

The Proposed Polish Advertisement Levies – An Efficient Source of Public Income or Instruments of the Political Battle?

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Abstract: This article analyses the bill of 2nd February 2021 on additional revenues of the National Health Fund, the National Fund for the Protection of Historical Monuments and the establishment of a Fund for the Support of Culture and National Heritage in the Media Area. The draft legislation, the announcement of which has triggered an unprecedented blackout protest in private media as well as a mass anti-government protest on the Internet, provides for the introduction of new public levies called advertisement contributions and the establishment of a new state special-purpose fund – the Fund for the Support of Culture and National Heritage in the Media Area. The aim of the article is to identify and present those provisions of the draft act which have evoked most controversies and have given rise to the stiff social resistance to the proposal. The first part of the paper is devoted to the assessment of the regulations within the context of the objective of the bill that was declared by the drafters in the legislative rationale. The analysis carried out has supported the assumption that providing adequate finances for those special-purpose funds that are strongly involved in remedying the consequences of the SARS CoV-2 epidemic was not a genuine purpose of the bill. It also leads to the conclusion that there is no constitutional justification for such a special-purpose levy. In the second part, the controversies over technical components of the advertising levies have

been presented and analysed. On the basis of this analysis, it is possible to conclude that some of the qualitative and quantitative elements of the so-called advertisement contributions may give rise to interpretative doubts. The implementation of the research objectives made it possible to formulate a thesis that the advertisement contributions, as drafted, would not be efficient instruments of fair taxation of digital economy but rather would form instruments for achieving certain political objectives.

1. Introduction

The challenges associated with fair and efficient taxation of the digital economy were identified several years ago, yet at the international level, solutions to these problems are still being sought. On 2nd February 2021, the Polish Ministry of Finance announced a bill on additional revenues of the National Health Fund, the National Fund for the Protection of Historical Monuments and the establishment of a Fund for the Support of Culture and National Heritage in the Media Area¹. The draft act provides for the introduction of the so-called advertisement contributions, which can be viewed, at least in part, as a kind of digital tax. The announcement of the bill has resulted in an unprecedented blackout protest in the private media sector as well as in a mass anti-government protest on the Internet². In consequence, the government has suspended the legislative procedure by sending the proposal to social partners. It does not mean, however, that the plans to introduce some kind of digital tax have been abandoned altogether, especially bearing in mind that part of the political opposition is supporting such plans³.

¹ “Media pomogą w zwalczaniu skutków COVID-19. Przepisy o składce reklamowej w pre-konsultacjach”, Google, accessed February 8, 2021, <https://www.gov.pl/web/finanse/media-pomoga-w-zwalczaniu-skutkow-covid-19-przepisy-o-skladce-reklamowej-w-prekonsultacjach>, [henceforth cited as: the bill].

² On 10th February 2021, many private Polish TV channels and radio stations fell silent and newspapers and internet sites ran black front pages to protest against the planned levy. Top news websites had black front pages with the slogan “media without choice”.

³ See: parliamentary draft act on tax on some digital services and the establishment of Digital Technology Fund, parliamentary print No 1376.

The aim of the article is to identify and present those provisions of the draft act which have evoked most controversies and have given rise to stiff social resistance to the proposal, as well as to verify the hypothesis that the advertisement levies, as drafted, would not be efficient instruments of fair taxation of the digital economy but rather instruments for achieving certain political objectives.

2. The Objective of the Bill

The draft legislation provides for the introduction of new public levies called advertisement contributions and the establishment of a new state special-purpose fund, namely the Fund for the Support of Culture and National Heritage in the Media Area (CNHSF). According to the legislative rationale for the proposed bill, the purpose of the act is to “introduce into the legal order levies on online and conventional advertising the proceeds of which will accrue to special-purpose funds that are strongly involved in remedying the consequences of the SARS CoV-2 epidemic”⁴. The thing that is most striking about the content of the legislative rationale is the fact that – unlike the European Commission, foreign governments and most scholars – the Polish government does not consider the levy on digital advertising as a measure designated to ensure fair taxation of digital corporations or as a kind of equalisation tax. Not only does the rationale completely disregard the key argument for digital service taxes, which is applying them as a method to tax local “user-created value” or economic rents earned by digital platform companies in a particular location⁵, but it also leaves out

⁴ See “The legislative rationale for the bill on additional revenues of the National Health Fund, the National Fund for the Protection of Historical Monuments and the establishment of a Fund for the Support of Culture and National Heritage in the Media Area”, accessed February 1, 2021 <https://www.gov.pl/web/finanse/media-pomoga-w-zwalczaniu-skutkow-covid-19-przepisy-o-skladce-reklamowej-w-prekonsultacjach>, [henceforth cited as: the legislative rationale].

