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Jan Škrabka (Ed.)

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PREFACE

Dear Ladies and Gentlemen, Dear Readers,

These conference proceedings constitute a selection of papers submitted to the 13th International Scientific Conference "Law in Business of Selected Member States of the European Union" which was organized by the Department of Business and European Law, Faculty of International Relations, Prague University of Economics and Business, Czech Republic. The conference was held in the University´s premises on 4 and 5 November 2021 and welcomed speakers and participants from both Europe (United Kingdom, Denmark, France, Ireland, Belgium, Lithuania, Sweden, Poland, Slovakia, and the Czech Republic) and overseas (Saudi Arabia, Turkey, and South Korea). Given the ongoing Covid-19 related travel restrictions the conference was held in a hybrid format, being streamed online for those who could not join the conference venue in person. Unlike the conference events held in the past years, this conference has grown much more international. All the papers included in this volume passed a double-blind peer review successfully and were checked for their originality using the iThenticate software kindly provided by the University.

The participants´ papers were presented in specialized sections which correspond to the subheadings of the present volume:

Section: Legal Aspects of Doing Business in selected EU Member States
Section: Corporate Law
Section: Banking, Finance, and Insurance Law
Section: IT and IP Law

This conference was supported by an internal grant awarded by the Prague University of Economics and Business, No. F2/74/2021.

The conference organizers will be happy to welcome the readers at the conference to be held next year on November 3–4, 2022. For more information on the call for papers for the upcoming conference please check the conference webpage at https://lawinbusiness.vse.cz/.

Nicole Grmelová
Chair of the Scientific Committee of the Conference

Jan Škrabka
Chair of the Organizing Committee of the Conference

1. Legal Aspects of Doing Business in Selected EU Member States

Long-Term Contracts through the Lens of the Czech Law of Obligations

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Abstract:
In general, long-term contracts combine the potential of a stable instrument of co-operation, with the risk of difficult predictability of future developments. In business, both aspects gain special importance. This contribution attempts to present a systematic overview of how the current Czech Law of Obligations, in particular in its general part, reflects the phenomenon of long-term contracts and the need to "control" their longevity (especially by granting the right to terminate the contract, or to demand its termination or adaptation to the party affected).

Key words: *change of circumstances in contracts, contract for a definite period, contract for an indefinite period, long-term contracts, termination of contract, tying contracts*

INTRODUCTION

Long-term contracts form a normal and important part of the business world (e.g. agreements covering the supply chains in automotive sector or software maintenance/service agreements). However, they have enjoyed consistent attention in Law and Economics only since the turn of the millennium.[1] In the Czech context, they remain an issue which is relatively rarely researched.

In general, long-term contracts combine the potential of a stable instrument of cooperation, with the risk of difficult predictability of future developments. In the field of business, both these aspects are further emphasised: the stability is a valued quality of a business relationship and the risk is a natural part of it.

1 Cf. VAN DER BEEK, Nick. Long-term Contracts and Relational Contracts. In: DE GEEST, Gerrit, ed. *Contract Law and Economics*. (Encyclopedia of Law and Economics. Volume 6.) 2nd edition. Cheltenham, UK; Northampton, MA: Edward Elgar Publishing, 2011, p. 281.

In law, this characteristic of long-term contracts is contained in their fairly complicated relationship to the *pacta sunt servanda* principle. This principle, on the one hand, is considered virtually holy (thus reflecting the extreme significance of the social function of contracts); on the other hand, in some cases including long-term contracts, it requires reasonable mitigation. This seems to be the main goal of the law in respect of the long-term contract.[2]

Accordingly, the key question is how does the law (in this contribution, specifically Czech Law) achieve this goal? This question implies two, more concrete questions. Firstly, does the law operate with long-term contracts as with the legal term (*terminus technicus* in legal language)? Secondly, how does the law comprehend the specifics of long-term contracts?

On the first question, long-term contracts are often labelled in the broader, but also quite apt, category in doctrine. Not so in legislation: there, more precise terms are required, apart from provisions of highly abstract or principal contents, and long-term contracts use the expression of different means of circumlocution, e.g. c*ontract for an indefinite period, contract concluded for a period longer than one year*.

In reply to the second question, the solution to a long-term contract, mainly in respect of the tension between the *pacta sunt servanda* principle and the fact of the uncertainty of future developments, can be contractual or legislative.[3] The former, based on the parties' agreement – whether included in the original contract or subsequently concluded – is preferable, as being potentially more responsive to the parties' interests and "tailored" to the individual contract. The latter, based on more or less abstract legislator's formulas, is, of course, also needed. Further, on the latter, from a purely theoretical point of view, two approaches may be imagined, i.e. (i) the "abstract" – seeking a compact set of rules which are explicitly designed for all long-term contracts, and (ii) the "mosaic" or the "patchwork" – relying on different rules which are also applicable to (all or some) long-term contracts.

It is fairly obvious that a satisfactory result in the form of a compact set of rules that (a) defines the long-term contract or allows a contract to qualify as long-term and (b) encompasses the whole diversity of long-term contracts, is hardly achievable through the "abstract" approach. Despite "hardly achievable" not being equal to "unattainable", there apparently remains a strong reliance on the "mosaic" or "patchwork" approach.

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2 Briefly on this principle, e.g. ĎURICA, Milan. Veriteľ versus dlžník (súmrak nad veriteľom). In: ŠKRABKA, Jan a Lukáš VACUŠKA, eds. *Právo v podnikání vybraných členských států Evropské unie. Sborník příspěvků k XII. ročníku mezinárodní vědecké konference*. Praha: TROAS, s.r.o., 2020, p. 281.

3 I use the adjective "legislative" for the sake of simplicity, even though it (at least implicitly) refers to *civilian systems* where the law is based on legislation. In my view, however, the *common law systems* are not simply ignored by that simplification. After all, it might be said that, like legislation provides a legal provision in the civilian system, Case Law provides a legal doctrine in the Common Law system.

1. CONCEPT OF LONG-TERM CONTRACTS AND RULES FOR THESE IN THE BROADER CONTEXT

The broader context of the concept of long-term contracts and the rules for these can briefly be shown by examples from foreign legal doctrine and law and UNIDROIT Principles of International Commercial Contracts (hereinafter also referred to as "UNIDROIT Principles").

1.1 In Foreign Legal Doctrine and Law

In foreign legal doctrine, long-term contracts are now a well-established concept, but not expressed by a universal and precise definition. Rather than creating definitions of long-term contracts, authors try to explain them by a core characteristic, e.g. the incompleteness both literal and economic[4], the "evolutionary" nature[5] or the problem of keeping each party's gain[6]. Some authors add that not all contractual relationships involving a significant duration are drafted as long-term contracts.[7, 8]

In the context of what has been said so far, it is no wonder that in Foreign Law, the approach to long-term contracts remains "mosaic" or "patchwork", at least in the general Law of Obligation.[9]

4 VAN DER BEEK, Nick. Long-term Contracts and Relational Contracts. In: DE GEEST, Gerrit, ed. *Contract Law and Economics*. (Encyclopedia of Law and Economics. Volume 6.) 2nd edition. Cheltenham, UK; Northampton, MA: Edward Elgar Publishing, 2011, p. 289–295.

5 ROBERTSON, Donald. Symposium Paper: Long-Term Relational Contracts and the UNIDROIT Principles of International Commercial Contracts. *Australian International Law Journal*. 2010, p. 187, with reference to *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 [220].

6 SCHWARTZ, Alan, and Robert E. SCOTT. Contract Theory and the Limits of Contract Law. *The Yale Law Journal*. 2003, 113:54, p. 601.

7 ARTIGOT I GOLOBARDES, Mireia, and Fernando GÓMEZ POMAR. Long-term contracts in the law and economics literature. In: DE GEEST, Gerrit, ed. *Contract Law and Economics*. (Encyclopedia of Law and Economics. Volume 6.) 2nd edition. Cheltenham, UK; Northampton, MA: Edward Elgar Publishing, 2011, p. 314.

8 An additional point to note is that, at first glance, there are concepts similarly, but in fact differently related to long-term contracts, e.g. *relational contracts* – which are close to long-term contracts, so that they blend with them, or which are, on the contrary, different from long-term contracts. On the relationship between long-term contracts and relational contracts in detail, see e.g. VITASEK, Kate, Jane K. WINN and Toni E. NICKEL. The Vested Way: A Model of Formal Relational Contracts. University of the Pacific Law Review. 2020, 52 (1), p. 125 et seq., or HVIID, Morten. Long-Term Contracts and Relational Contracts. In: BOUCKAERT, Boudewijn, and Gerrit DE GEEST, eds. *Encyclopedia of Law and Economics. Vol. III. The Regulation of Contracts.* Cheltenham, UK and Northampton, MA: Edward Elgar Publishing, 2000, pp. 46 et seq. On the relationship between long-term contracts, see HALONEN-AKATWIJUKA, Maija, and Oliver HART. Short-term, Long-term, and Continuing Contracts. NBER Working Paper Series. Working Paper 21005, pp. 2–7. National Bureau of Economic Research. [online]. 2015. [viewed 31 August 2021]. Available from: https://www.nber.org/papers/w21005.

9 In specific regulations, provisions providing general rules on long-term contracts, including the general definition can be found (even though the "general" nature of such provisions is, in fact, limited by the scope of the specific regulations). e.g. articles 622-1 to 622-7 of French Order of 2014 approving accounting regulations. In: Legifrance. [online]. Available from: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000029583307?init=true&page=1&query=%22contrat+%C3%A0+long+terme%22&searchField=ALL&tab_selection=all.

1.2 In UNIDROIT Principles of International Commercial Contracts (2016)

In view of long-term contracts, the UNIDROIT Principles are particularly noteworthy because of the 2016 edition.[10] This edition, inter alia, has generally defined long-term contracts (Article 1.11, third ident thereof[11]) and has amended the Preamble and some provisions (Articles 2.1.14, 5.1.7, 5.1.8, and 7.3.7) in respect of these contracts.[12] UNIDROIT Principles have thus turned to the "abstract" approach as mentioned above, except when the provisions addressing long-term contracts do not form a coherent set.

Therefore, UNIDROIT Principles may trigger the question whether they should inspire national legislators. In my view, the answer should be cautious, if not sceptical, simply because the UNIDROIT Principles are not fully comparable to national legislation. This, nevertheless, does not preclude taking the UNIDROIT Principles into account in the interpretation and application of national legislation.

2. CONCEPT OF LONG-TERM CONTRACTS IN THE CZECH LAW OF OBLIGATIONS

Overall, the Czech Law[13] of Obligations does not deviate from the broader context as explained above (especially in subchapter 1.2), either with regard to the concept of long-term contracts or the rules for these. With regard to the concept of the long-term contract, firstly it should be pointed out that, according to Czech legal terminology, the correct term is not "long-term contract" (*dlouhodobá smlouva*), but "long-term obligation" (*dlouhodobý závazek*). Despite this being rigorously the case in the legislation, in the literature, the term "long-term contracts" is used.[14]

Accordingly, the Czech Civil Code[15] (hereinafter also referred to as "CC") does not refer to long-term contracts at all and does refer to long-term obligation only in exceptional cases i.e. if the question of "how long?" is not required, or is required

10 In short, see PETERS, Lena. *International Institute for the Unification of Private Law (UNIDROIT).* 2nd edition. Alphen aan den Rijn: Kluwer Law International B.V., 2017. 978-9041194763, mrg. 59–60. In detail, see UNIDROIT Principles of International Commercial Contracts. 2016 edition. [online]. Available from: International Institute for the Unification of Private Law (UNIDROIT). Available from: https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016.

11 The definition is that a "*long-term contract* refers to a contract which is to be performed over a period of time and which normally involves, to a varying degree, complexity of the transaction and an ongoing relationship between the parties".

12 UNIDROIT Principles, *cit. sub* 12, p. vii.

13 For foreign readers, it may be useful to add that Czech Law is typical of civilian legal systems. Czech Private Law is based on the Civil Code.

14 For Czech Contract Law terminology in more detail, see RABAN, Přemysl. K pojmu smlouva v novém občanském zákoníku. In: *Aktuální problémy práva v podnikatelském prostředí ČR a EU – sborník příspěvků z mezinárodní vědecké konference. Volume 1*. Praha: TROAS, 2014, pp. 102–111.

15 CZECH REPUBLIC. Act No. 89/2012 Sb., the Civil Code [zákon č. 89/2012 Sb., občanský zákoník].

to allow a rather flexible answer.[16] In other instances, the long-term nature of an obligation requires the more precise and, naturally, different wording[17] in relation to the question of "how long?".

We can find that "long-term contracts" is occasionally used in the Czech literature,[18] while the issue as a whole remains rather neglected.

3. RULES FOR LONG-TERM CONTRACTS IN THE CZECH LAW OF OBLIGATIONS

3.1 General

With regard to the rules for long-term contracts in the Czech Law of Obligations, it should firstly be pointed out that CC does not contain rules addressed to long-term contracts *explicitly*. Nevertheless, there are rules applicable *characteristically* to long-term contracts. These are, in particular, rules on:

- change of circumstances (*změna okolností*) in contracts,
- termination of a contractual obligation by a notice (*výpověď*),
- "tying" contracts (called šněrovací smlouvy),
- lease contracts for a definite period exceeding fifty years,
- contracts for a *de facto* indefinite period.

It behoves me to add that, in this contribution, the rules listed above are primarily dealt with as legal rules. Nevertheless, these rules largely remain in the *iuris dispositivi* sphere, so they may often (if not always) be replaced by agreements not only more detailed but also divergent, or simply, different.

3.2 Individual

Rules on the change of circumstances in contracts have been formed into one general and more special *clausulae rebus sic stantibus* in CC.[19] [In the former Civil Code (Act No. 40/1964 Sb., as amended by Act No. 509/1991 Sb., hereinafter also referred to as "CC 1964"), there had been no general but just one special *clausula* – § 50a (3).] The general *clausula* [§ 1765 and 1766 CC] applies to contractual obligations, whether for a definite or an indefinite period. This *clausula* gives the party affected by the change of circumstances the right to renegotiate against the other party. If parties fail to reach an agreement within a reasonable time, either of the parties may bring proceedings to Court. The Court, not being bound by the

16 Cf. § 898 (2) d); § 1752 (1) sentence one; § 2483 (1).

17 e.g., "a lease for a definite period exceeding fifty years" [§ 2204 (2) before semicolon].

18 e.g., NOVÝ, Zdeněk. Dobrá víra jako princip smluvního práva v mezinárodním obchodu. Praha: C. H. Beck, 2012, pp. 15–16.

19 Some authors present more complex systems of rules on the change of circumstances in contracts. cf. ŠILHÁN, Josef. *Právní následky porušení smlouvy v novém občanském zákoníku*. Praha: C. H. Beck, 2015, pp. 198–208.

applications of the parties (i.e. *iudicium duplex*), may then decide to change the contractual obligation, or to terminate it. This all requires the change to be *cumulative* (i) unexpectable, (ii) unaffectable, (iii) substantial and (iv) subsequent[20] [§ 1765 (1) sentence one *in fine*], in one word "extreme";[21] only such a change deserves an exception to the *pacta sunt servanda* principle. The general *clausula* can be modified by the parties' agreement (whether in prerequisites or in consequences, whether mitigating or tightening); a party may even take the risk of changing circumstances and thereby waive the right to renegotiate [§ 1765 (2) CC].

The special *clausulae* [e.g., § 1788 (2) CC for agreement to conclude a contract (*pactum de contrahendo*)] do not differ from the general one as much in the prerequisites as in the consequences.

The change of circumstances in contracts, as just explained, seems to be well applicable to address the risk associated with long-term contracts. However, it should be recognised that the long-term nature of the contract might involve a certain, albeit debatable, tendency to narrow the scope of application of *clausula rebus sic stantibus*.[22] In other words, we cannot underestimate the question, to what extent are the *clausulae rebus sic stantibus*, as directed towards extraordinary changes of circumstances, applicable to long-term contracts as naturally, albeit only partially, linked to the risk of such changes? In the case of traders or other professionals, this issue needs to be considered with particular care. This can be demonstrated by a simple and general example of the risk of future price developments. Generally said, in extreme cases, this risk can be solved *via clausula rebus sic stantibus*. But if this *clausula* is invoked by a professional, it is necessary to ask whether he or she should have foreseen such a risk, even though this is the extreme case. In addition, in cases of an obligation between a professional and a non-professional party, the professional may not invoke the *clausula rebus sic stantibus* if this would weaken the professional's liability or the special protection of the non-professional.

Rules on the termination of a contractual obligation by a notice comprise one general rule and many special rules. The general rule [§ 1999] applies only to the contractual obligation for an indefinite period that obliges at least one party to perform a continuous or recurrent activity or at least one party to tolerate such an activity. A party can terminate such an obligation by giving a notice to the other party. The obligation is terminated after the notice has been delivered and the notice period has expired. The notice does not require any specific ground. The general provision can be modified only by an agreement which is not contradictory to its

20 The latter is worded as "occurred only after the conclusion of the contract or the party became aware thereof only after the conclusion of the contract".

21 As expressed very commonly. Cf. ŠILHÁN, Josef, *op. cit. sub 19*, p. 200.

22 This is considered in foreign literature rather than in Czech literature. cf. PÉDAMON, Catherine. The Paradoxes of the Theory of *imprévision* In the New French Law of Contract: A Judicial Deterrent? *Amicus curiae.* 2017, 112, pp. 10–17.

purpose (this purpose could be expressed in such a way that "no one can be bound forever without any possibility of escape").[23]

Alongside the general provision, the right to terminate a contractual obligation by a notice can be given by a special legal provision or by an individual agreement. Such notices differ in their prerequisites as well as in other characteristics.

As we can see, the general provision on the termination of an obligation by a notice is more clearly linked to a long-term contract (we can also say: more directly) than the *general clausula rebus sic stantibus* (see above). This is similar to the rules dealt with below.

The rule on "tying" contracts[24] and the rule on lease contracts for a definite period exceeding fifty years, in contrast to the rules dealt with formerly, are single provisions in CC [§ 2000, 2204 (2), in the same order]. Their relationship in the field of lease contracts is not entirely clear.[25] [In CC 1964, similar provisions lacked.] They both apply only to contracts concluded for a definite period.

If a contract is "tying", in the words of CC "concluded for a definite period without a serious reason in a way that it obliges an individual for his entire life, or obliges anyone for more than ten years" [§ 2000 (1) sentence one], either party may claim for termination of that obligation ten years after its creation. A claim must be brought before a Court, unless the obligation has been terminated by the parties' agreement. For this claim, no specific ground is required. This provision can be modified by agreement. However, a waiver of the claim is disregarded, unless a legal person is the obligor [§ 2000 (2) CC].

If a lease contract has been concluded for a definite period exceeding fifty years, the lease is presumed to have been stipulated for an indefinite period (i.e. *praesumptio iuris, sed non de iure*). However, for the purpose of termination by notice, during the first fifty years, the lease may only be terminated as a lease for a definite period. In other words, during the first fifty years, a party may terminate the lease by a notice only on a specific ground stipulated by the parties or provided by a statute; later, a party does not need such a ground to do so. This provision [§ 2204 (2) CC] is considered modifiable by the parties' agreement.[26]

The rule on contracts for a *de facto* indefinite period, in contrast to all the rules above, has not been explicitly laid down in CC. (The same was true about CC 1964; however, the rule could be deduced from the Case Law at the time of CC 1964, e.g. from the conclusion that "*... a lease contract exceeding the normal length of human life cannot benefit from a contractual relationship for a definite period ... such a con-*

23 VÝTISK, Michal. § 1999. In: PETROV, Jan, Vladimír BERAN and Michal VÝTISK, eds. *Občanský zákoník. Komentář*. 2nd edition. Praha: C. H. Beck, 2019, p. 2152.

24 "Tying" in this sense is not to be confused with "tying"/"bundling"/"junctim" practices in Competition Law.

25 As outlined by JANOUŠKOVÁ, Michaela. § 2204. In: PETROV, Jan, Vladimír BERAN and Michal VÝTISK, eds., op. cit. sub 23, 2388.

26 Ibidem.

tract, as regards its content, is a contract for an indefinite period."[27]) Then the question is whether this rule really exists. One may consider that, since the entry in force of CC, the rule has been replaced by the rule on "tying" contracts and the rule on lease contracts for a definite period exceeding fifty years. But a possibility is that the rule is still "in play", because it applies to contracts for an indefinite period (or, more precisely: for a period, which is "so long that it is *de facto* indefinite"), while both new rules apply to contracts concluded for a definite period (or, more precisely: for a period, which is "quite long, but not so long to be *de facto* indefinite").

CONCLUSION

Viewing the concept of long-term contracts through the lens of the contemporary Czech Law of Obligations, we reach the following conclusions.

Firstly, long-term contracts form an autonomous category of contracts, whether the law explicitly refers to them or not. This also includes Czech Law.

Secondly, the contemporary Czech Law of Obligations as enshrined in the Civil Code has no compact set of rules explicitly designed for long-term contracts (not to mention a general definition of them). However, it offers provisions fully applicable to them. In this sense, the approach of the Czech Law of Obligations to long-term contracts is "mosaic" or "patchwork", not "abstract".

Thirdly, the Czech "mosaic" or "patchwork" may be considered quite large and well arranged due to the provisions granting the right to terminate a contract, or to demand its termination to the party affected (these are namely rules on the termination of a contractual obligation by a notice, on "tying" contracts, on lease contracts for a definite period exceeding fifty years, and, potentially, also the "cryptic" rule on contracts for a *de facto* indefinite period). However, if we are looking for provisions aimed at adapting and maintaining the long-term contractual obligation, the "mosaic" or "patchwork" remains clearly incomplete in this part; in this respect, the general *clausula rebus sic stantibus*, while preferring the adaptation and maintenance the obligation affected, perceptibly does not guarantee a comprehensive solution. How to find such a solution,28 however, would be more of a topic for a separate and broader study.

Fourthly, even if a legislative solution to long-term contracts were the best, a contractual solution is preferable as being potentially more responsive to parties' interests and "tailored" to the individual contract.

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27 Judgment of the Supreme Court, the Czech Republic, of 28 May 2007, No.28 Cdo 2747/2004. ECLI:CZ:NS:2007:28.CDO.2747.2004.1. In Rozhodnutí a stanoviska Nejvyššího soudu [online]. Nejvyšší soud. Available from: https://nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/076C12ADF21B1937C1257A4E0064C43E?openDocument&Highlight=0,

28 In a civilian legal system, this solution would presumably involve a set of provisions that comprehensively cover long-term contractual obligations and provide an effective right to enforce their adaptation ("adjustment" or "rearrangement") justified by evolving circumstances, namely in various instances where no *clausula rebus sic stantibus* is usable or that *clausula* does not bring an adequate effect.

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The Relation between the Lex Fori and the Arbitration

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Abstract:
The contribution deals with the interconnection of the principle of *lex fori* in the procedural sphere in the field of arbitration, from the perspective of Czech law. While in court procedures one works with the default principle of *lex fori*, in arbitration procedures the concept of *lex arbitri* is found. The aim of this contribution is to map the definition of the concept of *lex arbitri* and to state whether it constitutes the content of the concept of *lex fori*. The article addresses what all comes into the *lex fori* in terms of procedural norms and what composes the *lex arbitri.*

Key words: *lex fori, forum, lex arbitri, position of domestic law*

INTRODUCTION

Every social interaction entails a rise in opposing opinions that may result in a dispute between the concerned parties. The same applies in the case of international trade relations, where these disputes, can be applified to operate across borders. The participants of the parties, i.e., the parties of the dispute, may submit the dispute to both judicial and arbitration procedures. The reasons leading a dispute to be submitted to arbitration are diverse. They traditionally include the enforcement of arbitral findings - almost worldwide, the non-public nature of arbitration combined with the required expertise, the independence of arbitral institutions and, the greater degree of autonomy to the parties' will. The term “court” can refer to both judicial and arbitral procedures.

This article deals with the principle of *lex fori* in the procedural aspect of arbitration procedure. The area of the law applicable to the merits of the dispute is left aside and only the area of the law applicable to the procedural part will

be addressed. Moreover, the article is approached from the perspective of Czech law. The aim of this article is to define the term *lex arbitri* and to state whether it constitutes the content of the term *lex fori*. The article addresses all what constits the *lex fori* in terms of procedural norms and what composes the *lex arbitri*.

The aim of this article is to confirm or rejectthe stated hypothesis: *„the principle of lex fori, as we generally perceive it in general courts, is transferable to the field of arbitration."*

1. THE PRINCIPLE OF LEX FORI OR LEX ARBITRI?

In order to fulfil the stated aim and to confirm or reject the hypothesis in this essay, it is necessary to define the principle of *lex fori* in more detail as well as to clarify which norms enter into it.

1.1 The meaning of the principle of lex fori in the procedural level

The principle of *lex fori* is the default principle in international procedural law. The application of the principle of *lex fori* in judicial proceedings is consistent with the procedural level, with the result that procedural proceedings are in fact governed by the principle of territoriality.[1] This means that it corresponds to the territorial jurisdiction of the authorities.[2] As such, courts are organs of the state - they can be even considered as special organs - and can be governed in the procedural part only by the rules of the state which established them.[3] Therefore, the courts cannot be governed by any principle other than the principle of *lex fori*. *"Lex arbitri"* on the other hand refers to cases of arbitration. At the outset, it is necessary to mention a few connections. The field of international procedural law is governed by principles different than that of the field of private international law. One may ask why this is so. The traditional explanation is generally perceived to be the fact that the field of procedural law is more of a public law nature and, at the same time, the related principles of sovereignty and territoriality of the state involved. It is also often justified by the public order of the state in question[4], and its authorities cannot be governed by other procedural law unless the law specifically states so. If I look more closely at the *lex fori* principle itself, as it is generally perceived in the ordinary courts. The *lex fori* principle means that the courts apply the procedural norms of

1 STEINER, Vilém, and František ŠTAJGR. *Československé mezinárodní civilní právo procesní.* Praha: Academia, nakladatelství československé akademie věd, 1967, p. 19.

2 MALACKA, Michal, and Lukáš RYŠAVÝ. *Mezinárodní právo soukromé a procesní. Úvod do studia mezinárodního práva soukromého a rozhodčího řízení*. Praha: Leges, 2021, p. 215. 9788075025197.

3 This is justified by the sovereignty of the state, in the sphere of public and domestic international law. See Ibid.; KUČERA, Zdeněk, and Luboš TICHÝ. *Zákon o mezinárodním právu soukormém a procesním. Komentář.* Praha: Panorama, 1989, p. 217. 8070380209.

4 ROZEHNALOVÁ, Naděžda et al. *Mezinárodní právo soukromé Evropské unie.* Praha: Wolters Kluwer, 2018. 9788075981233.

the forum. This is a universally accepted principle.[5] At the procedural level, conflicts of procedural rules cannot arise. As such, procedural norms are territorial in nature, so there is no conflict between procedural norms of other states. These are the rules by which a state regulates the procedure of its courts, other authorities, parties and, other parties in proceedings conducted within its territory.[6] Court proceedings are conducted specifically in the territory.[7] In determining the link to the territory of the states i.e. in determining the international jurisdiction of the courts, each state must take into account the given situation of the territory of the state.[8] This principle i.e. proceeding in accordance with the procedural norms of the forum, is set out in section 8(1) of the Act No. 91/2012 Coll., on Private International Law ("PILA").[9] Forum norms in Czech law also allow for certain exceptions to this principle i.e. they do not necessarily always apply.[10] This leads us to the conclusion that the court is applying its own domestic law - in this case Czech procedural law - to its proceedings.[11] As *Bříza* and *Tichý* state, this can often have a rather significant influence on the outcome and development of a given dispute.[12] This just shows us that while this principle is certainly practical, I can find imperfections in it. The manifestation of this imperfection may occur when domestic procedural law is not in line with foreign substantive law. In parallel, domestic procedural law lacks sufficient protection for foreign substantive institutions.[13]

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5 ROZEHNALOVÁ, Naděžda. Určení fora a jeho význam pro spory s mezinárodním prvkem – I. část. *Bulletin advokacie* [online]. 2005, 2005(4), p. 17. 1805-8280. [viewed 12 July 2021]. Available from: http://www.bulletin-advokacie.cz/assets/zdroje/casopis/2005/BA_05_04.pdf; also see TICHÝ, Luboš. *Zákon o mezinárodním právu soukromém a procesním. Komentář.* Praha: Panorama, 1989, p. 269. 8070380209.

6 Another definition is, for example, „a set of procedural norms that regulate procedural relations with an international element of a private law character." See MALACKA, Michal, and Lukáš RYŠAVÝ. *Mezinárodní právo soukromé a procesní. Úvod do studia mezinárodního práva soukromého a rozhodčího řízení*. Praha: Leges, 2021, p. 211. 9788075025197.

7 BŘÍZA, Petr et al. *Zákon o mezinárodním právu soukromém. Komentář.* Praha: C. H. Beck, 2014, p. 67. 9788074005282.

8 ROZEHNALOVÁ, Naděžda. Určení fora a jeho význam pro spory s mezinárodním prvkem – I. část. *Bulletin advokacie* [online]. 2005, 2005(4), p. 17. 1805-8280. [viewed 12 July 2021]. Available from: http://www.bulletin-advokacie.cz/assets/zdroje/casopis/2005/BA_05_04.pdf

9 CZECH REPUBLIC Act No. 91/2012 Coll., on Private International Law [Zákon č. 91/2012 Sb., o mezinárodním právu soukromém].

10 Section 104(1) PILA.; See TICHÝ, Luboš. *Zákon o mezinárodním právu soukormém a procesním. Komentář.* Praha: Panorama, 1989, p. 269. 8070380209.

11 See and compare the case law from which this conclusion follows: Point C of the Opinion of the Supreme Court of ČSSR (Czechoslovak Socialist Republic) of 27 August 1987, No. Cpjf 27/86.; Resolution of the Supreme Court, Czech Republic of 25 April 2002, No. 25 Nd 17/2002 [online]. In Database of the Supreme Court of the Czech Republic. [accessed on 2021-07-31]. Available from: https://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/824E4AEEBF00671FC1257A4E0067A8BC?openDocument&Highlight=0,

12 BŘÍZA, Petr et al. *Zákon o mezinárodním právu soukromém. Komentář.* Praha: C. H. Beck, 2014, p. 7. 9788074005282; TICHÝ, Luboš. *Zákon o mezinárodním právu soukromém a procesním. Komentář.* Praha: Panorama, 1989, p. 216. 8070380209.

13 A typical example is the statute of limitations. It occurs that it is necessary to assign a given legal institute to a certain category of law – to procedural or substantive law, and the assignment is made according to the *lex fori*. In the continental concept, the statute of limitations is usually classified as substantive law, whereas in the *common law* system it is classified as procedural law. See MALACKA, Michal, and Lukáš RYŠAVÝ. *Mezinárodní právo soukromé a procesní. Úvod do studia mezinárodního práva soukromého a rozhodčího řízení.* Praha: Leges, 2021, pp. 216-217. 9788075025197. Also See TICHÝ, Luboš. *Zákon o mezinárodním právu soukormém a procesním. Komentář.* Praha: Panorama, 1989, p. 219. 8070380209.
At the same time I refer here, for example, to the application of this rule in Canadian private international law. When the question of limitation period had previously, prior to the decision in *Tolofson vs. Jensen*, belonged to the field of procedure. See MCEVOY, P. John. Characterization of Limitation Statutes in Canadian Private International Law: the Rocky Road of Change. *Dalhousie Law Journal* [online]. 1996, 19(2), pp. 425–436 [viewed 30 July 2021]. Available from: https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1743&context=dlj

The principle of *lex fori* has evolved throughout history. A distinction between questions of substantive and procedural character was already established in the post-glossatorial period. In relation to the law of obligations, there was a distinction in this period between procedural law – subject to *ad litis ordinationem*[14] – which was to be applied when considering procedural matters. At the end of the 13th century, the principle of *lex fori* was therefore applied to questions of procedure and was generally accepted in Italy and later became a general, traditionally accepted rinciple across the various states.[15]

1.2 Arbitration Court – an institution of the state?

In the opening sentences, I began by concluding that permanent arbitral courts cannot be considered organs of the state -even less so, are tribunals or arbitrators ad hoc. I will continue with the reasons that lead me to this conclusion. Even though these are institutions or individuals to whom jurisdiction has been transferred when certain categories of disputes meet the statutory conditions, as *Rozehnalová* states, this private law method of dispute resolution always works *"in the shadow of the courts."*[16] According to *Steiger* and *Steiner*, arbitrators replace the court, but they are not the court.[17] At the same time, they state that they are not public authorities[18] and therefore do not have enforcement powers.[19] This conclusion is confirmed by the case law of the Constitutional Court of Czech Republic and the Court of Justice of the European Union ("CJEU").[20] Ican quote the primary verdict in the case, namely the Nordsee judgment.[21] In this case, the Court stated that an arbitrator cannot be identified with a *"court of a member state "*, as his link to the judicial protection system is too loose in a member state. In another previous decision, the characteristics that an institution must have in order to be considered a court of a *"member state"* were set out. These authorities must have the same characteristics in their functions and purpose as those of authorities which fulfil

14 KALENSKÝ, Pavel. *Trends of Private International Law*. Prague: Academia, 1971, pp. 55–56.

15 KALENSKÝ, Pavel. *Trends of Private International Law.* Prague: Academia, 1971, pp. 55–56.

16 ROZEHNALOVÁ, Naděžda. Určení fora a jeho význam pro spory s mezinárodním prvkem – I. část. *Bulletin advokacie* [online]. 2005, 2005(4), p. 18. 1805-8280. [viewed 8 July 2021]. Available from: http://www.bulletin-advokacie.cz/assets/zdroje/casopis/2005/BA_05_04.pdf

17 STEINER, Vilém, and František ŠTAJGR. *Československé mezinárodní civilní právo procesní.* Praha: Academia, nakladatelství československé akademie věd, 1967, p. 172.

18 Ibid., p. 174.

19 Section 20 CZECH REPUBLIC Act. No. 216/1994 Coll., on arbitration proceedings and on enforcement of arbitration awards [zákon č. 216/1994 Sb., o rozhodčím řízení a o výkonu rozhodčích nálezů].
("Act No. 216/1994").

20 See for example, case law of the Constitutional Court of Czech Republic: Case No. IV. ÚS 511/03.; Case No. IV. ÚS 3184/14 or Case No. I. ÚS 3227/07 and more.

21 Judgment of the Court of Justice of 23 March 1982. "Nordsee" Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG. Case C-102/81 [online]. In EUR-Lex. [accessed on 2021-07-30]. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61981CJ0102&from=cs
("Nordsee Case").

a court function.[22] In the Nordsee decision, these features were further elaborated. If the characteristics are fulfilled, the authority in question can be considered to be a *"court of a member state."*[23] The conclusions of the Nordsee decision were later confirmed by further decisions of the CJEU.[24]

In a different, more recent judgment, an interpretation of the arbitration procedure was again given in connection with the right to raise a preliminary question under Article 267 TFEU.[25] The preliminary issue was submitted by the Portuguese Tribunal Arbitral Tributário. It is a specific institution and it was necessary to examine whether its specific nature entitled it to make the request. Keeping in mind that it is always necessary to examine that question in the context of the nature of the particular authority which is making the preliminary issue. In that case, the Court stated that the term *"arbitral"* in the name of an institution does not necessarily mean that it is an arbitral tribunal. In fact, it is common for some national authorities to use procedural institutes common to arbitral tribunals in their activities (e.g., single-stage proceedings, simplified procedural processes, etc.). This type of procedure must be distinguished from arbitration in the legal sense.[26] Arbitration in the strict sense is based on "*the authorization (will) of the parties concerned to entrust the resolution of the dispute to a non-state (private) tribunal*".[27] Arbitral tribunals in the strict sense of the term have a non-state character. Arbitral tribunals are private courts and were established by the will of the parties to resolve a specific dispute instead of a general court.[28] This means that the arbitral tribunal

22 Judgment of the Court of Justice of 30 June 1966. G. Vaassen-Göbbels (a widow) v. Bestuur van Beambtenfonds voor het Mijnbedrijf. Case 61/65, p. 268. [online]. In EUR-Lex [accessed on 2021-07-30]. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61965CJ0061&from=CS;

The decision is also important in relation to other conclusions that follow from the decision. In that decision, the Court of Justice confirmed that the preliminary question is a matter for the arbitral authority, which is of a public-law nature. On that question, see Judgment of the Court of Justice of 17 October 1989. Handels-og Kontorfunktionærernes Forbund I Danmark v. Dansk Arbejdsgiverforening, acting for Danfoss. Case 109/88, para. 7-9 [online]. In EUR-Lex [accessed on 2021-07-30]. Available from: https://eur-lex.europa.eu/resource.html?uri=cellar:cadc6e03-f086-4be3-82f1-5633543164ca.0002.03/DOC_2&format=PDF; or for example, Resolution of the Court of Justice of 13 February 2014. Merck Canada Inc. v. Accord Healthcare Ltd and others. Case C-555/13, para. 15-25 [online]. In EUR-Lex [accessed on 2021-07-30]. Available from: https://eur-lex.europa.eu/legal-content/cs/TXT/?uri=CELEX:62013CO0555

23 p. 1100, Nordsee Case.

24 Judgment of the Court of Justice of 1 June 1999. Eco Swiss China Time Ltd v. Benetton International NV. Case No. C-126/97, para. 34 [online]. In EUR-Lex [accessed on 2021-07- 30]. Available from: https://eur-lex.europa.eu/legal-content/CS/TXT/?uri=CELEX%3A61997CJ0126; Judgment of the Court of Justice of 27 January 2005. Guy Denuit, Betty Cordenier v. Transorient-Mosaïque Voyages et Culture SA. Case No. C-125/04, para. 13 [online]. In EUR-Lex [accessed on 2021-07-30]. Available from: https://eur-lex.europa.eu/legal-content/CS/TXT/PDF/?uri=CELEX:62004CJ0125&from=EN

25 Judgment of the Court (Second Chamber) of 12 June 2014. Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v. Autoridade Tributária e Aduaneira. Case C-377/13 [online]. In EUR-Lex [accessed on 2021-07-28]. Available from: https://curia.europa.eu/juris/liste.jsf?num=C-377/13&language=CS

26 In order to determine whether an authority is to be considered as a court of a member state, the Court takes into account a set of factors to be examined. I refer here to the abundant case law, e.g., Case No. C-394/11 Belov, para. 38-42; Case No. C-196/09 Miles and Others, para. 37; Case No. C-54/96 Dorsch Consult, para. 23; Case No. 14/86 Pretore di Salò v X., para. 7; Case No. C-393/92 Almelo and Others, para. 21-24 and Case No. C-111/94 Job Centre, para. 9 and other decisions.

27 Statement of Advocate General Szpunar in Ascendi Beiras Litoral E Alta, Auto Estradas Das Beiras Litoral E Alta. Case No. C-377/13, pp. 3-4 [online]. In EUR-Lex [accessed on 2021-07-28]. Available from: https://eur-lex.europa.eu/legal-content/CS/TXT/PDF/?uri=CELEX:62013CC0377&from=LV

28 LEW, Julian, MISTELIS, Loukas, and Stefan KRÖLL. *Comparative International Commercial Arbitration*. The Hague: Kluwer Law Intenational, 2003, p. 4. 9041115684.

derives its jurisdiction from the parties' agreement - an arbitration clause where the parties benefit from an increased position of autonomy of the parties' will and choose to submit their dispute to arbitration. Under this enhanced position of autonomy of the parties' will, the parties to the dispute can themselves control or influence several aspects of the proceedings, e.g. they can determine the principles of the functioning of the arbitral tribunal. The parties thereby voluntarily waive the right to have their dispute reviewed by a general court and at the same time waive the legal protection provided by the state.[29]

The extensive case law of the CJEU shows that there is no uniform definition of the term *"court of a member state"* within the meaning of Article 267 TFEU. It is an autonomous concept of EU law. It is therefore necessary to examine in each individual case whether an authority can be considered to be within the meaning of a court of a member state and is therefore entitled to raise a preliminary ruling. However, a certain set of criteria has been established through numerous case law which can be used to assess the judicial nature of the authority which raises the preliminary ruling question. As indicated in the opinion of Advocate General *Szpunar*, these criteria can now be regarded as codified in settled case law.[30] This set of criteria is also included in the CJEU's recommendation to national courts to initiate preliminary ruling proceedings.[31]

1.3 Territorial reach

Theforum is the place where the proceedings are physically held, and it is also linked to a specific legal order. It is the connecting link of the place where a given dispute is resolved by linking it to the particular legal rule in effect in that place. This is the traditional perception of the forum.[32] At the same time, the Forum as such defines or determines a number of questions. The relationship between the territory and the law applicable there, is clear in the courts. Thus, it is not possible, for example, by agreement of the parties, to exclude our Czech procedural law and subject the procedural process to the procedural law of another state.[33]

This is not the case with arbitration. The geographical and legal concepts of

29 Statement of Advocate General Szpunar in Ascendi Beiras Litoral E Alta, Auto Estradas Das Beiras Litoral E Alta. Case No. C-377/13, pp. 5-6 [online]. In EUR-Lex [accessed on 2021-07-28]. Available from: https://eur-lex.europa.eu/legal-content/CS/TXT/PDF/?uri=CELEX:62013CC0377&from=LV

30 Ibid., pp.5–6.
From the case law for example, Case No. C-54/96 Dorsch Consult, para. 23; Case No. C-53/03 Syfait and others, para. 29 and other decisions.

31 Para. 4 Recommendation No. 2019/C 380/01 of the European Court of Justice to national courts to initiate preliminary ruling proceedings.

