

A STATE AND THE PROTECTION OF ITS INTERESTS. ADVOCATUS FISCO VS STATE TREASURY SOLICITORS' OFFICE

ABSTRACT

The modern concept of the state dates its roots to the beginning of the Renaissance. Created at that time, the concept of 'the national interest' realized the existence of a sphere of rights and interests of a particular country, which must be protected in a particular way. To this end, national bodies responsible for protecting the rights and interests of the state were established. Despite the different conception of the state, the origins of institutions dealing with the legal protection of interests and rights of the state can be found in the Roman institution *advocatus fisci*. Even then, numerous provisions governing the organization and functioning of the institution arose. In Poland the institution which deals with this kind of protection is the State Treasury Solicitors' Office. The object of this elaboration is to identify similarities and differences between those two institutions.

KEYWORDS: *protection of the interests of the Treasury, Roman law, public law, advocatus fisci, the State Treasury Solicitors' Office*

INTRODUCTORY ISSUES

The subject of this dissertation is presentation and comparison of tasks and functions of institutions of litigation representative of a state in the ancient Rome (*advocatus fisci*) as well as the contemporary one on the basis of State Treasury Solicitors' Office, further called STSO. Diversification of those two institutions, or better their comparison, aims at explaining readers the area

of a state's interests protection. In this dissertation, the ways and institutions responsible for defining state's interest itself are purposely omitted since the task is most often the result of sector policies, e.g. the defense, ecological, economic or social ones. The dissertations focus on legal and historical analysis of normative regulations, and in case of the Roman law, also literature one, in order to explain the tasks of both institutions responsible for protection of State Treasury interests placed in various time space, and in consequence, in different factual situations.

The basic research method, besides the comparative, historical, legal and dogmatic ones, is the functional method. It will enable to explain a draft hypothesis namely adopting an assumption of the need to fulfill a task concerning State Treasury interests protection, fulfilled in different ways an various time spaces. On that level, the existence of certain similarities may not be excluded.

THE CONCEPT OF A STATE AND STATE TREASURY INTEREST

However, it is necessary to realize at the beginning that the way of state representation in civil processes mostly depends on a state concept, and consequently, on their objectives. In the republican Rome, a state concept was identified with the people comprehended as a group of free citizens (*cives romanorum*), men. Their task was care for common affairs, especially rules and life benefits in a community (Wołodkiewicz, 2009, p. 292–293). State interest was identified mainly with treasury (*aerarium populi Romani*) as well as property rights, e.g. the right of a state to inheritance or non-inheritance rights. During the principate and dominance, a state was associated with Caesar and his property, *fiscus* (Petrucci, 2012, p. 115; Sitek, 2011, p. 87). Certain enrichment of ancient concepts was held in the Middle Ages. According to St. Thomas Aquinas (1225–1274), a state is or should be a perfect community, self-sufficient, independent and self-governing (Sobański, 1979, p. 39–42).

Those assumptions were continued during the age of Renaissance, especially by J. Bodin (1530–1596) who claimed the concept of sovereign state and, consequently a national one (Izdebski, 1995, p. 98–101). Whereas, N. Machiavelli (1469–1527) in his works titled *The Duke* drew the way of

performing power within a state giving the basis to build absolute monarchy, a form of government dominant until the beginning of the 20th century (Izdebski, 1995, p. 94–97). Thanks to it, there was creation of a national state and consequently to defining the interest only of the nation living in a given area. It was the beginning of postponing national minorities that were excluded from the interests of a dominant national group. In that perspective, suppression of any European movements such as Spring od Nations in 1848 or national minorities' uprisings, including the Poles, e.g. the November uprising (1831) or January one (1863). The concept of a state identified with a ruler lasted until the end of the 19th and the beginning of the 20th century. It was transformed in many ways including the creation of the concept of an enlighten ruler, namely open to changes, at least illusory ones. Those included most often creation of a parliament or government that would gradually take over the governing rights of those ruling. In practice, it was often fiction.

Such an image of a state would not be changed by the latter Jellinek's three-element state concept that indeed strengthened the factual state. The most distinguished element of that definition was power that did not have to indicate any legitimation to its existence. Reaction to such shaped concept of power, and consequently comprehension of state interest were various ideologies of the 19th century, including the socialist one. The creators of that idea transferred only the center of Caesar's power or an absolute ruler onto the working class. The execution of the power in absolute way was barely amended. The interest of a working class simultaneously became the interest of a state (Bałaban, 1988, p. 13–34).