⁵ See Marcel Olbert, Christoph Spengel, “Taxation in the digital economy: Recent policy developments and the question of value creation,” *ZEW Discussion Papers*, no. 19-010 (2019): 15–22; Wei Cui, “The Digital Services Tax: A Conceptual Defense,” *Tax Law Review*, no. 73(2020): 24–26; Wei Cui, “The Digital Services Tax on the Verge of Implementation,” *Canadian Tax Journal*, no. 67(4) (December 2019): 1135–1139; Tereza Čejková, “Tax Absence in Relation to Taxation of Digital Services,” *Public Governance, Administration and Finances Law Review*, vol. 5, no. 2(2020): 5–16.

other essential aspects of digital taxation, such as rebalancing tax inequity between digital and traditional businesses as well as between local and international companies or counteracting tax avoidance and profit shifting⁶.

The analysis of the text of the proposal in the context of the aforementioned purpose leads to the following observations. First, the proceeds from the levies are to be assigned to three entities of the public finance sector, i.e.: the National Health Fund (NHF), the National Fund for the Protection of Historical Monuments (MPF) and the newly created CNHSF. In line with the wording of the draft act, 50% of the proceeds shall be allocated to the NHF, while 15% and 35% respectively shall go to the aforementioned state special-purpose funds. In this context, it should be noted that the NHF is a state organisational unit with legal personality⁷, whereas state special-purpose funds do not have legal personality. In fact, they are funds held on separate bank accounts at the disposal of the minister or any other authority designated in the statute establishing the fund⁸. This means that the introduction of new levies earmarked for purposes other than general budget ones undoubtedly deepens the process of the so-called ‘debudgetisation’, which, in the opinion of most scholars, creates many threats to the security of public finance⁹.

Second, contrary to the media coverage of the bill and despite unquestioned similarities of the contribution to a tax, the so-called advertisement

⁶ Georg Kofler, Julia Sinning, “Equalization Taxes and the EU’s ‘Digital Services Tax,’” *Inter-tax*, vol. 47, issue 2 (2019): 183–200; Rigó Csaba Balázs, András Tóth, “The Symbolic Significance of Digital Service Tax and its Practical Consequences,” *Public Finance Quarterly*, no. 4(2020): 51–526; Kim Young Ran, “Digital Services Tax: A Cross-Border Variation of the Consumption Tax Debate,” *Alabama Law Review*, no. 131(2020): 141–145.

⁷ Art. 96 of the Act of 27 August 2004 on Publicly Financed Healthcare Services, *Journal of Laws* 2020, item 1398, as amended [henceforth cited as: Health Care Act].

⁸ Art. 29 of the Act of August 2009 on Public Finance, *Journal of Laws* 2021, item 305, as amended [henceforth cited as: Public Finance Act].

⁹ See Janusz Stankiewicz, *Debudżetyzacja finansów państwa* (Białystok: Temida2, 2007), 37–40; Jolanta Szolno-Koguc, *Funkcjonowanie funduszy celowych w Polsce w świetle zasad racjonalnego gospodarowania środkami publicznymi* (Lublin: Wydawnictwo UMCS, 2007), 347–353; Cezary Kosikowski, “Reforma finansów w Polsce w świetle nowej ustawy o finansach publicznych,” *Państwo i Prawo*, no. 12(2009): 12; Krystyna Sawicka, “Formy prawno-organizacyjne jednostek sektora finansów publicznych,” in *System prawa finansowego*, t. II, *Prawo finansowe sektora finansów publicznych*, ed. Eugeniusz Ruśkowski (Warszawa: Oficyna Wolters Kluwer business, 2010), 39–40.