32 ROZEHNALOVÁ, Naděžda. Určení fora a jeho význam pro spory s mezinárodním prvkem – I. část. *Bulletin advokacie* [online]. 2005, 2005(4), p. 16. 1805-8280. [viewed 8 July 2021]. Available from: http://www.bulletin-advokacie.cz/assets/zdroje/casopis/2005/BA_05_04.pdf

33 STEINER, Vilém, and František ŠTAJGR. Československé mezinárodní civilní právo procesní. Praha: Academia, nakladatelství československé akademie věd, 1967, pp. 20-21.

the forum do not have to merge.[34] In arbitration, it is possible to see concepts that completely deny the link between the state and the legal order in force there.[35] The impact, of course, is itself viewed through the various determinative doctrines applied to arbitration. The link between the forum and the proceedings is also more complicated, for example, in cases where individual hearings take place in different states.[36] As can be perceived, these are mostly ad hoc arbitration cases. In these cases, one can find a disruption of that traditional link between territory and the legal order and an intensification of the position of autonomy of the will of the parties.[37]

As stated above, there is no such predetermination of the connection between territory and procedure in arbitration as there is in judicial proceedings. However, naturally, there still is a certain connection. Upon further inspection, there is a link between the arbitration proceedings and the forum and its legal order. This place which is considered as a forum when its legal code is applied determines a number of issues.[38] The forum decides on the application of procedural norms. Deviation from these procedural norms is possible within the framework of this legal order. The degree of departure varies, depending on the particular law of the country which is considered to be the forum.[39] Some jurisdictions allow for the complete substitution of domestic procedural rules as a whole and the application of another country rules instead. It is the place where the arbitration is situated that determines what procedural course is possible - whether it is entirely at the parties' disposal or whether certain limits are set.[40] Let us look at our Czech legal order; In the field of Czech law, procedural norms cannot be treated as a whole. According to *Rozehnalová*, this puts arbitration proceedings in a position comparable to court

34 We consider domestic arbitration proceedings to be those which are subject to domestic procedural rules and to which the supervisory and support functions of the courts apply. In contrast, we consider a foreign arbitration to be one that is not subject to domestic procedural rules and the functions of the courts, and at the same time the arbitral decision must be recognized before it can be performed. From the perspective of Czech law, international arbitration proceedings may be domestic or foreign, domestic arbitration proceedings may only be domestic. See ROZEHNALOVÁ, Naděžda. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. Praha: Wolters Kluwer, 2013, pp. 67-68. 9788074780042.

35 Autonomous doctrine. See HAERSOLTE-VAN HOF, Jacomijn, and Erik KOPPE. International arbitration and the lex arbitri. *Arbitration International* [online]. 2015, 31(1), p. 30. 1875-8398. doi: 10.1093/arbint/aiv001 [viewed 30 October 2021]. Available from: https://academic-oup-com.ezproxy.muni.cz/arbitration/article/31/1/27/252771

36 Here the question arises as to which criteria determine to which legal order of which state arbitration proceedings belong. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards contains two criteria – according to geography - the place of the arbitral award and - according to the procedural rules under which the arbitral award was made. So does the European Convention on International Commercial Arbitration. From the perspective of Czech law, the geographic criterion is used (see Section 120 PILA). See ŠIMKOVÁ, Iva. Enforcement of Foreign Annulled Arbitral Awards. In: DRLÍČKOVÁ, Klára (ed.). Cofola International 2015. Current Challenges to Resolution of International (Cross-border) Disputes [online]. Brno: Masaryk University, 2015, p. 171. 9788021080201 [viewed 30 October 2021]. Available from: https://www.law.muni.cz/sborniky/cofola-international/cofola2015.pdf

37 ROZEHNALOVÁ, Naděžda. Určení fora a jeho význam pro spory s mezinárodním prvkem – I. část. *Bulletin advokacie* [online]. 2005, 2005(4), pp. 16-17. 1805-8280. [viewed 8 July 2021]. Available from: http://www.bulletin-advokacie.cz/assets/zdroje/casopis/2005/BA_05_04.pdf

38 E.g., the possibility to arbitrate; the arbitrability of the dispute; the status of arbitrators or the arbitral tribunal or, for example, the binding of the auxiliary and supervisory functions of the courts.

39 ROZEHNALOVÁ, Naděžda. Určení fora a jeho význam pro spory s mezinárodním prvkem – I. část. *Bulletin advokacie* [online]. 2005, 2005(4), p. 18. 1805-8280. [viewed 8 July 2021]. Available from: http://www.bulletin-advokacie.cz/assets/zdroje/casopis/2005/BA_05_04.pdf

40 Ibid.

proceedings.[41] It is only possible to deal with the proceedings within the framework of the procedural norms of the forum – the Act No. 216/1994 is applied and subsidiary the Code of Civil Procedure is applied.[42] It is only within the framework of the mandatory provisions of the Act No. 216/1994 that the *lex fori* can be deflected.[43] As stated, the link between the forum, i.e. where the arbitration takes place, and the particular legal order of the country has an impact on a number of issues. One of them is the supervisory and ancillary function of the courts of the country towards the arbitration. Logically, most legal systems, not excluding the Czech legal system, contain a fundamental link between the place of the proceedings and local courts.[44]

As noted above, the nature of arbitration is influenced by the doctrine adopted by a particular country. The doctrines deal with the link between the country and the arbitration. The positions between the state and the will of the parties are evaluated differently under each doctrine**.** The outcome of arbitration varies entirely according to the position taken by that particular doctrine.[45] A stronger link between the forum and the law applicable there will certainly be upheld in the jurisdictional doctrine.[46] Under that doctrine, the arbitration takes the forum and applies its law. Arbitration is considered adversarial and arbitrators are vested with powers derived from the state – thus, arbitrators have a forum. At the same time, arbitrators must apply the procedural rules of the country. The degree of departure from procedural norms is determined specifically by the forum's law (see above on this).[47] With the contract doctrine, the position of the autonomy of the will of the parties is reinforced. Here, the autonomy of the will of the parties is considered to be the basis of the arbitration procedure.[48] The parties to the proceedings have a decisive influence on the nature of the proceedings in question. Under this doctrine, the state has only limited influence. Arbitrators do not have a forum and no control functions are exercised by the state. Litigants or arbitrators have unfettered discretion in determining the law for all components of the process.[49] This doctrine is faulted for failing to address and explain the link between the forum and international arbitration and for failing to distinguish between domestic and foreign proceedings. This doctrine is fundamentally contrary to the principles of due process of law. The mixed doctrine

41 Ibid.

42 CZECH REPUBLIC Act. No. 99/1963 Coll., Code of Civil Procedure [Zákon č. 99/1963 Sb., občanský soudní řád].

43 See Section 30 Act No. 216/1994.

44 Sections 41-43 Act No. 216/1994 and section 120 PILA.

45 A number of issues are affected: for example, the qualification of the arbitration agreement, the status of the arbitrator, the arbitrator's liability and so on. See ROZEHNALOVÁ, Naděžda. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku.* Praha: Wolters Kluwer, 2013, p. 71. 9788074780042.

46 For example, *Kučera* and *Růžička* advocate this doctrine. According to the case law of the Constitutional Court of Czech Republic, a certain development can be found on this issue. Previously, the Constitutional Court advocated the contractual doctrine, but nowadays it is more inclined towards the jurisdictional doctrine. See Case No. IV. ÚS 435/02 or Case No. ÚS 174/2002 vs. Case No. I. ÚS 3227/07.

47 ROZEHNALOVÁ, Naděžda. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku*. Praha: Wolters Kluwer, 2013, pp. 71–74. 9788074780042.

48 Ibid., p. 74.

49 A proponent of this doctrine is, for example, Raban.

is a doctrine of compromise between the two doctrines mentioned above. It reflects the interaction of two elements – the autonomy of the parties' will and the influence of the country on the arbitration. Within this doctrine, there is a reflection of a strong attachment to the forum location, but there is a constant emphasis on the autonomy of the parties' will. Therefore, arbitration is regulated by the will of the parties within the confines of the forum's procedural norms.[50] The final doctrine is the autonomy doctrine which treats arbitration as an autonomous proceeding with no connection to the territory. Here, arbitration is seen as an autonomous institution that is not affected by the law of the forum and the institutions of the forum. Arbitration is detached from the forum and should only pursue its objective. This doctrine nowadays best reflects the globalization of international trade relations. Here, there is a denationalization of arbitration. The will of the parties is the controlling element and these proceedings cannot be influenced by the law of any country.

Finally, I would add that a stronger link to the forum is evident in cases where the parties have agreed in the arbitration agreement that their dispute will be decided by a permanent arbitral tribunal than in cases where it is decided by one or more arbitrators who are appointed on an *ad hoc* basis.

2. THE MEANING OF LEX ARBITRI

2.1 Concept and content of the lex arbitri

I now turn to the second part of the contribution, which deals with the concept of *lex arbitri* appearing in connection with arbitration proceedings. Here are a few examples of how lex arbitri is described in the literature.

According to *Růžička, lex arbitri* refers to the legal norms governing arbitration proceedings in the territory of the country where the arbitration is to take place.[51] According to *Bělohlávek*, it is important to remember that an arbitration agreement can be understood as a kind of triggering mechanism for the application of a normative system enabling a particular dispute to be resolved differently than at the court. Defining the arbitration procedure itself always depends on the nature of the procedure and its basis. Nowadays, in most jurisdictions the regulation of arbitration is contained in special rules on arbitration, to which it refers to as *lex arbitri.* The term *lex arbitri* has a broader meaning. It refers to the set of rules and regulations by which arbitration is defined in relation to the public authorities, other types of proceedings, etc., as well as to the system of norms governing the extent to which the parties may agree to submit a dispute to arbitration and how they may express such an intention. A more precise interpretation was given later, when it was stated that the *lex arbitri* cannot be identified with the substantive law applicable to the

50 A proponent of this doctrine is, for example, *Rozehnalová*.

51 PAUKNEROVÁ, Monika, ROZEHNALOVÁ, Naděžda, ZAVADILOVÁ, Marta et al. *Zákon o mezinárodním právu soukromém. Komentář.* Praha: Wolters Kluwer, 2013, p. 765. 9788074783685.

merits of the dispute, the law applicable to the arbitration agreement or the procedural norms applicable during and to the course of the arbitration itself. These regimes are entirely dependent on the will of the parties. In a broader sense, *lex arbitri* can be understood as the application of fundamental rules and legal principles that either positively or negatively define the parties' autonomy in relation to arbitration.[52] As summarised by *Drlíčková*, the *lex arbitri* represents that part of the legal system of a particular country which regulates the field of arbitration. This legal order gives binding force and effect to arbitration.[53]

What is necessary to realize that arbitration proceedings have a higher degree of autonomy of will of the participants than the court proceedings, and they may have a number of questions concerning the course of the proceedings. The parties may thus conclude an agreement on arbitration proceedings (an agreement on arrangement of procedures) which is considered to be different from an arbitration agreement and at the same time is considered to be a procedural agreement.[54] Through this agreement, the parties may choose, for example, the number of arbitrators, the procedure in the proceedings or other issues related to the proceedings. As I have already outlined in the introductory section, the forum of a given arbitration decides the extent of the parties' or arbitrators' autonomy to regulate procedural issues. In the field of international arbitration, there is a constant question whether this scope should be extended beyond the governing procedural law of the forum, where the parties can dispose of the procedural law as a whole regardless of the position of the law of the forum.

This issue is entirely related to the *lex arbitri*. Is the *lex arbitri* the procedural law of the forum or is it an entirely different phenomenon.[55] *Rozehnalová* states that the *lex arbitri* is the totality of all norms and rules that affect the course of arbitration proceedings. This means that it is in fact not only the procedural norms of the forum. According to *Rozehnalová*, the *lex arbitri* contains both the norms that are contained in the procedural law of the place of arbitration proceedings and affecting on this proceedings, as well as legal rules and procedures that were adopted in a particular case by the parties or arbitrators for a particular arbitration.[56] Both the doctrines adopted and the approaches to arbitration affect the degree of attachment of the arbitral proceedings to the forum and thus the extent of the parties' autonomy of will. The approach of attachment to the forum and its procedural law is different in the territorial approach than in the contractual approach. At the extreme, I speak of

52 BĚLOHLÁVEK, Alexander. *Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů. Komentář.* Praha: C. H. Beck, 2012, pp. 9–10. 9788071793427.

53 SVOBODOVÁ, Klára. Místo konání rozhodčího řízení – rozhodující kritérium určení "Lex Arbitri". In: Dny práva 2009 [online]. Brno: Masarykova univerzita, Právnická fakulta, 2009, p. 3. 9788021049901 [viewed 1 August 2021]. Available from: https://www.law.muni.cz/sborniky/dny_prava_2009/files/prispevky/rozhodci_rizeni/Svobodova_Klara__1054_.pdf

54 ROZEHNALOVÁ, Naděžda. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku.* Praha: Wolters Kluwer, 2013, p. 124. 9788074780042

55 Ibid., pp. 240–242.

56 Ibid., pp. 240–242.

delocalization and denationalization of arbitration.[57] From the perspective of Czech law, the territorial approach is advocated. In the case of Czech law, Czech procedural norms cannot be replaced by foreign procedural norms in arbitration proceedings. If we look at the section 19(1) of the Act No. 216/1994, it allows the parties or arbitrators to dispose of the procedure of the proceedings and to regulate the procedure of the proceedings e.g., by agreement of the parties or to choose the rules such as the rules of the arbitral tribunal. Section 19(2) regulates the procedure in the event that the option referred to in paragraph 1 of the provision is not chosen. It is also necessary to mention the impact of the Code of Civil Procedure in the context of the regulation of the procedure. The content of the *lex arbitri* does not correspond to the full scope of the concept of procedure. Nor is there a full disposition of the Czech procedural rules. The parties' disposition of the procedure is limited by the mandatory provisions of the Act No. 216/1994, where the question of which rules are mandatory is also problematic[58] To the extent thus determined, the autonomy of the parties or arbitrators is applied and then, if the parties' or arbitrators' discretion is not exercised, the application of the Act No. 216/1994, or, as appropriate, the provisions of the Code of Civil Procedure.[59] As *Rozehnalová* outlines, the issue can be presented as *"How quickly do we get from the autonomy of will or principles of arbitration to the Code of Civil Procedure?"*[60]

2.2 Lex fori – equal to lex arbitri, but not lex arbitri

What all constitutes *lex fori* in terms of procedural norms and at the same time constitutes *lex arbitri*. After the above experiences, the question can be viewed and answered in two ways:

1. *Lex fori in the procedural level forms the concept of lex arbitri in terms of meaning and content.*

   The *lex abitri* is also constituted by the rules contained in the procedural law of the location of arbitration. *Lex fori* in the procedural level, which is applied in the general courts also means the application of the procedural rules of the location where the proceedings are held. I may conclude that the *lex arbitri* is also the procedural law of the forum.

2. *Lex arbitri does not constitute the concept of lex fori in meaning and content for the following reasons:*

   - *Lex arbitri* is the sum of all norms and rules that affect the conduct of the arbitration proceedings - i.e., it includes both the norms that are contained in the

57 Ibid.

58 See list reffered to in section 13 Act No. 216/1994.

59 See section 30 Act No. 216/1994.; Resolution of the Supreme Court, Czech Republic of 26 April 2007, No. 20 Cdo 1612/2006 [online]. In Database of the Supreme Court. [accessed on 2021-08-20]. Available from: https://nsoud.cz/

60 ROZEHNALOVÁ, Naděžda. *Rozhodčí řízení v mezinárodním a vnitrostátním obchodním styku.* Praha: Wolters Kluwer, 2013, pp. 245–242. 9788074780042.

procedural law of the location of arbitration and that affect those proceedings, and the legal rules and procedures that have been adopted in a particular case by the parties or arbitrators for that particular arbitration.[61]

- The arbitrators are not state agents (state bodies) but are private persons. They are a different body from the ordinary courts and, as such, do not form part of the hierarchy of the judiciary, are not subject to the rules on liability, etc.
- Strong position of autonomy of the will of the parties or arbitrators. In terms of specific legislation, full deferral to procedural rules of venue as a whole or the Czech approach advocated, a choice only within the framework of mandatory procedural rules of venue.

3. REPLACING LEX FORI WITH LEX ARBITRI OR WHY IS THE TERM "LEX ARBITRI" USED?

Why is it not *lex fori*? Upon reflection, the reasons seem obvious. I believe that Ican state that the concept of *lex arbitri* is fluid or resp. rubbery, as it will always be "a little different" from the perspective of a particular legal system in the case of the doctrine or approach advocated. Also, the question of the systematics of a given legal system on substantive or procedural law will have an impact.

The concept of *lex arbitri* is broader and at the same time hierarchically superior to the law applicable to arbitration, but at the same time there is the position of the particular approach given by the legal order of the particular country.[62] As already detailed, the forum of a given adjudication determines the *lex fori* and the procedure according to the procedural norms of that forum. I might think that it would be sufficient to establish the equivalent of the *lex fori* in the field of arbitration, but in this field, there is no equivalent of the *lex fori* as I generally understand it. As such, the *lex fori* determines when and whether another country's legal rules may be applied, but another legal rule can never be part of the *lex fori.*[63]

The problems with the application of the *lex fori* concept in international arbitration have already been outlined above. On balance, it is important to note that if arbitral tribunals were to serve as a substitute for ordinary courts, the particular legal order would have to so provide. General courts embody the sovereignty of the state whose sovereign power they exercise and whose international responsibility they uphold; arbitral courts do not.[64] At the same time, the two types of courts derive their authority from different sources, the arbitral court from a valid arbitra-

61 ROZEHNALOVÁ, Naděžda et al. *Právo mezinárodního obchodu. Včetně problematiky mezinárodního rozhodčího řízení.* Praha: Wolters Kluwer, 2021, p. 473. 9788076760462.

62 PETROCHILOS, Georgios. *Procedural Law in International Arbitrtion.* Oxford: Oxford University Press, 2004, p. 19. 0199249482.

63 Ibid.

64 Ibid., pp. 1–6.

tion agreement, the general court derives its authority from the state.[65] For these reasons, it is necessary to be mindful and to take care of, the appropriate application of the concepts of *lex arbitri* or *lex fori* in a particular proceeding.[66]

CONCLUSION

Arbitration has become the preferred method of dispute resolution in international trade. The question of the application of the procedural law of the place of arbitration is still an unsettled issue. The principles emerging in the procedural level are twofolds. The principle of *lex fori*, which applies in court proceedings, and the principle of *lex arbitri*, which in turn is familiar to the field of arbitration.

The aim of this paper is to define the concept of *lex arbitri* and to state whether it constitutes the content of the concept of *lex fori*. Simultaneously, the paper sets out the hypothesis: *"the principle of lex fori, as we generally perceive it in general courts, is transferable to the field of arbitration."*

In this contribution, a detailed analysis of both principles was made and a summary of what all enters into *lex fori in* terms of procedural norms and at the same time constitutes *lex arbitri*. Terminologically, the terms are not always used appropriately, especially in terms of how each practitioner approaches the *lex arbitri.* In conclusion, arbitral tribunals are not organs of the state and concomitantly the strong role of the autonomy of the will of the parties is unquestionable, which also determines the scope of the content of the concept of *lex arbitri*. *Lex fori* is not in arbitration as it does not have that direct link and *lex arbitri*, on the other hand, is considered to be "rubbery", "movable" and based on the autonomy of the will of the parties.

This concept creates a unique entity which can no longer be called *lex fori*. Additionally, because of the vague link to the territory, where *lex arbitri* does not have that direct authority-territory link, it is called something else to distinguish it, namely *lex arbitri.* From the foregoing I may state that the article fulfils its purpose and at the same time there can be no confirmation of the hypothesis stated.

65 WORTMANN, Beda. Choice of Law by Arbitrators: The applicable Conflict of Laws System. *Arbitration International* [online]. 1998, 14(2), p. 108. [viewed 2021-08-15]. Available from: https://doi.org/10.1093/arbitration/14.2.97

66 ROZEHNALOVÁ, Naděžda et al. *Právo mezinárodního obchodu*. Včetně problematiky mezinárodního rozhodčího řízení. Praha: Wolters Kluwer, 2021, p. 423. 9788076760462.

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Selected Aspects of Company Liquidation in Germany and in the Slovak Republic

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Abstract:
The existence of a market economy and the performance of business activities with private capital is also related to the issue of liquidation and dissolution of companies. In the conference paper, the authors deal with selective aspects of the liquidation of a company in the Slovak Republic and Germany. The authors analyse the cohesive and different elements in the process of liquidation of a business company, specifically in a limited liability company and in Slovakia and in Germany. The cohesive elements of liquidation in both countries include the mandatory registration with the Commercial Register and publishing the liquidator(s), liquidators in both countries have the obligation to notify all outstanding creditors to file their claims, opening balance and final balance and the necessary monitoring of the possible insolvency and the duty to file for insolvency. The differences lie e. g. in the length of the waiting period, the provisions on the *ex lege* liquidator and the conditions for establishment of the supplementary liquidation.

Key words: *company, liquidation, liquidator, Slovakia, Germany*

INTRODUCTION

The primary aim of the formation of corporations (legal persons established mainly for the purpose of conducting business), rests in the effort to achieve economic power and a concentration of capital that is not accessible to an individual.[1,2] The management of the company is in natura oriented to the growth of its market value, market position or competitiveness. Due to various exogenous and endogenous factors, business entities are forced to cope with various risks in the business environment. Companies may want to close their business for various reasons such as changes in their business scope, due to financial problems, or failure to adapt to the market. Nowadays, another important factor might the coronavirus outbreak (COVID-19). It is natural, that the existence of a market economy and the performance of business activities with private capital is also related to the issue of liquidation and dissolution of companies. Whatever the reason is for this decision to shut down the business, shareholder cannot just close the company, or stop trading and walk away without following proper closure procedures. Research in this area is important, as the globalization, internationalization and Europeanisation of markets allow companies to move freely, leading to the location of companies' assets in different countries in Europe and the world. Although at first sight the liquidation process appears to be de facto harmonized on the European platform, the different jurisdictions continue to have different elements. The need for conformity, among other things, to the liquidation process has been emphasized for a long time.[3] The purpose of this paper is to deal with selective aspects of the liquidation of a company in the Slovak Republic and Germany. In the text we also focus on issues concerning the status of the liquidator of a company. The reason for the elaboration of the conference paper is significant changes in the legal regulation of the institute of liquidation in the Slovak Republic, following the high standard of protection of third parties, especially creditors of the company. The current file on the topic of liquidation is insufficient. This part of the life cycle of a company has some elements worth discussing, such as the status of the liquidator. The authors used standard methods typical for the social sciences: synthesis, induction, analysis, comparison, deduction.

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2 DURAČINSKÁ, J. *The Purpose of Forming a Corporation and a Cooperative* In PATAKYOVÁ, M. a kol. *Company Law and Law on Cooperatives – General introduction to the topic and definition of basic terms* 1. vyd. – Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2019. p. 66.

3 PATAKYOVÁ, Mária and GRAMBLIČKOVÁ, Barbora. Bankruptcy and liquidation: current legal situation in European and international context, solutions under the European model company act (EMCA). In: *European company and financial law review*. Vol. 2 (2016), p. 323.

1. LIQUIDATION IN THE SLOVAK REPUBLIC

Liquidation is a legal institute reserved for legal entities as a method of property settlement in the event of the dissolution of an entity without a universal legal successor.[4] The provisions of the Commercial Code[5] on the liquidation of a company represent mostly mandatory legal regulation, which cannot be altered in corporate documents, or by agreement with a third party.

Legal regulation of the liquidation process[6] in the CC effective from October 1, 2020, resembles more bankruptcy proceedings. This is the logical outcome of the efforts of the legislator to protect third parties in the liquidation process, e. g. position of creditors, outflow of assets, as well as the interest of residual creditors[7]. The principal (general) function of liquidation is to protect legal certainty, to protect rights of creditors and residual creditors of the company (protective function), to fulfil public and private law obligations (security function) and to preserve the intangible wealth (conservation function).[8] These functions were strengthened by the new legal framework introduced from October, 1 2020. Shareholders of public company may file a proposal for dissolution in the event of a material breach of the articles of association. Shareholders of a limited liability company may stipulate in the corporation's documents other reasons for the dissolution of the company, on the basis of which the court may decide to dissolve the company. This is a dispute procedure to which the provisions of the Civil Procedure Code[9] apply. The procedure for dissolution of a company on a proposal is regulated in Sec. 309 Civil Non-dispute Code[10]. The procedure for the dissolution of a company or cooperative *ex offo* is regulated in Sec. 309a et seq. CNC.

The set of assets, subject to the settlement in liquidation, is referred to as the liquidation substance. According to Sec. 2 of Decree No. 193/2020, the liquidation substance consists of liquidation assets and liquidation proceeds achieved during liquidation. The entry of a company into liquidation changes the purpose of the existence of a company.

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4 ĎURANA, Marian.: Legal regulation of liquidation of legal entities. In: ŠKRABKA, Jan a VACUŠKA, Lukáš (ed.). *Právo v podnikání vybraných členských států Evropské unie. Sborník příspěvků k XII. ročníku mezinárodní vědecké konference.* Praha: TROAS, s.r.o., 2020, s. 32-39; NÉMETHOVÁ, Monika a ŠEVČÍKOVÁ, Andrea Bilas, On the legal regulation of additional liquidation in the Slovak Republic. In: ŠKRABKA, Jan a VACUŠKA, Lukáš (ed.). *Právo v podnikání vybraných členských států Evropské unie. Sborník příspěvků k XII. roč- níku mezinárodní vědecké konference*. Praha: TROAS, s.r.o., 2020, s. 305-312; MAMOJKA, Mojmír, ml. Obmedzenie právnej subjektivity obchodnej spoločnosti pred vznikom a počas likvidácie. In: *Acta Facultatis Iuridicae Universitatis Comenianae. 24/2006*. Bratislava: Univerzita Komenského, 2006, p. 79.

5 Act no. 513/1991 Coll. Commercial Code (hereinafter referred to "CC").

6 Based on the amendment to the CC, Act no. 390/2019 Coll. effective from October 1, 2020.

7 Introduction of the institute of advance payment for liquidation, introduction of the list of receivables, preparation of the list of assets - collection of documents, authorizations of the liquidator within the scope of authorizations of the administrator of the bankruptcy estate, etc.

8 Of the current ones, the status quo regime according to Art. § 68c CC, also known in the doctrine as a standstill, The amendment to CC no. 390/2019 Coll. effective from October 1, 2020, the purpose of which was to emphasize the protection of third parties, in particular the creditors of the liquidated company and the protection against any outflow of assets from the company at the time before and during the liquidation process.

9 Act No. 160/2015 Coll. Civil Procedure Code (hereinafter referred to "CPC").

10 Act No. 161/2015 Coll. Civil Non-dispute Code (hereinafter referred to "CNC").

New legal provisions introduced also the advance payment. That is supposed to eliminate the commencement of the liquidation process in cases where not even the basic costs are covered, which would defeat the purpose of liquidation. In both the appointment of the liquidator by the court or the shareholders the advance payment has to be made to cover the remuneration and reimbursement of the liquidator's expenses determined by the Sec. 3 of the Decree, currently in the amount of € 1,500. It serves mainly to cover the liquidator's remuneration and possible liquidation costs, even in cases where there is no other source of their coverage.

When bankruptcy is declared for the company's assets, the advance payment for liquidation is subject to bankruptcy proceedings, unless the liquidator has filed for bankruptcy[11].

The liquidation process can be variously demanding. A voluntary dissolution decision is the first step when the shareholders express their will to dissolve the company. In the case of an involuntary *ex offo* court decision to dissolve a company, the date of annulment is the date of validity of the court's decision to dissolve the company, unless a later date is set in the decision. Unless a special regulation provides otherwise, the company enters into liquidation by registering the liquidator in the Commercial Register. The initialization of the liquidation process by the court is governed by reference to Sec. 309h(2) CNC. The company's entry into liquidation should be carefully considered in advance. Based on practical experience, it is appropriate for the company to enter into liquidation already prepared, i. e. ideally without assets, liabilities and receivables and without personnel substrate in the form of employees[12]. From a pragmatic point of view, the liquidation process can be divided into several phases, namely the preparatory phase, the implementation phase, the final phase. The preparatory phase can only be spoken of in the case of voluntary liquidation.

Preparatory phase consists mainly in the economic analysis of the entity. In the process of determining the value of assets it is important to distinguish between the market value and the nominal value found in the financial statements.

In the event that the value of property is smaller than the value of debts and the concurrence of potential bankruptcy proceedings and liquidation is resolved in favour of bankruptcy and the liquidation process is interrupted *ex lege*.[13]

Liquidation is the final stage in the life cycle of a company.[14] The law specifies the minimum period of liquidation, which is six months after the notification of the

11 KUBINEC, Martin. Odmena a náhrada výdavkov likvidátora v likvidácii. In: *Právne rozpravy on-screen 2. [elektronický dokument]: sekcia súkromného práva*. Banská Bystrica: Belianum, 2021; p. 85 [online] [cit. 2021-04-30]. Online: https://www.prf.umb.sk/veda-a-vyskum/konferencne-on-line-vystupy/pravne-rozpravy-on-screen-ii/sekcia-sukromneho-prava/martin-kubinec.html

12 This is a trend of "hidden liquidation", which is that a substantial part of the elimination of the company's activities and the settlement of its assets will take place before the company is formally dissolved and enters into liquidation. POKORNÁ, Jana et al. *Zrušení a zánik obchodní korporace s likvidací*. 1. vydanie. Praha: Wolters Kluwer, 2020, p. 161.

13 ĎURICA, Milan. Likvidácia spoločnosti. In: PATAKYOVÁ, Mária a kol. *Obchodný zákonník. Komentár. 4. vydanie*. Praha: C. H. Beck, 2013, p. 352.

14 OVEČKOVÁ, Oľga. Likvidácia spoločnosti a predaj podniku. Právny Obzor. 2005, č. 6, p. 516.

company's entry into liquidation[15]. Pursuant to Sec. 70 (3) of the CC, the company enters into liquidation by registering the (first) liquidator with the Commercial Register, unless a special law provides otherwise. This is the constitutive effect of registration with the Commercial Register. At this point, the liquidation implementation phase begins.

The effects of the company's entry into liquidation are regulated in Sec. 75b of the CC. The entry of the company into liquidation terminates the unilateral legal acts of the company, in particular its orders, authorizations, powers and powers of attorney, except for the powers granted to represent the company before courts.

Liquidation does not affect the restrictions on the company's right to dispose of its assets, which arose before its entry into liquidation. The obligation to comply with these obligations, also apply *ex lege* to the liquidator. This also applies in relation to subsequent liquidation. From a procedural point of view, the liquidation process is regulated in Sec. 75c to 75i of the CC. The liquidator shall, immediately after the company enters liquidation, publish a notice that the company has entered into liquidation together with an invitation for creditors to register their claims and other rights. It is a convocation of the company's creditors. The convocation institute plays an important role because in several cases the liquidator does not have the complete accounting documents of the company. With reference to Sec. 75d of the CC, creditors have the right to file their claims and other rights in liquidation with an application, regardless of their maturity.

The duties of the liquidator include creating a list of receivables under Sec. 75e of the CC which is related to the transparency of the liquidation process. The basic application period is 45 days, after which the liquidator will deposit the list of registered claims in the collection of documents within the specified period, similarly as in the case of bankruptcy. The liquidator will also prepare a list of assets (Sec. 75g of the CC), which will also be stored in the company's collection of documents together with a basic list of receivables. Failure to comply with these obligations is a reason for the liquidator's removal from office. According to Sec. 75f of the CC the obligation to prepare extraordinary financial statements according to the situation as of the day preceding the date of entry of the company into liquidation in order to assess whether the company is bankrupt due to prevalence of debts over the value of the property. If the liquidator finds such a situation (at any time during the liquidation), Sec. 75h of the CC in conjunction with Sec. 11(2) of the Bankruptcy and Restructuring Act imposes on them the obligation to initiate bankruptcy. Satisfaction of receivables is regulated in Sec. 75i of the CC. The liquidator satisfies the claims of the company's creditors on an ongoing basis. The satisfaction of receivables is governed by the so-called absolute priority rule, which is a fundamental principle of corporate law according to which claims of creditors should always be satisfied before the claims of residual creditors. This concept is reflected in the ban in Sec.

15 In this case, the nature of the company's debts and assets, as well as the professional skills of the liquidator, are important.

75i(3) of the CC to provide performance due to a right to a share in the liquidation balance before the claims of all known creditors of the company are satisfied. However, this is not the only principle, because it is necessary to differentiate the individual claims of creditors, the right to return the advance payment on liquidation, priority of some claims (receivables). Secured receivables also have a special status.

The end of the liquidation depends on the satisfaction of the creditors' claims and on the liquidator's abilities. The very end of the liquidation is the distribution of the liquidation balance among the residual creditors. On the day of the end of the liquidation, the liquidator shall compile the financial statements, the final report on the course of the liquidation and a proposal for the distribution of the liquidation balance among those who are entitled to it. The aforementioned shall be part of the notice on the end of liquidation published without delay. After approving the described documents, the liquidator shall publish a notice to that effect and shall immediately forward the liquidation balance to those who have acquired the right to it. The law does not explicitly regulate the moment of termination of the liquidator's term; however, we are of the opinion that the liquidator's position ends with end of the liquidation, and not with the deletion of the company from the Commercial Register.

In practice, there may be a situation where it will be necessary to settle assets that appeared at the time after the completion of the liquidation or after the dissolution of the company. In the absence of any creditors, the additional liquidation balance will be distributed among the former partners. The liquidator's procedure subsequently follows from the fact whether the company has been deleted from the Commercial Register in the meantime. The legal regulation of the additional liquidation of property regulates the procedure for settling the property rights and obligations of an already dissolved legal entity. It applies to defunct companies, regardless of the reason for their deletion, resp. regardless of the reason for the cancellation, as well as the fact which preceded the deletion process.

1.1 Liquidator

The liquidator performs on behalf of the company only actions leading to the liquidation of the company.[16] The liquidator acts on behalf of the company only to the extent of the purpose of liquidation of the company[17]. In the exercise of this power, the liquidator mainly fulfils the company's obligations, claims and accepts benefits, acts on behalf of the company before courts and other bodies, concludes settlements and agreements on the change and termination of rights and obligations. It may conclude new contracts only in connection with the termination of existing

16 DVOŘÁK, Tomáš. K některým otázkám spojeným s osobou likvidátora kapitálových obchodních společností. *Právník*, 2000, roč. 139, č. 8, p. 767.

17 In this context, we draw attention to the legislation of the Czech Republic, which in Art. § 187 par. 1 Act no. 89/2012 Sb. The Civil Code, as amended, defines the purpose of liquidation of the company, "the purpose of liquidation is to settle the assets of the dissolved legal entity, settle debts to creditors and dispose of the net asset balance resulting from liquidation under the law." HUSÁR, Ján. Úprava likvidácie právnickej osoby v SR a ČR. *Justičná revue*. 2013, roč. 65, č. 2, p. 225 and 226.

legal relations. Basic tasks of liquidator also include inviting creditors to register claims. The liquidator appointed by the court has the same rights when ascertaining the company's assets as the administrator in the bankruptcy proceedings when ascertaining the bankrupt's assets pursuant to a special law. The liquidator is a body of the company, but it is not its statutory body. They enjoy status *sui generis*.

The immanent rule in Sec 73 of the CC consists in the fact that the person who appoints the liquidator to the position may also remove them from office. A liquidator appointed by the shareholders, or the competent body of the company may resign. If the liquidator has been appointed by a court, they are not entitled to resign, but regardless of the method of appointing the liquidator, the court may, dismiss a liquidator who is in breach of their duties or for any other serious reason. The purpose of this legislation is to protect companies and shareholders who are unable to eliminate the liquidator themselves, which harms their interests during the liquidation. In such a case, the court may dismiss the liquidator, even if it has not appointed them to office.

The relationship between the company and the liquidator is managed in accordance with Sec 66 (6) provisions of the CC on a mandate contract, although a contract may be concluded directly between the company and the liquidator on the performance of the liquidator's function as an innominate contract subject to Sec. 269(2) CC. Csach and Galandová define three basic functions for a liquidator, which they should fulfil in the process of liquidation, i. e. identify the assets and liabilities of the company, monetize the assets of the company, satisfy creditors, while protecting the interests of the company and shareholders[18]. We identify the liquidator's main duties as acts by which the effective termination of relationships and activities of the company, notification and notification obligations towards third parties, tax and accounting obligations and obligations towards the registry court.

According to Sec. 74 of the CC the liquidators are responsible for the performance of their powers in the same way as the members of the statutory bodies. It can be extracted from the provision in question that the liquidator is, similarly to a member of the statutory body, the holder of the so-called fiduciary duties, and therefore has a duty of loyalty,[19] which means that they need to act in such a way which would fulfil and coordinate all interests at stake to the company and all its shareholders[20] and is obliged to perform its function with professional care. However, if the liquidator has fiduciary duties, it is appropriate in this context to consider the possibility of applying the business judgment rule, which means that the liquidator would not be responsible if they acted both in terms of loyalty and the necessary knowledge and

18 CSACH, Kristián, GALANDOVÁ, Miriam In: OVEČKOVÁ, Oľga a kol. *Obchodný zákonník. Veľký komentár*. Bratislava: Wolters Kluwer, 2017, p. 639.

19 In liquidation, we consider in genere to be the interest of the company in terminating its activities with the full satisfaction of the company's creditors and reaching the maximum amount of the liquidation balance. JOSKOVÁ, Lucie. Povinnosť loajality In: JOSKOVÁ, Lucie, PRAVDOVÁ, Markéta, ZACHARDOVÁ, Lenka. *Likvidace obchodních společností.* 1. vydání. Praha: C. H. Beck, 2017, s. 47 a nasl.

20 FEIGERLOVÁ, Monika, PUKNEROVÁ, Monika: Private International Law for Corporate Social Responsibility. In: *The Lawyer Quarterly*. Vol 8, No 4 (2018) p. 386.

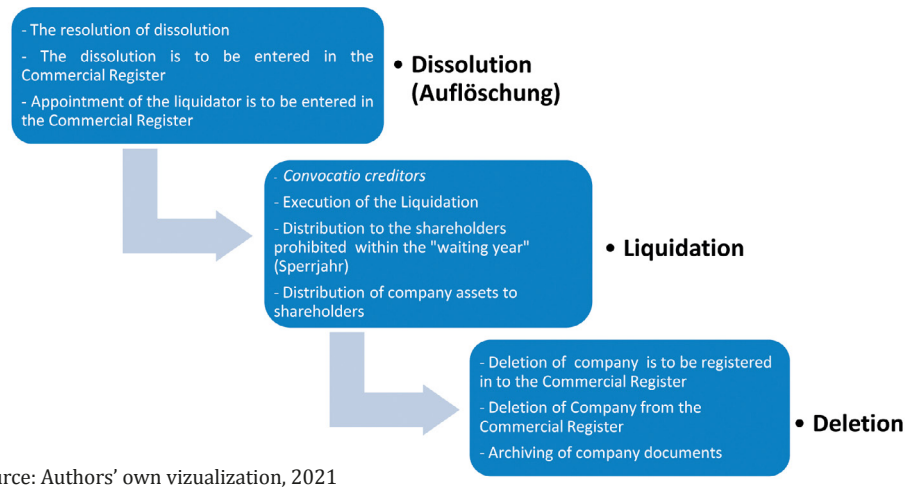
diligence[21]. Sanctions associated with breaking their duties are the removal from office, responsibility to compensate damage, disqualification, sanctions connected with the bankruptcy of a liquidated company, criminal liability.

Reason for removal of the liquidator by the court in accordance with Sec. 73(4) CC is appropriate only in case of serious breach of obligations by the liquidator, or in case of repeated violation. Disqualification must also be mentioned[22]. A decision of a court or other body on exclusion[23] may stipulate that for a period specified in the decision or on the basis of a court decision, for a period of three years, a natural person may not perform the function of a member of the statutory body or supervisory body in a company or cooperative.

2. LIQUIDATION IN GERMANY

In this article we will outline the necessary steps regarding winding up a German Limited Liability Company (GmbH). The process of dissolution and liquidation of a limited liability company in Germany is regulated in 5. part of the Limited Liability Companies Act (Gesetz betreffend die Gesellschaften mit beschränkter Haftung,[24] hereinafter referred to GmbHG). The comparison will point out the elements which are different as well as the elements which are cohesive.

Figure 1: Diagram of Liquidation process in Germany



Source: Authors' own vizualization, 2021

21 ČERNÁ, Stanislava, TOMÁŠEK, Petr. Group Instructions Regarding Business Management: the Czech and European Perspectives. In: *The Lawyer Quarterly*. Vol 10, No 3 (2020), p. 252

22 According to the current legislation, a decision on disqualification can be 2 types of court decision - a valid decision imposing a penalty of prohibition of activity or a decision which is to be considered a decision on disqualification.

23 The decision on exclusion is therefore only such a decision that is explicitly designated by law. Individual actions for exclusion are not admissible. See the Explanatory Memorandum to Act no. 87/2015 Coll. [online]. Available at: https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=412993.

24 Act on Limited Liability Companies, as consolidated and published in the Federal Law Gazette III, Index No. 4123-1, as last amended by Article 10 of the Act of July 17, 2017 (Federal Law Gazette I p. 2446).

2.1 Dissolution

German law provides several pre-conditions under which company may or must be dissolved. Company will be automatically dissolved when the term of the company's existence expires. Company may be dissolved e. g. by a decision of shareholders, by a decision of administrative court due to the illegal resolution passed by shareholders or if shareholders knowingly permitted the management to perform illegal acts, or other reasons may be specified in the articles of association. Company will be dissolved by regional court will occur if the court is convinced that the purpose of the company has become impossible or if company is in such a state that such decision would be justified. The dissolution will also occur pursuant the institution of insolvency proceedings. Company will be dissolved as well by a decision of court if it will be without assets. The termination of a GmbH can also have reasons which are not expressly mentioned in the GmbHG. In a nutshell, there are two main manners in which companies are wound up: compulsory closure and voluntary closure. In this paper we primarily focus on the kind of voluntary closure. Special procedure will be applied in the case of serious defects in articles of association. Firstly, the court will order the company to fix the defects and only if the company does not comply, the court will pronounce the articles of association ineffective by a decision. After such decision is final, the company becomes dissolved automatically by operation of law.[25] The existence of a companies (e.g. GmbH) is inseparably bound up with its entry in the Commercial Register. Accordingly, a GmbH exists until it is deleted from the Commercial Register. To legally close a company in Germany there are three basic steps involved as Dissolution, Liquidation Deletion. The dissolution of the company (Auflöschung) by corresponding resolution by the shareholders under German law must be registered with the commercial register.[26] The dissolution of the GmbH must be announced immediately by liquidators in the "company gazettes", under Section 65 (2) GmbHG. A company (GmbH) in liquidation is given the addition „i. L.". (in liquidation) or „i. Abw." (in liquidation), which is significant for this status. Moreover, it is necessary for liquidated companies to include the addition which we mentioned above in their business documents. Liquidator must make an application on registration and the application must be signed by the liquidator, whereas the signature must be authenticated by notary public. Responsible is the register court where the company is registered. Date and reason of liquidation are also obligatory requirements.[27] The legal personality and capacity to act of the limited liability company continue to exist until the moment of deletion from the commercial register, but on the other hand the purpose of the company changes during this phase. Instead of operating economically, the aim of the company is to be liquidated. The company continues to exist during the liquidation period, however

25 ROSENGARTEN, BURGERMEISTER, KLEIN *The German Limited Liability Company,* 9th revised edition. 2020 XVI, 195 S. C.H.BECK. ISBN 978-3-406-74919-3.

