LEGAL AND ECONOMIC ASPECTS OF THE BUSINESS IN V4 COUNTRIES

Conference proceedings

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INTRODUCTION

Dear ladies and gentleman

This publication is a collective work of the participants of the International Conference "Legal and Economic Aspects of the Business in V4 Countries" and also the outcome of the project **No. 11320291**, from the **International Visegrad Fund's Small Grant**. The primary objective of the project was to cooperate and discus the problems with Czech, Polish, Hungarian and Slovak researchers and for that reason organize one conferences followed by the development of joint publication in the area of legal and economic aspects of business in V4 countries.

The Polish Law Centre cooperates on this project with following institutions, partners of the project:

- **Faculty of Law, Masaryk University, Brno, Czech republic;**
- **Faculty of Economics, VSB – TU Ostrava, Czech republic;**
- **Faculty of Law, University of Bialystok, Poland;**
- **Faculty of Law, Comenius University in Bratislava, Slovakia;**
- **Faculty of Law and Political Sciences, Széchenyi István University, Hungary.**

The Conference was held under the auspices of **Consul of the Republic of Poland Ms. Anna Olszewska** in Rožnov pod Radhoštěm on 14 – 16 March 2014 and organized by the Polish Law Centre. The conference was attended by cca 40 researches (professors, young scholars and also doctoral students) from not only V4 countries, but also from Germany. Their research was focused on issues of legal and economic

aspects of the business in V4 countries and their impact on Visegrad region.

It was great opportunity to present own research, to get lot of new information about surrounding countries and their economic and legal problems, to get a feedback from other researchers, especially professors, during discussions; to meet new and interesting people for future cooperation; to make new friends, etc.

Brno, 20. 6. 2014

Editoři

STATE AID AS FINANCIAL SUPPORT FOR SMES

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Abstract:

No question that after the crisis cited from 2008 the national governments need to make measures to support their economics. Still no question that the small and medium sized enterprises (SMEs) are a group of legal entities whose central supporting has never been doubted in the EU member states. But there are still opened questions of what are the most comfortable and efficient tools in the hands of the governments and EU institutions to ensure the sustainable production and competitiveness of these enterprises. The study analyses the regulation on state-originated financial support in the EU particularly in the V4 countries, with the main focus on Hungary.

Keywords:

SMEs, state aid, EU competition law, global crisis, V4

JEL classification: K30

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1 EU regulation of state-originated financial supports for SMEs

Articles 107. and 108. of the Treaty on the Function of the European Union (TFEU) are the basis of EU regulation on state aids[1]. The state aid control is a specific characteristic feature of European competition policy, it relates to possible distortions of competition through state subsidies to private or public companies that are in active or potential competition with other companies. Article 107 of TFEU (former Article 87 of EU Treaty) issues a general ban on state aid, however there are exceptions to the rule defined in the Article which allow aid under certain conditions. As the term of state aid has a legal nature, definition is developed by the European Court, determined four criteria that cumulatively must be met in order to speak of state aid:

- state aid needs to be a transfer of government fund, irrelevant whether this is direct money transfer or an indirect allocation of government funds

[1] Article 107 1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

- the state measure must confer an economic advantage upon the recipient which he would not gain under “normal” business
- the transfer must be conducted selectively, thus benefiting some companies more than others
- the competition and trade between two or more member states must be affected by the award of government funds

Over the past half-century, a large body of secondary legislation and guidelines has grown up in order to give practical application to these basic principles. The rules must evolve to keep pace with economic and technological change, with the emergence of new political priorities, such as the increased emphasis placed on the protection of the environment over the last decade, and with new developments in economic theory. Consequently, Community State aid policy has undergone a number of important changes in recent years and further reforms are envisaged[2].

As a result of the financial crisis, the Commission enforced new General Block Exemption Regulation applicable from 29 August 2008 until 31 December 2013. According to this Regulation, different types of aid are specifically designed to help SMEs to overcome the specific "market failures" they face. The SMEs could be subsidized in their different development stages. Risk capital constitutes an important instrument for the financing of SMEs. The Regulation exempts from notification aid for risk capital in the form of constitution of private equity investment funds in which the State is a partner, investor or participant, even if on less advantageous terms than other investors. The investment fund may invest up to EUR 1.5 million per target undertaking over twelve

[2] EC 2007: Economic Analyis of State Aid. Economic Papers No. 286. p. 2.

month period[3]. In 2014 the Commission plans to go further in the regulation of risk financing for SMEs by adopting a new rule book for Risk Finance State Aid. The goal is to setting up a simpler, more flexible and generous state aid framework for the provision of risk finance to SMEs. The new rules aim at enhancing the incentives of private sector investors – including institutional ones – to invest and increase their funding activities. The new rule book consists of two parts. The first is a revised block exemption regulation covering a multitude of aid measures, including risk finance aid. Once adopted by the summer of 2014, it will be a key pillar of the entire new State Aid architecture. The second is a new set of Guidelines adopted on 15th January 2014, specially dealing with risk finance measures[4].

As a basis of further regulation of the EU the Commission has started a new screening of the EU legislative *acquis* to implement the "Think Small First" principle and to identify possible further legal exemptions or burden reductions for SMEs, in particular micro-enterprises. Among these rules, a distinction should be made between different cases. In some cases, SMEs are completely excluded from the scope of the legislation. In other instances, legislation applies to SMEs but exemptions are granted based on the size of the enterprise. Finally, legislation is applicable to SMEs but with lighter requirements[5].

The de minimis Regulation specifies that aid measures up to EUR 200 000 per company over any period of 3 fiscal years do not constitute

[3] Council Regulation No 733/2013 of 22 July 2013 amending Regulation (EC) No 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid

[4]EC (2014) Competition policy brief: A new rule book for Risk Finance State Aid. http://ec.europa.eu/competition/publications/cpb/2014/001_en.pdf (29th March, 2014)

[5] EC (2011) Report from the Commission to the Council and the European Parliament - Minimizing regulatory burden for SMEs. Adapting EU regulation to the needs of micro-enterprises COM(2011)803 final. p.3.

State aid within the meaning of the Treaty which means that Member States can grant these amounts of aid without any procedural burden. A State guarantee amounting to EUR 1.5 million can be considered as implying an aid amount which does not exceed EUR 200 000[6].

2 EU policies for supporting SMEs

In 2008 European Commission put on its way his policy for SMEs the so called "Small Business Act". The document summarizes in 10 principles the most important problems of SMEs in Europe and at the same time gives action plan for the EU and the member states. Among other principles, Small Business Act states that raising the right kind of finance can be a major difficulty for entrepreneurs and SMEs, and comes second after the administrative burden on the list of their concerns. This is in spite of EU public support such as the Competitiveness and Innovation Framework Program (CIP), which provides over €1 billion to support SMEs' access to finance, a substantial amount of it channeled via the EIB Group. By 2013, Cohesion Policy will provide some €27 billion explicitly dedicated to the support of SMEs[7]. Around €10 billion will be contributed through financial engineering measures, including JEREMIE and some €3.1 billion through venture capital[8].

The statistical data shows improvements in SMEs' performance in the year 2013. These result are underpinned by an impressive number of policy measures by the EU and the Member States since 2008. These

[6] Commission Regulation (EC) No 1998/2006 of 15 December 2006, revised on 18th December, 2013.

[7] Kadocsa, György – László Borbás (2010): Possible ways for improving the competitiveness of SMEs. A Central-European approach. MEB 2010 – International Conference on Management, Enterprise and Benchmarking. p.113.

[8] in details see: Glavanits, Judit: A kockázati tőkebefektetések egyes jogi aspektusai. PhD thesis. Győr, 2012.

policy developments, taken under the umbrella of the Small Business Act for Europe have been instrumental in mitigating the effects of the crisis and in creating a pro-SME policy momentum across the European Union. In 2010-2012 only, the EU's Member States implemented a total of almost 2,400 policy measures to support SMEs, i.e. an average of 800 measures per year, and almost 90 measures per country[9].

A trend can be seen in the pallet of instruments that Member States use to disseminate state aid to SMEs. The most important instrument is grants. In 1992 68% of the total amount of state aid had been distributed through grants, and it has increased to 82,5% in 2002. The second most important instrument is tax exemptions, although there is strong decline since 2000. The relative importance of loans also decreased during the last decade, as while loans represented the 23,9% of the total amount of primary SME state aid in 1992, their relative share was reduced to 6,5% in 2002. Guarantees represented 1,7% of the total amount of state aid in 1992, and increased to 2,4% in 2002. Other forms of state aid to SMEs, such as equity participations and tax deferrals played relatively marginal role[10]. According to the analytical report of the European Commission from 2013, after the crisis the numbers has dramatically changed. The most widely used external sources of financing in 2013 were bank overdrafts (39%), leasing/hire purchasing/factoring (35%), trade credit (32%) and bank loans (32%). Overall, 75% of EU SMEs had used at least one form of debt financing (excluding debt securities and equity) in the past six months (in 2013) and this is unchanged from 2011 levels. Equity financing was little used, by

[9] EC (2013) A Recovery on the Horizon? Annual Report on European SMEs 2012/2013. European Commission,

[10] Mosselman, Marco – Yvonne Prince (2004) Review of methods to measure the effectiveness of state aid to SMEs. Final report to the European Commission. EIM Business and Policy Research, Zoetermeer, 2004. p. 18.

just 5% of EU SMEs in 2013, which is slightly lower than the 2011 level of 7%[11].

3 Financial crisis in the V4 and its result to SME financing

Eastern European Countries, new member states, were hit hard by crisis, especially because of their pro-export oriented economies and big losses because of falling national currencies. Hungary, Latvia and Romania have tapped billion euro bailouts from the European Union, the International Monetary Fund and others. In the first quarter of 2009 all V4 states registered negative growth except Poland (+ 0,4 %)[12]. Slovakia recorded the biggest (- 11,4 %) GDP fall in EU compared with the last quarter of 2008 when it in contrast registered biggest GDP rise in the bloc of 27 countries[13].

Ikeda analyzed the monetary policies in the V4 countries, and resulted one consistent tendency of preferences in policies: an aversion to interest rates above the reference values and a preference for currency appreciation relative to the euro area. This tendency is either the same or greater with the recent financial crisis. These countries implement their monetary policy as a compromise between these conflicting preferences[14]. In details, there are sufficient differences between the monetary policy of the counties. One explanation relies on the structure of the economies, where the relative size of the Polish economy vis-à-vis

[11] EC (2013b) SMEs access to finance survey. Analytical Report, 14-11-2013. p.6.

[12] Eurostat Government Financial Statistics 1997-2012.

[13] Economic crisis in CEECs: http://www.visegrad.info/economic-crisis-in-ceecs/factsheet/economic-crisis.html (28th March, 2014)

[14] Ikeda, Taro: Asymmetric preferences for monetary policy rules in the Visegrad Four and the financial crisis. Economics Bulletin AccessEcon, Vol. 30(3). p.270.

its smaller Visegrád peers and its lower dependence on exports for driving growth helped shield it from the 2008-09 crisis. At the same time, the higher share of small- and medium-sized enterprises in the Polish economy allowed for more flexibility[15]. If exchange rate flexibility is indeed a main factor driving faster GDP growth, Slovakia — which adopted the Euro in January 2009 — should now have the worst economic results of the V4. In fact, Slovak exports have since recovered strongly and outperformed the rest of the region in 2011 and into 2012. The Czech Republic's exports have also risen more rapidly than those of Poland and Hungary in the 2011-12 period, despite a more modest currency depreciation.

The short and the long term outlooks of three countries, Poland, Slovakia and the Czech Republic seem quite stable. The crisis made it very clear that Hungary has fallen behind the Visegrád countries[16].

The current economic environment has brought SME needs into particular focus of governments given the significantly tightened credit supply conditions arising from the reduced ability and willingness of banks to provide the financing on which this sector is particularly reliant. According to a study of V4 after the crisis in the majority of small and medium enterprises in the region there are still difficulties in securing capital, which can be explained in different ways, ranging from the lack of a sufficient level of domestic savings in the financial systems of each country, to a large exposure to risk of each individual economic entity[17].

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[15] Fisher, Sharon (2012) The Visegrád Four: On Diverging Economic Path. Center for European Policy Analysis, Washington D.C. p.2.

[16] Farkas, Beáta (2012) The Impact of the Global Economic Crisis int he Old and New Cohesion Member States of the European Union. ÁSZ Public Finance Quarterly,

[17] Redzepagic, Srdjan – Eric Dejan – Bodroza Dusko: Does Banking Sector Support SME sin the Time of Crisis? – The Case of V4 Countries and Serbia. National an Regional Economics VIII. Technical University of Košice - Faculty of Economics, Slovakia, p. 267-273.

In Hungary the government introduced the following instruments for easing the access to finance for SMEs:

(1) microloans with preferred conditions (so-called: UMFT Microloan Program)

(2) Hungarian Development Bank and 100% state-owned Eximbank granted preferential loans

(3) warrants by the government for commercial bank loans

(4) interest-support, and the preferential interest-rates of Széchenyi Card only for Small and Micro Enterprises

(5) state financed venture capital funds financing directly small or start-up companies[18].

Facing the fact that after 3-4 years of the crisis the domestic product still does not growing fast enough in comparison with the other V4 countries – the government introduced the National Bank Growth Loan Program in the summer of 2013. It is divided in two parts: 1. pillar is for financing investments as tangible assets, financing innovation or capacity-enlargement, securing the self-part of EU projects, or redemption of previous loans granted for the same purposes. The 2. pillar is inclusively for redemption of loans and financial leases granted in foreign currency. The latter has caused serious problems in the Hungarian economy during the crisis as the currency rate of Hungarian forint has changed dramatically and made households and enterprises much more difficult repaying their loans registered in foreign currency, mainly in Swiss franc. In this Growth Loan Program the National Bank grants to commercial banks loan on 0% interest for a maximum period of 10 years, which loan can be granted only for SMEs on a maximum 2,5% interest.

[18] A kis- és középvállalkozások fejlesztésének stratégiája 2007-2013 (Strategy of the Government of Developing Small- and Medium Sized Enterprises 2007-2013).

The demandable amount for SMEs is minimum 3 million HUF, maximum 3 billion[19].

4 Conclusions

The SMEs are the backbone of Europe's economy, there are more than 23 million SMEs in the Eu which represents 99% of the European undertakings. SME play an important role for European growth by producing 60% of European GDP[20]. As a regulatory aspect, SMEs are eligible for all aid cathegories allowed under EU state aid rules and for those cathegories of aid measures which can also be provided for large undertakings, SMEs benefit from higher aid intensities. Under the *de minimis* Regulation member state's grant subsidies of a limited amount to SMEs can effect without notification to the Commission and without entering into any administrative procedure. This supportive measures are highly important for counties suffered from the impacts of the global financial crisis. We can see that the V4 counties, especially Hungary are still under the impression of the crisis, so governmental measures are crucial for building a stable and EU-conform financing mechanism for SMEs.

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[19] Information from the Hungarian National Bank's official Information Handout.

[20] EC (2009) Handbook on Community State Aid Rules for SMEs. European Commission 25-02-2009. p.3.

http://ec.europa.eu/competition/state_aid/studies_reports/sme_handbook.pdf;

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IMPACT OF COMPUTERIZATION OF PUBLIC ADMINISTRATION NOT ONLY ON ENTREPRENEURS IN THE CZECH REPUBLIC AND POLAND[#]

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Abstract:

With the introduction of the information technologies the development of the society started to speed significantly up and it is obvious that also the Public Administration in the whole world has to follow this trend, as well. The term „electronisation/computerization" or „introduction of electronic devices" is undoubtedly well-know, anyway the legal attributes of the electronisation still escape from the attention of legal experts. For that reason the paper intends to describe the legal aspects of computerization in Public Administration and especially Tax Administration in the Czech Republic and compare with solutions in Poland. There is few steps of computerization in the Czech Republic and Poland, as lunching e- Registries, Electronic infrastructure of public administration (e – Portals), Data boxes, CzechPOINTs, e-Puap, etc..

[#] The research was supported through the European Social Fund (CZ.1.07/2.3.00/20.0296). Článek je zpracován jako jeden z výstupů výzkumného projektu *Výzkumný tým pro modelování ekonomických a finančních procesů na Vysoké škole báňské – technické univerzitě Ostrava* registrovaného pod evidenčním číslem CZ.1.07/2.3.00/20.0296.

Key words:

Computerization; Public administration; Tax administration; Entrepreneurs; Citizens; Czech republic; Poland;

JEL classification: K20, K34

1 The concept of computerization and e-government

For a long time computers have become a part of life in many areas. Computerization of the life is ongoing. We communicate at a distance, work in a "home office", study "on-line". Whether this development is moving forward, or will lead to the destruction of humanity as a community, we allow ourselves to be surprised. The truth is that the current development of the community, acceleration of life and the demands placed on citizens necessitates the computerization. The area of public administration is not an exemption. For a long time we have encountered with efforts to streamline, improve and speed up work of public administration. One of the ways that lead to the desired goal is undoubtedly computerization and communication with public authorities via the Internet.

In addition to purely factual and practical effects of the development of computer and communication technologies there are also scientific implications. A new scientific discipline[1] that investigates the transfer and sharing of information through new-electronic is being formed.

[1] Information Science.

It should also realize that the key concept of the whole process of computerization is widely understood concept of "information". Computerization, respectively communication using modern information technology is only one form of interpersonal communication, i.e. the transfer of information. [2]

The central concept is the idea of "e-governance", respectively. "e-Government", as a result of a process by which the ongoing computerization of all aspects of our life[3].

It is not possible to argue that e-Government is the status quo, which is not being developed. As Mates and Smejkal have written in their book about e-Government, this phrase has become part of modern society newspeak so that it might not seek adequate translation in any language.[4]

The concept of e-Government is everywhere around. It is not only fashion term, but also modern. At its core is the next phase of bringing public administration to citizens, but also dealing with the need of speed and efficient communication, i.e. one of the prerequisites of good governance. From this perspective, the concept of e-Government can also be found in the documents of the Organization for Economic Cooperation and Development. [5] E-Government is here understood as "the use of

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[2] CZUDEK, Damian. Elektronizace veřejné správy v České a Polské republice, především té daňové. In DÁVID, Radovan a kol. *Dny práva – 2010: 4. ročník mezinárodní conference pořádané Právnickou fakultou Masarykovy university.* Brno: Masarykova univerzita, 2010.

[3] See CZUDEK, Damian. Electronisation of the Public Administration primarily focusing on the Data boxes, In: *New Economic Challenges – 3rd International PhD Students Conference*. Brno: Masarykova univerzita, 2011.

[4] MATES, Pavel; SMEJKAL, Vladimír. *E-government v českém právu*. Praha: Linde, 2006, p. 9.

[5] Organizace pro hospodářskou spolupráci a rozvoj. *IMPLEMENTING E-GOVERNMENT IN OECD COUNTRIES: EXPERIENCES AND CHALLENGES*, [Cited 25th May 2011]. Source z: http://www.oecd.org/dataoecd/35/6/36853121.pdf

information and communication technologies, and partly the Internet as a tool to achieve better public government".[6]

The World Bank also tries to define E-government on its web pages. According to World Bank e-Government refers to *„use by government agencies of information technologies (such as Wide Area Networks, the Internet, and mobile computing) that have the ability to transform relations with citizens, businesses, and other arms of government. These technologies can serve a variety of different ends: better delivery of government services to citizens, improved interactions with business and industry, citizen empowerment through access to information, or more efficient government management. The resulting benefits can be less corruption, increased transparency, greater convenience, revenue growth, and/or cost reductions"*.[7]

In the simplest sense, e-Government is a synonymous for delivering public information and public services through the Internet. [8]

From the linguistic point of view, of course, E-government is an abbreviation of the phrase "electronic government", which could be translated as electronic administration (e-administration). Polish literature, however, points to the inaccuracy of the interpretation of this concept. E-government includes services offered by various budget

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[6] Ibidem: *„the use of information and communication technologies, and particulary the internet, as a tool to achieve better government"*

[7] Definition of e-Government, World Bank, Washington D.C. [Cited 25th May 2011]. Source z: http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTINFORMATIONANDCOMMUNICATIONANDTECHNOLOGIES/EXTEGOVERNMENT/0,,contentMDK:20507153~menuPK:702592~pagePK:148956~piPK:216618~theSitePK:702586,00.html

[8] Global e-Government Survey, World Markets Research Centre, Brown University, Providence 2001, str. 1 [Cited 12th June 2007] Source: http://www.respondanet.com/english/financial?mgmt/reports/Globalegovsurvey.pdf

organization units that are beyond the scope of public administration sensu largo. Therefore, the e-Government should be seen as "an electronic system of public information and services." [9]

2 Computerization in public administration and modern methods of delivery

2.1 Development of computerization in Czech Republic

The first very important document concerning e-government was in the Czech Republic “State information policy – Way to information society” from the year 1999. Following document was material so called “Czech 2006” from the year 2004.

The computerization really began in year 2000 by implementation of the Act No. 365/2000 Coll., about information systems in public administration, as amended. There were expectations, that it will start revolution in on-line communication in public administration. But it was not. Many steps that have been taken, but apparently distrust of citizens in the information technology and conservativeness caused the failure. Technical and professional unpreparedness of public administration could also play an important role. According to this act, every public administration body has to have electronic Mail room. But number of electronic filing lags behind the traditional paper form. [10]

The condition of use of the above-mentioned form of communication – email with a secure electronic signature are set up in

[9] LUTEREK, Mariusz. *E-government: systemy informacji publicznej*. Warszawa: Wydawnictwo Akademickie i Profesjonalne, 2010, p. 35-36.

[10] CZUDEK, Damian; CHALUPECKÁ, Kristýna. Změny v doručování po 1.7.2009 se zaměřením na správu daní. In *Cofola 2010: The Conference Proceedings*. Brno: Masarykova Univerzita, 2010, p. 10-20.

Electronic Signature Act[11]. This delivery is still possible in administrative and civil proceedings on a request of a proceedings party.

So it was necessary to make another step in enlargement of e-Government, next stage of the reform of public administration – computerization of public administration in accordance with today's trends and needs of state and also citizens. First crucial stimulus for legislation changes was Resolution nr 1085 of the Czech Republic Government from September 20, 2006, about steps for faster development of e-Government in Czech Republic.

The result was the adoption of Act No. 300/2008 Coll., on Electronic acts and authorized document conversion, also called "E-government act". It is an important law in the field of communications of public authorities with natural and legal persons, natural or legal persons with public authorities and after later amendments between these bodies. The effectiveness of this law was established on July 1, 2009.

The law is the general rule for delivery and establishes the superiority of using of data box over other methods of communication identified in the specific laws, e.g. in the administrative order, and of course, in the Act on Administration of Taxes and Fees and from 1st January 2011 in the Tax Procedure Code. [12]

Purpose of the amendment of the Act, is primarily equalization of paper and electronic document format. In this context, the institute of authorized document conversion and the possibility of legalizing

[11] Act no. 227/2000 Coll., on Electronic Signature, as amended.

[12] CZUDEK, Damian; CHALUPECKÁ, Kristýna. Změny v doručování po 1.7.2009 se zaměřením na správu daní. In *Cofola 2010: The Conference Proceedings*. Brno: Masarykova Univerzita, 2010, p. 10-20.

recognized electronic signature, i.e. the official verification of the electronic signature has been created. [13]

The law on e-Government implements the concept of a data box as an institute for communication, as an electronic repository designed for delivery of public authorities, for interacting with public authorities and after the adoption of the amendment also delivery of documents of individuals, business persons and legal entities. [14]

2.2 Manifestations of computerization in tax administration

The manifestation of the changes outlined above is in financial law, respectively in tax administration since 2002 if the possibility to submit tax return and other tax submissions through a web application EPO, which is located on the website of the Ministry of Finance - Czech tax administration[15]. The advantage is that there is not a need for special registration, the entire system is based on a qualified certificate with the client identifier of the Ministry of Labor and Social Affairs. However, since 2008, the system has been gradually transferred to the new solution. [16] The taxpayer had not sent an email to the tax administration body, but use tax portal for creating, checking, printing, saving and sending submissions - both in electronic and paper form. A positive aspects undoubtedly are clarity, the possibility of simple changes, and the rapidity

[13] Web site [cit. 2010-07-09] Source: http://www.egovernment.cz/best/PDF%2007/EgovAct.pdf

[14] Article 2 par. 1 Act no. 300/2008 Coll.

[15] http://eds.mfcr.cz

[16] Server solution. In addition to the server solution is also prepared offline version of EPO allowing even without a permanent connection to the Internet, fill in a tax return or write submission. Installing the application is available to "download" and install on your own personal computer on the website of Czech tax administration. Path to download offline version of EPO: http://adis.mfcr.cz/adis/jepo/hlavni.htm

of such communication. [17] Filling takes place on the portal or offline, depending on the selected mode and the options and sending via data boxes. Attachments in the appropriate formats can be add.

With 2014 a change in communication with the financial administration of the Czech Republic comes. The tax entity that has a data box the tax information box is mandatory ex officio established[18]. The tax information box contains information about personal tax accounts and tax entity may inspect the public part of the electronic files kept by the tax administration body.

Another change is the obligatory electronic communication[19] with the tax administration in the case of VAT. Exceptions are set for individuals whose turnover does not exceed 6 million CZK in 12 immediately consecutive calendar months. In this case taxpayers will no longer be able to communicate in other way than electronically. Written submission shall be void for failure to comply with the prescribed form.

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[17] CZUDEK, Damian. Elektronizace veřejné správy v České a Polské republice, především té daňové. In DÁVID, Radovan a kol. *Dny práva – 2010: 4. ročník mezinárodní conference pořádané Právnickou fakultou Masarykovy university.* Brno: Masarykova univerzita, 2010, 7 p.

[18] See: LENDGRÁF, Roman, Daňová informační schránka bude k 1.1.2014 automaticky zřízena všem právnickým osobám, [cited 28th Decembre 2013] Source: http://landgrafroman.wordpress.com/2013/12/06/danova-informacni-schranka-bude-k-1-1-2014-automaticky-zrizena-vsem-pravnickym-osobam/:

[19] 1. Taxpayer has to to submit electronically to the email address of registry published by the tax administration body:

a) tax return or additional tax return,

b) reporting,

c) Annex to the tax return, the additional tax return or report.

2. Application for registration and a notice of change of registration data shall be submitted only electronically to the email address registry published by the tax administration body. This is not applied to an identified person.

2.3 Computerization in Poland

Unlike the Czech legal order and the revolutionary total solution of communication between public authorities on the one hand and citizens on the other hand, in the form of data boxes in the Polish legal system this form of communication is not found. But it is not possible to say that in Poland in tax administration computerization of tax administration do not work and that their administration do not go with the times.

The first important document is the Resolution of the Sejm of 14 July 2000 concerning the foundation creation of an information society in Poland. [20] In November 2000, the Council of Ministers adopted a document entitled *"The aim and direction of information society development in Poland."* [21] On the basis of this document other document was adopted: *"ePoland - Action Plan towards the information society development in Poland in the years 2001 - 2006"*[22], which defined development plan for e-Government. As regards the conduct of e-government in Poland, its principles and foundations were defined at the end of 2002 in a document entitled "Wrota Polski".[23] Over the years, this concept was changed and in 2005 the project of electronic public administration portal was created. This concept was subsequently

[20] Uchwała Sejmu z 14 lipca 2000 r. w sprawie budowania podstaw społeczeństwa informacyjnego w Polsce, M.P. 2000 nr 22 poz. 448.

[21] Cele i kierunki rozvoju społeczeństwa informacyjnego w Polskce.

[22] ePolska – Plan działań na rzecz rozwoju społeczeństwa informatycznego w Polsce na lata 2001 - 2006

[23] Wrota. Wstępna koncepcja projektu. Komitet Badań Naukowych, 2002 r. [cited 10th May 2011], Source: http://www.epractice.eu/files/media/media_336.pdf

instantiated by the Law of 17 February 2005 on computerization of the administration authorities' activities with tasks of public administration[24].

By an amendment in 2010, the above mentioned Act created legal conditions for the establishment of the Polish electronic portal of public administration, i.e. creation of a central depository of electronic forms of public administration, the obligation for the establishment of registries for public authorities, as well as the creation of the institute of electronic accounts and users in secure mode profiles. [25]

The aim of EPuap project is to create a portal where public administration services will be provided, i.e. in terms of unifying and simplifying of access to public service in one place - on one website. It is similar to the Czech public administration portal[26]. But the part of the Polish portal there are also services of tax administration and, in addition, it is also a transactional portal, while in the Czech Republic with regard to the unification and simplification of the transaction was part of the transactional portal from 1 January 2012 replaced by information system of data boxes.

From the 1999 it is thus consistent with the Polish Code of Administrative Procedure[27] possible to make submissions by e-mail, but in the original version there was lack of clarification regarding the signing of such filing. Disputes ended up in 2005 by a revision that required

[24] Ustawa z dnia 17 lutego 2005 r. o informatyzacji działalności podmiotów realizujących zadania publiczne (Dz. U. Nr 64, poz. 565).

[25] ADAMIAK, Barbara; BORKOWSKI, Janusz. *Kodeks postępowania administracyjnego: komentarz.* 11. vyd. Warszawa: Wydawnictwo C.H. Beck, 2011, p. 245-246.

[26] www.portal.gov.cz

[27] Kodeks postępowania administracyjnego.

submission with electronic signature[28]. Another option is making a submission in accordance with Article 63 of the Polish Code of Administrative Procedure – filling the electronic form on the website of the respective office if the law assumes this option in a particular case. [29] Among other reasons for not completely successful quantity in electronic communication in Poland is the price of electronic signature, which is about 8-10 times higher than in the Czech Republic.

2.4 Computerization in tax administration in Poland

The first of the two expressions of computerization in tax administration, which I would like to mention is the ability to submit electronic returns and various other administration. The Polish legal order, respectively Minister of Finance, divided the introduction of electronic forms of declarations in four stages. The first concerned mainly the administration of VAT, corporate income tax and was launched on 1 January 2007. Second phase concerned the annual tax on personal income and its start was scheduled for 1 April, 2008. Beginning of the next two phases was established on 1 July 2008 and 1 January 2009. [30]

Legal regulation is contained in Article 3a of Ordynacja podatkowa. The legitimate electronic communication with the tax authorities is elaborated in the Decree of 19 December 2007 concerning the determination of species of submission and returns, which may be submitted in electronic form[31] and determination in the case of the logical

[28] Ustawa z dnia 18 września 2001 r. o podpisie elektronicznym.(Dz. U. z dnia 15 listopada 2001 r.)

[29] See SZOSTEK, Dariusz a kol. *E-Administracja, prawne zagadnienia informatyzacji administracji*. Wrocław: Presscom, 2009.

[30] BARTOSIEWICZ, Adam a kol. *Leksykon ordynacji podatkowej*. Wrocław: Unimex, 2009, p. 269.

[31] Rozporządzenie z dnia 19. grudnia 2007 r. w sprawie określenia rodzajów deklaracji, które mogą być składane za pomocą środków komunikacji elektronicznej,

structure of declaration and submissions, way of transmission and types of electronic signatures, by which they have to be signed[32].

From 16 August 2006 the Polish legal system knows as one of the options of delivery "letters" in tax administration, delivery to the specified email address - email / portal[33]. Recipient first receive an information email about saving documents to ePuap where the recipient can pick it up and where he has within this takeover confirm an advanced electronic signature. The taxpayer has to make explicitly request or the express consent on such a delivery method. The regulation is in Article 144a, which was added to Ordynacja. [34,35]

3 Conclusion

Fast, accurate and cheap – that means for businesses economic advantage, threrefore the electronic communication is very important in this field. All surrounding world is speeding up and everybody need tools to keep the step with it. According to problems of world economics there is the need to bring more efficiency in all processes and activities. One of that tools is the computerization. It is crucial that the computerization is

[32] Rozporządzenie z dnia 24. grudnia, w sprawie struktury logicznej deklaracji i podań, sposobu ich przesyłania oraz rodzajów podpisu elektronicznego, którymi powinny być opatrzone,

[33] Art. 144a. par 1. Doręczenie pism, z wyjątkiem zaświadczeń, następuje za pomocą środków komunikacji elektronicznej, jeżeli strona wnosi o zastosowanie takiego sposobu doręczania albo wyraża na to zgodę.

[34] Przepis ten został wprowadzony w związku z dostosowaniem ordynacji podatkowej do założeń wynikających z ustawy z dnia 17 lutego 2005 r. o informatyzacji działalności podmiotów realizujących zadania publiczne (Dz. U. Nr 64, poz. 565 z późn. zm.)

[35] CZUDEK, Damian. Elektronizace veřejné správy v České a Polské republice, především té daňové. In DÁVID, Radovan a kol. *Dny práva – 2010: 4. ročník mezinárodní conference pořádané Právnickou fakultou Masarykovy university.* Brno: Masarykova univerzita, 2010, 7 p.

"natural" and "automatic" process, as well, therefore it anyway influences the society to use the electronic devices in order to be up to date.

Delivering as one of the most important procedural institution went throw it also and have to adapt to people needs. Lunching of data boxes is just one stage of it. We will see if this method of electronic communications with public administrative bodies will be more used by the citizens and will be more friendly for them compare to previous communication by emails with guarantee signature.

But anyway, lunching of data boxes was a good step in public administration and the most useful thing is, that it will fastest the proceeding and guarantee avoiding from delivering the mails – documents to the party of all proceedings – administrative, tax, judicial, etc.

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IES/EXTEGOVERNMENT/0,,contentMDK:20507153~menuPK:702592~pagePK:148956~piPK:216618~theSitePK:702586,00.html;

- Wrota. Wstępna koncepcja projektu. Komitet Badań Naukowych, 2002 r. [cited 10th May 2011], Source: http://www.epractice.eu/files/media/media_336.pdf.

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FINANCIAL IMPLICATIONS OF MANDATORY CONTRIBUTIONS OF BANK ENTITIES IN TIMES OF FINANCIAL CRISIS IN THE CONTEXT OF BANKING UNION ANTICIPATION

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Abstract:

Author puts forward a briefly introduction into the reasons for the creation of Banking Union. The focus of this paper is to analyze the financial implications for the Slovak banking sector. He attempts to identify and quantify obligatory payments de lege lata burdened by banks in Slovakia for the years 2012, 2013, 2014 and 2015. Subsequently author tries to estimate the increase of financial impact by the new mandatory levies envisaged in the draft European legislation, which establishes a legal framework for the creation of the Banking Union. Article refers to the specifications, which shows Slovak legislation in this field and related problems of its further development.

Key words:

Banking Union; Bank Levies; Current Legal Status;

JEL classification: K30, G20

1 European Reasons for Determination of Financial Requirements

The Banking Union's initiative is based on negative experience of the financial crisis in the EU area. Countries as Greece, Cyprus and Spain, but even Luxembourg, Belgium and France, out of the frame of reorganizational measures, financially supported the banks acting within the respective country[1] via state aid mechanism[2]. On one hand, the financial aid for banking institutions from national public funds of EU member states burdened the national public budget; on the other hand, it created bonds between the banks and states (so called vicious circle). Breaking this bond is also a challenge for determining the legislative framework of all the pillars of the Banking Union. Reports on the current situation at European level are subject of several professional presentations.[3] Their content is limited to providing general information and it does not focus on specific issues that arise from political and professional discussions of working groups set up at EU authorities. This is particularly applicable for the creation of the Banking Union and related issues. Financial impact on the banking sector of individual EU

[1] For example, this refers to providing state aid for the cross-border acting Dexia SA banking group in February 2010 through direct recapitalization and provision of state guarantee. See Boudghene, Y. et al.: The Dexia restructuring decision. In: Competition Policy Newsletter, No. 2, 2010, pp. 63-66. In the period from October 2008 through October 2011, the European Commission approved state aid in the amount of 4.5 billion euros for the financial institutions. Machelski, T.: Banking resolution as an economic intervention. In: Days of Law 2012. Zborník z medzinárodnej vedeckej konferencie. Brno: Vydavateľské oddelenie MU, 2013, p. 2125.

[2] Individual state aid or proposed scheme of state aid.

[3] For example, Pénzeš, P.: Banková únia z pohľadu hostiteľského štátu. In: Zborník z medzinárodnej vedeckej konferencie Bratislavské právnické fórum 2013. Bratislava: Vydavateľské oddelenie Právnickej fakulty UK, 2014, pp. 173-179. Nebeský, Š.-Paluš, P.-Pénzeš, P.-Šesták, Ľ.: Stručný prehľad právomocí a organizačnej štruktúry nových európskych subjektov dohľadu. In: Biatec, No.1, Vol. 19, 2011, pp. 19-30. Sidak, M.: Finansovo-pravove rehuljuvannja bankivskych vidnosyn v Jevropejskomu Sojuzi ta krajinach schidnoji Jevropy: porivnjaľnyj analiz. Užhorod: Lira, 2010. 397 pp.

member states as well as potential financial impact on public budgets of the member states is one of the most debated spheres. From this point of view it makes sense to examine especially the second and third pillar of the Banking Union. Proposals of European legislation, which should form their legal basis, will quantify financial obligation for the individual EU member states and/or banks acting within their territory in the form of compulsory levies. It will be necessary to pay such levies to entities, whose creation is foreseen in the respective proposals. Financial obligations will be determined for the participating states, which will be mandatory for the eurozone member states, and optionally other EU states.

The second pillar (single resolution mechanism) assumes multiple recovery tools of the financial condition and tools for management of possible liquidation of systematically significant banks. One of them is creation of national resolution funds, national resolution authorities, and creation of a single supranational resolution fund on European level and a board for resolving crisis situations (Resolution Board) through compulsory levies. Such accumulated funds using the given tools should be then utilized as financial aids for banks in resolution. The intention of creating such scheme is based on the aim of the banking resolution, which is besides to minimize public spending of state budgets (and thus indirectly protecting the tax-payers), also transfer the focus of their share to bank shareholders while ensuring protection of the depositors. The measures of the second pillar should also reduce the risk of moral hazard.[4] Its legitimacy for the banks is justified mainly by flexibility and associated promptness of solving the bank's problem compared to

[4] Shareholders may succumb to moral hazard and be motivated to risk more counting on the implicit government guarantees to banks. Shareholders of great banks are prone to moral hazard because of the too-big-to-fail doctrine. Refer to Machelski, T.: Banking resolution as an economic intervention. In: Days of Law 2012. Zborník z medzinárodnej vedeckej konferencie. Brno: Vydavateľské oddelenie MU, 2013, p. 2128.

standard national insolvency proceedings. These are subject to national bankruptcy law governing mainly a controlled procedure of various entities at failing/bankruptcy (or likely to fail) which is applied when encashing the debtor's assets and in case of ensuring collective proportional satisfaction of creditors, or in case of striving to maintain substantial part of the debtor's operation and ensuring collective proportional satisfaction of the creditors.[5] Briefly it is a universal collective civil process, in which the creditors' claims are being satisfied pro rata.[6] Its disadvantage compared to the European resolution framework of the second pillar is a longer progress, and in case of reorganization, it usually requires complex negotations and agreements with the creditors. At the same time the traditional bankruptcy process might interrupt the bank's capability to provide payment services to their clients with potentially far-reaching general economic implications.[7] Resolution measures over the bank should be introduced in advance as legal assumptions shall incur for commencing a traditional bankruptcy proceeding. Adoption of regulations for the second pillar also assumes change in the area of harmonization of reorganization and winding-up of credit institutions[8], thereby also the principles of bank reorganization need reassessesment and amendment[9]. This actually affects our national

[5] Zámožík, J. a kol.: Civilné právo procesné. Vykonávacie konanie. Konkurz a reštrukturalizácia. Rozhodcovské konanie. Správne súdnictvo. Plzeň: Aleš Čeněk, 2013, p. 156.

[6] Ibid, p. 155.

[7] Machelski, T.: Banking resolution as an economic intervention. In: Days of Law 2012. Zborník z medzinárodnej vedeckej konferencie. Brno: Vydavateľské oddelenie MU, 2013, s. 2126.

[8] Modification of the Directive 2001/24/EC of the European Parliament and of the Council of April 4, 2001, on the reorganization and winding up of credit institutions.

[9] As for the principles refer to Sidak, M.: Legal frameworks to reorganize and wind up credit institutions in the EU and eastern European countries: a comparative analysis. In:

institute of forced administration of banks. During discussions on the legal framework, legal doubts were mainly raised related to the adoption of the regulation on single resolution mechanism (SRM)[10] that should supplement the upcoming directive in this field with certain specifics (Bank Recovery and Resolution Directive/BRRD).[11] These doubts referred to Art. 114 of the Treaty on the Functioning of the EU as a competent legal basis for adoption of such regulation that would establish a body (i.e. Resolution Board) with decision-making and discretionary powers to introduce specific resolution tool, although there is no such body identified by the main EU law.[12]

Medzinárodné vzťahy 2010: Aktuálne otázky svetovej ekonomiky a politiky. Bratislava: Ekonóm, 2010, pp. 707 – 712.

[10] Proposal for a Regulation of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council

[11] Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010.

[12] The question was whether delegation of decision-making powers to the Resolution Board in the regulation is compatible with the primary law of the EU and general principles of EU law expressed in the jurisdiction of the Court of Justice of the EU (particularly the case of Meroni 9-56). The decision in the case of Meroni contains one of the basic principles of the European law according to which powers different from the powers that the body of the primary law have cannot be transferred to the body, which is not laid in the primary law. In case of the SRM, it referred to the proposed discretionary powers of the Resolution Board. As for the decision-making powers, it was agreed to waive it so that the decisions could be adopted by the European Commission. The mentioned doubts were eliminated by the formal statement of the Legal services of the Council of the EU by the end of 2013 and additionally also by the decision of the Court of Justice of the EU on an analogous matter in proceeding No. C-270/12, issued on January 22, 2014 (the European Securities and Markets Authority was vested with intervention powers in exceptional circumstances).

The third pillar (common framework of deposit protection) assumes gradual creation of a supranational deposit protection system in addition to the already existing network of national deposit protection funds. Its definite form is still subject to great discussions; although, certain assumed financial implications for banks have already been presented.

2 Quantification of Possible Financial Impacts on the Slovak Banking Sector

2.1 Compulsory levies of banks based on the current legal status

Specific bank levy as part of state financial assets („bank tax"). As of January 1, 2012, Act No. 384/2011 Coll. on special levy of selected financial institutions and on amendment to certain acts came into effect. This Act introduced compulsory payment of special levies for banks (including subsidiaries of foreign banks).[13] The aim of the Act was to introduce levies and thus contribute to the creation of participation mechanisms of financial institutions on the costs of future financial crises in the banking sector, to ensure fair burden-sharing and prevent from extensive expenses for the tax-payers, government and economy. At the same time it should contribute to stimulation of the selected financial institutions to limit system risks as well as protection of the financial sector's stability of the Slovak Republic.[14] So far it has not appeared to be appropriate to extend the levies on foreign banks conducting business within the territory the Slovak Republic without founding a subsidiary or

[13] The introduction of bank tax was a reaction on the EU's recommendation in its Crisis Management working paper. Heseková Bojmírová, S. – Krajčová, V. – Mičátek, V.: Finančno-právne aspekty osobitného odvodu vybraných finančných inštitúcií; s účinnosťou od 1.9.2012. In: Justičná revue, No. 3, Vol. 65, 2013, p. 347.