levy is not a tax within the meaning of Polish tax law. Under the Tax Ordinance Act, a tax is a gratuitous, compulsory, non-repayable pecuniary performance made under public law for the benefit of the State Treasury or local government units (a province (*województwo*), district (*powiat*), commune (*gmina*)), arising from statutory tax law¹⁰. What follows from the wording of the definition is that only pecuniary contributions made for the benefit of the State Treasury or local government units may be qualified as taxes. Although the term ‘contribution’ (*składka*) has been used in respect to the proposed levy, it also does not bear the characteristics of contributions. The term “contribution” has not been defined in Polish legislation. Nevertheless, it is stressed in legal literature that this notion means a levy in exchange of a certain performance, which is connected with the contribution payer becoming eligible for public services¹¹. Pursuant to the provisions of the draft act, beneficiaries of the CNHSF shall include, inter alia, entities liable for the advertisement levy¹². Nonetheless, payment of this levy is not associated with acquisition of the right to any public benefit¹³. In view of this, the so-called advertisement contribution should be categorized as a public levy within the meaning of Art. 217 of the Constitution of the Republic of Poland¹⁴ that is neither a tax nor a contribution but rather a new special-purpose levy (a quasi-tax) arising from a separate act. In this context, it should further be noted that, as it has been adopted both in the jurisprudence of the Polish Constitutional Tribunal and legal literature, special-purpose levies (designated for specific uses) shall be considered as permissible. Nevertheless, their permissibility, as public levies other than taxes within the meaning of Art. 217 of the Constitution of the Republic of Poland, is as a general rule conditional upon

¹⁰ Art. 6 of Act of 29 August 1997 – Tax Ordinance, Journal of Laws 2021, item 1540.

¹¹ See Beata Kucia-Guściora, “Commentary to art. 5”, in *Ustawa o finansach publicznych. Komentarz*, ed. Paweł Smoleń (Warszawa: Wydawnictwo C.H. Beck, 2014), 99; Anna Hornowska, “Commentary to art. 5”, in *Ustawa o finansach publicznych. Komentarz*, ed. Agnieszka Mikos-Sitek, (MIASTO:SIP Legalis 2021) 9 and references cited therein.

¹² Art. 30 of the bill.

¹³ Art. 31 and 32 of the bill.

¹⁴ Act of 2 April 1997 – Journal of Laws 1997, No. 78, item 482, as amended.

their extraordinary rather than regular nature¹⁵. The legal literature also indicates that special-purpose levies, unlike taxes, are not a constant and primary source of state income. In consequence, they shall be introduced only as far as it is necessary, and their introduction has to be constitutionally justified¹⁶. It is stressed that the objective of the introduced levy should directly refer to constitutional values or constitutional rights whose pursuit is a total or partial responsibility of the state in such a manner as to justify a permanent or interim specific and separate allocation of the funds and, at the same time, these funds not being allocated to the general budget¹⁷.

Third, although the declared objective of the draft act is to provide adequate finances for those special-purpose funds that are strongly involved in remedying the consequences of the SARS CoV-2 epidemic, the analysis of the laws governing those funds does not allow the conclusion that it was the genuine purpose of the bill. Destination of the revenues from the advertisement levy is determined by statutory tasks of those units to which the revenues are to be allocated. It is also worth noting that the draft act does not contain provisions amending those tasks. In the Polish legal system, the tasks of the NHF have been laid down in the Act on Publicly Financed Healthcare Services. Under the Act, the Fund shall administer public funds, including revenues from national health insurance contributions, intended to finance healthcare services. The scope of activities of this unit also includes other tasks in the field of healthcare, in particular determination of the quality and availability as well as cost analysis of healthcare services insofar as necessary for the correct conclusion of agreements on the provision of healthcare services¹⁸. It is beyond doubt that the NHF plays a central role in the healthcare system. Nevertheless, it should be pointed

¹⁵ See Constitutional Tribunal, Judgment of 15 July 2013, Ref. No. K 7/12, published OTK ZU 6A/2013, item 76; see also: Teresa Dębowska-Romanowska, "Pojęcie podatków i innych danin publicznych w świetle Konstytucji," in *Księga jubileuszowa Profesora Ryszarda Masalskiego. Stanowienie i stosowania prawa podatkowego*, ed. Wiesława Miemiec (Wrocław: Wydawnictwo UNIMEX 2009), 117.

¹⁶ Teresa Dębowska-Romanowska, *Prawo finansowe. Część konstytucyjna wraz z częściami ogólną* (Warszawa: Wydawnictwo C.H. Beck 2010), 124 and 134.

