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The Companies Act 2006: The Duties of Directors, Conflicts of Interest and the Recurrent Problem of Nominee and Multiple Directors

Adina Maria Ciciovan

Abstract

The initiative of the Government to introduce the new Companies Act 2006 has been applauded for its attempt to codify for the first time the common law duties of directors and for introducing social, environmental and ethical considerations in company law. Section 172 of the Companies Act 2006 has been harshly criticized by the Law Society for requiring in reality to safeguard the financial interests of shareholders which, it is submitted, is not a legitimate purpose. In addition, the interests of employees have received less protection than the Companies Act 1985 initially offered. The problem of multiple and nominee directors raise contentious issues in the jurisdictions of England, Australia and New Zealand, and while both courts and Parliament have failed to provide guidance in case of conflict, they have acknowledged the commercial reality of the duties of nominee and multiple directors. Moreover, the standard of care and the issue of ‘unfitness’ of directors under section 6 of the Directors Disqualification Act 1986 has received scant attention in English law and there is no clear consensus as to the meaning of unfitness or to the standard of care to be imposed on directors.

Key words: The Companies Act 2006; directors duties; nominee directors; shareholders; standard of care; conflict of interest.

1. Introduction

The Companies Act 2006 received the Royal Assent on the 8th of November 2006 and it is undoubtedly the most significant reform of company law undertaken by the British Government for 150 years. Introduced first in the House of Lords in November 2005 and in the House of Commons in May 2006, the Act is based on the enlightened shareholder principle while establishing the framework within which companies in the United Kingdom operate. The Act is the product of seven years’ work by the Department of Trade and Industry’s Company Law Review and contains over 1300 pages, 885 sections and 15 schedules.

In initiating the Act, The Government objective was ‘to produce clearer law, without unnecessary burdens and which responds today business needs and provides flexibility for the future.’ The Companies Act 2006 therefore introduced several changes in the current company law by abolishing the unanimous consent of shareholders rule and replacing it with a 75% qualified majority, thus removing the obligation of private companies to appoint a secretary and codifying for the first time in British legal history the common law duties of directors. The aims of the Act were first set out in the Government White Paper in November 2005 and were the following: a) ensuring better regulation and a ‘think small’ first approach b) enhancing shareholder engagement and long-term investment culture c) making it easier to set up and run a company d) providing flexibility for the future.

The Law Society welcomed the introduction of environmental and social considerations in the Act and the codification of the law on directors duties, however it harshly criticized the replacement of the duty imposed on directors to act in the best interests of the company with the new rule that requires them to promote the success of the company for the benefit of its members, as we shall see, is the most controversial part of the Act: ‘While the current duty requires directors to act in the best interests of the company, the new duty requires them to promote the success of the company for the benefit of its members, which will create problems for directors facing hostile takeover bids or competing bids would have to balance their shareholders’ desire to receive the best price for their shares against the ongoing future interest of the company and those who depend upon it.’

The individual statutory duties of directors are set out in sections 171–177 of the Companies Act 2006 and shall be considered in turn.

2. The Individual Statutory Duties

Section 171 of the Act reiterates the duty of directors to act within their powers and it is based on the common law duty formulated by Turner LJ in Re Cameron’s Coalbrook Steam Coal and Swansea and Lougher Railway Co. Bennett’s case: “… ‘in the
exercise of powers given to them ...directors must as I conceive, keep within the proper limits. Power given to them for one purpose cannot, in my opinion, be used by them for another and different purpose. To permit such proceedings on the part of directors of companies would be to sanction not the use but the abuse of their powers. It would be to give effect and validity to an illegal exercise of a legal power. 5 It should be noted however, that whenever directors exercise their powers in pursuit of a purpose, the end result of their actions can sometimes yield a substantial purpose or a dominant purpose, a phase used in Whitehouse v Carlton Hotel Pty Ltd6 or a moving cause, a phase used by Lord Shaw in Hindle v John Cotton Ltd7. These phases are used interchangeably by the courts, however the most controversial situation is when the result of directors' actions yield an improper purpose which is in effect a purpose outside their powers. Therefore, an improper purpose invalidates the exercise of a power, had the power had not been exercised if the alleged purpose did not exist (Mills v Mills8). In contrast, if the exercise of a power benefits the director this does not invalidate his power as long as the self – benefit was not the dominant purpose (Hirsche v Sims9).

Section 172 of the Companies Act 2006 states the duty of directors to act in the way they consider to promote the success of the company for the benefit of its members and represents probably the most controversial part of the Act. The previous duty to act in the best interests of the company was formulated by Lord Greene MR in Re Smith and Fawcett Ltd10 that directors must act... bona fide in what they consider – not what the court may consider – in the interests of the company, and not for any collateral purpose.11 The new duty to promote the success of the company for the benefit of its members leaves a lot to desire from the 2006 Act as some cases suggest that the benefit of its members actually represents the interest of its shareholders which is not a legitimate purpose under which an Act should operate. In addition to the interest aforementioned, directors also have to take into consideration the interests of employees according to section 172 (1)(b) of the Companies Act 2006, social, environmental and ethical considerations, sections 172 (1) (d) and (e), the interests of creditors in case of insolvenacy or bankruptcy pursuant to section 214 of the Insolvency Act 1986 (Mercia Safetywear Ltd v Dodd12) and the interests of persons for whom the company is a fiduciary (Lion Breweries Ltd v Scarrott13).

Previously, under the Companies Act 1985 the interests of its members had to be considered in both the long and short term, however, under the new provision the interests of members are considered solely in the long term (Paramount Communications Inc v Time Inc14) which reflects previous criticisms that British people prefer short-term immediate gains rather than gains in the long term. Section 172 reflects the principle of enlightened shareholder value on the grounds that success will be optimized if directors recognize that the success of companies can only be achieved by considering both the long term and the short term and wider factors such as employees, the effects on the environment, customers and suppliers. Although there is no guidance in the Act on what concerns conflict between the interests of the several classes above mentioned, the stance taken by the Courts is that the benefit of members prevails over all other interests. In other words, under section 172 of the Companies Act 2006 the primary aim of directors should be the promotion of the companies success for the benefit of the members which effectively means that if there is a conflict between the success of the company and other matters such as the protection of employees or the environment, the financial interests of members is given obvious priority.

Nevertheless, the interests of employees are the ones that suffered the most in the new regime. Previously, section 309 of the Companies Act 1985 required directors to consider the interests of employees as it refers to employees interests, the new section 172 refers to the company’s relationship with its employees. The implication of this is that under section 172 directors could disregard employees interests whenever they considered that the financial interests of the members have primacy or if they believe that there is no need to pause and consider the interests of this class of stakeholders which is in my opinion a shame. This practically reduces employees from a class of people ‘whose interests must be respected or at least considered, to suppliers of labour, alongside of suppliers of goods and services.’15 Another unfortunate effect of section 172 is that under this provision employees do not have a judicial remedy if they seek to pursue an alleged claim because the duty under section 172 is owed to the company which means that it only can be enforced by the company or the shareholders in a derivative action, which essentially leaves employees to seek a remedy outside the remit of the Companies Act 2006 which is inconvenient.

The introduction of social, environmental and ethical considerations in section 172(1) is an innovative and highly welcomed provision in the current commercial world. This section provides that when directors consider the success of the company for the benefit of its members as a whole, they must have regard to: ‘(d) the impact of the companies operations on the community and the environment’16 and ‘(e) the desirability of

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5 ibid.
6 Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR.
7 Hindle v John Cotton Ltd (1919)6 SLR 625.
8 Mills v Mills (1938) 60 CLR 150.
10 Re Smith and Fawcett Ltd (1942) Ch 304.
11 ibid.
13 Lion Breweries Ltd v Scarrott (1986) 3 NZCLC100,042 New Zealand.
14 Paramount Communications Inc v Time Inc (1990) 571 A 2d 1140.
16 Companies Act 2006, section 172 (1)(d).
the company maintaining a reputation for high standards of business conduct.\textsuperscript{17} Such interests are important to be taken in consideration nowadays as some major corporate companies such as Bmn for example, take decisions that can have wide implications or effects on the public at large.

It has long been established that a director of an insolvent company owes a duty to its creditors (\textit{West Mercia Safetypwear v Dodd})\textsuperscript{18} and has been restated in more recent cases such as \textit{Colin Gwyer and Associates Ltd v London Wharf (Limehouse) Ltd}\textsuperscript{19} where the Deputy High Court Judge stated: ‘Where a company is insolvent or of doubtful solvency or on the verge of insolvency and it is the creditor’s money which is at risk, the directors, when carrying out their duty to the company, must consider the interests of the creditors as paramount and take those into account when exercising their discretion.’\textsuperscript{20} Director that fail to do so risk to be considered ‘unfit’ by the courts pursuant to section 6 of the Director’s Disqualification Act 1986 which shall be considered below.

On what concerns the interests of persons for whom the company is a fiduciary it has been held that directors of a company are not in a fiduciary relationship with persons for whom the company is a fiduciary (\textit{Bath v Standard Land Co Ltd})\textsuperscript{21} although later judgments stated the contrary i.e. in \textit{Re French Protestant Hospital}\textsuperscript{22} it was held that directors themselves should be considered trustees of a charity. Also, directors are not liable for failing to ensure that the company does not breach its fiduciary duties (\textit{Gregson v HAE Trustees Ltd})\textsuperscript{23} but the fiduciary duties that a director possesses may be enforced by beneficiaries for whom the company is a trustee. (\textit{Baden v Societe Generale Pour Favoriser le Developpement du Commerce et de l’Industrie en France SA})\textsuperscript{24}.

Other duties to take into consideration while promoting the success of the company for the benefit of its members is to take into account all material considerations which essentially means that directors should act reasonably when exercising their powers (\textit{Edge v Pensions Ombudsman})\textsuperscript{25} and the duty to disclose misconduct which is highly controversial and shall receive elaboration here. In \textit{Item Software (UK) Ltd v Fassihi}\textsuperscript{26} Mr Fassihi was the sale and marketing director of a company called Item which managed a distribution business. While still being the director of Item he set up a new company called RAMS to take over the distribution contract with a company called Isograph while still being in negotiations with Item. Not only did Mr. Fassihi deliberately set up a company to take over a contract which was initially a matter for Item, but he advised the latter company to take a strong stance in its negotiations with Isograph. The test applied by the court was whether an intelligent and honest person in the position of Mr. Fassihi could have reasonably believed that it was in the company’s interest to know that he breached his duty to disclose misconduct.

Moving on to section 173 of the 2006 Act, the duty to exercise independent judgment; the case of \textit{Thorby v Goldberg}\textsuperscript{27} established that when exercising judgment directors must act bona fide in the interest of the company. In addition, Lord Denning MR stated in \textit{Boulting v Association of Cinematograph, Television and Allied Technicians}\textsuperscript{28} that: ‘It seems to me that no one, who has duties of a fiduciary nature to discharge, can be allowed to enter into an engagement by which he binds himself to disregard those duties or to act inconsistently with them. No stipulation is lawful by which he agrees to carry out his duties in accordance with the instructions of another rather than on his own conscientious judgment; or by which he agrees to subordinate the interests of those whom he must protect to the interests of someone else,’ Directors will infringe this duty when they deliberately or purposely agree to allot shares to a particular class of people before a meeting, or when they exercise their voting power to block votes from different groups of stakeholders or when they try to benefit themselves by ensuring that they will remain in office.

Pursuant to section 174 of the Companies Act 2006, directors have a duty to exercise reasonable care, skill and diligence which is established to be a common law duty requiring a dual / objective standard of care (\textit{Norman v Theodore Goddard})\textsuperscript{29}, section 174 of the Companies Act 2006) but it is not classified as a fiduciary duty (\textit{Henderson v Merret Syndicates Ltd})\textsuperscript{30}. A particular aspect which is important in this area is the directors knowledge of the company’s business. In the beginning of the 20th century Neville J pushed matters a bit too far by declaring in the case of \textit{Re Brazilian Rubber Plantations and Estates Ltd}\textsuperscript{31} that a managing director of a rubber company does not require any knowledge of rubber to be able to chair a company, nor will he be liable for any consequences deriving from his lack of knowledge. Nowadays section 174 of the Companies Act 2006 imposes a dual objective / subjective standard based on the statement of Jonathan Parker J in \textit{Re Barrings plc}\textsuperscript{32}: ‘Directors have,
both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company’s business to enable them properly to discharge their duties as directors.33

The duty to avoid conflicts of interest can be found in section 175 of the Companies Act 2006 and it is a duty based on the no-conflict rule and the no profit rules affirmed by Lord Herschell in Bray v Ford34. ‘It is an inflexible rule of a court of equity that a person in a fiduciary position … is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict’35. Of particular relevance in this area is the doctrine of corporate opportunity, which provides that a director breaches his fiduciary duty if he pursues for his own benefit a business opportunity which would be regarded in equity as belonging to the company (Bhullar v Bhullar36). To illustrate this doctrine, we will examine 2 important cases involving the conflicts of interests of directors.

In the case of Cook v Dees37, the directors of Toronto Construction Ltd were in the process of negotiating a contract with Pacific Railway Co and before finalizing their agreement with the latter company, they argued and left one director, Mr. Cook out of the business. Without the consent or knowledge of Mr. Cook, the 3 other directors set up a new company to complete the contract with Pacific Railway Co. The Privy Council decided to order the 3 directors and their new company to account to Toronto Construction Co for the profits made out of their contract establishing therefore that they breached their duty to avoid conflicts of interests. Similarly in Industrial Development Consultants Ltd v Cooley38, Mr. Cooley was the managing director of a company called Industrial Development Consultants Ltd who during the 60s negotiated several contracts with Eastern Gas Board which decided not to go ahead with the work. A few years later the Eastern Gas Board reconsidered its position and this became known to Mr. Cooley from a discussion with the Gas Board which decided not to go ahead with the work. A few who during the 60’s negotiated several contracts with Eastern Gas Board was on the verge of a breakdown. Mr. Cooley was awarded the tender for the contracts and asked to be released from his job at Industrial Development Consultants Ltd v Cooley38, Mr. Cooley was the managing director of a company called Industrial Development Consultants Ltd who during the 60’s negotiated several contracts with Eastern Gas Board which decided not to go ahead with the work. A few years later the Eastern Gas Board reconsidered its position and this became known to Mr. Cooley from a discussion with the Gas Board’s chairman, who also intended to employ Mr. Cooley himself to do the work. Mr. Cooley prepared therefore the tender for the contracts and asked to be released from his job at Industrial Development Consultants Ltd on the ground that he was on the verge of a breakdown. Mr. Cooley was awarded the contract and the court held that he breached his duty to avoid conflicts of interests and that he was a trustee for the claimant of his profits on the contract with the Eastern Gas Board.

The duty to avoid conflicts of interest under section 175 of the Companies Act 2006 is particularly important due to the fact that it can create a chain of future potential breaches. Arguably, a director who breaches his duty to avoid conflicts of interest inevitably also breaches duties such as the duty to exercise independent judgment under section 173, the duty to declare an interest in a proposed transaction under section 177 and possibly even the duty not to accept benefits from third parties under section 176. Both directors in Cook v Dees39 and Mr. Cook should have declared their interest in the proposed contracts on the first occasion they had a board meeting, and they subsequently should have left the other directors of the board to decide what should have been done. The duty to declare interest in a proposed transaction is based on the equitable principle that when a company enters into a transaction, a director of the company must disclose to it any interest which that director has in that transaction (Bentinck v Fenn40). In addition, the duty not to accept benefits from third parties under section 176 applies even after directors leave office.

3. The Problem of Nominee and Multiple Directors

First of all we must distinguish between nominee directors and multiple directors of rival companies. Nominee directors are defined as ‘… persons who, independently of their method of appointment, but in relation to their office, are expected to act in accordance with some understanding or arrangement which creates an obligation or mutual expectation of loyalty to some persons or persons other than the company as a whole.’41 For this purpose, a nominee director may be appointed in a subsidiary to represent a shareholder or a large group of shareholders or debenture holders of the parent company. Multiple directors are directors appointed by more than one company and there is potential overlap between the two categories of directors as nominee directors appointed by a principal may already be directors of another company.

The most important duty of nominee directors is the duty to act bona fide in the interests of the company as stated by Lord Greene MR in Re Smith & Fawcett Ltd42 which was stated above and which applies to all directors. In addition, nominee directors have the duty not to fetter their discretion as it would be a breach of duty to contract with an outsider even if it is a principal, to vote in a particular way at board meeting, or to prefer the interests of a principal to those of the subsidiary in event of conflict. (Kregor v Hollins43; Clark v Workman44). Another duty that may be imposed on nominee and multiple directors is a duty to avoid a conflict of interest and it arises where a director intends to make a personal profit from the information acquired as a result of holding office in the subsidiary or in another company which was firmly state by Lord Cranworth.

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33 ibid.
34 Bray v Ford [1896] AC 44.
35 ibid.
37 Cook v Dees [1916] 1 AC 554.
39 ibid.
40 Bentinck v Fenn (1887) 12 App Cas 652.
41 Companies and Securities Law Review Committee (NSW, Australia) Nominee Directors and Alternate Directors Report No 8, 2 March 1989 at 7.
42 ibid.
43 Kregor v Hollins (1913)109 LT 225.
LC in *Aberdeen Railway Co v Blaikie Bros*43 that: ‘... it is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect’.46 We will move on to consider how the courts have applied these duties in England, Australia and New Zealand.

In England, an appropriate starting point to consider the duties of nominee directors is the case of *Scottish Cooperative Wholesale Society Ltd v Meyer*47 where Scottish Wholesale Society Limited formed a subsidiary company and nominated 3 of their 5 directors to sit on the board of it. Four years later due to the abolition of cotton control the Society changed its priorities and did not longer require connections with the nominee directors and decided instead to starve the subsidiary of supplies and also set up a competing rayon business. The House of Lords held that the parent company conducted its affairs oppressively via its nominees contrary to section 210 of the then Companies Act 1948. In regard to the question of the duties of nominee directors, Lord Denning expressed the following judgment: ‘So long as the interests of all concerned were in harmony, there was no difficulty. The nominee directors could do their duty by both companies without embarrassment. But, as soon as the interests of the two companies were in conflict, the nominee directors were placed in an impossible position. It is plain that, in the circumstances, these three gentlemen could not do their duty by both companies, and they did not do so. They put their duty to the cooperative society above their duty to the textile company in this sense, at least, that they did nothing to defend the interests of the textile company against the conduct of the cooperative society: they probably thought that as nominees of the cooperative society their first duty was to the cooperative society. In this they were wrong. By subordinating the interests of the textile company to those of the cooperative society they conducted the affairs of the textile company in a manner oppressive to the other shareholders.’48

Lord Denning judgment in the *Scottish case*49 should be contrasted with his judgment in *Boulting v Association of Cinematograph, Television and Allied Technicians*50. In this case, the Boulting brothers who were joint managers of a subsidiary company that produced films, sought a declaration that their membership of the ACTT would amount to a breach of their fiduciary duties because as they argued the Union Rules empowered the General Council to expel or fine a member where the member was acting in prejudice or against the rules of the company and that a conflict of interest would appear between acting by such rules and the company and the persons employed by it. Despite of being the only dissenting judge, Lord Denning was the only judge to consider the question of duties of nominee directors in this situation and would have probably been the only judge in this case to offer a declaration that the membership of the nominee directors in the ACTT was unlawful.

In the Privy Council case of *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd*51, Kuwait Asia Bank EC was beneficial interested in 40% of shares in a New Zealand company called AICS and appointed two directors to be the nominee directors of the latter company. The Privy Council said: ‘In the performance of their duties as directors ... House and August were bound to ignore the interests and wishes of their employer, the bank. They could not plead any instruction from the bank as an excuse for breach of their duties to AICS.’52 The end result of the above mentioned cases is that they give priority to the interests of the nominee company as opposed to the principal. However, one important question that is left unanswered is: what is the point of appointing a nominee director in subsidiary company if the alleged director cannot safeguard the interests of the principal? The holding of the courts that a nominee director should consider the interests of the nominee company when in conflict with the parent inevitably defeats the purpose of appointing a nominee director in this situation in the first place. The better view is that a nominee director can give priority to the interests of the principal as long as the supposed interests are not in conflict with the interests of the subsidiary. Or, as long as the nominee director bona fide believes that the interests of nominator are identical with the interests of the company as a whole as suggested by Jacobs J in *Re Broadcasting Station 2GB Pty Ltd*53. The jurisdictions of Australian and New Zealand offer the same view of the question of the duties of nominee directors and is considered below.

In Australia, the first case to consider the position of nominee directors was *Levin v Clark*54. Here, Levin purchased all the shares in a company called Argus and also entered into a mortgage whereby he charged all the shares to the vendor company. According to the arrangements that purported these changes was that additional directors should be appointed to Argus while the two current directors, Clark and Rappaport would retire and were only to resume their powers in the company in the event of a default by Levin. Levin defaulted, and the two directors sought to enforce their powers in the company and Levin decided to challenge the resolutions passed by them on the ground that Clark and Rappaport were not acting in the interests of the company but were acting solely in the interests of the mortgagee. Jacobs J did not deny the requirement that directors act in the best interests of the company but held that the content of this duty may be lawfully modified by the constituent articles of the company according to the wishes of the beneficiaries. Therefore

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43 *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461, 471–472; [1843-60] All ER 249, 252.
44 ibid.
45 *Scottish Cooperative Wholesale Society Ltd v Meyer* [1959] AC 324.
46 ibid.
47 *Scottish Cooperative Wholesale Society Ltd v Meyer* [1959] AC 324.
48 ibid.
49 *Scottish Cooperative Whole Society Ltd v Meyer* [1959] AC 324.
50 *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 605.
52 ibid.
53 *Re Broadcasting Station 2GB Pty Ltd* [1964-5] NSWR 1648.
the court upheld the fact that the directors were acting solely in the interests of the mortgagees provided that there was a clause in the constitution of the company that allowed them to enforce their powers in the event of default by another director.

The next case, *Re Broadcasting Station 2GB Pty Ltd* 55 concerned the acquisition of 60% interest in shares by Fairfax of a broadcasting company that ultimately became a subsidiary of Fairfax. The purchase required the consent of the Australian Government and Fairfax secured 4 nominee directors in the subsidiary company. The nominee directors refused to cooperate with the other directors by denying any details of negotiations that took place and one of the directors sought relief under section 186 of the Companies Act 1961 (NSW) that the minority shareholders were being oppressed by the majority thorough the nominee directors. Jacobs J here considered that the nominee directors bona fide believed that the interests of the broadcasting company coincided with the interests of Fairfax and that this did not amount to oppressive conduct against any of the shareholders. This case therefore affirms that nominee directors should prefer the interest of the subsidiary and not the parent but it also makes express the ability of the nominee to act in the interests of the parent where there is no conflict between the two.

In New Zealand, Mahon J expressed approval on the idea of bringing directors duties in line with commercial reality by stating in the case of *Berlei Hestia (NZ) v Fernyhough* 56 that: ‘…there have been attempts to bring this theoretical doctrine of undivided responsibility to harmony with commercial reality upon the basis that when articles are agreed upon whereby a specified shareholder is empowered to nominate its own directors, then there may be grounds for saying that in addition to the responsibility which such directors have to all shareholders as represented by the corporate entity, they may have a special responsibility towards those who nominated them’. Such a view proceeds on the basis that the articles were so constructed with the intent and belief that the institution of such a special responsibility towards one class of shareholders was conducive to the interests of the company as a whole. For an illustration of this line of thinking I refer to the dicta of Jacobs J in *Levin v Clark* 57 and *Re Broadcasting Station 2GB Pty Ltd* 58... As a matter of legal theory as opposed to judicial precedent, it seems not unreasonable for all corporators to be able to agree upon an adjusted form of fiduciary liability, limited to the circumstances where the rights of third parties vis-à-vis the company will not be prejudiced.’ 59 This paragraph duly affirms that the duty to promote the success of the company for the benefit of its members may be modified by agreement amongst the corporators and suit therefore the commercial reality of persons in the place of nominee directors.

Moving on the position of multiple directors, we note that these directors are allowed to sit on the board of more than one company provided that the company’s articles do not expressly prohibit it. This of course raises contentious issues as regards the duty of directors and how far can they exercise their powers in situations outside their company. We also note that neither the courts of England, Australia or New Zealand have attempted to put down guidelines for such directors in cases of conflict and there are no clear limitations or qualifications for a multiple director. Moreover, the position seems to be that directors will be let to hold office in rival companies.

In England, in the case of *London and Mashonaland Exploration Company Ltd v New Mashonaland Exploration Company Ltd* 60, Chitty J has attempted to impose sanctions on a person holding directorships in rival companies subject to three qualifications: first of all, it is open for a company to restrict the directors activities in its articles of association, by forbidding them to act on the board of any other company doing a substantial amount of business in competition to the company he is already serving. Secondly, Chitty J also refers to the possibility of there being an express or implied contract limiting the director’s activities especially in the cases of executive directors who are asked in their contracts of service to work exclusively for one company or not to engage in any other external activities that might give rise to a conflict of interest. And thirdly, where there is no such express provision, the duty of fidelity to the employer will be implied. Therefore, subject to these three qualifications, a person may be a director of rival companies according to Chitty J.

Interestingly, in the case of *Bell v Lever Brothers Ltd* 61, Lord Blanesburg extended the dictum of Chitty J by declaring that ‘...what he (the director) could do for a rival company, he could, of course, do for himself’ 62 and affirmed that directors are not prohibited by their position from entering private engagement provided that they did not make use of the company’s property or information. In the case of *Scottish Cooperative Wholesale Society Ltd v Meyer* 63, Lord Denning has attempted to put a limitation on Lord Blanesburg’s judgment in *Bell v Lever Brothers Ltd* 64 by stating that: ‘Your Lordships were referred to *Bell v Lever Brothers Ltd* 65 where Lord Blanesburg said that a director of one company was at liberty to become a director also of a rival company. That may have been so at that time. But it is at the risk now of an application under section 210 if he subordinates the interests of the one company to those of the other.’ 66 Unfortunately this dictum does not expressly prohibit persons

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53 ibid.
56 *Berlei Hestia (NZ) v Fernyhough* [1980] 2 NZLR 150.
57 ibid.
58 ibid.
59 ibid.
60 *London and Mashonaland Exploration Company Ltd v New Mashonaland Exploration Company Ltd* [1891] WN 165.
61 *Bell v Lever Brothers Ltd* [1932] AC 161,193.
62 ibid.
63 ibid.
64 ibid.
65 ibid.
66 ibid.
from holding multiple directorships in different companies and the position still remains in England to be so.

There is little authority on the position of multiple directors in rival companies in Australia. One case to consider the issue is Mordecai v Mordecai where Hope J acknowledged that the law was still developing in this area and referred to the judgment of Lord Denning in Scottish Co-operative Wholesale Society Ltd v Meyer to affirm that this may correctly point the direction in which the law as to directors duties is going, but it is not necessary to resolve the question in the case. He also held the directors to be in breach of their duties applying Aubanel and Alabaster Ltd v Aubanel.

In the case of Trounce v Wakefield v NCF Kaiwai Ltd & Ors in New Zealand there was an action by two nominee directors to restrain the company on whose board they were nominees from excluding them from meetings of the board in relation to a takeover offer for the company by a fully owned subsidiary of the principal. The company argued that the nominee directors were in breach of their fiduciary duties by having placed themselves in a position where their personal interest may conflict with those of the company. Heron’s J response was the following: ‘In my view it would be wrong to apply the principle in anticipation of a breach of fiduciary duty on the facts in this case removed as they are from the personal profit consideration which was at the heart of Bray v Ford and Boardman v Phipps.

As it stands from all 3 jurisdictions, it seems that directors will be allowed to hold office in rival companies. It is surprising that the courts have not offered any guidance for nominee and multiple directors in case of conflicts of interests and neither did Parliament as there is no statute mentioning nominee or multiple directors. My impression is that nominee directors will be allowed to preside over the board of a subsidiary as it is in the interest of the subsidiary to have the guidance and the view of the principal. As regards the issue of multiple directors in rival companies, it seems to me that a large number of them are not active in all the companies that they supposedly serve, making the possibility of conflicts of interest to arise not so frequent and problematic.

4. Disqualification of Directors

The disqualification of directors under section 6 of the Directors’ Disqualification Act 1986 raises contentious issues. There is no Parliament Act stating the standard of care to be imposed on a director, and while the courts did set out some guidance on the issue there is still confusion in this area of the law. Also, there is no general consensus yet on the meaning of ‘unfitness’ of directors and neither did Parliament put a definition on a statutory basis for this matter. The standard of care was first set out by the court in Re City Equitable Fire where it was held that unless the appointment of a director has been manifestly foolish, a director cannot be expected to show a higher standard of care than is reasonably expected from him as Romer J stated: ‘A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.’ Under section 6 of the Directors’ Disqualification Act 1986 the courts must disqualify a director of a company which has become insolvent either while the director was acting for it or later and where the court finds that his conduct ‘makes him unfit to be concerned in the management of a company.’ The minimum period of disqualification is 2 years and the maximum period of disqualification is 15 years (s6(4) of the Director’s Disqualification Act 1986).

The circumstances under which a director may be disqualified are set out in sections 2–5 of the 1986 Act and are the following: conviction of indictable offence (Re Georgiou), persistent default (Re Arctic Engineering Ltd) and fraud discovered in winding up (section 4 of the 1986 Act). The duty to disqualify is set out in section 6 and reads as follows: ‘The court shall make a disqualification order for a period of not less than two years nor more than 15 years against a person if, on application by the Secretary of State or at his discretion by the Official Receiver where a company is being wound up by the court in England or Wales, the court is satisfied that: a) such a person is or has been a director of a company which has at any time become insolvent (whether while he was a director or subsequently); and b) his conduct as a director of a company (taken alone or together with his conduct as a director of any other company or companies) makes him unfit to be concerned in the management of a company.’

While there is a considerable number of cases on the issue, there is no clear standard to determine unfitness. Section 9 of the 1986 Act sets out matters to be taken into account when determining unfitness whereas cases such as Re Churchill Hotel (Plymouth) Ltd and others and Re Stanford Services have held that where directors withhold VAT, National insurance and PAYE tax money which should be sent to the Crown was a significant factor in determining unfitness but in the case of Re Dawson Print Group this issue was not considered to be
particularly crucial in determining unfitness. The criteria stemming from Dawson and Stanford is that directors will be considered unfit where there has been: a) a breach of commercial reality b) really gross incompetence c) recklessness d) the director would be a danger to the public if he were allowed to continue to be involved in the management of the companies.

Important factors that the court will take into consideration when considering the issue of unfitness of directors are: the amounts of debts outstanding and especially the amount of Crown debts (Re Lo-line Electric Motors Ltd), the amount of other liquidations that the director has been involved in, how the company has been managed, the personal circumstances of the director, where the director is young it will be considered as a mitigating factor (Re Majestic Recording Studios Ltd) and the state of mind of the defendant (Re Civia Investments Ltd).

Although the standard of care to be attributed to directors has received scant attention, there have been cases in which it has been inferred that the standard of care to be imposed on a director should be an objective one: ‘To reach a finding of unfitness the court must be satisfied that the director has been guilty of a serious failure or serious failures, whether deliberately or through incompetence, to perform those duties of a director which are attendant on the privilege of trading through companies with limited liability. Any misconduct of the respondent qua director may be relevant.’ (Peter Gibson J in Re Bath Glass). Since the standard of care entails a serious failure that can be breached by an incompetent director this means that the test is objective, in that the standard can be breached by someone who is incapable of performing the duties of a director. In AB Trucking and BAW Commercials the director was held to be ‘incapable of understanding the commercial reality of accounts’ and ‘incapable of discharging his duty to the public.’ One of the most important mitigating factors to be taken into account by the courts when disqualifying a director are the following: the possible effect on employees (Re Majestic Recording Studios), whether the director was acting on professional advice or not (Re Rolus Properties Ltd & Anor) and the youth of the director.

As seen there is no clear consensus yet on the standard of care or the meaning of unfitness since the case of Re City Equitable Fire has not been overruled either by the courts or by Parliament passing legislation. It is therefore surprising that neither the courts nor Parliament have taken steps to clarify the law on this area and it seems that further elaboration and most of all significant reform is needed to objectively ascertain when a director will be considered unfit in the eyes of the court.

5. Remedies

The last section of this article will briefly discuss remedies against defaulting directors. The first and most common remedy provided by the court is return of property and confiscation of profits where a director has acquired property in breach of his fiduciary duty. He is considered to hold the property in trust for the company and has to return it to the company (Murad v Al-Saraj). It is obvious however that a director in breach of a fiduciary duty is not liable to return profits which are not a result of the breach of the fiduciary duty he possesses towards the company (Warman International Ltd v Dwyer) nor will he be liable for profits which are made by another person (Regal (Hastings) Ltd v Gulliver). In addition, pursuant to section 1157 of the Companies Act 2006, the court will relieve honest and reasonable directors of liability if he or she acted honestly or reasonably.

Another common remedy awarded by the courts is rescission where each party gives back any profits made from the alleged breach and it is only available where both parties are in a position to do so. Any transaction in breach of a director’s duty is voidable at the company’s option and may be rescinded, but the transaction itself is not void (Spackman v Evans). Equitable compensation is a remedy awarded by the court where no other remedy is available or suitable to the parties and only when the party that is pursuing the action can reasonably show the losses that it has suffered.

A director can be relieved from liability if the company has ratified his action in which case the company has no cause of action and cannot bring a claim against a director, section 239 of the Companies Act 2006. As said before, if the company can and

81 Ibid.
82 Ibid.
84 Ibid.
87 Ibid.
89 Ibid.
90 Ibid.
91 Murad v Al-Saraj [2005] EWCA Civ 959.
93 Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134.
94 Coleman Taymar Ltd v Oakes [2001] 2 BCLC 749.
95 Spackman v Evans (1868) LR 3HL 171.
96 Target Holdings Ltd v Redfemrs [1996] 1 AC 421.
does bring a claim against a defaulting director, the court will also relieve a director from liability if it finds that the acts committed by the director were honest and reasonable pursuant to section 1157 of the Companies Act 2006. In addition, were the shareholders fully understand the actions of the director and have provided him with fully informed consent there will be no cause of action (Phosphate of Lime Co v Green\textsuperscript{98}). These grounds for relief are qualified in the sense that relief will not be granted if the acts of the director will financially affect the creditors or if they bring some sort of detriment to them. (DKG Contractors Ltd\textsuperscript{99}).

This article started by considering the Companies Act 2006 and the individual statutory duties, placing particular emphasis on the new duty of directors to promote the success of the company for the benefit of its members and the interests of employees. Also this article has considered the problem of multiple and nominee directors in the different jurisdictions of England, Australia and New Zealand. Lastly, this article considered the issue of disqualification of directors under section 6 of the Director’s Disqualification Act 1986 and the availability of remedies and relief from liability of defaulting directors.

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Changes of Civil Liability in Europe

Tamás Fézer

Abstract

The area of tortious liability is not a harmonized part of private law in the EU Member States. Although no general directives or regulations
exist in the field of torts in the European Union, the past two decades showed a remarkable approximation of tort doctrines in the judicial practice.
National courts tend to take into close consideration foreign judgments and doctrinal changes. This phenomena led to a semi-harmonized European
tort theory that provides basic consideration and remedies to plaintiffs who suffered damages. The essay seeks those areas of tort law that verify this
voluntary approximation and should function as a base to future harmonization of tortious liability in a European level. Intentionally the essay also
aims to provide overview on those changes in tort concepts that were driven by the social and economic changes of the last decades.

Key words: tort law; tortious liability; approximation of laws in the European Union; European private law; damages; liability; civil law; fault;
general damages; judicial practice.

1. Harmonizing Tort Law in the European Union

The European Union never meant to intervene private law
issues in the Member States. Most of the early history of the
European Union focused on destroying all legislative obstacles
in the way of a single European market. However, it soon became clear that no economic integration and single market exist without some kind of unified business law. Even if the most significant and visible obstacles, like the existence of cus-
toms, mandatory registration, almost completely disappeared by the end of the 1960s, the surprisingly diverse contract law, company law, tort law issues still functioned as serious barriers that blocked the operation of a smooth and unified European business sphere. The European Commission faced the difficul-
ties arisen from the non-harmonized business law rules in the Member States and initiated a massive attack on the private
law freedom of states with drafting many directives to destroy these serious obstacles and provide smooth operation for the single market. At the beginning, the original competences and powers provided to the European Communities in the Roman Treaty did not allow intervention in the private law legislation of the Member States, and in the Council and the European Parliament the representatives and political members from the states still blocked most of the new legislative attempts. Finally, in 1989 the European Parliament adopted a decision that specifically addressed a new duty to the Commission to
work on the potential approximation of mainly contract law
rules in the Member States. By that time the amended Roman
Treaty established so-called flexible clauses in order to create new competences in legislation for the European Union, and the European Court of Justice also broadened the legislative scope and power for the EU institutions and legislators. Back those days private law approximation focused mainly on classic contract law issues, like formation of a contract, performance and breach. It is easy to understand how tort law and liability in general became an important and central element in this private law harmonization process, mainly because breach of an obligation – regardless of its contractual or non-contractual na-
ture – normally constitutes liability on the side of the tortfeasor.
In the infamous Bergaderm decision, the European Court of Justice also established the liability of EU institutions to cover damages suffered by the European citizens. The Francovich decision went even further with establishing a direct liability of the Member States to its citizens when committing a breach or violation against EU norms. We may think of these changes as starting points on the way to establish some kind of unification in tort and civil liability in national laws in the European Union, although this approximation goes a lot deeper. Independently from the achievements and harmonization activities of the European Union, the national courts often consider foreign judgments and their reasoning when deciding in a cross-border business conflict or an international tort debate.

1 The study is part of a research project supported by the Hungarian Scientific Research Fund (OTKA PD105704).
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4 Bergaderm C-352/98.
5 Francovich v Italy C-6/90.
This is an understandable necessity that comes from the globalization and Europeanization, since especially in the sector of real business law, actors of the business sphere do not favor closed national judgments and national laws in general. *Lex mercatoria* and the need for a sector specific *iusus* based supra-law should not seem to be a new phenomenon in modern day business life. Many factors, like the constantly growing migration from regular national courts to the direction of international arbitration committees forced and are forcing both national legislators and courts to consider business law and tort law as truly international areas of law. Without the intention to ruin the effectiveness of the European Union, we must say this European approximation of national civil liability laws is more a result of a voluntary, organic process than a result of EU legislation. So far, only very specific areas gained legislative interest in the EU, such as products liability, liability issues in connection with consumer protection (e.g. unfair commercial practices, consumer rights, etc.). Although an ambitious project was delivered in 2003 on the Principles of European Tort Law (PETL), this proposed European tort code was never accepted as a binding law, either in the form of a directive or regulation. As we mentioned above, there is a dynamic trend to harmonize national laws in Europe. This is particularly true for contract law, but also counts for specific areas of tort law, e.g. product liability. However, there has not been an attempt until the drafting of PETL to harmonize tort law by the European Union or the Council of Europe. Everyone who is a little aware of the development of tort law in various European countries will have noticed that the foundations of tort law in these legal systems differ considerably. There is not only the traditional boundary between the common law and the continental civil law countries. Also, legal systems on the continent e.g. France and Belgium, take a dramatically different approach than e.g. Germany. These differences in tort law today explain why there has, until now, not been an attempt to harmonize the entire field of tort law in a consistent manner. While this statement is still true regarding the core concepts of fault, causation or even the calculation of damages, most EU Member States still show some organic progression towards a more globalized, Europeanized approach of tort law when it comes to judicial practice. The trend, some interpretation methods courts use in order to evaluate civil liability in an actual case, as well as new challenges and reactions to these challenges definitely show a truly harmonized action in practice. I only have time to highlight some particularly interesting areas of tort law and civil liability in general in which national courts seem to find some kind of consent over the past years.

2. Dichotomy of Contractual and Tort Liability – Widening the Gap

In the European civil liability traditions there have always been common cores for tort liability and liability for breach of a contract. Especially the Civil Codes of the newly joined Central and Eastern European countries brought a tradition that relied on firm bridges between the liability regimes. In the third trimester of the 20th century, some Western European countries changed directions in the handling of tort and contractual liability problems. Contract law became more like a professional field of law that primary has to provide rules for businesses and not individuals. Contract law became part of business law instead of an important leg of private law in general. This process was sped up by the rapid development of consumer protection law and the involvement of the European Union in constituting consumer protection law in Europe. Consumer protection law rules created a different territory for mainly contractual rules requiring strict information duty of sellers and businesses to consumers. As more and more consumer protection law directives and some regulations were adopted in a European level, contract law started to focus on business to business (B2B) relations, instead of business to consumer (B2C) relations.

A professional contract law had to face with different needs of business society than the needs of the old consumer-business or individual to individual approach. This new contract law got more independent from the original fault-based tort law rules and gave birth to a modern business liability for breach of a contract. Although the European Union never had enough power to succeed in unifying contract law or its separate fields (most importantly the questions of breach and its legal consequences), the European consumer protection law oriented national legislators toward the direction of a business contract liability regime. As we take a closer look at the recent civil codification processes in some EU Member States, we can easily identify this voluntary change of paradigms in Italy, Romania, the Czech Republic and Hungary. Contractual liability is no longer a little sister of tort liability, heavily relying on the core concepts and legal institutions created for the latter, but a separate column of civil liability with its own institutions and interpretation needs.

What might be the most significant differences between the two liability regimes? First of all, the fault-based liability system of tort law is no longer accepted in business contractual relations. Liability of a contracting party who committed a breach is a lot closer to strict liability than ever before. Fault is generally not an issue and the restorative purposes dictates liability for damages the breach caused to the other party. However, limitations still exist, while not with the evaluation and precondition of fault, but the limitation of full compensation, the amount of damages to be compensated. Clauses like foreseeability seemed to be a causation issue for centuries in the European continent. These days foreseeability is the core element and most important defense a contractual party can get if he wishes to narrow the scope of liability for breach of a contract. Foreseeability also serves as an important manifestation

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of the old cooperation duty between contractual parties (culpa in contrahendo). In order to be entitled for the maximum compensation in case of a breach situation, parties are forced to inform each other deeply about their interests in the contract. If the buyer of raw materials does not express the background motivation behind the deadline in the contract, she may face with a limited compensation once the seller (manufacturer of the raw materials) delivers the goods with a significant delay. Even if she proves the existence of a default penalty in her other contract formed with the seller of the finished product, the raw part manufacturer will not be liable for these damages unless she informed him about it at the time they formed the contract. Some authors think of foreseeability as a self-regulative method of business life and the enforcer of fair business. Some authors think of foreseeability as a self-regulative method of business life and the enforcer of fair business.10 In our case, we see the interpretation of foreseeability in the practice of the national courts in Europe more like an explicit limitation of the old tort law theory of full compensation.

3. Interpretation of Fault

In the European civil liability traditions, going back to the ancient Roman law cores, there were always four important preconditions, lemmas of civil liability in tort law: damage, wrongfulness, causation and fault. However, during the centuries, the European Union Member States developed very scattered interpretation of these preconditions. Fault seemed to be the most diverse of all in the practice of national courts across Europe. In order to simplify things, we can divide the European fault concepts into two major categories: some of the states in the EU follow the old intentional-negligent tort concept that heavily relies on the level of fault on the side of the tortfeasor. The second category does not make a difference between intentional and negligent torts, neither the scope of liability, nor the amount of damages depend on the levels of fault. States following this second concept developed a single measure of all human acts: all individuals must exercise utmost care that is expected from a reasonably thinking, ideal person of the society. This almost objective measure treats all tortfeasors equal with the intent to reach the somewhat idealistic goal of full compensation. In a tort case, the only goal is to make the plaintiff whole again with providing her full compensation paid by the tortfeasor, who is liable for the damages he caused. In this concept, judges do not care about the actual knowledge, psychological condition, social status of the tortfeasor – who is in the defendant position – but apply a general standard, a general approach of duty of care that is expected from all members of the society. The comparison is about an idealistic person, who probably does not exist in reality, only in the mind of society. However, this almost objective requirement in everyday life is not entirely independent from the significances of the actual case. According to the rule of imputation only those tortfeasors shall compensate the damages they caused, who did not act with what is expected generally in such situation.11 The actual situation can concretize the case and may ease this very high expectation from the society.

The two fault models and interpretations seemed to be very far from each other for centuries. In the past two decades, judges started to adopt the objective measure of an idealistic person in professional malpractice cases, constituting an almost strict liability of professionals who caused damages to a plaintiff. Although there is no general definition of professionals, not in a European and certainly not in a national level. Judges across Europe use this term for all running activities that require specific qualification, knowledge or skills. The starting point and justification for this rigorous approach is that a person who makes business with a professional is usually a lay person without the knowledge, qualification and skills. She entirely relies on that professional, who – therefore – infringes not only a personal but a public trust with the malpractice. Medical doctors, accountants, investment advisors, transport companies are all considered professionals and faced with the almost strict liability in both tort and contractual liability cases.

We might have made an impression above that these changes were generated fully by judges serving in various jurisdictions. The truth is that the expectation of consumers, businesses and the people in general became a lot higher to professionals than it ever was in the past decades. It is not a change of mind in the society, more like a conscious process that starts forming the citizens of the European Union into a lot more litigious society than it was before. The economic crisis also helped speeding this process with making the hire of a professional a lot more painful economically, financially than ever before.

4. Damages for Non-pecuniary Losses

The question of general damages or immaterial damages as these are called in some jurisdiction provides the most diverse picture when it comes to the examination of civil liability in the Member States of the European Union. We cannot even find two countries that follow the same interpretation when it comes to awarding general damages.12 Non-personal injuries as results of infringements of reputation, privacy, personal data, etc. are the most problematic ones when one needs to find common cores in European civil liability laws. Categorizing the Member States on this question is not an easy and certainly not a sane task. Awarding damages for non-pecuniary losses wear undeniable marks of social, cultural and in some cases economical significances and heritage of a Member State. Globalization and Europeanization led to many international debates, and claims in which plaintiffs and defendants were from different jurisdictions. While private international law of non-contractual obligations is harmonized in the European Union, even the general rule of lex loci damni (the law of the country where the damage arose is applicable)13 does not provide real helping hand to judges. In most cases the damage, the non-monetary loss can only be measured in the soul and mind of the injured

11 This rules is the general rule in the Act 1954 of IV on the Hungarian Civil Code Art. 4.
person and there is no way to give evidence to the existence or the amount, seriousness of it.

There has always been a gap between Western and Eastern Europe on the evaluation of damages for non-pecuniary loss. Due to the long Soviet dominance in the Eastern hemisphere, personality rights are still very private and have less value, so judges tend to price them low. It is not a debate anymore that anyone has a right to protect her personality, however the exact value, the damages judges award vary significantly across Europe. In the 21st century European societies expect more protection of their personality rights than before. It is not only a new money making instrument for plaintiffs but a new approach of self-estimation. Statistics show dramatic rise of claims in this field. Not only the number of these claims but the damages plaintiffs claim significant increase everywhere in the EU. Although there is a slight restraint in the amounts judges award these days as an effect of the economic crisis, both plaintiffs and judges feel the need to give more freedom to personal sphere and space than ever before. The right to privacy gets more and more attention and in contrary to legislative trends in some states, judges still explore new territories of human personality. 14

Another exciting trend in the judicial evaluation of damages for non-pecuniary losses is the acceptance and interpretation of loss of chance as proof for non-pecuniary losses. The change in the attitude of judges evolved sometime around 2006, when medical malpractice cases became more frequent in the practice of national courts. The main reason for the increase of medical malpractice cases was the change of state policy in financing the health care sector in many Member States. Before the economic crisis started to show its real face, countries changed the original welfare state model to a more economic approach. The welfare state model provided almost free – or in certain Member States totally free – health care for citizens financed by the state budget. With the implementation of co-payments and other increasing dividends in the system, people started to feel themselves real costumers and initiated more medical malpractice claims than ever before. As we touched the issue of professional liability as an almost constantly evolving concept of strict liability, courts revaluated their approach to damages suffered in connection with damages for medical malpractice.

5. Conclusion

It seems to be a very strange way of evolution when it comes to the question and development of civil liability law in Europe. Although the European Union still has not succeeded with the adoption of truly efficient legislative instruments in order to approximate tort and contract liability in the laws of the Member States, national courts established many new and harmonized aspects and interpretation of classic tort and contract law institutions. Some authors see a systematic and well planned order in this process. They think the non-binding documents stuck in the level of academic debates, like the Principles of European Contract Law15 or the Draft Common Frame of References (DCFR) 16 silently made impact on national laws without declaring themselves as binding, legislative instruments. We strongly argue with this view. If PETL and DCFR had been the engines of changes in liability law described above, mainly the national legislator would have adopted new laws. In reality, judicial practice took the old interpretation of tort law and contract law elements apart and built up a new interpretation to serve society more efficiently. This is a rare phenomenon when Member States harmonize their new approaches and trends without the existence of any binding implementation duty. Tort law and contract law are especially good excuses for such harmonization, since both classic private law territories live through real cases. The development of tort and contract law institutions require undeniable judicial freedom in order to evaluate all important significances of each case.

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The New Labour Code in the Mirror of the Regulations of The European Union and the Member States

Tamas Prugberger,¹ Andrea Szollos²

Abstract

In the introductory part of the Article, Dr. Tamás Prugberger D.Sc. Professor gives us a few hints about the deficiencies of the rules relating to employment in both the Fundamental Law and the new Labour Code of Hungary.

The Article gives an evaluation of the new Labour Code making use of the legal-comparative method. First the new regulations of the collective labour law are being discussed, then the evaluation proceeds to the individual labour law discussing: - the rules of the conclusion of employment contracts; - the new regulations of the modification of the employment contract which mean avant as compared to the old Labour Code; - the regulations concerning the performance of the employment contract; - the subjects of working hours, rest period, and holiday which are the most neuralgic questions in the new Labour Code; - the payment of work; - the termination of employment relations; and - the new regulations pertaining to atypical labour contracts making the Hungarian labour law more complete and basically positive.

As a moral conclusion, after giving a final summary of the evaluation of the new Labour Code, the authors emphasize that the best economic situation has always been and will be in the West-European countries, where the social market economy and the economic and employment policies of the well-fare society predominate to a maximum level.

Key words: Fundamental Law; Labour Code; employer; employee; interest reconciliation council; trade union; collective agreement; employment contract; performance; working hours; rest period; minimum wages; collective redundancy; termination of the employment relationship; atypical labour contract.

¹ The Constitutional Committee of the Parliament held a conference on May 22, 2011 about the Proposal of the new Fundamental Law, where my task was to give a lecture on the evaluation of the proposals to the rules of employment in the new Fundamental Law. In my lecture, which appeared in the Conference Volume, I already suggested that on the one hand, it should be laid down in the Fundamental Law, similarly to the German Grundgesetz, that Hungary is a social legal state, on the other hand, similarly to the fundamental law of more West-European countries and the American Constitution, the opinion of interest representation organisations should be asked for before passing acts involving a wider range of classes of a society. None of my proposals was included in the new Fundamental Law, moreover, the government discussed the Proposal of the new Labour Code only with the employers’ interest representation organisations and sat down to negotiate with the trade unions’ alliances only after they had forced the government to do so by different demonstrations and putting it under pressure. However, the forced negotiations of the government with the trade unions brought few results on behalf of the employees. It is to be mentioned here that during the modification process of the then still prevailing old Labour Code in July 2012, Act No. XCIII. dissolved the National (Labour) Interest Reconciliation Council, which laid down the legal grounds for the government to present a proposal before the Parliament without a triparti conciliation of the proposal with the labour coalition partners.

Before evaluating – using the legal-comparative method – the new Labour Code, I think it is reasonable to point out that two years ago I examined how – after the Maastricht Summit in 1991 – the directives of the European Economic Community were exchanged and altered by new directives of the European Community and how the first directives of the European Union were modified by new directives and I had to establish that the new directives – almost without exceptions – reduced the social minimum standards protecting employees’ interests. While these aggravations were not or just partly taken over by the old member states of the European Union, the new European Union member states were forced to take them over by either the European Union or the IMF almost without any modifications. It seems that Immanuel Wallerstein was right when he talked about the formation of a two-circle Europe, where the inner circle is the neo-coloniser and the states belonging to the outer circle are the neo-colonised.

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The new Labour Code is being examined from this aspect based on my previous legal-comparative partial analyses considering that I had already made detailed comparisons of the main labour law institutions with the solutions of the member states, which I published in many of my recent works during the last months. On this basis, an evaluation is being given now as a kind of synthesis of the groups of the legal institutions of the new Labour Code.

2. Consequently, the New Regulations of the Collective Labour Law Are Being Discussed First

a) I do not consider proper that Act No. XCIII as of 2011 abolished the National Interest Reconciliation (Labour) Council (hereinafter referred to as NIRLC) which is also known in the Benelux and Latin states, in France and among the new member states in the Czech Republic and which was once already renamed by the first FIDESZ (Hungarian Civic Union) government for National Labour Council similarly to the Belgian institute. Instead of it, the National Reconciliation Council has been found as an opinion giving organisation, where all social organisations, public bodies and church organisations are represented, and among them only the participation of the social labour organisations is subject to conditions of representation, which is therefore discriminative and not in compliance with the regulations of the European Union. If the government had discussed the proposal before the NIRLC with its coalition partners, trade unions’ demonstrations and social tension could have been avoided. Moreover, it would have been worth considering in connection with the abolishment of the NIRLC that in the NIRLC, there can be made such general tripartite collective labour agreements, through which – because of their quasi legal source character and according to the practice of the European Court of Justice – the directives of the European Union may be integrated into the national law of the member states. It is one of the reasons why it would be reasonable to re-establish the NIRLC as a national labour council and abolish the previous bureaucratic rules, which were put on it by Act No. LVIII of 2007, which had properly fulfilled a legal gap until then. In my opinion, the bureaucratic-free Spanish model would be the best solution to revive the national interest reconciliation.

b) As concerns the rights of the trade unions, they have also been cut down strongly by the new Labour Code. The new Labour Code does not contain the status security of trade union functionaries, neither does it mention the objection right of trade unions – with a delaying force – and which was possible to be brought before labour court pursuant to the old Labour Code – against the employer’s measures affecting a larger group of employees in case of – among others – a work-norm increase connected with performance based payment, nor does it rule whether the trade union may represent its member before the labour court in a case against the employer. Neither does the new Labour Code rule whether – in accordance with the practice and regulations until now – the employer shall bear the operation costs of trade unions, moreover, whether the employer shall put the company’s premises at trade unions’ disposal after working hours or trade unions – similarly to the English and Irish situation – shall be forced to hold their consultations in restaurants and pubs near the company. For the sake of legal security, it would have been reasonable to arrange these questions in the new Labour Code, too, like in most member states belonging to the continental legal system.

c) The problem regarding the collective agreement (CA) is that while Subsection 3 of Section 277 declares the principle of ‘Günstigetsprinzip’ as a main rule like the law of most older member states, Section 283 cancels that by permitting a general divergence from the CA, which may even be unfavourable on the employee’s side. Nor is it clear in the new Labour Code whether only one or more CAs may be concluded at a company. As concerns this, it causes a problem that Subsection 2 of Section 276 only says that the trade union with the right for representation is entitled to conclude a CA. The right for representation is only limited to a membership of 10%. If such a trade union with this kind of membership were entitled to conclude a CA in the name of but contrary to the majority, it would be rather antidemocratic. On the other hand, another version may be that the new Labour Code, bringing the older regulation to an end – similarly to the English law – would make it possible for all trade unions with representation rights at a company to conclude their own CAs obliging their own members. In this case more CAs may simultaneously be effective within a company. This question should also have been arranged. It is also not clear whether the CA may be extended and if yes, upon what conditions. The old Labour Code regulated this question similarly to most West-European countries. It is not regulated either whether the CA may be extended and if yes, upon what conditions. However, it is positive that according to the new regulations, the CA shall be concluded in writing. Though, it is unfortunate that the registration of the CA still takes place at a national level instead of their own county/town level of the CAs, by the local labour agency since the National Labour Agency is unable to check the dumping-like CAs in terms of lawfulness.

d) The new Labour Code makes no changes to the system of the rights of the works councils (WC). Therefore, the collective decision jurisdiction remains rather restricted and formal, although it would be proper if the collective decision jurisdiction covered, similarly to the law of most West-European countries, the most important questions of employment relations such as payment according to performance, working hours, time of rest, holidays, and work and health protection. On the contrary, the right for opinion giving of the WC has been limited, since in the case of payment according to performance, the working norm may be increased by the employer without his having to ask the WC about it. The modification according to which – similarly to the German model – at the election of the WC the candidate is set by committees instead of trade unions is acceptable, however, it would be proper to make it possible for the representative of the trade union to take part in the meetings of the WC ex officio with the right of consultation. I consider it as an inadequacy of wording, that Section 236 only states that WC shall be elected if the number of employees at the workshop/workshop unit exceeds 50, however, it says nothing about what happens when the number of employees reaches 15. Section 269, namely, only throws the institute of shop-steward, but the new Labour Code does not even mention when the shop-
steward functions, when he/she is to be elected, although this question is regulated in detail by all old member states. (See foreign literature: Prugberger, The National, Sectorial and Regional Interest Reconciliation de lege lata and de lege ferenda, Miskolc Legal Review, No. 210/2, pp. 5–12.)

3. Proceeding to the individual labour law, among the rules of the conclusion of employment contracts we can see that the information given verbally has to be sent in writing within 15 days instead of the previous 30 day interval, which is in favour of the employee. However, the list of the essential elements of employment contracts still does not contain who practices the employer’s rights, and as regards payment, only the base payment has to be fixed, other regularly received supplements to it still do not have to be set – as opposed to West European legal systems. (See foreign literature: Prugberger The Basic Rights and Obligations arising from the Employment Contract and the Employment Relations in the Recodification Draft of the Labour Code, Economic Life and Society, No. 2011/1-II., pp. 269–287.)

4. The new regulations of the modification of the employment contract mean avanti as compared to the old Labour Code.

a) According to the new regulations, in the case of a legal succession of the employer, which is mostly connected to the sale of a company, factory or their units, the employee has the right to choose whether he/she wants to work for the new employer or stay at the old one. Moreover, the new employer has the guarantor’s liability for the not paid-out salaries except for the case of company-takeover in the framework of bankruptcy proceedings, when the payment guarantee fund is liable in the amount of a maximum of 3 months not paid-out salaries retroactively for one year. The regulation of the old Labour Code, according to which the successor employer was liable for the not paid-out salaries by the old employer only if he/she had 50% ownership in the old employer’s company, was totally contrary to the regulations of the European Member States. /8/

b) The period of the transfer, substitution, posting and secondment, and delegation of the employee, which is regulated in the new Labour Code as a temporary modification of the employment relationship in compliance with the ‘posting’ directive while the old Labour Code treated it as an employer’s order, is determined in 44 days each and altogether 110 days in case of the first four while in the case of the last one it can be a maximum of 2 months, which determination was made by the legislator in favour of the employees. At the same time, owing to the increasing unemployment, the regulation of the Posting Directive according to which the temporary modification of the employment contract inclusive of posting, namely secondment and transfer, too, may last for a year and it may also be prolonged by one more year. There is only one constraint, that is if the duration of such modification exceeds one month and in the case of prolongation, the approval of the labour office is needed. /9/

d) Finally, I would like to mention the institute of the so-called “Anderungskündigung”, which means that the employer terminates the employee’s employment relationship by offering him/her another job and if the employee does not accept it, the termination becomes effective. This solution of the German law has been taken over by the Austrian, French and Polish labour law, too. With this, the regulation of the permanent modification of the employment contract and the job transfer, which are both fixed to a mutual agreement, may be overcome. /10/

5. Chapter VIII is about the performance of the employment contract. This chapter as compared to the old Labour Code is much shorter and has been made so empty that this has resulted in total legal uncertainty and subordination on the employees’ side. Pursuant to the old Labour Code when an employer gives an inaccurate or unprofessional order, the employee is obliged to call the employer’s attention to that fact and has to act according to the order if the employer still insists on it. The old Labour Code regulated such a procedure on behalf of the employee. The new Labour Code does not involve such a rule at all and it only says that the employee is required to act according to the employer’s orders. With this, the employee has become totally defenceless against the employer, which is capped by Section 8 subsection 3 saying that the freedom of speech of the employee may be restricted, the way and content of which – according to the last turn of Section 9 subsection 2 – may be determined by the employer. Whereas according to the
legal solutions of the old member states of the European Union, either labour legal source or stable judicial legal practice appearing in authoritative ruling assures the right of the employee for criticism in order to improve working conditions. This can be applied to this question, too. This problem should have been included in Chapter VIII entitled ‘The Performance of the Work Contract’, which could have meant the concretization of the here referred question of freedom of opinion described in Chapter I entitled ‘Introductory regulations’.

It is also to be mentioned – in connection with this – that the employee’s obligation of providing personal data also involved in this chapter may be determined by the employer in the new Labour Code similarly to the old rules. While according to the old Labour Code the Shop Council’s opinion had to be asked for by the employer, this obligation of the employer no longer exists though in most of the older Member States the employer is obliged to co-determine the circle of personal data to be given by the employee together with the Shop Council. (see the foreign source material in my article referred to at the end of points 1 and 3)

6. The subjects of working hours, rest period, and holiday are the most neuralgic questions in the new Labour Code

a) To start with the working hours, even Act No. XCIII of 2011 increased the ordinary working hours to 44 hours as compared to the 40 working hours determined by the Directive, true that only for one and a half years’ transition period and compared to the 40 working hours determined by the Directive, which could have meant the concretization of the here referred question of freedom of opinion described in Chapter I entitled ‘Introductory regulations’.

This injures seriously employees’ interests for even two reasons. On the one hand because the employer may deprive the employee of three quarters of an hour without having to pay allowances and on the other hand, allowances would be owing only in case of further 4 hours’ overwork per week. It is not by accident that the schedule of three times 8 hours in connection with work has developed where 8 hours are work, 8 hours are recreation after work and 8 hours are relaxation. The enforced work at the expense of both recreation and relaxation makes the worker’s mental and physical regeneration more difficult and leads to the wearing out of the worker ahead of time. All this results in nerve and physical burden and the decrease in work effectiveness and quality because of the loss of staying power, which is disadvantageous for the employer, too and it may even lead to break-down and incapacity for work. All this – as a consequence of an easily setting chronic disease and a possible incapacity for work – especially if this becomes multitudinous – may charge the state budget very strongly because of the increased expenses of health and retirement insurance and social financial aid. In order that a worker may be able to work permanently in a good physical condition and efficiently, it is important that his thoughts shall be occupied by other things than just work and that he shall be suitably relaxed, as well. The employment policy and the labour authority are not only responsible for job creation and employment encouragement, but also for preventing workforce from exhaustion. Regard for this, I disapprove of Section 92 subsection 2, which, similarly to the old rules, makes 12 working hours per day possible in case of standby-like jobs that is in case of duty. Contrary to
monthly duty has become 84 hours instead of 72 hours. Lots of physicians leave their jobs not only in Hungary, but also in the neighbouring countries for this very reason and undertake work in the United Kingdom, the Scandinavian states or Austria. There is a factual case from Debrecen University of Medicine where a physician undertook work in England because instead of 100 working hours in Hungary, there he is obliged to work only 40 hours for four times much salary and he is even able to travel home to his family for one week per month while during his work in Hungary, his family rarely even saw him.

b. The daily rest period at the work of place is regulated by the new Labour Code practically in the same way as in the old one with the complementary rule according to which it may not exceed one hour. This amendment is good in a way that when the rest period exceeds one hour, we can rather talk about work split up over the day. Here it is worth mentioning that both the domestic small and medium-sized enterprises and the multinational companies are unwilling to give out the employee the 20 minute rest period after 6 ordinary working hours or 3 hours of overwork, and therefore employees do not have time either for eating or even fulfilling their biological needs.

c) The daily rest period - more exactly the rest period between two working days - is determined by the Directive in 11 hours and less time is assured in the United Kingdom, where at least 10 hours are to be given to employees between two working shifts. Whereas in the circle described under point a) - similarly to the old regulations - the rest period between two working days may be shortened to 8 hours, while in the case of agricultural seasonal work, it may even be 7 hours - which was not allowed according to the old Labour Code. This kind of regulation endangers the biological and mental regeneration of the workforce to a large extent and is anti-humanic and because of the reasons described under point a) it is harmful not only for all the employees, but also for employers and even the state.

d) As concerns the weekly rest period – in compliance with the old labour Code – the new Labour Code prescribes two days a week, one of them – as a main rule – has to fall on a Sunday. The other rest day is not necessarily needed to fall on a Saturday beside Sunday, it may be given out on any other day of the week, and may even be drawn together. At work places operating continuously both rest days may be given out on weekdays, but at least one of them shall fall on a Sunday per month. This rule is more favourable that the one of the Directive in respect that the Directive prescribes 24+11 hours as weekly rest period, that is one and a half day, 24 hours from which shall be given out together and at only work places operating continuously and in more shifts the rest days may be given out on other weekdays and not on a Sunday but even in this case one of them shall fall on a Sunday once a month. Half days, that is 11 hours may be draw together and given out that way. Theoretically, every second Saturday is a rest day, however, no one work on Saturdays in the old member states, they are only on standby. Therefore, the more workers are employed at a company in the west, the less time employees have to spend on standby. In reality, the rest time at the weekends is not less, or just to a small extent in West-European countries than pursuant to the regulations in Hungary.

e) At the beginning the minimum extent of the ordinary holiday was defined in one month by the Directive and now it is only 4 weeks. In Hungary, both the old and the new Labour Code specify the basic holiday in 20 days, which – according to age – is increased by one day first every 3 then every 2 years until it reaches a maximum of 10 days as a supplementary holiday. The holiday thus reaches 30 days by the age of 45. As regards the time when holidays are given out, it is determined by the employer except for one quarter of the holidays. Whereas in the old member states, the minimum extent of holidays is 25–30 days, which is supplemented by holiday given based on age or a managerial position, and even supplemented by skiing holidays in more member states and moreover, in most countries people do not work between Christmas and New Year’s Eve, at most they are on standby. This way the extent of ordinary holidays in old member states is generally 5–6 weeks. In West-European countries the holiday schedule is worked out by the employer in conjunction with the works council after it has been agreed with employees. In Denmark, the employees who are unable to take out their yearly ordinary holidays during ‘holiday season’ are granted more days as supplementary holidays. Besides, in the old member states employees are entitled to a holiday bonus in the amount of one month salary during holidays – either in summer or in winter – with regard that they spend more money. (See foreign comparative source material: Prugberger: The Questions of the New Hungarian Regulations Regarding Working Hours, Rest Period and Holidays. Law Journal. No. 2011/11. pp. 539–549.)

