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# PUBLIC INTEREST AS A FEATURE OF PUBLIC FINANCE INSPECTION

## Abstract

This article deals with the selected attributes of public interest within the realization of public finance inspection. It is based on the hypothesis that inspection can be considered legitimate and legal only if it is properly justified by the protection of a specific public interest. From the interpretation perspective, the resolution of conflict, even a potential one, either with a private interest or possibly with another public interest, is essential. The article also points out that interest of the public in inspection outputs is a kind of protected public interest as well.

## KEYWORDS

public interest, inspection, public finance, management of public funds, public administration, Supreme Audit Office

## SŁOWA KLUCZOWE

interes publiczny, kontrola, finanse publiczne, gospodarowanie środkami publicznymi, administracja publiczna, Najwyższa Izba Kontroli

## 1. INTRODUCTION

There is no doubt that inspection represents an integral part of the proper management of public funds. It is no different in the case of private funds management. However, inspection means a significant intervention in the area of inspected persons. Depending on the subject and focus of the inspection, in the case of public finance, it can be public administration bodies, as well as private entities, i.e., legal entities and individuals, for example those holding the role of a subsidy recipient. This article is based on the hypothesis that inspection can be considered legitimate and legal only if it is properly justified by the protection of a specific public interest. In general, it is an interest in the protection of public funds which are entrusted to the inspected persons on the basis of various legal acts and under various conditions. The true essence of entrusted public funds, which justifies the public interest in their protection, is the fact that they are the result of the allocation function of the tax system, i.e., they represent a mass of funds that were drawn from taxpayers specifically in the public interest. At the same time, the variety of public interests pursued by the allocation is increasing. It is a result of the global development of the economy in recent years. In general, state and public administration, including territorial self-governing units, is increasingly taking on the role of a provider of public goods and services, which are financed through public funds. This phenomenon, of course, also brings greater pressure on the proper management of public funds and, therefore, a demand for a higher level of responsibility and the associated increased interest from the public. In this context, the aim of this article is to point out selected aspects that are related to the public interest and its protection within the public finance inspection.

## 2. THEORETICAL BASIS

Based on Hendrych,[1] Kotáb,[2] and Mrkývka,[3] for the purposes of this article, the public finance inspection can be defined as an assessment of whether a certain activity or a certain state corresponds to legal regulations, or an assessment of whether the obligations set out on the basis of these legal regulations are met to ensure the protection of public finance. The protection of public finance repre-

[1] D. Hendrych, *Správní věda: teorie veřejné správy*, Praha 2014, p. 190; D. Hendrych, *Správní právo: obecná část*, Praha 2009, p. 299.

[2] P. Kotáb, *Chapter V. State inspection and financial control*, (in:) M. Bakeš, *Finanční právo*, Praha 2012, p. 51.

[3] P. Mrkývka, *Determinace a diverzifikace finančního práva*, Brno 2012, pp. 62–63.

sents the public interest. Public interest is a vague legal term that must always be interpreted with regard to the circumstances of the given case as is assumed by the relevant legal regulations that serve its protection. Even though it is a vague legal term, in essence, it is a specific interest that is protected. In this context, Vedral[4] points out that public administrative bodies do not create public interest within their activities. Public interest results directly from the relevant legislation. The Constitutional Court states that a public administrative body finds the public interest in the course of administrative proceedings, which must necessarily be reflected in the justification of its decision. The justification must include, in particular, the reason why the public interest prevailed over the private interest.[5] This interpretation corresponds to the general principle of the public interest protection, which is defined in the provisions of Section 2, paragraph 4 of the Code of Administrative Procedure.[6] However, it cannot be assumed that the public interest would be constructed *a priori* by the legal regulation. Rather, the legal regulation defines the relevant public interest but not always explicitly, and, in particular, creates the prerequisites for its successful protection, or provides specific instruments for this purpose. The definition of public interest, which is contained in Black's legal dictionary, also corresponds to this: '*1. The general welfare of the public that warrants recognition and protection. 2. Something in which the public as a whole has a stake; especially an interest that justifies governmental regulation'*.[7] According to Skulová,[8] public interest determines the content of public administration as it represents the purpose to be achieved through the activity of a public administrative body. In addition, public interest is also a legitimate reason for limiting the private interest of the persons concerned. It follows from the nature of the matter that public administrative authorities or courts only deal with a question of public interest in the event of its conflict with another interest, even if the existence of other interests is not a *sine qua non* condition.