[14] Explanatory Memorandum to Act No. 384/2011 Coll. General Part.

other financial institutions such as investment funds or insurance companies.[15] The levy rate is 0.4% for the respective calendar year. The bank is obliged to pay the levy in four quarterly payments that shall be settled no later than on the 25th day of the respective quarter. The quarter installment is one quarter of the 0.4% rate of the base used for calculating the levy for the calendar quarter. The base for the levy calculation is the amount of the bank's liabilities[16] reported in the balance sheet reduced by the amount of equity, value of long-term funds provided to the subsidiary of a foreign bank, and value of subordinated debt. Average values calculated from the data as of the last day of the individual months of the previous calendar quarter will be used for the given calculation. The settled levies become state financial assets that are maintained on a separate extra-budgetary account and form a certain national resolution fund. The revenue from these state financial assets becomes their part. They are purposely bound to cover the costs of resolving financial crises in the banking sector and protect stability of the banking sector in the Slovak Republic. They can be also used to supplement the resources of the Deposit Protection Fund neccessary for the expenses to pay compensation for the inaccessible deposits, if required.[17] The bank shall bear its expenses related to the levy payment, while prices, charges,

[15] Ibid.

[16] The reason of determining liabilities for the levy base is that the banks should not pay levies for having own capital resources as their increase is a long-term objective in accordance with the Basel recommendations within the anti-crisis combat, nor should they pay levies from deposits, currently for which the bank entities already pay an annual contribution to the Deposit Protection Fund. In: Explanatory Memorandum to Act No. 384/2011 Coll. General Part.

[17] *„The determination of effectiveness of the special levy (...) is one of the main areas that is subject to criticism of the given act. (...) The main subject of criticism is absence of a precise definition of rules for their utilization and specification of the purpose of their use.“* Heseková Bojmírová, S. – Krajčová, V. – Mičátek, V.: Finančno-právne aspekty osobitného odvodu vybraných finančných inštitúcií; s účinnosťou od 1.9.2012. In: Justičná revue, No. 3, Vol. 65, 2013, p. 351.

remunerations and other financial transactions shall not be raised out of this reason, nor shall any special charges, remunerations or other transactions be required to cover expenses related to the levy payment according to the said Act. The accumulated target amount for levy collection is set to EUR 750,000,000 (the act states „exceeding" this amount, i.e. it is enough to exceed the amount by one eurocent) as well as 1.45% of the value of total assets in the banking sector. In such case by the force of law, the levy rate is set to 0% for the following (calendar) years, in which this condition is fulfilled. Moreover, in case the given amount has been achieved during the respective year, the bank is not obliged to settle the quarterly payment either for the following (calendar) quarters. In addition, the act recognizes several special rates based on modalities of fulfilling certain conditions.[18] An extraordinary one-off levy[19] was additionally introduced into the act effective from September 1, 2012 (Act No. 233/2012 Coll.). Its amount was set to 0.1% from the base for the calculation of the special levy. As a certain form of

[18] Provision of Art. 8, Par .4: In case 1.45% from the total assets for the banking sector as of the last day of the previous year is not achieved by October 25 of the respective year following the year when the condition of the target amount was fulfilled, the rate will be increased from 0% to 0.05% for the following years.

Provision of Art 8, Par. 2: In case it is **managed to exceed EUR 750,000,000** by April 25, July 25 or October 25 of the respective year, the levy rate for the following years **shall be 0.1%** assuming that 1.45% from the amount of total assets for the banking sector is not achieved in the given years.

Provision of Art. 8, Par. 1: In case it is managed to **exceed EUR 500,000,000** by April 25, July 25 or October 25 of the respective year, the levy rate **shall be 0.2%** for the following calendar years.

[19] The extraordinary levy was intended to support development programs of the government of the Slovak Republic and to enhance own sources of funding for legal entities established to promote foreign trade operations of exporters and importers. In 2012 the revenue from the total extraordinary levy (EUR 49 mil.) was used as deposit to increase fixed assets of the Export-import bank of the SR, although the total deposit was up to EUR 60 mil. (cost of all state financial assets). Refer to Press Report from December 21, 2012: (http://www.eximbanka.sk/buxus/docs/TS_eximbanka_Zdrojove_posilnenie.pdf).

compensation for the compulsory levies, the levies are considered as tax-deductible expenses in compliance with Act No. 595/2003 Coll. on income tax.

Contributions to the Deposit Protection Fund. The fund resources are formed by accumulation of the separate kinds of fund contributions to provide compensation for the inaccessible deposits in accordance with Act. No. 118/1996 Coll. on deposit protection and on amendments to certain acts, as amended. The minimum cumulative target limit for creation of own fund resources is at least 1.5% of the total covered (*protected*) deposits. Contributions paid into the fund are initial, annual and extraordinary. The amount of a one-time initial contribution is stipulated by law (still in SKK: SK 1,000,000 = EUR 33,193.9). The annual contribution is paid on quarterly basis. Its amount for the respective year is determined by law or by the fund for all the banks in advance, no later than December 20 of the previous year. The fund determines the amount of annual contribution in the range of 0.1% to 0.75% of the value of covered deposits, based on the average status of covered deposits for the previous quarter prior to the due date of the annual contribution payment.[20] By the force of law, the amount of the annual contribution was specifically determined for certain periods at 0% (for the third and fourth quarter of 2012 and entire 2013 in compliance with Art. 28 of the respective Act – interim provisions to amendments effective from September 1, 2012). It was related to the introduction of the extraordinary levy as well as to the overall effort to reduce financial burden of the banking sector by public levies. In the context of interlinking the possibility of using the state financial assets from the bank levies to supplement the fund resources, the possibility of using the

[20] Minimum rates are set by the law in certain cases, such as the **period of credit repayment** to funds (min. **0.35%**, 0.2% upon previous approval of the NBS), or **period when the credit is not being repaid**, but the fund does not have own resources in the cumulative target amount (in such case the rate of annual contribution is min. **0.2%**).

fund resources to cover the costs of resolving financial crisis in the banking sector and protect the stability of the banking sector was reciprocally introduced in addition to the provision of compensation for inaccessible deposits.[21] The amount of the extraordinary contributions is determined by the fund or law in the range of 0.1% to 1% of the value of covered deposits. The contributions of the bank entities into the Deposit Protection Fund are assessed as tax-deductible expenses.

Annual contributions of banks as supervised entities. The annual contribution, which is paid quarterly, is determined for the respective year by the Bank Board of National Bank of Slovakia in advance, no later than December 20 of the previous year, within the rate limits in compliance with Art. 40 (3) and (4) of Act No. 747/2004 Coll. on supervision of the financial market and on amendments to certain laws, as amended. The annual contributions, their installments and interests on late payments are the income of the National Bank of Slovakia (NBS) and are used to cover expenses related to the supervision of banks. The annual contribution of the banks for 2013 was determined in the amount of 0.0032% of the assets reported in the audited finanical statements, while the minimum value of the contribution is EUR 1000.[22]

2.2 Quantification of financial burden of the banking sector in 2012 and 2013

State financial assets (in budget of public administration: item 1.3. special levy of selected financial institutions + extraordinary levy of

[21] Heseková Bojmírová, S. – Krajčová, V. – Mičátek, V.: Finančno-právne aspekty osobitného odvodu vybraných finančných inštitúcií; s účinnosťou od 1.9.2012. In: Justičná revue, No. 3, Vol. 65, 2013, p. 352.

[22] Decision of the NBS dated November 20, 2012, No. 9/2012 on determination of annual contributions of supervised entities of the financial market for 2013. Refer to:

http://www.nbs.sk/_img/Documents/_Legislativa/_Vestnik/ROZ9-2012.pdf

selected financial institutions) – revenue from the collection for 2012: EUR 169.752 mil. (out of which one-time revenue of extraordinary levy is EUR 49 mil.).[23]

Annual contribution of banks into the Deposit Protection Fund for 2012 was defined in the amount of 0.2% of the value of deposits subjected to protection. Banks paid a total amount of EUR 25.45 mil. of annual contributions for the first and second quarter of 2012 into the deposit protection system. [24] Due to the above-mentioned legal changes, the banks did not pay annual contributions for the last two quarters of 2012.

For 2012 the overall financial burden of the Slovak banking sector was EUR 195.202 mil.[25]

For 2013 the revenue from the collection of special levies into the state financial assets was EUR 204 mil.

The annual financial burden by the Deposit Protection Fund was zero since the rate for the annual contribution calculation was determined to 0% based on the law for the entire year of 2013.

For 2013 the annual contributions of banks connected with supervision were approximately EUR 2 mil.[26]

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[23] All the data of the amount of revenue from special banking levy and forecasts of its development are from the approved budget of public administration for 2014 through 2016, p. 150.

Refer to: http://www.mfsr.sk/Default.aspx?CatID=9521 (dated February 26, 2014).

[24] Deposit Protection Fund. Annual report 2012, p. 4. Refer to: Pozri: http://www.fovsr.sk/files/File/FOV-2012.pdf

[25] The author did not include the costs of bank supervision into this figure since the information on the amount of the annual contribution of the bank for 2012 as supervised entity had not been published on the NBS website.

[26] At total assets of the banking sector for 2013: EUR 60,571 billion. Source NBS: Analytical data of the financial sector. 3rd quarter of 2013. Released: January 2, 2014. Refer to: http://www.nbs.sk/sk/dohlad-nad-financnym-trhom/analyzy-spravy-a-

For 2013 the overall financial burden of the Slovak banking sector was EUR 206 mil.

Altogether for 2012 and 2013 up to date the financial burden of the banking sector is approximately EUR 374 mil. as a result of the „bank tax" introduction.

At the end of 2012 the amount of funds of the Deposit Protection Fund was EUR 145 mil.[27], which is almost 0.5% of the total amount of covered deposits (while, in compliance with the law, the target amount is 1.5% of the covered deposits). Due to the zero burden by the Deposit Protection Fund, it can be stated that this financial status was the same by the end of 2013 (not taking into account the interest profit from depositing this amount onto the account maintained by the NBS).

2.3 Estimate of financial burden of the banking sector for 2014 and 2015

For 2014 the budgeted revenue from special levy of selected financial institutions is EUR 160.649 mil. During 2014 the accumulated value of these state financial assets shall achieve the limit of EUR 500 mil.[28] Therefore, the rate for the levy calculation should be reduced to 0.2% for the following year, i.e. 2015 (refer to footnote No. 18).

As of January 1, 2014, the bank institutions are again obliged to pay an annual contribution into the Deposit Protection Fund after 1.5-year „break". At its minimum rate of 0.2% (refer to footnote No. 20) and

publikacie-v-oblasti-financneho-trhu/analyticke-udaje-financneho-sektora (dated February 26, 2014).

[27] Deposit Protection Fund. Annual report 2012, p. 4. Refer to: http://www.fovsr.sk/files/File/FOV-2012.pdf

[28] For 2012 and 2013: EUR 374 mil. + for 2014: EUR 160.649 mil. = EUR 534.649 mil.

assuming that the status of the covered deposits are the same as in 2013[29], the banks should pay EUR 56 mil. in 2014.

For 2014 the contributions associated with supervision are determined in the amount of 0.0032% of the assets, but not least than EUR 1000.[30] Assuming an equal amount of assets of the banking sector as in 2013, it will also be EUR 2 mil.

The total financial burden of the Slovak banking sector for 2014 may be estimated to EUR 218.649 mil. (maintaining identical values of bank assets and covered deposits as in 2013).

For 2015 the budgeted revenue from special levy of selected financial institutions is EUR 113.525 mil.

As for the Deposit Protection Fund, a similar burden may be expected by the annual contribution at minimum 0.2% rate (EUR 56 mil.). In case of persistent instability on the financial markets it, could be expected that the fund could determine the rate of the annual contribution even at the top rate of 0.75% (EUR 187.5 mil.).

As of launching of the first pillar of the Banking Union, from mid November 2014, the banking institutions should participate in the funding of the single supervisory mechanism that will be under the surveillance of the European Central Bank. Contributions to the supervision could be

[29] The status of the total covered deposits in 2013: EUR 28 billion. Source NBS: Analytical data of the financial sector. 3rd quarter of 2013. Released January 2, 2014. Refer to: http://www.nbs.sk/sk/dohlad-nad-financnym-trhom/analyzy-spravy-a-publikacie-v-oblasti-financneho-trhu/analyticke-udaje-financneho-sektora (seen on Febraury 26, 2014).

[30] Decision of the NBS dated November 19, 2013, No. 8/2013 on determination of annual contributions of supervised entities of the financial market for 2014. Refer to:

http://www.nbs.sk/_img/Documents/_Legislativa/_Vestnik/ROZ-8-2013.pdf

at the same level as in the previous years (EUR 2 mil.); however part of them will be probably remitted from the NBS to the ECB.

Thus the overall financial burden for 2015 might be from EUR 171.525 mil. to 303.025 mil.

As a consequence of the assumed adoption of EU regulations that shall constitute the second and third pillar of the Banking Union, it is necessary to count with further financial burden of the Slovak banking sector in 2015.

The Directive on Bank Recovery and Resolution (BRRD) should enter into force on January 1, 2015, which will introduce the second pillar – crisis management of banks.[31] The National Resolution Authorities[32], whose creation is expected by the given directive, will have powers in the area of prevention and timely intervention. When against all the bank's recovery will not be possible, the costs for its financial rehabilitation shall be borne equally by the shareholders and creditors (bail-in tool). The protection should be provided to the bank deposit holders in the current harmonized amount. In case additional funds are needed for the bank recovery, they will be provided from the national resolution fund, which should be established by the member states using the mandatory contributions of banks in the transition period over 10 years, as of January 1, 2015, and in the amount of 1% of all covered deposits in the given state. This method will help to break the bond between public budgets of states and banks, unburdening thus the taxpayers. Consequently, public financial aid from public funds cannot be applied (i.e. bail-out). This shall

[31] A trilogue agreement on the EU framework of this directive was reached on December 12, 2013.

[32] Such authorities could be, for example, the Ministry of finance, Central Bank, or a new independent agency, which will require the adoption of new legislation.

be applied only in rare urgent and duly justified cases[33] (called as national backstop). In reference to the BRRD, adoption of the regulation on single resolution mechanism (SRM) shall follow. The scope of SRM will apply to all banks that are supervised under the first pillar (Single Supervisory Mechanism (SSM)). The Resolution Board, which is to be established, shall determine individually, based on the bank's risk profile, the amount of mandatory contribution to be paid to the national resolution fund (Single Resolution Fund/SRF). This fund shall be used for bank recovery purposes of SSM member states (eurozone member states and volunteer participants of non-eurozone EU member states) and administered by the Resolution Board. The target level of SRF had been a much debated topic, and finally it was decided to bring it into line with the target level in the BRRD, i.e. a level of 1% of covered deposits, and the process of its gradual formation within a 10 year period, beginning from January 1, 2015. The transnational fund (Single Resolution Fund) will be considered as a funding mechanism for crisis management. It will consist of individual national resolution funds (national compartments) until the said fund is established. Upon the end of the 10-year transition period (January 1, 2025), the individual national resolution funds will cease to exist following their progressive mutualisation.[34] The legislative initiative of the Banking Union's second pillar has been overtaken by the adoption of the special bank levy via Act No. 384/2011 Coll. Such accumulated state financial assets might be considered as a certain kind of national resolution fund. Even the Explanatory Memorandum (General Part) to Act No. 384/2011 Coll. assumed that *upon approval of the proposed European legislation (directive) concerning the European regime of levies of selected financial institutions, should obligation for*

[33] Refer to: httpi://ec.europa.eu/internal_market/bank/crisis_management/, December 12, 2013.

[34] Refer to: http://europa.eu/rapid/press-release_MEMO-13-1186_en.htm?locale=en, December 19, 2013.

the EU member states be introduced to create a separate resolution fund, legislative conditions will be established so that the levy funds under the given act become part of the said created fund.

Outstanding question is whether there is political will to transfer the up to date accumulated state financial assets from the revenue of special levies towards the single (transnational) resolution fund within the 10 year transition period; or whether to accept the fact that these assets will become part of the network of mutualized national resolution funds. In both cases it is assumed that the funds will not be available to the state within the state financial assets. Given that these are significant amounts, a question arises whether, in addition to the existing bank levy, it is necessary to introduce another levy into the national resolution fund effective from January 1, 2015, in accordance with the BRRD, and another levy into the national resolution fund in accordance with the regulation on SRM. In that case it would be necessary to add two new levies to the costs calculated for 2015. The amount of **each levy is 0.1% of all covered deposits in the state, which would be paid annually for a 10 year period up to achieving the amount of 1% of covered deposits.**

Assuming the same status of covered deposits as in the 3rd quarter of 2013 (EUR 28 billion), then it would be necessary to add EUR 28 mil. (into the national resolution fund) and EUR 28 mil. into the transnational (single) resolution fund to the annual burden of the banking sector in 2013. **Thus the overall quantified financial impact on the banks supplemented by the two new levies would be 227.525 up to EUR 359.025 mil.** (depending on the determination of the annual contribution rate into the Deposit Protection Fund).

In terms of legislation, the Slovak legislator would have to adopt a special act in the given case, which would stipulate an obligation for the

banks acting within the territory the Slovak Republic to pay two new levies.

Finally, in the preparation of the legislation that should ground the third pillar of the Banking Union, the possibility of creating a single transnational bank deposit protection fund was also considered. Based on the available information, this aim has been abandoned recently.[35] However, it counts on properly filled national deposit protection funds that will be financed ex ante by contributions. The target amount of such national fund should be 0.8% of all covered deposits in the EU member state over a 10 year period, probably as of the same as the date of launching the second pillar, i.e. January 1, 2015. In addition, the upcoming EU legislation should enable mutual borrowing of funds between the individual national deposit protection funds of the EU member states. For Slovakia it would mean that the Deposit Protection Fund should achieve the target level of 0.8% of all covered deposits over the 10 year period, by 2025. At constant status of deposits during the 10 year period (2015 - 2025) as in the 3rd quarter of 2013 (i.e. EUR 28 billion), the target amount would be EUR 224 mil. The currently effective legislation, as it was mentioned above, determines to fill up the resources of the given fund up to the target amount of 1.5% of all covered deposits, while there is EUR 145 mil. in the fund until today. Therefore, it may be noted that the Slovak legislator should have a clear idea of this area at least and should agree only to certain changes of the existing Act No. 118/1996 Coll. towards reducing the range of rates for the annual contribution of banks. I, therefore, assume that the analysis of the newly adopted EU regulation on deposit protection would not represent an increase of the financial burden by the Deposit Protection Fund in our

[35] http://europa.eu/rapid/press-release_MEMO-14-57_en.htm, January 24, 2014

calculation of the financial burden of the banking sector, but it would be rather rational to believe the contrary.

3 Conclusions

As it was implied in my article, the financial burden of the Slovak banking sector has been gradually increasing from the beginning of 2012 (**2012:** EUR 195.202 mil., **2013:** EUR 206 mil., **2014:** EUR 218.649 mil., **2015:** EUR 227.525 up to EUR 359.025 mil. assuming the creation of other two levies in addition to the existing special bank levy due to the Banking Union's second pillar). This refers to an increase by approximately EUR 10 mil. per year. However, this estimated growth is not compensated by the state at all. When the compulsory levy for the banks was introduced in 2012, it was recognized as tax-deductible expenses as a compensation for the banks' financial burden in compliance with Act No. 595/2003 Coll. on income tax. At the same time the payments of annual contributions into the Deposit Protection Fund for the third and fourth quarter of 2012 and the entire 2013 (zero rate) were cancelled. However, for 2014 the obligation to pay the annual contribution has automatically been renewed in the amount of 0.2% of the value of covered deposits. From the bank's as well as the client's view, I believe that it is required that the banking sector should not be progressively long burdened by financial levies. This trend would ultimately have a negative impact also on the reduction of interest rate of bank deposits and paradoxically it might cause strangling of the economic activity of banks acting in Slovakia. In the context of the Banking Union's expectations, in my opinion, substantial reduction of the rates of annual contributions into the Deposit Protection Fund appears more realistic even considering the fact that its target level is gradually being achieved in Slovakia (1.5% or based on EU proposal 0.8% of the amount of covered deposits in the state).

In conclusion, it is necessary to say that the given study of quantification of financial impacts on the banking sector is not considered closed at all since further financial burden might occur by fulfilling the *Financial Consumer Protection Strategy* which alternatively assumes establishment of a Center for Resolving Financial Disputes[36]. This could be financed by the tools of financial institutions including banks. Also financing of the Banking Union's first pillar remains an open question, which has not been resolved so far.

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RISKS OF VIRTUAL CURRENCIES IN BUSINESS PRACTICE

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Abstract:

Virtual currencies are currently experiencing rapid rise in popularity. The first cases have appeared in which before mentioned currencies are being applied not only within a specific Internet environment but they have begun to be accepted also by conventional entrepreneurs. With regard to the way of their issuance and performance of payment system a parallel monetary system arises which carry many new challenges for regulators. In connection with virtual money, there are many problems in order to be economically and legally defined.

The aim of this paper is an attempt of grasping the virtual money both from an economic point of view, namely in terms of fulfilling the general definition of money, an legal point of view when the possibility of subsumption under particular institutes is considered.

Key words:

Virtual money; Virtual currency; Bitcoin; Cryptocurrency; Currency regulation;

JEL classification: E52

1 Introduction

This paper sets as its aim to define the key characteristics of virtual currencies in viewpoint of their economic and legal nature. Thus, formulated task inevitably leads to the need for an interdisciplinary approach. The outcome of this paper is to describe the essential characteristics and risks linked to the use of virtual currencies in business practice. The novelty of the topic is primarily apparent in the limited number of professional papers processed to this date. So far, the only domestic work trying to grasp the basic legal viewpoint is the paper by Činková (2013).

The first part of the paper is relying in particular on general economic publications. The aim is to relate the general and already well described theory to virtual money and thereby help their classification and definition. The legal part focuses on the analysis of the applicable law and exploring the possibilities of virtual money subsumed under the chosen legal institutions. As an alternative, documents of the Ministry of Finance and the Czech National Bank are used.

2 Basic Terms

The rapid development of the Internet has brought, among others, a new concept, namely virtual money. The importance of virtual money has long been overlooked. The traditional focus of their application lies in online games where they are used to trade with game items. However, virtual currencies, those used in the context of digital services and online communities[1], are gradually gaining importance. The use of the vast

[1] For instance, Facebook offers so-called Facebook Credits through which it is possible to pay for extra services.

majority of virtual money is very limited[2], but exceptions exist. Method of issuance of virtual money is not uniform and depends on the operator. The term „cryptocurrency" is the specific subgroup of virtual currencies. The first such currency was BitCoin in 2009. According to Stevenson (2013), such money is characteristic by implementing the principles of cryptography[3] in the manner of their distribution, decentralization and security.

An opposite of virtual money the term real money is usually used. That is, however, rather misleading simplification according to some authors. Samuelson et al. (2005, str. 511) defines money as *„…anything that serves as commonly accepted means of exchange."* Revenda (2012, str. 14) perceives money as *„…an asset which is generally accepted in the process of paying for goods and services or when paying debts."* Despite the fact that in the present day no virtual currency is universally accepted means of payment its character does not exclude it. Terminological ambiguity of „real money" lies in the fallacious belief that it is the synonymy for the national currency. Nevertheless, Bakeš (2009, str. 335) states that *„…money is strictly economic category…, currency is primarily legal category and generally means particular form or kind of money."*

It is necessary to differentiate between virtual and digital money. These are perceived as tools created and saved on a digital media, which in meaning covers traditional currencies such as USD or Euro deposited on an checking account for instance. Another term that needs to be distinguished „electronic money" (so called e-money) which the Act No.

[2] For example, within one website such as the aforementioned Facebook page or within a particular community (eg www.warforum.cz, which emits „WarMoney" that are accepted between users of the website as currency in their mutual interaction.

[3] Cryptography is the science dealing with concealing the meaning of messages by transferring them into a form that is readable only with special knowledge. See http://kryptografie.ic.cz/kryptografie.php. [10-03-2014].

284/2009 Coll. on Payment system act, as amended dealing with payments in the current wording in article 4 know as means representing claim against the person who issued it, are stored electronically, are issued on receipt of funds for the purpose of making payment transactions and are accepted by persons other than the issuer.

3 Virtual money in terms of fulfilling the functions of money

„Fiat lux“ were the first words said by God according to the Genesis. The Maker created a light out of emptiness. It is, therefore, apt that current currencies with forced circulation are called „fiat money“. The central bank, similarly to God, emits money from nothing. The present situation is the result of the development that dates back to the very dawn of human civilization. Commodity money are historically the first money. Smith (2002) sees the emergence of money as a result of the enforcement of division of labor. Specialization in the economy has created the need for economic entities to exchange their surplus production for other goods. This exchange was however slowed down by barter trade so it was necessary to find an asset generally accepted in payment for goods and services or in payment of debts. And such an asset generally corresponds to the definition of money. In the absence of authority guaranteeing by its power the circulation of fiat money, original money represented certain value themselve. Despite partial attempts to use cattle, salt or tobacco for pragmatic reasons precious metals started to be used - especially gold or silver. Although mainly gold is perceived as a value by itself, is not completely so. Demand due to its necessity in industry and dentistry in 2008 was only 11,8%. The remaining part was allocated as investment into gold as the commodity (a total of 29,8%) and to jewelry (58,4%). (Revenda, 2010) The last of the motives of its usability combines admiration to gold as a symbol of wealth, delight in

its beauty and efforts to invest in permanent store of value. It can be therefore said that its value is partly defined by the same type of faith, as in the case of fiat money. The fundamental difference is thereofre especially in the way of issue. The total amount of gold or silver is limited, it is getting into the circulation together with how it is mined. In contrast, fiat money can be released by the central bank in any amount, which, however, in the case of excesive issue may challenge such an important confidence in them. By now, gold or silver do not fulfill the function of money. Their limited amount, tradition, partial real usability and last but not least valued aesthetic qualities make them sought after store of value.

The future of cryptographic money is to be assessed from the ability to fulfill essential functions that define money. Revenda (2010) primarily refers to the need of money to be universally accepted medium of exchange. Such state has not been achieved yet for any existing cryptographic funds. Although news about decisions of traders to accept the selected virtual currency does appear, they are efforts motivated primarily to increase visibility of the seller. For the vast majority of economic entities there is no objective reason for their acceptance. Controversial point of virtual currencies is their credibility. No state authority stands behind them, as it is in the case of currencies with forced circulation, and they can not even rely on a real usability that would lay the foundation stone of their stability, as it is the case with gold or silver. The question is whether for existence of money its general acceptance is really necessary. Revenda (2010, p. 19) states that *„Unless the asset is accepted by all entities in the economy, it is not money, but only its time limited substitute."* But history knows a whole host of so called supplementary or local money. They appeared frequently especially in times of economic crisis. The question is how significant impact has

the introduction of local legal tender on the economy as whole.[4] Partial community applying its local money for exchange, according to empirical experience, benefits from it. The scope for using virtual means of payment might consist just in the role of additional money in a certain community of interest.[5] Lack of regulation by state authorities is at such tenders replaced by mutual trust and solidarity.[6] Extending supplementary tender to the general exchange lacks the meaning, because it would absent the unifying element presented in the community.

The relative stability[7] of the common currency is ensured by the Central Bank's monetary policy by maintaining the balance between supply and demand for money. In the Czech Republic the task of the Czech National Bank is defined in the Constitution (Article 98) as: *„… to maintain price stability …"*. Thus in the case of inflationary pressures the central bank would begin to reduce the money supply by its restrictive policy and opposite, release monetary policies during deflationary tendencies. Mechanisms of functioning of virtual money are different. Especially here is absent a central authority that would be able to influence the money supply. Cryptocurrencies are from the perspective of their way of issue similar to commodity money such as gold or silver

[4] It can be assumed that from the economic point of view it is a negative influence. Local currencies restrict competition, complicate internal trade and in the case of mass popularity they are also able to destabilize the currency of the country. Central banks therefore have previously responded to the spread of local money negatively. Lietaer (2004) mentions that after the success of the introduction of local currency in Wörgl (1933), 200 cities in Austria wanted to introduce their local currency, which led the local central monetary authority to put ban on such money.

[5] Thus compared to local currencies not in community defined locally, but rather firstly defined by interests.

[6] For example in the case of regional tender called Chiemgauer, 3% of each transaction goes to selected charitable projects. Simultaneously, tender loses every three months 2% of its original value, which supports the circulation speed.

[7] Relative stability does not generally mean effort to noninflationary policy. For example in the Czech Republic, the Czech National Bank tries to aim the inflation at 2%.

- instead of their release into the circulation by the central monetary authorities they are “mined” by their users. Just like minerals, total amount of cryptocurrencies is usually limited (except Peercoin). Characteristics of the most important cryptographic currencies in terms of the total amount is summarized in the following table:

The total amount of selected crypto currencies

Title	The total number of units after extraction
Bitcoin	21 mil
Litecoin	84 mil
Peercoin	Theoretically unlimited, although the rate of expansion will decrease over time.
Namecoin	21 mil
Quark	247 mil

Source: www.bitcoin.org; www.litecoin.org; www.peercoin.net; www.namecoin.org; www.qrk.cc

In the case of Bitcoin it is stated that all „coins” will be mined in the year 2140. While the number of "mined" Bitcons will annually be reduce by half. The consequences of this feature, which is characterized not only for Bitcoin, can be demonstrated on the equation of exchange:

$$M.\ V = P.\ Q$$

where *M* is the total amount of money in circulation, *V* is the velocity of money, *P* is the price level and *Q* quantity of exchanged production. In modern monetary systems the central bank pays attention to fluctuations in the amount of exchanged output (Q) or velocity (V)

compensated through monetary policy instruments affecting the amount of money in circulation (M). As stated above, the objective is to keep the rate of change of the price level (P) in the required amount. However, all cryptocurrencies have autonomous growth rate of M. Therefore, any change in the amount of exchanged production (Q) or velocity (V) toll on the price level (P). This fundamental feature of cryptographic money makes the price level relatively unstable.

Fixed total amount of money has in addition a second crucial feature, namely the inevitable tendency towards deflation. At the moment when the value M becomes constant while the number of exchanged output (Q) will continue to grow, the above equation will primarily deal by reducing the price level (P). Although inflation is seen as a negative phenomenon, it is not true that its opposite - deflation – can be viewed positively. The negative effects of deflation by Kufa (2006) can be divided into four areas: (1) redistribution of loss, (2) asymmetric rigidity of nominal wages, (3) an adverse effect on the financial system, and (4) the zero nominal interest rate limitations.[8] The mentioned impacts are *„… a decline in the product of the economy, rising unemployment, declining profit (respectively loss) of enterprises and banks, rising real interest rates."* (Černohorský et al., 2011, p. 93). Assuming that the selected cryptographic means of payment would replace the state currency, the innate deflation tendency of such money would have negative impact to the economy in the long-term.

It is difficult to identify the extent to which the demand for selected cryptographic money is determined by the transaction motive. However, given the limited number of traders who accept the most common of these currencies (Bitcoin) the assumption that the dominant

[8] These negative impacts do not relate to situations in which deflation is caused by positive supply shock (eg. increase productivity, decrease in import prices, trade liberalization, etc.) (Kufa, 2006).

motivation to trading is speculation about increase of its value can be made. This will also make (taking into account the zero real intrinsic value) speculating entities sensitive to signs of a market downturn. Samuelson et al. (2005, p. 514) states that the money: *„compared to risky assets such as stocks, real estate or gold,... are relatively risk-free asset."* Cryptographic money, however, fails this requirement due to high market risk associated with them. Thus at present, in the above mentioned type of money, nor the second of the basic functions of money is possible, namely the ability to be store of value.

4 Legal aspects of virtual money

From the perspective of the effective Czech law, there exist several provisions whose intention is to regulate the handling of funds. The term electronic money already mentioned in the introduction has its definition contained in the Payment System Act as currently amanded, namely in article 4. Virtual currencies can not be identified with this legal definition as being free of a claim against a person who issued them and they are not issued on receipt of funds for the purpose of making payment transactions. From article 4 of the Payment System Act it is clear that electronic money are tied to national currencies,[9] as shows also the definition of the European Commission. Here they are described as: *„…a digital equivalent of cash, stored on an electronic device or remotely at a server."*[10] Unsubordination of virtual money under a legal

[9] The Payment System Act in its article 4 means by electronic money monetary value issued on receipt of funds, while those article 2 (1)(c) of the Act defines as banknotes, coins, non-cash funds and electronic money. In the Act on the circulation of banknotes and coins, in which banknotes and coins as terms are introduced in article 2, is stated their denomination on the czech crowns (domestic banknotes ot cons) or rather foreign currency (foreign banknotes or coins).

[10]E-money. The European Commission. Available from: http://ec.europa.eu/internal_market/payments/emoney/index_en.htm. [10-03-2014].

definition of electronic money is in viewpoint of their functionality and purpose appropriate because they do vary in fundamental characteristics.

E-money do not aspire to replace the national currency, but it is only a supplement to facilitate transaction of payment system. This is proved by the fact, as stated in Máče (2006), that the electronic money practically do not circulate - they do frequently disappear after one use. Even the provision of definition of funds in article 2 paragraph 1 c) of the Payment System Act is not applicable because banknotes and coins under the Act on the circulation of banknotes and coins (see article 2) are denominated in the czech or foreign currency. The Payment System Act connects even the terms „payment service" (article 3) or „non-cash foreign currency transaction" (article 2(1)(e)) with national currencies. According to notification of the Czech National Bank (2014), buying and selling of virtual currency can not be considered as payment service or non-cash foreign currency transaction. Nor realization of virtual money or managing of their account is not a payment service.

Regulation of exchange of virtual money for Czech crown is not included even in the Act on bureau-de-change activity. This Act again defines the condition of the material substrate and denomination on the selected national currency when the bureau-de-change activity is referred to in article 2 paragraph 1 as an exchange of *„…banknotes, coins or checks denominated in certain currency to banknotes, coins or checks denominated in another currency"*.

From the above mentioned it can be concluded that trading with virtual currencies is essentially unregulated. While the realization of the bureau-de-change activity requires a permit from the Czech National Bank, for the similar activity with the subject of virtual money it is sufficient to have trade certificate. Nevertheless, in the current legal system, there are some limitations. Nevertheless, in the current legal system, there are some limitations. First of all, credit and financial

institutions, which were granted by the Czech National Bank, have exhaustively enumerated in the Act activities which they may carry.[11] Therefore, these regulated entities can not transact with virtual currencies beyond the framework of managing their own property.[12] The exceptions are those entities that can obtain in addition to the registration or permit by the Czech National Bank other business authorization - such as the so-called hybrid payment institutions.[13]

Another question related to the issue is the legal status of virtual currencies stock market. The Act on Capital Market Business defines the regulated market in article 55 as market with investment instruments, while those mean according to article 3(1) investment securities, money market instruments and financial and commodity derivatives. Virtual currencies does not fall under this legal definition. With regard to the nature and characteristics of virtual money, subsumption of their stock

[11] For example the bank can carry out its business only within the article 1(1)(a,b) or more precisely article 3 of the Act No. 21/1992 Coll., on Banks, as amended; trader with securities with articles 5 and 6 of the Act No. 256/2004 Coll., on Capital Market Businesses, as amended. Similar restrictions can be found for other regulated entities (such as credit and savings cooperatives).

[12] According to the Ruling of the Supreme Court (Case No. 29 Cdo 152/2007) managing of own property is not a business. It is an activity that is inherent in every business, since it is essential to its proper functioning. Managing its own assets does not need any official authorization. See http://www.epravo.cz/top/soudni-rozhodnuti/sprava-vlastniho-majetku-55291.html. [10-03-2014].

[13] The hybrid payment institution is a credit institution or electronic money institutions that perform activities other than those performance for which would be subject to authorization due to the Payment Systems Act. The essential characteristic is that financial services are not the main focus of their business. For example, telecommunications companies, which allow making payments via SMS. The article 9(1)(h) of the Payment System Act should be kept in mind, there is the requirement that any business involving activities other than the provision of payment services shall not constitute a substantial threat to the financial stability of credit institutions even can not prevent effective supervision over the activities of payment institutions. The Czech National Bank (2014) in its notification also states that in this case it is probably necessary to distinguish those activities that are subject to supervision by The Czech National Bank and which not to prevent consumer deception.

market under the definition of a commodity stock market is offered. Here, however, we encounter the absentee clear legal definition of a commodity. This is to be inferred from article 1(1) of the Act on commodity exchanges, where it is stated that commodity exchange is a legal person designated to organized stock exchange trading with goods that are referred to hereinafter as a commodity. Goods, according to article 4(2) of the Act on Consumption Tax means especially a material thing, except money and securities, the right to build, live animals, human body, human body parts, gas, electricity, heat and cold. It is obvious that the intangible nature of virtual money does not take this definition. More flexible and more appropriate definition of goods was published by the European Court of Justice in its judgment (7/68: Commission vs Italy): *„Goods is anything that may be eligible for monetary valuation and what may be the subject of a business transaction.“* Such a definition would have covered virtual currency due to opinions of the authors, however, the definition of the European court of Justice in this case does not apply because there is no European element. It can thus be concluded that the stock markets of virtual money are currently in the Czech Republic unregulated. A potential reason for the regulation would be accepting deposits from the public to which such stock market held accounts for trading. There would be worth considering whether it would be necessary to obtain permission from the Czech National Bank, although it is obviously not a deposit within the meaning of the Act on Banks. Currently one stock market focused on bitcoin exchange (BitStock) works in the Czech Republic. This one does not collect any deposits from entities who trade there. During matching of payment it uses the mechanism, which can be likened to a documentary payments.[14] As it

[14] See the scheme of operation of stock market available at https://www.bitstock.cz/info/info. [10-03-2014].

says, its activity is carried out on the basis of a trade license in the field of *„brokering trade and services“*.

The national legal order does not expressly regulate virtual money, yet it may be inferred, as Činková (2013) says, in the case of virtual money it is intangible movable thing. Therefore, according to the authors of the paper it can be considered as possible that virtual currency has been the subject of obligations-legal relationship. Their character enables them to appear in such relations as "financial means". Thus it is unable to pay the purchase contract by virtual money, as is clear from the nature of provision of article 2079 of the Civil Code, where is discussed the payment of the purchase price. With regard to the designation of virtual currencies as an intangible movables things it would be desirable to choose as a type of contract an exchange contract (see article 2184 et seq.) Yet non regulation of virtual currencies complicates their use in business as a means of payment, not only because of the impossibility of choice of the above mentioned contract type. EBA (2013) notes that in the case of paying with virtual money sender of the payment is not in any way protected by European Union law, as is the case with the transfer on current bank or other payment account. Therefore, you can not request cancellation of unauthorized or incorrectly executed transactions. Absence of regulation complicates cases when the counterparty refuses to fulfill his obligations under the contract. Rights arising from private law relationship may be claimed through the courts, but particular difficulties must be taken take into account. Especially in terms of execution of account of virtual money. While the Civil Procedure Code knows the institute claim on the bank account (article 303 onwards), due to which the creditor can enforce his claim through inaction liable party, in the case of the account of virtual money such option is not possible. The debtor then receives powerful tool to effectively hide his property from state power, thus it prevents the rightful party to enforce its claim from contractual relationship.

In terms of taxes virtual currencies are currently in the Czech Republic obscured by a wall of silence from the part of Internal Revenue Service. In light of the rising popularity of especially Bitcoin it is expected that this situation does not stay long. Author's opinion is to not introduce taxation of virtual currencies except situations where they interfere into the real world in terms of their use for the acquisition of goods or services which by their nature are otherwise subject to the normal exchange tanned to make a profit for seller, and in exchange for domestic or foreign currency. General taxation of transakctions with virtual currencies as well as taxation of their acquisition by mining without subsequent use of the methods provided above, it would be disproportionate and unjustified interference by the state into the freedom of the Internet. On the other hand, when article 10 of the Act on Income Tax is fulfilled by using virtual currency to an increase in property, it is appropriate to tax such income. With regard to article 10 it is therefore not sufficient to tax only the exchange of virtual money for national currency, but also a situation where any virtual currency is used as consideration of goods. Referring to the currently valid legal order it is therefore appropriate expect, according to the authors, that the revenue derived from the use of virtual currencies, which leads to an increase in property and will not be exempted under article 10(3)(a) the Act on Income Tax, so will exceed the amount of CZK 30 000 per tax year, will be taxed. The sentence „an increase in property“ can be interpreted due to the authors that the possible use of virtual currency to purchase services will not be the subject to taxation.

5 Conclusion

Contemporary cryptocurrencies do not fulfill two of the basic functions of money. Their character corresponds rather to commodities, although unlike them they do not have the material nature and they do

absent any real underlying value. There is no reason to believe that virtual or rather cryptographic money will fulfill the functions of money in the near future. The deflationary character accompanied by speculative demand will make cryptographic money prone to high volatility which is also underlined by the lack of real intrinsic value. By this aforementioned money do not meet the condition of depository value. In the case of the elimination of short-term fluctuations caused by speculation such money would suffer from deflation for the reasons already stated in the paper. Their holders would not have been motivated to spend them, but further evaluate them by its holding. Taking into consideration experience with local funds it is known that the success of complementary currencies is based on controlled inflation, which supports velocity of circulation. This discrepancy underscores the inappropriateness of cryptographic money in the role of a medium of exchange. Moreover, the absence of supervision of central monetary authority makes money cryptographic more risky than a standard national currency. In combination with high volatility it will be more difficult to gain the needful trustworthiness necessary for its general acceptance and thus fulfill the function of money as a medium of exchange. It can thus be concluded that the acceptance of virtual money by entrepreneurs for their goods or services represents a risk to them, which is currently useless to undergo.

From the part devoted to the legal nature of virtual money is apparent in particular the conclusion that at present they are completely unheeded by Czech law. Virtual currency can not be classified under any of the legal definitions contained in the applicable regulation. In this case, the legal regulation lagged behind the dynamic development of economic reality. The dismal situation is especially obvious when compared to the strict regulation of money exchange and operation of regulated markets (these businesses need to be registrated by Czech National Bank) - for identical activities is sufficient trade certificate. Yet virtual currency can act as a subject in legal relations. However it is necessary to take into

account the difficulties involved in the enforcement of claims, which can be misused to conceal property from execution. The uncertainty associated with virtual currencies exist also in the area of taxes. In the opinion of the authors those are subject to taxation but only when their usage leads to an increase in real property.