7. a) As regards the regulations of Chapter XIII on Payment of Work, the first problem arises at the connection of minimum wages with performance based wages. According to the old Labour Code, in the case of performance based payment the employee is entitled to the full amount of the minimum wages regardless of whether he/she has performed less than the minimum wages. Whereas it seems from the obscure composition of Section 137 subsection 3 of the new Labour Code that exclusively in the case of performance based payment, the payment may go under the level of the minimum wages if the employee underperforms based indeed on the unilateral decision of the employer. Due to the lack of the precise regulation of this question, the employer may decrease the payment even implicitly, without the employee’s noticing it. It is true that according to the old Labour Code, the employer suffered a loss since he was obliged to pay the minimum wages even in the case of underperformance by the employee. The employer could only get rid of his/her lazy employee by ways of ordinary of extraordinary dismissal, and he was entitled to demand the payment without performance as a compensation of damages, though I am not sure that all labour courts were on this opinion. The good solution would be a middle course according to which in such cases a reconciliation committee organised within the company or in the cases of smaller companies a regional arbitrary service officer would determine the lawfulness or unlawfulness of a measure. The party who would not agree with the decision could start an out-of-court procedure at the law court against it within 5 or 8 days. The court could make a first instance decision in the case within a shortened period of 8 or 15 days.
b) Another problem in connection with the minimum wages is that the government is unwilling to determine uniform minimum wages and different minimum wages according to economic-geographical regions of the country, economic sectors, professions demanding different education levels are set. If minimum wages were defined at a state level without negotiations with the coalition partners, the differentiation in minimum wages were defined at a state level without negotiations with the coalition partners, the differentiation in minimum wages on a regional basis – in my opinion – is clearly discriminative (agreeing with the declaration of Istvan Palkovics, the President of Workers’ Council on TV), however, I think the differentiation in the other cases is rather disquieting, too. None of them was perilous if minimum wages were determined during negotiations taken place in the national and regional sectoral and regional general committees with the participation of the state. In this case, however, the best solution would be to determine uniform national minimum wages within the framework of a National Workers’ Council as a tripartite agreement, and in the committees it would not be possible to undergo the thus set level (Günstigkeitsprinzip).

   c) As regards the granted wages attached to performance, according to Section 138., it is clearly the employer who is entitled to determine them within his/her own competence. This means that neither the opinion of the Works Council nor that of the trade union with a representation at the company has to be asked for by the employer. The situation is the same when the employer raises the work norm forming the base for the performance-based payment. Pursuant to the old Labour Code, the employer was obliged to ask for the opinion of the Works Council, and it is another question that he/she was able to decide without taking it into account. As we compare all this with the solutions of the old EU member states, we can see that in most member states it falls under co-decision jurisdiction or standpoint jurisdiction with the Works Council regarding both questions, and as concerns the latter, the employer may not neglect taking it into consideration.

   d) Regarding allowances, the new regulations are rather antisocial. While we could agree with the solution that employees working in shifts and/or for permanently operating work places are entitled to only 50% of allowances for work on Sunday, however, the employee who works in different conditions from those above and is summoned for extraordinary work on a Sunday, should be eligible for a 100% allowance in the same way as employees – otherwise working according to ordinary work schedule – who work on a bank holiday. As opposed to this, it can be concluded from the provisions of Section 143 that those who – on a bank holiday – work not according to an ordinary work schedule but are summoned to work in an extraordinary way, are only entitled to a 50% allowance or free time in accordance with the employer’s decision. The situation is the same in the case of overwork, too, where it is also the employer who decides whether to assure a 50% extra work allowance or free time in proportion with the work done. In the case of summoning the employee to work on his/her rest day, the employer is only obliged to provide another rest day for the employee without having to pay an allowance.

   The allowances for shiftwork have also changed dramatically unfavourably for employees. Both allowances in the amount of 20 per cent paid for afternoon work and for regular work in night shifts have been ceased. Only employees working in shifts are entitled to allowances for night shiftwork though only to half of the prior 30 per cent that is to 15 per cent. According to the reasoning of the legislator, these restrictions are in full compliance with the rules of determining and paying allowances in the West-European states. The legislator, however, neglects the fact that in the West-European states this percentage represents a lot higher allowance-value as compared to that of the Hungarian wages/salaries.

   In comparison with the regulations effective up to July 1, 2012, trade unions assume a 30% decrease in wages/salaries due to the drastic fall in allowances. As a result, Hungarian wages/salaries will not even reach one quarter of the West-European wages/salaries. Therefore, this kind of payment in the future will cover only the limited costs of living, it will not be enough for founding a family and educating the future generation. Thus the government will put the country on the downward path both mentally and financially. The goal of the government to create more job opportunities is welcome. However, the way of achieving that is rather objectionable. Pursuant to the concept of the government, the foreign companies will settle down in Hungary because of the cheap work force similarly to the way it happened in the far-eastern ‘small-tigers’. The employment there, however, was quasi slave work for pittance and there was an excentration of the workforce. Nevertheless, the skilled Hungarian workforce will not be willing for this and will migrate to the inner circle of the more developed member states of the EU who are trying to neo-colonise the outer circle of the member states of the EU including the Middle-Eastern European member states and where – due to serious demographic problems – there is an increasing need for skilled workforce. If this progress continues, only the underskilled workforce whom the West companies do not need and the layers of the society which want to live from aids will stay in Hungary. All this will lead to a total economic, employment, educational and cultural policy deadlock, and thus the government will accelerate the elimination of Hungary, which was projected by Bela Pokol.

(See foreign source material in my articles indicated at the bottom of points 3 and 5).

8. As regards the regulations concerning the termination of employment relations, the two very much antisocial concepts have been left out from the new Labour Code. One of them was the possibility of employment termination at small companies without giving a reason, and the other one was the abolition of the protected age before pensioning. The first one was thrown out by the government itself because it would not have been in compliance with the Social Charter, and as concerns the second one, trade unions managed to have it repealed during the conciliation process. However, the institute of the protected age before pensioning prevails in all West-European states. As opposed to this, the new regulations of the new Labour Code relating to the termination of employment relationships are more disadvantageous in many respects to employees’ interests than the similar West-European solutions. This manifests itself right at the beginning of the termination period in the case of an ordinary dismissal. Since in most of the old member states, the termination
of the employment authority is to be invited by the employer 
before the formal notice of dismissal. Such a regulation is missing from the new 
Hungarian Labour Code. However, as concerns the rules of severance pay, in the case of an ordinary dismissal, the Hungarian solution is more advantageous for employees in the respect that it assures the severance pay 'ex lege', while in most old member states, it is applied only if the employment relationship is terminated because of the employee’s getting inadequate due to health reasons or economic reasons arising from the employer’s interest sphere. Based on the practice formed in West-Europe, in other cases, on the basis of a mutual agreement, even in the case when the employee gives the notice of dismissal, severance pay is paid when the employment relationship is terminated, and the amount of the severance pay is adjusted to the average salary not to the payments for periods of absence, which rule the new Labour Code has expanded to the severance pay and the payment for the termination period, as well.

As concerns the collective redundancy, in spite of the fact that pursuant to the Directive regulating it, apart from the previous period, the special protection exists not from 5, but from 10 persons planned to be dismissed, most West-European states take still 5 persons into account. Both the old and the new Hungarian Labour Code follow the Directive in this respect similarly to the other new member states. Besides, West-European countries, except for Sweden and partly the United Kingdom, require the notice of dismissal to be justified socially and therefore a redundancy plan is required to be made by the company planning the collective redundancy. Pursuant to ‘Tulir(c) a’, it is required to make a social plan in the case of a redundancy of more than 200 employees even in the United Kingdom and it is not possible to connect redundancy with ‘out placement” and dismiss employees fast on the basis of the American seniority principle. The social plan is expressly required by the French, German and Austrian statutory labour law regulations, in the other states it is the judicial practice which requires it. It is in connection with this that pursuant to the Directive about the collective redundancy, in all old member states except for Sweden, the negotiation period with the employees’ representatives is 30 days as a main rule, which may be prolonged up to 60 days if necessary, and in case of a light negotiation, it may be shortened to 15 days. In most old member states besides the works councils or trade unions representing employees, the representative of the employment (labour) authority also has to participate in the negotiations with the employer and the works council has the right for opinion on the merits.

As opposed to this, it is considered in Hungary as a collective redundancy – similarly to the new member states – when at least 10 employees are dismissed. Although the representative of the employment authority is to be invited by the employer for the negotiations, in practice it does not represent itself. The new Labour Code does not mention the requirement of a social plan as it was involved in the old one, it only prescribes that the goal of the negotiations should tend to avoid redundancy or at least reduce it, and to mitigate its consequences. At the same time, the new Labour Code shortens the negotiation period to 15 days as a main rule and this may be prolonged up to 30 days. This means that the legislator talks in vain about how the possibilities of reducing the redundancy have to be discussed during negotiations, in such a limited period of time, generally, it is the principle of seniority which prevails, which can be experienced in practice, too. At least the Romanian regulations relating to termination protection prescribe that if the economic situation of the company improves and the increase in employment is needed, the employer is obliged to re-employ the employees who were made redundant within the previous one year. Such an obligation does not exist in the Hungarian law, either. Furthermore, in case of a collective redundancy and a dismissal due to economic reasons in general, neither the works council nor the trade union having representation at the company has the right for opinion, which rule existed in the old Labour Code. As opposed to this, in Holland, nobody can be made redundant without the approval of the works council and the employment agency, and in Germany, from the time of the Hartz reform, besides collective agreements, in all cases of employment relationship terminations due to economic reasons not reaching the number of employees when it would be considered as a collective redundancy, the works council has to be listened and moreover, similarly to the Austrian law, the employees’ representation may sue the collective redundancy before court.

As concerns the unlawful termination of the employment relation by the employer, as opposed to the new Labour Code, the first legal remedy in the old member states is the ‘in integrum restitutio’, that is the reinstatement. Moreover, the western law – similarly to the new Labour Code – sets a limit for the compensation of the fall in income and the usual damages occurred in connection with the unlawful termination. At the same time, in the old member states the courts assure the possibility for the compensation of damages which were occurred in reality and are expressly proved even in the United Kingdom (compensatory award). (See foreign source materials: Prugberger: The Draft of the New Regulations of the Termination of Employment Contracts. Miskolc Law Review, 2011. Special Edition, pp. 130–154.)

9. The new regulations pertaining to atypical labour contracts make the Hungarian labour law more complete and basically positive. It is very progressive that the new Labour Code significantly broadens the circle of atypical labour contracts. It is unfortunate that the self-employment, which is treated as a ‘quasi’ employment relationship in the Western labour law and its rules are to be applied except for the employer's social insurance contribution, has been omitted. Furthermore, the arrangement of the work as a member of a company (co-operative, limited liability company, unlimited partnership) is missing. However, the employment relationship of managers is more modernly regulated in the new Labour Code than before. It sets a more precise definition of what a managerial employee is. The only insufficiency is that the hierarchical chain of mana-
grial employees worked out by Fayol and taken into account in the west is not mentioned in the new Labour Code. It is also positive that the managerial employees’ limited liability for the negligent omission of their supervision duty has been omitted. There are no grounds for such a limitation. It is also considered to be positive that the new regulation does not categorically forbid in the case of workforce-lending that the workforce-lending company should not perform intermediate activity, too, it only prohibits that it may not employ itself as a borrowed worker the people who it procures for a consideration. However, it should have prescribed that the workers to be lend are entitled to the minimum wages or at least half of them even when they are not borrowed, but if they work – according to the rules of the equal treatment principle – they are entitled to the same wages as the other employees. This would have been reasonable to prescribe – similarly to the French law – because in that case there would be fewer possibilities for companies to undertake collective redundancies and send their employees to a primarily agreed workforce-lending company, which lends them back to the dismissing company at a cheaper cost. Such out- and back arranging businesses should have been invalidated ‘ex lege’. This would be advantageous primarily in terms of employment policy.

10. As a summary, we would like to state that in order that the Labour Code could promote competitiveness, efficient work is neeed. However, efficient work is hindered by bad work atmosphere, the feeling of being at the employer’s mercy, the fear from dismissal, and the decrease in salary in inverse ratio to the increase of working hours and all this do not raise employment. Maybe, indeed it is possible that the broadening of workplaces prognostised by the government takes place, however, it will result in the migrating of skilled workforce to the neighbouring countries, where – due to demographic crisis – there is an increasing need for workers. Nevertheless, because of this, foreign companies will be discouraged to settle down in Hungary. It is to be feared that the new Labour Code – in such circumstances – will act not as a means of crisis management but rather as a crisis increasing element. In addition, the powerful limitation of interest protection role of interest representation organisations, trade unions and works councils increases this process. The new Labour Code – in the mirror of international trends and labour law regulations – is a disadvantage to employees while an advantage to the employer as regards the principle of equal treatment, which is considered very offensive in an anti-social way. This also appears in the aim of making labour law civil law-like, since in the civil law dispositivity appears only in the co-ordinate civil law relations, and legal transactions. In civil law relations, legal transactions, where one party can make use of the other party, the civil law regulation makes dispositivity relative, moreover, by the use of legally binding minimum standards, civil law protects the weaker party. Since labour law is a field of law within the civil law, this principle should prevail in the new Labour Code, too. As opposed – in contradiction to the West-European labour law regulations – the new Hungarian Labour Code is a mere sketch in many relating questions, which can and will be used by employers for their own advantage. Therefore, it will be the primary task of the judicial practice to eliminate the slipshod work and lacks made by the legislator based on the principles of the equilibrium of interests and law, and good faith and honour. In conclusion, as a moral lesson, the best economic situation has always been and will be in the West-European countries (Germany, Austria, France and the BENELUX states), where the social market economy and the economic and employment policies of the well-fare society predominate to a maximum level.

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The Interpretation of the Principle Equal Pay for Equal Work in the Practice of the Equal Treatment Authority in Hungary

Márton Leó Zaccaria

Abstract

The topic of this study is the presentation of the principle of equal pay for equal work, what is one of the most important fundamental principles of the European and international labour law, and it is presented mainly from practical aspect. Though the science of labour law deals with this question a lot, it can be observed that this principle can be enforced only with difficulties in everyday life, and it is true to a greater extent in the Hungarian law. That’s why I regard necessary to examine systematically the relevant resolutions – to the extent of their publicity –, regarding that in this question several resolutions of the Advisory Board also were made besides the ad hoc resolution of the Equal Treatment Authority, what is an authority definitely defending the equal treatment. Though for the Authority the Labour Code and the Act on Equal Treatment defines the direction to be followed, the principles worked out in the practice of the Court of Justice of the European Union are more definitely used at several points than in the practice of the Hungarian courts. This question is of high importance since the appropriate wage is one of the employee’s basic social interests.

Key words: labour law; Labour Code; remuneration; equal pay for equal work; Equal Treatment Authority; discrimination; social interest; compulsory minimum wage; ILO Convention No. 95; comparability; legal differentiation.

1. Introduction – Discrimination in the Field of Employment

The requirement of equal treatment can be regarded as one of the most important fundamental principles of the labour law system and as such principle at the same time which can be interpreted within the employment relationships exclusively. This principle is so diverging and varied that it causes several interpretative and practical problems which make the correct interpretation rather difficult and cause contradictory situations in everyday life. This principle expresses the most sensitive field of the law basically and the labour law at the same time since in its focus there is the prohibition of anyone’s being suffered any infringement that is caused by the fact that she/he is discriminated because of her/his personal – protected – attribution. The catalogue of the personal attributions is rather wide, the most typical are the gender, age, race, colour, origin, state of health, and practically one can suffer discrimination on the basis of any attribution and anyone may cause such injury. In this circle we mean the discrimination based on personal opinion, belief, and the specialities of forms of employment.

Typically, the damage is caused in a hierarchy relationship, since in such relationships – legal relationships – where one party has additional authority above the other such conduct may emerge easily by which the party in the position of power may cause such legal injury even unintentionally. The best example of it, mutatis mutandis, is the world of employment relationship, where even with the new changing labour law regulations it is beyond dispute that the employer is in such a position of power opposite to the employee which cannot be compensated practically, since even the seemingly effective legal protective regulations do not guarantee proper protection for the employee. Furthermore, such situations must be mentioned where the authorities, juries, institutions act in a discriminativ manner against people. Finally, even the discrimination as the consequence of the state’s act introduces great risk, since the state during the legislation does not always pay enough attention to the requirement of discrimination exemption.

This study deals with the most typical case of disadvantageous discrimination, the discrimination realized in connection with employment discrimination which in practice emerges day by day and is based on the employee’s gender, age, origin, state of health, or even opinion, and within these the questions of non-discriminatory wage are in the focus of this study.

At the same time it must be added that cases do not emerge that the source and form these discrimination can be defined clearly since in connection with labour relationship the employee’s discrimination can be fulfilled in several ways (see e.g. the establishment of legal relationship, the conditions of employment, the possibilities of job progress, wage, or even the termination of the labour relationship). One of its reason is that though the fact that the damaged party should receive actual and effective legal remedy is both a fundamental international legal and Union requirement, most of the cases do not emerge,
namely, a given case of discrimination cannot get to the judicial procedure stage.

In Hungary the Equal Treatment Authority was established with the demand of easier use of effective legal remedies, even if it is not a judicial forum, but in most of the cases the complaints can be actually rectified. Though this possibility itself cannot guarantee that the injurious situation would be rectified and neither can it prevent later discrimination, but regarding that cases are being processed parallel before the courts and the Authority, a special type of double protection is aimed to establish for the damaged party, that is the employees. In connection with employment the Authority has made several decisions which are remarkable regarding that the Authority does not feel to be bound to the Hungarian legal practice, so it often interprets the relevant regulations closer to the Union directives, so the relationship between the legal interpretation of the Hungarian judicial practice. In the following some individual resolutions and commitments of the Advisory Board of the Authority will be interpreted in connection with wage in a way that conclusions can be made referring to the standard legal interpretation.

2. The Principle of Equal Pay for Equal Work as a General Requirement

The Hungarian courts follow the principle of equal pay for equal work relatively consequently in their practice and the legal interpretation takes into consideration the European standards, but its undue emphasis in the Labour Code (in the following: LC) may prevent from the progressive interpretation, since the new LC applies this restriction rather unnecessarily and inexplicably. Though, it is beyond the frames of this study, but it is worth mentioning that the Hungarian labour courts – and also the Curia of Hungary – apply the principle of equal wage for equal work in most of the cases but they do it in a reducing way, namely, the primary consideration is not always the employee’s social protection. This practice should be improved anyway if the courts would take into consideration the explications of the Equal Treatment Authority. Regarding the employment discrimination most of the cases emerge in the field of the wage, and it must be added that though the Advisory Board of the Authority issued commitment about it, cases in greater number appear before the courts that before the Authority. The cause of all this is that quarrels based on interests of incorrect wage or no wage may lead to lawsuit itself, that is in such cases the injury of equal wage means only one type of circles of cases. At the same time this discrimination is a classic example why the requirement of equal treatment is not less relevant today than it was in – let’s say – 1975, when within the frames of the European Union the EEC Directive declaring and protecting this principle was established.

3. The No. 348/2008. TT. Commitment of the Advisory Board of the Equal Treatment Authority

In the wake of the 12. § of the new LC the No. 348/2008 TT. Commitment of the Advisory Board of the Authority may get in a new light, since the 12. § regarding its structure and mainly its content redrafts the requirement of equal treatment. At the same time the importance and the applicability of the commitment has not reduced because the thoughts declared here were based on such practical experiences which try to answer regularly returning questions. In spite of this we must emphasise that part of the commitment which quotes and interprets the 142/A. § of the previous LC repealed on the 30th June 2012 as it follows. On the basis of this place of law when defining equal or accepted equal wage the requirement of equal treatment must be kept and all this was completed by section (4) according to which the wage based on the job classification or performance must be stated that it should meet the requirements of equal treatment. It is incomprehensible that this regulation cannot be found in the new LC, even the Basic Law does not contain the principle of equal wage for equal work, so in my opinion it may be another source of danger of non-discrimination what is a fundamental principle in the field of waging. It may be an explanation that the 12. § of the new act – in addition to the general rule – names directly the equal treatment as a specific – and at the same time the most typical – case of equal treatment, while it would be irresponsibility to regard this rule as one which contains the repealed guarantee norms of the cited act.

The standpoints states that one can speak about non-discriminative waging only if the Act CXXV of 2003 is interpreted together with the regulation of the LC, e.g. together with the above mentioned rule. It is also added that in connection with the non-equal wage the prohibition of direct discrimination regulated in the 8. § of the Act CXXV of 2003 is typically relevant, namely, the standpoint on interpreting the principle definitely considers practical points of view. I’d like to add that these requirements are less enforced in the judicial practice, since the Hungarian legal practice demonstrates that the legal regulations applied together “annul” each other, and the courts – even sometimes the Curia of Hungary itself – apply one-sided legal interpretation.

The standpoint intends to define the further aspects of equal pay on the basis of constitutional operative at that time, labour law and the European Union norms, but because of the above mentioned statements they can be applied only partly in the present legal circumstances. Though, that part of the standpoint noteworthy in which the Board explains that the principle of equal treatment should be applied in as wide sphere of legal relationships as it is possible, namely, in each legal relationship in which any kind of labour is done in return for remuneration. So the Board orders to apply the principle as analogous proceeding for both enterprise and mandate contracts also for outlawer legal relationships which are in force of civil law and on the merits differ from the inner logic of labour relationship. On the basis of these regarding to the latter with widening interpretation the principle must be kept in all forms of employment which are different from the general, consequently, the requirement of equal treatment has become one of the most important principles of the continuously widening catalogue of the atypical labour relationships. Regarding the latter ones the prohibition of discrimination has a preferential role in the European legal practice, too, with special attention to the fact that in such relationships in most cases the level of the employees’ legal
It can be questioned whether in types of legal relationships which are not characterized by the structure of labour relationship this principle be applied, and at the same time the Board regards properly that in practice the work done within the frames of civil law is viewed the same as labour relationship, e.g. regarding waging, even if the reigning legal practice demands that these legal relationships would be separated from labour relationships mainly because of forcing back abuses. It is a general principle that in return for labour one is entitled remuneration, and as a consequence of it the remuneration must meet the social requirements in all cases, e.g. the requirement of equal treatment. Another important question is the problem of compulsory lowest wage – minimum wage – for which the letter principles cannot be applied. The rules of the minimum wage are relevant only for labour relationship, and in civil law type legal relationships these guarantees do not refer for the workers. It is logical since the work as an element of conclusion of fact is characteristic of both labour relationships and the civil law legal relationships of this subject, but the labour law system of rules declares the need of social protecting function while it cannot be found in the civil law anyway, and to apply it would not be possible because of the differences of the ideas of these two legal relationships. At the same time the damage of the principle of equal pay for equal work may emerge even this way, since in case of comparable situations a situation in which a person in mandate legal relationship receives less wage – namely less that the minimum wage – only because her/his legal relationship belong to the scope of civil law and not to labour law. Though this logic may be disputed, but it can be traced to the quoted points of the Board’s standpoint. Besides, in principle it is possible that this kind of discrimination may be involved in the sphere of cases of discrimination on the basis of other situations, even if the possibility of this type of decision is rather little.

In connection with the minimum wage referring to the standpoint I raise that the 153. § of the new LC bears the possibility of discrimination even in its drafting regarding to the lowest wage, since it makes possible for the Government to establish in regulation the so called differentiated minimum wage. In this case it means the difference should be made between the employees according to the type of labour done, and similarly by naming the labour market specialties of the geographical regions at defining the minimum wage, the differentiation on the base of regions is quasi legitimated, and this basically would be contrary to the original function of the compulsory lowest wage. In some cases it can be justified that employees would be employed on the basis of geographical division with different conditions in different regions, but the employees’ rights would be injured to a large extent it practically because of the special conditions of their living place or their place of work would they receive lower minimum wage. Furthermore, the employers could misuse easily, since they could avoid paying higher minimum wage this way. At the same time it is unfair that the LC sets such open differentiation between the groups of employees, since in this circle the collective agreements, which can also be made on branch level, assure enough freedom for the parties.

It is rather interesting in the light of the fact that the new act definitely supports the social partners’ bargaining procedure emphasizing that the collective agreements based on free will means one of the most important facts regarding that the parties should make such working conditions which suit them the most. All these are adequate to a greater extent for the questions of remuneration, though, it must be guaranteed basically that the lowest wage which is due to every employee must be defined homogeneously.

In accordance with this the commitment states that the place of work cannot be the base of the damage of the principle of equal wage. The most typical of the prohibited cases are when the employer makes differences between the employees by the places of working sites, since in these cases on the basis of defining the other situation discrimination can be fulfilled supposing the employer cannot excuse her/himself. This rule can be traced back to two facts. On the one hand the employee’s fundamental right to equal treatment is due to the employee at the same extent who works at “X” working place and not at „Y“. Namely, as discrimination is strictly forbidden on the other determining attributes of labour relationship – working time, the length of the legal relationship, scope of duties, position, promotion – neither can the place of work be the base of legal differentiation. On the other hand, if this kind of attitude would be accepted legal, than existence or non-existence of one plus condition would found the breaking of the principle of equal payment regarding that the place of work has effect on the nature of the working activity typically only if this work definitely bound to a certain place or region. But even in such a situation the place of work itself is not the base of discrimination, but the quantity and quality of the duties and tasks done. We can sum up this question that in the LC the criteria for comparability must be interpreted widen and as a function that of the employees’ right to equal wage would not be damaged.

The commitment examines the concept of payment in short, and this definition is of basic importance from the point of its correct application, regarding that it defines the circle in which the principle is normative. It must be stated that though to interprete the principle of equal pay for equal work widely is necessary, but its application cannot be shoreless, since the aim of the principle is that the wage as remuneration of the work would be fair and free from discrimination. Namely, it is also important to define which are the allotments that are exempt from the application this principle, since certain elements of wage cannot be the subject of this application. Naturally, the commitment drafts the concept according to the legal regulation in force at that time taking into consideration the Treaty of Rome and the Act XXII of 1992 Act on the Labour Code. The definition of the new LC equals with the earlier concept essentially, altogether one or two points have been made clear. According to it every allotment in money or in kind directly or indirectly given on the basis of labour relationship can be regarded wage.
Dogmatically, this definition cannot be regarded as a concept in the classical sense, since the law also states that this definition is regarded to be governing in the application of the principle of the equal wage for equal work. This hasn’t got any importance in practice because it is clear from the text of the act that the concept of wage was drafted in accordance with the act about equal treatment, furthermore it is important that the concept guarantees the necessary wide interpretation. Namely, it can be understood because the legislator’s aim is to assure the correct interpretation of wage, and regarding that the justification of the bill emphasizes that in connection with equal treatment one of the most important – practically the most important – field is keeping the principle of the equal pay for equal work and the concept definitely serves that the principle should be kept. In connection with all these section (3) of paragraph 12 also defines the aspects of equivalent work explicative (e.g. the quality, quantity of the work done, circumstances of labour market), this way our Union obligation is fulfilled, and on its basis the Member States are obliged to apply a system which is worked out objectively to compare work. The Treaty on the Functioning of the European Union also defines the concept of equal wage for equal work in connection with the principle of equal treatment as it follows: ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. (section (2) of Article 157). Obviously, this aspect interprets the concept more widely, since it names separately the base and minimum wage, and also stipend is listed here (this can be found in Hungarian legal practice, too). Furthermore, it is also important that the employee should get remuneration from the employer, since it is not enough if she/he receives it only in connection with the labour relationship, namely, the working activity. Its explanation is that it is not excluded that the employee during fulfilling her/his legal relationship should receive such remunerations which do not come from the employer, and their measure can be varying from the really low to the definitely high sum of money. Seemingly, these sums should be taken into consideration in connection with the wage, namely, the employee receives the remuneration in return for performing work, but it would be unfair if even the principle of equal wage would be applied between two employees the way that only one of them would get remuneration from a third person, because in such case the comparison would be impossible, either. Dogmatically and also from practical points of view it is justified that the above mentioned elements should not be regarded as the elements of the wage, obviously they must be left aside on examining the equality of the works done and wages.

It is worth mentioning that it would be advisable to establish this in the Hungarian regulation, mainly because in the structure of the employees’ rights and obligations the LC states that the employee can receive allotment from a third person if it is definitely permitted by the employer in part or in whole. That is the employer can forbid the employee to accept tips or gratuities. On the other hand, if she/he supports this and the employee really receives such money, her/his wage cannot be decreased, since if the employee does perform in labour relationship she/he can get wage only from the employer for her/his performance. From this point of view this rule is of guarantee importance regarding to equal wage. Finally, it must be added that international labour law base of the concept of the wage was established in the Convention No. 95 of the International Labour Organization (ILO), and the ideas explicated there defines the concept in a wider circle than either the Hungarian or the Union concept. Although the concept can be applied in the legal practice, but it is worth thinking whether it would be possible to force back the wage discrimination in a way that the legislator would widen the circle of concept emphasizing the importance of equal pay.

4. About the Problems of Piece Rates

In a certain case regarding the waging the Authority has made the following decision. In the new act the rules of piece rates have become stricter and more precise, altogether they guarantee the employees’ right to equal wage at a greater extent. At the same time these rules were laid in the previous regulation, so it is worth examining the next case which came in force during the previous LC.

The base of the new system of benchmarking introduced by the employer could be performed at 100% if the employees’ presence was at least at 85% during the relevant period, so besides the paid annual leave and other justified absence, any kind of absence would result in not fulfil the required – modified – requirements even if she/he has performed serious, even greater performance than it was supposed. This way the employees could lose such additional income that they could not receive any other way, so they would lose the possibility of performance at 100%, while this is one of the fundamental requirements in the LC regarding piece rates, even independently from the requirement of equal treatment. According to the employer’s justification by this method they would try to separate and sanction the „laggards”, but the real essence of this measure affected the complaining employee negatively to a great extent. Namely, such measure discriminates those, whose absence according to the employer is not „justified” – that is to the employer they did not „skive” – and are away because of their state of health, family situation or because of their child. As a consequence of the modification the complainant found her/himself in this situation and the Authority declared that the economic reason cited by the employer according to which both the employer’s and employee’s performance can increase by decreasing the absences is not correct, and cannot be the base of discrimination because it is obvious that it refers only to a certain group of persons. If the reason of somebody’s absence is definitely the „skive”, the employer’s discretion is available to sanction individually, e.g. she/he can make termination in a justified case. The Authority emphasizes that with such measure the employer may cause discrimination, namely such measure is not necessarily discriminative, but from the point of effective legal protection it is required that such measures of the employer would be forbidden. From this case it emerges that at piece rates it is also of great importance that the requirement of equal treatment must be fulfilled, mainly if the reason of differentiation among the employees is such personal circumstance.
which on the merits has no connection with the employee’s performance.

It must also be added that the way of discrimination reflects that the employer introduced these new requirements with the aims of sanctioning, so she/he argues with that in vain in such a situation that she/he intends to force back the absences, on one hand this means is not suitable for this purpose, and on the other hand to connect the fulfilment of the requirement of performance to personal circumstances in such open and direct way is forbidden. Another conclusion of this case is that to keep the requirement of equal payment is rather difficult from the employer’s view, but because of the special guarantee rules of the piece rates special attention should be paid to this field, too. I remark that similar situations can be observed in Hungarian judicial practice, but unfortunately, the labour courts do not interpret these aspects in such wide circles, and in spite of balancing the personal attributes they pay more attention to examine whether the given employer’s actions cause and to what extent legal damage to the employees. Namely, the courts hasn’t applied so far the Authoritiy’s system of principles which definitely prohibits making such situations which risk the requirement of equal treatment.

5. Conclusions

In my opinion the above described and concerned cases taken in random express clearly what kind of dangers should be taken into account in connection with protected personal attributes during the labour relationship. Practically, the number of these cases is infinite, since employees can be discriminated in several ways. The task of the Equal Treatment Authority is to draft such legal principles and consequences which take into consideration the European legal practice and can be regarded as a guide for the courts’ legal practice as well as for the legislature, but only after close examination of the individual cases. On closing my essay I’d like to emphasize that the judicature must intend at any level and with any preferences to interpret the employees’ interests correctly, as widely as possible, to improve and widen the principle of equal treatment anyway, since the right to equality is one of the most important fundamental rights of the workers. The employees’ interests also need protection invariably in a labour law structure which is approaching civil law, and in connection with the prohibition of discrimination the Equal Treatment Authority may have a key-role in this circle. Basically, the employees receive payment in return for their work and by this they can satisfy their most fundamental social and existential needs, so the principle of equal wage for equal regarded equal work is of great importance and it should be protected more definitely on both legal regulational and judicatural level. In this respect the Authority’s commitments and decisions should be standard for the Hungarian courts anyway, and for the legislator the continuously developing requirements of the European and international labour law should be standard.

Bibliography


European and international labour law should be standard.
French Social Insurance System: from Uniformity to Complexity

Audrius Bitinas

Abstract

In this article the social security system and its development in France is analysed; the analysis, the assumptions of the complexity of the French system and the relations between general and independent professions of social security systems are presented. The author of the article analyses the financing, identifies specific types of benefits, other specific regulations in the general and independent professions social insurance schemes. The paper presents reforms, the trends of the social insurance and deficit reduction measures.

The French government introduced the new general social security system in 1945 according to the principles of universality, unity and social equality of the partners. In 1947 – 1967, the social insurance system became fragmented, split into special professional systems. This situation could be explained by the fact that different professional groups treated social security as a social victory and did not want to accept stricter or universal conditions, did not want to lose the current benefits and independent social insurance fund management.

The general social insurance system applies to employed persons and includes five branches, which have become autonomous since 1967: health insurance (including maternity, disability and death risk), accidents at work and occupational diseases insurance, old-age insurance, family insurance, and the collection of social security contributions.

Special social insurance systems are applied to the professional groups or to the company’s professional funds. The analysis of autonomous advocates social insurance system is presented in this article because the principle of independence of advocacy institute is introduced in French legislation.

In France we could identify the classical approach that an advocate is an independent profession, having a legal procedural independence and autonomy of the advocacy institute.

In conclusion, it could be pointed out that financial problems can not be solved only by reducing the coverage of social security but must be accompanied by institutional reforms providing employment and higher labour market activation measures as well as by increasing the competitiveness of companies and the financial sustainability of the state budget.

Key words: Social insurance; reform; France; advocacy; pensions.

Introduction

The aim of this article is to analyse the contemporary French social security system’s (from the middle of the last century) transformation problems related to the implementation of the principle of the universality. The key of this analysis is concentrated on the research of the assumptions of actual social security system construction: the emergence of system’s complexity; the refusal of the principle of universality; the separation of the independent professions system and other social insurance subsystems from the general social insurance system. Moreover, several autonomous social security systems have a special place because of the specific provisions or principles guaranteed by the law. For example, advocates social insurance system is exceptional because of the statutory provisions of advocacy institute autonomy and the guarantee of the freedom of advocate’s activity. Accordingly, the special contributions and benefit rules for advocates are fixed and an autonomous system’s administration is introduced.

Before the analysis of the social security system transformations and problems of post-war France, it may be noted that the traditional concept of the social security system covers nine groups: medical care, sickness benefits, maternity benefits, accidents at work and occupational diseases insurance, old-age insurance, family insurance, and the collection of social security contributions.

This article examines social security system assessing the basic social security system’s design elements: the concept of social insurance (universal or specialized approach, according to the professional groups); system organization (unified or delegated to the professional categories); allocation of benefits in-cash or in-kind; methods of financing (pay-as-you-go, funded or mixed system); types of social insurance contributions (contributions related to the employment, contributions related to

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all income (taxes). In addition, it is important to analyse who pays social insurance contributions which is the rate of social insurance contributions and how the decision is made. For example, in France the social security legislation is incorporated into a single code, in Lithuania social security is regulated by special laws and the Constitutional Court rulings or decisions, in the Nordic countries social security and social guarantees are determined by collective agreements.

D. Grandguillot defines social security as a national solidarity based system that guarantees to workers and their families protection against various types of risks which reduces or eliminates possibility for the person an opportunity to earn money. Social risks may have originated from the professional activities (accidents at work and occupational diseases) or could be not related to the profession (illness, maternity, disability, old age and death). We could note that social protection system (including social insurance) is a set of different measures which creates solidarity among the people who lost their jobs or income or had extraordinary expenses. This could be benefits in-cash (paid under conditions of social risks): due to old-age; disability; unemployment (when a person loses income from the employment relations); survivor benefits; family benefits or benefits in-kind (for example, medical care; lack of means of living, etc.).

When we are searching for the better efficiency of the social security system and higher social security coverage, it is important to note that social security structure depends on the type of social model. Today it is difficult to find pure social model, designed in the classic Bismarck or Beveridge tradition, but the essential elements of a theoretical model still dominates. The strengths of Continental model (France, Germany) could be: mandatory participation in the social insurance system; the right to social security benefits is related to the paying of social insurance contributions; relatively high benefits; indexation related to the economic situation; autonomous management of the system; social insurance contributions are related to the social insurance risks. The weaknesses of this model are: complexity of the system; the system is not fully universal; the system does not guarantee minimum level of benefits. The strengths of Anglo-Saxon model (United Kingdom, Ireland) are: universality; free medical care; the system includes all needs of a person. The weaknesses are the following: relatively low level of benefits; medical care (financed by taxes) coverage depends on the economic situation; the biggest role is given to the additional voluntary private systems. The strengths of Nordic model (Scandinavian countries) are: universality (wide coverage); extremely high benefits; the minimum level of benefits is established; the public social insurance depends on the contributions paid; large public confidence in the system; equality between women and men. The weaknesses of this model are the high cost of the system and high level of social insurance contributions. Eastern European social model characterized by both Nordic social model features (active labour market policies), Continental model (the structure of the social security system) and the Anglo-Saxon features (development of private initiatives and labour market liberalization policy). Development of Eastern European social model is related to the fact that countries in this region changed economic orientation from socialist to market-oriented system. But we could point out that the economic transformation (increased unemployment, poverty, inequality, bankruptcies of companies and industries, fiscal crisis, creation of new public institutions) and other related facts (the needs of different social groups, recommendations of international institutions, European integration) resulted in the limited public financial resources. G. Esping-Andersen argues that Eastern European countries have opted for a liberal social security system concept where the basis of social security schemes have been privatized, reduced social security coverage, social assistance is based on the means-testing principle and labour market is flexible.

France and other European Union countries began to reform the state social insurance systems in the past decades which aim is to reduce the budget deficit, promote efficiency and strengthen the state social insurance guarantees. M. Ferrera emphasized that a genuine European invention, public protection schemes were introduced to respond to the mounting “social question” linked to the industrialization and the disruption of traditional, localized systems of work-family-community relations and the diffusion of national markets (based on free movement and largely unfettered economic competition within the territorial borders of each country) profoundly altered the pre-industrial structure of risk and need. Today France neighbors and competitors profoundly reformed their pension systems reconciling social justice, the economic efficiency, financial viability and political feasibility. Henceforth dominates plural architectures, combining management modes (public-private) and funding methods (distribution-capitalization), technical innovations.

1. The Development of the Social Insurance System: from the General to Specific Social Security Systems

The social security system’s changes in France are related to the transformation of the economic and social situation: more open economy; the ageing of population; economic competition required a reduction of labour costs (raising the rate of social insurance contributions is problematic); the social insurance system partially financed from taxes; labour forms modified (the appearance of atypical employment relationships);

family structure changed (higher participation of women’s in the labour market, the number of divorces increased, the fertility rate decreased); public services moved into electronic space; the pension funds invested in the global market etc. From one side, the economic growth preconditioned the increase of social benefits, but on the other hand, the budget deficit in the social security system increased (in 1959 social security expenses were only 14.64% of the GDP, but in 2003 the level of expenses reached 29.9% of GDP).

Therefore, from the last decade of the twentieth century, social security reforms in France and in other European Union countries were implemented. The level of social security benefits decreased, the access to benefits became stricter: longer work record to receive benefits; targeted social security benefits; development of private funded systems (more private insurance and less from the state budget); development of electronic services (more responsibility to the social security system’s participants); the part of public functions transferred to private companies (funds); encouraged participation in the supplementary individual or professional insurance; strengthening the financial management of the social insurance budget; increasing independence from the state budget (more from taxes).

Such transformations in the social security system changed the concept and the scope of social solidarity. The social security system is based on the classic concept trying to distinguish social insurance from the social assistance. But today we could fix a tendency to encourage the individual’s but not the state’s responsibility from the social risks, reducing social solidarity in the society. However, social security can not be the economic and labour market hostage. G. Esping-Andersen noted that the human and labour can not become treated as good, because the social rights ensure to the person the independence from the market.

It should be noted, that French social security system’s reforms are designed in relation to the mandatory principles of social dialogue (projects of law should be discussed with the social partners; reforms should maintain the relationship between the national solidarity and benefits; the link between contributions and benefits should be improved). It means, that it is enough complicated to reach a final agreement on social security system’s reforms. Therefore, the social partners in France have the opportunity to evaluate the scope of social solidarity and social partners could ensure the adequate level of the social security coverage.

Council of the European Union in the recommendation „on France’s 2013 national reform programme and delivering a Council opinion on France’s stability programme for 2012–2017” indicated for France to take further action to lower the cost of labour, in particular through further measures to reduce employers’ social-security contributions in association with social partners. It means, that all reforms in social security field must be accompanied by the other sectorial institutional reforms: to raise the level of employment, to create new jobs, to introduce the labour market activation measures, to increase the competitiveness of business and to maintain the financial sustainability of the state budget.

1.1 State Social Security Development Problems in France

The development of the contemporary French social security system began after the Second World War in 1945. Government adopted the main social security system organization principles: universality (the system must be accessible to all residents and include all social security risks. No privileges to special social groups. The same basic amount of social security benefits is paid for all and the maximum benefit “ceiling” is fixed for all professional categories. Social security benefits shall be awarded in accordance with clear rules and shall be applied to the widest possible group. Certain exceptions must be reasoned objectively); uniformity (the same system should be applied to all) and the principle of the management of social insurance system, based on the social partnership.

Despite these principles, in the period of 1952–1966 we could fix the separation of independent professions social security system from the general social security system, the formatting of different social security subsystems or autonomous systems. In the period of 1968–1978 we could observe the partial harmonization of the different social security systems (for example, artists and small business pension schemes, introducing of the compensation mechanism between different systems).

Today in France we could identify several social security systems (according to the number of participants: a) the general system (covers all employed persons. About 72% of participants of all social security systems are involved in this general system); b) agricultural social security system (only self-employed persons, working in the agriculture sector, are involved); c) system of civil servants and employed persons in the military structures; d) self-employed persons system; e) special systems (state enterprises, civil servants, persons of military structures etc.); f) additional compulsory social insurance system (AGIRC and ARRCO); g) others (independent professions etc.). Civil servants and special social security systems cover about 18% of participants, self-employed system covers about 10% of persons.

For the specific social groups, the occupational or professional enterprise social security systems are applicable. Social security systems in France could be autonomous (systems of French railway, underground companies, sailors, employees of French Bank, miners etc.) or partially autonomous systems (EDF-GDF company, notaries, students etc.).

Such heterogeneous social security system is related to the historical context and a social structure. W. Korpi argues that the conflict between the ruling elite and well-organized groups of workers in France highlighted during decades, as well as the conflict between the corporate model and the idea of self-insurance. Such conflicts influenced reforms in France and we can see now the most fragmented social security system in Western Europe.

It should be noted that modern French social security system (created in 1945) was constructed in relation with two of the three major Beveridge system principles (universality and uniformity) and in relation with main Bismarck's system fundamental principle – benefits depend on the contributions paid. However, the principles of uniformity and universality evolved towards the traditional Bismarck system: the system lost the universality and uniformity characteristics. When the social transfer system was created after World War II, it was organised mainly as an insurance: if risk is not linked with income, then the higher the wage, the lower the contribution rate. The system progressed to a general coverage of every resident and turned towards the purpose of redistribution.12

The Social security system Act (adopted in 1945) provides that social security should guarantee to every person (and his family) the necessary measures for a dignified living (Grandguillot, 2008, p. 23). French Constitution (adopted in 1946) provides that all persons (despite of age, physical or mental ability, economic situation) are entitled to different measures which are necessary for proper living if they are notable to work. The preamble of the Constitution of France of 1958 indicates that any human being, regardless of age, physical or mental condition, economic situation, disability, has the right to an adequate standard of living measures.

However, an unified system did not became real: in the period of 1946–1958 the independence of the management of different professional groups strengthened. Firstly, the independent professions opposed to the universal system and retained a special social security system. Instead, the social insurance of several social groups (civil servants, students, writers) were incorporated into the general universal system. Also, due to the social security budget deficit, the partially financing of social security system from taxes introduced.

Initially, the organisation of the social security system was based on three levels of the social security institutions: local insurance funds, regional insurance funds and the National Social Insurance Fund. The aim of such a universal system was to ensure that all professional groups should be entitled to receive the same benefits and to pay the same social insurance contributions (fixed in the national legislation) without any privileges. At the beginning the law stated that social insurance is financed by the contributions of employers and employees and is managed by social partners (elected from employers and employees under the supervision of the state), management of social insurance fund is executed through the administrative councils. In 1945, the law indicated the proportion of social partners participation: two thirds of representatives appointed by the employees and one third by the employers. In 1946, the law changed the proportions of representation: 3/4 of employees and 1/4 of employers. In 1967, the law established the parity representation without elections and in 1982 the election of representative persons was introduced on a parity basis.

In the French Constitution (adopted in 1958) we could see the expansion of the government role regulating social security systems: the state participates in the formation of administrative councils (together with social partners) and executes financial and management control.13 But the procedures of management of the social insurance funds became different, contrary to what was intended in the Social security system Act of 1945.14

In the beginning of seventies of the last century in France and in other Western European countries the economic recession (because of oil crisis) and state budget deficit rose and the debate on the need for further harmonization of the different social security schemes was launched again. For example, in 1968 the general social insurance system was in surplus of 611 million French francs. However, in 1974 the budget of the general systems had a deficit of 3.3 billion French francs. In 1984, the budget was in surplus again (16.7 billion French francs), but in 1994 the deficit reached 54.8 billion French francs. In 2004, the budget deficit was 12 billion French francs.15 Because of the growth of the deficit, the process of merging of different social security schemes started. It should be noted, that in 1974 the law introduced the financial and demographic compensation mechanism between all social insurance systems (because of ageing and the deficit in different systems). This mechanism allows to transfer financial means between the different systems. However, the French society actively opposed to any changes in the social security system for a long time and the reforms in social security field began later than in other European countries or in other sectors in France (industrial restructuring, deregulation of the transport and communications systems etc.).

This public opposition can be explained by the fact that persons are attached to the current system (especially pensions), social security is treated as a social win, persons do not want to accept restricted conditions and they do not want to lose their benefits and independency of social insurance fund management. Another explanation is that persons have adequate social protection and want to be a closed social group. The existence of special schemes breaches the principle of universality and uniformity of the social security system management. Different specific privileged systems and different management create exemptions from the general social insurance laws.16 M. Dreyfus notes that massive strikes against the planned reform of the French Prime-Minister A. Juppé showed how actively the French population supports social insurance. In addition, trade unions defend social insurance rights as the achievement of workers. Thus, this situation in France created a strong connection between people and the social protection in France.17

The growth of the budget deficit led to introduce the additional financing of social security budget by taxes: the tax revenue from sales of alcohol beverages is transferring to social security budget; special general social contribution (CSG) introduced (revenue from this source in 1991 was about 41 billion French francs, in 2000 it was about 377 billion French francs) (Palier, 2005, p. 373).

In 1993, the pension reform touched the general system and the system of self-employed persons. The main task of this reform was to preserve the fundamental rights of the insured persons as well as the principle of solidarity and to ensure equality between different generations. The law indicated, that the fundamental pension system reform provisions should be discussed in a special institution – Pension Guidance Council (Conseil d’orientation des retraites), which is composed of the representatives of social partners. Pension reform established measures to encourage older people to stay in the labour market: for example, for each career year at the age of 60, the pension is increased by 3% per year until a person reaches the age of 65. The pension reform laws introduced changes in the pension calculation formula. By default, the missing social insurance periods can be included in the pension formula if the person pays the financial compensation for the social insurance fund (but not more than 12 quarters). The number of working record for the pension raised from the best 10 years to 25 years (gradually until 2008), compulsory social insurance record for the full pension increased from 150 quarters to 160 quarters period (from 2003).

Under the stricter conditions of competition and globalisation, the government continued to restrict benefits without raising the level of contributions. This fact caused public disagreement. Together with tax reform, the structural reforms started in the mid nineties of the last century, which caused the fall of French government in 1995 (because of a huge strike). Moreover, government adopted the pension reform plan in 1995 without broader consultations with social partners (in France it is extremely important). This can also be explained by the fact, that by the nineties the government increased social security contributions, increasing and social security contributions at the same time, which have been accepted by the public. Because of complicated negotiations with social partners and growing of the budget deficit, a comprehensive reform of the pension, health, unemployment, family benefits started at the end of the last century.

In 1999, the pension system reserve fund was created. The aim of this reserve was to accumulate the capital because of ageing and to ensure financial sustainability in the future.

Since 2000 the structural social security reforms have been launched in France. When the economy grows, the social welfare can be created by introducing new types of benefits or increased benefits. Growing of the budget deficit requires not only parametric but also structural – institutional reform because the increase of taxes or social insurance contributions is problematic. Start of the reform was influenced not only by the rising costs of social insurance, but also because of the regulatory development of the European Union: the Maastricht deficit criteria were introduced, competition increased. The aim of structural reforms was to raise employment, to personalize the pension calculation rules, to develop and regulate private pension funds, to strengthen universal health system provisions, to develop the supplementary health insurance system and to extend the requirements of pension calculation.

In 2002, the compulsory supplementary pension schemes merged, additional mandatory retirement ARRCO system was created and the legal provisions of AGIRC and ARRCO compulsory supplementary pension schemes were unified. This was done in order to unify the different pension schemes and seeking for the pension system uniformity. After long discussions, it was decided not to increase the retirement age to 65 because of negative opinion of society and do not reform civil servants and other specific systems.

The pension reform of 2003 touched almost all autonomous pension schemes. The main objectives of the reform were to continue the harmonisation of pension systems, to promote the longer work of older people and to encourage participation in the private pension funds. In 2007, the social insurance record for the employees of state enterprises (railways, underground, EDF) rose until 40 years (in 2012) and pension indexation on the inflation (no longer on the growth of an average salary).

The data in 2013 European Commission Draft Joint Employment Report shows that the nominal unit labour costs in the whole economy in 2011 (annual rate of change) in France was almost twice higher than the EU average (change in France was 1.6, in the EU average was 0.9), the general government debt in 2011 was 86% of GDP (the EU average was 83% of GDP), the total amount of taxes in 2011 (total taxes as % of GDP) in France was 45.6 (the EU average was 39.9). This indicator of total taxes was higher only in Denmark. Sustainability of social security systems (the higher ratio means the less sustainability) in 2011 in France was only 1.6 and it is less than the EU average (2.1). There we could conclude that despite of high taxation the sustainability of social security system in France is relatively low. B. Palier notes, that French government tries to raise taxes or contributions and to finance the deficit of social security, but not to reduce the benefits (because of negative reaction of social partners). For example, in 1975 the health insurance contribution raised by 1% and pension contribution raised by 0.5%; in 1977, social insurance contributions for aged persons (63 years and more) increased; in 1995, CSG tax increased from 1.1% to 2.4% and taxation of alcohol increased; in 1996, alcohol and tobacco excise tax increased and the CSG tax increased; in 1997, CSG tax increased again and

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property tax was introduced; in 2004 CSG tax increased again. Accordingly, the tax part in the financing of social security is increasing; in 1996, the social security contributions composed about 90% of the total social security revenue, in 2005 social security contributions composed only 65% of the total social security budget revenues.

In the report of the Pension Guidance Council of 2010, there was a national reflection on a reform of the pension system on the following themes: the conditions for setting up a universal social security system by the account units (“points”) or notional accounts in pay-as-you-go system, the conditions for more equity between mandatory pension plans, facilitating the choice and the conditions of insured persons of their cessation of activity. The government began a comprehensive negotiations with the social partners on the retirement age, duration of the assessment of contributions, the pensions’ level, the evolution of budget income, changing pension calculation formula into the account units (“points”) or notional accounts.22

The reforms in the last decade of past century and at the beginning of this century were related to the strengthening of social insurance management, harmonisation of different systems and strengthening of the benefits.

L. Ch. Viossat argues that it is also a complex goal that encompasses several dimensions difficult to combine: horizontal equity (for equal career, equal retirement pension) vertical equity (more for the poorest, least for the rich), individual equity (each receives that he contributes), and “transversal” equity (no generation is in favor).23

It could be concluded, that contemporary French social security system moved away from the declared principles in 1945: restricted conditions for benefits, expanded private insurance, more responsibility for persons’ future, increasing the state budget role financing the social security system (the part of social insurance contributions falls), modernisation and digitalisation of the social security institutions etc. The differences between the post-war and modern social security system are obvious: from the income support and the support of social needs (in relation with economic growth) to the improvement of working conditions and growth of the competitiveness.24 Today French social security system is Bismarck tradition-based, the system has become dependent on economic situation, social security system’s welfare and decreased solidarity.

Despite social security reforms, France has maintained the system based on the solidarity principle. This may be regarded as an advantage for the society and in the spirit of the concept of welfare state. The safeguard of social security guarantees is an advantage for the society and in the spirit of the concept of welfare state. The safeguard of social security guarantees is an advantage for the society and in the spirit of the concept of welfare state. The safeguard of social security guarantees is a positive phenomenon positively indicated in the European Union strategy “Europe 2020” which provides a social market economy orientation.

1.2 General Social Insurance System in France

The general social insurance system applies to employed persons (under employment contract) and includes five branches, which became autonomous in 1967: health insurance (including maternity, disability, and death risks); accidents at work and occupational diseases insurance; old age insurance; family insurance; contribution’s collection and administration system. General system is administered by the four national funds: National Health Insurance Fund (CNAMTS), National Pension Insurance Fund (CNAVTS), National Family Benefits Fund (CNAF), Central institution of social security funds (this agency collects and administers contributions) (ACOSS). The Ministry (responsible for social security policy) and national fund concludes three-year management and objectives contracts with targets and financing sources.

In order to finance the budget of the general social insurance system, persons pay social security contributions and additional general social contribution (CSG): 7.5% from the business income and pre-retirement benefits; 6.2% from the unemployment and sickness benefits; 6.6% from the retirement or disability benefits; 8.2% from the income for the use of real estate; 9.5% from the revenue of gambling.

In order to cover the deficit of the general system, persons additionally pay social security deficit recovery contribution (CRDS), which is 0.5% of person’s income. The budget deficit of this systems also is financed from the other sources: a part of the state revenues from gambling; excise taxes on tobacco, alcohol; from realized pharmaceuticals etc.

If the salary or professional income is below of a ceiling of social security (36,372 euro in 2012), the social insurance contributions are calculated from the maximum ceiling level.25 General social security system’s participants receive the cash benefits or benefits in-kind:

- medical expenses (medical consultations, pharmaceuticals, medical analysis, optics, dental services, vaccines, transport costs) and hospitalization (80% or 100%, if the treatment lasts longer than 30 days) compensation;
- sickness benefits (from 8th day);
- childbirth and maternity benefits in kind: from the 6 month of pregnancy up to 12 days after birth maternity leave is granted and medical consultations, medicines, tests are fully reimbursed;
- disability pensions (if a person lost 2/3 or more capacity). The benefit amount is determined by the capacity to work (the first category – 30% of the average wage; the second category – 50% of the average wage; the third category – 50% of the average wage and 40% for the carer). A disabled person can receive full reimbursement of all medical expenses. A disabled person can receive an additional payment if the person’s income is below the minimum established by the state;
- death benefits (lump sum is related to the average daily wage, multiplied by 91.25);
- disability pension for a widow. If the disabled person died under age of 60, the pension is 54% of the deceased per-

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son’s pension (calculated on basis of the second disability category); if the disabled person dies at 60 years or more, the pension is 54% of the deceased person’s pension. The pension is increased by 10%, if the deceased person had three or more child;

• accidents at work and occupational diseases (in-kind and in-cash) benefits. Person has full reimbursement of medical expenses. Benefits in cash are 60% of the estimated earnings for the first 28 days and 80% of the estimated earnings from the 29 day;

• family benefits are related to the family’s needs: for housing or housing improvement, for the child care, for disabled child care; child benefit etc.;

• old-age pensions are paid to a person at the age of retirement if this person has the necessary social insurance record (the best 25 years of work, the minimum and maximum limits are applicable). A full pension is 50% of the estimated person’s wage. In order to receive a full pension, the social insurance contributions must be paid not less than 164 quarters and not less than 166 quarters (from 2015). If a person has reached a full retirement age and full social insurance contributions record, he receives 1.25% higher pension. Accordingly, a person who retires at the minimum retirement age, but have not enough social insurance record, receives 1.25% per quarter reduced pension. Early retirement is possible for a person, who had already received disability pension or who was a war veteran, or for mothers with three or more children (having enough of social insurance record). Persons under the age of 60 have a right to take partial retirement. The amount of this pension depends on the number of reduced working hours. The minimum age for retirement is 60 years (in 2017 – 62 years). The person can get a full pension at the age of 65 (in 2023 – 67 years). Survivors (orphans) pensions are paid, if the survivor’s incomes do not exceed the fixed limit. The pensioner can receive additional payments from the social insurance fund if the person’s pension is less than fixed limit.

1.3 Additional Mandatory Social Insurance System (AGIRC and ARRCO)

General social insurance system participants are compulsory covered for the additionally pension insurance AGIRC (public sector) and the ARRCO (private sector). AGIRC pension contributions are paid by the employer (depending on the category – from 4.5% to 12%) and employees (depending on the category – from 3% to 8%). AGIRC pension contributions are paid by the employer (12.6%) and the employee (7.7%) and the employee pays 1.5% contribution for the death insurance. A full pension in this system can be obtained at the age of 65 (the insured persons can nevertheless receive the retirement pension in this system from 60 years if they receive a mandatory full basic pension, they are in early-retirement of in case of disability). In case of pre-retirement, the pension is reducing. It is also possible to receive survivor pension from the age of 55 (amount is 60% of the deceased person’s pension).

2. The Social Insurance System of Independent Professions

As has already been mentioned, the various special social insurance systems have been developed by the occupational categories (general system, self-employed insurance system, farmers’ social insurance system, social insurance for the independent professions, social insurance system of railways workers etc.). The conditions of participation in these systems are different and are based on membership of a particular professional group. The independent professions social insurance system was created in 1948 when social security system began to separate from the general system. In 2009, 581,000 people contributed to this system and 223,500 persons received benefits. The revenues of the system were 1.5 billion euro, while its expenses were 1.47 billion euro.26

Sickness and maternity social insurance for the independent professions is organized by National Health Insurance Fund (CANAM); family allowances – by National Family Benefits Fund (CNAF). Old-age pensions, widow’s (orphans) benefits, disability benefits are administered by National Pension Fund of Independent Professions (CNAFPV) which includes different professional funds: notaries (CRN); bailiffs, advocates of the Appeal Court, judges (CAVE); doctors (CARMF); dentists (CARD); pharmacists (CAVP); nurses (CARSF); medical nurses, physical therapy doctors (CARPIMKO); veterinarians (CARPV); insurance agents (CAVMAC); financial brokers (CAVEC); arts, sports, tourism guides (CREA); architects, translators, writers (CIPAV). In 1954, the social insurance fund of advocates (CNBF) became independent from CNAFPV.

Independent professions’ social security system in France administers several autonomous social insurance funds: bailiffs, notaries, doctors, insurance agents, architects, pharmacists, advocates. These funds are financially independent, except that they participate in the compensation mechanism between all social insurance funds. Participants of independent professions social security system are compulsory covered by sickness and maternity social insurance, family insurance, disability, old-age social insurance and the death insurance.

Participants in this system pay contributions for sickness, maternity, family, disability, death, pension (basic and additional coverage) insurance. Also persons pay contributions for the vocational training (0.15%). In order to finance the social insurance budget of this system, individuals pay general social contribution (CSG) and social security deficit recovery contribution (CRDS). The size of CSG and CRDS is 8% of person’s income.

Sickness and maternity social insurance system in 1945 was constructed under the principle of solidarity, accessibility, universality and quality of service. Gradually, this type of insurance expanded and included not only workers, but also inactive persons. In 1967, sickness and maternity social insurance of independent professions became autonomous. In 1996, the sickness and maternity social insurance was expanded to all persons residing in France at the age of 18. In 2000, all persons aged 16 years, received an electronic health insurance card Carte Vitale which is a health insurance document. In 1973, the health in-

Advocates pension fund (hereinafter – Advocates pension fund).

2.1 Advocates Social Security System

Advocates pension system is administered by the National advocates pension fund (hereinafter – Advocates pension fund). This fund was established in 1938 and in 1948 was integrated into the National Pension Fund of Independent Professions (CNAFPL). In 1958, Advocates pension fund became independent and administered only old age, survivors (orphans) and disability benefits. In 1990, the law merged the advocates and legal advisers (only a former salaried legal adviser remained affiliated to the general social insurance system before 1992).

In 2003, a national social security reform was launched, which aims were to unify the different systems and subsystems (at that time there were about 30 basic pension systems and 300 additional pension systems). During that reform, the retirement age increased, the working record periods prolonged and the possibility to buy the missing pension periods was introduced. Despite the government efforts, the advocates pension fund remained independent and could fix contribution rates. During the reform in 2010, the retirement age (gradually up to 67 years) and the working record for the full pension prolonged farther.

The articles No. L.723-1, R-721-1 and D-723-1 of French social security code provide the fundamental principles of advocates social security system. In 1979, the General assembly of advocates pension fund approved the regulation of additional pension insurance. The subjects of advocates pension insurance are the State Council advocates, the advocates of the Supreme Court, other advocates and assistants of advocates (indicated in the special list). Furthermore, the advocates, having more than 50% of the advocates company’s capital, fully participate in this system. Advocates with less than 50% of the company’s capital are insured only for pension insurance, other social risks are covered by the general social insurance system. Advocates from the French Overseas territories are involved in the same pension insurance.

According to the French social security code, the financial supervision of Advocates pension insurance fund is executed by the Ministry of Finance and the Ministry responsible for the social security. In 2012, about 50 thousand advocates paid pension’s social insurance contributions and about 11 thousand received pension benefits.

Advocates pension fund administers the basic pension and additional pension benefits. The advocate can work and can receive the pension benefit at the same time. But in this case, the pension can not be reduced: for the additional worked quarter the basic pension is increased by 0.75% (period between 2004 and 2010) or 1.25% (from 2010).

Advocates pay the social insurance contributions for the basic pension insurance related to the working years. For the first year of activity, the annual contribution rate is 264 euro; for the second year – 527 euro; for the third – 829 euro; for the fourth and fifth years – 1130 euros and 1444 euros from the sixth year. Moreover, advocates pay income tax (which is reduced for the first and second activity’s year). The maximum taxable income is 273,000 euro. Similar to the general pension system, advocates can buy the missing quarters. The minimum retirement age is from 60 to 62 (depending of birth year), but the full pension could be paid only at the age of 65 – 67 years. Mandatory contribution period is from 160 to 166 quarters (depending on the year of birth) and there are favourable provisions for disabled persons and persons with a child.
The contribution rate for the supplementary pension part (participation in this pension scheme is mandatory from 1979) is 3.08% (if income is less than 39,860 euro) and 6.15% (if income is between 39,861 euro and 159,440 euro). During the first year of activity, persons pay the reduced contributions which level in 2012 was 213 euros per year. There is also the opportunity to participate in the voluntary supplementary pension scheme (if income is between 39,861 euro and 159,440 euro) and the contribution rate is from 2.67% to 9.43% (depending on income).

There is also a survivor’s pension. A widow is entitled to 50% of basic pension benefits if the deceased person was married at least for five years (or during the marriage one child or more were born). The widow is entitled to 60% of a supplementary pension if his age is not less than 50 years, was married at least for five years (or a child was born during marriage). Accordingly, 25% of basic and supplementary pensions are paid for orphans (the child must be younger than 21 years or a student, younger than 25 years in the day of death).

Advocates pay contributions for the incapacity and death risk. Contribution rate per year is 216 euros (from first to fifth years) or 298 euros (from the fifth year of activity). The benefit amount for this insurance risk is a half of the basic pension (if the advocate worked more than twenty years) or equal to the supplementary pension (if a person worked more than 20 years). In case of death, the lump-sum could be paid (the amount of benefit depends on the cause of death).

Contribution rate for the sickness social insurance is 6.5% from the declared income (if annual income is not more than 34,620 euro). If annual income is between 34,620 euro to 173,100 euro, the contribution rate is 5.9% from income. The medical expenses, dental services, the expenses for pharmaceuticals (from 35 to 65%) are reimbursed and partially medical expenses in hospitals (80%, if the treatment lasts from 30 to 50 days; 100%, if the treatment lasts longer than 50 days) are covered. Sickness benefit is paid only from 91 day and its size is 61 euros per day.

Conclusions

1. Contemporary French social security system began to develop after the Second World War, when the Government adopted the main social security system organization principles: universality, uniformity and equality of the social parties management. However, these principles were not implemented in the reality. Independent professions opposed to the idea of the unified social security system and preserved a special social security system.

2. The opposition of different social groups in France can be explained by the fact, that persons, belonging to the different social security systems, do not want to lose the current benefits and want to keep independent social insurance fund management.

3. The general social security system applies to employed persons and includes five branches which became autonomous in 1967: health insurance (including maternity, disability and death insurance), accidents at work and occupational diseases, old age insurance, family and administration of social insurance contributions.

4. Special social security systems are created for different professional groups or there are professional company’s funds systems. Specific systems can be completely autonomous or partially autonomous.

5. The autonomous management of advocates social security system can be distinguished from other professional social security systems because of the principle of the independence of advocate’s activity and principle of autonomy of the advocacy institute.

6. The adequate social insurance coverage is guaranteed in France. It follows from the principle of autonomy of advocacy institute and contributes to the development of social security coverage.

7. The autonomous advocates social security system creates the possibility for the further social development and adequate social security coverage, promotes personal involvement in private social insurance and establishes the principle of social solidarity.

8. Social security system is based on the classical concept of intention to separate social insurance system from the social assistance. Today there is a tendency to promote the individual responsibility for persons’ welfare, reducing social solidarity in the society.

9. The financial problems can not be solved reducing social security coverage. It is important to activate employment and labour market, to increase the competitiveness of companies and to maintain the financial sustainability of the state budget.

References

New Concept of Specially Protected Nature Territories in Russia in the Context of Targets of the Development of Ecological Tourism

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Abstract

Specially protected nature territories represent an important value for any state. Their optimum number and proper legal regulation of creation and functioning allow realize the human right to a healthy environment. However, the legislation on specially protected nature territories available now in Russia, does not allow them to implement their necessary functions in full. It is of a collision character, and gives rise to contradictory law enforcement practices. This circumstance prevents the development of ecological tourism on the territory of the Russian Federation.

The authors of the article make a number of proposals for modernizing the network of nature reserves and other types of specially protected territories and propose measures for the development of ecological tourism in Russia. Importance of the study is that when planning business activities in Russia, carried out within the boundaries of specially protected areas, a foreign investor must have a clear understanding of existing prohibition, permissions and restrictions, stipulated by the Russian environmental legislation. The article might also be interesting to ordinary citizens who are the lovers of ecological tourism.

Key words: Ecological tourism; environmental zoning; land parcel; national park; nature reserve; resort; right of property.

1. Introduction

Specially protected nature territories (hereinafter referred to as SPNT) are plots of land, water surface and air space above them, where are being located nature complexes and objects, which are of special environmental, scientific, cultural, aesthetic, recreational and health-improving importance, which have been withdrawn by the decisions of public authorities either in whole or in part, from economic use and for which has been established a special protection regime.

The SPNT importance for any country in the world is that they preserve the islets of nature, untouched by the human being, for scientific investigation and environmental tourism. The Russia Environmental Law distinguishes the following SPNT categories: State nature reserves; National Parks; nature parks; State wild-life reserves; monuments of nature; dendrological parks and botanical gardens; health-improving localities and resorts. Similar classifications are contained in laws of other countries of the former USSR.³

At the beginning of 2012 the Russian Federation had more than 13 thousand of specially protected natural territories of federal, regional and local significance, with the total area of 211 million hectares, while the area of the land territory taken together with the internal waters (land) is 200.4 million hectares, or 11.7% of the area of Russia. 11148 of them are of regional importance, the total area of which makes 125.8 million hectares (i.e. 7.3% of the territory of Russia) and 1598 SPNT are of local significance, total area of which makes 27 million hectares (i.e. 1.6% of the territory of Russia).⁴

Despite of availability of the large area of functioning SPNT, their state, financing and effectiveness leave much to be desired. The concept of conservation of nature complexes formulated back in the 30’s of the last century, does not meet the environmental, political, economic and other realities of the second decade of the 21st century and objectively requires the revision. But the conservative mood of both the legislative and executive environmental bodies of State power of Russia prevent from updating the targets, tasks and methods of special protection of nature complexes and the adoption of urgent measures for the development of ecological tourism in most of SPNT types. Исполнительные природоохранные органы государственной власти

In this connection, views and solutions proposed in the within article, can be used by the representative and executive bodies of State power of Russia and CIS countries while developing a new conception of SPNT legal status as well as business representatives of European countries and USA, who are ready to take part in investing the development of ecological tourism in the post-Soviet countries’ area (after improvement of their investment attractiveness and measures taken against corruption).