¹⁷ Ibid. 134. See also: Constitutional Tribunal, Judgment of 9 September 2004, Ref. No. K 2/03, published OTK ZU 8A/2004, item 83 and Judgment of 10 September 2010, Ref. No. P 44/09, published OTK ZU 7A/2010, item 68.

¹⁸ Art. 97 of the Healthcare Act.

out that as estimated by the Ministry of Finance, the revenues from the advertisement levy could reach approximately 800 million in 2022¹⁹. This means that the NHF would receive about PLN 400 million, whilst the costs resulting from the tasks of this unit (without administrative costs) have been planned for 2021 in the amount exceeding PLN 103 billion (PLN 103 022 215 000)²⁰. The financial impact of the revenues from the advertisement levy would therefore be negligible (0.38%) in relation to the costs resulting from the tasks of the Fund. This, in turn, might call into question the need for the creation of a new special-purpose levy.

As indicated earlier, the National Fund for the Protection of Historical Monuments is another proposed beneficiary of funds derived from the advertisement levy. According to schedule 13 to the Budget Act for the year 2021, the statutorily prescribed activities of the Fund are expected to cost up to PLN 824 thousand²¹. It is also worth noting that, within the existing legal framework, the revenues of the Fund are administrative penalties imposed on the basis of the Act on the Protection and Care of Historical Monuments, which are projected in 2021 in the amount of PLN 700 thousand. Earmarking 15% of the funding derived from the advertising levy to the Fund would increase the revenues of this unit by approximately PLN 120 million. In the case of this Fund, the income from the proposed levy would constitute not so much additional as a principal source of its revenues. What is striking, however, is the fact that the draft act does not provide for the extension of the scope of tasks entrusted to the Fund. In consequence, the funds would have to be allocated exclusively to cover expenditure necessary for the execution of conservation or restoration work on historical monuments listed in the Heritage Treasure List, expenditure necessary for the execution of conservation, restoration or construction work on historical monuments listed in the Historical Monuments Register as well as operating expenses of the Fund²². In view of these considerations, the question arises whether

¹⁹ See Google, “Media pomoga.”

²⁰ See “Financial plan of the NHF for the year 2021 NFZ”, Google, accessed May 2, 2021, <https://www.nfz.gov.pl/bip/finanse-nfz/>.

²¹ Act of 20 January 2021, Journal of Laws 2021, item 190, Annex no. 13, Table 5 – Financial Plan of National Fund for the Protection of Historical Monuments.

²² Art. 83b of the Act of 23 July 2003 on the Protection and the Care of Historical Monuments, Journal of Laws 2021, item 710.

the MPF may be considered as a state special-purpose fund that is strongly involved in remedying the consequences of the SARS CoV-2 epidemic. The legislative rationale for the draft act does not provide clarification on that issue but limits itself to the following statement: “Additional financing [of the fund] will contribute to increasing tourist attractiveness of places with undisclosed and untapped tourist potential”²³. This demonstrates that, in contrast to the objective stated, the advertisement levy has not been exclusively designated as a measure aimed at obtaining the funding to combat the effects of the epidemic.

One of the most controversial changes provided for in the draft law is the creation of a new state special-purpose fund, which would be the third beneficiary of the advertisement levy. According to the draft law, the CN-HSF shall receive 35% of the proceeds from the levy, which means that, as estimated by the Ministry of Finance, it would possess an amount of PLN 280 million. Under the provisions of the bill, the scope of the activities of the Fund includes: (1) improving knowledge and awareness of the public of risks associated with the media, particularly digital media; (2) creation of platforms for exchanging information and analyses of content appearing in the media, particularly in digital media; (3) creation and development of information channels and platforms (television and radio broadcasts, internet portals) addressed to those who do not have high digital competences; (4) promotion of Polish cultural achievements, national heritage and sport; (5) supporting research in the field of the media; (6) supporting the development of radio broadcasting and cinematography in the field of Polish national heritage and sport; (7) supporting efforts to increase the share of Polish content in the media area²⁴.