Several conclusions can be drawn from the submitted paper for business entities which are considering the utilization of selected virtual currencies in their business. From the economic point of view there is currently no existing virtual currencies which meet the definition of money and its usage makes it necessary to cope with the increased fluctuation of their rate and limited acceptance by third parties. It can not be denied that by its nature it is not money but rather an investment commodity. The absence of a clear legal regulation also increases their overall degree of risk. For the reasons stated above, the virtual money bring a significant risk to business entities. Their potential utilization in the current business practice is limited to small transactions executed through a mobile phone when an entrepreneur these money promptly passes back to the state currency. A way with such usage is reminiscent of current electronic money, with the difference that it is unregulated and fluctuating alternative.

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MICRO, SMALL AND MEDIUM ENTREPRENEURS IN POLAND – THE CLASSIFICATION BASED ON THE ECONOMIC SIZE OF THE ENTREPRENEUR

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Abstract

Normative establishment of classification of entrepreneurs based on the criterion of an economic value is determined by a Commission Regulation (EC) No 800/2008 of 6 August 2008, which recognizes some kinds of aid as being in accordance with the Common Market in application of Article 87 and 88 of Treaty (General block exemption Regulation) was introduced into legal order of Republic of Poland under the rules of Act of 2 July 2004 on Freedom of Economic Activity. The aim of this article is to present the idea of the classification and the components necessary to apply diversification of micro, small and medium-sized enterprises – staff headcount and financial thresholds determining enterprise categories, types of enterprise taken into consideration in calculating staff numbers and financial amounts, data used for the staff headcount and the financial amounts and reference period, staff headcount and rules of establishing the data of an enterprise.

Key words

Micro- small- medium- entrepreneurs; Classification; Entrepreneur; Entrepreneurial activity; Economic activity; Freedom of

economic activity; Poland; European Union; Economic size; Independence; Types of enterprise;

JEL classification: K22

1 Legal basis

Normative establishment of classification of entrepreneurs based on the criterion of an economic value is determined by a Commission Regulation (EC) No 800/2008 of 6 August 2008, which recognizes some kinds of aid as being in accordance with the Common Market in application of Article 87 and 88 of Treaty (General block exemption Regulation)[1]. Annex 1 of Commission Regulation (EC) No 800/2008 includes 6 articles in which it determines components necessary to apply diversification of micro, small and medium-sized enterprises. In particular it specifies the definition of an enterprise[2], staff headcount and financial thresholds determining enterprise categories, types of enterprise taken into consideration in calculating staff numbers and financial amounts, data used for the staff headcount and the financial amounts and

[1] Annex 1 of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty (General block exemption Regulation) (Official Journal of the European Union L 214/3 of 9.8.2008) – hereinafter referred to as the Regulation No 800/2008.

[2] It is worth noticing that in Article 1 of Annex 1 of Regulation No 800/2008, the definition of enterprise was formulated according to which an enterprise is considered to be any entity engaged in an economic activity, irrespective of its legal form. This includes, in particular, self-employed persons and family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in an economic activity.

reference period, staff headcount and rules of establishing the data of an enterprise[3].

The indicated classification which meets the guidelines of EU, was introduced into legal order of Republic of Poland under the rules of Act of 2 July 2004 on Freedom of Economic Activity[4]. This act in Article 103-110 defines above all the idea of categorization, criteria of dividing shares, its amount and way of calculation – in this scope it copies the European Union regulations[5]. However it is worth noticing that Act on Freedom of Economic Activity does not contain an exhaustive regulation that enables the correct application of classification, which means that in the unregulated scope and also in case of possible contradictions EU law is applied directly.

2 Economic size

The application of criteria of economic size diversifies the following categories of entrepreneurs[6]:

- a micro-entrepreneur – that is an entrepreneur, who within one or two past fiscal years: 1) employed, on average, less than 10 employees in a year, and 2) generated the annual net turnover from sales of products, goods and services and financial operations of less than the equivalent of EUR 2 million expressed in PLN, or if the balance sheet total value of assets as at the end

[3] See Article 1-6 of Annex 1 of Regulation No 800/2008.

[4] Act of 2 July 2004 on Freedom of Economic Activity (consolidated text Journal of Laws 2013, item 672 as amended) – hereinafter referred to as the Act on Freedom of Economic Activity.

[5] Content of chapter 7 of Act on Freedom of Economic Activity is not only limited to the indicated issues.

[6] See Article 104-105 of Act of Freedom of Economic Activity and Article 2 of Annex 1 of Regulation No 800/2008.

of one of these two years was less than the equivalent of EUR 2 million expressed in PLN,

- a small-entrepreneur – that is an entrepreneur who within at least one of the past two fiscal years: 1) employed, on average, less than 50 employees in a year, and 2) generated the annual net turnover from sales of products, goods and services and financial operations of less than the equivalent of EUR 10 million expressed in PLN, or if the balance sheet total value of assets as at the end of one of these two years was less than the equivalent of EUR 10 million expressed in PLN,
- a medium-entrepreneur – that is an entrepreneur who: 1) employed, on average, less than 250 employees in a year, and 2) generated the annual net turnover from the sales of products, goods and services and financial operations of less than the equivalent of EUR 50 million expressed in PLN, or if the balance sheet total value of assets as at the end of one of these two years was less than the equivalent of EUR 43 million expressed in PLN within at least one of two fiscal years[7].

The above shows that the classification is based on expressed in quantity economic criteria. These are:

1) the size of average annual employment, and also
2) the annual net turnover from the sales of products, goods and services and financial operations or the balance sheet total value of assets (within at least one of two last fiscal years).

It is difficult to question the legitimacy of the accepted criteria because the scale of employment and financial dimension of economic

[7] The classification therefore divides the whole entrepreneurs into 4 categories: 1) micro, 2) small, 3) medium and 4) other than previously classified, that is: big (macro) entrepreneur.

activity as measurable enable to illustrate the economic size of each entrepreneur. Nevertheless their interpretation and correct application needs a certain comment.

The basis of the first criterion in employment – Article 103-106 of the Act of Freedom of Economic Activity and also Article 2 of Annex 1 of Regulation No 800/2008 clearly constitutes "entrepreneur employing no more than (…) employees".

The above may suggest that the criterion of employment refers to persons having a status of an employee in understanding of Labour Code, according to which an employee is a person employed on a basis of a contract of employment, appointment, election, nomination or a collective contract of employment[8]. It is necessary to emphasize that the interpretation of an employee (and the criterion of employment) limited exclusively to worker's employment is too narrow in the light of a supranational dimension of categorization.

Article 5 of Annex 1 of Regulation 800/2008 indicates directly the competence of a broader interpretation of a criterion. It states that the staff consists of: a) employees (in the meaning established in *acquis de l'union*), b) persons working for the enterprise being subordinated to it and deemed to be employees under national law; c) owner-menagers and d) partners engaging in a regular activity in the enterprise and benefiting from financial advantages from the enterprise[9].

[8] Article 2 of Act of 26 June 1974 Labour Code (consolidated text Journal of Laws 1998, No. 21, item 94, as amended) – hereinafter referred to as the LC.

[9] The divergence above provokes a question which interpretation of employment is appropriate? Answer to this question has a doctrinal meaning, and also causes significant consequences in application and usage of the criterion. In author's opinion, the identification of employee restricted to a Article 2. LC is allowed only in situations that are strictly internal, that is facts of the case in which all the significant components are closed in the borders of the Republic of Poland (even in this case one should consider the competence of the conception of so called non-employee contracts covering employment in other relationship than employment relationship yet still very similar to

Regardless of the indicated divergence it is reserved that while calculating the average employment, employees on maternity and parental leaves, as well as employees with an apprenticeship or vocational training contract are not included as staff[10].

It is worth emphasizing that: a) employment is not a personal employment but it is determined by the conversion to full-time units[11] or to the number of annual work units[12], and also b) it's average is determined annually which means that it is an annual those arithmetical mean calculated on the basis of the numerical data from the consecutive 12 months (that is at least in one of two fiscal years)[13].

The second criterion refers to financial dimension of entrepreneur's economic activity. The components of this criterion are: a) the amount of net turnover or b) the sum of balance of assets in at least one of two last fiscal years[14]. These expressed in EUR are converted into

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employment relationship for example task-specific contract or contract of mandate). On the other hand the way of interpretation of employment covered in Article 5 of Annex 1 of Regulation no 800/2008 will be appropriate in facts of the case which have cross-border characteristics. Compare Z. Snażyk, A. Szafrański, *Publiczne Prawo gospodarcze*, Warsaw 2009, p. 83-84; A. Powałowski, *Ustawa o swobodzie działalności gospodarczej. Komentarz*, Warsaw 2007, p. 386.

[10] Article 109 issue 2 of the Act on Freedom of Economic Activity and art. 5 of Annex 1 of Regulation No 800/2008.

[11] Article 101 issue 2 of the Act on Freedom of Economic Activity. Taking into consideration the lack of definition of full-time employment one should make use of the regulations of LC referring to the norms and general workload.

[12] According to art. 5 of the Annex 1 of Regulation No 800/2008 The headcount corresponds to the number of annual work units (AWU), i.e. the number of persons who worked full-time within the enterprise in question or on its behalf during the entire reference year.

[13] Admissible (and common In practice) is the situation in which entrepreneur employs on annual average "fractional parts" of vacancies.

[14] Alternatively determined conditions have an objective character, thus their application is generally independent of the entrepreneur's will. However the entrepreneur will be able to show the fact of fulfilling criterion on the basis of freely chosen height, in the

Polish zlotys in accordance with the average rate of exchange announced by the National Bank of Poland in the last day of the fiscal year chosen to specify the entrepreneur's status[15].

3 Verification of the economic size of entrepreneur

Correct application of classification, that will allow to specify precisely category of entrepreneur, requires acceptance of two basic rules.

First of all, conditions of average annual employment and the amount of net turnover or the sum of balance of assets have to be fulfilled simultaneously.

Secondly, due to the negative character of the definition the entrepreneur may be qualified only to one category, therefore verification of conditions towards the individually specified entrepreneur must take place at the grassroots, which means that it should always start from the micro-entrepreneur category and end up on the first category, which fulfills both conditions simultaneously.

It needs to be emphasized that the employment and the financial scale of economic activity is defined on the basis of at least one of two fiscal years. Thus, total fulfillment of the criteria only in one of two fiscal years is sufficient for the qualification[16].

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situation when the basis of qualification will be entrepreneur's declaration on the basis of Article 110 issue 1-3 of the Act on Freedom of Economic Activity.

[15] Article 107 of the Act on Freedom of Economic Activity.

[16] Exceeding of both or one of the value in a subsequent financial year, that is after a year in which the qualification took place, is not equivalent with the change of the entrepreneur's status, but it may influence on the qualification in subsequent years. See Article 104-106 of Act on Freedom of Economic Activity and Article 4 of Annex 1 of Regulation No 800/2008.

It is significant that qualification of an entrepreneur functioning for less than a year (fiscal year) is also permissible – in this case as an expected net turnover of selling goods, services and financial operations, as well as average annual employment is estimated on the basis of data for the last (possibly longest) period, documented by an entrepreneur[17] or the assessment done in good faith during the financial year[18].

4 Independence

In the inseparable relation to categorization in accordance with economic size functions so called criterion of independence. Established in Article 3 of Annex 1 of Regulation No 800/2008 divides the whole of entrepreneurs into: 1) linked enterprises, 2) partner enterprises and 3) autonomous enterprises. Their relation (relationship and dependence) with other subjects participating in economic relations (entrepreneurs) is assumed as a basis of division[19].

An autonomous enterprise is any enterprise which is not classified as a partner enterprise or as a linked enterprise[20].

Status of partner enterprises have all enterprises which are not classified as linked enterprises and between which there is the following relationship: an enterprise (*upstream* type) holds either solely or jointly with at least one linked enterprise 25% or more of the capital or voting

[17] Article 109 issue 3 of Act on Freedom of Economic Activity.

[18] Article 4 of Annex 1 of Regulation No 800/2008.

[19] It is necessary to clearly point out that In the system of national law of the Republic of Poland criterion of independence is not regulated normatively – as such regulation the reference in Article 110 of Act on Freedom of Economic Activity cannot be assessed to the content of Annex 1 of Regulation No 800/2008. It may result in not applying this criterion in practice, what will cause negative consequences being a result of incorrect identification of entrepreneur's economic size.

[20] Article 3 issue 1 of Annex 1 of Regulation No 800/2008.

rights of another enterprise of lower rank (*downstream* type). However, an entrepreneur may be ranked as autonomous, and thus not having any partner enterprises, even if this 25% threshold is reached or exceeded by the following investors, provided that those investors are not linked either individually or jointly to the particular enterprise:

a) public investment corporations, venture capital companies, individuals or groups of individuals running a regular venture capital investment activity who invest equity capital in unquoted business ("business angels"), provided the total investment of those investors in the same enterprise is less than EUR 1 250 000;

b) universities or non-profit research centers;

c) institutional investors, including regional development funds;

d) autonomous local authorities with an annual budget of less than EUR 10 million and less than 5 000 inhabitants[21].

Whereas linked enterprises are those, that remain in one of the following relations:

a) an entrepreneur has a majority of the shareholder's or member's voting rights in another enterprise;

b) an entrepreneur has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;

c) an entrepreneur has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;

[21] Article 3 issue 2 of Annex 1 of Regulation No 800/2008.

d) an entrepreneur, who is a shareholder/member in another enterprise, controls alone, pursuant to an agreement with other shareholders or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise[22].

Qualification of entrepreneurs as linked, partner or autonomous is performed on the basis of written statement about belonging to a particular group, which is submitted by the interested entrepreneur, which consists data and information confirming legitimacy of assessment and which undergoes an audit of appropriate national or European organs[23].

The indicated criterion performs a supplementary function but is also of great importance as it is a condition of admissibility of applying classification based on the economic size. It is accepted that identified as micro, small or medium is only an autonomous entrepreneur, whereas in case of partner or linked entrepreneurs classification on the basis of economic size is either unacceptable or takes into account the sum of employment and financial scale of all partner and linked enterprises.

On this basis one should admit that the relation of the qualified enterprise with other participants of the market is the first stage of its identification as micro, small and medium entrepreneur. What is more, it is the stage shaping the result of this categorization, since extending the number of employed and financial size of the activity of evaluated of the value of partner subjects or those related with them.

The reservation assigned to the criterion of independence should be recognized as reasonable. Taking the meaning of categorization based on the economic size of an enterprise into account and all the

[22] Apart from the indicated cases an enterprises cannot be recognized as a small or medium-enterprise if 25% or more capital or rights to vote is controlled directly or indirectly, jointly or individually at least one national authority. Article 3 issue 3 of Annex 1 of Regulation No 800/2008.

[23] Article 3 issue 5 of Annex 1 of Regulation No 800/2008.

consequences and guidelines characteristic for the establishment of category of micro, small and medium enterprises there is no possibility of claiming anything differently – a situation in which an entrepreneur of bigger size benefits from the special rights stipulated for micro, small or medium enterprises should not occur[24].

5 Significance of categorization

Already mentioned above idea of categorization based on the economical size of an enterprise is clear and does not raise any concerns. It has a useful value since it constitutes a component of realization accepted politics of EU and its members relying on especially preferential treatment of micro, small and medium-enterprises[25].

Admission and realization of a specific political preference results from the fact that micro-enterprises as well as small and medium-enterprises play a vital role in the European economy. Human skills and predispositions in the scope of entrepreneurship, innovation and employment is concentrated in them. They perform a vital role in creating places of employment, and in a broader general meaning they are also an important factor of social stability and economic development[26].

It is necessary to remember that micro, small, medium and macro-enterprises constitute respectively: 92,1%, 6,6%, 1,1% and 0,2% of the whole engaged in economic activity.

[24] It can be assumed that In case of not applying the criterion of independence, reduced to revealing or explaining relationships with other entrepreneurs, it would be common or at least definitely more probable.

[25] Due to the respect for the rules of equality and rules of competitiveness it determines the access to the real effects of this politics. Thus, it enables potential beneficiary practical utilization of the created in the national and European ground preference retaining the idea of free market and social market economy.

[26] See the Preamble (54) of Regulation No 800/2008; European Commission.

For these reasons – values for economy and influence on their condition in purpose of simplification of their development[27] it was accepted to realize preferential politics towards these categories of enterprises in a supranational aspect[28].

In the legal order of the Republic of Poland a justification reflecting the nature and aim of a discussed categorization.

In accordance with Article 103 a state with the respect for the rules of equality and competitiveness, creates favourable conditions for functioning and development of micro, small and medium-enterprises, and especially through: 1) initiating changes of legal state that are favourable to development including concerning access to funds from credits and loans and credit guarantees; 2) supporting institutions that enable financing economic activity on convenient conditions within realized government programmes; 3) equalizing conditions of performing economic activity for the reason of public law encumbrance; 4) simplification of access to information, trainings and consultancy; 5) supporting institutions and organizations performing for benefit of entrepreneurs; 6) promoting cooperation with other Polish and foreign entrepreneurs.

Mentioned in the regulation grounds of state's activity are of exemplary character and do not exhaust entirety of actions in this scope. Article 103 and other regulations of chapter 7 of the Act on Freedom of Economic Activity should be treated as a development of one of the superior rules forming state-entrepreneur relationship, that is supporting

[27] It is also important that their development can be limited by irregularities in functioning of the market, causing some typical problems – difficulties with obtaining capital, venture capital of higher risk or credits, limitations in access to information concerning especially new technologies and potential markets. See Preamble (54) of Regulation No 800/2008.

[28] See Preamble (54) of Regulation No 800/2008.

development of entrepreneurship on the basis of Article 8 of this act[29]. In this context one should perceive the essence of discussed categorization, which manifests itself in preferential treatment of the indicated categories of enterprises (in particular in tax law, requirements of running accounting and granting public aid via donations, exemption, advisory assistance and infrastructure)[30].

The idea of preferential treatment, supporting, creating favourable conditions of development of micro, small and medium-enterprises is reasonable and definitely justified structure of entrepreneurship in Republic of Poland. In accordance with analyses of the European Commission[31] 1 480 984 entrepreneurs are functioning in Poland, including micro- 1 410 335 (95,2%), small- 51 129 (3,5%), medium- 16.206 (1,1%) and 3 313 (0,2%) of the others. Those entrepreneurs employ 8 656 858 people, including micro – 3 085 243 (35,6%), small- 1 130 418 (13,1%), medium – 1 692 622 (19,6%), others – 2 784 576 (31,8%). Whereas their income amounts EUR 172 billion, of this 26 billion (15,2%) was generated by micro-enterprises, 23 (13,2%) billion

[29] See C. Kosikowski, Ustawa o swobodzie działalności gospodarczej. Komentarz, Warsaw 2013, p. 574-581.

[30] Z. Snażyk, A. Szafrański, *Publiczne prawo gospodarcze*, Warsaw 2009, p. 84.

[31] See Enterprise and Industry. 2013 The Small Business Act for Europe Fact Sheet. Poland – http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/countries-sheets/2013/poland_en.pdf - of 6.12.2013.

by small-enterprises, 38 billion (22,1%) medium-enterprises and 85 billion (49,5%) by other[32].[33]

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- Enterprise and Industry. 2013 The Small Business Act for Europe Fact Sheet. Poland –

[32] Approximate values are indicated in the report of the Ministry of Economy from 2013. Entrepreneurship in Poland in which it is showed that micro-entrepreneurs constitute 95,85%, small- 3,08%, medium- 0,89% and others only 0,18% of the whole entrepreneurs in the country – see the report of Ministry of Economy of 2013 Entrepreneurship in Poland, Warsaw 2013, p. 43 – http://www.mg.gov.pl/files/upload/19066/Raport_20130916.pdf - of 12.03.2014.

[33] State in which condition of economy depends on subjects often created temporarily, accidentally, without any preparation or financial basis for continuation is not profitable to development of the Republic of Poland and simply forces the state to undertake suitable activity. See C. Kosikowski (ed.), *Przedsiębiorczość na Podlasiu (problemy prawne i funkcjonowanie)*, Białystok 2009, p. 221-248.

http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/countries-sheets/2013/poland_en.pdf - of 6.12.2013.

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CHARAKTERISTIC FEATURES OF BUSINESS LEGAL REGULATION IN V4 COUNTRIES[#]

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Abstract:

The article deals with a comparison in the area of legal regulation of business in V4 countries. In the foregoing sections, the author will mainly focus on comparison regarding the fundamental questions of licensed trading in the Czech Republic, Poland, Slovakia and Hungary taking into account the size and length of this article. Therefore, the article should be considered rather as an introduction into specificities of licensed trading in these countries than a comprehensive overview of the subject. The first part of this article presents the constitutional basis, which is followed by a section on the sources of licensed trading adopted on a legal and sub-legal level. After, the term of trade or similar term used in compared countries will be defined. The last chapter focuses on classification of trade and differences in particular states. This article

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aims to compare the main institutes and legal regulation of licensed trading in V4 countries.

Key words:

Business; V4 countries; Licensed trading; Trade;

JEL classification: K22

1 Introduction

The Visegrad Group (V4) i.e. alliance of the Czech Republic, Poland, Slovakia and Hungary with its more than 20 years tradition had a positive influence on a transition from totalitarian regime to democracy due to a mutual cooperation between those countries. These countries were not only connected by their common history, but also by their similarities of social, political and legal development which might be beneficial for their future development in the field of law. After all, they often need to deal with the same problems and obstacles of their geopolitical location and their membership in European Union to a great extend offers an interesting opportunity for inspiration to legislative bodies. For those countries, it's with no doubt easier to adopt the conclusions accepted by any of the V4 countries than applying the solutions inspired by US or Italian practice (regulation) since the mentality, background, as well as historical, political and social development are significantly different.

As the topic suggests, the main object of this article is a comparison in the area of legal regulation of business. Business along with dependent activity represents the primary way how the persons may

gain assets for their living. Business, which is operated on a basis of a trade license, may be considered as a special way of running a business. Business operated through a trade license is in many countries the most common form of doing business and can be distinguished by many specifications and characteristic features.

In the foregoing sections, the author will mainly focus on comparison regarding the fundamental questions of licensed trading in the Czech Republic, Poland, Slovakia and Hungary taking into account the size and length of this article. Therefore, the article should be considered rather as an introduction into specificities of licensed trading in these countries than a comprehensive overview of the subject. The first part of this article presents the constitutional basis, which is followed by a section on the sources of licensed trading adopted on a legal and sub-legal level. After, the term of trade or similar term used in compared countries will be defined. The last chapter focuses on classification of trade and differences in particular states. This article aims to compare the main institutes and legal regulation of licensed trading in V4 countries.

2 Constitutional basis

The constitutional basis of this particular regulatory subject determines the foundation for legal regulation and also for further study. The right to be engaged in a business activity is guaranteed in all V4 countries' constitutions. In the Constitution of the Czech Republic[1] and in the Charter of Fundamental Rights and Basic Freedoms[2] the questions regarding business activities can be found, mainly the article 26 item 1 of Charter of Fundamental Rights and Basic Freedoms stipulates that

[1] Ústavní zákon č. 1/1993 Sb., Ústava České republiky, ve znění pozdějších předpisů.

[2] Usnesení předsednictva České národní rady č. 2/1993 Sb., o vyhlášení Listiny základních práv a svobod jako součástí ústavního pořádku České republiky, ve znění pozdějších předpisů.

"*everybody has the right to the free choice of his profession and to the training for that profession, as well as to engage in commercial and economic activity*" and through this provision the right to run a business is guaranteed. Furthermore, in the constitutional regulations the indirect business guarantees can be inferred from the protection and guaranty of property law established in article 11 of Charter of Fundamental Rights and Basic Freedoms, especially in its first subsection: "*Everyone has a right to own property. Each owner's property right shall have the same content and enjoy the same protection…".* Other links to the protection of business activities could be associated to a varying extend with other fundamental rights and freedoms (for example right to information, right to judicial and other legal protection, prohibition to be the subject to forced labor or service etc.)

In Poland, the basis of legal regulations in business can also be found in a constitutional level. In this country the fundamental regulation is The Constitution of the Republic of Poland[3], i.e. Polish Constitution. The article 20 of the Constitution provides that "*a social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland*".[4] The other, no less important article, is article 22, which further provides, that "*limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons*".[5] At last, article 31 guarantees legal protection to rights and freedoms and establishes the duty to respect the rights and freedoms of others.[6] And by

[3] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.

[4] Art. 20 Polish Constitution.

[5] Art. 22 Polish Constitution.

[6] See art. 31 Polish Constitution.

all means, the connection between business and other rights and freedoms can also be found in Polish Constitution. .

The basis of business regulations in Slovakia can also be found in the Constitution of the Slovak Republic[7], more precisely in article 35, paragraph 1 of this Constitution providing that "*everyone has the right to a free choice of profession and to training for it, as well as the right to engage in entrepreneurial or other gainful activity"*[8]. This article guarantees everyone the right to run a business. Again, Slovak Constitution contains some indirect business guarantees, for instance the right to own a property contained in article 20 of Constitution[9] and other rights and freedoms.

Based on the information presented the general rule can be deduced being, that the right to be engaged in business in all V4 countries is considered to be the fundamental human right. Considering the historical, social and political development of these countries, the enactment of this fundamental human right on a constitutional level was a logical conclusion. Similarly, there is no difference in this respect in case of Hungary. Nowadays, Hungary has the youngest Constitution[10] among V4 countries that came into force on 1 January 2012. During the process of adoption of the new Constitution, the Hungarian legislator followed the trend and there is no surprise that the business guarantees can be found in Hungarian Constitution, namely in its article XI is stipulated, that *"everyone has the right to freely choose the fields of work*

[7] Ústava č. 460/1992 Sb., Ústava Slovenskej republiky, ve znění pozdějších předpisů.

[8] Art. 35 par. 1 Slovak Constitution.

[9] Art. 20 par. 1 first sentence of Slovak Constitution, which says: *„Everyone has right to own a property."*

[10] Hungarian Constitution, called also „Basic Law", Act of 25 April 2011 on Basic Law of Hungary (Official Journal 2011, 43).

or occupation, and to conduct a business".[11] Other guaranties such as the guaranty of protection of property right contained in article XII Hungarian Constitution ("*Everyone has the right to property and to inheritance. Owning property carries a social responsibility*"[12]) and other related rights and freedoms also take part of this Constitution.

3 The sources of law of licensed trading in V4 countries

The fundamental statute regulating licensed trading in the Czech Republic is Act no. 455/1991 Coll., The Trade Licensing Act (Trade Licensing Act), as modified by later amendments (hereinafter "Czech Trade Licensing Act"). Apart from this Act, it's definitely necessary to mention another important act, i.e. Act no. 570/1991 Coll., The Trade License Offices Act, as modified by later amendments, which regulates, as its name suggests, the role and the competence of the Trade License Offices in Czech Republic.[13] The Czech Trade Licensing Act has been amended many times and those amendments have always been more or less a reaction to the current development in society. For the purpose of consistency and comprehensiveness, it's desirable and necessary to mention another Act no. 89/2012 Coll., Civil Code, which is the fundamental private law statute and defines the fundamental terms and principles also used in trade law. Apart from legal regulations mentioned

[11] Art. XI Hungarian Constitution.

[12] Art. XII Hungarian Constitution.

[13] Next see JURNÍKOVÁ, Jana, Soňa SKULOVÁ, Petr PRŮCHA, Petr HAVLAN, Stanislav SEDLÁČEK, Stanislav KADEČKA, Petr KOLMAN a Alena KLIKOVÁ. *Správní právo: zvláštní část*. 6. dopl. vyd. Brno: Masarykova univerzita, 2009, s. 262 a násl. ISBN 9788021048478.

above, there are of course more legal instruments that play a fundamental role in trading on a legal or sub-legal level.[14]

In Poland, the main legal regulation in the area of trading is the Act of 2 July 2004 on Freedom of Economic Activity with amendments (hereinafter "Polish Trade Act"), which in 2004 replaced the Act that was effective until then, i.e. Act of 19 November 1999 – Economic Activity Act. Polish legislators decided to regulate the area through the unification of the rules by adoption of the entirely new legal regulation. This method of regulation can be considered as better and more efficient, because the enacted Act is much better arranged and more systematical.[15]

The situation in Slovakia is similar to the one in Czech Republic. The fundamental statute in the area of licensed trading is Act no. 455/1991 Coll., The Trade Licensing Act (Trade Licensing Act) as modified by later amendments (hereinafter "Slovak Trade Licensing Act"). The same title and numerical signification as of the one in Czech Act evoke the fact, that it's the identical Act, which both of seceding states (the Czech Republic and Slovakia) adopted in their legal orders after the separation of the Czech and Slovak Federal Republic. From 1 January 1993 it's necessary to see these legal regulations as Acts being absolutely independent on each other and following their own paths. However, Slovak legal order as opposed to the Czech one doesn't contain a single Act that would regulate the system of Trade License Offices in Slovakia. The role of this Act is filled by Slovak Trade Licensing Act,

[14] For example nařízení vlády č. 278/2008 Sb., o obsahových náplních jednotlivých živností, ve znění pozdějších předpisů; zákon č. 500/2004 Sb., správní řád, ve znění pozdějších předpisů; zákon č. 255/2012 Sb., o kontrole (kontrolní řád); a další.

[15] See ETEL, Maciej. *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym.* Warszawa: Wolters Kluwer Polska Sp. z o.o., 2012, 408 s. ISBN 978-83-264-1614-9; or ZDYB, Marian. *Wspólnotowe i polskie publiczne prawo gospodarcze*. Warszawa: Oficyna, 2008, 396 s. ISBN 9788376012384.

whilst its fifth part contains the regulation of state administration in the field of trading.[16]

In Hungary, the situation is more complicated, but also there it is possible to allocate fundamental rule of law, which is represented by the Private Economic Activity Act (Evt., V 1990). From other legal regulations, it's possible to enumerate, for example Act IV of 2006 on Business Associations (Companies' Act), Act CXV of 2009 on private entrepreneurs and private enterprises Act on the Pursuit of Commercial Activities (korm. rendelet 210/2009), Act CLXIV of 2005 on Trade etc. The fragmentation of Hungarian legal regulation can be illustrated by the fact, that there exists various other acts and secondary legislation pursuant to which the entrepreneur can perform a variety of different activities.[17]

In all countries under study, it's possible to find few fundamental laws, which regulate the area of trading in particular state. However, there exists a lot of other related laws, such as, for instance tax legislation that wasn't mentioned before, but undeniably interfere with entrepreneurs activity and determine various duties to them. Plethora of legal statutes, which entrepreneurs need to follow, does not help in many ways the stability in the area of business and the legal certainty.

4 The term of trade

The interesting part of the research is looking into the definition of "trade" in V4 countries. Czech Trade Licensing Act defines this term in two ways. Firstly, trade is defined by the act positively meaning that trade is *"a systematic activity carried out independently under the conditions laid down in this Act, under a person's own name and liability,*

[16] See §§ 66a – 66d Slovak Trade Licensing Act.

[17] Przewodnik prowadzenia i rejestracji działalności gospodarczej na Węgrzech [online]. [cit. 28.4.2014]. Available on: http://polska.trade.gov.pl.

with a view to making a profit".[18] Apart from that, the following section of the same act contains negative definition of trade, when it enumerates the activities, which cannot be regarded as trade, even though these activities would satisfy all conditions mentioned in the legal definition.[19] This enumeration of non-conforming activities is quite long and that's why a potential sole trader needs to be careful if the activity he would like to start doing is not beyond one of the activities mentioned there. The definition of trade is at the same time markedly similar to the general definition of entrepreneur in Civil Code.[20]

The polish legal regulation also contains a definition of trade, i.e. similarly in the second section of Polish Trade Act. According to this Act *"an economic activity includes profit-making activity related to manufacturing, construction, trading, provision of services and prospecting, identifying and mining of minerals in deposits, as well as professional activity conducted in an organised and continuous fashion.*"[21] The difference with, for example, Czech legal regulation can be seen in the definition of the trade or licensed trading itself. While the Czech legal regulation contains the both positive and negative definition of trade, the polish legislature has only stuck to positive definition.

The other problematic passage in Polish law is the definition of term "działalność gospodarcza" itself, which in the broader sense can be

[18] § 2 Czech Trade Licensing Act.

[19] § 3 Czech Trade Licensing Act.

[20] § 420 par. 1 zákona č. 89/2012 Sb., občanský zákoník, originally says, that: *„Kdo samostatně vykonává na vlastní účet a odpovědnost výdělečnou činnost živnostenským nebo obdobným způsobem se záměrem činit tak soustavně za účelem dosažení zisku, je považován se zřetelem k této činnosti za podnikatele."*

[21] See art. 2 Polish Trade Act, which originally says „*Działalnością gospodarczą jest zarobkowa działalność wytwórcza, budowlana, handlova, usługowa oraz poszukiwanie, rozpoznawanie i wydobywanie kopalin ze złóż, a także działalność zawodowa, wykonywana w spodob zorganizowany i ciągły.*"

translated as “economic activity” , but in a shorter sense it can be considered as license trading. However, polish legislative bodies do not make a difference between these two terms, as it is the case for Czech legislation. Because of that there is no negative definition contained in the Polish Act. Whilst the Polish legislator took the path of general legal statute and the specific activities are being regulated in the special statutes, in the Czech legal order the Trade Licensing Act and other acts regulating individual activities are not dependent on each other). Another problematic issue of Polish regulation of economic activities is the incoherence in defining the term “działalność gospodarcza” in different special statutes regarding specific economic activities. The definition of “działalność gospodarcza“ is aside of the Polish Trade Act, also contained in Tax Ordinance[22], Act on Goods and Services Tax[23], Act on Natural Person’s Income Tax[24] or Social Insurance System Act[25] among others. Therefore, since this one term can be interpreted in many different ways, it means that if some activity cannot be regarded as “działalnością gospodarczą“ according to Polish Trade Act it does not necessarily follow that the same activity cannot satisfy the conditions for “działalność gospodarczą” contained in a different statute.[26]

[22] Art. 3 par. 9 ustawy z dnia 29 sierpnia 1997 r. Ordynacja podatkowa, ze zm.

[23] Art. 15 par. 2 ustawy z dnia 11 marca 2004 r. o podatku od towarów i usług, ze zm.

[24] Art. 5a par. 6 ustawy z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych, ze zm.

[25] Art. 8 par. 6 ustawy z dnia 13 października 1998 r. o systemie ubezpieczeń społecznych, ze zm.

[26] Compare ETEL, Maciej. *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym.* Warszawa: Wolters Kluwer Polska Sp. z o.o., 2012, 408 s. ISBN 978-83-264-1614-9; or Działalność gospodarcza [online]. PIT.pl [cit. 28.4.2014]. Available on: http://www.pit.pl/dzialalnosc_gospodarcza_definicje_1052.php.

The Slovak Trade Licensing Act defines trade in the same way as Czech Act, i.e. *"a systematic activity carried out independently under the conditions laid down in this Act, under a person's own name and liability, with a view to making a profit"*.[27] Likewise, Slovak Trade Licensing Act in its section 3 contains a very long list of activities that are beyond Slovak Trade Licensing Act and these are regulated in special acts.[28] This list of activities is a bit more extensive that the one contained in the Czech counterpart. An interesting provision can be found in section 3 subsection 3 of Slovak Trade Licensing Act[29], which from the range of trade activities puts out the activities, that by their nature comply with the characteristics of a trade, but because they are in contradiction with the principle of good manners. Another interesting provision, section 4 of Slovak Trade Licensing Act implicitly stipulates that the sale of unprocessed vegetable or animal products resulting from small-scale horticulture and livestock-breeding conducted by natural person and the retail sale of forest products shall not be considered a trade under this Act.[30]

The Hungarian definition is substantially different from all V4 countries definitions in the sense that it distinguishes between the trading operated by natural persons (Act on Trade Activities by natural persons) and the one conducted by legal persons due to a special statutes According to Hulkó: "In sum, the Hungarian legal literature uses the same term for both types of activities, namely "iparostevékenység", which is

[27] § 2 Slovak Trade Licensing Act.

[28] For example notary, advocate, tax adviser, expert, interpreter, veterinarian etc.

[29] § 3 par. 3 Slovak Trade Licensing Act, which originally says: *„Živnosťou nie je ani činnosť, ktorá svojou povahou spĺňa znaky živnosti podľa § 2, ale je v rozpore s dobrými mravmi."*

[30] See § 3 par. 4 Slovak Trade Licensing Act.

some kind of analogy to "trade". However, Hungarian regulation does not contain or use a word that would be identical to trade".[31]

5 Classification of trades

The differences in the regulations of trade licensing in the V4 countries can also be found with respect to trade classification. Czech Trade Licensing Act classifies trades into two principal groups, i.e. notifiable trades and permitted trades[32], the former is then divided into three groups, due to the conditions for professional competence (professional qualification) into vocational trades, professional trades and unqualified trades.[33] Classification into notifiable trades and permitted trades reflects the rate of state interference into particular trades. As opposed to the Czech legislator, Slovak legislator abolished on 1 June 2010 the category of permitted trades through the Act No. 136/2010 Coll. on Services in the Internal Market and amending certain acts. From this time forward, the permitted trades are placed among professional trades.[34] By this abolition, there are only vocational trades, professional trades and unqualified trades available in Slovakia.[35]

In the case of Poland, the situation is a bit complicated. Polish legislation firstly defines the categories of trades in which only the

[31] HULKÓ, Gábor. Dissertation on topic *„Oprávnění k živnostenskému podnikání v České republice a ve vybraných státech Evropské unie"*. Brno: Masarykova univerzita, 2005, s. 10. Available on: http://is.muni.cz/th/13621/pravf_d?info=1;zpet=%2Fvyhledavani%2F%3Fsearch%3Dhulk%C3%B3%20gabor%26start%3D1.

[32] See § 9 Czech Trade Licensing Act.

[33] § 19 Czech Trade Licensing Act.

[34] Dôvodová správa k vládnemu návrhu zákona o službách na vnútornom trhu a o zmene a doplnení niektorých zákonov [online]. [cit. 28.4.2014]. Available on: http://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&MasterID=3200.

[35] § 19 Slovak Trade Licensing Act.

general conditions need to be fulfilled (some similarity to unqualified trades in Czech Republic). Secondly, it lists the ones on which the state does not put any limitations to be performed.[36] Furthermore, due to a rate of state interference and due to specified requirements for fulfillment, Polish Trade Act lists the categories of concessions, licenses, permits and regulated economic activity. Concession is the most restrictive variation from all trades Permits and licenses are the most frequently used option that embraces the greatest number of activities. Lastly, the regulated economic activity is the least restrictive option from the ones mentioned above.[37]

In Hungary, the situation is also slightly different. Some groups of activities require notification (registration), other activities require the statement from the administrative body whereas there are also some activities require professional qualification. For the sake of comprehensiveness, there are also concessions.[38]

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[36] See for example ETEL, Maciej. *Pojęcie przedsiębiorcy w prawie polskim i prawie Unii Europejskiej oraz w orzecznictwie sądowym.* Warszawa: Wolters Kluwer Polska Sp. z o.o., 2012, 408 s. ISBN 978-83-264-1614-9.

[37] Next also ETEL, Maciej a kol. *Publiczne prawo gospodarcze.* Wydanie 2. Warszawa: LexinNexis, 2010. s. 181 a násl. ISBN 978-83-7620-437-6; or art. 46 and following Polish Trade Act.

[38] See Vállalkozásindításhoz szükséges alapvető végzettségek [online]. Vállalkozási Portál [cit. 28.4.2014]. Available on: http://vallalkozas.munka.hu/39/-/asset_publisher/i3Tk/content/vallalkozasinditashoz-szukseges-alapveto-vegzettsegek?redirect=%2Fweb%2Fvallalkozasok%2F16; or HULKÓ, Gábor. Dissertation on topic *„Oprávnění k živnostenskému podnikání v České republice a ve vybraných státech Evropské unie“.* Brno: Masarykova univerzita, 2005, s. 10. Available on: http://is.muni.cz/th/13621/pravf_d?info=1;zpet=%2Fvyhledavani%2F%3Fsearch%3Dhulk%C3%B3%20gabor%26start%3D1.

6 Conclusion

With regard to what was said above, it is clear that in the legal regulations of trade licensing in V4 countries it is possible to find a lot of similar features, but at the same time there are some essential differences. The legacy of the European tradition of human rights and the protection of fundamental freedoms is most probably the reason we can see many similarities up to the point of almost unification in all legal orders of V4 countries, such as the reference to business in the regulations of the highest legal force, including the constitution. More essential differences may be found on statutory and sub-statutory level. The essential Acts in the Czech Republic and Slovakia arise from the mutual tradition, however in course of the time and development of both legal systems, these acts became to differ. Poland chose the way of authorizing the general rule of law that regulate the business (sometimes called as "constitution of business" or "constitution of license trading"[39]) with the simultaneous existence of many other acts regulating specific questions. Whilst in Hungary there exist no rule of law regulating the license trading in a general way. There, the rules are spread into few acts depending on a type of subjects.

No less important differences arising from the method of legal regulation in particular countries can be possibly found in the definition of licensed trade, in case this term is defined or used. It is some kind of a paradox that the activities conforming to a term of trade (or significantly similar term) are regarded almost the same way in all V4 countries. Nevertheless, although the definitions are markedly different, similar understanding of this term has been reached in practice and jurisprudence.

[39] Compare ETEL, Maciej. Ograniczenia wolności gospodarczej w świetle Konstytucji RP (zagadnienia wprowadzające). In: CZUDEK, Damian a Michal KOZIEŁ. *Česko-polská právní komparastika 2012: sborník příspěvků z mezinárodní vědecké konference*. 1. vyd. Brno: Masarykova univerzita, 2012, s. 21-41. ISBN 9788021060623.

Concerning the classification of trades in particular countries, the rate of state intervention plays a significant role in the regulation of some economic activities. But in all V4 countries the group of economic activities not requiring the fulfillment of specific conditions can be determined. Further, there is a group of economic activities where the condition to carry on the trade is the professional competence. Last but not least, there are trades that require a permission of a particular body or even gaining a concession.

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SELECTED ISSUES OF CORPORATE INCOME TAX[#]

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Abstract

The paper will focus on selected application problems of corporate income tax. These will include the issues associated with cross-border effects of business in the framework under the freed movement of persons, goods, services and capital. Therefore, the contribution will deal with the current case law of the Court of Justice of the European Union.

Key words

Corporate income tax; Court of Justice of the European Union; Discriminatory effect; Indirect discrimination; Harmonization; Preliminary ruling; Retail store chains; Tax on the turnover of store retail trade; Tax rate;

JEL classification: K34

[#] The text forms a part of the grant project no. MUNI/A/0856/2013 Selected aspects of direct taxes and their interpretation and application in case law (PriDJud).