This article may be of interest to environmental lawyers who carry out comparative-legal scientific research in the area of unique nature complexes and objects, as well as ordinary citi-

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zens interested in the problems and prospects of development of ecological tourism in the countries of the former USSR.

Legal problems of SPNT creation and functioning are rather actively discussed in the Russian legal and ecological science, as well as find their research in writings of scientists from CIS countries.


The hypothesis of this scientific research is that, still acting Soviet concept of conservation of unique nature complexes is an obstacle for attracting to Russia foreign investments, necessary for the development of ecological tourism and increase of the budget profitability. Abeyant of many legal aspects of existence of specially protected nature territories hampers not only business projects implementation, but also the realization of the human right to a healthy environment, an integral part of which is access to unique natural objects.

When writing this article we used the methods of comparative jurisprudence, systems analysis, statistical accounting and some others.

2. General Description of the Legal Protection of Nature Complexes and Objects in the Russian Federation

The Russian ecological law theory and law mark out three directions of environmental protection: enshrining in the law the environmental requirements to individual types of activities (industry, transport, agriculture, defense, etc.); establishment of particularities for protection of individual nature objects (lands, forests, waters, soils, air, fauna); creation of territories with special ecological and legal status. The latter should be understood as a set of measures enshrined in the law for SPNT protection, including prohibitions, permissions, environmental requirements, etc. It is of two types: a so called «protective» for valuable and unique nature complexes (nature reserves, natural parks, etc.) and a «restorative» for territories that are severely polluted and require their rapid reclamation (ecological disaster areas).

In addition to these types of lands of special ecological and legal status, there are a number of intermediate varieties of lands, legal provision of which is specified in legislation very fragmentary. Thus, ecological and legal status of natural landscapes or natural ecological systems is defined only partly.3

These territories are of high environmental fragility, which is not enough to give them the status of specially protected nature territory.

As to specificity of protection of such «intermediate» territories, the scientific literature has already had a number of research works. However, it is still a long way to the final (doctrinal and then legislative) decision of this issue.

Nevertheless, we shall mark out the works on ecological and legal status of steppes,4 Arctic,5 islands,6 original habitat and territories of traditional nature use,7 etc. The essence of the issue is that these areas cannot be classified as SPNT (because they take up too much area and do not always fall under SPNT standards), while objectively is required the adoption of a series of measures to their additional protection and rehabilitation.

We shall try to doctrinally formulate a list of lands and territories which have such specificities of conservation:

1) The Red Book of soils of the Russian Federation (not approved yet) and subjects of the RF. A number of subjects of the Russian Federation have adopted corresponding normative acts, for example, Resolution of the Government of Perm region. December 7, 2007 № 312-p «On the Red Book of soils of Perm region». The main task of special conservation of soils is preservation of the most diverse natural soil differences, structures of land cover and their biotic communities;

2) zones with specific conditions of territories use – protective, sanitary and protective zones, zones of protection of objects of cultural heritage (monuments of history and culture) of the peoples of the Russian Federation, water protection zones, zones of sanitary protection of sources of drinking and household economy water supply, zones of protected objects, other zones, established in accordance with the RF legislation (Art. 1, Town-planning Code of the Russian Federation).

In this list we clearly see two groups of zones with special environmental and legal status: protective (close to SPNT regime, e.g. water protective, zones of sanitary protection, etc.) and restorative (close to the regime of ecological disaster, for example, sanitary-protective zones);

3) lands, which have a special value. These include high-value lands, within which there are nature objects and objects of cultural heritage of particular scientific, historical and cultural value (typical or rare landscapes, cultural landscapes, communities of plant, animal organisms, rare geological formations, etc.).

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At the same time, we note that they are not included in the SPNT lands, since the value of such objects is insufficient to give them special protection regime.

In addition, the lands of particular value include valuable forests or special protective sites of forests (a special status, respectively, have and forest sites at which these forests grow, Art.102, Russian Forest Code); especially valuable productive farmlands (Art. 79, Russian Land Code); territorial zones of specially protected territories within the boundaries of settlements (Art. 85, Russian Land Code); especially valuable wetlands (Art.61, Russian Water Code).

The recent trend is of a particular interest to us, because the appearance of such intermediate ecological and legal structures means that in the land and environmental law is being formed a more complex land gradation based on their protection (which does not require the construction of a special category of lands for them, because they naturally present in all categories).

These lands are fragmentarily mentioned in the Land Code of the Russian Federation, Town-planning Code of the Russian Federation, the Federal Law «On environmental protection», the Federal Law of June 25, 2002 «On objects of cultural heritage (monuments of history and culture) of the peoples of the Russian Federation» as well as in other normative acts, however, there neither exists scientific, nor the legislative classification so far.

It follows from this that currently de facto exist both a hard structured system of territories with legally established regime of special protection (reserves, national parks, wildlife reserves, etc.), and no less complicated (although not so precisely settled by the law) system of territories with the individual elements of such special protection. The differences between above-mentioned legal regimes consist in a various set and content of prohibitions, permissions, positive obligations, addressed both to the right-holders of corresponding land parcels (their neighbours) and to an indefinite number of persons.

Therefore, when planning investments in the Organization of the ecological tourism on the Russian territory, foreign investors need to clearly understand the legal status of those lands on which they will have to work. The content depends on the restrictions and prohibitions which may be imposed on the construction of recreational facilities as well as other activities. The most stringent prohibitions are envisaged within the SPNT boundaries, followed by lands with the individual elements of a special mode of ecological and legal protection. The list is completed with lands, within the boundaries of which function only general prohibitions specified in the Land Code of the Russian Federation.

3. Contemporary Legal Issues of SPNT System

Functioning in the Russian Federation, and Means of their Solutions

Central issue of SPNT legal regime is the SPNT archaic concept and ineffectiveness of solution of the nature conservation tasks (environmental challenges) on their territory. Acting until the present time in Russia and some CIS countries, the concept of conservation of unique nature complexes had formed in 30-ies of the last century, in other socio-economic, political and environmental conditions. It has a number of significant drawbacks.

The inefficiency of existing system of State nature reserves, for example, consists of the fact that there is no required amount of budgetary funds for serious scientific studies; the nature reserves territories are huge (for example, Teberda State biosphere reserve occupies about 85330 hectares), and that is why it is not possible to arrange adequate protection of their territory against poachers and other violators.

3.1 Collisions of Law Norms on State Nature Reserves

We should separately say about legislative collisions, connected with organization of the regime of special protection of State nature reserves. Initially, even the Soviet concept of State nature reserves formation assumed to completely withdraw a nature reserve from the economic turnover, with realization within its limits only scientific research.

The remains of this concept can be found in clause 5, Art. 9 of the Federal Law of March 14, 1995 № 33-FL «On specially protected nature territories», according to which «stay on the territory State nature reserves of the civilians who are not employees of such reserves within State nature reserves, or officials who are not in staff of the bodies in charge of the reserves, is allowed only with permission of these bodies or directorates of State nature reserves».

Thus, it was assumed that the reserve territory in a legal sense is a single whole, and there may not be carried out any side activities, but protection. This was the difference between a nature reserve and a National park, in the structure of which were allocated different zones with a differentiated legal regime.

«Monolithic» legal status of lands of the nature reserve had been originally destroyed by the residents, who found themselves in a giant border territories recognized as the reserves. The administration the nature reserve and State authorities did not have financial ability and necessity to relocate inhabitants of such villages, therefore, within the boundary of the reserve was allowed a cattle pasturage, horticulture, etc.

Later in 2011, this trend was exacerbated by the amendments to the Federal law of March 14, 1995 «On specially protected nature territories», according to which on specially designated by the Federal body of executive power sites of the biosphere polygon of State nature biosphere reserve to ensure the provision of its types of activities, training activities and sports the development of cognitive tourism, physical culture and sports is allowed the capital construction of objects and related infrastructure.

Plots of land necessary to carry out such types of activities, may be provided to the citizens and legal entities as rented in accordance with land legislation.

If add to this the existing regulatory provisions allowing for the implementation of eco-tourism within the boundaries of the reserve, it becomes quite incomprehensible where is the difference between the nature reserve and the National Park. When actually legalized status of the single whole (monolithic)
of the territory, within its boundaries there in fact exist various functional zones envisaging agricultural, tourist, recreational and other kinds of the territory use.

We assume that the following way out is possible in such a situation.

Existing in the Soviet years giantomania (creation of abnormally large works), associated with the creation of huge territories of nature reserves should be reviewed.

Territories of nature reserves located in densely populated areas of the country should be heavily shortened, giving the new legal status for the rest of them.

For example, the part of the nature reserve, which without threat to the preservation of its unique natural complexes can be used for recreational purposes (skiing or rafting), should reasonably be given the status of the «recreational environmentally sensitive reserve».

To date, such a variety of environmentally sensitive reserves does not exist in Russia, and it should be developed. The necessity to create them is that the tasks of special protection of the unique nature complexes can be tackled in conjunction with ecological tourism.

Another variant of the solution of this issue is to convert the part of functioning network of nature reserves into national parks, for which the regulatory framework provides the combination of tasks for nature protection with the tasks of recreational activities (including eco-tourism). Giving a diversified conservation status to these protected nature complexes (even if 90% of the territory of the National Park will be considered as a protected zone) will allow to settle both economic (financing at the expense of eco-tourism), and environmental tasks (not to allow tourists get into the certain protected territories). Besides at present, at entry (pass) to the certain protected territories a person has to pay a so called «ecological fee» which is not envisaged by the Russian Federation Tax Code.

It seems that such a spontaneous illegal experience should be partially legalized, but not take any fee for the entrance (as far as there should not be any strangers), and for entry to an environmentally sensitive reserve such a fee should be taken with the target to its obligatory use aiming environment protection expenditure.

Thus, such SPNT category, as the nature reserves, we offer to save by reducing their surface area and prohibit all non-core activities exercise in their territories, including tourism and recreation.

3.2 Problems of the Land and Legal Status of Some Kinds of SPNT

As the Land Code of the Russian Federation declares, the whole land territory within the boundaries of Russia is divided into seven land categories (farmland, settlements, forest resources, etc.). A similar division of the land fund is being traced in the countries of Europe and CIS.10

Attribution of an individual land parcel towards a particular category of land has some serious legal consequences, since its purpose depends on such attributions, special set of permissions and bans, etc.

Such a particular category of lands are the lands of specially protected territories and objects, which include a number of varieties. One of them is the land of specially protected nature territories. According to paragraph 1, Art. 93 of the Land Code of the Russian Federation, the lands of specially protected nature territories include lands of State Wildlife nature reserves, including the biosphere, the State Wildlife nature reserves, natural monuments, national parks, natural parks, dendrological parks, botanical gardens, the traditional nature use territories of the small-numbered indigenous peoples of the North, Siberia and the Russian Far East, as well as lands of treatment and recovery localities and resorts.

Meanwhile, such approach of a legislator to this problem is internally contradictory.

1. In structure of SPNT lands are mentioned the resorts, dendrological parks and botanical gardens. But what is a resort? According to the ecological laws of Russia, the resort is a territory which has the definite natural and curative resources and necessary infrastructure. However, availability of the latter in almost 100% cases means that they are located within the boundaries of a settlement – a town or a village (in Russia they are the resort towns like Sochi, Anapa, Kislovodsk, etc.). Meanwhile, in virtue of Art. 83 of the Land Code «the borders of urban, rural communities separate the lands of settlements from the lands of other categories». It means that within the boundaries of a settlement there cannot be any land parcels belonging to the other categories of land (in our case the lands of SPNT). Undoubtedly, in town-resorts a special town-planning zoning of the territory is carried out, a lot of specially protected and recreational zones are allocated, but this category of land does not change therewith.

That circumstance obtains its practical significance only then, when the local self-governmental authorities refuse that the entrepreneurs would privatize the land parcels which are located under the objects of real estate in town-resorts, referring to the fact that the land of SPNT can not be transferred from the public ownership into a private one.11

This matter has formed a contradictory court practice.

But from our point of view, the reference at the Law of Federal ownership of land resorts of Federal significance do not entail an automatic title of Federal ownership for entire territory of the resort (which, at the same time, has no any clear and legally established boundaries). The right of Federal ownership may only be spread on land parcels which have been formed and put to cadastral recording. The Federal status of a resort only means that the resort is under a particular management, and no more.

2. Most of the dendrological parks and botanic gardens also classified under the Land Code of the Russian Federation as the SPNT lands are located on the lands of settlements. However, even if they are positioned beyond the boundaries of settlements, there is no clear understanding of logic of the legislator, who referred them to the category of SPNT lands. What

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is a dendrological park or a botanic garden? It is a land parcel with artificially planted collections of rare plants and where is not a mass reception of tourists.

But what then is the protection of «unique nature complexes». In our view, there is none. This is a typical case of lands of the re-creative purpose.

3. The categories of SPNT lands are referred by the legislator to the territories of traditional nature use of the small-numbered indigenous peoples of the North, Siberia and Far East of the Russian Federation. This approach is very strange, because traditional nature use is a kind of economic activity. In respect of such territories, there do not exist any special body of management (i.e. Administration of the nature reserve), special observations of nature are not carried out, special environmental protection campaigns are not envisaged. Taking into account all above said, we offer to exclude this type of lands out of SPNT.

3.3 Issues of Civil and Legal Regime of SPNT Lands

The issue of observance of the legal regime of land parcels within SPNT boundaries is directly connected with the issue of registration of land rights of SPNT owners’. Initiation of any SPNT consists of managerial decisions and their civil and legal consequences. So, in order to create a natural park, for example, is issued a normative act of the subject of the Russian Federation, in which are specified its approximate boundaries, appointed the Board, which begins to carry out a complex of environmental activities on this territory, etc.

Meanwhile, the initiation of such SPNT should be accompanied by not only territory zoning and defining its boundaries, but also the proper registration of real rights, because this land should be owned by the subject of the Russian Federation.

In reality, such civil and legal consequences do not occur: surveying and cadastral records of this area are not made; State registration of ownership of the subject of the Russian Federation is not carried out by Federal service of State registration, cadaster and cartography; Certificate of registration of State property of the Executive authority of the subject of the Russian Federation shall not be issued.

Moreover, on this territory which, according to p.p.6, 7, Art. 2 of March 14, 1995 of the Federal Law on «Specially protected nature territories» should be fully owned by the subject of the Russian Federation (for example, a natural park “Donskoy” in Volgograd region) continue to peacefully coexist with the federal, municipal and private property, and to live in villages (or horticultural associations beyond the boundaries of settlements) the citizens whose land parcels are on the right of lease, permanent (indefinite) use and lifetime inheritable possession.

In turn, federal and regional land parcels available within the boundaries of the Park, also in most cases have not been legally registered as an appropriate public property.

As to the civil and legal positions, this situation is inadmissible, because a land parcel, before becoming the object of ownership (no matter whether private or public), should be individualized as an independent object of the civil turnover. In addition, the lack of accurate borders of SPNT makes impossible the application of several articles of the Criminal Code on violation of the SPNT legal regime.

The current situation is explained by the fact that the formal process of SPNT creation connected with land marking and cadastral works, State registration, withdrawal and compensation of value of land parcels to the physical entities, is very expensive and often is an overwhelming task for the budget.

The organs of the State (or municipal) authorities are not economically interested in carrying out the above-mentioned arrangements, and that is why Federal (regional, local) budgets of corresponding expenditure articles are not programmed. In a result, the property relations at the sphere under consideration remain unsettled until the end.

In our view, there is none. This is a typical case of lands of the re-creative purpose.

We offer the following possible solutions to this problem.

The first way. The Federal law of December 1, 2007 № 310-ФЗ «Organization and conduct of the XXII Olympic Winter Games and XI Paralympic Winter Games of 2014 in Sochi, development of Sochi as Alpine climatic resort and amendments to certain legislative acts of the Russian Federation» provides an opportunity for citizens who are owners or holders of other rights on land parcels, as well as the owners of apartment buildings located on them, seized in order to accommodate the Olympic facilities, get into the ownership another land parcel.

By analogy, the procedure for granting land and dwellings in return of the seized ones may be applied in the case of SPNT creation.

By the citizens’ choice, they may get: land parcels and individual apartment buildings located on them or housing premises in residential houses of block buildings; housing premises in multifamily houses located nearby SPNT, but out of its boundaries.

The second way aims at the streamlining of land use in SPNT, and does not provide for the seizure of land parcels, expenditures for buying them or provision of an equivalent property. It consists in realization of ecological zoning on created and already existing SPNT (mainly in the State nature reserve) by type of functional zoning in national parks.

As a result of such zoning will be highlighted in special zones where are located settlements and agricultural types of land use by their residents, protected areas intended for scientific research, as well as tourism and recreation zone.

Indeed, at present moment the territory of almost any SPNT is not monolithic.

In case of such zoning realization, the actually formed public relations will be streamlined by norms of law.

In this connection, it should be mentioned that the legal regime of land parcels is determined not only by their designated purpose, but also by type of permitted use established for a particular land parcel.

The legal literature rightly points the absence of a legal definition of the concept «permitted use», despite the fact that it is used in many laws.12

Art. 37 of the Town-planning Code refer to various types of permitted use which can be established in relation to land parcels.

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Types of permitted use are determined by town-planning regulations, but its force does not apply to land parcels located within the boundaries of the lands of specially protected natural territories.

There is a fact of the gap in the law, so far as until the present time has not been adopted a regulation, which would determine the types and parameters of permitted use of land parcels within the boundaries of specially protected nature territories.\(^\text{13}\)

To this problem has already been drawn attention in the scientific legal literature.\(^\text{14}\)

Final judicial authorities regularly receive writs on disputes about changes to the permitted use of land parcels located within the boundaries of specially protected nature territories (see, for example, the Definition of the Supreme Arbitration Court of the Russian Federation dd. August 27, 2008 № 10455/08).

To prevent further such litigation disputes we offer secure types of permitted use, and their content in relation to lands of specially protected natural territories in a separate normative Act, directly securing the order of use of the land parcels of certain SPNT ecological zones, taking into account the location and supposed (existing) purpose. A corresponding federal regulatory act should be called *The rules of ecological zoning of specially protected natural territories*.

Arguments in favour of zoning on territories with particular environmental and legal status have already been made in scientific literature. O.E. Medvedeva draws attention to the problem of selection of initial natural criteria and parameters for marking out the appropriate zones on the terrain, lack of a mechanism to monitor compliance with legal regimes and use of economic sanctions against violators of such regimes, necessity to develop lists of encumbrances and restrictions for different land users and their registration in those or other documents.

In her view, «the initiative in conducting environmentally oriented zoning and make such zoning legal status can and should belong to local authorities, interested in preserving their environmental potential in conditions of land reform and creation of a full-fledged land markets».\(^\text{15}\)

It is assumed that such a zoning should be accompanied not only by the development of land-planning and cadastral documents, but also by economic valuation of land parcels which form part of SPNT.

On the prospects of such an institution introduction are also writing the scientists from CIS countries, considering the ecological zoning Institute exclusively as «the legal and organization measure of the State, ...which is governed by environmental and natural resource law and aims to highlight the relative system of natural areas of the country with internal cohesion and a kind of individual traits, either objectively reflecting the adverse environment, ultimately determining the features of their legal use».\(^\text{16}\)

Civil and legal significance of this measure therewith is not being considered, although the legal and ecological status of SPNT influences on the content of the right to property of citizens and other subjects.

Ecological zoning would solve existing conflicts in management of such territories and fill gaps in the Law concerning the definition of the order of building land reserves, nature parks, etc., on the territory of which the town-planning regulations are not expanded.

When elaborating the structure of eco-zoning as a mode of normative securing limits and restrictions of private and public ownership on land parcels in boundaries of SPNT, we may take as an example the system of town-planning zoning.

In this sense, the ecological zoning of SPNT must fulfill the same tasks as epy town-planning zoning, and, at the same time, fix the limits of land parcels in civil circulation, to define land parcels subject to withdrawal (redemption) in the future for public needs (for example, in the conservation zone for expanding boundaries of the reserve).

Ecological zoning should include the development of environmental regulations, which will distribute its action over all territories available within the SPNT boundaries, and said results would not be in competence of a local government agency, but the SPNT Directorate.\(^\text{17}\)

Thus, by means of environmental zoning it will be possible to determine the permitted use of land parcels included in SPNT.

This will require introduction of changes into Land Code and Town-planning Code of the Russian Federation, approval of the order to determine the types of permitted use of land parcels and other real estate within the SPNT limits, recognition of environmental zoning implementation as mandatory.

*The third way.* Analyzing the experience of SPNT creation in Europe, those which practically have no protected territories and nature complexes preserved in its natural form (SPNT there are mainly man-made and artificial forest plantations, we should conclude the necessity of changing the conception of property available within SPNT in the Russian Federation. In accordance with the legislation currently in force, SPNT may exclusively be created in the frames of public property. Public authorities are entitled to manage and control them, and participation of citizens and legal entities in organization, protection and functioning of specially protected nature territories is only limited by the possibility in assisting public authorities in realization of individual activities or making suggestions.

Such a restrictive approach is justified when it comes to creating SPNT of federal or regional importance (e. g., State nature reserve or National Park), where is reasonable, of course, to preserve the preferential public property on such natural territories. Whether it would be correct to limit the citizens and legal entities in creating private specially protected natural

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territories, namely, such types as resorts, dendrological park or botanical garden?

a) if the creation of private SPNT (dendrological parks, Botanic Gardens and private resorts) is normatively allowed, it will not lead to imposition of restriction of rights of the other owners. State dendrological parks and Botanic Gardens do not have any conservation zones, and there is no reason to introduce them for private SPNT of this type. Conservation zones are located around the resorts. However, these zones are placed around State nature curative resources, and that is why they are located even around the municipal resorts. Therefore their availability around private resorts would be logical also;

b) establishment of private SPNT will lead to necessity for the development of a mechanism of guarantees for their conservation from State interference.

Such measures should be appropriately enshrined in Federal Law «On specially protected nature territories»

Establishment of private SPNT will be the guarantee for citizens’ rights to a healthy environment the same as the existence of State SPNT. In this regard, we propose introduction of necessary changes to the Federal Law «On environmental protection», enshrining the possibility of establishing private SPNT, and the Land Code must set the regime of their circulation.

Besides legal rules, governing legal status of private SPNT, there is a need in specifying measures of State support and protection of SPNT as well as the mechanism of responsibility for violation of the legal regime of private SPNT.

The scientific literature has already made its first steps to examine foreign experience in creating private SPNT. They can be used in refining this concept in Russia and other CIS countries.

Thus, in the United States in territorial nature protection are involved public, private and non-governmental organizations. Currently, the Nature Conservancy (NC) operates the largest private system of natural reserves in the world, with quantities ranging from a few to many thousands of hectares. Only in the United States it operates over 1600 private reserves.

There is a small practice of provision for environmental organizations and individuals some natural areas for the establishment of SPNT in Russia.

So, in the Amur region on the territory of Muraveyovsky Wildlife preserve, a socio-ecological Union leased a land parcel (which represents tremendous value for maintaining populations of rare birds), where organized a non-governmental special protected natural territory, namely «Muraveyovsky Park of sustainable development ». In 1998, a private entrepreneur (Norilsk town) announced the creation of a private natural park with 123 996 hectares area, located within the boundaries of conservation zone of the «Putoransky» State nature reserve (Taimyr Autonomous County) on a plot of forest fund, supplied under a Contract of lease (the landlord is Taimyr forestry enterprise).

«Biodiversity conservation» Global Environment Facility project, supported creation of micro-reserves on farm lands in Volgograd region under the program of «small grants».\(^{18}\)

The Russian Government approved the concept of development of the system of specially protected territories of federal status for the period up to 2020. The concept only mentions the issues of lease of the land parcels within the boundaries of national parks, however, does not answer the questions posed above on civil and legal regime for SPNT. Meanwhile, this document is a program for the development of all SPNT system. We think that the identified gap of this Concept requires elimination.

At the same time, it is necessary to develop a resolution of the Government of the Russian Federation (and on base of it – the acts of subjects of the Russian Federation and bodies of local self-government), dedicated to the grounds and order of SPNT cessation and the right of property therewith. At present a procedure of creation of SPNT exists, but how such procedure existence can cease?

Among such grounds might be disappearance (due to a natural disaster, technological accident or because of the other reasons) of protected natural complexes, or termination of threat to such natural, historic and other sectors and objects.

In the latter case, we may draw an appropriate analogy with the Red Book: in case if a protected animal population and a plant have been restored, they will be excluded from the Red Book.

After an act on cessation, a land parcel may be transferred to the reserve, and then to another category of lands with or without any tender (for example, agricultural lands). Lack of such regulatory act hampers realization by the public owner his authorities, though exist objective reasons both creation and cessation of special protection regime for a particular sector of the territory of Russia.

4. Issues of Ecotourism Development on SPNT

According to different estimates, ecotourism is 10–20% of the entire global tourism market, and is the most dynamic industry. The year 2002 was declared by the United Nations Organization as the «Year of ecotourism». UN considers tourism not only as a segment of the tourist market, but also as an entire philosophy.

First eco-tourism (ecotourism) appeared in Africa in 1950, which was connected with the legalization of hunting.

This need for recreational areas of hunting has led to the creation of natural reserves, national parks and game reserves. Today, these areas have become important huge revenue-generating sites. Since the end of 1980’s, the concept of eco-tourism (ecotourism), responsible tourism and sustainable development have become very common.

Unfortunately, despite several published scientific papers, so far there is no single universal definition of concept «ecological tourism». Such a unified understanding of the ecological tourism is absent in ecology, economics, geography, management and other sciences. Ecological tourism in Russian legal science has been very little researched as well.

Analysis of few Russian publications in the sphere of ecotourism shows that they are mostly devoted to economic, geographical and historical aspects of ecological tourism functioning. As noted in scientific literature, the issues connected with defining ecotourism have led to confusion both among tourists and scientists, because there exist more than 30, in varying degrees, of kindred and related concepts and terms.

International Union for Conservation of Nature defines ecological tourism (ecotourism) as a journey with the responsibility towards the environment in relation to the undisturbed natural territories with a view to exploring and enjoying nature and cultural attractions, which contributes to the conservation of nature, has a «soft» impact on the environment, provides an active social and economic participation of local people in getting benefits from this activity.

World Wildlife Fund defines eco-tourism as tourism, which includes travelling in places with relatively untouched nature in order to get an idea about the natural and cultural-ethnographic peculiarities of this area, which does not violate the integrity of ecosystems and creates such economic conditions where the conservation of nature and natural resources becomes beneficial to the local population.

In Quebec Declaration, adopted at the World Ecotourism Summit, the agreement was reached on interpretation of the term «ecotourism» and how it differs from the term «sustainable tourism». Ecotourism is a type of tourism aimed at the political and financial support for protection of the environment, on recognition of and respect for the rights of local and indigenous communities, on the cultural and environmental education of tourists.

Their own definition of ecotourism offer scientists from around the world.

Representatives of Indonesian science note that ecotourism is responsible journey to natural zone intended to protect environment and improve local people well-being. The purpose of such activities is to enjoy the beauties of natural surroundings. Such purpose includes education, understanding and maintenance of nature conservation, as well as increases the income of local communities.

Ecotourism embraces environmental, economic and social issues. Environmental aspect means that ecotourism makes a positive contribution to the preservation of nature. Economic aspect means that it is a tool for a sustainable economy.

Other authors believe that ecotourism is a form of tourism which includes a journey in relatively quiet or in uncontaminated areas with the specific purpose of learning to admire and enjoy the scenery, wild plants and animals, as well as any existing cultural manifestations (past and present) found in these areas.

Despite the differences in perception of the term «ecological tourism» in different areas of scientific knowledge, some of the existing definitions mean that ecotourism is a form of recreation supposing whereby:

- an organized visit to the undisturbed, unique natural territories aiming to study nature, cultural attractions and ethnographic peculiarities of the locality;
- implementation of environmental enlightenment and education of tourists, improvement of their environmental culture;
- compliance with environmental standards and technologies;
- sustainable development of environment;
- organization of such activities, which will minimally influence on the environment and will not lead to the destruction of natural complexes and deterioration of their qualities;
- will ensure an active social and economic participation of local people and ensure getting benefits from this activity.

Ecological tourism gains particular importance for the well-being of the small-numbered indigenous peoples as far as it allows them to conserve and keep under supervision their natural habitats and create decent and long-term employment opportunities. The development of tourism infrastructure allows providing goods and services for such peoples, getting of which in the other situation would be difficult for them.

We note that the legislative concept of «ecological tourism» is absent in the Russian Federation. «Ecological tourism» is not defined in all-Russian classifier of services to the population OK 002-93 (OKUN).

Model Law on tourist activities adopted in St. Petersburg on November 16, 2006 at the 27-th plenary meeting of the Interparliamentary Assembly of the CIS Member States, in Art. 2 gives the definition of tourism types, among which mentions separately concepts of rural (rustic) and ecological tourism. Rural (rustic) tourism is understood as organization of activities for recreational tourists in rural areas or small towns (in the absence of industrial areas and buildings) with the provision of hospitality services within the private sector with possibility of employment (farm holidays), focused on the use of natural, cultural and historical resources traditional for this locality.

Ecotourism is understood as nature-oriented tourism activities targeting organization of recreation or getting natural-scientific or of practical knowledge and experience, which do not damage natural environment.
In our view, ecotourism must satisfy a number of criteria, including the conservation of biological and cultural diversity through the protection of ecological systems; promoting the sustainable use of biological diversity; sharing of socio-economic benefits with local communities through informed consent and participation; improving environmental and cultural knowledge; the reduction of volume and production of wastes and, as well as minimizing the ecological tourism self impact on environment.

On this basis, we propose to understand the ecological tourism as a variety of entrepreneurial activity related to the organization of tourist routes, oriented to cognition and preservation of the environment.

In this connection, it is necessary to include the concept of ecological tourism and its types into Art. 1 of the Russian Federation Law dd. November 24, 1996 № 132-FL «On principles of tourist activities in the Russian Federation» and in Art. 1 of the Russian Federation Law dd. January 10, 2002 № 7-FL «On environmental protection».

One of the priorities of governmental regulation is the support and development of inbound tourism. Russia has enormous potential for ecotourism development: diversity of natural landscapes, a large number of State nature reserves, National Parks, other monuments of history and culture.25

To date has been prepared and under the RF Government Decree approved the concept of the federal target program «Development of domestic and inbound tourism in the Russian Federation» (2011–2016 yrs.), which among the types of tourism subject to be developed in Russia, also indicates ecotourism. Ecological tourism, being a kind of ecological entrepreneurship, also performs a number of social functions, being socially important activities. In other words, in comparison with other types of tourism, it has a more pronounced social and economic orientation. We speak about creating new jobs for the local population, stimulating traditional forms of environmental management; production of ecologically clean products; increasing of investment in both infrastructure and services and the protection of nature; growth of well-being of the local population and the development of special education aimed at the acquisition of tourist and environmental professions; development of crafts, local self-government, etc.26

V. V. Putin held a meeting on October 29, 2010 related to issues of development of SPNT Federal System. It referred to the need to establish infrastructure for ecological tourism. The main objective raised by V. V. Putin was the need for the development of ecological tourism in Russia. The importance attached to the development of ecological tourism in Russia, reflects in the fact that from the first seven special economic zones (SEZ) of tourist-and-recreational type, in six assumes the development of ecological tourism.

It is necessary to pay attention to the fact that the development of ecological tourism in Russia will be carried out on territories with particular environmental and legal status.

5. Conclusion

It is impossible to actualize life large-scale objectives on development of ecological tourism in Russia without foreign investments. It appears that the achievement of this objective depends on solution of a number of general issues in the Russian Federation (anti-corruption policy, judicial reform, etc.) and the intelligibility and the validity of environmental legislation, regulating the legal status of State nature reserves, National Parks and other SPNT types.

The validity and reasonableness of the prohibitions and restrictions contained within the boundaries of SPNT, is able both to attract and to repel the environmental entrepreneurs. The special challenge, not yet perceived by legislative and executive authorities of Russia, is to clearly define the conditions for development of ecological tourism on territories with unique natural resources, which have not been included into the structure of specially protected nature territories.

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Legal Issues of Workers' Representation in the Republic of Belarus

Kirill Tomashevski

Abstract

Institution of representation plays an important role in realization of rights and legitimate interests in the sphere of labour law by workers and employers. With the help of their representatives workers take part in organization management, creation of local corporate norms, take part in collective bargaining and collective labour disputes, control the labour legislation and collective agreements execution. This is particularly relevant to organizations with a large quantity of workers, where it is rather difficult for an employer to ‘hear the voice’ of each worker.

Kew words: workers’ representation; trade union; labour law; employer; legislation; occupational safety and health; authorized person.

I. Historical Introduction of Workers’ Representation in the USSR and Belarus

History of workers’ representation on the territory of modern Belarus goes back to 1894, when the first trade union of bristle workers was founded. In 1901–1902 strike committees, factory commissions, workshop gatherings etc. on some plants have often been organized. They became predecessors of big trade unions.

One of the first attempts to establish workers’ representation in Russia (and alongside in Belarusian provinces) was made in Russian Empire Law on ‘Implementation of stewards in industrial enterprises’3. Trade unions were legalized only with adoption of a Law called ‘Temporary rules on professional communities established for individuals employed by trade and industrial enterprises (03/04/1906)’4.

In Soviet times (before the middle of 1980th) the only representation bodies of workers were the trade unions. With the adoption of the USSR law ‘On work collectives and enhancement of their role in management of plants, institutions and organizations’ (06/17/1983) and after that in the BSSR Labour Code (1972, chapter XV-A), such collective subject of labour law as work collective was legally formed. Russian scholar L. Bugrov was right when writing: ‘The life itself has put a question about emerged and probable in the nearest future balance between competence of work collectives and trade union organizations on enterprises’5. Belarusian scholar A. Voytik reasonably writes about the necessity of package settlement of work collectives’ legal status.6 It is necessary to mention, that this problem has not been solved presently neither by labour legislation, nor by labour law doctrine.

In spite of reasonably detailed examination of legal status of work collectives in 1970–19807, the problem of workers’ representation in labour law hasn’t been examined in details in academic labour law. The questions of workers’ participation in management of organization in modern conditions were

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raised by M. Lushnikova, A. Lushnikov, V. Vasilyev, V. Melnikova, but those are just the first steps in a solution of the problem.

Besides, while the questions of trade union representation are partly examined in the science, the problem of non-trade union representation was hardly raised in labour law and hasn’t been solved until now.

After the collapse of the USSR the institute of representation has undergone a lot of changes in legislation of Eastern Europe independent states. This gives a field for the comparative law research. Important methodological basis for this research is laid by conventions and recommendations of International Labour Organization (ILO), decisions of the ILO Committee on Freedom of Association, other publications of the ILO and general conclusions of European Court of human rights.

The Labour Code of the Republic of Belarus (1999) with changes and amendments is the basis of legal control for workers’ representation in Belarus. It is stated in Article 4 that the Labour Code regulates relations between employees (their representatives) and employers. Two out of three goals stated in Article 3 of the Labour Code (development of social partnership; establishment and protection of mutual rights of employees and employers) cannot be reached without effective mechanism of not only employer representation, but interests of workers in individual and collective labour relations.

II. The Experience of Non-trade Union Representation in Issues of Occupational Safety and Health

In Belarusian companies where plant-level trade union bodies exist, public control over the occupational safety and health legislation compliance is exercised by trade unions through their technical inspector and through social inspector for occupational safety and health.

The rights of technical inspectors of labour are enumerated in Part 2 Article 38 of the Law of the Republic of Belarus “On occupational safety” of 23.06.2008 No. 356-3 2008. In details the procedure of exercising of public control by trade unions and powers of trade unions’ representatives, taking part in examinations, are specified in the Decree of the President of the Republic of Belarus from 05.06.2010 No. 240 “On exercising of public control by trade unions”, in which the Provision on exercising of public control by trade unions, their organizational structures, associations of such unions and their organizational structures in the form of exercising control was approved.

At the same time, the existing legislation of the Republic of Belarus allows participation of authorized persons for occupational safety and health in exercising public control in the organizations without plant-level trade union bodies.

According to Part 4 Article 38 of the Law “On occupational safety and health”, public control over the occupational safety and health in the company can be exercised by authorized persons for occupational safety and health. The elections of such authorized persons are held on a general meeting of workers. They are elected for a period of 2–5 years. At the same time their number is determined. Authorized persons for occupational safety and health exercise public control over the occupational safety and health legislation compliance in accordance with the rules set by the Government of the Republic of Belarus, or its authorized body.

These rules were set in the Instruction for the procedure of exercising of public control over the occupational safety and health legislation compliance by authorized persons for occupational safety and health, approved by the Decree of the Ministry of Labour and Social Protection of the Republic of Belarus in 28.11.2008 No 179 (hereafter – the Instruction).

In accordance with Article 3 of the Instruction, if there is no trade union in the company, public control over the occupational safety and health legislation compliance can be exercised by authorized persons. This refers to non-trade union representen.
tation of workers’ interests on exercising control over the questions of occupational safety and health.

The need for the institution of ‘authorized persons’ on the questions of occupational safety and health emerges mostly in the companies of small and medium-sized business, where trade unions often don’t exist.

Upon the results of general meeting of workers of an organization, on which the elections are held, a protocol is made up. The authorized persons are given the abstract of record form the protocol of the meeting. This abstract of record is the document, which approves the powers of the authorized persons to exercise public control over the occupational safety and health legislation compliance.

The instruction doesn’t specify the procedure of holding of general meeting, demands to quorum, that seems to be a legal gap. It may be solved with use of Part 3 Article 389 of the Labour Code, which determines demands to quorum when holding a meeting about calling a strike: more than a half of the total amount of workers must be present on a general meeting; on a conference – attendance of not less than 2/3 of delegates is required.

Along with that we suppose that for making a decision about election of authorized person the simple majority of voices (50% + 1 vote) is enough, because the legislation doesn’t set any particular demands on this question. According to the common practice the voting can be either open or secret.

Authorized persons can be called off before the term of their powers upon the decision of the meeting or conference on which they were elected, if they don’t fulfill assigned functions or don’t show the needed diligence on protection of workers’ rights in the occupational safety and health issues (Article 5 of the Instruction).

It is interesting that Article 6 of the Instruction defining with whom workers’ authorized persons organize their work, mention among others “persons authorized by other workers’ representative bodies”. By doing this the Ministry of Labour and Social Protection confirms the legality and legal basis for creation and functioning of other (non-trade union) bodies, authorized by workers (e.g. council of labour collective).

The status of authorized persons is defined by the Law On occupational safety and health, Standard Instruction on exercising control over the occupational safety and health legislation compliance in a company, approved by the Decree of the Ministry of Labour and Social Protection of 26.12.2003 No. 159 16, by other legislative acts, agreement, local laws and regulations of an organization.

Authorized persons – at least annually – report on a general meeting (conference) of workers of about assigned functions (Article 8 of the Instruction).

The main responsibilities and functions of assigned persons are specified in Article 2 of the Instruction. The main responsibilities of the authorized persons are:

- Assistance in creation in an organization (corporate organization unit) of healthy and safe work conditions;
- Exercising of public control over the occupational safety and health legislation compliance by the company;
- Providing assistance to workers on defense of their occupational safety and health rights;
- For carrying out their responsibilities, authorized persons have a right to:
  - Carry out inspections on complying with the occupational safety and health legislation;
  - Make inquiries and receive information from an employer and state administrative bodies about industrial accidents, occupational diseases and other information on the questions of exercising control over the occupational safety and health legislation compliance;
  - Make reports about rectifying violations discovered in the field of the occupational safety and health legislation compliance;
  - Inspect workplaces, demand from an employer results of the inspection of conditions of work, industrial buildings, technological processes and facilities, which create danger for life and health of workers and associates;
  - Take part in the work of commissions on testing and acceptance for operation, safety review of conditions of work of industrial objects and supplies and materials with a view to determine their compliance to requirements of the labour legislation, in exercising of evaluation of workplaces on conditions of work, in creation of labour safety regulations, activities on accidents prevention and improvement of working conditions;
  - Demand from an employer and from employer’s authorized official person results of corrective actions in the occupational safety and health requirements, which pose a threat to life and health of workers, and in case of instant danger to life and health they have a right to suspend work before the violations are corrected;
  - Inform workers about detected violations in the occupational safety and health requirements, conditions of work and occupational safety and health in the company;
  - Other activities, as provided for in the occupational safety and health legislation and agreements.

According to Article 11 of the Instruction, the reports of official persons are necessary for consideration. The authorized official person of an employer, who was given in a report, has to consider it and within one month time and has to provide an authorized person with the results of the consideration.

When necessary the report is sent to state supervision and control bodies over the compliance with the occupational safety and health legislation of the Republic of Belarus.

Employers provide authorized persons with necessary conditions for exercising public control over the occupational safety and health legislation compliance; provide them with rules and instructions, other legislative acts on occupational safety and health; provide assistance in training of newly elected authorized persons on the questions of labour protection (Article 12 of the Instruction).

Authorized persons exercise their activity on public control over the labour protection legislation compliance without signing any contract (labour or civil), and without any remunera-

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We suppose that such authorized persons need additional guarantees of the rights presented to them (such as wages payment and release from work during the inspection). In other case they won’t be able to exercise effective control over the labour protection compliance.

At present time authorized persons can demand preservation of average wages in case of carrying out responsibilities on public control during working hours in virtue of Part 3 Article 101 of the Labour Code, which notes ‘carrying out of other state or public responsibilities in cases as provided for in the legislation’.

In some cases employers impose pressure on authorized persons, detecting violations in the labour protection legislation, by inflicting disciplinary punishments on them for absence from the work place during the inspections, and even dismissing them for non-attendance or systematic breach of duties or improper execution of work duties. To avoid such abuse from the side of employers and workers, we suppose that if there is other workers’ representative body in a company, it is necessary to specify the procedure similar to dismissal of a member of trade union (2 weeks’ notice) or those of a chairman of trade union (agreement of workers’ representative body).

Thus, the guarantees to authorized persons need to be specified more clearly in the legislation, because in those organizations which don’t have a trade union, collective agreements as a rule are not signed.

Conclusion

In conclusion we will sum up the information and offer some prospects for further development of different forms of workers’ representation in Belarus.

1. Trade union representation remains prioritized in the Republic of Belarus in the conditions when more than a half of the population are members of trade unions, being a part of Federation of Trade Unions of Belarus (the vast majority of workers) or independent trade unions.

2. The procedure for creating of other workers’ representative bodies is not specified in the legislation, which complicates representation and protection of workers’ interests in the organizations that doesn’t have primary trade union bodies, or if workers don’t want to enter existing trade union.

3. The legislation of the Republic of Belarus is inconsistent in the questions of participation of workers’ representative bodies in creation of cooperative bodies with employer, adoption of local company acts and dealing with different problems resulting from labour relations. In these cases the legislation favours trade unions.

4. Lack of complex legislative regulation on workers’ participation in management of the company, forms of such participation, leads to almost lack of industrial democracy in such important issues as key managerial decisions dealing with labour and social-economic conditions of work (winding-up of the company and reorganization, privatization, sale, bankruptcy redundancy etc.).

5. The adoption of complex legislative act concerning the participation of workers in management of the companies may be advisable to improve the situation.

6. In creation of such act it seems to be advisable to examine the foreign experience in this field. In addition it is necessary to take into account the positive and negative experience of the legislative regulation of the activities of work collectives in USSR in 1980th.
Flexible Employment in Poland
Małgorzata Król

Abstract

This article presents changes in terms of flexibility of employment that took place in Poland in the previous quarter. Considerations are based on the statistical data available. Therefore, it was possible to analyse the quantitative changes of the number of employees working on the basis of employment relationship (i.e. employment contract, appointment, designation, selection or service relationship), employers and self-employed workers, home-based workers and agents. In all four groups, during the studied period, there was a significant decline. It was also noted that the scope of telework is marginal. On the other hand, a very dynamic development of temporary work, which is very popular especially among employers, was diagnosed. At the same time, changes in the number of employees working under two civil-legal contracts, namely a mandate contract and a contract for specific work, were not included in the article due to the lack of any statistical data relating to these forms of employment.

Key words: flexible employment; employment contract; self-employed workers; home-based workers; temporary work; employees; Poland.

1. Introduction

The last two and a half decades in Poland was a period of profound transformation in various spheres of life, such as the political, social and economic sphere. In the early nineties of the twentieth century there was an opening of the Polish economy and its integration into the global economic system, which in turn made it necessary to run the adaptive mechanisms, that could help improve the competitiveness of Polish enterprises. The marketization of the Polish economy, as well as the impact of global trends such as globalization, have contributed to changes e.g. in the functioning of the labour market and business entities. From today’s perspective, these changes are reflected in the field of employment particularly in two ways, namely, by disclosure, and then the development of unemployment in the labour market and by employment flexibility in enterprises.

The subject of this article is the latter of the identified areas, i.e. employment flexibility. The goal of the article is to diagnose changes in directions of the elasticity of employment in case of Polish business entities. The research method was an analysis of the subject literature and analysis of statistical data. Statistical analysis, in the case of employees working according to employment status and working hours, covered the years 1985 to 2010. The reason for including such a long period is the fact that the year 1985 refers to the time when in Poland there was still a centrally planned economy, in which employment under the employment relationship dominated. The following years, however, was a period of systemic transformation and construction of a market economy. In the case of temporary work, the analysis of its development covers a shorter time because it was only in 2003 when the statistics related to temporary work was done, and what is more, this form was – in fact – not applied in Poland.

2. Employment Flexibility – Terminology Issues

Operation of enterprises in modern dynamic economy requires them to respond quickly to all changes. These reactions, of an adjustment process nature, very often relate to the employment area. Possibilities of adjusting the level and structure of employment to current needs of an enterprise increase with the extension of the use of flexible forms of employment. The category of flexible forms of employment is very broad. In the most general terms, it includes all forms that do not meet at least one of the conditions of typical employment, which include: indefinite employment contract, full-time work, fixed working hours, the employees subordination, performing work on the employer’s risk and on his premises. Clarifying the definition of flexible forms of employment, they can be specified as a category including both employment flexibility in terms of...
the employment relationship (e.g. part-time work) and employment on a basis other than the employment relationship (e.g. civil law contracts, home-based work)3. Such opportunities are not provided by the typical form of employment, and that is a full-time employment contract for indefinite period, which is the basis of permanent employment model. Thus, companies are moving away now from a fixed model, which is dominated by the indefinite period contracts that prevent rapid adjustment of the level of employment in the company to its needs, in the direction of a flexible model. In the flexible model, the share of employing permanent personnel decreases, while the share of other groups, namely, peripheral employees and external collaborators increases4. Peripheral workers are employed under flexible forms of employment, especially those that involve an employee briefly with the organization and enable dismissing them quickly. Frequently used forms of employment offered to this group are civil-law contracts. Peripheral employees are therefore an unstable peripheral part of the staff, with qualifications of changing demand, and who usually perform additional tasks. However, external collaborators are a group which is not formally associated with the company, although, they provide services to the business operation. Forms of employment used in this case are: outsourcing, temporary work and employees leasing. The size of these two groups is growing and constantly adjusted to the needs of an enterprise.

Evolution of the employment model from a typical model toward the flexible one could have been observed in recent years in Polish enterprises. This is caused by the need to adapt to market requirements and global trends. These changes are enhanced by legislation allowing employing in a broad range of flexible forms.

Among the changes in the law regulating ways of establishing a cooperation between the organization and people providing work service, two of them deserve special attention, namely the adoption of the Act on the employment of temporary workers5 and the amendment of the Labour Code specifies the rights and obligations of teleworkers and employers hiring in the form of telework6.

The first of these regulations was enacted in 2003. It sanctioned the possibility for employer (called an employer user) to obtain workers, so called temporary workers, through temporary employment agencies. The form of flexible employment shaped on this basis has a specific nature primarily due to the resulting configuration of the individual entities7, which includes: temporary employment agency, temporary employee and employer user. In accordance with the Act, this form can be used in three cases: first, when there is a need to carry out work of seasonal, periodic or additional nature; second, when timely execution of the organization’s employees work is not possible; and finally, when the execution of specific work is the responsibility of an absent employee8. The use of temporary work is related to a number of benefits for an organization. First of all, it allows for finding an employee with the required competencies in a short time. Also, what is very important, the entire process of recruitment and selection of candidates for work is carried out by an employment agency so that the organization does not devote the time and bears lower costs associated with them. The use of temporary work also eliminates the problem of redundancies, mainly because the temporary employment contracts are short-term in nature (it happens that they are concluded for a few days), and that before the end of the contract an unnecessary temporary worker can be sent back to the agencies without any consequences. Thus, temporary work gives an organization the opportunity to adapt the current level and structure of employment to the needs, which in turn leads to lowering its operating costs.

The latter of the mentioned regulations, the amendment to the Labour Code, introducing provisions relating to telework was adopted in 2007. As a consequence, telework became a form of employment relationship. In accordance with the Act, telework is performed regularly outside the company with the use of modern tele-information technologies outside the premises of the employer, usually at teleworker’s home10. Work outcomes are sent to the employer via the Internet. Moving the work outside the organization is the primary advantage of telework because it allows to reduce costs related to a workstation equipment and office space maintenance. Work carried out by a worker outside the employer’s premises contributes to the elimination of unproductive downtime, and so results in better use of time. Telework also reduces spatial barrier of access to employees and enables to acquire them from distant labour markets.

3. Employees Working According to Employment Contract and Working Hours

By the end of the eighties of the twentieth a constant pattern of employment operated in Poland, which was dominated by full-time contracts of employment for indefinite period. In the mid-eighties of the twentieth century, more than 12 million people in Poland worked under the employment relationship, i.e. contract of employment, appointment, designation, selection or employment relationship (see Tab. 1). The analysis of the first fifteen years shows decrease in the number of people working under the employment relationship. The largest decline was between 1985 and 1990. In 1990 in Poland, 12.5% less people worked under the employment relationship than in 1985. A further decline of 9.6% took place in 1990–1995. The

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5 Ustawa z dnia 9 lipca 2003 roku o zatrudnianiu pracowników tymczasowych (Dz. U. Nr 166, poz. 1608 z późn. zm.).
6 Ustawa z dnia 27 sierpnia 2007 roku o zmianie ustawy Kodeks pracy oraz niektórych ustaw (Dz. U. Nr 181, poz. 1288).
lowest level of employment under the employment relationship was recorded in 2000 and amounted to slightly more than 9.5 million people. In the decade between 1995–2005, this figure stood at a similar level. After 2000, there was an increase in the number of employees under the employment relationship to the level of 10.4 million people. However, this increase was not significant, and the proportion of working under the employment relationship amounted in 2010 to only 84.3% of those working on this basis in 1985. Changes in the number of employees, including those working in terms of the employment relationship may be subject to various factors. One of them refers to changes in the size of population at working age. In Poland, in the studied period, the numbers of both groups, i.e. those working in terms of an employment relationship and people at working age, changed in opposite directions. Number of working-age population increased from 21.8 million in 1985 to 24.8 million in 2010. It shows that the changes in the number of people at working age are not a factor leading to lowering the level of employment in terms of employment relationship. Thus, the causes must be sought elsewhere. In the case of Poland, in the studied period, these were primarily the consequences of system transformation process expressed in the deregulation of the labour market and flexibility of employment in organizations.

In the centrally planned economy also the level of resource of employers and the self-employed was significant, which is illustrated by the year 1985 (see Tab. 1). A large size of this resource in 1985, reaching 5.0 million people, is due to the fact that this group also includes those working in individual households in agriculture. In the first fifteen years of the analysis, the number of employees and the self-employed increased, and in 2000 it reached a level more than 5.5 million. In the last decade, however, there is a significant decline in this group to a level of 71.7% compared to the base year.

Table 1. Employees working according to employment contract in Poland between 1985–2010 (for the date 31 XII) (in thousands) and changes dynamics

<table>
<thead>
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<tbody>
<tr>
<td>Total</td>
<td>12343.7</td>
<td>10797.2</td>
<td>9757.5</td>
<td>9504.7</td>
<td>9543.1</td>
<td>10410.2</td>
</tr>
<tr>
<td>Changes dynamics*</td>
<td>92.2</td>
<td>22.0</td>
<td>2.7</td>
<td>1.3</td>
<td>0.9</td>
<td>0.9</td>
</tr>
<tr>
<td>Women</td>
<td>5469.8</td>
<td>4970.2</td>
<td>4650.9</td>
<td>4626.9</td>
<td>4505.5</td>
<td>4938.1</td>
</tr>
<tr>
<td>Changes dynamics*</td>
<td>66.9</td>
<td>12.2</td>
<td>6.4</td>
<td>2.9</td>
<td>1.3</td>
<td>0.9</td>
</tr>
<tr>
<td>Home-based workers</td>
<td>136.5</td>
<td>125.8</td>
<td>30.0</td>
<td>19.3</td>
<td>9.9</td>
<td>9.6</td>
</tr>
<tr>
<td>Changes dynamics*</td>
<td>100</td>
<td>92.2</td>
<td>22.0</td>
<td>14.1</td>
<td>7.2</td>
<td>7.0</td>
</tr>
<tr>
<td>Agents</td>
<td>-</td>
<td>66.9</td>
<td>12.2</td>
<td>11.3</td>
<td>7.2</td>
<td>7.3</td>
</tr>
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</table>

The largest decrease in the number of employees, expressed by the primary index, was observed in the case of home-based workers. In 1985, home-based work was performed by 164.9 thousand people. In the next ten years there was a rapid decline to 55.7 thousand in 1990 and 9.6 thousand in 1995. In further period the downward trend continued, and the smallest number of people – only 1.5 thousand – performed home-based work in 2010. It accounted for only 0.9% of those performing work under this form, compared to the base year.

The number of people performing work under a contract agency also decreased. From 136.5 thousand people performing work in 1985, in 2010 only 9.6 thousand worked under this form of employment. At the same time, the downward trend, observed throughout the whole analysed period, slowed down only in 2005, and the size of this group remained at a similar level in the subsequent years. Primary index of change dynamics was 7.0% in the last year of analysis compared to the base year.

When analysing changes in the structure of employment in Poland in relation to working hours, a one-way trend can be observed for both full-time and part-time employees. However, the dynamics of changes in the number of people working full-time was higher in the analysed period than the dynamics of changes in the number of people working part-time (see Tab. 2). The number of full-time workers declined most between 1985 and 1990. This decrease was 19.9%. During the same period, the number of part-time workers decreased by only 4.0%. The number of full-time workers decreased in the subsequent years from 11.1 million in 1985 to 7.1 million in 2005. Only in the last five analysed years there was a small increase to 7.8 million people. Finally, in 2010, the number of full-time employees accounted for 70.8% of this group of employees in the base year. As mentioned, a direction of changes in the number of part-time employees was analogous to full-time employees. The resource of part-time workers was significantly smaller than of full-time workers, and therefore the decreases in its number expressed in absolute numbers were not that large. The number of part-time employees decreased from 0.9 million in 1985 to more than 0.6 million in 2010. The dynamics of changes in this period was 74.3%.

\[ \text{Rozniki statystyczny pracy 2010. GUS, Warszawa, p. 23; Rozniki statystyczny Rzeczpospolitej Polskiej 2012. GUS, Warszawa, p. 43.} \]
In the era of modern technology and common access to ICT facilities one could expect more and more common use of teleworking, especially after the adoption of relevant legislation in 2007. In Poland, however, this form of employment is used to a very small extent. According to official statistics at the end of 2007. In Poland, however, this form of employment is used to grow in Poland and have been legally sanctioned, in recent years a temporary work, as opposed to telework, has been especially often used by employers.

In the first year of the Act on the employment of temporary workers, 56 temporary employment agencies operated in Poland. In subsequent years, this number was rapidly increasing (see Tab. 3), for example, a year later, there were already 320 of them, and 1703 in 2007. In 2008, the number of temporary employment agencies was the highest in the entire period of their operation and it amounted for 2166. In 2009–2010, the number of temporary employment agencies operating in Poland dropped significantly; and started growing in the following years. In 2012, 1509 of such agencies operated.

The creation of new temporary employment agencies was accompanied by an increase in both the number of employees providing service through them, and companies using temporary workers.

Number of people referred to temporary work, and that is temporary workers, amounted to 31.6 thousand in 2003. In the following years, until 2007, it was rapidly growing. In 2004, there was an increase in the number of temporary workers to the level of 167.6 thousand, and in 2007 the number of them amounted to 486.5 thousand. In 2008–2009, there was a decrease in the number of people referred to temporary work, however, since 2010 there has been an upward trend again. Throughout the whole analysed period, the majority of people worked temporarily in 2012 – there were over 509.3 thousand of them.

The creation of new temporary employment agencies was accompanied by an increase in both the number of employees providing service through them, and companies using temporary workers.

Number of employers using the services of temporary employment agencies increased significantly, from 1086 in 2003 to 2166 in 2007. In subsequent years, until 2010, it has been rapidly growing. In 2011 the number of employer users – using work of temporary employees increased to 486.5 thousand. In 2008–2009, there was a decrease in the number of people referred to temporary work, however, since 2010 there has been an upward trend again. Throughout the whole analysed period, the majority of people worked temporarily in 2012 – there were over 509.3 thousand of them.

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In the studied years, also the number of enterprises – employer users – using work of temporary employees increased...
rapidly. In the first year of analysis, i.e. 2003 in the whole Poland there were 1031 entities using the services of temporary work agencies. The increase in the number of employer users occurred until 2007, the year in which temporary work was used by nearly 11.4 thousand companies. In 2008, there was a decrease in the number of companies using temporary work to 10.4 thousand, and it remained at a similar level over the next two years. The largest number of entities used temporary work in 2011, when their number exceeded 12.3 thousand. In the last year of the analysis it slightly decreased because it did exceed 12.3 thousand.

In conclusion, it is worth noting that temporary work is a form of employment, which in the last decade in Poland grew most rapidly, as illustrated by the above statistics.

Conclusions

The presented in the article picture of the changes taking place in the area of employment flexibility in Poland is not complete. The reason for this situation is the lack of data on other forms of employment, in particular a mandate contract and contract for specific work. As shown in various studies and observations of business practice in recent years, in Poland, the scope of these forms, but mainly mandate contract, has significantly expanded. Therefore, the paper presents the changes only in relation to certain types of employment, those on which complete statistics are available.

Based on the analysis of statistical data it was concluded that:
- the number of people working on the basis of employment relationship decreased – by 15.7% compared to 1985,
- the number of employers and the self-employed decreased – by 28.3% compared to 1985,
- in percentage terms, the resource of home-based workers and agents decreased to the largest extent – respectively 99.1% and 93.0% compared to 1985,
- among Polish employers there is little interest in employing workers in the form of telework,
- in the last decade, a rapidly growing form of employment was temporary work – currently more than 0.5 million employees work under this form of employment.

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Ustawa z dnia 27 sierpnia 2007 roku o zmianie ustawy Kodeks pracy oraz niektórych ustaw (Dz. U. Nr 181, poz. 1288).
Input-Output Analysis of Regional Innovativeness. The Case of The Visegrad Group

Anna Golejewska

Abstract

The objective of the paper is to measure and compare INPUT and OUTPUT innovativeness of 35 NUTS-2 Visegrad Group (V4) regions in the years 2004 and 2009. The analysis is based on Eurostat Regional Statistics. The indexes of regional innovativeness are based on synthetic measure. The first part of the paper contains a survey of innovativeness measures. In the next part I apply INPUT-OUTPUT analysis. The research procedure consist of three steps: 1. the construction of matrix of regional innovativeness data, 2. the measurement of innovation indexes and 3. the comparison of regions based on INPUT and OUTPUT indexes. The results show that there have been and continue to be substantial differences among the V4 regions as regards innovativeness. Differences are particularly visible in case of capital regions, which are characterised by the highest INPUT- and OUTPUT indexes (except for mazowieckie). In the V4, high value of INPUT index not always corresponds with high value of OUTPUT index. The most numerous group consist of regions with medium values of both indexes. The lowest OUTPUT indexes are recorded for Polish Eastern regions. To the group characterised by low or medium INPUT indexes and high OUTPUT indexes belong mainly Czech and Hungarian regions. In Slovak regions low INPUT indexes correspond to medium OUTPUT indexes.

Key words: innovation; regional input-output analysis; Central and Eastern European Countries.

Introduction

In the long run, efficient institutions, human capital, appropriate infrastructure, effective finance and goods markets are not sufficient to improve standard of living. Technological innovation is the only one determinant which can manage it. There are two ways by which innovation boosts the competitiveness of countries and regions. Firstly, it fosters change in organisation, production methods and marketing strategies, which results in an improved effectiveness of production. Secondly, innovation contributes to the appearance of new or significantly improved products on the market [Golejewska 2013b]. The capacity to innovate and to assimilate innovation have regularly been considered as two of the key factors behind the economic dynamism of any territory. Yet, despite this agreement on the essentials, different researchers have tried to investigate the link between research, innovation and economic growth in very different ways [Rodriguez-Pose, Crescenzi 2008, pp. 52]. According to the interactive model of innovation, there is no general order of how innovation come about. The ability of firms to innovate depends on their networks with other firms and actors [Andersson, Karlsson 2004, pp. 6].

Regional disparities in innovativeness can be large. Investigating factors determining its level can help in understanding processes of innovations and provide implications for regional policy. The objective of the paper is to measure and compare INPUT and OUTPUT innovativeness of 35 NUTS-2 Visegrad Group (V4) regions in the years 2004 and 2009. The indexes of regional innovativeness are based on synthetic measure [Strahl, 1978; Strahl, Walesiak, 1997; Markowska 2009]. The variables correspond with the variables implemented in Regional Innovation Scoreboard [Hollanders, Leon and Roman 2012]. The paper is organized into three further sections. The first section presents a survey of innovativeness measures. The next section provides results of INPUT-OUTPUT analysis. The final section concludes.

1. Innovation and its Measures

To understand the meaning of innovation we must specify its definition and its measures. The first approaches defined innovations as great leaps of knowledge accomplished by talented individuals or research groups. They were perceived as a linear processes from the research to the market applications. The theories of innovation initiated important changes. Innovations are no more seen only as technological but also as social and organisational changes. Consequently, it is created not only in a laboratory but also, and maybe first of all, in networks “where actors of different backgrounds are involved in the process”.

The most important determinant of innovation is no more the science push effect but the ability to learn collectively and build
solid relationships between the partners participated in the process of innovation [Golejewska 2013a].

First measures of innovativeness, developed in the 1950s and 1960s, included R&D expenditures and other inputs of the innovation activities of the firms. Next measures contained outputs, especially patent data. Significant contribution to the development of measures of innovations had the work of Pavitt [Pavitt, Robson and Townsend 1987]. Generally, the measures of innovativeness can be divided into two groups: output-type and input-type measures.3 The first group of measures is connected to the results of successful utilisation of innovation capability in firms and organisations, the second is related to the ways, in which innovation process is supported and resourced by firms and institutions. The most common output-type (intermediate) measures are patents and licences. Although they have some shortcomings, namely they do not measure the economic value of the developed technologies [Hall, Jaffe and Trajtenberg 2001]. The output-type measures are also problematic because of the fact that they usually apply only to certain types of innovations and firms, ignoring small enterprises and service firms [Romijn and Albaladejo 2002, pp. 3–4]. Input-type measures such as R&D expenditures, R&D personnel or resources on training and education are also a subject of criticism. Firstly, input measures like R&D expenditures measure only the budgeted resources assigned to innovation activities [Acs, Anselin and Varga 2002, pp. 1070]. Secondly, they also underestimate less significant innovation activities and innovations of less R&D intensive sectors. Thirdly, it is controversial whether they measure “real” innovativeness, or maybe rather some internal and external support activities of innovation processes [Romijn and Albaladejo 2002, pp. 4]. Both measures neglect the aspect of the dynamics of the innovation processes. While the resources involved in the process of innovation, as well as its results, are broadly considered, the factors between them are still largely unstudied [Tura and Harmaakorpi 2005, pp. 8–9]. Despite awareness of their shortcomings, both measures are widely applied in empirical studies [Markowska and Strahl, 2007, Golejewska 2013a].

In the paper, I followed the approach of Regional Innovation Scoreboard (RIS) [Hollanders, Leon and Roman 2012, pp. 10], in which input- and output-type measures are used simultaneously. The authors of RIS divide innovation indicators into three groups. The first one is enablers, which capture the main drivers of innovation, external to the firm. To these belong human capital; open, excellent and attractive research systems and financial support from public sector. The second group: firms activities contains firm investments, linkages and entrepreneurship, and intellectual assets. The last group of indicators are outputs in the form of firms which introduced product, process, marketing or organisational innovation, employment in knowledge-intensive activities (manufacturing and services) and sales of new to market and new to firm innovations as percentage of turnover. In empirical analysis, I have modified the group of output-type measures, including patent applications, because there was no regional data on granted patents in the V4.

2. Empirical Analysis

The research covers 35 V4 regions at NUTS 2 level, in two years: 2004 and 2009 and is based on Eurostat Regional Statistics. The group of analysed regions consist of 16 Polish, 8 Czech, 7 Hungarian and 4 Slovak regions. The analysed period is the 4th stage of transformation process in CEECs, which started after the year 1999, characterised by visible uniformity in development paths. The author’s intention was to compare the first and the last (available) year of the mention stage, but the lack of complete, actual and comparable regional data for the whole group of regions at the moment of preparing this article, caused the choice of analysed years. The choice of the analysed countries results from their geographical proximity, similarity in socioeconomic changes, common interests and similar level of their development. However the group is not homogenous. Differences are caused among others by cultural factors, different systems of law and dissimilar spatial structures [Gorzelak and Smtkowski 2010]. There are large differences in GDP per capita among V4 regions. In 2009, to the group of regions with the highest standard of living, measured by GDP per capita, belonged capital regions, particularly Bratislavský kraj and Praha, region Strední Cechy, Jihozapad and Západné Slovensko. The lowest GDP per capita was recorded in two Hungarian regions – Észak-Magyarország and Észak-Alföld and two Polish regions: lubelskie and podkarpackie. In Praha, GDP per capita was almost three times higher than in Strední Morava. Even bigger differences were recorded in Slovakia between capital region and Eastern region Východné Slovensko. In the analysed period, all the regions recorded GDP per capita growth. The highest growth rate was observed in Slovak regions. According to the results of analysis of GDP per capita and its growth, the group of the V4 regions can be divided into four subgroups. The first one contains regions with the highest values of both indicators: four capital regions. The group with the highest GDP per capita and lower growth rate belong six Czech regions and one Hungarian region Nyugat-Dunántúl. The group of “catching up” regions build seven regions: three Slovak and four Polish regions: wielkopolskie, dolnośląskie, łódzkie i świętokrzyskie. The weakest group consist of the majority of the V4 regions: remaining Polish and Hungarian regions and one Czech region – Moravskoslezsko.

Interpreting regional diversity one should consider territorial division of a country [Golejewska 2013a]. Division into small and few regions causes higher concentration. This explains the smallest dispersion of regional GDP at NUTS 2 in Poland. A very important factor of regional diversity is a delimitation of capital region, especially when capital region domi-

nates economically in a country, where the number of regions is not numerous. An extreme example is Slovakia, where the contrast between the capital region and the rest of the country is exceptionally big. The predominance of Praha is also visible, but because of higher level of development of the country, it is not as big as in case of Bratislava in Slovakia. The predominance of Mazowieckie in Poland is definitely the smallest. The analysis of dispersion of GDP per capita between the first and the second region and the second and the last region of each of the countries analysed shows that regional diversity, in case of exclusion of capital region, is not big. In the V4, similarly to the rest of the EU countries, there is no relationship between the level of regional diversity and economic development of a country [Domanski, Guzik and Micek 2003].

