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STATUTORY JUSTIFICATIONS OF TORTS IN THE PUBLIC FINANCE DISCIPLINE INTRODUCED BY THE PROVISIONS OF ANTI-CRIRIS SHIELD – ANALYSIS AND *DE LEGA FERENDA* POSTULATES

Abstract

The statutory concept of justification in public finance discipline comes down to clear exclusion of unlawfulness of discipline's tort. It is assumed that the reason for the existence of justification of torts is a collision of interests and resulting from it, the necessity to indicate the interest excluding unlawfulness, and later waiving liability for breaching law. Justification behavior refers to actions which in typical situations are incorrect and unwanted, but because of special circumstances may constitute justification and hence need to be tolerated, accepted or even approved in the legal order. Regulations shaping the new premises excluding liability for breaching public finance discipline in connection with COVID-19 are included in legal regulations included in so called Anti-Crisis Shield. The aim of the study is to analyze the established legal solutions and to formulate de lege ferenda postulates.

Keywords: public finance discipline, justification, COVID-19.

JEL Classification: K13

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1. Introduction

Specificity of the liability regime for breaching public finance discipline is determined by the subject of protection, which is a widely understood public finance management. A special character of liability for breaching public finance discipline is also proved by the existence of a special mode of asserting claims, including investigation led by the Disciplinary Proceedings Representative, proceedings before the adjudication committee and appeal proceedings before the Chief Commission Issuing Decisions in Cases related to Violation of Public Finance Discipline. Because of its regulatory shape, the liability is qualified in literature as a type of administrative liability of sanction character. The nature of liability for violating public finance discipline is also sometimes referred to in the literature as "hybrid" or "mixed" [Lipiec-Warzecha 2008: 19-20; Ostrowska 2015: 421; Miemiec 2010: 377]. It results from a number of premises differentiating this type of liability from constitutional liability characteristic for private legislation. Apart from the subject of protection and the character of the prosecuting and adjudication authorities, they include also the control of the administrative court over the final decisions of the appealing authority [Kryczko 2004: 413].

The act of 17th December 2004 on liability for breaching public finance discipline Act (hereinafter referred to as p.f.d.a.) includes a number of regulations excluding or limiting liability for breaching public finance discipline. Among them it is worth mentioning circumstances excluding holding someone liable for breaching public finance discipline, circumstances excluding the fault of the charged, circumstances excluding convictions for breaching public finance discipline and finally, circumstances excluding unlawfulness of breaching public finance discipline, so called justifications.

The idea of justification in public finance discipline comes down to exclusion of unlawfulness of discipline's tort. Similarly, on the grounds of criminal law, justification is not autonomous, and it functions in connection with certain types of torts of public finance discipline. It is also assumed that the reason for the existence of justification of torts is a collision of interests and resulting from it, the necessity to indicate the interest excluding unlawfulness, and later waiving liability for breaching law. Justification behavior refers to actions which in typical situations are incorrect and unwanted, but because of special circumstances may constitute justification and hence need to be tolerated, accepted or even approved in the legal order [Bojkowski 2015: 31].

Among justifications existing on the grounds of breaching public finance discipline, as an example, can be shown only unlawfulness connected with unimportance of financial results

of the tort of public finance discipline and settlement concerning the receivable in question [Talik 2015: 53; Miemiec 2010: 382].

In the first case, public finance discipline is not breached if a certain action or omission concerns financial means in the amount not exceeding a minimum amount - happening once, or in case of more than one action or omission, together in a budget year [art. 26 sections 1 and 2 of the p.f.d.a.]. A minimum amount is an amount of an average monthly salary in the national economy in the previous year, announced by the President of the Central Statistical Office [art. 5 section 7 of the act of 4th March 1994 on the Company Social Benefits Fund].

While the tort referring to the settlement indicates that failure to establish, failure to pursuit or failure to collect the receivables of the State Treasury, regional authority or other unit of the public finance sector as well as not compliant with regulations authorization of relief in payment are not a breach of public finance discipline if they are the results of settlements. Pursuant to public finance act [art. 54a section 1 of the p.f.d.a.], a unit of public finance sector may enter a settlement concerning the dispute on civil law debt in case the assessment is done and it shows that that the results of the settlement are appropriately for the unit or the State Treasury more beneficial than the possible results of court or arbitral proceedings [Salachna 2020: 108]. Moreover, payment from public means or making a commitment as well as change of commitment based on such a settlement are not a breach [art. 11 section 2; art. 15 section 2 of the p.f.d.a.]

