



LEGAL REGULATION OF BANKS IS A PART OF FINANCIAL MARKET LAW

PART 1

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Scientists in the field of financial law, in the framework of their scientific-educational and publishing activity, constantly examine the subject of financial law - an important and in recent times one of the most dynamically developing branches of Slovakia's legal system. In this branch we find also legal regulation of the financial market, the largest component of which is the two-stage banking system.

The roles of financial law science

The existence and development of financial law as a legal branch has stimulated the emergence and development of financial law science. Financial law science is the sum of scientific knowledge on financial law with which financial-legal scientists are concerned. Representatives of constitutional, administrative and other legal branches have made a substantial contribution to the development of this science. Financial law science, as with all legal sciences, is a social science discipline and as such examines the social processes connected with the forming, distribution, use and monitoring of financial resources by the state and local authorities. In this regard financial law science differs from other legal sciences.

Despite the fact that in recent times, i.e. in the period since the changeover from a centrally managed economy to a market economy, the subject of financial law in Slovakia has rapidly developed in the form of a number of standards governing financial relations, financial law science has not correspondingly developed at a desirable pace. This has in some way been connected also with the generational exchange of financial law scientists especially at faculties of law.

The conditions of Slovakia's market economy development are the right preconditions for the full development of the potential of financial law standards. As a result of this process there arises the need to thoroughly understand the mechanism of financial law regulation, in particular to manage legal technique necessary for efficient taxation, to apply new financial law categories, etc.

Financial law science, due to its being socially conditioned, endeavours to answer requests posed by

legal practice. At the same time it examines the fundamental issues of financial law, which have long-term importance for solving many practical tasks. The science's subject is a set of phenomena and processes which require examination. Financial law science deals primarily with the examination and evaluation of financial law standards in various financial normative legal acts from the aspect of their feasibility, efficiency of their regulation, comprehensibility in interpreting financial law standards, their accordance with the constitution, etc. In relation to financial law standards financial law science fulfils three functions:

(a) analytical – commenting and classification of financial law standards and the arrangement of all these standards into an ordered and comprehensible system,

(b) critical – revealing errors and shortcomings in existing financial legislation for ascertaining any discordance of a legal standard with needs in practice,

(c) constructive – providing the stimulus for the creation of new financial legal standards and institutes.

In accordance with financial legal standards financial law science examines the essence and substance of various financial law institutes, relations between them, as well as tendencies and trends in their future development.

The subject of financial law science can be said to cover also the analysis of real social relations regulated by financial law standards, i.e. financial law relations. Specifically, this means the examination of the subjects and objects of financial law relations, their rights and obligations, examination of the legal mechanism at work in the realisation of rights and obligations by subjects, etc. In recent years, in connection to the dynamic development of financial law,



in financial law science there has been a growing need to prioritise attention given to financial legislation, its codification, in particular budgetary and tax legislation, as well as the creation of standards in the field of the financial market, something which was absent in Slovakia during the period of a centrally managed economy.

Financial law science also focuses on the further development of financial law regulation and, last but not least, also on establishing financial law as a branch of law. It is based understandably not only on knowledge of Slovakia's economic development, but primarily that of countries with developed market economies. Based on these ideas the subject of financial law can be said to comprise these four basic elements:

- (a) standards and institutes of financial law in the Slovak Republic,
- (b) financial law relations,
- (c) financial legislation,
- (d) directions and trends in the development of financial law regulation and financial law as a branch of law.

In connection with the subject of examination, financial law science is a public law science. Its public law nature lies in the fact that it examines the phenomena and processes concerning not individual, but collective interests, interests of society-wide importance. The result of examination by financial law scientists is the forming of a system of knowledge and generalisations that form financial law science.

This system of knowledge includes:

1. Financial law concepts, financial law categories, financial law principles.

Financial law concepts are abstract generalisations of financial law issues elaborated by financial law science. This concerns the concept of unity of the budgetary and tax system, the concept of tax obligation, the concept of financial law liability, etc.

Financial law categories are terms elaborated by financial law science which best express the essence of normative activity in the field of state finances. Categories include: the financial activity of the state and local authorities, financial law relations, the method of financial law regulation, the budgetary process, etc.

Financial law principles are the bases elaborated by financial law science under the assistance of economic sciences, on which the normative activity in the sphere of state and local authority finances must be founded. For example it concerns the principle of justice in taxation and the principle of anti-

discriminatory nature of taxes and fees, their economic justification, etc.

2. Rules of legal technique, which need to be applied in the process of normative activity in the sphere of state finance. An example in this field can be the requirements for constructing legal standards in the legal regulation of taxes and fees. A tax or fee has a legal form if it has these basic elements: an object of the taxation, a subject, a base and rate.

3. Scientific prognoses and proposals in the interest of performing normative activity in the field of state and local authority finances.