The INPUT-OUTPUT analysis of innovativeness consist of three steps: 1. the construction of matrix of regional innovativeness data, 2. the measurement of innovation indexes and 3. the comparison of regions based on INPUT and OUTPUT indexes. The INPUT and OUTPUT data are written in matrices using the following symbols [Markowska and Strahl, 2007, Markowska 2009]:

- set of countries \( P = \{P_1 \cup \ldots P_n \cup \ldots \} \), where \( n = 1, \ldots, N \),
- set of regions in \( n \)th country \( P_1, P_2, \ldots, P_K, \ldots \), where \( k = 1, \ldots, K \),
- set of data characterising innovativeness INPUT \( X_{1}^{1}, X_{2}^{1}, \ldots, X_{j}^{1}, \ldots, X_{m}^{1} \),
- set of data characterising innovativeness OUTPUT \( X_{1}^{2}, X_{2}^{2}, \ldots, X_{j}^{2}, \ldots, X_{m}^{2} \).

Data matrices take the following form:

- matrix INPUT: \( X^{1} = \begin{bmatrix} x_{11}^{1n} & \cdots & x_{1m}^{1n} \\ \vdots & \ddots & \vdots \\ x_{kn}^{1n} & \cdots & x_{km}^{1n} \end{bmatrix} \) where: \( x_{kj}^{1n} \) is the value of \( j \)th variable \( (j = 1, \ldots, m) \) INPUT, in \( k \)th region \( (k = 1, \ldots, K) \) in \( n \)th country \( (n = 1, \ldots, N) \),

- matrix OUTPUT: \( X^{2} = \begin{bmatrix} x_{11}^{2n} & \cdots & x_{1m}^{2n} \\ \vdots & \ddots & \vdots \\ x_{kn}^{2n} & \cdots & x_{km}^{2n} \end{bmatrix} \) where: \( x_{kj}^{2n} \) is the value of \( j \)th variable \( (j = 1, \ldots, m) \) OUTPUT, in \( k \)th region \( (k = 1, \ldots, K) \) in \( n \)th country \( (n = 1, \ldots, N) \).

Both indexes are based on synthetic measure (Strahl, 1978; Strahl, Walesiak, 1997):

\[
IR_{k}^{\text{INPUT}} = \frac{1}{m} \sum_{j=1}^{m} Y_{kj}^{1n}
\]

where:

\[
y_{kj}^{1n} = \frac{x_{kj}^{1n} - \min_{k \in P} x_{kj}^{1n}}{\max_{k \in P} x_{kj}^{1n} - \min_{k \in P} x_{kj}^{1n}}
\]

\( k \in P; k = 1, \ldots, K \)
\( j = 1, \ldots, m \)
\( n = 1, \ldots, N \)

\( x_{kj}^{1n} \) – the value of \( j \)th variable in \( k \)th region in \( n \)th country.

\[
IR_{k}^{\text{OUTPUT}} = \frac{1}{m} \sum_{j=1}^{m} y_{kj}^{2n}
\]

where:

\[
y_{kj}^{2n} = \frac{x_{kj}^{2n} - \min_{k \in P} x_{kj}^{2n}}{\max_{k \in P} x_{kj}^{2n} - \min_{k \in P} x_{kj}^{2n}}
\]

\( k \in P; k = 1, \ldots, K \)
\( j = 1, \ldots, m \)
\( n = 1, \ldots, N \)

\( x_{kj}^{2n} \) – the value of \( j \)th variable in \( k \)th region in \( n \)th country.

Both indexes take the values from 0 to 1 (closed interval). The value closed to 1 indicates higher innovativeness INPUT/OUTPUT. INPUT innovation is illustrated by four characteristics: share of employed persons aged 25–64 with tertiary education attainment in total employment (ISCED 5–6), share of adults aged 25–64 participating in education and training, Human Resources in Science and Technology (HRST) as percentage of active population and R&D expenditure in business enterprise sector as percentage of GDP. OUTPUT innovation is described by three indicators: share of employment in high and medium high-technology manufacturing in total employment, share of employment in knowledge-intensive services in total employment and patent applications to the EPO per million labour force. The variables correspond with the variables proposed in European Innovation Scoreboard. The choice of the analysed indicators results from availability of comparable regional data for the whole group of regions.

The analysed variables and their descriptive statistics presents table 1. The results of mean and median analysis show, that in the whole group of regions there are some units (particularly capital regions), which raise the average values of the variables. In the group of INPUT variables, the highest variation was recorded for R&D expenditure in business enterprise sector, the lowest for HRST. In the case of OUTPUT variables, patent applications were characterized by the highest and employment in knowledge-intensive services by the lowest value of coefficient of variation. Values of all variables, except for patent applications, have improved in the analysed period.
Table 1. Descriptive statistics of the analysed variables

<table>
<thead>
<tr>
<th>variables</th>
<th>year</th>
<th>n</th>
<th>mean</th>
<th>median</th>
<th>min.</th>
<th>max.</th>
<th>lower quartile</th>
<th>upper quartile</th>
<th>standard deviation</th>
<th>coefficient of variation</th>
</tr>
</thead>
<tbody>
<tr>
<td>X1</td>
<td>2004</td>
<td>35</td>
<td>17,66</td>
<td>17,30</td>
<td>7,98</td>
<td>29,50</td>
<td>15,12</td>
<td>20,21</td>
<td>5,03</td>
<td>28,49</td>
</tr>
<tr>
<td>X1</td>
<td>2009</td>
<td>35</td>
<td>21,62</td>
<td>21,02</td>
<td>9,79</td>
<td>33,53</td>
<td>17,67</td>
<td>25,05</td>
<td>5,80</td>
<td>26,81</td>
</tr>
<tr>
<td>X2</td>
<td>2004</td>
<td>35</td>
<td>4,90</td>
<td>4,80</td>
<td>1,90</td>
<td>12,30</td>
<td>3,60</td>
<td>5,20</td>
<td>2,02</td>
<td>41,23</td>
</tr>
<tr>
<td>X2</td>
<td>2009</td>
<td>35</td>
<td>4,49</td>
<td>4,20</td>
<td>2,00</td>
<td>10,80</td>
<td>2,60</td>
<td>5,70</td>
<td>1,99</td>
<td>44,33</td>
</tr>
<tr>
<td>X3</td>
<td>2004</td>
<td>35</td>
<td>27,98</td>
<td>25,70</td>
<td>21,60</td>
<td>52,90</td>
<td>24,70</td>
<td>29,00</td>
<td>6,71</td>
<td>23,97</td>
</tr>
<tr>
<td>X3</td>
<td>2009</td>
<td>35</td>
<td>32,87</td>
<td>31,80</td>
<td>24,90</td>
<td>57,10</td>
<td>27,90</td>
<td>35,20</td>
<td>7,08</td>
<td>21,53</td>
</tr>
<tr>
<td>X4</td>
<td>2004</td>
<td>35</td>
<td>0,60</td>
<td>0,43</td>
<td>0,08</td>
<td>2,37</td>
<td>0,27</td>
<td>0,75</td>
<td>0,50</td>
<td>83,31</td>
</tr>
<tr>
<td>X4</td>
<td>2009</td>
<td>35</td>
<td>0,75</td>
<td>0,59</td>
<td>0,10</td>
<td>2,54</td>
<td>0,34</td>
<td>1,00</td>
<td>0,55</td>
<td>73,24</td>
</tr>
<tr>
<td>X5</td>
<td>2004</td>
<td>35</td>
<td>6,90</td>
<td>6,41</td>
<td>2,85</td>
<td>14,37</td>
<td>4,27</td>
<td>8,65</td>
<td>3,16</td>
<td>45,74</td>
</tr>
<tr>
<td>X5</td>
<td>2009</td>
<td>35</td>
<td>6,97</td>
<td>6,10</td>
<td>2,00</td>
<td>15,60</td>
<td>4,20</td>
<td>9,40</td>
<td>3,51</td>
<td>50,33</td>
</tr>
<tr>
<td>X6</td>
<td>2004</td>
<td>35</td>
<td>24,60</td>
<td>22,86</td>
<td>18,59</td>
<td>40,57</td>
<td>22,03</td>
<td>25,86</td>
<td>5,21</td>
<td>21,18</td>
</tr>
<tr>
<td>X6</td>
<td>2009</td>
<td>35</td>
<td>30,40</td>
<td>29,00</td>
<td>23,00</td>
<td>47,30</td>
<td>26,70</td>
<td>32,50</td>
<td>5,59</td>
<td>18,40</td>
</tr>
<tr>
<td>X7</td>
<td>2004</td>
<td>35</td>
<td>13,64</td>
<td>7,75</td>
<td>0,46</td>
<td>85,78</td>
<td>4,35</td>
<td>18,20</td>
<td>16,57</td>
<td>121,46</td>
</tr>
<tr>
<td>X7</td>
<td>2009</td>
<td>35</td>
<td>8,59</td>
<td>5,88</td>
<td>0,33</td>
<td>26,90</td>
<td>4,17</td>
<td>11,14</td>
<td>6,79</td>
<td>79,06</td>
</tr>
</tbody>
</table>

Source: Eurostat Regional Statistics, own calculations

The highest share of employed persons with tertiary education attainment in total employment was recorded, apart from capital regions, in Polish regions with pomorskie, zachodniopomorskie and śląskie as the leaders. In 2009, regions with the lowest share were localised in the Czech Republic and Slovakia: Severozápad (9,8 per cent), Severovýchod (13,9 per cent), Strední Morava (14,0 per cent), Strední Čechy (14,4 per cent), Západné Slovensko (14,5 per cent) and Východné Slovensko (15,3 per cent). The leaders in lifelong learning remained Praha and Bratislavs’ký kraj, with the shares respectively 10,8 per cent and 7,4 per cent. The regions characterised by the lowest participation in lifelong learning were two Slovak regions (Východné Slovensko and Západné Slovensko) and two Hungarian regions (Közép-Dunántúl and Nyugat-Dunántúl). At the end of the analysed period, the highest share of HRST (over 35 per cent) was recorded, apart from capital regions, in five V4 regions: Jihovýchod, Strední Čechy, śląskie, pomorskie and Jihozapad. The region with the lowest share in two analysed years remained Východné Slovensko. Eastern regions of Poland were characterised by the lowest R&D expenditures in business enterprise sector. The leader in this case remained invariably Strední Čechy. Output indicators are also diversified in the V4 regions. In 2009, the group of regions with the highest share of employment in high and medium high-technology manufacturing consisted of: Közép-Dunántúl (15,6 per cent), Severovýchod (13,3 per cent) and Jihozapad (12,9 per cent.). In the same year, the lowest values were recorded in two Polish regions: podlaskie and warmińsko-mazurskie, respectively 2 per cent and 2,6 per cent and capital region of the Czech Republic – 2,8 per cent. Regions with the highest share of employment in knowledge-intensive services were again capital regions. In 2009, the share oscillated from 47,5 per cent in Praha to 38,2 per cent in mazowieckie. In 2004, the lowest number of patent applications to the EPO per million labour force (lower than 0,7) was recorded in three regions of Eastern Poland: świętokrzyskie, lubelskie and podlaskie. In 2009, the lowest value of the indicator was in warmińsko-mazurskie (0,33), the highest in Jihovýchod (26,9).

The list of regions with the highest INPUT indexes and corresponding OUTPUT values presents table 2. Region of Praha was characterized by the highest values of INPUT indexes in both analysed years. To the group with the highest values belonged also other capital regions, Strední Čechy, Jihovýchod and four Polish regions: dolnośląskie, małopolskie, pomorskie i zachodniopomorskie. In 2009, the latter region was replaced by śląskie. In Polish regions, high INPUT indexes correspond with medium or low OUTPUT indexes. An outstanding region is undoubtedly Jihovýchod, leader in effects of innovative activity in 2009, on sixth place in INPUT indexes. In both analysed years, all Slovak and Hungarian regions (apart from capital regions), had the value of INPUT measure lower than the median.
Table 2. Regions with the highest INPUT indexes and corresponding OUTPUT value and its ranking, 2004–2009

<table>
<thead>
<tr>
<th>regions, 2004</th>
<th>INPUT</th>
<th>OUTPUT</th>
<th>ranking</th>
<th>regions, 2009</th>
<th>INPUT</th>
<th>OUTPUT</th>
<th>ranking</th>
</tr>
</thead>
<tbody>
<tr>
<td>Praha</td>
<td>0.915</td>
<td>0.579</td>
<td>2.</td>
<td>Praha</td>
<td>0.947</td>
<td>0.554</td>
<td>2.</td>
</tr>
<tr>
<td>Bratislavský kraj</td>
<td>0.795</td>
<td>0.455</td>
<td>3.</td>
<td>Bratislavský kraj</td>
<td>0.700</td>
<td>0.451</td>
<td>7.</td>
</tr>
<tr>
<td>Közép-Magyarország</td>
<td>0.637</td>
<td>0.721</td>
<td>1.</td>
<td>mazowieckie</td>
<td>0.644</td>
<td>0.352</td>
<td>15.</td>
</tr>
<tr>
<td>mazowieckie</td>
<td>0.515</td>
<td>0.311</td>
<td>14.</td>
<td>Kozép-Magyarország</td>
<td>0.584</td>
<td>0.451</td>
<td>8.</td>
</tr>
<tr>
<td>Strední Čechy</td>
<td>0.406</td>
<td>0.350</td>
<td>8.</td>
<td>Strední Čechy</td>
<td>0.517</td>
<td>0.466</td>
<td>6.</td>
</tr>
<tr>
<td>Jihovýchod</td>
<td>0.381</td>
<td>0.321</td>
<td>11.</td>
<td>Jihovýchod</td>
<td>0.486</td>
<td>0.587</td>
<td>1.</td>
</tr>
<tr>
<td>dolnośląskie</td>
<td>0.330</td>
<td>0.243</td>
<td>19.</td>
<td>pomorskie</td>
<td>0.391</td>
<td>0.280</td>
<td>22.</td>
</tr>
<tr>
<td>małopolskie</td>
<td>0.308</td>
<td>0.145</td>
<td>29.</td>
<td>małopolskie</td>
<td>0.360</td>
<td>0.330</td>
<td>18.</td>
</tr>
<tr>
<td>zachodniopomorskie</td>
<td>0.304</td>
<td>0.173</td>
<td>26.</td>
<td>śląskie</td>
<td>0.359</td>
<td>0.305</td>
<td>20.</td>
</tr>
<tr>
<td>pomorskie</td>
<td>0.295</td>
<td>0.249</td>
<td>17.</td>
<td>dolnośląskie</td>
<td>0.351</td>
<td>0.352</td>
<td>14.</td>
</tr>
</tbody>
</table>

Source: Eurostat Regional Statistics, own calculations

Table 3 presents regions with the lowest OUTPUT indexes in the individual analysed V4 countries. The lowest values were recorded in Poland, particularly in four Eastern regions. In 2004, to the regions with the lowest OUTPUT indexes belonged Severozápad and Moravskoslezsko in the Czech Republic, Stredné Slovensko and Východné Slovensko in Slovakia and region Dél-Alföld in Hungary. At the end of the analysed period, the group with the lowest indexes joined Észak-Alföld. Severozapad improved its index, taking the 13th place. In 2004–2009, the number of Polish regions with OUTPUT indexes lower than median value decreased from 14 to 11.

Table 3. Regions with the lowest OUTPUT indexes in respective countries, 2004–2009

<table>
<thead>
<tr>
<th>regions</th>
<th>OUTPUT 2004</th>
<th>regions</th>
<th>OUTPUT 2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>świętokrzyskie</td>
<td>0.004</td>
<td>podlaskie</td>
<td>0.087</td>
</tr>
<tr>
<td>podlaskie</td>
<td>0.009</td>
<td>świętokrzyskie</td>
<td>0.118</td>
</tr>
<tr>
<td>lubelskie</td>
<td>0.030</td>
<td>warmińsko-mazurskie</td>
<td>0.135</td>
</tr>
<tr>
<td>warmińsko-mazurskie</td>
<td>0.064</td>
<td>lubelskie</td>
<td>0.142</td>
</tr>
<tr>
<td>Severozápad</td>
<td>0.173</td>
<td>Dél-Alföld</td>
<td>0.251</td>
</tr>
<tr>
<td>Dél-Alföld</td>
<td>0.189</td>
<td>Észak-Alföld</td>
<td>0.276</td>
</tr>
<tr>
<td>Stredné Slovensko</td>
<td>0.205</td>
<td>Stredné Slovensko</td>
<td>0.254</td>
</tr>
<tr>
<td>Východné Slovensko</td>
<td>0.248</td>
<td>Východné Slovensko</td>
<td>0.263</td>
</tr>
<tr>
<td>Moravskoslezsko</td>
<td>0.234</td>
<td>Moravskoslezsko</td>
<td>0.294</td>
</tr>
</tbody>
</table>

Source: Eurostat Regional Statistics, own calculations

The results of analysis show that:
- the group of regions with very low innovativeness INPUT and OUTPUT, existing only in 2004, consisted of three regions, two Polish: podkarpackie and warmińsko-mazurskie and one Czech: Severozápad,
- the group of regions with low INPUT measures and medium OUTPUT measures contained five regions; in 2004: opolskie, Východné Slovensko, Západné Slovensko, Nyugat-Dunántúl i Észak-Magyarország and in 2009: Slovak regions (apart from capital region), Dél-Dunántúl and Severozapad,
- in the group of regions characterized by low INPUT-s and high OUTPUT-s, existing only in 2009, were three Hungarian regions and one Polish region – lubuskie,
- a half of Polish regions and in 2004 also one Hungarian region – Dél-Alföld, were characterized by medium INPUT-s and low OUTPUT-s,
- the most numerous group composed regions with medium values of both indexes,
- medium INPUT-s and high OUTPUT-s were recorded mainly in Czech regions,
- the group of regions with high INPUT-s and medium or high OUTPUT-s consisted of capital regions, Strední Čechy and in 2009 Jihovýchod.
The findings confirm that among 35 analysed regions, in 2004 17 and in 2009 only 14 were characterized by relatively equal level of innovativeness INPUT and OUTPUT. To conclude, in the analysed period there were four regions which improved their INPUT indexes, changing the group. These were in Poland: warmińsko-mazurskie, podkarpackie and opolskie and Jihovýchod in the Czech Republic. The indexes got worse in four regions: Stredné Slovensko, Dél-Dunántúl, Közép-Dunántúl and lubuskie. In the case of effects of innovativeness, four Polish regions (lódzkie, zachodniopomorskie, małopolskie

### Table 4. List of regions by INPUT and OUTPUT values in 2004

<table>
<thead>
<tr>
<th>value</th>
<th>INPUT</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0–0.200</td>
</tr>
<tr>
<td>OUTPUT</td>
<td></td>
</tr>
<tr>
<td>0–0.200</td>
<td>Severozápad</td>
</tr>
<tr>
<td></td>
<td>warmińsko-mazurskie podkarpackie</td>
</tr>
<tr>
<td>0.201–0.400</td>
<td>opolskie</td>
</tr>
<tr>
<td></td>
<td>Východné Slovensko Západné Slovensko Nyugat-Dunántúl Észak-Magyarország</td>
</tr>
<tr>
<td>powyżej 0.400</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Eurostat Regional Statistics, own calculations

### Table 5. List of regions by INPUT and OUTPUT values in 2009

<table>
<thead>
<tr>
<th>value</th>
<th>INPUT</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0–0.200</td>
</tr>
<tr>
<td>OUTPUT</td>
<td></td>
</tr>
<tr>
<td>0–0.200</td>
<td>-</td>
</tr>
<tr>
<td>0.201–0.400</td>
<td>Východné Slovensko Západné Slovensko Stredné Slovensko Dél-Dunántúl Severozápad</td>
</tr>
<tr>
<td>powyżej 0.400</td>
<td>Közép-Dunántúl Nyugat-Dunántúl Észak-Magyarország lubuskie</td>
</tr>
</tbody>
</table>

Source: Eurostat Regional Statistics, own calculations
and lubuskie), three Hungarian (Dél-Alföld, Nyugat-Dunántúl, Észak-Magyarország) and five Czech (Jihovýchod, Jihozápad, Severozápad, Střední Morava and Střední Čechy) improved their indexes, changing the group. Opolskie was the only one region where the OUTPUT index got worse.

Conclusions

The results of the analysis show that there have been and continue to be substantial differences among the V4 regions as regards innovativeness. Differences are particularly visible in case of capital regions, which are characterised by the highest INPUT- and OUTPUT indexes (except for mazowieckie).

In the V4, high value of INPUT index not always corresponds with high value of OUTPUT index. The most numerous group consists of regions with medium values of both indexes. The lowest OUTPUT indexes are recorded for Polish Eastern regions.

To the group characterized by low or medium INPUT indexes and high OUTPUT indexes belong mainly Czech and Hungarian regions. In Slovak regions low INPUT indexes correspond with medium OUTPUT indexes.

Growing regional disproportions between capital region and the rest of the country are a big challenge for regional policy of all the V4 regions. This confirms that a distinct analysis of regional disparities, excluding capital regions, is still needed. Finding one best model of regional policy, which could be implemented in all the analysed regions is rather problematic. As benchmark could be regarded the region with high innovativeness effects. If innovativeness inputs do not correspond with innovativeness outputs, it could be worth to analyse factors influencing these relations. Economists try to compare structures and results of regions seeking the best development paths.

Regional benchmarking evolves from relatively simple forms to more complex models [Luque-Martinez and Munoz-Leiva 2005]. The models include performance, process and policy benchmarking. The first one is based on a comparison of metrics portraying the relevant characteristics of benchmarked regions, the second one is based on a comparison of the structures and systems constituting the practices and functioning of benchmarked regions, while the last one is based on a comparison of the types of public policy considered to influence the nature of the practices and the characteristics of benchmarked regions.

However, politicians are not expected to imitate institutional models of regional development, without considering the specificity of the context of a given region. Key issues of a regional policy when imitating best practices, are often subtle interdependencies between the elements of the “optimal model”. The region’s past history creates major constraints to using the development model of another region, which refers not only to entire systems, but also their elements, e.g. innovation systems [Boschma 2004, Golejewska 2013b].

Analysing the results, one should not forget that they are based on several selected variables, which are a result of – in some measure – random choice and data accessibility. Presumably, adding or subtracting one of the variables would lead to slightly different results. However it should not underrate the importance of this research.

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Abstract

The turn of the 20th and 21st centuries is the time period, which is also called ‘the new economy’ due to significant changes which took place in companies carrying out a variety of business activities and competing against each other on the market. The appearance of the new economy’s type was primarily observed on the verge of nineteen seventies and nineteen eighties. This new kind of economy was based on the knowledge, and was named by A. Toffler who presented the wave theory. The characteristic feature of the present period of civilisation’s development are: knowledge, information, the intangible assets and this period’s attribute is a computer. The changes which have already occurred caused that the importance of fixed assets, as the source of building competitive advantage, decreased significantly in favour of the intangible assets.

This growth of importance of the intangible assets caused however, that the expectations towards both accountancy and the tax law have also increased for this particular element of company’s wealth was properly expressed and settled in company’s financial statements. One of more important elements of proper assessing and accounting the intangible assets, is the definition of the intangible assets, simply because everything begins with its definition, or in other words qualifying particular assets’ element to a certain group of the company’s assets.

The most important aim of this elaboration is to carry out the analysis of both accounting and tax definitions of the intangible and legal assets’ components and also to point out the similarities, the differences and their possible consequences. The secondary aim is to point out the desirable direction of changes in accountancy and tax laws in terms of the intangible and legal assets’ definitions.

Because of the fact that the rules of Polish accountancy are based on the International Accounting Standards the conclusions drawn from the analysis presented herein may be useful for other countries whose accountancy systems are also based on the International Accounting Standards.

While creating this article, the following methods of scientific research were used: the method of literature analysis and legal acts in order to present current definition of the intangible and legal assets in both accountancy and the tax laws in Poland, also the method of source documents’ analysis to describe the rules of identification and the intangible and legal assets’ recognition in KFI Investments – limited liability company.

Key words: intangible assets, tax law, intellectual capital, international accounting standard, true and fair view.

Introduction

The assets of the company can be divided into two basic groups: the fixed assets and the intangible ones. The fixed assets are those which exist physically. This means that they can be seen, measured, counted, touched and sold off. They mostly consist of properties, machinery and equipment, products, commodities, materials, cash, money in bank accounts etc. The intangible assets, unlike the fixed ones, do not appear physically. This means that it is impossible to see them, touch, count or measure. They mostly consist of standards, values, knowledge and employees’ competences, company’s reputation, clients’ database, trademarks, brand names and legal values.

Intangible assets play significant and very often key role in companies’ business activities. The company’s brand, its products’ trademarks, know-how, the costs of completed researches, developmental works and other intangible assets are becoming more and more important for both firms and their clients. Those factors, despite direct influence on current business activity and achieved by the company targets, have also impact on its image presented in financial statement. Thanks to this they are recognised as the most important contemporary value sources of business establishment.

Misidentification, underestimating their initial value, inadequate balance valuation or even omitting some elements of the intangible and legal assets in balance sheets, result in the fact that the company’s image in its financial report becomes falsified. All the reasons mentioned result in the need of analysis and modifications of the existing accountancy regulations which concern identification, valuation and the presentation of the intangible and legal assets. From practical point of view the changes in the tax law are also recommended, because despite the tax law being completely separate field of knowledge to accountancy, in reality, especially in the reality of small and medium sized companies, compliance or very close similarity of both tax law and accountancy rules play huge role and eliminate many misunderstandings.

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The intangible and legal assets are one of the most problematic fields of accountancy and the tax law. This situation is mainly the result of the difficulties with their proper defining and measuring their values. At first the analysis of the definition of the intangible and legal assets’ element of should be accomplished and we should focus on their possible amendment to adjust to today’s contemporary economic realities. The second important problematic field is their valuation, which is not the point of this elaboration.

1. The Importance of the Intangible Assets in Companies’ Activities

In not too distant past the companies used to base their competitive advantage only on its capital and fixed assets. Such approach was begun by the Industrial Revolution in the 18th century, when the greatest importance for creating certain situation on the market and achieving economic advantages of the companies running business activities were their financial capital and fixed assets amongst which first and foremost were properties, machines and production equipment.

Nowadays the situation has changed and other elements decide about the economic advantages. Labour, especially physical labour, became cheap and its supply significantly exceeds the demand. Good financial company’s condition used to be and is still is vital reason when struggling against the competitiveness on the market. Unfortunately not always, as it used to be in the past, has it its result in reassuring achieving economic advantage. It is no longer difficult for the companies to access the financial reserves. This is a direct result of common access to credits or loans. Thanks funds like venture capital even new firms may get large amounts of money to finance their investments. Thanks to high risk funds it is possible to obtain huge financial capital on risky and insecure activities which however are characterised as those with potentially high profit margin. Technology, based on the knowledge and the newest IT achievements reduced the money demand when producing the same thing, so we can gain bigger advantages from the same funds.

As for the tangible assets, that means machinery, equipment used in production etc., the situation has significantly changed in favour of intangible assets. So far an access to the tangible assets guaranteed achieving competitive advantage. In the era of evenness in accessibility to production factors the sources of competitive advantage should be searched in the intangible assets and in the quality features. The escalation of competitiveness on the market resulted in the growth of strategic meaning of the intangible assets. If a company struggles against other competing firms, How can you fight with this competitiveness? The things, which can be very supportive for certain companies and which may try to search for their competitive advantage are those assets and competences which are very difficult to be copied like:

a) recognised company’s trademark and products’ brands,
b) the ability to fast adaptations to market changes,
c) company’s ability to introducing new products and new services on the market and which will allow outdistancing the rivals,
d) appropriately developed computer systems related with customer’s service, handling production processes also trade and storage processes etc., which allow to minimise the costs of these processes.

So, the former sources of competitive advantage have significantly devaluated and the intangible assets (new technologies, know-how, computers’ software, patents, copyright laws, licences etc.), fast access to them, exploitation, the protection of sources and most of all the ability of identifying, valuation and presentation are in the centre of attention now.

The intangible assets play yet another important role. They make some basic element which makes the value of a company, which then makes basis to evaluate the company’s development, management’s effectiveness and the main determinant of taking economic decisions related with it. For a long time company’s value used to be set on the basis of the fixed assets and it is them that were the main generator of company’s worth. Nowadays, it is emphasised, that intangible assets function in two ways: they are a tool used in rivalry and are the main generator of company’s worth which is clearly presented in financial statements’ analysis, as a result of weakening the correlation between firms’ market’s value and the traditional indicators calculated on the basis of balance sheets and profit – loss calculations. Nowadays, the correlation between stock market value and intangible values is more and more accurately appointed.

The economy of the 21st century can therefore be called the economy of the intangible assets. According to the data mentioned by Low and Kalafut, 35% of the decisions of those people who manage investment portfolios are based on the intangible values. The research conducted by Ocean Tomo bank showed that over 80% of companies’ values, which appear on S&P 500 Index are based on the intangible assets.

The intangible assets, as opposed to classic company’s assets, are not easily identified, cannot be subjected to accountant’s evidence and price valuation, which results in the fact that some of these assets are of the nature of the intangible recognised assets, priced and expressed in particular company’s balance sheet. Some of them, however do not exist in balance sheet despite the fact that they have specific and very often significant market value. The relations between all company’s intangible assets and their part revealed in balance sheets are presented in a diagram 1.

Diagram 1 – The Intangible Assets Contrasted with Company’s Intangible Assets Revealed in Balance Sheets

![Diagram 1](image)

The source: self study

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The second group of the intangible assets – not revealed today in company’s financial reports is often called in literature as an intellectual capital and it is claimed that it is the difference between the net value of the assets presented in balance sheets and the market value of the whole company.

2. The Intangible and Legal Assets in Polish Accountancy

One of more important rules of accountancy is the idea of a true and fair view of a company (TFV), which belongs to the superior accountancy rules. Primarily, this idea appeared in Great Britain and then it was accepted by other countries. Nowadays it appears in accountancy law regulations in many more countries. TFV states that a company running business activity ought to present in a true and fair way its financial situation together with accurate results of its business activity. The true view is described and understood as the depiction of wealth and financial situation of a particular company in as fair way as possible and in accordance with the truth. TFV excludes free shaping company’s image depending on the situation, simply because it assumes depicting the reality in accordance with truth and facts without any embellishments or falsifying the situation.

In Polish legislation the rule of the true and fair view is not directly mentioned, however, the Accountancy Act obligates companies to present wealth and financial situation in an honest and clear manner together with accurate financial reports. This Act states that actions, including economic operations, must be both included in the accountant books and shown in balance sheets in accordance with their economic content.

The view on the conception of TFV can also be found in EEC Directive IV about the annual accounts’ closures, where an entry is seen: „The annual financial report should present the true and fair view of company’s assets and liabilities of the partnership, its financial situation and its profits or losses.” In exceptional circumstances, if applying any regulation or directive was contradictory to the duty of presenting the true and fair view of the company, it is recommended to refrain from such regulation. The reasons for such refrain must be explained in the form of additional information included in the financial statement. Also the impact on the assets of such refrain, liabilities, financial situation and its profits or losses must be specified.

In the International Accounting Standards the true and fair view is achieved by applying appropriate accounting standards, also by the realisation quality features while issuing financial statements. Furthermore, IAS 1 – The Presentation of Financial Statements specifies that companies’ financial statements should fairly depict their financial situation, financial results and the cash flow. For the presentation to be true and fair, it is required that all the effects of transactions, other occurrences and conditions were ideally depicted. Such depiction must comply with the definitions and conditions which are set for assets, commitments, income and costs, which were presented in „conceptual guidelines for issuing financial statements”. Applying appropriate standards causes, that the financial statement will meet reliable presentation’s requirement, though in justified cases additional information will have to be provided.

Important reason for applying the TFV concept in reality is an accurate classification of owned intangible assets, which must ensure true, reliable and harmonious with the actual state presentation of company’s intangible and legal assets. Intangible assets are such elements which cannot be touched because they do not appear physically. That is why they make one of the most difficult problematic fields of accountancy.

In Polish accountancy the element of the intangible and legal assets was defined by section 3 paragraph 1 item 14 of the Accountancy Act and in accordance with this law the intangible and legal assets are those which were acquired by a company, counted as the fixed assets, property rights – suitable for economic usage in predicted time of economic usage longer than a year, intended to be used for company’s purposes. In particular they are:

a) copyright property law, licensees, concessions
b) inventors’ rights to their inventions, patents, trademarks, etc.,
c) know-how.

Analysing the literal meaning of the definition it is not difficult to see that, in accordance with Polish accountancy law, to the intangible and legal assets can be counted only those elements which were purchased by a company. This means those ones which were paid for, given in the forms of reports, issued for free, including donations – the possibility of producing such element by the company itself has not been foreseen.

Furthermore, each element of the intangible and legal assets must fulfil three conditions stated below:
1. the expected period of company’s economic usage must last longer than a year,
2. it must be suitable for economic usage and
3. it must be intended for company’s economic needs

Both acquired legal rights and long-term periodical financial settlements of particular sort of costs, which are intangible assets, are ranked as the intangible and legal assets – from the sort’s of element point of view. The Accountancy Act counts copyright property laws, licensees, concessions, inventors’ rights to their inventions, patents etc., to especially distinctive

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5 Article 4 of the Accountancy Act.
7 §15 International Accounting Standard No 1 – The presentation of financial statements.
8 The second very important element is true valuation of priced intangible and legal assets, but the issues of this valuation are not the subject of this dissertation and that is why they were omitted in further discussion, which focuses on the definition itself and on the identification of the intangible and legal assets.
property rights. Property laws are generally understood as the rights on basis which entitled subject has certain property benefits (such as the right to receive payment, the right to receive interests, etc).

Apart from property rights, to the intangible and legal assets the Accountancy Act counts also very specific sorts of financial settlements’ periodical costs, which include two titles such as:
1. the wealth of a company and
2. the costs of completed researches and development works.

The wealth of a company was defined under the article 33 section 4 of the Accountancy Act, as the difference between the purchasing price of a certain company or its organised part and a smaller than that one fair value of the established net assets. If the purchasing price of a certain company or its organised part is lower than the fair value of the established net assets, then the result is the negative firm’s value.

The rules of recognising the costs of completed researches and developmental works were described under the article 33 section 2. According to this rule the costs of completed researches and developmental works are counted as the intangible and legal assets when:
a) the product or the technology of production are strictly established and bound with them costs of the developmental works are reliably described,
b) the technical usefulness of a product or technology was stated and the proper documentation was provided and on their basis the company decided to produce these products or applying the technology,
c) the costs of developmental works will be covered, according to predictions, by the income which either comes from the sales of these products or from applying the technology.

As for the intangible and legal assets, Polish accountancy is based on the International Accounting Standards 10, so many solutions in Polish accountancy are analogous to the ones in the international standards. This is the result of a few factors one of which is the Accountancy Acts’ harmonisation within European Union, to which Poland has also been belonging since 2004.

3. The Intangible and Legal Assets in Polish Tax Law

The tax law sets completely different goals to accountancy. In some sort of simplification it can be stated that the main aim of the tax law (all over the world, not only in Poland) is gaining appropriate income to country’s budget in order to secure certain country’s expenses, killing the risk of lack in regularity of budget collections and making sure that the taxation base will not be reduced. This could put at risk the realisation of the fiscal policy. The consequence of such state is that the tax law does not accept the rules of accountancy, which results in various differences, first and foremost in understanding the result categories 11, and also in classifying balance categories.

As for defining the intangible and legal assets in Polish tax law, according to an entry in law article 16 b section 1 of the company’s income tax law act 12, the intangible and legal assets are understood as, acquired and suitable for economic usage, on the day in which the law was permitted to use, elements:
1. eligibility to residential premises,
2. eligibility to business establishment,
3. eligibility for a single-family house within housing cooperative,
4. copyright or acquired property rights,
5. licences,
6. the rights defined in the Act on 30 June 2000 r. – Business Proprietorship. Law paper 2003 No 119, item 1117),
7. value being an equivalent of gathered information related to knowledge in industrial, commercial, scientific, or organisational (know-how) fields;

These elements must additionally fulfil strictly set in the law act regulations such as:
a) expected period of their economic usage must last longer than a year,
b) they must be used by the tax payer for the purposes of a business activity run by him

c) must be handed over by him for usage purposes on the basis of a licence contract (sub-licence), a lease for premises etc.

Similarly to the accountancy, to the intangible and legal assets are also counted:
a) the value of the company, if this value was raised as a result of purchasing a company or its organised part as:
- in a form of buying,
- accepting for payable usage. The depreciation allowances in accordance with chapter 4a, are the user’s responsibility,
- investing in the partnership on the basis of commercialization and privatisation laws,
b) the costs of the developmental works positively completed, which can be used for tax-payer’s business activity if:
- the product or technology of manufacturing are strictly established and bound with them the costs of developmental works are lawful and reliably set, and
- the technical usefulness of a product or technology was properly documented by the tax-payer and on these basis the tax-payer decided to begin the products’ production or decided to use the technology, and
- from the documentation bound with the developmental works appears that the costs of developmental works will be covered either with expected profits from the sales of those products or from using the technology.

Comparing the two definitions: the accountancy definition and the tax definition it is clear to state that they are conver-

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10 International Accounting Standard No 38 – Intangible assets.
11 What counts here is understanding the costs and income, the rules of their recognition and the rules of setting tax financial result which is the base for calculating taxes.
12 The Law Act on 15 February 1992 r. about the company income tax (Law paper 2011 No 74, item. 397).
gent. First and foremost, the tax definition, by analogy to the accountant one, requires that only purchased elements were counted as the intangible and legal assets. This means that if a company produces an intangible and legal asset on its own, this element will not be mentioned in the balance sheet.

As for the differences between two definitions, they concern only two fields, such as:
1. the tax law includes a certain catalogue of the intangible and legal assets while the accountancy regulations define elements’ criteria for the intangible and legal assets and show an ‘open’ list of the particular intangible and legal assets’ elements,
2. the tax law treat differently to the accountancy:
   a) the right to timeless usufruct of land,
   b) eligibility to a residential premises,
   c) eligibility to business establishment,
   d) eligibility for a single-family house within housing cooperative,

Which for tax law purposes are categorised as the intangible and legal assets, while in accountancy they are categorised as fixed assets 13.

Summary
The aim of companies’ financial statement preparation is to deliver information about its financial situation and achieved by the company results, which will be useful for wide range of users while taking right and accurate economic decisions. It is necessary to ensure the credibility of information presented, so neither decreasing nor increasing any presented in balance sheets values of wealth elements, sources of funds or even the result of company’s financial situation are allowed. It is expected that the economic image of the company, presented in its financial reports, is true and fair. Experience gained in the 21st century shows, that the most important element of company’s assets, the element which is responsible for the value of a company and also company’s competitive ability are the intangible assets. With reference to many companies and many financial reports it is ok to say that the company’s image improvement presented in its financial report depends on completeness, correctness, the point of view and the valuation of the intangible company’s assets. Unfortunately the issues related with the intangible assets, their perspectives, their valuation and their revealing constitute big problem and challenge for economic sciences, especially for the science of accountancy.

Although, there are no bigger problems related with defining and identification (also valuation) of the intangible assets purchased by the company, there are many problems and doubts related with a group of the intangible assets created by the company itself. Such elements are not enclosed, valued or presented in neither Polish accountancy nor in Polish tax law. The problem makes the definition of a particular element of the intangible and legal assets which admits the classification of only purchased elements, not those produced by the company.

The list of chosen differences and similarities of the definition of intangible and legal assets’ element in the view of Polish accountancy and Polish tax law are presented in table no 1.

| Table no 1 – Basic differences between the definitions of intangible and legal assets’ element in the accountancy and the TAX law |
|---------------------------------|---------------------------------|
|                                  | Accountancy                     | TAX law                          |
| **Definition**                  | **Analogy**                     | **Divergence**                   |
| The intangible and legal value is a non-money and purchased element of the assets, without its physical appearance, fulfilling following criteria: | a) used in production, delivering goods or providing service by the company, b) remaining under company’s supervision, c) from which in the future the company will gain economic profits. | Example titles which are counted to the intangible and legal assets are listed. This is still an ‘open’ list. The ‘closed’ list of titles which are counted as the intangible and legal assets is defined. |
| **Stated below elements are counted as the fixed assets:** | Stated below elements are counted as the intangible and legal assets. | 1. the right to timeless usufruct of land, 2. eligibility to a residential premises, 3. eligibility to business establishment, 4. eligibility for a single-family house within housing cooperative |

Source: self study on the basis of the LAW ACT, 29 September 1994 r. about accountancy and LAW ACT, 15 February 1992 about company income tax

Such approach causes that the expenses spent in order to produce the intangible and legal assets by the company itself are moved to costs, which results in:

1. from the accountancy point of view – in disproportion of company’s image in its financial statement,
2. from the tax point of view – lowering taxation base by company’s income tax, and consequently lower tax paid annually by the company.

In order to eliminate mentioned above anomalies the definition of the intangible and legal assets’ element should be changed both in the field of accountancy and in tax law.

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The Concept of a Banking Union – Risks and Opportunities for the Banking Sector in Poland. Risk Evaluation and Recommendations

Jacek Pera

Abstract

The banking Union will change the face of Europe. Member states joining the Banking Union, will get “more Europe”.

The aim of the deliberations is an attempt at a synthetic take on the main policy dilemmas with respect to banks in EU countries. The Banking Union project is long term and constitutes an important determinant for the future growth of the European Union, both for the eurozone countries and those which remain outside. The search for an appropriate balance between European and national supervision is necessary.

Key words: the Banking Union; banking sector; risk; recommendations; concept; supervision; assets; guarantees; financing; security system; fragmentation; stability; safety; policy; interdependence; integrated financial framework.

Introduction

The financial and economic recession highlighted the weakness of the European banking system and showed its low resistance to shocks. Grappling with the previous recession in the European Union (EU) resulted in more than euro 4.5 trillion spent on aid, rescue and stabilisation of the European banks. They also brought to the fore the existence of a negative interdependence between the national debt and the bank debt (and in particular the occurrence of covering bank debts from the country’s budget) – constituting a significant cause for turbulence and disruptions to the European system of financial safety.

Today’s fragmentation of the banking sector, causes a weakening of the single market for financial services and restricts the effects of monetary policy on the eurozone real economy. In the ensuing situation in the EU the establishment of a Banking Union (BU) is considered favourable, and as such could contribute to limiting risks of banking recessions occurring in the future and help in breaking the aforementioned negative interdependence between the national and bank debt, as well as reinstate trust in the common currency, constituting a part of the long term fiscal and economic integration process.

The main aim of the report is to present the banking sector situation in Poland, in the backdrop of the integrated financial framework – (BU) and in the context of the accompanying mechanism – risks and threats.

The thesis being advanced is that joining the BU should be in the interest of the Polish banking system subject to the most favourable conditions for its participation and cooperation with the BU are scrupulously and precisely negotiated, and namely:

- drawing up of a procedure on the basis of which a controlled transfer of capital by groups of companies operating within Poland will be possible,
- consolidating the position of the PFSA on the issue of uncontrolled and excessive transborder transfers,
- exemption from at least the joint part of liabilities within the scope of moral hazard,
- a different method for calculating the distribution of liabilities within the scope of bank restructuring and liquidation fund,
- adoption of single regulatory standards for withdrawing capital from subsidiary Polish banks.

Recommendations for the Polish banking sector stemming from the current BU shape will constitute the effects of the implementation of the assumed objective and the advanced thesis. The analytical part is predominantly based on research in national and international literature and the adopted qualitative methods.

The Planned Banking Union – Risk Evaluation and Recommendations for the Banking Sector in Poland

The concept of establishing a BU was coined at a European Council meeting on 23 May 2012, and already in June 2012 a report was published entitled: “Towards a genuine EMU” where the fundamental component elements of the future Union were determined, i.e. integrated financial, budgetary and economic policy framework as ensuring the necessary democratic legitimacy by close integration of the European parliament and national parliaments.

1 Jacek Pera, Ph.D, Department of International Economic Relations, Cracow University of Economics, Cracow, Poland.
2 The Spinelli Group: Only a European federal union can solve the crisis. Federal Union or disintegration. Shadow European Council, Brussels 2012, p. 89.
The integrated financial framework, or the BU are to encompass:

- Single Supervisory Mechanism\(^3\) (SSM) for the banking sector – This mechanism was designed to ensure macro-prudential oversight, including the identification of risk concentration areas in the banking system. Thus the regulations will cover "systemically important" banks which are considered to be:
  - banking groups operating in at least three EU countries,
  - banks with total assets exceeding euro 30 billion, banks with total assets exceeding 20% of the GDP of the country of their incorporation\(^4\).

At the moment the BU does not intend to tackle the problem of the split large banks – banks too big to fall. In effect institutions too big to fail, which in Europe usually constitute universal banks holding significant assets and quite large trading portfolios – will still be able to develop their activities in the current shape. In the event of market turmoil they will constitute systemic risk for the entire sector and in the worst case will be jointly financed by the other BU members. The costs of rescuing large banks will thus be borne by the entire eurozone and not only the home-countries which could be too weak to carry such a load. Today this problem pertains to 25 of the most important European banks with a significant transborder influence, whose joint assets amount to 24.6 trillion euro – see data in table 1\(^5\).

Table 1: Profitability ratios and assets of EU banking sectors in 2012

<table>
<thead>
<tr>
<th>EU member state / No. of large banks</th>
<th>Banks’ assets in EUR trillion</th>
<th>ROE as %</th>
<th>ROA as %</th>
<th>Eurozone</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria 0</td>
<td>0.0</td>
<td>+1.2</td>
<td>+0.5</td>
<td>YES</td>
</tr>
<tr>
<td>Belgium 1</td>
<td>0.3</td>
<td>+0.5</td>
<td>-1.5</td>
<td>YES</td>
</tr>
<tr>
<td>Bulgaria 0</td>
<td>0.0</td>
<td>+6.3</td>
<td>+0.5</td>
<td>NO</td>
</tr>
<tr>
<td>Croatia 0</td>
<td>0.0</td>
<td>+0.1</td>
<td>+0.1</td>
<td>NO</td>
</tr>
<tr>
<td>Cyprus 0</td>
<td>0.0</td>
<td>-3.4</td>
<td>+0.5</td>
<td>YES</td>
</tr>
<tr>
<td>The Czech Republic 0</td>
<td>0.0</td>
<td>+19.7</td>
<td>+0.6</td>
<td>NO</td>
</tr>
<tr>
<td>Denmark 1</td>
<td>0.5</td>
<td>-0.3</td>
<td>-0.1</td>
<td>NO</td>
</tr>
<tr>
<td>Estonia 0</td>
<td>0.0</td>
<td>+34.2</td>
<td>+2.5</td>
<td>YES</td>
</tr>
<tr>
<td>Finland 0</td>
<td>0.0</td>
<td>+5.5</td>
<td>+0.2</td>
<td>YES</td>
</tr>
<tr>
<td>France 5</td>
<td>6.8</td>
<td>+14.1</td>
<td>+0.3</td>
<td>YES</td>
</tr>
<tr>
<td>Greece 0</td>
<td>0.0</td>
<td>-15.3</td>
<td>-10.1</td>
<td>YES</td>
</tr>
<tr>
<td>Spain 3</td>
<td>2.1</td>
<td>+6.5</td>
<td>+0.2</td>
<td>YES</td>
</tr>
<tr>
<td>The Netherlands 3</td>
<td>2.1</td>
<td>+5.4</td>
<td>-0.1</td>
<td>YES</td>
</tr>
<tr>
<td>Ireland 1</td>
<td>0.1</td>
<td>-9.1</td>
<td>-1.0</td>
<td>YES</td>
</tr>
<tr>
<td>Lithuania 0</td>
<td>0.0</td>
<td>+15.5</td>
<td>+1.8</td>
<td>NO</td>
</tr>
<tr>
<td>Luxembourg 0</td>
<td>0.0</td>
<td>+0.8</td>
<td>+0.1</td>
<td>YES</td>
</tr>
<tr>
<td>Latvia 0</td>
<td>0.0</td>
<td>-12.4</td>
<td>+0.2</td>
<td>NO</td>
</tr>
<tr>
<td>Malta 0</td>
<td>0.0</td>
<td>+0.3</td>
<td>+0.5</td>
<td>YES</td>
</tr>
<tr>
<td>Germany 3</td>
<td>3.2</td>
<td>+18.5</td>
<td>-0.1</td>
<td>YES</td>
</tr>
<tr>
<td>Poland 0</td>
<td>0.0</td>
<td>+17.6</td>
<td>+1.8</td>
<td>NO</td>
</tr>
<tr>
<td>Portugal 0</td>
<td>0.0</td>
<td>+2.1</td>
<td>+0.1</td>
<td>YES</td>
</tr>
<tr>
<td>Romania 0</td>
<td>0.0</td>
<td>-4.3</td>
<td>+0.1</td>
<td>NO</td>
</tr>
<tr>
<td>Slovakia 0</td>
<td>0.0</td>
<td>+15.5</td>
<td>+0.5</td>
<td>YES</td>
</tr>
<tr>
<td>Slovenia 0</td>
<td>0.0</td>
<td>-12.3</td>
<td>-0.3</td>
<td>YES</td>
</tr>
<tr>
<td>Sweden 1</td>
<td>0.7</td>
<td>+13.6</td>
<td>+0.2</td>
<td>NO</td>
</tr>
<tr>
<td>Hungary 0</td>
<td>0.0</td>
<td>-4.9</td>
<td>-0.2</td>
<td>NO</td>
</tr>
<tr>
<td>The Gr. Britain 5</td>
<td>7.3</td>
<td>+2.7</td>
<td>-0.1</td>
<td>NO</td>
</tr>
<tr>
<td>Italy 2</td>
<td>1.6</td>
<td>+2.2</td>
<td>-0.2</td>
<td>YES</td>
</tr>
<tr>
<td>Total 25</td>
<td>Total 24.6</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>


\(^3\) Actions allowing for a more organised banking supervision:

1 January 2011 three European supervisory authorities were appointed: European Banking Authority (EBA), which supervises banks and supervises their capital injections European Securities and Markets Authority (ESMA), the aim of which is supervision over capital markets; and European Insurance and Occupational Pensions Authority (EIOPA) which supervises the insurance sector.


Banking supervision is to be carried out by the ECB and its bodies and the jurisdiction of the bank will include: issuing and withdrawing banking licences, taking over and selling significant share packages, controlling the satisfaction of requirements: capital, liquidity and other prudence, introduction of additional capital requirements in crisis situations, making individual decisions pertaining to the internal bank organisation including on increasing capitals, liquidity or making information public. Furthermore the ECB will have the right to control holdings in which banks and their subsidiary companies participate in, will be able to conduct on site controls, instigate interventions and apply sanctions.

At the outset circa 200 banks in the EU is to be subject to supervision and control. In practice this means that as much as up to 80 per cent of assets of banks from the eurozone will be supervised. At least three of the largest banks in each country are to be subject to this “European” supervision. It is to commence operation in 2014. However, already in 2013 it is to be granted the power to decide on liquidation of collapsing banks (to date only national authorities can make such decisions). Whereas banks, which will be positively evaluated will be able to turn for needed funds and loans to The European Stability Mechanism – ESM. This solution is unfavourable inasmuch that the smaller, regional savings and credit banks (with a large market share in crises strewn Greece or Spain) will only be indirectly regulated by the ECB. That is why the suggestion to create the possibility of direct capital injections to private banks under threat by activating ESM funds – at least for countries in recession. For countries which are financially engaged in this mechanism to the largest degree, and thus primarily Germany, the creation of a banking supervision for the eurozone, would constitute a guarantee of control over the banks. On the other hand for countries steeped in the debt crisis, such as Greece or Spain, this would open the way for transferring some of the burden, or loss of liquidity by private banks from the state to the eurozone.

The situation that the monetary union non participants would find themselves in is also a significant dilemma. They will have a choice as to whether they want for their banks subscribe to the common supervision. Today we know that the Great Britain and Sweden refused accession. Taking into consideration the size and scale of the activity or British banks and the role of London as the most important financial centre of Europe, this could create serious problems for the effective functioning of the new system. This is of key importance for the eurozone countries (currently 17).

Poland, which is not home of any of the large systemic banks, would not reap the benefits stemming from their financing and at the same time would have to shoulder some of the costs on account of ECB payment. Thus the net effect of Polish accession would be negative (-4.9%). This means that it would bear – similar to Germany – the largest costs on account of Accession to the BU.

It seems that the BU in the current form will not bring any measurable benefits for Poland which currently has a fairly well structured banking supervision and quite small bank assets in as compared to the GDP. Additionally the ownership structure of Polish banks is dominated by banks, where the majority shareholders are entities from other EU countries. The transfer of banking supervisions from individual national institutions to groups of companies will mean the introduction of central management over both liquidity and capital at group level.

Considering the nature of the Polish banking system, the economic consequences of introducing BU rules could be problematic – such as capital concentration in the banking sector within the scope of the European system, or its drain from preferential areas and a unification of the crediting terms by the banks, bypassing the local economic characteristics. In both cases this phenomenon would be unfavourable for the Polish economy.

Poland as a country which has not so far adopted the common currency, is faced with the following dilemma: Is it to enter common supervision, without full decision making rights? Contrary to other EU states, Polish banking supervision in the form of the Polish Financial Supervision Authority (PFSAnia) has led a conservative supervision policy, which to a large extent has been conducive to the stability and profitability of the home banking sector. From the logistical point of view – supervision centralisation within the scope of the BU shall facilitate ease of contacts with a single supervision – currently the PFSA authority has to maintain relationships with many eurozone supervisory bodies.

The primary BU rule, which Poland could be a part of, should be based on the principle that all supervisory decisions on the European level cannot result in a worsening in to the security level of local banks. This principle should apply both to capital and liquidity requirements as well as prudence regulations. At the same time – and this should be of key importance to Poland – all actions harmonising on a pan European level cannot limit the authority of local supervision bodies within the scope of preventative regulations. Per analogia, all decisions by European supervision affecting the situations of subsidiary banks, would have to be consulted with local authority bodies. National authority would also have the right to implement more restrictive supervisory regulations within its own country in relation to those effective at the European level, subject to them not constituting a more lenient solution. A general principle of European supervision should have to be the supervisory division over supervision over financial conglomerates and small banks. The adopted solutions should combine the two elements, so as in supervising local banks systemic risks stemming from the sum of local solutions should be taken into account. In such a sys-

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9 Ibidem.
10 M. Cichocki, Unia bankowa – związek kapitału i państwa, [in:] www.teologiapolityczna.pl, [reading date: 16.05.2013].
The accession of Poland to the EU in the correct form may present a risk to deposits. The share of foreign institutions in Polish banking assets currently stands at 70 per cent. In this situation the accession of Poland to the BU would be “extremely destructive”. Financial groups will be able to transfer assets between individual entities in a situation where one BU member would experience financial problems. This threat stems from the transfer of the entitlements of national financial authorities for the benefit of an entity remaining within the framework of the ECB. The Polish FSA would then lose most of its competencies. A Union supervisory body would care more for banks from large Union member states and would analyse the situation at Polish banks to a lesser degree (if subsidiary banks part of European banking groups would be subject to European supervision then it will certainly concentrate its attention on the financial group, as a whole, losing sight of the local situation). Then – even if under the heading of a centralised liquidity management at a banking group – transborder transactions would be far easier to carry out. So far the PFSA was able to effectively stop transfers, in par. through the introduction, after the collapse of Lehman Brothers in 2008 the obligation for daily transactions reporting or an increase in the level of required capital. As a result the Polish banking system steered clear of the crisis. The adequacy of fundamental own capitals ratio (Tier 1 capital – capital used to cover real loses under conditions of a bank trying to remain solvent) remains in Poland at a good level of 12.9%, the PFSA recommends for banks to cease disbursing dividends in a situation where this proportion falls below 9%. A common Union supervisory authority would most probably relax these principles. For Poland it would be better if parent – banks would sell their Polish branches. And Polish capital could purchase them. This would be an opportunity to establish Polish banking – insurance groups.

In the context of bank deposits Poland joining the BU would have one advantage: communitisation of risk. If a common deposit guarantee system was established, the safety of Polish banks would be strengthened, as not only Polish but Union taxpayers would be responsible for the possible loses of national banks. However a problem would arise is a banking system of hybrid capital owners and to soften the competitive disruptions caused by use of aid. The purpose of SRM is to unify separate legal solutions of member states. It also provides for

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11 M. Belka, Unia bankowa korzysta dla Polski, [in:] www.finanse.wnp.pl, [reading date: 16.05.2013].
15 V. Constâncio, Towards a European Banking Union, Lecture held by Vice-President of the ECB at the start of the academic year of the Duisenberg School of Finance, Amsterdam, 2012, p. 9.
the possibility of establishing bridging institutions, allowing for the restructuring of a bank in a manner which bears no threat to the stability of the entire system. Furthermore the instrument covers issues of extraordinary capital injections into banks is crisis situations.

It should be remembered that a potential liquidation of a bank is an invasive procedure and one which requires a long time. It relies on sharing the cost of risk between bank’s shareholders and usually entails the loss of money. Those affected by it demand compensation. Thus an ordered procedure is necessary for the eventuality of liquidating a bank, setting out when – and in what order – shareholders and creditors would be requested to participate in the costs of rescuing or liquidating a bank. In order for the common system of bank liquidation to be significantly founded in legislation, amendments to EU treaties will be necessary and this is time consuming and requires consensus amongst the eurozone members (in practice one and the other may turn out to be difficult to obtain).

A significant dilemma is financing within the scope of a common bank restructuring and liquidation fund and a common deposit guarantee system. According to estimates, in a situation where bank assets in the EU reached 366% of EU GDP – a common bank restructuring and liquidation fund would have to have at its disposal at least 600 billion euro in order to be trustworthy, and the deposit guarantee system would have to have 114 billion euro at its disposal, out of which 96 billion euro would be earmarked for the eurozone. Most of these moneys would have to be assigned from the top (and not in the form of credit guarantees) and what’s most important, both programmes will have to have direct access to ECB credit facilities or national treasuries in order to unlock funds in the event of a crisis. Thus a problem concerning the accumulation of sufficient amount of financial means arises. This solution will also require a change of ECB statute and an amendment to Union treaties.

Financing may become disrupted due to the fact that there are many toxic credits still hidden at European banks granted to companies and public institutions. A hastily established BU would lead to the fund and its financing (designated as a guarantee of overall stability), would be overly burdened by irrecoverable debts. That is why two stages in the implementation of financing are postulated: first bringing it back to health on a national scale, with the entire burden of budgetary reforms and cuts which this entails and then, once this process is completed, going over the stage of preventing similar threats in the eurozone in the future.

Within the scope of the restructuring system Poland would have to pay in excess of 200 billion euro, or 74% GDP, whereas in reality in only paid 9 billion euro to EU budget. These data indicate that the share of burden in such a system, where national contributions are based on GDP and population size, would be extremely unfair considering the fact that Polish banks only hold 0.73 of banking assets of the entire Union.

At the moment the Polish banking system is safe, profitable and well developed. It survived the crisis and the deposit guarantee system is advanced and has accumulated significant financial means. Effectiveness indicators for the Polish banking sector (measured using ROE and ROA indicators) as compared to the indicators of other Union banking sectors are at a good level – both considering return on equity and assets (table 1) – 4 position after Estonia, the Czech Republic and Germany. banks in Poland are highly trustworthy. It can even be said that trust to the broadly taken financial sector is also very high. Polish citizens are not afraid that their savings will be lost. Polish banks are better capitalised and leveraged to a much lesser degree than their European competitors.

Finally joining the BU should be in the interest of the Polish banking system subject to the most favourable conditions for its participation and cooperation with the BU are scrupulously and precisely negotiated, so that the supervisory effectiveness and possibility of further growth for Polish banks was retained – of course taking into consideration fiscal costs borne by Poland. This means that as long as it will bear such costs it has to be able to influence key decisions which will result in fiscal costs for the Polish market.

Poland no joining the BU – on account of the size of the Polish banking sector and its associations with the eurozone – externally would be perceived in a negative light. In practice this would mean that remaining outside of the BU would be detrimental to the external valuation of the Polish banking sector, even if its financial conditions was very good.

**Summary**

Taking into consideration the above analysis – it is possible to define key recommendations for the Polish banking sector – table 2 – directly resulting from the current BU project and the solutions adopted by the EU within that scope. These recommendations also constitute the performance of the main objective and thesis.

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16 www.ekonomia.rp.pl reading date: 15.05.2013.

17 Ibidem.
Table 2: Recommendations and risks for the Polish banking sector stemming from the BU

<table>
<thead>
<tr>
<th>No.</th>
<th>Scope of recommendations and risks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td><strong>Bank deposits</strong> – a procedure should be drawn up on the basis of which a controlled transfer of capital by groups of companies operating within Poland will be possible, taking into consideration threshold and numerical values and the lack of uncontrolled money drain.</td>
</tr>
<tr>
<td>2.</td>
<td><strong>PFSA</strong> – consolidating the position of the PFSA on the issue of uncontrolled and excessive transborder transfers, through the drawing up and implementation of appropriate recommendations.</td>
</tr>
<tr>
<td>3.</td>
<td><strong>Moral hazard</strong> – the need for Poland to negotiate in the EU clear and legible rules in the event of a moral hazard problem or the need to burden all BU members jointly) with costs stemming from systemic rescues of large European banks. It is justified to exempt Poland from at least the joint part of liabilities.</td>
</tr>
<tr>
<td>4.</td>
<td><strong>Restructuring Fund</strong> – Poland negotiating a different method for calculating the share of liabilities within the bank restructuring and liquidation fund, in the first place bypassing the parameter associated with the size of population (which, if Poland joins the BU, is unfavourable).</td>
</tr>
<tr>
<td>5.</td>
<td><strong>Decision making</strong> – Poland obtaining a guarantee that all supervisory decisions on the European level cannot result in a worsening in to the security level of Polish banks.</td>
</tr>
<tr>
<td>6.</td>
<td><strong>Recommendation</strong> – Adoption of single regulatory standards for withdrawing capital from subsidiary Polish banks.</td>
</tr>
<tr>
<td>7.</td>
<td><strong>Financing</strong> – after accession to the BU the banking sector should be able to finance the economy at a level not below the current.</td>
</tr>
<tr>
<td>8.</td>
<td><strong>BU membership</strong> – Polish membership should be conditional upon ensuring financial support instruments in the form of EMS fund and a trust packet in the form of the new Vienna Initiative. A lack of such solutions will cause Poland to bear financial responsibility for decisions taken by the ECB.</td>
</tr>
<tr>
<td>9.</td>
<td><strong>Institutional solutions</strong> – Institutional solutions should be established in Poland, which will facilitate running banking business and will affect the stabilisation of the financial market before Poland joins the BU. An example of such solutions is an effectively functioning system of guarantee funds.</td>
</tr>
<tr>
<td>10.</td>
<td><strong>No BU membership</strong> – Poland not accessing to the BU – will mean a deterioration of the external valuation of the Polish banking system. In such an event the banks need further capital with a majority share of Polish capital, through the creation of appropriate reserves and costs should be calculated stemming from the lack of declaration (short term costs and long term benefits).</td>
</tr>
</tbody>
</table>

Source: Own work

References

3. Constâncio V.: *Towards a European Banking Union*, Lecture held by Vice-President of the ECB at the start of the academic year of the Duisenberg School of Finance, Amsterdam.
8. The Spinelli Group: *Only a European federal union can solve the crisis. Federal Union or disintegration*. Shadow European Council, Brussels.
9. www.ekonomia.rp.pl, reading date: 15.05.2013].
Forfaiting as a Method for Financing Public-Private Partnership Projects in Poland

Jaroslaw Marcin Szewczyk

Abstract

In view of the present sovereign debt crisis, the problem with the level of public debt is of special importance. One of the methods used to minimise the public sector involvement in financing public infrastructure is via public-private partnership arrangements. The collaboration between the private and the public sector is based on a strong assumption, that optimal risk sharing between them results in a better “value for money”.

The paper examines the concept of PPP projects and focuses on forfaiting as the method for financing PPP projects. In the time of the spreading banking crisis and given the lack of confidence in financing big infrastructure projects, alternative methods for financing are eagerly sought for. The author discusses main advantages of this way of financing and points out the most important obstacles to its further development. The article concerns mainly the Polish PPP market.

Key words: public finance; controlled debt; PPP projects; forfaiting; assignment of rights; local government units; concessions.

1. Public-Private Partnerships

A public-private partnership arrangement (“PPP” or “P3”) involves a cooperation of a public entity with a private partner. They collaborate on the execution of a specific project either via a joint venture or based on a concession, which is granted by the public entity to the private partner. On the one hand, it is a financing method (the project is financed by the private partner), and on the other, a public procurement technique.2

In comparison to conventional public procurement, PPP projects are more complex and usually fraught with complicated structures. Since part of the project’s costs is defrayed by the private partner, the level of public debt can be significantly reduced. A public entity’s contribution is quite often limited to the in-kind contribution.

The level of the private partner’s risk depends on a project and the level of public entity’s involvement therein. In any case, P3 projects are considered to be more costs effective than conventional public procurements. They are considered to deliver better “value for money”. The public entity may not participate in the costs of the project’s development and cover only a part of the project’s overheads. It is also possible that the public entity injects to the project an in-kind contribution or a capital grant.

2. Blended Projects (EU market)

Within the European Union the growth of P3 project is fostered by, among others, activity of the European PPP Expertise Centre (EPEC).3 Over the long haul, a strong support of the European Union and the European Investment Bank should make this method for procuring infrastructure more and more popular. However, as of today we are witnessing a substantial decrease in a total amount of PPP project on the European market. During the first half of 2012, the European PPP market recorded its lowest volume for the last ten years.4 Nonetheless, we can assume that next several years should bring about slow but steady development of the European P3 sector. The next EU’s multi-annual budget framework (2014–2020) will prioritize PPP projects over direct states’ in-

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1 Jaroslaw Marcin Szewczyk, Chair of Civil Law, Faculty of Law, Jagiellonian University in Crakow, Poland.
3 It is a joint initiative involving the European Investment Bank (EIB), the European Commission and Member States of the European Union. For further information please browse: [www.eib.org/epec/].
fastructure investments. The EU’s furtherance and sovereign debt crisis will facilitate the growth of this sector. From the EU’s perspective, the most interesting are blended projects, which combine financing from three sources: private partner, a Member State and the EU funds.

Whether they will turn out to be successful is still to be seen. So far in Poland, only a few blended projects were carried through and neither of them is perceived as a particular success. Several projects of this type are under way, if they pan out, others are expected to follow.

3. Polish Legal Framework

In Poland, PPP is governed by the Act of December 19, 2008 on public-private partnerships, as amended (the “PPP Act”). It replaced the Act of July 28, 2005, which was widely criticized for overburdening private partners with too many obligations.

According to Article 1 sec. 2 of the PPP Act, the subject of the public-private partnership is the joint implementation of a project based on division of tasks and risks between a public entity and a private partner. The PPP Act applies to such projects as: construction or refurbishment of buildings, provision of specified services or the performance of work. Within the PPP framework, a public entity may contribute the assets or provide for a part of expenditures, including financing of subsidies to services rendered by a private partner.

In all those cases where the remuneration of a private partner includes mostly the right to collect benefits generated by a PPP project, the selection of the private partner has to be done applying the provisions of the Act of January 9, 2009 on concessions for construction works or services, as amended.

Under the Polish law, a PPP contract means an agreement whereby a private partner commits to implement an agreed project at a specified remuneration and to defray in whole or in part all the expenditures connected therewith, while a public entity undertakes to collaborate for the purpose of achievement of the project goal, in particular by making its own contribution towards the project. Article 14 of the PPP Act provides for PPP in the form of a special company. Parties to the PPP contract can, therefore, establish such a special purpose vehicle (“SPV”) in order to achieve the goal of the partnership.

4. Concerns about the Level of Public Debt

Since 2008 all PPP’s arrangements are affected by the current financial crisis. As a result of the crisis, private partners get cut off from the private financing while banks become less inclined to risk their money. On the other hand, the public sector struggles with the level of debt crisis. Public entities want an end to providing loans and guarantees. In consequence, huge tensions are generated.

Although the public partner always aims to minimise its financial contribution in a PPP project (ideally, it would like the project to be financed by the private partner’s equity, received grants (EU funds) and debt financing obtained by the private partner), normally each public investment entails an increase in the level of public debt.

