

# COMPARATIVE STUDY ON PENALTIES STIPULATED IN THE BUDGETARY DISCIPLINE ENFORCEMENT REGULATORY FRAMEWORK IN THE VISEGRÁD COUNTRIES

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**Abstract:** Penalties are important part of any regulatory framework. They represent an ultima ratio measure which complements preventive and corrective measures. The goal of this article is to analyse and compare regulatory frameworks of the Visegrád countries in a perspective of penalties which aim to secure compliance with budgetary discipline. The article concludes that there exist significant differences between Visegrád countries. Utilizing a comparative method of research, primarily based on a questionnaire survey conducted by the authors, and responded to by a team of legal scholars, this article offers valuable insight for the legal scholarship and policymaking withing the Visegrád countries.

**Keywords:** penalties; sanctions; budgetary discipline enforcement; comparative study; Visegrád countries

## INTRODUCTION<sup>1</sup>

In this article, we present a comparative study focused on the penalties stipulated in the budgetary discipline regulatory frameworks which are currently in force in the Visegrád countries, namely (in the alphabetical order) in Czechia, Hungary, Poland and Slovakia. This article is a part of a series of three mutually related comparative studies on various aspects of this regulation. In the other two articles, there are conducted comparative studies on control procedures and refunds.

According to the theory of law, a proper legal norm should contain a sanction for its breaching.<sup>2</sup> However, it is not necessary to impose the criminal sanctions only. There are many measures, which can be labelled as a sanction for a breach of a legal norm. For the purposes of this article, we will consider as a penalty a measure intentionally leading to a loss of any kind (other than refund of budgetary funds), which is imposed by a public authority on an entity responsible for a breach of budgetary discipline as a response to

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<sup>2</sup> KELSEN Hans. *General Theory of Norms*. Oxford: Clarendon, 1991, pp. xxiv–xxv.

the breach.<sup>3</sup> According to this definition, there are many types of penalties, for example criminal penalties (eg., imprisonment or pecuniary punishment), administrative penalties (e.g., fine), contractual penalties. This article focuses primarily on penalties, which fall into scope of the financial law.

The research team previously proposed an optimal regulatory model of the budgetary discipline enforcement<sup>4</sup> which can be used in an evaluation of qualities of any particular budgetary discipline enforcement regulatory framework. The model was created as country independent model. Thus, it does not highlight or suppress any particular feature of an existing regulatory framework. The research team's final goal is to perform a normative analysis of budgetary enforcement regulatory frameworks which are currently in force in the Visegrád countries. However, such analysis needs as its first step full understanding of these regulatory frameworks, before they can be analysed in deep.

All of the Visegrád countries faced the same difficulties and presented the same approach during the transformation to democratic regime and shared similar experiences connected with the process of entering the European Union.<sup>5</sup> Moreover, all of these countries base their legal system on a western rule of law concept and European "unity of values".<sup>6</sup> All of these countries are also parties to European Convention on Human Rights containing provisions on right to fair trial<sup>7</sup>, which must be respected when applying of the national penal measures.

Since there is no in-depth analysis of the current budgetary discipline enforcement frameworks among the Visegrád countries, there is a research gap on this topic which can be filled by a comparative analysis of various aspects of the budgetary discipline enforcement regulatory frameworks relevant to the proposed regulatory model.

As mentioned earlier, all of the Visegrád countries share common values and are members of the European Union. Furthermore, there is wide cooperation among the academics and practitioners in the area of the financial law and two of the abovementioned countries (Czechia and Slovakia) were federated, which brings them even more together. Moreover, in the previous two comparative studies focused on supervisory procedures and refunds, lead to a conclusion, that in these areas hypothesis on similarity of Visegrád countries cannot be falsified.<sup>8</sup> Thus, one can assume that there are no significant differences among the Visegrád countries in respect to the penalties stipulated in the budgetary

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<sup>3</sup> HOSKINS Zachary and Antony DUFF. *Legal Punishment*. In: ZALTA Edward N. and Uri NODELMAN (eds.). *The Stanford Encyclopedia of Philosophy*. Online. Spring 2024. Stanford: Stanford University, 2024. Available at: <https://plato.stanford.edu/archives/spr2024/entries/legal-punishment/>