26 Unless you have otherwise agreed in the articles of association, the resolution requires a majority of three quarters of the votes cast.

27 Registration; Publication; Creditor Notification In: ROSENGARTEN, BURGERMEISTER, KLEIN *The German Limited Liability Company*, 9th revised edition. 2020 XVI, 195 S. C.H.BECK. ISBN 978-3-406-74919-3.

the purpose of its existence changes. Its only purpose is now to liquidate, i. e. terminate all activity, fulfil obligations, turn assets into cash and distribute the liquidation balance.[28]

In addition to the dissolution, the liquidators must be appointed and also entered in the Commercial Register. *In genere*, any natural person with full legal capacity can become liquidator, which also applies for the role of managing director (Geschäftsführer) of a company. There is really important to mention that all acting managing directors are appointed as liquidators by law automatically, without any special appointment act, unless otherwise regulated by the articles of association, shareholders' resolution or court order. On the other hand the appointment of a liquidator by shareholders' resolution is also possible in any case, i.e. even if a liquidator is appointed in the articles of association. Liquidators may be appointed also by the register court just in exceptional cases. Whether the managing director is obliged to continue their activity in the role of liquidator depends on the contract for the performance of the function and is to be affirmed just in case of doubt. Only the status of liquidation is not in itself an important reason for termination of contract mentioned above. If acting managing directors do not become liquidators, we dare to say that their power of representation expires. The liquidators can be dismissed in the common way as they were appointed. The role of liquidator is a crucial one as they will represent the company and be responsible for complicated proceedings of liquidation itself.[29] It is critical to appoint an appropriate person to be the liquidator and it is not excluded that the liquidator is also a third party, e.g. a lawyer. As in the Slovak Republic, the liquidator uses the status of a company body as *sui generis.* After the dissolution, there is coming the phase of the liquidation.

2.2 Liquidation

The phase of dissolution is followed by the phase of the liquidation. The liquidator is responsible for the quick and proper process of liquidation. Upon this announcement of the liquidation, the season of waiting year (Sperrjahr) begins. This institute serves to protect third parties, mainly creditors. It begins on the day on which the notice to creditors (*convocatio*) is published. During this period, no assets of the GmbH i. L. is allowed to be distributed to the shareholders. During this time, it is only permitted to settle claims of third parties. As in our conditions in the Slovak Republic there is no ranking among the creditors. In favour of a fair arrangement of relations, the method of satisfaction of receivables is governed by the immanent principle of absolute priority (the so-called absolute priority rule). The principle of *absolute priority rule* is a fundamental principle of corporate law and its essence lies in the fact that the claims of creditors should always be satisfied before the claims of

28 Effect of Dissolution; Liquidation In: ROSENGARTEN, BURGERMEISTER, KLEIN *The German Limited Liability Company*, 9th revised edition. 2020 XVI, 195 S. C.H.BECK. ISBN 978-3-406-74919-3.

29 PASSARGE, Malte, TORWEGGE, Christoph. Die GmbH in der Liquidation. Recht, Steuern, Bilanzierung. 3rd revised edition. 2020 XVI. C.H.BECK. ISBN 978-3-406-72660-6.

residual creditors. In the event of a conflict of interest between the partner and the creditor, the protection of the creditor takes naturally, which is a consequence of the very essence of the company, where the ultimate risk is borne by the partner as the company's residual creditor. The standard procedure is that the managing directors would act as liquidators after the company is dissolved. During the process of liquidation the company has the obligation to de-register from the local authorities, such as the German pension insurance scheme, Federal Employment Agency and other public (e. g. tax) authorities. The role of liquidator in this process is core. This default rule may be amended by the articles of association, shareholder resolution or by a court following an application by shareholders holding at least 10 percent of shares. Such application must be based on grounds which would justify such decision of the court. The liquidators appointed by court can be removed only by a court decision pursuant the same requirements as are applicable for their appointment. The ones appointed by shareholders can also be removed by shareholder resolutions or can resign under the same conditions which apply to resignation of general managers. The liquidator represents the company before courts, other authorities and third persons and such representation is equal to that of managing director. The representation is internally limited only to acts performed with the purpose to liquidate the company. This however cannot be invoked externally because the doctrine of *ultra vires* does not apply.[30] In addition, the liquidators carry out the tasks that would otherwise fall to the managing directors. This means that they represent the GmbH externally (also in court) and are – and the law places a particular emphasis on this – responsible for proper bookkeeping. With the beginning of the liquidation, the liquidator has under German law two separate obligations. First to make an application to the commercial register to register the liquidation of a company and second, to make three separate postings of the liquidation of a company in appropriate publications. The liquidation balance may be distributed to the shareholders only after all the creditors are satisfied and one year time limit elapsed from the third posting. Duties of liquidators are laid down in §§ 70-73 GmbHG. Among other things they must announce the liquidation in the Federal Gazette (Bundesanzeiger), terminate the current business of the company, fulfil the obligations of the GmbH (satisfy the creditors), collect receivables, convert the assets of the company into cash. The responsibilities of liquidators include preparing an opening liquidation balance sheet at the beginning of the liquidation, regular financial statements and final liquidation balance sheet upon completion of the liquidation. In the case the liquidation is planned for a longer period, like multiple years, annual interim balance sheets shall be prepared as well. Except for the aforementioned basic responsibilities, the liquidators have the same duties as managing directors only adapted to the purpose of liquidation.[31] The company is fully liable for damages resulting from unlawful acts

30 Liquidation In: ROSENGARTEN, BURGERMEISTER, KLEIN *The German Limited Liability Company*, 9th revised edition. 2020 XVI, 195 S. C.H.BECK. ISBN 978-3-406-74919-3.

31 Ibid.

committed by the liquidator while performing their duties. Liquidator is fully liable to the liquidated company, anybody of aggregate of shareholders and creditors of the company for damages caused by wilful or negligent violation of the duties of liquidator.[32] In addition it is crucial to say that the liquidator keeps an eye on a possibly upcoming insolvency of the company during the process of liquidation and if necessary, fulfils their obligation to inform the court and propose for insolvency.[33]

2.3 Deletion

At the end (after all the liabilities have been fulfilled), the asset of the liquidated company is capable to be distributed to the shareholders. The distribution of asset may take place within the expiration of the "waiting year" or before the expiration of that one year only under the condition d that a confirmation of a specially qualified auditor that all creditors´ claims have been settled.[34] The mission of the liquidator for liquidation is finished after the distribution of assets to the shareholders. The liquidation process is complete. Then the liquidator has just reporting obligations to the court. The liquidator must register the end of the liquidation and thus the termination of the company and enter it in the Commercial Register. The registration just be signed with the notary. The final balance sheet must be sent to the court along with the registration as well. The company is deemed to be terminated when the completion of the liquidation and the deletion of the company is entered in the Commercial Register. The company is deleted from the register and loses its subjectivity.[35] After completion of the liquidation the company documents (the files, books and records) must be archived for a period of ten years. It can be given to one of the shareholders or a third party for safekeeping. A special situation occurs in the case of the deletion of the company, when afterward turns out that assets are still available. In this case a supplementary liquidation must be carried out. For this purpose, the company will then re-enter the liquidation proceedings. In order to become capable of acting again, new liquidators must be appointed either upon application or by the register court. After the end of the supplementary liquidation, it must then be noted that the power of representation of these liquidators for the GmbH has expired again. Examples of liquidation measures to be carried out in the

32 PASSARGE, Malte, TORWEGGE, Christoph. Die GmbH in der Liquidation. Recht, Steuern, Bilanzierung. 3rd revised edition. 2020 XVI. C.H.BECK. ISBN 978-3-406-72660-6.

33 In the course of the opened insolvency proceedings, the role of managing director or shareholders is marginalized. The insolvency administrator has the sole right to manage and transfer the insolvency estate. In the case of an insolvency plan procedure, the insolvency plan may also be prepared and presented by the insolvent company (ie, the previous management). The insolvency plan sets out the measures to be implemented for the liquidation of the company.

34 In special circumstances, the waiting year may be waived, e.g. if the company's assets are no longer distributable and the liquidator declares that the company's assets do not exist, that no payments on shares are existing, that there are no claims and receivables from third parties including the public (i.e. tax) authorities, that no legal disputes are pending in which the company is involved, and that there is also no case of insolvency or over-indebtedness. The termination of a company without a waiting year is carried out a structured scheme.

35 Under § 393 Löschung einer Firma in Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction of December 17, 2008 (Federal Law Gazette I, p. 2586, 2587), last amended by Article 2 of the Act of June 22, 2019 (Federal Law Gazette I p. 866) (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG)).

context of supplementary liquidation are the sale of assets (i. e. lands), the deletion of Mortgage liens, the delivery of notices or the distribution of assets to creditors or shareholders. To carry out the supplementary liquidation, a supplementary liquidator is appointed by the registry court at the request of one of the parties involved under Section 66 (5) GmbHG.

CONCLUSION

Considering the issue of liquidation of companies to be one of the key ones to the fairness of the business environment on the European platform, we elected this topic of paper. We have come to the conclusion, that the liquidation of Slovak or German limited liability company requires compliance with some amount of formalities, which is checked by the registry court. Any liquidation leading to the company's removal from the commercial register requires its dissolution. Such dissolution will not terminate the company, but it is followed by the phase liquidation aiming at satisfying the company's creditors by distributing the remaining assets among the shareholders and removing the company from the commercial register. At the end of our contribution, we can state that the process of liquidation of a company in both countries has cohesive but also different elements. In conclusion as we also mentioned above after the dissolution is registered in the Commercial Register and published the liquidator(s) must notify all outstanding creditors to file their claims with the liquidators. In Germany so called "waiting year" begins with the notice. In Slovakia it is not possible to end the process of liquidation in less than 6 months. In addition, in Germany the liquidators carry out the tasks that would otherwise fall to the managing directors, it would be the same as in Slovakia but there is difference and managing director are not liquidators ex lege like in Germany. The duties of liquidators in both jurisdictions includes among other things an opening balance (Eröffnungsbilanz) including explanation at the beginning of the liquidation and a final balance (Schlussbilanz) at its end. It is important that the liquidator keeps an eye on a possibly upcoming insolvency of the company and if necessary, fulfils obligation to inform the local court and file for insolvency. There is also supplementary liquidation (Nachtragsliquidation) in both jurisdictions, however, the conditions for its establishment are not coherent.

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[11] SLOVAK REPUBLIC Act no. 513/1991 Coll. Commercial Code [zákon č. 513/1991 Zb. Obchodný zákonník].

[12] SLOVAK REPUBLIC Decree No. 193/2020 Coll. of the Ministry of Justice implementing some provisions of the Commercial Code on liquidation [vyhláška č. 193/2020 Z. z. Ministerstva spravodlivosti Slovenskej republiky zo 6. júla 2020, ktorou sa vykonávajú niektoré ustanovenia Obchodného zákonníka o likvidácii)

[13] GERMANY Act on Limited Liability Companies, as consolidated and published in the Federal Law Gazette III, Index No. 4123-1, as last amended by Article 10 of the Act of July 17, 2017 (Federal Law Gazette I p. 2446)

Decision-making Process of the Slovak Alternative Dispute Resolution (ADR) Entities in Years 2017–2020

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Abstract:
The article focuses on alternative dispute resolution of consumer disputes under Act No. 391/2015 Coll. on consumer alternative dispute resolution and on amendment and supplementation of certain acts in the Slovak Republic. The aim of the research is the decision-making process of the Slovak ADR entities in 2017–2020, in comparison with the decision-making process of similar ADR entities in the Czech Republic. The result of the research is a comparison of the ways of termination of consumer alternative dispute resolution and its evaluation. The methods used for the research include analysis, deduction, synthesis and comparison.

Key words: *consumer alternative dispute resolution (ADR), ADR entities, decision-making process, termination of consumer ADR proceedings*

INTRODUCTION

Directive 2013/11/EU of the European Parliament and of The Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)[1] was implemented into the Slovak legislation by the Act No. 391/2015 Coll. on consumer alternative dispute resolution and on amendment and supplementation of certain acts (Act on consumer ADR)[2]. According to Article 1 the purpose of the Directive on consumer ADR is *„to contribute to the proper functioning of the inter-*

1 Council Directive No 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [online]. In EUR/Lex. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013L001

2 SLOVAK REPUBLIC Act No. 391/2015 Coll., on consumer alternative dispute resolution and on amendment and supplementation of certain acts [zákon č. 391/2015 Z.z., o alternatívnom riešení spotrebiteľských sporov a o zmene a doplnení niektorých zákonov].

nal market by ensuring that consumers can, on a voluntary basis, submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures." "*This Directive shall apply to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts...*" (Article 2 of the Directive on consumer ADR). The *Directive has followed a minimum harmonization approach. It has sketched a framework that Member States were free to further complement to ensure a higher level of consumer protection. The Directive also gave Member States some leeway to create their own certification and monitoring processes reflecting and tailored to the peculiarities of their national ADR landscapes.*[3]

Since 2016 out-of-court settlement on consumer disputes in the Slovak Republic includes consumer arbitration, mediation, consumer alternative dispute resolution and online consumer dispute resolution.[4] Consumer ADR represents a kind of intermediate step between the existing dispute resolution processes through arbitration and mediation. The basic difference from both of the previous procedures is primarily the possibility and exclusivity of resolving only consumer disputes. In terms of the degree of commitment to the outcome of the dispute, alternative dispute resolution is closer to mediation than to arbitration because the outcome is an agreement to resolve the dispute (in the case of mediation, a mediation agreement) which, although binding, is not enforceable (unlike an arbitral award), nor is it an obstacle to the adjudication of the case before court.[5] As Raban points out, this disrupts the existing system of out-of-court resolution of consumer disputes and at the same time creates a new system of ADR entities.[6] *"The focus is put on the entities conducting the ADR and quality of the decision making-process. The main goal is to improve the internal market by encouraging cross-border trade while ensuring EU-wide access by consumers in every Member State to ADR entities which, in combination, comprehensively cover all business sectors in every territory, and which comply with a number of quality criteria."*[7]

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3 BIARD, A. Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK. J Consum Policy 42, 109–147 (2019). https://doi.org/10.1007/s10603-018-9394-z Available from: https://link.springer.com/article/10.1007/s10603-018-9394-z

4 MASLÁK, Marek. Vynútenie ochrany spotrebiteľa. In: Monika JURČOVÁ and Marek MASLÁK and Monika BORKOVIČOVÁ. *Spotrebiteľské právo*. Praha: Wolters Kluwer ČR, a. s. 2021, pp. 145–146, 163, HUČKOVÁ Regina and TREŠČÁKOVÁ Diana. Nové mechanizmy uplatňovania práv spotrebiteľov. In STUDIA IURIDICA Cassoviensia. [online] 2016, 4(1), p. 54. [wieved 21 September 2021] Available from: http://sic.pravo.upjs.sk/files/5_huckova_nove_mechanizmy_uplatnovania.pdf

5 ČUNDERLÍK, Ľubomír. Alternatívne riešenie (nielen) spotrebiteľských sporov súvisiacich s poskytovaním platobných služieb a bankových obchodov po novom. In Zborník z medzinárodnej vedeckej konferencie Bratislavské právnické fórum 2019. Bratislava: VO Praf UK, 2019, pp. 17–18.

6 RABAN, Přemysl. Aplikace záměrů eu v oblasti alternativního řešení spotřebitelských sporů v právním prostředí České republiky a Slovenské republiky v posledních letech. *Studia Iuridica Cassoviensia* [online]. 2017, 5(1), 46–55. [viewed 20 September 2021]. Available from: https://sic.pravo.upjs.sk/files/5_raban_-_aplikace_zameru.pdf

7 SLAŠŤAN, Miroslav and MARTINÁKOVÁ, Ľubica. Alternative disputes resolution for consumer contracts: challenges for EU and its implementation in Slovakia. *COFOLA INTERNATIONAL 2015 Conference on Current Challenges to Resolution of International (Cross-border) Disputes*. p. 270. [viewed 1 October 2021]. Available from: https://www.law.muni.cz/sborniky/cofola-international/cofola2015.pdf

Under Section 3 (1) of the Act on consumer ADR three state authorities are operating in the area of the Slovak Republic: Regulatory Office for Network Industries (URSO), Regulatory Authority for Electronic Communications and Postal Services (RÚ) and Slovak Trade Inspection (SOI), which has the position of the residual entity for disputes not resolved by the two previous authorities. SOI is not entitled to resolve disputes arising from financial services contracts.

The list of ADR subjects contains also other ADR entities - Slovak Banking Association, Slovak Insurance Association, OMBUDSPOT, Združenie na ochranu práv spotrebiteľov and Spoločnosť na ochranu práv spotrebiteľov S.O.S. Poprad. Since July 2021, the Ministry of Economics of the Slovak Republic has listed another consumer association among the ADR entities (Združenie na ochranu práv občana – AVES).[8] Združenie sociálno-právne poradenstvo pre každého, registered since May 2018, ceased to operate as an ADR entity in July 2021 due to Covid-19 pandemic situation.[9]

Provision of the Section 20e of the Act on Consumer Protection[10] enumerates four ADR entities operating in the Czech Republic, namely Financial Arbitrator (FA), Czech Telecommunications Office (ČTÚ), Energy Regulatory Office (ERÚ) and Czech Trade Inspection Authority (CTIA). The last one or other ADR entity authorised by the Ministry of Industry and Trade of the Czech Republic should act as a residual entity for applications which do not fall within the competence of the previous three. But there are also other ADR entities listed such as Czech Bar Association, Association of Czech Consumers and Office of the Ombudsman of the Czech Insurance Association.

The paper focuses on results of decision-making process of ADR entities in the Slovak Republic. Based on the annual reports of ADR entities and obligatory published information, author points out characteristics of ADR proceedings of individual ADR entities. Comparison with the chosen ADR entities operating in the Czech Republic is presented, too. Main methods used in the paper are methods of analysis, deduction, synthesis and comparison. The subject of consumer ADR is handled in books by Jurčová M., Maslák M., Borkovičová V. Consumer Law, in scientific articles from Raban, P., Hučková R. and Treščáková D. (Studia Iuridica Cassoviensia) and Čunderlík Ľ. Information from author's previous publications concerning the topic of consumer alternative dispute resolution (Studia commercialia Bratislavensia, 2020) was also applied.

8 MINISTERSTVO HOSPODÁRSTVA SR. Zoznam subjektov alternatívneho riešenia spotrebiteľských sporov. [online]. 2021 [wieved 2. 10. 2021]. Available from: https://www.mhsr.sk/obchod/ochrana-spotrebitela/alternativne-riesenie-spotrebitelskych-sporov-1/zoznam-subjektov-alternativneho-riesenia-spotrebitelskych-sporov-1

9 MEDIAČNÉ CENTRUM MAGNÓLIA. ARS. Základný prehľad. [online]. 2021 [wieved 2. 10. 2021] Available from: http://mediacne-centrummagnolia.sk/ars/zakladny-prehlad

10 CZECH REPUBLIC Act No. 634/1992 Coll. on Consumer Protection, as amended [zákon č. 634/1992 Sb., o ochrane spotřebitele, ve znění pozdějších předpisů].

1. TERMINATION OF ADR PROCEEDINGS

According to Section 2 (2) of the Act on consumer ADR alternative dispute resolution is the procedure of the ADR entity aimed at an amicable settlement of the dispute between the parties. This chapter analysis results of a decision-making activity of selected Slovak ADR entities in comparison with the Czech ADR subjects.

Under the Section 20 (1) of the Act on consumer ADR alternative dispute resolution in the Slovak Republic may be terminated in the following ways: conclusion an agreement by the parties, issuance of a reasoned opinion, postponement of the application, death or declaration of death of a party to the dispute, who is a natural person, dissolution without legal successor of a party to the dispute, who is a legal person or removal of entitled legal entity from the list.

On the other hand, alternative dispute resolution in the Czech Republic is terminated according to the Section 20u of the Act on Consumer Protection by concluding on agreements of the parties, by the consumers' unilateral declaration of termination of participation notified to the CTIA or an authorised body, by the death, declaration of death, declaration of disappearance or termination of one of the parties to the dispute without a legal successor, by the expiry of the time limit of the 90 days (which may be extended by another 90 days) or by rejection of the proposal.

Application in the Slovak ADR proceedings may be postponed from various reasons according to the Section 19 (1) of the Act on consumer ADR, such as infringement of litis pendens rule (an ADR proceedings has been already initiated) or principle of res iudicata (a court decision or arbitration award has been issued, a mediation agreement has been concluded, an ADR proceedings in the same matter has been terminated), consumer's fail to provide necessary assistance despite a request from the ADR entity, consumer's declaration that his/her participation in ADR proceedings is terminated or if it is not apparent from the facts established during the ADR that the consumer's rights were violated by the trader under the consumer protection rules.

According to the Section 18 of the Act on consumer ADR when the agreement between the parties to the dispute is not reached but the ADR entity, on the basis of the facts it finds during the ADR, reaches a reasoned conclusion that the trader has violated the consumer's rights, terminates the ADR proceedings by issuing a reasoned opinion. It is not legally binding, but as the explanatory memorandum states, it can become an important support for a consumer who intends to pursue his/her rights through the courts. The opinion also contains a conclusion and a statement of reasons, describing the facts, identifying the evidence on which the opinion is based and the ADR entity's approach to assessing the evidence.[11] It should be noted that consumer rights association SOS Poprad terminated in 2018 – 2020 at least 50% of the disputes by issuing a reasoned opinion. This association proposed as possible

11 MAGUROVÁ, Hana a kol. *Základy práva v cestovnom ruchu pre ekonómov*. Bratislava: Wolters Kluwer, 2016, s. 170.

future legislative change the issuance of reasoned opinions with the legal force of arbitral awards. Similarly, one of the three state authorities, Regulatory Office for Network Industries terminated half of the disputes in 2020 by issuing a reasoned opinion.[12] According to the Article 15 (1) of the ADR rules set by the CTIA, ADR entity may issue a non-binding reasoned opinion, if it considers it useful, in the situation when the consumer withdrawn his submission or a party to the dispute die, or is dissolved without legal successor.[13]

Tab. 1: Decision-making process of the Slovak Trade Inspection (SOI)

SOI	2017	2018	2019	2020
received submissions	256	279	282	273
terminated submissions:	192	207	219	183
dismissed	36	41	59	35
postponed	96 (50%)	106 (51%)	116 (53%)	102 (56%)
a) termination of the consumer's participation	45	52	58	53
b)consumer's rights have not been breached	51	54	58	48
agreement	42 (22%)	42 (20%)	28 (13%)	29 (15%)
reasoned opinion	18	16	13	8
withdrawal of the submission	-	2	2	10
in favour of the consumer	45%	47%	38%	36%

Source: VAČOKOVÁ, Lenka. Spotrebiteľ a jaho vplyv na rozhodovaciu činnosť orgánov alternatívneho riešenia spotrebiteľských sporov. Studia commercialia Bratislavensia: vedecký časopis Obchodnej fakulty Ekonomickej univerzity v Bratislave. Bratislava: Ekonomická univerzita v Bratislave, 2020, 13(2), 174-186. 1339-3081. p. 184, and Own analysis of the data based on Annual report of SOI 2017–2020.

As can be observed from the alternative dispute resolution of the SOI (Tab. 1) approximately half of the cases were terminated by postponement (half of them due to the fact that consumers' rights were not breached and the rest because the consumer terminated the participation in the proceedings). The number of agreements concluded by the parties is on a slightly declining trend, as well as the number of reasoned opinions issued. Cases postponed because the consumer's participation was terminated, agreements or other cases where trader satisfied consumer's requests represent the percentage of cases resolved in favour of the consumer. While in 2017 around 45 % of disputes were terminated in favour of the consumer, in 2020 it was only 36 %.

12 ÚRAD PRE REGULÁCIU SIEŤOVÝCH ODVETVÍ. Výročná správa ÚRSO o alternatívnom riešení sporov za rok 2020. [online]. [viewed 28 September 2021]. Available from: https://www.urso.gov.sk/data/att/1f0/245.9ceae8.pdf

13 ČESKÁ OBCHODNÍ INSPEKCE. Information about Alternative dispute resolution (ADR). ADR rules. [online]. [viewed 4 November 2021]. Available from: https://www.coi.cz/en/information-about-adr/

Tab. 2: Decision-making process of the Czech Trade Inspection Authority (CTIA)

CTIA	2017	2018	2019	2020
received submissions	3394	3582	3504	3740
refused	740 (22%)	858 (24%)	908 (26%)	986 (26%)
withdrawn	310	351	351	526
agreement of the parties	1124 (53, 5%)	1109 (51, 8%)	1005 (50, 3%)	1044 (51,7 %)
expiration of 90-days period	976	1033	992	974
extension by further 90 days	95	85	72	34
ongoing procedure in total	244	231	248	210

Source: Own analysis of the data based on Annual reports CTIA 2017–2020.

Compared to the SOI, the Czech Trade Inspection Authority in 2017–2020 terminated more than 50 % of the cases in an amicable way, by an agreement between the consumer and the supplier, about one quarter of the submissions were refused based on legal reasons and around 10 % of submissions were withdrawn by the consumer (Tab. 2). We can conclude, that more than 60% of the submissions were resolved in favour of the consumer. Less than 30 % of the applications ended with the expiry of the 90-day period (without any amicable solution).[14] In the Slovak Republic ADR proceedings should be terminated in the period of 90 days, which may be extended in particularly complicated cases by 30 days, even repeatedly (Section 16 (9) of the Act on consumer ADR).

2. REJECTION/DISSLUTION OF THE APPLICATION

Provision of the Section 13 of the Act on consumer ADR contains both reasons for obligatory and facultative dismissal of the application. Common grounds for mandatory rejection include consumer's failure to complete the proposal within the time limit set despite a request from the ADR entity or when the ADR entity is not authorised to solve the dispute or a type of dispute does not have an authorised legal entity listed or there is a defect of litis pendenza, res iudicata or an application is unfounded etc. Reason for dismissal of the application according to the Section 20q of the Czech Act on Consumer Protection are formulated similarly to the first three grounds for obligatory dismissal. The Slovak ADR entity may also reject the application if, for example, there was no prior communication between the consumer and the trader before the initiating the ADR proceedings or the value of the dispute

14 ČESKÁ OBCHODNÍ INSPEKCE. Annual Reports on CTIA Activities. [online]. 2017–2020 [viewed 30 September 2021]. Available from: https://www.coi.cz/en/about-ctia/annual-reports/annual-reports-on-ctia-activities/

does not exceed 20 Eur, the application is manifestly unreasonable or the consumer submits the application after the expiry of one year from the date of receipt of the trader's negative response to the consumer's request for a remedy or from the expiry of a period of 30 days from the date on which the consumer sent the trader a request for a remedy to which the trader has not responded. Manifestly unreasonable application and the expiration of one year period from the date on which the right was first exercised with the trader are also reason for rejecting a proposal by the CTIA or authorised legal entity.

In our opinion, grounds for obligatory dismissal of the application are very close to reasons for postponing the application [Section 19 (1) (a) and (b)]. The most common reasons for postponing the application are a statement of the consumer that his participation in the ADR proceedings is terminated and the fact that the rights of the consumer were not violated [Section 19 (1) (c) and (e)]. Compared to the Czech legislation, we consider our legislation on the postponement of an application to be unnecessarily complicated. Rejection of the application should be possible during the whole ADR proceedings not only at the beginning of the proceedings.

Tab. 3: Alternative dispute resolution of Regulatory Authority for Electronic Communications and Postal Services (RÚ)

RÚ	2017	2018	2019	2020
number of submissions received/resolved	18/19	7/8	8/10	11/14
dismissed/rejected	15 (13 obligatory, 2 facultative)	1 (obligatory)	-	-
agreement	1	-	-	-
postponed	3 (16%)	6 (86%)	9 (100%)	13 (93%)
termination of the consumer's participation	2	4	4	6
consumer's rights were not infringed	1	2	5	7
reasoned opinion	-	-	-	1

Source: VAČOKOVÁ, Lenka. Spotrebiteľ a jaho vplyv na rozhodovaciu činnosť orgánov alternatívneho riešenia spotrebiteľských sporov. Studia commercialia Bratislavensia: vedecký časopis Obchodnej fakulty Ekonomickej univerzity v Bratislave. Bratislava: Ekonomická univerzita v Bratislave, 2020, 13(2), 174-186. 1339-3081. p. 179, and Own analysis of the data based on ADR Annual report of RÚ 2017–2020.

RÚ received the same number of submissions (18) in 2017 as in 2016. While in 2016, it rejected 8 applications due to the consumer's failure to complete the submission, in 2017, it rejected up to 15 applications, more than half of which due to the same reason.[15] On the basis of the above, we can conclude that, despite the fact that the consumer is considered to be the weaker party in the consumer-supplier relationship, the consumer also has certain obligations. Important aspect of consumer protection should be educating consumers about their rights and obligations.[16] In 2018–2020 the number of cases terminated by postponement has increased considerably (see the Tab. 3). Issuing a reasoned opinion or concluding on agreement of the parties to the dispute was rather exceptional for RÚ.

By comparison to Slovak ADR entities, in years 2017–2020 the Czech Telecommunication Office (ČTÚ) received from 333 to 434 applications. Similar to the RÚ, about one quarter of applications were rejected or the proceedings discontinued, mainly due to the consumer's failure to pay the administrative fee[17], to remedy substantial defects in the application or due to the consumer's withdrawal of the application.[18]

Tab. 4: Alternative dispute resolution of the Slovak Banking Association (SBA)

SBA	2017	2018	2019	2020
Number of cases resolved	176	128	64	66
dismissed	56%	56%	48%	62%
postponed	30%	36%	30%	26%
reasoned opinion	7%	-	-	5%
agreement/voluntary fulfilment of the trader	7%	8%	8%	6%
In favour of consumer	7%	16%	16%	23%

Source: Own analysis of data based on Annual ADR reports of Slovak Banking Association from 2017–2020.

When observing decision-making process of SBA, the professional association of commercial banks and financial institutions, some similarities to other Slovak ADR entities are noticeable (see the Tab. 4). Around half of the submissions were

15 VAČOKOVÁ, Lenka. Spotrebiteľ a jeho vplyv na rozhodovaciu činnosť orgánov alternatívneho riešenia spotrebiteľských sporov. *Studia commercialia Bratislavensia*. Bratislava: Ekonomická univerzita v Bratislave, 2020, 13(2), 179–180. [viewed 28 September 2021]. Available from: https://sekarl.euba.sk/arl-eu/sk/csg/?repo=eurepo&key=64465656444

16 POSPÍŠIL, Michal. Povinnosti spotřebitelů ve vztahu k podnikatelům. In: *Právo v podnikání vybraných členských států Evropské Unie – sborník příspěvků k IX. ročníku mezinárodní vědecké konference.* Praha: Troas, 2017, pp. 201, 203. 978-80-88055-03-7.

17 The administrative fee in opposition proceedings is 100 CZK and in other disputes 200 CZK.

18 ČESKÝ TELEKOMUNIKAČNÍ ÚŘAD. Výroční zprávy. [online]. 2017–2020 [viewed 29 September 2021]. Available from: https://www.ctu.cz/vyrocni-zpravy

dismissed, mostly from the obligatory reasons (for instance the application was brought by an unauthorized person, lack of jurisdiction or consumer's failure to complete the application when requested to do so). About 30% of cases were postponed mainly because the consumer's rights were not infringed. A small percentage of cases (6-8%) was terminated by the agreement of the parties. Nevertheless, in years 2018 - 2020 from 16% to 23 % of the cases were resolved in favour of the consumer (due to the voluntary fulfillment of the trader).

Tab. 5: Alternative dispute resolution of the Financial Arbitrator (FA)

FA	2017	2018	2019	2020
complaints received	1343	1399	1178	1228
decisions in legal force	1007	1660	1944	1315
terminated for withdrawal	598	967	1107	781
agreement approved	1	1	5	1
terminated for the complaint became devoid of purpose	16	18	12	10
amicable settlement of the dispute	615 (60%)	986 (59%)	1124 (58%)	792 (60%)
complaint rejected/dismissed	77	105	250	61
complaint partially / fully upheld	9/17	74/20	121/5	72/6
terminated for failure to provide assistance	195	356	222	200
terminated for inadmissibility	26	43	143	70
terminated for incompetence	63	74	79	112
terminated for other reasons	5	2	-	

Source: Own analysis of data based on Annual reports of the activities of the Financial Arbitrator from 2017–2020.

By comparison, between 2017 and 2020 the Czech Financial Arbitrator terminated about 60% of the complaints by the amicable settlement of the dispute. Overwhelming majority of these cases were terminations for consumers' withdrawal (because financial institutions accepted their claims fully or partially), the rest of these complaints were terminated for lack of purpose and by an approval of the agreement. On the next places were cases terminated for failure to provide assistance by consumer and rejected complaints. In addition, the Financial Arbitrator issued decisions upholding in part or in full the consumer's claim.[19]

19 KANCELÁŘ FINANČNÍHO ARBITRA. Výroční zprávy. [online]. 2018–2021 [viewed 29 September 2021]. Available from: https://finarbitr.cz/cs/informace-pro-verejnost/vyrocni-zpravy.html

CONCLUSION

On the basis of the analysis of the decision-making process of ADR entities operating in the Slovak Republic, we can state the following. As regards ADR authority, namely RÚ, the vast majority of disputes in 2018-2020 ended in postponement. Agreement was truly rare. In 2019 – 2020 around 40 % of cases were resolved by RÚ in favour of the consumer.

SBA dismissed around half of the submissions before the termination of the dispute. On average around 30% of submissions were postponed. Not more than 10% represents agreements. In 2018-2020 SBA terminated around 18 % of the cases in favour of the consumer. Just for the purpose of comparison, in 2017-2020, the Czech Financial arbitrator concluded more than 60% of disputes in favour of the consumer. It should be added that the Financial Arbitrator acts as the state authority and his decisions are legally enforceable.

A similar trend can be found when comparing the decision-making process of the two residual authorities SOI and CTIA. In 2017 – 2020 SOI resolved around 40% of cases in favour of consumer. Although there are certain problems of the ADR before the CTIA such as the lack of an enforceable legal title, its hybrid character (which can be seen in the fact that the aim of the whole process is to reach an agreement by the parties and CTIA is not authorized to decide the case), or mainly written character of the proceedings,[20] in 2017-2020 CTIA terminated more than 60% of the submissions in favour of the consumer.

From our point of view, Slovak ADR entities typically terminate the proceedings by postponement of the applications. Only SOI terminated approximately 20% of the cases by the agreement of the parties. According to the Implementation Report on the European Framework for Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR) *„the ADR/ODR framework is underused and has yet to reach its full potential."*[21] On the other hand, it seems that Czech ADR entities are much more successful in terminating the procedure by amicable settlement/agreement of the parties. Considering the purpose (fast and fair out-of-court resolution) and results of ADR proceedings, Czech consumers might have more confidence in the decision-making process of Czech ADR entities than consumers in the Slovak Republic and this can subsequently also impact their willingness to participate in the process.

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20 PAUKNEROVÁ, Monika and SKALSKÁ, Helena. Enforcement and effectiveness of consumer law in the Czech Republic. *In. Enforcement and effectiveness of consumer law. Ius Comparatum – Global Studies in Comparative Law.* p. 246. Springer, 2018. 978-3-319-78431-1

21 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes [online] 25. 9. 2019 [4 October 2021] Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1569491348132&uri=COM%3A2019%3A425%3AFIN

From the point of view of consumer associations *"the Act on Consumer ADR is too complicated and bureaucratic."* In the context of the implementation of EU directives and the proposal for partial unification of consumer law, we propose to simplify the process of ADR and make it more effective. ADR proceedings should be rejected at any stage of the proceedings. In case of the maintaining the postponement of the application, only the two most common grounds should be retained.

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Some Legal Aspects of Economic Activity of the Catholic Church in Poland

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Abstract:
This paper analyses some legal aspects of economic activity of the Catholic Church in Poland. Legal persons of the Catholic Church are at the same time subject to the canon law (their internal law) and to Polish law. The relationship between the state and the church is regulated in particular in an international agreement between Poland and Holy See of 1993 (concordat) and statues. Economic activity is obviously not primary occupation of church legal persons but is generally allowed. Therefore, in such cases they should be treated as entrepreneurs. Specific types of this activity include religious investments, activities in the field of devotional art, educational activities, charity and care activities or publishing activities. It should be noted that economic activity must not deviate from the general purpose of existence of church legal persons.

Key words: *economic activity of the Catholic Church in Poland, legal persons of the Catholic Church as entrepreneurs, freedom of entrepreneurship*

INTRODUCTION

The economic activity of the Catholic Church in European states is increasingly the subject of scientific interest.[1] It is obvious that such activity is not the main goal of religious associations. However, due to the great organizational structure and considerable wealth, their activities constitute an important element of national economies.

1 See for example GRMELOVÁ Nicole, The Catholic Church as an Entrepreneur in the Czech Republic, In: ŠKRABKA, Jan and Lukáš VACUŠKA, eds. Law in Business of Selected Member States of the European Union. Proceedings of the XII International Scientific Conference, Praha: TROAS, s.r.o., 2020, 384, ISBN: 9788088055105; SOKOL Tomislav, and Frane STANTIC, Legal Status of the Catholic Church as an Economic Entity in the EU and Croatian Law. Zbornik Pravnog Fakulteta u Zagrebu. 2018, 68(1), 31-60. Also, on economic consequences of regulation of church by state, see HYLTON Keith N., Yulia RODINOVA, and Fei DENG, Church and State: An Economic Analysis. American Law and Economics Review. 2011, 13(2), 402–452.

The Constitution of the Republic of Poland guarantees freedom of conscience and religion to everyone.[2] It includes the freedom to profess or accept a religion of one's choice, and to manifest one's religion individually or with others, publicly or privately, by worshiping, praying, participating in rituals, practicing and teaching. Religious freedom also includes having temples and other places of worship according to the needs of believers, and the right of individuals to receive religious assistance wherever they are.

The freedom of economic activity is also guaranteed by the Constitution. It is the basis of the economic system of the Republic of Poland.[3] No one may be discriminated against in political, social or economic life for any reason[4], and restriction of the freedom of economic activity is permitted only by statute and only for the sake of important public interest.[5] Additionally, any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.[6]

1. LEGAL REGULATIONS FOR THE ECONOMIC ACTIVITY OF THE CHURCH

The Act on Entrepreneurs Law states that undertaking, carrying out and terminating business activity is free for everyone with equal rights.[7] In particular, an entrepreneur may be a legal person.[8] It is interesting to note that the very concept of legal persons in Poland originates from ecclesiastical law.[9] Also today, the law stipulates that in matters concerning property churches and other religious associations act through their legal persons.[10] It should be emphasised that church legal persons are subject to two overlapping legal systems: the state law and the canonic law. Additionally, relations between the Republic of Poland and the Catholic Church are defined by an international agreement concluded with the Holy See and by stat-

2 POLAND Constitution of the Republic of Poland of April 2, 1997, Official Journal of the Republic of Poland 1997 no 78 pos. 483 (hereinafter „Constitution"), Article 53(1-2).

3 Constitution, Article 20.

4 Constitution, Article 32(2).

5 Constitution, Article 22.

6 Constitution, Article 31(3).

7 POLAND Act of March 6, 2018 - Entrepreneurs Law, consolidated text: Journal of Laws 2021 item 162, hereinafter „Entrepreneurs Law", Article 2.

8 Article 4(1).

9 PIETRASZEWSKI Mateusz, TYRAKOWSKA Magalena. Status kościelnych osób prawnych jako przedsiębiorców. *Acta Universitatis Wratislaviensis (Przegląd Prawa i Administracji)*. 2011, vol. 84, 249-270, 250.

10 POLAND Act of May 17, 1989 on Guarantees of Freedom of Conscience and Religion, Journal of Law 1989 No.29, item 155, hereinafter „Act on Guarantees", Article 28(1).

utes.[11] The register of churches and religious associations is kept by the competent minister.[12]

The legal status of churches and religious associations and their legal persons in Poland is regulated by the Act of May 17, 1989, on Guarantees of Freedom of Conscience and Religion. It provides, in particular, that clergymen and religious of churches and other religious associations, established in accordance with the internal law of a church or other religious association, enjoy the rights and are subject to obligations equal to other citizens in all areas of state, political, economic, social and cultural life. Under the applicable provisions of the law, they are exempted from duties incompatible with the performance of the function of a clergyman or religious person.[13] The act also pays attention to the issue of taxation of the activities of legal persons of churches and other religious associations.[14] Namely, they are exempt from taxation on revenues from their non-economic activities.[15] In this respect, these persons are not obliged to keep the documentation required by tax regulations.[16] A contrario, therefore, not only has economic activity been sanctioned as such, but has also been subject to general tax obligations. On the other hand, income from economic activity of legal persons of churches and other religious associations and companies whose shareholders are only these persons, are exempt from taxation in the part in which they were allocated in the tax year or in the year following it for cult, educational and upbringing purposes, scientific, cultural, charity and care activities, catechetical points, conservation of monuments and for sacred investments and church investments, the subject of which are catechetical points and charity and care institutions, as well as renovation of these facilities.[17] Legal persons of churches and other religious associations are exempt from taxation and benefits for the municipal fund and municipal fund, from real estate or parts thereof, which are the property of these persons or used by them on the basis of another legal title for non-residential purposes, with the exception of the part used for the performance of business.[18]

Similar regulations are included in the Act on the State's Relationship to the Catholic Church in the Republic of Poland of May 17, 1989.[19] In addition, it provides

11 Constitution, Article 25(4).

12 Act on Guarantees, Article 30.

13 Act on Guarantees, Article 12(1).

14 PIETRZAK Michał, Prawo wyznaniowe, Warszawa: Państwow Wydawnictwo Naukowe, 1993, 298, ISBN: 8301037288, 281; KOREDCZUK Józef, Ulgi i zwolnienia podatkowe na rzecz związków wyznaniowych, In: MEZGLEWSKI Artur, ed., Leksykon prawa wyznaniowego. 100 podstawowych pojęć, Warszawa: C.H. Beck, 2014, 610, ISBN: 9788325555702, 477-480.

