipline (Budgetary Rules Act 2000, sec 44a/4).

For example, imagine that the recipient of the subsidy got the subsidy in the total amount of 1.000.000 CZK and this subsidy had to be used just for the financing of two same projects of the subsidy recipient under the rules of public procurements. One public procurement related to half of the provided subsidy was implemented in accordance with the public procurements regulation; unfortunately, the second one was not. Because the agreement on the subsidy had not contained any regulation of the charge for the breach of the budgetary discipline, the competent tax authority shall levy this charge in the amount of the affected fund by the breach of the budgetary discipline and the penalty up to the amount of the imposed charge depending on how long is the recipient of subsidy default with the payment of the charge. Therefore, the charge for the breach of the budgetary discipline should be levied in the amount of 500.000 CZK (half of the subsidy affected by the breach) and, depending on the length of default with its payment, the penalty up to 500.000 CZK could be also levied.

The problem is that the charge for the breach of the budgetary discipline is always levied retrospectively to the date of the particular breach of law; therefore there is always the penalty to be imposed on the offender. Finally, the Budgetary Rules Act 2000 does not contain complex procedural regulation how to administer the charge for the breach of the budgetary discipline, therefore the Budgetary Rules Act 2000 constitutes that its administration belongs to the scope of tax authorities and it must be administered pursuant to the Tax Procedure Code 2009. So, it is administered in the same way as taxes are levied in the Czech Republic.

III. Problem of Competing Authorities

The important aspect related to the imposition of the charge for the breach of the budgetary discipline is that the disposition of the budgetary fund in the meaning of the financial resources accumulated in the public budget could be regulated not just by the Budgetary Rules Act 2000, but also by a different regulation belonging to the scope of different public law authority than tax authority. In particular, a good example is the above-mentioned case of subsidy. The regulation of subsidies provided from the state budget or from the national

fund[3] is usually presented in the Budgetary Rules Act 2000 and in the subsidy conditions published in every particular program of public subsidies (Budgetary Rules Act 2000, sec. 14/4). However, the subsidy conditions usually establish the specific requirement, that the recipient must realize legal acts (contracts) financed by the subsidy in accordance with public procurements law belonging to the scope of the Office for the Protection of Competition (Public Procurements Act 2016, sec. 248).

The result of the conditions is that if the recipient of the subsidy breaches the procurement regulation, this illegal conduct could be supervised by the Office for the Protection of Competition as an administrative offence and this office could impose the fine on the recipient of the subsidy. Concurrently, this illegal conduct shall be assessed as the breach of the condition of the subsidy (thus as the breach of the budgetary discipline) belonging to the scope of the tax authority, which can impose the charge for the breach of budgetary discipline. It is obvious that the recipient is punished for the same facts related to the same illegal activity in both cases. Thus, it is necessary to ask whether such legal regulation is in accordance with the basic principle *non bis in idem* (not to be punished twice in the same case) as it is incorporated to the Czech legal order by article 40 paragraph 5 of the Charter of Fundamental Rights and Freedoms and by article 4 of the Protocol 7 to the European Convention in connection with articles 6 and 7 of this convention. The key question for the resolution of this issue is, does the charge for the breach of the budgetary discipline have the nature of a criminal sanction?

IV. Sanction under the European Convention on Human Rights

The European Convention does not define the term 'criminal sanction', but it could be deduced by the grammatic interpretation of the European Convention and from the case law of the European Court of Human Rights, that the criminal sanction shall be defined as a threatening sanction for the illegal conduct of an offender in the proceedings based on the criminal charge. The nature of the sanction is an important attribute for an assessment, whether the proceedings against offender was based on the criminal charge (*Engel and Others v. The Netherlands*App no 5100/71, 5101/71, 5102/71, 5354/72 et 5370/72 (ECHR, 8 June 1976) para 82). In this case, the national authority that conducted such proceedings must obey specific principles of criminal law explicitly constituted by articles 6 and 7 of the European Convention and by article 4 of the Protocol 7 to the European Convention. For these purposes, the European Court of Human

[3] The national fund is the fund accumulating financial sources provided from the EU or from other international organizations to the Czech Republic.