<sup>4</sup> BOHÁČ Radim, SEJKORA Tomáš, ŠMIRAUŠOVÁ Petra and Michal Tuláček. *Regulatory Model of the Budgetary Discipline Enforcement*. Online. *Studia Iuridica Lublinensia*. 2023. Vol. 32, no. 1, pp. 11–39. ISSN 1731-6375. DOI <https://doi.org/10.17951/sil.2023.32.1.11-39>

<sup>5</sup> POPLAWSKI Karol. *Introductory parts to the constitutions of Visegrad Group countries. Their relevance, constitutional identity and relation towards European Constitutional Identity*. Online. *Central European Papers*, 2020. Vol. 7, no. 1, p. 45.

<sup>6</sup> POPLAWSKI Karol, op. cit., pp. 45–46.

<sup>7</sup> Article 6 of European Convention on Human Rights.

<sup>8</sup> MÁLEK, Ondřej, BOHÁČ, Radim, KERNDLOVÁ, Petra and Michal TULÁČEK. *Comparative Study on Supervisory Procedures in the Budgetary Discipline Enforcement Regulatory Framework in the Visegrád Countries*. In review.; KERNDLOVÁ, Petra, MÁLEK, Ondřej, BOHÁČ, Radim and Michal TULÁČEK. *Comparative Study on Supervisory Procedures in the Budgetary Discipline Enforcement Regulatory Framework in the Visegrád Countries*. In review.

enforcement regulatory framework, there are no significant differences. However, this is only an assumption, which must be tested. Therefore, in this article the research team proposes a following hypothesis: **“in respect to the penalties stipulated in the budgetary enforcement regulatory framework, there are no significant differences among the Visegrád countries”**. To test this hypothesis, we will answer the research question **“what are the similarities and differences of the existing budgetary discipline enforcement regulatory frameworks in the Visegrád Group countries in respect to penalties?”**

## I. METHODOLOGY

All three articles share common methodology, which is in depth discussed in the first of them.<sup>9</sup> To avoid unnecessary replication, we will here provide only short overview of the methodology. For further details, please see the first article.

The article is based on the comparative method. First, the research team cooperated with legal scholars from all Visegrád countries whose expertise is financial law. These scholars participated in a questionnaire survey on this topic. Afterwards, the research team created a set of *tertia comparationis*  $T_1, \dots, n$  related to penalties and sanctions in general based on the information captured in the survey. Each *tertium comparationis* was clearly defined and the relevant part of each regulatory framework related to the area covered by this *tertium comparationis* was described. Afterwards, all regulatory frameworks were compared using this *tertium comparationis* to find similarities and dissimilarities as defined above.

Together, these comparisons provide answer to the research question stated in the introduction.

## II. RESEARCH AND RESULTS

Based on the optimal regulatory model and answers in the abovementioned questionnaires, we created the following set of *tertia comparationis*, which provides us a basis to study various aspects of the penalties connected to the budgetary discipline enforcement regulatory framework. The data obtained from the questionnaire surveys were used to identify the *law in books* and *law in action* in relation to these *tertia comparationis*.

$T_1$ : First, we examine all penalties stipulated in the financial law, which are related to the breach of budgetary discipline. In all Visegrád countries, there are more countermeasures related to the breach of the budgetary discipline. One of them is a duty to return related budgetary funds. Depending on the goal of the imposed return duty, this measure could be considered as a refund (which is beyond scope of this article) or as a punitive measure. In Czechia and Slovakia, there is a levy for the breach of the budgetary discipline, which can be used as a refund as well as a penal measure. This measure is present in all Visegrád countries. In all these countries, there is a criminal measure for the most serious

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<sup>9</sup> MÁLEK, Ondřej, BOHÁČ, Radim, KERNDLOVÁ, Petra and Michal TULÁČEK. *Comparative Study on Supervisory Procedures in the Budgetary Discipline Enforcement Regulatory Framework in the Visegrád Countries*. In review.

breaches of the budgetary discipline. Between these extremes, there are administrative punitive measures such as warning, reprimand, fine or ban. In Slovakia, a fine can be imposed for a breach of budgetary discipline. In Poland, a responsible authority can impose all the mentioned administrative measures. Finally, in Hungary, there can be initiated a disciplinary proceeding as a result of budgetary discipline breach.