On the basis of these ideas it can be said that **financial law science is a social, public law science, the subject of which is the examination of financial law as a branch of science, and embodies a system of knowledge in the form of financial law concepts, categories, principles, as well as of rules of legal technique necessary in applying normative activity and in making scientific prognoses and proposals – in the interest of performing normative activity of the state and local authorities in the sphere of finance.**

This system of knowledge forming financial law science is expressed also in the structure of this science's system. The system of financial law science is thus formed by the examination of the following spheres of homogeneous theoretical problems:

1. General theoretical issues of financial law science. This covers the examination of such theoretical questions as the subject of the financial law branch, the essence and specifics of financial law standards, financial law relations, the subject of financial law science, specific features of state financial control, financial legal liability.

2. Issues of budgetary law and the law of state and local authority non-budgetary funds. This sphere of the science examines the legal issues of the budgetary arrangements of the Slovak Republic in the form of the budgetary system, the budgetary process, non-budgetary relations, purpose-specific budgetary funds, etc.

3. Legal issues of state revenues. Financial law science in this section examines the complex of scientific topics connected with elaborating the theory of tax law, with an examination of taxes themselves, as well as the non-tax incomes of the estate and local authorities.

4. Legal issues of the finances of state and local authority business entities. This group covers the scientific analysis of a complex of questions connected with decentralised state and local authority finances, which the state or local authorities have entrusted to these subjects, where there are



examined the legal requirements for the creation and use of finances of state and local authority business entities.

5. Legal issues of state and local authority credit. This concerns a field which is focused on examining issues connected with state or local authority debt, the issuing of state or municipal securities, etc.

6. Legal issues of state expenditure. Financial law science naturally focuses also on examining issues of the redistribution itself of financial resources and their drawing and use, in particular in government agencies as well as government-subsidised agencies.

7. Legal issues of money circulation in the form of examining the currency, foreign exchange, system of payments and the financial market.

This section of financial law science is relatively complicated, because its subject comprises, besides traditional financial law relations originating in the field of currency and foreign exchange, also relations of a mixed nature, especially in the field of the financial market, which financial law science must approach as a new phenomenon. The complex of issues connected with relations arising in the field of financial market activities will require serious scientific work. Today the mere definition of the roles of banking and their examination in the framework of financial law are no longer sufficient. The financial market is a complex of intricate relations connected with a large number of instruments specific to this market, comprising the capital and money markets.

Financial market instruments themselves would be dead were there not someone to put them into operation, that is if financial market's subjects, in the form of banks, insurance companies, mutual funds and other intermediaries in the circulation of finance in the economy were absent. Besides its fulfilment of, in particular, tax obligations, the financial market has almost nothing in common with public finance. Still, there is some sort of connection between the financial market and financial law. This concerns two cases.

In the first instance it is the fact that financial law science should examine also private finance. As a result financial law science must also have its word on the process of financial market regulation as a basic requirement of the state for its functioning in order that financial stability is not threatened.

Financial law and the subject of its treatment

Financial law is a set of legal standards governing socio-economic relations arising in the process of

the creation, redistribution and use of centralised and decentralised financial resources in the conditions of the estate and local authority units, in the interest of the financial coverage of the fulfilment of their tasks.

Financial law then in this way legally fixes the structure of the financial system, the division of competences between the state and its bodies, between a local authority units and their bodies, where the relations arising in the process of the financial activity of the state and local authorities and their competent bodies are governed by the respective legal standards. So the subject of financial law therefore comprises socio-economic relations arising in the process of the delivered activity of the state and local authority units in the creation, distribution and use of financial resources for realising the objectives of their tasks.

From the aspect of content this concerns various relations, where this is conditional upon the degree of variety within the financial system, its links to all structures of the production and distribution process, to all groups and types of the life of society and the state. The range of participants in financial relations is also varied. The state in connection with its competences in the field of finance enters into contacts with its subjects, having links to local authority bodies, and not forgetting the links of state authority bodies toward local authority representative bodies, connections with private juristic and natural entities. An opinion featuring strongly in the past in legal theory was that financial law is a matter exclusively of state finance and the financial activity of the state, where account was not taken of the finance of local authority bodies, which seemed as if they were only derived from state finance. An opinion similar, though no longer now so clearly, is expressed also by the Czech financial law school of prof. Milan Bakeš, which defines the subject of financial law regulation as "those relations that originate in the course of financial activity, in particular, though not exclusively, in the course of the financial activity of the state. At the same time however he acknowledges that these relations arise in various fields.

We can further divide these financial law relations in the framework of a separate part of financial law into the following sections:

1. The first of the sections, important from the public finance aspect, is that of **legal standards regulating the flow of state expenditure**, the legal treatment of which is relevant from the aspect of knowing the needs of the state for its uninterrupted functioning. These relations of the state can be seen in the process of budgetary policy. Only when the state (or



local authorities) has set the level of its needs can it deal with the question of whether it will be able to cover these needs, and thus must determine the level of its revenues.

2. In the framework of this function financial law comprises the **section of state and local authority revenues**. It is executed by means of setting taxes, fees and customs, provided for by the respective legal norms of financial law, that is tax, fee and customs regulations. Financial processes would not be workable if the state did not have the power and instruments to put them into effect.