15 STANISŁAWSKI Tadeusz, Finansowanie instytucji wyznaniowych ze środków publicznych, Lublin: Wydawnictwo KUL, 2011, 182, ISBN: 8377023598, 58-62. However, this issue may cause interpretation difficulties, even requiring an interpretation of the CJEU. See for example NICOLAIDES Phedon, Not Even the Church Is Absolved from State Aid Rules: The Essence of Economic Activity. European State Aid Law Quarterl. 2017, 4, 527-536.

16 Act on Guarantees, Article 13(2).

17 Act on Guarantees, Article 13(5).

18 Act on Guarantees, Article 13(6).

19 POLAND The Act of May 17, 1989 on the State's Relationship to the Catholic Church in the Republic of Poland, Journal of Laws No. 1989 No.29, item 154, hereinafter „Act on Relationship", Article 55(1-4).

that the acquisition and sale of property and property rights by church legal entities by way of legal transactions as well as inheritance, bequest and prescription is exempt from tax on inheritance and donations as well as stamp duty, if their subject matter are things and rights not intended for business activity.[20] It is also worth mentioning that, in accordance with the Act, funds for charity and care may come, in particular, from income from business activities carried out by Caritas Polska and Caritas of the diocese, directly or in the form of separate establishments.[21]

The concordat between the Holy See and the Republic of Poland[22] distinguishes three basic categories of legal persons. The first is the Catholic Church itself.[23] The second is the territorial and personal ecclesiastical institutions established on the basis of canon law, the establishment of which is notified by the Polish state by the Church.[24] The third is church institutions which acquire legal personality on the basis of Polish law at the request of the church authority.[25] The concordat does not refer directly to the economic activity of church legal entities, but states that, in accordance with the provisions of Polish law, they may acquire, possess, use and dispose of immovable and movable property, as well as acquire and dispose of property rights.[26] Legal persons of the Catholic Church and their bodies are regulated in Chapter 2 of the Act on relationship.[27]

2. CHURCH LEGAL PERSONS AS ENTREPRENEURS

According to the Civil Code, but also Entrepreneurs' Law Act, an entrepreneur is a natural person, legal person and organizational unit which is granted legal capacity, conducting business or professional activity on its own behalf.[28] Taking up, performing and terminating a business activity is free for everyone on equal rights.[29] Economic activity is organized, for profit activity, performed on one's own behalf and on a continuous basis.[30] In Article 6 the Entrepreneurs' Law Act lists types of activity to which is does not apply. Activity of church legal persons is not on the list.

This fact, especially in the context of the previous considerations on the constitutional guarantees of the freedom of economic activity, leads to the conclusion

20 Act on Relationship, Article 55(6).

21 Act on Relationship, Article 40 point 6.

22 Concordat between the Holy See and the Republic of Poland, signed in Warsaw on July 28, 1993, Journal of Laws No. 1998 No.51, item. 318, hereinafter „Concordat".

23 Concordat, Article 4(1).

24 Concordat, Article 4(2).

25 Concordat, Article 4(3).

26 Concordat, Article 23.

27 See footnote 18.

28 POLAND Act of 23 April 1964 - Civil Code, consolidated text: Journal of Laws No. 2020 item 1740, hereinafter „Civil Code", Article 43[1]. See also Entrepreneurs' Law, Article 4.

29 Entrepreneurs Law, Article 2.

30 Entrepreneurs Law, Article 3.

that the right to undertake economic activity is vested in church legal persons in all areas of activity relevant to them, without any object exclusions and limitations.[31]

It is worth noting that the Catholic Church, or more broadly churches and religious associations with a regulated legal status in Poland, are listed among entities of the national economy in accordance with the Regulation of the Council of Ministers of November 30, 2015 on the method and methodology of keeping and updating the national register official entities of the national economy, patterns of applications, surveys and certificates.[32] The Catholic Church received the code 050 in the register, and the remaining churches and religious associations - code 051.[33] The Regulation also regulates in detail the method of determining the type of predominant activity.[34]

Despite the absence of explicitly binding legal restrictions on the conduct of economic activity of church legal entities, it should be borne in mind that it cannot be the main subject of their activity.[35] Pursuant to the Act on the Guarantees, religious communities (called "churches and other religious associations") are established for the purpose of professing and spreading religious faith.[36] A detailed list of activities related to the performance of a religious function is specified in Art. 19(2) and of course it does not include economic activity. The Concordat also stipulates that church institutions should conduct their activities "in accordance with their nature"[37], and the Act on the State's Relationship to the Catholic Church in the Republic of Poland - that they have the right to conduct activities „appropriate to each of them".[38]

Economic activity, however, can be conducted, and the profit obtained from it can be used to support religious and cult purposes.[39] Examples of such activities include renting and leasing real estate, running publishing houses, educational institutions, pharmacies, retreat houses and funeral services. [40] The literature indicates that, unlike in the case of associations and foundations, "profits from the economic

31 SKUBISZ Ryszard, Marcin TRZEBIATOWSKI. Kościelne osoby prawne jako przedsiębiorcy rejestrowi (na przykładzie osób prawnych kościoła katolickiego). Przegląd Prawa Handlowego. 2002, no 3, 8-21, 10.

32 POLAND Regulation of the Council of Ministers of 30 November 2015 on the method and methodology of keeping and updating the national official register of national economy entities, templates of applications, surveys and certificates, Journal of Laws of 2015, No. 2015 item 2009.

33 Par. 7 point 2) letter e and f.

34 Par. 9 section 2 point 1-2.

35 On the blurring of the boundary between non-economic and economic activity of church legal persons see BRZOZOWSKI Wojciech, Działalność kultowa czy działalność gospodarcza?, In: SOBCZYK Paweł, WARCHAŁOWSKI Krzysztof, eds. Finansowanie kościołów i innych związków wyznaniowych, Warszawa: Oficyna Wydawnicza ASPRA-JR, 2013, 477, ISBN: 9788375454178, 57-66.

36 Act on Guarantees, Article 2 pkt 1.

37 Concordat, Article 21(1). See TUNIA Anna, Finansowe aspekty działalności jednostek organizacyjnych związków wyznaniowych w zakresie turystyki, In: SOBCZYK Paweł, WARCHAŁOWSKI Krzysztof, eds. Finansowanie kościołów i innych związków wyznaniowych, Warszawa: Oficyna Wydawnicza ASPRA-JR, 2013, 477, ISBN: 9788375454178, 226.

38 Article 38(1).

39 RAKOCZY Bartosz. Zdolność upadłościowa kościelnych osób prawnych Kościoła Katolickiego. *Przegląd Sądowy*. 2006, vol. 3, 83-92, 90.

40 PIETRASZEWSKI Mateusz, TYRAKOWSKA Magdalena, *op. cit*., 262.

activity of church legal entities are not limited in spending to meet the" basic activity "of a given church or religious association."[41]

CONCLUSION

The Polish Constitution guarantees both the freedom of religion and the functioning of religious communities as well as the freedom to conduct business activity for everyone. Exclusions are possible only in the act and only due to the important social interest.

The relations between the Republic of Poland and the Catholic Church are regulated by a special international agreement (concordat) and statutes. These provisions give the Church the right to independently regulate its internal affairs and create ecclesiastical legal entities that are recognized by the state. These persons are therefore subject to both canon law and state law. The regulations distinguish three types of such legal persons.

Statutory provisions explicitly stipulate that clergy may conduct business activities on an equal footing with other persons. In this respect, the Polish legislator devoted most attention to the issue of taxing the Church. As a rule, except for just economic activity, church legal persons are exempt from tax obligations.

There are no reasons for church legal persons to be denied the status of entrepreneurs within the meaning of Polish law. In particular, the regulations explicitly mention them among entities of the national economy. Moreover, there are no objective limitations to their business activities. It should be added, however, that their economic activity can always only supplement their religious activity. Churches should be primarily concerned with spreading and practicing the faith.

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2. Corporate Law

The Extent of the Duty to Exercise the Office of an Elected Member of a Legal Entity with Necessary Knowledge and Diligence

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Abstract:
Legal entities exercise their will by governing bodies. Discharging the office of an elected member in a legal entity's governing body therefore impacts the legal entity directly. Laws and regulations provide for standards to compare with whether an elected governance body member acted in line with his or her duties or whether he or she can be held liable for unlawful conduct under civil of public laws. Duty of care is one of the fundamental principles that determine the performance of an elected governing body member. It comprises, *inter alia*, duty to perform the role with caution and prudence. Nevertheless, laws and regulations do not provide for a complete overview and the terms need to be further interpreted in line with court decisions and literature.

Key words: *corporation, statutory body, due care, prudence, necessary knowledge, damages*

INTRODUCTION

Legal regime of membership in governing bodies of legal entities provides for general requirements and pre-requisites for both an appointment into and accepting such roles. Those legal requirements nevertheless do not specify detailed specifics relevant for different roles in different types of legal entities. It is therefore important for candidates or nominees into those roles to observe current legislation as well as judicial practice. As explained further in this paper, judicial practice is in particular important in the Czech legal framework as it supplements gaps in general legislation and sets forth interpretation of key legal concepts based on real situations and their implications.

1. DEFINITION OF THE MAIN CONCEPTS

A legal entity is a construct enabling legal existence, including the acquisition of rights and obligations, to artificially created structures.[1,2]

Czech laws recognize legal entities with different legal regimes of incorporation, purpose, and existence.[3] In particular, the incorporation of legal entities for business purposes is subject to restrictions and rules depending on the type of legal entity and the object of its activity.[4] Likewise, the laws specifies conditions for membership in the bodies of such legal entities including requirements for knowledge and experience.[5] The specificity of different types of bodies depends, on the one hand, on their position within a particular legal entity corresponding to its purpose and from specific rights and obligations attributed by Czech law to such bodies.[6]

The widely used term "performance of office" does not have a legislative definition despite its significance in the corporate law framework. Therefore, it needs to be interpreted with the help of literature and case-law of the Supreme Court.

2. GENERAL AND SPECIFIC CONDITIONS FOR MEMBERSHIP IN AN ELECTED BODY OF A LEGAL ENTITY

Full legal capacity is a fundamental prerequisite for membership in an elected body of a legal entity.[7] Section 152(3) CC provides for an exception to this rule conditional on the cumulative fulfilment of the conditions set out therein. [8] For commercial corporations, the requirement of integrity refers to its definition in the Trading Act.[9]

In addition to the basic prerequisites, Czech law also defines special requirements to membership in an elected body of a legal entity. For example, the Act on Banks[10] lays down detailed requirements for banks' internal governance and the

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1 See Section 20(1) of the Act No. 89/2012 Coll., the Civil Code [zákon č. 89/2012 Sb., občanský zákoník], ("CC").

2 Ibid.

3 See Sections 144 and 145 CC on the (permitted or prohibited) purpose of legal entities.

4 For example, industry-specific legislation in regulated sectors such as banking (BA), telecommunications (CZECH REPUBLIC Act No. 127/2005 Coll., on Electronic Communications [zákon č. 127/2005 Sb., o elektronických komunikacích a o změně některých souvisejících zákonů (zákon o elektronických komunikacích)]) or energy (EA).

5 For example, Section 8 BA, Section 58c EA.

6 For example, Section 44 of the CZECH REPUBLIC Act No. 90/2012 Coll., on Companies and Cooperatives (Act on Commercial Corporations) [zákon č. 90/2012 Sb., o obchodních společnostech a družstvech (zákon o obchodních korporacích)], ("ACC").

7 For more information, see section 152(2) CC.

8 For example, Bejček, J., Hajn, P., Pokorná J. et al. *Obchodní právo. Obecná část. Soutěžní právo*. 1st edition. Prague: C. H. Beck, 2014, pp 90–91.

9 For the definition of integrity, see section 6(1) CC and Section 2 of the CZECH REPUBLIC Act No. 455/1991 Coll., on Business Enterprises (Trading Act) [zákon č. 455/1991 Sb., o živnostenském podnikání (živnostenský zákon)]), ("TA").

10 Act No. 21/1992 Coll., on Banks [zákon č. 21/1992 Sb., o bankách], ("BA").

conditions for membership in its governing bodies.[11] Similarly, the Energy Act provides for preconditions to membership in the statutory body of a legal entity conducting business activity in the energy sector. [12,13] This list is non-exhaustive. However, the mere existence of sector-specific requirements indicates that by defining higher standards for certain fields of activity, the legislator accepts that there is no need to determine the same for other types of activity.

Institutes of "necessary knowledge" and "diligence" are based on CC and ACC. They are nevertheless not defined in Czech laws. The fundamental objective is the protection of legitimate interests of persons concerned. Their fair expectations can be based on the concepts of "average man's intellect" and "ordinary care and prudence" introduced into Czech law through Section 4(1) CC. Lavický interprets these concepts as a "*rebuttable presumption attributing to every rightful person the average intellect, as well as the ability to use it with normal care and prudence*".[14]

Interpreting the term "diligence" leads to "fair expectations" of third parties as assumed by CC or ACC, to address the protection of legitimate interests of parties concerned. From the point of view of acting persons, this view is important for determining the extent of proportionality of the conduct and associated risks. From the point of view of the persons concerned, this view is similarly important for determining the level of risk or protective measures.[15]

Further analysis of the term "necessary knowledge" relies on the general term of "knowledge".[16] Prof. Pelikánová and dr. Pelikán conclude that the rather problematic assessment of someone's knowledge requires evidence that the circumstances do not imply the impossibility of ignorance.[17] Lavický also adds that, despite the objective nature of the institute of knowledge, a subjective aspect must also be considered in certain circumstances. For example, it will be important whether the person concerned should have, and could have, known about a specific information or knowledge.[18],[19]

Czech law does not define an "average person". Therefore, its interpretation cannot be determined parametrically and needs to rely on relevant case-law and litera-

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11 For more information on the requirements for membership in the bank's bodies, see Section 8 BA.

12 For more information on the requirement of professional competence, see Section (5) of the CZECH REPUBLIC Act No. 458/2000 Coll., Energy Act [zákon č. 458/2000 Sb., o podmínkách podnikání a o výkonu státní správy v energetických odvětvích a o změně některých zákonů (energetický zákon)], ("EA").

13 For more information, see section 58c(3) EA.

14 Lavický, P. a kol. *Občanský zákoník I. Obecná část (Sections 1-654). Commentary*. 1st edition, Prague: C. H. Beck, 2014, p. 66.

15 For example Moravec, T., Andreisová, L. *Obchodní společnosti pohledem Corporate Governance*. Prague: Grada Publishing, a.s., 2021. p 167.

16 For more information, see Section 4(2) CC.

17 Švestka, J., Dvořák, J., Fiala, J. *et al*. *Občanský zákoník. Commentary. Volume I (Sections 1-645, general part)*. Prague: Wolters Kluwer, 2014, version available in ASPI system as at 1.1.2020. Commentary to the provisions of Section 4(2) CC.

18 Lavický, P. a kol. *Občanský zákoník I. Obecná část (Sections 1-654). Commentary*. 1st edition, Prague: C. H. Beck, 2014, p. 69.

19 For example Novotná Krtoušová, L. *Odpovědnost členů statutárních orgánů právnických osob.* Prague: Wolters Kluwer Czech Republic, 2019, p. 8.

ture. Using a teleological interpretation, it can be considered that the actions of an 'average person' can be regarded as a conduct which other natural persons would have done in a given (or comparable) situation and circumstances. Lavický refers to actions of an "average person" as " *how a person who is not an expert in the given field would act under the circumstances*".[20] It also states that the assumption of the average intellect is not significant, since what is important above all is "*how a person of the average intellect behaves externally and what others can expect from him*".[21]

It is necessary to correctly assess the overall context in which specific actions are performed and thus the performance of the function take place to assess liability risks because different context and conditions may lead to different consequences. For example, Covid-19 pandemic demonstrated the need for a contextual view. Established procedures and rules of business management of a business corporation, despite applied to the extent possible under new circumstances, had to be often replaced with crisis management.

3. ANALYSIS OF THE TERMS "NECESSARY KNOWLEDGE" AND "DILIGENCE"

The concepts of 'necessary knowledge' and 'diligence' are based on Section 159(1) CC, which does not provide for a detailed definition of those terms. The second sentence of that provision merely states that those who are incapable of care of a proper manager act negligently. Both terms are a part of a broader concept of 'due care' as a fundamental legal principle determining the status of a member of an elected body of a legal entity.[22]

Section 51(1) ACC builds on those terms and stipulates that those individuals act with necessary knowledge and diligence who could reasonably have assumed in good faith that they act in an informed way and in the interest of their corporation. In this context, Lasák concludes that the obligation to act carefully and with the necessary knowledge can be expressed as "*an obligation to act in an informed or justifiable interest of a legal entity*".[23] Then, he concludes by referring to case-law of the Supreme Court[24] based on which members of statutory bodies are not expected to have all expertise but it is sufficient to have "*basic knowledge enabling the impending damage to be identified*". [25],[26]

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20 Lavický, P. *et al*. *Občanský zákoník I. General Part (Sections 1-654). Commentary*. 1st edition, Prague: C. H. Beck, 2014, p. 68.

21 Ibid p. 67.

22 Ibid p. 817.

23 Ibid p. 818.

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25 Lavický, P. *et al. Občanský zákoník I. Obecná část (Sections 1-654). Commentary*. 1st edition, Prague: C. H. Beck, 2014, p. 818.

26 Decision of the Supreme Court of the Czech Republic of 28 February 2019, No. 27 Cdo 2724/2017 [online]. In Salvia Kraken [accessed on 2021-10-02]. Available from: http://kraken.slv.cz/27Cdo2724/2017

Some authors suggest that co-opted directors have a lower standard of acting in good faith and in the interest of corporations[27]. This is concerning also from proper knowledge and care perspective because the evidence presented[28] suggests that co-opted directors are less engaged, propose less agenda items and exhibit lower attendance to board meetings.

It follows from the case-law analysed that the requirement of expertise or scope of knowledge is incorrect to interpret as absolute. It would therefore be a mistake to assume that a person in the capacity of a member of an elected body of a legal entity is equipped with all available information and knowledge and is only in such conditions competent to perform his duties.

An important judgment of the Supreme Court dealing with the extent of the necessary knowledge of a member of the statutory body was delivered on 17 December 2019 under the file number **27 Cdo 1310/2018** and expressly addressed scope of the obligation to act with the necessary knowledge as follows: "*[...] an executive* (in Czech "jednatel") *of a limited liability company is obliged to act [...] with the necessary knowledge, and therefore also in an informed way [...] and [...] carefully consider the possible advantages and disadvantages (recognizable risks) of existing business decision options. However, the fulfilment of this obligation must be assessed from an ex ante point of view, i.e. through the prism of the facts which the executives may or should have been able to know and should have been known at the time when the business decisions in question were taken or when the relevant care was taken (using the available information resources). An executive's decision cannot be assessed based on facts which have taken place or have only come to light ex post, i.e., after the business decision under review has been made [...]*".

The implication of this court ruling is that reasons and context of actions and decisions made by governing bodies need to be captured well enough so that it is possible to assess in the future whether a decision made in the past had complied with legal requirements and standards at that time. Retrospective view should not apply.

In its decision of 30 October 2008 under the file number **29 Cdo 2531/2008**, the Supreme Court concluded that "*[...] if the executive* [in Czech "jednatel"] *lacks the necessary expertise for the performance of his duties, he is obliged to ensure assessment by a person who has the necessary knowledge*". The requirement of the necessary knowledge is thus specified by the court as the ability to identify the limits to deal with a particular matter and the ability to select suitable persons to carry out an activity for which the member of the elected authority is not equipped. This nevertheless does not mean that such delegation relieves members of an elected body from liability according to Section 51(1) ACC. It only means that nobody is expected to know everything, and they need to ensure any missing knowledge from those who possess it.

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27 Rashid Zaman, Nader Atawnah, Ghasan A. Baghdadi, Jia Liu, *Fiduciary duty or loyalty? Evidence from co-opted boards and corporate misconduct.* Journal of Corporate Finance,Volume 70,2021.

28 Ibid.

Section 52(1) ACC helps to set standards for necessary knowledge and diligence when it stipulates that the assessment of whether a member of an elected authority has acted with due managerial care requires considering the diligence "*which would have been carried out in a similar situation by another reasonably careful person if he had been in the position of a similar body of a commercial corporation"*. Although this provision does not specify the content of the concepts of diligence or necessary knowledge, it does, to some extent, relativise the otherwise absolutist view of the "perfection" of a member of an elected body and adjusts the required level of diligence and knowledge to a general level of a person in a comparable position. Doc. Štenglová and doc. Havel state that it will always depend "*on the foreseeable standard but modified by the circumstances of the case*".[29]

It would probably be a mistake to assume that Section 52(1) ACC weakens performance standards required from a member of an elected body. On the contrary, the concept of "status as a member of a similar body of a commercial corporation"[30] increases the requirements for the performance of the function where the nature of the activity of the legal entity or the specificity of its position imply specific demands or expectations, either in terms of readiness for the function or in terms of how it is carried out. In this respect, the authors of the above literature agree and conclude that it is always necessary to assess specific circumstances in a particular case.

This is also how the Supreme Court ruled in its judgment of 23 November 2005 under the file number **5 Tdo 1143/2005** when assessing the liability of members of the statutory body for damage caused by the implementation of a "*stock incentive program*". In this case, members of the Board of Directors of a joint stock company sold (in some cases) the company's shares to selected employees at a price that, thanks to the subsequent sale of these shares, proved to be significantly below the market price. In this case, the Supreme Court concluded, *inter alia*, that the price level of the shares is a factual issue and is in the power and ability of the members of the Board of Directors to obtain such information. The key principle here clearly states that obtaining information on the current share market price is in the power of the members of the statutory body concerned and it is therefore fair to expect a person in the capacity of a member of that body to obtain the information. The implication of this court ruling therefore is that where facts are concerned, it is difficult to avoid responsibility and liability.

Even though it follows from the case-law cited above that there is no need for a member of the statutory body to be equipped with all the necessary knowledge, the same case-law implies an obligation (i) to use for the benefit of the corporation the knowledge it has and (ii) to ensure the performance of professional tasks by

29 Štenglová, I., Havel, B., Cileček, F., Kuhn, P., *Zákon o obchodních korporacích. Commentary*. 3rd edition. Prague: C.H. Beck, 2020, p. 178.

30 For more information on whether a member of an elected body has acted with due managerial care, see section 52(2) ACC.

other persons with the necessary knowledge. In this context, it is a part of the duties of a member of the statutory body to verify with diligence that (i) such another person is equipped with the necessary knowledge and (ii) performs tasks properly with knowledge (expertise).

CONCLUSION

Czech law does not define the concepts of "necessary knowledge" or "diligence". However, actions of members in elected governing bodies of legal entities are compared to standards that represent those concepts.

It derives from relevant court rulings that while members of elected governing bodies of legal entities are not expected to have all knowledge, they are expected to ensure that lack of such knowledge is compensated by information or knowledge possessed by other parties. To that effect, members of such governing bodies need to recognize the boundaries of their own knowledge.

Moreover, case law also recognizes individual circumstances of individuals involved such as whether they had, could have, or should have had a particular information needed to decide or take an action.

It follows from the literature and case-law that the conclusion as to whether a member of an elected authority has acted with the necessary knowledge and diligence at a given time depends on an evaluation of a number of aspects, including, for example, (i) the extent of the information obtained by the acting member of the elected authority, (ii) the efforts made to assess the correctness of the procedure and (iii) the standard of the procedure in the circumstances.

Clarity of legislation

There is no single place where a person considering membership in an elected body of a legal entity finds all aspects of the conduct to be governed. Some sectors, such as banking (BA), provide for a more detailed guidance. Such legislation can therefore be seen as inspiration and guidance for setting internal processes and standards of commercial corporations and the personal attitude of members of elected bodies of legal entities to the performance of their duties. The context of an individual legal entity then determines the extent to which it incorporates such guidance into its internal processes. On the other hand, however, the legislator did not embody similar rules in general legal rules (such as CC and ACC). It can therefore be considered that even his expectations about standards of "necessary knowledge" and "diligence" are lower. This is in line with the case-law analyzed, which does not assume such 'higher' standards as a rule.

Assessment of compliance depending on circumstances

The importance of considering circumstances of situations is reflected consistently in the analyzed literature and case-law. It is repeatedly argued that the insti-

tutes under discussion are not an accurate "mathematical formula". This conclusion relates to the previous conclusion and confirms that various aspects of the issues under discussion always need to be analyzed and interpreted in a specific context.

Possibility of increasing legal certainty

Both current and future members of the elected bodies of legal entities have many opportunities to increase their legal certainty (i) when deciding to accept the position of a member of such an institution, or (ii) in a specific act by virtue of such a function.

The conclusions presented by literature and case-law are not surprising and do not go out of the standard concept of property diligence and liability in private law relations. A member of an elected body of a legal entity may be considered to have the possibility to increase legal certainty individually or in cooperation with an advisor (lawyer).

However, a specific category is the state of mind (not only with reference to the provisions of Section 4 CC) and thus the ability of a member of the elected body to estimate the limits of own expertise and ability to act in a certain way. However, this issue is a general problem of accepting any function or negotiating the type of work.

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Several Practical Comments on the Designate Shares with Appointing Rights

Několik praktických poznámek k akciím s vysílacím právem

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Abstract:
The paper deals with some partial aspects of a relatively new institute of the law of shares, namely shares with the right to appoint and dismiss members of the bodies of a joint stock company, i.e. designate shares with appointing rights. This type of shares was only introduced by the amendment to the Business Corporations Act by Act No. 33/2020 Coll., effective from 01.01.2021, it is reasonable to assume that practical experience with this type of shares is minimal. However, it should be stressed that the practical use of this institute will not be without problems, and one may even question to what extent the legal regulation of designate shares with appointing rights will be commonly used in practice. The aim of this article is to define some limits of the possibility of using this type of shares in relation to their use, form, merger and division of shares and change of the internal structure of the company and to point out some application problems related to this type of shares from a practical point of view. The author of the paper then recommends, in view of the number of open questions, even those not mentioned in this paper, to read in more detail the designate shares with appointing rights in the articles of association.

Abstrakt:
Příspěvek se zabývá některými dílčími aspekty relativně nového institutu akciového práva, a to s akciemi s právem jmenovat a odvolávat členy v zákoně uvedených orgánů akciové společnosti, tedy akcie s vysílacím právem. Tento druh akcií zavedla teprve novela zákona o obchodních korporacích daná zákonem č. 33/2020

Sb., který je účinný od 01.01. 2021, lze se důvodně domnívat, že praktické zkušenosti s tímto druhem akcií jsou minimální. Je však třeba zdůraznit, že praktické využití tohoto institutu nebude prosto problémů, a lze i položit otázku, nakolik bude právní úprava vysílacích akcií v praxi běžně využitelná. Vymezit některé limity možnosti využití tohoto druhu akcií ve vztahu k jejich použití, formě, spojení a rozdělení akcií a změně vnitřní struktury společnosti a upozornit na některé aplikační problémy s tímto druhem akcií spojené z praktického pohledu je právě cílem tohoto příspěvku. Autor příspěvku pak s ohledem na množství otevřených otázek, a to i neuvedených v tomto příspěvku, doporučuje si podrobněji upravit vysílací akcie stanovami.

Key words: *securities, shares, shares with appointing rights, company bodies, board of directors*

Klíčová slova: *cenné papíry, akcie, akcie s vysílacím právem, orgány akciové společnosti, představenstvo*

ÚVOD

Tématem tohoto příspěvku jsou některé otevřené otázky spojené s problematikou akcií s právem jmenovat a odvolávat člena představenstva, dozorčí rady či správní rady akciové společnosti[1]. Tyto akcie bývají v literatuře označovány[2] jako akcie s vysílacím právem, a pro účely tohoto příspěvku budou dále pro stručnost nazývány jako vysílací akcie. Vysílací akcie zakotvila do našeho právního řádu novela zákona o zákona č. 90/2012 Sb., o obchodních společnostech a družstvech (zákon o obchodních korporacích) [dále též „ZOK" nebo „zákon o obchodních korporacích"] daná zákonem č. 33/2020 Sb. (dále též „Novela"), která nabyla účinnosti dnem 01.01. 2021. S touto právní úpravou jsou už nyní spojeny určité teoretické otázky[3], nicméně ambicí tohoto příspěvku není výzkum těchto teoretických otázek. Tento příspěvek totiž není zaměřen záměrně výlučně teoreticky, ale naopak je jeho cílem prozkoumat některé praktické důsledky existence tohoto druhu akcií v akciové společnosti, na které je při aplikaci právní úpravy vysílacích akcií pamatovat.

Důvodem pro akcentaci praktického rozměru problematiky vysílacích akcií vychází z mé zkušenosti, kdy úprava akcií stanovami byla širokou veřejností – především zakladateli a akcionáři – víceméně pojímána mechanicky, tedy především s ohledem na to, jak velký podíl získá zakladatel či akcionář na akciové společnosti.

1 V anglicky psané literatuře se této problematice věnuje např. DAVIES, Paul: Introduction to Compnay Law. Oxford: Oxford 'University Press, 2010, s. 120 a násl.; DE LUCA, Nicola*: European Company Law.* Text, Cases and Materials. Cambridge: Cambridge University Press, 2017, s. 264 a násl. a TRICKER, Bob: *Corporate Governance: Principles, Policies, and Practices*. Oxford: Oxford University Press, 2019.

2 např. JANOŠEK, Vladimír in JANOŠEK, Vladimír: *Akcie s vysílacím právem*, 17.10. 2018, 1-4, Dostupné z https://www.epravo.cz/top/clanky/akcie-s-vysilacim-pravem-108238.html

3 MALLIN, Chris; MELIS, Andrea. Shareholder rights, shareholder voting, and corporate performance. Journal of Management & Governance, 2012, 16(2), s. 171-176.

Méně pozornosti už bylo věnováno obsahu práv a povinností spojených s daným druhem akcií[4,5]. Tento přístup bylo možno za existence obchodního zákoníku pochopit, protože rozhodujícím druhem akcií byly v praxi kmenové akcie, jejichž katalog práv a povinností byl poměrně podrobně vymezen v právní úpravě a výčet možných druhů akcií byl taxativní. Zásadní změna nastala s přijetím zákona o obchodních korporacích, kdy se prostor pro vydávání zvláštních druhů akcií zcela zásadně rozšířil, neboť výčet druhů akcií se stal demonstrativním, což bylo patrno z ustanovení § 276 odst. 1 a 3 ZOK ve znění do 31.12. 2020. Tato demonstrativnost výčtu zvláštních druhů akcií na jednu stranu zcela zásadně rozšířila možnosti takové tvorby zvláštních druhů akcií a jejich přizpůsobení rozmanitým požadavkům praxe, na druhou stranu však vyžadovala značné povědomí o fungování akciové společnosti jako celku a poměrně velké teoretické znalosti i v oblasti právní úpravy akcií jako takových. Tento požadavek na vysokou odbornost tvůrců stanov a jejich hlubokou znalost fungování akciové společnosti vzrůstá s novou právní úpravou druhů akcií daných Novelou, která opustila příkladmý výčet druhů akcií a koncepci základního druhu akcie bez zvláštních práv – kmenové akcie, neboť nově vymezení druhů akcií naráží nejen na limity veřejného pořádku, statusu či dobrých mravů, ale i na nezbytnost dlouhodobé funkčnosti základní úpravy vnitřního uspořádání akciové společnosti ve stanovách akciové společnosti.

Tento příspěvek využívá základní vědecké metody práce, především však metody analýzy a komparace. S ohledem na krátkost účinnosti uvedené právní úpravy nemá autor příspěvku konkrétní poznatky o aplikaci této právní úpravy, a tak je nepochybné, že právní praxe přinese ještě další praktické i teoretické otázky, které budou vyžadovat rozsáhlejší odbornou diskuzi, či dokonce pozdější případnou změnu této právní úpravy.

1. PŘEDMĚT PŘÍSPĚVKU

Jak již bylo zmíněno úvodem, tématem, a tedy předmětem tohoto příspěvku, jsou vysílací akcie. Je zajímavé, že zatímco zák. č. 33/2020 Sb. vypustil z ustanovení § 276 odst. 3 ZOK alespoň příkladmý výčet zvláštních druhů akcií, tento samý zákon inkorporoval do naší právní úpravy nový zvláštní druh akcie, a to akcii s právem jmenovat zákonem určené členy volených orgánů akciové společnosti (představenstva, dozorčí rady, popř. správní rady) akcionářem. I když důvodová zpráva[6] k Novele právní důvody zakotvení vysílacích akcií do našeho právního řádu neuvádí, lze z textu Novely dovodit, že tím základním důvodem byly teoretické diskuze, zda právní úprava

4 IRAPORT, Portsit; DAVIDSON, Wallace. Regulation, shareholder rights and corporate governance: an empirical note. *Applied Economic Letters*, 2009, 16(10), s. 977-982.

5 ATTENBOROUGH, Daniel, The Vacuous Concept of Shareholder Voting Rights. *European Business Organization Law Review*, 2013, 14(2), s. 147–173.

6 Důvodová zpráva k Novele dostupná na https://www.psp.cz/sqw/text/tiskt.sqw?O=8&CT=207&CT1=0, s. 215-216, dále 219-222 a 226-227.

před Novelou připouštěla vydání tohoto druhu akcie a případně za jakých podmínek. Tento stav byl způsoben nejasnými limity tvorby zvláštních druhů akcií, a tedy mírou dispozitivnosti právní úpravy. Z autorů připouštějících vydávání vysílacích akcií lze jmenovat např. Vybírala[7] a Lasáka s Filipem[8], na opačném pólu stála Štenglová[9], která možnost vydání zvláštního druhu akcií s vysílacím právem nepřipouštěla. Ideovou inspirací byla nepochybně německá a rakouská[10] právní úprava, byť to výslovně důvodová zpráva k Novele neuvádí. Důvodová zpráva[11] výslovně zdůrazňuje, že nepřebírá základní principy německé a rakouské právní úpravy, neboť na rozdíl od německé a rakouské právní úpravy je právo jmenovat členy dozorčí rady obligační povahy, a nevytváří tak zvláštní druh akcií. Toto tvrzení důvodové zprávy není zcela přesné, neboť vysílací právo může být spojeno s akcií i nemusí, jak uvádí s odkazem na německý a rakouský akciový zákon odborná literatura[12]. Pozitivní na právní úpravě vysílacích akcií obsažené v Novele je skutečnost, že zákon odstranil nejistotu, zda tento zvláštní druh akcií, resp. zvláštní právo do tohoto druhu akcií vtělené může vůbec existovat, či nikoliv, a to ve prospěch připuštění této možnosti. Nicméně z poměrně podrobné právní úpravy vysílací akcie stanovené pro její použití u dozorčí rady (na kterou se právní úprava vysílacích akcií pro představenstvo a správní radu zásadně odkazuje) lze odvodit závěr, že sám zákonodárce si byl vědom určitých potenciálních aplikačních nejasností spojených s tímto druhem akcie.

2. KDY KONSTITUOVAT VYSÍLACÍ AKCIE?

V úvodu tohoto příspěvku jsem uvedl, že právním důvodem pro zakotvení vysílacích akcií do našeho právního řádu bylo odstranění nejednoznačnosti dosavadní právní úpravy ve smyslu, zda naše právní úprava vysílací akcie připouští, či nikoliv, a v případě, že ano, za jakých podmínek. Při této příležitosti si ale rovněž můžeme položit otázku, jaký je věcný důvod pro zakotvení druhu akcií spojených s vysílacím právem. Dle mého názoru je to zcela nepochybné: hlavním důvodem této právní úpravy je možnost akcionáře s vysílacími akciemi uplatnit svůj vliv na řízení akciové společnosti za situace, kdy jinak tento akcionář nedisponuje či nemusí disponovat takovou většinou hlasů, která by mu umožnila obsadit jím navrženým kandidátem či kandidáty příslušnou funkci člena voleného orgánu akciové společnosti.

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7 VYBÍRAL, Petr in LASÁK, Jan, POKORNÁ, Jarmila, ČÁP, Zdeněk, DOLEŽIL, Tomáš a kol.: *Zákon o obchodních korporacích. Komentář.* I. díl. Praha: Wolters Kluwer, a.s. 2014, pozn.č. 26, s. 1402.

8 FILIP, Václav, LASÁK, Jan in LASÁK, Jan, POKORNÁ, Jarmila, ČÁP, Zdeněk, DOLEŽIL, Tomáš a kol.: *Zákon o obchodních korporacích. Komentář.* II. díl. Praha: Wolters Kluwer, a.s. 2014, pozn. č. 31, s. 2115.

9 ŠTENGLOVÁ, Ivana in ŠTENGLOVÁ, Ivana, HAVEL, Bohumil, CILEČEK, Filip, KUHN, Petr, ŠUK, Petr: *Zákon o obchodních korporacích. Komentář.* 2. vydání. Praha: C.H. Beck. 2013. s. 781.

10 Konkrétně se jedná o ustanovení § 101 odst. 2 německého akciového zákona a ustanovení § 88 odst. 4 rakouského akciového zákona.

11 Důvodová zpráva k Novele dostupná na https://www.psp.cz/sqw/text/tiskt.sqw?O=8&CT=207&CT1=0, s. 221.

12 DĚDIČ, Jan, LASÁK, Jan, LÁLA, Daniel in LASÁK, Jan, DĚDIČ, Jan, POKORNÁ, Jarmila, ČÁP, Zdeněk, a kol.: *Zákon o obchodních korporacích. Komentář.* 2. vydání. Praha: Wolters Kluwer ČR. 2021, s. 1992 s odkazem na 101 odst. 2 německého akciového zákona a § 88 odst. 1 rakouského akciového zákona.

První praktickou otázkou, kterou si musíme položit, je otázka, v kterém okamžiku se jeví jako vhodné využití vysílacích akcií. Zde musíme jednoduše uvést, že Novela logicky takový okamžik neupravuje. V zásadě přicházejí do úvahy dva reálné okamžiky využití vysílacích akcií, a to při založení akciové společnosti (byť první členové volených orgánů jsou určeni výslovně stanovami dohodou zakladatelů ve smyslu ustanovení § 250 odst. 2 písm. f) ZOK a využití vysílacího práva je až následné po vzniku společnosti), a při zásadní změně akcionářské struktury společnosti spojené se změnou stanov společnosti reflektující novou akcionářskou strukturu (a to při změně druhu dosavadních akcií na vysílací akcie nebo při zvýšení základního kapitálu za využití vysílacích akcií).

Obecně bez ohledu na okamžik, kdy lze institut vysílacích akcií využít, jsem přesvědčen o tom, že vysílací akcie nebudou běžně využívány v „běžně" založené akciové společnosti, ale u těch akciových společností, kde akcionáři mohou mít různé motivace k účasti na akciové společnosti dané zájmem např. na zvýšeném podílu na zisku, na likvidačním zůstatku či vyšší váze hlasů spojených s akciemi. Současně je evidentní, že vysílací akcie lze reálně využít především u akciové společnosti s relativně malým počtem akcionářů, nebo u akciové společnosti, kde je sice větší počet akcionářů, ale kde je možno výhodu vysílacích akcií spočívající v právu (možnosti) jmenovat a odvolat jednoho nebo více členů představenstva, dozorčí rady či správní rady u jednoho nebo více akcionářů vykompenzovat např. vydáním akcií s vyšším podílem na zisku, nebo větším počtem hlasů u jiných akcionářů. Jinými slovy: vysílací akcie přicházejí především do úvahy, kdy jsou zvláštní práva akcionářů spojených s vydávanými akciemi těmto akcionářům modelována „na tělo". Na druhou stranu mám za to, že je třeba při úvahách o zakotvení vysílacích akcií do stanov vnímat možnost následné změny osoby akcionáře, neboť v podstatě k ní kdykoliv může dojít, a to jak nedobrovolné (např. v důsledku smrti akcionáře), tak dobrovolné (např. v důsledku změny vlastnictví k těmto akciím).

Prvním okamžikem, kdy je možno logicky uvažovat o využití vysílacích akcií je okamžik založení akciové společnosti. Zde je zpravidla ten výjimečný okamžik, kdy v rámci konstituování zakladatelského právního jednání, tj, stanov, jsou zakladatelé schopní se domluvit na vydání tohoto druhu akcií. Již na začátku je však třeba domyslet, zda pro danou akcionářskou strukturu se jedná o vhodný nástroj právní regulace, neboť změnit vysílací akcie na jiný druh akcií je možno dle ustanovení § 417 odst. 2 ZOK pouze se souhlasem tříčtvrtinové většiny hlasů akcionářů přítomných na valné hromadě vlastnících tyto akcie. Tento souhlas akcionářů s vysílacími akciemi ke změně tohoto druhu akcií pak bude zpravidla obtížné získat, a proto je třeba zvážit, zda je existence vysílací akcie vhodná i v případě, že se změní struktura akcionářů. Je však třeba opětně zopakovat, že vysílací právo na jmenování člena voleného orgánu nelze uplatnit již při určení těchto členů orgánů ve stanovách ve smyslu ustanovení § 250 odst. 2 písm. f) ZOK. Jen pro doplnění uvádím, že samozřejmě tato úvaha logicky není spojena pouze s vysílací akcií, ale i s jakýmkoliv jiným druhem akcií se zvláštními právy.

Druhým okamžikem, kdy dle mého názoru reálně přichází do úvahy konstituování vysílacích akcií je okamžik, kdy se zásadně mění akcionářská struktura společnosti, a to cestou změny druhu dosavadních akcií na vysílací akcie nebo při zvýšení základního kapitálu za využití vysílacích akcií).

To může být zapříčiněno podle mého názoru především dvěma okolnostmi. První okolností je stav, kdy dosavadní akcionáři pozbývají majoritní podíl v akciové společnosti, který těmto akcionářům umožňuje vahou svých dosavadních hlasů prosadit jimi navržené osoby do volených orgánů akciové společnosti, a ti by chtěli si určitou část svého vlivu ponechat. Druhá je naopak okolnost, kdy nový akcionář požaduje získat vliv na složení volených orgánů akciové společnosti, ačkoli by jím získaný podíl na hlasovacích právech uplatňování takového vlivu na řízení společnosti neumožňoval, a ten by podíl na řízení společnosti požadoval.

V obou případech, kdy reálně může dojít ke vzniku potřeby konstituovat vysílací akcie, je třeba uvážit rozsah vysílacího práva – zda se vztahuje v případě dualistické vnitřní struktury společnosti na oba volené orgány (představenstvo a dozorčí radu) nebo jen jeden z nich, a který z nich. Zde je obtížné cokoliv z hlediska praxe doporučit, bude záležet opravdu na konkrétní struktuře akcionářů ve společnosti.