Rights established the well-known Engel criteria (Opinion of advocate general Case C-489/10 Bonda [2012] ECR, para 46).

These criteria formulate the assessment of three attributes of examined case for the application of article 6 of the European Convention (van Bockel, 2009: 215). The first Engel criterion concerns whether the applied provision belongs to criminal law according to national law (Opinion of advocate general Case C-489/10 Bonda [2012] ECR, para 47). Nonetheless, this criterion is not decisive for the final assessment because it provides just the basic information about the national legislation, which is not distinctly relevant for the interpretation of the European Convention. Therefore, the European Court of Human Rights states that this criterion represents just the starting point for the further application of remaining two Engel criteria (*Engel and Others v. The Netherlands* App no 5100/71, 5101/71, 5102/71, 5354/72 et 5370/72 (ECHR, 8 June 1976) para 82). In respect of that, it is not possible to conclude that assessed sanction is or is not the criminal by its nature based on the application of this first criterion.

The second Engel criterion is far more important (*Jussila v. Finland* App no 73053/01 (ECHR, 23 November 2006) para 38). This criterion is devoted to the assessment of what is the nature of the offence; therefore the authority applying this criterion shall evaluate the nature of the offence itself based on the individual ground. As an example, the authority shall consider factors such as (European Court of Human Rights: 2014, 8):

- whether the legal rule in question is directed solely at a specific group or is of a generally binding character;
- whether the proceedings are instituted by a public body with statutory powers of enforcement;
- whether the legal rule has a punitive or deterrent purpose;
- whether the imposition of any penalty is dependent upon a finding of guilt; and
- how comparable procedures are classified in other Council of Europe member states.

The last criterion concerns the nature and the severity of the penalty, which is liable to be imposed. In the case of the sanction potentially imposed in tax proceedings, the really important factor is the objective of that penalty. A criminal nature of such penalty shall not be found if the penalty is only intended as pecuniary compensation for damages caused by the offender (*Jussila v. Finland* App no 73053/01 (ECHR, 23 November 2006) para 38). Contrary to that, if the objective of such sanction is to repress offender or prevent the potential offender from illegal conduct, we must conclude that penalty with the criminal nature exists in this case (*SergeyZolotukhin v. Russia* App no 14939/03 (ECHR, 10 February 2009) para 55). The decisive attribute is not also the fact that an offence

is not punishable by the imprisonment since the relative lack of seriousness of the penalty cannot exclude the criminal character of an offence (*Nicoleta Gheorghe v. Romania* App no 23470/05 (ECHR, 3 April 2012) para 26).

Finally, the significant rule applied on the application of second and third Engle criteria is that they are alternative, not necessarily cumulative (*SergeyZolotukhin v. Russia* App no 14939/03 (ECHR, 10 February 2009) para 53). For the application of article 6 of the European Convention, it is sufficient that '*the offence in question should by its nature be regarded as "criminal" from the point of view of the Convention, or that the offence rendered the person liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere'* (European Court of Human Rights: 2014, 8).

V. Charge for a Breach of the Budgetary Discipline as a Criminal Sanction

As it was stated earlier, the charge for the breach of the budgetary discipline is a negative consequence for the illegal activity of the offender in the field of the budgetary law. Applying the first Engel criterion on this instrument, it is sure that the charge for the breach of the budgetary discipline is constituted by the budgetary regulation, not by the criminal one. However, this conclusion is not decisive for an assessment whether it is a criminal sanction or not (*Engel and Others v. The Netherlands* App no 5100/71, 5101/71, 5102/71, 5354/72 et 5370/72 (ECHR, 8 June 1976) para 82).

According to the second Engel criteria, we should acquire more specific information about the material nature of the offence called breach of the budgetary discipline. There is no doubt that the regulation of the breach of the budgetary discipline is constituted by the general binding regulation and therefore this regulation is not directed solely at a specific group of persons (*Bendenoun v. France* App no 12547/86 (ECHR, 24 February 1994) para 47). Also, the proceedings are instituted by the public body with the statutory powers of enforcement, in particular by the tax authorities who are competent to execute the tax execution too (*Stephen Andrew Benham v. the United Kingdom* App no 19380/92 (ECHR, 29 November 1994) para 56). Concerning the punitive or deterrent purpose of the imposition of the charge for the breach of the budgetary discipline, I assume that the imposition of this sanction is punitive and deterrent by its nature, because the tax authorities should impose this sanction also in case that the offender breaches just some marginal obligation arising from the subsidy regulation and it is not relevant if the aim of the provided subsidy is reached. However, the imposition of the charge for the breach of the budgetary discipline is not dependent on a guilt finding in tax proceedings and it is levied based on the