Regulations shaping the premises excluding liability for breaching public finance discipline in connection with COVID-19 are included in legal regulations included in so called Anti-Crisis Shield, i.e. the act of 2nd March 2020 on specific solutions connected with the prevention, counteraction and eradication of COVID-19, other infectious diseases and crisis situations caused by them (hereinafter referred to as covid.a) and in the act of 16th April 2020 on special support instruments in connection with the spread of the SARS-CoV-2 virus (hereinafter referred to as sars.a) and the act of 3rd April 2020 on special solutions supporting realization of operational programs in connection with the appearance of COVID- 19 (hereinafter referred to as o.p.a.).

2. Justifications in Public Procurements

2.1. Failure to Establish or Failure to Pursuit the Receivables from a Party of a Public Procurement Contract

Covid.a constitutes a justification of a tort in public finances, which is a failure to establish or a failure to pursuit from a party of a public procurement contract the receivables which appeared

as a result of non-execution or inadequate execution of the public procurement contract resulting from circumstances connected with the occurring of COVID-19:

> *Art. 15s. Public finance discipline as described in art. 5 section 1 item 1 and 2 and art. 17 section 6 of the act of 17th December 2004 on the liability for breaching public finance discipline (Dz.U. /J. of L./ of 2019 items 1440, 1495, 2020 and 2473 and of 2020 item 284) is not infringed by:*
>
> *1) a failure to establish or a failure to pursuit from the party of a contract as described in art. 15r section 1, receivables which appeared as a result of non-execution or inadequate execution of the public procurement contract resulting from circumstances connected with the occurring of COVID-19, as described in art 15 section 1. (…).*

Types of actions, which the introduced exclusion refers to, cover a number of actions. They include a failure to establish receivables of the National Treasury, regional government or other unit of public finance sector, or a failure to determine such receivables in the amount lower than the one resulting from a correct calculation, as well as a failure to collect or a failure to pursue such receivables or collection and pursuing them in the amount lower than the one resulting from a correct calculation.

Indicated justifications of public finances sector do not apply only to public procurement. However, the tort applies only to actions connected with receivables occurring as a result of a non-execution or inadequate execution of a public procurement contract.

The circumstances which may lead to the appearance of receivables in connection with a non-execution or inadequate execution of a public procurement contract, and which may be a justification, are not precisely described. The question of receivables in public procurement is, however, most often connected with contractual penalties for an inadequate execution of the contract by a contractor. The National Treasury, regional authority and other units of the public finance sector are entitled to the rights resulting from it. Simultaneously, the entitlement is connected with the obligation to establish and pursue receivables resulting from the regulations included in the act on public finance. Pursuant to the act of 27th August 2009 on public finance [art. 42 sections 5 and 6], the units of the public finance sector are obliged to establish the receivables owned to them, including those of civil law character, as well as to undertake timely actions towards the obliged concerning the execution of the obligation. The units may waive the undertaking of the actions concerning the execution of the obligation if there are reasons to waive the undertaking of the actions aiming at using enforcement procedures by the units,

in accordance with the regulations on administrative enforcement procedures. In the law case on the range of liability for the breach of public finance discipline it is stated, among others, that ”(…) contractual penalty receivables are receivables as described in art. 5 of the p.f.d.a. [Ruling of the Regional Committee of 27th November 2007], and the execution order” is based not only on the principle of diligence in managing public finance, but also on the principle of legality in managing it [Ruling of the Chief Committee of 21st April 2008].

In the range of the characteristics of justification, the regulation refers us to art. 15r section 1 of the covid.a, which, first of all, describes the obligation of the contract parties to inform one another about such circumstances. Additionally, the article states that a contract party referring to the circumstances connected with the occurring of COVID-19 is obliged to present statements and documents confirming such an influence and enumerates exemplary circumstances which can be shown in such documentation. They include the absence of the employees or workers with other than employment contracts, who participate or could participate in the realization of the procurement; decisions issued by the Chief Sanitary Inspector or by the State Regional Sanitary Inspector acting under the Chief Inspector's authority, in connection with COVID-19 prevention, obliging the contractor to undertake certain preventive and control actions; ceasing products, product components and material deliveries; difficulties in the access to the equipment or difficulties in realization of shipment services as well as other circumstances which prevent or to a vital degree limit the possibility of performing the contract. Art. 15r section 1 item 3) talks also about the circumstances such as the decisions issued by governors, the minister of Health or the Prime Minister connected with COVID-19 prevention as mentioned in art. 11 sections 1-3 of the act. However, because of the revocation of art. 11, the indication needs to be deemed otiose.