1 Introduction

Following on from my previous papers, which deal with the efforts of the European Union on the harmonization of taxes on corporate income, this contribution is the practical way to verify my conclusions. The paper discusses decision of Court of Justice of the European Union in preliminary ruling in the case C-385/12 under Article 267 TFEU from the Székesfehérvári Törvényszék (Hungary) in the proceedings Hervis Sport- és Divatkereskedelmi Kft. versus Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága (hereinafter „Hervis case")[1]. The paper presents arguments for the conclusion that the harmonization of the tax base, which falls on the income of legal persons, entities tax does not guarantee fair taxation, respectively, in fact, it is not a harmonization of taxation because the rate is an effective tool in the hands of the Member States, through which they can completely deny the impact of harmonization. On the other hand, if such interventions of member states legislatures, the possibility of choosing another method of calculating the tax base of taxpayers can be advantageous. But it depends on the way in which the consolidated tax base is created and what space will be left to Member States to adjust rates.

2 Special tax on turnover

Hungary for the years 2010 – 2012 introduce special tax on turnover. Justification of its introduction is contained in the preamble of the Law No XCIV of 2010 on the special tax on certain sectors (hereinafter "the law on the special tax"): *'In the context of the adjustment of the budgetary balance, the Parliament introduces this law*

[1] Judgment of the Court of Justice of the European Union (Grand Chamber) of 5 February 2014. Hervis Sport- és Divatkereskedelmi Kft. v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága. Case C-385/12. CELEX 62012CJ0385.

on the establishment of a special tax imposed on taxpayers whose capacity to bear public burdens surpasses the general obligation to pay tax.'

3 Taxpayers

The tax was levied on store retail trade, telecommunications activities, and supply of energy. It was levied on both legal persons and physical persons - entrepreneurs. The basis of the dispute is the way in which this tax falls on the related entities (a linked undertaking). Linked undertaking are in Hungarian law defined as:

a) „the taxable person and the undertaking in which the taxable person directly or indirectly holds a majority influence, in accordance with the civil code;

b) the taxable person and the undertaking which directly or indirectly holds a majority influence over the taxable person, in accordance with the civil code;

c) the taxable person and any other undertaking where a third party directly or indirectly holds a majority influence in the two undertakings, in accordance with the civil code, provided always that close relatives holding a majority influence over the other undertaking shall be considered to be third parties;

d) the foreign trader and its Hungarian establishment, the establishments of the foreign trader, and the Hungarian establishment of the foreign trader and any undertaking which has with the foreign trader one of the relationships defined above in points a) to c);

e) the taxable person and its foreign establishment, and the foreign establishment of any undertaking which has with the taxable person one of the relationships defined above in points a) to c).“[2]

The relevant the law on the special tax defined the conditions of the impact of this tax on defined linked undertaking as follows:

“The tax of taxable persons classified as linked undertakings within the meaning of the Law [No LXXXI of 1996] concerning tax on companies and dividends (‘Law No LXXXI of 1996’) must be calculated by aggregating the net turnover from the activities referred to in Paragraph 2(a) and (b), pursued by taxable persons acting as linked undertakings, and the amount obtained by applying the rate defined in Paragraph 5 to that total must be divided between the taxable persons in proportion with their respective net turnover from the activities referred to in Paragraph 2(a) and (b), compared with the total net turnover from the activities referred to in Paragraph 2(a) and (b) earned by all the linked taxable persons.”[3]

4 Tax base

Tax base is the net turnover, which the law on the special tax defined this way: „in the case of a taxable person subject to the accounting law, the net turnover from sales within the meaning of the accounting law; in the case of a taxable person subject to the simplified business tax and not covered by the accounting law, the turnover exclusive of [value added tax (VAT)] within the meaning of the law on the tax regime; in the case of a taxable person subject to the law on individual income tax, income exclusive of VAT within the meaning of the law on income tax“.

[2] Paragraph 4 of Law No LXXXI of 1996.

[3] Law No XCIV of 2010 on the special tax.

5 Tax rate[4]

The law on the special tax defined 4 tax rates for store retail trade depending on the value of tax base:

- for the band of the taxable amount up to HUF 500 million – 0 %
- for the band between HUF 500 million and HUF 30 billion – 0.1 %
- for the band between HUF 30 billion and HUF 100 billion – 0.4 %
- for the band above HUF 100 billion. – 2.5 %.

6 Hervis Case[5]

Trading company Hervis operates in Hungary network of retail stores with sporting goods called Hervis Sport. It is a subsidiary company of SPAR Österreichische Warenhandels AG. In view of the above provisions of the law on the special tax, on its turnover was levied much higher rate than would be the case if it were not linked undertaking. In violation of the provisions of European law, in particular Articles 18, 49 to 55, 65 and 110 TFEU, the Hervis Company sees the prohibited in the State Aid. On her biggest competitive firms this higher rate was not levied because they are in the form of a franchise store. Company Hervis defended rights in administrative proceedings, from which emerged this preliminary ruling:

[4] Law No XCIV of 2010 on the special tax.

[5] Judgment of the Court of Justice of the European Union (Grand Chamber) of 5 February 2014. Hervis Sport- és Divatkereskedelmi Kft. v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága. Case C-385/12. CELEX 62012CJ0385.

'Is the fact that taxpayers engaged in store retail trade have to pay a special tax if their net annual turnover is higher than HUF 500 million compatible with the provisions of the Treaty governing the general principle of non-discrimination (Articles 18 TFEU and 26 TFEU), the principle of freedom of establishment (Article 49 TFEU), the principle of equal treatment (Article 54 TFEU), the principle of equal treatment as regards financial participation in the capital of companies or firms within the meaning of Article 54 TFEU (Article 55 TFEU), the principle of freedom to provide services (Article 56 TFEU), the principle of the free movement of capital (Articles 63 TFEU and 65 TFEU) and the principle of equality of taxation of companies (Article 110 TFEU)?'[6]

Court of Justice of the European Union did consider the case as a matter that concerns of freedom of establishment, so the question judged in the spirit of Article 49 TFEU and the provisions of Articles 56, 63 and 65 did not apply. Furthermore, the application of Article 110 TFEU ruled out due to the fact that it is not obvious that the products of other Member States were burdened with special taxes more than domestic products.

In preliminary proceedings in Hervis case Court of Justice of the European Union adopted this decision: *"Articles 49 TFEU and 54 TFEU must be interpreted as precluding legislation of a Member State relating to tax on the turnover of store retail trade which obliges taxable legal persons constituting, within a group, 'linked undertakings' within the meaning of that legislation, to aggregate their turnover for the purpose of the application of a steeply progressive rate, and then to divide the resulting amount of tax among them in proportion to their actual turnover, if – and it is for the referring court to determine whether this is*

[6] Judgment of the Court of Justice of the European Union (Grand Chamber) of 5 February 2014. Hervis Sport- és Divatkereskedelmi Kft. v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága. Case C-385/12. CELEX 62012CJ0385.

the case – the taxable persons covered by the highest band of the special tax are 'linked', in the majority of cases, to companies which have their registered office in another Member State."[7]

The core of the case is the question of discrimination. It is not direct discrimination, because if the retail chain fills a condition of linked undertaking the same tax obligation falls on them. The unequal treatment (discrimination) but can occur by the Hungarian authorities because the distinction between legal entities that are part of a group (linked undertaking) and between legal entities that are not part of the group (though the consumer may not be obvious at first glance - for example, may be a franchise). At first glance, an objective criterion based on the amount of turnover in the case of legal conditions that apply to linked undertaking, acts as a disadvantage reason for subsidiaries companies. Given the fact that most of the linked undertaking affects taxpayers of more member states this case gets a European dimension.

Court of Justice of the European Union in the decision did not determine whether the Hervis case is the case of a real discrimination, but imposed a Hungarian court to ascertain the condition: "*whether this is the case – the taxable persons covered by the highest band of the special tax are 'linked', in the majority of cases, to companies which have their registered office in another Member State.*"[8] If this condition is fulfilled, the Hungarian legislature commits illegal discrimination.

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[7] Judgment of the Court of Justice of the European Union (Grand Chamber) of 5 February 2014. Hervis Sport- és Divatkereskedelmi Kft. v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága. Case C-385/12. CELEX 62012CJ0385.

[8] Judgment of the Court of Justice of the European Union (Grand Chamber) of 5 February 2014. Hervis Sport- és Divatkereskedelmi Kft. v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága. Case C-385/12. CELEX 62012CJ0385.

Court of Justice of the European Union has adopted is decision in the first part of February 2014, when the object of preliminary ruling is a special tax on turnover, which fell on the tax from 2010 to 2012. Now it is awaiting a decision from the Hungarian court that started the preliminary ruling. In the event that the Hungarian court decides that discrimination has been committed, another procedure will start, in which other taxpayers a will claim for tax refund.

Even if Hungary's ministry for the national economy *"welcomes the judgment of the ECJ supporting the view that the retail tax did not constitute discrimination among different types of retail organizations"*[9], Hungarian tax experts point out another important aspect of Hervis Case: *"a thought may be given to whether the business tax and the insurance tax replacing the special retail tax in 2013 and in which brackets were also introduced will have the same outcome."*[10]

7 Conclusion

In my opinion, the question remains, what the real motivation of the Hungarian legislator was. If we assume that the legislature's motive was not discrimination but a clumsy way to ensure a higher tax yield to the Hungarian budget highlights Hervis case at least the fact that each tax change requires not only an economic but also a thorough legal analysis. Otherwise, it may just be that they incurred costs to implement changes to the tax law, the costs of litigation and thus, if there is indeed discrimination, the cost of refund of tax collected by aggrieved taxpayers. This is followed by the issue of cash-flow and the impact of the return of

[9] KEATING, Dave. ECJ casts doubt over Hungarian retail tax law. European Voice. [29th March 2014]. Source: http://www.europeanvoice.com/article/2014/february/ecj-casts-doubt-over-hungarian-retail-tax-law/79587.aspx

[10] KALOCSAI, Zsolt. The Hervis affair: not over yet! RSM DTM Blog. [29th March 2014]. Source http://blog.rsmdtm.com/2014/02/the-hervis-affair-not-over-yet/

the amount on the solvency and macroeconomic outlook in tax collection. Because, if the condition of the European Court is fulfilled and discrimination actually was occurred, Hungary in the years 2010 to 2012 collected more taxes, but in 2014 there is de facto a drop in income of tax account due to tax refund. This is followed by discussion of tax advisors whether other tax changes introduced in 2013 will have the same end.

The question of setting the tax systems in the European Union is a complex topic that extends to the sovereignty of the individual member states, economic needs, the development of the ability to pay the state for the provision of public services to citizens and, last but not least, in European law, which can no longer remains neglected, because in the end it can only mean an increase in the cost of the reform and the subsequent removal of undesirable effects that have a negative impact on the freedoms of the EU.

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UNIFICATION OF REGULATION OF INTERNAL AND EXTERNAL DISTRIBUTION OF INSURANCE WITH INSURANCE MEDIATION DIRECTIVE (IMD2)[#]

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Abstract

One of two methods of sale can be selected for insurance mediation in the insurance market – an internal or external sales method. External (also intermediate) channels are insurance intermediaries, and internal (also employee) channels are largely employees of insurance and reinsurance companies. Currently, there have been some efforts for unification of both methods of insurance distribution under the proposal for Directive on Insurance Intermediaries (IMD2). The paper focuses on the regulation of insurance product mediation in the insurance market in the context of development and changes in legislation on insurance sales under European law in order to clarify the extension of legislation scope.

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Key words:

Insurance mediation; Distribution of Insurance Products; Insurance Intermediaries; EU Directive on Insurance Mediation;

JEL classification: G22

1 Introduction

The European Council issued Directive 77/92/EEC on December 13, 1976 on provisions to facilitate the effective exercise of the right to establish businesses and provisions on free movement of the services associated with activities of insurance agents and brokers and, in particular, on interim provisions in respect of those activities. The Directive introduced a temporary scheme, which enabled agents and brokers to expand their activities beyond their country of residence. Member countries followed the recommendation of the Recommendation 92/48/EEC of the Commission as of December 18, 1991 on insurance intermediaries, thereby contributing to the harmonization of regulations of each Member State on the professional requirements and registration of insurance intermediaries. However, there continued to be significant differences between the national regulations, thus preventing optimal functioning of the unified market. For this reason, the Council concluded to replace the current directive with a new one that would allow insurance intermediaries to benefit from both the right to establish businesses and freedom to provide services in the unified insurance market.[1]

[1] See also Nazerali, J., Cowan, D. Member States and Activities of Insurance Intermediaries. Business Law Review, March 2001.

On December 9, 2002 the new Directive 2002/92/EC on insurance mediation (hereinafter referred to as "IMD1"), which replaced Directive 77/92/EEC[2], was adopted. In order to provide quality assurance of insurance services and consumer protection, the Directive defines conditions for insurance intermediaries. Insurance intermediaries are allowed to provide insurance intermediary activities in any EU country either in relation to the freedom to establish branch offices or in relation to the freedom to provide insurance services. As is the case with insurance companies, the competent authority of the country of residence of an insurance intermediary ensures supervision.

The European Commission in its inspections of the Directive implementation revealed significant differences in the approach of different member states towards the Directive IMD1, which can be summarized into several main points as follows:

- Legal inconsistency in the national regulations governing insurance mediation
- Lack of information requirements to ensure consumer protection
- In some cases, the lack of effective rules for the performance of activities of insurance intermediaries (fragmented categorization across each Member State) and the rules for potential conflict of interest
- The absence of equal conditions between insurance intermediaries and other vendors of insurance products (primarily through external and internal sales channels).

Not only for these reasons, the European Commission published in the beginning of July 2012 a draft revision of the Insurance Mediation

[2] The obligation to transpose the Directive into national legal code was set by January 15, 2005 for the member states.

Directive (IMD2). However, as it was originally assumed that a draft amendment of IMD1 would be sufficient, the changes were eventually presented in the new draft IMD2, and it has been proposed that IMD1 be cancelled. The reason for this is the considerable scope of legal modification, as evidenced by the increase in a number of articles, where the current directive IMD1 contains 18 articles and the proposed IMD2 39 articles.

The IMD2 Directive aims to solve the issues listed above, inter alia, through the extension of the legal scope, thereby creating equal conditions between different distribution channels. Consumers will thus benefit from the same level of protection and professional care without regard to the sales method by which they choose to purchase their insurance products. The IMD2 Directive should also be the point of reference for the identification, management and mitigation of conflicts of interest of conventional insurance products and should represent an enhanced mode for investment insurance products. The increased transparency of the sale shall help avoid conflicts of interest and at the same time help regain consumer confidence in the insurance markets.

2 Legal scope of IMD1 and IMD2

The Insurance Mediation Directive (IMD1) pursuant to Article 1, Paragraph 1 shall apply to all natural and legal persons who are established or reside in a Member State (or they wish to become a resident or settle here), and who provide insurance mediation services to third parties for a fee. The text of selected articles of IMD1 and IMD2 directives is shown in Scheme 1.

The scope of IMD2 has been already greatly expanded in Article 1, paragraph 1 (and subsequently in Article 2, paragraph 3 under the definition of insurance mediation). Most importantly, there is an expansion of the scope that now includes the professional management

of insurance events and the settlement of claims. Firstly, it should be noted that insurance companies also carry out activities of professional insurance management, which means that the IMD2 Directive should also apply to employees of insurance companies, who perform professional management and settlement of claims (based on common practice and differences of each Member State there are work positions such as a loss adjuster, technical loss adjuster or expert loss adjuster, etc. available[3]). The change in the definition will bring a much more considerable change for insurance intermediaries. Inclusion of the professional management of insured events and settlement of claims in the definition of insurance mediation means a significant extension of the activities of insurance intermediaries. Under Directive IMD1 the competencies of insurance intermediaries only allowed them to assist in the management and settlement of claims (they were mostly responsible for reporting of insurance claims of their clients and assistance to them during the claim settlement process). According to Mesršmíd (2013), however, the insurance intermediary (broker) - client relationship objectively differs from the assessor - client relationship, which will require its appropriate definition in implementation of the directive into national legislations, among others also definitions of the professional management of insured events and settlement of claims that IMD2 does not define in any detail.

There is a change of a substantial term in the definition of insurance mediation; "consulting or advice" replaces the term "submission". The consulting services are newly defined in IMD2 as provision of recommendations to customers either upon their request, or from the initiative of the insurance undertaking or insurance

[3] An important aspect for assessment of the scope of the directive in the area of claim settlement per a particular employee of an insurance undertaking should be a thorough assessment of the position description set in an employment contract (or in internal directives of an insurance undertaking).

intermediary[4] . The customers should be viewed in a wider frame of reference, i.e. those interested in an insurance contract and the policy holders and insured persons.

Scheme 1: Text of selected articles of IMD1 and IMD2 directives

Directive IMD1	***Directive IMD2***
Article 1 paragraph 1	
This Directive lays down rules for the taking-up and pursuit of the activities of insurance and reinsurance mediation by natural and legal persons which are established in a Member State or which wish to become established there.	*This Directive lays down rules concerning the taking-up and pursuit of the activities of insurance and reinsurance mediation, including professional management of claims and loss adjusting, by natural and legal persons which are established in a Member State or which wish to be established there.*
Article 1 paragraph 2	
This Directive shall not apply to persons providing mediation services for insurance contracts if all the following conditions are met: *(a) the insurance contract only requires knowledge of the insurance cover that is provided;*	*This Directive shall not apply to persons providing mediation services for insurance contracts if all the following conditions are met:* *(a) the insurance contract only requires knowledge of the insurance cover that is provided;*

[4] Article 2 of paragraph 9 of Insurance Mediation Directive IMD2

(b) the insurance contract is not a life assurance contract;	*(b) the insurance contract is not a life assurance contract;*
(c) the insurance contract does not cover any liability risks;	*(c) the insurance contract does not cover any liability risks;*
(d) the principal professional activity of the person is other than insurance mediation;	*(d) the principal professional activity of the person is other than insurance mediation;*
(e) the insurance is complementary to the product or service supplied by any provider, where such insurance covers:	*(e) the insurance is complementary to the goods supplied by any provider, where such insurance covers the risk of breakdown, loss of or damage to the goods supplied by that provider.*
(i) the risk of breakdown, loss of or damage to goods supplied by that provider, or	
(ii) damage to or loss of baggage and other risks linked to the travel booked with that provider, even if the insurance covers life assurance or liability risks, provided that the cover is ancillary to the main cover for the risks linked to that travel;	
(f) the amount of the annual premium does not exceed EUR 500 and the total duration of the insurance contract, including any renewals, does not exceed five years.	*(f) the amount of the annual premium for the insurance contract, when pro-rated to produce an annual amount, does not exceed EUR 600.*

Article 2 paragraph 3

'Insurance mediation' means the activities of introducing, proposing or carrying out other work preparatory to the	*'Insurance mediation' means the activities of advising on, proposing or carrying out other work preparatory to the*

conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim. *These activities when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking shall not be considered as insurance mediation.* *The provision of information on an incidental basis in the context of another professional activity provided that the purpose of that activity is not to assist the customer in concluding or performing an insurance contract, the management of claims of an insurance undertaking on a professional basis, and loss adjusting and expert appraisal of claims shall also not be considered as insurance mediation;*	*conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim, and the activity of professional management of claims and loss adjusting. These activities shall be considered to be insurance mediation also if carried on by an insurance undertaking without the intervention of an insurance intermediary.* *None of the following activities shall be considered to be insurance mediation for the purposes of this Directive:* *(a) The provision of information on an incidental basis to a customer in the context of another professional activity, if the provider does not take any additional steps to assist the customer in concluding or performing an insurance contract;* *(b) The mere provision of data and information on potential policyholders to insurance intermediaries or insurance*

	undertakings or of information about insurance products or an insurance intermediary or insurance undertaking to potential policyholders.

Sources: Directive IMD1, Directive IMD2, own processing

The IMD1 Directive defines a group of persons who are not considered insurance intermediaries and to whose actions the directive shall not apply. One of the groups discussed is the employees of insurance companies. The following is stated in Article 2, paragraph 3 of IMD1: "*These activities when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking shall not be considered as insurance mediation.*" The reason behind this is because employees are in an employment relationship with the employer and at the same time the employer is responsible for them and is able to ensure their expertise through its own training programme. However, employees responsible for the sales perform similar or same activities as insurance intermediaries, and therefore it is desirable to view them the same way as well. This exception is already omitted in the draft directive IMD2 leading to the unification of regulation regardless of who sells the insurance product, i.e. the IMD2 Directive extends beyond its legal scope to also include employees who mediate the insurance contracts on behalf of their employer, i.e. an insurance undertaking (or bank or reinsurance undertaking). According to the Opinion of the European Economic and Social Committee[5] the new directive shall also include banks, since their range of products includes insurance products. This decision can be

[5] Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on insurance mediation (recast)' COM(2012) 360 final — 2012/0175 (COD).

positive, meaning that the same rules would be set for the entire insurance market, which was the main objective of the amendments executed.

Insurance mediation is not considered if it only involves occasional consulting services in insurance, i.e. the activities of persons who within the scope of other professional activities occasionally provide general information on insurance schemes and during which no liability is to be constituted once the insurance contract was concluded, since this would be already considered insurance mediation. Examples include accountants, tax advisors or auditors, etc., who in the performance of their main activities provide information about insurance. The IMD2 Directive does not change the legislation in this section in any way.

Furthermore, the legal scope of IMD1 excludes activities of persons who, with regard to their nature, do not require separate regulation, and if all the above conditions have been satisfied. In fact, (1) it is a complementary activity to the business where in order to conclude the insurance contract basic knowledge of the given insurance is sufficient, and (2) the principal activity of the person is not insurance mediation; (3) concluded insurance contracts have a low annual premium, not exceeding 500 EUR and five years in their duration[6]; and (4) neither an insurance contract for life insurance, nor (5) liability insurance shall be concluded. The last necessary condition is that (6) insurance offered[7] is simply complementary to the product or service from another provider. Therefore, if the person concludes non-life insurance with exclusion of

[6] including any extensions of insurance contract

[7] where such insurance pursuant to Article 1, paragraph 2 covers *"(i) the risk of breakdown, loss of or damage to goods supplied by that provider, or (ii) damage to or loss of baggage and other risks linked to the travel booked with that provider, even if the insurance covers life assurance or liability risks, provided that the cover is ancillary to the main cover for the risks linked to that travel;"*

liability insurance and satisfies the listed conditions, it shall not be considered mediation activities. For example, car dealers or travel agencies shall be taken into account (provided they satisfy the conditions)[8]. The IMD2 Directive limits the scope of force to this area and changes only the part listed in condition (3) herein by increasing the annual premium in the insurance contract from 500 EUR to 600 EUR and by cancellation of the maximum five-year duration of the insurance contract; and by simplifying the condition (6) herein.

3 Other selected changes to IMD2 Directive

The aim of this paper is to inform of change to the scope of the Directive, however, there are numerous changes in this directive and it appears to be useful to list and describe certain ones.

The IMD2 Directive shall ensure greater protection to customers and one of the possibilities of how to accomplish this goal is to increase customer awareness of the position of an insurance intermediary (insurance undertaking) and the negotiated insurance product. The draft IMD2 Directive IMD2 talks about the general principle binding both the insurance intermediary and the insurance undertaking to act honestly, fairly and professionally in accordance with the best interests of customers. Another option is to increase the professional requirements for insurance intermediaries. The IMD2 Directive extends the qualification requirements of insurance intermediaries to insurance undertaking employees who perform mediation activities, as well as the persons who carry out these activities as ancillary and persons engaged in the professional management of insured events, claims settlement or professionally persons assessing the claims (which may be a wide group

[8] even though some of them rather choose registration for an insurance intermediary

of persons). The aim of the Directive is also to ensure the provision of independent advice.[9]

A change significantly discussed is the area of remuneration. The definition of "remuneration" changes so as to include not only payments (fees, commissions, etc.), but economic benefits of any kind.

Insurance intermediaries facilitate for insurance companies their launch on the insurance markets, are able to address a broad customer base, and do not have to spend on building a distribution network at the same time. Thus an easier and a more efficient access of insurance intermediaries to the markets of the European Union is a welcome step, resulting in promotion of cross-border provision of services also in the insurance sector.

4 Conclusion

The main objective of the proposal on IMD2 is to ensure equal opportunity and conditions between all participants in the sale of insurance products and thereby to enhance consumer protection (of insurance applicants, policy holders). Insurance products may be mediated by different types of persons or institutions, such as insurance intermediaries, insurance and reinsurance undertakings, banks as insurance operators, and under certain specified conditions also travel agents and car sellers. Equal treatment of economic entities and consumer

[9] IMD 2 also provides conditions under which the advice is provided independently. Particularly, an insurance agent or insurance undertaking must assess a sufficiently large number of insurance products that are available in the market. Insurance products should not be limited to insurance products issued or provided by entities closely linked to the investment intermediary or insurance undertaking. Another condition is that the insurance agent or insurance undertaking shall not accept or receive any fees, commission or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in connection with the provision of services to customers.

protection require that the directive should apply to all these persons and institutions.

Directive IMD2 and IMD1 are both in the mode of minimum harmonization[10] and its objective is therefore to improve the effective regulation of the retail insurance market, focusing on ensuring equal opportunity and conditions between all participants in the sale of insurance products, and to enhance the protection of customers.

The process of adoption and implementation of the IMD2 proposal by different Member States will be difficult due to the different conditions and methods of sale of insurance products in a given Member State. Despite this the Directive shall be implemented in two to three years, Member States must regulate that which is already prepared. The impact will be significant. The insurance undertakings of the EU Member States employ approximately one million people, and the number of insurance intermediaries is expected to increase.

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- Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (IMD1).

[10] Minimum harmonization mode - EU legislation, which sets minimum requirements to be met by Member States when implementing Community legislation into national law; Member States are free to set stricter rules depending on the specifics and traditions of individual markets other than the one set by the Directive.

[online]. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32002L0092;

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CURRENT LEGAL AND ECONOMIC ASPECTS OF THE REAL ESTATE TRANSFER TAX IN THE CZECH REPUBLIC AND SEVERAL OTHER COUNTRIES

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Abstract:

An impressive milestone of the Czech recodification occurred on 1st January, 2014, when the new Civil Code took effect. Its impact on the transfer of real estate tax regime was reflected through the enactment of new statutes, especially the legal measure of the Senate No. 340/2013 Coll., on the tax on the acquisition of real estate. Since the Czech Republic is a member of the Visegrad group and of the EU, it is highly instructive to study the legal and economic aspects and impacts of the new real estate transfer tax system in the Czech Republic and compare it with matching systems in several other EU member states as well as the USA and Canada.

Keywords:

Real estate transfer tax, Real estate acquision tax, Tax rate, Expert appraisal, Tax exemption;

JEL classification: K34

1 Introduction

On 1st January, 2014, there took effect the Act. 89/2012 Coll., the Civil Code ("new Civil Code"), which replaced the Act No. 40/1964 Coll., the Civil Code ("old Civil Code"). The new Civil Code is based on principles of justice and freedom and emerged as a result of the massive, by many welcome and by many rejected, project of the re-codification of the national private law of the Czech Republic. This project overlaps the sphere of the national Czech private law and directly impacts as well the Czech national public law, including the Czech tax law. Consequently, new legislation was issued, and among else the still in effect Act No. 357/1992 Sb., on inheritance, gift and real estate transfer taxes ("Act on inheritance, gift, and real estate transfer tax") was cancelled and the agenda was divided. The regulation of the inheritance and gift tax is newly added to the existing Act. 586/1992 Coll., on income tax. The former real estate transfer tax became a real estate acquisition tax and is newly regulated by the legal measure of the Senate No. 340/2013 Coll, on real estate acquisition tax ("Senate measure").[1] Since the Senate measure is not a mere formal cut-and-paste of real estate tax provisions from the previous Act on inheritance, gift, and real estate transfer tax, and

[1] This Act of Parliament took the form of the legal measure and not of a conventional statute approved by both Chambers due to the temporary resolution of the lower Chamber, the Chamber of Deputies, in the fall 2013.

considering the significance of the tax impact on real estate transactions for business as well as citizens, the new regime introduced by the Senate measure needs to be understood and its particularities appreciated, or at least reflected on and considered. This descriptive and critically evaluating analysis can be to the advantage of the membership of the Czech Republic in the Visegrad group, of the European integration, and of the globalization in general. The involvement in the European integration, the requirements and conditions of the functioning of the Internal market and harmonization trends and the high intensity, exceeding even beyond the commercial interactions between EU member states, especially those from the Visegrad group, provides the massive recodification of the national private law of the Czech Republic with an importance transcending the Czech borders. Thus, it is highly instructive to study the legal and economic aspects and impacts of certain contemporary changes in the tax field in the Czech Republic and in other selected countries and with the employment of comparative analysis to assess, and potentially evaluate, their reciprocal interactions.

Namely, based on selected goals and an appropriate methodological approach, the presentation of the new status quo regarding the taxation of transferred and acquired real estates in the Czech Republic can be comparatively completed and expanded while referring to and considering a number of countries from the Europe and North America. The resulting output should lead to conclusions bringing light in this new arena.

2 Goals and methods

The principal goal of this presentation is a structural and operational analysis of a predominantly static nature in the legal field of the Senate measure. The description of the instrument and the key aspects, features and functions of this Senate measure will be performed

in the context of the new Czech post-recodification setting, while comparatively referring to similar, or at least comparable, legal systems, predominantly from the EU. From such a foundation, appropriate conclusions and recommendations should be extracted and offered for further discussions on both theoretical and practical, levels.

3 Real estate acquisition tax according to the Czech law

3.1 The changing legal regime of real estate and of its disposition taxation

The law of the Czech Republic belongs to the continental legal family and thus, unsurprisingly, the legal regime of Czech real estate has been included in the Civil Code and a set of special Acts dealing with particular aspects, such as taxation of the disposition with real estate. For the last five decades, it was the old Civil Code for the general framework and for the last two decades, it was the Act on inheritance, gift, and real estate transfer tax for the special framework regarding the taxation of the disposition of real estate. It is well known that the old Civil Code underwent a large number of novelizations and modifications which significantly changed, not only a large part of its contents, but as well its concepts, principles and structure and thus generated a potential for its substitution by the new Civil Code.

It is much less well known that the Act on inheritance, gift, and real estate transfer tax, called by financial specialists the "Act on 3 tax", has undergone an unbelievable number of 50 novelizations and modifications during the two decades of its validity and thus the need of its "consolidation", or directly substitution, by a brand new statute, was even more obvious than in the case of the old Civil Code. As a matter of fact, the Act on inheritance, gift, and real estate transfer tax was not only

inconsistent and way too often changing, but in addition was often subject to a critical court scrutiny and even the Constitutional court had to decide about its rather weak constitutional conformity.[2]

With a touch of exaggeration, it can be summarized that the new Civil Code changed a lot in comparison to the old Civil Code, but the Senate measure did even more and changed the entire content of the Act on inheritance, gift, and real estate transfer tax, except the tax rate of 4%.[3]

3.2 The determination of the real estate acquisition tax

The strongest reason for the new legislation by the Senate measure was the need to assure the continuity of the legal regulation of the taxation of the acquisition of real estate in the Czech Republic, i.e. to avoid the vacuum created by the cancellation of the Act on inheritance, gift, and real estate transfer tax. The new regulation is connected to the new Civil Code and reflects new instruments introduced by the new Civil Code, such as trust fund, building right, or emphyteutic lease. Real estate as an immovable item is defined by Art. 498 al. 1 of the new Civil Code and this definition is clearly broader than its formal definition in the old Civil Code. Thus, the category of real estate includes not only land and buildings, but as well subterranean buildings with an independent purpose designation, right in rem to them and rights designated as real estate by the law. According to Art. 498 al. 1 of the new Civil Code, if the law states that a certain item is not a part of a piece of land and if such

[2] SKÁLA, Milan. Dopady nového občanského zákoníku do zdaňování nemovitých věcí v roce 2014 - III. Díl. *Daně a právo v praxi*, 2013(2):2. ISSN 1211-7293. ASPI ID LIT 45893CZ.

[3] PILAŘOVÁ, Ivana. Rekodifikace práva a navazující účetní a daňová legislativa s účinností od 1.1.2014. *Účetnictví v praxi*, 2014 (1):29. ISSN 1211-7307. ASPI ID LIT 46142CZ.

an item cannot be transported from one place to another without disturbing its fundaments, then it is an immovable item.

The building right is explicitly regulated by the new Civil Code and is covered as well by the Senate measure. It is a legal instrument allowing to encumber the land by an in rem right of another person to have on its surface or under its surface a building. According to Art. 1240 and foll. of the new Civil Code, the building right is an immovable item and its regime is governed by the regulation of the real estate, including the Senate measure. Hence, the Czech new real estate taxation covers even the building right.

According to Art. 2 of the Senate measure, the real estate acquisition tax is applied in the case of the paid acquisition of the ownership right to real estate and real estate is understood as defined by the new Civil Code, i.e. land, building, engineering infrastructure, flat, and building right related to the land in the Czech Republic. The term acquisition extends to and includes securing the transfer of right and paid transfer of a claim secured by the securing transfer of right. Newly, the taxation applies to real estate acquired by possession prescription and the acquisition of a building illegally built on the land of a third party.[4] Conversely, the taxation according to the Senate measure does not cover the acquisition of the right to real estate created by land shaping, the compensation for expropriation and the acquisition of real estate based on corporate transformation.

3.3 Exemption from taxation of real estate acquisition

Similar to the former regulation, the Senate measure allows a tax exemption in the case of the transfer and acquisition of real estate if the defined conditions are met. As before, one of the exemptions from

[4] Explanatory Report to the legal measure of Senate No. 340/2013 Coll., on real estate acquisition tax – to Art. 1 al. 1 letter b) and to Art.3.

taxation covers the new buildings, although the criteria and details of this exemption are now slightly different. According to Art. 7 of the Senate measure, the new exemption applies to cases when the first payable transfer occurs within 5 years from the date, when according to the Act No. 183/2006 Coll., Building Act, the building was approved for the use, i.e. 5 years from the day of the final building approval or from the 31st day after the submission of the declaration about the use of the building, when the building office did not have any objections. Henceforth are exempt the first paid transfers of flats in new buildings or of flats, via construction, added to existing buildings. This exemption is no longer conditioned by the business activities of the seller in the field of construction and selling flats. The Senate measure does not include the exemption for the transfer of real estate due to the privatization, because this provision was excluded as obsolete.

Two potential big issues to establish or to reject this exemption is the new definition of the unit (flat)[5] along with its determination by the declaration of the owner under Art. 1159 of the new Civil Code[6] and the newly strongly stated denial in the case of "no flat premises", i.e. buying a unit in a newly built building in which it is not clearly 100% apartments, may disqualify from the application of this exemption. The old legislation defining "no flat premises" is gone due to the re-codification and it is a so far unresolved question of how to interpret this criterion and it may

[5] PILAŘOVÁ, Ivana. Odkud kam směřuje právní, účetní a daňová legislativa, aneb co nás čeká v roce 2014. Účetnictví, daně a právo v zemědělství, 2013 (12):25. ISSN 1212-9453. ASPI ID LIT 46122 CZ.

[6] Běhounek BĚHOUNEK, Pavel. Rekodifikace soukromého práva od 1.1.2014 - nemovité věci. *Účetnictví v praxi*, 2013 (12):14. ISSN 1211-7307. ASPI ID LIT 45798.

generate a line of case law. Nevertheless, reportedly there is ongoing work on the ministerial level to address this problem.[7]

3.4 The payer of the real estate acquisition tax

Probably the most discussed issue during the drafting and enactment of the Senate measure was the identification of the payer of the real estate acquisition tax. According to the Act on inheritance, gift and real estate transfer tax, the payer was always the transferor, i.e the seller, and this regardless of the contractual agreement of the parties.

The former bill was prepared by the Ministry of Finance of the Czech Republic, and stated that the payer should be the transferee, the buyer, in the case of a paid transfer and thus should be cancelled the guarantee of the transferor for the payment of the tax. This change generated a large discussion which resulted in the return to the previous regime and to the addition that, although the payer is still the transferor, the contractual parties are free to provide otherwise and to make the transferee to be the payer, see Art. 1 of the Senate measure.

It should be emphasized that the approach presented by the unsuccessful bill, i.e. the determination that the tax payer will always be the transferee, the acquirer of the real estate, and that the tax payment guarantee should be abolished was in compliance with the prevailing law setting within the continental legal family. Namely, 16 of the 20 EU member states assessing tax by the occasion of the transfer of real estate indicate as the payer the transferee-acquirer, while only 2 states make the

[7] SKÁLA, Milan. Dopady nového občanského zákoníku do zdaňování nemovitých věcí v roce 2014 - III. Díl. *Daně a právo v praxi*, 2013(2):2. ISSN 1211-7293. ASPI ID LIT 45893CZ.

transferor and transferee joint taxpayers and only 2 states make the transferor the taxpayer.[8]

However, the Czech Parliament had a different opinion, allegedly due to concerns of manipulation with sale prices, and thus rejected the clear identification of the acquirer as taxpayer and instead returned to the previous solution with a contractual option to modify it.[9] Therefore, the transferor is the taxpayer and the transferee is the guarantor for the tax payment, unless they agree that the taxpayer is the transferee. Conceptually, this is an exceptional move allowing the shift of tax duty by a private law instrument, a contract, from one person to another. Practically, this may cause a myriad of issues linked to the uncertainty about the taxpayer, i.e. tax officers will have to gain access to and study the appropriate contractual documentations to figure out who is the taxpayer and face a number of complex contractual mechanisms with an unclear interpretation. Obviously, tax officers will have to address this newly created issue and it will take their time and efforts.[10]

The tax payer, thus in the most cases the transferor, has the duty to file the tax return about the real estate transfer in the time period according to the law. The legal regulation of this time period remained the same in the Senate measure, and so the payer of the real estate acquisition tax has the duty to file the tax return at the latest by the end of the 3rd month following the calendar month when the State title office, the Cadastre, allowed the registration of his or her right. If the real estate

[8] SKÁLA, Milan. Dopady nového občanského zákoníku do zdaňování nemovitých věcí v roce 2014 - III. Díl. *Daně a právo v praxi*, 2013(2):2. ISSN 1211-7293. ASPI ID LIT 45893CZ.

[9] PILAŘOVÁ, Ivana. Rekodifikace práva a navazující účetní a daňová legislativa s účinností od 1.1.2014. *Účetnictví v praxi*, 2014 (1):29. ISSN 1211-7307. ASPI ID LIT 46142CZ.

[10] HANDLOSOVÁ, Martina. Daň z nabytí nemovitých věcí - 2. Část. *Daně a právo v praxi*, 2013 (12):21. ISSN 1211-7293. ASPI ID LIT 45875.

is not registered in any public registry, then the 1st day of this three month period is the day of the signature of the contract by all parties.

Interestingly, though the contractual documents are always to be filed with the tax return, they do not need to be filed in original or notarized verified copies, i.e. their plain copies are sufficient. Less interestingly, the time period to file the tax return remains unchanged.

3.5 The tax rate, tax base and its determination

Regarding the tax rate, the situation in the Czech Republic is unchanged, i.e. as before even now the rate is 4%. However the tax base determination and the exemption have changed.

The tax base for the real estate acquisition is the acquisition value of the real estate, reduced by the recognized expense. According to Art. 24 of the Senate measure, the recognized expense is particularly the reward and proved expenses paid by the payer to the expert for the expert appraisal, in the case when the taxpayer decides to let the expert prepare and to attach the expert appraisal to the tax return and to clearly request for it in the tax return.

Newly, the acquisition value of real estate is either the agreed upon price, the comparative value, the determined price based on the expert appraisal or special price[11] of the real estate. According to the Act on the inheritance, gift and real estate transfer tax, the tax payer always paid a real estate transfer tax in the amount of 4% from the higher amount, i.e. either from the agreed upon price or from the price as set by the expert appraisal. The Senate measure newly introduces an option for the taxpayer and allows him or her to choose between two systematic regulations for the real estate acquisition tax payment – the taxpayer can

[11] Special price is price paid in the Auction price, value of the real estate as invested in a corporation, etc.

either allow to be compared his or her agreed upon price with the guidelines value, or the expert appraisal value.

In the majority of contractual transfers, the agreed upon price is used for the determination of the tax base, i.e. the price agreed upon by the seller and the buyer. This agreed upon price is scrutinized based on 75% of the guidelines value or an expert appraisal value. In other words, the buyer can decide whether his agreed upon price will be compared as not lower than 75% of either the guidelines value or the expert appraisal value. Since the taxpayer can decide whether the comparative value will be established based on guideline value or expert appraisal value, there is no longer a universal need to file, with all tax returns regarding real estate acquisition, an expert appraisal. Hence, the expert appraisal must be attached to the tax return only if the taxpayer wants to make the 75% calculation of the comparative value based on the expert appraisal value and not the guidelines value.

If the taxpayer opts for the establishment of the comparative value based on the guidelines value, then the tax officer will use the information indicated in the tax return. For the establishment of the guidelines value, the tax officer will consider prices of other real estate in the given place and time, while reflecting the position, status, age, equipment and technical parameters of the concerned real estate. The exact calculation procedure to determine the guidelines value is included in the regulation of the Ministry of finance. In these cases, the agreed upon price will be the tax base, unless it is less than 75% of the guidelines price.

This would mean, in praxis, that the tax payer will pay a tax advance in the amount of 4% of the agreed upon price while filing his or her tax return. If, later on, the tax officer finds that the comparative value, i.e. 75% of the guidelines value or 75% of the expert appraisal value, is higher than the agreed upon price, the tax office will ask the taxpayer to

pay the difference between the paid tax advance and the tax calculated based on the comparative value.

4 Real estate transfer tax in selected countries

4.1 The changing legal regime of real estate and of their disposition taxation

The tax imposition on the transfer of real estate is a typical feature of legal systems in the USA and the majority of the EU member states, and especially the contractual transfer of the ownership title regarding a real estate property against payment often implies a tax duty. However, the dynamics of social evolution along with the globalization and economic situation leads to a continuous scrutiny and review of the real estate transfer tax as an income for the national and regional or municipal budget. In sum, the real estate transfer tax is basically acceptable as a source for public finances, provided the rate is reasonable and exemptions are available. At the same time, the transfer of real estate is often motivated by socially appreciated good reasons and the speculative element has been vanishing, especially since the so-called crisis from 2007 and 2008.

