Law: The Basic Concepts

Polish Financial Law

edited by

ANNA DOBACZEWSKA

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Introduction

The academic textbook *Polish Financial Law* is the first edition of a work written by a team of authors representing several universities in the Tri-City (Gdańsk, Gdynia, Sopot) area. They have studied various areas of financial law and public finances for many years. The results of their study include scholarly works such as monographs, textbooks, and articles. The results of their research have been presented at international and national conferences as well as in seminars. Authors of this work include jurists, as well as persons with a second degree in the field of economics or a PhD in economics. Establishing a connection between financial law and economics seems to be a rational and necessary idea in this day and age.

Finance or financial phenomena are an economic category. Their nature is solely monetary. Finance does not exist without money. There is a close and unbreakable relationship between finance and money. This relationship manifests itself in the fact that every financial phenomenon is a monetary phenomenon, but not every monetary phenomenon is a financial phenomenon. Finance is a category of monetary phenomena consisting in collecting and spending money for public purposes. It is based on the allocation of monetary values to meet specific needs. Generally speaking, finance can be divided into two categories: 1) private finance and 2) public finance. The former serves to meet individual needs, while the latter serves public ones. Distinguishing between private and public finance is the starting point for a presentation and analysis of the public financial phenomena and the legal regulations concerning these phenomena. The current textbook does not include issues related to private finances. This is an area sometimes presented in the form of monographic studies. It should only be noted, however, that there do, in fact, exist relationships and links between public finance and private finance.

The authors of this academic textbook have adopted a broad formula for the study of the field of financial law. It is a comprehensive approach to this area of law, which also includes tax law and customs law. Indeed, there are numerous legal acts in the field of tax law, but, in a general sense, taxes are one of the classic instruments of collecting funds from various entities and allocating them for financing public tasks. It is possible or even necessary to give a separate discussion of tax law, but there are no reasons for excluding it from the field of financial law. Tax law is an important element of financial law. Similar reflections concern customs law and its basic instrument – customs duties. Customs regulations are of a complex nature, and the basic legal act related to this filed is the EU Customs Code. This code is an important element of the national legal order. Nevertheless, we have treated customs regulations as part of financial law because customs duties and charges are considered instruments of financial law.

The authors' efforts have focused, among other things, on presenting and analyzing the latest solutions in the field of financial law. Consequently, we have also presented the far-reaching changes to Polish tax administration, and customs and tax law. The textbook also discusses the issues of the financial market and banking law. Financial law is an extremely dynamic field. In recent years, tax administration, EU customs law, and, to some extent, tax law have been subject to far-reaching changes. Moreover, further amendments to financial law and future developments in financial law textbooks are to be expected. The authors share the view that too many and too frequent changes in financial law negatively affect its stabilization and effectiveness.

The authors have also observed numerous relationships and connections between financial law and other areas of law, including constitutional, administrative, economic, civil, penal and international public law. They express this insight in many parts of the current textbook. Financial law is a subject taught as part of degrees in law, administration, and economics. It constitutes an important aspect of the process of educating people intending to work, especially, in law enforcement agencies, public administration, legal corporations, and business entities. This textbook is addressed to students in these fields of study. In addition, it can be used by PhD students, postgraduate students, and students of any degrees which include the subject of financial law and public finance or aspects of those.

Professor Andrzej Drwiłło

June 25, 2019

Chapter 1

General Characteristics of Finance and Financial Law

The essence of financial phenomena

To explain the essence of financial phenomena of a public nature, one must refer to the concept of finance. In the broadest of terms, finances (financial phenomena) are monetary phenomena and processes that occur in the course of commercial and social processes. It is worth noting the close relationship between finance and money in the sense that every financial phenomenon is a monetary phenomenon. Financial phenomena are an important element of monetary-type phenomena. However, they are not the sole component since monetary phenomena include those that involve cash flow between specific entities and those that are an expression of a static approach to money. The first category of monetary phenomena has come to be known under the term "financial phenomena," and they constitute an important and central part of monetary phenomena. The static approach to monetary phenomena, on the other hand, represents the occurrence of money as a measure of the inputs and effects of production processes and a measure of collective and individual consumption processes. The prices of goods and services are an example of such a measure. The setting of the prices of these goods and services is a static approach to money. These types of activities are classified exclusively as monetary phenomena. These are not financial phenomena.