The structure of justification unfortunately refers to a narrow range of actions, i.e. *a failure to establish or a failure to pursue the receivables*. Meanwhile, typified justifications of public finance discipline included in art. 5 section 1 item 1 and 2 of the p.f.d.a, which the justification refers to, include also a failure to collect receivables as well as establishing, pursuing or collecting receivables in the amount lower than resulting from a correct calculation. The lack of correspondence between the content or the regulation excluding unlawfulness and the catalogue of breaches, to which it refers the reader, does not have a convincing explanation and may be a source of vital interpretation discrepancies in the practice of executing the regulation.

Analysis of the characteristics of the discussed justification forces us to notice a problem of the personal scope of its application. The overall regulation seems to show *prima facie* that it is connected only with the exclusion of unlawfulness of the actions of people representing

contracting authorities which are the units of the public finance sector. The mentioned above list of the examples of circumstances ,which may influence the appropriate execution of the public procurement contract by one of the contract parties – the contractor, seems to show it clearly. While pursuant to a clear wording of the regulation, the circumstances may also concern subcontractors and further subcontractors.

Meanwhile, the legislator in art. 15s of the covid.a *in principio* uses the term "contract parties". Hence the indication that it is possible to refer to events in which the creditor of the receivables for the improper contract execution is not only a contracting entity but also a contractor. Such a situation may take place, for example, in case of statutory punishments, which the contracting party is obliged to pay.

It is a substantial statement from the perspective of the liability for breaching finance discipline. It needs to be noted that the contractor of public procurement may also be a unit of the public finance sector which – as shown above – is obliged to establish and pursue the due receivables [Guziński 2018: 287-290].

It needs to be emphasized how important from the practical point of view of liability for breaching finance discipline is the problem of legal effects of a failure to establish or a failure to pursue the receivables. Even in case of exclusion of the unlawfulness of a failure to establish or a failure to pursue the receivables as a result of inadequate execution of a public procurement contract resulting from circumstances connected with the occurring of COVID-19, the non-established and non-pursued receivables stay receivables until the obligation they result from expires. However, the expiry of the obligation requires additional legal events such as, for example, remission of the receivables, which means releasing the debtor from the debt. It is important to notice that the discussed justification is connected with a failure to establish or to pursue the receivables, however, it does not concern redemption, deferral or dividing into instalments the receivables resulting from an inadequate execution of a public procurement contract. The justification of the government project does not include any explanations of the accepted legislative solution. Meanwhile, the breaching of public finance discipline is also incompatible with the regulations concerning redemption, deferral, dividing into instalments or allowing limitation of the receivables for the State Treasury, regional authorities and other units of the public finance sector [art. 5 section. 1 item 3 of the p.f.d.a.] (The issue of allowing limitation in repayment of civil legal receivables is regulated by the act on public finance) [art. 55–59a of the p.f.d.a.]. It shows that the assessment of the correctness of the provided relief in the repayment of the receivables for non-execution or inadequate execution of a public procurement contract, including the redemption of such receivables and possible application of

justification will be based on the regulations included in the p.f.d.a, not connected with the Antic-Crisis Shield.

As a consequence, it means that the failure to establish or pursue the receivables under justification, if not additionally connected with the redemption, will not expire the receivables, which might have to be executed after the cessation of the causes connected with COVID-19 under pain of liability for the breaching of public finance discipline.

Taking into considerations the comments above, it would be necessary to postulate the following wording of the discussed regulation:

> *Art. 15s. Public finance discipline as described in art. 5 section 1 and art. 17 section 6 of the act of 17th December 2004 on the liability for breaching public finance discipline (Dz.U. /J. of L./ of 2019 items 1440, 1495, 2020 and 2473 and of 2020 item 284) is not infringed by:*
>
> *1) an action or omission concerning receivables resulting from a non-execution or inadequate execution of a public procurement contract as a result of circumstances connected with the occurring of COVID-19, as described in art 15 section 1. (...).*

2.2.Change of Public Procurement Contract

Regulations of the Anti-Crisis Shield introduce justification of a tort in discipline. According to it, pursuant to art. 15r section 4, a change of a public procurement contract is not a breach:

> *Art. 15s. Public finance discipline as described in art. 5 section 1 item 1 and 2 and art. 17 section 6 of the act of 17th December 2004 on the liability for breaching public finance discipline (Dz.U. /J. of L./ of 2019 items 1440, 1495, 2020 and 2473 and of 2020 item 284) is not infringed by:*
>
> *(...).*
>
> *2) a change of public procurement contract pursuant to art. 15r section 4.*

The introduced justification concerns a tort in public finance discipline, which is a change of a public procurement contract, social services and other specific services contract or a framework contract breaching the regulations on public procurement [art. 17 section 6 of the p.f.d.a.]. The subject matter of the protection here is durability of the contract conditions described by a contracting entity in the public procurement procedure. Their free change in the course of the implementation of the contract would undermine conducting a procedure ended with choosing

a contractor. This way it would breach the principle of equal treatment and transparency of the public procurement procedure [C-152/17; C-91/08].