The analysis of the catalogue listed above leads to the conclusion that some of these tasks are normatively assigned to other already existing entities of the public finance sector. The first thing to be noted is the fact that activities consisting in promoting and supporting Polish cultural achievements are the responsibilities of the Culture Promotion Fund, which is a state special-purpose fund established by the Gambling Act and administered by the minister in charge of culture and national heritage protection.

²³ Legislative rationale, 12.

²⁴ Art. 30 of the bill.

The Fund's revenues are surcharges to stakes, ticket prices or other documents of participation in gambling games covered by state monopoly²⁵. This means that there is already a special-purpose levy earmarked for the promotion and support of Polish cultural achievements. The next category of public tasks, that is tasks consisting of supporting cinematography in the area of Polish national heritage projects, are conducted by the Polish Film Institute, which is a state organisational unit with legal personality operated on the basis of the Cinematography Act and supervised by the minister in charge of culture and national heritage protection. The main source of revenues of this entity consists of proceeds from the separate compulsory levy that is imposed on cinema operators, film distributors, television broadcasters, digital platform operators, cable television operators and entities providing audiovisual media services on demand²⁶. In this context, it should also be mentioned that, although the levy does not constitute a tax within the meaning of the Tax Ordinance Act, insofar as it concerns audiovisual media services, it is regarded as a kind of a digital tax in legal literature²⁷. The next thing to consider is the fact that some of the tasks aimed at improving knowledge and awareness of the public of risks associated with digital media are carried out by the Fund for Solving Gambling Problems since it is the Fund that undertakes information and education activities as well as prepares expert opinions and reports on non-substance addictions²⁸. The Fund is a state special-purpose fund which operates on the basis of the Gambling Act and is administered by the minister in charge of health. The main source of revenues of this entity includes proceeds from the aforementioned surcharges to stakes in gambling games covered by state monopoly. Another issue that deserves special attention is the fact that some of the tasks assigned to the newly created Fund for the Support of Culture and National Heritage in the Media Area fall under the heading

²⁵ Art. 87 of the Act of 19 November 2009 on Gambling Games, *Journal of Laws* 2020, item 2094, as amended [henceforth cited as: Gambling Act].

²⁶ Art. 7–10 of the Act of 30 June 2005 on Cinematography, *Journal of Laws* 2021, item 257.

²⁷ See “What European OECD Countries Are Doing about Digital Services Taxes”, Tax Foundation, accessed July 6, 2021, <http://taxfoundation.org/digital-tax-europe-2020/>; Daniel Bunn, Elke Asen, Cristina Enache, “Digital Taxation around the World”, accessed July 6, 2021, <https://taxfoundation.org/digital-tax/>.

²⁸ Art. 88 of the Gambling Act.

of the broadly understood ‘media education’, whereas media education is the responsibility of the public media and shall be carried out as part of the public service remit²⁹. It is also worth mentioning that those activities are funded from the proceeds of the broadcast receiving licence, which is a separate public levy laid down by the Act on Broadcast Receiving Licence and designated for specific uses³⁰. Last but not least, it should be noted that most of the CNHSF’s tasks could be financed directly from the state budget, for example in the form of programmes implemented by the minister in charge of culture and national heritage protection. Against the above considerations, the question arises whether the catalogue of tasks assigned to the CNHSF provides sufficient grounds for establishing both the new state special-purpose fund and the new special-purpose levy. Undoubtedly, and clearly contrary to the stated objective of the bill, the CNHSF cannot be also considered as a fund particularly involved in counteracting the effects of the epidemic.

While examining the draft legislation in the context of its declared objective, the rules and procedures for managing proceeds from the advertisement levy should also be taken into consideration. Under the draft act, the CNHSF shall award grants. The proposed provisions do not specify the nature of these grants; however, in the view of the provisions of the Public Finance Act, grants to finance statutorily defined tasks, including tasks in the field of state patronage of culture, carried out by units other than units of local government, constitute targeted grants³¹. The CNHSF grants shall be awarded through an open call, in which the entities liable for the advertisement levy would also be able to participate³². Since the scope of the tasks assigned to the CNHSF coincides to some extent with the tasks performed within the public service remit, it cannot be excluded that public broadcasting units would be beneficiaries of those funds. It basically means establishing a new source of public funding for public broadcasters. When the principle of public finance transparency is taken into consideration,

²⁹ Art. 21 sec. 1a clause 11 of the Act of 29 December 1992 r. on Radio and Television, Journal of Laws 2020, item 805, as amended.