*T<sub>2</sub>*: To fully achieve desired effect of a penalty, its parameters should be adjusted according to the case and breacher.<sup>10</sup> *T<sub>2</sub>* studies the freedom of public authority to adjust parameters of an imposed penalty, especially whether it can choose a type of the penalty and its severity. In all of the Visegrád countries, generally the discretion of public body is limited only to the ability to choose from penalties explicitly stipulated by law or to set a specific amount of a penalty. However, in Czechia and in Slovakia, there are several cases, where law allows to include sanction provisions in a subsidy contract but does not prescribe any further specifics or limits of such provision<sup>11</sup>. Nevertheless, the Slovak respondent indicated, that these sanction provisions are normally in the nature of default interest.

*T<sub>3</sub>*: According to the *T<sub>2</sub>*, the responsible authority can choose from a palette of measures focused on a duty of a public office to ensure consistency in its exercise of public authority. *T<sub>3</sub>* studies, whether the public authority is bound by previous decision (regardless of whether its own or someone else's), i.e. whether it must either follow previous decisions in factually identical cases or explain, why it takes a different approach. In all Visegrád countries, only laws are formally binding. This means that actions of the administrative bodies do not set a legally binding precedent for future cases. Similarly, since all the countries have a continental based legal system, judicial case-law is not a formal source of laws as well. However, in all these countries, the legal certainty and legitimate expectation principles are important parts of their legal system. This means that generally these authorities must follow “comply or explain” policy.

*T<sub>4</sub>*: In case of the non-criminal measures, it is important to determine, which public authority is responsible for their imposition. In each of the Visegrád countries, there is a supreme audit body<sup>12</sup>. Their common characteristics is absence of power to impose sanctions. In Czechia, tax offices are responsible for imposing of the levy for breach of budget discipline related to the state budget funds. In case of the breach related to local budgets, the levy is imposed by municipal or regional offices, depending on the budget concerned. In Slovakia, there is more fragmented approach on the state level. Apart from Supreme Audit Office, the body that detects the breach of budgetary discipline,<sup>13</sup> has power to impose a sanction (levy or fine). In Hungary, the responsible body is the Hungarian Treasury. In Poland, the responsible bodies are several different adjudicating commissions.

<sup>10</sup> GRIVNA, Tomáš, SCHEINOST, Miroslav and ZOUBKOVÁ, Ivana. et al. *Kriminologie* [Criminology], Online. 5<sup>th</sup> upd. ed. Wolters Kluwer: Praha [cit. 2024-04-05]. Available at: [www.aspi.cz](http://www.aspi.cz), ASPI\_ID MN497CZ. ISSN 2336-517X.

<sup>11</sup> In Czechia, it is for example paragraph 9(1)(r) of the Act No. 130/2002 Sb., on support for research and development from public funds and on amendments to certain related acts (Act on support for research and development). In Slovakia, it is for example paragraph 19(2)(m) of the Act No. 310/2019 Z. z., on the Sports Promotion Fund and on amending and supplementing certain acts.

<sup>12</sup> In Czechia, Poland and Slovakia, they are by constitution independent bodies. In Hungary, the State Audit Office is a control body of the Parliament performing its duties under the authority of the Parliament.

<sup>13</sup> The Ministry of Finance, Government Audit Office or the Ministry of Labour, Social Affairs and Family.

x	T <sub>x</sub>
1.	Variety of penalties that can be imposed in connection with breaches of budgetary discipline.
2.	Public authorities have a broad discretion when imposing penalties.
3.	Public authorities are bound by previous action when imposing penalties.
4.	Centralization of public authorities responsible for imposing penalties.
5.	Penalties can be imposed only as a result of an audit or another control procedure.
6.	There are different penalties for different entities.
7.	There is a defence against imposed penalties.
8.	The <i>ne bis in idem</i> principle applies when imposing penalties.

*T<sub>5</sub>*: In case of the non-criminal penalties, it is also important to determine, whether they can be imposed only as a result of the audit or other supervisory procedure. According to the reports, an audit or other supervisory procedure always precedes the imposition of penalties.

*T<sub>6</sub>*: In theory, penalties available can vary depending on the type of subject, which breached budgetary discipline (e.g. state, municipality, private person, etc.). In all the Visegrád countries, the non-criminal penalties are universal and do not vary depending on the type of subject.