Hence the act of 11th September 2019 Public Procurement Law (hereinafter referred to as p.p.l.) describes a general ban, according to which a change of the already signed contract requires a new public procurement procedure [art. 454 section 1]. As an exception, the change of a contract without a new public procurement procedure is acceptable in situations described in the act. Among them, there are changes foreseen in a procurement announcement or documents, in a form of clear, precise and explicit provisions of the agreement [art. 455 section 1 item 1] or changes, whose summed value is lower than the EU procurement thresholds and is lower than 10% of the value of the initial contract in case of services and delivery contracts, or lower than 15% in case of construction works, and the changes do not cause a change in a general character of the contract [art. 455 section 2].

It needs to be emphasized that the presented here justification refers only to a change in a public procurement contract, not a change in a frame contract or social services or other special services contract. It also does not exclude the unlawfulness of the breaching of public finance where there is a change of a concession contract breaching the regulations on the concession contract for construction works and services [art. 17a section 4 of the p.f.d.a.].

The regulations, which the justification refers to, simultaneously includes an authorization and obligation for the contracting party to make a change in a public procurement contract in agreement with a contractor. It concerns a situation when the contracting party concludes that the circumstances connected with the occurring of COVID-19 influence a proper contract execution. The regulation additionally indicates a legal basis of the conducted contract change [art. 455 section 1 item 4) of the p.p.l.]. Pursuant to it, the necessity of a change in a public procurement contract is justified by circumstances which a contracting party, acting with due diligence, could not foresee, if the change does not modify a general character of the contract and the price increase caused by each subsequent change does not exceed 50% of the value of the initial contract. The change may especially refer to the change of a date of a completion of a contract or its part, or a temporary suspension of an execution of a contract or its part, change in a form of delivery, services or construction works or a change in the range of the contractor's services and appropriate change of remuneration or a manner of accounting of the contractor. The justification approach reproduces the restriction included in art. 455 section 1 item 4) of the p.p.l., pursuant to which the increase of the remuneration caused by each subsequent change may not exceed 50% of the value of the initial contract.

The obligation of a contracting party to change the public procurement contract in case of circumstances as described in the discussed regulation is questionable as a contract change is a bilateral action, which means it requires an agreement of the other party – in this case a public procurement contractor. It is also difficult to assume that art. 15r section 4 of the covid.a imposes an obligation of the contract change both on a contracting party and a contractor. Such a view is opposed mainly by the provision itself, which clearly addresses a contracting party. Hence it seems that the range of the application of 15r section 4 of the covid.a needs to be referred to actual circumstances, in which a contractor is interested in a public procurement contract change, and as a result, a contracting entity is obliged to change it on the conditions agreed on with the contractor.

It also needs to be noted that the exclusion of the unlawfulness of the tort of a contract change does not refer to a situation described in another provision, i.e. art. 15r section 4a of the covid.a, in which a contracting party decides that the circumstances connected with the occurring of COVID-19 only may (but not have to) influence the adequate execution of the contract. In such a case, an ordering entity is entitled, but not obliged, to change the contract. However, the circumstance is not an *ex lege* element excluding the unlawfulness of the act of breaching public finance discipline. This differentiation should be deemed unjustifiable. Apart from the doubtful differentiation between circumstances obliging and just entitling to a contract change, conducting it in accordance with the requirements as described in the covid.a should in each case constitute the exclusion of the unlawfulness of the breach of public finance discipline. Taking into considerations the comments above, it would be necessary to postulate the following change in the analyzed approach to the justification:

> *Art. 15s. Public finance discipline as described in art. 5 section 1 item 1 and 2 and art. 17 section 6 of the act of 17th December 2004 on the liability for breaching public finance discipline (Dz.U. /J. of L./ of 2019 items 1440, 1495, 2020 and 2473 and of 2020 item 284) is not infringed by:*
>
> *(…).*
>
> *2) a change in a public procurement contract in accordance with art. 15r section 4 and section 4a.*

3. Justifications in the Range of Public Benefit Activity

Another area for which the Anti-Crisis Shield introduced justification of the torts in public finance discipline is public benefit activity. In accordance to the content of the act of 24th April 2003 on public benefit activity and volunteering (hereinafter referred to as p.b.a.v.a), public

benefit activity is a socially useful activity led by non-governmental organizations in the area of public tasks as described in the act [art. 3 section 1 p.b.a.v.a.].