3. FORMA VYSÍLACÍCH AKCIÍ

Ve shodě s literaturou[13] mám za to, že vysílací akcie může znít jak na jméno, tak na majitele, neboť zákon formu vysílací akcie neomezuje. Volba formy vysílací akcie je podmíněna především důvodem, proč a komu má akciová společnost vydávat vysílací akcie. Je-li záměrem petrifikace akcionářské struktury společnosti, a tím částečně i volených orgánů akciové společnosti, jeví se jako vhodnější vydávání vysílacích akcií na jméno v kombinaci s jejich omezenou převoditelností. V opačném případě se může samozřejmě stát, že vysílací akcie získá a svůj vliv na řízení společnosti prosadí ten akcionář, s jehož podílem na vlivu na obsazení volených orgánů společnosti nejsou stávající akcionáři příznivě srozuměni. I v tomto případě však platí ve smyslu ustanovení § 270 odst. 2 ZOK, že převoditelnost těchto vysílacích akcií může být omezena, nikoliv však vyloučena, byť i v tomto případě lze vést diskuzi o tom, kam sahají limity omezené převoditelnosti či nepřevoditelnosti akcií. To však není předmětem tohoto příspěvku.

13 DĚDIČ, Jan, LASÁK, Jan, LÁLA, Daniel in LASÁK, Jan, DĚDIČ, Jan, POKORNÁ, Jarmila, ČÁP, Zdeněk, a kol.: *Zákon o obchodních korporacích. Komentář.* 2. vydání. Praha: Wolters Kluwer ČR. 2021, s. 1994.

4. ROZDĚLENÍ A SPOJENÍ VYSÍLACÍCH AKCIÍ

Vysílací akcie mohou mít obdobně jako jiné druhy akcií jmenovitou hodnotu [viz ustanovení § 259 odst. 1, písm. c) ZOK], i být bez jmenovité hodnoty [viz ustanovení § 247 odst. 2 a § 257 ZOK ohledně kusových akcií]. Z praktického pohledu drtivě převažují akcie se jmenovitou hodnotou, a proto se dále budu zabývat pouze akciemi se jmenovitou hodnotou. Jak uvádí ustanovení § 261 ZOK, akcie téže společnosti mohou mít různou jmenovitou hodnotu, což samozřejmě platí i pro vysílací akcie. Zákon umožňuje spojení i rozdělení akcií, a nevylučuje ani změnu jmenovité hodnoty akcií v souvislosti se zvýšením nebo snížením základního kapitálu akciové společnosti.

O rozdělení akcií obecně hovoříme v tom smyslu, že se akcie s určitou jmenovitou hodnotou rozdělí na více akcií s nižší jmenovitou hodnotou, přičemž součet jmenovitých hodnot akcií vzniklých v důsledku rozdělení odpovídá jmenovité hodnotě akcie, která byla rozdělena, a výsledkem celého rozdělení akcií tedy není snížení základního kapitálu.

Domnívám se, že nelze ze zákona dovodit, že by nebylo možno vysílací akcie bez dalšího rozdělit, nicméně odpověď na tuto otázku bude diferencovaná podle rozsahu vysílacího práva. S rozdělením vysílacích akcií je totiž z praktického pohledu spojena základní otázka, jak se promítne vysílací právo do vysílacích akcií vzniklých rozdělením původní rozdělované akcie.

Dle mého názoru problém nenastává v případě, kdy v důsledku rozdělení akcie na více akcií připadá na každou jednu akcii vzniklou v důsledku rozdělení právo jmenovat a odvolávat alespoň jednoho člena voleného orgánu. Existuje-li tedy např. vysílací akcie o jmenovité hodnotě 2 000 Kč, se kterou je spojeno právo jmenovat dva členy představenstva, a tato vysílací akcie je rozdělena na dvě vysílací akcie s jmenovitou hodnotou 1 000 Kč, je logické, že s každou z těchto dvou vysílacích akcií, každá s jmenovitou hodnotou 1 000 Kč, bude spojeno právo jmenovat a odvolávat jednoho člena představenstva, neboť vycházím z toho, že je třeba zachovat poměr počtu členů volených orgánů před rozdělením vysílací akcie vůči počtu členů představenstva spojených s oběma vysílacími akciemi vzniklými v důsledku rozdělení. Tento závěr opírám o ustanovení § 244 ZOK, dle něhož akciová společnost zachází za stejných podmínek se všemi akcionáři stejně a z ustanovení § 212 zákona č. 89/2012 Sb., občanský zákoník (dále též „ObčZ“ nebo „občanský zákoník“), dle kterého nesmí korporace svého člena bezdůvodně zvýhodňovat nebo znevýhodňovat. Ke stejnému obecnému závěru o zákazu vzniku újmy na právech akcionářů po rozštěpení akcií v režimu zák. č. 513/1991 Sb., obchodního zákoníku (dále též „ObchZ“ nebo „obchodní zákoník“) dospěla již dříve shodně Štenglová[14]. Jiný, pro vlastníka rozdělené vysílací akcie výhodnější poměr vysílacího práva po rozdělení vysílací akcie, by tak ve skutečnosti znamenal, že by akcionář vysílacích

14 ŠTENGLOVÁ, Ivana in DĚDIČ, Jan, ŠTENGLOVÁ, Ivana, KŘÍŽ, Radim, ČECH, Petr *Akciové společnosti*. 7. přepracované vydání. Praha: C.H. Beck. 2012, s. 430.

akcií vzniklých v důsledku rozdělení, byl oproti ostatním akcionářům nedůvodně zvýhodněn.

Shrnu-li výše uvedené, mám osobně za to, že varianta spočívající v tom, že by se s rozdělením vysílací akcie poměrně rozdělil počet členů volených orgánů tímto akcionářem jmenovaných připadajících na jednotlivé rozdělené akcie, by připadala do úvahy pouze v případě, že by v důsledku rozdělení akcie připadalo na každou rozdělenou akcii právo jmenovat a odvolávat alespoň jednoho člena voleného orgánu společnosti.

Jiná situace ale nastává, kdy nelze vysílací právo přiřadit bezproblémově k vysílacím akciím vzniklým v důsledku rozdělení. Co to tedy konkrétně znamená? Máme-li např. vysílací akcii o jmenovité hodnotě 2 000 Kč, se kterou je spojeno právo jmenovat jednoho člena představenstva, která je rozdělena rozhodnutím valné hromady na dvě akcie, každá o jmenovité hodnotě 1 000 Kč, je možno si položit otázku, v jakém rozsahu má akcionář vlastnící vysílací akcie právo jmenovat člena představenstva. Znamená rozdělení vysílací akcie na dvě akcie o stejné jmenovité hodnotě stav, kdy s jednou tisícikorunovou akcií je spojeno právo jmenovat pouze poměrnou část členů představenstva vůči vysílací akcii s původní jmenovitou hodnotou 2 000 Kč, tedy „polovinu" člena představenstva, a je tedy potřeba k výkonu vysílacího práva buď mít obě tisícikorunové akcie, nebo se dohodnout s druhým vlastníkem vlastnícím tisícikorunovou akcii na výkonu vysílacího práva a společně tak rozhodnout o jmenování stanovami určeného jednoho člena voleného orgánu? Nebo tato skutečnost znamená, že se nemohou vysílací akcii rozdělit? Či že s každou vysílací akcií musí být spojena možnost jmenovat minimálně jednoho člena představenstva, a že u společnosti musí být upraven počet členů orgánů akciové společnosti tak, aby počet členů volených akcionářem s vysílacími akciemi nebyl větší než počet členů orgánů volených valnou hromadou. Poslední možností je, že rozdělení vysílací akcie současně znamená změnu práv spojených s vysílací akcií.

V případě, že by vysílací právo bylo spojeno s vysílací akcií tak, že by v důsledku rozdělení vysílací akcie akcionář měl získat poměrné vysílací právo jmenovat členy volených orgánů v rozsahu počtu členů volených orgánů společnosti nedělených na celé číslo, mám za to, že by takové rozdělení akcií bylo v rozporu se zákonem, neboť ve všech třech případech (u představenstva dle ustanovení § 438a odst. 1 ZOK, u dozorčí rady dle ustanovení § 448b odst. 1 ZOK a u správní rady dle ustanovení § 458 ZOK) se hovoří o tom, že jde o právo jmenovat jednoho nebo více členů, a nikoliv o právo jmenovat „podíly" na členech těchto orgánů. To by znamenalo, že v tomto případě vysílací akcii rozdělit bez dalšího nelze. Nicméně celá situace je řešitelná v případě, kdy by bylo rozhodnutí valné hromady o rozdělení vysílací akcie spojeno s rozhodnutím o změně druhu akcií nebo změně práv spojených s druhem akcií. O jaké případy by se mohlo jednat? Mám za to, že by se mohlo jednat v zásadě o dva případy. V prvním případě by se jedna vysílací akcie o jmenovité hodnotě 2 000 Kč, se kterou by bylo spojeno právo jmenovat a odvolávat jednoho člena

voleného orgánu, rozdělila na jednu vysílací akcii o jmenovité hodnotě 1 000 Kč a jednu akcii bez vysílacího práva o jmenovité hodnotě 1 000 Kč. Došlo by tedy v případě druhé akcie bez vysílacího práva ke změně druhu akcií. Ve druhém případě by se jedna vysílací akcie o jmenovité hodnotě 2 000 Kč, se kterou by bylo spojeno právo jmenovat a odvolávat tři členy voleného orgánu, rozdělila na jednu vysílací akcii o jmenovité hodnotě 1 000 Kč, se kterou by bylo spojeno právo jmenovat dva členy voleného orgánu společnosti a jednu vysílací akcii o jmenovité hodnotě 1 000 Kč, se kterou by bylo spojeno právo jmenovat jednoho člena voleného orgánu společnosti. Oproti předchozímu případu by se nejednalo o změnu druhu akcií, ale o změnu práv spojených s těmito vysílacími akciemi.

Dědič, Lasák a Lála15 však dospěli k jinému řešení, když uvádějí, že v případě rozhodování valné hromady o rozdělení akcií je vysílací právo spojeno se všemi akciemi vzniklými rozdělení, čímž se i zvýší ve společnosti počat vysílacích práv. Současně tito autoři upozorňují, že pokud by zvýšením počtu vysílacích práv měl být překročen limit stanovený v ustanovení § 448b odst. 1 ZOK, byla by změna stanov v rozporu se zákonem k jejich změně by nedošlo.

K rozdělení akcií, které není doprovázeno změnou druhu akcií nebo změnou práv spojených s akcií, je třeba dle ustanovení § 416 odst. 1 ZOK souhlasu dvoutřetinové většiny hlasů přítomných akcionářů, neurčí-li stanovy většinu vyšší, neboť se jedná o změnu stanov. Bylo-li by rozdělení vysílacích akcií spojeno s výše uvedenou změnou druhu akcií nebo práv spojených s vysílacími akciemi, bude se vyžadovat kromě souhlasu dvoutřetinové většiny hlasů přítomných akcionářů nezbytných ke změně stanov společnosti (neboť změna druhu akcií a změna práv spojených s určitým druhem akcií je současně změnou stanov) také souhlas tříčtvrtinové většiny hlasů akcionářů majících tyto rozdělované vysílací akcie dle ustanovení § 417 odst. 2 ZOK[16].

Kromě rozdělení akcií, umožňuje zákon spojení více akcií. Jedná se o případ, kdy se spojí více akcií do jedné nebo několika akcií, takže jmenovitá hodnota akcie (akcií) vzniklé spojením více akcií je dána součtem jmenovitých hodnot spojovaných akcií. V případě spojení více vysílacích akcií do jedné vysílací akcie mám za to, že prakticky problém nenastane, neboť počet členů volených orgánů společnosti spojených s vysílací akcií vzniklou spojením více vysílacích akcií je dán součtem počtu členů volených orgánů spojených se všemi vysílacími akciemi, které jsou spojeny. Vydala-li společnost dvě vysílací akcie, každá o jmenovité hodnotě 1 000 Kč, s tím, že s každou vysílací akcií je spojeno právo jmenovat a odvolávat jednoho člena představenstva, a dojde ke spojení těchto dvou vysílacích akcií do akcie se jmenovitou hodnotou 2 000 Kč, lze dovodit, že s touto jednou vysílací akcií bude spojeno právo

15 DĚDIČ, Jan, LASÁK, Jan, LÁLA, Daniel in LASÁK, Jan, DĚDIČ, Jan, POKORNÁ, Jarmila, ČÁP, Zdeněk, a kol.: *Zákon o obchodních korporacích. Komentář*. 2. vydání. Praha: Wolters Kluwer ČR. 2021, s. 2011.

16 Shodně též ŠUK, Petr in ŠTENGLOVÁ, Ivana, HAVEL, Bohumil, CILEČEK, Filip, KUHN, Petr, ŠUK, P.: *Zákon o obchodních korporacích. Komentář*. 3. vydání. Praha: C.H. Beck. 2020. s. 849.

jmenovat a odvolávat dva členy představenstva. Mám za to, že v případě spojení např. dvou vysílacích akcií, každá s jedním vysílacím právem, nemůže být spojeno s vysílací akcií vzniklou spojením dvou vysílacích akcií pouze jedno vysílací právo, neboť by se tím v podstatě změnil obsah uvedeného vysílacího práva, neboť by vlastně v důsledku spojení vysílacích akcií mohl vysílací akcionář využít pouze jednoho vysílacího práva namísto dvou vysílacích práv, a jeho vliv na jmenování a odvolání členů volených orgánů by poklesl.

Co se týká daného rozhodnutí o spojení akcií, bude kromě změny stanov upravující jmenovitou hodnotu a počet akcií schválené dle ustanovení § 416 odst. 1 ZOK dvoutřetinovou většinou hlasů přítomných akcionářů také třeba dle ustanovení § 417 odst. 4 ZOK souhlasu všech dotčených akcionářů, tj. souhlasu všech akcionářů, jejichž akcie se mají spojit[17].

V případě spojení akcií s vysílacím právem zastávají Dědič, Lasák a Lála[18] ten názor, že v důsledku rozhodnutí valné hromady o spojení akcií s vysílacím právem se spojí vysílací práva do jedné akcie a celkový počet vysílacích práv se nezmění.

5. ZMĚNA SYSTÉMU VNITŘNÍ STRUKTURY SPOLEČNOSTI

Poslední otázkou přednesenou k diskuzi v tomto příspěvku je otázka, jaký má dopad na vysílací akcie změna systému vnitřní struktury společnosti ve smyslu ustanovení § 396 ZOK. Jedná se o situaci, kdy akciová společnost vydala vysílací akcie spojené s právem jmenovat členy do orgánů dualistického systému společnosti a následně se tento systém vnitřní struktury společnosti změní na systém dualistický a opačně.

V případě, kdy se dualistický systém vnitřní struktury společnosti mění za systém monistický, jde o to, zda např. akcionář s vysílací akcií opravňující jej jmenovat jednoho člena představenstva se automaticky stává akcionářem oprávněným jmenovat člena správní rady, či nikoliv, či zda jeho jmenovací právo zánikem představenstva, či dozorčí rady zaniká. Mám za to, že když je s vysílací akcií spojeno právo jmenovat člena představenstva, či dozorčí rady, toto právo změnou dualistického systému vnitřní struktury společnosti na monistický nezaniká, a transformuje se do práva jmenovat člena správní rady. Důvodem je skutečnost, že změnou tohoto práva z práva jmenovat člena (členy) představenstva či dozorčí rady na právo jmenovat člena (členy) správní rady se sice mění, ale neoslabuje právo akcionáře s vysílacími akciemi ovlivňovat výkon podnikatelské a ostatní činnosti společnosti. Jedná se dle mého názoru o rozšíření práva akcionáře. Dalším argumentem je účel právní úpravy existence vysílacích akcií, kterým je umožnění výkonu vlivu na obsazování členů

17 Shodně též ŠUK, Petr in ŠTENGLOVÁ, Ivana, HAVEL, Bohumil, CILEČEK, Filip, KUHN, Petr, ŠUK, Petr: *Zákon o obchodních korporacích. Komentář*. 3. vydání. Praha: C.H. Beck. 2020. s. 851.

18 DĚDIČ, Jan, LASÁK, Jan, LÁLA, Daniel in LASÁK, Jan, DĚDIČ, Jan, POKORNÁ, Jarmila, ČÁP, Zdeněk, a kol.: *Zákon o obchodních korporacích. Komentář*. 2. vydání. Praha: Wolters Kluwer ČR. 2021, s. 2011.

určených volených orgánů společnosti, který se transformací tohoto práva z práva jmenovat členy představenstva a dozorčí rady na právo jmenovat členy správní rady nemění v tom směru, že by došlo k oslabení tohoto práva akcionáře. Dle mého názoru s ohledem na charakter správní rady současně jako orgánu statutárního a kontrolního[19] není rozhodné, zda existují ve společnosti akcionáři, jejich vysílací právo se týká pouze práva jmenovat člena (či členy) představenstva, nebo pouze práva jmenovat člena (či členy) dozorčí rady, popř. práva jmenovat jak člena (či členy) představenstva, tak člena (členy) dozorčí rady. Ve všech těchto případech získávají akcionáři s těmito vysílacími akciemi právo jmenovat člena (či členy) správní rady. Mám však současně za to, že uvedený závěr není bezrozporný, neboť členové představenstva a členové dozorčí rady se naopak nestávají automaticky členy správní rady, ale musejí být do funkce člena správní rady zvoleni. J Je možno také dospět k závěru, že změnou vnitřní struktury společnosti z monistického na dualistický vysílací právo zaniká. Osobně se k tomuto závěru nepřikláním. Jako důvod uvádím již zmíněný účel právní úpravy. Tento závěr by mohl navíc vést k situaci, kdy změnou stanov provedenou dvoutřetinovou většinou hlasů přítomných akcionářů spočívající ve změně vnitřního systému společnosti z dualistického na monistický by bylo zrušeno uvedené vysílací právo. Lze oproti tomu namítnout, že by se v tomto případě na hlasování o změně vnitřního systému použila právní úprava pro změnu druhů akcií. To by ovšem znamenalo, že by se o změně vnitřní struktury volených orgánů společnosti mohlo obecně hlasovat za použití dvou různých většin – dvoutřetinové většiny hlasů přítomných akcionářů jako při „standardní" změně stanov, pokud by společnost nevydala vysílací akcie, a většiny potřebné pro změnu druhu akcií, pokud by vysílací právo v důsledku změny vnitřní struktury zaniklo. To považuji za problematické. Na druhou stranu by mohl např. akcionář s vysílací akcií, se kterou by bylo spojeno právo na jmenování jednoho člena představenstva zablokovat při svém nesouhlasu změnu systému vnitřní struktury společnosti z dualistického na monistický, ač by touto změnou nebyl fakticky vůbec dotčen. Případný argument, že akcionář s vysílací akcií může zablokovat jakékoliv usnesení valné hromady, kde se hlasuje podle druhů akcií, považuji za nepřiléhavý, neboť o změně vnitřní struktury volených orgánů společnosti se nehlasuje v principu podle druhů akcií, ale postupem používaným pro změnu stanov.

S ohledem na skutečnost, že změna systému vnitřní struktury společnosti musí být provedena cestou změny stanov, je třeba k přijetí tohoto rozhodnutí dvoutřetinovou většinu hlasů přítomných akcionářů dle ustanovení § 416 odst. 1 ZOK. Otázkou zůstává, zda je třeba k přijetí rozhodnutí o změně systému dualistické vnitřní struktury na systém monistický souhlas v návaznosti na vysílací akcie souhlas tří čtvrtin hlasů přítomných akcionářů majících tyto akcie z důvodu, že se jedná o změnu práv spojených s tímto druhem akcií ve smyslu ustanovení § 417 odst. 2 ZOK. Jsem osobně přesvědčen o tom, že nikoliv, protože z hlediska věcného se prá-

19 Viz ŠTENGLOVÁ Ivana, in ŠTENGLOVÁ, Ivana, HAVEL, Bohumil, CILEČEK, Filip, KUHN, Petr, ŠUK, Petr: *Zákon o obchodních korporacích. Komentář*. 3. vydání. Praha: C.H. Beck. 2020. s. 967.

va akcionáře s vysílacími akciemi mění spíše jen formálně, a navíc dochází pouze k určitému rozšíření jejich práv. Mám za to, že účelem úpravy potřeby tříčtvrtinové většiny hlasů potřebné pro přijetí změny práv spojených s určitým druhem akcií je eliminovat možnost proti vůli rozhodující části akcionářů vlastnících tyto akcie zhoršení postavení těchto akcionářů změnou práv spojených s určitým druhem akcií, což však není tento případ. Z tohoto důvodu jsem přesvědčen o tom, že není třeba k tomuto rozhodnutí souhlas tříčtvrtinové většiny hlasů přítomných akcionářů.

V případě, kdy se monistický systém vnitřní struktury společnosti mění za systém dualistický, jde o to, zda např. akcionář s vysílací akcií opravňující jej jmenovat a odvolávat jednoho člena správní rady se automaticky stává akcionářem oprávněným a odvolávat jmenovat člena představenstva a dozorčí rady, či nikoliv, či zda jeho jmenovací právo zánikem správní rady zaniká, nebo dokonce zda členu správní rady vznikne právo jmenovat pouze buď člena představenstva, nebo člena dozorčí rady. Osobně mám opět za to, že právo jmenovat a odvolávat člena správní rady se transformuje na právo jmenovat současně člena představenstva a dozorčí rady. Argumentuji i v tomto případě účelem právní úpravy, kterým je umožnit uplatňování vlivu na složení určených volených orgánů společnosti. Současně si dovoluji zdůraznit, že pokud by vysílací akcionář získal pouze právo jmenovat a odvolávat buď pouze členy představenstva, nebo pouze členy dozorčí rady, jednalo by se o změnu v obsahu vysílacích práv, a muselo by být přijato postupem pro změnu práv spojených s druhem akcií. Je nepochybné, že k přijetí rozhodnutí o změně stanov spočívající ve změně systému vnitřní struktury společnosti z monistického na dualistický je třeba souhlasu dvoutřetinové většiny hlasů přítomných akcionářů dle ustanovení § 416 odst. 1 ZOK. Je však třeba rovněž souhlasu tříčtvrtinové většiny hlasů akcionářů majících vysílací akcie ke změně těchto práv spojených s tímto druhem akcií? Mám za to, že v případě, kdy za vysílací akcii spojenou s právem jmenovat člena správní rady získá akcionář akcii spojenou s právem jmenovat člena nebo členy představenstva a současně dozorčí rady, není třeba souhlasu tříčtvrtinové většiny hlasů akcionářů majících vysílací akcie, neboť akcionáři se jeho právo jmenovat jednoho či více členů správní rady transformací na právo jmenovat člena nebo členy představenstva a dozorčí rady nemění, neboť akcionář získá právo jmenovat jak statutární, tak kontrolní orgán. Jiná situace by dle mého názoru nastala, pokud by akcionář s vysílací akcií, se kterou by bylo spojeno právo jmenovat člena správní rady, měl získat vysílací akcii s právem jmenovat pouze buď člena představenstva, nebo člena dozorčí rady. V tom případě by se právní postavení akcionáře s vysílací akcií změnilo, neboť by získal akcii s právem jmenovat buď pouze člena statutárního, nebo kontrolního orgánu.

Je třeba zdůraznit, že ohledně změny vnitřní struktury společnosti při současné existenci vysílacího práva musí být samozřejmě zachována pravidla pro zachování povinné participace zaměstnanců v dozorčí radě ve smyslu ustanovení § 448a ZOK.

ZÁVĚR

Závěrem je možno konstatovat, že akcie s vysílacím právem je zajímavým druhem akcií, který umožňuje doplnit stávající paletu druhů akcií o možnost spojit s touto akcií právo jmenovat volené členy orgánů akciové společnosti. Nicméně z příspěvku vyplývá, že je třeba při právní úpravě stanov připouštějících tento druh akcií zamyslet se nad praktickými aspekty použití tohoto druhu akcií. Je třeba upozornit na to, že výše uvedené problémy nejsou jedinými, které se s existencí právní úpravy vysílacích akcií pojí, ale existuje celá řada dalších otevřených otázek spojených s tímto druhem akcií. Lze doufat, že i judikatura zaujme k některým aspektům tohoto druhu akcií svoje stanovisko, a odstraní tak určité tyto i další pochybnosti spojené s tímto druhem akcií.

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Online Formation of Companies in Selected Jurisdictions of the European Union: Issues and Challenges

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Abstract:
The Digitalisation Directive of 20 June 2019 has foreseen the obligation of Member States of the European Union to ensure that the registration of companies is carried out fully online. This publication examines, which obligations have been undertaken by the Member States in the field of online company formation, and whether these obligations have already been fulfilled in selected jurisdictions: Germany, Poland, Lithuania, and the Netherlands. The research focuses on Lithuanian experience, while other jurisdictions are selected due to their successes in creating market conditions and implementing EU law. For these purposes, comparative, systemic and historic methods have been used. The paper also elaborates on the existing recommendations and studies in the field. The research has shown that there have been considerable divergencies in legal regulation of online registration of companies in different EU Member States, and there is still room for unification.

Key words: *online formation, company, directive*

INTRODUCTION

This paper deals with one aspect of digitalisation in European company law and governance that is online registration of companies pursuant to the Directive 2019/1151 of 20 June 2019 (Digitalisation Directive)[1], and is aimed at finding out

1 Directive (EU) 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law [online]. In EUR-Lex. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019L1151.

whether this requirement is implemented in four jurisdictions: Germany, the Netherlands, Poland, and Lithuania. The reason to analyse the laws of the mentioned jurisdictions comes from the fact that these countries belong to the tradition of civil law, have concentrated ownership in the capital structure, are historically and geographically close, and have demonstrated successes in creating market conditions and harmonizing national law with the requirements of EU law. For these purposes, the adoption of the Digitalisation Directive and relevant expert reports are studied, as well as academic articles, electronic and other sources. Historic, systemic, and comparative methods are used.[2]

1. REGULATION OF ONLINE FORMATION OF COMPANIES AT THE EU LEVEL

Digitalization has become a changemaker for many industries, including financial industry and corporate law.[3] The coming of digital technologies has forced lots of companies to adapt the way they conduct business to new reality.[4] These processes require substantial investigation which is still lacking.[5] As far as corporate law and governance are concerned, it is visible that digitalization will further promote European integration[6] and has already resulted in the adoption of the Digitalisation Directive.

The Digitalisation Directive mandates that the online formation of companies, that is their establishing in line with national laws, including the drawing up of the company's constitution and other steps to enter into the register, has to be ensured by the Member States of the European Union.[7] This obligation covers legal entities indicated in Annex IIA of the Digitalisation Directive that is companies traditionally viewed as private companies. The implementation obligations include recognition of identification means for the purposes of online procedures, designation of an authority or person or body to deal with the mentioned online procedures, payment and information requirements, including availability of templates, rules on disqualification of directors, disclosure of information and access to the disclosed

2 This paper has been written within the Project "Digitalisation of Company Law: Harmonisation Challenges and Opportunities in Selected Jurisdictions (DigiCol)" (No 01.2.2-LMT-K-718-03-0067).

3 SPINDLER, Gerald. Fintech, digitalization, and the law applicable to proprietary effects of transactions in securities (tokens): a European perspective. *Uniform Law Review* [online]. 2019, 24(4), 724 [viewed 18 September 2021]. Available from: doi:10.1093/ulr/unz038.

4 SKJØLSVIK, Tale, and Karl Joachim BREUNIG. Virtual law firms: an exploration of the media coverage of an emerging archetype. *International Journal of Law and Information Technology* [online]. 2017, 26(1), 64. ISSN 1464-3693 [viewed 18 September 2021]. Available from: doi:10.1093/ijlit/eax023.

5 Ibid.

6 MÖSLEIN, Florian. Back to the Digital Future? On the EU Company Law Package's Approach to Digitalization. *European Company Law* [online]. 2019, 16(1), 4 [viewed 17 September 2021]. Available from: https://kluwerlawonline.com/journalarticle/European+Company+Law/16.1/EUCL2019001.

7 Digitalisation Directive, Art. 1(5).

information.[8] The general deadline for the transposition of the Digitalisation Directive was 1 August 2021.[9] As far as the requirements regarding the disqualification of directors and verification of the origin and integrity of documents filed online are concerned, the transposition deadline is 1 August 2023.[10]

Before the Digitalisation Directive was adopted there were public consultations and academic publications where thoughts were expressed about the need for the introduction of fully online company law procedures.[11] The first Commission proposal was launched in 2018.[12] In the Impact Assessment report, which accompanied the main Proposal, the Commission emphasized the fact of variable degrees of digitalization in the application of corporate laws in different Member States.[13] At that moment fully online procedures were already in place in some European jurisdictions, while in others the use of online procedures for the purposes of corporate law and governance was almost non-existent.

2. REGULATION OF ONLINE REGISTRATION OF COMPANIES IN SELECTED JURISDICTIONS

By the time the Digitalisation Directive was adopted in some EU countries a decent level of digitalisation in company law procedures had already been achieved.

In 2016, when the ICLEG report was issued, as a part of the report the answers received from some European jurisdictions were published.[14] On all four jurisdictions mentioned in this paper responses were requested and received.[15]

Later, in the 2017 report, written by Optimity Advisors and Tipik Legal for the European Commission, the laws of 14 Member States of the European Union were analysed regarding the use of digital tools in different company law operations.[16]

8 Ibid, Art. 1(4)(5).

9 Ibid, Art. 2(1).

10 Ibid, Art. 2(2).

11 See, e.g.: The ICLEG Report on digitalisation in company law [online]. March 2016. Available from: https://ec.europa.eu/info/sites/default/files/icleg-report-on-digitalisation-24-march-2016_en_1.pdf, 17; BIERMEYER, Thomas, and Marcus MEYER. European Commission Proposal on Corporate Mobility and Digitalization: Between Enabling (Cross-Border Corporate) Freedom and Fighting the 'Bad Guy'. European Company Law [online]. 2018, 15(4), 110 [viewed 17 September 2021]. Available from: http://www.kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\EUCL\EUCL2018017.pdf.

12 Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law [online]. In EUR-Lex. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A0239%3AFIN.

13 Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law and Proposal for a Directive of the European Parliament and of the Council amending Directive 2017/1132 as regards cross-border conversions, mergers and divisions [online]. SWD (2018) 141 final. In EUR-Lex. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52018SC0141. 13-14.

14 The ICLEG Report on digitalisation in company law [online], 52–84.

15 Ibid, 52.

16 Assessments of the impacts of using digital tools in the context of cross-border company operations [online]. Final report. Written by Optimity Advisors and Tipik Legal. December – 2017. Available from: https://ec.europa.eu/info/sites/default/files/impact_of_use_of_digital_tools_final_report.pdf, 10.

Experts admitted the divergence of rules in various Member States of the European Union: some MSs showed higher level in the introduction of digital technologies in corporate law and governance, while others were behind.[17] Although the study served as a basis for the Commission's proposal it should be nevertheless noted that it was once characterized as a "sophisticated opinion survey, rather a comparative law analysis".[18] For unidentified reasons in the latter report Lithuania was omitted.

This part of the paper studies the progress in the use of digital technologies in four jurisdictions, including Germany, the Netherlands, Poland, and Lithuania.

2.1 Formation of companies in Germany

At present it is necessary to have recourse to a notary for company formation: notaries verify the documents and in practice send electronic communications to courts charged with the function to maintain the Commercial Register.[19] However, on 10 June 2021 the German Parliament adopted the Act on the Implementation of the Digitalisation Directive of the European Union (DiRUG).[20] The DiRUG will start applying on 1 August 2022 – Germany opted for the one-year extension period,[21] with some provisions to apply on 1 August 2023.

The DiRUG does not go beyond the Directive's requirements and will introduce mechanisms for online registration only for GmbHs formed using cash contributions. During the online registration notaries will be able to verify qualified electronic signatures using audio-visual communication system, which will be operated by the Federal Chamber of Notaries and still has to be made available. For notaries who will not be able to ensure the use of such system physical presence of parties during notarization will be required. Considering that the involvement of a notary has provided guarantees to the interested parties and prevented illegal fraudulent practices, it was a certain relief for Germany that the final text of the Digitalisation Directive allowed to involve notaries as intermediaries.[22]

2.2 Formation of companies in the Netherlands

Similarly to the German system, it has been necessary to use an intermediary, i.e. a notary, who would notarise the articles of association before the entry in the register.

17 Ibid, 17.

18 OMLOR, Sebastian. Digitalization and EU company law: innovation and tradition in tandem. European Company Law [online]. 2019, 16(1), 6. Available from: https://kluwerlawonline.com/journalarticle/European+Company+Law/16.1/EUCL2019002.

19 GERMANY. Handelsgesetzbuch [online]. 10 May 1900. Available from: http://www.gesetze-im-internet.de/hgb/BJNR002190897.html, §8 Abs. 1.

20 GERMANY. Gesetz zur Umsetzung der Digitalisierungsrichtlinie (DiRUG). Law of 5 July 2021. Bundesgesetzblatt [online]. 13 August 2021, 2021 Part I(52) [viewed 3 October 2021]. Available from: https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/Bgbl_DiRUG.pdf;jsessionid=1B00278E2E1B327DC96E52E02D845CD1.1_cid297?__blob=publicationFile&v=2.

21 Digitalisation Directive, Art. 2(3).

22 SCHMIDT, Jessica. Editorial: Coming Soon: 'Company Law Package Part 2 – Implementation'. European Company Law [online]. 2019, 16(6), 174 [viewed 22 September 2021]. Available from: https://kluwerlawonline.com/journalarticle/European+Company+Law/16.6/EUCL2019025.

One of the reasons to use a notary has been the absence of standardized constituent documents – templates.[23] The KvK website[24] does not offer end-to-end company registration, but one can access forms that should be handed over physically.[25]

On 15 June 2021 the Minister for Legal Protection submitted a bill for the implementation of the Digitalisation Directive for public consultation (expired on 12 July 2021).[26] The intention of the drafters is to implement the whole Directive (including the provisions that should be implemented by 1 August 2023) before 1 August 2022: the Netherlands opted for an extension period similarly to Germany.[27] Only *BVs* formed using cash contributions will be covered.[28] Online formation of companies will work using a data processing system operated by the KNB (Royal Notary Association). This system has to establish picture and sound connection, use of electronic signature, online payment, and identification of parties using identification means, including a digital identifier at the highest security level pursuant to the eIDAS regulation.[29] Also, it will be the role of the KNB to design the said system and to suggest a model statute for the purposes of online registration.

2.3 Formation of companies in Poland

In contrast to company registration in Germany and the Netherlands, online registration of companies in Poland has been available since 2012.[30] According to the Polish Code of Commercial Companies, limited liability companies (*sp. z o.o.;* the Digitalisation Directive requires that online formation exists in these companies*)* can be formed online using a qualified electronic signature and an established company template.[31] Similar provisions are provided for general partnerships (*spółka jawna*)[32] and for limited partnerships (*spółka komandytowa*[33]). The template used for registration purposes can be changed afterwards, and the share capital has to be paid in cash.

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23 The ICLEG Report on digitalisation in company law [online], 73.

24 Inschrijven besloten vennootschap of naamloze vennootschap. KVK [online]. [viewed 24 September 2021]. Available from: https://www.kvk.nl/inschrijven-en-wijzigen/inschrijven-onderneming-bv-of-nv-bestaand/.

25 Assessments of the impacts of using digital tools in the context of cross-border company operations [online], 32.

26 Overheid.nl | Consultatie Voorontwerp online oprichting besloten vennootschappen. [viewed 3 October 2021]. Available from: https://www.internetconsultatie.nl/onlineoprichtingbeslotenvennootschappen.

27 Beantwoording IAK vragen. Voorontwerp online oprichting besloten vennootschappen [online]. [viewed 3 October 2021]. Available from: https://www.internetconsultatie.nl/onlineoprichtingbeslotenvennootschappen/document/7066.

28 Voorontwerp digitalisering in het vennootschapsrecht. Voorontwerp online oprichting besloten vennootschappen [online]. [viewed 3 October 2021]. Available from: https://www.internetconsultatie.nl/onlineoprichtingbeslotenvennootschappen/document/7064.

29 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [online]. In EUR-Lex. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.257.01.0073.01.ENG.

30 The ICLEG Report on digitalisation in company law [online], 75.

31 POLAND. Kodeks spółek handlowych. Ustawa of 15 September 2000. Dz. U. 2000 [online]. 94(1037) [viewed 23 September 2021]. Available from: http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20000941037/U/D20001037Lj.pdf, Art. 157-1.

32 Ibid, Art. 23-1.

33 Ibid, Art. 106-1.

2.4 Formation of companies in Lithuania

According to the ICLEG report, Lithuania has allowed establishing some companies online, namely an individual enterprise (*individuali įmonė*), a private limited liability company (*uždaroji akcinė bendrovė*) and a small partnership (*mažoji bendrija*), using electronic signature and based on a template of a constituent corporate document.[34] Besides companies there are also other legal entities that can be registered online, namely associations (*asociacija*), public institutions (*viešoji įstaiga*), and charity and support funds (*labdaros ir paramos fondas*).[35]

In order to perform registration of a company online in Lithuania founders need to have a qualified electronic signature (issued by the State Enterprise Centre of Registers, by mobile operators or by the Centre for Issuance of Personal Documents), and to opt for the use of an approved model articles of association. In addition, for the formation of share capital in a private limited liability company it is possible to open a savings account electronically – a range of banks offer this service.[36] The registration itself is performed through a self-service web-site.[37] In other words, in Lithuania there is already a fully functioning end-to-end online registration for the mentioned types of companies, while to register public limited liability companies (*akcinė bendrovė*) there is still a need to use an intermediary – a notary.

CONCLUSION

One of the obligations Member States of the European Union have according to the Digitalisation Directive is to ensure that online formation of companies may be carried out fully online, without an intermediary. This obligation concerns only types of companies that are listed in Annex IIA of the Digitalisation Directive. Poland and Lithuania have already complied with this requirement, namely private limited liability companies in these countries may undergo direct online registration without the involvement of an intermediary. In Germany and the Netherlands, the situation is different: it is still necessary to use a notary to submit an application to the register. However, this year the German Parliament has already adopted the DiRUG to implement the Directive starting from 1 August 2022, while in the Netherlands there is a bill in this sphere, planned to come into effect by 1 August 2022.

As far as Polish and Lithuanian company law about online registration of companies is concerned, there is still room for further research on how it can be im-

34 The ICLEG Report on digitalisation in company law [online], 67.

35 Juridinio asmens steigimas | VĮ Registrų centras [online]. [viewed 24 September 2021]. Available from: https://www.registrucentras.lt/p/671.

36 Ibid.

37 iPasas.lt - Tapatybės nustatymas internete [online]. [viewed 24 September 2021]. Available from: https://www.ipasas.lt/?app=savitarna.

proved through new regulations. It concerns changes that should be made in order to implement the Digitalisation Directive's provisions on the disqualification of directors and verification of documents. Besides the need to implement the provisions of the Digitalisation Directive where the transposition deadline is 1 August 2023, there is a problem, previously raised in literature,[38] that for the purposes of online registration of companies only Lithuanian electronic signatures so far may be used. Similarly, Polish legislation recognizes qualified signatures from certified suppliers presented on the website of the National Certification Centre,39 i.e. qualified signatures from foreign suppliers do not have the same effect.

In addition, the Digitalization Directive requires that templates, i.e. model constituent documents of companies, are available in an official Union language broadly understood by the largest possible number of cross-border users.40 The first choice would be English for the said purpose. Therefore, it would be in line with the Directive to provide English versions of templates for private companies on the registration portals and websites in Poland and Lithuania, having transposed this rule in the national regulatory acts.

Meanwhile, some changes may be made without any law-making, as the technical changes do not always challenge law.41 Among others, translation of important web-pages on www.registrucentras.lt and www.ipasas.lt into English might attract more interested users and attract investments.

38 BITĖ, Virginijus, and Gintarė GUMULIAUSKIENĖ. The Proposal for a Directive on Single-member Private Limited Liability Company (SUP) from the Lithuanian Perspective. In: A. Jorge Viera GONZÁLEZ and Christoph TEICHMANN, eds. Private Companies in Europe: The Societas Unius Personae (SUP) and the Recent Developments in the EU Member States. Thomson Reuters Aranzadi, 2016, p. 135.

39 Narodowe Centrum Certyfikacji. [viewed 3 October 2021]. Available from: https://www.nccert.pl/.

40 Digitalisation Directive, Art. 1(5).

41 OSTER, Jan. Code is code and law is law—the law of digitalization and the digitalization of law. *International Journal of Law and Information Technology* [online]. 2021, 29(2), 101 [viewed 25 September 2021]. Available from: doi:10.1093/ijlit/eaab004.

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Corporate Social Responsibility as a Group Interest

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Abstract:
Since companies are usually merged for economic reasons, the term "group interest" logically includes, first and foremost, the economic interests of the group (in particular, maximising profits). Especially in recent years, however, we can observe an interest in other aspects of business, which can be described by the collective term corporate social responsibility (CSR). The main aim of this paper is presenting the results of the analysis of the concept of CSR in terms of its possible applicability in defining the group interest. The paper also answers the research question on the most appropriate way of resolving conflicts and tensions between purely economic and other interests of the group.

Key words: *corporate social responsibility, group interest, group of companies, economic interest, multinational corporation, conflicts of interests*

INTRODUCTION

Although governance is an important topic in many scientific disciplines, little attention has been paid to governance of corporate groups.[1] The issue of corporate governance has been addressed repeatedly, in particular at the Community level. The aim was both to regulate these groups comprehensively and to adjust only some of their aspects, such as consolidated financial statements or takeover bids. Whereas in the past there was a tendency to implement harmonisation rather by means of directives, more recently we can see that the reports and proposals of expert groups, which operate in particular within the European Commission, are predominant in this area. The reports of expert groups, especially the "Winter

1 This paper is based on the author's dissertation (ŠTAŇKO, SILVIE. *Právní postavení statutárního orgánu řízené akciové společnosti.* Praha, 2021. Disertační práce. Univerzita Karlova.) [The Legal Status of the Stat-utory Body of a Controlled Joint-Stock Company. Prague, 2021. Dissertation. Charles University.].