*T<sub>7</sub>*: Usually, law systems are based on principles, which tries to eliminate, or at least minimize errors. One of these principles is usually the right to appeal and to seek protection by an independent court. In all Visegrád countries, the non-criminal penal measures are imposed in an administrative proceeding and its participant has right to appeal to a higher authority.<sup>14</sup>

*T<sub>8</sub>*: The *ne bis in idem* principle is an important part of country penal framework. In context of this article, we will study, whether imposition of one penal measure excludes the possibility to impose simultaneously another penal measure for the same breach. Additionally, we will study, whether imposition of a penalty prohibits imposing of additional penalties in the future for the same breach. In Czechia, it is possible to impose a duty to return budgetary funds more than once (up to the amount previously granted). This is not possible in other Visegrád countries. The other penalties follow in all Visegrád countries *res administrata/res iudicata* principle. In Czechia, Hungary and Slovakia, more penal measures can be imposed simultaneously for one breach. However, in Poland, it is not possible.

<sup>14</sup> In Czechia, they can appeal to the Appellate Financial Directorate in case of a state budget funds. In Hungary, they can appeal to the central body of the State Treasury or to the minister, if the decision was issued by the regional body of the State Treasury. In Poland, they can appeal to the Main Adjudicating Commission. In Czechia (in case of regional budgets funds) and in Slovakia, there are many appellate bodies, because there are many bodies, which can impose penalty.

### III. DISCUSSION

Next to the control procedures and refunds, the penalties are third important part of the optimal regulatory model of the optimal budgetary discipline enforcement.

There are many ways, how to penalize someone, who breached budgetary discipline. This penalization can be in its nature a measure specific to financial law, it can be an administrative measure (such as disciplinary proceeding or revoking from the possibility to acquire a financial grant in the future) or it can be in nature true criminal measure (no matter, if arising from the administrative law, such as fine, or from criminal law, such as imprisonment or pecuniary penalty). As we mentioned before, we (if certain conditions are met) list duty to return budgetary funds among the penalties as well. Even though outcome the duty to return budgetary funds is the same no matter if the purpose of return duty is refund or penalty, reasons for imposing of such measure differs. If the reason is corrective, i.e. to repair damage, the measure is in its nature refund. However, if the reason is preventive or retributive, the measure is in its nature a penalty. Naturally, the reasons behind imposition of the measure can be mixed, which means the duty to return budgetary funds can be both a refund and a penalty.

$T_1$  proved, that the penalty system differs among in Visegrád countries. In all these countries, there is possible to impose a duty to return budgetary funds.<sup>15</sup> Additionally, in all these countries, serious breaches of budgetary discipline are considered as crime. This is not a surprising finding, since there is a European directive which prescribes to fight against fraud to the European Union's financial interests by means of criminal law<sup>16</sup>. Only in Slovakia and Poland, it is possible to impose a fine in relation to the breach of budgetary discipline. Only in Hungary, there is a possibility of disciplinary proceeding specifically related to the breach of budgetary discipline.<sup>17</sup> Finally, in Poland, there are other administrative measures, such as reprimand or ban on future grants from budgetary funds.

In the questionnaires, we tried to identify possible reasons for these differences across Visegrád countries. Unfortunately, the findings did not provide sufficient explanation. Therefore, this issue remains open for the future research.

In all Visegrád countries, standard legal principles apply in relation to penalties. Thus, according to  $T_2$  and  $T_3$ , the public authorities can impose only penalties stipulated by law and their discretion is limited only to selection of an appropriate penalty from the available ones and to specifying a concrete amount of the penalty if it is scalable. It is a manifestation of the principle of legality. Additionally, this discretion is limited by previous actions of public authorities, since they cannot significantly differ from their previous decisions,

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<sup>15</sup> In Czechia, according to the Act No. 218/2000 Sb., on budgetary rules, and Act No. 250/2000 Sb., on budgetary rules of the territorial budgets. In Hungary, according to the Act No. CXCV of 2011, on public finances, and government decree No. 368/2011. (XII. 31.), on the Implementation of the Act on Public Finance. In Poland, the Act of 27<sup>th</sup> August 2009 on Public Finance. In Slovakia, according to the Act No. 523/2004 Z. z., on budgetary rules of public administration.