In the USA, the real estate transfer tax is not federal, but state issued. Similarly, in the EU, the real estate transfer tax is basically in the competence of member states. At this point, there are differences between states in the USA and in the EU regarding their real estate transfer tax and even some of them do not have it at all. It is critical to recognize that the EU key constitutional acts, the Treaty on EU and Treaty on the functioning of EU, make it clear that the real estate taxation is not covered by the EU exclusive or shared competence, and there are no signs of a significant shift in this approach. As a matter of fact, it seems to be well established that the direct taxation is the sole responsibility of the EU

member states and the EU member states have just to avoid the double taxation.

Therefore, it is possible and remains possible to have the EU member states imposing a heavy, high and low exemption taxation on the real estate transfer, as well as to have EU member states completely abandoning the real estate transfer tax per se, such as Slovakia and Poland, and focus on other aspects of the same transactions, such as taxation of the gain. Hence the EU setting is very similar to the USA setting.

4.2 The determination of the real estate acquisition tax

Firstly, only the majority of states in the USA and in the EU have opted to assess tax by the occasion of the contractual transfer of real estate.[12]

Secondly, each of the approximately forty states in the USA and twenty states in the EU member states assessing this tax follow a different regime.[13] The real estate transfer tax can be either imposed on conventional real estate or can reach further, even to follow the doctrine of the lifting of the corporate veil, and go after real estate transfer tax even in the case of the acquisition of shares of a company owning real estate. Such a scenario is unthinkable in the Czech Republic, but plausible in Germany.[14]

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[12] SKÁLA, Milan. Dopady nového občanského zákoníku do zdaňování nemovitých věcí v roce 2014 – III. Díl. *Daně a právo v praxi*, 2013(2):2. ISSN 1211-7293. ASPI ID LIT 45893CZ.

[13] SKÁLA, Milan. Dopady nového občanského zákoníku do zdaňování nemovitých věcí v roce 2014 - III. Díl. *Daně a právo v praxi*, 2013(2):2. ISSN 1211-7293. ASPI ID LIT 45893CZ.

[14] CINNAMON, Allan. Fiscal Odyssey – The diary of an international tax consultant, *Tax Journal*, 2008, 921:13.

Thirdly, there is an ongoing discussion about the legitimacy and effects of the property transfer tax and thus the observed systems are in a process of ongoing changes. An excellent example of an evolution towards the elimination of the property transfer tax would be Italy, where a sequence of tax reforms resulted in the abolishment of the real estate transfer tax. The observation, along with empirical analysis and statistic data showed especially the impact on the top, since the lower price bracket enjoyed, even before the reforms, various exemptions, and evaluated the effect of the transfer tax as rather small and precisely estimated.[15] The allegedly small effect of the transfer tax seems rather surprising and may just reflect the eternal problem of the correctness of the reported value, which is an omnipresent challenge for all transfer tax systems – what is the true value to be assessed?

4.3 Exemption from taxation of real estate acquisition

A very popular exemption on both sides of the Atlantic is linked to the purchase of new real estate, especially if it is new housing for people. The consensus about the exemption of new buildings exists and probably reflects the business reality and the support of the building industry and of housing for citizens. Thus, even countries with a high real estate transfer tax allows exemptions for newly constructed properties, see e.g. France. To this in rem exemption mechanism is often, e.g. in Canada and in the USA, added a similar in personam exemption mechanism to support first time home buyers and exempt them from a transfer tax payment, or at least reducing it.

Another common, but not so largely used, exemption reflects the business corporate reality. Despite a slight shift and reduction of

[15] JAPALLI, Tullio, PADULA, Mario, PICA, Giovanni. Do transfer taxes reduce intergenerational transfers? Journal of the European Economic Association, 2014, 12(1): 248-275. ISSN 1542-4774.

exemptions for corporate transactions, the acquisition of real estate within a corporate transformation is not covered by the transfer tax duty in the Czech Republic according to Art. 5 of the Senate measure. However, e.g. in Germany, there is no exemption for intra-group transfers and tax will be paid on the price of the sold shares of a company owning a real estate.[16]

4.4 The payer of the real estate acquisition tax

The question of who should pay the real estate transfer tax is discussed and addressed differently across the USA and the EU. As indicated above, the prevailing trend is to make the transferee the principal debtor. Certain countries go even further, such as Germany where the transferor and transferee are the common payer of the real estate transfer tax. A softer version of this mechanism can be found in the USA, where certain states split the tax and make each party pay half.

4.5 The tax rate, tax base and its determination

Over 20% of the states in the USA and in the EU are not assessing a real estate transfer tax at all. The approximately forty states in the USA which assess it, charge a rate between 0.1% and 5%.[17] The twenty EU member states which assess it, charge a rate of 1-10%. This rate is imposed on a tax base which can be the agreed upon price, paid price, fair market value, assessed value, or adjusted value.

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[16] CINNAMON, Allan. Fiscal Odyssey – The diary of an international tax consultant, *Tax Journal*, 2008, 921:13.

[17] *Assessment Journal*, International Association of Assessing Officers, November/December 1997; Commerce Clearing House *State Tax Guide* 2001. Compiled by National Conference of State Legislatures Fiscal Affairs Program. Updated by NAR from various sources 8/15/05. [accessed on 22nd March, 2014]. Available at http://www.nahb.org/fileUpload_details.aspx?contentTypeID=3&contentID=159797&subContentID=354745

In the USA, the resulting tax duty is rather low, due to a large number of states opting for an almost symbolic rate under 1%.

In Germany, the real estate transfer tax is set by regions, Bundesländer, and municipalities, and generally is 3.5%.[18] A higher rate oscillating between 4% and 5 % is set by the presumably richer and wealthier areas such as Berlin, Hamburg and North Rhine Westphalia. The regional determination of the rate applies as well in Belgium, where the tax rate to be applied on the agreed upon price is different in Flanders, Walloon and Brussels regions and goes from 5% to 12%. In France, the rate of the real estate transfer is almost double in comparison to Germany. Another country with a high rate is Hungary. In addition, in Hungary it is explicitly stressed that the imposition goes on the fair market value.

A very interesting approach is followed by the UK, where the stamp duty land tax rate is progressive, i.e. up to the contractual purchase price of residential properties of GBS 125 000 the tax is 0%, between GBS 125 001 and GBS 250 000 it is 1%, etc. Thus the purchase of a small flat in the UK can escape the transfer tax while the purchase of a luxury residential property for over GBS 2 000 000 will be taxed at 7% and in the case of the purchase by a corporation by 15%. A different set of rates is set for non-residential properties. The UK tax administration, called Her Majesty's Revenue and Customs, i.e. "UK IRS", offers even an online calculator to help the parties to determine the amount of their transfer tax duty.[19] The situation in the UK is even more complex, because the leasehold and freehold aspects are considered. An easier version of this approach is in British Columbia in Canada, where the rate

[18] CINNAMON, Allan. Fiscal Odyssey – The diary of an international tax consultant, *Tax Journal*, 2008, 921:13.

[19] http://www.hmrc.gov.uk/sdlt/calculate/calculators.htm

on the fair market value of the purchase property is 1% for the first CAD 200 000 and 2% for the amount above.[20]

5 Conclusions

A real estate transfer tax is applied by the majority, but not all, of the states in the EU and in North America, and does not belong to federal or union competencies, i.e. each country, even each state or region within a country, sets its regime. Therefore, the real estate transfer tax is capable to exactly match local and regional public policies, principles and preferences.

Recently, the legal system of the Czech Republic has undergone a massive re-codification of the private law with an impact on the public law sphere. As a result, the new Civil Code generated the need to review the Czech statute covering the real estate transfer tax. Due to the largeness of the new Civil code and the instability of the prior Act on inheritance, gift, and real estate transfer tax, the Czech legislature opted to replace it by a brand new statute, the Senate measure.

A review of the Senate measure shows that significant changes were introduced, nevertheless the most popular issues remained the same – the 4% rate to be typically paid by the transferor. This solution does not deviate significantly from the European trends. Nevertheless, it may be suggested that the laws following the continental legal tradition, including the Czech law, should consider the much more pragmatic and business oriented common law tradition. Plainly, reducing the rate to 1%, putting the responsibility on the truly interested party – the transferee, allowing online filing and forgetting about complicated re-calculation and certified copies, could be much more customer friendly, dramatically

[20]http://www2.gov.bc.ca/gov/topic.page?id=B6F43B3AAE394299B03B1F777747A36F

less demanding for finance office administration and ultimately leading to almost the same public income. The Senate measure seems to be aiming towards a more efficient and effective public administration, but a lot of work remains ahead.

It is a positive sign that the Czech legislature showed the willingness to improve the real estate transfer tax system. However, the result does not meet all expectations, and the future will probably soon indicate its weaknesses, its heavy duty features and its lacking of leanness. Hence, much work is needed and using shortcuts would be contra-productive. Copying another better operating system, such as the USA transfer tax system, is not a good idea, because most observers agree about the need to restructure it.[21] Obviously, only a well informed, hardworking, and communicative approach with open self-criticism can bring us to an appropriate real estate acquisition tax system which will not need ongoing reforms and, more importantly, will be accepted and thus respected by the majority of the population.

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RULES OF EMPLOYMENT IN V4 COUNTRIES

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Abstract:

The Visegrád Group, also called the Visegrád Four, V4, or European Quartet is an alliance of four Central European states – Czech Republic, Hungary, Poland and Slovakia. All members of the Visegrad Group are also the State Members of the European Union. As a result, their labour legislation are similiar in some areas, but still preserve distinct regulations. The purpose of this article is to present the most important rules of employment in V4 countries. In this paper, labour law of four members of the Visegrad Group will be described (on the rules of adumbration) – Czech Republic, Hungary, Poland and Slovakia.

Key words:

Employment; Labor law; V4;

JEL classification: K31

1 Introduction

The Visegrád Group is an alliance of four Central European states – Czech Republic, Hungary, Poland and Slovakia. The Group's name in the languages of the four countries is *Višehradská čtyřka* or *Višehradská*

skupina (in Czech); *Visegrádi Együttműködés* or Visegrádi négyek (in Hungarian); *Grupa Wyszehradzka* (in Polish); and *Vyšehradská skupina* or *Vyšehradská štvorka* (in Slovak).

2 Rules of employment in Czech Republic

The relations between employees and employers in the Czech Republic are governed by the labour law consisting of a number of acts, decrees and regulations of the government. Sources of labour law in the Czech Republic in descendent order are the Constitution of the Czech Republic, international treaties, acts and regulations to implement acts published in the Collection of Laws of the Czech Republic, normative provisions of collective agreements and individual employment contracts. Labour relations are regulated, in particular, by written labour law and, within its framework, by collective agreements and individual employment contracts.

The main sources of the labour law are three acts: 1) The Labour Code (in Czech *Zákoník práce*)[22], 2) The Collective Bargaining Act (in Czech *Zákon o kolektívnom vyjednávaní*)[23] and 3) The Employment Act (in Czech *Zákon o zaměstnanosti*)[24]. These acts are the Czech Republic's fundamental regulation in the area of labour law. Moreover the area of labour law is governed by other important regulations, in particular in the Act Stipulating Further Requirements for Health and Safety at Work (in Czech *Zákon 309/2006 Sb., kterým se upravují další požadavky bezpečnosti a ochrany zdraví při práci v pracovněprávních vztazích a o zajištění bezpečnosti a ochrany zdraví při činnosti nebo poskytování*

[22] Act No. 262/2006 Coll., as amended by Act No. 585/2006 Coll.

[23] Act No. 2/1991 Coll.

[24] Act No. 435/2004 Coll.

služeb mimo pracovněprávní vztahy)[25], The Labour Inspection Act (*Zákon o inspekci práce*)[26], The Sickness Insurance Act (in Czech *Zákon o nemocenském pojištění*)[27] and The Social Security Act (in Czech *Zákon o sociálním zabezpečení*)[28]. Furthermore employment relations of certain groups of employees (for example state prosecutors, members of armed forces, judges etc.) are subject to special legislation.

An employment relationship is based on a contract between an employer and an employee. This mean that employment relationship between an employer and employee is established solely by means of an employment contract[29]. An employment contract must be concluded in writing and the employee must receive a copy[30]. In accordance with section 34 of the Labour Code mandatory particulars to be specified in an employment contract are as follows 1) the type of work (job title) which the employee will perform for the employer; 2) the place or places of performance of the work and 3) the date of commencement of employment (the starting date)[31]. The agreed content of the employment

[25] Act No. 309/2006 Coll.

[26] Act No. 251/2005 Coll.

[27] Act No. 187/2006 Coll.

[28] Act No. 100/1988 Coll.

[29] Section 33 Labour Code.

[30] The same applies to an alteration of such contract or to the withdrawal therefrom. Section 34 paragraph 4 Labour Code Act No. 262/2006 Coll., as amended by Act No. 585/2006 Coll..

[31] The employment relationship is established as of the date which has been agreed in the employment contract as the starting date or on the day stated as the date of appointment to the top position in a government agency (head, chief); Section 36 Labour Code Act No. 262/2006 Coll., as amended by Act No. 585/2006 Coll.

contract can be changed only by agreement between the employer and the employee[32].

An employment relationship shall last for an indefinite period (open-end employment relationship) unless a fixed term of its duration has been expressly agreed[33]. A fixed-term employment relationship between the same contracting parties may not exceed three years and as of the date of the first fixed-term employment relationship and it may be recurrently agreed no more than twice (section 39 paragraph 2 of the Labour Code).

According to section 35 of the Labour Code, the duration of trial period (in Czech „zkušební doba“) is 3 consecutive months from the date when the employment relationship commences or 6 consecutive months from the date of commencement of the employment relationship where it concerns a managerial employee. A trial period may not be longer than one half of the agreed period of the employment relationship and must be agreed in writing (section 35 paragraph 5 and 6 of the Labour Code).

The length of standard weekly working hours (in Czech „*pracovní doba*“) should not exceed 40 hours[34]. As a rule, working hours are distributed over five-day working week. Shift (in Czech „s*měna*“) should not be longer than12 hours per day[35]. After 6 consecutive hours of uninterrupted work, a 30 minute break must be provided. Employers are

[32] Section 40 paragraph 1 of the Labour Code Act No. 262/2006 Coll., as amended by Act No. 585/2006 Coll..

[33] Section 39 paragraph 1 of the Labour Code Act No. 262/2006 Coll., as amended by Act No. 585/2006 Coll..

[34] Section 79 of the Labour Code Act No. 262/2006 Coll., as amended by Act No. 585/2006 Coll..

[35] Section 83 of the Labour Code Act No. 262/2006 Coll., as amended by Act No. 585/2006 Coll..

also obliged to keep a record of working time of employees, including overtime work.

In the Czech Republic, the Labour Code specifies the minimum amount of paid annual holiday entitlement which amounts to four weeks (including weekends) per year[36]. Longer holiday entitlements may be agreed in collective agreements. Employees become entitled to take a holiday after having worked for 60 days (section 212 of the Labour Code).

In accordance with section 48 of the Labour Code employment may be terminated in the Czech Republic by the employer or the employee by several ways: 1) by agreement (concluded between the employer and the employee); 2) by notice of termination in writing (when given by an employer, it is referred to as dismissal, when it is given by an employee, it is referred to as resignation); 3) by immediate termination or 4) by termination within the trial period (no reason need be given). An agreement on the termination of an employment relationship must be in writing[37]. Also upon the death of an employee his employment relationships terminates.

The employer may immediately terminate an employment relationship only: 1) if an employee has been sentenced, under a final verdict, for a wilful criminal offence to a term of unconditional imprisonment of over one year or if an employee has been sentenced, under a final verdict, for a wilful criminal offence committed during performance of his working tasks, or in direct connection therewith, to an unconditional imprisonment of no less than six months; or 2) if an employee has breached some obligation that arises from the statutory

[36] Section 213 of the Labour Code Act No. 262/2006 Coll., as amended by Act No. 585/2006 Coll..

[37] Section 49 paragraph 2 of the Labour Code Act No. 262/2006 Coll., as amended by Act No. 585/2006 Coll..

provisions and relates to his work performance in an especially gross manner[38]. The employee also have right to immediately terminate his employment relationship but only if: 1) according to a medical certificate issued by the occupational medical services provider or under a ruling of the competent administrative agency having reviewed the medical certificate, the employee cannot perform his work (job) any longer without a serious threat to his health and the employer has not transferred the employee to perform some suitable alternative work within 15 days of the submission of such medical certificate or 2) the employer has not paid this employee's wage or salary or compensatory wage or compensatory salary or some part of such wage or salary within 15 days of the maturity date[39].

3 Rules of employment in Hungary

General labour regulations in Hungary are outlined in Act I of 2012 – the Labour Code (in Hungarian: *A munka törvénykönyvéről*)[40] which "lays down the fundamental rules for decent work according to the principle of free enterprise and the freedom of employment, taking into account the economic and social interests of employers and workers alike"[41]. These regulation refer to the employers, workers, employers interest groups, works councils and trade unions. This Act shall also apply to user enterprises and beneficiaries of services provided by school cooperatives.

[38] Section 55 paragraph 1 of the Labour Code Act No. 262/2006 Coll., as amended by Act No. 585/2006 Coll..

[39] Section 56 paragraph 1 of the Labour Code Act No. 262/2006 Coll., as amended by Act No. 585/2006 Coll.

[40] Published in the Hungarian Official Gazette No. 2 of 2012 on 6 January 2012.

[41] Section 1 of the Hungarian Labour Code.

In accordance with section 6 of the Hungarian Labour Code employment contracts shall be executed as it might normally be expected in the given circumstances, unless any legal provision exists to the contrary. In exercising rights and discharging obligations, the parties involved shall act in the manner consistent with the principle of good faith and fairness, they shall be required to cooperate with one another, and they shall not engage in any conduct to breach the rights or legitimate interests of the other party. Moreover employers shall take into account the interests of workers under the principle of equitable assessment.

An employment relationship is deemed established by entering into an employment contract. According to section 48 of the Hungarian Labour Code under an employment contract the employee is required to work as instructed by the employer while the employer is required to provide work for the employee and to pay wages. The contract of work must be set out in writing[42]. The parties must specify in the contract of work the employee's personal base wage and job function[43]. Furthermore the employer shall inform the employee in writing about his daily working time, wages above the base wage, payroll accounting, the frequency of payment of wages, the functions of the job, the number of days of paid annual leave, the rules governing the periods of notice to be observed by the employer and the employee etc. Parties shall be entitled to amend employment contracts by mutual consent[44]. In accordance to Employee must be at least sixteen years of age.

In Hungary the contract of work can be terminated in various ways for example upon the employee's death, upon the dissolution of the employer without succession, upon the expiration of the fixed term or in

[42] Section 44 of the Hungarian Labour Code.

[43] Section 45 subsection 1 of the Hungarian Labour Code.

[44] Section 58 of the Hungarian Labour Code.

other cases defined by law (section 63 subsection 1 of the Hungarian Labour Code). According to section 64 of the Hungarian Labour Code an employment relationship may be terminated in three situations 1) by mutual consent; *2)* by notice and 3) by dismissal without notice.

Working time conditions and extra payment for overtime are strictly regulated by the law. Unless otherwise agreed, the daily working time in full-time jobs is eight hours (regular daily working time). Regular working hours are 40 hours per week, Monday to Friday. Moreover the full-time working schedule may be raised to maximum 12 hours a day on the basis of an agreement between the parties[45]. Work carried out between 22 hours and 6 hours is classified as night work. The period for breaks during work is: 1) 20 minutes a day, which the employee is entitled to if he or she works more than six hours a day or 2) 25 minutes a day, which the employee is entitled to if he or she works more than nine hours a day. Workers shall be entitled to two rest days in a given week (weekly rest day)[46].

Work on Sundays in accordance to section 101 subsection 1 of the Hungarian Labour Code may be scheduled within the framework of regular working time if the employer generally operates on Sundays by the nature of its business, in seasonal work, if working in continuous shifts, for workers working in shifts; in stand-by jobs; for part-time workers working Saturdays and Sundays only, in connection with the provision of basic public services or transfrontier services, where it is necessary on that day stemming from the nature of the service or in the case of work performed abroad.

In Hungary public holidays are 1 January, 15 March, Easter Monday, 1 May, Whit Monday, 20 August, 23 October, 1 November and

[45] Section 92 subsection 2 of the Hungarian Labour Code.

[46] Section 105 subsection 1 of the Hungarian Labour Code.

25–26 December (section 102 subsection 1 of the Hungarian Labour Code). Workers are also entitled to paid annual leave based on the time spent at work, comprising vested vacation time and extra vacation time. The annual paid holiday is 20 work days, which increases with the age of the employee in categories.. According to section 117 subsection 1 of the Hungarian Labour Code basic holiday entitlement in Hungary:

- up to the age of 25 - 20 working days
- from the age of 25 - 21 working days
- up to the age of 31 - an additional working day every three years
- up to the age of 45 - an additional working day every two years
- from the age of 45 - 30 working days

Vacation time shall be scheduled by the employer upon hearing the employee

State duties related to employment are coordinated by the Ministry of National Economy (in Hungarian: *Nemzetgazdasági Minisztérium*) and the Ministry of Human Resources (in Hungarian: *Emberi Erőforrások Minisztériuma*). The Central Administration of National Pension Insurance (in Hungarian: *Országos Nyugdíjbiztosítási Főigazgatóság* – ONYF) handles matters related to pension insurance, while the central authority for social security is the National Health Insurance Fund (in Hungarian: *Országos Egészségbiztosítási Pénztár* – OEP).

4 Rules of employment in Slovakia

Slovak employment law is codified in the Labour Code, Act Number 311/2001 Coll as amended. According to section 42–44 of the Slovak Labour Code, an employment relationship must be established by a written employment contract. The employer must provide the employee with one written copy of the employment contract. The

substantial terms of an employment contract include (§ 43 of the Slovak Labour Code):

- the type of work and its description;
- the place of work;
- the commencement date;
- the salary, unless agreed by collective agreement.

The employer shall also stipulate further working conditions, particularly concerning payment terms, working time, duration of annual leave and the length of the notice period. An employment relationship shall be agreed for an indefinite term if the employment duration is not expressly stated in the employment contract or if in the employment contract or in the amendment thereto, the legal conditions for the conclusion of a fixed-term employment relationship are not met (§ 48 of a Slovak Labour Code). A fixed-term employment relationship may only be agreed for a maximum of three years. If, within six months after termination of such fixed-term employment relationship, a consecutive agreement is concluded, it is considered a prolongation of the first relationship and the overall duration must not exceed the legal maximum.

The maximum probationary period permitted by law is 3 months and may not be extended at any way. The probationary period shall only be prolonged if the employee was incapable of work because of disease or accident, periods of maternity leave and parental leave, etc. The probationary period must be agreed in writing, otherwise it will be invalid . The employment relationship may be terminated by either party without cause. Usually, the notice of termination shall be delivered at least three days before the end of the probationary period.

The regulation of working time, including overtime work and rest periods are defined in section 85 to section 117 of the Slovak Labour

Code. The maximum limits are generally 40 hours of work per week[47]. There are, however, exceptions relating to the working time of employees working on shifts or in harmful working environments as well as to the working time of adolescent employees. A working week consists of a maximum of 40 working hours with certain exceptions. The employer can demand on average a maximum of 8 hours of overtime work per week, but no more than 150 hours per year[48]. Any additional overtime work requires the employee's approval. Total overtime work may not exceed an average of 8 hours per week, which means approximately 150 hours per year[49]. If the overall working hours exceed the statutory maximum, the employer and its representatives may incur administrative fines for each violation. In Slovakia, an employer is obliged to provide an employee (whose work shift is longer than 6 hours) a break at least of 30 minutes. An employer is obliged to provide an adolescent employee whose work shift is longer than 4.5 hours with a break for rest and eating, which should last 30 minutes. Concerning work that may not be interrupted, an employee must be secured, without discontinuing operation or work, adequate time for rest and eating[50].

Mandatory provisions of the Slovak Labour Code provide that all employees are entitled to annual leave, the minimum length of which is prescribed by law (section 100 to section 117 of the Slovak Labour Code). Collective bargaining agreements also provide for additional paid holiday days on particular occasions. Additional paid holiday is generally provided to the employees of state institutions. An employee who, during the continuous duration of an employment relationship with the same employer, performs work for the employer for at least 60 days in the

[47] K. Wach, *Europejski rynek pracy*, Kraków 2007, s. 337.

[48] http://www.legalcounsels.sk/hrnews/Slovak_employment_law_basics.pdf

[49] Section 85a of a Labour Code, Act Number 311/2001 Coll. as amended

[50] Section 91 of a Labour Code, Act Number 311/2001 Coll. as amended

calendar year shall be entitled to annual paid holiday or a proportionate part thereof. A day shall be considered a whole working day if the employee worked the major part of his or her shift; parts of the shifts worked over various days shall not be added up for the purposes of annual leave entitlement (section 101 of the Slovak Labour Code).

The proportionate part of paid holiday for each calendar month of continuous duration of the same employment relationship shall be one-twelfth of annual paid holiday (section 102 of the Slovak Labour Code). Paid holiday shall amount to at least four weeks annually (section 103 of the Slovak Labour Code).

5 Rules of employment in Poland

Labor law is primarily regulated by the Act of 26 June 1974 Labour Code[51], which governs the rights and obligations of employees and employers. The Labor Code also regulates the basic principles of employment law which specify basic rights and duties in an employment relationship, etc. a right to a minimum wage, lack of discrimination in employment, health and safety provisions[52].

The most important part of employment law is a relation created between employer and employee, called employment relation. Employment relation is mainly established under an employment contract., which is the contract between an employer and an employee, by which the employee voluntary agrees to carry out a certain kind of work under the guidance of employer, in location and time designated by

[51] Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy, Dz.U. 1974 nr 24 poz. 141 z późn. zm.

[52] T. Liszcz, *Prawo pracy*, wyd. 9, Warszawa 2012, s. 38-40.

the employer[53]. On the other hand, employer is obliged to to employ employee in return for remuneration (art. 22 par. 1 of the Labour Code).

An employment relation may be established by an employment contract, appointment, election, nomination and under co-operative employment contract[54]. The basic form of employment is unquestionably a contract of employment. We can specify a few forms of contracts of employment:

1) an employment contract for a probationary period,
2) a fixed term employment contract,
3) a fixed term employment contract to cover a long term leave,
4) an employment contract for e period needed to perform certain work,
5) permanent employment contract[55].

An employment contract should be concluded in writing no later than on the first day of work. If not, an employee should at least receive a written confirmation of the employment essential conditions.

An employment contract for a probationary period may last up to 3 months and may precede all other contracts[56]. A fixed-term employment contract terminates automatically at the end of the term.

An employment contract may be terminated:

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[53] J. Stelina [w:] K. Baran (red.), *Zarys systemu prawa pracy TOM I Część ogólna prawa pracy*, Warszawa 2010, s. 107.

[54] M. Barzycka- Banaszczyk, *Prawo pracy*, wyd.15, Warszawa 2013, s. 64-77.

[55] K. Walczak [w:] K. W. Baran (red.), *Prawo pracy i ubezpieczeń społecznych*, Warszawa 2013, s. 170-173.

[56] K. Jaśkowski [w:] K. Jaśkowski (red.), E. Maniewska, *Kodeks pracy TOM I Komentarz*, wyd. 9, Warszawa 2014, s. 160.

- upon mutual agreement of the parties (at any time and regardless of the type of contract),
- by one of the parties upon prior notice,
- by one of the parties without prior notice[57].

Notice periods depend on the type of employment contract and actual duration of employment. A fixed term contract may be terminated upon a 2-weeks notice provided that it has been concluded for at least 6 months with an express contractual provision concerning the termination possibility. A permanent employment contract may be dissolved upon a 2-weeks notice if the employee has worked for the employer less than 6 months, a month notice if at least 6 months have elapsed but less than 3 years and a 3-months notice if employee has worked for at least 3 years[58]. Dismissal without notice is possible in case of:

- a serious breach of basic employee's duties, commitment of a crime,
- expiry of credentials indispensable for the work performed (occupational qualifications),
- inability to work due to an illness or other excused reason for more than a specified period. Termination is restricted during e.g. vacation, pregnancy, maternity leave, sick-leave, near-retirement period, trade union term of office[59].

[57] M. Barzycka- Banaszczyk, *Prawo pracy*, wyd.15, Warszawa 2013, s. 95.

[58] Z. Góral [w:] K. W. Baran (red.), *Kodeks pracy Komentarz*, Warszawa 2012, s. 250-264.

[59] K. Walczak [w:] K. W. Baran (red.), *Prawo pracy i ubezpieczeń społecznych*, Warszawa 2013, s. 226-235.

General number of working hours in Poland is 40 a week (with an average working week of 5 days of 8 hours work)[60]. Additional weekly working hours and overtime may not exceed 48 hours a week. Overtime as a rule may not exceed 150 hours a year. An employee is entitled to double remuneration for overtime at nights, on Sundays and bank holidays (as well as for overtime exceeding the statutory aggregated weekly limit) and to remuneration increased by a half for other overtime. Employees have the right to at least 11 hours of undisturbed rest in every 24 hours and 35 rest hours a week. Days free of work are Sundays and bank holidays.[61] Employees are also entitled to annual leave. Number of days off is 20 in case of employees working less than 10 years and 26 in case of employees working for at least 10 years[62]. The minimum remuneration is 1680 PLN (for a full-time employment)[63]. Remuneration should be paid at least once a month, generally at the same fixed day.

Employees who perform their employment duties (tasks) in a location other that the employer's seat or their regular workplace are entitled to reimbursement of expenses related to the business trip. These daily allowances, as well as accommodation limits and conditions for reimbursement are set, for the public sector, in a regulation by the Minister of Labor, which is also applied by other employers in lack of own regulations. Travel expenses to the regular workplace are not covered by the employer.

[60] Section 129 subsection 1 of the Polish Labour Code

[61] T. Liszcz, *Prawo pracy*, wyd. 9, Warszawa 2012, s. 340.

[62] Section 154 of the Polish Labour Code

[63] Rozporządzenie Rady Ministrów z dnia 11 września 2013 r. w sprawie wysokości minimalnego wynagrodzenia za pracę w 2014 r., Dz.U. 2013 poz. 1074

6 Conclusions

To sum up, it is worth noticing, that some of the existing labour acts were implemented recently. New labour codes were adopted in two member states of The Visegrád Group – Hungary and Czech Republic, while in Slovakia a substantial amendment of the Slovak Labour Code came to force.. The new labour codes are in line with the general trend of many recent labour law reforms across Europe in that it aims to allow more flexible regulation of work. It is significant that all of V4 countries have similar labour regulations, because of free movement of workers in EU. What is more, global crisis contributed to all of the changes and amendments of labour law, which is now more adjusted to economical and social situation: flexible work hours, a lot of different basis of employment (working at home), maternity and paternity leave.

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FREE MOVEMENT OF WORKERS

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Abstract:

The free movement of workers is one of the fundamental right guaranteed to European Union (EU) citizens by the Treaties. The focus of this article will be on the facilitation of the free movement of workers. This paper also discusses the types of restrictions of the free movement of workers. The rights derived from this freedom are not unlimited. There are some limitations laid down in the EU treaties and in the secondary EU legislation. The purpose of this paper is to present the general information about purview of the freedom and possibilities of constriction.

Key words:

Free movement of workers; Worker; European Union;

JEL classification: K31

1 Introduction

The free movement of workers is one of the fundamental right guaranteed to European Union (EU) citizens by the Treaties[1]. Free movement of workers is part of the free movement of persons and one of the economic freedoms: free movement of goods, services and capital,

[1] M. Ahlt, M. Szpunar, *Prawo europejskie*, Warszawa 2011, s. 204 – 205.

otherwise known as the "four freedoms" envisaged in 1957[2]. Existence of the freedom, which is being analized, enables implementation of internal market idea, which is "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties"[3].

Freedom is supposed to be considered as an unhampered right of the EU citizens to free movement on the European Union territory to undertake a job or look for a job[4]. In freedom purview there are certain rights that can be distinguished: the right to entry and residence (also for family members) and right to undertake work in another Member State[5]. It should be emphasized that free movement of workers is not unlimited, like other freedoms. There is a possibility to limit free movement of workers, especially when it comes to entry and residence in a EU Member State and the right to work in public sector[6].

2 The legal bases of the right of free movement of workers

Free movement of workers is established in Article 45 of The Treaty on the Functioning of the European Union (TFEU) and developed

[2] M. Herdegen, *Prawo europejskie*, Warszawa 2006, s. 212 – 213.

[3]Article 26 paragraph 2 The Treaty on the Functioning of the European Union (TFEU); L. Mitrus, *Swoboda przemieszczania się pracowników po przystąpieniu Polski do Unii Europejskiej*, Warszawa 2003, s. 55.

[4]M. Duszczyk, *Swobodny przepływ pracowników w negocjacjach o członkostwo Polski w Unii Europejskiej*, Warszawa 2002, s. 13.

[5]J. Barcik, A. Wentkowska, *Prawo Unii Europejskiej po Traktacie z Lizbony*, Warszawa 2011, s. 346.

[6] K. Wach, *Europejski rynek pracy*, Kraków 2007, s. 26 – 28.

by European Union secondary legislation and have been interpreted and developed by the case law of the European Court of Justice[7].

Conform with article 45 TFUE free movement of workers shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment[8]. Workers can move freely and work anywhere in the EU, without discrimination on grounds of nationality[9]. According to articles 45 – 48 TFEU workers have the right to exit, right to enter, right to short-term residence, right to long-term residence.

As it has been already mentioned, regulations about free movement of workers were expanded also in secondary legislation. The provisions of Article 45 TFEU are further developed in:

- Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union,
- Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[10],

[7] M. Ahlt, M. Szpunar, *Prawo europejskie*, Warszawa 2011, s. 204 – 205.

[8] A. Kuś, *Swobody europejskie* [w:] A. Kuś (red.), *Prawo Unii Europejskiej z uwzględnieniem Traktatu z Lizbony*, Lublin 2010, s. 346-347.

[9] J. Barcik, A. Wentkowska, *Prawo Unii Europejskiej po Traktacie z Lizbony*, Warszawa 2011, s. 343 - 344.

[10] OJ No L 158, 30 April 2004.

- Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community[11].

Free movement of workers is one of the primary rights, considered in article 15 pragraph 2 Charter of Fundamental Rights of the European Union, which comprises that „everyone has the right to engage in work and to pursue a freely chosen or accepted occupation" in which „every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State"[12]. Moreover nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

3 Essence of the free movement of workers in EU

Free movement of workers is a right guaranteed to European Union (EU) citizens, who are: employees that participate in professional education, members of their families (or from the same household as a worker) and students[13]. Due to the freedom under discussion, a worker who is also a citizen of EU has a right to move freely to another State Member to begin work or seek for an employment[14].

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[11]OJ No L 209, 25 July 1998.

[12] A. Wróbel (red.), Karta Praw Podstawowoych Unii Europejskiej, Warszawa 2013, s. 580.

[13] A. Kuś, *Swobody europejskie* [w:] A. Kuś (red.), *Prawo Unii Europejskiej z uwzględnieniem Traktatu z Lizbony*, Lublin 2010, s. 347-349.

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Workers primary entitlement, which results from the free movement of workers, are encompassed in article 45 TFEU[15]. In accordance with article 45 paragraph 3 TFEU free movement of workers shall entail the right:

a) "to accept offers of employment actually made;

b) to move freely within the territory of Member States for this purpose;

c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission"[16].

The European Court of Justice in its judiciary activity emphasised that above enumeration is only exemplary[17]. Article 45 TFEU also declares that "freedom of movement for workers shall be secured within the Union".

Moreover, on the basis of EU law, beneficiary of the free movement of workers „who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of

[15] Z. Hajn, *Pojęcie i podstawy prawne swobodnego przepływu pracowników wewnątrz Unii Europejskiej* [w:], Z. Hajn (red.), *Swobodny przepływ pracowników wewnątrz Unii Europejskiej*, Warszawa 2010, s. XV-14.

[16]Article 45 paragraph 3of The Treaty on the Functioning of the European Union (TFEU).

[17]Case C-292/89 *The Queen v. The Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen*.

employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or reemployment"[18]. He also shall enjoy the same social and tax advantages as national workers and, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centers[19].

According to article 8 Regulation (EU) 492/2011 "worker shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote and to be eligible for the administration or management posts of a trade union. He may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law". Moreover, he shall also have the right of eligibility for workers' representative bodies in the undertaking.

Free movement of workers entails the necessity of the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment[20]. The principle of non-discrimination between workers in the Union also "requires that equality of treatment be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers be eliminated, in particular as regards the conditions for the integration of the worker's family into the host

[18]Article 7 paragraph 1 of Regulation (EU) 492/2011.

[19] A. Czaplińska, *Zakres przedmiotowy swobodnego przepływu pracowników* [w:], Z. Hajn (red.), *Swobodny przepływ pracowników wewnątrz Unii Europejskiej*, Warszawa 2010, s. XV- 58 – XV-60.

[20] A. Kuś, *Swobody europejskie* [w:] A. Kuś (red.), *Prawo Unii Europejskiej z uwzględnieniem Traktatu z Lizbony*, Lublin 2010, s. 349.

country"[21]. Such right should be enjoyed without discrimination by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services[22].

Freedom of movement constitutes a fundamental right not only for workers but also for their families[23]. It means that workers have a right to treat their family members according to the rules binding family members of certain Member State citizens[24]. The families are entitled to a joint stay and residence, the workers children right to access to the general education system (so-called right to education) and the right to social and health benefits for family members, according to the regulations and system applicable to the citizens of the Member State[25]. Worker's children "shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory"[26].

[21]Regulation (EU) 492/2011 preamble, section 6.

[22]Regulation (EU) 492/2011 preamble, section 5.

[23] I. Boruta, *Swoboda przepływu osób (obywateli Unii)* [w:] J. Barcz (red.), *Prawo Unii Europejskiej. Zagadnienia systemowe. Prawo materialne i polityki*, Warszawa 2006, s. II-80 – II-81.

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[25]R. Birk, Swobodny przepływ pracowników i ich rodzin. Bezpieczeństwo i ochrona zdrowia pracowników. Indywidualne prawo pracy, [w:] Europejskie prawo pracy i prawo socjalne, red. H. Lewandowski, K. Serafin, Instytut Europejski w Łodzi, Łódź 1998, s. 71–91; A. Czaplińska, *Zakres przedmiotowy swobodnego przepływu pracowników* [w:], Z. Hajn (red.), *Swobodny przepływ pracowników wewnątrz Unii Europejskiej*, Warszawa 2010, s. XV-84 – XV-86.

[26]Article 10 of Regulation (EU) 492/2011.

4 Definition of a worker

The right to free movement inheres for the workers especially. However, term 'worker' is not explicitly defined in either the article 45 or regulation. Although the concept of 'worker' and 'activity as an employed person' is essential to the fundamental freedoms guaranteed by the Treaty[27]. It must be interpreted autonomously and may not be interpreted restrictively[28].

The definition of a worker has been given a wide interpretation under case law[29]. According to the case law of the European Court of Justice, the term 'worker' must be defined "in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that a person performs services of some economic value for and under the direction of another person in return for which he receives remuneration"[30].

Another restriction upon the definition of a worker is that the work should not be ancillary or marginal[31]. This can be illustrated by the case of *Levin v Staatssecretaris van Justice* in which the ECJ came to the conclusion that 'worker' is "any person who pursues employment activities which are effective and genuine, to the exclusion of activities

[27] A. Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego*, Tom I, Warszawa 2009, s. 109.

[28] M. Ahlt, M. Szpunar, *Prawo europejskie*, Warszawa 2011, s. 207.

[29] A. Cieśliński, *Wspólnotowe prawo gospodarcze. Swobody rynku wewnętrznego*, Tom I, Warszawa 2009, s. 109.

[30] Case 66/85 *Lawrie-Blum v Land Baden-Württemberg*.

[31] M. Ahlt, M. Szpunar, *Prawo europejskie*, Warszawa 2011, s. 207 – 209.

on such a small scale as to be regarded as purely marginal and ancillary"[32].

In case *Pfeiffer v Deutsches Rotes Kreuz* (C-397/01) a worker was defined as a person who "must be regarded as the weaker party to the employment contract and it is therefore necessary to prevent the employer being in a position to disregard the intentions of the other party to the contract or to impose on that party a restriction of his rights without him having expressly given his consent in that regard"[33].

5 The limitations of the free movement of workers within the European Union

EU law stipulates that the freedom of movement of workers is not an unlimited right[34]. On the basis of analysis of the provisions of the TFEU and the case law of the European Court of Justice should therefore be considered that the restrictions on freedom of movement for workers are exceptionally permitted.[35].

The Treaty on the Functioning of the European Union (TFEU) provides two situations justifying the introduction by the Member States of the EU restrictions on the free movement of workers[36]. Firstly, when

[32] Case 53/81 *Levin v Staatssecretaris van Justice*; L. Mitrus, *Swoboda przemieszczania się pracowników po przystąpieniu Polski do Unii Europejskiej*, Warszawa 2003, s.63.

[33] Case C-397/01 *Pfeiffer v Deutsches Rotes Kreuz*.

[34] K. Wach, *Europejski rynek pracy,* Kraków 2007, s. 26 – 28.

[35] H. Kisilowska, I. Ciach, *Wybrane problemy prawa administracyjnego i gospodarczego w aspekcie wejścia Polski do Unii Europejskiej,* Zeszyty Naukowe - Kolegium Nauk Społecznych i Administracji Politechniki Warszawskiej, Nr 17, Warszawa 2000, s. 24.

[36] M. Smusz-Kulesza, *Ograniczenia swobodny przepływu pracowników* [w:], Z. Hajn (red.), *Swobodny przepływ pracowników wewnątrz Unii Europejskiej*, Warszawa 2010, s. XV-98 – XV-100.

limitations are “justified on grounds of public policy, public security or public health”. What is more, the provisions of article 45 TFUE shall not apply to employment in the public service. Member States may define these notions themselves[37].

At the same time the ECJ affirms that restrictions must be applied in a non-discriminatory way, and be justified by imperative requirements of the public interest. In addition, they should be appropriate for the main goal and must not go beyond what is necessary for that purpose[38]. Permitted restrictive measures, practiced by the Member States, requires proper justification for their general interest[39]. What's more, it cannot be equated with economic interests, in which the state would protect their own citizens and businesses. Proportionality of the measures requires "that their way of using would be a transparent procedure and based on objective, non-discriminatory criteria known in advance "[40].

The TFEU has no definition of “public order" and "public safety"[41]. Therefore, in principle, the Member States of the EU have a freedom in defining those terms. It should be noted, however, that the

[37] K. Wach, *Europejski rynek pracy*, Kraków 2007, s. 26 – 28.

[38]Case C-19/92 *Kraus*; Case C-384/08 *Attanasio*; Case 279/80 *Webb*.