Report"[2] and the recommendations of the Forum Europaeum Konzernrecht expert team[3], as part of soft law have also become an important source of inspiration for the new regulation of business groups in Czech law. Nevertheless, it cannot be said that the level of attention received corresponds to their fundamental importance in the global economy.

A necessary condition for group governance to be considered uniform is that the influence of the controlling entity on the activities of the controlled entity is exercised for the purpose of promoting the group's long-term interests within the framework of the group's uniform policy[4].

The main aim of this paper is presenting the results of the analysis of the concept of CSR in terms of its possible applicability in defining the group interest. The paper also answers the research question about the most appropriate way of resolving conflicts and tensions between purely economic and other interests of the group.

The introductory part of this paper defines the term "group interest". The definition is followed by considering the possibilities of applying the social responsibility concept in the determining of group interest. The third part of the paper recapitulates the recent recognition of the social responsibility concept by public authorities. The last part outlines possible ways of resolving conflicts and tensions between economic and other interests.

1. GROUP INTEREST

The law does not define the concept of "group interest"[5]; however, it has been elaborated in a doctrinal manner. As to the content of this concept, Černá states that the interest of a group is to achieve the objectives for which it was formed (depending on the circumstances, this may be greater economic stability of the group as a whole compared to the separate business activity of an independent business corporation, the strengthening of the group's competitiveness on the

2 WINTER, J. W. et al. *Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe* [online]. Brussels: High Level Group of Company Law Experts: 2002 [cit. 2020-02-21]. Available from: https://ecgi.global/sites/default/files/report_en.pdf .

3 FORUM EUROPAEUM KONZERNRECHT. Konzernrecht für Europa. *Zeitschrift für Unternehmens- und Gesellschaftsrecht*. 1998, 27.

4 CZECH REPUBLIC Act No. 90/2012 Coll., on Commercial Companies and Cooperatives (Business Corporations Act) [zákon č. 90/2012 Sb., o obchodních společnostech a družstvech (zákon o obchodních korporacích)]. Hereinafter referred to as "Business Corporations Act". Section 79(2).

5 A major amendment to the Business Corporations Act issued in 2021 introduced a significant change in the terminology. In section 72(2) of the Business Corporations Act, the term "interest of the controlling entity or other entity with which it forms a corporate group under section 79" was replaced by the term "group interest". This brought the wording in line with the wording of section 72(1) of the Business Corporations Act, which started to use the term "group interest" already in 2014. The divergence of the terms was causing problems, as it was not clear whether it was sufficient for the purpose of exemption from the obligation to compensate damage that the damage occurred in the interest of the controlling entity or other entity with which it forms a corporate group, or whether it must always be damage arisen in the interests of the group as a whole. Although the Explanatory Memorandum to the amended provisions does not define what constitutes the "group interest", it is already clear from the amendment that it must relate to the interest of the group as a whole.

internal or multinational market, spreading the risks associated with the implementation of large projects, diversification of the business focus to counteract cyclical fluctuations, or a combination of these and other reasons)[6].

Economic theory also mentions other reasons for having a group (holding) structure. According to Valach, the reasons for this are (in addition to higher competitiveness on the market by concentrating funds for the implementation of capital-intensive investments, the creation of a better joint scientific and research base, higher utilisation of existing production capacities, improvement of the purchasing or sales position, etc.) also synergy effects (especially due to increase in revenues and cost savings), the use of surplus cash to buy another company, diversification through risk spreading and stabilisation of cash flows, efforts to enter other markets and to obtain state support in less developed countries seeking foreign capital[7]. Ficbauer adds specialisation, liability, optimisation of capital structure and cash flow optimisation as other reasons[8]. According to Marek, the main rationale for mergers is synergies (additional revenues, cost savings and tax advantages), investment motives, diversification of risk, increase in debt capacity and optimisation of agency costs[9].

It can be agreed that a group's interest can be derived, to some extent, from the reasons that led to forming the group. At the same time, however, the specific content of this concept will evolve over time, as it will be influenced by internal factors such as the interests of the parties involved, innovation, the financial performance of the group, as well as by external factors such as the situation in the relevant markets, the socio-political climate, consumer preferences, competition, etc. The group's interest will therefore have to be analysed in each individual case in relation to the relevant period (it will be the period in which the specific decision was made in the context of implementing group governance).

The issue of recognition of group interest has been the focus of, inter alia, expert groups at the Community level. For example, the European Model Company Act[10] considered the fact that the parent company manages the group as a single entity to be economic reality. It recognized the right of the parent company to give directions to its subsidiary without creating special liability or imposing a burden on the parent company, provided that the protection of creditors, minority sharehold-

6 ČERNÁ, Stanislava. O koncernu, koncernovém řízení a vyrovnání újmy. (Corporate Groups, Group Governance and Compensation of Damage.) Obchodněprávní revue. 2014, 2, p. 34.

7 VALACH, Josef et al. *Finanční řízení podniku. (Financial Management of Companies.)* Praha: Ekopress, 1999, pp. 278-280. ISBN 80-86119-21-1.

8 FICBAUER, David. Specifika finančního řízení holdingu při řízení peněžních toků. (Specifics of financial management of holdings when managing cash-flow.) Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis. 2014, 58, p. 674.

9 MAREK, Petr et al. *Studijní průvodce financemi podniku*. (Study guide to corporate finance.) Praha: Ekopress, 2009, pp. 569-572. ISBN 978-80-86929-49-1.

10 ANDERSEN, P. K. et al. European Model Company Act. In: *Nordic & European Company Law Working Paper* No. 16-26 [online]. 20. 9. 2017 [cit. 2020-02-24]. Available from: https://ssrn.com/abstract=2929348.

ers and the subsidiary itself was ensured. In this respect, therefore, the European Model Company Act explicitly advocated the *Rozenblum* concept[11] .

2. CORPORATE SOCIAL RESPONSIBILITY AS A GROUP INTEREST

Corporate social responsibility (CSR) can be defined as such behaviour of a corporation's management and employees that respects not only the economic and technical interests of the corporation, but also the interests of all stakeholders, and is implemented voluntarily beyond the scope of the law and contractual arrangements and obligations. The triple bottom line concept is usually defined as a framework with three parts: economic, social and environmental[12]. In addition to this triad, CSR can also include the ethical and philanthropic responsibility of the corporation. Carroll defines CSR in a hierarchical way as a four-level CSR pyramid, with philanthropic responsibility at the top, ethical and legal responsibility below, and economic responsibility in the sense of making a profit at the base[13]. The EU Commission has limited itself to a simple definition where *"CSR is the responsibility of enterprises for their impact on society."* [14].

2.1 Economic, Social and Environmental Responsibility of Corporate Groups

Economic responsibility of a corporation can be defined as the activities that the corporation undertakes with the aim of making a long-term profit so that it can spend resources on socially responsible activities without compromising the interests of the corporation owners or its long-term existence[15]. Therefore, it is not just the matter of making a profit, but also of linking it to these other objectives. In practice, this may involve, for example, the application of the principles of good corporate governance, the production of quality and safe products, the provision of quality services and the long-term strengthening of good relations with all stakeholders.

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11 The *Rozenblum* concept, subject to certain conditions, allows for providing contributions within a group of companies and does not require that each individual injury caused to the controlled person as a result of the controlling influence should be compensated (it allows for flexibility of the group's internal remedies on the basis of the going concern value). The test can be summarised in 4 points: (i) there is a group of companies characterised by capital ties, (ii) there is a strong, effective business link of the companies in the group, (iii) financial support is provided by one company to another company for an economic consideration (quid pro quo) and does not disturb the balance of mutual obligations between the companies concerned, and (iv) the company does not expose itself to the risk of insolvency by providing the support.

12 TETŘEVOVÁ, Liběna. *Společenská odpovědnost firem společensky citlivých odvětví*. (Corporate social responsibility in socially sensitive industries.) Praha: Grada Publishing, 2017, p. 19. ISBN 978-80-271-0285-3.

13 CARROLL, Archie B. et al. The pyramid of corporate social responsibility: Toward the moral management of organizational stakeholders. *Business horizons.* 1991, 34, p. 42.

14 COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A renewed EU strategy 2011-14 for Corporate Social Responsibility. In EUR-Lex. Available from: https://ec.europa.eu/transparency/documents-register/api/files/COM(2011)681_0/de000000005977 84?rendition=false.

15 TETŘEVOVÁ, Liběna, 2017, p. 47 (op. cit.).

Economic responsibility should be distinguished from social responsibility, which concerns especially the employees. The group can, for example, improve their working conditions, ensure better health care, or further training opportunities. In a broader sense, employee retention in the group may also be considered a group interest[16]. Many large corporate groups also place an emphasis on combating gender discrimination. A typical example is the introduction of quotas for employees in managerial positions[17].

Environmental responsibility is nowadays discussed especially in the context of sustainability, which, according to Bohatá, can be defined as *"meeting the present needs of society without compromising the ability of future generations to meet their needs"*[18]. A responsible environmental culture can be promoted externally (by promoting conservation of resources or biodiversity, encouraging environmentally friendly activities), but also internally (e.g., by maximising savings and energy, minimising waste and promoting recycling). Some corporate groups develop this concept even further by declaring, for example, that social sustainability is the reason why they were created or that it forms part of their existence. Tesla, for example, states in its impact report that sustainability is the driving force behind the group and that it is not just about their products, but that sustainability is a value, a product and a goal of their business[19]; ČSOB, for example, states that sustainability and ecology are part of its DNA[20].

2.2 Ethical and Philanthropic Responsibility of Corporate Groups

Ardichvili et al. define five basic characteristics of ethical business cultures: promoting values, keeping stakeholders' interests in balance, effective governance, integrity of processes and a long-term perspective[21]. In the area of ethical responsibility, the recent trend within corporate groups is to issue codes of ethics (compliance), which usually include a declaration of the group's mission and vision, a definition of its core values, a definition of its responsibilities towards stakeholders, and selected standards and rules (e.g., in relation to bribery or other forms of criminality), and

16 ČERNÁ, Stanislava, 2014, p. 37 (op. cit.).

17 Cf. the proposal for a Directive aimed at achieving a minimum of 40% share of both genders in supervisory/non-executive board positions (Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures COM/2012/0614 final - 2012/0299 (COD). In EUR-Lex. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012PC0614&from=EN). Both the Parliament and the EU Commission are positive about the proposal for the Directive. The EU Commission has recently committed to promote the adoption of the proposal in its Gender Equality Strategy 2020-2025. However, the opinion of the EU Council is still awaited.

18 *„Uspokojování současných potřeb společnosti, aniž by byly ohrožovány možnosti uspokojování potřeb generací budoucích".* BOHATÁ, Marie. *Podnikatelská a hospodářská etika a její vývoj v České republice*. (Business and economic ethics and its development in the Czech Republic.) Praha: Nadace Nadání Josefa, Marie a Zdeňky Hlávkových, 2020, p. 55. ISBN 978-80-88018-32-2.

19 TESLA. Impact Report 2019. Tesla Motors. [online]. 2020. [viewed 27. 9. 2021]. Available from: https://www.tesla.com/ns_videos/2019-tesla-impact-report.pdf. p. 47.

20 ČSOB. Centrála ČSOB je nejekologičtější kancelářskou budovou v České republice, tisková zpráva. (ČSOB headquarters is the most environmentally friendly office building in the Czech Republic, press release.) ČSOB. [online]. 2020. [viewed 27. 9. 2021]. Available from: https://www.csob.cz/portal/-/tz200227a.

21 ARDICHVILI, Alexandre et al. Characteristics of ethical business cultures. Journal of business ethics. 2009, 85, p. 448.

related employee training. However, corporate groups also undertake specialised activities to promote ethical responsibility. Among these are, for example, the activities of alcohol producers in the area of responsible alcohol consumption: the Brewery Ethical Code (Czech Breweries and Malt Association), the Code of Ethics for UVDL members (Union of Spirits Producers and Suppliers of the Czech Republic), campaigns promoting a responsible approach to the consumption, sale and marketing of alcoholic beverages beyond the scope of statutory restrictions, etc. Traditionally, larger groups in particular have also committed themselves to philanthropic responsibility, most often in the form of corporate volunteering or donations to culture, sport, social field, etc. These activities not only contribute to a positive public perception of the group's activities, but also work as a tool in the group's marketing.

2.3 Recognition of the CSR Concept

Today, CSR is considered a major topic, which can be seen, among other things, in the fact that highly regarded international organisations also tend to embrace this approach. As early as 1999, the Global Compact, a voluntary corporate initiative to develop and promote principles-based approach to doing business and to share new experiences in the field of human rights, labour and the environment, was launched by UN Secretary-General Kofi Annan at the World Economic Forum in Davos. The Global Compact sets out ten objectives in the areas of human rights, labour, the environment, and anti-corruption activities[22]. Currently, the platform has over 16,000 corporate members from more than 160 countries around the world[23]. As a condition of membership, organisations must publish an annual report on the progress they have made in the implementation and promotion of the initiative's main objectives (Communication on Progress, COP.

The first general recommendation issued by the OECD for multinational enterprises is that they should contribute to economic, environmental and social progress with a view to achieving sustainable development[24]. The G20/OECD further recommends that *"[t]he corporate governance framework should protect and facilitate the exercise of shareholders' rights and ensure the equitable treatment of all shareholders, including minority and foreign shareholders."* [25].

The ILO[26] provides guidance to multinational enterprises in the social area for them to achieve the Sustainable Development Goals set out in the UN 2030 Agenda

22 UNITED NATIONS GLOBAL COMPACT. Corporate Sustainability in The World Economy. United Nations Global Compact. [online]. 2014. [viewed 27. 9. 2021]. Available from: https://d306pr3pise04h.cloudfront.net/docs/news_events%2F8.1%2FGC_brochure_FINAL.pdf

23 UNITED NATIONS GLOBAL COMPACT. Who we are. Our participants. United Nations Global Compact. [online]. 2021. [viewed 27. 9. 2021]. Available from: https://www.unglobalcompact.org/what-is-gc/participants

24 OECD. OECD *Guidelines for Multinational Enterprises, 2011 Edition*. Paris: OECD Publishing, 2011, p. 19. ISBN 9789264115415.

25 OECD. G20/OECD *Principles of Corporate Governance*. Paris: OECD Publishing, 2015, p. 18. ISBN 9789264236882.

26 ILO. *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. Adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions*. Geneva: International Labour Organization, 2017. ISBN: 978-92-2-130700-6.

for Sustainable Development. Directive 2014/95/EU[27] lays down the rules on mandatory disclosure of non-financial information by large public-interest entities; the mandatory reporting includes information on environmental protection, social responsibility and treatment of employees, respect for human rights, anti-corruption programmes and diversity areas (age, gender, education)[28]. The issue of "short-termism" in corporate governance (in the sense of prioritising short-term interests to maximise profits over the long-term interests of the enterprise) and the promotion of more sustainable corporate governance is also addressed in the EY study published by the EU Commission[29].

The importance of CSR in the Czech Republic is evidenced by the fact that in 2014 the Ministry of Industry and Trade[30], issued and since then has been continuously updating the strategic document "National Action Plan for CSR in the Czech Republic", the aim of which is to contribute to the development of the CSR concept and its positive impact on society and economic development of the Czech Republic.

2.4 Tensions and Conflicts Between Interests

There is a high probability of tensions and conflicts arising between purely economic and other interests.

Luňáček and Martinovičová give three viable solutions to prevent the occurrence of such phenomena. The first solution, preferring the corporation's economic interests with the expectation that the enforcement of other interests will be ensured by legal norms, is an approach that shifts the responsibility for conflict resolution away from the corporation. In this case, the corporation is not forced to go beyond its minimum obligations. The second marginal solution, preferring "non-economic" interests, may lead to inefficiencies in the use of the corporation's resources and, in the extreme case, to the corporation's bankruptcy. As a third way, Luňáček and Martinovičová mention the creation of a strategy of compatibility between economic and "non-economic" interests[31].

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27 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance. In: EUR-Lex. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN (reflected in the amendment to Act No 563/1991 Coll., on Accounting). Also referred to as the "CSR Directive".

28 On the concept of corporate social responsibility in European law, cf. LEYENS, Patrick C. Corporate Social Responsibility in European Union Law: Foundations, Developments, Enforcement. In: DU PLESSIS, Jean J., Umakanth VAROTTIL, and Jeroen VELDMAN (eds.). *Globalisation of corporate social responsibility and its impact on corporate governance*. Berlin: Springer, 2018. ISBN 978-3-319-69127-5.

29 EY. *Study on directors' duties and sustainable corporate governance*. Luxembourg: Publications Office of the European Union, 2020. ISBN 978-92-76-19979-3.

30 Návrh akčního plánu na léta 2019-2023 srov. MINISTERSTVO PRŮMYSLU A OBCHODU. *Národní akční plán společenské odpovědnosti organizací v České republice na léta 2019–2023.* Ministerstvo průmyslu a obchodu. (Draft Action Plan 2019-2023 cf. MINISTRY OF INDUSTRY AND TRADE. *(National Action Plan for Corporate Social Responsibility in the Czech Republic 2019-2023.* Ministry of Industry and Trade.) [online]. 2018. [viewed 27. 9. 2021]. Available from: https://www.mpo.cz/assets/cz/podnikani/spolecenska-odpovednost-organizaci/2018/4/Narodni-akcni-plan-CSR---12-dubna-2018_1.pdf.

31 LUŇÁČEK, Jiří and MARTINOVIČOVÁ, Dana. *Podniková ekonomika II.* (Business Economics II.) Brno: Mendelova univerzita, 2011, p. 44. ISBN 978-80-7375-489-1.

I consider the third way to be the most appropriate. In line with long-term planning, it will, of course, not be just a matter of creating a strategy, but also of implementing it, monitoring and then evaluating the strategy implementation, and possibly of redefining the objectives and the means of achieving them. All this entails additional costs for the group. However, if we recognise that the main objective of a business group is to minimise costs and maximise profits for the whole group (otherwise it would not be economically efficient for companies to group together), it is fair to demand that the group return some of these resources to society by means of accepting its social responsibility.

CONCLUSION

Over the past 30 years, the concept of CSR - corporate social responsibility - has gained broad acceptance among the professional community and enterprises themselves. Enterprises can now choose from a wide range of tools to implement CSR in their policies. At the same time, there is an increasing pressure from stakeholders to take CSR into account when defining the interests of multinational enterprises (groups). It can therefore be assumed that it will be the application of the CSR concept in defining the group's interests and their strategic alignment with other interests, particularly economic ones, which will become one of the key tasks in defining the group's unified policies in the future.

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3. Banking, Finance and Insurance Law

Distribution of Financial Services at Distance Performed by Independent Financial Agents

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Abstract:
Financial intermediation in Slovakia can be characterized as a set of consecutive activities carried out by natural persons – entrepreneurs or legal entities, determined primarily by the Act on Financial Intermediation and special regulations governing individual sectors of the financial market. This is a sui generis business activity under the Commercial Code and special legislation. Despite the fact that financial agents perform financial intermediation, and thus their business shows the same characteristics, it is also largely influenced by the category of financial agent in which it is carried out. The spread of the COVID-19 disease has had an extraordinary impact, among other things, on the way in which financial intermediation is carried out. The paper focuses on how financial services are being distributed at distance, by means of electronic communication, by the independent financial agents.

Key words: *distribution of financial services, financial services, distance contracts*

INTRODUCTION

The Act No. 186/2009 Coll.[1] On Financial Intermediation and Financial Advisory supplementing and amending other laws as amended (herein after only "Financial Intermediation Act") represents the fulfillment of the Slovak legislator's plan to unify the conditions for financial advisory and the distribution of financial services in the insurance or reinsurance sector, capital market sector, pension saving and supplementary pension saving sectors, deposit-taking sector as well as the sectors of consumer and mortgage credit.[2] It introduces also a distinction between financial advisory[3] and financial intermediation. This legislation is unique because it consolidates regulation of financial intermediation and advisory in various sectors of the financial market.

Financial advisory is carried out for providing information and analysis, sufficient to enable the client to make a responsible decision before entering into a contractual relationship with a financial institution.[4] The information and recommendations of the financial advisor are based on an independent analysis of a sufficient number of available financial services. Thus, they are not based on a limited range of financial services.[5] Solely the client compensates the financial advisor. Financial advisory as a sui generis business has therefore not yet developed its potential.

The current legislation allows the following categories of financial agents to perform the intermediation of financial services – tied financial agent, subordinated financial agent, supplementary insurance intermediary, tied investment agent and independent financial agent.[6] Unless stipulated otherwise by the Financial Intermediation Act, financial intermediaries from another Member State in the insurance or reinsurance sector and financial intermediaries from another Member State for mortgage credit are also authorized to engage in financial intermediation. However, these categories are disregarded for the purposes of this paper and we will focus on the independent financial agent.

The regulation of financial intermediation has undergone dynamic development and numerous changes over the last 11 years. The increasing regulatory burden can be attributed to the fact that financial intermediaries make a significant contribution to the conclusion of financial service contracts and meet a large number of

1 SLOVAK REPUBLIC Act No. 186/2009 Coll., the Financial Intermediation Act, as amended [zákon č. 186/2009 Z. z., o finančnom sprostredkovaní a finančnom poradenstve a o zmene a doplnení niektorých zákonov v znení neskorších predpisov].

2 This contribution is the result of the project implementation: APVV-16-0553 "Metamorphoses and innovations of the corporations´ concept under conditions of globalisation"/„Premeny a inovácie konceptu kapitálových spoločností v podmienkach globalizácie".

3 R. Inderst identifies financial advisory as a key service for retail clients. INDERST, Roman. Consumer Protection and the Role of Advice in the Market for Retail Financial Services. Journal of Institutional and Theoretical Economics. 2011, 167 (1), 4–21, p. 4.

4 WINKLER, Martin. Finančný poradca – definícia pojmu a podmienky výkonu činnosti v Slovenskej republike. In: Právo v podnikání vybraných členských států Evropské unie. Sborník příspěvků k XII. ročníku mezinárodní vědecké konference. Praha: TROAS, 2020, pp. 120-128, 978-80-88055-10-5, p. 120.

5 Ibid.

6 Cf. Article 6(2) of the Financial Intermediation Act.

clients, including retail clients. By distributing financial products, they contribute to the profits of financial institutions, the financial intermediaries in the economy, bringing together the supply and demand for capital. In the wake of the financial crisis (and now the pandemic crisis), the legislator, whether national or European, is increasing the regulatory burden and demands placed on financial institutions.[7] In the same vein, the requirements are also rising on the distributors of their services.

1. INDEPENDENT FINANCIAL AGENTS

Although all types of financial agents under Slovak law carry out financial intermediation and thus their business shows the same characteristics, it is also largely influenced by the category of financial agent in which it is performed. This paper is focused on the independent financial agent (in Slovak: *samostatný finančný agent*), because this type of agent has its own license and supervision regime from the National Bank of Slovakia. It is also the only category of agent entitled to maintain its own network of subordinated agents (sub-distributors).

The independent financial agent exercises delegated supervision over such sub-distributors. The possibility to maintain this network can be seen not only as an opportunity to increase the scope of activities (and ultimately profits), but also as a set of obligations of the independent financial agent when determining the rules of doing business by subordinated entities in such a way as to satisfy the requirements of delegated supervision.

Delegated supervision represents the activity of an entrepreneur (the independent financial agent) consisting of supervising the performance of another entrepreneur's activity (the subordinated agent), whereby the National Bank of Slovakia itself will supervise whether the entrepreneur duly fulfils this obligation.[8]

The license to perform the activity of an independent financial agent is granted by the National Bank of Slovakia. This regulated business (distribution of financial services) contributes to the allocation of funds from savings entities to investing entities. This will always entail a certain amount of risk and therefore the independent financial agent is obliged to demonstrate that it fulfils specific conditions for the performance of financial intermediation in a licensing proceeding, with specific types of supervisory proceedings. Supervisory proceedings can be defined as administrative proceedings sui generis, but without any supporting application of the general rules of Slovak administration proceedings (the "Administrative Procedure Code").[9]

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7 QUAGLIA, Lucia. The "Old" and "New" Politics of Financial Services Regulation in the European Union. New Political Economy. 2012, 17(4), pp. 515-535, p. 515. QUAGLIA, Lucia. Financial regulation and supervision in the European Union after the crisis. Journal of Economic Policy Reform. 2013, 16(1), pp. 17–30, p. 17.

8 WINKLER, Martin. Delegovaný dohľad nad finančným sprostredkovaním v Slovenskej republike. In: Právo v podnikání vybraných členských států EU: sborník příspěvků k XI. ročníku mezinárodní vědecké konference. Praha: TROAS, 2019, pp. 277-286. 978-80-88055-08-2, p. 279.

9 SLEZÁKOVÁ, Andrea et al. Konanie vo veciach dohľadu: vybrané právne aspekty regulácie konania vedeného Národnou bankou Slovenska. Praha: Wolters Kluwer ČR, 2018. 978-80-7598-010-6, p. 57.

Supervisory proceedings comprise two categories of proceedings. Proceedings initiated ex offo by the National Bank of Slovakia are usually sanctions proceedings.[10] Proceedings initiated because of a party's request are typically licensing proceedings.[11] The procedure of issuing individual administrative acts such as the licenses is a procedural form of activity; it is the application of law to a specific subject.[12]

The licensing procedure primarily fulfils:

- a regulatory function – it admits to financial intermediation only entities fulfilling the statutory conditions, i.e. if the submitted application and its annexes show that the conditions for conducting business on the financial market have been proven to be fulfilled; and
- a protective function – if the application and its annexes show that the legal conditions for operating on the financial market have not been proven, the supervisory body will not grant the license to a subject to operate as an independent financial agent and the authority is hereby protecting the market from an unprepared entity.

Another key reason for the focus on the independent financial agent is the all-finance concept, which is becoming more and more popular in practice. This represents a diversification strategy.[13] Its aim is to offer a range of financial services "from a single source".[14] Independent financial agents who are authorized to operate in several sectors of the financial market fulfill that model.[15]

2. DISTRIBUTION OF FINANCIAL SERVICES AT DISTANCE

The spread of COVID-19 has had a particular impact on, among other things, the way financial intermediation is carried out, and legislation regulating the conclusion of a distance contract, also based on the idea of protecting the client (consumer), has been applied largely.

The National Bank of Slovakia has even issued a specific methodological guidance on the financial intermediation at a distance, expressly noting the increasing trend of financial intermediation without physical contact between the agent and

10 SLEZÁKOVÁ, Andrea et al. *Zákon o dohľade nad finančným trhom. Komentár.* Bratislava: Wolters Kluwer, 2018. 978-80-8168-947-5, p. 274.

11 Ibid.

12 SOBIHARD, Jozef. *Správny poriadok. Komentár*. 6. prepracované vyd. Bratislava: IURA EDITION, 2013. 978-80-8078-600-7, p. 13.

13 KLOEPFER, Jacob. Marketing für die private Finanzplanung: Vermarktung einer innovativen, komplexen Beratungsleistung. Wiesbaden: Springer Fachmedien, 1999. 978-3-8244-6934-5, p. 7.

14 HOPPE, Uwe. *Teachware für Finanzdienstleister: Entwicklung – Integration – Einsatz*. Wiebaden: DUV, Dt. Univ. - Verl., 2000. 978-3-8244-0517-6, p. 79– 80.

15 In case of Slovakia, this includes insurance or reinsurance, capital market, pension saving and supplementary pension saving, deposit-taking and lending – consumer credit and mortgage credit. SLEZÁKOVÁ, Andrea et al. *Samostatný finančný agent ako dohliadaný subjekt finančného trhu*. Bratislava: Wolters Kluwer, 2016. 978-80-8168-497-5, p. 12.

the client due to the COVID-19 pandemic and the likelihood of this trend prevailing going forward.[16]

2.1 Protecting the client

In an ideal competitive market environment, entrepreneurs and consumers are transacting on an arm's length basis and their decisions are based on free will, without coercion or unjustified advantage to the other party.[17] However, no such ideal competitive market system exists in reality, which is why in practice there are countless inequalities between businesses and consumers, both in the information sphere and in the ability to make the right choices and enter into a favorable contractual relationship.[18]

Where groups of persons whose legal position differs significantly in terms of information, technical skills and equipment or economic standing, meet in market relations, additional regulatory systems must be put in place to create a degree of order that reduces the risks of unforeseen or arbitrary behavior by the participants in the market affairs.[19] In legal regulation, the idea of protecting the weaker party is an expression of this trend.[20]

In general, a weaker party is anyone in a situation, which it is unable to influence or control.[21] The characteristics of a weaker party are lower knowledge, less experience, possible distress and less attention to the specific circumstances of the case.[22] These are typically conditions, which enable the stronger party to obtain an advantageous position for itself in the legal relationship at the expense of the weaker party.[23] The consumer is a type of weaker and worthy of protection participant from the group of the least litigious.[24]

The reasons for consumer protection lie in the information asymmetry.[25] The reasons for protection are also apparent from the dependence on the provider of the goods or services, in the impossibility of incurring transaction costs to over-

16 NBS Methodological Guidance No. 4/2020 concerning the performance of financial intermediation at distance [Metodické usmernenie útvarov dohľadu Národnej banky Slovenska z 18. mája 2020 č. 4/2020 k vykonávaniu finančného sprostredkovania na diaľku] (hereinafter "NBS Distant Intermediation Guidance")

17 TOMANČÁKOVÁ, Blanka. *Ochrana spotřebitele v praxi se vzory a příklady*. 2. vyd. Praha: Linde, 2011. 203 s. ISBN 978-80-7201-864-2, p. 11.

18 Ibid.

19 POKORNÁ, Jarmila et al. *Ochrana spotřebitele proti nekalým obchodním praktikám podnikatelů.* Praha: Wolters Kluwer ČR, 2017. 978-80-7552-625-0, p. 11.

20 Ibid.

21 ELIÁŠ, Karel et al. *Nový občanský zákonník s aktualizovanou důvodouvou zprávou a rejstříkem*. Ostrava: Sagit, 2012. 978-80-7208-922-2, p. 11.

22 POKORNÁ, Jarmila et al. *Ochrana spotřebitele proti nekalým obchodním praktikám podnikatelů*. Praha: Wolters Kluwer ČR, 2017. 978-80-7552-625-0, p. 3.

23 ŠVESTKA, Jiří et al. *Občanský zákonník. Komentář. Svazek I.* Praha: Wolters Kluwer, 2014. 978-80-7478-370-8, p. 1020.

24 BEJČEK, Josef. *Smluvní svoboda a ochrana slabšího obchodníka*. Brno: Masarykova univerzita, Právnická fakulta, 2016. Spisy Právnické fakulty MU, řada teoretická, edice Scientia, svazek č. 557. 516 s. ISBN 978-80-210-8185-7, p. 37.

25 TAMM, Marina et al. *Verbraucherrecht. Beratungshandbuch*. Baden-Baden: Nomos, 2012. 978-3-8329-5745-2, p. 19.

coming information asymmetry, and lower influence of a consumer in the decision-making process, compared with the institutionalized, detached procedures of a professional counterparty.[26]

The consumer is generally not professionally prepared to negotiate, and often does so in a time pressure without being able to compare prices of other services.[27]

The imbalances inherent in the B2C relationship are also referred to as structural imbalances.[28] This should be compensated for within a social protectionist model.[29] Consumer protection law is understood primarily as a set of precautionary measures to prevent abuse by professionals.[30] Consumer protection law is dominated by mandatory (in Slovak: kogentné) rules,[31] i.e., the rules that cannot be derogated from by an agreement between the parties.

The consumer protection laws including the Financial Intermediation Act also state extensive requirements aimed at provision of sufficient information to the client/consumer, thus reducing the impact of information asymmetry. In this regard, not only in the light of the current pandemic crisis, but in general and for all categories of financial agents, the scope of information provided to the client may deserve further extension. For example, an amendment to Article 33 of the Financial Intermediation Act could require the financial agent to inform the client of the history of written contracts concluded with financial institutions (or other financial agents) over the last several years, including the exact periods of time during which financial intermediation has been carried out for a particular financial institution or financial agent.

This information would indicate to the client whether the financial agent had recently changed the financial institution or financial agent. If that is the case, this may prompt the client to consider whether the conclusion of a particular financial service contract is really in his/her best interest or it may involve an attempt of the financial agent to increase the production for the new cooperating partner.

In the context of conducting the financial intermediation at distance, the Act on Consumer Protection in Distance Financial Services can be identified as a relevant normative legal act contributing, at least partially, to balancing the asymmetry. It also protects the consumer to whom the conclusion of a distance contract is medi-

26 BEJČEK, Josef. *Smluvní svoboda a ochrana slabšího obchodníka.* Brno: Masarykova univerzita, Právnická fakulta, 2016. Spisy Právnické fakulty MU, řada teoretická, edice Scientia, svazek č. 557. 516 s. ISBN 978-80-210-8185-7, p. 38.

27 KRAJČO, Jaroslav. *Občiansky zákonník pre prax (komentár). Judikatúra NS SR, NS ČR, ESD, ESĽP.* Bratislava: EUROUNION, 2015. 978-80-89374-32-8, p. 673.

28 DREXL, Josef. Die wirtschaftliche Selbsbestimmung des Verbrauchers: eine Studie zum Privat- und Wirtschaftsrecht unter Berücksichtigung gemeinschaftsrechtlicher Bezüge. Tübingen: Mohr Siebeck, Jus Privatum 31, 1998. 978-3-16-146938-1, p. 278.

29 BEJČEK, Josef. *Smluvní svoboda a ochrana slabšího obchodníka*. Brno: Masarykova univerzita, Právnická fakulta, 2016. Spisy Právnické fakulty MU, řada teoretická, edice Scientia, svazek č. 557. 516 s. ISBN 978-80-210-8185-7, p. 38.

30 PELIKÁNOVÁ, Irena. *Obchodní právo. Obligační právo – komparativní rozbor*. 4. díl. Praha: ASPI, 2009. 978-80-7357-428-4, p. 65.

31 VETERNÍKOVÁ, Mária. *Vybrané kapitoly zo spotrebiteľského práva.* Bratislava: Vydavateľstvo EKONÓM, 2015. ISBN 978-80-225-4143-5, p. 9.

ated. The concept of a consumer can also be subsumed under the concept of a retail client, as defined in the Financial Intermediation Act.

2.2 Act on Consumer Protection in Distance Financial Services

For the purposes of the Act on Consumer Protection in Distance Financial Services,[32] the legislator has introduced a legal definition of distance contract, financial service, consumer, intermediary as well as the means of distance communication. The Act on Consumer Protection in Distance Financial Services implements Directive 2002/65/EC concerning the distance marketing of consumer financial services and these main concepts are thus harmonized in the European Union.

A characteristic feature of the means of remote communication used in financial intermediation is the conclusion of a contract without physical presence of a consumer (retail client) and an independent financial agent in the same space. Hence physical absence.[33] The time when they act is irrelevant.[34]

In the current legislation, we find an enumerative list of means of remote communication (e.g., electronic mail). A distance contract must be concluded by means of distance communication only, but it is not necessary to use only one specific way of distance communication. Different means may be used in relation to the same service or contract.[35]

The parties to such distance contract are the consumer (retail client) and the supplier (financial institution), represented by the independent financial agent. A consumer is a natural person concluding a contract and acting for his or her personal use, outside his or her business, profession or employment.[36] The supplier shall be a legal or natural person possessing a relevant authorization, license or registration allowing the provision of a financial service, i.e., a financial institution. The independent financial agent is not a party to the contract, but it acts as the agent on behalf of the financial institution.

As to the scope of the covered financial services, this includes any service of a banking, credit, insurance, pension, investment or payment nature.[37] Given the intangible nature of financial services, they are particularly suited to distance selling and the existence of an adequate legal framework governing marketing

32 SLOVAK REPUBLIC Act No. 266/2005 Coll. on Consumer Protection in Distance Financial Services, as amended [zákon č. 266/2005 Z. z. o ochrane spotrebiteľa pri finančných službách na diaľku a o zmene a doplnení niektorých zákonov, v znení neskorších predpisov.]

33 HULMÁK, Milan et al. Občanský zákoník V. Závazkové právo. Obecná část (§ 1721–2054). Komentář. Praha: C. H. Beck, 2014. 978-80-7400-535-0, p. 601.

34 PETROV, Jan et al. *Občanský zákoník. Komentář*. 2. vyd. Praha: C. H. Beck, 2019. 978-80-7400-747-7, p. 1960.

35 HULMÁK, Milan et al. Občanský zákoník V. Závazkové právo. Obecná část (§ 1721–2054). Komentář. Praha: C. H. Beck, 2014. 978-80-7400-535-0, p. 525.

36 Cf. § 2 of the Act on Consumer Protection in Distance Financial Services.

37 MORAVEC, Tomáš et al. *Spotřebitel a podnikatel na dynamicky sa rozvíjejícím trhu*. Praha: C. H. Beck, 2019. 978-80-7400-745-3, p. 121.

is particularly important in situations where they are concluded between a consumer and an entrepreneur.[38]

The Act on Consumer Protection in Distance Financial Services is a public law protection. It protects the weaker contracting party, primarily through information obligations. Time-to-think and information obligations are measures to compensate for the position of the consumer (retail client).[39]

Information obligations compensating for information asymmetries can be categorized under the following fields: information relating to the financial service; information on the supplier (financial institution); information on the independent financial agent; information on the distance contract' information on handling of complaints; information on out-of-court dispute resolution; and information on compensation and guarantee funds.[40]

2.3 Basic Prerequisite for Financial Intermediation at Distance

The basic document, which enables the performance of financial intermediation at distance by an independent financial agent, is the client's consent to electronic communication and provision of information on a durable medium other than paper form. The requirement to document client consent is stressed in the NBS Distant Intermediation Guidance.[41] The guidance of this type expresses the legal opinion of the National Bank of Slovakia for supervisory purposes and thus provides a practical aid for the sector. The supervisory guidance is not legally binding as a source of law in traditional sense. But it is generally followed by the market because it is perceived as the supervisory authority's expression of the best practice.

As for concluding the contract itself, there are several methods of technical implementation of a legally relevant electronic signature under EU, Czech and Slovak law:

- writing a name in an email message or typing a name in an electronic document, similar to an email message, but in a text editor, a text field under a form, etc.;
- a name in an e-mail address;
- a personal identification number (PIN); entering the personal identification number (PIN) finally confirms (as a signature) the previous action;
- click wrap - legal text or a link to it is displayed on the screen, and the user ticks a box and presses a button (I agree/accept);
- scan of handwritten signature;

38 Ibid.

39 DREXL, Josef. Die wirtschaftliche Selbsbestimmung des Verbrauchers: eine Studie zum Privat- und Wirtschaftsrecht unter Berücksichtigung gemeinschaftsrechtlicher Bezüge. Tübingen: Mohr Siebeck, Jus Privatum 31, 1998. 978-3-16-146938-1, p. 544–545.

40 Cf. Article 4 of the Act on Consumer Protection in Distance Financial Services.

41 NBS Distant Intermediation Guidance, part B, last paragraph.

- biometry version of the handwritten signature – the signature is created on the signature platform (pad, touch screen) with a pen or stylus; where the device is able to measure and record both the position of the pen and the dynamics of the handwritten signature (pressure, inclination, speed, height above the platform); and the record of the signature is then attached to the document;
- digital signature – with asymmetric public key cryptography, the document is signed using a private key that is held exclusively by one signer in the world.[42]

The above enumeration does not imply that in every jurisdiction and situation methods will be admissible as a substitute for a handwritten signature.[43] These methods are however generally admissible under Slovak law, subject to the discussion below.

The current Slovak legislation, namely Article 40(4) of the Civil Code, allows a legal act (in Slovak: *právny úkon*) to be performed by means of communication technology, expressly mentioning the telegraph, telegraph and other electronic means (eg fax, internet, email, mobile phone).[44] A legal act made in such a form shall be deemed by the law to be a legal act made in writing if it is made by means, which enable the content of the legal act to be recorded (and reproduced), and the person who made the legal act in such a way must be identifiable.[45]

The identification of the person who performed the legal act must be done by stating the personal data of the person acting by stating, in the case of a legal person, the data containing its name, under which this person is registered in the relevant register.[46]

Consent to electronic communication is an expression of the client's will by which he expressly and unconditionally agrees to sign documents electronically. Specifically, there are three types of such consent. The first is where the client signs outputs related to the performance of financial intermediation by an independent financial agent (eg a record of a meeting between the financial agent and the client) in order to demonstrate compliance with legal information obligations towards the client. The second is where the client is a party to the contract, ie the financial service contract concluded with the financial institution. The third is concerned with the consents and acknowledgements related to data protection.

In consenting to electronic communication, the client typically agrees to the use of his/her e-mail address as well as his/her mobile number for sending authoriza-

42 KMENT, Vojtěch. Elektronické právní jednání: analýza s důrazem na využití elektronického podpisu podle práva EU, České republiky a Německa. Praha: Wolters Kluwer, 2018. 978-80-7552-814-8, p. 59.

43 Ibid.

44 FEKETE, Imrich a Martina FEKETEOVÁ. *Občiansky zákonník. Prehľadný komentár*. Bratislava: Epos, 2012. 978-80-8057-972-2, p. 127.

45 Ibid.

46 VOJČÍK, Peter et al. *Občiansky zákonník. Stručný komentár*. 3. doplnené a prepracované vyd. Bratislava: IURA EDITION, 2010. 978-80-8078-368-6, p. 137.

tion codes used to verify the client's identity when signing the document. By entering the authorization code for the document to be signed and sending it at the same time, the document in question shall be deemed to have been signed by the client.

The Act on Consumer Protection in Distance Financial Services and the NBS Distant Intermediation Guidance are technology-neutral, ie they do not prescribe the use of specific technology – such as, eg, sms-codes, mobile applications or similar.

2.4 Stages of Financial Intermediation at Distance

When mediating the conclusion of a distance contract, we distinguish the following stages:

- contacting the client via a communication tool, platform (Zoom, Skype, etc.)
- and obtaining consent to electronic communication from the client (e.g. via sms-code);
- general identification of the client (personal data, educational attainment, etc.);
- identification of the client in terms of anti-money-laundering by means of a questionnaire;
- client risk profiling, collecting information necessary for appropriateness and/or suitability test - in addition to general information such as age, gender and educational attainment of the client, the client is further profiled by selecting alternatives for investing over a five-year horizon, as well as ideas about the concept of risk, investment experience, testing how the client would handle a higher amount (e.g. EUR20,000), what financial services have already been provided to the client, the client's attitude to risk, the client's handling of funds, the estimated value of the client's assets, and the share of the investment in the total value of the client's assets.