Money is simultaneously a legal and an economic category. [Marecki, 2008, p. 14; Cyman, 2015, p. 282] From a legal standpoint, money is a means of payment. It allows for the fulfillment of financial obligations of various kinds. It should be noted that among public and private obligations, monetary obligations are an extremely important category. An example of such obligations are those associated with trade in goods.

A characteristic phenomenon is the occurrence of money in various forms. In general, the commonly accepted classification distinguishes two forms: cash and non-cash. Cash money is paper money. Its value is unrelated to the value of the material it is made from. It is given a "set exchange rate," i.e., a nominal value displayed on a specific currency mark. Token money, i.e., coins minted from base metals, represents another form of cash money. Cash money exists exclusively in material form. Non-cash money, referred to also as bank money or scriptural money, exists in the form of funds deposited in a bank account. The transformation of cash money into non-cash money is very distinctive. It occurs in the form of a transfer of cash to a bank. As a result of this transfer, the bank registers this transfer in a bank account. On the other hand, the withdrawal of funds from a bank account in the form of cash denotes the transformation of non-cash money into cash money. Another form of money that is currently becoming widely used is electronic money, which is encoded on a magnetic strip card. It has the form of electronic impulses. It can be converted into cash money at ATMs or can be used for non-cash transactions.

Money is not only a universal means of payment, but it is also an intermediary in the exchange of one good for another and a means for the storage of value. Trading in goods (commodities) takes place with the significant involvement of money. It is an intermediary good in this process. Money is a type of payment in the course of acquiring a specific good (commodity) or using certain services. The disposal of certain goods (commodities) and providing services are also connected with the involvement of money. The role of money in these transactions reduces the costs of these constantly occurring operations. Money also functions as an instrument for storing value. There is no perfect good that can be used for the storage of material value. In general, the storage of value occurs in the form of the collection of valuable property, for example, real estate, gold, or valuable works of art. The storage of value in monetary form is characterized by the fact that this type of store is distinguished by the highest degree of liquidity. Money as a store of value gives rise to the phenomenon of saving, which is based on society's trust in the stable value of money (fiat money). An important function of money, which often considered the most important, is the use of money as a measure of the value of goods and services. The advent of money made it possible to estimate the value of goods and services and to make a comparison between the values of them. Determining the value of certain goods or services corresponds strictly with the category of price, which is the value of a given good expressed in money.

Financial phenomena consist of the processes of the collection and spending of funds for specific purposes. As mentioned before, this is a dynamic approach to monetary phenomena. Financial phenomena under this definition are divided into two clear categories, namely, public and private financial phenomena. [Kosikowki, Ruśkowski, 2006, p. 20] The significant difference between these categories of financial phenomena comes down to defining the purposes for which they are used. Public financial phenomena are the processes of the collection and spending of funds for public purposes. The collection of funds categorized as public finance results from existing laws. These types of cash flow processes have their source in legal regulations of the highest order (statutes). The spending of public funds is also based on the provisions of existing laws. Private financial phenomena are of a completely different nature; they serve to meet personal needs. The funds of natural persons come from various sources (remuneration for work, retirement plan payments, disability payments, scholarships or stipends, etc.) and are allocated for various purposes relevant to the needs of these people. What should be noted is not only the different nature of these two financial phenomena, but also the interrelations between them. No definite division between these categories of financial phenomena exists. It is necessary to note the cash flow from the public finance sector to the private finance sector and the cash flow in the opposite direction. These are fields that fall into the category of communicating vessels.