The European integration and economic cooperation that took place between the USA and Canada show that state structures have less and less range of competences and as a consequence, their decision making. More and more contemporary state tasks are taken over by the EU's bodies, e.g. the European security, international policy, consumer's protection, environmental protection, decreasing unemployment, stimulation of decrease of unemployment by regional or territorial units, e.g. space planning, decrease of poverty or education as well as non-governmental organizations.

In the 19th century many European thinkers started to ask themselves a question not what a state was or how it should be ruled but what it should

be like. What features it should have in order to fulfill its basic functions, e.g. social, political or military ones. They started to speak about the state of law of the need to democratization of state structures. Another area of research was asking a question concerning the range of competence of a state and the ways of protection of its interests. According to I. Kant, a state must be fair and just social order should lie on the basis of it. Conceptualization of the order depends however on a human who is a central being according to the Kant's philosophy.

Therefore, there are questions about decent living conditions for human development. Therefore, it is necessary to order public life in such a way that it would be possible for free people to co-exist in one society. The coexistence should be based on the principles of exchangeable justice, namely mutuality and equality of services mentioned in the activity by the sides for each other. Politics is closely related with morality. Therefore, providing freedom to a unit is a basic task and characteristic feature for a just state. A state should stand on guard of typical values for changeable justice. Thus, conceptualization of the idea of impartial governing institutions is essential, and the consequence of its implementation is just social or public order (Kieliszek, 2010, p. 27–60).

Nowadays, there is a dominant concept of a custody state and law. A social or custody state not only supports a unit with the help of its bodies but it supervises private, family life, it interferes into upbringing processes of children, relations between spouses, arranges relax and even defines the ways of spending leisure time. Moreover, such a state performs far juridisation of social life, namely interference of law into citizens' lives, and simultaneously gradual displacement moral or religious norms by law (Juros, 1998, p. 68–69). Whereas, a state of law is based on unconditional respecting legal regulations and procedures towards units, collective entities, companies and observing legal regulations by *stationes fisci*. Such comprehended concept of a state of law has been recently transformed into a "state of culture", "tax state", "judicial state", "state of political parties" or "ecological state" (Juros, 1998, p. 78). In that perspective of changing a state concept, there is a question to be asked about the definition of state treasury interest. *Prima facie*, it should be realized that there is no legislative definition of a state treasury. However, it is adopted that it is property and any material and non-material assets remaining at the disposal of state bodies (*stationes fisci*).

THE NEED TO PROTECT THE INTEREST OF A STATE TREASURY

There is a need to re-define state and its role in a globalizing society towards existing changes as for functions and objectives of a contemporary state. Nowadays, a state is more and more treated as one player besides physical and legal persons, especially before civil courts. It possesses judicial ability therefore it may sue and be sued. An avalanche of claims, mainly damages towards a state treasury proves the radical change of mentality and attitude of citizens or business entities that do not identify with the state any more but treat it as a potential perpetrator of a damage caused by activities of negligence of activities by its bodies simultaneously obliged to repairing it.

Such damage may be result of civil legal actions (e.g. an agreement between state bodies and private entities), lack or improper legislation, negligence (e.g. improper maintenance of anti-flood embankment may contribute to flood or increase of its range) and administrative decisions both while their issuing and negligence in that matter. The beginning of compensative attitude of citizens as well as *quasi* legal persons towards a state started in the ancient Rome, especially during the age of principate and implementation of the cognition process. The most common area of disputes between physical persons and *fiscus* were tax affairs. Such a possibility in the ancient times was an innovative solution. Monarchies ruling then, e.g. in Egypt (López Melero, Plácido, Presedo, 1992, p. 152–153) or Persia (López Melero, Plácido, Presedo, 1992, p. 595–596) did not allow to sue the state, namely rulers often identified as gods, by private entities before civil courts.

What is more, jurisdiction was in hands of the ruler himself or clerks completely dependent on him. The necessity to establish an institution of judicial substitute resulted from different areas of activity of a state bodies also within the necessity to undertake civil legal actions, e.g. providing public orders to build a road, organization of games, building a church or building an aqueduct. Civil legal agreements concluded in that occasion could create later mutual claims that were next solved before courts. In the ancient Rome, such an institution was *advocatus fisci* and now in Poland it is State Treasury Solicitors' Office.

ADVOCATUS FISCI

The *advocatus fisci* institution has been of interest of the ancient times researchers, especially Romanists for a long time. It should be noticed that those are mainly definition dissertations in various encyclopedias, by such authors as follows: E. De Ruggiero, voce *Advocatus fisci*, in *Dizionario epigraficodi antichità romane*, I, Roma 1886, p. 126; W. Kubitschek, voce *Advocatus fisci*, in *R.E. Pauly Wissowa*, I, Stuttgart 1894, c. 439. V. Humbert, voce *Advocatus fisci*, in *Dictionnaire des antiquités grecques et romaines*, I,1, Paris 1877, p. 90; U. Coli, voce *Fisco (diritto romano)*, in *Nov. Dig. It.*, Torino 1961, 384; A. Burdese, voce *Fisco (diritto romano)*, in *ED*, 17, Milano 1968, 676.