Of course in most cases, PPP arrangement results in a reduced public entity’s involvement in the investment, thus, the reduced costs as well. Nonetheless, almost none private-public partnership is free of expenses on the public side. Therefore, under Article 17 of the PPP Act, the total amount of liabilities which can be contracted by the governmental entities on the basis of PPP contracts in a given year has to be specified in the State Budgetary Act. Furthermore, financing of a PPP project from the State budget, if its value exceeds PLN 100 million, requires sign off by the Minister of Finance.

It is a general tendency observed across the world, that it is becoming more difficult to move the PPP project off balance sheet. The regulatory framework and accounting standards are getting tight. Nonetheless, in Poland under Article 18a section 1 of the PPP Act, liabilities arising from a PPP contract do not influence the level of public debt and deficit of public sector, as long as a private partner bears most of the risks of construction and most of the risks of availability and/or the risks of demand.

By reason of concerns about the level of public debt, public entities look for a financing method, which will enable them to participate in PPP projects without increasing the level of public debt.
obtains financing for its investments.

5. Financing PPP Projects

Forfaiting is a finance service (similar to factoring) rendered by banks or other financial institutions, involving the acquisition of receivables due from third party (“debtor”) on account of delivered goods or performed services with discount and without recourse rights (“a forfeit”). The price for the assignment is paid in advance. As a result the receivables’ seller obtains financing for its investments.

As a rule, a financial entity (“forfaitee”) organizes and arranges the forfaiting transaction directly with a transferor of receivables (“forfaiter”). However, in most cases the forfaiting transaction requires a tripartite agreement entered into by the forfaitee, the forfaiter and the debtor. Subject to specific terms negotiated by all parties, the forfaiter assumes all the risks connected with the due payment of transferred receivables.

For rendering forfaiting services the forfaiter receives a special premium (“margin”) which depends on such factors as: the discount rate, grace period (to cover the costs of deferred transfer of payment from the debt), the currency of transaction, and the repayment structure. A rule of thumb is the higher the risk, the higher the premium. Since the purchase of receivables takes place on a “without recourse” basis, the forfaiter takes all the risks related to the future payments and the forfaiter becomes immunized from them. If the risk of debtor’s insolvency or other debtor’s problems with proper payment of its debts is high, the forfaiter will require relatively higher margin.

6. Forfaiting under Polish Civil Code

On the grounds of Polish law, conclusion of forfaiting agreement is allowed under the principle of the freedom of contract (Article 335 of the Polish Civil Code). The transfer of receivables is performed under the assignment agreement (Articles 509–518 of the Civil Code). Pursuant to Article 509 of the Civil Code, the creditor can, without consent of the debtor, assign his claims to a third party, unless it would be contrary to the law, contractual provisions or the nature of the obligation.

By and large assignment of rights under a PPP contract is the complete transfer of the rights to receive the benefits accruing to one of the parties to that contract. The assignment of claims transfers only the rights, while the liabilities remain at the assignor. Under Polish law it is not possible to delegate the duties without a permission of the creditor. A third party may assume the liabilities of the assignor, however consent of the creditor is then required.

In the case of assignment of rights without assumption of debts, a tripartite relation is formed. The assignee acquires the rights but the assignor still remains liable for performance of the contract. Such formula is used in forfaiting schemes. The private partner’s claims under the PPP contract are assigned to the bank (“a forfeit”), while the debts remain with the private partner.

Forfaiting enables the private partner to obtain financing and improves its cash flow. The public entity may defer its payments towards PPP project to a later time, while the forfaiter acquires liabilities with an adequate discount. Payment’s risks are born by the forfaiter, therefore the discount has to be relatively high to adequately remunerate the bank for the risk-taking.

7. Financing PPP Projects through Forfaiting in Poland

Forfaiting seemed to be an effective way for financing PPP projects. Some authors emphasized the risks connected with this form of financing (presumably it obscured the actual amount of public debt). Nonetheless, given limited alternatives many local government units have no other choice. Financing procurement of public infrastructure through forfaiting was the only way to finance public investments within limits of the public finance law.

Under Article 72 of the Public Finance Act the public debt includes liabilities of the public sector stemming from the following titles: (1) outstanding securities holding claim to money; (2) contracted loans and credits; (3) accepted deposits; and (4) due obligations:

a) resulting from separate acts and the final court judgments or final administrative decisions,

b) deemed unquestionable by a competent unit of public finance sector being the debtor.

Public entities construed this Article as not including forfaiting. Seemingly, conclusion of forfaiting agreement leads to the...

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16 65% of all PPP projects in Germany are financed through public forfaiting; see: [http://www.kth.se/polopoly_fs/1.144253!/Menu/general/column-content/attachment/43.pdf].

17 Forfaiting usually concerns large projects which need long term financing (longer payment windows). Whereas, factoring is the term employed for transactions involving payment expected relatively quickly. Furthermore, unlike factoring, forfaiting is connected mainly with international transactions (export/import of capital goods).


19 Connected with the interbank interest rate (e.g. LIBOR).

20 According to the International Forfaiting Association, IFA, discounted receivables typically have maturities over medium terms of 3 to 5 years they can be as short as 6 months or as long as 10 years.


23 See: M. Bittner, Wpływ transakcji partnerstwa publiczno-prawnego na długi i deficyt jednostki samorządu terytorialnego, Samorząd Terytorialny, 2011/1.2,


assumption of long term liabilities (imputed loan), but which are due and payable at a later date. According to some local entities, liabilities under forfaiting agreements should be included in the level of public debt when they are due, not earlier on.

7.1 An Example of Forfaiting Scheme

One of the most famous examples of using forfaiting as a method of financing PPP project was the project entitled: The construction and modernization of local roads – commune and county carried out by local government units in Dolny Śląsk (South West Poland). The payments arising under the forfaiting agreement were supposed to be spread out over 6 years (2010-16).

Nonetheless, the Regional Accounting Chamber decided that forfaiting is similar to a long term loan and should be taken into account when calculating the level of public debt. Świdnica County appealed this decision filing the complaint to the Regional Administrative Court in Wrocław. The Regional Administrative Court held that the catalogue included in the Public Finance Act is exhaustive and cannot be extensively interpreted. In particular, the Regional Administrative Court expressed an opinion that the deferred payment of liabilities excludes categorizing it as the loan. According to the Regional Administrative Court, because payments of liabilities under PPP contracts are delayed until a future time, they should not be included in the level of public debt.

7.2 Changes to Existing Regulations

However, the Act of December 16, 2010 on the amendment of the Public Finance Act brought changes to Article 72 Section 2 has been added, allowing the Minister of Finance to issue the regulation specifying the method for classifying debt titles categorized as the public debt, including types of obligations listed as debt titles, taking account of basic subject and object categories of debt and maturity dates thereof.

Under the power vested in the Minister of Finance pursuant to Article 72 section 2 of the Public Finance Act, the Minister issued the Regulation of the Minister of Finance on detailed ways of classifying debt titles categorized as the state public debt.

Under § 3 point 2 of this Regulation, the public debt includes, among others, loans and credits, including “contracts for public-private partnerships, that have an impact on the level of public debt, securities with a limited transferability, sale contracts, where the price is payable in installments (…) as well as unnamed agreements with dates of payment longer than one year, connected with the financing of services, supplies, construction works, that produce similar economic effect to the loan or credit agreement (…).”

In view of this Regulation forfaiting falls under above cited category (“contracted loans and credits”). Hence, in many cases, this method of financing loses its advantages and we can expect public entities to become more reluctant to employ it in their PPP projects. Forfaiting seemed to be interesting mainly because it allowed public entities to sidetrack requirements connected with the level of public debt. As long as forfaiting is treated on a par with loans and credits, this way of financing does not seem to be attractive.

8. Conclusions

8.1 The Scope of Possible Application

Still, in many cases this method of financing may turn out to be useful. The rescue for PPP projects brought the Act on reduction of certain administrative burdens in the Economy introducing Article 18a to the PPP Act.

The amendment allows public entities not to include in the level of public debt those liabilities arising under PPP projects in which the private partner bears most of the risk of construction and most of the risk of availability and/or the risk of demand. This Article has been introduced in response to postulates raised by entities applying the PPP Act, which called for statutory regulation of the rules for including liabilities arising from PPP contracts in the level of public debt.

Since the statutory regulation prevails over Minister’s regulations, it can be stated, that in all those cases which Article 18a of the PPP Act refers to, forfaiting has a chance to find a wider application. In other cases, the Regulation of the Minister of Finance is binding and obliges public entities to include liabilities arising under PPP contracts in the level of their debt.

8.2 Controversies Surrounding the Minister of Finance Regulation

The Regulation of the Minister of Finance is supposed to tighten the local governments’ belts. Regardless of the Regulation, it aims to give rise to a great deal of controversies. It is not certain, whether it was issued in compliance with the binding law, including the Constitutional law. There is also information, that the Regulation of the Minister of Finance might be amended allowing local government units not to include forfaiting debts in the level of their overall debts.
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Serious Challenge of Security Strategy in the Czech Republic. Conceptual Preparation of youth for Emergency

Libor Kirsch, Jaroslav Padrnos, Ivo Svoboda

Abstract

The human condition of readiness for emergencies is an effective preparation. Due to the repeal of the Act No. 73/1973 Coll., Military training by the Act No. 217/1991 Coll., the obligation of such training lost its legal support. Preparedness and related issues and challenges are the issues and challenges of the Security Strategy of the Czech Republic. Currently in the Czech Republic, after about a decade of cease, the challenge of educating school youth to protect a human under normal risks and in emergencies is gradually incorporated into the school educational process within the school lessons. During the school year 2012/2013 this preparation gains, at least in basic schools, conceptually coherent and for present a mandatory character.

Key words: emergency; biodromal conception; protection; training human; people, law.

Introduction

The protection of a human, his life and health is one of the priority objectives of the state policy in a legal democratic state. The process of achieving this objective must be conceptually coherent and must be constituted as an integral part of the discipline and education of every young generation.

In the Czech Republic, the protection of individual rights is enshrined and guaranteed by the Czech legal system and international legal instruments to which the Czech Republic was joined already as an existing legal entity, or as a legal successor of the previous constitutional bodies.

The guarantee of the Czech legal system is based mainly on the constitutional order of the Czech Republic. Everyone’s right to life and health is enshrined in the Charter of Fundamental Rights and Freedoms (Article 6, paragraph 1, Article 31 of the Charter) and the protection of these high values are further incorporated into a number of special laws, such as the Civil Code, the Criminal Law, the Integrated Rescue System Act, the Crisis Management Act, the Public Health Protection Act, the People’s Care and Health Act.

The international legal instruments mandatory for the Czech Republic should be mentioned especially the „Universal Declaration of Human Rights“ and the „International Convention on the Rights of the Child“.

The authors aim to focus the attention of experts and the general public on the extremely serious problems of conceptual education of school children to „protect a human in emergency“ in general, the need of their intention without taking in account their age peculiarities and other specifics, as an integral part of the security policy of the Czech Republic. The authors also emphasize, within the stated concept, the urgent need to pay the care and efforts of educational institutions to the patriotic education of school children, focusing on civic duties related to the national defense.

1. The Integration of Education of a Human Safety in Emergencies in Schools

1.1 The Project of the Integration of Education of a Human Safety in Emergencies into School Lessons

The training in „protecting people in emergency“ as this highly serious and multifactorial issue is called by current and already at least in academic circles accepted terminology was implanted in schools as a compulsory part of school education for the first time by Act No 184/1937 Coll. Military Training Act, lastly by Act No. 73/1973 Coll. Military Training Act.

Listed and not listed laws on military training have always been a reflection of international and national socio-political relations. Ideal (rather than ideological) concepts were both conceived as a functional symbiosis of an inextricable preparation for the defence and protection, by the current terminology words „a human in emergencies.“

Continuous preparation for the defense and safety of a human in emergencies conceptually conceived as a process of lifelong learning concept was recently regulated by Act No. 73/1973 Coll., and implemented through compulsory school subject „military training“ within the education of school chil-

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dren in schools of I.–III. cycles. This was done on the basis of the Act and the directives of the Minister of Education until the end of the school year (academic year) 1991–1992.

After the repeal of the military training by Act No. 217/1991 Coll. in the school year 1991–1992 the teaching of the subject military training in schools ended. Some topics of extinct teaching fields were integrated into the teaching of other subjects.

In primary schools they were the topics of fire safety and first aid, in secondary schools – the grammar schools – to gain knowledge in first aid remained in special-interest physical training. Departmental educational concept of necessary preparation, in case of need, for the defense of the country and for fulfilling alliance commitments of the republic and the protection of the population, however, has been neglected. This completely inadequate state was not essentially affected even by the guidelines for the organization of civil protection in schools and educational institutions, published in the Journal of the Ministry of Education No. 10–12 of 18 December 1992, concerning in particular the self-organization of civil protection of school.

The Czech Republic Government Resolution of 17th March 1993 No. 126 established new challenges for civil protection. The Minister of Defence turned to the Minister of Education, Youth and Sports of the Czech Republic for help in solving the problems in his department. The Minister of Education agreed and Main Office of Civil Protection of the Czech Republic held talks with other interested ministries and authorities – the Ministry of Economy, Health, Agriculture, Research Institute of Education in Prague, Research Institute of Vocational Education, Institute of Education and Training of the Ministry of Agriculture and the individual directors of departments of the Ministry of Education, Youth and Sports of the Czech Republic.

The Main Office of Civil Protection in relation to these negotiations started preparing the project for primary and secondary schools to include the topic „Human Protection in Emergency Situations“ in selected subjects. The project was completed in collaboration with the Research Institute of Education in Prague and approved the Ministry of Education, Youth and Sports of the Czech Republic ref SM 1054/95 of 9th June 1995.

The project was designed to verify in the selected primary and secondary schools in selected subjects, according to the existing curriculum without creating a separate subject, the opportunity to teach topics aimed at protecting humans in emergency situations that threaten human life, such as natural disasters and operational accident release of hazardous substances into the environment and at the same time to validate teaching aids and recommended content of practical exercises to verify the acquired knowledge and skills.

At this point it should be noted that the project in the spirit of the political perception of the process of releasing political tensions in the early nineties of the twentieth century as a fiction does not guarantee the maximum possible military conflict, in which the Czech Republic could participate and which still prevented the escalation of international terrorist movement, entirely disregarded the preparation for homeland defense and also the protection against terrorist attacks. The state listed above, de facto, with few exceptions, applies up till now.

1.2 Implementation of the Project

The project was implemented in 1995–1997 in three phases.

1.2.1 The first phase of the project

The first phase took place from January 1995 to August 1996 and included the preparation of the experiment. It consisted both in the material and technical preparation of the experiment (in the creation, production and distribution of teaching aids), and in the preparation of professional personnel representatives of school-teachers and advisers to the start of the experiment.

1.2.2 The second phase of the project

The second phase took place from September 1996 to June 1997 and included experiments in 71 state schools and private schools (4 secondary grammar schools, 1 social-legal academy, 1 secondary engineering school, 3 secondary vocational training schools, 2 secondary vocational schools, 54 secondary medical schools and 6 primary schools), 3 of which were religious schools and 3 private schools.

The thematic block „Human Protection in Emergency Situations“ was divided into four separate topics:

„Human Protection in Emergency Situations“ – the topic recommended for classes in civics. The topic was a motivation for entering the field as such.

„Natural disasters“ – the topic suggested according to the type of schools, first of all for classes in science, geography and similar subjects.

„Accidental release of hazardous substances“ – the topic recommended for classes in chemistry and according to the type of schools to the thematically similar subjects.

„Radiation accidents at nuclear power plants“ – the theme was recommended for classes in chemistry or physics.

The cross point of all the topics were the principles of human behaviour during floods, fires and operating accidental release of hazardous substances into the environment.

Any school that was enrolled in the experiment was assigned by a professional advisor out of officials from the regional office of civil protection, department of defence and protection of the district authorities, municipalities of cities and civil protection training centers.

In some regions, schools provided considerable assistance to civil associations-Association of CO Czech Republic, Czech Red Cross and the Union of volunteer firefighters. Their members mainly helped to organize practical exercises.

1.2.3 The third phase of the project

The third stage is dated July 1997 and December 1997. Its subject was to evaluate the experiment.

The experiment was considered useful and beneficial by an overwhelming majority of schools. The results of the survey showed that 226 teachers (88.6%) had agreed with the incorporation of issues of human protection in emergency situations into teaching, 189 teachers (74.1%) suggested teaching selected topics from the issue of „Human Protection in Emergencies „ being implemented into teaching at primary and secondary schools unchanged, 37 teachers (14.59%) agreed after recasting
some aids and only 4 teachers (1.6%) proposed to abandon the teaching of all the proposed topics, 25 teachers (9.8%) did not respond.

Comments and knowledge of teachers can be generalized as follows:

• a wider range of devices and specific videos lacked – all was on one tape (this comment was subsequently observed and a number of videocassettes substantially expanded),
• the diversity of approaches of the students – topics concerning the territory, or extracurricular interests of students (young firemen...) encountered a greater understanding and interest of students,
• the time constraints for the robustness of the topic was manifested (e.g. natural catastrophes and natural disasters),
• the big demand on the alignment of the taught subject and the topic of protecting human subjects (e.g. physics and radiation accidents),
• in secondary schools, certain topics cannot be linked to the knowledge of the primary schools because of its low level or no knowledge on the field of military topics,
• there is a considerable fragmentation of the topic due to its inclusion in several subjects taught by different teachers,
• to include the topic „Human Protection in Emergency Situations“ respectively in a combination with other related topics in a single subject

It seems logical that anecdotal evidence from the experiment resulted in the finding of needs of re-creation of a separate special subject, respectively in a combination with other related topics.

The evaluation of the experiment with the particular proposals was sent to the Minister of Education, Youth and Sports on 27th February 1998 through the Minister of Defence.

2. The Start of Teaching Human Protection in Emergency Situations in Primary and Secondary Schools

Based on the results of the experiment the Ministry of Education, Youth and Sports issued the Instruction (ref. 34776/98-22 dated May 4th, 1999) to incorporate the topic of human protection in emergency situations into educational programs, with effect from 1st September 1999.

All schools providing elementary and secondary education acted in accordance with that guidance, published in No. 6 Bulletin of the Ministry of Education, Youth and Sports. To ensure the implementation of guidelines, the Ministry issued a methodological manual for teachers which contained instructions on how to prepare pupils for the potential impact of natural disasters and other emergency situations caused by human activity.

The separate subject, the content of which was the preparation of human protection in emergency situations has not been introduced and implemented yet. The elements of this teaching were in the range of four thematic units („Human Protection in Emergency Situations“, „Natural Disasters“, „Accidental Release of Hazardous Substances“, „Radiation Accidents at Nuclear Power Plants“) implemented in individual subjects.

Through the content of individual thematic units implemented into each subject the pupils and students are informed about the issues of population protection, basic tasks and measures of protection of the population, the problems of fires, floods and high water, landslides, atmospheric disturbances, earthquakes and the possibilities of protection in these natural disasters.

„Human Protection” is aimed at motivating students and gives a general overview of the issue of protection of the population. The students will learn the basic tasks and measures of protection of the population, the imminent danger and effects of hazardous substances and principles of action and measures ensuring the protection of human health in the event of a radiation accident in the nuclear power station.

The headmaster of the school decides the layout of the topics to subjects and determines the specific content of education at each grade and subjects and also decides the implementation, organization and form of practical exercises. Topics are included in the articles and thematic blocks that are close to them in terms of content. The issue of human protection in emergencies (civil protection) is introduced to the pupils in primary schools and in secondary schools the findings obtained are repeated and deepened.

Minimum level of education in a given topic was not determined.

After discussing the topics, the guidelines recommend to carry out practical exercises to validate the acquired knowledge and skills by classes within the year or within the school. The content, method and time range of practical exercises was decided by the headmaster. When organizing a course of practical training, it was possible to use the assistance of experts from the Czech Red Cross, Association of Civil Defence of the Czech Republic, Fire and Rescue Service and so on.

Fulfilling the instructions with the Ministry of Education, Youth and Sports, to include the topic of human protection in emergency into education in 2002, 82 schools were certified by the Czech School Inspection. Inspectors have found mainly consequential, substantial findings:

• lack or complete absence of practical visual aids,
• issued and recommended teaching aids are high-quality and if they are available to schools, they are fully utilized, nevertheless for the need of teaching at individual schools they are distributed in insufficient numbers,
• insufficient number of actively prepared and trained teachers on the issue, only a small number of teachers had the opportunity to attend short courses of training facilities of Fire Rescue Service of the Czech Republic
• significant differences in attitude of school headmasters in assigning topics in curricula and subjects,
• the results of an anonymous questionnaire showed weaker knowledge of evacuation warning signal, then a good knowledge of the acting in the case of floods and knowledge of important phone numbers,

Substantial changes in the understanding of the need to deal seriously with the protection of the population occurred in our country gradually. Since 1st January 2001 a new legislation
came into force, in particular the Act No. 239/2000 Coll., The Integrated Rescue System and Amendments to certain laws, and Act No. 240/2000 Coll., Crisis Management and Amendments to certain laws (The Emergency Law). The state administration in civil protection matters was transferred from the Ministry of Defence to the Ministry of the Interior. The General Headquarters of the Fire Rescue Service of the Czech Republic newly established as a part of the Ministry of Interior together with the Fire Brigade took over the role of the regional coordinator in meeting the challenges of population protection on the central and regional levels.

Since 1st November 2001, a single warning called a „general warning“ was adopted on the territory of the Czech Republic. The situation has changed dramatically following the transformation process in education, in particular due to the floods in August 2002.

In connection with the above changes and on the basis of the Government Resolution No. 11 of 5th January 2003 guidelines to be introduced in the protection of a human in emergency education programs in the Ministry of Education, Youth and Sports were updated. When the amendment was being worked out, the conclusions of the Czech School Inspection and knowledge of the Fire Rescue System were utilized.

With the new guideline of the Ministry of Education, Youth and Sports ref. 12050/03-22 of 4th March 2003, an amendment to the educational documents for primary schools, secondary schools, special schools and higher professional schools was issued (ref. 13586/03-22) entitled „Human Protection in emergencies.“

A significant change from the previous guideline was that in the curricula for primary schools, secondary schools and higher professional schools and curricula for special schools, a minimum range of 6 teaching hours per year in each year concerning the topic human protection in emergency was set. Even this in a directive manner specified minimum amount is to be regarded as insufficient considering the seriousness of the diversity and multifactorial interdependence of the problem, and essential needs in mastering a considerable range of knowledge and skills only on the basis of the necessary habits. The content is based on the context of teaching methodological materials prepared by the Fire Rescue Service, particularly in the revised methodological guide „Human Protection in emergencies“ that was issued by the Ministry of Interior General Headquarters of the Fire Rescue Service of the Czech Republic in March 2003. It provides the teacher with the basic information on the topics discussed, including clarification of the relation to the issue of the protection of the population. The guide also provides teachers with recommended methodology and the tests to verify the students’ knowledge.

The guide covers topics of preparations how to protect people against the effects of:

- natural disasters, including the necessary skills (code of acting in case of floods, earthquakes, large landslides, volcanic eruptions, atmospheric disturbances, fire, avalanche danger)
- the release of hazardous substances into the environment, including the necessary skills (improvised protection of people in case of radioactive, chemical and biological substances release)
- the use of explosives or the anonymous threat of the use of explosives or dangerous substances (acting after the finding or receiving a suspicious object)

The topic is classified by the headmaster, individually or in the relevant subjects under the current curricula in accordance with § 39 of Act No. 29/1984 Coll., The System of Primary Education (Education Act), as amended.

The stated goal was to acquire the topic in a reasonable age of students focused on

- the recognition of the warning signal „general warning“ and action after its announcement
- the use of emergency telephone lines and other means of communication
- the preparation of evacuation baggage, the policy for leaving the apartment and endangered area
- activities of the integrated rescue system
- providing first aid for injuries in case of emergencies.

Since 2002, primary and secondary schools have been supplied by numerous methodological materials and teaching aids to secure the teaching of subjects on protection of human in emergency. The list of documents is published on the website of the Ministry of Interior General Headquarters of the Fire Rescue Service in the section „To help schools.“

2.1 Findings of the Czech School Inspection

In January-February 2004 (from 5th January to 14th February) the inspection in 37 primary schools and 22 secondary schools was conducted by the Czech School Inspectorate, which focused on the detection of the efficiency of inclusion of the topic of human protection in emergency and first aid to education of the school programs. The subject of the inspection was to determine whether favorable personnel and material and technical conditions for learning were created, whether the topic areas were included in the curricula of schools within the specified time, whether the teaching staff chose suitable organizational forms of teaching and curriculum selection was adapted to the age of students and whether the students acquired the basic knowledge in the field of human in emergencies.

During the inspection the inspectors used the following methods: analysis of pedagogical documentation, interviews with school headmasters, searches of premises and equipment of schools, testing students’ knowledge always of one class in the highest year of the pursued school.

Analysis of the findings of the inspection carried out by the CSI came to the conclusion that compared with the identically themed inspection in 2002, the situation in preparation in emergencies of the school children has improved both in formal educational qualifications and professional competence of teachers and the classification of tracked topics in educational process of schools, as well as the material and technical equipment of schools, all of which also had a positive effect on the test methods which verified knowledge of primary and secondary schools. Results achieved in the integration of topics in the
The educational process in schools cannot be overstated and in no case considered optimal.

Ex.: To the date of the inspection, the subject was incorporated into training programs at 100% of primary school, but only 86.4% of secondary schools, including topics in respect of all years only 81% of primary schools and 72.7% of secondary schools, and also the scope of teaching in schools was different;

- most schools devoted to the topic the minimum specified range of 6 classes per year,
- only one-fifth of primary and secondary schools devoted to the topic more than 6 lessons,
- however, five primary schools (13.5%) and 3 secondary schools (13.6%) did not respect the specified range,
- in terms of organization, content and scope of teaching significant differences were found among schools, only the larger number of schools conducted classes in various subjects combined with practical actions (outdoor exercises, military day, discussions with police officers, field trips to area of the Fire and Rescue Service and nuclear power plants), the secondary schools included the subject on the agenda of sports hiking and ski tours or vocational training and accepted it as a part of training on health and safety at work.
- the necessary proportionality attention has not been devoted to individual topics, so many lessons were devoted to teaching first aid in schools, followed by the issue of protection of the population, the topic of natural disasters, accidental release of hazardous substances, the least time was devoted to the issue of radiation accidents, only the differentiation of the curriculum according to the age of the students was observed in most schools.

A positive outcome of the inspection was:

- the secondary schools included the subject on the agenda of sports hiking and ski tours or vocational training accepted it as a part of health and safety at work
- relatively wide range of cooperation between schools with different components of the integrated rescue system was restored.

Therefore it was stated that 97.2% of primary and 86.3% of secondary schools cooperated with Integration Rescue System components, which positively influenced the level of education of the topic, an extensive cooperation was recorded with the Fire Rescue Service, followed by co-operation with the Police of the Czech Republic, and the Municipal Police. The cooperation with the Red Cross Regional Hygiene Stations, Mountain Rescue Service of the Czech Republic, with the selected departments of regional offices, health centers, health institutions and other entities have rarely been reported.

### 2.1.1 The Results of the Written Test of Knowledge of Pupils (see the Table below)

<table>
<thead>
<tr>
<th>Tested areas</th>
<th>Successful answers in %</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Primary schools</td>
</tr>
<tr>
<td>use of emergency telephone lines</td>
<td>96.3</td>
</tr>
<tr>
<td>protection of population in case of release of hazardous substances</td>
<td>86.2</td>
</tr>
<tr>
<td>providing first aid for injuries in case of emergencies</td>
<td>74.8</td>
</tr>
<tr>
<td>protection of population in case of radiation accident</td>
<td>73.6</td>
</tr>
<tr>
<td>recognition of general warning signal and action after its announcement</td>
<td>73.0</td>
</tr>
<tr>
<td>components of Integrated Rescue System</td>
<td>24.4</td>
</tr>
<tr>
<td>preparation of evacuation baggage</td>
<td>21.6</td>
</tr>
</tbody>
</table>

Low percentage of 2 last questions - already one wrong answer resulted in negative evaluation

It should be noted to these results that only a theoretical knowledge of students was identified, and as you can see with just the overall average success rate of 64.3% in primary school and 65.8% in high school. However, if we eliminate the last two items (Integrated Rescue System components, preparing evacuation luggage), the overall average success rate in primary school reached 80.8% and overall success in high school reached 79.6%. And the elimination of finding the ability to use emergency lines, i.e. the ability to refer a fact or threatening to compromise the life or health, even if only in theory knowledge of the acts of self-protection in situations threatening the life and health, the success of a sample of primary school pupils reached the average of 76.9% and high school students 75.6%. Due to the high seriousness of the issues examined the result achieved, can be in no way considered satisfactory

Success rate even when the eventual training takes place and detection of practically applied knowledge and skills can be only predicted. Not to mention the habits.

### 2.1.2 Schools Suggestions and Recommendations

Inspection gave space to teachers for their opinions and suggestions. The authors consider it necessary to acquaint readers with the quantitatively processed suggestions and recommendations and give an overview:

- allocate for this topic a separate subject,
- strengthening of hours of courses in which this topic runs.
- accurately define the scope of teaching,
- provide a textbook with the issue in full,
- improve information about the supply of available learning materials,
• develop a detailed methodology of teaching,
• broaden the range of training events for teachers,
• address the issue of acquisition of new equipment,
• Provide written instructions for the operation of schools in the event of a threat,
• establish rules for cooperation between schools and the Integrated Rescue System,
• address the issue of school concerning equipment protective masks or training dummies.

The inspection, among other things, came to a significant conclusion that an appreciable contribution to the design and organization of teaching in schools to prepare a human for his protection in emergencies are teachers who previously taught military training. Results of empirical research conducted in November and December of 2010 with a sample of college youth in Brno range of 129 respondents correspond partly to the view of the inspection and fully coincide with the opinion of the teachers who participated in the survey within the school inspection performed by the Czech School Inspectorate in the months of January and February of 2004, which resulted in their suggestions and recommendations. For illustration, a brief résumé: 99.2% of respondents believe that citizens have a right to be prepared to defend and protect life, health and property. 60.5% of respondents felt serious shortcomings in the preparation of citizens to protect and defend the civilian population against threats to national security, to the extent that they feel completely, or inadequately prepared. In the causal context, it should be noted that only 26.5% of respondents are aware of their civic duties in the event of national emergency.

3. The Concept of Protection of the Population – Inherent Security Strategy of the Czech Republic

Even the highest executive of the Czech Republic is aware of the severity of the needs of the conceptual solution of the population. The concept of protection of the population and its evaluation is a part of every security strategy announced by the Government. The Government document „Security Strategy of the Czech Republic“ of 2003, in paragraph 74 sets the activation task components of the integrated rescue system and other components involved in national security and civil protection. An important, but poorly concretized, the task assigned to state and local governments in the area of public awareness as the last point below 86, and it is formulated as a special emphasis on youth education and the use of special-purpose government grants, grant policies, systems and preventive activities.

The degree of completion and the level of realization of the „Concept of protection of the population in 2006, with a view to 2015“ explore the material „Evaluation of the implementation of the Concept of protection of the population in 2006 until the year 2015“. The material evaluates the concept in setting guidelines for the protection of the population as right, but also highlights the need for incremental changes and clarifications in the various areas and the need for a broader conception of measures to protect the population. Inter alia, the evaluation material of the increase of the readiness among school youth was considered necessary. Material cites measures through which the youth is prepared for risk incidents: they are (as previously stated in this article) the instruction of the Ministry of Education, Youth and Sports to implement the topic of human protection in emergency situations in the range of 6 lessons per year in the curricula of primary and secondary schools, the handbook „Human Protection in Emergency Situations“ processed and distributed to schools for teachers and a number of other thematic books and movies, and the courses for teachers. Even the lecturers of the Fire and Rescue Service were actively involved in the preparation of teachers. In schools in the period 2003–2006 total about 10,000 educational and informative events were held.

From this it is clear, first, that the top state executive is fully aware of the seriousness of the issue being addressed, and that there is on obvious deficit of a comprehensive concept of the education of school children for protection in emergencies. It is thus evident that the lessons allocated to six lessons per school year are insufficient.

The evaluation material clearly states the insufficiency of the preparedness of the people for the defense, protection and managing of emergencies and crisis situations and expresses the need to address this problem; it recommends to prepare a program of education of the population for emergency preparedness, protection and defense. The threat of danger to Czech Republic from international terrorism should be regarded as serious. At the end of September 2006, security forces have received important information about the possible preparation of a terrorist act on the territory of the Czech Republic.

While the „Schedule of implementation of measures of protection of the population in 2006, with a view to 2015“ lacks any measures regarding the education of school children in preparation for protection in emergencies, and therefore does not, in this regard, impose the Ministry of Interior with the concurrence of the Ministry of Education, Youth and Sports any task, the „Schedule of implementation of security measures by the year 2013 until the year 2020“, imposes the Ministry of Interior with the concurrence of the Ministry of Education, Youth and Sports, the Ministry of Health and Ministry of Transport in Point No. 8 to create a program of education of the population for its safety and protection in emergency and crisis situations. According to the program the schedule should have been ready by 2010, but by the end of 2013 it has not been yet. The schedule, Section 9 imposes the Ministry of Interior, with the concurrence of the Ministry of Education, Youth and Sports, the Ministry of Health and Ministry of Transport to include the protection of people in emergencies into curricula of pedagogic faculties. This task was fulfilled according to the statement of the Government of the Czech Republic in Resolution No. 734 of 5th October 2011, although not in originally set up deadline which was the end of 2010.

You can not ignore the fundamental document „Strategy for Combating Terrorism for the years 2010–2012“ prepared in 2010 by the Ministry of Interior of the Czech Republic in terms of measures to minimize the risk and impact of potential terrorist attacks on the territory of the Czech Republic and against the interests of the Czech Republic abroad and based on „National Action Plan to Combat Terrorism – an updated ver-
An Innovative Implementation of Educational Elements of Training for a Human in Emergency in the Framework of Educational Program for Basic Education (FEPPE)

At the beginning of the school year 2012/2013, by the Ministry of Education, which was the guarantor of interdepartmental activities of the expert committee consisting primarily of workers Interior Ministry and Rescue Service of the Czech Republic, worked out much more thorough material dealing with the preparation of pupils of the first school cycle (primary education) in the issue of „protecting the human to the protection for ordinary risks and emergencies“, whereby the original Framework Educational Program for Basic Education was revised in the necessary extent.

After studying the amendments incorporated into the current proposal of FEPPE by its revisions, you can appreciate the fact that since 1991, it is the first legal present departmental binding document dealing with education of human for protection in normal risks and emergencies. Departmental materials published after decades of the vacuum lasting since 1991, had the character of methodological materials or recommendations whose severity was at least controversial and the non-acceptance was virtually unenforceable and untraceable.

Material for the first time since the repeal of Law No. 73/1973 Coll., albeit marginally, but still also mentioned the issue of national defense.

The issue of „protection of human for protection in normal risks and emergencies“ is incorporated in the individual educational areas, with respect to the core competencies of their characteristics, target focus, formulation of curriculum content and expected outcomes.

Significant enrichment of the issue can be seen in the educational area Man and His World (Part C, 5.4 FEPPE), Man and Society (Part C, 5.5 FEPPE), where the target also pays attention to the requirement of „exploring issues of national defense“ as one of the sub-elements shaping the training and development of key competencies, and especially in the educational area of Human and Health (Part C, 5.8 FEPPE). Here I demonstrate the content of the curriculum for the 2nd level „risks to health and their prevention“, in educational content of the educational field of health (5.8.1) – Human Protection in emergencies – protect the population in the threat or occurrence of extraordinary events, prevention of emergencies, classification of emergencies, warning signs and other ways of warning, the basic tasks of civil protection, protection of self and the environment during emergency evacuation activities after emergencies, terrorism. Certainly valuable enrichment of the curriculum is also the second degree course „Physical Education“ (5.8.2) in teaching-tourism and nature-on learning elements: survival in nature, orientation, shelter, emergency shelter, providing water, food, heat, basic utilities.

The material in question is undoubtedly beneficial for teaching practice of basic education in preparing people for their protection for ordinary risks and even for emergencies. Still quite timid and unspecified concerns are also in the issue of national defense. Materials to some extent fill the legal and factual vacuum created by the abolition of the Act No. 73/1973 Coll. Military training in 1991. It is a clear reflection of the society in the preparation of the population not only to situations arising in everyday life, but especially in situations entailing the extraordinary events of various origin, nature, duration and intensity. In the context of permanent urgency of the age and time continuous training of human for all conditions of life in which he lives and will live, which can of course only be anticipated, to a certain extent but with the obligation of the state prediction based on historical and current experience, there is still up to date account of designing a special subject. According to the authors of the desired account, even if it brought with it the need to address issues such as exemplary solving of hours for the course and teacher qualifications and perhaps, even without any consideration of the establishment of such a subject, which would appear as an optimal solution to the problem of teacher qualification establishment of the Teacher Certification Study on faculties, in relevant teaching qualification session for the current educational concept, it should be considered of whether an intrusion of the issue in various educational areas and subjects and the specifics of all the teachers are and under what conditions they will be able to qualify students in the preparation.

Authors due to the multifactorial nature of the preparation to protect human in normal risks and emergencies suggest it to be designed as an educational curricular topic, the dominant feature of this topic is the intersection (cross-section) through all educational areas, but also the intersection (cross-section) through all defined cross-cutting topics, namely personal and social education, education for democratic citizenship, education for thinking in European and global coherence, multicultural, media and environmental education.

However, with the above conceptual considerations can therefore be concluded that the adjustments made in FEPPE can be evaluated as positive, though not desirably conceptually complex.

Conclusion

The issue of human protection in crisis situations arising from extraordinary events of different nature, whether arising...
from human activities (industrial accidents, terrorism), or due to the action of natural forces, and a sophisticated conceptual preparation on human behavior and conduct of these situations is one of the very important tasks of the society. The nature and seriousness of the danger to life, health and property of citizens and the environment from threatening emergencies clearly require continuous training and involving all sections of the population. Since 1991, over ten years to prepare people for emergencies was not even partially regulated by any special law. Till the beginning of the school year 2012/2013, the preparation of school youth (school and school facilities Land II. Cycles) for emergencies was not adjusted in a binding way. Up till now, however, there have been no special preparation on the legal basis and mostly it is not a part of the preparation of university students. Despite these we can register at least a partial satisfaction that this preparation is of interest to the Government of the Czech Republic and the Ministry of Education.

The legal basis and mostly it is not a part of the preparation of teaching in this area, as it is clear from the opinions of teachers, actors of the experiment from the years 1995–1997 and on the opinions of teachers who were, in early 2004 from a position of teaching human subjects protection in emergencies, embedded into subjects of interest to the Czech School Inspectorate, which focused on detection of the efficiency of incorporation of the issue and first aid in schools programs. Findings of the experiment from the years 1995–1997 and fairly extensive themed school inspection from 2004 bear out the authors of this study; in addition to the stated that there is a need for specialized teachers to teach (yet again introduced) departmental course of instruction, encompassing an integral education to meet civic duties in defense of the country and to protect the man in emergencies, but also as advisors trained other teachers in the implementation in question of topics and thematic elements in the educational process in different educational areas of other subjects. This requirement can be drawn from the results of empirical research opinions of university students, implemented in late 2010.

In conclusion, the authors also present their views on the desirability of professional discussion regularization of conceptual preparation of school children to protect man in emergencies, including targeted training to perform civil duties in defense of the homeland, by a special law. The author’s opinion is leaning on the fact that the current trend incorporating the issue of „protecting human in normal risks and emergencies” in the „Framework of Educational Programs” is the trend of highly conserved serious social relationship in legal subordinate level, whose liability is not derived from the law, but from the reviews of the current state representation, which in potentially undefined future may be fundamentally different.

Used Sources and literature


Pokyn Ministerstva školství k začlenění problematiky ochrany člověka za mimořádných událostí do vzdělávacích programů a Dodatek k učebním dokumentům pro základní školy, střední školy, speciální školy a výšší školy – ochrana člověka za mimořádných událostí Ministerstvo školství, mládeže a tělovýchovy č. 12050/03-22, v Praze 4. 3. 2003.


Length of Service (Experience) and its Impact on youth Employment in Lithuania

Ingrida Mačernytė Panomariovičienė

Abstract

The unemployment rate for youth up to 25 years age is the highest not only in Lithuania, but throughout all EU as well. Common reasons of youth unemployment are the lack of professional training, work experience or the mismatch between vocational knowledge and labour market needs. Lithuanian Labour Law regulations provide employees with applicable rights, additional benefits or guarantees in respect with their length of service (experience). Accordingly, the question then arises whether, in respect with current market conditions, these incentives and guarantees do not limit other constitutional and human rights, i.e. right to work, especially for young people. Therefore, with the help of systematic, documental analyzes and comparative methods, this article will carry out the analysis of Lithuanian labor laws and regulatory acts, which impede or otherwise limit youth employment, and propose suggestions to abolish them. This article analyses application of provisions related with the length of service, i.e. in determining the payment, additional annual leave, period of notice of the termination of an employment, the right of priority to retain the job in case of redundancy and determining severance pay.

Key words: length of service (work experience), loyalty at work, termination of employment, social guarantees.

Introduction

The unemployment rate for youth up to 25 years age is the highest not only in Lithuania, but throughout all EU as well. According to the data of the Statistics Lithuania, in the period of 2008–2012 the highest (over 20 percent) unemployment rate by age group was among persons aged between 15 and 24: in 2008 the rate reached 27.6 percent (persons aged between 15 and 19); in 2009 – 52.7 percent (persons aged between 15 and 19); in 2010 – 60.9 percent (persons aged between 15 and 19); 3.2 percent (persons aged between 20 and 24); in 2010 – 60.9 percent (persons aged between 15 and 24); and 20.8 percent (persons aged between 25 and 29); in 2011 – 49.6 percent (persons aged between 15 and 19) and 30.8 percent (persons aged between 20 and 24); in 2012 – 43 percent (persons aged between 15 and 19) and 25.2 percent (persons aged between 20 and 24). As it can be seen, in 2010 special attention has been drawn to the group of persons aged between 25 and 29 with the unemployment rate above 20 percent. Common reasons of youth unemployment are the lack of professional training, work experience or the mismatch between vocational knowledge and labour market needs.

The length of service is applied rather widely and not always reasonably. Some authors (for example, T. Davulis, M. Löwish, G. Thüsing, M. Schlachter and others) even admit that differentiation of employees by the period of service is considered as unfair.

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2 According to the data of the Statistics Lithuania, in the third quarter of 2011, the highest youth unemployment rate was in Spain – 45.8 percent, in Greece – 45 percent, in Slovakia – 33.6 percent, in Lithuania – 31.7 percent. (in the 1st quarter of 2013 – 22.7) In Latvia youth unemployment rate has reached 28.2 percent, in Estonia – 22.2 percent. [interactive]. Access on Internet: <http://www.stat.gov.lt/lt/view/?id=9343> (accessed 9 June 2013). Workers under the age of 25 are considerably more disadvantaged in their contractual arrangements: 42% were temporary employees in 2010 according to the LFS, compared with 11% of workers aged 25 and over. <http://www.eurofound.europa.eu/pubdocs/2013/31/en/1/EF1331EN.pdf>(accessed 9 June 2013).
3 A hint to include persons of such age to the list of socially vulnerable might be found only at the end of 2012: “ideally the Youth Guarantee should take effect as early as possible, i.e. at the point of registration at a job centre <...> The Committee recommends that the Youth Guarantees also include young adults aged 25–29. Opinion of the European Economic and Social Committee on the "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a job-rich recovery" COM(2012) 173 final. 19 November, 2012, Brussels. [Speaker Gabriele Bischoff].
indirect age discrimination. On the other hand, the Directive 2000/78/EU allows Members to provide exceptions for special conditions, including a minimum age, necessary professional or work experience, in pursuance of employment, self-employment or youth getting certain privileges at work, promoting their professional integration and ensuring their protection. The requirements to have a minimum age or relative experience are in a part related with young person’s protection against excessive workload or complicated work assignments which require additional responsibility. However, the exceptions, which are permitted under the Directive, must be coherent and based on the state policy of youth employment; in order such restrictions would not become a nuisance to get employed, seek career and/or remain in labour market. On the other hand, the promotion of youth integration should not turn to be an obstacle in respect to other socially vulnerable groups, for example elderly persons, persons at pre-retirement age and other.

In accordance with the Article 30 of the Labor Code of the Republic of Lithuania (further after LC), length of service includes periods which are determined by labor laws, other regulatory acts and collective agreement and have influence on relative labour rights, additional guarantees or privileges. The analysis of Lithuanian labor law acts identified the following applicable rights, guarantees and privileges related to the length of service: countable wage (for example, rate of payment depends on experience (length of service), bonus for the period of service (experience) single premium if you have worked for a certain time (length of service) for the same employer and others; the employee with more than 10 years of service has a right of priority to retain the job when an employee is dismissed without any fault on his part (except for the cases when a person is entitled to the full old age pension or is in receipt thereof) (Subparagraph 3 Paragraph 1 Article 135 LC), severance pay (the amount varies according to the continuous length of service of the employee) (Article 140 LC) and for the loyalty to the enterprise employees are provided with other guarantees, for example, additional annual leave (Article 168 LC) or a leave to improve one’s qualification (Paragraph 1 Article 38 of the Law on Civil Service (further after LCS)) and etc. However, none of these guarantees or privileges is related with a work quality of a certain employee, his qualification or skills. The purpose of this article is to invoke systematic research, document analysis and logical methods and answer the question whether the length of service, which is defined in the regulatory acts of labor law, establishes conditions for young people to get employed, to work and allows to reduce the unemployment.

### Wage Depending on the Length of Service

Nobody disputes that acquired experience allows employees to perform their duties better. As T. Davulis notes, the wage for accomplished job functions is increasing over the years. However, according to G. Thüsing, the representatives of most professions much earlier best perform their job functions than the age of retirement. Meanwhile, person’s wage reaches highs only before the retirement age. Thus, pay for work can not directly depend only on the acquisition of the length of service. It should be taken into consideration, that a new employee may bring new knowledge, experience and skills from another company, employment place or even individual work. Therefore, there is no sense to pay higher wage or provide other guarantees only after an employee has worked a certain number of years (length of service) at the same enterprise or agency. J. Chandler states that in respect of time the competition and the conflict of interests between younger and older employees are inevitable. On the other hand, it is faulty when the law or other legal act obliges the employer to pay benefits and to provide other guarantees related to the acquired length of service only after the appropriate number of years, since very often the work of a particular person, his experience and skills have no surplus value for the overall results of the enterprise, agency or organization. As after the analysis of the length of service and wage impact on the working efficacy (Belgium), other scientists (for example, An De Coen, Anneleen Forrier and Luc Sels) observe that the work experience increases with age. Although, in the sense of diversity there is on the contrary, since the experience might be concentrated only in a specific work area. Thus, working efficiency may decrease with age. Accordingly, there has been made a conclusion, that the relationship between experience (age) and working efficiency coincide with the reverse U-shape. Consequently, the acquired knowledge and skills are sufficient only to a certain limit of working age, while afterwards work experience decreases over years. Therefore, it might be stated that such regulation of wage when it depends on the period of service does not encourage young employees, does not motivate them, and such workers will be forced to look for the
job elsewhere if they do not get recognition for their results in time. Thus, in order to attract good, productive specialist, the employer should have the ability and discretion of extra payments for merits and not for the time spent at work.

Annual Leave Depending on Seniority

Another privilege which is applied to the employees depending on the length of service is additional annual leave. It is granted for a long uninterrupted employment at the same workplace (Paragraph 1 Article 168 LC). The Government of the Republic of Lithuania (further after Government) does not only determine the duration of additional annual leave, the terms, conditions and procedures for providing it (Resolution No. 940, 18 July, 2003 The Government), but also provides definition of “long uninterrupted employment at the same workplace” definition of “uninterrupted employment in a concrete enterprise, agency or organization” (Paragraph 1, Article 30 LC), when the length of service is calculated for persons working in enterprises, agencies and organizations financed from the state and municipal budgets. The latter long uninterrupted period of service includes pregnancy leave and parental leave before the child has reached the age of three. Meanwhile, according to the Subparagraph 3 Paragraph 1 Article 170 of LC\(^{15}\), the parental leave is not included in the number of years entitling the employee to annual leave. The Resolution of the Constitutional Court of the Republic of Lithuania (further after CC) 7 December, 2007 stated that definition of “uninterrupted employment at the same workplace” in Subparagraph 2 (edit 4 June, 2002) Paragraph 1 Article 168 of LC (edit 4 June, 2002 and 12 May, 2005) is not identical to the definition of “uninterrupted employment” in Subparagraph 4 Paragraph 1 Article 30 of the same LC. This Resolution has also noted that the period of service on which depends the calculation of additional annual leave does not include the time when a person, who has worked in one enterprise, establishment or organization, has been transferred to another workplace by agreement between employers or on the other grounds which do not terminate the period of service. Accordingly, it can be said, that the length of service may have a different objective purpose: in one case, for example, in order to get superannuation it is calculated in one way, and for the annual leave in another.

The analysis of Lithuanian Law has revealed discriminatory provisions related to the inclusion of the length of service (service) for a period when a person has been on parental leave. According to the above mentioned Subparagraph 3 Paragraph 1 Article 170 LC, this period is not included in the calculation of additional annual leave\(^{16}\), when, meanwhile, in civil service it is included (Paragraph 1 Article 42 LCS).\(^{17}\) Accordingly, there are doubts whether employees from enterprises, agencies and organizations financed from the state and municipal budgets get equal opportunities. On the other hand, this provision is relevant for young employees who have created a family and have children, but do not want to lose guarantees related with work. Therefore, the young people with the children under 3 years will be encouraged to work if these provisions are adjusted and assimilated to civil service guarantees, since now the provided provisions are not intended to promote youth employment, especially if one wants to match work and family duties.

Period of Notice of Termination of Employment Depending on the Length of Service

In case of termination of employment by the initiative of the employer without any employee’s fault, the law provides a period of notice. According to the Convention No. 158 of the International Labour Organization (further after ILO), a worker whose employment is to be terminated without his guilt shall be entitled to a reasonable period of notice. Main purpose of notice-period is to give an employee some time to adapt to forthcoming termination of employment and find or arrange an alternative work. The longer is the notice-period, the stronger is the protection from dismissal\(^{18}\). Practice on this issue is very diverse in Member states: from one week to 3 month. In Lithuania there are two notice-periods – 2 months and 4 months. The longer notice-period is applied to the group of employees who will be entitled to the old age pension in not more than 5 years and persons under 18 years age. However, regardless their education young people without work experience are not provided with such guarantees. In Case C-555/07 Seda Kücükd-

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\(^{13}\) Resolution No. 497 by the Government of the Republic of Lithuania "On Approval of the Duration of the Additional Annual Leave and the Conditions and Procedure for Granting It". Official Gazette 2003, No. 39-1787 with all later Amendments.

\(^{14}\) Resolution No. 940 by the Government of the Republic of Lithuania "On Approval of the Procedure for the Calculation of the Length of Service at the Enterprises, Agencies and Organizations Financed From the State and Municipal Budgets". Official Gazette 2003, No. 73-3374 with all later Amendment.

\(^{15}\) Work year, for which annual leave is granted, includes <...> time during which in respect with the law employee maintains his work place (position) and gets scholarship or other benefits, except the time, when the employee is on parental leave.


\(^{17}\) The length of service also includes annual, maternity leave, maternity leave, parental leave before the child reaches the age of three, <...>, study leave, according to the Articles no 37,38 and 39 of this Law, the periods of provided vacation time and sick leave. Size of bonus identified in Subparagraph 1 Paragraph 1 Article 25 of this Law and the duration of additional annual leave identified in Paragraph 2 Article 36 of this Law are determined in respect with the length of service. // Law on Civil Service. Officiel Gazzette, 1999. No. 66-2130.

veči v Swedex GmbH & Co. KG the European Court of Justice (further after ECI) has rejected application to adopt preliminary decision on court’s argument that Subparagraph 2 Paragraph 2 (‘calculating the seniority does not take into account the length of service of employees under the age of 25’) of the Article 622 of legislation BGB, which defines notice-period of termination of employment depending on the length of service at the enterprise, reflects legislator’s opinion that young employees easier and quicker respond to job loss in general and they might be required greater flexibility. After all young employees are applied a shorter period of notice of termination of employment what facilitates their recruitment and provides more flexibility in personnel management.19 According to German Law, notice period depends on the length of service, for example, after 2 years of service a person has to be noticed before one month, after 10 years of service – before 4 months, after 20 years – before 7 months. According to advocate Bot, the purpose of the longer notice-period is to protect the employees whose possibilities to adjust and change the qualification decrease if they have worked at one enterprise for a long time. If the employer decided to dismiss the employee who is working at the enterprise for a long time, the longer notice-period undoubtedly allows this employee easier to adapt to a new professional situation, in particular, to look for a new job and contributes to the objective related to the employment policy and labour market as it is determined in Paragraph 1 Article 6 of the Directive 2000/78.20 Considering the above expressed issues and in pursuance to make equal guarantees for the current most sensitive groups in EU labour market, i.e. persons aged from 19 to 29 years and persons with less than 5 years till full old age pension, i.e. 55–59 years, it would be appropriate to provide a longer notice period of termination of employment on the initiative of the employer for the persons who recently started their career (for example, for those who work at the enterprise longer than 3 years or persons aged from 19 to 29 years). We would suggest Lithuanian Law to provide those persons with the longer notice-period and make it equal to the period which is provided to the persons who will be entitled to full old age pension in no more than 5 years or change notice’s of termination regulation imposing period depending on the length of service.

Exceptions in the Right of Priority to Retain the Job in the Case of Redundancy

In terms of legal regulation, which provides the right of priority to retain the job when the employee is terminated from work without being guilty, according to the regulatory acts of Lithuanian Law, besides socially vulnerable groups21, which might have difficulties to find the job quickly, are included persons with more than 10 years of service. In author’s opinion, this category of employees is no how connected with the number of unemployed of this group in the country. Normally such employees find another or alternative job more easily, therefore, there can be doubts about the excessive protection of employees of this category against the termination of an employment. Paragraph 2 Article 135 LC provides that this privilege is applied without exceptions to those whose service at work is at least 10 years and does not give a possibility to strengthen human capital (potential) in the enterprise, for example, acquire staff with better qualification and skills, but with service of only 5 or 7 years at the enterprise. On the other hand, as the scientists have noticed, differentiation of the length of service should be justified if there might be stated that the employer received benefit for loyalty, motivation and experience.22 And it goes without saying, since the employer seeks to reserve only those employees who work efficiently and productively. Therefore, the author suggests to delete Subparagraph 3 of the Paragraph 1 of the Article 135 of the Labour Code, especially when Subparagraph 5 Paragraph 1 Article 135 LC provides a possibility to get into the list if the employee has such right prescribed by the collective agreement.

Severance Pay

Some authors (V. Mačiulaitis, 2013) attribute severance pay to compensatory allowances, which compensate the loss of certain revenue; others (I. Mačernytė-Panomriovienė, 2008, 2003) attribute it to guarantee payments, which are associated with employment policy, when partially the employer contributes both by directly paying the severance allowance for the dismissed employee and contributions to Employment Fund23. Both V. Mačiulaitis in his dissertation (2013),24 and the thematic report of experts of European Labour Law Network

19 Judgment of the Court (Grand Chamber) of 19 January 2010, Case-C-555/07 Seda Kücükdveci v Swedex GmbH & Co. KG. Clause 35 and 39.
21 International labour standards and EU documents provide protection to certain categories of employees, which has to be implemented by the Member States: employee’s representatives/delegates (Article 10(3) Directive 2002/14/EC and Article 7 Directive 2009/38/EU); pregnant workers (Article 10 Directive 92/85/EEC) and workers on parental leave (Directive 2010/18/EU on Parental Leave Clause 5 (4)) and etc. All Member States have special protection for employees who might be discriminated: Article 1 (c) Directive 2000/43/EU and Article 14 (1) (c) Directive 2006/54/EU.
23 Those links are confirmed in legal regulatory acts: according to the Paragraph 3 Article 6 of Law of Unemployment Social Insurance of the Republic of Lithuania, the unemployed person who has been dismissed from work (service) and has been paid severance pay or compensation by the agreement between the parties is granted the unemployment insurance benefit not earlier than the number of calendar months after the termination of the employment contract for how many months severance pay or compensation he has been paid. Official Gazette, 2004, No. 4-26.
the longer is the period of service, the greater is experience and during the search of the new job it only facilitates the process of employability.

Accordingly, considering the changed situation in the labour market and especially youth unemployment, I would suggest to apply the provisions of ILO Convention No. 158 in a way that the amount of severance pay would not depend on the length of service, especially in cases when the reasons of an employee’s dismissal are not related with qualification (persons who have started the career for the first time, have no skills and experience), health, disability or on the other grounds (for example, retirement age), which may cause certain limitations and difficulties in search of a new job. Therefore, in author’s opinion, if the employee is terminated of an employment without any fault on his part, the calculation of severance pay should be individual, while overall legal regulation should provide a minimum allowance, for example, 2 AMW. Meanwhile, the amount of severance pay for persons of certain socially vulnerable groups, who have more difficulties to find a new job, has to meet the proportions related with the period of transition from former to a new job.

Another currently relevant problem in Lithuania is the division of severance pay for public sector workers and delayed payments. The Amendment of Paragraph 2 Article 140 LC on 17 November 2011 and the Amendment of the Article 41 of LCS have not only differentiated the legal regulation in order to overcome the consequences of post-crisis period, but also do not encourage the employment of the employees who have been dismissed from the enterprises, agencies and organizations financed from the state or municipal budgets, the owner of which is the state or municipality, or Central Bank of the Republic of Lithuania. The severance pay shall be paid only after a month of the termination of an employment and payable in equal monthly installments. The worker is not interested in the search of the new job in public sector until he is paid the full amount of severance pay, since he will lose the rest amount of severance pay. The payment of severance pay is stopped if a person starts to work in a position of public servant or is employed in the enterprise, agency or organization financed from the state or municipal budget, the owner of which is the state or the municipality, or Central Bank of the Republic of Lithuania.


26 According to the Subparagraph 9 Paragraph 1 Article 44 of the Law on Civil Service, when the position of the civil servant is being canceled, the dismissed civil servant shall be paid the severance pay in the amount of the average wage which civil servant has received before his position has been canceled, in respect with the length of his service in the institution or agency funded from state or municipal budgets: until five years – 2 months; from five to ten years – 3 months; from ten to twenty years – 4 months; over twenty years – 6 months. The civil servant is paid the severance pay in the amount of 2 his average wages, when a worker is dismissed from a position because under the court’s decision a former civil servant is returned to service in this position or it is proved that the employment of the civil servant has violated the requirements of the Law and it is impossible to eliminate these violations; and when according to the laws it is identified that civil servant cannot hold his position because of disability or work incapacity; the civil servant might be also dismissed from his position by the decision of the person who has employed him, if because of temporary disability he cannot hold his position for more than 120 successive days or longer than 140 days within the last 12 months. These periods do not include time during which civil servant has received social insurance benefit for sick leave to care for sick family members and illness benefit due to communicable disease outbreak or epidemics. See Official Gazette, 2002, No. 45-1709 (with later Amendments).

27 For example, the severance pay for the officers of the State Security Department is increased in the following manner: for the officers with more than 5 years period in the Security Department it is increased one and a half times, with the period of more than 10 years – twice, with the period of more than 20 years – three times. See. Law on the Approval of the State Security Department Statute. The State Security Department Statute // NEWS, 2002, No.73-3101.
Conclusions and Recommendations

The legal instruments that encourage the employment of young people would be the following: young people without skills and experience should be provided a longer notice-period if they are dismissed from work without being at fault on their part; laws should not regulate the calculation of the length of service only on the basis that an employee has worked a certain number of years, for example, the settlement of wage bonuses, the calculation of additional annual leave or severance pay, and the right of priority to retain the job in case of redundancy and others. Therefore, in my opinion

- Bonuses for the period of service should not be applied since they discriminate young and perspective persons who perform their functions and work better and quicker, but do not have work experience. Such bonuses might be granted in respect with the qualification, skills and experience which an employee has brought from another workplace or self-accumulated.

- The provisions on the inclusion of the length of service for the additional annual leave are acknowledged as discriminatory since the parental leave before the child has reached the age of three is included in the calculation of length of civil service, while for the other persons who are employed by LC this period is not included.

- Notice periods of the termination of employment should not discriminate young persons, because they also meet difficulties in finding a new job quickly. Therefore, it is suggested to provide young people aged between 19 and 25 years (alternative – 29 years), who have just started their career, with a longer notice period in accordance with the term established in Article 129 of LC.

- The right of priority to retain the job in case of redundancy (Subparagraph 3, Paragraph 1, Article 135 LC) should be abolished for the employees with more than 10 years of service as employer loses a possibility to remain the best and the most perspective young employees with less than 10 years of service at the enterprise.

- Severance pay and its amount should not depend only on certain length of service. The author believes that it should not be related with the compensation for the loss of job, but with the aim to get employed after the dismissal.
Public Interest in the Matters of the Restitution of Property Rights in the Lithuanian Case Law

Egidijus Krivka

Abstract

This paper presents the research results and conclusions drawn from the analysis of the public interest in the Lithuanian case law, in the matters of restitution of property rights to the existing real property. This article reveals the objective criteria applied by the Lithuanian courts in deciding the boundaries of public interest, and attribute interests to the category of the public interest, the rules applied by these courts when solving the collisions of private and public, or several different public interests in civil and administrative matters of restoration of property rights to the existing real property. The paper also addresses the issues of procedural legal capacity in the matters of defence of public interest and the problematic aspects of public interest as the assumption of the right to apply to court or as a condition of satisfying the claim.

Key words: public interest, restitution of property rights, public interest criteria, public interest priorities, case law.

Introduction

Public interest is the important category not only in social and political but also legal terms, however the legislation is lacking legal norms, which would present the definition of this concept. Such a situation creates conditions for scientific research to determine the content of this concept, to discover the objective criteria expressing the public interest, exploring the arguments that lead to the granting of priority to the public interest. In Lithuania, surveys of legal scholars and practitioners also suggest that the need for the research of legal science in the development of the doctrine of public interest is very relevant. The work in this field is being carried out by researchers of the Law Institute of Lithuania which will implement the project in 2013–2015 „Problems of Identification of Public Interest in Lithuanian Law: Criteria and Priorities“.

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The restitution of property rights in the aforementioned scientific research programme was chosen on purpose, to formulate the conceptual guidance that will help to focus in defining the public interest. The processes of restitution of property rights in Eastern and Central European countries have been and are an important object of scientific research. Scientific work was mainly focused on the political and legal assumptions of the restitution of property rights and the positive law regulating the process of restitution, on the assessment of the effects of restitution to the interests of separate groups of persons, such as former owners and current owners of property, also the interests of the entire society, seeking to identify the characteristics of interaction between the restitution and the state legal system, policy and the economy, proposing potential solutions for the legal regulatory problems of the restitution of property rights.

Such legal research studies are often based on the comparative method to evaluate the restitution models in several selected countries. However, there is very little scientific work done

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in this area, dedicated to the analysis of case law of the restitution of property rights in different countries. Perhaps one of the reasons why this happened was that it is not entirely clear from what aspect we should explore the decisions of courts in the area of the restitution of property rights. Of course, decisions of constitutional courts evaluating the constitutionality of the laws regulating the restitution of property rights did not go unnoticed. This is quite understandable, since the constitutional jurisprudence not only determined the further development of the restitution of property rights but also enriched the legal doctrine. In Lithuania, as in other Eastern and Central European countries, the restitution of property rights was limited because property rights have been restored not to all former owners and (or) not to the entire property previously possessed. Partial restitution was due to major objective social, economic, legal and political changes that took place over the last few decades. Each state was modelling the restitution of property rights in the positive law, in the light of these developments, and their financial capabilities, aiming to combine the interest of former owners and the current users of property, and legitimate interests of the entire society. Balance between the public and private, and several public interests was sought, to restore justice and to ensure the development of the rule of law. Therefore, in determining the restitution of property rights in Lithuania, as in other post-communist Central and Eastern European countries, there is a political – legal compromise between different interest groups.

On the other hand, the mere establishment of conditions and procedures for restitution of property rights in legislation is not sufficient for the restoration of justice, because the final real results are important for the restitution process. Therefore it is necessary to draw attention to the dimension of the law application – the activities of public administration institutions in performing the functions delegated by the state, to restore property rights and judicial processes on the restitution of property rights. All of this justifies the need and create an opportunity to analyze the case law of the Lithuanian courts of general and administrative jurisdiction dealing with cases involving restoration of property rights to the existing real property, to determine the objective criteria for the recognition of public interest, and its protection priorities.

The investigated area includes violations of the law by restoring property rights to the immovable property the ownership whereof is exclusively attributed to the state, illegal restitution of property rights to the land to persons who do not have such a right. In view of this, various claims are filed and examined in Lithuanian courts: on the revocation of decisions of corresponding public administration institutions to restore the property rights, on the invalidation of certificates of the right of inheritance, on the award of monetary compensation to the state, on the withdrawal of legal registration of immovable property, and on the recognition of deeds of conveyance and transactions of immovable property as null and void. The variety of the analysed legal relationship leads to the attributability of the matters of restoration of property rights to the existing real property to both the general competence and specialized administrative courts.

The Lithuanian positive law governing restitution of property rights has not directly established any criteria defining the public interest. There is also no explicit mechanism of defence of public interest, which might allow the court to clearly evaluate the collision between the public interest and the private interest, or several different public interests. It is therefore important to find out how the courts fill these gaps of the law, which criteria of the defence of public interest are used in arguing their decisions and which criteria are used in prioritizing one of several public interests.

The case law from the period of 2003–2012 was chosen for the analysis of the discussed field of study. Using the Infolex Praktika database covering the effective decisions of all courts of the Republic of Lithuania, and the case law classifier, the categories of cases falling within the defined research area were identified. Later, cases attributed to his categories were chosen looking for the criteria for the recognition of the public interest, and priority identification, by key words such as “public”, “state”, “interest”, “need”, and similar.

After analysing the reasoning part of the Lithuanian courts decisions and orders in accordance with the selected criteria, specific cases for using the definition of the public interest were identified, along with the public interest recognition criteria and priorities in the field of restitution of property rights during the period of 2003–2012 in the case law of general jurisdiction and administrative courts, and the summary conclusions were presented. Not only the specific case precedents but the judicial process was also analysed, because both the initiation of the judicial process on the violations of imperative rule of law in the field of restitution of property rights, and the court’s own practices is the defence of public interest. Therefore, the features of the defence of public interest in the matters related with restitution of property rights are further disclosed in the article in two aspects – substantive and procedural.

1. Boundaries of the Public Interest Defined in the Case Law

The Constitutional Court of the Republic of Lithuania, in addressing the question of compliance of certain norms of the Law on Administrative Proceedings, the Code of Civil Procedure, the Code of Criminal Procedure, the Law on Courts to the Constitution, pointed out in the reasoning part of ruling of 21 September 2006 that public interest is not any legal interest of a person or a group of persons, but only the interest that reflects and expresses the fundamental values of society, which are enshrined, protected and defended by the Constitution. Every time when the question arises whether a certain interest is to be considered as a public one, it must be possible to reason that without satisfying a certain interest of a person or a group of persons, certain values entrenched in, as well as protected and defended by the Constitution, would be violated. It should be

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noted that the Constitutional Court has repeatedly pointed out that, while adopting new, amending and supplementing already adopted laws and other legal acts, the state institutions that pass them are bound by the concept of the provisions of the Constitution and other legal arguments set forth in the reasoning part of the Constitutional Court ruling. Thus, state institutions and other subjects are bound not only by the reasoning part of final acts of the Constitutional Court, but also by the arguments set forth in the part of reasoning as well as by the construction of the constitutional norms provided therein. It is therefore quite consistent that the test for the determination of the public interest formulated by the Constitutional Court was later used in the general jurisdiction and administrative courts of Lithuania. However, this test for the determination of public interest cannot be regarded as sufficiently clear. According to it alone, it is impossible to decide where is the limit when non-satisfaction of a person’s private interest, despite the values entrenched in the Constitution and protected and defended by it, becomes not just a private matter, but also the public interest. This is a relevant problem because the legal institute of the defence of public interest should not be used solely to protect only personal private interests, in addition, the prosecutor’s office is not the institution providing public legal aid to individuals.