Financial phenomena are the effect of the activities of certain entities in the sphere of the collection and spending of funds. In short, these are financial activities. The term financial management is present in existing financial law and in literature. [Brzeziński, Dębowska-Romanowska, Kalinowski, Wójtowicz, 2000, p. 4] Using the concept of financial management requires further clarification, especially since in financial law literature authors use the terms finance, financial management, and financial activity interchangeably. Financial management is an economic term derived from the action of managing. The sense of economy or management in an economic setting is completely different than management in the sphere of finance. Economic activity consists of commercial activities of various kinds (manufacturing, construction, commercial activities, services, and others), which as a rule are calculated for profit. Economic activity is carried out by traders or other authorized entities. Financial activities do not belong to this category of activities, since they are associated with various processes of the collection and spending of funds in the absence of the premise of making a profit. Other criteria are involved in the process of the collection and spending of funds for public purposes. With regard to the sphere of collecting funds, it is essential that they are acquired without devastating the source of their origin, while the process of spending should be guided by the principle that counteracts wasting public funds.

Financial activity in relation to the public sphere focuses on satisfying public needs. [Drwiłło, ed., 2014, p. 24] It should be noted that these aims cannot be achieved through a policy of maximum effects with minimal expenditures. This would be a serious error. Recommendations for the implementation of such policy are sometimes found in statements written by lawyers and even economists. Financial activity should rely on the policy of achieving maximum effects within the scope of satisfying public needs with given expenditures, or the principle of achieving certain effects with minimal expenditure. Financial activity should rely on the ability to economize costs since this is an important tool for achieving public effects.

A characteristic phenomenon recognized on the basis of applicable financial law is the use, to a certain extent, of the science of management in the process of the collection and spending of funds. In the simplest terms, management is a certain way of organizing and managing a particular type of activity. Management includes activities that are undertaken with the intention of creating, controlling, and adapting the rules of conduct, such as standards, plans, and instructions, of a specific organizational unit for the purposes it pursues. Under current regulations, the Minister of Finance is required to develop a four-year strategy for managing State Treasury debt and budget surpluses of European funds. The Minister of Finance takes legal and factual actions aimed at obtaining funds for financing the so-called borrowing needs of the state treasury and needs associated with servicing State Treasury debt obligations resulting from the issue of securities, as well as from the loans and credits it has taken out. The powers of the Minister of Finance also apply to the management of liabilities and financial assets. His/her activities in this area are aimed at changing the structure of the State Treasury debt in order to increase the financial security of the state and reduce the risk and costs of servicing state debt.

The field of financial law is not a hermetic science; on the contrary, it is related to a certain extent to other areas of law, particularly constitutional, administrative, and criminal law. [Ostrowski, 1970, p. 19 *et seq*.] One must also recognize the infiltration of other sciences, particularly of management and economics, into financial law. The science of economics is becoming more widely utilized based on existing financial law. [Gaudemet, Molinier, 2000, pp. 17–18] This is manifest in the introduction of economic concepts into financial law regulations, although sometimes these concepts have different meanings, and in the application of mathematical formulas in the provisions of existing laws. These types of trends result, *inter alia*, from the participation of representatives of various sciences in the process of formulating the drafts of financial legislation.

In order to present the essence of financial phenomena, it is also necessary to highlight the main objective that is pursued in the process of the collection and spending of funds. As is widely know, collecting funds serves to satisfy public needs. No other valid premise for collecting these funds exists. Public needs always refer to certain communities (society, municipal communities, regional communities). Funds for satisfying the needs of a given community are collected from various entities (natural persons, legal persons, entities without legal personality) in the form of taxes, duties, fees, and contributions. This is how funds are redistributed resulting in the depletion of funds of certain entities, which, in turn, limits the possibility of satisfying individual needs and creates opportunities to meet public needs such as national defense, public order, and internal security, public administration, environmental protection, health care, etc. Society notices to a greater degree the role of public needs in the event of real danger or the loss of a certain good. Under such circumstances, citizens are more willing to bear greater financial and material burdens. The occurrence of public needs is objective in nature, and they exist in every state and require limiting the satisfaction of individual needs.