³⁰ Act of 21 April 2005 – Journal of Law 2020, item 1689.

³¹ Art. 127 of Public Finance Act.

³² Art. 31 sec. 1 and 3 of the bill.

attention should also be drawn to the fact that the draft act does not set any criteria that should be employed by the Commission responsible for examining grant applications³³. In particular, it was not indicated that the anticipated effects of a given project, as well as the financial and economic conditions for its implementation, should be taken into account. The above reservations seem to be even more important in view of the fact that under the draft legislation, the Commission shall be composed exclusively of government administration representatives: to be more precise, three representatives of the minister in charge of culture and national heritage protection and one representative each appointed by the minister responsible for informatisation and the minister in charge of public finance³⁴. According to the bill, the Commission is also not obliged to seek advice from outside experts. It may raise a concern that the decisions to award a grant would be based not only on the merits of a given project but also on political issues, worldviews and ideological attitudes.

Another issue that needs to be highlighted is the fact that the bill does not contain any provision specifying the source from which the operating costs of the CNHSF are to be covered. According to the draft legislation, the resources of the Fund shall serve to cover banking costs of this unit, as well as operational costs of the Commission responsible for examining applications for grants awarded by the Fund. The draft act also states that the administrative support of the Commission shall be provided by the office serving the authorizing officer of the Fund, who is the minister in charge of culture and national heritage protection. It is clear from the wording of these provisions that, contrary to the standard practice, the operating costs of the Fund shall not be covered with the resources of this unit. In the case of the CNHSF, the appropriations of the Fund should only be assigned to cover its banking costs and travel expenses of the Commission members³⁵. This means that if new posts were necessary, they would be financed from the state budget, from part 24 – Culture and national heritage protection. In consequence, despite the earmarking of PLN 280 million

³³ It would be possible to adopt such criteria as cognitive, educational or artistic values of a given project.

³⁴ Art. 32 sec. 2 of the bill.

³⁵ Art. 32 of the bill.

annually to the CNHSF, the operational costs of the Fund would place an additional financial burden on the state budget, which raises concerns in view of the principles of management. In order to justify the above definition, the drafters invoked the Austrian and French provisions; however, those provisions are significantly different³⁶. In Austrian advertisement tax (*Werbeabgabe*), the taxable base shall include consideration (*Engelt*) within the meaning of § 4 of the Value Added Tax Act (*Umsatzsteuergesetz*)³⁷ which the person accepting the order enters on an invoice, whereby the advertisement tax is not a part of the assessment basis³⁸. In the case of the French tax on publishers and distributors of television services (*taxe sur les éditeurs et distributeurs de services de télévision*), the taxable amount includes, inter alia, amounts paid by advertisers and sponsors for the distribution of advertisements and sponsor messages, including catch-up TV services, net of value added tax³⁹. Nevertheless, it should be stressed that the substantive scope of this tax is not limited to advertising services, and thus the tax base also includes other amounts, for instance TV subscription fees.

As proposed, the basis for calculation of the contribution on conventional advertising shall be the total revenue in a calendar year from a given source of revenue. Additionally, four sources of revenue have been indicated, i.e.: (1) advertising through television, radio, cinema and outdoor advertising media, except advertising of qualified goods; (2) advertising of qualified goods through television, radio, cinema and outdoor advertising media; (3) advertising through the press, with the exception of advertising of qualified goods; (4) advertising of qualified goods through the press. The basis for the calculation of the contribution does not include revenue covered by the contribution on digital advertising, nor does it include

³⁶ See legislative rationale, 3.

³⁷ § 4 (1) Gesamte Rechtsvorschrift für Umsatzsteuergesetz 1994, Google, accessed September 6, 2021, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10004873>.

³⁸ § 2 (1) Gesamte Rechtsvorschrift für Werbeabgabegesetz 2000, Google, accessed September 6, 2021, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20000689>.

³⁹ Art. L115-7 Code du cinéma et de l'image animée, Google, accessed August 2, 2021, https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000020908868/LEGISCTA-000020907745/#LEGISCTA000020908833.

revenues covered by the fee applying to alcoholic beverage advertisements. As already mentioned, the levy on traditional advertising would be imposed if the value of the revenue exceeded certain limits and would be calculated on the excess of these limits⁴⁰. Since the advertising of qualified goods constitutes a separate source of income, the question arises whether the limits shall be applied separately to revenues from advertising of such goods⁴¹.