However, there are situations where the unlawful act of public authorities to restore the property rights violates not only the public but also private interests. In defending the public interest, often the area of subjective rights of other people is interfered. In this case the Lithuanian case law assumes that the prosecutor’s right and obligation to initiate the proceedings of the defence of public interest for the annulment of illegal acts of public administration institutions cannot be restricted by the circumstances that the court decision will have the positive effect on the interests and subjective rights of individuals. In terms of the process law this means that the individuals concerned should be included in the proceedings of the defence of public interest as third parties, or co-applicants. In this way, the legitimate and effective way to protect both the public and private interests at the same decision of the court arises in the defence of public interest process initiated by the prosecutor.

According to the Lithuanian case law, restitution of property rights, under special legal provisions established by the Law on the Restoration of the Rights of Ownership of Citizens to the Existing Real Property, and assuring the transparent process of restitution of property rights, is the public interest. This stance of the courts is quite understandable, because the rule-of-law state must apply a clear and significant principle of the whole of society – public administration entities can not violate mandatory norms of public laws governing restitution of property rights and other public areas. It is important that this broad interpretation of public interest as the compliance with a mandatory norms would not be indiscriminately extended to the sphere of private law, because it would endanger the principle of the autonomy of the parties, where the attention has already been rightly pointed out in legal literature.

In evaluating whether public interest has been violated in a particular case, the Lithuanian courts take into consideration the nature and scale of the violations of imperative laws. According to the Lithuanian Supreme Administrative Court, there is no public interest where the administrative act is contested because of technical errors, which involves only the interests of few private persons: “... such dispute essentially concerns not the just assurance of the enforcement of legislation, as a constitutional value significant for society as a whole, which should be protected by the prosecutor, but rather the elimination of technical errors which led to the likely unfounded act of the public administration body. It is more a dispute between the public administration entity and individuals, or between individuals, of the right to dispose the land concerned. The arisen conflicting legal and factual situation should be resolved with the assistance of not the institute of public interest, as in this case it does not exist.” Thus, elimination of minor technical errors of measurement is outside the scope of the defence of public interest; they have to be eliminated not by the prosecutor initiating the action of the defence of public interest in the court, but by individuals challenging the acts of the public administration body.

10 Ruling of the Supreme Court of Lithuania of 28 April 2010 in civil case No. 3K-143/2010; Ruling of the Supreme Administrative Court of Lithuania of 25 July 2008 in administrative case No. A-146-333-08.
12 Ruling of the Supreme Court of Lithuania of 22 March 2006 in civil case No. 3K-194/2006.
14 Ruling of the Supreme Court of Lithuania of 24 April 2006 in civil case No. 3K-3-242/2006; Ruling of the Supreme Court of Lithuania of 23 July 2007 in civil case No. 3K-3-310/2007; Ruling of the Supreme Court of Lithuania of 1 August 2008 in civil case No. 3K-3-297/2008; Ruling of the Supreme Administrative Court of Lithuania of 25 July 2011 in administrative case No. A-63-2910-11.
The whole society is concerned about the appropriate application of the law. However, Lithuanian courts consider that there is no public interest, if after performing the legal analysis of the facts in the case it is not found that the contested decisions violate legitimate interests of individual subjects to the land parcels, or that the disputed land was granted to the person who had no right to get it. The mere violation of adopted administrative procedures that has not affected the legality and validity of the administrative act may not be defended by legal means as the public interest. This shows that the judicial approach to the defence of public interest is not superficial and formal.

2. Problems in Identifying the Priority of Public Interest

In resolving administrative and civil cases falling under the scope of the defence of public interest, courts are sometimes dealing with the non-trivial task of solving the issue of the collision of several different public interest or the public and the private interest, giving the priority to one or another interest. This is a complex question of the law application, since the legislature has not established criteria in the positive law that would guide the courts in dealing with cases involving restitution of property rights.

In practice there had been cases where the procedures of restitution of property rights were accompanied by various law violations. In solving such cases, courts usually follow the rule – the violation of procedures of restitution of property rights is not sufficient to declare the contested administrative regulations as invalid, if upon invalidation of those administrative acts because of such violation, and repeating the procedure of restitution of property rights, the contenders are again restored property rights to the same immovable property. It is important that in this case, the property rights are restored to the former owners, and if they are dead – to other persons named in the special law. It follows that in the Lithuanian judicial practice the personal legitimate interests and expectations, as the public interest, are given priority over other public interest – to remove their procedural violations of restitution of property rights if during the trial it is proved that the person actually had the right to restore property rights under the specific law. Prioritising individual legitimate interests and expectations as the public interest is a reasonable and legitimate approach, because not people are there to serve the public authorities, but the state has to serve the people. Persons who have duly expressed their will for restoration of property rights to the existing real property must not suffer disproportionate negative effects on violations caused by the officials of the state authority empowered to carry out the process of restitution of property rights. On the other hand, the courts state that such an interpretation of law is presented in the particular case to assess the specific legal situation, therefore, as a precedent it should be used only in similar cases.

According to the Constitution of the Republic of Lithuania, national forests are owned by the state of the Republic of Lithuania according to the exclusive right of ownership. The property rights are not restored to the state forests and the forests cannot be returned in kind, therefore, they are bought out by the state by paying compensation to former owners. Due to such legal regulations, the courts, while resolving the matters of restitution of property rights, recognise the exclusive ownership of the Republic of Lithuania in the state forests as special objects of ownership as securing the public interest. Public administration entities cannot make any decisions based on which the said objects are transferred from the state ownership to the ownership of other entities, except for cases where the Constitution allows it. The courts, having found that property rights were restored in violation of mandatory provisions of law, used not to defend the personal rights to the object of property, and annulled old administrative documents restoring the rights to the property which at the moment of decision on restitution of property rights was attributed to the state forests. The Constitutional Court has held that illegally acquired property does not become the property of the person acquiring it. Thus, such a person does not acquire property rights protected by the Constitution. Therefore, the case law assumes that the public interest to protect, use rationally and increase the state forest has priority over private interests of applicants to forest owners, as state forests is a special object of property rights, a national value having major significance, used by the entire society rather than certain individuals or communities.

A similar legal reasoning on the priority of public interest is used by the Lithuanian courts in dealing cases related to restitution of rights to the property, which is currently assigned to urban forests. Prohibition of the restitution of property to the forests which are attributed to urban forests, was established in the law in 1992 “Law on the Procedure and Conditions of the Restoration of the Rights of Ownership to the Existing Real Property”. In this way, the public interest in urban forests essentially existed since the beginning of the process of restoration of property rights to the existing real property. Therefore, the priority is given in the case law for the urban forest preservation as the public interest over the personal interest in restor-

17 Ruling of the Supreme Administrative Court of Lithuania of 22 April 2003 in administrative case No. A-14-416-05.
18 Ruling of the Supreme Court of Lithuania of 31 July 2009 in civil case No. 3K-3-319/2009. The Cassation Court pointed out: “The grounds for stating the essential procedural violations of restitution of property rights is when the property rights are restored not to the former owner, and annulment of administrative acts solely for the formal breach would undermine the public confidence in the state, while not be in line with the public interest, which requires to ensure the legitimacy in the acts of public institutions, and the provisions of Article 5 part 3 of the Constitution according to which the state institutions must serve the people”.
ing property rights to the property in kind. For such persons it is compensated by legal regulation that these items of property are bought out from persons by the state, offering them the opportunity to choose other equivalent methods for restoration of property rights to the existing real property.22

Lithuanian courts, when considering which public interest should be given a priority, also use the benefit/harm test. Essentially it means that the decisions of public administration institutions on restitution of property rights appealed by the prosecutor are not annulled if, in the opinion of the court, the significance and the scale of violation in terms of public interest is not exclusive or particularly significant, and if their annulment would cause greater damage to other areas of public interest. For example, if this would even more extend the process of restoration of property rights to the existing real property, require additional funds from the state budget, cause property damage to honest persons, create additional and unnecessary encumbrances and restrictions of personal subjective rights and legitimate interests23. In addition, in the protection of the public interest in a particular case it is evaluated whether the particular result will be achieved, and whether both the individual and society will receive reasonable and actual tangible benefits, whether the object of ownership, the restitution of which is sought to the state, has significance for the society. Therefore the measures of the defence of public interest must be adequate to the aim and comply with the principle of proportionality24.

There have been cases when because of the scale of restitution of property rights it is difficult for the prosecutor to quickly identify individuals who illegally restored the property rights, and their successors and assigns, and to apply to the court within the statutory time limit. The case law has formed a precedent rule – if the court finds that the action is brought to protect important public interests, and that it is difficult to collect necessary details for bringing action within the statutory time limit, or if there are other circumstances that preclude the plaintiff (prosecutor) in time to apply to the court for redress, the plaintiff (prosecutor) has taken active steps to protect the violated rights, and the omitted delay is not unreasonably long, the rejection of the action because of the expiry of the period of limitation would not serve the purpose of the institute of limitation of the claim. In this case, the public interest to ensure the real defence of violated subjective rights, including the defence of the violated right of state ownership, has priority over the public interest to ensure the stability of legal relations, i.e. the claim limitation25.

From the presented analysis of case law we already saw that giving the priority to one or another interest is not unconditional. Priority for specific interest is determined by the factors and objective criteria, which are relevant, in the opinion of the court. In some cases, the courts in their reasoning in similar cases seek to establish a reasonable balance between the interests: «<...>» in each particular case, when considering the renewal of the term of limitation for a certain action, it is necessary to find the reasonable balance between public interest to ensure that real defence of the violated subjective rights, and to guarantee the stability and certainty of legal relations.26 On the other hand, such a balancing of interest performed by the court nevertheless leads to the issue of identifying the priority, therefore, the final result of the reasonable search for balance is giving the priority to one or another public interest.

3. Problem of Procedural Legal Capacity

The defence of public interest in the judicial procedure is one of the most complex issues of the administrative proceedings and the civil procedural law, as these procedural activities are usually assessed and regulated as exceptions to the general rules. The prosecutor in Lithuania is the main legal entity with procedural legal capacity to apply to the court regarding the defence of public interest. The basis of this provision is Article 118 of the Constitution of the Republic of Lithuania („In cases established by law, the prosecutor shall defend the rights and legitimate interests of the person, society and the State”)27, also Article 56 of the Law on Administrative Proceedings, Article 49 of the Code of Civil Procedure, Article 19 of the Law on Prosecutor’s Office. The Seimas of the Republic of Lithuania in its resolution of 4 July 2003 “On the solution of problems related to the restoration of property rights to land, forest and water” proposed to the General Prosecutor’s Office to take steps in defending the public interest to invalidate illegal decisions on the restoration of property rights to land, forest and water and transactions on property transfer later concluded on their basis, according to the statutory procedure. According to article 19 of the Law on the Prosecutor’s Office of the Republic of Lithuania, prosecutors defend the public interest when

25 Ruling of the Supreme Administrative Court of Lithuania of 18 December 2007 in civil case No. 3K-3-578/2007; Ruling of the Supreme Court of Lithuania of 2 October 2002 in civil case No. 3K-3-1123.
26 Ruling of the Supreme Court of Lithuania of 5 November 2007 in civil case No. 3K-3-470/2007.
they detect the infringement of legislation, violating the rights and legitimate interests of the person, the society, the state, and where such violation are to be considered the breach of public interest, and state and municipal authorities that committed the violation in their activities, did not take steps to remedy it or when there is no such competent authority. Prosecutors, who have reason to believe that there is a breach of legislative requirements, in protecting the public interest, have the power to go to court with a claim, a statement, a request, or to join the case as a third party expressing individual claims of the subject matter of the dispute.

Prosecutors defending the public interest, in the legal relations of restoration of property rights to the existing real property, most often apply to the courts in order to invalidate administrative acts that unreasonably restored property rights, and to nullify subsequent property transfer transactions, and the application of the restitution in kind, returning land, forests, water bodies to the public domain, or award a certain compensation in favour of the state.

According to the case law of the Lithuanian Supreme Administrative Court, the court hearing the case on the violation of the public interest in each case checks whether the entity who applies to the court has a statutory mandate to protect the public interest. If such a right is not granted by the law, the court cannot establish the material interest of a person applying to the court, and satisfy his claim to protect the public interest. Such trend of case law is not sufficiently justified. We can definitely agree that the court has to check in every case whether the person applying to the court because of the defence of public interest has a special procedural legal capacity (locus standi). But it should not be agreed that having the right to apply to the court because of the defence of public interest presupposes material legal interest in the outcome of the case. Substantive legal interest would mean that a person who applies to the court is a participant of the contested material legal relations and the future judgment will have a particular impact on his rights and obligations. However, the prosecutor and the entities who defend the public interest in the administrative and civil procedure are not and may not be materially interested in the outcome of the case, because they are not the participants of the substantive legal relationship on which the judicial process is going on. The fact that the entities defending the public interest do not have the direct material interest, is recognized both in the administrative procedure law and in the civil procedural law doctrine. These entities are to be acknowledged as having not substantive but procedural legal interest, which is the basis for the initiation of the legal proceedings to determine possible violations of the public interest, and which it can objectively be realized by the court by making a relevant decision that removes the public interest violations. Such an interpretation not only has the theoretical, scientific, but also practical importance in ensuring the effective implementation of the legal protection of the public interest, when violations of public interest are related not with the collective interests of the undefined group of persons, but with the rights of specific individuals. The illegal acts of public authorities made in the process of restitution of property rights usually violate not only the public interest, that the process of restitution of property rights is carried out in accordance with imperative legislative requirements, but also the private interest, because administrative regulations on restitution of property rights concern specific individuals. Proper identification of the material and legal interest determines the procedural situation of participants in the case, and helps to assess whether third parties should be included in the case in addition to the prosecutor, if their rights or interests protected by laws might be affected by the future judgment.

According to the extensive case law, prosecutors in Lithuania undoubtedly have a special procedural legal capacity to apply to the court for the defence of public interest in the area of restitution of property rights. There have been cases in the case law when municipalities, in defending the public interest, approached the court seeking to nullify the legal consequences of illegal restitution of property rights to the person who was not the owner of that property. Other entities virtually had no such opportunities or they were very limited, and the case law on this issue has not been entirely consistent, too. Back in 2004, the Lithuanian Supreme Administrative Court did not recognize the right of the county’s chief administration to go to the court on the withdrawal of the decision of the county governor to restore property rights to land. The court supported its decision by the fact that neither the county governor administration or its governor are authorised by the law to defend the state and public interests in the court, and the rights of other persons related with restoration of property rights to the existing real property. Such a position of the court was formed for a good cause. The court saw the problem regarding the right of the applicant – the county governor’s administration – to challenge their own decision on restoration of property rights to the existing real property. There must be two parties to the case in the administrative proceedings, i.e. the applicant and the defendant. The law does not provide that the applicant and the defendant can be the same person in the case. The need for such parties is also determined by the fact that the Administrative court settles disputes over issues of law in public or internal administration. This means that a dispute must arise in cases of dispute between the parties (natural or legal person and an administrative entity) for real or alleged violation of law, and

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36 Ruling of the Supreme Court of Lithuania of 1 August 2008 in civil case No. 3K-3-297/2008.
during the examination of such a dispute in the court, the parties involved must have conflicting interests

4. Public Interest – Assumption of the Right to Apply to Court or a Condition of Satisfying the Claim?

There have been attempts in Lithuania for more explicit regulation of the defence of public interest in the civil and administrative proceedings, offering to issue a separate special law, but no such law has been adopted. This draft law provides that the court, in deciding the issue on the acceptance of the application, complaint or statement with regards to the defence of public interest, seeking the court to withdraw the decision on restitution of property rights. At this point we can formulate a broader conclusion. Currently, there are new trends of the case law that the laws governing the competence of public administration institutions not necessarily must have their right enshrined as expressis verbis to apply to the court regarding the defence of public interest; it is sufficient that such right is implicit based on the goals and objectives applicable to such authority.

during the examination of such a dispute in the court, the parties involved must have conflicting interests

43 Ruling of the Lithuanian Supreme Court of 4 January 2012 in civil case No. 3K-3-109/2012.

44 Ruling of the Supreme Court of Lithuania of 2 June 2008 in administrative case No. A-556-859-08.
est. Analysis of the contents of this ruling suggests that it is a problem of terminology used in the court, rather than the rule having the precedence value.

Conclusions

Lithuanian courts of general jurisdiction and administrative courts apply the test for the identification of public interest determined by the Constitutional Court of the Republic of Lithuania, maintaining that the public interest is not any legitimate interest of a person of a group of persons, but only one that reflects and expresses the fundamental values of society which are enshrined, protected and defended by the Constitution. However, if defence of public interest interferes into the area of subjective rights of persons, this does not prevent the protection of public and private interests in one decision of the court. According to the Lithuanian case law, restitution of property rights, under special legal provisions established by the special law on restitution of property rights, and assuring the transparent process of restitution of property rights, is the public interest. The violation of the public interest is identified in accordance with the nature and scale of the mandatory norms of law. The courts consider that the measures of public interest defence must be adequate to the aim and comply with the principle of proportionality.

Lithuanian courts assume a rational rule that the violation of procedures of restitution of property rights is not sufficient to declare the contested administrative regulations as invalid, if upon invalidation of those administrative acts because of such violation, and repeating the procedure of restitution of property rights, the contenders are again restored property rights to the same immovable property under a specific law. In such cases, individual legitimate interests and expectations as the public interest are given priority over other public interest – to remove the violations of the procedure for restoration of property rights to the existing real property.

Lithuanian courts, when considering to which public interest they should give priority, also use the benefit/harm test, when the decisions of public administration authorities contested by the prosecutor are not revoked, if, in the opinion of the Court, the significance and scope of the violation in terms of public interest is not exclusively significant and large, and if their annulment might cause greater damage to other public interest areas.

The Lithuanian case law has formulated a precedent rule that under certain circumstances the public interest to ensure the real defence of violated subjective rights, including the defence of the violated the right of the state ownership, has a priority over the public interest to ensure the stability of legal relations (claim limitation).

It was assumed in specific cases of restoration of property rights to the existing real property that the protection of forest of state importance and urban forest as a public interest has priority over personal interest in restoring property rights in such forests in kind. In all cases, the provision of priority to one or another interest is not unconditional. Granting priority to specific interest, in the judicial assessment, is determined by important factors and objective criteria. In some cases, in the cases of restoration of property rights to the existing real property the courts seek to establish a reasonable balance between the public interest, but it still leads to the issue of determining the priority, therefore, the end result of the search for reasonable balance is granting a priority to one or another public interest.

According to the extensive case law, prosecutors in Lithuania undoubtedly have a special procedural legal capacity to apply to the court for the defence of the public interest in the area of restoration of property rights to the existing real property. Currently, there are new trends of the case law that the laws governing the competence of public administration institutions not necessarily must have their right enshrined as expressis verbis to apply to the court regarding the defence of public interest; it is sufficient that such right is implicit based on the goals and objectives applicable to such authority.

The court in each case should check whether the person applying for the defence of public interest to the court has a special procedural legal capacity (locus standi). But it should not be agreed that having the right to apply to the court because of the defence of public interest presupposes material legal interest in the outcome of the case. The prosecutor and others who defend the public interest according to the administrative and civil procedure, are not and cannot be materially interested in the outcome of the case, because they are not the participants of substantive legal relationship on which a judicial process is taking place. These entities should be acknowledged as having not the substantive but rather the procedural legal interest, which is the basis to initiate legal proceedings in order to identify and eliminate the public interest violations.

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The developed world including Europe is facing an important challenge: the necessity of energy to provide the basic input for the economic development. The energy access is fundamental for the European economy in order to keep the capacity to compete with other economies of the world. The energy necessities discussed in this article include different priorities, such as security of the supply, protection of the environment or cheap access to energy.

The creation of a common market of energy is pointed out as a big necessity for Europe in terms of integration, because of many benefits the European citizens and the European economic actors could achieve from it.

The discussion of climate change is also mentioned in the article, as it has been a priority for Europe during the second half of the XX century and probably will become one again after the end of the current economic crisis.

The influence of the Energy policy of the EU previously described on the Eastern and Central Europe member states is discussed from the prism of different necessities and different priorities, and hence asking for a special treatment for these economies.

**Key words:** Energy policy, European Union, energy market in the EU, climate change, energy supplies, energy priorities in Europe, energy competitiveness, energy access, energy integration, energy and East and Central Europe.

**Introduction**

Energy is essential for the good of the citizens, competitiveness of companies, and economic development. The energy challenge is understood from the point of view of:

1. Security
2. Competitiveness
3. Environmental sustainability

Security mainly means granting consumers, the citizens, access to energy. Competitiveness is basically linked with prices, providing energy at reasonable prices for the final consumers, people and companies. Environmental sustainability is based on respect of the environment; in a way it is fulfilling current and the future needs.

The problem in the energy field is that with the current technology it is not possible to achieve these three targets at the same time, so society, governments and the European Union have to choose where their priorities lie. For example, if security is wanted, using local energy sources is needed – that is mainly coal in Europe and would be negative for the environment. On the other hand, if the protection of the environment is the main concern, green, renewable energy is needed. It means higher prices for the access of energy and hence a decrease in competitiveness. Economical agents need to pay a higher price for a basic input in any type of production.

In the case of Europe, the main problem is different level of economic development and economic necessities between the member states of the Union. The three main targets that currently cannot be achieved at the same time, force the policy makers to focus on some aspects and forget about others. In other words, what is good for one member state could be harmful to another. The more integrated are the economies of Europe, the more similar are their necessities, hence an energy policy will be developed easier as it will target the main necessities of the whole area. Currently there are different levels of integration between the European member states, creating different areas or regions where the main economies are more integrated. Obviously because of historical reasons there are two main areas regarding economic integration, Western Europe and East and Central Europe. This division is decreasing step by step as Germany is becoming a strong force of economic integration between both areas, but the differences still persist nowadays.

**Energy Policy of the EU. Historical Approach**

The energy policy of the European Union can be traced to the period after WW II, when Europe had been destroyed and a supply of cheap energy was needed in order to increase competitiveness and promote economic growth. It was an important tool for the recovery of the economic situation of Europe after the great destruction of the war.

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The first European community, the European Coal and Steel Community, meant a common market where customs and subsidies were forbidden. It included the most common local energy of Europe: coal. The new Community boosted the production of steel, but the production of coal has since been reduced. Nevertheless, the European subsidies helped the companies and workers in the coal industry to overcome the crisis.

The crisis of the Suez Canal forced the European Communities to look for energy alternatives, as nuclear energy. But it was an expensive alternative for the member states individually because the investment required was a big burden. The solution back then was the creation of the EURATOM in the '50s with the Treaty of Rome. Aside of the investment, energy also has to be understood from the prism of a basic input for war and confrontation between the European states. Energy is fundamental to carry on a war, and hence if the source of energy is shared, it cannot be used against each other and makes wars impossible. This was an important reason to create the EURATOM as at that time, nuclear weapon was considered to be the definitive weapon. Officially the EURATOM was created for coordinating investigation programs, infrastructures, and financing the field of nuclear energy between the member states. But in fact, as some countries were suspicious of the role of the European Commission in such a vital field for their national security, the power of this European institution was minimal. The EURATOM in reality never had good acceptance among the member states, because it was seen as France was pretending to lead the Community for its own benefit, accessing the technology and funding of the other members for developing its own nuclear power in the context of the Cold War. The suspicions of the other member states meant an almost empty Community, with not much power.

Altogether different treaties in the European Union history include just three energy sources: coal, steel, and nuclear energy, but there is no energy policy in the European Union.

There are different reasons:
1. It is an important sector with huge influence in the general economy of the countries, and hence the member states want to keep their independence to act according to their respective national interests.
2. The energy sector requires a high level of financing and huge investments, and the situation after WW II was critical because many infrastructures were damaged.
3. The final prices of energy have a big impact in the competitiveness of the industry, something the member states want to protect.
4. As the activity in the energy field is done by energy nets, it became a natural monopoly where energy companies, normally owned by the state, fulfill all the processes, from the production of energy to its distribution.
5. Electricity is a public service and influences the society, and hence the national politics.

Most of the companies in Europe were public; they were the executors of governmental policies. Most of the big companies of Europe in the energy business were created in the period after WW II, as CEBG in the ‘40s, EDF in ‘46 or ENEL in ‘62. So, the action of governments was direct and they decided almost everything in these companies, as the number and kind of installations to be built, the kind of energy to be used, and overall, the final prices. The companies under the surveillance of the states even brought energy to the less populated areas against any economic sense, because the investment could never be recovered because of the low density of consumers, and the cost of delivering the electricity surpassed the incomes of selling it by far.

As mentioned, the main energy source at the beginning of the European Communities was coal. That is not the case anymore – currently it is switched for petroleum and gas. During the ’50s coal counted for 55.7% of the energy supply, and petroleum 37.8%. Already in 1972 petroleum and gas counted for 64.5% of the supply. Nuclear energy also started being developed in the ’50s, with the first nuclear plant built in 1947 in the UK, but it became important later, in the ’60s.

Oil as an energy source has lacked stability. In October 1973 the Arab producers of oil imposed an embargo on the countries that had helped Israel in the Yom Kippur War, creating a new threat for the national security of some European states. Also the Organization of the Petroleum Exporting Countries unilaterally raised the prices of the already most extensive energy source in Europe. From October till December the prices pushed up by the decisions of OPEC rose to four times their original level. The new situation, the new energy crisis, was not completely solved when in 1979 the second part of the Iranian revolution took place, adding more instability to the supply of petroleum, and hence higher prices. At the end of 1981 the prices for petroleum were 10 times higher than before the crisis, and the consequences for the European economies were important, such as high inflation, less economic activity, and even in some cases negative economic growth. It meant companies closing, higher unemployment, and a lack of trust in the economic model based on massive imports of energy supplies.

At this point the European economy started to save energy and also started using energy in a more efficient way in order decrease its dependence on unreliable suppliers, and keeping its economy safe from the volatility of the petroleum market. At the same time the declining economic activity meant a significant decrease in the demand for petroleum products, and hence by 1986 there was an important reduction in the prices of petroleum. It showed that the link between suppliers and consumers is a bidirectional relation where the actions of any of the sides will influence the other. It made clear that equilibrium in the relations between the consumers of energy and the suppliers was the best situation.

This crisis also coincided in time with the beginning of the green movement and the proposal for different sources of energy as a way to protect the environment, but also providing security in the supply as most of these sources could be found in all the European territory.

The member states of the European Communities reacted differently to the crisis, trying to save themselves individually. Each country searched for bilateral agreements with the petroleum producers, losing the possibility of acting as a block to the pretensions of OPEC, and hence diminishing their possibilities.
for better agreements that could have been reached from a common position on the oil crisis. All these troubles made clear that a common position was needed in the field of energy, and so in 1986 the European Communities made a declaration about the necessity of acting together, identifying common energy targets. It was a minimum step in terms of integration, but the embryo for future developments.

This crisis also meant the development of nuclear energy as a local source of energy, providing independence to the European states. The countries more keen on this energy source were France, Germany, Spain, and the United Kingdom. Nuclear energy is still important in these countries today, but its role is decreasing. In some cases radically: Germany will close all its nuclear facilities in 2022, refusing the 22% of the total supply that this energy presently provides. The decision clearly has political reasons, plus environmental concerns, but any change or crisis in the world energy market could reverse this decision. Some European states, such as Denmark or Austria, did not develop nuclear energy in the first place because it was highly unpopular among their citizens and others just could not afford to develop a national nuclear energy sector, in the context of an important economic crisis. The financial cost of developing a national program in the field of nuclear energy was too high for them. These different positions did not help the Communities before and even now – for the European Union with so many different approaches, the possibility of a common position seems unlikely in the issue of the nuclear energy.

After the Oil Crisis, when in 1986 the prices of energy decreased and the economic crisis was over, some social agents started complaining about the rule of the national governments in the energy field. On one hand, member states had reduced the external dependence of their national markets, but in the electricity field there was an overproduction and a financial crisis. The new situation meant a dysfunction in the energy market that finally was paid by the final consumers, the companies and the citizens.

Soon afterwards, globalization changed the priorities of the member states of the European Union, bending from security to competitiveness. The GATT agreement in the Ronda Uruguay of 1994 plus the fact that prices of energy were and still are, lower in the USA than in Europe, led to the idea of a common European energy market in order to increase competition between different companies of the member states in a sector traditionally dominated by public monopolies. The idea purported a market focused on electricity and gas without any interference based on political or national grounds, just control by market rules.

This change in the approach to the energy policies of the European states was also provoked by the fall of the communist block and the disintegration of the Soviet Union because the end of communism and the success of capitalism increased faith in the market as a natural regulator. Central and East European states, previously part of the communist block played an important role in the European trust on market economy as the best economic system to meet the necessities of the society. This faith is weakened though: the current economic crisis caused some to blame a softly regulated market in excessive ambition.

Nevertheless it is still an important factor to take into consideration in the energy field.

Technology also helped the change of mentality in Europe because the combined cycles allowed the production of more energy with less cost than before, increasing energy productivity. The developments in the field of information and energy were also important because the new systems allowed information in real time of the needs of the market, increasing the productivity and becoming crucial for energy companies.

Finally, what made that change possible was the environmental concerns of the population, as environmental issues became more public and were included in the political agendas of the main political parties all over Europe. Currently in the context of an important economic crisis the environmental concerns have decreased as employment and economic activity has become the main priority to most of the European states. The main exception is Germany: as its economic performance is better than other European economies and its population very concerned about environmental production, the country has decided to close its nuclear facilities. It will increase the price of energy in the country, increasing the final price of the national production and reducing the benefits of the German economy as it is mainly focused on exports. Hence the prices of energy on other markets have an important impact on German competitiveness. But German society has accepted to absorb this economic loss because of a higher benefit in terms of protection of the environment.

Creation of the European Common Market in the Field of Energy

The establishment of a common market in the field of the energy means in politics the free movement of goods, and it is accepted that electricity is a good. In the electricity field it means that any producer or any consumer can sell or buy electricity wherever they want inside the territory of the Union. In economic terms, a bigger market means bigger companies and bigger competence. It is more efficiency in the market, with lower prices, and a global increase in competitiveness of the economic actors of the European area. Obviously under the condition of free market and free competence regulated by the authorities, that have to protect the market from any position of market domination that could lead to a monopoly or oligopoly. In the late case the most probable outcome would be fixed prices decided by the main economic actors for the electricity, and hence the loss of the benefits of the integration. It is the role of the European Commission to check the market conditions and avoid the domination of any supplier of the market conditions that might lead to an artificial development of the offer and the demand.

A progressive liberalization of the market was decided upon as the way of developing the common market in energy matters. The electric activity shows some differences as it was accorded to a free market in generation and selling, but net systems and transportation of electricity were left aside, being monopolies of distribution. The reality is that every economic actor can use them following the conditions established by the regulator in each state.
The big national companies, previous dominators of their respective national markets, were divided into four different units, the units dedicated to generation and selling being later private. It is very important because it means the loss of control by the national governments of important economic tools, as the generation companies are in charge of the decisions of building new facilities, the kind of energy used, or the source of energy to be used. The sales activity is influenced by the consumer, who decides what he wants to buy according to the free offer in a free market. And hence, it means the end of governmental prices and the use of energy in domestic politics. The role of the governments after this reform was focusing on legislation and control over the private companies and economic agents to reinforce respect for the common rules.

The creation of the interior market had other consequences, such as the unification of fields previously separated, as gas and electricity in the already mentioned generation and sales. Another important effect was the creation of European companies. They were normally large and public companies, less effective, less competitive, and supported by national rules in their home markets, and in the last instance protected by the national states. The new companies are more active and are becoming bigger economic agents as the market is bigger. The most active companies in the field of energy are the two main German companies, a French company, and an Italian one.

The interior market also meant a change related to coal and nuclear energy, as the construction of facilities in these two energy sources halted in most European states, with the exception of France, Finland, and Bulgaria. Finally, as a result of the competition among companies, the overcapacity should disappear because at least in theory competition leads to bankruptcy of the older and less competitive facilities, and also because demand increased after the creation of the market. At the moment, with an important economic crisis, the situation is different, and hence there is less economic activity and lower demand for energy.

Influence of the Climate Change in the European Energy Policy

The European Union is the world leader fighting against the climate change, and thus priorities in the energy sector have changed. Environment is becoming a very important issue in the main targets of energy policies. But now, because of different factors, the security of supplying primary energy is becoming the main target. For example: the crisis in California made the state suffer of energy cuts, or the problems with suppliers such as Russia, that made the member states remember the importance of security.

The EU made a plan in order to increase the energy efficiency and the use of renewable energy. Also the Union introduced the Trade of Emission Trading Scheme to achieve reductions of greenhouse gas emissions. The idea is very simple, the more you pollute, the more it costs you, and hence companies that pollute more increase their production costs, and the final price of their products will also increase. As companies that pollute more will be less competitive, their position in the economic market will become difficult and they will try to invest more in efficient energy. In the period of 2005–2007, the price of emission trading was very low because too many emission rights were given to the economic actors at the beginning of the system. The period of 2008–2012 was expected to be good in terms of emission rights trade, but the financial crisis and the decrease of economic activity in many European countries has again given too many emission rights for the current economic activity, so the system is still not working properly. Currently there should be a reduction of the emission rights, but the economic crisis in most of Europe has meant that the focusing on competitiveness and hence environment is not any longer the main concern of the Union.

In the field of nuclear energy environment is still a big factor, discussed in terms of security for a long time, the debate has only intensified since 2007. The European Commission did not get involved in the nuclear field and pointed out that the competences in this field are completely in the hands of the member states. Difference of opinions has divided the Union in this matter and the accidents in nuclear plants in Japan are just growing the mistrust of the European population over nuclear energy.

All these facts have given an important push for the development of renewable energy because it is good for the environment, as it pollutes much less than other energy sources; because it is good for security, as it is a local source of energy; and because it is good for the economy, as Europe is the world leader on the technology of these energy sources. Exporting the European technology to the rest of the world could provide important benefits for European companies. Finally, renewable energy is increasing its competitiveness as the price of petroleum is high, and will surely be higher when the economic crisis is over and a reactivation of the world economy will lead to higher economic activity, and hence to higher consumption of energy and petroleum. As the technology of renewable energy improves, the cost of this energy source is decreasing step by step; there will be a moment in the future when the prices of petroleum and renewable energy will converge, solving the problem of the high cost of green energy, making it competitive. So far the situation of renewable energy depends on public subsidies to make it able to compete with other sources of energy as the cost of the production is still much higher. It means that in terms of competitiveness the renewable energy is negative. Nevertheless three main facts influence the support of the national governments to this source of energy:

1. Development of the technology: The further development of the current technology will lead to a decrease in the cost of energy production in this area, with the consequence increase in the competitiveness of the sector.
2. Other sources of energy are not endless, petroleum or gas reserves will be reduced as the world demand on energy increases. It is just a matter of time that it will happen, equalizing the production cost of both sources of energy and reducing the current economic benefit of the fossil fuels. As the demand will increase, and the offer will be reduced, logically the price will grow, making gas and petroleum more expensive.

2 http://www.elpais.com/articulo/internacional/mapa/nuclear/mundo/elppepoint/20110314/elppepoint_15/Tes.
3. The friendly environmental technology will become an important economic sector as the absolute and relative cost of production will be reduced by new technical developments and the increase on the fossil fuels cost. Currently the European Union has dominance on this market and the possible economic benefits in the future, as this market becomes more important, can be huge.

Currently some governments in Europe are supporting wrongly the idea that competitiveness is more important than protection of the environment because it is just a temporal solution to the current economic crisis. Countries in deep crisis, as Spain, are cutting the subsidies to the renewable energy in order to save some money and increase the competitiveness of the Spanish economy with cheaper access to energy and hence finish with the crisis. It is just a temporal solution, because the current action does not take into consideration the future of the Spanish economy, as the dependence on foreign energy sources will increase, more pollution will mean more expenditures in the future solving the health problems now generated and decreasing the possible incomes of some Spanish companies, leaders in the world in renewable technology, will not happen as the investigation will be reduced as the economic benefits have been reduced also. The current bet of the Spanish government on competitiveness as a priority against environmental concerns or security of the supply will provide some benefits in the short term, but in the middle and long term it involves just negative aspects.

The future of European energy policy will be determined by the supply of energy and by climate change. Both factors are global problems that can be solved just with global positions. So, a European market, with a European energy policy with a single voice in the world, would be more effective for the interests of the Europeans. The European Council in spring 2006 agreed to start a real common policy in energy, but mainly in its international side, leaving still many competences to the states in their national markets, but it leaves the door open for further integration.

The European energy market of the future will just work if the member states share their sovereignty in the common institutions of the Union. It means in practical matters that consumers will have easier access to better and safer conditions from suppliers. On the national level we will see deeper integration of the national markets forging a real European market. The Commission should increase its power in order to deal with infrastructures of interconnection between member states and to create new rules regulating energy transit between states. Finally, integration between companies will help European integration; as they get bigger they will be able to compete under better conditions in the world market. Their size will also give them access to enough economic resources needed for investments in infrastructures. The influence of these companies will be European, as their home market will be the European market. The decision making will be done by the European Commission, and hence the interest of these companies will focus on this European institution, changing the current situation where the focus is on the national governments. It will mean a transfer of loyalty from the national to the European level.

East and Central Europe

The situation of East and Central Europe in the energy field is different from the Western European region because of the division of Europe in two main blocks right after the Second World War. Two main economic conceptions were developed, communism and capitalism, with different technologies and priorities in the energy field. The different situation between both areas means a lack of integration and hence different priorities between both areas. In order to solve the problem more integration is needed and then both areas will need the same priorities and an Energy Policy in the European level will become more beneficial for the whole Union. The fall of the Berlin Wall and the collapse of Soviet Union meant an economic change in the Eastern and Central part of Europe to capitalism adopting Western European standards as most of these countries joined the European Union. As an obvious consequence new necessities in the energy field change the priorities of these member states, different from the leading block of the Union, from Germany and other Western European States.

The energy field can focus on:

1. Competitiveness: Cheap access to energy sources in order to provide a cheap input for most of the economic activity increasing hence the competitiveness of the European economic agents. It is fundamental for most of Eastern and Central European economies, as these countries based their development in cheaper production in the Common Market of the European Union. Their competitiveness comparing to Western economies meant the relocation of industries to East and Central Europe as they became part of the same European market. If the energy access becomes more expensive, it will increase the production cost and at the same time will reduce the competitiveness gap between the different areas of Europe.

Cheap energy is also important for most of Eastern and Central European states because of their climate conditions. Cold weather means more necessity of heating in the companies but also for the whole society as private citizens also need reasonable access to energy for their heating necessities. Also less hours of light during the long winters means a higher necessity of electricity.

The higher economic development of Western countries with similar weather conditions than the East and Central European states has meant an increase on the efficiency in the use of energy, as for example a good heating isolation reduced the waste of energy and hence the consume of energy, making energy then cheaper.

Also link with the economic development, the rent of Western population is higher than in most of the Eastern and Central European states, and the part of the rent dedicated by the citizens to meet their energy necessities is higher in East and Central Europe than in Western Europe. So, because of all these reasons, cheap access to energy is the main priority for Eastern and Central European states.

2. Security: The supply of energy has to be constant to avoid the collapse of the economy as energy is a basic input for the production. As more energy independence more security. It means the development of local energy sources to reduce the
dependence on the international suppliers. The low technical quality of many energy facilities from the Communist time has meant the end of different local sources of energy in this area as the facilities were closing because for them it was cheaper to buy energy than to invest in the local production. It was also link with environmental concerns, as for example nuclear energy technology is believed after Chernobyl to be less secure in former members of the Communist bloc. This situation lead to some nuclear facilities to close in Eastern and Central Europe, as in the case of Lithuania, where because of environmental and health security an important nuclear plant supplier of local energy has been closed. The energy was then bought abroad, reducing the security of supply of the country and increasing the cost of energy.

The relations of many of these East and Central European states with Russia, somehow heir of former Soviet Union are not so good, as there was a Soviet occupation of the area for almost half a century. Russia as the leading country inside Soviet Union is seen as an occupation power that still wants to influence this part of Europe. Russia is one of the most important suppliers of energy of Europe, and has often used the energy supply as a political weapon to increase the Russian influence or just as a political reprisal, as in the case of Estonia with the problem of the Bronze soldier some years ago. The north stream linking directly Russia with Germany might mean and increase of the security of supply in Eastern and Central Europe, as many of this states can buy energy from Germany, but with higher prices than buying it directly to Russia. So, the decrease of local sources of energy because of environmental reasons, and the impossibility of developing local energy sources because of high financial reasons against the main priority already mentioned of competitiveness and the tense relations with Russia make impossible the development of security of the supply of energy in East and Central Europe. The increasing dependence on Western suppliers will mean an increase in the cost of Energy decreasing the competitiveness of the economy.

The current failure of the Nabucco pipeline from Azerbaijan to Europe, linking directly the European energy market to an important producer has decrease the possibilities of independence from the Russian energy companies, dominated by the political will of the Kremlin. It means that the main possibility of these states to develop a local energy source is based on the new fracking technology, negative from an environmental point of view or the development of renewable energy, negative from the financial point of view.

3. Environmental concerns: East and Central Europe have fewer concerns about environment than Western European states because of their different history and different economic development. Clearly as higher as the income per capita is, citizens will be willing to share a part of it to protect the environment.

The communist times meant lower economic development and also lower environmental rights, as the citizens could not influence the political power with their concerns. As a consequence, there are many populated areas in East and Central Europe heiress of the Communist system. On the other hand, as the economic development was lower, there were fewer areas occupied with human activity, and hence more natural spaces to protect. The medium habitant per square meter is clearly lower in East and Central Europe than in Western Europe, increasing the areas to be protected. These two facts make expensive to protect the environment in the region, and it has become the third priority, far behind competitiveness and protection.

Conclusions

The energy policy in the European Union is fundamental to understand the development of the new members of the Union, the East and Central European member states. These states are mainly focus on the competitiveness of their economies, as they come from a long period of relative underdevelopment during the communist era. In their strong will to develop economically and close the gap with the richest countries of Western Europe, they are willing to sacrifice the protection of the environment. As the main target for these governments is to provide access to cheap energy to their national economic agents, it focuses on the energy that generates more pollution.

On the other hand, Western European states are focusing their energy priorities to the protection of the environment, as we see with the German decision about the nuclear energy and the development of renewable energies in other Western European states. It has made Western Europe the leading area in terms of clean energy technology and the possible future dominant of this important economic field. It is clearly a different plan of priorities.

The second main concern is the independence from Russia, former leader of the Communist bloc. Russia as a different political system, obviously not a democracy, but still with the influence of different institutions and governmental organizations, has used often its energy supply to obtain political benefits. It makes suspicious most of Eastern and Central European states, and forces them to search for security in the supply. The best option to get it will be developing local energy sources, normally the most unfriendly energy sources with the environment, and also normally the most expensive option.

So, the security for Eastern and Central European states will mean a sacrifice in terms of competitiveness and environmental protection. As cheap access to energy is the main priority, security has been sacrificed, and Eastern and Central Europe has tried to deal with the issue through a common European position towards the suppliers, mainly Russia, in order to balance the Russian power. But Western economies have different priorities. The concerns of the Western states about a secure supply of energy have made them reach individual agreements with Russia to secure their own national supply. The best example is the North Stream, directly from Russia to Germany. It means the security of the Russian supply of energy to the German economy, avoiding the conflictive relations in some cases between Russia and East and Central Europe. It has provided more security to Germany, but it also has increased the Russian capacity to lobby East and Central Europe with the supply of energy, as now it can just cut the energy supply without affecting its main customer, Germany. Other plans to link directly Russia through the Black
The main priority in many states of Western Europe, in opposition to East and Central Europe where environmental concerns are the last priority. The movements of the German government to move their economy to a more environmentally friendly system promoting the development of renewable energies and dismantling the most unfriendly energy sources have been complemented with the security of the supply by the construction of the North Stream. Other Western states are following the German example, but the current economic crisis is breaking down the transformation of the energy model from a more economic efficiency in the short term with cheap access to energy to a more sustainable system in the long term where the environmental issues are on the top of the agenda. The main problems here will be three:

1. The end of the economic crisis: More states will change their energy priorities to focus on the protection of the environment. It will make the group stronger inside the European union, and then their demands to expand this priority to the rest of the members of the Union will be more powerful. Eventually they will reach a majority of the needed votes and probably more integration in the energy field will be achieved towards the environmental protection. It will clearly be against the interest of East and Central European economies and their necessity of cheap access to energy supply in order to keep their economic competitiveness.

2. The environmental borders of Europe: the political borders of the European states are not link with the environmental borders. Most of the continent is link, so what affects a local area of Europe probably will affect the whole continent. For example, most of the pollution in the Scandinavian lakes comes via the atmosphere from Central European states pollution. It means that the individual efforts of any member state of the European Union will be ineffective. What happens in Poland has an effect in Finland; the pollution in Croatia affects the Italian shore, the pollution in the Spanish rivers will spread to Portugal. So, the environment has to be understood as a complex system affecting the whole continent.

It is just a matter of time that the states investing more money in the protection of the environment in energy terms, like Germany, will lobby to spread its vision to the whole Europe in order to have a real protection of the environment. If Germany does not do that, the main industries could just move to the border states of Germany, have access to cheap energy harming the environment. As Germany is one of the most powerful states inside of the European Union, and the supporters to a greener approach in the energy field are increasing all over Europe, it is logical to think that sooner than later it will become a European Union priority, with the negative economic consequences for East and Central Europe.

3. The market of renewable energy is becoming more important in economic terms as the world economy is moving slowly to a more environmental friendly economic model. The main leaders in terms of technology are located in Europe, so these European companies will obtain big benefits from the expansion of the environmental priority in the energy field to the rest of Europe first, and then to all the parts of the world with economic ties with the European market. Obviously, these companies also will lobby to increase the role of environmental protection in the energy priorities of the whole European Union. It will eventually lead to a deeper integration in the energy field in the European level, and a focus on Western priorities rather than Eastern or Central European priorities.

The main problem between East and West is the lack of integration, as an area is more integrated its necessities become similar and a common action is possible. Currently there is not such a level of integration between West and Central and East Europe. Obviously the protection of the environment should be the main priority for any government because without a planet the humans will disappear. But the decision is hard to take because it has an important financial cost and will lower the incomes of the citizens in a short term. More developed states have enough incomes to afford it, new members of the Union are in a more difficult situation.

As the Energy Policy of the European Union is moving towards a deeper integration, and to focus its priority on environmental concerns with the complementary support of security as renewable energy is produced locally, it will harm temporally the Eastern and Central European economies. East and Central member states have less wealth and less income per capita, they have more areas to protect as the population density is lower and wild areas more common. Also they will have to buy the Western technology in the renewable energy field increasing the price of the energy without getting the return of economic benefit of local companies and the creation of the European energy market has meant the creation of big European companies, all of them from Western Europe, where they pay most of their taxes, with the consequent benefit for the Western European states tax offices.

In order to avoid these problems, the European Union should create a fund to decrease the negative influences, as higher prices of energy through different European subsidies focus on East and Central Europe. It will help to achieve artificially the three main priorities in the field of Energy, competitiveness with European subsidies, security of the supply, with local energy sources based on renewable energy and protection of the environment. Obviously this will be just a temporal solution in order to avoid a big shock to the economy of these new members of the Union, which gradually will disappear. Hopefully, the integration between these two areas of Europe will increase at the same time that the energy subsidies decrease, equalizing the situation in the middle term. Once the subsidies disappear there will be enough integration in the European Union that the energy priorities will be common.

A problem of the proposed energy subsidies for East and Central Europe, even if they are temporal, is where the money will come from. Currently there is an economic crisis, so it is
not likely to expect important advances in the field, but once the crisis will be overcome, the funding of the energy subsidies will become a priority. The most logical step will be that the economic agents obtaining benefits from the European Energy common market will pay some kind of European tax and the money collected will pay for the energy subsidies. The current big companies in the energy field are Western European, so they pay most of their taxes in their local states. In other words, they obtain a benefit from the European Market and they pay their taxes in the national level benefiting their local governments. Obviously there is not a European tax office, there is not European government to deal with common taxes but there are national contributions to a common budget. If a national state obtains a higher income via taxes because of the payments of the energy companies located there, this state should contribute economically to a European Energy Fund to pay the already mentioned energy subsidies. It will break the rule of the European Budget that no common income can be linked to an specific purpose, but it will be accepted as an exception.

It will be a fair situation where West and East and Central Europe will win from the integration in the energy field, the whole Europe will benefit from it as far as the subsidies are temporal, because any artificial influence in the market will disturb the free competence, and is complemented with other actions in other fields to integrate more all the members of the European Union.
Corporate Social Responsibility and Legal Regulations in Poland

Olga Dębicka,1 Aneta Oniszczuk-Jastrząbek 2

Abstract

The development of the world economy, technological progress and the irrational exploitation of natural resources have caused increasing negative effects of economic activities what led – in turn – to paying more and more attention to such phenomenon as pollution, growing unemployment and deterioration of the society’s living standards. A socially responsible business claims to be an answer to increasing public awareness that draws more and more attention to quality of product, the origin of raw materials and semi-finished products, the treatment of workers, working conditions or environmental aspects of the manufacturing and service processes.

This article presents the legal regulations concerning the concept of corporate social responsibility undertaken by enterprises in Poland.

Key words: Social corporate responsibility, responsible business, legal regulations.

Introduction

Social responsibility can be defined as a voluntary strategy taking into account social, ethical and environmental aspects in business and in relations with stakeholders (including employees, customers, shareholders, suppliers, the local community). It is a contribution of enterprises in the implementation of policies for sustainable economic development and a way of doing business, where a prime objective is to achieve a balance between either efficiency and profitability and the public interest. The priority areas of CSR, selected in the dialogue process, should be included in the mission, strategic plans and business operations of a company.

1. The State Policy in the Field of Corporate Social Responsibility

Standards and instruments for the implementation of corporate social responsibility can be included in national laws and regulations to which companies must comply. These are the so-called provisions of the “hard law”. But some voluntary and non-binding standards, the so-called instruments of “soft law” can be also applied. CSR standards can be used by all types of businesses. National governments may take into account a number of practical measures that will encourage companies to use these standards in the field of investment and enterprise management mechanisms. CSR standards can be divided according to the organizations that created them and they can include, for example, international standards established by general principles recognized in international declarations and agreements or multilateral initiatives.

Governments can encourage and support the development of CSR standards through the provision of financial support, technical expertise, support for the development of national standards for management certification systems and by promoting environmentally-friendly practices, tax breaks and easier access to loans dedicated to pro-social activities.

Social dialogue on new regulations creates a possibility of communicating business problems and needs, and influencing development of the law. Greater enactment transparency will make businesses easier to prepare for the changes.

Action undertaken by national governments to encourage companies to apply the principles of social responsibility are based on the introduction of an appropriate system of subsidies and taxes for businesses to stimulate their commitment to CSR. They are so far the least popular in the EU, and consist mainly of subsidies and taxes for charitable purposes (possibly the oldest government policy on CSR), for the introduction of “clean technologies” and employment of specific groups of workers.

Through the tax system, national governments worldwide have the ability to promote certain solutions and to reduce others, encouraging certain behaviours or deciding on the course of the various areas of social and economic life.

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5 Ibidem, p. 69.
Thus, the public institutions create certain tax incentives to promote doing business in a responsible manner. Although Polish tax system provides business with a number of minor concessions, but it can be concluded that they have little relevance to their daily practice and really does not affect basic economic, environmental and social problems in the context of CSR. An example may serve generally available tax incentives for research and development, all of which are granted for the benefit of companies wishing to conduct or expand research projects with the principles of CSR.

Some countries developed specific solutions that can serve as a good practice and valuable guidance for enacting and building a system of tax incentives in other countries (Table 1).

Table 1. Examples of tax incentives in selected EU countries

<table>
<thead>
<tr>
<th>Area</th>
<th>Examples of tax incentives</th>
</tr>
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<tbody>
<tr>
<td>Business</td>
<td>Belgian tax system for companies having research and development employees provides for 75% tax exempt on wages for these workers. The tax reduction is granted on the condition of reinvesting the tax saved.</td>
</tr>
<tr>
<td>Environment</td>
<td>Belgium has introduced a tax incentive to buy a car with an electric motor, expressed as a fixed amount specified in the internal regulations. The tax reduction is higher for cars with optimal CO₂ emission (established by law) and it varies between 50% and 100% (cars with emission up to 60gr on kilometers or less are granted with a 100% tax discount, while cars emitting 195 gr CO₂/km or more entitle to 50% reduction). In addition, the CO₂ tax is lower for the company cars with optimum CO₂ emissions. In some regions of Spain, there is a tax relief for the use of „green” energy. For example, in Madrid, the owner of a residential building, who has invested in the installation of solar energy can reduce tax liability connected with property tax by up to 25%.</td>
</tr>
<tr>
<td>Employees</td>
<td>In Spain, there is a special tax relief for each newly hired person with a disability (EUR 6 000 per year). To receive funding, the company has to raise the average level of employment of people with disabilities within the organization as compared to the previous year.</td>
</tr>
<tr>
<td>Social</td>
<td>In Finland, a legal entity is entitled to deduct donations supporting science, art, Finnish cultural heritage or resources allocated to universities (or other higher education institutions) in the Member States of the EEA or given to the fund associated with such University in the amount of EUR 850 to 250 000. The tax advantage refers also to the donation from 850 to 50000 EUR for promoting science, art or Finnish cultural heritage granted to associations, foundations and other institutions in the EEA, provided that they have been recognized by the National Board of Taxes as recipients of aid and their goal is to protect Finnish cultural heritage. The entities entitled to the above tax advantage are companies, investment banks, mutual funds, etc.</td>
</tr>
</tbody>
</table>

When considering tax incentives, it should be noted that it is important to carry out projects based on the CSR principles having in mind not only minimization of their negative impact on the environment, but also maximization of the positive impacts.

Some governments promote CSR through the development of a „kit tools”, and almost all of them have introduced „green policy” in public procurement. Many government actions in this area are connected with the activities of other international organizations calling for responsible business behaviour (e.g. UN, ILO, chambers of commerce, business associations). United Kingdom, Germany, France, Sweden and Denmark imposed on large institutional investors a requirement of disclosing the importance of social and environmental criteria in their investment decisions. The UK government has published proposals of guidelines for social reporting and mandatory reporting on emission for stock companies. From April 2013, all stock companies in the UK will be required to report on greenhouse gas emissions each year, according to the accepted guidelines. Moreover, the Code of the British Financial Reporting Council’s Stewardship requires that the owners of assets and asset managers should inform about their conformity with the UN Principles for Responsible Investment. Since 2004, German companies have to include in their annual reports information on non-financial indicators that significantly affect their business, but this provision has not been formulated in relation to CSR. In France, according to the law concerning economic regulation introduced in 2001, the stock companies are obliged to disclose in their annual reports information on the 40 social and environmental criterions.

Since 2009, the Swedish state-owned companies are obliged to prepare annual sustainability reports in accordance with the guidelines of the G3 Global Reporting Initiative (GRI). In 2008, Danish Parliament adopted an Action Plan for Corporate Social Responsibility, which obliged large Danish companies and institutional investors to report on CSR activities. The Danish Government calls institutional investors for following the rules of the United Nations Principles for Responsible Investment and recommends large companies to join the UN Global Compact initiative. The principle of SRI in the pension systems was introduced in the legislation of some other European countries, including Austria (2005), Belgium (2004) and Italy (2004).

Poland, joining the European Union in 2004, has also committed itself to the principles, policies and regulations that are mandatory for all member states. It is very important with regard to the sustainable development because the so-called old EU countries are already more advanced in that field and thus the standards and legal provisions are more restrictive.  

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2. Polish State Policy for Socially Responsible Actions

The priority of the Government of the Republic of Poland in the promotion and implementation of CSR at the national level is a partnership cooperation with companies to overcome social barriers, to develop and search for new sources of competitive advantages, to ensure a stable growth necessary for fulfilling the aspirations of present and future generations. Government’s vision of CSR consist in creation of the best conditions for the development of Poland as a friendly country for responsible, innovative and competitive business.

Implementation of that vision can be defined by achievement of strategic objectives, in particular:

- increasing government accountability and enabling participation of socio-economic partners in the debate on public affairs,
- raising awareness and increasing the responsibility of market participants on opportunities and benefits of CSR strategies and instruments,
- strengthening cooperative relations and building CSR cross-partnerships.

For the purpose of efficient and effective implementation of the adopted recommendations, it was agreed that their implementation will take place in the annual work plans of the CSR Task Group. In addition, the need for systematic monitoring and evaluation of actions taken has been highlighted.

Polish CSR is still in embryonic phase, but companies are more and more engaged in discussion and debates on corporate social responsibility, not only at the corporate level. Several initiatives were launched in particular provinces to support the development of CSR in small and medium-sized enterprises. These projects are implemented in Silesia, Lower Silesia, Malopolska, and Wielkopolska voivodship.

New initiatives are mostly implemented by non-governmental organizations which embrace the CSR issues in their areas of interest. The regional government offices are also very active, with the Silesian region at first place, where the first Council for corporate social responsibility has been created. The promotion of CSR at the national level is mostly provided by actions undertaken by the Ministry of Economy. The Ministry’s representatives participate in conferences and symposia on CSR. Polish law does not enforce the obligation of social reporting. So far, Polish government can at most encourage businesses to adopt good CSR practices. Therefore, on the strength of the Prime Minister resolution, a CSR Task Group has been established in May 2009.

Its aim is to promote CSR idea, to build structures enabling a dialogue between representatives of the three economic sectors and to analyse and implement the experience of other European countries in the area of corporate social responsibility. The team operates within four working groups:

- group on promoting CSR in Poland,
- group on responsible investment,
- group on CSR education,
- group on Sustainable Consumption.

The CSR Task Group has already developed recommendations addressed to all economic actors to contribute to the harmonious development of CSR in Poland.

So far, Polish government support for CSR focuses mainly on publications and recommendations. If all other, more systemic, actions prove to be successful, become clear over time. Polish situation differs greatly from the United Kingdom, where more than 10 years ago, Prime Minister Tony Blair has established the Ministry of CSR. Unfortunately, the last decade has shown that it is of little avail, as this Ministry has rather marginal importance. The dynamic development of CSR in the UK is rather caused by the operation of a strong civil society and the actions of conscious consumers who – by their purchasing decisions – are forcing companies to rethink their business.

Although Polish tax system allows for a number of minor reliefs for the companies, but they have little relevance to their daily practice and do not solve the fundamental problems of economic, environmental and social workers in the context of CSR. As an example may serve generally available tax reliefs for research and development activities, all of which are available to entrepreneurs who want to lead and develop research projects in line with the CSR principles. It is important to realize these projects, with a view not only to minimize its negative impact on the environment, but also to maximize the positive impact. These reliefs include:

- investments on underdeveloped regions, investments in “green funds” and “ethical funds”,
- purchases from domestic farmers, research and development activities,
- innovation and investment in environmental protection, new lines, products and eco-car fleet, increasing the eco-efficiency of buildings (in Poland, the entrepreneurs who pay CIT or PIT taxes may deduct up to 50% of the amount spent on the purchase of new technology),
- recycling and recovery of packaging, use of renewable energy sources; hiring people with disabilities, training for employees,
- investments improving the safety of workers; providing workers with additional medical care or sports activities; transfer of funds for charity (in Poland, if an entrepreneur made a donation for a specific purpose or for specific organizations active in Poland – or for the organizations conducting charitable activities in other EU Member States or countries belonging to the European Economic Area – the entrepreneur can deduct from taxable income the value of provided donations; the total tax deduction can reach up to 10% of the income for businesses, and 6% in the case of income tax from individuals).

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8 http://biznesodpowiedzialnie.blog.pl/2012/06/06/jak-razd-wpiera-csr/.
9 http://biznesodpowiedzialnie.blog.pl/2012/06/06/jak-razd-wpiera-csr/.
The main task of the state is to create transparent rules governing the business. At the level of public authorities, this requires development of the conditions for effective compliance and enforcement of the law, access to information, transparency of decisions, reduction of harmful privileges, ensuring professional civil service, prevention of corruption and bribery, and promotion of ethical behaviour. Local administration should encourage companies to develop CSR strategies, offering them an access to information and appropriate education.

3. Regulations on Good Business Practices in Poland

Good business practices of CSR embrace activities, programs or projects undertaken either in specific areas of company’s operation, such as human resource management, marketing, production, R&D, etc., or refer to the entire enterprise and improve the quality and effectiveness of its operations. They are directed to one or more groups of stakeholders (employees, suppliers, customers, local community, etc.) and respond to their specific needs and / or expectations, demonstrating an innovative approach to solving the existing problems and at the same time benefiting the company by creating value added to the company or society. According to the ISO 26000 international standard on corporate social responsibility published on November 1st, 2010, good practices can occur in the following 7 areas:

1. governance,
2. human rights,
3. employee practices / aspects,
4. natural environment,
5. fair market practices,
6. consumer Issues,
7. local community involvement and development.

The governance promotes taking responsibility for companies actions and integrates the issue of social responsibility with all areas of company’s operation. The general principles of corporate governance are resulted from statutory regulations, including in particular the Commercial Companies Code, the rules governing the capital market and the principles set out in the “Code of Best Practice for WSE Listed Companies”.

The good practices in the field of human rights include freedom of expression and association, prevention of all types of discrimination (e.g. due to age, sex, nationality). The main document, in which the human rights are written, is the Constitution of the Republic of Poland of April 2nd, 1997. The human rights are mainly contained in the Chapter II of the Constitution, but they can be also find in other Chapters. Particular human rights are also enshrined in other Polish acts, such as the Law on Personal Data Protection, the Law on the Education System and the Social Support Act. Poland has also ratified several international conventions. The most important and the first document in which all generations of rights – personal, political, social, economic, community – are listed is the Universal Declaration of Human Rights of 1948. Other documents were being developed in regional systems of human rights protection. On the Council of Europe level, the most important documents include: the European Convention on Human Rights and the European Social Charter.

The employee practices / aspects includes all issues related to the performance of work for the company, both within its organizational structure and by subcontractors. In Poland, the documents relating to the employees’ rights are contained in:

- constitution of the Polish Republic and the European Union Law,
- acts (Labour Code – its standards refer to all workers employed under employment relationship, e.g. employees within the meaning of Article 2 of the Labour Code; acts regulating collective labour law – mainly laws on trade unions, employers’ organizations, councils of workers, resolution of collective disputes, Civil Code – in accordance with Article 300 of Labour Code; Code of Civil Procedure – mainly the rules which govern proceedings before the labour courts),
- ratified international treaties (such as the International Covenants on Human Rights or the European Convention on Human Rights),
- regulations (the acts of an executive nature – a statutory delegation specifying the scope and method of adjustment is necessary to issue such acts),
- external agreements and collective agreements,
- internal company agreements, regulations and statutes.

Moreover, the acts adopted in the European Union are of fundamental importance for the labour law, in that all treaties: Rome, Maastricht, Amsterdam, Nice, Lisbon, as well as the Community Charter of the Fundamental Social Rights of Workers.

Good practices related to environmentally friendly corporate behaviour can take many forms. The most tangible business activities for the environment are investments improving production processes, leading to savings of materials, reducing the use of natural resources, reducing harmful emissions, improving energy efficiency – throughout the life cycle of the product or service. There recognized standards define environmental norms. Their implementation can formally confirm eco-friendly attitude of the company. They are extremely important, especially in plants. Environmental norms are included, among other, in the international quality certificates (ISO 14001, ISO 18001, ISO 9001) and HACCP food safety certificates. These standards define basic requirements that every company should fulfill. The minimal standards that have to be met by a particular company are set by law and depend on the nature of the business.

For the first time in the history of Polish law, the Act which covers all aspects of environmental protection and nature conservation – based on the global and European guidelines – came into force in 2001. The Environmental Protection Law of April 27th, 2001, with the later amendments, is nowadays a law base for many specific regulations, which include:

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11 ISO 26 000- guidance on social responsibility.
12 http://www.metis.pl/content/view/635/142/.
13 D. Badan, Źródła prawa pracy; www.sekcjaprawapracy.tbsp.pl/.../Daniel%20Badan%20-...
5. Decree of the Council of Ministers of December 28th, 2000 on the national system of information on dangerous products (Journal of Laws No 4, pos. 28).
6. Decree of the Council of Ministers of November 28th, 2000 on conditions of labelling the footwear for sale to the consumer (Journal of Laws No 110, item 1168).

The activities associated with involvement in local community development focus on business relationships with the communities located in the nearest surroundings in all places, in which the companies operate. The measure, which is often used and which probably describes most accurately the development of social attitudes in society, consists in frequency of voluntary and selfless actions undertaken by the citizens in favour of other people – which is called voluntary. In Poland, the rights and responsibilities of volunteers and the organizations and institutions that could benefit from their services are set out in the Act on Public Benefit and Volunteer Work – in Section III.

Conclusion

In recent years, the concept of corporate social responsibility has been met with growing interest, accompanied by changes in attitudes and expectations of all market participants.

Concluding the above considerations, it should be stated that the concept of corporate social responsibility should not only be promoted by businesses and business organizations, but also the government, state institutions, academia, NGOs and the media. Particular attention should be paid to promoting education in this field and the role of the media, which should be involved in motivating entrepreneurs to affirmative action, cooperation, partnership and implementation of long-term development strategy. CSR challenges calls for the cooperation of private and public sector. And the economic sector should be more active in the social dialogue. Therefore, companies should implement codes of conduct, conduct periodic audits of CSR and should cooperate in this area with NGOs which promote ethical and responsible action.

The laws are constantly changing, so it is necessary to constantly monitor them. This is necessary because of the requirement to comply with new regulations to carry out or modify the existing procedure.

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15 Ibidem, p. 44.
17 http://osektorze.ngo.pl/x/631738;jsessionid=63C803F2DEC7611B33318860CO0073EDD.
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Development Potential of Polish SMEs – Problems and Barriers

Joanna Duda

Abstract

Globalisation and emergence of a uniform market pose new challenges to entrepreneurs. These are both opportunities and threats associated with new principles of enterprise operation, access to new resources, changes of legal regulations and procedures, as well as appearance of new competitors.

Poor innovativeness and weak competitive standing of enterprises are commonly mentioned. These changes give rise to discussions concerning development potential of companies, particularly those from the SME sector, as these are the driving force of the economy. This paper, therefore, aims to assess development potential of Polish SMEs on the basis of available literature and results of empirical research.

Key words: globalisation, Poland, SME.

1. Introduction

The process of globalisation and formation of a uniform market encourage a range of scientific and business discussions concerning development possibilities of enterprises in the joint market, with particular reference to the sector of small and medium-sized enterprises that are the driving force of the economy. It is these enterprises that generate more than a half of GNP, employ three quarters of the workforce and are highly flexible, rapidly adapting to shifts in their environment. This is demonstrated by their steady numbers. Although approx. 50% of SMEs function for less than a year and 75% less than three years, their numbers have ranged around 3 million for the past 10 years [www.parp.gov.pl].

In the context of changes in the global market, development potential of Polish SMEs has become the subject of a range of studies and debates, with particular reference to the emergence of the common European market. Poor competitiveness, restricted access to capital and a number of barriers to growth of Polish SMEs have been mentioned, which directly translates into their competitive standing in the market. Therefore, this paper intends to explore the development potential of Polish SMEs. Based on a review of available literature and results of empirical research, a variety of barriers have been analysed, such as: legislative barriers including fiscal and labour laws, functioning of business courts, business audit procedures and regulations, efficiency of starting and closing of businesses. Financial barriers have also been analysed that directly affect structure and innovativeness of investments, which immediately translate into competitive standing of enterprises in the market. Innovation ratios of Polish SMEs have also been explored.