The functions of public finance

Financial phenomena of a public nature are phenomena that largely relate to the relationship between the movement of funds and the turnover of tangible assets. The movement of funds is related to a great degree to the trade in goods, because goods satisfy people's material needs. Although these financial phenomena play an important role, they are not the sole phenomena to occur. Depending on the relationship between the movement of funds and the movement of tangible assets, financial phenomena can be divided into the following categories:

1. primary financial phenomena in which the movement of funds corresponds to the movement of tangible assets (for example contracts for the purchase and sale of goods);

2. secondary financial phenomena, in which only cash flow occurs (for example subsidies, grants, taxes, duties);
3. emission-related financial phenomena, meaning the creation of money by the central bank.

In order to understand the essence of financial phenomena, one must also refer to the functions that these phenomena perform. In general, the term "function" should be understood as a task carried out by a specific entity. The performance of specific tasks requires the use of appropriate instruments (tools). Funds are a sui generis instrument used in the process of implementing public needs. It is an intermediary instrument facilitating the fulfillment of such tasks. The general objective of the collection and spending of funds, i.e., the movement of these funds, is the fulfillment of public needs, where these funds act as an intermediary in the process of satisfying given needs. This is the most important, fundamental premise for the accumulation of funds and their use for public purposes.

The fiscal function of public finance

The fiscal function is strictly related to the essence of financial phenomena, or more strictly to an important sphere of these phenomena, i.e., the collection of funds. The fiscal function should be understood as the activities of authorized bodies to provide the state with the necessary income to carry out its functions and tasks. The fiscal function under this definition is, in part, a significant element of financial phenomena. However, it would be unjustified to mark as equal the fiscal function and the essence of public finance since public finance includes not only the sphere of the collection of funds, but also their spending.

In connection with the deliberations on the fiscal function of public finance, some significance should be attributed to the phenomenon of fiscalism, which is not always appreciated. In the process of the collection and spending of funds for public purposes, actions are taken both in the areas of creating and applying financial law. An essential requirement of these activities is their effectiveness. One of the phenomena that occurs in the process of the collection of funds for public purposes is the phenomenon of fiscalism. It is a natural phenomenon occurring in these types of processes. It cannot be viewed exclusively in a positive light. Sometimes excessive fiscalism may occur, that is, the use of legal instruments and solutions that are intended to charge excessive imposts for state needs. Fiscalism may also be expressed in the charging of excessively high public levies (taxes, duties, fees). It is not easy to predict the financial outcomes of these types of financial phenomena. They do not always produce the desired effects. Sometimes, instead of increasing public revenue, they may lead to its reduction, and as a result weaken the state of public finance.

The redistributive function of public finance

The redistributive function of public finance is viewed as a basic function of this sphere of public activity. It should be strictly associated with the essence of financial phenomena. Certain assets created in the economic sphere are acquired with money, which is also used in the procurement of these assets (goods and services). The collection and spending of funds results in the purposeful acquisition of these funds and the financing of public tasks, that is, the secondary division of the gross domestic product. Money is also used in the transfer of tangible assets from the productive sphere to the non-productive sphere. These types of processes are referred to as "redistribution," which is one of the most distinctive features of public finance. The redistributive (divisional) function amounts to the imperious acquisition of funds from some entities (natural persons, legal persons, and entities with no legal personality), and then the transfer of these funds to other entities or to the same entities, but within a different structure. [Komar, 1994, p. 60; Ostaszewski, 2007, p. 21] The procedure of the acquisition of funds is largely non-refundable and free of charge. To some extent, it operates on the principles of maneuverability (state loans) and remuneration.