The amount of the levy depends on the subject matter of the advertisement, the medium of communication used and the amount of the revenues realized. In regard to the subject matter of the advertisement, the category of the so-called qualified goods has been distinguished. This category includes medicinal products, food supplements, medical devices and beverages with sweeteners⁴². It has not been explained in the legislative rationale what grounds led to the adoption of this catalogue. Nevertheless, it seems that the intention of the drafters was to impose a greater burden on those products which are widely advertised and, when consumed in excessive amounts, could be harmful. The rates for television, radio, cinema and outdoor media advertising shall be 7.5% of the portion of the assessment basis that is less than PLN 50 million and 10% of the excess of the assessment basis over PLN 50 million. Rates of 10% and 15% respectively are to be applied to revenue resulting from advertising of qualified goods. If the revenue is from press advertising, the rates shall be 2% of the portion of the assessment basis that is less than PLN 30 million and 6% of the portion of the assessment basis exceeding PLN 30 million. In the case of press advertising of qualified goods, the rates shall be 4% and 12% respectively. The thing that may give rise to controversy in that respect is the fact that cinema advertising is not treated any differently from advertising through television and radio, whereas cinema operators have suffered severely from the restrictions imposed due to the COVID-19 outbreak.

The technical components of the contribution on digital advertising have been set out separately. The analysis of these provisions leads to the conclusion that the obligation to pay the contribution on digital advertising

⁴⁰ Art. 6, 7 and 9 of the bill.

⁴¹ See P. Rochowicz, "Podatek od reklam: niejasności w projekcie problematyczne dla podatników i skarbowki," *Rzeczpospolita*, 8 February 2021.

⁴² Art. 7 of the bill.

arises under the following conditions. First, the digital advertising service has to be provided on the territory of Poland. Second, the entity providing the service must meet conditions relating to the level of revenues.

As defined by the proposal, “digital advertising” means a digital service which enables the service user to direct the advertisement to the recipient, in particular by displaying or playing audiovisual material or sound on the recipient’s device. The targeting of the advertisement must depend on data related to the recipient. The term “digital advertisement” should also be understood to cover all other services that are relevant to directing the advertisement to the recipient, in particular: (1) building the recipient’s advertising profile; (2) data sale; (3) advertising auctions⁴³. As the scope of meaning of the term ‘digital advertising’ is wide, some activities have been excluded from the substantive scope of the levy. The regulations do not apply to telecommunication services within the meaning of the Telecommunication Law⁴⁴, digital services provided by an entity belonging to a consolidated group for financial accounting purposes to another entity in that same group, as well as to gambling games.

According to the draft act, a person liable for the contribution on digital advertising shall mean an entity meeting both of the following conditions: (a) the total amount of the worldwide revenues reported by the entity or a consolidated group to which the entity belongs for the relevant financial year exceeds EUR 750 million; (b) the total amount of the revenues resulting from digital advertising services obtained by the entity or a consolidated group to which the entity belongs within Poland during the relevant financial year exceeds EUR 5 million. The digital advertising service is deemed to take place in Poland if at the time of receiving the advertisement, the recipient is located on the territory of Poland. The assessment whether the recipient is located in Poland shall be made by determining the place where the recipient’s device is being used⁴⁵.

The basis for calculation of the contribution on digital advertising is equal to the worldwide revenue resulting from digital advertising multiplied by the share (percentage) of recipients located in Poland in the total

⁴³ Art. 13 of the bill.

⁴⁴ Act of 17 July 2004 – Journal of Laws 2021, item 576, as amended.

⁴⁵ Art. 15 and 16 of the bill.

number of recipients of advertising services provided by the entity or a consolidated group to which the entity belongs⁴⁶. It is clear that in determining the proportion of the revenue obtained in Poland, the drafters made use of the French experiences (the so-called French presence ratio)⁴⁷. Such a formula undeniably constitutes a simplification measure since there is no need to calculate the amount of revenue earned by digital platform companies from a particular location. The term “revenue” has been defined as everything which constitutes consideration in return for the advertisement services, net of value added tax. In respect of the assessment base for the contribution on digital advertising, the draft act also explicitly states that revenue shall be recognized as having been obtained at the time when it falls due; it is therefore not relevant whether the amounts have actually been paid.