<sup>16</sup> Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

<sup>17</sup> We do not consider here possible disciplinary proceeding arising for example from the state service legislation, since it is not specifically linked to the budgetary discipline.

T <sub>x</sub>	Czechia	Hungary	Poland	Slovakia
1.	Narrow	Middle	Broad	Narrow
2.	N	N	N	N
3.	Y	Y	Y	Y
4.	State level: Centralized Other: Decentralized	Centralized	Decentralized	Decentralized
5.	Y	Y	Y	Y
6.	N	N	N	N
7.	Y	Y	Y	Y
8.	Partly	Y	Y	Y

unless they have a specific reason for that difference. This is a manifestation of the legal certainty principle. It is not surprising that these principles are followed in these countries, since they all are countries with a continental legal system based on the rule of law.

Another significant difference between Visegrád countries is the degree of centralization of the penalty agenda. According to T<sub>4</sub>, Czechia on the level of state budget, and Hungary follow the centralized approach. In Czechia, there are responsible tax offices organized on a territorial principle (there 15 of them). However, we consider Czech approach as a centralized one since these tax offices are multiple instances of one type of public authority. In contrast, Czechia on the regional level, Poland and Slovakia follow the decentralized approach, where there is not one particular public authority (or one set of generally same public authorities, as in case of the Czech tax offices), but the public authority responsible for imposition of penalties depends on the type of the breacher of budgetary discipline.

There are no significant differences in T<sub>5</sub> and T<sub>6</sub>. In all Visegrád countries, an audit or other supervisory procedure must precede the imposition of penalties. Thus, the imposition of penalties cannot be “played by ear” (the responsible authority cannot be led only by its intuition) or exist by itself. Therefore, imposition of penalties is always accessory to the audit or other supervisory procedure. Above, we discussed, that there is a variation in available penalties across Visegrád countries. However, within one legal system, there are generally not variations in respect to the type of the breacher.

In all Visegrád countries, the non-criminal penalties are imposed in an administrative decision which can be according to T<sub>7</sub> challenged by filing an appeal or eventually by filing an administrative lawsuit.

Finally, all Visegrád countries in general follow the *ne bis in idem* principle. There cannot be more proceedings on the same subject held simultaneously. Moreover, in all countries except Czechia, final decision cannot be altered. However, in Czechia, the procedural basis for the levy for the breach of the budgetary discipline is the Tax Code<sup>18</sup>. According to the Tax Code, a decision in force can be amended during the given 3 to 10 years long period if new information become available. However, the tax office cannot cumulatively impose

<sup>18</sup> Act No. 280/2009 Sb., the Tax Code.

higher levy, than the amount of budgetary funds related to the breach. Other sanctions available in Czechia follow the *ne bis idem* principle without exceptions.

## CONCLUSION

The research team conducted an analysis of Visegrád countries legal frameworks to answer the research question “**what are the similarities and differences of the existing budgetary discipline enforcement regulatory frameworks in the Visegrád Group countries in respect to penalties?**” The penalty imposition procedure is similar in all Visegrád countries and varies only in insignificant details. However, the palette of available penalties significantly varies. In all Visegrád countries, there is a possibility to impose duty to return budgetary funds and criminal offences. However, only in Czechia, it is possible to increase (or decrease) the amount which must be returned, after the decision come to force. Additionally, in Slovakia, it is possible to impose a fine, in Hungary, it is possible to conduct disciplinary proceeding with the person responsible for the breach and in Poland there is wide variety of available administrative measures.

Additionally, the Visegrád countries differs in the matter of centralization of authority to impose penalties. In Czechia (on the state budget level) and Hungary, there is a centralized approach. On the contrary, in Czechia (on regional level), Poland and Slovakia, there is a decentralized model.

According to the research team, the differences between available penalties and authorities responsible for imposing of penalties are significant and falsify the initial hypothesis. Therefore, in respect to the penalties stipulated in the budgetary enforcement regulatory framework, there **are significant differences** among the Visegrád countries. Unfortunately, the used research method did not lead to explanation, why these differences occurred. In the future research, this question should be studied in more depth.

Based on these differences, we can divide the Visegrád countries into the groups sharing similar approaches in relation to penalties stipulated in the budgetary discipline enforcement regulatory framework: (i) Czechia and Slovakia, (ii) Hungary and (iii) Poland.