[39] E. Skibińska, *Ograniczenia swobody zakładania przedsiębiorstw i świadczenia usług - art. 45, 46 i 55 TWE*, [w:] A. Wróbel (red.), M. Bychowska, M. Daca, W. Postulski, E. Skibińska, A. Szoplińska, I. Twardowska-Mędrek, *Wprowadzenie do prawa Wspólnot Europejskich (Unii Europejskiej*), Kraków 2002.

[40]Case C-250/06 *Must Carry*.

[41] J. Barcik, A. Wentkowska, *Prawo Unii Europejskiej po Traktacie z Lizbony*, Warszawa 2011, s. 349.

interpretation of the Member States in this area is controlled by the ECJ [42] and the same cases has to be strictly interpreted[43].

Moreover, the ECJ in its case of 28 October 1975, Case 36/75 *Rutili* stated that considerations of public policy include "not only generally applicable in the territory of the Member State laws that restrict freedom of movement and residence of citizens of other countries, but also issued decisions in individual cases in the application of these provisions". The Court found that limiting the right of a national of another Member State for entry, stay and movement in the territory of another Member State is possible only when "his presence or behavior is a real and immediate danger to public order"(Case 36/75 *Rutili).* According to ECJ „*community law precludes the expulsion of a citizen of a Member State which is the expulsion on grounds of a general preventive, ie expulsion, which is aimed at deterring other aliens"*[44]. Moreover the ECJ came to the conclusion that "expulsion for life automatically follows a criminal conviction, without any account being taken of the personal conduct of the offender or of the danger which that person represents for the requirements of public policy*"*[45].

On the basis of section 45 paragraph 4 TFEU rights under the freedom of movement for workers do not apply to employment in the public sector[46]. Therefore, access to positions related to public authority

[42] Case C-268/99 *Jany.*

[43] M. Smusz-Kulesza, *Ograniczenia swobodny przepływu pracowników* [w:], Z. Hajn (red.), *Swobodny przepływ pracowników wewnątrz Unii Europejskiej*, Warszawa 2010, s. XV-98 – XV-100.

[44]Case C-67/74 *Carmelo Angelo Bonsignore przeciwko Oberstadtdirektor der Stadt Köln*.

[45]Case C-348/96 *Calfa*.

[46] M. Ahlt, M. Szpunar, *Prawo europejskie*, Warszawa 2011, s. 222.

may be limited by a Member State for its own citizens[47]. As in the case of " public order " and " public safety "the Treaty on European Union nor any act of secondary law does not contain a definition of public authority" . The issue of this problem is clarified by the ECJ judicial activity[48]. As an example, it can be indicated in the judgment of 21 June 1974, Case 2/74 *Reyners* Court of Justice took the position that the use of the derogation provided for in Art. 51 TFEU in relation "to the entire profession would be acceptable only in the case if the link above certain activities with the exercise of this profession meant that a Member State, if the liberalization of access to economic activities, it would be forced to allow execution, even temporarily, the tasks of public authority by foreigners". This means that the profession as a whole can be turned off only in case if its execution is inextricably linked to the functions of public authority[49].

Based on the premise of public health Member State also has the ability to refuse the right of entry or residence permit citizen of another EU Member State[50]. The ECJ also in this case highlights the need for a restrictive interpretation of this exception.

It is worth noticng that the restrictions on the freedom of movement of workers may also be incorporated in the transitional period following the accession of new Member States.

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[47] M. Smusz-Kulesza, *Ograniczenia swobodny przepływu pracowników* [w:], Z. Hajn (red.), *Swobodny przepływ pracowników wewnątrz Unii Europejskiej*, Warszawa 2010, s. XV-118 – XV-120.

[48]M. Herdegen, *Prawo europejskie*, Warszawa 2006, s. 224.

[49] M. Ahlt, M. Szpunar, *Prawo europejskie*, Warszawa 2011, s. 224 – 225.

[50] M. Smusz-Kulesza, *Ograniczenia swobodny przepływu pracowników* [w:], Z. Hajn (red.), *Swobodny przepływ pracowników wewnątrz Unii Europejskiej*, Warszawa 2010, s. XV-105 – XV-107.

6 Conclusions

The EU's overarching aim is to "promote peace, its values and the well-being of its peoples"[51]. Free movement of workers, understood as an uninhibited right of the EU citizens to free movement on the whole EU territory to undertake job or to seek for an employment, play an important role in EU cooperation[52]. What is more, free movement of persons guarantees correct functioning of internal market and unity policy in EU.

As it has already been mentioned, the legal basis of the restrictions on the free movement of persons was set out in the TFEC. Free movement of workers has its amplification in secondary law, which creates legal framework for the free movement of workers on the territory of European Union.

Basic rights that derives from the free movement of workers the right of exit and entry, residence and the right to remain in the territory of a Member State after expiration of employment, which inheres mainly to citizens of Member States of the EU[53].

At the same time TFEU foresees the possibility of limiting the freedom of movement of workers in exceptional cases. The reasons justifying such measures is for example situation when limitations are "justified on grounds of public policy, public security or public health". The concept of public policy, public health and public security is not fully defined in EU law[54]. Member States have a freedom to determine boundaries of the premises of public policy, public security or public health. Therefore, it seems necessary to be very restrictive in

[51]Article 3 paragraph 1of The Treaty on the Functioning of the European Union (TFEU).

[52] M. Ahlt, M. Szpunar, *Prawo europejskie*, Warszawa 2011, s. 204 – 205.

[53] J. Barcik, A. Wentkowska, *Prawo Unii Europejskiej po Traktacie z Lizbony*, Warszawa 2011, s. 346.

[54] M. Ahlt, M. Szpunar, *Prawo europejskie*, Warszawa 2011, s. 204 – 205.

interpretation of the restrictions of this freedom. This idea is also supported by the case law of the ECJ. Each restriction on the freedom of movement of workers should accomodate the proportionality rule and the individual responsibility of the specific person.[55]. Moreover, the provisions of article 45 TFUE shall not apply to employment in the public service. Member States may define these notions themselves.

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[55] M. Smusz-Kulesza, *Ograniczenia swobodny przepływu pracowników* [w:], Z. Hajn (red.), *Swobodny przepływ pracowników wewnątrz Unii Europejskiej*, Warszawa 2010, s. XV-98 – XV-100.

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RESTRUCTURING IN GERMANY AND ITS INFLUENCE ON THE EUROPEAN QUARTET (V4)[#]

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Abstract:

The ongoing globalisation increases the requirement for the development of new markets. In view of the growing European Community many western companies continue to embark on "voyages of discovery" in the European Quartet. As a consequence of the associated broad branching of the finance system this contribution focuses on the new course for cross-border restructuring in the German insolvency regulations and its influence on the V4. It provides a review of the latest discussion on amending the law concerning the further facilitation of the restructuring of companies and on its areas of concern from a European perspective.

[#] Reštrukturalizácia v Nemecku a jej vplyv na Vyšehradskú Štvorku (V4).

Abstrakt: Prebiehajúca globalizácia zvyšuje požiadavky na rozvoj nových trhov. Z pohľadu rastúceho Európskeho spoločenstva pokračuje mnoho západných spoločností v „objaviteľských cestách" po Vyšehradskej štvorke. Ako následok s tým spojeného širokého rozvetvovania finančného systému sa tento príspevok sústreďuje na nový priebeh cezhraničnej reštrukturalizácie v nemeckých insolvenčných právnych predpisoch a jeho vplyv na V4. Poskytuje prehľad o najnovších diskusiách na tému doplnenia právneho predpisu týkajúceho sa ďalšieho zjednodušenia reštrukturalizácie spoločností a o dotknutých oblastiach záujmu z európskej perspektívy.

Kľúčové slová: cezhraničné projekty; insolvencia; Vyšehradská Štvorká; reštrukturalizácia; záchranné spoločnosti;

Key words:

Cross-border projects; European Quartet (V4); Insolvency; Restructuring; Rescuing companies;

JEL classification: K20

1 Introduction

The European internal market reflects the socio-economic relations with all its difficult interactions. These mutual connections are clearly present during an economic crisis, when one weak part in the chain of modern business markets may endanger another industrial partner or the "entire enterprise group". In case of the restructuring of a member of a group of companies or "enterprise group", often an economic recession that leads to a crisis does not confine itself to a single company in the group, instead spreading to a handful of or even the entire family of the companies. This circumstance in connection with the ongoing globalisation increases need for enhancing the standards of requirements concerning the development of new markets and legal instruments. In view of the constantly growing European Union many western companies continue to embark on "voyages of discovery" in the eastern European states, in particular to the Visegard Four countries[1], in order to utilise new opportunities for selling their products and services. As a consequence of the growing national and international integration of companies with regard to both economic and legal aspects (globalisation)

[1] The Visegrad Four (countries) are also known as the "**European Quartet**". It is an alliance of four Central European states – the **Czech Republic, Hungary, Poland and Slovakia** – for the purpose of closer cooperation as well as furthering their European integration.

and the associated broad branching of the finance system, the economic and financial crisis that commenced in Europe in 2008 has resulted in numerous insolvencies. Individual companies hit hard by the crisis have subsequently shifted their assets or legal disputes from one member state to another in order to achieve an improved legal status (so-called "forum shopping").

This occurs on the one hand in the form of inter-state co-operation, on the other with the founding of new companies and subsidiaries in the neighbouring countries. "Crossing the border" in the European single market makes it easier for a German company to utilise the freedom of establishment as per art. 49 in association with art. 54 (1) of the Treaty on the Functioning of the European Union (hereinafter referred to as "TFEU")[2]. Closer co-operation between the European member states[3] at political and economic level opens up further framework conditions for the trade in goods and services in the European single market and its transfer. Therefore the European Union (hereinafter referred to as EU) and its capital market grow continuously. Supported by the free circulation of capital and payments, as per art. 63 of the Treaty on the Functioning of the European Union[4], it leads to a broad branching of the finance system, which sometimes results in the collapse of one business partner with a dreaded domino effect within the euro-zone.

The cross border corporate activities and their culture of termination give rise to a degree of uncertainty and scepticism towards the relevant insolvency legislation amongst the creditors of such

[2] Art. 49 in connection with art. 54 (1) TFEU has replaced (ex-)art. 43 in association with (ex-)art. 48 (1) of the Treaty establishing the European Community (hereinafter EC-Treaty).

[3] Hereinafter referred to as „Member States".

[4] Art. 63 TFEU has replaced (ex-)art. 56 EC-Treaty.

"stricken" companies, which are less and less likely to have their registered office in the same state.

The European Union is a complex organisation, comprising an ever increasing number of Member States with different legal, political and cultural backgrounds. This structure can only operate if the relationship between the EU and its Member States, and between individual Member States, is clearly defined. In order for the EU to be able to function effectively, its law must be applied uniformly, and it must prevail over conflicting national legislation[5]. Uniform application of the law is vital for the efficient operation of the EU and it is the task of the EU bodies and each Member States to protect and enforce it[6].

2 General Observation

As Europe is facing a severe economic and social crisis, the European Union is taking action to promote economic recovery, boost investment and safeguard employment[7]. The economic crisis has led to an increase in the number of failing businesses. From 2009 to 2011, an average of 200,000 firms went bankrupt per year in the EU. About one-quarter of these bankruptcies have a cross-border element. About 50% of new businesses do not survive the first five years of their life. 1.7 million jobs are estimated to be lost due to insolvencies every year.[8]

The associated questions concerning the securing of individual economic sites and their competitiveness with regard to the regulations

[5] SIMS: English Law and Terminology. 3. Ed. Baden-Baden. Nomos (2010). ISBN 978-3-8329-4951-8. p. 133.

[6] SIMS: English Law and Terminology. 3. Ed. p. 134.

[7] See President Barroso´s letter to EP President in the framework of the State of Union addressed on 12 September 2012.

[8] EUROPEAN COMMISSION. COM(2012) 742 final, Page 2.

of (cross-border) corporate activities and their influence in other companies located in different member states of the European Union are the subject of the current discussion regarding the proposed amendment to the Council Regulation (EC) No. 1346/2000 on European insolvency proceedings[9].

The aforementioned Regulation on insolvency proceedings was adopted to deal with issues of cross-border insolvency through the proper recognition and co-ordination of national insolvency proceedings and in order to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)[10].

Now the focus is upon the new regulations regarding restructuring options in European insolvency law and their formation in a way that is conducive to restructuring.

In the German discussion the reference to foreign regulatory role models has always played a significant part, in particular as a number of states have special restructuring procedures that either come into play earlier than purely insolvency proceedings aimed more at liquidation or that are available parallel to insolvency proceedings, as an alternative[11]. For example, reference may be made to:

- Reorganisation proceedings under Chapter 11 of the United States Bankruptcy Code.
- Under English law: The Scheme of Arrangement, the actual restructuring instrument of the Company Voluntary Arrangement

[9] Council Regulation (EC) No. 1346/2000 on insolvency proceedings, OJ L 160, 30.6.2000, Page 1.

[10] EUROPEAN COMMISSION. COM(2012) 742 final, Page 2.

[11] BORK, R. Sanierungsrecht in Deutschland und England, 2011, Recital 1.19 (Page 9 et sq.).

(CVA) and the administration in which restructuring is assigned to an administrator, according to part 26 of the Companies Act 2006.

- Austrian law with a specific restructuring procedure as per §§ 166 et sq. Austrian insolvency act[12].
- The Slovakian insolvency act has a comprehensive amendment[13], passed with the third reading of the Parliament of the Slovak Republic on 13 September 2011[14] and which entered into effect on 1 January 2012, apart from a few exceptions. These amendments include regulations that aim to render the manipulation of bankruptcy proceedings more difficult. In addition, the term over-indebtedness is redefined and the liability of the management organ in the case of breach of duty to petition for bankruptcy tightened; the latter came into force on 1 January 2013[15].

Experience gained with these in some cases new restructuring legislation has not yet become evident; however, this promotes the need for action for both the German legal system and the European single market.

[12] Österreichische Insolvenzordnung (öIO).

[13] Slovakian Act No. 7/2005 Coll. on Bankruptcy and Restructuring amended by No. 348/2011 Coll.

[14] w.w.w.gtai.de / Germany Trade & Invest / Grünes Licht für slowakische Insolvenzrechtsnovelle – Änderungen im Insolvenzgesetz stärken Rechte der KMU of 24/11/2011.

[15] e/n/w/c: Reform des slowakischen Konkursrechts bringt Stärkungen der (österreichischen) Gläubiger; published in Recht.Extrajournal.Net on 03/12/2011.

3 Particular Consideration

Keeping pace with the intensity of reform in limited liability company law via the Law for the modernisation of the limited liability company and the combating of misuse[16] a new course has also been set for cross-border restructuring projects in the German insolvency regulations with the law concerning the further facilitation of the restructuring of companies[17], with these having an effect on competition amongst legal systems and the future choice of registered office for companies hit by the crisis within the European single market.

4 Restructuring in Germany

With the German law for the modernisation of limited liability company law and the combating of misuse[18] which entered into effect with the announcement in the Federal Law Gazette with the resolution of 1 November 2008[19] key impetus for reform from the national and European legislature and jurisprudence regarding freedom of establishment and capital market saw its implementation. Particularly noteworthy here is the easing of the law regarding capital contributions for limited liability companies, the shifting of maintenance of capital principles from limited liability company law to the German insolvency

[16] Law for the modernisation of limited liability company and the combating of misuse (Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG).

[17] Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen (hereinafter referred to as "ESUG") passed by the Bundestag (BT-Drucks 17/5712, Page 39).

[18] The German Act to Modernise the Law on Private Limited Companies and Combat Abuses (Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbrauch, hereinafter referred to as "MoMiG").

[19] WILHELM, Jan. Kapitalgesellschaftsrecht, 3. Edition (2009), Preface p. V.

code[20] and the act on contestation[21] for the protection of the assets of the limited liability company with regard to shareholder loans.

In conclusion it is intended to provide German companies or proprietors and their creditors with specific instruments and mechanisms that help in managing of the genuine competition between legal systems. To equip the business location Germany for a better future, especially given the global economic crisis and the challenges arising from this, the bankruptcy reform is being implemented in three stages. In the first stage, the Act for Further Facilitation of the Restructuring of Companies ("ESUG") was passed and is effective as of March 1st 2012 and introduces a new course for cross border restructuring projects. These rules are intended to improve the economic conditions for the rehabilitation of distressed companies, so that the insolvency process in future will be seen as a real "opportunity for rescuing", and allows the preservation of jobs.

[20] The MoMiG describes the legal situation as follows: According to § 39 German Insolvency Code (Insolvenzordnung, hereinafter referred to as "InsO") the granting of capital within a crisis is of no relevance any longer; shareholder loans or economically corresponding payments are always satisfied subordinated in bankruptcy. The obligatory insolvency petition for directors of a limited liability company under German law in case of insolvency (§ 17 InsO) and overindebtedness (§ 19 InsO) is relocated to § 15a InsO. § 15a InsO is now generally applicable to all entities. Moreover, in case of a company without legal personality the executive bodies shall file a request for the opening proceedings. Also it stipulates a director´s liability for payments to shareholders which lead to insolvency.

[21] Anfechtungsgesetz (hereinafter referred to as "AnfG").

Graph: Main reforms under the German "ESUG"

In addition hereto, the second stage applies the reform of consumer bankruptcies, which will be effective in its main parts as of July 1st 2014. The reform of the residual debt discharge proceeding shall also support consumers receive a realistic "second chance" to meet its debts. Noteworthy in this connection is the fact that it involves provisions to strengthen licenses during insolvency proceedings[22]. Finally a proposal for a Law to Facilitate the Management of Group Insolvencies (of January 3rd 2013) rounds up the reform package at the third and final stage. The aim of such a group insolvency law is to prevent friction losses due to insolvency of a break-up of companies and to protect

[22] Similar provisions may be found regarding the amendments to the EIR under Amendment 34 Proposal for a regulation Article 1 – point 26 a (new) Regulation (EC) No 1346/2000 Article 12: "(26a) Article 12 is replaced by the following: Article 12 **European** patents ***with unitary effect*** and ***Community trade marks*** (...)".

redevelopment opportunities. The existing principle remains, that for each rescuing group member an individual insolvency proceeding will be open. By special jurisdiction and procedural provisions, by the possibility of appointment of an administrator for several procedures and the introduction of a separate coordination method, this method should be better coordinated.[23]

5 Summary to Chapter

Cross-border insolvencies are not an exemption anymore but a daily phenomenon not only with regard to large (group) companies but also reaching to the small and mid-sized enterprises (SMEs).[24] Therefore the aim of this paper shall also reveal the possible impacts of the latest amendments regarding the proposal to amend the European Insolvency Regulations (EIR) and reconsider whether these proposed changes may be considered as an appropriate means to the fight against the causes of economic crisis or just against its symptom.

6 Restructuring in the European Union

Beyond this, international private law and international procedural legislation also need to be taken into consideration in the review. The same applies for the UNCITRAL model law 2011 on cross-border insolvencies[25] taken from this. These key national and European

[23] For further readings see: "Diskussionsentwurf des Bundesministeriums der Justiz – Stand 3.1.2013".

[24] EUROPEAN PARLIAMENT, Report on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM(2012)0744 – C7-0413/2012 – 2012/0360(COD) dated December 20th 2013. Explanatory Statement, p. 47.

[25] cf. http://unicitral.org/unicitral/en/unicitral-texts/insolvency/1997Model.html and (...)/2011Model.html

aspects have been considered in an empirical research carried out on the basis of a comparative legal study on the evaluation of the Regulation in 26 Member States which was carried out by the Universities of Heidelberg and Vienna with the support of a network of national reporters[26], a comprehensive questionnaire[27] addressing factual and legal questions concerning the Insolvency Regulation[28] as well as further studies and consultations for an impact assessment of an amendment of the Regulation[29].

With this proposal for a regulation of the European Parliament and Council (presented on 12 December 2012) the intention is also to amend Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (hereinafter referred to as European Insolvency Regulation or EIR), in force since 31 May 2002. The European Parliament has addressed its position on the proposal for its regulation of the European Parliament and of the Council amending Regulation (EC) No 1346/2000 on insolvency proceedings (COM (2012) 2014 - C7-0413 / 2012 - 2012/0360 (COD) on February 5th 2014. In this it is also necessary to address its areas of concern.

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[26] HESS/OBERHAMMER/PFEIFFER, Study for an evaluation of Regulation (EC) No. 1346/2000 on Insolvency Proceedings; published on the Europa site of DG JUSTICE at http://ec.europa.eu/justice/civil/document/index_en.htm

[27] The questionnaire is available at http://www.ipr.uni-heidelberg.de/InsReg.

[28] External Evaluation of Regulation No. 1346/2000/EC on Insolvency Regulation JUST/2011/JCIV/PR/0049/A4, Introduction, Page 1.

[29] A study is published on the Europa site of the DG JUSTICE at http://ec.europa.eu/justice/civil/document/index_en.htm

and a statistical overview of the replies received through the IPM tool has been published at
http://ec.europa.eu/yourvoice/ipm/forms/dispatch?userstate=DisplayPublishedResults&form=Insolvency

7 Scope of the European insolvency regulation

With this European Insolvency Regulation the European member states have created the first specification for the co-ordination and drafting of cross-border insolvency proceedings, binding upon the European single market with the exception of Denmark[30]. It applies whenever the debtor has assets or creditors in more than one Member State, irrespective of whether he is a natural or legal person[31]. The Regulation determines which court has jurisdiction to open insolvency proceedings and ensures the recognition and enforcement of the ensuing decision throughout the Union[32].

Ten years after coming into effect, the critical points that have emerged during its practical application have revealed the necessity of examining the application of this regulation and amending it accordingly. In particular, regulations should be foreseen here to avoid "restructuring migration", also known as "forum shopping", the prohibition of legal misuse and concepts for both out of court and judicial restructuring and insolvency options and practical co-ordination of proceedings between so-called primary and secondary insolvencies, in order to avoid collisions to the detriment of the creditors and enable this goal to be achieved.

[30] Denmark does not participate and has a special regime for judicial co-operation under the Treaty on the Functioning of the European Union.

[31] Exceptions are insurance undertakings, credit institutions, investment undertakings, which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings. Furthermore, issues outside the EIR's scope are covered by national law.

[32] EUROPEAN COMMISSION. COM(2012) 743 final, Page 3.

8 Objectives

Regulation at Community law level should be targeted in order to realise these objectives.

8.1 Applicability of the insolvency act

Thus far the European insolvency act has applied neither for national proceedings, which foresee the restructuring of a company in advance of insolvency (pre-insolvency proceedings), nor for combined (hybrid) proceedings, in which the debtor continues to run the company (debtor-in-possession-management/ -proceedings[33]). Such proceedings have recently been introduced in a number of member states[34] (including in Germany, with the ESUG[35] and in Slovakia[36] with the amendment to

[33] Sometimes also referred to as "self-administration proceedings".

[34] An overview of national pre-insolvency proceedings and self-administration proceedings can be found in Section 2 of the Commission Report of 12/12/2012 on the assessment of Council Regulation (EC) No. 1346/2000 on insolvency proceedings.

[35] Sec. 270 and 270a of the German Insolvency Act enhance the debtor-in-possession proceedings (DIP) ("Eigenverwaltung") and sec. 270b of the Insolvency Act provides for protective shield proceedings ("Schutzschirmverfahren"), both amended by the Act on facilitation of the restructuring of companies in the version of 01/03/2012 (ESUG). Nevertheless, Annex A of the EIR includes "Insolvenzverfahren" (insolvency proceedings) and, therefore, also DIP-proceedings. However the new proceeding "Schutzschirmverfahren" was not listed in the Annex of the Regulation as it does not qualify as an insolvency proceeding in the sense of Article 1 (1) EIR: it applies at the pre-insolvency stage and is aimed at the preparation of insolvency proceedings (i.e. the elaboration of a restructuring plan). For this purpose the (COM(2012)0744 – C7-0413/2012 – 2012/0360(COD) shall be amended to: Amendment 69 Proposal for a regulation Article 1 – point 51 a (new) Regulation (EC) No 1346/2000 Annex C – Deutschland: "(51a) In Annex C, the section entitled "Deutschland" is amended as follows: (...) -*included at the end*- ***"- Vorläufiger Sachwalter".***

[36] There are no hybrid- or pre-insolvency proceedings in **Slovakia**, at the time of the empirical research, see Annex I of the National Reports (in tabular form), (JUST/2011/JCIV/PR/0049/A4 – External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings, Q4, Page 43. Also according to the Survey by bnt Attorney-at-law in Central and Eastern Europe, which was prepares based on the law in effect on June 30th 2013, there is no such restructuring instrument like the German debtor-in-

the insolvency law effective as of 1 January 2012), as it is assumed that this enhances the outlook for a successful corporate restructuring[37]. The proposal and the temporary amendment hereto[38] extends the scope of the Regulation by revising the definition of the "insolvency proceedings" to include hybrid and pre-insolvency proceedings[39] in its art. 1 (1). Moreover a new definition of the "debtor in possession"[40] shall be included in art. 2 point (ba). This opens the scope to proceedings which do not involve a liquidator[41] but in which the assets and affairs of the

possession management (also known as "self administration"). The same applies to the national law in the **Czech Republic**, where the Act on insolvency (Act. No. 182/2006 Coll.) does not contain such an instrument of reorganisation. Nor exists such an institution under the **Hungarian** Bankruptcy and Liquidation Proceedings Act No. 49 of 1991. There is only a pre-evaluation procedure on the insolvency of the debtor company but this is an integral part of the insolvency procedure. However under the **Polish** Insolvency Act of February 2003 with further amendments, the court supervisor supervises the activities of an entrepreneur (debtor) that manages the property by itself (see rehabilitation proceedings covered by Art. 492-521 of the BRL).

[37] EUROPEAN COMMISSION. COM(2012) 744 final, Grounds point 1.2 Page 2.

[38] According to the European Parliament legislative resolution of 5 February 2014 on the proposal for a regulation of the European Parliament and the Council amending Council Regulation (EC) NO 1346/2000 on insolvency proceedings (COM(2012)0744 – C7-0413/2012 – 2012/0360(COD). See Amendment 1 Proposal for a regulation Recital 3: "(3) The scope of Regulation (EC) No 1346/2000 should be extended to proceedings which promote the rescue of a debtor ***in severe financial distress*** in order to help sound companies to survive and give a second chance to entrepreneurs. It should notably extend to proceedings which provide fort he *restructuring of a debtor at a pre-insolvency stage or which leave the existing management in place.* The Regulation should also cover those proceedings providing for a debt discharge of consumers and self-employed persons which do not fulfil the criteria of the current instrument."

[39] EUROPEAN COMMISSION. COM(2012) 744 final, Page 5.

[40] (COM(2012)0744 – C7-0413/2012 – 2012/0360(COD): Amendment 18 Proposal for a regulation Article 1 – point 21 Regulation (EC) No 1346/2000 Article 2 – point b a (new): "(ba) ***"debtor in possession" means a debtor in respect of whom insolvency proceedings have been opened which do not involve the complete transfer of the rights and duties to administer the debtor's assets to an insolvency representative and where the debtor therefore remains at least partially in control of his assets and affairs."***

[41] (COM(2012)0744 – C7-0413/2012 – 2012/0360(COD): See Amendment 3 Proposal for a regulation Article 1 – point 7 Regulation (EC) No 1346/2000 Recital 9 a: "(9a) The

debtor are subject to control or supervision by a court. The amendments would also bring the Regulation more in line with the approach taken by the UNCITRAL Model Law on cross-border insolvency[42].

8.2 Responsibility for the opening of insolvency proceedings

It is currently difficult to determine which Member State is responsible for the opening of insolvency proceedings. The most widely-accepted view is that responsibility for the opening of primary insolvency proceedings should lie with the Member State in which the debtor has its centre of main interest (Abb.: COMI), however, the application of this criterion proves difficult in practice. A definition is required here, in particular through the improper relocation of the centre of interest to more advantageous legal systems (so-called forum shopping for e.g. a quicker

scope of this Regulation should extend to proceedings which promote the rescue of a debtor ***in severe financial distress*** in order to help sound businesses to survive and give a second chance (...) Since ***those*** proceedings do not necessary entail the appointment of ***an insolvency representative,*** they should be covered by this Regulation if they *take place under the control or supervision of the court."*

[42] See footnotes 39.

discharge of debts) and the jurisprudence of the European Court of Justice in legal cases[43], such as "Interedil[44]" and "DekoMarty[45]".

The concept of the centre of main interest (COMI) will be maintained in art. 1 because it ensures that the case will be handled in a

[43] "Zaza Retail" ruling of 17/11/2011, Rs. C-112/10 in NZI 2012, 101 with comments from Mankowski on the permissibility of isolated territorial insolvency proceedings; "Rastelli" ruling of 15/12/2011, Rs. C-191/10 in NZI 2012, 147 with comments from Mankowski on responsibility for opening proceedings in the case of extension of the insolvency proceedings to cover a company with registered office in another member state, incorporating the general criteria of the centre of main interest (so-called COMI); "MG probud Gdynia" ruling of 21/01/2010, Rs. C-444/07 in ZIP 2010, 187 on the acknowledgement of foreign opening decisions.

[44] Ruling of 20/10/2011, Rs. C-396/09 on the refutation of the assumption that the centre of main interest of a legal entity is the place of his registered office; in conclusion the (German) Federal Court ruled on 01/12/2011 – IX ZB 232/10 in NZI 2012, 151, that the international responsibility for the opening of insolvency proceedings concerning the assets of a company with registered office abroad, which has ceased its business operations and not been wound up, depends upon where its main centre of interest lay at the time of cessation of its activities (Prof. Dr. Eckardt, University of Trier, Chair of International, European and Foreign Insolvency Law, on the reform of the EIR); "Eurofood/ Parmalat" ruling of 02/5/2006, Rs. C-341/04 in NZI 2006, 360 = ZIP 2006, 907 with comments from Knof/ Mock p. 911 = ZinsO 2006, 484 with comments from Poertzgen/Adam p. 505 (cf. possible summary at beck.online), on responsibility for opening proceedings, in particular to refute the assumption of EIR that the positioning at the registered office of the company as defined in the articles of association is to be maintained.

[45] Ruling of 12/02/2009, Rs. C-339/07 on international responsibility for applications for the annulment of insolvency proceedings, in particular for the bundling of proceedings before the court that has opened insolvency proceedings that are derived directly from the insolvency proceedings or in close contact with them – for example applications for the annulment of insolvency proceedings. According to this an administrator could bring an action for liability in insolvency law against a managing director and an action under the law of tort or corporate law against the same person, before the same court.

jurisdiction with which the debtor has a genuine connection[46,47]. In addition, a new recital[48] clarifies the circumstances in which the presumption that the COMI of the legal person is located at the place of its registered office can be rebutted; the language of this recital is taken from the "Interedil" decision of the Court of Justice of the European Union[49]. Besides the court should examine its jurisdiction ex officio prior to opening insolvency proceedings and specify in its decision on which grounds it based its jurisdiction[50]. Also courts opening insolvency proceedings have the jurisdiction for actions which derive directly from insolvency proceedings or are closely linked with them such as avoidance actions[51].

8.3 Secondary insolvency proceedings

In the following the co-ordination of primary and secondary proceedings are to be discussed, as the opening of secondary proceedings can hinder the efficient administration of the debtor's estate. With the

[46] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1346/2000, COM(2012) 744 final, Page 6.

[47]One has to consider that this idea might run counter to the aim of enhancing legal certainty and avoiding forum shopping.

[48](COM(2012)0744 – C7-0413/2012 – 2012/0360(COD): Amendment 6 Proposal for a regulation Article 1 –point 11 Regulation (EC) No 1346/2000 Recital 13 a: "(13a) The *"centre of main interest"* of a company or other legal person should *be presumed to be at the place of its registered office*. It should be *possible to rebut this presumption**, in particular*** if the company's central administration is located in another Member State than its registered office and a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interest is located in that other Member State."

[49] See footnotes 39 and 43.

[50] See footnote 49.

[51] EUROPEAN COMMISSION. COM(2012) 744 final, Page 7 and see the case-law of the CJEU in the „DekoMarty" decision *(vis attractiva concursus)* in footnote 35.

opening of secondary insolvency proceedings the administrator of the primary insolvency proceedings no longer has control over assets located in the other member state, which renders the disposal of a still-active company as a going concern[52] more difficult. In addition, secondary proceedings are also by nature liquidation proceedings, which make the successful restructuring of the insolvent company problematic[53].

The court seised with a request for opening secondary proceedings should be able, if so requested by the liquidator in the main proceedings, to refuse the opening or to postpone the decision(54) if such opening would be necessary to protect the interests of local creditors.[55]The proposal obliges the court seised with a request to open secondary proceedings to hear the liquidator of the main proceedings prior to taking its decision(56), in order to ensure that the judges are fully aware of any rescue or

[52] "Going concern" is a concept used primarily in accounting which directs accountants to prepare financial statements on the assumption that the business is not about to be liquidated over the next 12-months period.

[53] EUROPEAN COMMISSION. COM(2012) 744 final, Grounds point 1.2 Page 3 and 8 et sq.

[54](COM(2012)0744 – C7-0413/2012 – 2012/0360(COD): Amendment 43 Proposal for a regulation Article 1 – point 34 Regulation (EC) no 1336/2000 Article 29 a – paragraph 2: "2. Upon request by the insolvency representative in the main proceedings, the court referred to in paragraph 1 shall postpone the decision of opening or refuse to open secondary proceedings if the insolvency representative in the main proceedings provides sufficient evidence that the opening of such proceedings is not necessary to protect the interests of local creditors in particular, when the insolvency representative in the main proceedings has given the undertaking referred to in Article 18(1) and complies with its terms."

[55] This could, for example, be the case if an investor made an offer to buy the company on a going concern basis and that offer give more to the local creditors than a liquidation of the company's assets; see footnote 56.

[56](COM(2012)0744 – C7-0413/2012 – 2012/0360(COD): Amendment 42 Proposal for a regulation Article 1 – point 34 Regulation (EC) No 1346/2000 Article 29a – paragraph 1: "1. The court ***seised*** of a request to open secondary proceedings shall *immediately give notice* to the ***insolvency representative*** in the main proceedings and give him an *opportunity to be heard* on the request."

reorganisation options explored by the liquidator and are able to properly assess the consequences of the opening of the secondary proceedings[57]. The current requirement that secondary proceedings have to be winding-up proceedings shall be abolished. Consequently, courts will be obliged to cooperate and communicate with each other; moreover, liquidators will have to cooperate and communicate with the court in the other Member State involved in the proceedings[58]. It can notably be crucial to ensure a successful restructuring, e.g. concerning the approval of a protocol setting out a rescue plan[59]. The draft report also addresses the question of what happens if the insolvency representative is not complying with the undertaking and provides the local creditors the right to seek protection via a court order.[60]

8.4 Public announcement of insolvency proceedings and registration of claims

In the Member States in which insolvency proceedings are opened or in which a subsidiary of the insolvent company exists there is not currently an obligation to publish or register decisions regarding neither the opening of insolvency proceedings nor the lodging of claims. There is also no European Insolvency Register that would permit a search of national registers to be undertaken[61]. This inhibits the efficacy of cross-border restructuring and insolvency activities. Notwithstanding this, the German legislature has created the prerequisites for implementation at national level, in the form of an act on the publication of insolvency

[57] EUROPEAN COMMISSION. COM(2012) 744 final, Page 8.

[58] See footnote 39.

[59] See footnote 39.

[60] For instance by prohibiting removal from assets (Art. 29a (2b)).

[61] EUROPEAN COMMISSION. COM(2012) 744 final, Grounds point 1.2 Page 3.

proceedings on the internet (InsoBekV)[62]. Other Member States have not adopted such requirements[63,64]. However, judges need to be aware whether proceedings have already been opened in another Member State as well as creditors or potential creditors need to be aware that proceedings have commenced[65]. The different national habits call for the creation of an EU registry which enables creditors and courts to determine whether or not insolvency proceedings have been opened in another

[62] A publicly available register can be found at http://www.insolvenzbekanntmachungen.de, according to sec. 102 § 5 (2) EGInsO, only regarding an establishment in Germany; publication in the land register is governed by sec. 102 § 6 EGInsO, but this publication is not mandatory.

[63] There was no central point registering insolvency proceedings in Slovakia at the time of the empirical research. See Annex I of the National Report (JUST/2011/JCIV/PR/0049/A4 – External Evaluation of Regulation No. 1346/2000/EC, Q 39 Page 388. However, **Slovakia** publishes decisions in an insolvency register accessible online to the public nowadays (Insolvency Register – Register upadcov: http://insolv.justice.sk/). For Commercial bulletin – Obchodny vestnik: http://www.zbierka.sk/sk/obchodny-vestnik) See Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 1346/2000, Page 16.

[64] **Czech Republic** Insolvency register may be found under Insolvency register (insolvencni rejstrik), electronically maintained by the Ministry of Justice: https://isir.justice.cz/isir/common/index.do . **Hungary:** The fact of opening proceedings may be published in the Corporate Gazette („Cegközlöny“) / „Commercial register“ and is limited to Hungary. In practise the name of the enterprise becomes a supplementary “f.a.“ meaning “under bankruptcy“ or “cs.a.“ meaning “under restructuring“. **Poland:** Until 2013 there was no national insolvency register, however the opening of bankruptcy proceedings is currently published in the Court and Commercial Gazette (Monitor Sadowy i Gospodarczy, “MSiG“) and an announcement in a “daily newspaper of local circulation“ (Art. 53 I of the BRL). Transparency shall be ensured by the following aspects: a) affixes to company names “w upadlosci likwidacyjnej“ meaning “under insolvency aiming at liquidation of the debtor“ or “w upadlosci ukladowej“ meaning “under insolvency aiming at reaching a settlement“. For further details read the survey by the Universities of Vienna and Heidelberg and bnt attorneys-at-law as of June 30th 2013.

[65] EUROPEAN COMMISSION. COM(2012) 744 final, Page 3.

Member State. Such a registry embedded in the e-justice portal is vital in order to enhance publicity and transparency.

Certain minimum information[66] relating to the insolvency proceedings have to be published in an electronic register available to the public free of charge via the internet[67]. The proposal provides for the establishment of a system for the interconnection of national registers which will be accessed via European e-justice portal[68]. The interconnection of national registers will ensure that a court seised with a request for opening insolvency proceedings will be able to determine whether proceedings relating to the same debtor have already been opened in another Member State; it will also enable creditors to find out such information as well as which powers the liquidator has, if any[69]. In order to facilitate these proceedings two standard forms, available in all official languages of the EU, will be introduced by way of implementing act, one for the notice to be sent to creditors and the other for the lodging of claims[70]. Foreign creditors have at least 45 days following publication of the notice of opening of proceedings in the insolvency register to lodge their claims, irrespective of any shorter periods applicable under national law[71]. Finally, legal representation will not be mandatory for lodging a claim in a foreign jurisdiction, thereby reducing costs for creditors[72].

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[66] Such as the court opening the insolvency proceedings, the date of opening and for main proceedings, the date of the closing proceedings, the type of proceedings, the debtor, the liquidator appointed, the decision opening proceedings and the decision appointing the liquidator, if different, also the deadline for lodging claims.

[67] See footnote 39.

[68] See footnote 67.

[69] EUROPEAN COMMISSION. COM(2012) 744 final, Page 9.

[70] See footnote 67.

[71] See footnote 70.

[72] See footnote 70.

8.5 Insolvency of members of a corporate group

Following on from this, it should be noted that the insolvency act contains no specific terms for the insolvency of multi-national enterprise groups and takes the assumption of individual insolvency. As a consequence, individual insolvency proceedings need to be opened for each member of the corporate group and the proceedings need to be conducted wholly independently of one another. It is necessary to determine the extent to which a duty to co-ordinate aids the collaboration between the respective administrators and the insolvency courts in primary and secondary proceedings in the case of insolvency proceedings against members of the same corporate group. Moreover, in such proceedings the administrator could receive authorisation to apply for the suspension of the other proceedings and to propose a restructuring plan for the members of the corporate group against which insolvency proceedings have been opened.[73] Otherwise, the lack of specific provisions for group insolvency often diminishes the prospects of successful restructuring of the group as whole and may lead to a break-up of the group in its constituting parts[74].

[73] EUROPEAN COMMISSION. COM(2012) 744 final, Grounds point 1.2 Page 6 and 10.

[74] EUROPEAN COMMISSION. COM(2012) 744 final, Page 3

The amended proposal creates a specific legal framework[(75),(76)] to deal with the insolvency of members of a group of companies while maintaining the entity-by-entity approach which underlies the current Insolvency Regulation[77]. An obligation to coordinate insolvency proceedings relating to different member of the same group of companies shall be introduced by obliging the insolvency representative and the courts involved to cooperate with each other in a similar way as this is proposed in the context of main and secondary proceedings[78]. Insolvency representative should notably exchange relevant information and cooperate in the elaboration of the rescue or reorganisation plan where this is appropriate[79]. In particular, the insolvency representative has a right to be heard in other proceedings concerning another member of the same group, to request a stay of the other proceedings and to propose a reorganisation plan in a way which would enable the respective creditors' committee or court to take a decision on it[80]. Notwithstanding the

[75](COM(2012)0744 – C7-0413/2012 – 2012/0360(COD): Amendment 55 Proposal for a regulation Article 1 – point 45 Regulation (EC) No 1346/2000 Article 42 c: "An insolvence representative appointed in insolvency proceedings concerning a member of a group of companies shall cooperate and communicate with any court before which a request fort he opening of proceedings with respect to another member of the same group of companies is pending or which has opened such proceedings to the extent such cooperation is appropriate to facilitate the coordination of the proceedings is not incompatible with the rules applicable to them and does not entail any conflict of interests. In particular, the insolvency representative may request information from that court concerning the proceedings regarding the other member of the group or request assistance concerning the proceedings in which he has been appointed."

[76] For the moment, the Commission is not following the recommendation of Parliament but focuses on enhancing the coordination and communication of different insolvency proceedings.

[77] EUROPEAN COMMISSION. COM(2012) 744 final, Page 9.

[78] See C. 3. Coordination of main and secondary proceedings as well as footnote 68.

[79] The possibility to cooperate by way of protocols is explicitly mentioned. See footnote 68.

[80] See footnote 39.

foregoing, the proposal does not intent to prevent the existing practice in relation to highly integrated groups of companies to determine that the COMI of all members of the group is located in one and the same place and, consequently, to open proceedings only in a single jurisdiction[81].