The Anti-Crisis Shield introduces three exclusions of unlawfulness. The first one is connected with a failure to establish or a failure to pursue receivables, the second with the contract change and the third concerning the waiver of recovering receivables.

3.1.Failure to Establish or Failure to Pursue Receivables

In accordance with the provisions of the covid.a, there is no breach of public finance discipline in case of failure to establish or failure to pursue the receivables from a non-governmental organization or an entity which may conduct public benefit entity if the receivables resulted from a non-execution or inadequate execution of a public procurement contract or a contract concerning supporting the realization of public procurement:

> *Art. 15zzzzzc: Public finance discipline as described in art. 5 section 1 items 1 and 2, art. 8 items 2 and 3 and art. 9 items 2 and 3 of the act of 17th December 2004 is not infringed by:*
>
> *1) a failure to establish or a failure to pursue receivables from a non-governmental organization or an entity as described in art. 3 section 3 of the act of 24th April 2003 on public benefit activity and volunteering, which appeared as a result of non-execution or an inadequate execution of a contract as described in art. 15zzzzzb section 1 (…).*

It is worth reminding here that a supporting realization of public procurement or public procurement realization contracts are signed between a public administration authority and a non-governmental organization. It creates for a non-governmental organization a liability for the execution of a public procurement in the range and in accordance with regulations described in the contract, appropriately concerning supporting the realization of a public procurement or realization of a public procurement. On the other hand, the public administration authority is obliged by the contract to transfer the subsidy for the realization of the task [art. 16 section 1 of the p.f.d.a.]. The contract describes, among others, a detailed description of the task, including the objective for which the subsidy is given and the date of the execution; the subsidy amount, a method of settlement and the time of the repayment of the part of the subsidy which has not been used [art. 151 section 2, art. 221 section 3 of the p.f.d.a.]. At the same time, the p.b.a.v.a includes a statutory delegation for the President of the

Public Interest Committee to state, among others, a frame models of contracts on realization or entrusting realization of a public procurement [art. 19 of the p.b.a.v.a.].

A statutory justification indicates receivables appearing in connection with a failure to execute or inadequate execution of concluded by means of competition contracts for the support of the realization of a public task or entrusting realization of a public task, as well as contracts on realization of public tasks, including the realization of a public task of a local or regional character concluded without competition [art. 11a-11c, art. 19a of the p.f.d.a.].

Similarly to public procurement contracts, the discussed regulation refers us to the regulation describing the obligation of the contract parties to inform one another about the influence of circumstances resulting from the occurring of COVID-19 on the adequate execution of the contract, provided such an influence has appeared or may appear, to confirm the circumstances with appropriate documents and showing examples of circumstances influencing the execution of the contract.

Unfortunately, both the range of the application of justification connected with a failure to establish or a failure to pursue the receivables, and the content of the p.b.a.v.a. itself do not allow to precisely indicate a form of dependences which may appear in connection with a non-execution or inadequate execution of a contract by a non-government organization. Hence, it is necessary to apply a wide understanding of the notion. A justification may refer both non-tax budget receivables of a public legal character, and budget civil legal receivables. An example of the former is an amount of a subsidy repaid by a non-governmental organization because it has not been used or has been used inadequately. An example of civil legal receivables is a statutory punishment resulting from a non-execution or inadequate execution of a contract by a non-governmental organization.

It needs to be noticed that in practice of contracts on entrusting or supporting public tasks statutory punishments are not applied for a non-execution or inadequate execution of contracts by non-governmental organization. There are no records on statutory punishments also in frame contract models on realization or entrusting realization of a public task described by the President of the Public Interest Committee. The use of the received subsidy contrary to its purpose, as well as undue received subsidy in excessive amount are connected mainly with the necessity of the repayment including interest calculated as in case of arrears of taxes as described in the regulations of the act on public finance [art. 169 section 1; art. 252 section 1 of the p.f.d.a.]. Hence, a reference to art. 5 section 1 items 1 and 2 of the p.f.d.a. in the regulation establishing the justification seems unjustifiable.

A formulated above in connection with the issue of public procurement, remark must be repeated concerning the lack of correspondence between actions indicated in a justification and typified torts, which it refers to. The exclusion concerns a failure to establish and a failure to pursue receivables, while the torts of discipline, which it concerns, has the exclusion of unlawfulness connected also with lack of a timely approval of a presented accounting of the subsidy (art. 8 item 2 of the p.f.d.a.); lack of timely accounting of the subsidy (art. 9 item 2 of the p.f.d.a.) and the lack of timely repayment of the subsidy in the due amount (art. 9 item 3).