strict liability. Summarizing these partial conclusions, it shall be implied from the application of the second Engel criteria that the breach of the budgetary discipline is rather the criminal offence in the meaning of article 6 of the European Convention.[4]

Related to the assessment of the nature and the severity of the charge for the breach of the budgetary discipline, the charge could be imposed up to the amount of the funds affected by the breach of the budgetary discipline (Budgetary Rules Act 2000, sec. 44a/4). It is clear that this sanction is quite severe, indeed, if the tax authority can impose also the penalty up to the same amount as the charge is. It is obvious that the charge for the breach of the budgetary discipline is settled by the strict amount, which does not allow any discretion of the applying public authority. Therefore, the main aim of this sanction is to prevent the potential offender from any illegal conduct related to the budgetary discipline and may be to punish the offender by the loss of provided part of the budgetary fund. From these reasons, applying the last Engel criterion, we must conclude that the charge for the breach of the budgetary discipline is a criminal sanction.

The national circumstances also draw the criminal nature of this charge. As the Supreme Administrative Court found: '*the penalty is not the sanction (in the broader sense) for the breach of the budgetary discipline as it is in the case of the charge, but rather a sanction for a non-payment of the charge in the prescribed time. It follows from the construction of the section 44a subs. 7 of the Budgetary Rules that the penalty is due on the day of the breach of the budgetary discipline'* (Supreme Administrative Court: 1 Afs 53/2013 – 33). The point is that the penalty for the breach of the budgetary discipline is constituted exactly the same way as the tax surcharges are constituted by the Tax Procedure Code 2009, which must be considered as the criminal sanction according to the case law of the Supreme Administrative Court (Supreme Administrative Court: 4 Afs 210/2014 – 70) and European Court of Human Rights (*Nicoleta Gheorghe v. Romania* App no 23470/05 (ECHR, 3 April 2012)). Therefore, pursuant to the *argumentum a fortiori*, if such penalty must be considered as the criminal sanction in the meaning of articles 6 and 7 of the European Convention, when the criminal nature of this penalty had been trivialized to avoid the application of the criminal sanctioning principles, it must be concluded that the charge for the breach of the budgetary discipline has the criminal nature as well. Moreover, it was the financial administration (organization of tax authorities) which had admitted that this charge has the nature of the sanction before the relevant European Court of Human Rights' case law was adopted (Generální finanční ředitelství: 2013).

[4] On the other hand, contrary opinion could be found between Czech professionals to financial law. Compare Kateřina Frumarová et al, *Správní trestání* (1st edn, Leges, Prague 2017) 336.

VI. *Non Bis in Idem* Issue

The proceedings conducted before the Office for the Protection of Competition can lead to the imposition of the fine for the administrative offence due to the breach of the public procurements law. The nature of administrative offences had been analysed by the Supreme Administrative Court for the purpose of the application of articles 6 and 7 of the European Convention and the result was that such offences are based on the criminal charge (Supreme Administrative Court: 3 As 57/2004 – 39). Therefore, the imposed fine by the Office for the Protection of Competition must be also considered as a criminal penalty (Office for the Protection of Competition: ÚOHS-R370/2014/VZ-37230/2015/321/Oho).