2. Development of Enterprises – a Theoretical View

Enterprises today are different than in the nineteen fifties or seventies as a result of their development, a process involving any organisations, with enterprises in particular. Many new enterprises are formed every year, yet few manage to survive for long. Only 16 out of 100 largest American companies in the early 20th century are still in operation, while a third of the 500 largest US corporations listed by ‘Fortune’ biweekly in 1970 were already out of business in the early 1980s [Laszczak 2000, p.25].

According to Z Pierścionek, development of an enterprise denotes coordinated changes of business systems which adapt it to a constantly changing environment. These adjustments are effective if they assure that an enterprise achieves and maintains its competitive edge, a pre-requisite for remaining in the market. In this perspective, development means introduction of certain new elements to an enterprise system, improved quality of its existing components and changes of system structures. It is primarily a qualitative phenomenon which involves introduction of product, process, structural, organisational and management innovations. The need for an enterprise to develop is a function of continuous changes in its environment; in order to adapt, a business must constantly effect changes, that is, develop. Two parts of an enterprise environment can be distinguished: controllable, which can be influenced, and uncontrollable, i.e. not liable to any impacts. An enterprise is capable of influencing demand, competition and, to some extent, economic policies. Determining which actions and resources tend to affect a business and which tend to affect its environment is a strategic issue. As an organisation develops, its effect on the environment grows. Thus, Pierścionek proposes an expanded definition of
... 'development comprises changes of enterprise systems and (controllable) environment which provide for an enterprise to achieve and maintain (as well as increase) its competitive advantage'. [Pierścionek 1996, p.11]

Development potential, defined in general, is creative potential of a business which assures feasibility of qualitative changes in all areas of its operation. Productive potential, on the other hand, includes all and any material and intellectual resources and skills, thus, all factors determining operation and development of a business. Financial development potential, which expresses operational capabilities of a business seen as an economic system, is normally the starting point for evaluation of the development potential. Financial development potential is a systemic category that indicates the capacity for improving efficiency to such a degree that it would be significantly confirmed with current and future financial performance of a business. Development must be documented with economic benefits as the latter provide for financing of investment and operational activities at subsequent stages of the production process. If a business is profitable in a given period, it can be said to display development potential [Stabryła 2000, p. 244].

A. Light believes development of an organisation is the process of improving its position in the environment and effect of an organisation mastering the process of 'learning'. Consequently, it can occupy 'market niches' and attain a better competitive standing. Contemporary managers not only perceive the need for changes but virtually treat them as opportunities. [Light 1991, p.2]

The very concept of development and definitions of its process are variously interpreted in theory, being frequently associated with the notion of evolution, that is, successive changes towards a specific direction. In this approach, the process of development involves transition to increasingly more complex and diverse forms, towards increasingly perfect conditions. Thus, development is connected to the idea of progress. [Marciniak 1997, p.6]

The situation and development prospects of small and medium-sized enterprises depend on a range of conditions, including macroeconomic factors – state policies regarding the sector, assurance of long-term economic equilibrium, dynamics and growth, levels of demand and supply, as well as internal (microeconomic) conditions and factors, e.g. volume of assets, capacity for innovation, quality of products.

Small and medium-sized enterprises encounter a range of obstacles both at their establishment and in their operations. Processes in the contemporary world build barriers of their own, too. The globalisation, emergence of the Common European Market and Poland’s membership of the European Union have dramatically changed condition of business activity. Thus, the sector of small and medium-sized enterprises faces barriers in effect of globalisation, internationalisation and integration processes.

3. Characteristics of Polish SMEs

It is common knowledge that small and medium-sized enterprises play a substantial role in economy. The sector has a key importance as it:

- generates new jobs, thus helps to solve the social and economic problems of unemployment,
- rationalises resource allocation,

The Polish National Office for Statistics (GUS) reports SMEs contributed approx. 48.4% to gross added value, while their workers accounted for 2/3 of the total workforce.

The sectoral structure of Polish enterprises is somewhat different than in the EU-27. Compared to the EU average, Poland has many more trading and fewer service businesses. Slightly more Polish enterprises operate in industrial and construction sectors than is the case in the EU. Eurostat figures suggest three quarters of Polish SMEs are engaged in trade and commerce (37.7%; in the EU, 30.6%) and services (35.4%; in the EU, 44.3%), with every seventh active in construction (15.3%; in the EU, 14.5%) and every tenth – in industry (11.6%; 10.6% in the EU). [PKPP Lewiatan, 2012]

The smallest entities, i.e. micro-enterprises, play an especially role among the SMEs – they account for a vast majority (96%), employ more than a third of those working in business (37.5%), generate a quarter of turnover (26.9%) and gross added value (21.6%) and a seventh part of all investments (14.2%).

Self-employed individuals prevail in the Polish SME sector (91.7% of all businesses). Poland is distinct in this respect. The following table compares percentages of individual businesses (without limitations of owners’ liability) with those of all enterprises in selected countries. The figures indicate that only structures existing in Germany and Italy comprise ca. 60% of such legal forms, whereas they are utterly absent in such countries as Austria, Ireland, Switzerland, Turkey or Romania. (Table 1)

Table 1. Percentage of enterprises operating as self-employment

<table>
<thead>
<tr>
<th>Country</th>
<th>Percentage of enterprises operating as self-employment (the owner is liable with all its assets)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>42</td>
</tr>
<tr>
<td>Finland</td>
<td>41</td>
</tr>
<tr>
<td>Germany</td>
<td>64</td>
</tr>
<tr>
<td>Poland</td>
<td>91.7</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>24</td>
</tr>
<tr>
<td>Italy</td>
<td>62.2</td>
</tr>
<tr>
<td>Austria</td>
<td>0</td>
</tr>
<tr>
<td>Ireland</td>
<td>0</td>
</tr>
<tr>
<td>Romania</td>
<td>0</td>
</tr>
<tr>
<td>Turkey</td>
<td>0</td>
</tr>
<tr>
<td>Switzerland</td>
<td>0</td>
</tr>
</tbody>
</table>

Source: author’s own study based on data from EUROSTAT [http://appsso.eurostat.ec.europa.eu]
A survey of 1500 Polish SMEs, conducted by the Polish Confederation of Private Employers ‘Leviathan’ in 2012, shows that a bulk of small and medium-sized enterprises engage in local or regional operation. In both 2011 and 2012, a vast majority of Polish SMEs, nearly 70%, were only active in their regional market. Less than a quarter operated in the national Polish market and just above 6% were present in the global market. With regard to enterprise size, this trend has been steady. Indeed, as an enterprise grows, it is more willing to internationalise, yet this holds true for merely 33% of medium-sized enterprises (Table 2). It can be stated in general that Polish SMEs are very poorly internationalised.

Table 2. Activity range of Polish SMEs

<table>
<thead>
<tr>
<th>Enterprise size</th>
<th>Local activity</th>
<th>Domestic activity</th>
<th>UE and Word activity</th>
</tr>
</thead>
<tbody>
<tr>
<td>SMEs 2011</td>
<td>68.1</td>
<td>23.4</td>
<td>6.7</td>
</tr>
<tr>
<td>SMEs 2012</td>
<td>69.5</td>
<td>24.9</td>
<td>7.0</td>
</tr>
<tr>
<td>Micro</td>
<td>71.6</td>
<td>22.8</td>
<td>5.5</td>
</tr>
<tr>
<td>Small</td>
<td>57.7</td>
<td>27.3</td>
<td>13.0</td>
</tr>
<tr>
<td>Medium</td>
<td>31.2</td>
<td>34.7</td>
<td>33.8</td>
</tr>
</tbody>
</table>

Source: author’s own study based on: Starczewska-Krzysztoszek, M., MSP – zdolność do konkurowania na rynku globalnym, PKPP „Lewiatan” Warszawa, 2013

A marked majority of Polish SMEs based their strategies on sales of the existing, not new products or services. This varies markedly according to size. As many as 62% respondents among micro-enterprises did not implement any innovations, with the proportion being reversed among medium-sized entities. More than a half focused on sales of products or services that were of an innovative nature. The survey results are presented in Table 3.

Table 3. Business priorities of Polish SMEs in respect to the types of offered products

<table>
<thead>
<tr>
<th>Enterprise size</th>
<th>Sales of current products</th>
<th>Investment in innovative products</th>
</tr>
</thead>
<tbody>
<tr>
<td>SMEs in Poland</td>
<td>62.4</td>
<td>37.5</td>
</tr>
<tr>
<td>Micro</td>
<td>63.4</td>
<td>36.5</td>
</tr>
<tr>
<td>Small</td>
<td>56.4</td>
<td>43.4</td>
</tr>
<tr>
<td>Medium</td>
<td>47.8</td>
<td>52.1</td>
</tr>
</tbody>
</table>

Source: author’s own study based on: Starczewska-Krzysztoszek, M., MSP – zdolność do konkurowania na rynku globalnym, PKPP „Lewiatan” Warszawa, 2013

Price competition strategies are another characteristic of Polish SMEs, which ultimately kills their profitability and reduces commitment of owner capital, which the following sections of this paper will demonstrate to be the dominant source of financing for investments of small and medium-sized enterprises. The figures in Table 4 show that 2010 marked a turning point as entrepreneurs began competing in terms not only of pricing but also of quality of their products and services. This shift of strategy is mainly due to the impossibility of any further price-cutting as margins of most enterprises were so narrow as to squeeze profitability of such businesses.

Table 4. Competitiveness factors for Polish SMEs in 2006–2014

<table>
<thead>
<tr>
<th>Years</th>
<th>Price of products/services</th>
<th>Quality of products/services</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>64.3</td>
<td>15.2</td>
</tr>
<tr>
<td>2007</td>
<td>57.3</td>
<td>21.7</td>
</tr>
<tr>
<td>2008</td>
<td>52.0</td>
<td>26.8</td>
</tr>
<tr>
<td>2009</td>
<td>57.3</td>
<td>21.7</td>
</tr>
<tr>
<td>2010</td>
<td>70.8</td>
<td>67.3</td>
</tr>
<tr>
<td>2011</td>
<td>13.4</td>
<td>43.4</td>
</tr>
<tr>
<td>2012</td>
<td>18.3</td>
<td>41.9</td>
</tr>
<tr>
<td>Plan na 2013–2014</td>
<td>20.1</td>
<td>39.6</td>
</tr>
</tbody>
</table>


It is universally believed that flexibility is a key advantage of SMEs over larger companies as the former are capable of rapid adjustments to market changes. It is therefore surprising that so few entrepreneurs compete in respect of: quality of customer service (38%), specialisation (16.9%), the ability to adapt its output to individual customer requirements (21.9%) or novel nature of their products or services (7.2%). [Duda J., 2012] 4. Barriers to Development of Small and Medium-sized Enterprises

Despite the fact that small and medium-sized enterprises are of particular importance to development of economy, they encounter a number of barriers to their growth, including financial, demand, institutional, legal and legislative obstacles. [Duda J., 2012]
For purposes of analysis, barriers to SME development must be classified. A range of classification criteria have been suggested. In respect of the stage of business development during which they emerge, they are divided into:
- entry barriers,
- development barriers.

Entry barriers occur as a business is started and relate to problems a firm faces entering a market. These include: unclear regulations, economic slump, corrupt and incompetent officials, high costs of investments, patent legislation.

Development barriers affect enterprises already operating in the market. Their impact varies at the different stages in the life of a business as capital, human, information and space resource requirements fluctuate [cf. Blawat F., 2004].

To identify these barriers, Ministry of Economy, Department of Forecasting and Analyses conducted a survey of development trends in the Polish SME sector in early 2013. The test sample comprised 6000 enterprises, with 15% or 900 responses returned.

The legislative barriers, to be analysed below, include: fiscal laws, labour law regulations and procedures, business jurisdiction procedures, business auditing regulations and procedures, as well as regulations and procedures of establishing and closing of a business.

None of the entrepreneurs surveyed evaluated fiscal legislation in Poland as very good. Average to poor assessments prevailed. Analysis of figures in Table 5 indicates the proportion of entrepreneurs considering fiscal laws to be bad, very bad or average had risen significantly between 2006 and 2012.

<table>
<thead>
<tr>
<th>Years</th>
<th>very bad</th>
<th>bad</th>
<th>neutrally</th>
<th>good</th>
<th>very good</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>10</td>
<td>19</td>
<td>36</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>2007</td>
<td>17</td>
<td>35</td>
<td>39</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>2008</td>
<td>32</td>
<td>38</td>
<td>43</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>2009</td>
<td>31</td>
<td>40</td>
<td>10</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>2010</td>
<td>20</td>
<td>30</td>
<td>46</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>2011</td>
<td>30</td>
<td>30</td>
<td>37</td>
<td>3</td>
<td>0</td>
</tr>
</tbody>
</table>

Source: author’s own study based on the report: Trendy rozwojowe sektora MSP w ocenie przedsiębiorców w pierwszej połowie 2012 roku, MG DPiA, nr 1/2013, Warszawa 2013

Polish entrepreneurs have long held Polish labour legislation in low esteem, seeing it primarily as insufficiently flexible and obstructing business activities. Labour regulations, side by side with high costs of employment, are the most marked barrier preventing Polish micro-entrepreneurs from hiring new staff. The results summarised in Table 6 suggest that a vast majority of Polish entrepreneurs assess Polish labour law as bad or average.

<table>
<thead>
<tr>
<th>Years</th>
<th>very bad</th>
<th>bad</th>
<th>neutrally</th>
<th>good</th>
<th>very good</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>10</td>
<td>26</td>
<td>46</td>
<td>18</td>
<td>0</td>
</tr>
<tr>
<td>2007</td>
<td>6</td>
<td>29</td>
<td>47</td>
<td>17</td>
<td>1</td>
</tr>
<tr>
<td>2008</td>
<td>8</td>
<td>31</td>
<td>45</td>
<td>16</td>
<td>0</td>
</tr>
<tr>
<td>2009</td>
<td>9</td>
<td>23</td>
<td>51</td>
<td>19</td>
<td>0</td>
</tr>
<tr>
<td>2010</td>
<td>9</td>
<td>29</td>
<td>42</td>
<td>20</td>
<td>0</td>
</tr>
<tr>
<td>2011</td>
<td>10</td>
<td>20</td>
<td>32</td>
<td>17</td>
<td>1</td>
</tr>
<tr>
<td>2012</td>
<td>12</td>
<td>27</td>
<td>41</td>
<td>20</td>
<td>0</td>
</tr>
</tbody>
</table>

Source: author’s own study based on the report: Trendy rozwojowe sektora MSP w ocenie przedsiębiorców w pierwszej połowie 2012 roku, MG DPiA, nr 1/2013, Warszawa 2013

The same applies to taxation, regarded as excessively high. The share of respondents expressing their negative opinions on this subject increases over time. The rise in adverse assessments is far less dramatic than in respect of fiscal legislation, however. In addition, 2% more entrepreneurs view this aspect in a positive light.

The entrepreneurs also estimated impact of business jurisdiction regulations and procedures on development of their operations. The figures in Table 7 point to a far greater proportion of very adverse assessments in this area than in the two preceding cases. In 2012, 20% respondents found business jurisdiction regulations very poor (1% fewer than in 2006), 22% poor (7% fewer than in 2006), and 46% average (that is, 7% more than in 2006).

<table>
<thead>
<tr>
<th>Years</th>
<th>very bad</th>
<th>bad</th>
<th>neutrally</th>
<th>good</th>
<th>very good</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>21</td>
<td>29</td>
<td>39</td>
<td>11</td>
<td>0</td>
</tr>
<tr>
<td>2007</td>
<td>18</td>
<td>22</td>
<td>42</td>
<td>18</td>
<td>0</td>
</tr>
<tr>
<td>2008</td>
<td>20</td>
<td>23</td>
<td>41</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>2009</td>
<td>11</td>
<td>29</td>
<td>43</td>
<td>17</td>
<td>0</td>
</tr>
<tr>
<td>2010</td>
<td>19</td>
<td>21</td>
<td>42</td>
<td>18</td>
<td>0</td>
</tr>
<tr>
<td>2011</td>
<td>14</td>
<td>22</td>
<td>32</td>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td>2012</td>
<td>20</td>
<td>22</td>
<td>46</td>
<td>18</td>
<td>0</td>
</tr>
</tbody>
</table>

Source: author’s own study based on the report: Trendy rozwojowe sektora MSP w ocenie przedsiębiorców w pierwszej połowie 2012 roku, MG DPiA, nr 1/2013, Warszawa 2013
Evaluation of business auditing regulations and procedures was another element to be considered by entrepreneurs. It appears that, in 2006–2012, 8–10% entrepreneurs regarded this legal dimension as very bad, more than 50% respondents found business auditing regulations average, between 12% and 22% as bad and approx. 20% as good. In contradistinction to the legislative barriers discussed above, some individuals saw these regulations as very good. (Table 8)

Table 8. Evaluation of business auditing regulations and procedures by entrepreneurs

<table>
<thead>
<tr>
<th>Years</th>
<th>very bad</th>
<th>bad</th>
<th>neutrally</th>
<th>good</th>
<th>very good</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>8</td>
<td>13</td>
<td>55</td>
<td>22</td>
<td>2</td>
</tr>
<tr>
<td>2007</td>
<td>9</td>
<td>20</td>
<td>49</td>
<td>19</td>
<td>2</td>
</tr>
<tr>
<td>2008</td>
<td>8</td>
<td>12</td>
<td>55</td>
<td>23</td>
<td>2</td>
</tr>
<tr>
<td>2009</td>
<td>9</td>
<td>16</td>
<td>54</td>
<td>22</td>
<td>3</td>
</tr>
<tr>
<td>2010</td>
<td>8</td>
<td>13</td>
<td>54</td>
<td>23</td>
<td>3</td>
</tr>
<tr>
<td>2011</td>
<td>8</td>
<td>16</td>
<td>54</td>
<td>23</td>
<td>3</td>
</tr>
</tbody>
</table>

Source: author’s own study based on the report: Trendy rozwojowe sektora MSP w ocenie przedsiębiorców w pierwszej połowie 2012 roku, MG DPiA, nr 1/2013, Warszawa 2013

Table 9 includes figures since 2009 as the Ministry of Economy (MG) had not undertaken research in this field before. Publications by PKPP Lewiatan show, however, that procedures concerning establishment and closure of a business had been a major barrier ever since economic transformation processes began. [Duda J, 2012]

These figures were analyse in order to verify whether the amended Freedom of Business Operations Act of 01.07.2004 relieved this barrier. The law in question was amended on 13.05.2011 and became effective as of 01.07.2011. Its goal was to simplify the procedure of opening and closing a business by introducing the so-called ‘one desk’ as entrepreneurs had complained against extended registration times and complicated procedures. The results collected by the Ministry of Economy, Department of Forecasting and Analyses (MG DPiA) suggest that the number of entrepreneurs grading this aspect as very bad, bad or average did indeed decline in 2012, with good and very good assessments rising clearly (by 14% and 4%, respectively).

Table 9. Evaluation of regulations and procedures concerning establishment and closure of a firm by entrepreneurs

<table>
<thead>
<tr>
<th>Years</th>
<th>very bad</th>
<th>bad</th>
<th>neutrally</th>
<th>good</th>
<th>very good</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>11</td>
<td>22</td>
<td>41</td>
<td>25</td>
<td>1</td>
</tr>
<tr>
<td>2010</td>
<td>10</td>
<td>20</td>
<td>43</td>
<td>23</td>
<td>2</td>
</tr>
<tr>
<td>2011</td>
<td>10</td>
<td>18</td>
<td>43</td>
<td>26</td>
<td>3</td>
</tr>
<tr>
<td>2012</td>
<td>7</td>
<td>16</td>
<td>30</td>
<td>40</td>
<td>7</td>
</tr>
</tbody>
</table>

Source: author’s own study based on the report: Trendy rozwojowe sektora MSP w ocenie przedsiębiorców w pierwszej połowie 2012 roku, MG DPiA, nr 1/2013, Warszawa 2013

Entrepreneurs’ opinions on the quality of legislative changes in the second half of 2012 imply most of them fail to note any dramatic shifts, with the exception of business opening procedures. Among the entrepreneurs requested to evaluate the legislation in its entirety, merely 4% felt an improvement, 79% did not perceive any clear changes and 17% went so far as to suggest the conditions for business had deteriorated. The figures in Table 10 confirm the law constituted a major barrier to development of the Polish SME sector in 2006–2012.

Table 10. Evaluation of changes in enterprise environment by entrepreneurs

<table>
<thead>
<tr>
<th>Specification</th>
<th>Deterioration</th>
<th>Unchanged</th>
<th>Improvement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tax law</td>
<td>24</td>
<td>71</td>
<td>5</td>
</tr>
<tr>
<td>Labour law</td>
<td>15</td>
<td>80</td>
<td>5</td>
</tr>
<tr>
<td>Business jurisdiction</td>
<td>13</td>
<td>81</td>
<td>4</td>
</tr>
<tr>
<td>Business auditing</td>
<td>14</td>
<td>80</td>
<td>6</td>
</tr>
<tr>
<td>Establishing and closure of a firm</td>
<td>10</td>
<td>63</td>
<td>27</td>
</tr>
<tr>
<td>The overall law</td>
<td>17</td>
<td>79</td>
<td>4</td>
</tr>
</tbody>
</table>

Source: author’s own study based on the report: Trendy rozwojowe sektora MSP w ocenie przedsiębiorców w pierwszej połowie 2012 roku, MG DPiA, nr 1/2013, Warszawa 2013

4.1 Financial Barriers

Difficult access to external sources of financing is a fundamental barrier to a majority of small and medium-sized enterprises beside those analysed above. Polish SMEs take bank crediting to a limited extent. It is very hard for the small and medium-sized enterprise sector to obtain investment crediting, banks tend to offer short-term crediting liable to far lower risk of insolvency. Barely 6% of businesses awarded
bank crediting in 2011 took advantage of investment credits. Most entrepreneurs were issued current account and operational crediting. As banks applied more stringent criteria of crediting, applications by more than a half of businesses were rejected. Many more entrepreneurs had resorted to that source in 1999–2000, yet in time banks commences to apply more sever assessment criteria, mainly due to high percentages of lost credits and businesses in operation for less than a year. [Duda J., 2012]

Due to the above, owner capital from retained profits and owner contributions has been the key source of investment financing by Polish SMEs, which is particularly significant in view of the fact that self-employment is the prevalent legal form in Poland, that is, the amount of capital contributed by shareholders is limited to assets and wealth of a single individual. Bank crediting and leasing are the next most common sources of financing used by entrepreneurs. The structure of investment financing in the Polish SME sector in 1999–2011 is shown in Table 11.

### Table 11. Financing sources of activities in Polish SME sector in 1999–2011

<table>
<thead>
<tr>
<th>Specification</th>
<th>Percentage of enterprises</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equity including retained income</td>
<td>76</td>
</tr>
<tr>
<td>Bank credit</td>
<td>38</td>
</tr>
<tr>
<td>Leasing</td>
<td>24</td>
</tr>
<tr>
<td>EU funds</td>
<td>0</td>
</tr>
<tr>
<td>Other</td>
<td>0</td>
</tr>
</tbody>
</table>


The data in Table 11 indicate the proportion of entrepreneurs taking advantage of bank crediting and leasing declined during the eleven years under discussion. Nearly 40% entrepreneurs used crediting in 1999–2000 compared to merely 12% in 2011, due chiefly to absence of crediting history and collateral, but also to stricter bank policies insofar as crediting of SMEs is concerned.

The restricted access to external sources of financing is a major factor determining innovativeness of investment projects and thus the competitive standing of enterprises undertaking such projects.

These limitations translate into the structure of investments. In 2003–2011, half entrepreneurs did not pursue any investment activities. Enterprises investing before Poland joined the EU had invested in computers and IT systems (over 60% of small and medium-sized enterprises). These investment decisions seem reasonable since more than 50% enterprises did not have computer systems or Internet access at the time. Entrepreneurs also purchased production plant and machinery, both new and second-hand. In 2004, plant and machinery of production parameters similar to those already in place were purchased, investments were carried out in development of sales networks, improved quality of service quality, purchase of state of the art production plant and machinery. Those investments were above all motivated by the will to face the heavy competition in the EU market. [Duda J, 2009].

The structure of investments has begun to shift clearly since 2005. Most entrepreneurs began to invest in new production plant and machinery with a view to launching of new products and services. Since 2007, the share of enterprises interested in innovative investments has declined a little, expressed as fewer investors in plant and machinery for their new technologies. The withdrawal from innovative and thus costly investments may have been caused by low demand for innovative products in the Polish market. Buying decisions of most Polish consumers are driven by price and a vast majority of Polish SMEs operate in their local or regional markets. Due to the market stagnation both in Poland and our EU neighbours, 43% failed to take any investment activities in 2011 most of the actual investments were into purchases of office equipment and furniture (25%), Building investments fell sharply, possible due to the continuing slump in that sector. Spending on new product launches was not noted either. (Table 12)

### Table 12. Investment structure in Polish SME sector in 2003–2011

<table>
<thead>
<tr>
<th>Investment type</th>
<th>Percentage of enterprises</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purchase of machines and devices in regard of a new technology</td>
<td>-</td>
</tr>
<tr>
<td>Purchase of machines and devices of similar production parameters</td>
<td>42</td>
</tr>
<tr>
<td>Used machinery and equipment</td>
<td>23.5</td>
</tr>
<tr>
<td>Construction or purchase of buildings</td>
<td>-</td>
</tr>
<tr>
<td>Replacement of machines and devices with similar ones</td>
<td>-</td>
</tr>
<tr>
<td>Modernisation of transport means</td>
<td>41.5</td>
</tr>
<tr>
<td>Quality improvement</td>
<td>-</td>
</tr>
<tr>
<td>Introduction of new products</td>
<td>-</td>
</tr>
</tbody>
</table>

The figures in Table 12 indicate that fewer than 25% of Polish SMEs invest in innovative fixed assets. This is due to the fact that trading and service businesses whose operations do not require such assets prevail among Polish SMEs, on the one hand, whereas it adversely affects long-term competitive edge on the other hand.

5. Development Potential of Enterprises

Development standards of SMEs in Poland diverge from the EU average, though. This points to relatively low numbers of workers (and employment), especially in micro and small businesses; low productivity, expressed as gross added value, and scale of operations – average turnover or limited presence in international markets. In spite of dynamic improvements, the extent of pro-development actions remains unsatisfactory – levels of investment and interest in innovation and market research. Polish businesses develop faster than average, markedly faster than their West European counterparts or even some in the states of our region.

Regrettfully, the rate of enterprise development slowed down again in the second half of 2012. The figures in Table 13 indicate that the ratio was negative for all enterprise groups in 2006–2012. It was lowest among micro-enterprises, however, which prevail in the Polish SME sector.

### Table 13. Development index in the SME sector

<table>
<thead>
<tr>
<th>Years</th>
<th>Micro</th>
<th>Small</th>
<th>Medium</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>-0.7</td>
<td>-0.4</td>
<td>-0.3</td>
<td>-0.5</td>
</tr>
<tr>
<td>2007</td>
<td>-0.5</td>
<td>-0.1</td>
<td>0.3</td>
<td>-0.4</td>
</tr>
<tr>
<td>2008</td>
<td>-0.5</td>
<td>-0.2</td>
<td>-0.2</td>
<td>-0.7</td>
</tr>
<tr>
<td>2009</td>
<td>-0.8</td>
<td>-0.8</td>
<td>-0.8</td>
<td>-0.8</td>
</tr>
<tr>
<td>2010</td>
<td>-0.4</td>
<td>-0.5</td>
<td>-0.2</td>
<td>-0.4</td>
</tr>
<tr>
<td>2011</td>
<td>-0.56</td>
<td>-0.42</td>
<td>-0.2</td>
<td>-0.5</td>
</tr>
<tr>
<td>2012</td>
<td>-0.7</td>
<td>-0.75</td>
<td>-0.75</td>
<td>-0.7</td>
</tr>
</tbody>
</table>

Source: author’s own study based on the report: Trendy rozwojowe sektora MSP w ocenie przedsiębiorców w pierwszej połowie 2012 roku, MG DPiA, nr 1/2013, Warszawa 2013

Polish SMEs cited the changed economic circumstances of the country (more than a half of those queried) and changing sales prospects (19%) as the major reasons for absence of development opportunities. Markedly fewer, namely, above 20% of survey participants believe the economic changes in Poland foster enterprise development, with 30% finding the shifts in the trade market beneficial. The results are summarised in Table 14.

### Table 14. Reasons for development (or lack of development) of businesses in 2013

<table>
<thead>
<tr>
<th>Causes</th>
<th>Percentage of enterprises</th>
</tr>
</thead>
<tbody>
<tr>
<td>Changes in the economic conditions in the country</td>
<td>55</td>
</tr>
<tr>
<td>Changes in sale perspectives</td>
<td>19</td>
</tr>
<tr>
<td>Other</td>
<td>11</td>
</tr>
<tr>
<td>Hard to say</td>
<td>2</td>
</tr>
<tr>
<td>Changes in the cost of labor</td>
<td>3</td>
</tr>
<tr>
<td>Changes in the legal conditions of business activity</td>
<td>6</td>
</tr>
<tr>
<td>The change in the political climate in the country</td>
<td>2</td>
</tr>
<tr>
<td>Changes of interest rates for loans and credits</td>
<td>1</td>
</tr>
</tbody>
</table>

Source: author’s own study based on the report: Trendy rozwojowe sektora MSP w ocenie przedsiębiorców w pierwszej połowie 2012 roku, MG DPiA, nr 1/2013, Warszawa 2013

A majority of entrepreneurs asked to evaluate business conditions over the particular years tend to find them unchanged or deteriorating year over year. Optimism becomes distinctly felt among entrepreneurs in 2007, with 20% respondents considering conditions for business to have improved, and 2009 (17% felt the conditions to be better). Attitudes of entrepreneurs have deteriorated in the last two years. (Table 15)

### Table 15. Conditions of business activity compared to the previous six months – as evaluated by entrepreneurs

<table>
<thead>
<tr>
<th>Years</th>
<th>Percentage of enterprises</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Better</td>
</tr>
<tr>
<td>2006</td>
<td>13</td>
</tr>
<tr>
<td>2007</td>
<td>20</td>
</tr>
<tr>
<td>2008</td>
<td>12</td>
</tr>
<tr>
<td>2009</td>
<td>17</td>
</tr>
<tr>
<td>2010</td>
<td>14</td>
</tr>
<tr>
<td>2011</td>
<td>10</td>
</tr>
<tr>
<td>2012</td>
<td>10</td>
</tr>
</tbody>
</table>

Source: author’s own study based on the report: Trendy rozwojowe sektora MSP w ocenie przedsiębiorców w pierwszej połowie 2012 roku, MG DPiA, nr 1/2013, Warszawa 2013
6. Conclusion

The data presented in this article suggest that enterprise development is defined in a variety of dimensions. Above all, specialists point to the skill, or even necessity of enterprises to adapt to shifts in their variable environment, building of competitive status by, inter alia, investments in broadly-defined product, process, marketing and organisational innovations, introduction of new changes and quality improvements. It is emphasised that the need for enterprises to develop is a result of ongoing changes in the environment adjustment to which is only possible by means of constant changes inside an enterprise, or its development. In this context, barriers restricting development of Polish SMEs were analysed to conclude that fiscal and labour legislation, business jurisdiction and business auditing are key. These barriers have remained steadily burdensome to enterprises in the past 6 years. Major changes have only occurred to the procedure of opening and closing a business. The amendments to the Freedom of Business Operations Act dated 01.07.2012 [Journal of Laws 131] have lifted this barrier in the opinion of entrepreneurs.

Polish SMEs’ tend to blame the economic situation of the country and poor commercial prospects as key reasons for absence of development opportunities, which is undoubtedly related to the fact that Polish SMEs focus on local or regional markets, with a very low degree of internationalisation. The specific nature of Polish SMEs, with a predominance of micro-enterprises and self-employed, needs to be highlighted as well. These facts also influence the local or regional extent of operations.

Finances are another major barrier. Owner capital has remained the core source of financing for Polish SMEs in the last 11 years, virtually restricted to the capital contributed by a single individual, the owner, due to the legal status dominant in the sector. The figures discussed in this paper indicate that, in time, the share of enterprises resorting to bank credits have declined, due to more stringent criteria of awarding applied by banks and short market life of micro and small enterprises.

Problems obtaining capital immediately translate into the structure of investments (cf. Table 12) and development potential of enterprises.

7. References

Changings of Social Welfare in Old and New Member Countries of the European Union

Małgorzata Zielenkiewicz 1

Abstract

The new member states of the European Union had to make an effort to adapt a number of systemic changes in the pre-accession process, as well as after the enlargement of the EU. The second important issue, that the EU had to face, was the financial crisis of 2008. How did these aspects affect the social welfare in member countries? The aim of the paper is to examine the changes of social welfare in the EU countries. Measures used in the analysis are: the Human Development Index (with its components), Gini coefficient, and shares of materially deprived people in the population. Data comes from the Human Development Reports and Eurostat. The analysis was conducted for years 2005 and 2010. The methods used in the research are: dispersion measures, hierarchic cluster analysis and comparison analysis of rankings.

Key words: social welfare, catching-up process, European integration.

1. Introduction

One of the purposes of the European integration is to improve a social welfare in member countries. It is well known that the level of socio-economic development in older EU countries is usually higher in comparison to the new members of the EU. New member states had to make an effort to adapt a number of systemic changes in the pre-accession process, as well as after the extension of the EU. The second important issue, that the EU had to face, was the wave of financial crisis of 2008. These two aspects may raise a question, how did these aspects affect the social welfare in member countries and what kind of changes in the positions of the EU countries could be observed. Most of the research focus on the level of GDP or the rate of growth of GDP. Domestic or national product, however, is a poor measurement of the social welfare, and omits many aspects of the standard of living. In the paper social welfare is defined more widely, with taking into account issues such as inequalities in income distribution, material exclusion, access to education and length of life. The aim of the paper is to examine the changes of social welfare in the EU countries. Measures used in the analysis are the Human Development Index (with its components), Gini coefficient, and shares of materially deprived people in the population. The research was conducted for years 2005 and 2010 (more recent data were not available for all countries). The data comes from the Human Development Reports and Eurostat. The main extension of the EU took place in 2004 (except for Bulgaria and Romania – these two countries joined the EU in 2007), so the year 2005 shows the situation at the beginning of “new EU”. Data form 2010 shows the situation couple years after the enlargement of the EU and after the appearance of financial crisis of 2008.


Although the economists still give a high priority to the national income in their research, a way of thinking about the social welfare has changed over the past few decades. Contemporary the researchers emphasize also the importance of non-income issues. In theory of economics this is not a new idea. Since the beginning of the considerations on social welfare it was defined as the function of the wealth, not as a wealth itself. In the simplest form it is the sum of the individual utilities – so-called utilitarian welfare function, the approach of Bentham and Mill (Mill, 2008). In a modified version the welfare function is a weighted sum of individual utilities, where is possible to assign a higher weight e.g. to working adults. In Bernoulli-Nash approach social welfare is a multiplicative function, based on the product of individual utilities. Later versions do not necessary impose an additivity or a multiplicativity of the relationship between the individual utilities (e.g. Bergson-Samuelson welfare function (Allen, 2004)). Despite of the discussions how the function of welfare should look like, how to maximize it, and how to treat the utility (which are a debatable issues, see e.g. Fleurbaey, Mongin, 2005; Withagen, Asheim, Buchholz, 2003; Mäler, 2002), the concept of the welfare contains the individual perception of the wealth.
Utility is obviously a difficult thing to measure. Hence, many indicators of social welfare refer to the income or consumption, but with some additional elements, like leisure time or externalities (e.g., Measure of Economic Welfare, Net National Welfare, Index of the Economic Aspects of Welfare, Index of Sustainable Economic Welfare). Also official recommendations of Fitoussi, Sen, and Stiglitz (2009) are maintained in the spirit of including some non-income aspects in the measures of socio-economic condition of the countries. Authors in their Report by the commission on the measurement of economic performance and social progress give following advice:

- “When evaluating material well-being, look at income and consumption rather than production;
- Emphasise the household perspective;
- Consider income and consumption jointly with wealth;
- Give more prominence to the distribution of income, consumption and wealth;
- Broaden income measures to non-market activities”.

One of a popular measure used in the studies on social welfare is the Human Development Index (HDI). HDI was constructed by a team under the direction of Mahbub ul Haq in 1990, and was a part of the United Nations Development Programme. HDI measures social and economic development and is based on three indices (Malik, 2013):

- Health Index: life expectancy at birth
- Education Index: mean of years of schooling for adults aged 25 years and expected years of schooling for children of school entering age
- Income Index: gross national product per capita (in USD, purchasing power parity of currency).

HDI and its components are in the range of [0, 1]. HDI was used in the next part of the paper to compare social welfare in the EU countries. For social inequalities and exclusion there were used two measures: Gini coefficient and share of severely materially deprived people in the population, published by Eurostat.

The Gini coefficient is the relationship of cumulative shares of the population ordered by the level of equivalised disposable income, to the cumulative share of the equivalised total disposable income. In other words, Gini coefficient measures the unevenness of the distribution of some characteristic (in this case – income) in the population. It is in the range [0, 1] or [0, 100], where the higher score means the higher inequalities. The Gini coefficient, however, has some limitations – it does not inform about the level of poverty in the society. For example, if people are generally poor and there is no a big differences between the level of their income, the Gini coefficient is low. If people are generally rich and there is no a big differences between the level of their income, the Gini coefficient is low as well. For that reason the analysis was supplemented by the share of materially deprived people.

In Eurostat database “severely materially deprived persons” are defined as those who are excluded (because of a lack of resources) from consumption at least 4 out of 9 items: “1) to pay rent or utility bills, 2) keep home adequately warm, 3) face unexpected expenses, 4) eat meat, fish or a protein equivalent every second day, 5) a week holiday away from home, 6) a car, 7) a washing machine, 8) a colour TV, or 9) a telephone” (Eurostat). Material deprivation in author’s opinion gives a better view on material exclusion in comparison to such a measures as the percentage of population with an income less than 1/2/5 USD per day, because last one does not take into account the purchasing power of the money (there is a difference if the individual has to survive for 2 USD e.g. in Norway or in Bosnia and Herzegovina). In Eurostat the share of materially deprived people is provided as a percentage of population, in the paper was rescaled to the range [0, 1].

3. Characteristics of the EU Countries in the Context of Social Welfare

The aim of this part is to examine the diversity of the EU countries in terms of the level of HDI components, the Gini coefficient and the share of materially deprived people in years 2005 and 2010. Table 1 shows the average level (EV) of indices for the EU countries (EU-27), and differences between old (EU-15) and new (EU-12) member states in 2005 and 2010. Table includes also standard deviation (SD) and the range between minimum and maximum value (R). Table in appendix 1 includes more detailed data for each country.

<table>
<thead>
<tr>
<th>Index</th>
<th>Income</th>
<th>Education</th>
<th>Health</th>
<th>Gini coef.</th>
<th>Deprivation</th>
</tr>
</thead>
<tbody>
<tr>
<td>EV</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>EU-27</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>EV</td>
<td>0.779</td>
<td>0.784</td>
<td>0.845</td>
<td>0.866</td>
<td>0.902</td>
</tr>
<tr>
<td>SD</td>
<td>0.062</td>
<td>0.054</td>
<td>0.060</td>
<td>0.054</td>
<td>0.047</td>
</tr>
<tr>
<td>R</td>
<td>0.264</td>
<td>0.219</td>
<td>0.242</td>
<td>0.224</td>
<td>0.146</td>
</tr>
<tr>
<td>EU-15</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>EV</td>
<td>0.062</td>
<td>0.054</td>
<td>0.060</td>
<td>0.054</td>
<td>0.047</td>
</tr>
<tr>
<td>SD</td>
<td>0.031</td>
<td>0.028</td>
<td>0.063</td>
<td>0.058</td>
<td>0.013</td>
</tr>
<tr>
<td>R</td>
<td>0.147</td>
<td>0.125</td>
<td>0.242</td>
<td>0.224</td>
<td>0.049</td>
</tr>
<tr>
<td>EU-12</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>EV</td>
<td>0.722</td>
<td>0.736</td>
<td>0.837</td>
<td>0.860</td>
<td>0.860</td>
</tr>
<tr>
<td>SD</td>
<td>0.041</td>
<td>0.038</td>
<td>0.056</td>
<td>0.047</td>
<td>0.039</td>
</tr>
<tr>
<td>R</td>
<td>0.132</td>
<td>0.119</td>
<td>0.196</td>
<td>0.136</td>
<td>0.110</td>
</tr>
</tbody>
</table>

Source: Own study on the basis of Eurostat and HDR data
According to the average level for EU-27: in 2010 the values of all HDI components were higher in comparison with 2005, the Gini coefficient had the same value and the shares of materially deprived people decreased. Average Income Index increased by 1%, but the standard deviation decreased by 13%, and the range – by 17%. An increase of the Education Index and Health Index was of 2%. The Health Index is based on the length of life, but it should not be surprising, that the index has changed during 5 years only, because it is related to a healthcare systems and a high safety standards used in the EU, which reduce life- and health-threatening factors. However, there cannot be observed a reduction of the distance between the countries in this case – the range increased by 6%. The largest decrease took place in case of the material deprivation – an average for EU-27 was lower by 23%, standard deviation – by 28%, and range – by 19%. Dispersion measures for the Gini coefficient also declined (SD by 13%, R by 11%).

There still could be observed a distance between old and new members of the EU – the largest differences are for the Income Index and material deprivation. However, in the EU-15 the Income Index slightly decreased, while in the EU-12 – despite of financial crisis – in 2010 was higher by 2% than in 2005. In 2005 the average level of the Income Index was higher by 14%, in 2010 – by 11%. The greatest progress in the Income Index belongs to Poland (an increase of 3%) and Slovakia (4%).

Material deprivation is much higher in the EU-12 but there is a progress. In 2005 24.3% of population of EU-12 was living below a standard level. In 2010 the share of materially deprived people decreased to the level of 17.3%. At the same time in EU-15 the average percentage of materially excluded people was around 5%. Again, the biggest progress could be observed in Poland (reduction of 58% in the share of deprived people during 5 years), Slovakia (decrease of 48%), and also Czech Republic (decrease of 47%). Among the new member countries the share of deprived people increased only in Slovenia and Malta, but it is worth of noticing that these two countries still have the lowest percentage of deprived people in the EU-12 (around 6%), while in Poland in 2010 it was 14%, in Slovakia – 11%. In that context Czech Republic had the best scores, because this country not only did one of the largest reduction of the material deprivation in the society, but also achieved the level similar to EU-15 – 6.2%. Similar level in the EU-12 had only Slovenia (5.9%), and mentioned earlier Malta. Material deprivation is the biggest problem in case of Bulgaria, where the share of materially excluded people in 2010 was at the level of 45.7%.

The Gini coefficient is a bit higher in new member countries, as well as Education Index and Health Index is a bit lower, but these differences are not significant (about 1-2.5%). In fact not all EU-15 countries have a relatively high scores in these indices – e.g. the lowest scores in Education Index belong to Portugal and Luxembourg.

Such differences among the EU-12 as in case of material deprivation can rise a question if looking at new members of the EU as at one group is justified. In order to examine, which EU countries can be considered as similar in terms of social welfare, a cluster analysis was conducted.

4. Cluster Analysis of EU Countries

Cluster analysis is a method that enables grouping the countries according to the similarity with taking into account more than one characteristic. In the research there are 5 characteristics: three HDI components, the Gini coefficient, and the deprivation index. The aim of this part of the research is to examine the similarity/dissimilarity within the EU in terms of the above social welfare measures.
The dendrograms shown at figure 1 and 2 are based on the Euclidean distance\(^2\) with usage of the weighted-average linkage method. Figure 1 refers to data from 2005, figure 2 – 2010.

In terms of social welfare, most different from the rest of the EU countries was and still is Bulgaria. In 2005 the strongest group (high HDI scores, low inequalities and material deprivation) were Denmark, Germany, Sweden, Finland, and the Netherlands (the group in the middle of the dendrogram at figure 1). Relatively the most similar to them was Ireland, while the United Kingdom was together with the Mediterranean countries (the UK had a higher income, but in this analysis an income has weight of 20% only; other indices for the UK were one of the lower in the EU-15). From the EU-12 only Malta and Slovenia were at the left side of the dendrogram, together with the EU-15 countries (however could create an agglomeration with them only with Euclidean distance settled above 0.1). In 2005 Portugal was lagging behind the rest of the EU-15 (on the dendrogram Portugal is at the right side, among the EU-12 countries). Also Luxembourg was quite different, but in other sense that Portugal – Luxembourg had a very high score in the Income Index and, at the same time, a relatively low value of the Education Index, which is not typical for the EU-15. Portugal just had all scores below the EU-27 average.

Figure 3. Transfers between cluster groups – comparison for the dendrograms form 2005 and 2010

Source: Own study

\[^2\] The Euclidean distance is the square root of the sum of differences between the value of \(j\) characteristic for the objects \(x\) and \(x\), and \(p\) is the number of characteristics: 

\[ d(x_i, x_k) = d_{ik} = \sqrt{\sum_{j=1}^{p} (x_{ij} - x_{kj})^2}. \]
In 2010 the situation of some countries had changed. To make the comparison easier, at figure 3 there are shown main transfers between cluster groups. Austria and Belgium went closer to the Nordic countries. Poland became less similar to Latvia, Lithuania, and Romania and in 2010 created a cluster agglomeration together with Slovakia and Estonia. But also Lithuania increased the distance to Latvia and Romania. The cluster analysis shows the changes in similarity/dissimilarity between the countries, but does not give the answer to the question, if these changes appeared as a result of catching-up process in the countries which had lower level of social welfare or because of the deterioration in the countries that used to have a higher scores. In order to examine the direction of changes in the next stage there was conducted a comparison of the positions in the rankings made for considered indices.

5. Positions in the Rankings

Tables 2 and 3 show the positions of the EU countries in the rankings of social welfare measures. The last column contains an overall ranking (an arithmetic average for the other rank positions was calculated, than countries were ordered according to the score and new numbers of position were given, hence the number in the last column is not a mean but the number of position in the ranking based on a mean). Positions from 2005 are in the brackets. Red colour means the three best scores, green colour is for the three lowest scores in the group – in table 2 for the EU-15, in table 3 for the EU-12.

### Table 2. Positions of the EU-15 countries in the rankings in 2010 and 2005

<table>
<thead>
<tr>
<th>Country</th>
<th>Income</th>
<th>Education</th>
<th>Health</th>
<th>Gini coef.</th>
<th>Deprivation</th>
<th>Mean position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>3 (5)</td>
<td>18 (19)</td>
<td>5 (5)</td>
<td>8 (8)</td>
<td>7 (4)</td>
<td>4/5 (3/6)</td>
</tr>
<tr>
<td>Belgium</td>
<td>7 (8)</td>
<td>10 (10)</td>
<td>10 (9)</td>
<td>9 (15)</td>
<td>13 (15)</td>
<td>8/9 (11)</td>
</tr>
<tr>
<td>Denmark</td>
<td>6 (3)</td>
<td>5 (5)</td>
<td>18 (17)</td>
<td>10 (3)</td>
<td>4 (5)</td>
<td>6 (3)</td>
</tr>
<tr>
<td>Finland</td>
<td>9 (10)</td>
<td>11 (8)</td>
<td>11 (11)</td>
<td>5 (3)</td>
<td>5 (7)</td>
<td>4/5 (3/6)</td>
</tr>
<tr>
<td>France</td>
<td>10 (11)</td>
<td>15 (16)</td>
<td>2 (3)</td>
<td>16 (14)</td>
<td>11 (11)</td>
<td>11 (9)</td>
</tr>
<tr>
<td>Germany</td>
<td>5 (9)</td>
<td>4 (3)</td>
<td>8 (7)</td>
<td>15 (7)</td>
<td>8 (8)</td>
<td>3 (4)</td>
</tr>
<tr>
<td>Greece</td>
<td>13 (14)</td>
<td>12 (13)</td>
<td>12 (8)</td>
<td>21 (21)</td>
<td>21 (20)</td>
<td>20 (16)</td>
</tr>
<tr>
<td>Ireland</td>
<td>11 (6)</td>
<td>1 (1)</td>
<td>7 (13)</td>
<td>14 (19)</td>
<td>16 (10)</td>
<td>8/9 (7/8)</td>
</tr>
<tr>
<td>Italy</td>
<td>12 (12)</td>
<td>19 (18)</td>
<td>1 (1)</td>
<td>18 (20)</td>
<td>13 (14)</td>
<td>14 (14)</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>1 (1)</td>
<td>26 (25)</td>
<td>13 (12)</td>
<td>11 (10)</td>
<td>1 (1)</td>
<td>10 (7/8)</td>
</tr>
<tr>
<td>Netherlands</td>
<td>2 (1)</td>
<td>3 (2)</td>
<td>6 (6)</td>
<td>6 (12)</td>
<td>1/2 (1)</td>
<td></td>
</tr>
<tr>
<td>Portugal</td>
<td>19 (17)</td>
<td>27 (27)</td>
<td>16 (16)</td>
<td>24 (27)</td>
<td>18 (16)</td>
<td>23 (22)</td>
</tr>
<tr>
<td>Spain</td>
<td>13 (13)</td>
<td>13 (17)</td>
<td>4 (4)</td>
<td>25 (18)</td>
<td>6 (6)</td>
<td>12/13 (12)</td>
</tr>
<tr>
<td>Sweden</td>
<td>4 (7)</td>
<td>8 (6)</td>
<td>3 (2)</td>
<td>3 (1)</td>
<td>2 (2)</td>
<td>1/2 (1)</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>8 (4)</td>
<td>22 (21)</td>
<td>9 (10)</td>
<td>20 (23)</td>
<td>9 (12)</td>
<td>15 (15)</td>
</tr>
</tbody>
</table>

Note: 2005 scores are in the brackets. Source: Own study on the basis of Eurostat and HDR data

In the EU-15 the weakest overall scores belongs to Portugal (23) and Greece (20). Also the United Kingdom (15) and Italy (14) are not in the upper half of the ranking. In case of the UK a low score in Education Index and a high score in Gini coefficient are the reason. The Education Index does not inform about the quality of education, but about the possibility or willingness to learn under education system. In the UK, Luxembourg, and Portugal people – averagely speaking – spent less time on formal education in comparison to the other EU-15 countries.

### Table 3. Positions of the EU-12 countries in the rankings in 2010 and 2005

<table>
<thead>
<tr>
<th>Country</th>
<th>Income</th>
<th>Education</th>
<th>Health</th>
<th>Gini coef.</th>
<th>Deprivation</th>
<th>Mean position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bulgaria</td>
<td>26 (26)</td>
<td>23 (24)</td>
<td>25 (24)</td>
<td>22 (4)</td>
<td>27 (27)</td>
<td>27 (23)</td>
</tr>
<tr>
<td>Cyprus</td>
<td>14 (15)</td>
<td>24 (26)</td>
<td>14 (14)</td>
<td>12 (16)</td>
<td>19 (18)</td>
<td>19 (19/20)</td>
</tr>
<tr>
<td>Czech Rep.</td>
<td>18 (19)</td>
<td>6 (2)</td>
<td>19 (19)</td>
<td>4 (6)</td>
<td>14 (17)</td>
<td>12/13 (13)</td>
</tr>
<tr>
<td>Estonia</td>
<td>22 (21)</td>
<td>7 (4)</td>
<td>22 (23)</td>
<td>19 (22)</td>
<td>17 (19)</td>
<td>21 (19/20)</td>
</tr>
<tr>
<td>Hungary</td>
<td>23 (20)</td>
<td>16 (14)</td>
<td>23 (22)</td>
<td>2 (13)</td>
<td>24 (22)</td>
<td>18 (21)</td>
</tr>
<tr>
<td>Latvia</td>
<td>23 (23)</td>
<td>14 (15)</td>
<td>26 (26)</td>
<td>26 (25)</td>
<td>25 (26)</td>
<td>25 (26/27)</td>
</tr>
<tr>
<td>Lithuania</td>
<td>24 (23)</td>
<td>9 (9)</td>
<td>27 (27)</td>
<td>27 (26)</td>
<td>23 (23)</td>
<td>24 (26)</td>
</tr>
<tr>
<td>Malta</td>
<td>17 (18)</td>
<td>23 (22)</td>
<td>15 (15)</td>
<td>13 (11)</td>
<td>10 (13)</td>
<td>16/17 (17)</td>
</tr>
<tr>
<td>Poland</td>
<td>21 (24)</td>
<td>27 (20)</td>
<td>20 (20)</td>
<td>17 (24)</td>
<td>23 (24)</td>
<td>23 (25)</td>
</tr>
<tr>
<td>Romania</td>
<td>27 (27)</td>
<td>20 (23)</td>
<td>24 (25)</td>
<td>23 (17)</td>
<td>26 (25)</td>
<td>26 (26/27)</td>
</tr>
<tr>
<td>Slovakia</td>
<td>20 (22)</td>
<td>12 (12)</td>
<td>21 (21)</td>
<td>7 (9)</td>
<td>20 (21)</td>
<td>16/17 (18)</td>
</tr>
<tr>
<td>Slovenia</td>
<td>16 (16)</td>
<td>2 (11)</td>
<td>17 (18)</td>
<td>1 (2)</td>
<td>12 (9)</td>
<td>7 (10)</td>
</tr>
</tbody>
</table>

Note: 2005 scores are in the brackets. Source: Own study on the basis of Eurostat and HDR data

The biggest drop in the overall ranking in the EU-27 belongs to Greece (which shifted from 16th to 20th place) and Bulgaria (23rd place in 2005, 27th in 2010). The leaders was and still are Sweden and the Netherlands. Third position has changed.
In 2005 third was Denmark (in 2010 at 6th position), in 2010 – Germany (previously at 4th position). Austria and Belgium, mentioned in the cluster analysis, indeed had improved their position. France at the same time dropped by 2 places, mainly because of an increasing income inequalities. Lower position in 2010 in comparison to 2005 could be observed also in case of Ireland, Luxembourg, Portugal, and Spain.

In the EU-12 it was Slovenia that had the highest score. In 2005 Slovenia was at 10th place, in 2010 – 7th. Slovenia and Ireland, Luxembourg, Portugal, and Spain.


References

Appendix 1. Values of the components of the Human Development Index, Gini coefficient, and a share of materially deprived people in the EU countries in 2005 and 2010

<table>
<thead>
<tr>
<th>Country</th>
<th>2005</th>
<th>2010</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Income</td>
<td>Education</td>
</tr>
<tr>
<td>Austria</td>
<td>0.831</td>
<td>0.813</td>
</tr>
<tr>
<td>Belgium</td>
<td>0.828</td>
<td>0.865</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>0.657</td>
<td>0.733</td>
</tr>
<tr>
<td>Cyprus</td>
<td>0.281</td>
<td>0.344</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>0.755</td>
<td>0.930</td>
</tr>
<tr>
<td>Denmark</td>
<td>0.833</td>
<td>0.914</td>
</tr>
<tr>
<td>Estonia</td>
<td>0.726</td>
<td>0.920</td>
</tr>
<tr>
<td>Finland</td>
<td>0.821</td>
<td>0.878</td>
</tr>
<tr>
<td>France</td>
<td>0.817</td>
<td>0.844</td>
</tr>
<tr>
<td>Germany</td>
<td>0.825</td>
<td>0.929</td>
</tr>
<tr>
<td>Greece</td>
<td>0.786</td>
<td>0.852</td>
</tr>
<tr>
<td>Hungary</td>
<td>0.727</td>
<td>0.830</td>
</tr>
<tr>
<td>Ireland</td>
<td>0.831</td>
<td>0.943</td>
</tr>
<tr>
<td>Italy</td>
<td>0.809</td>
<td>0.823</td>
</tr>
<tr>
<td>Latvia</td>
<td>0.796</td>
<td>0.849</td>
</tr>
<tr>
<td>Lithuania</td>
<td>0.706</td>
<td>0.869</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>0.913</td>
<td>0.765</td>
</tr>
<tr>
<td>Malta</td>
<td>0.749</td>
<td>0.804</td>
</tr>
<tr>
<td>Netherlands</td>
<td>0.840</td>
<td>0.898</td>
</tr>
<tr>
<td>Poland</td>
<td>0.702</td>
<td>0.810</td>
</tr>
<tr>
<td>Portugal</td>
<td>0.766</td>
<td>0.701</td>
</tr>
<tr>
<td>Romania</td>
<td>0.649</td>
<td>0.781</td>
</tr>
<tr>
<td>Slovakia</td>
<td>0.722</td>
<td>0.838</td>
</tr>
<tr>
<td>Slovenia</td>
<td>0.781</td>
<td>0.860</td>
</tr>
<tr>
<td>Spain</td>
<td>0.802</td>
<td>0.830</td>
</tr>
<tr>
<td>Sweden</td>
<td>0.830</td>
<td>0.809</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>0.832</td>
<td>0.809</td>
</tr>
</tbody>
</table>

Source: Human Development Reports, Eurostat

6. Conclusions
After en enlargement of the EU and financial crisis some shifts of the EU countries positions occurred. During the few years some countries improved their position, while in the other countries the situation worsened. The reasons, why some countries cope better than the others, is the subject for the separate analysis. The purpose of the paper was to examine the changes only. Comparing the situation in 2010 to 2005, the following countries changed a cluster group: Austria, Belgium, Slovenia, Czech Republic, Poland, Slovakia and Malta. Central European countries coped with the new circumstances relatively well. Although among the new member countries only the Czech Republic and Slovenia form a cluster group with a highly developed countries, most of the new member countries have improved their situation. In the old EU countries results were more varied.
The Characterisation of Unemployment in Poland

Dariusz Żmija 1

Abstract
There are two basic sources of data about unemployment in Poland. The first source is labour office reports on registered unemployment. The second source is the quarterly results of the research on the economic activity of the population – the Labour Force Survey (LFS). Within the years 2003–2012, the unemployment rate calculated using both methods indicates the same trends with slightly different values. Within the years 2003–2008, there was a distinct decrease in the unemployment rate and the number of unemployed individuals, and beginning from 2009 their systematic growth has been noticeable. The initial fast decrease in the number of the unemployed was firstly connected with Poland’s accession to the European Union, and, in consequence, with the gradual opening of the European labour market, and also with the increased pace of Poland’s economic growth. The systematic increase in the number of the unemployed noticeable from 2009 has been related, to a great extent, to the world economic crisis.

Key words: unemployment, unemployment rate, unemployment in Poland, unemployment in the European Union.

Introduction
There are many factors of economic, political, demographic, cultural and institutional nature that are listed as the reasons for the present unemployment crisis and the mass unemployment. The labour market is affected by the globalization processes that are connected with the opening of national labour markets, increased competitiveness, labour efficiency, world’s production, international trade and foreign investments. The structure of the employment changes due to the progress of science and technology. The progress of science and civilization results in the decrease in demand for the labour force. The ongoing transformations result in unemployment currently being a permanent structural phenomenon which threatens not only the marginal groups, but highly qualified employees are also at a greater risk of unemployment. Various social consequences, of both a material and psychological nature, result in the majority of countries in the world taking efforts in order to reduce the range of unemployment. The activities focused on reduction of unemployment are undertaken first of all in the economic domain and they aim, among others, at maintaining the economic growth and also at maintaining and creation of new jobs.

The basic objective of this paper is to carry out an analysis of unemployment in Poland. The paper discusses the basic issues related with the calculation of unemployment in Poland. Furthermore, it characterizes unemployment in Poland and presents an analysis of the phenomenon in the European Union.

The research was conducted based on subject-related literature and the use of source materials from the Central Statistical Office, the Ministry of Labour and Social Policy and Eurostat.

1. The Basic Issues Related with the Calculation of Unemployment in Poland
There are a lot of definitions of unemployment that can be found in economic literature or the provisions of law. In principle, it can be assumed that the occurrence of this phenomenon is related to a lack of employment and occurs when the demand for the labour force is lower than its supply and persons able and willing to work cannot find employment. Unemployment has a very negative influence on the social law and order. There are many planes that can constitute the grounds for an analysis of unemployment: economic, social, political, ethical and moral. The state of being unemployed brings about negative consequences in both the material sphere and the psychological sphere of human life. Unemployment, in particular long-term unemployment, may lead to a considerable worsening of the standard of living. It also contributes to negative mental and psychosocial consequences.

There are two basic sources of data about unemployment in Poland. The first source is labour office reports on registered unemployment that define an unemployed individual in accordance with the provisions of the Act on the promotion of employment and labour market institutions. The second source is quarterly results of the research on the economic activity of the

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3 Act of 20 April 2004 r. on promotion of employment and labour market institutions (Journal of Laws from 2008 r. No. 69, item 415 as amended).
The second source of information about unemployment in Poland is the Labour Force Survey (LFS), which focuses on gathering information about the volume and the structure of the labour force. The research determines the number of persons who are economically active and the number of individuals who are economically inactive. The unemployed, according to the LFS, are individuals aged 15—74 who have simultaneously fulfilled the following three conditions: did not work in the reference week, were active job-seekers, and they were ready to accept the job. The number and the structure of the unemployed determined on the basis of the Labour Force Survey are different from those determined based on information received from the voivod’s labour offices. The differences result from the methods of defining an unemployed individual.

2. The Phenomenon of Unemployment in Poland

The phenomenon of unemployment (open unemployment) came out at the beginning of the 1990s, as a result of the economic transformation which took place in Poland. As a result of the change of the political system and the opening of the economy, the number of the unemployed grew rapidly due to the initial rationalisation of employment and later as a consequence of the economic recession. Thus, since the beginning of the 1990’s, unemployment has become a permanent structural phenomenon. The second wave of unemployment at the end of the 90’s was of not only of a structural but also of an economic nature, which was due to the decline in economic growth, the decrease in Poland’s internal demand, the lack of necessary reforms, the crisis in Russia and the Inconsiderable flexibility of the labour market. That was also the period in which the baby boomers started to enter the labour market. The decrease in employment was accompanied by the changes in ownership that resulted in the increase of the share of private sector in

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4 The unemployment rate is the percentage of the total labour force that is unemployed in a number of people that are economically active (i.e. the employed and the unemployed).

5 Approximate data describing non-registered unemployment in rural areas indicate different values, even up to 1.5 million unemployed individuals. See: Duczewska-Mały K., Przyszłości polityki rozwoju obszarów wiejskich. Maźline scenariusze. Dylematy i wyzwania [Future of the policy of rural areas development. Possible scenarios. Dilemmas and challenges]. Opinion elaborated by the order of the Ministry of Regional Development, MRR, Warszawa 2009, p. 5. In Poland the owners and possessors of agricultural property of the area of cultivated land exceeding 2 comparative fiscal hectares cannot be registered as unemployed. According to the estimations, due to this fact, there are about 1 million jobless persons in individual farming. See: Kocięszewska I., Wybrane problemy społeczno-ekonomiczne rozwoju obszarów wiejskich [Selected social and economic problems in development of rural areas]. I. Agrobip. Rural Dev. 2/24). 2012, p. 131–132.

6 Quarterly information on the labour market, Główny Urząd Statystyczny, Departament Badań Demograficznych i Rynku Pracy, Warszawa 2013, p. 1.

7 An economically active population means people aged 15 and more who are recognized as the employed or the unemployed. Therefore, the employed and the unemployed together constitute the economically active population.

8 The economically inactive population means persons aged 15 and more, who were persons who during the reference week: – did not work and were not job-seekers, – did not work and were job-seekers, but were not ready to start a job within two weeks after the reference week: according to LFS within two weeks after the reference week, according to the National Census of Population and Housing 2002 in the reference week or the next week, – did not work and were not job-seekers because they had found a job and they were waiting to start it in the period: – longer than 3 months, – not longer than 3 months, but they were not able to take the job (additional condition in LFS). Among the economically inactive, a group of people who are discouraged can be distinguished, which includes persons who are not job-seekers, because they are convinced about the inefficiency of job seeking. Economically inactive means persons aged 15 and more, who were not classified as employed or unemployed.

9 Quarterly information on the labour market, op. cit., p. 1.
the labour market. The structure of employment in particular sectors of the economy had also changed, which resulted in the decline of the number of persons employed in industry and agriculture with the simultaneous decrease of employment in the services sector.10

After Poland’s accession to the European Union, the level of unemployment decreased, which was due to the gradual opening of the European labour market as well as the increased pace of economic growth (Diagram 1). The rate of registered unemployment decreased from 20% before the accession (2003) to 9.5% in 2008. That indicated the decrease in the number of the unemployed from 3,176 thousand people to 1,474 thousand. Since 2009, another systematic increase in the number of the unemployed persons was stated. This was first of all due to the world economic crisis, the consequences of which can still be observed. At the end of 2012, there were 2,137 thousand people registered as unemployed in poviat labour offices, which means that 13.4% of the people were without jobs.

Diagram 1. The number of registered unemployed persons and the rate of registered unemployment from December in 2003–2012 in Poland

![Diagram 1](image1.png)

Source: author’s own research based on data from the Central Statistical Office

The analysis of the data concerning unemployment calculated according to the LFS indicates the same trends with slightly different values concerning the number of the unemployed and the unemployment rate (Diagram 2). In accordance with that data, the number of unemployed persons decreased within the years 2003–2008 from 3,273 thousand to 1,154 thousand persons, which meant that the unemployment rate dropped from 19.3% to 6.7%, whereas the years 2009–2012 brought the increase in the number of the unemployed, which grew from 1,471 thousand individuals to 1,757 thousand. Thus, at the end of 2012 the unemployment rate according to LFS amounted to 10.1% and was lower than the rate of the registered unemployment by 3.3%.

Diagram 2. The number of unemployed persons and the unemployment rate according to the LFS in December in the years 2003–2012 in Poland

![Diagram 2](image2.png)

Source: author’s own research based on data according to LFS

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Unemployment in Poland is a spatially diverse phenomenon, the feature of which is firstly due to the asymmetric social and economic development in the cross section of the regions, the different geographical location and also the unequal advancement of restructurisation and privatization processes in the economy. Figure 1 presents the rate of registered unemployment in the individual provinces in Poland at the end of 2012.

Figure 1. The rate of registered unemployment in the individual provinces in Poland – status as at 31st December 2012

At the end of 2012, the highest rate of registered unemployment was recorded in the Warminsko-Mazurskie province, where it achieved 21.2%, whereas the lowest rate of registered unemployment was stated in the Wielkopolskie province (9.9%). Thus, the difference between the lowest and the highest rate of registered unemployment between the provinces amounted to 11.3 percentage points. In comparison with the status as at the end of 2011, the unemployment rate increased in all provinces. Its highest growth was stated in the Dolnoslaskie and Lodzkie provinces – by 1.1 percentage points, whereas its lowest growth was noted in the Lubuskie province – by 0.4 percentage points.

While analysing the unemployment rate estimated on the basis of the Labour Force Survey (LFS) it should be stated that in 2012, the spatial diversity of unemployment in Poland was different (figure 2). At the end of 2012, the highest unemployment rate was stated in the Podkarpackie province, where it amounted to 14.0%, whereas the lowest rate was stated in the Wielkopolskie province – 7.7%. The difference between the lowest and the highest unemployment rate between the provinces was 6.3%. In comparison with the status as at the end of 2011, the unemployment rate increased in 11 provinces, whereas it decreased in 5 provinces, with the highest decrease stated in the Lubuskie and Swietokrzyskie provinces – by 0.6 percentage points.

Figure 2. The unemployment rate according to the LFS in particular provinces in Poland – status as of 31st December 2012

Source: author’s own research based on data from the Central Statistical Office
Unemployment in Poland, apart from the abovementioned territorial dispersion, is also characterized by a diversity connected with particular social and demographic and occupational features. At the end of 2012, there were 1,099,900 women and 1,038,000 men registered in the records of the unemployed. In comparison with the status as at the end of 2011, the number of unemployed women increased by 3.7%, whereas the number of unemployed men increased by 12.5%. The rate of women in the total number of unemployed persons declined within a year from 53.5% to 51.4%. There were 1,778,600 persons with no right to receive an unemployment benefit (i.e., 83.2% of the total number of the registered unemployed individuals). That group of jobless persons includes 44.2% of the inhabitants of rural areas. The largest group among the unemployed were persons aged 25–34 (29.4% of the total number of the registered persons), persons aged 24 and less (19.9%), and persons aged 35–44 (19.6%). The rate of the registered unemployed aged 45–54 amounted to 18.7%, whereas persons aged 55 and more – 12.4%. Within the reference period, as in previous years, the largest group of the registered unemployed in the labour offices possessed a basic vocational education – 28.3% and a lower secondary and primary education – 27.3%. Only 10.6% of the unemployed possessed a secondary general education, whereas 11.7% – a higher education. Among the unemployed registered in labour offices as of December 2012, as many as 35.4% persons were seeking employment for a period longer than 1 year (an increase by 0.8 percentage points in comparison with 2011). The number of persons who were without work for the period of no longer than one month constituted 9.7%, for the period from 1 to 3 months – 19.7%, and for the period from 3 to 6 months – 17.2%, whereas for the period from 6 to 12 months – 18.0% of the total number of the unemployed individuals.