Prima facie such provisions seem to be clear; however, a closer examination leads to the conclusion that they would create difficulties in their implementation. It should be noted that, in light of the broad legal definition of ‘digital advertising’, there is a risk of double taxation of the same amounts. Remuneration for services other than internet publishers’ services, for example for building the user’s advertising profile, is usually calculated in the amount which the service user has to pay for the provision of the whole service finalised by the advertisement being displayed on a web page. Since providers of such services are also liable for the contribution, the proposed levy might distort the market due to its cascading effects and may make consumers rather than the targeted multinational corporations the actual payers of the contribution. In view of the above, the concept of gross margin taxation might be put into consideration, that is the taxation of net revenue from the advertising services after the deduction of the remunerations paid to the entrepreneurs providing services to the entity liable for the advertisement levy and to intermediaries. It is worth noting that such a tax base has been adopted in the Austrian digital tax (*Digitalsteuer*). Under the act on digital tax, the basis of assessment shall

⁴⁶ Art. 18 of the bill.

⁴⁷ See “France issues comprehensive draft guidance on digital services tax”, Ernst&Young, accessed May 1, 2021, https://www.ey.com/en_gl/tax-alerts/france-issues-comprehensive-draft-guidance-on-digital-services-tax.

be the consideration (*Engelt*) which the entity providing digital advertising services receives from a customer minus expenses for preparatory work done by other entities in the field of digital advertisement, if they do not belong to the taxpayer's group⁴⁸.

The rate of the contribution on digital advertising is 5%⁴⁹. In contrast to the contribution on conventional advertising, the amount of the levy is not based on revenues obtained from advertising services or on the subject matter of the advertisement. Therefore, and in view of the fact that the so-called qualified goods are widely advertised on the Internet, the following question arises: why higher rates of the digital advertisement contribution have not been imposed on such goods? Needless to say, it is another issue that has not been clarified in the legislative rationale for the bill.

3. Conclusions

Taxation of digital business activities undoubtedly poses a challenge for adequate regulation. In spite of the fact that it is unclear whether national digital taxes can overcome challenges stemming from the increasing digitalisation of the economy, such instruments have been either proposed, announced or implemented by numerous governments worldwide, including Poland. The analysis of the bill leads to the following conclusions.

First, as it is frequently the case with quasi-taxes, the advertisement levy has not been designated as a tax for political reasons. Nevertheless, one can attribute certain features and functions of a digital tax to this levy. Although the term “contribution” has been used, the levy also does not bear the characteristics of a contribution but rather constitutes a new special-purpose levy within the meaning of Art. 217 of the Constitution of the Republic of Poland.

Second, the analysis of the bill supports the assumption that providing adequate finances for those special-purpose funds that are strongly involved in remedying the consequences of the SARS CoV-2 epidemic is not a genuine purpose of the bill. In the case of the NHF, the financial impact

⁴⁸ § 3(1) Gesamte Rechtsvorschrift für Digitalsteuergesetz 2020, Google, accessed September 9, 2021, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20010780>.

⁴⁹ Art. 20 of the bill.

of the revenues from the advertisement levy would be negligible, whereas the MPF cannot be at all considered as a state special-purpose fund that is strongly involved in repairing the consequences of the epidemic. The proposal to establish a new state special-purpose fund seems even more controversial since most of its tasks have been normatively assigned to other already existing entities, including the public media, or could be financed directly from the state budget.

Third, despite the fact that the provision of the bill mirrors to some extent the proposal for a Council Directive on the common system of digital advertising tax on revenues resulting from the provision of certain digital advertising services, the structure of rules on the technical components of the advertisement levies may give rise to interpretative doubts. There are controversies relating to both the qualitative and quantitative elements of the levies, including: the subjective scope of the advertising contributions, revenue thresholds, special rules on advertising of qualified goods and the bases for calculation of the contributions.

In light of the above considerations, the conclusion can be drawn that there is no constitutional justification for such a special-purpose levy. The accomplishment of the research objective allowed for the formulation of the thesis that advertisement contributions, as drafted, would not be efficient instruments of fair taxation of the digital economy, but they would rather form instruments for achieving certain political objectives.

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