The risk profile as well as the appropriateness and/or suitability tests are signed by the client (again, eg via sms-code). The above-mentioned operations are carried out in a virtual environment – the information systems of an independent financial agent. The aforementioned consents, as well as the risk profile, appropriateness and/or suitability test and the AML questionnaire are sent to the client's email address provided in the consent to electronic communication.

At the same time, the information provided to the client prior to the conclusion of the financial services contract (reflecting in particular Section 33 of the Financial Intermediation Act) will be sent to the client's email address. In the case of a client who is a consumer under the Act on Consumer Protection in Distance Financial Services, the range of information provided to the consumer prior to the conclusion of the distance contract is also included in the email in question.

In the next phase, the interaction typically takes place through the information systems of the financial institution with which the independent financial agent has

a written contract. Through the online portal of the financial institution, the relevant client data is recorded. In this process, the financial institution also verifies the independent financial agent in a pre-agreed manner. Subsequently, the draft financial service contract, together with the relevant annexes (in accordance with the specific law regulating the relevant sector), will be sent to the client's email address at the same time as an authorization code is correctly sent to the client in question, on the basis of which the draft financial service contract, as well as the annexes, will be made available to the client. For a client who falls within the legal definition of a consumer under the Act on Consumer Protection in Distance Financial Services, the range of information provided to the consumer prior to the conclusion of the distance contract is also included in the present report. In order to verify the identity of the customer and to fulfill the obligations of the financial institution as an obliged person in the field of anti-money laundering, a scan of the identity document is sent by the customer via the portal of the financial institution.

The client makes an informed decision and signs the financial service contract electronically, eg via sms-code (in the insurance or reinsurance sector, the client's signature can also be replaced by the payment of the first premium), after which the signed financial service contract is sent to the client's e-mail address. Evidence of the conclusion of a contract by means of electronic devices is an electronic document if the written legal act is required to be presented or kept in its original form. An electronic document meets this requirement if the conditions for its unmistakability and reliability are established from the first presentation in its final form, and it can always be presented in this form to the person to whom it is addressed.[47]

Finally, another important aspect of contracting at the distance and consumer protection measures is the existence of a "cooling off period", ie the right of the consumer to rescind the distant contract within the period of 14 days from entering into the contract.[48]

CONCLUSION

The spread of COVID-19 has had a particular impact on, among other things, the way financial intermediation is carried out. Since 2020, a discernible trend reflects that more and more independent financial agents perform financial intermediation at a distance. This way of distributing financial services shows specific features, compared to financial intermediation carried out when dealing with clients in person.

In cases where the interaction with the client also takes place in a virtual environment, it is necessary that the internal policies demonstrating the technical

47 FEKETE, Imrich a Martina FEKETEOVÁ. *Občiansky zákonník. Prehľadný komentár*. Bratislava: Epos, 2012. 978-80-8057-972-2, p. 127.

48 Article 5 of the Act on Consumer Protection in Distance Financial Services; subject to limited exemptions in case of (eg) open market transactions and prolonged period of 30 days in case of life insurance and supplementary pension savings.

and organizational readiness to carry out the activity of an independent financial agent will be amended. This should include at least changes to the description of technical equipment, the internal regulation on measures to prevent money laundering and terrorist financing, the internal regulation governing the rules on dealing with clients and potential clients, and the internal regulation on record keeping. The NBS Distant Intermediation Guidance should be followed. Any change in these internal policies should be reported to the National Bank of Slovakia. These changes involve not only legal, but also technical and operational questions, although ultimately bearing significant legal implications. For example, where the evidence of client's submission, acceptance or receipt of a document or information does not exist in the traditional paper form and signature, the independent financial agent must be able to keep and reproduce (including for supervisory purposes) such evidence in reliable electronic form. This requires additional technical know-how and equipment, both on the part of the independent financial agent, but also the supervisory teams and possibly, in case of a dispute, courts or other relevant authorities. At the same time, from general *de lege ferenda* point of view, the legal regulation should reflect on the trend of increasing volume of intermediation and transacting activity taking place by the means of electronic communication.

Having said that, an independent financial agent who continues to carry out financial intermediation in a manner that involves only a face-to-face meeting with the client does not have to change its internal policies that have been assessed by the National Bank of Slovakia for the purpose of granting the relevant authorization.

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Financial Market Security Risks

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Abstract:
The financial market, together with financial market law, contains various interdisciplinary areas that have an impact on its effective functioning. The aim of the paper is to identify and analyze selected security risks of the financial market with a focus on the criminal law. The author points out selected security and legal risks of the money market and the capital market. Legal risks are divided according to the financial market system. In the money market, it will point out the risks of committing crime, the obligation to provide information in accordance with the law, as well as individual types of risks. In the capital market, it will highlight sub-issues such as zombie companies, threats to property, unfair practices.

Key words: *financial market, crime, security risks, capital market, zombie company*

INTRODUCTION

Due to the uniqueness of its position among all other markets, the financial market can influence them and therefore its regulation and protection are desirable. Security risks accompany the development of the financial market as a whole and can be divided into different categories, whether economic risks, cyber risks, credit risks, market risks, legislative risks and a specific category are also security or security risks. Significant emphasis is placed on the issue of security of financial markets, which is forced to constantly face threats, risks, while its functioning is a matter of course and an integral part of our daily lives. Security risks affect the financial market, but also partially, for example in the form of an impact on the functioning of institutions, companies, exchanges, or the consumer-client himself. The current situation during Covid-19 has also created space for us to analyse new promising effects threatening the financial market, both the money market and the capital market. The importance of continuous analysis of financial market security risks is also pointed out by current legislation, such as the financial intermediary

(obligations to process documents and the risk management system in a commercial bank), or from the point of view of the regulatory authority – the central bank) financial crisis management). The precondition for managing and coping with risks is their very knowledge, identification, evaluation, and subsequent solution of the issue of prevention, but also the issue of eliminating the consequences they have caused. This paper will aim to point out selected security risks of the financial market by focusing on the risks associated with the committing of crime.

1. SECURITY RISKS OF THE FINANCIAL MARKET

The financial market in the Slovak Republic and its legal regulation subsumes diversified views on its characteristic position, not only in terms of legal, or financial law, commercial law, but also from economic, political, practical, and social. Globally, the issue is given due attention by the lay and professional public. The Slovak normative-legal regulation of the financial market is gradually being completed and supplemented, while at that time it is only in its beginnings, which mark its scattering in the entire legal order. We constantly see the changes implemented within it, while they are largely influenced by EU standards.

Security risk means the probability of the occurrence of unexpected negative phenomena, which bring with them certain outcomes or consequences. The risk is associated with a state of uncertainty in the system.[1] If we want to apply this general definition to the financial market, it represents the probability of the occurrence of unexpected phenomena in the financial system, which create impacts on the functioning and efficiency of the financial market. If we divide the financial market into money, capital, insurance, foreign exchange, and precious metals markets, we can identify in each of them what we mean by security risks. Even the legal regulation itself specifies the concept of risk, for example in § 23 par. 6 letter a) of the Banking Act, risk means a possible loss, including damage caused by the bank's activities or caused to the bank by other facts. Čunderlík understands the risk in the banking sector of the probability of the occurrence of a negative phenomenon because of banking activities or the impact of another event.[2]

2. SECURITY RISKS OR THE MONEY MARKET

Money market security risks can be divided according to the financial intermediary operating in the money market and providing money market instruments or a financial advisor, i.e. on the one hand, we can identify the security risks of the money market as such, the security risks of financial institutions (commercial banks, building societies), as well as security risks that threaten the client by a financial

1 BUZALKA, Ján. *Security Risk Theory*. Bratislava: Academy of the Police Force in Bratislava. 2012. 168 p. ISBN 978-80-8054-547-5. pp 16–19.

2 ČUNDERLÍK, Ľubomír et al. *Financial Market Law*. Bratislava: Wolters Kluwer, s.r.o. 257 p. ISBN 978-80-8168-753-2. pp 27–31.

broker or financial advisor. Financial intermediation aims to ensure the distribution of financial services to clients. Financial advice aims to provide the client with such impartial information that he decides to enter into an obligation.[3] If we draw attention to commercial banks, the Banking Act directly identifies credit risk, market risk, operational risk, liquidity risk, systemic risk, the risk of loss, leverage risk, interest rate risk.[4] Based on this law, every bank is obliged to have a system in place to manage and monitor security risks.

The development of information technologies, their innovation and the electronization of services bring with them certain risks that we can also observe around the banking sector. We are talking about cyber risks that threaten banking information systems, thanks to which communication between the client and the bank has improved. The client could use electronic banking (internet banking), which is preferred in this modern age to a greater extent than in the past. Banks spend a significant amount of funds to ensure the protection of their information systems through certified security systems, protocols, as well as to analyze and manage the cyber risks associated with it.[5] The aim is to protect its clients from the misuse of banking services provided through the Internet. Typical cyber threats in the field of banking are the so-called remote bank theft when funds are stolen during their transfer in a non-cash payment system. Given the dynamic development of information technology, perpetrators use various types of misuse of personal data, e.g., through phishing and pharming. It is cyber-attacks themselves that can affect not only the consumer, but also the bank, or the entire money market, even the financial market. It is the observance of the principle of information by banks towards clients that increases the protective function of not becoming a victim of such an attack. These are mainly attacks aimed at the misuse of personal data, where the attacker tries to obtain sensitive personal information from a bank client. Sensitive information may include credit card information, credit card number, PIN code, or login name, a password for a service, and more. The attacker accesses sensitive data by sending a fake e-mail or SMS message, e.g., to verify identities that look very authentic, allowing the attacker to take advantage of the bank client's inattention, who believes the message was sent to him by the bank. They also use untrusted applications installed on their mobile phone to obtain data, which then redirect you to a fake website. The solution to eliminating the risk is, for example, to authorize the payment, in case of lower risk in the form of an SMS key, or case of high risk, it may suspend the payment.

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3 WINKLER, Martin. *Financial Advisor- definition of the concept and conditions of its activity in the Slovak Republic.* In ŠKRABKA, Jan and VACUŠKA L. (ed.) *Law in Business of Selected Member States of the European Union.* Proceeding of the XII International Scientific Conference. Prague: TROAS, s.r.o., 2020, 384 p. ISBN 978-80-88055-10-5. pp 121.

4 Art. 23 (6) (a) of the SLOVAK REPUBLIC Banking Act No.483/2001 Z.z. [zákon č. o 483/2001 Z.z., bankách a o zmene a doplnení niektorých zákonov].

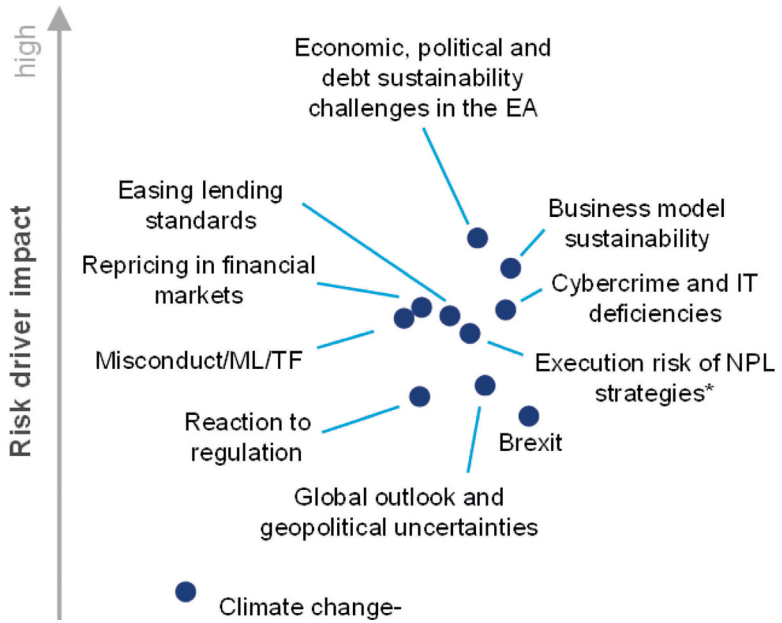
5 KORAUŠ, A., DOBROVIČ, J., POLÁK J., BACKA, S. *Aspects of the security use of payment card pin code analysed by the methods of multidimensional statistics*. In Entrepreneurship and Sustainability Issues, 2019, 6(4), pp. 2017–2036

Money market security risks with a focus on crime can be divided into two groups, namely payment system crime in the area of money transfer and credit transaction crime. The first group can include transfer order fraud, computer fraud, misappropriation, embezzlement by bank employees, fraud with payment cards and checks, counterfeiting, alteration and misappropriation of money, their putting into circulation, endangering the circulation of money. The second group includes credit fraud, damaging and favouring the creditor, bribery. The specific criminal offences related to banking secrecy that we include here also include the threat to trade, banking, postal, telecommunications and tax secrecy. In a more thorough analysis of these crimes, this is a latent crime associated with a high level of expertise of offenders, often committed using computer technology. At present, however, the most problematic and current risk of the banking sector is the abuse of banks to carry out illegal processes, among which we also include the so-called money laundering. Money laundering is the process of changing large amounts of money obtained from crimes, such as drug trafficking, into origination from a legitimate source. Money laundering often involves financial institutions to make the money look as if it came from a legal source. Instead of depositing a large sum of money all at once at a bank, a money launderer will deposit small sums over time to avoid drawing attention. Money earned illegally may be taken to a country where money laundering laws aren't as strictly enforced, but this often requires smuggling cash across national borders.[6] This is a very complex process, carried out in several stages, which makes it difficult to detect and investigate it by law enforcement authorities. If the liable person finds, based on the information available to him, as well as based on an assessment of the risks, that the client, the trade represents a higher risk of legalization, exercises increased care against such a client. In its risk assessment report for 2020, the ECB mentions the risk of money laundering as one of the risks to the euro area banking system. This type of risk poses a significant risk for banks and their viability, which is often associated with poor governance and inadequate risk management mechanisms in banks. The ECB calls on banks to pay more attention to their internal legalization processes and to improve the risk management framework.[7]

6 Money laundering. *Bankrate* [online]. Bankrate, LLC., 2021. [online 2021-10-08] Available from: https://www.bankrate.com/glossary/m/money-laundering/

7 EUROPEAN CENTRAL BANK. ECB Banking Supervision: Risk assesment for 2020. *European Central Bank* [online]. Frankfurt am Main: European Central Bank, 2020 [viewed 2021-10-03]. Available from: https://www.bankingsupervision.europa.eu/ecb/pub/ra/html/ssm.ra2020~a9164196cc.en.html#toc1

Fig. 1: SSM Risk Map for 2020



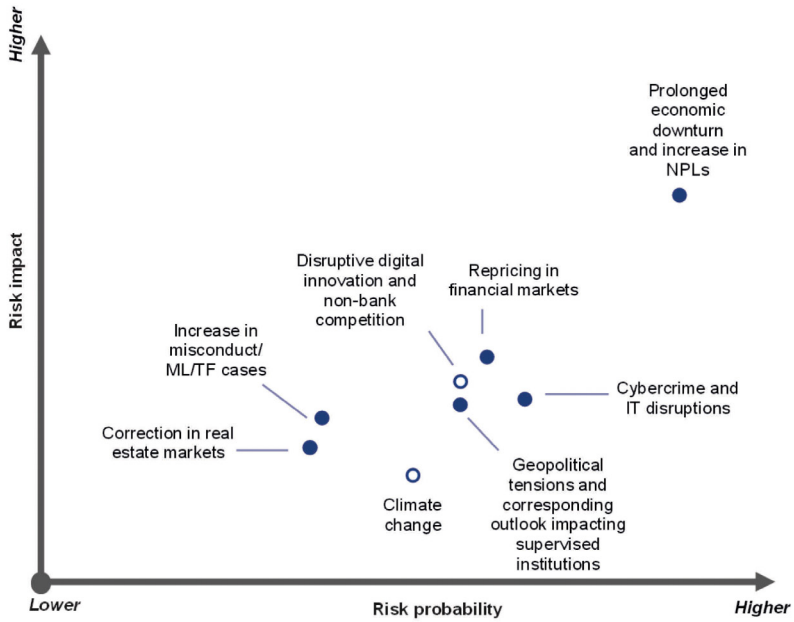
Source: European Central Bank and national competent authorities (NCAs), 2020.[8]

The latency of some security risks and the consequent consequence are pointed out by various cases, such as the case of Dexia bank and Devín bank. Often their existence is associated with speculative trades, insufficient coverage of intended operations, uncovered loss, distortion of documentation, lack of regulation.

According to the ECB, high risk is also associated with the pandemic situation of Covid-19. The SSM Risk Map shows the key risk drivers affecting the banking sector, defined as shock-type events along the dimensions of probability and impact. These risk drivers can have an impact on supervised institutions through existing internal and external vulnerabilities prevalent in the banking system itself or in the economic environment in which banks operate. The pandemic and the high uncertainty surrounding the macroeconomic outlook are the predominant forces shaping the risk picture for supervised institutions. Weaknesses in the money market, together with risk assessment, can logically be linked to security risks when there is already a risk of crime. We currently mean money laundering, cybercrime, and the creation of artificial structures and speculative trading.

8 Ibid.

Fig. 2: SSM Risk Map for 2021



Source: European Central Bank and national competent authorities (NCAs), 2021.[9]

2. SECURITY RISKS OF THE CAPITAL MARKET

Capital market security risks have a broader impact as well as understanding because, on the one hand, we talk about security risks on the part of the issuer and on the part of the investor, on the other hand, we perceive them as the existence of possible effects on the functioning of the capital market through the stock exchange. Concerning the entity, security risks can be divided into stock market risks, risks within management companies, client risks. The risks threatening assets on the stock exchange include:

- the risks of the capital market itself,
- the risks associated with the committing of crime in the capital market,
- the legal risks and risks related to the omission of proceedings.

Capital market risks include macroeconomic threats (e.g., negative reports of interest rate increase as a tool of the central bank's monetary policy), global threats and war conflicts (e.g., Covid-19, World War II), or political threats (e.g. affecting

9 EUROPEAN CENTRAL BANK. ECB Banking Supervision: Assessment of risks and vulnerabilities for 2021. European Central Bank [online]. Frankfurt am Main: European Central Bank, 2021 [viewed 2021-10-03]. Available from: https://www.bankingsupervision.europa.eu/ecb/pub/ra/html/ssm.ra2021~edbbea1f8f.en.html#toc1

oil prices by the US official, the internal security of the state). This may also include the risk of increasing banks' lending capacity or the asset purchase program[10]. To accumulate capital to overcome adverse events, banks create a capital conservative pillow, following the Basel III Agreement. According to the Basel III Agreement. the so-called counter-cyclical capital cushion that aims to achieve better protection for the banking sector at a time of excessive growth in total loans. Increasing lending capacity will be maximally suppressed to restore the stability of the financial market, and entrepreneurs will lose the opportunity to borrow money to cope with a difficult period.[11] It is clear from the above division that these risks affect the capital market, they are absent from a specific perpetrator, they result in frequent sharp falls, which are associated with high losses according to the severity of the risk.

The second group of security risks is related to the committing of crime, and it is important to emphasize that it differs from ordinary crime not only in its frequent links to organized crime but in its higher recidivism and latency rates. The dynamics of capital market law also has a logical impact on the manner of committing a crime, its international aspect of manipulating financial statements, changing procedures and technologies, and the like. Offenders also abuse legislative gaps in foreign legislation concerning the inference of tortious liability. Property crimes committed on the capital market include those that are characterized by enrichment at the expense of foreign property (embezzlement, fraud, capital fraud), crimes involving intentional damage to property and crimes involving the exploitation of the crime of other property. persons (e.g., in the form of money laundering). Among the economic crimes protecting economic interests, it is possible to include e.g., misappropriation of business, misuse of the information in business dealings, falsification, alteration and unauthorized production of money and securities, display of counterfeit, altered and unauthorized production of money and securities.

The capital market has a special position in comparison with the other second financial market, which means that it provides a demonstration space for the construction of various common speculations, which are closely related to unfair practices. In principle, securities are bought or they are traded mainly for two practical reasons. The first is to obtain income (dividend, interest) and the second is to make a profit at a changing exchange rate using stock market speculation. In general, and from the previous historical analysis of the development of the capital market, it is obvious that the existence of stock market speculation is closely linked to the origination of stock exchange trading. Stock market speculation is associated with profit, but also loss. Contribute to the stability and equilibrium of securities prices. They become negative when they threaten the smooth running of the market economy

10 FUNTA, Rastislav. *Is the ECB's pandemic emergency purchase programme (PEPP) in line with EU Law?* In ŠKRABKA, Jan and VACUŠKA L. (ed.) *Law in Business of Selected Member States of the European Union.* Proceeding of the XII International Scientific Conference. Prague: TROAS, s.r.o., 2020, 384 p. ISBN 978-80-88055-10-5. pp 365.

11 ÚRADNÍK, Michal *Increasing the lending capacity of banks – a measure to support the economy or a measure undermining financial stability for the future.* In ŠKRABKA, Jan and VACUŠKA L. (ed.) *Law in Business of Selected Member States of the European Union.* Proceeding of the XII International Scientific Conference. Prague: TROAS, s.r.o., 2020, 384 p. ISBN 978-80-88055-10-5. pp 375–376.

or when they involve financially and intelligently weak entities in stock exchange trading. The most standard described some practical practices of the capital market include insider trading, manipulating the price of a security, dissemination of false information and dishonest practices committed by securities traders.

Insider trading is a term that restricts the misuse or use of securities information to its advantage. Macroeconomic or microeconomic information is therefore in itself one of the risks of investing in the capital market and which implies that its impact on the values of securities as well as other instruments traded on the capital market. Insider trading uses all available information that could lead to security or dividends, and thus to obtain such property benefits or access to assets that await the prices of the security, such as shares. At that time, this information was only available to a limited number of people in the confidentiality mode (i.e. it is not publicly available).[12] This is a fundamentally serious problem for its transparency because it is very difficult to find, the latency rate is huge. Thus, help those insider traders to obtain property gain from the perpetrators and it also violates the right to information of all other market participants according to Article 11 of the Charter of Fundamental Rights and Freedoms. The following profit with the usual securities trading can be considered illegal income.

When manipulating the price of a security, we mean direct manipulation, i.e. if the person unjustifiably provides false information or grossly misleading information about the offer, demand or price of a financial instrument or related spot contract relating to commodities, within which the perpetrator's intention to manipulate the price is also provable. In addition, we also know the so-called, not direct manipulation, i.e. the person was not interested in changing or influencing the price, does not benefit from it, but in the light of his knowledge he knew or could have known that the disclosure of such information would affect the capital market or the price of the security. By manipulation, we also mean a specific order on the capital market, namely a trade or a price at a pre-agreed non-exchange price at which a security will fall or rise. These phenomena and agreements are often not mentioned, but they are guaranteed on the capital market and can be detected on a security chart together with an indicator of the volume of trades (e.g. volume index) the so-called number of trades of securities units at a given time. Indirect manipulation can be said when an entity does not change or adjust the facts that affect the price or buy or sell securities so that the price increases but encourages market participants with their statements and attitudes to act in favor and in the direction in which the statements are directed. Manipulation most often begins with an agreement between the buyer and the one who compresses the price of the security. When two traders invest in the securities market, one is interested in buying a security at a non-market price and the other one

12 ŠIMONOVÁ, Jana. Právna regulácia finančného trhu v Slovenskej republike. Trnava: Trnavská univerzita v Trnave, 2012. 188 p. ISBN 978-80-80825-829, pp 136–138.

is willing to sell the securities even in such circumstances at a certain time or for an agreed monetary performance. However, the principle is mainly controlled volume sales in the period when the market does not move much and then the accomplice starts to sell his securities sharply, thus artificially pushing the price down. By doing so, it can cause so-called crowd sales psychosis for fear of falling prices. Often the individual ways of committing are cumulative, complementary, e.g. the price of a security is artificially printed downwards, people who have no publicly available information will buy them security more advantageous below its fair value, maximize their profit, they can even legalize it.

In the 21st century, with the rapid rise of e-commerce, much-needed sciences such as computer science and mathematics have been added, further deepening the knowledge-intensive multidisciplinary complexity of all securities trading as well as expanding the ability of entities to circumvent certain rules or standards or to commit a crime. The offenders use the temporary latency of crime in the securities market, as well as the ever-changing ways of committing it. The reaction of authorities (law enforcement agencies, regulators, stock exchanges) to new types and structures of securities trading is slower. The riskiest part of the stock exchange is its entities, especially securities traders (ESMA even specifies retailers). Because a retail investor can see high profits, often artificially adjusted to make them more attractive when we talk about manipulating business statistics, he can often enter the risky parts of a stock exchange with the vision of profit and thus lose a significant portion capital. It is most often traded over computer platforms because it is the simplest solution. The first risk is if the person pretends to be an outward securities trader, but the aim of that fraudulent activity is to obtain funds from an investor or to pretend that trading orders are placed. The other risk is to obtain finance by fraudulent methods and a frivolous approach via various illegal fees or commissions. We recognize the 3 most common fees when trading in securities, which may be subject to illegal enrichment at the expense of the client. These are Spread, Swap and Commission. A special group is the already mentioned fraudulent conduct, which may relate to manipulated statistics, fraudulent evaluations of agencies, fraudulent financial outputs, promotion of false returns, false financial assets of the company, etc.

The last-mentioned risk was the legal risks and the risks that arose due to the omission of the proceedings. We perceive legal risks on two levels. On the one hand, it is a partial diversity of the legal regulation of trading on the capital market, primarily from a private point of view, on the other hand, it can be defined as a threat to capital indirectly because legal risk does not condition loss of capital. It indirectly endangers the trader's capital in such a way that if the trader violates the law only after the decision in the case against him is valid, he loses the right to capital and cannot claim it. I.e. the person receives capital or part of it, or the legal risks also concern the imposition of a fine for non-compliance with a legal

obligation, which will also affect the number of the investor's assets. In such a case, the offender is aware of the unlawful conduct or omission. Although the obligated subject e.g., by failing to tax the income from the proceeds from the sale of a security, which is greater than the legal minimum under the current legislation, ignorance of the law does not justify and therefore a fine will be imposed that harms capital.

We can also divide the risks according to the time limit, before entering the capital market, during the disposal of the security, when selling the security.

3.1 Zombie companies

This phenomenon and the informal term used by experts in the current capital market designate companies that pretend to work but upon careful analysis, we find that the company makes no profit and until it should have been in bankruptcy and bankruptcy for a long time is not and continues to function. It looks like it's profitable and advancing, which can attract potential investors, but they are taking a risk, and if the company goes bankrupt, ordinary shareholders are at the very bottom of the list of liabilities from the company's liquidation balance. Zombie companies can be also the forms that are issuers and have been operating on the stock exchange for more than 10 years. The company makes such profits that cover part of the costs and therefore does not achieve a net profit. The company also has liabilities to creditors and because it does not make a profit, it cannot pay its liabilities and must therefore acquire a new creditor. With the new finances, it then satisfies the requirements of the initial creditors and will thus continue to operate until the banks can provide it with resources. Zombie companies have avoided natural extinction, so it seems that it violates the principles of competition.

There is no legal definition of a "zombie company" because it is difficult to determine its risk and also characteristics. In generally we can claim that it can pose a security risk to the financial system, f.e. due to the principle of Snowball. The latency of such companies is high outside the stock exchange because while companies issuing securities are generally required by law to disclose thorough accounting as well as sales and funds and others, it is difficult to find out about companies that do not issue securities whether they meet the requirements of "zombie companies" and thus are a threat to the economy and its creditors. This can be part of the negative impact of monetary policy and quantitative easing, which was beneficial after the crisis of 2009 as a tool to relaunch national economies, but too long a period of low-interest rates also results in such dormant economic threats, which at the first negative threat may cease to be able to repay liabilities and if they do not acquire a new creditor, they simply go bankrupt. In principle, there may be various threats, whether a drop in demand or an increase in interest rates or other risks, such as a sharp drop in the price of a company's security, when investors so-called lose interest in the company and move their capital elsewhere.

An important factor of the existence of the "zombie company" is also the banking policy of central banks such as the ECB or the federal reserves of the Fed (in the USA), where monetary policy pours financial resources for loans to banks even at negative interest rates. It is easy to stay on the financial market and interest rates do not fundamentally limit their minimum profit, when at a higher interest rate the company would have higher costs of repaying liabilities and would therefore have to make more profit. According to PWC, it seems that up to 25% of companies in Greece can be considered "zombie companies" or are almost definable as "zombie companies".[13]

According to the analysis, many new issuers (companies) coming to the stock exchange, are non-profit. They don't make more profit than their operating costs and costs of paying liabilities. The value of a company and a given issuer's security is not calculated solely based on profit, but the fact remains that until the firm and thus the issuer they are an important source of security for the investor if they do not just look at the profit from the price difference. Dividends are paid only from the company's profit according to the decision of the statutory body, but it is classically customary to pay dividends of some percent of the profit to shareholders. Also, these types of new companies on the stock exchange can be to classify into the group of zombie companies and the main risk remains.

This situation and percentage give us an insight into the expectations of the capital market, specifically investors on the stock exchange, which are overvalued according to the number of non-profit companies, and thus the market can accept more companies that do not make a profit. Investors, therefore, assume that most companies will start to make a profit, but the fact remains that not all of them can do it, and therefore if the market is direct at once or increases a constant percentage of such accepted, new companies that do not make a profit, thus increasing the risk of a stock sale, which will withdraw even those companies that have already made a profit but is not lucrative, and finally the crowd psychosis of securities sales will pull down even stable companies securities prices, however, lose a significant part. These massive sell-offs are further reflected in the issuer's lack of assets, so the company starts protective measures such as redundancies, thus reducing the financial burden on human resources and thus increasing unemployment. Subsequently, the purchasing power of the population and thus the demand will decrease, which results in a reduction in corporate profits and so it continues when we can talk and the economic recession or economic crisis. This principle is also called Snowball, i.e. the principle of a snowball, where we can realistically imagine the packing, which also takes place during the economic crisis. The risk is that the economic cycle is repeating itself and that "zombie companies" could be one key indicator of weakness in the economy, which can have fatal con-

13 PWC GREECE. *Stars and Zombies: Greek corporates coming out of the crisis. Executive summary*. 2014. [online 2021-10-09] Available from: https://www.pwc.com/gr/en/publications/assets/stars-zombies-eng.pdf

sequences, which is a positive interpretation should be settled by the resumption of economic growth from the previous bottom of the cycle.[14]

CONCLUSION

We can identify security risks in various areas of our lives, and from the point of view of property protection, we consider it important to know even the most typical of the financial market. Without a clear identification of security risks, the stability of the financial system cannot be adequately protected. As in the article, we state that the security risks of the financial market are different, with a very narrow line between the risk that threatens the financial market and the committing of crime that already harms the financial or economic interest. Risk management in the bank is responsible for the effective monitoring of risks, for the elaboration of the system of their identification and elimination, as well as for the application of the principle of information to clients and the public. Regulators, whether the ECB or NCA's, also have a significant influence in identifying security risks. As the financial market is highly dynamic, it is a space for the creation of innovative financial instruments, technologies, in a dynamic evolving digital space with a wealth of IT technologies, there is a highly probable risk of crime.15 Each financial market entity, especially a capital market trader, has its investment plan or procedure (investment strategy), trading strategy and ratings (agency ratings). If the strategy maker adjusts the statistics to make the strategy look more lucrative, the investor is likely to lose the capital invested and the amount he loses depends on when he realizes that the strategy is not working. In such an action, the creator commits and especially the one who offers such a strategy of TC fraud or TC of capital fraud; however, it depends on what the strategy is aimed at. It does not have to be just manipulation, but it can be accumulated with a lack of information and price leverage, which enormously increases the risks on the market, and then it is difficult to prove misleading or. use of error. Solution or "Strategy verification" can prevent risk, but it can often be challenging. The general common element of security risks in the financial market from the point of view of criminal activity is precisely the fraudulent conduct of the offender. In the article, the author identified and pointed out only selected security risks, as only from the point of view of financial market crime this is a large-scale issue, which is constantly evolving dynamically. We consider it very positive, but also important, that not only standard financial market risks, but also security risks and ways of committing a crime are monitored by regulators. Only regulators, in cooperation with financial intermediaries, can identify together the risks of speculation or a crime.

14 OBERSTELLER STEFAN, Zombie-Firmen: Wie gefährlich sind Zombie-Firmen für die Wirtschaft und für Privatanleger?, Geldbildung.de [viewed 2021-10-09] Available from: https://www.youtube.com/watch?v=sjrLRELHWUw

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Concentration of Powers of Monetary and Macro-prudential Policy – Potential Misuse of Powers?

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Abstract:
The main goals of central banks include maintaining the price stability (monetary policy) and the financial stability (macro-prudential policy). The legal competences that are granted to the central banks to implement their policies are different, yet a strong complementarity of both of the monetary and macro-prudential policies instruments cannot be denied. Therefore, it may be difficult to track whether the instruments were really applied in order to achieve the objectives contemplated by the respective policy. The aim of this paper is to analyse the risk of potential abuse of powers by central banks, in particular in relation to new macro-prudential policy instruments introduced by the amendment to the Czech National Bank Law from 2021.

Key words: *monetary policy, macro-prudential policy, price stability, financial stability, central bank, misuse of powers*

INTRODUCTION

The powers to determine and implement both monetary and macro-prudential policies are essentially concentrated with the independent entities - central banks.[1] Usually, such an entity is granted by a strong independence of a state, whereas this legal status empowers the entities to perform the functions entrusted to them irrespective of any government and political influence.

The primary goal of central banks is to maintain price stability. Maintaining the price stability is usually accepted to be legally superior to other objectives.[2] Natu-

1 SLÁDEČEK, Vladimír. Art. 98 In: SLÁDEČEK, Vladimír, and MIKULE, Vladimír, and SUCHÁNEK, Radovan, and SYLLOVÁ, Jindřiška. *Ústava České republiky*. 2nd edition. Prague: C. H. Beck, 2016, s. 1153. ISBN 978-80-7400-590-9.

2 Cf. the Article 98 (2) of the Constitution of the Czech Republic [ústavní zákon č. 1/1993 Sb., Ústava České republiky] which sets out the major goal and organization of the Czech National Bank.

rally, central banks may then strive to achieve their other legal goals, only as long as they do not conflict with their main goal.

Powers, whether entrusted by law or by an international treaty, go hand in hand with the legally defined goals of the central banks. These powers are defined and may be executed only in relation to the scope of the specific economic policy (either monetary or macro-prudential). The use of different powers (instruments of the policy) to achieve objectives of the other policy may not be accepted from the legal point of view, as such powers would serve to different goals than those for which those powers were granted.

However, given the complementary effects of the two policies, it can be in a particular case very difficult to assess whether the instruments of the respective policy were used in order to achieve different objectives.

This can also be illustrated by the new powers of the Czech National Bank in the area of macro-prudential policy to set mandatory indicators in relation to consumers' loans, which may have undoubted effects on monetary restriction.

In this paper, the author will analyse the existing Czech and European legislation in order to identify the specific competences of central banks (namely Czech National Bank) on the field of monetary and macro-prudential policy. The identified instruments shall be further legally assessed from the point of view of the legal impacts to the subordinated entities. Having regard to the legal differences between the instruments, the author will further attempt to detect (by using both legal and economic theory), whether there is a potential place for misuse of the competences in course of conducting the macro-prudential policy.

1. DIFFERENT OBJECTIVES, STILL SIMILAR EFFECTS

Primary European Union law states that the primary objective of the European System of Central Banks is to maintain the price stability.[3] This goal, set by the norms of the European law, is then consistently reflected also by the national legislations of such member states of the European Union that are not yet participating in the European monetary union.[4] Price stability is, of course, a rather vague legal concept that depends on ad hoc basis interpretations by economic experts.

As regards the execution of the macro-prudential policy on the European Union level, the European law also presupposes the conferral of powers in the area of

3 Such primary goal is set by the respective provisions of the primary law, most importantly the Article 127 (1) of the Treaty on Functioning of the European Union.

4 In the case of the Czech Republic the goal of the monetary policy is determined in the Article 98 (1) of the Constitution of the Czech Republic and by the Section 2 (1) of the CZECH REPUBLIC Act No. 6/1993 Coll., on Czech National Bank, as amended [zákon č. 6/1993 Sb., o České národní bance]. With regard to the constitutional entrenchment, the achievement of monetary policy objectives can be considered a priority in terms of legal force. See SLÁDEČEK, Vladimír. Art. 98. In: SLÁDEČEK, Vladimír, and MIKULE, Vladimír, and SUCHÁNEK, Radovan, and SYLLOVÁ, Jindřiška. *Ústava České republiky*. 2nd edition. Prague: C. H. Beck, 2016, s. 1153. ISBN 978-80-7400-590-9.

macro-prudential policy on the European Central Bank.[5] The objectives of the macro-prudential policy are generally to adopt instruments to prevent risks to the stability of the financial system and to contribute to its resilience, to limit the reduction of systemic risks and to maintain financial stability.[6]

Although the objectives of both policies are defined differently, it is clear that there is high level of interdependence and complementarity in relation to fulfilment and achievement between the goals of the monetary and macro-prudential policy. Naturally, a stable price level is desirable for the healthy functioning of the financial market. Equally, the stable functioning of the financial market is a cornerstone for the conduct of monetary policy. The complementary effects of both policies are logical and widely accepted.[7,8,9]

From a legal point of view, it is crucial that both objectives are defined under such legal (or rather economic) concepts which are rather vague and have to be specified with respect to the particular case. The interpretation of both concepts in course of implementation of both policies is difficult not only for lawyers but also for economists in – sometimes it takes several years to identify whether the powers were exercised in the desired way to achieve the intended sub-goals. In policy-making, intermediary objectives are often chosen through a long causal chain of transmission mechanisms,[10] and identifying specific economic practices is a fragile art that requires economic knowledge and experience that is often difficult to justify legally in specific cases.

2. LEGAL INSTRUMENTS OF CENTRAL BANKS

The law confers central banks various instruments to achieve their legally defined goals. From a legal point of view, these instruments can be divided pursuant to the extent to which these powers interfere with the legal status of the subordinate entities to market-based instruments and administrative instruments.[11] While by using the market-based instruments the central bank seeks to achieve its objec-

5 In particular the Article 127 (6) and 132 of the Treaty on the Functioning of the European Union in connection with the Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

6 On the level of the law of the Czech Republic, the key objectives of macro-prudential policy are defined in Section 2 (2) let. e) of the CZECH REPUBLIC Act No. 6/1993 Coll., on the Czech National Bank, as amended [zákon č. 6/1993 Sb., o České národní bance].

7 ALTAVILLA, Carlo, and LAEVEN, Luc A., and PEYDRÓ, José-Luis. *Monetary and Macroprudential Policy Complementarities: Evidence from European Credit Registers*. ECB Working Paper No. 20202504. December, 2020. Available at SSRN: https://ssrn.com/abstract=3750006 [viewed 2021-10-03].

8 NIER, Erlend, and KANG Heedon, 2016. *Monetary and macroprudential policies – exploring interactions*. BIS Papers chapters, in: Bank for International Settlements (ed.), Macroprudential policy, 2016, volume 86, pages 27-38.

9 VOJTEK, Radek. *Bail-in a ochrana vlastnického práva*. 1st edition. Prague: C. H. Beck, 2021, pp. 99.

10 GALVAO, Ana Beatriz, and MARCELLINO, Massimiliano. *The effects of the monetary policy stance on the transmission mechanism*. Studies in Nonlinear Dynamics & Econometrics, vol. 18, no. 3, 2014, pp. 217-236. ISSN 1027-6297.

11 REVENDA, Zbyněk. *Centrální bankovnictví*. Third updated edition. Prague: Management Press, s.r.o., 2011. 558 p. ISBN 978—80-7261-230-7. pp. 221.

tives by conducting market operations, the administrative instruments are specific rather by directly imposing obligations or restrictions on subordinated entities whose only option is to comply with such instruments.

Thus, it is clear that market-based instruments will usually have indirect effects on the position of market participants, since their position will be affected only by the market transmission mechanisms. On the other hand, the administrative instruments are directly interfering with the legal status of the subordinated individuals. From the point of view of legal regulation, the administrative instruments are, without a doubt, more intensive and their use must more be more consistently assessed in respect of the principles of the rule of law;[12] resp. in the case of the European Monetary Union, the principles of conferred powers.[13]

Market-based instruments are particularly specific in the area of monetary policy. Central banks conduct their own market operations seeking to ensure the intended consequences in relation to maintaining price stability through market transmission mechanisms. Although there are also certain administrative instruments of the monetary policy, their role in relation to maintaining the price stability is rather marginal.[14]

On the contrary, the area of macro-prudential policy is specific to the more frequent use of the administrative instruments.[15] Generally, while central banks implement the macro-prudential policy, they act as public authorities empowered to decide on the rights and obligations of the subordinated entities.[16]

12 The state (including any other entity exercising the delegated powers) may exercise only such powers and only in a way expressly defined by law. See SLÁDEČEK, Vladimír, SYLLOVÁ, Jindřiška. Art. 2 In: SLÁDEČEK, Vladimír, and MIKULE, Vladimír, and SUCHÁNEK, Radovan, and SYLLOVÁ, Jindřiška. *Ústava České republiky*. 2nd edition. Prague: C. H. Beck, 2016, s. 1153. ISBN 978-80-7400-590-9.

13 The European principle of conferred powers is regulated primarily in Article 5 of the Treaty on European Union and has been subject to legal interpretation of various courts of the member states, such as Judgment of the Constitutional Court of the Czech Republic of 26 November 2008. File No. ÚS 19/08, published under No. 201/2008 Coll., and Judgment of the Federal Constitutional Court of the Federal Republic of Germany of 12 October 1993, File No. BVerfGE 89.

14 The administrative instruments of monetary policy consist mostly of a power to set a minimal reserve requirements ratio and to apply sanctions for non-compliance with these reserve requirements (in the legal system of the Czech Republic, this issue is regulated in Sections 24 to 26 of CZECH REPUBLIC Act No. 6/1993 Coll., on the Czech National Bank, as amended [zákon č. 6/1993 Sb., o České národní bance]). However, the role of such administrative instruments is rather disputable and has been subject to questions on their importance in past several years. For instance, see CARRERA, César, *The Evolving Role of Reserve Requirements in Monetary Policy*. Journal of CENTRUM Cathedra: The Business and Economics Research Journal. March 20, 2013. Vol. 6, Issue 1, pp. 11-25. Available at SSRN: https://ssrn.com/abstract=2236314 [viewed 2021-10-03].