9 Summary to Chapter

The existing provisions of the European Insolvency Regulation No. 1346/2000 apply sufficiently and smoothly within the European Union and the respective proposals will strike the right balance. However, Parliament's observation in the report, namely that "there are certain areas of insolvency law where harmonisation is worthwhile and achieveable" – as outlined before -, is still valid today. It cannot be neglected that "disparities between national insolvency laws create competitive advantages or disadvantages and difficulties for companies with cross-border activities which could become obstacles to a successful restructuring of insolvent companies.[82]A modernised EU Insolvency Law will shift the focus from merely winding a company up towards giving businesses a second chance. The focused objectives to provide companies, their proprietors and creditors with specific instruments and mechanism that help in the managing of the company's crisis situation, to indicate a legal basis for "restructuring" or at least to limit the risks associated, should be achieved by the proposed amendments. In the next step now will be voted in the so-called trialogue between the Council, the Commission and the Parliament on the final version of the EIR all likelihood. This may be eagerly awaited.

[81] EUROPEAN COMMISSION. COM(2012) 744 final, Page 10.

[82]EUROPEAN PARLIAMENT, Report on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM(2012)0744 – C7-0413/2012 – 2012/0360(COD) dated December 20th 2013. Explanatory Statement, p. 47.

10 Conclusion

This means that there will be a „second“ season for the construction and the development of European insolvency law, which will also influence the national insolvency regulations within the internal market. In addition it is necessary to reveal the possible impacts of these amendments on the EIR for the European Quartet. Modern insolvency law in the V4 states should help sound companies to survive and encourage entrepreneurs to get a second chance. It should ensure that procedures are speedy and efficient, in the interest of both debtors and creditors, and should help safeguard jobs, help suppliers to keep their customers, and owners to retain value in viable companies.[83] To put ist all in a nutshell: In its relation with the wider world, the European Union and the European Quartet as part of the EU shall uphold and promote its values and interests as aforementioned, in particular to contribute in a suitable and development of free and fair trade to the benefit of its citizens.

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[83] EUROPEAN COMMISSION. COM(2012) 742 final, Page 3.

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INFLUENCE BETWEEN LEGAL FORM OF BUSINESS AND TAXATION FORM

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Abstract:

It's simple when you want to start the business in Poland, you must consider which legal form of business you have to choose. Why? Because it's has big influence to which form of public tribute (income tax) you will have to pay. This article may helps, people how want to start doing business in Poland which legal form is the most suitable to them and which taxation form is the less troublesome.

Key words:

Business; Tax; PIT; CIT; Taxation form;

JEL classification: K34

1 Introduction

The selection of a taxation form of business activities run in Poland is determined by many factors, the most important of which include: object of business activities (among others, trade, services, production), amount of revenues, and the organizational and legal form of run activities (i.e. one-man business, partnership, corporation). They have significant impact on tax burden on business activities. Therefore,

before commencing business activities on the territory of Poland, it is required to analyze in a reliable manner the above aspects, to choose the most optimal (least troublesome) taxation form. In the paper I will try to present taxation forms permitted by Polish for particular organizational and legal forms.

2 Taxation forms

Upon Poland's accession to the European Union, citizens of other member states can undertake and perform business activities in Poland on the same terms as the citizens of Poland.[1] According to this regulation, people with status of a citizen of member country can establish one-man businesses, civil companies and companies operating under the commercial law within the Republic of Poland.

In the Polish legal system taxation of the income obtained from non-agricultural business activities is governed by three legal acts: the Act on personal income tax [2], the Act on lump sum income tax on some revenues earned by natural persons[3], the Act on Corporate Income Tax[4]. The application of the regulations of the above acts is determined by the organizational and legal form of business activities. Each of acts determines the entities subject to particular taxation forms.

[1] Article 13 of the Act of 2 July 2004 on the freedom of economic activity (Journal of Laws 2013.672. consolidated text as amended) – further u.s.d.g.

[2] Act of 26 July 1991 on personal income tax (Journal of Laws 2012.361. consolidated text as amended) – further u.p.d.o.f.

[3] Act of 20 November 1998 on lump sum income tax on some revenues earned by natural persons (Journal of Laws 1998.144.930 as amended) – further u.z.p.d.o.f.

[4] Act of 15 February 1992 on Corporate Income Tax (Journal of Laws 2011.74.391 consolidated text as amended) – further u.p.d.o.p.

2.1 Tax scale

Natural persons earning income from business activities have the largest spectrum of possibilities to select optimal taxation form.

The first of them, with the broadest scope of application, is taxation on the general principles, since each taxpayer can pay income tax on the general principles. The selection of this form of taxation involves keeping accounting documentation in the form of accounting books or Tax Revenue and Expense Ledger. The tax rate is 18 and 32%; it is a progressive rate. Using this taxation form enables deducting tax deductible costs and using any deductions (both from tax and income) and reliefs provided for by law. In the case of the general principles, advance payments for income tax may be paid monthly, quarterly or (applies to minor taxpayers) in a simplified manner – the taxpayer pays monthly advance payments calculated at the tax rates binding in a given fiscal year on the basis of 1/12 of income shown in the annual return for the preceding tax year or in the tax year preceding given tax year or in the tax year preceding given tax year 2 by years[5]. However, we should remember that this simplified form may be used only by minor taxpayers, namely entities whose sales revenues value (along with amount of input Value Added Tax) did not exceed in the previous year tax expressed PLN equivalent of EUR 1,200,000[6].

The general principles, as mentioned earlier, may be chosen by natural persons always regardless of the object of activities and organizational and legal form. They can be used by entrepreneurs running one-man business, under civil partnership, or being partners in private companies operating under the commercial law. However, we should remember that this form of taxation is the most beneficial in the case

[5] Article 44 of u.p.d.o.f.

[6] Article 5a item 20 of u.p.d.o.f.

when, in connection with high revenues, the company generates high deductible costs. Otherwise, it may prove that tax costs will increase significantly when, in the course of a tax year, entrepreneur's income exceeds PLN 85,528.00. Then, the entrepreneur will have to pay tax at the rate of 32% on surplus of income earned above the mentioned amount[7].

2.2 Flat tax

The form of taxation of income from non-agricultural business activities at the flat rate was introduced in 2004. An important feature of this taxation form is 19% fixed tax rate regardless of the amount of earned income[8]. Like in the case of the general principles, it enables deducting incurred costs from revenue earned in the fiscal year. An unquestionable defect is, on the other hand, lack of the possibility of using reliefs and most deductions and the lack of tax-free allowance.

It should be pointed out that not always the taxpayer will have the possibility of selecting flat tax, because this form of taxation cannot be used by taxpayers who, in the year preceding the tax year or in a given tax year, performed or perform activities covered by the scope of the services provided for former employer, performed previously under employment relationship or co-operative employment relationship[9]. In addition, taxation of income earned from business activities with the flat rate excludes the possibility of joint settlement with a spouse[10].

Similarly as in the general principles, the flat tax can be selected by people conducting each type of economic activities. The same

[7] Article 27 of u.p.d.o.f.

[8] Article 30c of u.p.d.o.f.

[9] Article 9a section 2 and 3 of u.p.d.o.f.

[10] Article 6 section 8 of u.p.d.o.f.

principles relate to deducting tax deductible costs, methods of paying advance payments for income tax (monthly, quarterly or using simplified method) and keeping accounting documentation[11]

The tax paid at the flat rate is favorable in the situation when the entrepreneur's income exceeds clearly the amount from which the applicable tax rate is 32%. Higher income implies greater difference in the amount of tax income between the tax scale and the flat tax for the benefit of this second taxation form. The only exception is a situation when the entrepreneur is a single parent, or when spouse earns low income because, in the case of scale, there is a possibility to settle jointly, which may reduce significantly income earned on business activities[12]. In this situation, it is required to calculate precisely what will be more beneficial: tax scale or flat tax.

2.3 Lump sum taxation forms.

A separate act covers lump sum taxation forms, which include lump sum on recorded revenues and fixed amount tax[13]. The lump sum taxation form is not obligatory. In the case of lump sums, the range of entities that can use them is largely limited, both due to object of activities, amount of earned revenues and the legal and organization business form. Lump sum on recorded revenues may be taxable revenues earned from non-agricultural business activities of natural persons also when activities are conducted in the form of civil partnership and general

[11] See 2.1 General principles.

[12] Article 6 section 2 and 4 of u.p.d.o.f.

[13] Article 2 section 1 of u.z.p.d.o.f.

partnership of natural persons[14]. In addition, revenues taxed in a lump sum manner are not connected with revenues from other sources[15].

Lump sum on recorded revenues earned under conducted business activities is possible in the case when, in the year preceding the tax year, revenues from these activities, run independently, did not exceed the equivalent of EUR 150 000, or when activities are conducted in the form of civil partnership or general partnership of natural persons – the sum of revenues of the partners of the company did not exceed in the previous tax year equivalent of EUR 150 000. Furthermore, selection of lump sum on recorded revenues earned under conducted business activities is possible also in the case when activities are started in the fiscal year, subject to non-application of taxation in the case of fixed amount tax – regardless of the amount of revenues. In this case, taxation in the form of lump sum on recorded revenues is applied from the date of earning first revenue.[16]

The amount of tax is calculated on revenues (without costs) from sale of goods or services. The disadvantage – like in the case of fixed amount tax – is lack of possibility to deduct costs of run business activities and the need to pay tax also in a situation where costs of activities surpass revenues (loss).

Rates of lump sum on recorded revenues and object of business activities, to which they apply, are listed by the employer in the Act in enumerative manner. Rates depend on the object of run activities and are as follows:

[14] Article 6 section 1 of u.z.p.d.o.f.

[15] Article 3 of u.z.p.d.o.f.

[16] Article 6 section 4 of u.z.p.d.o.f.

- 20% on revenues earned in the case of freelance professions (among others, doctors, dentists, vets, midwives, nurses)
- 17% on revenues from provision of some intangible services, among others, agency in wholesale trade, hotels, passenger car rental,
- 8.5% on revenues from, among others, service activities, including on revenues from gastronomic activities in the scope of sale of beverages with the alcohol content above 1.5%; on revenues under contract for rent, subrent, lease, sublease or other similar contracts,
- 5.5% on revenues, among others, from manufacturing activities, construction works,
- 3.0% on revenues from, among others, service activities with regard to trade and gastronomic activities, except for revenues of sale of beverages with the alcohol content above 1.5 %, on interest on funds on bank accounts kept in connection with the performed business activities[17]

It is necessary to emphasize that the first two rates are of penal character, because taxpayers running freelance activities, earning high revenues, may choose e.g. taxation rate 19% (flat tax) and pay tax on income (namely revenues reduced by tax deductible costs), and not from revenue, regardless of incurred costs. An analogous situation applies to 17% lump sum rate. For this reason, the fact that the legislator introduced these rates is curious.

Taxpayers who benefit from the lump sum taxation form with are required to keep and store evidence of purchase of goods, keeping the list of fixed assets and intangible assets, records of equipment and revenue

[17] Article 12 section 1 of u.z.p.d.o.f.

records separately, for each tax year [18]. Taxation in the lump sum form like in the case of flat tax results in a loss of right to joint settlement with spouse, and in a manner determined for single parents[19].

The basis for taxation is revenue without reducing by tax deductible costs. For this reason, the described taxation form is favorable for the taxpayers who do not bear high administrative costs related to running business activities, and the costs which they have to sustain are compensated by low tax rate. Taxation in the form of lump sum on recorded revenues should be recommended particularly to entrepreneurs performing mainly building services and retail trade services.

Additionally, it should be pointed out that the legislator provided the possibility of resigning from lump sum during the tax year by obtaining revenues for provision of services excluded from lump sum taxation on recorded revenues (which is not possible in the case of the general principles or flat tax)[20]. It may be a way to reduce tax burdens, for instance, in the situation when the entrepreneur plans an investment whose costs in the long run can decrease the amount of tax obligations incurred by the entrepreneur in the case of change in the form of taxation to the general principles.

Fixed amount tax is the second lump sum taxation forms. It is used mainly by taxpayers who run activities in the field of to provision of services for natural persons who do not run business activities[21]. In this case, the taxpayer is exempted from the obligation to keep records for the purposes of the income tax, submission of tax returns and payment of

[18] Article 15 section 1 of u.z.p.d.o.f.

[19] Article 6 section 8 of u.p.d.of.

[20] See Article 8 of u.z.p.d.o.f.

[21] Article 23 section 1 of u.z.p.d.o.f.

advance payments for income tax[22], since the amount of tax is determined in the form of decision on the amount of tax, issued by Head of the Tax Revenue Office competent for the place of business[23].

Rates of fixed amount tax for different kinds of activities are included in the Appendix to the Act on lump sum income tax. They are specified in amounts and are subject to annual increase corresponding to increase in the consumer price index in the first three quarters of the year preceding the tax year, decreased by 6.7% as compared to the same period of the previous year[24].

Their amount depends on:

- type and scope of conducted activities,
- number of employees,
- number of inhabitants of towns, where business activities are conducted.

Taxation in the form of fixed amount tax is effectuated at request of the taxpayer submitted in the return, according to a determined model[25]. Fixed amount tax can be chosen by entrepreneurs who run one-person business or activities in the form of a civil partnership[26].

Fixed amount tax is not one of the most popular taxation forms; most often it is applied by people who run activities within smaller towns. Tax is paid regardless of whether or not activities bring income or loss.

[22] Article 24 section 1 of u.z.p.d.o.f.

[23] Article 30 section 1 of u.z.p.d.o.f.

[24] Article 54 section 1 of u.z.p.d.o.f.

[25] Article 29 section 1 of u.z.p.d.o.f.

[26] Article 25 section 5 of u.z.p.d.o.f.

2.4 Corporate income tax

The last described form of taxation on income earned from business activities is corporate income tax. As the name indicates, this form covers entities who have legal personality, but not only. The nature of this papers orders to indicate the most important organizational and legal for of partnerships which are covered by this form of taxation. They include corporations, companies of the commercial law (limited liability companies and joint-stock companies) and limited-joint-stock company[27]. These are the most advanced organizationally forms of business activities that are used to run large-scale business. These companies are obliged to keep full accounting books, namely to record all economic operations which take place throughout the whole period of activities of a given entity.

The corporate income tax rate is 19%[28]. The object of taxation is income regardless of source of its origin[29]. Like in the case of individual income tax, the income is surplus of revenues over tax deductible costs, earned in a given fiscal year[30]. What is interesting, the tax year in entities subject to CIT must be consistent with the calendar year, if the taxpayer decides otherwise and reports it to a competent Head of the Tax Revenue Office, then the tax year is the period of subsequent 12 calendar months (e.g. from April 2014 to the end of March 2015)[31]. The tax return concerning the amount of income (loss) earned in the fiscal year is submitted by Taxpayers until the end of the third month of the following

[27] Article 1 section 3 of u.p.d.o.p

[28] Article 19 section 1 of u.p.d.o.p

[29] Article 7 section 1 of u.p.d.o.p

[30] Article 7 section 2 of u.p.d.o.p

[31] Article 8 section 1 of u.p.d.o.p

year[32]. During the tax year, taxpayers and payers and corporate income tax do not have to submit tax returns but are obliged to pay advance payments. In addition, they have a possibility of simplified settlement (1/12 of due tax reported in the annual return, submitted in the year preceding the tax year)[33]. In the case of small taxpayers (to EUR 1,200,000 of revenue) and taxpayers who started activities, advanced payments for CIT may be paid quarterly[34].

Running business activities in the form of companies mentioned in the previous paragraph will make the profit constituting tax income be taxed twice at the time of its payment to the partners or shareholders. First, at the level of a company and then at the level of partners. It increases tax burdens to a considerable extent. For this reason, activities in the form of corporations or limited-joint stock companies are recommended in a situation when revenues from activities exceed significantly the maximum level of revenues of a minor taxpayer of EUR 1,200,000. In addition, administrative costs in the case of these companies are much higher than in the event when activities are run as one-person business or civil company. However, their popularity results from limited liability of partners and shareholders to the amount of submitted contributions. Apart from one exception when partners comprise the board, since the board is responsible for obligations incurred jointly and severally with the company.

3 Conclusions

To sum up, the range of possibilities is quite large when it comes to appropriate selection of the form of taxation and organizational and

[32] Article 27 section 1 of u.p.d.o.p

[33] Article 25 section 1 and 6 of u.p.d.o.p

[34] Article 25 section 1b of u.p.d.o.p

legal form. For this reason, it should be re-emphasized that before undertaking business activities in Poland we should analyze thoroughly how to organize business so as not to bear too high costs already at the start. It is also important to consider the scale of future business in terms of planned revenues or the object of activities. The simpler the business and the more requiring minor own expenditures, the easier the selected organizational and legal form and taxation form (particularly at the first stage of developing business activities). Along with the development and growth in revenues, we may consider transformation into another organizational and legal form. However, in the case when we have large investment capital, and business is to be run on e.g. all-Polish scale, it is a definitely better organizational and legal form than capital partnerships.

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DISTINCTIVENESS AND LANGUAGE IN TRADEMARK LAW

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Abstract:

Language matters bear high importance in trademark law, since the meaning of words or combinations of words may be the key to ensure marks to be protected shall have eligible distinctiveness for protection; at the same time, linguistic meanings of marks may be the obstacle before protection in case of lacking distinctiveness compared against the relevant list of goods and services and also in case of other relevant issues (e.g. being contrary to public policy or to accepted principles of morality).

Key words:

Trademark; Trademark law; Language; Distinctiveness;

JEL classification: K10

1 Introduction

The connection between trademark distinctiveness and language matters is of high significance in inquiring the nature of distinctiveness of marks. The reason for this significance is, that interpretation of non-

linguistic symbols (figures, lines, colors, etc.) is much more bound and culture-independent than it is of linguistic symbols.

The recognition of a solely figurative mark usually does not require special knowledge that depends on one's culture and, many times in consequence of that, geographical territory. On the contrary, verbal marks – except for the marks that can not be connected to specific languages, e.g. fabricated names – usually can not be recognized and interpreted without the knowledge of the given language.

In order to substantially inquire the 'language matter', it is essential to specify the scope of inquiry at first. The mark to be protected as trademark shall

- apparently contain a verbal part and
- this verbal part shall be dominant regarding the mark as a whole (however, the verbal part can be even exclusive).

In the opposite perspective, the question of distinctiveness depending on the language matter does not have any significance if

- the mark to be protected does not have any verbal parts
- or the mark is complex enough to contain the verbal part as not being dominant regarding the mark as a whole.

As for the latter, beer bottle labels[1] are good examples, since they specifically contain the word 'beer' (or the equivalent word from different languages) that refers to the nature of the product and is merely descriptive, but they also may have many further figurative and verbal components. In consequence of this and the fact that marks shall be of

[1] E.g. 'Borsodi sör' domestic figurative color trademark, Reg. no. 188407, or community figurative trademark 'Carlsberg' Reg. no. 001241025.

distinctive character as a whole, the lack of distinctiveness would not be raised against protection.

2 Relevant regulation on descriptive character

Regulations on trademarks regardless their territorial effect strictly expect marks to be of distinctive character in order to be capable of being registered as trademarks. However, this distinctive character is not more closely defined by law, namely there is no legal definition of being distinctive, on the contrary: the lack of distinctive character is defined as absolute legal object to registrability with also mentioning the most typical cases thereof.

The Hungarian Act No. 11 of 1997. on Trademarks and Protected Designations of Origin states[2] that all marks devoid of distinctive character are excluded from trademark protection, especially if the mark in question consists only of signs or indications which may serve in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service; or have become customary in the current language or in the bona fide and established practices of the trade.

According to The Regulation on Community Trademark (henceforth referred to as CTMR) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade[3].

This complex definition is identified and used as ’descriptive character’ in legal practice. It is clearly visible that legislators draw

[2] Article2. Par 2 a)

[3] Article 7, Par. 1. b

special attention to the fact that the lack of distinctiveness can be retraceable specifically to linguistic concerns.

3 Descriptive character in foreign languages

As a consequence, the linguistic concern also propound a geographical-territorial concern, too. Namely, different verbal marks can be qualified differently in various geographical-linguistic environment, regarding the registrability of marks. In other words, a mark has a distinctive character in one language and has not in another one.

With a simple example, almost every Hungarian word that serves as general description of a kind of goods or services (e.g. cipő – shoe, tej – milk, pékség – bakery, óra – watch) can hold a distinctive character in a trademark system of a state, and presumably in the community trademark system of the European Union (henceforth referred to as EU) as well, where the Hungarian language is not overall spoken and understood. Presumably neither the trademark authority inquiring the trademark application, nor foreign customers do not know the meaning of Hungarian words and so that the meaning might serves as a general description of a kind of goods or services. It is not hard to imagine either, that words, combinations of words, even sayings or slogans can be protected as trademarks in Hungary, since even if they are merely descriptive in other languages, neither the Hungarian Intellectual Property Office[4], nor Hungarian customers are not aware of the meaning of the words in question. So, the protection would most probably be granted, namely such marks appear to be without a definite meaning just like fabricated words. If someone applied for a trademark in Hungary for a verbal mark in e.g. Estonian or Maltese (not to mention even more

[4] This office has competence for all trademark administration in Hungary (http://www.sztnh.gov.hu/English/index.html)

‘exotic’ languages), where the given word would be of merely descriptive character in the given language, then presumably the absence of distinctiveness would not be raised against it as absolute grounds for refusal, despite the Hungarian equivalent thereof does not have any distinctive character.

The following shall stand here as examples. The mark *’The shoe shop’* („a cipőbolt” in Hungarian) is under national protection in Hungary under No. 209153. The list of goods or services contains only Class 25 (shoes)[5]. The mark *’Profi BAU’* (professional constructions, buildings in English and also the very same meaning in Hungarian, however it is of German origin) is national trademark No. 153119, with Class 6 (mass products made of metal, especially products to be used in building material industry) in the list of goods and services thereof. The mark ‘*NOTEBOOK STORE’* (notebook üzlet in Hungarian) in under national protection No. 198633 including Class 9 (a variety of equipments of computer engineering), Class 35 (commercial activities, especially retail and wholesale trade of computers, computer parts, other units of computer engineering and connecting hardware and software), Class 37 (installation and reparation of computing and office technology systems). The common attributes to the above mentioned trademarks is that they are protected as figurative marks, so the absolute ground for refusal that derives from the connection of descriptive verbal components and group of relevant goods and services may be avoided regarding the presence of figurative components.

However, national trademark No. 184585 ’New Garden’ (új kert in Hungarian) does not meet these conditions either. This mark has been granted protection as a mere word mark, namely in Class 9 (agricultural, horticultural, silvicultural goods and seeds, living animals, plants,

[5] In the Nice Classification class 25 stands for ’Clothing, footwear, headgear’, however the list of goods and services of this trademarks is restricted to shoes.

flowers, feed stuff for animals). This combination of words is merely descriptive regarding its nature, in the absence of figurative components it appears not to have any distinctive character concerning the list of goods and services thereof.

With regard also to the above examples, the significance of the English language shall be emphasized in this matter. These days the English language, at least in basic level, became so wide-known among the major part of customers, that they are more and more aware of the descriptive meaning of most English names of goods and services (e.g. shoes, shop). There is further trend in practice, where different goods and services do not even have any proper Hungarian names for them, but English names (e.g. notebook, coaching) thereof are used widely in the Hungarian language, as it is seen worldwide.

Thus, this phenomenon deserves extraordinary attention along the examination trademark applications. In case of application of marks in English shall be extendedly examined after incidental descriptive character, and that requires intensified attention from the examining officials. It is also revealed by the consequences of the below detailed Matratzen-case, however it tells the adventurous story of a German – not English – word in Spanish linguistic environment.

But who would be venturesome enough to check the lack of descriptive character, even among the relation of greater European languages? In the national trademark system it is relatively easy to refuse protection from a merely descriptive mark, since the examination shall cover one or – adding English – two languages. Descriptive marks in further – less known or mostly unknown – languages would most probably not sorted out. It is – knowing the conclusions drawn from the verdict by the Court of Justice of the European Union (henceforth referred to as European Court) in Matratzen-case – not even entirely unacceptable in practice. The Hungarian Trademark Act, namely and rightly, does not

raise such criteria that descriptive character (‘a mark become customary in the current language or in the practices of trade’) shall concern exclusively the Hungarian language in Hungary. At the same time, words and combinations of words unknown to Hungarian customers may have distinctive character even if they are of descriptive character regarding their literal – yet to Hungarian customers unknown – meaning. Eventually, they can be granted of protection as a kind of exception from the use of absolute refusal.

4 Distinctiveness concerning EU-languages

The situation with community trademarks – which protections are of course effective in the territory of Hungary – is not this simple. Though CTMR also defines descriptive character as an absolute ground for refusal, it is not to be examined regarding specific languages, either. However, institutions of the European Union have 24 official languages and many more languages are officially used in the territories of various member states (e.g. Basque in Spain, Frisian in Holland), and a registered community trademark shall be equally protected in the entire territory of this polyglot union of states. And even more languages are yet to be considered: the ones that are spoken by large communities in the territory of the EU and the said communities reside within the barrier of the EU in consequence of transitional or even long-term migration (e.g. Turkish or Albanian languages). In such a heterogeneous population it is practically impossible to properly put across the Article 7, Par. 1 d) of CTMR. Therefore, the problem described above in national legal environment can occur more frequently in the trademark system of the EU. As conclusions can be drawn from the verdict of the Matratzen-case, marks with descriptive character are connected mostly with the English language. The question is, that trademark applications on marks in less known languages of the EU (e.g. Hungarian, Slovenian or Latvian) and without

distinctiveness in the given language would make how much trouble before the Office of Harmonization for the Internal Market[6] (henceforth referred to as OHIM) or the European Court.

There is a further interesting matter, namely languages outside Europe shall also be taken into consideration in the globalising world. Conditions of international commerce expect the meeting of requirements that descriptive marks in e.g. Japanese or Chinese shall not be registered as trademarks. Without expecting any answers, the question can be raised: if a descriptive mark in question in Japanese (Chinese, Russian, etc.) is understood by the majority of Hungarian customers, would it not be proper to handle them similarly to descriptive marks in Hungarian or in English?[7]

5 Distinctiveness and the list of goods and services

When it comes to distinctiveness, the list of goods and services of trademarks must be mentioned, since distinctiveness can only be examined and discussed with the projection of the mark on the goods and services listed. Namely, words or combinations of words are not descriptive per se, but only regarded to specific goods and services.

The word ‘gas’ (gáz in Hungarian) is under national trademark protection No. 204700. Theoretically, if the trademark holder had applied for protection on Class 4 that covers also fuels (including engine fuels), the application had most probably been refused, since the word ’gas’ is obviously descriptive regarding such goods. However, this one is about well-known fashion brand ’Gas Jeans’, the shortest verbal trademark

[6] Trademark Office of the EU (http://oami.europa.eu/ows/rw/pages/index.en.do)

[7] Vida Sándor – Distinctiveness of words in foreign languages – The Matratzen-case before the European Court; Industrial Property and Copyright Review; Aug. 2007. edition

thereof, the list of goods and services cover Classes 14, 18 and 25 that contain overall various clothing, footwear and headgear. Regarding this group of goods, the word ‘gas’ is able to function as distinctive, since the linguistic interpretation thereof does not concern the list of goods and services covered by trademark protection (and the brand is usually indicated in the form of figurative marks on the goods of the trademark holder).

The ‘Rózsakert’ (rose garden in literal translation) national verbal mark with registry No. 159971 serves as another similar example. This word would most probably be not registered as trademark in Class 31[8], since it would be merely descriptive concerning most of the goods within the class. Though the list of goods and services thereof embraces Classes 16[9], 35[10], 36[11], 37[12], 41[13], that are nothing to do with neither roses, nor gardens. In this group of products, the combination of words ’rose garden’ can nearly be interpreted as fabricated words, that the distinctive ability thereof can not be argued in the scope delimited by the list of goods and services. Finally, the question how much the denotation ’rose garden’ as a brand is effective to attract customers of real-estate administration

[8] Grains and agricultural, horticultural and forestry products not included in other classes; live animals; fresh fruits and vegetables; seeds; natural plants and flowers; foodstuffs for animals; malt.

[9] Paper, cardboard and goods made from these materials, not included in other classes; printed matter; bookbinding material; photographs; stationery; adhesives for stationery or household purposes; artists' materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging (not included in other classes); printers' type; printing blocks.

[10] Advertising; business management; business administration; office functions.

[11] Insurance; financial affairs; monetary affairs; real estate affairs.

[12] Building construction; repair; installation services.

[13] Education; providing of training; entertainment; sporting and cultural activities.

services to the trademark holder, shall be left for the creativity of marketing experts.

Also the combination of words ’Babaváró’ (the closest translation would be expecting babies) met the criteria of trademark protection concerning printed matter, newspapers and mail order services, since the mark, though it is not fabricated or a linguistic invention, is able to distinguish, because the usual meaning of the combination of words does not concern the goods and services within the scope of protection.

6 Distinctiveness in judicial practice

In the Hungarian judicial practice, the trademark application on verbal mark ‘CAFEHAUS’ was refused on grounds of lack of distinctiveness. In the court’s opinion, customers instantly and without consideration identify this combination of words with one of the services listed among the desired goods and services[14]. The curiosity of this case is that ‘CAFEHAUS’ is not to be found precisely in any languages as the equivalent of ‘café’, since it is a compound of cafe (English) and Hause (German). Despite, the court judged that this unusual, foreign combination of words refers to café so much, that it qualifies as of descriptive character regarding the list of goods and services, so it can not be protected as trademark.

Neither could be registered as trademark the combination of words ‘Nosztalgia Fotó’ (literally translated nostalgic photo) on photographic services, since it exclusively refers to the kind, method or rendering of the very services.[15] The trademark application on verbal mark ‘*Network.hu’* had been refused with a reasoning saying that there is no sensible difference between the verbal components simply on the

[14] Capital Regional Court of Appeal, 8.Pkf.25338/2011.

[15] Supreme Court, Pfv.IV.20.521/2011.

whole and the combination of verbal components, there is no added value, and any of the services in the list are available in the internet. It expresses the essence of the internet and it is fabricated either, so to say it is merely descriptive regarding any services that are available in the internet[16].

The European Court dealt with the practical significance of distinctiveness and descriptive character in numerous "classic" verdicts, but these verdicts usually consider the descriptive character of words or combinations of words as given, separated from the question of their linguistic 'belongings'. In other words, they do not focus on the comparative examination of the descriptive character of marks in different languages. However, there is a – so far – only case, well-known as Matratzen-case that is closely connected to the very subject of this study.

In more details, in the case became well-known as Matratzen-case, the European Court measured the question whether a word descriptive in one language can be registered as trademark in a different country using its own language (where the word in question is not used otherwise). The background of the case is as follows. A Germany-based company called 'Hukla' obtained a national (namely Spanish) trademark protection on the word 'Matratzen' in Spain in 1994. This word means mattress in German, and also has similar forms and meanings in both English and Hungarian (which, knowing both languages is very exceptional). The trademark protection in question is regarded incidentally to mattresses, however, the Spanish equivalent of mattress is 'colchón', and it does not even remind one to the word that is – without question – merely descriptive in a different language (German this time), regarding the list of goods of the trademark, of course.

[16] Capital Regional Court of Appeal, 8.Pkf.26.074/2010.

A likewise Germany-based company called Matratzen Concord applied for community trademark protection on a figurative mark containing the word 'Matratzen' in 2000. Hukla raised an opposition against this trademark application, referring to the prior Spanish trademark thereof and stated that the similarity of the marks is an obstacle to the registry on grounds of likelihood of confusion. In this case, a question has been raised by the collision of a national (Spanish) and a community trademark, whether the word 'Matratzen' was really able to be registered regarding mattresses in a linguistic environment where mattresses are not called mattresses by far. A further connecting question was, whether such trademark, that is descriptive in a different member state's language, could be an obstacle before the registry of a community trademark application. A further curiosity to the case was, that it also concerned EU basic legal principles: Matratzen Concord referred to the possible violation of free movement of goods, that is a basic EU freedom[17], in consequence of registering the word 'Matratzen' in Spain and by that, letting the trademark holder block all German-speaking EU member states' mattress export to Spain.

This question created a case of great complexity of connecting court cases, and in the end, the trademark application by Matratzen Concord was finally rejected. According the final verdict, it should be pointed out, that it in no way appears that the principle of the free movement of goods prohibits a Member State from registering, as a national trade mark, a sign which, in the language of another Member State, is descriptive of the goods or services concerned and which cannot therefore be registered as a Community trade mark. Such national registration does not in itself constitute a barrier to the free movement of

[17] The Treaty on the Functioning of the European Union (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF), Articles 34-37.

goods. Moreover, under the case-law of the Court of Justice, the Treaty does not affect the existence of rights recognized by the legislation of a Member State in matters of intellectual property, although the exercise of those rights may none the less, depending on the circumstances, be restricted (point 54 of the verdict).

Therefore, a mark is conceivable for trademark registry in a Member State, even if it descriptive in the language of another. It is not excluded by the free movement of goods either. The condition thereof is, that customers affected shall not be able to recognize the descriptive character of the mark in consequence of the linguistic, cultural, social and economical differences between the Member States in question. The European Court added that the perception in the mind of the average consumer of the goods or services in question plays a decisive role. For the purposes of that global assessment, the average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect.

The Matratzen-case points out the further relations between distinctiveness and the descriptive character that shall be considered not only at the examination of national and community trademark applications, but also at the incidental collision thereof (in opposition and infringement cases). Not only the language of the member state involved in the case shall be considered, but also further linguistic meanings that may be known by customers of the member state in question, either by translation or any other way. This matter may be of extraordinary significance in the United Kingdom, since in consequence of major migration and subsequent traditional use of multiple languages, the everyday English language has a plenty of foreign words that appear even in English dictionaries in due course. The aforementioned inverse of this phenomenon also exists: on account of the even more frequent understanding of the English language, originally English words with a descriptive character, if applied for trademark protection, shall be

examined on being able to registry in non-English speaking countries, too.

7 Language matters in a further aspect

The language matter is connected to another grounds for refusal in a special way as well. According to Article 3 Par. 1 of , a mark may not be granted trademark protection if it is contrary to public policy or to accepted principles of morality. When it comes to linguistic correlations, the problem of being contrary to principles of morality may emerge. It is possible that a certain word or combination of words is contrary to principles of morality regarding the linguistic meaning thereof, however, the trademark protection would most probably be granted in a country where customers, being not the speakers of the given language, are otherwise not aware of the meaning of the mark in question. As for an example, the Spanish expression 'de puta madre' may be mentioned, that is very offensive in the Spanish language. The case of the trademark application filed thereon reached even the Capital Regional Court of Appeal, that finally refused it on the grounds of being contrary to principles of morality[18]. One would wonder if Hungarian customers, that are usually completely unaware of the meaning thereof, would find it offensive or scandalous, if this expression appeared on articles of clothing or energy drinks as a registered trademark? The conditional wording of this question is certainly not correct, since OHIM granted the trademark protection on 'de puta madre', so it is effective in the territory of Hungary as a community trademark.[19] As a twist in the tale, it seems that those Spanish curse words have been registered by an authority that happens to

[18] 8.Pkf.26.837/2008.

[19] Reg. No. 004781662

be based in Spain[20], however for the benefit of an Italian applicant. A case like this can start anytime, and such marks can be judged under linguistic regards. Even consequences written above in point 4 can prove to be true in such situation: the question whether a word qualifies being contrary to principles of morality largely depends on the linguistic environment it is used in.

8 Conclusions

Finally, a practical suggestion shall serve as closing. The registry of an incidentally descriptive mark can be reached by applying it not as a word mark, but as a figurative mark, namely the mark shall be completed with distinctive figurative components. So, the verbal component can be displayed as part of the figure, and the figurative components can provide distinctiveness for the mark as a whole, to meet the requirements for registry along the examination of the trademark application. In the practice of trademark law, there are countless examples prove that marks with descriptive verbal components are registered, since the figurative surplus assures the ability to be registered, even if figurative means only the use of special fonts in some cases.

In addition to the above, the legal role of trademarks in branding shall be mentioned as well. Trademarks are legal grounds for each brand, namely trademarks serve the management of brands, that prefers marks that draw attention, are memorable and remarkable. These purposes are better served with marks that consist not only words, but provide a visual plus of figures and colors that allow a complexity of associations.

[20] OHIM is based in Alicante, Spain (http://oami.europa.eu/ows/rw/pages/OHIM/contact.en.do)

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SEVERAL THOUGHTS ON THE COMING INTO FORCE OF THE NEW HUNGARIAN CIVIL CODE, WITH RESPECT TO COMPANY LAW

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Abstract:

In recent years the Hungarian legal system has undergone fundamental changes, including the drafting of a new Civil Code. The aim of the codificators was to include as many fields of private law into the Code as possible. As their efforts succeded, fields of law of utmost importance like family law and company law were incorporated into the Code. The new code replacing the previous affects all fields of private and business relations and thus shall forge a new framework to international business relations as well.

Keywords:

Civil Code, codification, company law, business relations

JEL classification: K10

1 Historical Introduction

1.1 A New Civil Code in the Works

In recent years the Hungarian legal system has undergone a series of fundamental changes, comparable only to the changes evoked by the country's transition to market economy, dated from the late 1980's. On the turn of the 1980's and 1990's, following from the fundamental changes of the political superstructure and thre transition towards market economy, our first act on business associations was enacted, the constitution was revised, new labour code came into force, etc. In recent years the Hungarian Parliament adopted a new Fundamental Law, a new Labour Code, a new Penal Code, and, in December 2012. the new Civil Code passed also. These reforms can not yet be evaluated in an unbiased manner, but we all should agree that these changes set a new legal framework for Hungary.

Yet the codification of the new Civil Code is independent from ideological or political considerations. The committee in charge of the preliminary works of codification was given its mandate in 1997, and it took fifteen years to complete the code. We should also add, that there is a massive history of unsuccesful, failed attempts at the codification of private law, starting from the mid-XIX. century. Some of these attempts resulted in drafts, others not, one of them even served as written customary law[1], but the first Code in force is the current Act IV. of 1959, all other attempts failed. It is also to be noted that in 2009 the Parliament adopted a new Civil Code that passed, but it never came into force due to both professional and political reasons.[2]

[1] Draft Proposal of Private Law, 1928.

[2] Although the Code itself was not problematic constitutionally, the relating acts on the coming into force of the new code did not leave sufficient time for the preparations for

The current Code, due to be effective on the symbolic date of 15 March, 2014 shall come into force after fifteen months of its promulgation in order to provide sufficient time for preparations for the legal profession for its adaptation. It is certain that the new code, the new rules shall impose a large burden and workload on everybody working on the field of private law, including courts and other state institutions.

The New Civil Code consists of eight books and several parts, titles and chapters within each Book. The Books deal with the following: book I on preliminary provisions and the principles of civil law, book II on natural persons, book III on legal persons and entities, book IV on family law; book V on property law; book VI on obligations and contracts; book VII on inheritance; and book VIII on closing provisions. The codificator's basic approach was to incorporate as many fields of private law into the Code as possible. In addition, as today, the new Civil Code will remain the general law applicable as a background law to major fields of law such as labour law or copyright law.

A basic pre-question arose during the years of codification: should companies be regulated separated from the Civil Code or should they be incorporated in the code?[3] Both solutions have their respective advantages – and pitfalls.

In favour of the first choice many argued that the general and traditional body of civil law is designed and created to remain – unamended – for decades. Company law, simply owing to its special subject, cannot be handled that constant, there is a continous pressure to

its effect, therefore the rules on its coming into force seriously harmed security in law and proved to be anti-constitutional.

[3] Vékás, Lajos (2001): *Az új Polgári Törvénykönyv elméleti előkérdései*. [*Conceptual Pre-questions of the New Civil Code*.] Budapest, HVG-ORAC, p. 62-67. Vékás, Lajos (2008): *Parerga. Dolgozatok az új Polgári Törvénykönyv tervezetéhez*. [*Paregra. Studies on the Expert Proposal for A Draft of the New Hungarian Civil Code*] Budapest, HVG-ORAC, p. 259-260., 263.

keep it up-to-date as market conditions and expectations change swiftly. A constant need for amendements cannot be reconciled with the nature of a civil code, a monument of permanence: the rapid changes of company law shall inevitably burst the structure of the code. In addition, the procedural rules applying to company law cannot be treated as rules of private law and thus cannot be integrated into the code; these rules shall obviously be regulated elswhere, which shall inevitably preserve the dual application of substantive and procedural rules and two separate acts would definitely serve the practice better.

Several others argued that a civil code of the 21st century should integrate and incorporate all and any fields of private law, not only the traditional body of civil law. It should regulate, besides company law, family law, the individual labour contract, intellectual property rights, copyright law and other related fields of private law. Since company law is a special field of private law and the Civil Code has always been its background, the higher level of uniformity and uniform application of certain notions can be realised through integration. This professional point of view accepted the fact that procedural rules belong elsewhere, nevertheless did not consider that factor substantial, rather technical.

Although the codificators' choice never reached a complete accord professionally, in the guidelines and principles of the then-in-the-works Civil Code[4] made it obvious that the codificators are committed to the incorporation of company law to the Code. Following from the aforementioned, despite of the rollercoaster ride-like passing of the code (as it is described elswhere), company law finally found its new place in the Civil Code, in Book Three on Legal Persons. We should like to emphasise that these new rules seamlessly continue the traditions of

[4] Vékás (2001), on the expert proposal (2008) see: *Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez* [*Expert Proposal on the Draft of the New Civil Code*] Budapest, p. 222.-382.

company law and do not, in any sense, create cracks in its organic development. Therefore it is to be stressed that the new rules are not heuristically new, rather improved and developed further. For the purposes of investor-protection, protection of foreign investments, no fundamental or drastic changes shall come into force on 15 March, 2014. The codificators successfully preserved what was workable and effective and reformed, renewed or replaced those rules that needed to be revised.

In general, half of the current rules appear in the new Civil Code practically unamended, a quarter of the current rules appear in a modernised, refreshed manner, and we can state that only about a quarter of the new rules can be considered substantially new to the Hungarian legal system. There are numerous new features, of course: the restructuring the system of liabilty for the breach of contract, modernised inheritance law, new types of contracts (trust, financial leasing, lease of rights, etc.), but the new Code shall bring evolutive and not revolutive changes to our legal system.

1.2 The role of Company Law

As we look back on the past two-and-a-half decades of Hungarian company law and its new regulation in our reformed civil law as an integrated part in the Civil Code, we must emphasise that company law has not played a merely technical role in the reform processes but a major role of utmost importance. Company law created space for the establishment of business associations, laid down the basic principles of market economy, started the process of privatisation – changes that made obvious that market economy and a Socialist political regime simply could not be sustained together. In this sense company law forced political changes int he late 1980's. The first act on business associations is usually considered a "first mover", an act that catalysed the development of non-existing fields of law or the reform of other fields eg. antitrust law, insolvency law, labour law, corporate taxation law,

accounting law, rules on health care service for social security systems, capital market regulations, rules on the stock exchange, etc.[5]

The Hungarian acts on business associations have always been subject to continous refinery, modifications and revision, which resulted in a brand new act every seven-eight years, therefore there have been three acts on business associations so far, apart from the brand new rules of the Civil Code.