3. The third section of financial law is that of **money circulation**. In the interest of its correct functioning standards exist to regulate the currency and foreign exchange of the state, financial market and money circulation.

Legal regulation of money circulation

An own currency is a basic attribute of every state. For the efficient functioning of a financial economy it is necessary that the issuance and circulation of legal tender be perfectly organised, where this legal tender is generally recognised and accepted as a medium of exchange and basic value criterion. It is these and other issues that are the subject of regulation by monetary law. **Monetary law** forms a special set of legal standards governing socio-economic relations arising in the regulation of the Slovak currency, its system, the issuing of legal tender, regulation of the money circulation, of the exchange rate, etc.

Legal regulation of the currency is an expression of state sovereignty. The development of Slovak monetary law has been closely connected with the constituting of an independent, sovereign state – the Slovak Republic – and with this the related founding of the Slovak currency. This process was not a one-off affair, but took course over several stages. In the first phase the Constitution of the Slovak Republic was adopted, which in Article 56 names the National Bank of Slovakia as the independent central bank of the republic and in the autumn of 1992, linking to the constitution, the Act on the National Bank of Slovakia was adopted, which laid the bases of Slovak monetary law and became its basic legal regulation – the source in its formal sense. The NBS as the central, issuing bank is the only bank entitled to issue cash money. The National Bank of Slovakia as the central issuing bank in the Slovak Republic gradually began to realise its powers in the monetary field.

All state departments are developing certain con-

tacts abroad, whether economic, social, cultural or other. Relations arising in this field are the subject of a further sub-branch of financial law – foreign exchange law.

Foreign exchange law is the sum of specific foreign exchange legal standards which govern socio-economic relations arising in connection with foreign exchange values, and its trading, specify the rights and obligations of nationals and foreign nationals in handling foreign exchange, the competence and activity of foreign exchange and customs authorities in the field of foreign exchange, the foreign exchange economy, and specific decrees in foreign currency management.

The stability of the national currency, its exchange rate in relation to foreign currencies, often also with an impact on the stability of state sovereignty, is independent of the level of the financial market's system in the state. For any state, issues of the system of financial market stability equal "the economic stability of the state", have strategic importance and are always current. The emergence of the financial market's system and the formation of its legal bases in Slovakia have been one of the most important results of economic reform. Besides this, the emergence of this system and the building of its legal bases is also a condition for the further implementation of economic reform itself. Even if some components of subjects in the financial market and its instruments have now existed here for some time, they have had to be formed anew. This is connected on the one hand primarily with the fact that new banks, insurance companies, mutual funds, stock exchanges, both domestic and foreign, have been established, but on the other hand in particular with the fact that the conditions in which they work have fundamentally changed, where they have taken on new functions, roles, methods, the nature of operations they perform and indeed the whole system of their functioning have been transformed.

The existence of the created system of the new financial market has led to a need to form a new legal sub-branch of financial law, this being **financial market law**.

In the period of centrally managed economy law Slovakia did not recognise any financial market law and the legal treatment of banks and insurance companies, which operated as subjects of financial market law, fell under financial law. Eventually, even financial law as such had to be only gradually disentangled from its bondage to administrative law, in particular with regard to the specific features and peculiarities of the subject of its legal treatment and their importance for society. In this way the subject of



the legal treatment of financial law extended also to legal standards concerning in particular banking and insurance law, which today belong to the financial market. Oddly, many socio-economic relations in which banks and insurance companies featured as economic subjects, as equal partners, were in the sphere of civil law. In the socialist era the activities of today's financial market subjects were founded primarily on directives from the economic centre, and not on a contractual principle. Thus the activity itself of banks and insurance companies, since there were no other financial market subjects, was of a power-organiser nature, and not commercial. In these conditions, understandably, there could not have arisen the practical need to link standards of civil (not even mentioning commercial), administrative law, or the emerging financial law to any branch of branch of financial market law, from which an integral field of law would be created.

Through the launching of economic reform and the qualitative changes conditional upon it, the relationships between public and private law also changed. A topical question posed by such standards was also the issue of the separation of financial market law into an integral sub-branch of financial law. It is in connection with this systemisation of financial mar-

ket law that it can be ventured that its closest "kin" is financial law. Also the leading Czech financial lawyer, professor Milan Bakes, inclines towards this opinion in his textbook *Financial Law*. Nevertheless the textbook does not give a definition of financial market law. It contains only a description of the financial market.

In coming times, which will see a significant trend in the orientation of the Slovak financial market towards the spheres of international capital, especially due to the influence on the Slovak economy of European rules concerning trade in capital and services, development of financial market law will become ever more influenced by its functioning in the European Union. Under the influence of globalisation financial markets are gradually becoming multinational and so it is the international elements in Slovakia's law that will become more and more relevant in Slovakia's financial market law. Not only is it necessary to legally treat international standards deriving from Slovakia's involvement in international institutions, such as the International Monetary Fund or the World Bank, but it will also be necessary to fulfil ever more thoroughly conditions ensuing from Slovakia's membership in the European Union.

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