## 3. CONFLICT OF PUBLIC INTERESTS

In practice, not only private interest can be in conflict with public interest but also several public interests can be in conflict mutually. The Supreme Administrative Court formulated instructions for resolving this conflict: *'In the case*

[4] J. Vedral, *Kontrolní řád: komentář*, Praha 2015, p. 206; J. Vedral, *Správní řád: komentář*, Praha 2012, p. 100.

[5] Decision of Constitutional Court of 28 June 2005, Pl. ÚS 24/04.

[6] Act No.500/2004 Coll., Code of Administrative Procedure, as amended.

[7] B. A. Garner (ed.), *Black's law dictionary*, St. Paul 2004.

[8] S. Skulová, *The principle of compliance with the public interest*, (in:) A. Kliková (ed.), *Správní řád*, Praha 2016, p. 48.

*of weighing two public interests that are in conflict, analogically to the case of a conflict of fundamental rights, the administrative authority must first properly determine and individualize both public interests that are involved, and then compare the importance of the two public interests in conflict with the fact that interference with either of the two protected public interests must not outweigh the positives in its negative consequences. In dealing with a conflict of public interests, the maximum of both conflicting interests should be preserved, while the core and periphery of the conflicting public interest should be identified, and of the two public interests that are involved, at least their core should be preserved'.*[9] An example of two public interests that are in conflict in connection with the public finance inspection is public procurement. The public interest pursued by the Public Procurement Act[10] is the protection of economic competition, which is reflected in the individual provisions of the Public Procurement Act and, in particular, in the principles that are postulated in Section 6: equal treatment, non-discrimination, and transparency. In the case where a public contract is financed from public resources, the contracting authority has, in addition to these obligations, the obligation to comply with the 3E principle, i.e., economy, efficiency, effectiveness. This principle is defined in the provisions of Section 2, letters m), n) and o) of the Financial Control Act[11] and it represents the public interest in the protection of public finance. In an effort to protect public finance to the greatest extent, there may be situations where principles protecting economic competition are partially or completely suppressed. This is especially the case when, in accordance with the principle of efficiency, specific detailed requirements are defined for the purchased goods, delivery or service. In particular, this refers to qualitative parameters, which may lead to the restriction or even the exclusion of economic competition. It is obvious that if specific quality requirements are set, which is required by the 3E principle, the number of potential suppliers is automatically reduced. This can lead to a potential threat to economic competition. Taking into account the nature of both public interests as well as the fact that these are public interests that go beyond national legislation and are based on the European Union legislation,[12] it is necessary to follow the procedure

[9] Judgement of the Supreme Administrative Court of 10 May 2013, 6 As 65/2012-161, No. 2879/2013 Coll. NSS.

[10] Act No. 134/2016 Coll., on Public Procurement, as amended.

[11] Act No. 320/2001 Coll., on Financial Control in Public Administration and amending certain acts (Act on Financial Control), as amended.

[12] In particular, the Regulation (EU, Euratom) 2018/1046 of the European Parliament and the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No. 1296/2013, (EU) No. 1301/2013, (EU) No. 1303/2013, (EU) No. 1304/2013, (EU) No. 1309/2013, (EU) No. 1316/2013, (EU) No. 223/2014, (EU) No. 283/2014, and Decision No. 541/2014/EU and repealing Regulation (EU, Euratom) No. 966/2012, as amended and Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, as amended.

defined by the Supreme Administrative Court,[13] as none of the principles can be excluded from the application. The final solution must be, just as in the case of an administrative decision, properly justified and recorded within the audit trail to perform a preliminary financial control.[14]

## 4. INTEREST OF THE PUBLIC IN INSPECTION OUTPUTS

Leaving aside the fact that the public interest is implied in the essence of inspection, it also appears explicitly in the legal system in connection with the regulation of the public finance inspection. It can be assumed that in these cases, the legislator was guided by an effort to emphasize its meaning or by the need to provide a proper and explicit justification. The Constitution of the Czech Republic[15] does not regulate public finance primarily, with the exception of a marginal reference to the budget and property of territorial self-governing units[16] and further in the provision of Article 97, paragraph 1 of the Constitution of the Czech Republic, which generally regulates the competence of the Supreme Audit Office to perform audits on the management of state property and the implementation of the state budget. From the point of view of the protection of the public interest, the constitutional definition of the authority of the Supreme Audit Office can be considered essential.