The first code, besides its inevitable role to catalyse political reforms and changes, aimed to create opportunity for the people to undertake. Its guiding motive was to grant everyone easy access to the market with the largest possible extent of freedom in line with the spirit of codification. That goal indeed was achieved, a great number of undertakings were formed and accessed the market and our economy's transition to market economy immediately started and finished succesfully. As a second step, in the second act on business associations (Act CXLIV of 1997), the purpose was to apply a more rigid and strict method to cut back or eliminate the "wildings" of the market. Another basic goal of the act was to harmonise company law with the rules of the European Union and thus help and support the country's accession to the EU in the enlargement process. We cannot decide whether the first goal was completely achieved, yet it is clear that the full conformity, wherever it was required, was reached with the Community rules. The third act (Act IV of 2006) had no such specific sublime mission as in the case of the first two, merely to help market consolidation and preserve the achievements of the other codes. In this sense, the current act in force can be qualified succesful.

[5] Sárközy, Tamás (ed.) (1993): *A társasági törvény magyarázata* [*Commentary on the Act on Business Associations*]. Budapest, KJK-Kerszöv, p. 38-39.

Why drawing up a fourth act (or its material), if an existing act supports and serves the needs of the market and the everyday practice? Why revising what has been proven adequate and workable? Both questions are relevant, nevertheless one matter has always gone without saying for the commission in charge of codification: whenever a new Civil Code is created, there should be a new body of company law as well, to ensure integrity, coherence and conformity between the two separate, yet interlinked fields of law.

2 The Structure of the Rules on Company Law

Integration expresses the position of company law in the new code better than incorporation, therefore the rules on business associations cannot be viewed separately, but in a wider perspective, with respect to the rules on legal persons. Book Three governs the following fields: General Provisions on Legal Persons, Association, Business Companies, Co-Operative Society, Grouping, Group of Companies, Foundation and The Role of State in Relations of Civil Law.

Instead of simply duplicating and refreshing the previous or any other act on business associations within the framework of the code, the codifiers decided to organically integrate the regulatory spirit and the specific provisions of company law into the texture of the code. In the last twenty-five years, the development of company law resulted in a massive and highly abstract part, the general provisions that apply to all business associations. This part became lenghtier with each act, and in the codifiers' point of view, some of these rules were mature enough to create the grounds for the Common Provisions on Legal Persons. What the Civil Code contains as common provisions applicable to all legal entities, basically stems from the current general provisions of company law. Certain rules on the establishment of a legal person, their registration, management, the control within the legal entity, representation,

transformation, etc. were all generated from the current general provisions in force. Our company law hereby proves that its rules are adaptable and apt for a more abstract application as well.

Yet not all general provisions were improved to become common provisions for all legal entities. Needless to say that a certain body of common provisions applicable to all business associations (and not all legal entities) remained. Since a good deal of its rules were trasformed to common provisions for all legal persons, the extent of these special business association-related common provisions was reduced. Still, there are common provisions on the esteblishment of companies, the amendement of the memorandum of association, minority protection, exclusion of members, company structure, transformation and termination without succession.

The new code preserved the current approach in the sense that besides the common provisions on business associations, the special rules govern the types of business associations, the roster of which was left unamended. The new Civil Code shall regulate the following types of business associations: general partnership[6], limited partnership[7], private

[6] Act IV of 2006. Sec. 88. par. (1): By virtue of the memorandum of association for the establishment of a general, the members of the partnership shall undertake to jointly engage in business operations with unlimited and joint and several liability, and to make available to the partnership the capital contribution necessary for such activities. The same concept is reflected in the new Civil Code under 3:123. §.

[7] Act IV of 2006. Sec. 108. Par. (1): By virtue of the memorandum of association for the establishment of a limited partnership, the members of the partnership shall undertake to jointly engage in business operations, where the liability of at least one member (general partner) for the obligations not covered by the assets of the partnership is unlimited, and is joint and several with all other general partners, while at least one other member (limited partner) is only obliged to provide the capital contribution undertaken in the memorandum of association, and, with the exceptions set out in this Act, is not liable for the obligations of the partnership. See 3:139. §. of the new Code.

limited liability company[8] and company limited by shares[9]. The latter type functionally is also divided into two sub-types: private company limited by shares and public limited liability company[10]. Since there was not any practical need to correct, extend or reduce the above list, and these types adequately responded to expectations of the practice and the market, the codifiers decided to keep these four forms. Joint undertaking, a corporate form regulated by the 1988 and 1997 acts was not brought back, nor were other forms, common in Europe yet unknown in Hungary (e. g. partnership limited by shares or Kommanditgesellschaft auf Aktien), introduced.

[8] Act IV of 2006. Sec. 111. § Par. (1): Private limited-liability companies are business associations founded with an initial capital (subscribed capital) consisting of capital contributions of a predetermined amount, in the case of which the liability of members to the company extends only to the provision of their capital contributions, and to other possible contributions as set forth in the memorandum of association. With the exceptions set out in this Act, members shall not be liable for the liabilities of the company. See also 3:144. §. of the new Code.

[9] Act IV of 2006. Sec. 171. § Par. (1): Public limited companies are business associations founded with a share capital (subscribed capital) consisting of shares of a pre-determined number and face value, in the case of which the obligation of members (shareholders) to the public limited company extends to the provision of the face value or the issue price of shares. With the exceptions defined in this Act, shareholders shall not bear liability for the obligations of a public limited company. See also 3:195. §. of the new Code.

[10] Private company limited by shares shall mean a company whose shares are not offered to the public, also any limited company whose shares were originally offered to the public and are no longer available to the general public, or that were removed from trading on a regulated market shall also be considered a private company. Public limited company shall mean any company whose shares (all or some) are traded publicly in accordance

with the conditions set out in the act governing securities. Any limited company whose shares were not originally offered to the public and are offered for sale to the general public or admitted for trading on a regulated market shall also be considered a public company.

3 Regulatory Method and Approach in Company Law

It is always a crucial matter whether a good regulation on companies should be of mandatory or of default character. On the one hand, as a special field of private law, a default character seems to be reasonable dogmatically and structurally. On the other hand, as the functioning of companies could affect many interests apart from the members' or partners' interests (creditors, minority, employees or even the common good) a strict mandatory approach can be justified as well.

The past two acts and the current one tried three different approaches, yet the Civil Code will implement a fourth. The 1988 act was mainly of default character, imposing binding rules – beyond the scope of companies limited by shares, where the whole regulation was mandatory – only wherever issues of liability or structure were touched. The 1997 act chose a completely different method, in line with its "regulatory" purposes: the rules were fundamentally binding. Departing from these prescriptions, they were lawful only if the code explicitly enabled it

Within the framework of the 2006 Business Associations Act (Section 9., Paragraph (1), "members may freely establish the contents of the memorandum of association (articles of association, charter document); however, they may depart from the provisions of the act only if provided for by law. The attachment of any additional provisions into the memorandum of association shall not be treated as a deviation from the provisions of the act if it is not regulated in the act, and if it is not in contradiction with the general purpose of company law or with the objective of the regulations pertaining to the company form in question, and if it is in harmony with the principle of good faith." In other words, the current code employs a slightly different method, however, the mainly mandatory approach remained, yet the extent of the members' freedom

has been considerably extended as the number of rules granting the partners the right to deviate increased substantially, as opposed to the 1997 act.

The mandatory regulatory method, especially between 1997 and 2006, was subject to fiery professional criticism that clearly led the legislator to the current approach, as described above. The codifiers decided to preserve the achievements carried out in the 2006 act, but at the same time, further its development. The new company law regulations will employ default rules as main rule, and from this perspective the Code returned to the principles of our first act of 1988. Members of a legal person shall not be entitled to depart from the rules set forth in the Civil Code, given that the deviation is expressively prohibited by the Code or the deviation obviously harms the interests of the creditors or employees of the legal person, seriously affects the rights, granted by law, of the minority within the legal person or obstructs the supervision of the lawful operation of the legal person. Theses changes will impose a special duty on jurisdiction, as each and every deviation from the rules set forth in the Code should be evaluated relating to the factors prescribed by the above rule to determine whether the deviation is lawful. Considering that from 1997 our company law had a basically mandatory regulation, there is a serious doubt whether the jurisdiction, that used to tend to apply the rules of company law strictly and tightly (sometimes stricter and tighter than justifiable), might immediately change and adapt the new rules in line with the spirit of the new apporach.

We firmly welcome these changes and qualify them both favourable and desirable, yet we might have to face a potential lack of comprehension and clumsiness in the immediate adaptation process, which shall surely be settled mid-term.

4 Doubiously Enhancing Creditor Protection: New Capital Requirements for Private Limited Liability Companies

The novelty for private limited liabilities is that a new initial capital requirement shall come into force with the new code. The amount of initial capital may not be less than three million forints, as opposed to the current five hundred thousand. The codifiers decided to leave share capital requirements unamended (five million for private companies limited by shares and twenty million for public companies).

The decision on initial capital requirements can be viewed as a simple reflection of legislative policy. Yet we should take it in account that in Hungary private limited liability company is the most popular and common type of business associations – any changes in its regulation directly affect many. It is also worth taking a look back how initial capital requirements changed in the past and how we came to this current rule. From another perspective capital requirements might also serve as "filters" that may sort out companies seeking market access: initial capital is the price to pay for limited members' liability, and some might argue that these requirements serve the purposes of creditor protection as well.

In the first act, the initial capital had to exceed one million forints. In the second act, reflecting the elevated inflation level in the mid-90's, and due to valorization purposes, it had to exceed three million forints. The third act, in its original text did not change this rule. It reflected a conservative point of view and negated international trends and tendencies that clearly showed that for private limited liability companies a high level of initial capital is superfluent. In addition, the majority of former socialist states, and many other European countries applied a considerably lower level of initial capital, which did not necessarily help the country's competitiveness and worked as major obstacles for micro- or small undertakings to get market access. Right after the act came into

force, efforts were made to significantly reduce the three million level. The Ministry of Justice published a draft amendement of the 2006 act proposing an initial capital minimum of one thousand forints, responding to international tendencies. Finally, in 2007, the reduction came through, yet bearing the marks of a compromise and determining the current five hundred thousand forint-limit. The new rule that will bring back the 1997 level came by surprise, since the 2008 proposal of the Civil Code, drafted by the same committee in charge of the new code of 2013, promised a vanguardist rule: the initial capital of the private limited liability company was to be determined – freely – by the members of the company; in other words this rule would have completely erased capital requirements for this type of company too (as this is the case for partnerships).

This brief report is significantly indicating one fact: our legislation does not possess a clear and firm view on what role the regulation of initial capital limits for private limited liability companies should play and what role initial capital requirements could play. In our view, as described elsewhere in details[11], initial capital requirements contribute very little or nothing to creditor protection, yet might cut off micro-sized undertakings from the market, and thus might harm the competitiveness of the Hungarian economy.

Apart from theoretic and dogmatic considerations, the new initial capital requirement shall have pragmatic consequences. It goes without saying that there cannot be two versions of private limited liability companies, the pre- and the post-2014 companies. After the coming into force of the new Civil Code, all private limited liability companies will

[11] Szegedi, András (2007): *Az „ezer forintos kft." védelmében* [*In Protection of the "thousand-forint private limited liability company"*] In: *Gazdaság és Jog*, No. 3., 8-13. pp.; ibid. (2008): *The New Approach in the Regulation of Nominal Capital in Company Law: Fundamental Changes or Deadlock?* COFOLA 2008 Conference: Key Points and Ideas, Brno, 2008., 1350-1357. pp.), ibid. (2009): *A törzstőkeminimum dogmája* [*The Dogma of Initial Capital Minimum*] In: *Jog. Állam. Politika*, No. 1, 25-38. pp.

have to increase their initial capital to the new three million-level. The new rule shall affect tens of thousands of companies. It imposes financial and administrative burden on companies (most likely the smallest), and might even work as a factual filter as those who cannot meet the new requirements shall have to cease operation and terminate themselves or transform into partnerships.

5 The Coming Into Force

As the provisions on business associations in the new Civil Code is considered the fourth act on companies in the past three decades, there is considerable experience in adopting changes in the field of business. The law on the coming into force of the new Civil Code[12] applies a similar method the former rules prescribed. Hungarian companies are given one or two years to get their articles of association harmonised with the new Code, the first applying to partnerships and the longer period to companies and other legal entities. In other words, the acts and laws replaced by the new Code shall remain applicable for those business or legal entities that have not yet modified their articles of associations in the harmonisation period of one or two years on condition that there is no necessity for altering the articles or there are no modified company registrar data concerning the company. Should there be any amendements in the articles of association, the whole document is to be harmonised with the new rules.

The same approach is employed for limited liability companies to meet the new nominal capital requirements. Although it is clearly a technical rule driven by the favouring of the creditors' interests (at least this is the ideological background of the new rule), it shall be a real challenge for a considerable number of limited liability companies.

[12] Act CLXXVII. of 2013.

6 Conclusion

Act IV. of 2006. on business associations states in its preamble that "the purpose of this Act is to lay down an appropriate legal framework to facilitate the consolidation and further growth of the market economy in Hungary, to enhance the productivity of the national economy and the proficiency of enterprises".

The new Code shall impose new liabilites and burden on legal entities, but we must say that the above goal shall be achieved, even in a more sophisticated way. The new framework for business might serve the need of the everyday business practice by enhancing the extent of freedom the companies could enjoy and most likely will promote the protection of the creditors' interests. Needless to say that it will not happen immediatelly, but in the long run, it undoubtedly will achieve these goals.

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WILL THE NEW EU UNITARY PATENT PROTECTION HELP V4 COUNTRIES BUSINESS? JURIDICAL COMMENTS ON THIS REVOLUTIONARY CONCEPT

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Abstract:

The European Union adopted recently a new system of patent protection in Europe: The European (EPO) Patent, established in 1978, will be able to obtain a unitary effect in the whole EU without any translations into national languages. Due to the extreme costs of such translations the patent protection in the EU will become relatively very cheap, since presently the costs of compulsory translations are excessive and consequently inaccessible for smaller enterprises. EU already adopted necessary regulations. However, some very serious objections against that solution have been raised in Poland and the Czech Republic. The number of granted patents effective in those countries will dramatically increase and in the same time they will not be available in national languages. The result will probably be the deterioration of the position of Czech and Polish enterprises bound by an enormous number of foreign patents available only in English, French or German.

Key words:

European Union; Patent protection; European patent; Unitary effect in EU; Translation costs; Unitary Patent Court; Small and medium enterprises;

JEL classification: K11, K33

1 Initial success: overcoming of the national territorial limitation of the patent protection. European regional patent (EPO)

So far the national territorial limitation of the patent protection has been overcome on the regional basis. Regional patents exist in Europe, in Africa (organization ARIPO associating certain English speaking countries, OAPI associating French speaking countries) and on the territory of the former Soviet Union (Eurasian Patent Organization). For the Czech Republic and any other European countries the regional European Patent is of crucial importance.

In 1973 the *Convention on the Grant of European Patents* (shortly called *"European Patent Convention"*) was signed in Munich under the auspices of the Council of Europe. The Convention entered into force in 1978 and subsequently was supplemented by four Protocols and an implementing regulation. It had nothing to do with the European Economic Community (now the Europen Union).

The Convention established for its contracting states a common right to grant patents for inventions (European patents). Those patents enjoy, under defined conditions (see below), in all contracting states same

effect as national patents. Granting of an European patent may be claimed for all or just for selected contracting states.

The Convention established the *European Patent Organization (EPO)* formed by the *European Patent Office* and the Administrative Council. Its seat is situated in Munich with annexes in the Hague, Berlin and Vienna. The EPO languages are German, English and French.

The Convention contains among others substantive provisions of patent law. In fact this is an international codification of patent law, which is relevant alongside the national regulation and which is applicable only to cases, when the European patent application has been filed. This may be done by any person (natural or juridical) regardless its nationality. No relationship to a contracting state is required. Consequently, a European patent application may be filed by any applicant, including a person having the residence or seat in a third state. Nevertheless, the protection may be claimed only for contracting or associated states. The delay of protection is limited to 20 years from the day of the filing of the application. The European patent provides in any included state the same protection as the national patent granted in the particular state, provided that it has been validated there. If the subject of the patent is a manufacturing process or a production method, the protection includes products produced using this method. The infringement of the European patent is considered according to the national law of the state, where the infringement took place (lex loci delicti).

The European patent application has in the determined states same effects as national patent application. It provides for the applicant a preliminary protection from the date of its publication. This preliminary protection is again same as the protection resulting from a national application.

The European application has to be filed in one of the official languages of the European Patent Office (German, English or French).

The applicant must file, within six months after the publication of the search report, written demand for the full (substantive) examination. When this examination is made, the examination body will decide on the granting of the patent. If such a demand has not been filed, the application will be considered as withdrawn.

The decision on the granting of the patent will be effective from the day of the notification in the European patent Official Journal. That day is the day when the effects of the European patent come on.

A significant advantage of this integrated system appears already in the stage of filing of the application: the patent examination is made only once, by the European Patent Office, instead of multiple examinations made by each national office, where the protection is claimed. The EPO examination is carried out in the highest quality. Consequently the costs of the treatment of the application are much lower, not only for the applicant, but also for the Member State. It should be added, that national patent offices in smaller states do not dispose of the sufficient means for the carrying of a high quality patent examination and some of them do not provide it, for instance Switzerland, with the exception of time-measuring devices. Consequently, the quality of the patent decreases and the probability of the contest of the granted patent increases. The transfer of the examination procedure to the EPO reduces the number of purely national applications and contributes to the reduction of the staff of national patent offices.

- *Advantages of the European patent* (EPO) are essentially the following ones: The invention will be protected in any Member State of the European Patent Organization (according to the applicant's interests and choice).
- Costs of the filing of the application and the granting procedure of the European patent are substantially lower comparing to same

situation in multiple countries using the classical way of multiple national applications.

- The application is to be filed in one language. Translations into national languages of chosen Member States are required only for the granted patent.
- High quality of searches and of the substantial examination makes of the European patent a "strong" one. Its successfull contestation or annulment is thus very unlikely.
- European patent has also a "publicity" significance, since for commercial partners it guarantees the quality of the patented invention.

From the point of view of its juridical construction, the European patent is not a single integral patent. For its effects in a Member State the act of validation is necessary. It consists in the translation of the granted patent to the official language of the state a then its publication in the national patent Official Journal. For this reason the European patent is sometimes designated in the figurative sense as a "bundle of national patents". The condition of translation is in the present the subject of significant practical difficulties especially because of the high translation fees, as we shall analyze further.

European patent organization is considered to be an important element of the European economic integration despite the fact that it has no juridical nor institutional relationship to the European Union. All EU members are in the same time members of the EPO. The Czech Republic joined EPO in 2002.

Member States of the European patent convention on the date of 1st October 2010: Albania, Belgium, Bulgaria, Czech Republic, Estonia, Danemark, Ireland, Italy, Finland, France, Kroatia, Iceland, Liechtenstein, Latvia, Lettonia, Luxemburg, Cyprus, Hungary,

Macedonia, Malta, Monaco, Germany, Norway, Poland, Portugal, Austria, Romania, Netherlands, Greece, San Marino, Slovakia, Slovenia, Serbia, Spain, Sweden, Switzerland, Turkey, United Kingdom (38).

Countries, accepting on their territory effects of the European patent ("associated members"): Bosnia and Herzegovina, Montenegro.

2 Difficulties of the contemporary European patent (EPO). Efforts aimed at establishing the unitary European Union patent protection

The initial euphoria and enormous popularity of the European patent granted by the EPO in Munich are now going down. The reason are practical difficulties resulting from the compulsory validation in designated states. Stepwise and rapid increase of the costs of translation into languages of designated states becomes a significant financial burden for applicants. The translations must be made by highly qualified translators able to guarantee a substantial and terminological conformity with the original. In addition to that the majority of national patent offices require to pay a validation fee related to the publication of the patent in their patent Official Journal. European patent protection thus becomes too expensive despite the fact that the European system is very advantageous, since it requires to pay only one (European - EPO) application fee.

The Member States try to face this problem through new rules avoiding translations into all national languages. In 2004 Member States concluded the London Agreement on the application of Art. 65 of the European Patent Convention requiring translations. According to that Agreement translations into languages of designated states of whole patent documents should not be required, or subject of translations will

be required only for patent claims. The Agreement came into force in 2009 between 14 EU member countries only.[1]

Czech Republic falls within the group of countries, that are hesitating to accept this system. From the juridical point of view it is difficult to accept that a public document establishing rights and obligations of individuals on the national territory be not available in the Czech language. If such rights are on the territory of the Czech Republic violated, the violator could probably successfully argue that he could not understand correctly the text of the patent since it was not available in the Czech language. Any person may claim that his legal obligations at the public law level be stipulated in the country's official language. We can find an analogy of that situation in the jurisprudence of the EU Court of Justice. It ruled that an EU regulation in force inexisting in the official Czech version could not have any effect on the Czech territory (Skoma-Lux, C-161/06)[2].

Efforts to improve the European patent protection and making it more accessible through a really uniform patent on the EU level have been apparent for a long time. Still in the time of the European Economic Community (1979), first attempt to conclude the EEC Patent Convention was made, but completely failed. Since that time those efforts have been renewed several times. At present, as the patent protection falls into the EU competence, a EU regulation has been adopted. It presumes that the task of the "EU patent office" will be carried out by the current European

[1] For more details see for instance the EPO Web pages, http://www.epo.org/applying/european/validation.html (retrieved 20 February 2014).

[2] About this very interesting judgment and broader views, see for instance KŘEPELKA, Filip, *Between Legitimacy nad Efficiency. Developments of Language Regime in the European Union*, in: The Challenges of Modern Democracy and European Integration, vol. 1, Ed. by Elżbieta Kużelewska and Dariusz Kloza, Warszawa - Białystok 2012, ISBN 978-83-7545-324-9, p. 109.

Patent Office of Munich, that will continue to issue European patents, but with unitary effect in the whole EU.

The EU system of patent protection is intended to be more simple, less expensive and more reliable for the enforcement of rights. Granted European patents will be effective in all EU countries directly, without the need of any sort of validation in Member States.

The European patent with unitary effect in the EU is supposed to bring significant advantages. A single patent principle should provide an easy overview on what is protected in the EU. This should be favourable for subjects in the EU (enterprises), that must respect protected patent rights. The fees will be lower and other costs related to the patent as well - almost no translations into national languages of EU Member States will be needed. Another big advantage is the uniform way to settle patent disputes, since a new EU Unified Patent Court will be established.

For details, we can assert the following: There is a double main purpose for introducing the EU system of unitary patent protection:

1. The EU is supposed to represent an easier and simplier protection of inventions in the whole European Union. Contrary to the general European patent (EPO), it will not be concieved, for the European Union, as a "bundle of national patents", but as a really international unitary patent providing for a direct protection in the whole European Union without any validation in its Member States.

2. The introduction of the EU unitary patent protection will reduce costs of the patent protection in the EU by up to 80%. Currently, the costs of the introduction of the patent protection (without renewal fees) in all 28 EU member countries amounts for the average patent to 32.000 EUR (23.000 EUR of it being translation fees). The introduction of the patent protection in the US costs for an average patent 1.850 EUR only. The translation costs for the European (EPO) patent are cca 75 to 85 EUR per

page, i.e. 1.500 EUR per translation of one average patent into one language. The result is disastreous for small and medium enterprises, young innovative companies, start-up companies and public research organisations in the EU: they simply do not dispose of sufficient financial resources for an efficient patent protection of their inventions on the European (EU) single market.

3 New solution: European patent with unitary effect in the EU

The reason of of the current EPO system problems lies in the obligation to validate the European patent in all countries for which it is granted, including the translation into the national language. The validation thus brings following problems:

a) A granted European patent must be translated into the language of each state for which it is granted. In the contemporary European Union there are 24 different national oficial languages, that would make 23 translations of the whole patent document only for the EU and this means astronomical costs. Translation fees rise were rising quickly during last twenty years and machine (computerized) translations of good quality are not yet available.

b) Maintenance fees are to be paid in each country separately. This requires the vigilance in the form of an administrative care in order not to forget to pay the fee in time and not to lose protection.

c) The European patent is not a unitary patent. It works as a bundle of national patents, i.e. its destiny is regulated in each state by its national law.

The consequence of those problems is the strict selection of states where the protection is to be required. That concerns especially small and

medium enterprises that do not dispose of sufficient financial means to cover the patent protection of their inventions in many countries.

The new EU concept has been based on the following principles:

1. The European Union will not have any own patent office to grant patents. No "Union patent" will be introduced, but there will be make use of the existing European (EPO) patent. This patent will acquire, if so desired by the grantee, a unitary effect in the whole European Union (except absenting states). There will not be introduced a EU unitary patent, but the European (EPO) patent will get the unitary EU effect.
2. The applicant who obtained a current European (EPO) patent may, if he wishes, apply for its unitary effect in the EU. The granting of European patent will continue to be governed by the European Patent Convention from 1973, which will remain as it is. The European Patent Office will not be integrated in the EU system. Nevertheless, the EU unitary effect of the granted European patent will be the matter of the EU law.
3. The unitary effect of the European patent for a particular group of EPO members is foreseen by the European Patent Convention in its Art. 142 on the basis of a special agreement between those states. The above mentioned EU regulations are considered to constitute such an agreement for the group of EU members.
4. Basic change is the abolition of the requirement of validation of the European patent in participating EU Member States. The European patent will acquire in the EU states unitary nature and consequently also the unitary effect - automatically with no additional conditions - only on the basis of the request of the grantee of the European patent. This means that the protection of the invention is unitary - limitations, cancellation or transfer of

the patent have same effect in all EU participating states. On the contrary, licences can be granted for particular states.

5. The abolition of the validation eliminates the necessity of translations into languages of all states, where the protection is claimed. The application must be, as it is now, filed in one of the EPO languages (English, French or German) and the translation of claims only will be required into two remaining languages. During the transitional period, i.e. before the availability of good quality machine translations, it will be necessary to submit, together with the application for the unitary effect, the translation of the whole patent document into English (if the language of the patent application was French or German) or into any EPO language, if the language of the application was English. For the Czech Republic it means, that on its territory EPO patents not available in the Czech language will be effective, but their respect will be strictly required. This is an unnatural situation, where a private businessman will have strict legal obligations not available in his language (to refrain from a certain behaviour described in the patent - not to use the patented solution). Translations of patent documents will be made only in the case of a legal dispute when the businessman is sued before the court, i.e. too late.

6. As far as the exhaustion of the rights conferred by a European patent with unitary effect is concerned, it has been fully confirmed. Art. 6 of the Regulation 1257/2012 provides, that "the rights conferred by a European patent with unitary effect shall not extend to acts concerning a product covered by that patent which are carried out within the participating Member States in which that patent has unitary effect after that product has been placed on the market in the Union by, or with the consent of, the patent proprietor, unless there are legitimate grounds for the patent

proprietor to oppose further commercialisation of the product." The exhaustion of rights concerns only the commercial activity, not the production of the patented product nor the use of the patented method of production.

7. The whole system of unitary effect will be effective only after the entry into force of the Agreement on the Unified Patent Court and only for Member States parties to the Agreement. This Court will have an exclusive competence to resolve patent disputes concerning the EU unitary effect and the competence of national courts will be excluded. Entry into force of the Agreement will take place after 13 states (including Germany, France and the United Kingdom) have ratified it. So far only Austria ratified the Agreement.[3]

The unitary effect will be granted only for countries that have ratified the Agreement and participate in the reinforced cooperation for the unitary effect of the European patent.

This solution eliminating translations of European patents into national languages have been rejected by two EU member countries - Spain and Italy as discriminatory without any compromise. Consequently, the only possibility how to reach the proposal is to eliminate those two countries from the proposal by establishing the enhanced cooperation.

Enhanced cooperation is an exceptional solution ensured by EU law, when the objectives of the cooperation cannot be attained within a reasonable period by the Union as a whole, and that at least nine Member States participate in it. After the failure to find a unanimous agreement on the translation arrangements for the EU patent, 12 Member States agreed

[3] See http://ec.europa.eu/internal_market/indprop/patent/ratification/index_en.htm (retrieved 23 February 2014).

to proceed through this specific way, since Spain and Italy decided to stay outside this framework. Others except Spain and Italy followed. The Council and the European Parliament authorized the enhanced cooperation, and thus it is likely that the EU patent with very simplified requests for translations, as described above, could be theoretically established between 26 EU members without participation of Spain and Italy.

The enhanced cooperation between remaining 26 states is based on the following legal documents:

- **Regulation No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection,**
- **Council regulation No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements,**
- ***Agreement on a Unified Patent Court,*** which was signed in 2013 by 25 states (all EU Member States except Poland, Croatia and Spain).[4]

4 After the general enthusiasm: serious doubts arising about the EU unitary effect of the European patent in certain countries

After the initial enthusiasm some objections were raised in some countries in a later stage. The initial solution consisting in a unitary effect

[4] For its text in English see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:175:0001:0040:EN:PDF.

in the EU of the European patent was accepted everywhere except in Spain and Italy, that objected the language problems. The remainig 26 Member States have adopted the two regulations unanimously without any problem. However, the third instrument, the Unified Patent Court Agreement, was not welcomed so warmly. Let us remind, that the decision on the enhanced cooperation and on the adoption of regulation lies on the governements of Member States being very devoted to any EU ideas without almost no criticism. But the Agreement has to be ratified and approved by national Parliaments, that avakes a broader discussion and a more detailed examination discovering problematic aspects of the matter. Consequently, important objections were raised in this stage by Poland and in some extent in the Czech Republic as well.

Let us now summarize expected results of the introduced "EU patent package":

1. Unitary patent effective in all participating Member States, but not translated into national languages - available only in English or French or German.

2. Unified Patent Court - exclusive competence in any patent matter (patents with unitary effect) for an international court absolutely eliminating national courts, the court procedure directed in a foreign language.

Problems for "less innovative" countries (rather "users" of patents than inventors), such as Poland or the Czech Republic will probably occur as follows:

1. The granting of patents with EU unitary effect will be made very cheap and advantageous for applicants from big industrialized countries, such as France, United Kingdom, Germany and also USA, Japan, Korea. Their new patents will flood the EU. Czech businessmen innovating their own products will be obliged to

check all those new patents and verify protected technical solutions in order to avoid possible infringements. They will have to translate all those patents into Czech on their own expenses. Consequently, their production will become much more costly.

European Commission argues that the new system will be much cheaper and thus will make the patent protection accessible also to small and medium enterprises. In fact this kind of enterprises do not apply for patent protection very often. They are rather "users" of patents, they are producers, not inventors. Cheap patents for applicants from big countries will cause much more expenses for the production business in smaller less innovative countries, such as the Czech Republic. Thus, the new system will be very advantageous for economically strong countries, especially those using English language, but in the same time very disadvantageous for businesses in smaller countries using other languages and producing products, that formerly were not protected by a patent. According to a study of Deloitte & Touche made on the request of Poland, the costs related to the patent protection would be increased just in that country by 40 billions of złotys.

2. The Unified Patent Court is also a very strange "invention". The original intention is a good one: All patent disputes located in several countries concerning one patent will be resolved by one court, instead of several different courts in each country. This seems logic, but:

a) The Unified Patent Court will be endowed by an exclusive competence for the whole EU. It means that EU patent matters will be removed from the competence of any national court for ever. This causes a constitutional problem: This is for the first time where national courts are being replaced totally by an

international court. Such a solution is certainly not in accordance with national Constitutions of some countries, namely of the Czech Republic and Poland.

b) The language of the proceedings will be a language common to three judges of different nationalities and this will certainly not be the Czech. Everything what happens before the Court, any document, will have to be translated into the national language at the costs of the party, i.e. the Czech enterprise.

c) It seems to be necessary that parties be represented by foreign attorneys. The costs of such representation would be a disaster for small enterprises from smaller countries.

d) The result of those circumstances is clear and quite opposing the original idea: The bussinessmen from smaller countries will try to avoid the Court at any price - simply for financial reasons.

The Polish objections have been sharply formulated as follows:

- Polish entrepreneurs would be deprived of the opportunity to receive information in Polish about the scope of protection of patents in force in Poland, and this would increase the costs of patent clearance;
- as a result, the legal security of conducting business in Poland would deteriorate significantly;
- automatic effectiveness of European patents with unitary effect would result in an increase in the number of protected rights restricting freedom of operation of Polish companies;
- lack of Polish translations of patent documents would affect the availability of information on the technical knowledge contained in these documents, dissemination of which was one of the most important functions of patent documentation;

- the language system for unitary patent protection would require translation, not only from English, but also, potentially, from French or German, further increasing costs;
- the judicial system would constitute a permanent barrier for the development of the entrepreneurship and would significantly reduce the chances of rapprochement to highly developed countries with considerable capacity for technical development.

An important objection in relation to the Agreement on the Unified Patent Court was its violation of the Polish Constitution. This criticism referred to a breach of the provision regarding the national language and the need for national courts to be the only judicial power."[5]

It seems that objections raised in Poland are same as those raised in the Czech Republic. The Polish conclusion is more radical: Poland will probably not ratify the Agreement on a Unitary Patent Court and will perhaps join the whole system only later after the evaluation of experience of other similar countries.

To conclude, it should be pointed out that the presented problem is an example of very problematic working methods of the European Union: At the beginning there is a proposal for solving a complex and important problem, presented in a very simplified form. The governments of Member States are very keen do approve anything without sufficiently analyzing the consequences. Both regulations on the unitary effect were adopted by governments very quickly, except the two mentioned countries. Fortunately, the third document of the package (the Agreement) has to be approved by national Parliaments and this is the

[5] Quoted literally from: ŁAZEWSKI, Marek, *Whatever happened to Polish support for Unified Patent Package*, AIPPI e-News, No. 30, May 2013, available at https://www.aippi.org/enews/2013/edition30/Marek_Lazewski.html, retrieved February 26, 2014.

opportunity to discuss the whole concept in Member States in detail with no hurry - and to discover its hidden fatal defaults.

It seems that Poland and perhaps the Czech Republic as well will finally consider this new system of the unitary effect as inacceptable, at least temporarily. The idea of postponing the final decision to enable the national authorities to evaluate the experience of other countries having accepted it seems to be very wise.[6]

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[6] In this sense see also: Will Poland join the Unitary Patent system? Available at http://www.worldipreview.com/news/will-poland-join-the-unitary-patent-system, retrieved January 30, 2014

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ABOUT THE POLISH LAW CENTRE

Mgr. Damian Czudek, Mgr. Michal Kozieł

Czech-Polish relations form an integral part of academic life regardless of the prevailing humanistic or naturalistic character of the field of scientific research or educational activities. There is no exception in the law and its disciplines. Poland, the Polish legislation and jurisprudence are an important source of knowledge both with regard to the geographic and historical proximity which is connected with the similarity of national experience, goals and values. Huge potential of workplaces of Polish jurisprudence, whose base consists of more than 40 public and private law schools, provides the opportunity to draw from the fount of inspiring new solutions to current legislative and other social issues adopted in an environment that is very similar to ours. An intensive and coordinated monitoring of the development of this environment as well as participation in joint projects and mutual exchange of experience will definitely benefit not only for the Czech academic environment and candidates for entry into it, but also for the other entities interested in the information from Poland.

The initiative to form a platform for mutual cooperation has its roots in the already existing collaboration between academics (and recently also doctoral students) from Masaryk University (*MU*), Faculty of Law and colleagues from Poland. We would like to extend this cooperation to students of the master's degree programs too. Repeated study stays at partner University in Bialystok with interest in cooperation from both Czech students and Polish colleagues have led us to the idea of ***"the Polish Law Centre"*** (hereinafter referred to as "*CPP*" or "*Centre*").

There is a custom in Poland that within almost each department operates its kind "minicentrum" called "koło naukowe" (in Polish). These

engage students into academic work and thus open to them the opportunity of self-realization, establishing contacts and gathering valuable experience. However on the Czech side, there was no organization that could have been an equal partner to these Polish student associations and could thereby contribute to the development of joint Czech-Polish academic and research activities. We therefore decided to fill the gap by the founding of the Centre.

In the first stage, the CPP should be so called "koło naukowe" to allow masters students across the fields to establish cooperation and develop their technical, practical and also language skills during the Master's studies. It is essential in this way that there is considerable interest in Poland at MU, not only from academics but also from students. CPP should support students´ publishing activities whether through conferences and workshops in Poland or in the form of their own organization of international conferences, workshops, lectures and other similar meetings with academics from Poland. These activities will be thematically focused on the comparison of the Czech and Polish law in various sectors. At least at the beginning we would like to from organization viewpoint take the opportunity to join the already existing and well established events such as the conference of young scientists called "COFOLA".

In the next stage, the ambition of CPP is to cover large part of the scientific, technical as well as organizational activities and activities toward Poland which are already performed at MU, Faculty of Law, even though activities of the Centre should not be in future limited only to the Faculty of Law. There is not only a presumption but declared interest of many colleagues from other Czech law schools to engage in this type of project (in this regard, substantial personal basis should be members of the Polish minority students at law schools throughout the Czech Republic). As part of its activities CPP should include also academic

activities of scholars. An interest in cooperation and participation in the project was already promised by number of them.

We would like to provide advice and assistance to students who are interested in studying abroad in Poland whether under the Erasmus programme or other projects directly announced by Polish schools and other organizations. We want to establish contacts with the Polish expatriate organizations in the Czech Republic and, if possible, with similar Czech organizations in Poland.

Our greatest success so far include organization of three international conferences Czech-Polish Comparative Law (*http://www.centrumpp.org/konf/*) in cooperation with the Law Faculty of Masaryk University. The first one konference was held in Brno on 23 - 24th March 2012, the second one in Petrovice u Karviné on 26 - 28th October 2013 and the third on in Rožnov pod Radhoštěm on 14th – 16 th March 2014.

For two years of its existence, the Centre has also established cooperation with many organizations from the Czech Republic and abroad, among others with

- **Faculty of Law, Masaryk University, Brno, CZ**
- **Consulate General of the Republic of Poland in Ostrava, CZ**
- **Faculty of Law, University of Bialystok, PL**
- **Faculty of Law, Comenius University in Bratislava, SK**
- **Faculty of Law, Széchenyi István University, HU**
- **Faculty of Economics, VSB – TU Ostrava, CZ**
- **Local Government of the students of the Faculty of Law, University of Bialystok, PL**

- **Lingea juris, University of Warsaw, PL**
- **Student´s Koło Naukowe Prawa Finansowego FISCUS, PL and many others.**

In addition, the Centre and its members participate in the realization of other projects, in particular within the specified research under Masaryk University and projects in cooperation with Wydział Prawo w Uniwersytetu Białymstoku *("Regulacja rynku kapitałowego a cycle koniunkturalny - doświadczenia Polish and Czech" project finansowany fundacja 2065 im. Lesław Pagi, itp.*). The Centre also collaborates with the Hradec Králové region for which members of the Centre drafted a legal analysis focused on hierarchy and competence of particular public administration authorities in Poland and Czech Republic as part of the project "*Strategy for integrated cooperation Czech-Polish border*".

In 2013 the Centre got so called **Small Grant from the Visegrad Fund** for the organization of an international conference in 2014, which took place in Rožnov pod Radhoštěm. We also respond to many project challenges and submitted applications are currently under evaluation.

Among the areas of activities in which the Centre is focused also belongs issuing of monographs, scientific papers and conference proceedings. Recently issued publications include monographs Eugeniusz Ruśkowski and European dimension of Financial Law - ISBN 978-80-263-0303-2 or Proceedings of the International Scientific Conference Czech-Polish Law Comparision 2012 (ISBN 978-80-210-6062-3) and 2013 (ISBN 978-80-210-6568-0).

Our main goal is to build up over the next few years a well established platform within which active collaboration with the Polish academic community in various forms will take place (as indicated in the foregoing paragraphs). We want to create a system of friendly contacts with Polish students and universities so as to help

the students interested in the Polish law to deepen their knowledge in this field. We want to achieve greater coherence between the Czech and Polish jurisprudence, in particular the use of much more extensive knowledge of the Polish legal settlement to our own study. Finally, part of our efforts is to spread awareness about Polish culture and knowledge of the Polish language.

We hope (and we will do everything) that the Polish Law Centre will fulfill the above mentioned objectives and thus contribute to better mutual understanding of these two nations and cultures.

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- **Faculty of Law, University of Białystok**, Poland;
- **Faculty of Economics, VŠB – Technical University of Ostrava,** Czech Republic;
- **Faculty of Law and Political Sciences, Széchenyi István University**, Hungary.

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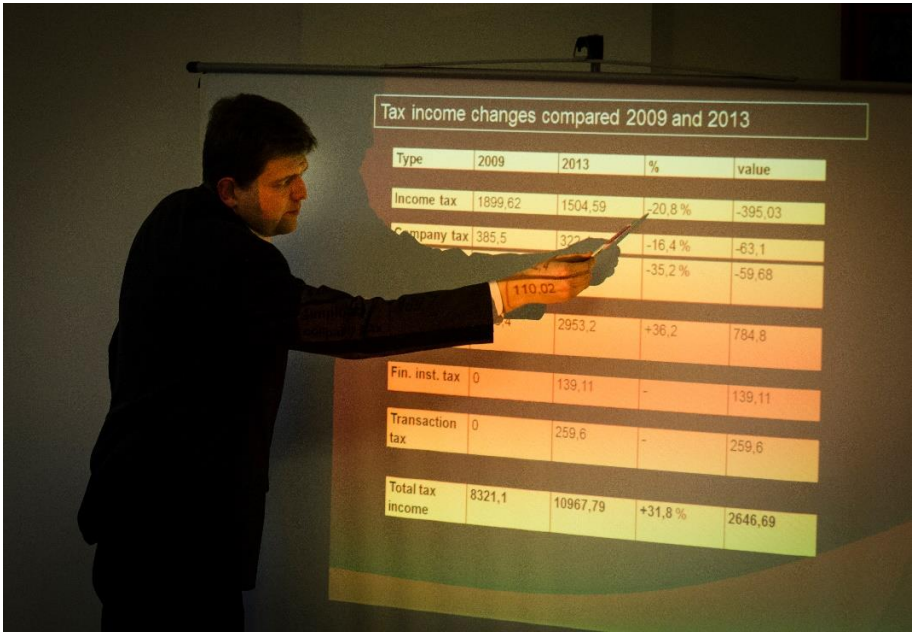
Tax income changes compared 2009 and 2013
Type
2009
2013
%
value
Income tax
1899,62
1504,59
-20,8 %
-395,03
-16,4 %
-63,1
-35,2 %
-59,68
110,02
2953,2
+36,2
784,8
Fin. inst. tax
0
139,11
-
139,11
Transaction tax
0
259,6
-
259,6
Total tax income
8321,1
10967,79
+31,8 %
2646,69

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