Also detailed dissertations of such Romanists should be mentioned as follows: G. Boulvert, *Advocatus fisci*, in *Index*, 3 (1972), 22 ss., or a wider dissertation by A. Burdese, *Sull'origine dell' «advocatus fisci»*, in *Studi E. Guicciardi*, Padova 1975, 90 ss. The latest monographic dissertation of the *advocatus fisci* institution is the work by a Spanish Romanist A. Agudo Ruiz titled *El advocatus fisci en derecho romano*, Madrid 2006 or the article by P. Lambrini titled *In tema di „advocatus fisci”*, in *SDHI*, 59 (1993), pp. 325-336. Principally, the *advocatus fisci* institution was mentioned on the occasion of discussing the issues concerning *fiscus* and protection of its interests (Herrlich, 1872, p. 28; Spagnuolo Vigorita, 1985, p. 1123; Hirschfeld, 1905, p. 49 nt. 4; Mitteis, 1908, p. 364, nt. 38; Giuffré, 1976, p. 644; Puliatti, 1992, p. 349; Nardi, 1937, p. 313; Bolla-Kotek, 1938, p. 76-97; Pugliese, 1948, p. 98; Pflaum, 1950, p. 64; Millar, 1963, p. 33; Chicca, 1964, p. 141; Brunt, 1964, p. 475-488; Brunt, 1966, p. 84; Provera, 1964, p. 120; Kaser, 1965, p. 175). In the Polish Roman literature, the subject remains absent.

On the basis of the remained fragment by Elio Sparziano, it is adopted that the *advocatus fisci* institution was most likely created during the ruling by the Caesar Hadrian.

Spart. (*Script. Hist. Aug.*) *Hadr.* 20,6: *Fisci advocatum primus instituit.*

That report is also confirmed by inscriptions deriving from the Times of Hadrian or the latter Caesar Antony Pius (ILS 1451). In the Roman doctrine there are also voices that the *advocatus fisci* institution could have existed much earlier. Those are concepts based on deduction performed separately from the source. Primary, the institution was likely to exist only in Rome,

later it was implemented in provinces in other *stationes fisci*. According to Lambrini, creation of the *advocatus fisci* institutions, during the time of principate, was related with incapability of private (*quasi ex populo*) claim institution (*delatio*) in the affairs that expose fiscus to loss, especially in cases of *bona caduca*, *bona vacantia* i *damnatio* (damning legate for the sake of fiscus) (Lambrini, 1993, p. 325–336). It was proved that a delator must be supported by professional legal power, namely *advocatus fisci*. The concept is very logical however not supported by any sources. Lambardini herself warns against a methodological error which is perceiving the *advocatus fisci* institution through the prism of present experiences to defend fiscus affairs or institutions serving to it (ILS 1451).

Advocatus fisci being a state body performer however as a physical person not an office. It was, therefore, a lawyer powered to represent fiscus before civil courts in processes of legacy for fiscus or of *bona vacantia*. A number of preserved legal regulations prove the significance of *advocatus fisci* for the protection of the interests of fiscus, that are included in Digests, especially in book 49 titled *De iure fisci* as well as in the Theodosian Code (C.Th. 10,15 – *De advocatis fisci*) and the Code of Justinian (C. 2,8 – *De advocatus fisci*). Whereas, literature sources are rather modest, since there is short notice on *advocatis fisci* at Apuleius, a writer and rhetoric from the 2nd century, in the work titled *Metamorphosis (Metamorphoseon)* (Apul. *Metamorph.* 7,10).