Taking the above into consideration, the following wording of the regulation should be suggested:

> *Art. 15zzzzzc: Public finance discipline as described in art. 9 items 3 of the act of 17th December 2004 on the liability of breaching public finance discipline is not infringed by:*
>
> *1) A failure to establish from a non-government organization or an entity as described in art. 3 section 3 of the act of 24th April 2003 on public benefit activity and volunteering an amount of a subsidy which needs to be returned to the budget as not used in connection with a failure to execute or inadequate execution of a contract, as described in art. 15zzzzzb section 1 (...).*

3.2.Contract Change

Regulations specify the exclusion of unlawfulness in the range of a change in a contract on the support in realization of a public task or entrusting realization of a public task. Pursuant to art. 15zzzzzb section 2 of the covid.a, parties of the contract, having agreed that the circumstances connected with the occurring of COVID-19 may or influence the adequate execution of the contract, may change the contract, especially by changing the due date of the contract execution or its part, or by a temporary suspension of the execution of the contract or its part, change of the way of executing the contract or its part.

Introduction of the indicated justification to legislation causes concerns of a basic nature. In accordance with the existing provisions of the act on the liability for breaching public finance discipline, a change in a contract concerning entrusting or supporting the realization of a public task by a non-government organization is not a tort in public finance discipline. This way, the introduction of conditions excluding unlawfulness is otiose in this case.

It is possible that the authors of the introduced solution had a practical goal, i.e. the removal of doubts concerning a failure to pursue the receivables from a non-government organization resulting from the change in the contract signed with it. It may only be assumed that the analyzed regulation was supposed to exclude the liability for a failure to establish or a failure to

pursue receivables (art. 5 section 1 items 1 and 2 of the p.f.d.a.), lack of a timely approval of a presented accounting of the subsidy (art. 8 item 2 of the p.f.d.a.), lack of establishing a subsidy amount which needs to be returned to the budget (art. 8 item 3 of the p.f.d.a.), lack of timely accounting of the subsidy (art. 9 item 2 of the p.f.d.a.) and the lack of timely repayment of the subsidy in the due amount (art. 9 item 3) – but caused by a change of a contract with a non-government organization (e.g. postponed date of its execution).

The intention, however, is expressed in an incorrectly formulated regulation which states that a change in a contract concerning entrusting or supporting of a public task realization does not, in some circumstances, constitute a breach of public finance discipline, while such a contract change does not constitute a breach in public finance discipline at all. In connection with the above, it would be advisable to propose to repeal the discussed provision as a whole.

3.3.Waiver of Recovering Receivables

The Anti-Crisis Shield introduced another justification of torts in public finance discipline where a public administration authority waives recovering the receivables from a non-government organization:

> *Art. 15zzzzzc: Public finance discipline as described in art. 5 section 1 items 1 and 2, art. 8 items 2 and 3 and art. 9 items 2 and 3 of the act of 17th December 2004 on the liability for breaching public finance discipline is not infringed by:*
> *(…)*
>
> *3) waiver of recovering receivables, as described in art. 15zzze sections 2-3a, art. 15zzzf and art. 15zzzg section 2.*

The waiver refers to three types of receivables:

- financial receivables of a civil law character owned to the National Treasury for renting, leasing or allowing the usage of a property for a period of the state of epidemiological risk or epidemics [art. 15zzze section 1 of the covid.a.];

- financial receivables of a civil law character attributable to a regional government authority or its organizational units for renting, leasing or allowing the usage of a property for a period of the state of epidemiological risk or epidemics [art. 15zzzg section 1 of the covid.a.];

- financial receivables of a civil law character attributable to a regional government authority or its organizational units in relations to entities whose accounting liquidity worsened as a result of negative economic consequences of COVID-19 [art. 15zzzf of the covid.a.].