The consequent conducted proceedings on the imposition of the charge for the breach of the budgetary discipline pursuant to section 44a of the Budgetary Rules Act 2000 and on the imposition of the fine pursuant to section 268 and following of the Act No. 134/2016 Col., on public procurements, are quite common phenomenon in the Czech Republic. The fact is that both proceedings are usually dealing with the same facts connected in the place and time, and therefore it is necessary to answer if the specific conditions for the conduct of both consequent proceedings are met. The European Court of Human Rights accepted that article 4 of the Protocol to the European Convention is not breached by the duplication of the proceedings dealing with identical or substantially the same acts if they are sufficiently closely connected in time and in substance (*Kapetanios and Others v. Greece* App no 3453/12, 42941/12 et 9028/13 (ECHR, 30 April 2015) para 130). Based on the so-called case A and B versus Norway, this connection in time and in substance exists whether:

- *'the different proceedings pursue complementary purposes and thus address, not only in abstracto but also in concreto, different aspects of the social misconduct involved;*
- *the duality of proceedings concerned is a foreseeable consequence, both in law and in practice, of the same impugned conduct (idem);*
- *the relevant sets of proceedings are conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities to bring about that the establishment of facts in one set is also used in the other set;*
- *the sanction imposed in the proceedings which become final first is taken into account in those which become final last, so as to prevent that the individual concerned is in the end made to bear an excessive burden, this latter risk being least likely to be present where there is in place an offsetting mechanism designed to ensure that the overall amount of any penalties*

imposed is proportionate' (*A and B v. Norway* App no 24130/11 et 29758/11 (ECHR, 15 November 2016) para 132).

It is a reality that the proceeding before the Office for the Protection of Competition is much faster than the proceeding before the tax authority. Also, this administrative proceeding usually ends before the tax proceeding held by the tax authority begins. Yet, it is precisely the tax authority that can impose the charge for the breach of the budgetary discipline without any discretion on the scope of this sanction; therefore in every case, this charge is always disproportional to the previously imposed fine by the Office for the Protection of Competition. Under these circumstances, it must be concluded that the tax proceeding with the aim to impose the charge for the breach of budgetary discipline on the subsidy recipient, following the administrative proceedings before the Office for the Protection of Competition is illegal due to the application of the *rei iudicatae* restriction arising from the principle *non bis in idem*. Summarizing the conclusions, the charge for the breach of the budgetary discipline and the fine for the breach of public procurements law is the criminal sanction for the criminal charge in the meaning of articles 6 and 7 of the European Convention on Human Rights; however, both proceedings are not sufficiently closely connected in substance and in time, therefore the later imposition of the charge for the breach of the budgetary discipline will cause the infringement of article 4 of the Protocol No. 7 to the European Convention.

VII. Conclusion

The European Convention regulation of the *non bis in idem* principle significantly affects the budgetary regulation in the Czech Republic, mainly the imposition of the charge for the breach of the budgetary discipline as a sanction for the infringement of the Budgetary Rules Act 2000. However, especially the regulation of subsidies is not affected just by the budgetary regulation, but also by the regulation of the provision of public procurements. The problem is that these regulations belong to the scope of different public authority and they are proceeded pursuant to different procedural law. In the first tax proceeding, the result could be the imposition of the mentioned charge and the second administrative proceeding could result into the imposition of the fine. In both cases, there is no doubt that these consequences for the infringement of law are criminal by their nature; therefore both proceedings are based on the criminal charge if we apply the Engle criteria.

Because of the nature of these sanctions, it must answer the question, under which condition could these sanctions be imposed – in consequent or parallel

proceedings. It is true that it is not categorically forbidden to conduct two proceedings dealing with the identical or substantially the same acts, however, just if they are connected in time and in substance. This condition was finally described by the European Court of Human Rights in the A and B case and briefly summarized, which means that these proceedings has to deal with different aspects of the social misconduct involved, the sanctions in both proceedings has to be foreseeable to the offender, the public authorities has to cooperate in both proceedings and finally, the sanctions in both proceedings must be proportional, therefore the last sanction must take into account the previously imposed one. Unfortunately, the proceedings before the Office for the Protection of Competition is much faster than the tax proceedings and it is usually finished before the tax proceedings on the imposition of the charge for the breach of the budgetary discipline starts. Therefore, it is the tax authority that must levy this charge proportionately to the previously imposed fine. Lamentably, the tax authority has no discretion over the severity of the charge, which must be imposed in the exact amount pursuant to the Budgetary Rules Act 2000. For this reason, the dual sanctioning of the offender for the breach of the budgetary discipline in the case of the recipient of subsidy, regulated also by the public procurements law, is in contradiction to article 4 of the Protocol No. 7 to the European Convention, and therefore the hypothesis was confirmed.

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