The Supreme Audit Office, as it is formed in modern legal states, represents an important control mechanism that enables the public, both directly and indirectly through elected representatives, to participate in the inspection of the use of public funds. The public can participate directly based on the provisions of Section 30, paragraph 1 of the Act on the Supreme Audit Office,[17] according to which all approved audit reports shall be published in the Office Bulletin which is accessible on its website.[18] The same provision also regulates indirect control, which is carried out through elected representatives. The approved audit reports are sent to both chambers of parliament as well as to the government. Especially in the case of the government, it is expected that, based on the results of the audit

[13] Judgement of the Supreme Administrative Court of 10 May 2013, 6 As 65/2012-161, No. 2879/2013 Coll. NSS.

[14] For details see D. Czudek, *Commentary on Section 4*, (in:) J. Czudek Kranecová, D. Czudek, T. Koucká Höfferová, A. Vuongová, *Komentář k zákonu o finanční kontrole ve veřejné správě*, Plzeň 2021.

[15] Constitutional Act No. 1/1993 Coll, The Constitution of the Czech Republic, as amended.

[16] Article 101, paragraph 3 of Constitutional Act No. 1/1993 Coll, The Constitution of the Czech Republic.

[17] Act No. 166/1993 Coll. on Supreme Audit Office, as amended.

[18] Supreme Audit Office: www.nku.cz

which are contained in the reports, it will take appropriate measures, both to eliminate the identified deficiencies and to strengthen the management and control mechanisms to increase the protection of the entrusted public funds. However, it is not excluded that both chambers of the parliament will deal with the audit reports in more detail. It can even be considered that this is assumed with regard to the wording of Section 30, paragraph 2 of the Act on the Supreme Audit Office, according to which both chambers of the parliament and their bodies (commissions and committees), as well as the government, have access not only to the published audit reports but also to their sources, especially the audit protocols in accordance with the provisions of Section 25 of the Act on the Supreme Audit Office. The audit protocol, unlike the audit report, is provided only to an exhaustively determined circle of authorized authorities. In addition to the aforementioned two chambers of the parliament, their bodies and the government, the audit protocol is of course forwarded to the auditee and, eventually, to law enforcement authorities in accordance with the provisions of Section 8, paragraph 1 of the Code of the Criminal Procedure,[19] and to the tax administration bodies in accordance with provisions of Section 58 of the Code of Tax Procedure.[20] The audit protocol is, therefore, inaccessible not only to the public but also to other bodies that have inspection authority over the auditees and for whom the conclusions of the Supreme Control Office can be crucial, especially from the point of view of inspection planning. In this case, for example, it is the Ministry of Finance according to the provisions of Section 7 of the Act on Financial Control.[21] The Ministry of Finance has extensive inspection competences, in particular, towards public administration bodies but also towards recipients of public financial support or providers of public financial support, whose inspection competence is based on the provisions of Section 8 *et seq.* of the Financial Control Act. It is not completely clear how lawmakers were driven to adopt such a restrictive legislation, especially in view of the fact that inspection bodies have the authority to request audit protocols from auditees, based on the provisions of Section 8, letter c) of the Code of Inspection Procedure.[22] In this case, the inspection authority is bound by the object and scope of the inspection. However, theoretically, according to the provision of Section 3, paragraph 1 of the Code of Inspection Procedure, inspection bodies have the authority to request all audit protocols from auditees, but only if they will serve to decide whether to initiate an inspection. The auditee is not obliged to comply with the request in this case. Public access to audit protocols of the Supreme Audit Office is excluded, as they are covered by one of the few exceptions according to the provision of Section 11, paragraph 4, letter

[19] Act No. 141/1961 Coll., Code of Criminal Procedure, as amended.

[20] Act No. 280/2009 Coll., Code of Tax Procedure, as amended.

[21] Act No. 320/2001 Coll. on Financial Control in Public Administration and amending certain acts (Act on Financial Control), as amended.