Another crucial problem in Poland is unemployment of the inhabitants of rural areas, which is a derivative of both unemployment in the entire economy and the low mobility of rural residents, as well as the limited possibilities on the labour market in rural areas. At the end of 2012, there were 939,000 unemployed persons residing in rural areas registered in labour offices, which, in comparison with the status as at the end of 2011, indicates a growth in the number of the unemployed by 7.4%.

A characteristic feature of unemployment in rural areas in Poland is its geographical differentiation, and the group of the unemployed has a diverse structure. Among the unemployed in rural areas the non-agricultural population (not having farms) is in a much worse situation as compared to the population connected with agriculture. There is insufficient volume of work places for the non-agricultural population in both urban areas and rural areas. Unemployment in rural areas is different from unemployment in urban areas as it is of a more permanent nature, and the labour market is not as flexible.

An important feature of the Polish labour market is its seasonal character. The growth of unemployment takes place in the months at beginning and at the end of a given year, whereas the decrease in the number of the registered unemployed occurs in spring months, which is, among others, due to the commencement of seasonal works in agriculture and the building industry as well as in tourism.

Since the beginning of transformation of the political system, which revealed the existence of unemployment in Poland, there were various methods applied to combat that phenomenon. Initially, protective actions, meaning passive methods, were used. The financial difficulties of the public finance sector and the change of approach to issues related to getting out of unemployment resulted in those actions being limited and replaced, with the passing of time, by active forms that are currently recognized as the most important actions aiming at combating unemployment in Poland.

In Poland, the Minister of Labour and Social Policy, is the authority responsible for issues related to employment and combating unemployment, work relations and conditions, remuneration and employment benefits as well as collective agreements and disputes. Tasks of the state concerning the promotion of employment, the employment support policy and relieving the effects of unemployment are carried out by the labour market institutions, which strive for full and productive employment. Many non-governmental organisations also deal with the issues of the labour market. The Labour Fund and the Guaranteed Employee Benefits Fund have been established, among other institutions, in order to support the unemployed in Poland.

3. The Analysis of Unemployment in Poland in Comparison with the European Union Member States

The level of unemployment in the European Union is calculated by Eurostat as a harmonised unemployment rate, which is a consequence of adopting a uniform method for determining that indicator by each of the EU member states. The data is calculated based on quarterly results of the Labour Force Survey (LFS) and monthly data on registered unemployment. The harmonised unemployment rate gives the number of unemployed persons as a percentage of the labour force (the total number of people employed plus the unemployed). Next, that data is seasonally adjusted. Figure 3 presents the level of the harmonised unemployment rate and the number of the unemployed in particular EU member states.

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11 Monthly information on registered unemployment in Poland in December 2012, Główny Urzad statystyczny, Departament Badań Demograficznych i Rynku Pracy, Warszawa 2013, p. 4–5
According to data from Eurostat, at the end of 2012, the highest unemployment rate in the European Union was recorded in Spain – 26.2%, and Greece – 26.1%, whereas the lowest unemployment rates were recorded in Austria – 4.7%, Luxemburg – 5.3% and Germany – 5.4%. The unemployment rate in Poland in comparison with other EU countries was at the average level amounting to 10.4% – lower by 0.4 percentage points than the average unemployment rate in the UE-27, which at the end of 2012 amounted to 10.8%. While analysing the number of the unemployed in particular EU countries, it should be stated that at the end of 2012, the greatest number of unemployed persons was observed in Malta (12 thousand persons), Luxemburg (13 thousand persons) and Cyprus (61 thousand persons). At the end of 2012, in accordance with calculations by Eurostat, there were 26.041 thousand unemployed persons in the entire European Union.

Considerable changes in the Polish labour market have caused the level of employment and economic activity in Poland to differ from the economies of other EU member states. On the one hand, the economic inactivity of the Polish people derives from the extended time of entering the labour market by young people, and on the other hand it is the result of the fact that a growing number of people are becoming entitled to a retirement or a pension and available pre-retirement benefits were available for many years and the employment rate remains at the same relatively low level in comparison with other EU countries (Diagram 3).

Diagram 3. The employment rate, people aged 15 – 64 in % – status as at the end of 2012

Source: author’s own research based on data from Eurostat

Employment rate represent persons in employment as a percentage of the population (aged 15 and over).
According to Eurostat, at the end of 2012 the unemployment rate of people in productive age (aged 15–64) amounted to 59.7%, in Poland and was lower in comparison with the EU’s average (27) by 4.5 percentage points. A lower employment level was recorded in Greece (51.3%), Spain (55.4%), Italy (56.8%), Hungary (57.2%), Bulgaria and Ireland (58.8%), Malta (59%) and Romania (59.5%). The highest employment rates were observed in the Netherlands, Sweden, Denmark and Great Britain. In those countries the employment rates exceeded the level of 70%.

The labour market policy in the European Union is conducted by particular member states, which create it individually through the selection of appropriate methods and forms of influencing the labour demand and supply. The particular EU member states apply different regulations and principles for structuring the labour market. The proportions in applying the national policy instruments and the volume of allocated funds are also different, with the maintenance of similar targets for their application. This means that particular member states use different methods of collecting and spending money for combating unemployment, they form different principles of granting and paying unemployment benefits, creating public employment agencies, establishing labour law, etc.17.

The European Union has been carrying out campaigns that aim at raising the employment level. In accordance with the “Europe 2020” growth strategy, the European Employment Strategy seeks to create more and better jobs. That strategy supports actions that will enable the assumed targets related to the increase of employment in the group aged 20–64, the decline of the rate of persons who finish their education too early to the level below 10% and increase the rate of persons aged 30–34 completing education at higher education institutions up to at least 40%, and also to lift at least 20 million people out of the risk of poverty or social exclusion by 2020, to be achieved.

In Poland, the National Action Plan for Employment has been adopted for the years 2012–2014, which includes the principles for the realization of the European Employment Strategy. It constitutes the basis for actions to be conducted by the state related to the promotion of employment, the employment support policy and relieving the effects of unemployment. The guidelines concerning the priorities and directions for the actions to be conducted by the state in those areas have been specified in the government strategic documents.

In the European Union, the European Social Fund (ESF) and the EUropean Employment Services (EURES) constitute a cooperation network for public employment agencies and their partners on the labour market, that support mobility in employment on an international level within the European Economic Area.

Conclusions

In Poland there are two basic sources of data about unemployment. The first source is labour office reports on registered unemployment. The second source is the quarterly results of the Labour Force Survey (LFS). It is difficult to unambiguously state which method of gathering information on the number of the unemployed in Poland is better. Both methods have their advantages and disadvantages. On the one hand, an unquestionable advantage of data coming from the registers kept by the labour offices is that they cover a vast community and in that way they reflect an accurate scale of unemployment. Furthermore, the data is available from the povit level. On the other hand, the flaw of that method is that it takes only those persons that are registered in the records of the labour offices into consideration. The comparability of the results with international data and the fact that not only persons registered in labour offices are covered by the research can be treated as the advantages of the LFS methodology, whereas its disadvantages are the general nature of the research, the rarity of research and the ambiguity of the criteria that is noticeable from time to time. Both methods do not take hidden unemployment into account, however, they provide valuable information on the changes taking place on the Polish labour market.

Irrespective of the method of determining the number and the rate of the unemployed, the unemployment rate within the years 2003–2012 determined with the application of both methods indicates the same trends with slightly different values. Within 2003–2008, there was an explicit decline in the rate and the number of the unemployed, and since 2009 their systematic growth can be observed.

Unemployment in Poland is a spatially diverse phenomenon. The lowest values of the unemployment rate are recorded in highly urbanized areas, e.g. in the Wielkopolskie, Mazowieckie, Slaskie and Lodzkie provinces. The highest values are observed in provinces of an agricultural nature, e.g. Warminsko-Mazurskie, Zachodniopomorskie or Kujawsko-Pomorskie provinces. A crucial problem in Poland is unemployment of rural residents. People who are at risk of unemployment also include the young, the elderly, women, persons without professional qualifications or former employees of state agricultural households.

The unemployment rate in Poland in comparison with the EU member states at the end of 2012 was at the average level and amounted to 10.4% which is lower by 0.4 percentage points than the average unemployment rate in the UE-27, which amounted to 10.8%. This means a considerable improvement in comparison with the years 2004–2006, when Poland was a country of the highest unemployment rate in the European Union. While analysing the number of the unemployed, it should be stated that in Poland it is on a relatively high level, and in terms of the number of the unemployed, Poland is second only to such countries as: Spain, France, Italy, Great Britain and Germany. The employment rate is also low. At the end of 2012 the employment rate of the people in productive age (aged 15–64) amounted to 59.7% in Poland, and was lower in comparison with the EU average (27) by 4.5 percentage points. The lower employment level was recorded only in Greece, Spain, Italy, Hungary, Bulgaria, Ireland, Malta and Romania. However, in Poland the employment rate of the people in productive age (aged 15–64) is systematically increasing.

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Abstract

Air travel is not only a popular form of moving people from either business or leisure purposes but a risky activity that comes with so many complaints from costumer passengers. The aviation market is forced to face important consumer protection issues in Europe and the European Union seems to be the first international organization that created unified liability rules for air carriers across the European Union and its Member States. The essay is about to discuss the liability of air carriers and the interpretation and scope of defenses listed in the Regulation, illustrating them with real cases in which national courts requested preliminary ruling from the European Court of Justice.

Key words: liability, strict liability, airlines, European Union, delay of a flight, cancellation of a flight, denied boarding, exoneration, compensation, Montreal Convention, 261/2004/EC Regulation, extraordinary circumstances.

I. Air Passenger Rights in the European Union and the Montreal Convention

1. European Union Regulation on Air Passenger Rights

In our globalized world several international treaties and legislative products of the European Union regulate travel law as an important area of law. People travel more and more and an undeniably popular form of travel is air travel. In the past decade passenger traffic increased significantly, newer, inexpensive services became also available, and remote or isolated destinations got a lot closer than they were before.

In aviation law we may distinguish two types of damages in case of delay of a flight, according to the European Court of Justice. One type of damages has the same impact on all passengers when placing them in a situation to spend a longer period of time at the airport than originally planned. Airports are often located far from the city and prices for most vital services – meals, shops, etc. – are significantly more. This problem should and can be solved with some immediate services, supports as listed in the regulation of the European Parliament and Council under 261/2004/EC Regulation establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay flights. This regulation pays particular attention to serve the interest of passengers, the customers.

The other type of damages is an individual damage suffered in connection with the purpose of travel. Compensating this category of damages may only happen in an individual proceeding that belongs to the territory of tort law. The Montreal Convention aims to regulate these damages. The Convention defines the conditions for air carrier liability, defenses, substantive law and some procedural rules about the tort claim such as limitation periods and jurisdiction.

During an air travel, passengers get into the most vulnerable situations when their flight is delayed, cancelled or they face denied boarding. These anomalies place passengers into a special situation comparing to passengers using other forms of transportation (e.g. trains, buses, etc.). This specialty justifies the increased need for regulating such problems with providing a high standard of protection for customers.

In order to fulfill the above mentioned goals, common liability rules are being applied for delays, cancellations and denied boarding situations in the European Union since 1991. The valid Regulation 261/2004/EC commonly establishes protection for all victims (passengers) of the three malfunctions of air travel.

Passengers mainly face delays, cancellations and denied boarding situations when they are already at the airport waiting for check-in and/or boarding. The vulnerable situation comes from the fact that these passengers are forced to spend hours – in some cases days – at the airport that is often only an intermediary airport in their itinerary. It is not surprising passengers suffer various damages: the pre-booked hotel reservation might only be changed for a hefty penalty; the long awaited important business contract vanishes due to the missed appointment, etc.
2. Delay

According to the European Court of Justice (ECJ) delay is when a flight is operated as it is scheduled but its original departure time is postponed. If the airline expects a flight to be delayed, it has to provide certain services depending on the length of the delay. First of all passengers are entitled to refreshments and meals. Additionally, if the flight is expected to depart on the day after the originally scheduled departure time, the airline has to provide accommodation for the passengers. If a flight is delayed by five hours, passengers are additionally entitled to abandon their journey and receive a refund for all unused tickets, a refund on tickets used already if the flight no longer serves any purpose in relation to their original travel plan, and, if relevant, a flight back to their original point of departure at the earliest opportunity.

3. Right to Compensation in the Regulation

In case of cancellation and denied boarding passengers are also entitled to get fair compensation that is not a negotiable but a fixed amount listed in the Regulation. The amounts vary between €250–600 on the actual length of the flight in kilometers. If the flight route is shorter than 1500 kilometers passenger are entitled for €250, between 1500 and 3000 kilometers the compensation is €400, over 3000 kilometers the amount is €600.

This compensation might get reduced with 50% if the airline offers rebooking for passengers and the rebooked flight lands after the original flight’s scheduled arrival time. This 50% reduction may be applied if there is a 2 hour long delay in case of route shorter than 1500km, 3 hours if it is between 1500–3000km and 4 hours over 3000km.

In a decision ruled in 2009 the ECJ found that passengers may also be entitled for the above listed compensation amounts if the flight is delayed 3 or more hours. In this decision the ECJ extended the scope of compensation in the Regulation for not only cancellations and denied boarding but delays as well.

4. Right to Care

The air carrier must provide sufficient care (services) for passenger effected by delay, cancellation and denied boarding. These services include:

- meals and refreshments in a reasonable relation to the waiting time;
- free of charge two phone calls, telex or fax messages, and emails;
- hotel accommodation in cases
  - where a stay of one or more nights is necessary, or
  - where a stay additional to the intended by the passenger becomes necessary.
- transport between the airport and place of accommodation.

The Regulation also contains special care as an obligation of the airline provided for passengers with reduced mobility, disability and unaccompanied minors.

5. Scope of the Regulation

Although some might think this special and strict EU Regulation of passenger rights is only applicable for flights operated inside EU territory, the scope of the Regulation is a lot wider than this geographical limitation. Regarding the scope of the Regulation, it shall apply to passengers departing from an airport located in the territory of an EU Member State, and to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State if the operating air carrier of the flight concerned is a Community carrier. The term Community carrier means the airline has to be registered in the European Union. For example in a case when British Airways operate a flight originating from Miami with the destination of London, the Regulation is applicable. While American Airlines is exempted under the Regulation rules if it flies in the EU. American shall also apply these rules if its flight originates from an EU airport. Regarding code share flights, the Regulation is clear enough to burden the operating carrier in every case. It does not matter if a passenger booked his or her flight under a non-Community carrier code, in case the operating carrier is a Community based one, the EU rules shall apply.

6. Warsaw and Montreal Conventions

The Warsaw Convention adopted in 1929 regulates international carriage by air, both cargo and passenger traffic. The Montreal Convention amended the Warsaw Treaty in 1999 and the two conventions serve as the most important sources of law for air traffic in the international community. The text provides basic definitions and the liability of air carriers. However there are significant differences in the approach and content of rights in the international treaties and the EU Regulation. While the EU Regulation provides a fix objective compensation system that may be labeled as a form of strict liability of air carriers, the Warsaw and Montreal Convention deal with individual claims and only provide a cap on damages in individual tort cases. This is why the EU Regulation is the most detailed and strict in the international aviation law and does not interfere with the Warsaw and Montreal Convention, since the scope of the two laws is significantly different. However we cannot say there are no common points in them, since the objective EU compensation amounts may have an impact in the amount of damages in an individual tort proceeding, according
to the obligation the plaintiff has to deduct the already provided surrogatum from the amount of damages. In the Montreal Convention this cap on individual damages is 4150 SDR in case of delay, 100.000 SDR in case of personal injury and death and 1000 SDR in case of lost and damaged baggage. The Montreal Convention aims to limit the monetary liability of air carriers if passengers suffer actual (general and special) damages in connection with air travel, while the EU Regulation mainly achieves to ease the negative consequences of immediate and mostly general damages suffered by delays, cancellations and denied boarding. In the former case passengers shall initiate individual tort proceedings in order to get damages from the airline and providing evidence on the actual amount of damages is an essential and crucial point in these processes. While according to EU law the fixed objective compensation amounts and care services are independent from any individual claim or justification of damages. As average and immediate damage cover assistances, the air carrier cannot redeem these amounts and the price of cares back even if the actual damage of the passenger is way under the regulated compensation amounts.

The Montreal Convention seems to be a favorable regulation for air carriers in terms of the caps on individual passenger damages. However these caps are not exclusive and mandatory but minimum standards. Any air carrier may oblige itself in its general terms and conditions for an unlimited damages and compensation not regarding the caps in the Convention (e.g. Japan Airlines is famous providing no limit compensation for its passengers, independently from the caps regulated in the Montreal Convention).

II. Defenses for Air Carriers in European Aviation Law

1. General Remarks on Defenses Available for Air Carriers

An operating air carrier shall not be obliged to pay compensation in accordance with Regulation, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier. Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.

Defenses under liability of air carriers still remain an uncertain and most crucial topic when it comes to the interpretation of the Regulation. Although the Regulation does not directly and explicitly lists the potential defenses in its text, its preamble gives some possible circumstances listed above. The European Court of Justice found this list an exhaustive one, neglecting the fact that the preamble is usually not binding in most sources of law. Air carriers usually try to widen the scope of each of the six circumstances in order to successfully exonerate under the strict liability the EU aimed to establish when having adopted the Regulation. The ECJ carried the interpretation of these defenses far in some aspects, while leaving doubtful questions and uncertainties in others. The presentation is about to discuss the content of the listed defenses, illustrating them with real cases in which national courts requested the interpretation of the ECJ in a preliminary ruling procedure. Having firm definitions for these defenses would be crucial if we tried to determine how air carriers might operate in the future and what risks one is taking when stepping up as a new player in this complicated market.

2. Political Instability

Political instability does not have a commonly accepted definition neither in the text of the regulation, nor in the practice of the European Court of Justice since no case ever reached the ECJ to scrutinize this problem. In order to get closer to the definition of political instability, we should take into consideration constitutional and public international law institutions as well. According to these, political instability is the governing of a country without a stable and well powered government. In this case, an opposition party or militia aspire to the acquisition or alteration of the governing political power. Such circumstances may be military operations, military coups, civil wars, revolutions, rebellions.

Although political instability seems to be an objective defense for the air carriers, still in every situation we must examine whether the air carrier could have avoided the influence of such circumstance with taking necessary and reasonable measures and care. Another criterion for a successful exoneration under the strict liability rules is that political instability should qualify as force major, independent under the influence of the air carrier.

In a case a British Airways flight was forced to stay on the ground by the activity of military groups in Kuwait, the English court had to decide whether this situation is qualified as one out of the air carrier’s influence. The court applied the rules of the Montreal Convention in this case. The trial judge came to the conclusion that military group activities didn’t belong to the influence of the air carrier so it could not have been foreseeable and avoidable even if the air carrier had had a knowledge that military operations were going on in the country. This interpretation might be applicable in cases under the scope of the EU regulation.

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13 261/2004/EC Regulation Article 5(3).
3. Meteorological Conditions Incompatible with the Operation of the Flight Concerned

Weather is always a common issue when it comes to flying. In most countries of the world bad weather should not constitute liability of the air carrier, since weather is a great example of force major. It is true that the air carrier does not have influence on this extraordinary circumstance, the weather. Although science and technology are well developed and high-standard these days, it is a generally accepted fact that airplanes cannot take off in a snowstorm, T-storm or in thick fog.\(^\text{17}\) The first case dealing with weather as a potential defense for the carrier was brought to the European Court of Justice when volcano Eyjafjallajökull in Iceland erupted and authorities ordered many plans to the ground for almost a week. Some airlines interpreted the rules of the regulation as an absolute, unconditional reason to exonerate under strict liability. They thought they were not obliged to provide any service or compensation to passengers at all. Even the necessary care (food, accommodation, communication, etc.) was not relevant. In the Denise McDonagh v Ryanair Ltd case \(^\text{18}\) the plaintiff claimed Ryanair still owes an obligation to take care of its passengers stuck on the ground. The plaintiff claimed €1129 to cover meal expenses, accommodation and transportation. The European Court of Justice ruled for the plaintiff on January 31 2013 and stated that the duty to provide reasonable care for passengers in case of delays or cancellations are absolute liability rules that cannot be neglected on the sole reason a force major evolved. Providing meals, accommodation and transportation to passengers is a liability of air carriers without proper defenses, according to the interpretation of the ECJ. Regarding the amount spent on these expenses, the court examined whether the given care was adequate and reasonable. The evaluation of the exact amount belong to the jurisdiction of national courts, according to the ECJ.

4. Security Risks

Security risks are not defined in the regulation and no ECJ case law exist in this field. If boarding is completed and doors are closed, however the final check before take-off reveals extra bags on the plane traveling without passengers, may qualify as a security risk that prevents the airline to operate the flight according to schedule. Another typical security risk may be when more passengers boarded the plane that it is shown on the check-in list. In these cases it is not relevant whether this situation is a result of the airline’s negligence or the intentional conduct of passengers, since these security risks must be clarified before take-off in order to provide safe service to customers. Especially after 9/11 the European Union and air carriers value security measures a lot more than before.

5. Unexpected Flight Safety Shortcomings

Before we interpret unexpected flight safety shortcomings as easy defenses for the air carrier, we must state that all safety issues must fall outside the influence of the airline in order to provide him successful exoneration under the duties given by the regulation. This is why the ECJ only accepts safety shortcomings with many restrictions. In only three cases, unexpected safety shortcomings can qualify as circumstances outside the interest of the carrier. Manufacturing defect is one of those cases, when the airline has no influence on the risk. The other two cases are terrorist attacks or sabotage. In the two latter cases, terrorists or saboteurs are responsible for mechanical failures of the plane. Anything else other than the three cases mentioned above could be prevented with exercising the necessary maintenance duties.\(^\text{19}\)

Since not all extraordinary circumstances confer exemption, the onus is on the party seeking to rely on them to establish, in addition, that they could not on any view have been avoided by measures appropriate to the situation, that is to say by measures which, at the time those extraordinary circumstances arise, meet, inter alia, conditions which are technically and economically viable for the air carrier concerned. The reason of this strict and narrow interpretation of the Regulation is the fact that consumers need a high level of consumer protection in the EU.\(^\text{20}\)\(^\text{,21}\)

6. Worker Strikes

In case of either a lawful or wrongful strike of employees, the air carrier is exempted under liability.\(^\text{22}\) The reason why there is no difference between a lawful or wrongful strike is that both are outside the influence of the employer, the air carrier. Even if the airline later gets a decision from the national court that evaluate the strike as an unlawful one, the employer had no reasons to believe so and more importantly had no lawful instruments to intervene without a binding court decision. However, the European Court of Justice drew the attention that the carrier's exempt is only valid for the passengers of the actual flight concerned in the strike. All other flights must operate according to schedule and the carrier cannot extend this defense generally to more flights.\(^\text{23}\)


\(^{18}\) C-12/11 Denise McDonagh v Ryanair Ltd case.

\(^{19}\) C-549/07. Friederike Wallentin-Hermann v Alitalia – Linee Aeree Italiane SpA case.

\(^{20}\) C-344/04. IATA and ELFAA case, Article 43–47.


\(^{22}\) See judgment no. 368 of the ILO.

\(^{23}\) C-22/11 Finnair Oyj v Timy Lassooy case.
7. Air Traffic Management Decision

According to the Preamble the extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations. Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.

However the air carriers cannot rely on extraordinary circumstances as general defenses that lead to their exoneration. The moment the extraordinary obstacle diminishes, the airline has to continue the service as planned. In a case passengers were boarded the plane, waiting for take-off, when a sudden black out prevented them in doing so. When the power had come hack, the plane still could not take-off and the airline cancelled the flight. Later, passengers learned that the real reason of cancellation was not the black-out that is an extraordinary circumstance, but that the flight attendants’ time shift expired.

The European Court of Justice ruled for the passengers claiming damages for the cancellation. The court stated that an air carrier must plan ahead and think of such extraordinary measures that differ from force majors. Since these extraordinary circumstance may happen at any time, the carrier must plan accordingly and take reasonable care in order to minimize the consequences of them. This is why all flight schedules are planned with some gaps. If the airline does not fulfill this obligation, he cannot refer to the defense of extraordinary circumstances successfully.

III. Interpretation, Anomalies and Conclusion

While the EU Regulation is pretty clear and certain regarding care services and the amount of compensation for passengers, some uncertainty can be seen in the interpretation of what qualifies as a delay, cancellation or sufficient and reasonable care. The Regulation uses these terms without clear definitions and airlines liberally mix and restrict the scope of them. Especially the thin border line between delay and cancellation lead to different interpretations in the practice of air carriers and certainly in the mind of passengers. The European Court of Justice had an opportunity to provide helping hand in interpretation through individual decisions. The standpoint of the ECJ in these cases truly divides public opinion. Some passenger rights are not explicitly mentioned in the text of the EU Regulation, only the ECJ widened the scope, almost contra legem in these situations. Think about the fact compensation should be provided for passengers even in delay situations according to the ECJ, while compensation is only regulated in EU law for cancellation and denied boarding cases. This problem leads to the interpretation of the role of ECJ in the European integration.

Some authors even think the ECJ is no longer a supreme court of the European Union but a legislative body that clearly mix the traditional civil law interpretation function of courts with judge-made-law principles from Anglo-American legal systems. However we must add that in the above mentioned actual ECJ preliminary ruling cases flights departing to the USA were delayed with more than 25 hours and the airline identified this problem as a form of delay and followed the legal consequences of delays as written in the EU Regulation. From a consumer protection angle the ruling of the ECJ is not a real over interpretation of the actual rules in the Regulation but a clarification and separation of the terms of what qualifies as a delay and cancellation.

Another important question is what qualifies as sufficient and reasonable care – most importantly the definition of a decent meal – when passengers stuck at the airport for longer than planned. Airlines try to minimize the amount they provide for passengers in the form of vouchers to spend on meals and refreshments. A common practice is that airlines do not pay attention to the actual price level of the airport and give out meal vouchers in the same amount everywhere. The ECJ never had an opportunity – at least until now – to interpret and evaluate this practice. Only ordinary court decisions in the member states dealt with this question. In a famous class action case in Hungary, the Hungarian court rejected the defense from Wizzair, a Community based discount airline in a case when Wizzair provided food vouchers in smaller amount as described in its general terms and conditions. Wizzair’s defense was that it adjusted the amount to the length of delay, while the court ruled for the passengers and made them entitled for the full amount listed in the general terms of air carrier.

Since the Regulation does not clarify the liability of air carriers, whether there are defenses for them or not, it is still not certain if airline liability for providing the above mentioned services and fix compensation amounts are strict or fault based. Although the practice of most national courts and the ECJ itself undeniably point to the direction of strict liability, it is not clearly coming from the text of the Regulation. The problem gets more serious when parallel application of the EU Regulation and the international treaties (Warsaw and Montreal Conventions) occur, since these treaties often provide a chance for exoneration on successful defenses. As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier. Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay,

24 C-402/07, and C-432/07. Christopher Sturgeon and others v. Condor Flugdienst Gmbh and Stefan Böck and Cornelia Lepuschitz v. Air France SA joined cases.
25 PM. 1420/2009/2-I.
an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations. Although these defenses are mentioned in the preamble of the EU Council Regulation as well, a preamble usually never enacts binding rules in the actual topic. Preambles are meant to list preliminary problem and situation that made legislation necessary in that field. This is why courts in the member states and the ECJ itself do not pay attention to these defenses in actual cases if the Regulation is applicable and claim is not under the scope of the Montreal Convention. An interesting practice of the ECJ is – again in a judge made law sense – that defenses are scrutinized and adjudged in every single case by the court itself, taking into consideration all circumstances of the situation and interpreting the meaning of these defense cases by itself. This practice leads to a precedent approach in EU law and the ECJ may interpret these otherwise very wide and uncertain defense cases with the outmost freedom.

National courts give chance for defenses for airlines only if the Montreal Convention is applicable in the actual case, e.g. an individual claim is in process for gathering individual damages suffered by a passenger. This is not surprising, taking into consideration that the Convention established a fault based liability system, while the EU Regulation follows strict liability itself. This practice leads to a precedent approach in EU law and the ECJ may interpret these otherwise very wide and uncertain defense cases with the outmost freedom.

Defenses in the regulation of air carrier liability are limited not only by the text of the regulation but the practice of the European Court of Justice. Disregarding the present economic crisis and the financial difficulties airlines are facing these days, strict liability is not only strict because of the general rule but the clearly narrow opportunities for exemptions. However some defenses still have not made it to the ECJ, therefore we cannot exactly give interpretation to all, the general approach and interpretation of the rules in the regulation is very favorable to costumers and take air carriers as true professionals, who owe high duty to their passengers.

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Involuntary Treatment in a Mental Institution in Hungary
Zsuzsa Gyöngyvér Kovács

Abstract
In my article I deal with involuntary treatment in a mental hospital. At first I survey the historical changes of criminal consiration of mentally disordered offenders from the eighteenth century to the Socialist Criminal Code. After this the rules of involuntary treatment in a mental hospital is presented, incuding the condiction, term and review of this measure. Finally I search answers to the problems of the legal institution.

Involuntary treatment in a mental hospital raises many questions. The main problem is in connection with the involuntary treatment in a mental hospital that what is the role of the criminal law? A question has arisen could criminal law accept a social goal as a treatment? Besides role of the criminal law, this legal institution has some problems from placement of the execution to period of the measure.

Key words: involuntary treatment in a mental hospital, mental disorder, offender, prison, hospital, indefinited period.

Introduction
In my article I deal with involuntary treatment in a mental hospital. I survey the historical changes of criminal consiration of mentally disordered offenders from the eighteenth century to the Socialist Criminal Code. After this the rules of involuntary treatment in a mental hospital is presented, incuding the condiction, term and review of this measure. Finally I search answers to the problems of the legal institution.

The number of mentally disordered people shows an increas-
ing. Among the causes we have found the improve of aging and more stress, also. Moreover faster life can cause more pyschical and psychiatric disorder. Changing life situations, consumption of drug and alcohol increase the probability of psychical damage. Above to these, we know more and more about mental disorderes. Treatments are more efficient, and it causes the shorter time of care and the number of discharged patients. The role of mental institutions improves, like our knowledge about illnesses 2.

Historical Survey
Before the 18th century mentally disordered offenders were accomodated in prison like other offenders. In 1763 an act prescribed the treatment of mentally disordered offenders from the eighteenth century to the Socialist Criminal Code. After this the rules of involuntary treatment in a mental hospital is presented, incuding the condiction, term and review of this measure. Finally I search answers to the problems of the legal institution.

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Noticable, legislation did not take into account mentally dis-
ordered offenders, in spite of the fact that jourists instigate this. This group of offenders was interpretated inside the cathegory of dangerous offender, and jurists suggested imposition of un-

1 Zsuzsa Gyöngyvér Kovács, Department of Criminal Law and Criminology, Faculty of Law, University of Debrecen, Hungary.
4 Lafferton Emese, A magyar pszichiátria történetének vázlata európai kontextusban 1850–1908, Receptió és kreativitás – Nyitott magyar kultúra, zeus.phil-inst.hu (2009. 10. 06).
7 Act 14 of 1876. 640 §
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specified measure against them. Safety measures which were introduced in the first decades of the 20th century – like workhouse – could not apply against mentally disordered people.

Following this, in these cases the neutralization was the main task, treatment of the offender was not mentioned.

The contemporary literature – for instance Pál Angyal and Ferenc Finkey – suggested the establishment of a special institution which has a double task: care and punishment.

It occurred often that mentally disordered offenders did not get accommodation in a hospital. This fact has two causes:
- these institutions were overcrowded
- the staff believed that these patients are treatable with more difficulty.

In Hungary the examination of the mental state was quite controversial: many hospital tried to avoid these offenders and transported them to a prison. After this proceeding the result was questionable, and the whole procedure took up a great deal of time.

In 1896 a mental institution was established, which was an independent institution, because it was subjected only to the justice minister. Fifty offenders were accommodated in the new hospital, but it did not solve the problem, because half of the patients stayed without placement.

Since the Public Health Act, no other act dealt with mentally disordered offenders. This situation was change with the third penal article in 1948.

The third penal article of Codex Csemegi established the safety detention, which could apply against insane offenders. This act was a solution only case of insane criminals, the accommodation of other mentally disordered types were not regulated. Groups of mentally disordered offenders in the effective Hungarian Criminal Codex are insanity, personality disturbance, mental deterioration, disturbance, imbecility. The judge could impose this measure if the offender was an adult. In the effective Codex the involuntary treatment in a mental hospital is applicable in the case of a juvenile criminal.

The tasks of the measure were to neutralize the offender, treatment and termination of public danger.

The period was one year, but the court could prolongated it for more than one year, if the danger of recidivism was exist. The court must repeat this process, while it was necessary because of the public danger.

The measure must be executed in a special mental institution, or a special unit of a prison or a mental institution. It is a deficiency that the regulation emphasized neutralization, not care of the offender. Moreover similar to the Act 1878, as this act not know the category of dismissed capacity.

In 1950 a new act was legislated about the General Part of Criminal Codex. This codex also knew the safety detention. It regulated the measures similar to the third novel article:
- the court could apply it, if the offender was insane,
- offending of every type of crimes, the period of the measure was one year, but the court could prolongate it, while public danger was existed,
- the criminal was an adult.

But the act defined a new condition: danger of recidivism.

In connection with the prolongation, it follows from the theory of the act, that the court must prolongate it, while public danger was existed, because this was used for protection of society and treatment of the offender.

The Socialist Criminal Codex 1961 defined the various types of mental disorders: insane, disturbance, imbecillity. The court could apply this article, if the disorder was chronic, not temporary. Weight of the committed crime have not been taken into consideration. The court could impose the measure on juvenile offenders, too. If the juvenile was imbecille, corrective education was also applicable.

Execution had two ways: treatment in a hospital, or homecare with treatment. The assigned institution was a special mental institution. In case of home-care, a relative looked after the patient by the control of the doctor of the Institution. The measure must be executed in the Institution, if the offender committed a crime, which was punishable for more than a one year period imprisonment. The measure must be discharged if the necessity did not exist. There was a way to modify the treatment in a hospital to home-care.

This was the first case, when the legislator took the weight of the committed crime into account.

From 1971, if the offender commmitted a misdemeanour, the court could disregard the execution of the measure. The judge took the weight of the offense, and the personal circumstance of the criminal into consideration.

The involuntary treatment must be executed in the Institution, if the offender committed a crime against life, phycical integrity, public safety or it was an agressive conduct. Another
condiction is that the crime would be punishable for more than a one year period imprisonment 22 .

This amendment was necessary, because the previous regulation took only the weight of the crime into account 23 .

**Rules of the Measure**

Condiotions of involuntary treatment in a mental hospital are defined in the Criminal Code:

- mentally disorder of the offender 24
- offending of a crime against a person or
- offending a crime which causes public endangerment
- dander of redicivism
- if the offender is punishable, the sanction would be at least a one year imprisonment 25 .

The definition of crime against a person is not defined in the Criminal Code unambigious, because the act do not inclu- de a list by involuntary treatment in a mental institution, but it has different list by violet redicivist and an act of terrorism 26 .

Of course there are some overlaps between the cathegories. Crimes which cause public endangerment includes for example an act of terrorism and public endangerment 27 .

If the offender has mental disorder, but other condictions of involuntary treatment in a mental hospital are not in existence, the judge orders an involuntary treatment, which is ruled by the Health Act. As this act rules, if a person has mental disorder or addiction and because of these states she/he gives evidence of dangerous conduct, but urgency treatment is not caused, the judge orders this treatment 28 .

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The danger of redicivism exists when the soul of the offender is ruled by delusions, and these causes offending of dangerous acts. An other character is transitional or permanent lack of inhibitions (these are causes by lack of discretionary power and critical power), which could prevent the offending of crimes 29 .

Sizing up the situation depends on danger to the society, and personal circumstance. Among these circumstances the judge must research psychical and psychiatric characters and familiar cirumstances. From this follows involuntary treatment in a mental institution is not necessary – in most of the cases – if the offender can take part in a regular treatment in a mental hospital, with consideration to the possibilities of the medical medical treatment and the familiar circumstances. Particulary is of the measure not desirable order if the offerder is able to get work or she/he has work, because this social envirement is favourable, so to tear her/him from this envirement is not justified, because it may hold back the reintegretion to society 30 .

If the conditions exist, the procuror has to accuse the offerder, and if the order is necessary he/she has to propose the application of involuntary treatment in a mental institution. If all of the conditions exist, the judge has no possibility of con- sideration, he/she has to order the measure 31 .

The place of the execution is the Mental Forensic Institution, which is situated in common premises with Penitentiary and Prison of Budapest.

From July of 2013 the measure is not a definited sanction 32 . Accept of this rule was averted by a professional discussion. Since the acception of Act 80 of 2009 the sanction has been a definited period. The length of the sanction was the maximum of the sentence, but it could be not longer than twenty years. If the offender needed a treatment after this period, it was executed in a psychiatric intitution 33 .

With the new Criminal Code this situation changed: the duration of the involuntary treatment in a mental institution depends on the necessity, the mental state and danger of the offerder.

In the last decades the application of the measure has been more and more narrower, so the number of the orders has been reduced. In the middle of the 1980s, the number of the treat- ment people reached 90–100 per a year 34 , in the last years it decreased to 40–50 35 . More than half of the patients suffer from skizophrenia. Most of the patients offended manslaughter, murder or the attempt of these, 70 percent of the treated offended these crimes 36 .

The review of measure – which is a special procedure – has special rules in the Criminal Procedure Code. Because the application of this sanction is caused by the danger of the offerder, a regular revision is a guaranteed requirement. If the necessity does not exist, the judge has to discharge the measure. During the procedure judge examines whether condi- tions of the sanction subsist, but he/she should not analyse the objective requirements. So the judge has to deal with the

23 argument of the minister.
24 Cases of mentally disorder do not list in Code. As the act word it, the offerder is not punishable, if he/she has mental disorder, and because of this state the crimer is not able to recognize the consequents of his/her act, or not able to act in according to recognition. Act 100 of 2012. 17.§ (1).
25 Act 100 of 2012. 78.§ (1).
26 Act 100 of 2012 314§ (4) and 459§ (1) 25 .
32 Act 100 of 2012 78. § (2)–(3).
33 Act 80 of 2009 288.
34 SZABÓ András, Az elmezettek helyzete….. op. cit., 526. p.
danger of recidivism and the protection of society. In spite of these type and preponderance of the act could not be analysed. Similar of if judge should not examine whether the act of the offender establishes a crime lacking the obstacle to criminal liability 37 .

The patient, his/her spouse, cohabitant, legal representative, attorney and the director of the execution institute have a legal right to the initiation of the procedure 38 .

On the hearing the judge analyses the advisory opinion. After it he/she hears the prosecutor and the attorney. The hearing of the patient is omitted if the statement causes it 39 . The order of evidences show that the advisory opinion is significant 40 .

We must emphasise the importance of a hearing, the hearing of the patient and division of a court. Significally these are caused by the restriction of fundamental rights. Moreover judge has to hear more actor of the procedure and opposite evidences may raise up at the hearing. Unanimity of the evidences do not make a difference 41 . These facts shows the differenence of the review procedure from the other special procedures 42 .

The review must be ordered per six months after starting of the execution, and the judge must repeat it per six months if the discharge does not occur 43 .

Appeal against the sentence is available for relatives of the patient, the patient too and the attorney 44 . Because of his/her mental state. The exercise of the right is questionable, so it is very important to accept every disagreement of the patient as an appeal 45 .

In practice this procedure has many contradictions. As the Mental Disability Advocacy Center mentioned it in a report there are some problems in connection with the review procedure for instance the duration of the hearings. The period of the noticed hearings was average seven minutes from opening to reading the sentence 46 . During this time the presentation of the advisory opinion, the prosecutor, the attorney and the hearing of the patient come to that. In the light of this I agree with the organisation; the hearings are quite perfunctory. The judge does not get to know about the social circumstance of the patient – without a report – so she/he does not take into account it in the decision. As MDAC noticed the judge did not ask a question in connection with the advisory opinion. The cause of it is that the expert did not appear at the hearing most of the cases. If the judge would like to know more about the case, she/he has to adjourn the hearing, but in the research there was no example of it. It must be emphasised that the attorney did not consider it necessary. In most of the cases jugdes do not ask from patients, but if they ask interested about visitors or average acts in the Forensic Mental Hospital. These questions do not make it easier to making of decision 47 . It is not too surprising considering the lack of health knowledge of judges. There is some development in the practice that is a spot hearing occurs sometimes nowadays. The advantage of it that judge can watch the patient in his/her everyday environment, moreover the patient not need to suffer from stress of travelling. The availability of the doctor is very useful, too 48 .

Problems with the Legal Institution

The main problem is in connection with the involuntary treatment in a mental hospital that what is the role of the criminal law? A question has arisen could criminal law accept a social goal as a treatment? Could involuntary treatment have such a role in a democracy? I join to the viewpoint, if criminal law accepts a social role, the scale will not be the offended act, but the danger of the offender, and the judge could not define this exactly. Proportionality is taken as a basis, not the personality or opinion of person, because society can convict only acts. If the task of the punishment will modify the education or treatment, these will preclude proportionality, because it will make the definition of the scale possible. This violets the principle of constitutionality 49 .

Punishment whose proportion to the act means a justified revenge, which respects the offender and it guarantees human dignity. This opinion means a return to the classic school, and it refuses a treatment in criminal law, which was ideal of the socialist state 50 . Agree with András Szabó the role of criminal law is related to this, which is a keystone of the legal system. In accordance with this the task is the maintenance of the legal and moral standards when sanctions of another areas of law do not help 51 .

In the viewpoint of criminal law the condition of become an offender is culpability, but the mentally disordered offenders do not have this. In spite of this is it possible to regulate the acts of these offenders by criminal law? Of course it could be

37 Opinion 30 of Criminal Division.
41 Opinion 30 of Criminal Division.
42 During the special procedures the judge make a decision about questions which do not refer criminal liability or refer it only secondary.
44 Act 19 of 1998. 566. § (5).
46 Duration of some hearings were shorter than three minutes.
47 MDAC, Megjósztott Szabadság. Embéri jogi jogértések a kényszergyógykezelés felülvizsgálata során Magyarországon, Mental Disability Advocacy Center, Budapest, 2004, 28 p.
48 Discuss with colonel János Laczkó (Forensic Mental Institution).
unacceptable to apply a punishment against these offenders, but measures offer a solution to this problem. After this is also undecided, whether the application of criminal law is justified or not? If the offenders not not regarded as a subject, is it correct to choose the legal consequence from instruments of criminal law? It is controversial involuntary treatment in a mental hospital, it is not a sanction which is grounded on liability, but Criminal code regulars it. In opposition to application of a measure is not necessary culpability, because the order of involuntary treatment in a mental hospital turns to an acquittal and application of a special legal consequence 52.

In my opinion because of serious restriction of rights to personal liberty it is justified by involuntary treatments in a mental hospital which remain a criminal sanction, and will not be transferred to – for instance – an administrative authority. It is undecided whether the conducted procedure is justified on the basis of mental health rules (this practice realized in Anglo-Saxon states). I mean it is not correct. In case of offending a crime which means an extrem danger to society the protecting of society and the rights of the offender are more appreciate to be applied in a criminal legal consequence.

As I mentioned in Hungary criminal law applies legal consequence against extremely dangerous act of mentally disordered people. I mean in this respect the principle of ultima ratio is realised. Other cases ruled by Health Act are authoritative, these defined procedures are needed to be applied.

So criminal law appears only in the most justified cases, I believe it is necessary; remaining involuntary treatments among the instruments of criminal consequences will be justified in the future.

The other dilemma in connection with the involuntary treatment in a mental hospital how is mentally disordered person taken to the prison? Different functions of prison and hospital means difficulty, because the hospital is not a general institute, people get into voluntarily. A prison is a general institute which requires all aspects of life, which occur in the same place.

A conclusion is drawn from this: a prison less suitable to a treatment 57. An- another problematical point of the legal institution is force – agree with Lenke Fehér –, which is a bad start, especially if it occurs from force position and the criminal goal and the treatment are mixed 58.

The claim of the settlement appears among plans of the government, but this has not occurred yet. In 2006 the utilization and working of health institutes and prisons was examined, and the results was discussed the financial minister mentioned the lack of funds. The Ministry of Health – with no authority – did not find legal grounds for intervention, but it suggested the chanche of estate change. In 2012 an examination occured whether a health estate which was a state asset can serve as the basis of the change. The deadline of the examination was 31th december 2012, a leap foward has occured since then 59.
Summary

As a summary we can say that view of mental disordered offenders changed in the last centuries. In my essay I surveyed the history of mentally disordered offenders in criminal law. After this the Hungarian rules of this measure was analysed, finally I wrote about the problem of this legal institution.

Involuntary treatment in a mental hospital raises many questions, including role of criminal law, placement of execution and period of measure. In my opinion the condition system and application of involuntary treatment in a mental hospital can be appreciated in my view. In spite of these I do not agree with the establishment of an indefinite period. I mean a defined period provides stronger right protection for the offender, which is extremely important in this case and importance was emphasized by European Court of Human Rights. Previous regulations that which were introduced in 2010 could provide this. Similarly I do not agree with the execution system, because – as I mentioned – it occurs in Juridical Mental Institution which is a part of the penal system.

In my view the best regulation system could be the following: forms of mental disorder are not defined by Criminal Code. The application has not changed either. Period of the measure is defined, the maximum period is the upper sentence. If the task of the measure is available without freedom-restrict, it could be possible to release somebody on probation under certain restricts. It involves visits a psychiatric institution, being in communication with a social worker or stay in a certain place. Execution could occur in a central forensic hospital.
Abstract

The paper deals with the Czech king George of Poděbrady and especially with the fate of the Compacts of Basle during his reign. This document is of a significant importance for Czech country and it was essential for the relation between the Catholics and the Utraquists. It has been recently translated into modern Czech language, which the paper also comments on as it also describes the problems connected with the Old Czech translation. A message about the Colloquium George of Poděbrady – a Pragmatist and/or a Seer, held in the Senate of the Parliament of the Czech Republic, and a detailed overview of the articles published in the anthology compiled from this colloquium are included in the contribution as well.

Key words: George of Poděbrady, Bohemia, Compacts of Basle.

Colloquium George of Poděbrady – a Pragmatist and/or a Seer

A colloquium commemorating the 555th anniversary of the election and coronation of the Czech king George of Kunštát and Poděbrady was held on May 6, 2013 in the Senate of the Parliament of the Czech Republic under the patronage of Václav Liška, the president of the Sight Chamber of the CR and the head of the Department of Social Studies FSv ČVUT. The colloquium was titled George of Poděbrady – a Pragmatist and/or a Seer. The senator Jaromír Jermář took charge of the introductory speech. An anthology of the same name was formed out of the contributions performed at this colloquium. The following articles can be found there:

2 Zdeněk Veselý, the top Czech specialist in history of diplomacy and international relations, contributed to the anthology with his paper titled In the service of the Hussite King – Advisors and Diplomats of George of Poděbrady. He discussed there the complicated international relations which had occurred after George came to the throne; at a time during which the Czech country was perceived abroad as a seedbed of heresy. The papal court expected the Czech king to come back fully to Catholicism. It did not happen, however, and George attempted to maintain the status given by the Compacts. Rome therefore wanted to isolate him. It was a difficult to manage the situation for all his advisors and diplomats. Consequently Veselý lists the king’s individual advisors, both home and foreign, both the Utraquists and Catholics. Among them were Jan and Ctibor Tovačovský of Cimburk, Zdeněk and Albrecht Kostka of Postupice, Catholic Zdeněk Konopištěský of Šternberk, who had in a short time turned against George, also the leading Czech nobleman Lev of Rožmitál, well-known for his diplomatic trip to western and south Europe, and also Jan and Prokop of Rabštejn. The contributor pays attention mainly to Jan of Rabštejn Jr., the founder of Czech humanism and author of the work titled Dialogus – i. e. Disputation of Czech Noblemen over the War against the Rule of George of Poděbrady. The list of foreign advisors includes Germans Martin Mair and Řehoř of Heimburk, and Antonio Marini from Grenoble. Veselý writes in more detail about the latter and mentions also the union of Christian emperors, other George’s attempts to unite Europe and the anti-Turkey coalition. A draft of The Contract for Establishing Peace among all Christians was created due to Marini’s and Mair’s activities. In addition, the contribution deals with the messengers to the French king, who should have been the representative of the proposed union. The meeting did not, however, conclude agreeably for George and after this failure, he did not present the project of a peace organization any more.

The second contribution to the anthology is a contemporary translation of the Compacts of Basle by Bořivoj Marek, which is discussed broadly in the following section.

The historian Martina Veselá contributed to the colloquium with her topic on the election of George of Poděbrady. Nevertheless, for the purposes of the anthology she prepared a paper titled Aenea Silvio Piccolomini (Pius II) – the opponent of George of Poděbrady, which concerns one of the largest political and religious enemies of George. The author describes the life and political-religious activities up to his election. She mentions also his ‘partners’ in negotiation as for example: Prokop Holý, Prokop of Rabštejn, and Jan Papoušek of Soběslav. Piccolomini’s work Historia Bohemica – The Czech History is also discussed as is the role of the Pope as a serious opponent to the Compacts.

1 Mgr. Bořivoj Marek, Academic Gymnasium of Prague; Faculty of Arts and Philosophy Charles University in Prague, Czech Republic.
3 „Smlouva o nastolení míru v celém křesťanstvu.”
Furthermore, the anthology includes a contribution by Josef Hrubeš titled *The King’s Court or not Always Reigned the King from the Castle*. In the introduction, he discusses that some Czech noblemen stayed for some time in the Prague Castle, but, also in Prague houses and at the King’s Court. This site, which was located in the southernmost part of the Old Town, in the neighbourhood of the Powder Gate, no longer exists. The Municipal House had replaced it in modern days. The author of the paper says that the King’s Court was at first used as a seat of the House had replaced it in modern days. The author of the paper says that the King’s Court was at first used as a seat of the king, probably by Václav II, who had made many changes to this place. During the Hussite movement, the premises was managed by the Old Town parish. Then the emperor Zikmund took over. He was succeeded by Albrecht the Habsburg and then in the years 1439–1453 it was placed once again under the control of the Old Town municipality. Ladislav Pohrobek (Ladislaus the Posthumous) also lived and died there. George of Poděbrady headed to this place after his coronation as well. The next part of the paper discusses the life and the character of George of Poděbrady and his activities at King’s Court. After George, Vladislaw Jagellonský (Ladislaus Jagellon) took over the place, but after him its historical significance came to a halt. The author also describes the construction of and the amendments to the Powder Gate and narrates other stories related to the former King’s Court. In the 17th century the King’s Court was purchased by the Prague bishop cardinal Arnošt of Harrach. Theological and philosophical school followed. In the 18th century a military hospital and later a school for cadets was established there. The demolition of the site began in 1902. It was replaced by the Municipal House.

The penultimate contribution to the anthology was sent by a well-known specialist of history of law Karel Schelle (*Criminal Law in the Time of George of Poděbrady*). He opens his paper with general comments about the criminal law in the time of the estate monarchy, listing all kinds of punishments, eventually discussing criminal judicature. He explains that in the Czech country criminal judiciary was always, even in the olden days, on a very high level. An overview and description of courts, which were in existence in the Czech country follows (major and minor country courts, Moravian country court, court court, man court, chamber courts, burgrave’s court, liminal court etc.). Schelle then deals with the question of public prosecution, discusses the office of the king’s prosecutor, and finally explores the criminal proceedings.

The anthology is concluded with a contribution from Karel Sosna, the head of the Parliament Library of the Lower House of the Parliament of the CR, entitled *The Digital Library of the Parliament of the CR*. This contribution introduces the digital library, *Czech Congregations*, to the reader. Its aim is to make available online all accessible and published sources referring to the history of the Czech congregations. What follows is a description of the different types of documents in this library. Two examples of particular sources are noted: “The King George Announces General Congregation of the Czech Kingdom on Sept 23 in Prague” and “Royal Programme to Country Desks about the Rights and Liberties of the Czech Kingdom.”

**George of Poděbrady**

The personage of George of Kunštát and Poděbrady has long been of great interest for Czech historians, lawyers, archivists, and other specialists who regularly organize conferences, lectures, and colloquia dedicated to various aspects of the life and activity of this significant representative of Czech Medieval history. The following contribution, which was held in the Senate of the Parliament of the Czech Republic, deals with George’s relation to an essential document of Czech political-religious history – the Compacts of Basle.

It is likely that George of Poděbrady was endowed with the Compacts in 1462, possibly receiving them in Karlštejn. They had been deposited there possibly by the castle regent Menhart of Hradec. George took them after the death of Menhart’s son Oldřich and after the coronation of Ladislav Pohrobek (Ladislaus the Posthumous) on October 28, 1453. However, there is one fact, albeit less likely, undermining this statement: In the year 1447, when Nicholas V became Pope, a meeting for recognition of the Compacts was held. Nevertheless, there was no outcome and the cardinal Juan de Carvajal was sent to Prague to deal with this issue. He raised a demand to see the master copies of the Compacts since neither he nor the Pope had known about them. The papers were presented to him. ŠMAHEL (o. c.: 84) says that according to existing sources Juan de Carvajal was provided with the Compacts from a political leader of the Utraquists George of Poděbrady. Consequently, it could be assumed that he must have received them from them, i.e. in the year 1448, from Menhart of Hradec. This contradicts the previous assumption, thus it seems he dealt with another cycle of the Compacts preserved in the Old Town Hall.

During this time, George of Poděbrady led the Utraquist party and also the four united regions in East Bohemia. He became a country regent on April 27, 1452. In autumn of the same year, he managed to persuade the emperor Fridrich III to release a paper to vindicate the Compacts to Czech noblemen. The throne was then occupied by Ladislav Pohrobek (Ladislaus the Posthumous). However, the condition was that he would follow the Compacts. Under-aged Ladislav Pohrobek (Ladislaus the Posthumous) prolonged the function of a regent to George of Poděbrady by six years, because he could not assume the office and its burden personally. He died in November 1457 before he could do so. Not long after that, George of Poděbrady became the Utraquist king of the Lands of the Bohemian Crown. And as ŠMAHEL notes (o. c.: 84 down), it is surprising that it was during his reign when the Compacts were threatened.

Before his coronation in 1451, George of Poděbrady met Enea Silvio Piccolomini, the prospect Pope Pius II, on a congregation in Benešov. George emphasized to him that the only way to maintain unity and peace is to preserve the Compacts of Basle. The Pope, however, later did not follow his words.
Unfortunately, George did not swear publicly by the compacts during his coronation on May 7, 1458. Moreover, the coronation was preceded by a secret vow, which George had had to make and confirm it in writing to the Hungarian bishops, in order to receive a legitimate consecration. Unfortunately, there was nothing about this in the Compacts.\(^8\)

Later on, when the Pope Pius II found out that the Czech king did not follow his vow, he decided to cancel the Compacts. In March 1462 Czech heralds set off to Rome to discuss the Compacts. From a considerably unpleasant discussion even a more displeasing result emerged. Pius II talked in front of a numerous crowd about the question of Czech heresy; he offended the Utraquist teaching and expressed doubt about the Compacts themselves, which he described as harmful to the Church unity. Pope’s fiscal Antonio de Eugubio in the end announced that the Pope repudiated the Compacts of Basle and handed over officially a confirmed summary of the Pope’s speech to the Czechs.\(^9\) This happened on March 31, 1462.

The news made the king George of Poděbrady angry and he strongly protested against the abolishment of the Compacts during the country congregation in Prague on August 12, 1462. Furthermore, he said that for the sacred truth he would sacrifice not only his own crown, but also his, his wife’s, and his children’s lives as well.\(^10\)

The recognition of the Compacts should have been discussed again by the Roman Curia (the Holy See) shortly before the king’s death on March 22, 1471. The other patronage of the Utraquist, elected but never approved by the Prague bishop Jan Rokycana, was also not able to attend the meeting. He died exactly one month preceding George of Poděbrady.

### The Compacts of Basle and George of Poděbrady

Not being a historian but a philologist, I decided that the core of my contribution would be a translation of the Compacts of Basle to contemporary Czech language. If the reader can take advantage of these important contracts and not labour with foreign or archaic words, then he/she can better understand the complexity of their content and to realize how difficult it must have been to come to their final version and what importance they could have had for the next years and therefore also for the reign of George of Poděbrady. The atmosphere on the Basle congregation and the thoughts about the discussions and their backstage of an anonymous member of the congress are revealed in the following words: *Multis annis iam transactis, paucis fides iam est in pactis, mel in ore, verba lactis, fel in corde, fraus in factis.*\(^11\)

The original text of the Compacts together with an Old Czech translation was published by František Palacký in the third volume of Archiv český (Czech Archive).\(^12\) The Old Czech translation comes mainly from the print made in the year 1513.\(^13\) Some parts are, however, missing completely. Palacký then compiled the Latin copy of the Compacts on the basis of various manuscripts and as ŠMAHEL says in his thorough monograph about the Compacts of Basle:\(^14\) “a critical edition of the Compacts remains to be a task of the future” (o. c.: 99). Therefore, I translated the Latin copy of the Compacts introduced by Palacký and in several places I consulted also its Old Czech translation. The list of manuscripts and all documents belonging to the Compacts, their division and classification is attached to the mentioned publication by ŠMAHEL, where modern Czech translations of several selected parts of the Compacts can be found as well. I also referred to them while working on my translation.\(^15\)

### The Pitfalls of the Old Czech Translation

The Old Czech translation is generally sufficient as far as understanding the content when the particular part of the text is not missing. Apparently, the translation is, because of the danger of interpretation, a calque of the Latin text. This often leads to very odd and obscure expressions, due to either literal translation or distance from the Old Czech language. For example, one of the declarations referring to the preaching of God’s Word is introduced by the following statement:

> “Circa articulorum de praedictione verbi dei fuit motum…,”

which is translated into the Old Czech as:

> “Při položení o kázání slova božího bylo jest hnuto…,”

> „In the article about preaching God’s Word it was moved … “

That means:

> “Pokud se týká článku o hlásání slova Božího, padla slova o tom, že….”

> „Referring to the article about preaching of God’s Word, these words were uttered … “

Or in the passage about secular and celestial law it is said:

> “Sol exigitur magna peritia in applicando regulam ad regulatum; nam interdum aliqui viaticum, quod sit tenuissimae in regulamento, et non est, sed est defectus in applicando, quia non applicatur debito modo regulae ad regulatum.”

The Old Czech translation says:

> “Ale potřeba jest veliké dospělosti w přikládání pravidla k tomu, co má byt vytměněno; neb někdy někamů zlá se, by byla křivolakost na tom, co je měsíc, ano není, ale jest nestatek v pětém věření, neb nepřišel s podobně pravidlo k tomu, co má byt vytměněno.”

> „But great maturity is needed in setting the rules to what should be measured; for some day it might seem to some that wickedness dwells on what is measured but it is not, yet there is a lack in probing because the rule is not followed for what is measured.”

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\(^9\) ŠMAHEL (o. c.: 85).

\(^10\) Cf. ŠMAHEL (o. c.: 86).

\(^11\) Cf. ŠMAHEL (o. c.: note 318).

\(^12\) Preserved in the State regional archive in Třeboň, rkp. A 19, fol. 138v. See also ŠMAHEL (o. c.: 80), who translates these anonymous words in the following way: “Oh, after many years passed, / promises of honey and milk, / little hope is in all, / bile in the heart, mischief in deeds.”


\(^14\) Cf. ŠMAHEL (o. c.: 114–115).


Mainly referring to the pages 38, 41, 46, 66.
My translation, in which I attempt to clarify this somehow unclear passage, follows:

"Avšak samo přizpůsobování pravidla tomu, co se jím má řídit, vyžaduje velkou zkušenost. Někdy se totiž někomu zdá, že je cosi nepatřičného v tom, co se má nějakým pravidlem řídit, ale ve skutečnosti tomu tak neni a ona nenáležitost je v samotném přizpůsobování. Prav- idlo se totiž v tomto případě nepoužívá potřebným způsobem."

"But adjusting the rule to what should be governed by it, requires much experience. Sometime, it might seem to somebody that there is something wicked in what should be governed by a rule, but in fact the impropriety is in the adjustment itself, since the rule is not used in a proper way in this case."

We might find more passages similar to that one.

The text of the Compacts, basically a text of an official document, which strives for clear and exact factual expressions and definitions, is in many aspects very interesting and we may find there phrases, which could be hardly found in contemporary law documents.

For instance, the following words are taken from the article about possession and maintenance of Church property in one of the documents:

"Jednalo se také o tom, zda pravomoc donutit někoho k něčemu, již má hospodář, je skrze něj zároveň i pravomocí preláta. Jan Palomar na to odpověděl, že tato otázka navozuje jinou, ohledně níž panují mezi učenci neshody, a sice: Kdo má v moci církevní majetek? A rovněž další: Jsou prováděné úkony záležitostí osoby ochránce dané věci, nebo jejího správce? Ano nebo ne? Mohla by užít provádění úkonů správci či úředníkovi tím, že ho k tomu ustanovila? Existuje prý i mnoho dalších nejasností, o nichž nenávštěva smysl

"It was also discussed if the right to persuade somebody to do something, which lies with the landlord, is through him prelate’s law as well. Jan Palomar answered that this question rises another one, which provokes disputes among thinkers. The question is: Who rules over the Church possession? And another one, too: Are the performed deeds a matter of the guardian of the particular thing, or a matter of its caretaker? Or if they were a matter of directly defined person, could he/she charge the caretaker or an officer to perform the deeds by appointing them to do it? There are many more ambiguities but there is no point in discussing them now. However, when they insisted on him to express his opinion, he said that if he had time to spend his free moments by discussions, he would present a view that could be debated. Nevertheless, he is more inclined to think that the rule over the Church possession belongs to Christ…“

The question of the ownership of the Church possession by clergymen is one of the core ones in the Compacts and it deserves further attention and research.

Bibliography


MEDICINE MEN

Aside from the Pure Food and Drug Act of 1906 and the Harrison Act of 1914 banning the sale of some narcotic drugs, there was no federal regulatory control ensuring the safety of new drugs until Congress enacted the 1938 Food, Drug, and Cosmetic Act in response to the elixir sulfanilamide poisoning crisis.

In 1937, S. E. Massengill Company, a pharmaceutical manufacturer, created a preparation of sulfanilamide using diethylene glycol (DEG) as a solvent, and called the preparation „Elixir Sulfanilamide“. DEG is poisonous to humans, but Harold Watkins, the company’s chief pharmacist and chemist, was not aware of this in spite of the fact that the first case of a fatality from ethylene glycol occurred in 1930 and studies had been published in medical journals stating DEG could cause kidney damage or failure, its toxicity was not widely known prior to the incident. Watkins simply added raspberry flavoring to the sulfa drug which he had dissolved in DEG and the company then marketed the product. Although animal testing should have been routine in most drug company operations, Massengill performed none and there were no regulations requiring premarket safety testing of new drugs.

The company started selling and distributing the medication in September 1937. By October 11, the American Medical Association received a report of several deaths caused by the medication. The Food and Drug Administration was notified, and an extensive search was conducted to recover the distributed medicine. At least 100 deaths were blamed on the medication. As a reaction to the public outcry the United States Congress passed the Federal Food, Drug, and Cosmetic Act of 1938. The law was signed by the president Roosevelt on June 25, 1938.

Among the pharmacologists that took part on a research project that verified that the excipient DEG was responsible for the fatal adverse effects was also a young woman by the name of Frances Oldham. She went on to follow a brilliant academic career in the next two decades and in 1960 she was hired by the FDA in Washington, DC. At that time, she was one of only seven full-time and four young part-time physicians reviewing drugs for the FDA. One of her first assignments at the FDA, was to review application by Richardson Merrell for the drug thalidomide as painkiller with specific indications to prescribe the drug to pregnant women for morning sickness. Even though it had already been approved in Canada and over 20 European and African countries, she withheld approval for the drug, and requested further studies.

Frances Oldham Kelsey’s insistence that the drug should be fully tested prior to approval was dramatically vindicated when the births of deformed infants in Europe were linked to thalidomide ingestion by their mothers during pregnancy. Researchers discovered that the thalidomide crossed the placental barrier and caused serious birth defects in infants. She was hailed on the front page of The Washington Post as a heroine for averting a similar tragedy in the US. Morton Mintz, author of The Washington Post article, said „[Kelsey] prevented … the birth of hundreds or indeed thousands of armless and legless children.“ The public outcry was swift and drug testing reforms were passed unanimously by Congress a few months later.

And what does it all tell to us? The pharmaceutical firms are corporations like all others. Their shareholders only care for their profits. Their managers only care about their bonuses. They don’t give a damn about their customers. Who knew?

MEN ON A HOT TIN ROOF

1920’s were difficult time for the British. After the boom of the immediate postwar years came the sharp recession of 1921. Then came partial recovery followed by what Pigou called the doldrums years. Output growth was strong from 1922 to 1925, but then slowed considerably from 1926 to 1929.

The economic slowdown was the result of an ill-fated move by Britain to return to gold standard at the pre-WWI parity. Winston Churchill, who was the Chancellor of the Exchequer, was largely responsible for this policy change. He was a member of the upper income class that had taken financial beating both during and after WWI as inflation greatly reduced the real value of both government and corporate bonds. The lend­ing class was very interested in reestablishing their wealth, which could be accomplished if the price level were returned to the value that existed before the war. The view at the time was that returning the British pound to its prewar gold parity ratio would accomplish this goal.

It was clear almost from the start that this decision was one of the worst monetary mistakes of the twentieth century. The problem was not that Britain had returned to gold standard but that it had done so at the prewar parity ratio. The prewar parity ratio implied an exchange rate between U.S. dollar and the British pound of $4.86/pound. At the time the new policy was announced (April 28, 1925) the exchange rate was about 10 percent below the prewar parity ratio. In another words, in one swoop Churchill’s policy caused the pound to be overvalued by about 10 percent relative to other currencies, most importantly to U.S. dollar and the French franc. The impact on British exports was immediate and inevitable. Overvalued pound meant that British goods and services were overpriced by about 10 percent on world markets. This was especially important for the five industries that represented the backbone of previous British economic success, namely coal, cotton, wool textiles, shipbuilding and iron and steel. The problems in those five industries were so severe that they accounted for more than half of all Britain’s insured unemployment by 1929. This explains why the unemployment rates in Britain were so high in second half of 1920s. In addition, the coal industry was also adversely affected by the increase in German coal production after the French army left the Ruhr region in 1924. The problems in the British coal industry were so serious that the coal operators locked out the workers for seven months to force down the wages. This coal strike eventually led to a nine-day nationwide general strike.
Throughout these years the British political leaders and the Bank of England officials must have felt like Tennessee Williams’ cat on a hot tin roof. But the fading economy, soaring unemployment and deepening social conflicts notwithstanding, they steadfastly stuck to the $4.86/pound parity with the desperate belief that somehow they will be able to turn this disaster into a victory. What is a victory for a cat on a hot tin roof? Just stand on it I guess. As long as she can.

The roof finally got too hot for them in September 1931. Amidst the ravages of the Great Depression with unemployment being over 15%, Britain went off gold. The sterling fell against the U.S. dollar by 25% and the British exports revived. The Depression was over for Britain. After all, the cats jump off roofs and they land uninjured, don’t they?

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