The editorial approach to the indicated tort also rises fundamental doubts. It refers to “a waiver of recovering receivables”, while the provision of the p.f.d.a. uses the term ”waiver of receivables” or ”recovering receivables in an amount smaller than resulting from a correct calculation. “ Of course, in practical terms such a discrepancy has no big consequences as exclusion of unlawfulness is connected, in this case, with a waiver of recovering receivables. Hence, taking into consideration remarks made earlier on the grounds of art. 15s. item 1 of the covid.a, a following correction of the provision should be suggested:

> *Art. 15zzzzzc:* Public finance discipline as described in art. 5 section 1 items 1 and 2, art. 8 items 2 and 3 and art. 9 items 2 and 3 of the act of 17th December 2004 on the liability for breaching public finance discipline is not infringed by: *(…)*
>
> *3) action or waiver of recovering receivables, as described in art. 15zzze sections 2-3a, art. 15zzzf and art. 15zzzg section 2.*

4. Justifications in the Range of Managing EU and Foreign Funds

The act on special solutions supporting the realization of operational programs in connection with the occurring of COVID-19 introduced structures of a justification referring to the area of managing EU and foreign funds. According to it, persons, as described in art. 4a of the p.f.d.a., are not liable for breaching public finance discipline, as described in art. 13 of the p.f.d.a., if the breach was directly connected with preventing the negative effects of the occurring of COVID-19, and the persons acted aiming at realizing the project correctly.

> *Art. 30 Liability for breaching public finance discipline, as described in art. 13 of the act of 17th December2004 on liability for breaching public finance discipline (Dz.U. /J. of L./ of 2021 item 289), does not concern persons, as described in art. 4a of the act, if the breach was directly connected with preventing the negative effects of the occurring of COVID-19, and the persons acted aiming at realizing the project correctly.*

The personal scope of the justification refers to only a certain group of people, indicated in art. 4a of the p.f.d.a., i.e. persons acting on behalf of an entity conducting actions connected with the realization of a financial program with the participation of EU or foreign funds; persons obliged to realize a financial project or acting on behalf of an entity obliged to realize a project with the participation of EU or foreign funds.

On the other hand, the material scope of the justification is connected with only one type of breaches of public finance discipline, i.e. the torts concerning actions of the entities granting subsidies connected with the realization of programs or projects financed with the participation of EU or foreign funds, the torts concerning actions of entities mediating in transferring such means from the beneficiaries of the programs and projects as well as actions of the beneficiaries themselves, i.e. entities receiving and using public means. The actions of the former of the indicated entities may include awarding, transferring, settling, fixing the amount to be repaid, recovering the receivables and granting a relief in the repayment of funds connected with the realization of programs and projects financed with the participation of EU or foreign funds. The actions of the latter include transferring the means returned by the beneficiaries. While the actions of beneficiaries may include using, settling or returning of the means connected with the realization of programs and projects financed with the participation of EU or foreign funds.

Exclusion of the unlawfulness described in the analyzed justification is connected with an existence of a direct connection between the breach of discipline and preventing negative effects of the occurring of COVID-19. Moreover, the justification refers to a direct goal of the actions of people breaching discipline, i.e. correct realization of projects.

The introduced justification may be compared to the criteria of a negative procedural condition described in art. 27 of the p.f.d.a. In accordance with it, liability for breaching public finance discipline cannot be held against someone in case of an action or omission undertaken only in order to limit the results of unforeseen circumstance. In both cases, a circumstance influencing the limitation of liability is the motive for actions, i.e. the intention of preventing negative outcomes of certain phenomena. Such an understanding of justification is highly valuable and leaves a wide margin for interpretation. The introduced legal structure relates more to a negative procedural condition – as it is present in case of art. 27 the p.f.d.a. – than to an exclusion of an unlawful act.

The introduced justification additionally needs for the action which breaches public finance discipline to be directed towards a correct realization of the project. However, the requirement seems to be a legislative *superfluum*. It makes the exclusion of an unlawful act impossible in case when it is possible to determine *that the breach was directly connected with a prevention of the negative results of the occurring of COVID-19*, and it is not possible to determine that the goal of such actions was a correct realization of a project. Moreover, in many cases determining a connection between a necessary prevention of the COVID-19 results and a correct realization of a project will be impossible. A clear example here is a situation when a beneficiary does not prepare on time an accounting of the received and used means after the project realization is finished (art. 13 item 7 of the p.f.d.a.).

In connection with the above, the repeal of the discussed provision should be proposed so as to keep the existing justification concerning undertaking actions in order to limit the results of unforeseeable circumstances, or to replace the justification with an exclusion of pursuing the liability for the breach of public finance discipline. In the latter case, the following form should be suggested:

> *Art. 30 Liability for breaching public finance discipline, as described in art. 13 of the act of 17th December 2004 on liability for breaching public finance discipline (Dz.U. /J. of L./ of 2021 item 289), does not take place if the breach was directly connected with the prevention of the negative effects of the occurring of COVID-19.*

5. General Exclusion of Unlawfulness

Pursuant to art. 76 of the sars.a:

> *A crime as described in art. 231 or art. 296 of the act of 6th June 1997 – The Penal Code (Dz.U. /J. of L./ of 2020 items 1444 and 1517), a tort, a disciplinary tort or an act as described in art. 4 section 1 item 4 of the act of 17th December 2004 on the liability for breaching public finance discipline (Dz.U. /J. of L./ of 2021 item 289), is not committed by a person who in the public interest fulfils duties and tasks connected with fighting the effects of COVID-19, including social and economic ones, imposed by name on an entity represented by the person in the course of an act or on the grounds of the resolutions of an agreement, as described in art. 21a section 5 of the act of 4th July 2019 on the Development Institutions System (Dz.U. /J. of L./ of 2020 items 2011 and 2255), if the aim is to fight the effects.*

The editorial approach to the indicated justification rises the biggest doubts of all discussed in this work.

It is worth noting that the phrase "is not responsible" is already used in the field of public finance discipline. Art. 29 u.d.f.p. provides that the person who violated the discipline of public finances as a result of the execution of the order from a supervisor is not responsible if he raised a written objection and, despite of it, received a written confirmation of the order or the order was not revoked or changed [art. 29 section 1 p.f.d.a.]. The same applies to a person who has implemented a resolution of the body executing the budget or financial plan of the public finance sector unit or the managing body of an entity not included in the public finance sector

[art. 26 section 2 p.f.d.a.]. T. Bojkowski states that the indicated exclusion is an example of a counter-type and - strictly speaking – "legalizes actions resulting in violation of public finance discipline" [Bojkowski 2015: 31-33].

But the exclusion of liability introduced in art. 76 u.s. deals with the conditions that make difficult to decompose the features of any tort of public finance discipline.

First of all, the indicated provision refers to art. 4 section 1 item 4 of the p.f.d.a., which does not describe any torts in public finance discipline. It only shows that persons acting on behalf of entities not included in the public finance sector, which was given public means for their use or allocation, conducting actions connected with the use or allocation of the means, may be held liable for breaching public finance discipline. That is why the reference seems totally unclear, hence unnecessary.

Moreover, the exclusion of unlawfulness refers only to certain category of persons, i.e. those fulfilling *in the public interest duties and tasks connected with fighting the effects of COVID-19*, *including social and economic ones*, *imposed by name on an entity represented by the person in the course of an act or on the grounds of the resolutions of an agreement concluded by the Council of Ministers with* the Polish Development Fund describing the conditions and ways of transferring means for the realization of the government program of granting financial support for entrepreneurs.

However, it is necessary to emphasize that the essence of the discussed justification is the motive of actions of a person conducting certain obligations amounting to “aiming at fighting the effects of COVID-19”. It means that the regulation concerning persons obliged to fight the effects of COVID-19 excludes unlawfulness of the actions of these persons if their intention in the public interest is to fight the effects of COVID-19. Such a range of the application of the justification brings it close to a true immunity understood as an exemption from liability because of the certain function of a person [Janusz-Pohl 2009: 24-26.; Cieślak1963: 5].

Hence, it is difficult to find reasons for keeping such a structure in the Polish legal order. It does not make it possible to unequivocally decide whether it relates to the exclusion of unlawfulness of discipline violation or exclusion of guilt.

Moreover, it rises doubts from the point of view of the Constitution of the Republic of Poland, especially in case of public confidence in the state and in the law as well as the principle of legality, resulting from art. 2 of the Constitution and the rule of law as described in art. 7 of the Constitution. The discussed exclusion of the unlawfulness, because of the use of too vague terms, may result in a disproportionate interference in the Constitutional regulations and freedoms as a result of the secondary legalization of the unlawful acts of persons performing

public responsibilities. For these reasons, the repeal of the analyzed regulation should be proposed.

6. Conclusion

The analysis of the new counter-types of torts of public finance discipline introduced by the Anti-Crisis Shield indicates the shortcomings of the introduced legal solutions. Among the disadvantages of the regulations, it is necessary to point out the selectivity or even redundancy of some provisions. In other cases, the problem is the lack of identity or full consistency between the behaviors covered by the exclusion of unlawfulness and the corresponding torts of public finance discipline. The enacted provisions also identified a too narrow scope of the regulation of the countertype in relation to the scope of norms penalizing specific actions or omissions.

It should be assumed that the authors of the introduced legislative solutions were motivated by a justified and practical need to create more favorable conditions for more flexible actions taken on the basis of managing public funds due to COVId-19. However, the defectiveness of the introduced solutions may cause further practical problems - related to the control of public finances and the application of possible exclusions of liability for violations of public finance discipline. Therefore, it would be advisable to repeal some of the introduced regulations and to modify the remaining provisions of the analyzed regulations.

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