[22] Act No. 255/2012 Coll. on Inspection (Code of Inspection Procedure), as amended.

d) of the Act on Free Access to Information.[23] In contrast to the access of control authorities to audit protocols, this prohibition applies to all authorities who have this information and protocols, not only to the Supreme Audit Office as such.[24] On the one hand, lawmakers formed a control mechanism, whose primary aim is, on the one hand, to protect the public interest in the sense of the protection of public funds and, on the other hand, it fundamentally limits public access to its outcome. The motivation of lawmakers is not entirely clear, especially in view of the fact protocols, representing an output of inspection bodies, which are accessible to the public either based on the aforementioned Act on Free Access to Information or are directly published in full as part of the preparation and discussion of the accounts of territorial self-governing units. In essence, the audit of the Supreme Audit Office and other inspection bodies can have very similar or even identical object, focus, and scope. With regard to the provisions of Sections 7 and 8 of the Code of Inspection Procedure[25] and the provisions of Section 21 of the Act on the Supreme Audit Office,[26] the scope of the authorization of the auditors and inspectors and, therefore, the scope of the documents on which the protocols are based is comparable. Public access to the outputs of the public finance inspection or audit follows not only the interest in protecting public finance but also the interest in informing the public as a prerequisite for ensuring that political representation is accountable to its citizens and voters. Any limitation of public access to the outputs of inspection or audit, which is provided by legal regulations, aims to protect the interests of the inspected entities and possibly other persons concerned. The audit or inspection can reveal a wide range of information that is protected by special legal regulations, such as personal data, classified information or trade secrets and also information that *a priori* does not belong to any special category of particularly protected information but can be misused or their publication could harm the person concerned.[27] This protection represents an interest protected by law, which may, depending on specific circumstances, take the form of both private and public interest, depending on who will be the inspected person or the person concerned.

For the sake of completeness, it is necessary to state that even in the case where the inspected person is a public administration body, documents relating to the rights and legally protected interests of private persons may be examined as part of the inspection. One of the general principles of public finance inspection applied for the purpose of information protection is the principle of confidential-

[23] Act No. 106/1999 Coll. on Free Access to Information, as amended.

[24] Judgement of the Municipal Court in Prague of 25 August 2010, 10 Ca 322/2008 – 80; M. Tuháček, J. Jelínková, *Commentary on Section 11*, (in:) J. Jelínková, *Zákon o svobodném přístupu k informacím*, Praha 2019.

[25] Act No. 255/2012 Coll. on Inspection (Code of the Inspection Procedure), as amended.

[26] Act No. 166/1993 Coll. on Supreme Audit Office, as amended.

[27] L. Jemelka, *Zákon o kontrole: komentář*. Praha 2021, p. 168.

ity. In the case of financial control, confidentiality is regulated in the provisions of Section 20 of the Code of the Inspection Procedure.[28] The provision of Section 20, paragraph 3 of the Code of the Inspection Procedure provides that an inspector may be exempted from the obligation of confidentiality in the public interest by the inspector's superior. Since it is a conflict of the public interest in the disclosure of information from the inspection and another interest protected by law, it is necessary to approach the solution carefully and in accordance with the procedures. In the case of a tax inspection, the obligation of confidentiality is regulated in the provisions of Sections 52 to 55 of the Code of Tax Procedure,[29] following the general principle of non-publicity expressed in the provisions of Section 9, paragraph 1 of the Code of Tax Procedure. The Code of Tax Procedure does not allow an inspector to be exempted from the obligation of confidentiality in the public interest. On the contrary, it regulates an exhaustive list of reasons for the provision of information obtained during tax administration, including an exhaustive definition of the range of authorized entities.

## 5. CONCLUSION

Public interest is a vague legal term that must always be interpreted with regard to the circumstances of the given case as is assumed by the relevant legal regulations that serve its protection. Public interest results directly from the relevant legislation. However, it cannot be assumed that public interest would be constructed *a priori* by the legal regulation. Rather, the legal regulation defines the relevant public interest but not always explicitly. Public interest may result from the purpose of the legal regulation. From the point of view of interpretation, the resolution of its potential conflict, either with a private interest or possibly with another public interest, is essential. This also applies in the case of the protection of public funds which is a public interest protected by the public finance inspection. The inspection, as interference with the rights and legally protected interests of inspected persons, can be considered legitimate and legal only if it is properly justified by the protection of a specific public interest. Inspection, therefore, represents a conflict of public interest in the protection of public funds and another interest which, depending on the nature of the inspected person, can take the form of both private and public interest. As follows from established jurisprudence, it is necessary that the maximum of both conflicting interests, i.e., public interest in the protection of public funds and the interest of the inspected person in the protection of his rights and legally protected interests should be preserved.

[28] Act No. 255/2012 Coll. on Inspection (Code of Inspection Procedure), as amended.
[29] Act No. 280/2009 Coll., Code of Tax Procedure, as amended.

It is therefore imperative to preserve the rights and legally protected interests of inspected persons at maximum.

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