SOLICITORS' OFFICE

State Treasury Solicitors' Office was established on the power of the act on July 8th 2005 on the State Treasury Solicitors' Office (Journal of Laws 2005 No. 169, pos. 1417). Simultaneously, there was a relation to the tradition of existence of the institution in the Kingdom of Poland from September 29th 1816 and in the Interwar period of the 20th century. After the WWII, Solicitors' Office existed until April 14th 1951 when the decree on March 29th 1951 on process substitute bodies (Journal of Laws 1951 No. 20, pos. 159) came into force, which cancelled State Treasury Solicitors' Office (Brzęk, 2006, p. 20–39). Restoration of centralized unit of State Treasury interest protection was undertaken at the beginning of the 1990s, during the 1st cadency of the Sejm. The proceeding over the submitted bill was not completed due to the end of

the Sejm cadency (The Sejm Copy of I Cadence No. 85). The 2nd cadency of the Sejm rejected the proposed legislative motion during the first reading. More favorable winds for Solicitors' Offices blew during the 3rd cadency of the Sejm. The Sejm worked over two bills, one by the group of AWS MPs, the other one by the government of Jerzy Buzek themselves. Finally, the act passed on September 30th 1998, however the President of the Republic of Poland vetoed the act indicating the existence of collision of powers of Solicitors' Offices and the Minister of Treasury.

During the next cadency, there were three bills prepared on Solicitors' Offices by a group of MPs from PSL, LPR and Marek Belka's government. Finally, unanimous act was adopted on July 8th 2005 and the President of the republic of Poland signed it on August 15th 2006. It came into force on January 1st 2006 (Brzęk, 2006, p. 40). A chairperson having at his/her disposal the Head Office of STSO took the lead of STSO. The Polish State Treasury Solicitors' Office has its equivalents in other countries. In the Czech Republic there has been *Úřad pro zastupování státu ve věcech majetkových* since 2002, in France there is *Agence judiciaire du Trésor*, in Austria it is *Finanzprokurator* and in Spain there has been *Cuerpo de Abogados del Estado* since 1881.

COMPETENCES AND SYSTEM PLACEMENT OF *ADVOCATUS FISCO* AND SOLICITORS' OFFICES – CONCLUSIONS

Little number of remained sources does not allow to claim unanimously what competences *advocatus fisci* possessed. The Roman doctrine adopts that *advocatus fisci* was a process representative of *fiscus*, namely of Caesar's property, identified with State Treasury. He participated in the *praetor fiscalis* processes, a clerk created during the Caesar of Nerva. He was entitled to solve disputes between a physical person and *fiscus*. Some adopt that *advocatus fisci* also stood before other judicial bodies, e.g. *praefectus aerarii*, *procurator* or governor of province (Humbert, 1877, col. 90). The *advocatus fisci* participation against *fiscus* was obligatory.

D. 49.14.7 (Ulp. 54 ad. ed.): *Si fiscus alicui status controversiam faciat, fisci advocatus adesse debet. Quare si sine fisci advocato pronuntiatum sit, divus Marcus rescipit nihil esse actum et ideo ex integro cognosci oportere.*

Ulpian, one of the most distinguished lawyers during the age of Severan Dynasty, in the comment to the edict of praetor wrote that *advocatus fisci* participation in processes against *fiscus* is obligatory. Lack of participation of *fiscus* representative in the process caused nullity of proceedings. Implementation of the *restitutio in integrum* procedure in that case meant initiating the procedure again – *ex novo* (Raggi, 1965, p. 339; Puliatti, 1992, p. 340).

The *advocatus fisci* competences concerned principally inheritance affairs, in cases of *fiscus* claims connected with inheritance, *bona caduca*, *bona vacantia* and *damnatio*. Other disputes remaining on the bordering on *fiscus* and a private person were included in its competences. With the time being, the range of competences was widened into new issues, e.g. liberation performed with the loss of *fiscus*.

Solicitors' Offices are not a single body but a state organizational unit (art. 1 par. 2 act on STSO) and it acts with the assistance of the office where legal advisors work. They are independent while performing process activities. They rely on own beliefs based on legal knowledge and experience (art. 26 par. 1 and 2 act on STSO). The advisors, similarly to *advocatus fisci* may act separately or give collective opinions. Basing on art. 4 par. 1 act on STSO, the tasks of Solicitors' Offices are as follows:

- Exclusive process substitute of State Treasury by Supreme Court,
- Process substitute of State treasury before common, military and conciliation courts,
- Substitute of the Republic of Poland before courts, tribunals and other bodies giving verdicts in international affairs,
- Giving legal opinions,
- Giving opinions on normative acts concerning rights or interests of State Treasury.

SUMMARY

The range of the tasks of Solicitors' Offices is much wider than the *advocatus fisci* competences. The way of acting and responsibility is different as well. The first factor of the differences are affairs of international character led by Solicitors' Offices. Such a task was absent in case of *advocatus fisci*.

Placement of both institutions was different as well. According to art. 1 par. 3 act on STSO, proper Minister of State Treasury supervises STSO. In case of *advocatus fisci* it was a physical person independent from other state bodies. However, it can be claimed that the Roman instruction of interest protection of fiscus was the foundation to present similar institutions, including State Treasury Solicitors' Office.

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