The stimulatory function of public finance

Public finance is also credited with a stimulatory function. The essence of this function amounts to influencing the attitudes of entities (natural persons, legal persons, and organizational units with no legal personality) which are affected by financial phenomena, or more strictly speaking, legal and financial instruments. Stimulatory influence on the grounds of public finance relies on the use of financial instruments, especially those such as taxes, fees, duties, subsidies, subventions, and loans which are tools for indirectly influencing financial actors. Stimulatory influence should be associated not just with the whole of the processes of the collection and spending of funds for public purposes, but rather directly with the appropriately constructed financial instruments used in practice, i.e. tax exemptions and reductions, or similar solutions with regard to duties. The construction of legal and financial instruments may encourage or discourage actions taken by entities to which these instruments are addressed. For example, high tax rates may be an important reason for a taxpayer subject to this type of tax rate to limit or stop his/her activity. Because financial and legal instruments are only an expression of indirect influence on financial actors, their application does not always produce the desired results. Financial actors are guided by many factors when making decisions regarding their own activities.

The characteristics and scope of financial law

The collection and spending of funds for public purposes is regulated by the provisions of existing laws. The term “existing laws” is used to signify all the legal regulations concerning the said processes. There are two basic elements in legal and financial relations:

1. the object of legal and financial relations,
2. the subject of legal and financial relations.

The object of legal and financial relations should be associated with the essence of public finance, that is, the collection and spending of funds for public purposes. All instances of the collection and spending of monetary funds are regulated by the provisions of financial law.

Legal and financial relations include active subjects and passive subjects. Active subjects in legal and financial relations are authorized bodies that represent the state (for example, the Minister of Finance). The rights and obligations (competence) of active subjects and passive subjects determine the nature and scope of financial law. This area of law is considered a part of public law. In legal and financial relations, one of the parties consists of subjects representing the state (active subjects) and which utilize discretionary financial power, while the other consists of other (passive) subjects that do not possess such an attribute. Active subjects in legal and financial relations perform specific functions and tasks in public financial activity. As a result, they usually operate in the form of public administrative bodies, with a special role played by revenue administration bodies. They consist of subjects and organizational units operating on behalf of the state and local self-government. A characteristic feature of legal and financial relations is the non-equivalence of the parties to these relations. It is accepted that this non-equivalence of the parties is one of the most distinctive features of legal and financial relations.

The scope of financial law is another significant issue. The scope of financial law can be appropriately approached in two ways: broadly and narrowly. [Wójtowicz, ed., Gorgol, Kuś, Niezgoda, Smoleń, 2005, pp. 22–23] In the broad sense, financial law is a separate branch of law which incorporates the law of the monetary system, budget law, tax law, customs law, public banking law, foreign exchange law, and social security law. It is therefore worth asking, what is the connection between these two fields? There are two elements that merge these fields, the first being the financial nature of these branches of law, the second, the implementation of public purposes. Financial law is not entirely detached from the other branches of law. It is permanently linked

The series Law: The Basic Concepts has been developed to meet the needs of English-speaking students of law, administration and business. In it academic staff of the Faculty of Law and Administration at the University of Gdańsk present fundamental concepts connected with three central perspectives on legal studies: the dogmatic, the historical, and the theoretical-philosophical. The editors of the series hope that the texts in the series will be an inspiration to further and deeper study of various aspects of law.

This book is the first to offer readers a comprehensive and scholarly presentation in English of all the basic notions and instruments known in Polish financial law. The authors are all academics and have experience in practising law. They lead the reader from a general introduction to financial law, the monetary system, and the structure of the administrative system in Poland through more detailed topics e.g. banking, customs, tax, and budgetary issues to discussions of public funds and local government finance. It should be a valuable source of knowledge for academics and jurists, businesspersons, or anyone interested in contemporary financial law in Poland.

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