15 In the Czech Republic, the legal set of instruments consist in particular of the power to set binding limits on consumer credit indicators pursuant to Article 45a et seq. CZECH REPUBLIC Act No. 6/1993 Coll., on the Czech National Bank, as amended [zákon č. 6/1993 Sb., o České národní bance], and further powers such as to determine the countercyclical capital buffer, the systemic risk buffer, the capital buffer for other systemically important institutions and capital conservation buffer in the sense of the relevant provisions of CZECH REPUBLIC Act No. 21/1992 Coll. on Banks, as amended [zákon č. 21/1992 Sb., o bankách], and Regulation (EU) No. 575/2013 of the European Parliament and of the Council. on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

16 In such situation a principle of rule of law / conferred powers must be observed carefully. Cf. Judgment of the Constitutional Court of the Czech Republic of 1 December 1998 File No. I. ÚS 41/98.

3. POSSIBLE MISUSE OF POWERS

Central banks are endowed with a wide range of powers which they are entitled to use in relation to their legally defined scope of activities. At the same time, macro-prudential policy instruments have legally stronger impacts for the subordinated entities and, unlike monetary policy instruments, are capable of directly achieving the objectives without the need of deep analysis of the causality of the market transmission mechanisms.

Furthermore, it cannot be overlooked that there is a strong complementarity of the objectives of monetary and macro-prudential policies and these objectives are difficult to specify from the legal point of view. Therefore, in a specific case, it may not be easy to determine at all whether the central bank really intended to achieve the declared objective by using the chosen instruments.

The independence secured by the norms of the constitutional order and by the European law should generally guarantee that central banks have rather broad discretion in conduct of monetary and macro-prudential policy. This generally means that central banks are free to choose any economic and legal instrument in pursuing their uneasy goals, provided that they do not completely conflict with their stated objectives.

In this context, the priority and primacy of the objective of maintaining price stability, which is a central objective of monetary policy, must also be taken into account.[17] In the case of weak or ineffective monetary policy instruments, central banks may be tempted to use rather administrative macro-prudential policy instruments, the use of which will be formally justified by the need to safeguard financial stability (which, moreover, is generally complementary to price stability), although such approach is legally inappropriate.

But how to assess in a particular case whether a chosen macro-prudential policy instrument has actually been used to achieve financial stability? With regard to the strong complementary effects of the policies, it may be difficult or even impossible.

An example of the above-described field for potential misuse of powers may be the extension of powers of the Czech National Bank on the field of macro-prudential policy adopted by the new amendment to the Czech National Bank Law from the year 2021.[18] Pursuant to this amendment, the Czech National Bank acquired the power to set binding limits for the consumer credits. Exercise of this macro-prudential policy instrument would also directly lead to monetary restriction, as the monetary issuance through bank lending would be limited.[19]

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17 In respect to the supremacy of the monetary policy see also VOJTEK, Radek. *Bail-in a ochrana vlastnického práva*. 1st edition. Prague: C. H. Beck, 2021, p 99.

18 CZECH REPUBLIC Act No. 219/2021 Coll., which amends the current Czech Act No. 6/1993 Coll., on the Czech National Bank, as amended [zákon č. 219/2021 Sb., kterým se mění zákon č. 6/1993 Sb., o České národní bance, ve znění pozdějších předpisů].

19 ROSSI, Sergio S. In: PONSOT, Jean-Francois, and ROSSI, Sergio. *The Political Economy of Monetary Circuits*. Palgrave Macmillan, London. ISBN 978-0-230-24572-3, Available at: https://doi.org/10.1057/9780230245723_3 [viewed 2021-10-03].

It is therefore clear that the application of the above mandatory indicators would have direct consequences not only in relation to financial stability, but would cause monetary restriction. Naturally, central bank may declare that the instrument is used in order to maintain the financial stability, while the real motivation of such step may actually be maintaining of the price stability. In case there is at least a partial need for use of such macro-prudential instrument, there is no way of anyone being able to discover the real purpose of the instrument.

CONCLUSION

The broad discretion of central banks in conduct of monetary and macro-prudential policy opens up potential place for possible misuse of powers. It is clear that central banks consider broad economic aspects in the exercise of their powers, however there is only a limited possibility of assessing whether the use of the chosen instruments was appropriate and proportionate. Therefore, the possibility of misuse of instruments of the monetary or macro-prudential policies to achieve the objectives of the other policy cannot be completely excluded.

Although the use of macro-prudential instruments by Czech National Bank may be theoretically challenged at the administrative court, it still may be quite difficult to bear the burden of proof, in particular in case such instrument was at least partially used to achieve the financial stability.

The threat of potential misuse of competences could be eliminated by delegating the powers of macro-prudential policy to other independent entity. However, would such a step be wise? Does the legal regulation of central banks not already contain a sufficient number of legal guarantees to prevent the potential misuse? Since the legislation governing the macro-prudential policy is relatively new, there are not very much information on unusual use of conferred instruments.

The members of the central banks' management are elected in a transparent manner, which should ideally guarantee sufficient expertise and knowledge in the given field. The question is whether another public authority would be able to represent the current role of the central banks in macro-prudential policy in a satisfactory way. Indeed, it is clear that central banks have a sufficient knowledge and information to implement both policies and the fragmentation of competences to multiple institutions could have a negative impact on the effectivity of these policies.

Although it may be assumed that the Czech National Bank does not misuse the conferred powers, this topic should be further discussed, both from a legal and an economic point of view. Possible future space for research lays within the identification of the internal decision-making processes of central banks in order to assess whether there is a potential for misuse of powers and, if so, which measures should be taken to prevent or minimize such a threat.

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[12] Constitutional Court of the Czech Republic judgment of 26 November 2008. File No. ÚS 19/08, published under No. 201/2008 Coll.

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[13] Federal Constitutional Court of the Federal Republic of Germany judgment of 12 October 1993, File No. BVerfGE 89.

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[15] CZECH REPUBLIC Act No. 219/2021 Coll., which amends the current Czech Act No. 6/1993 Coll., on the Czech National Bank, as amended [zákon č. 219/2021 Sb., kterým se mění zákon č. 6/1993 Sb., o České národní bance, ve znění pozdějších předpisů].

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4. IT and IP Law

Recent Development Regarding the EU's Sound Trademark

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Abstract:
Almost 17 years passed since the ECJ judgement in case C-283/01, which first time in history of EU trademarks law set basic requirements for registering the sound trademark. The conclusion of the judgement was that such a registration requires precise graphical representation of a sound. Nonetheless, as of 2017 the EU trademark law has undergone a revolution suddenly allowing all kinds of trademarks, including sound, without the requirement of graphical representation. On 7th June 2021, the ECJ has ruled for the first time since the new trademark directive on the sound trademark submitted to the European Union Intellectual Property Office as an audio file evaluating which sound could be eligible for registration and what prerequisite should the sound fulfil. Yet, it is still not clear whether the ECJ has answered all the essential questions or if the ruling is not determining yet more impossible criteria.

Key words: *sound, trademark, intellectual property*

INTRODUCTION

Since establishing the dual system of trademark protection in the EU by introducing the EU trademark in 1996, the entrepreneurs operating on the union market had significantly easier way of how to protect identification of their goods or service in all member states by one application and registration process.[1] Even though the European Union trademark does not aim to substitute the national trademark, but rather to complement it, the increase of applications of EU trademark increases every year rapidly as well as the total amount of finances spent by

1 HERZ, Benedikt, and Malwina MEJER. Effects of the European Union trademark: Lessons for the harmonization of intellectual property systems. Research Policy [online]. 2019, 48(7), 1841–1854. ISSN 0048-7333 [viewed 2 October 2021]. Available from: doi:10.1016/j.respol.2019.04.010

the entrepreneurs for the trademark protection (while the overall amount of protection cost per trademark is decreased especially when the protection in more member states is desired).[2]

Harmonization of the trademark regulation led to wider commercialization of plethora of goods and service at the union level. This supported smaller and less accessible markets that were rather excluded from the focus of international entrepreneurs due to both high costs of protection in comparison to the size of the market and to incomprehensible and fragmented protection processes.[3]

The trademark is there to protect the uniqueness identification of the product and to create legal barrier between the original and imitations. Economically speaking, the costs spent on trademark are well retrieved from both the sales of the trademark holder and from the services provided to the consumers that almost automatically link some of the goods and services with the undertaking of origin.[4]

As the technologies are advancing and the market is more subject to globalization, the means of marketing and identification of goods and services is shifting towards new tendencies. So called conventional or traditional trademarks[5] might not be further sufficient for the globalized market and the entrepreneurs are more inclining to use the unconventional trademarks such as scents, taste, 3D representation of the image, shape, color, or sound.[6] The potential of "distinctiveness" is almost unlimited as almost anything can be used to distinguish goods and services from one another.[7]

This contribution to the conferential proceedings focuses mainly on the sound trademark as one of the unconventional trademarks of which the registration proceedings and admissibility in terms of distinctiveness is yet to be further clarified through practice by either European Intellectual Property Office ("**EUIPO**") or by the European Court of Justice ("**ECJ**").[8]

The methodology of the research is based mainly on the analysis of relevant case law regarding the sound trademark that sets out the requirements for the sound trademark before the effectiveness of relatively recent new trademark directive

2 Ibid.

3 Ibid.

4 ANDES, William M., and Richard A. POSNER. Trademark Law: An Economic Perspective. The Journal of Law and Economics [online]. 1987, 30(2), 265–309. ISSN 1537-5285 [viewed 2 October 2021]. Available from: doi:10.1086/467138.

5 Name, word, phrase, symbol, design, image or combination of the aforementioned.

6 MISHRA, Neha. Registration of Non-Traditional Trademarks. Journal of Intellectual Property Rights. 2008, 13(1), 43–50 [viewed 2 October 2021].

7 CALBOLI, Irene. Chocolate, Fashion, Toys and Cabs: The Misunderstood Distinctiveness of Non-Traditional Trademarks. IIC – International Review of Intellectual Property and Competition Law [online]. 2018, 49(1), 1–4. ISSN 2195-0237 [viewed 2 October 2021]. Available from: doi:10.1007/s40319-017-0667-x.

8 WOŁANGIEWICZ, Michał. How, if at All, should the Law of Trademarks Adapt to the Rise of Sensory Marketing? Wroclaw Review of Law, Administration & Economics [online]. 2017, 7(2), 40–57. ISSN 2084-1264 [viewed 2 October 2021]. Available from: doi:10.1515/wrlae-2018-0016.

("**TMD**")[9] and on the case law that clarifies some of the requirements after the effectiveness of TMD. This paper also reflects some of the relevant decisions of EUIPO regarding submission of sound trademark as well as relevant literature concerning this topic.

1. ANTEDILUVIAN REQUIREMENT OF THE GRAPHICAL REPRESENTATION

Before TMD, the necessary requirement of the identification of goods and services to be registered as trademark was the graphical representation capability of the registered sign. Pursuant either to first council directive 89/104/EEC[10] or the following and replacing the former directive 2008/95/EC[11] and council regulation No. 207/2009[12], the "(community) trademark consist of any signs capable of being represented graphically..."[13] This means that the unconventional trademarks were not considered as unregistrable, but, as the case law have consequently explicitly confirmed, even the non-traditional trademarks required graphical representation.

Regarding the unconventional trademarks, the entrepreneurs have had been trying to find a way of how to successfully register such a trademark while fulfilling the requirement of graphical representation at the same time. In 2002, ECJ ruled landmark decision concerning the graphical representation of an unconventional trademark establishing so called "Sieckmann test" that aimed to specify what is sufficient graphical representation for nonvisual trademarks.[14]

In the presented case[15] Ralf Sieckmann tried to register the scent trademark constituting of chemical substance cinnamic acid methyl ester. During the registration process, Mr. Sieckmann, to fulfil the graphical representation obligation, provided the application with chemical formula of the scent, description of a scent: "balsami-

9 Directive (EU) 2015/2436 of the European parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks.

10 First Council directive of 21 December 1988 to approximate the laws of the Member States relating to trade marks (89/104/EEC) [online]. In EUR-Lex. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31989L0104.

11 Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks [online]. In EUR-Lex. Available from: https://eur-lex.europa.eu/legal-content/cs/TXT/?uri=CELEX%3A32008L0095.

12 Council regulation (EC) No. 207/2009 of 26 February 2009 on the Community trade mark [online]. In EUR Available from: https://eur-lex.europa.eu/legal-content/CS/ALL/?uri=celex:32009R0207.

13 Article 2 of the first council directive 89/104/EEC, Article 2 of the directive 2008/95/EC and Article 4 of the Council regulation No. 207/2009.

14 TRILLET, Garry. Registrability of Smells, Colors and Sounds: How to Overcome the Challenges Dressed by the Requirements of Graphical Representation and Distinctiveness within European Union Law? SSRN Electronic Journal [online]. 2013. ISSN 1556-5068 [viewed 3 October 2021]. Available from: doi:10.2139/ssrn.2340431.

15 Judgement of the European Court of Justice, C-273/00, Ralf Sieckmann, ECLI:EU:C:2002:748 [online] [viewed 2 October 2021]. Available from: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=47585&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=35317691.

cally fruity with a slight hint of cinnamon" and with the sample of a scent.[16] The application was dismissed by the authorities and the case eventually transformed into preliminary rulings.

ECJ ruled that a mark "may consist of a sign which is not in itself capable of being perceived visually"[17] confirming general admissibility of non-conventional trademarks. On the other hand, ECJ ruled that such a trademark must satisfy the graphical representation requirement by "images, lines or characters"[18] and that the representation must be "clear, precise, self-contained, easily accessible, intelligible, durable and objective."[19]

Based on the abovementioned, the ECJ concluded that chemical formula is not as such sufficiently clear and precise, because it does not represent the odor of substance itself *per se* (and therefore is not sufficiently intelligible).[20] Furthermore, description of an odor is neither sufficiently precise nor objective and moreover – clear.[21] ECJ also ruled that the sample itself is not either graphical representation, nor is it sufficiently stable or durable.[22]

The ECJ's conclusions in the aforementioned case – i.e. Sieckmann test – were further elaborated in the first case decided by ECJ concerning registration of sound trademark.[23] Case with popular name "Shield Mark BV" concerned several representations of sound trademark that were formerly successfully registered by national authorities. Some of the trademarks consisted of first nine notes of Für Elise represented by musical stave, description of the melody or by sequence of musical notes E, D#, E, #D, E, B, D, C, A, some of the signs were accompanied by piano recording. Another trademark consisted of onomatopoeia[24] "Kukelekuuuuu" imitating cockcrow and the last trademark describes the cockcrow as such.[25]

The national trademarks' protection was infringed which was followed by the civil lawsuit in which the national civil courts brought up the preliminary ruling to ECJ asking, whether is it even possible to register such sound trademarks.[26]

16 Ibid., par. 11–15.

17 Ibid., par. 55.

18 Ibid.

19 Ibid.

20 Ibid, par 69.

21 Ibid., par 70.

22 Ibid., par 71.

23 Judgment of the European Court of Justice, C-283/01, Shield Mark BV v. Joost Kist h.o.d.n. Memex, ECLI:EU:C:2003:641 [online] [viewed 2 October 2021]. Available from: https://curia.europa.eu/juris/document/document.jsf?text=&docid=48435&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=35317767

24 „The act of creating or using words that include sounds that are similar to the noises the words refer to" – Cambridge Dictionary, Available from: https://dictionary.cambridge.org/dictionary/english/onomatopoeia

25 C-283/01, par. 14-20.

26 Ibid., par 24–25.

ECJ upheld its conclusion in C-273/00 stating that sound sign is capable of being registered as trademark, however under the condition that it is "capable of distinguishing the goods or services of one undertaking from those of other undertakings and are capable of being represented graphically".[27]

ECJ then stressed that the Sieckmann test is applicable even for the sound trademark and as such this test establishes bare minimum for the sound trademark to comply with.[28] ECJ further stated that the description of a sound *a priori* does not constitute a graphical representation and therefore description such as "the first nine notes of Für Elise" or "a cockcrow" lacks precision and clarity.[29] Onomatopoeia, similarly, is not sufficient for graphical representation, for there is not consistency between the pronunciation of the onomatopoeia and the sound itself.[30] ECJ furthermore concludes that musical notes in sequence alone cannot be considered as graphical representation, for it is not possible to determine pitch and the duration of sounds forming the melody.[31]

Ultimately, ECJ concluded that a stave divided into bars with sequence of notes may constitute a "faithful representation" and therefore is admissible as graphical representation of a sound.[32]

The notation stave is not however effective medium for graphical representation of all the sounds. For example, the roar of a lion (Metro Goldwyn Mayer) or other sounds without possible representation in notes would not be fit for registration pursuant to the conclusion of ECJ in Shield Mark BV. It was not until 2005, when the European trademark authority allowed the sonogram to be used as graphical representation.[33] However, even after the possibility to use sonogram or oscillogram as the graphical representation, the sound trademark registration was still restricted to many undertakings, as such a condition was not easily met due to the technical complexity of the process.[34]

27 Ibid., par. 41.

28 Ibid., par 55.

29 Ibid, par. 59.

30 Ibid, par. 60.

31 Ibid, par. 61.

32 Ibid., par 62.

33 ZHANG, Xinyu. From Audio Branding to Sound Trademark: A Comparative Study in the EU and the US. Beijing Law Review [online]. 2021, 12(02), 409–424. ISSN 2159-4635 [viewed 3 October 2021]. Available from: doi:10.4236/blr.2021.122023

34 ROTH, Mellisa E. Something old, something new, something borrowed, something blue: new tradition in nontraditional trademark registrations. Cardozo Law Review. 2005, 21(1), 457–496 [viewed 3 October 2021].

2. POST DIRECTIVE 2015/2436 CRITERIA FOR SOUND TRADEMARK

After the TMD came to an effect[35] the graphical representation of a trademark was not further required by the EU's trademark law. Instead, the trademark must be "represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise matter of the protection afforded to its proprietor."[36] and additionally the registered sign shall "distinguish the goods or services of one undertaking from those of other undertakings."[37] Especially the latter is now perceived as the issue in regard to the registration of sound trademarks, which is further analyzed hereinbelow.

In 2021 the EUIPO's Fifth Board of Appeal was deciding whether it is admissible to register the first 25 seconds of James Bond theme[38] as a trademark.[39] The application was first dismissed by EUIPO arguing that it lacks distinctiveness, "since it is considered to be too long for it to be easily and instantly memorized as an indication of origin."[40] The EUIPO also stated that the sound might be on one hand distinguished by the film enthusiast, but is hardly to be commercialized for goods and services outside the movie merchandise.[41]

The Fifth Board of Appeal firstly questioned the assessment of EUIPO on the length of the trademark and raised a question why should be 25 second lasting sound "too long". The appeal decision also states that the consumer can "identify a product or service in "[...] sector as a result of a sound element which makes it possible to distinguish that product or service as coming from a particular undertaking."[42] Board of Appeal correctly notes that "Eligibility for registration does not require that the consumer memories the sign exactly and down to the smallest detail. Instead, it is sufficient to be able to trigger a memory effect."[43] Moreover, the Fifth Board of Appeal highlighted that the sound sequence applied for is somewhere in between extremely short, simple sounds and complex symphonies, "which only a professional musician could possibly remember."[44] Thus the presented sound is

35 Some of the provisions required transposition as of 2019, some of them as of 2023.

36 TMD, Article 3 let. (b)., another requirement pursuant to Article 3 let. (a) for the trademark is to be capable of„distinguishing the goods or services of one undertaking from those of other undertakings.

37 Ibid, Article 3 let. (a)

38 The sound and application. Application No. 018168977 of the sound trademark [online] [viewed 3 October 2021]. Available from https://euipo.europa.eu/eSearch/#details/trademarks/018168977

39 Decision of the Fifth Board of Appeal of 12 March 2021 in case R 1996/2020-5 [online] [viewed 3 October 2021]. Available from: https://euipo.europa.eu/copla/trademark/data/018168977/download/CLW/APL/2021/EN/20210312_R1996_2020-5.pdf?app=caselaw&casenum=R1996/2020-5&trTypeDoc=NA.

40 Ibid, par. 2.

41 Ibid., par 3.

42 Ibid, par. 12.

43 Ibid., par 32.

44 Ibid., par. 31.

suitable for identifying goods and services and certainly can be used commercially for all varieties of products in order to attract attention of consumers.[45] According to the abovementioned, the Fifth Board of Appeal ruled that the application may proceed for registration for all the goods applied for.[46]

This decision is utterly important in the manner that it explicitly acknowledges the marketing potential of sound trademarks and recognizes the importance of broad assessment regarding the classes of goods and services for which can be the sound trademark applied for[47].

On 7 July 2021 was rendered yet another decision that helped to clarify the requirements for sound trademark registration under TMD.[48] In this case, ECJ ruled for the first time on the registration of a sound trademark submitted in audio format.[49]

The company Ardagh Metal Beverage Holdings GmBH & Co. KG ("**AMBH**") tried to register the sound trademark consisting of the sound "made by a drink can being opened, followed by a silence of approximately one second and a fizzing sound lasting approximately nine seconds".[50] EUIPO rejected the application of such a trademark with reasoning that the sound is not distinctive enough.[51] The decision was upheld by the Second Board of Appeal and against its decision AMBH brought action to ECJ.

ECJ stressed that the criteria of distinctiveness should be applied non-discriminatory on all types of trademarks, including the non-traditional ones.[52] ECJ further reminded that the sound should be perceived as a trademark meaning that the sound should not be merely element of functional nature.[53] In such a case the public, according to ECJ, cannot perceive presented sound as an indication of the commercial origin of the products concerned.[54] This cannot be changed even by precise description of individual elements of the concerned sound (opening can, one second lasting silence, nine seconds lasting sparkling sound),[55] because such a nuance would not be perceived by the public as sign of distinctiveness.[56]

45 Ibid., par 30 –37.

46 Ibid., par. 40.

47 WANN SR, Jerre B., David A. AAKER, and Matt REBACK. Trademarks and Marketing. The Trademark Reporter. 2001, 91(4), 787–832 [viewed 3 October 2021].

48 Judgement of the European Court of Justice from 7 July 2021, T-668/19, Ardagh Metal Beverage Holdings GmBh & Co. KG v. EUIPO, ECLI:EU:T:2021:420 [online] [viewed 4 October 2021]. Available from: https://curia.europa.eu/juris/document/document.jsf?text=&docid=243853&pageIndex=0&doclang=CS&mode=lst&dir=&occ=first&part=1&cid=35318006.

49 ECJ Press Release No. 120/21, 7 July 2021, available from: https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-07/cp210120en.pdf [online] [viewed 4 October 2021].

50 Application No. 017912475 of the sound trademark.
Available from: https://euipo.europa.eu/eSearch/#details/trademarks/017912475 [online] [viewed 3 October 2021].

51 T-668/19, par. 5.

52 Ibid, par. 23.

53 Ibid, par. 24; meaning that the sound of opening can is just part of the functioning of a can as is sparkling sound of carbonated drinks.

54 Ibid., par. 41.

55 Ibid., par 43.

56 Ibid., par. 46.

However, ECJ rejected the reasoning of the Second Board of Appeal that it is uncommon for commercial origin of beverages and beverages packaging to be represented by sound, because the sound itself is audible only after the product is actually consumed, i.e. after it is bought.[57] ECJ correctly noted that almost any product would makes sound during the consummation process and therefore after its purchase.[58] However, for the aforementioned reasons ECJ dismissed the action and upheld the decision of EUIPO.

In the opinion of the paper's author, in case T-668/19, ECJ missed the opportunity to take a more liberal approach towards the distinctive sign of a sound trademark. As the market is evolving, so are the costumers and many of them distinguish various products only by sound or by sound and any additional sign such as shape, name etc.[59] The perception of a sound is in fact so important for the consumers that it is the indication of quality of the product.[60]

In 2020, the empiric research was conducted presenting various subjects with the sound of opening either bottle or can of beer and with the sound of pouring the liquid.[61] The presented sound was originating from one specific brand and for the purpose of the research was modified so that the pitch, frequency and depth of the sound establishes different sonic cues.[62] The subjects were then asked whether particular sounds are either more pleasant or indicate higher quality of the product and whether the subjects can actually estimate the quality of the product. Even though majority of the subjects stated that they are not able to estimate the quality of the product, the results of the experiment have shown that most of the subject agree on which sound is an indication for them of higher quality products.[63] This can be used by the undertakings while designating their products so that the product itself produces unique noise that, without copying the product alone, cannot be replicated. In this manner, the ruling of ECJ regarding the sound being "merely element of functional nature" is rather unfortunate and short-sighted.

57 Ibid., par 55.

58 Ibid., par. 56.

59 ALMIRON, Paula, et al. Searching for the sound of premium beer. Food Quality and Preference [online]. 2021, 88, 104088. ISSN 0950-3293 [viewed 4 October 2021]. Available from: doi:10.1016/j.foodqual.2020.104088.

60 Ibid.

61 Ibid., p. 3.6.

62 Ibid.

63 Ibid, p. 4;7.

CONCLUSION

As we have seen the approach of the European Union towards the unconventional trademarks have shifted significantly during past 20 years. Although the graphical representation is no longer required nor by the legislation neither by the case law, the EU insufficiently reacts to the evolution of market, advertisement and relevant technologies.

As was presented above in this paper, consumers are able to recognize even minor nuances in the sound while assessing the quality of the product. The sound is powerful tool for the undertakings to make their product more unique and desirable. Hence the sound trademark should be fully recognized as powerful tool for the undertaking to identify the commercial origin of a product and as such should be acknowledged in the decision praxis of EUIPO and ECJ case law.

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Data Protection Aspects of Covid-19 Home Office and Remote Work in Doing Business

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Abstract:
Due to the pandemic's forced relocation to a home office, labor and data security concerns were frequently overlooked. When employees' activities are relocated from business offices to home offices, this article demonstrates that labor and data protection difficulties arise. It gives an outline of the steps that must be taken to enable a legal and sustainable transition from company offices to home offices. It explains which labor law framework criteria apply and the data protection obligations that must be met. On the basis of this, it is demonstrated which steps must be taken to ensure that home office operations are designed in compliance with data protection regulations.

Key words: *business, covid-19, GDPR, legal framework, remote work*

INTRODUCTION

Due to the abrupt migration to a home office due to the Covid-19 outbreak, labor and data security concerns were frequently overlooked. Even though the GDPR[1] does not allow any exceptions for such instances, the data protection authorities first agreed to exercise some forbearance in the event of data protection infringement relating to the pandemic. There should be no justification for this indulgence now that companies have had several months to acclimatize to the "new normal"

1 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=EN

in coping with the Covid-19 outbreak.[2] This article gives an outline of the steps that must be taken to enable a long-term and legally sound transition of work activities to the home office. It explains which labor law framework criteria apply and the data protection obligations that must be met. On the basis of this, it is demonstrated which steps must be taken to ensure that home office operations are designed in compliance with data protection regulations.

1. LABOR LAW FRAMEWORK

1.1 Introduction of home office

Employees do not have the right or the obligation to do business from home unless they have a valid legal reason for doing so.

a) Contract with the company

Effective corporate agreements take effect immediately and are mandatory, even if they are not part of the employee's job contract. However, the respective agreements must adhere to the law's limitations. They must, in particular, be commensurate to the employees' personal rights. Agreements that force employees to work from home without their consent have an indirect impact on their personal lives.[3]

b) Enforcement in a Uniform Manner

Furthermore, it is debated whether the employer has the authority to direct work in the home office unilaterally by exercising his instruction power. The case law has presumed that a transfer to the home office is not covered by this privilege. However, most legal discussions assume that an employee has no right to work from home without the employer's permission. Due to his duty of consideration, the employer may be obligated to consent to work in the home office in extraordinary circumstances.[4]

1.2 Occupational Health and Safety Law Obligations

The employer's health and safety requirements are mainly confined to organizational and notification obligations because the alternatives for adopting health and safety precautions in the home office are limited. The risk assessment and instruction requirements require special care in this regard. Thus, informing the employee about a lack of exercise, ergonomics, and psychological stress in relation to the delimitation of work and leisure time, as well as pointing out the needs of working time law, is especially advised.

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2 Telework was more widespread in countries such as Sweden, Finland, and Denmark where there is a larger share of employment in ICT-intensive service. Some countries which were most affected by the Covid-19 pandemic had a very low prevalence of telework. E.g. the share of employees working from home (regularly or at least partially) was above 30% in only some countries. There were countries like Belgium, France and Portugal where the share of telework was between 15 to 25%. E.g. in Sweden and in the Netherlands more than 60% of employees were teleworking. On the other side, in Italy, Austria or Germany this was below 30%. See further in https://ec.europa.eu/jrc/sites/default/files/jrc120945_policy_brief_-_covid_and_telework_final.pdf

3 SVÁK, J.: *Ochrana ľudských práv (v troch zväzkoch)*. II.zväzok, Bratislava: Eurokódex, 2011.

4 SELUCKÁ, M.: *Covid-19 a soukromé právo*. Praha: C.H.Beck, 2020.

2. GENERAL DATA PROTECTION CONDITIONS FOR WORK IN THE HOME OFFICE

2.1 Data protection and data security in case data is handled by the employee

The activities carried out in the home office are not protected by any data security measures. The employee continues to operate in line with the employer's instructions in the operational management of personal data,[5] as per Art. 29 GDPR. Within the terms of Art. 4 (7) GDPR, the employer is still responsible for data protection. It makes no difference where data processing takes place in terms of legal considerations. Switching to a home office has no effect on the legal basis for data processing or the extent of data processing. Because employees processing personal data in the home office are beyond the scope of the employer's control and influence, the essential technical and organizational measures outlined in Art. 32 GDPR deserve special attention. When switching to home office, the employer must meet organizational obligations under data protection law in a special way in order not to risk any liability. He must guarantee that the information security standards are followed, in particular, ensuring the data's confidentiality, integrity, and availability. A guarantee of secrecy implies that the data in question is only accessible to those who are authorized to process it in the authorised manner and to the degree permitted, and that it is safeguarded from unauthorized access. Data integrity is ensured by taking steps to ensure that the recorded data is complete, correct, and authentic. It must be ensured that the related data are not harmed by system malfunctions or external access, that they can be fully restored in the event of damage, and that no unauthorized changes to the data are performed. This can be ensured, for example, by performing regular backups and synchronizations with company servers. Sufficient data availability assumes that authorized users can utilize the data as intended at all times. The person in charge must be able to access the data at any time and fulfil his or her deletion obligations if the data is no longer required for further processing. The needed breadth of protective measures in specific circumstances is connected to the data subjects' rights and freedoms in the event of personal data deletion, loss, alteration, or unauthorized disclosure (Art. 32 (1–2) GDPR).

2.2 Data protection requirements for employee protection

The employer must also take steps to protect its employees' personal information. This is because if an employee's private telephone number is shared internally for communication reasons or if the employee's family members may be seen during video conferences, there is a possibility of a mix-up of private and commercial worlds. There is no data pro-

5 KARÁCSONY, G.: Managing personal data in a digital environment – did GDPR's concept of informed consent really give us control? In. *Počítačové právo, UI, ochrana údajov a najväčšie technologické trendy*. Zborník príspevkov z medzinárodnej vedeckej konferencie. Brno: MSD, 2019.

tection permission if the processing of such personal data is not operationally essential. Working from home does not have to reveal the employee's personality to the same amount as working at the employee's place of employment. Furthermore, the employer may be tempted to use specific control or monitoring measures[6] in order to prevent the employee from dodging or failing to execute his official tasks in the home office. However, in this case, adherence to data protection standards is also necessary.

3. DESIGN OF THE HOME OFFICE IN COMPLIANCE WITH DATA PROTECTION LAW

3.1 Identification of data protection risks

There is a risk that the employer may lose factual and technological control choices in the home office. He is unable to use technical devices due to his physical limitations. When employing private end devices (Bring Your Own Device – BYOD), there are additional concerns because the processed data would be completely out of the employer's control unless appropriate technical protections were taken. Furthermore, contact between employees, which used to be done at the office, is now done through other methods. Employees could communicate secret data about essential applications and save it on private end devices using their private communication channels. Employees must be provided with suitable equipment to allow them to work safely from home. This entails identifying and managing any dangers posed to employees who work from home (to undertake a risk assessment).

3.2 Measures to maintain data protection principles

a) General requirements for the activity and the set up of the workplace

There is no (social) oversight by colleagues or superiors, and the private and business spheres automatically converge.[7] In light of this, the company's general data protection principles and procedures should be made apparent to employees. Employees should be made aware of the additional data security concerns that come with working from home. As a result, the employee should be told not to create physical copies or printouts of secret information at home. The workplace's outward design must ensure that no unauthorized individuals have access to personal information. It is necessary to have access to operational documentation as well as the technical gadgets that are used. Even when leaving the office for a short period, access to confidential information must be restricted by password protection of the operating system and activation of the screen lock when using technological equip-

6 MESARČÍK, M.: Digital surveillance in the times of COVID-19: Lessons from Slovakia. In. *EJTS European Journal of Transformation Studies*, Vol.8, 2020; OTTO, M.: Workforce Analytics" v Fundamental Rights Protection in the EU in the Age of Big Data. In. *Comparative Labor Law & Policy Journal*, Vol. 40, 2019.

7 PERÁČEK, T.: The perspectives of European society and the European cooperative as a form of entrepreneurship in the context of the impact of European economic policy. In. *Online Journal Modelling the New Europe*, (34), 2020; ŠMEJKAL, V.: Social or highly competitive Europe? EU law solution to conflict of social security and competition law. In. *The Lawyer Quarterly*, (1), 2016.

ment. Usernames and passwords, for example, should never be written down or stored in a way that is accessible to third parties. Unauthorized individuals must not have access to confidential phone calls. They should not be used in the garden or in the presence of uninvited guests.

b) Technical measures

Apart from that, the creation of a proper IT security system[8] in the home office is required to ensure compliance with data protection standards. In an ideal world, the employer provides the employee with all of the required technical devices for his work in the home office, including access to the client and complete control over the hardware and software. Strong password protection and, if necessary, two-factor authentication can provide the necessary access control (or 2FA). Furthermore, it is possible to verify that the devices are always up to date in terms of encryption and anti-virus software, as well as that required upgrades are performed. Data processing is mostly server-based within the enterprise network, and no local storage of secret data is permitted.

When it comes to company-owned devices, such configurations can be made with ease utilizing the necessary software. They're utilized for data confidentiality and integrity, as well as access and transfer control and input control. Simultaneously, the employer's ability to access the processed data via remote access is ensured. Data should only be transported utilizing remote connections to the company network, i.e. VPN, for transmission and transport control. In this approach, the security of data transfer may be ensured while also allowing for a greater understanding of where personal data is communicated or made available.[9]

c) Special features when using third-party devices

When employees use their own end devices at the home office (BYOD), there are added dangers because the company does not have complete control over the device, operating system, and loaded software. There is a risk of insufficient separation of private and operational data, as well as the possibility of uncontrolled storage or duplication of personal data, if special technical protections are not taken. However, customized IT solutions can be used to manage the hazards connected with the use of third-party devices. The operational interface can be built so that only a VPN is used to connect to the company network, and only a terminal server or Citrix environment is used to process operational data. The operational interface can be managed by the employer's IT department, allowing for nearly the same level of control over the data as with an employer-owned device. As a result, a self-contained IT system can be set up for operational communication and the archiving of work outputs.

8 FUNTA, R.: *Úvod do počítačového práva*. Brno: MSD, 2019.

9 SMEJKAL, V. – SOKOL, T. – KODL, J.: *Bezpečnost informačních systémů podle zákona o kybernetické bezpečnosti*. Plzeň: Aleš Čeněk. 2019.

d) Use of conference software

The type and functionality of conference software determine the data security threats. There are other services that allow screen content to be shared, calendar content to be incorporated into certain apps, and shared access by users to specific documents, in addition to video conferencing solutions. Because the other communicated data, in addition to the respective participant data, is processed on the servers of the respective service provider, the usage of conferencing software can pose a security risk. The integration of a conference service is a case of order processing under data protection law, as defined by Art. 28 GDPR.[10]

The person in charge must not only enter into a contract with the service provider that contains the required minimum content, but he must also ensure that the provider's processing of personal data complies with the GDPR's[11] requirements and that the rights of those affected are protected when selecting the provider. These requirements must be reviewed and controlled by the person in charge, with a proper commissioning generally being ruled out if there are actual signs of data processing in violation of data protection legislation.[12] In this context, choosing a conference provider who complies with data privacy laws is difficult. If a video conference is to be held, the conferencing provider should provide appropriate alternatives to protect the user's personal information. Certain services, for example, allow the subscriber's surroundings to be blurred so that only the subscriber can be seen. The employee, on the other hand, may be offered the choice of turning off his camera. As a result, steps must be implemented to provide a level of protection adequate to the risk, taking into account, among other things, implementation costs, the type and extent of processing, and the severity of the risk to natural persons' rights and freedoms. As a result, the GDPR does not oblige the person in charge to give the maximum level of security, simply what is economically feasible. Deviations from the above-mentioned technical and organizational protective measures should be precluded from the start if employees at the home office deal with substantial data collections or even process sensitive data within the sense of Art. 9 GDPR.[13]

CONCLUSIONS

If certain activities in the company are to be performed from the home office, extensive organizational and technical preparations are required. As a result, an internal guideline for employees using home offices must guarantee that employees follow data protection standards while handling personal data (Article 32 (4) GDPR). In terms of how employees carry out their job in the home office, the design of the workspace and employee behavior are mainly outside the control of the company. In order to meet organizational requirements, the employer must not only provide proper training to his employees, but also ensure that they follow the

10 VOIGT, P. – BUSSCHE, A.: *The EU General Data Protection Regulation (GDPR): A Practical Guide*. Cham: Springer, 2017.

11 HUDECOVÁ, I. - CYPRICHOVÁ, A. - MAKATURA, I. a kol.: *Nariadenie o ochrane fyzických osôb pri spracúvaní osobných údajov – Veľký komentár*. Bratislava: Eurokódex, 2018.

12 ŠRAMEL, B. - HORVÁTH, P.: Internet as the communication medium of the 21st century: do we need a special legal regulation of freedom of expression on the internet? In. *The Lawyer Quarterly*, (1), 2021.

13 PLAVČAN, P. – FUNTA, R.: Some Economic Characteristics of Internet Platforms. In. *Danube Law, Economics and Social Issues Review*, 11 (2), 2020.

above-mentioned steps to secure confidential data while working from home (e.g. through binding guidelines). A guideline like this can be drafted as an addendum to an employment contract or as a work agreement. Companies also owe their employees obligations in terms of the equipment they require to execute their jobs from home. These must be specified in the remote work agreement. Another essential element is that they must reimburse their employees for expenses incurred while working remotely (e.g. stipulated in the reimbursement policies).

The pandemic-related shift to a home office was frequently made without regard for applicable labor or data protection laws.[14] If the relevant requirements have not yet been implemented, they should be done as soon as possible to create a legally secure basis for activities in the home office and to be prepared for any quarantine measures or future lockdowns in order to avoid being fined due to current home office regulations. Companies will be ready for the digital future thanks to new technology that helps them transform and modernize their processes.[15] The change results in a fully digital, data-driven home office. This will change how businesses manage information flow and deliver services, allowing them to respond swiftly to changing business or customer demands. From the standpoint of employment law, remote working appears to be a desirable option for both individuals and businesses. Despite the slow vaccination rate in many nations around the world, it is still difficult to predict the pandemic's progression and recovery. As a result, we should expect remote work to become more popular among companies in the future.

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[18] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=EN .

Impact of Schrems II on Data Exporters in Slovakia – Practical and Legal Aspects

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Abstract:
After the adoption of the Schrems II decision data exporters were thinking about the way to ensure legally compliant transfer of personal data to third countries. Since the CJEU did not set a transitional period for implementation of the decision conclusions, the data exporters had to adopt ad hoc solutions. These were hoped to bring the exporters more lenient approach from public authorities and to minimize a risk of fines. It took the EU Commission and the EDPB almost a year to adopt legal tools assisting and guiding data exporters in fulfilling their obligations. This paper will evaluate whether the intentions pursued by the Schrems II decision were successfully fulfilled in the conditions of the Slovak Republic, how were the processing activities of the data exporters affected by the decision, which legal instruments and procedures have been used to align processing practices with the decision conclusions, and what steps should be taken in the future under the current recommendations.

Key words: *data exporter, data transfer, Schrems II, processing of personal data, data subject rights, appropriate safeguards*

INTRODUCTION

Although the Court of Justice of the European Union (the "CJEU" or the "Court") adopted the Schrems II decision[1], which abruptly redrew the landscape for exchanging personal data across the borders[2], more than a year ago, the answers

1 Judgement of the Court of Justice of 16 July 2020. Facebook Ireland v Schrems. Case C-311/2018 [online]. In EUR-Lex. [viewed on 09-01-2021].

2 BRADFORD, Laura, ABOY, Mateo, LIDDELL, Kathleen. Standard contractual clauses for cross-border transfers of health data after Schrems II. *Journal of Law and the Biosciences* [online]. 2021, 8 (1), 1-36. [viewed on 10-25-2021]. Available form: https://doi.org/10.1093/jlb/lsab007, p. 2

to some practical questions about its impact on data processing activities of data exporters[3] (regardless of whether in position of controllers or processors) are available only now. Its most important inference is the exporters' obligation to enable solely the data transfers to those third countries, where an afforded level of protection is essentially equivalent to that guaranteed within the EU.

Immediately after the adoption of the decision this requirement caused certain doubts among the data exporters. It entailed the need to assess the level of data protection guaranteed in each of the third countries where the data is being transferred, to take into the account the contractual arrangements between the data exporters from the EU and the data importers from the third countries, to agree on the additional technical, organizational and contractual measures, to dispose with detailed knowledge about the whole chain of the subsequent transfers, and to conduct an assessment of the relevant elements of the third country legal system, in particular those referred to in Art. 45 (2) of the GDPR[4]. The latter was considered to be the most critical due to (i) the limitations of the data exporter's ability to understand and know the applicable legislation and the situation in the data protection in the third country, (ii) the necessity to rely on the resources and the information provided by the data importers who usually have a business interests to process personal data as a part of the cooperation with the data exporters and, the last but not the least, (iii) the possibility that even if all steps are properly done and the level of the data protection in the third country is assessed and documented, it will not have to suffice in case of the inspection of the data public authority.

Thus, it is only understandable that the data exporters have expressed their doubts on how to ensure legally compliant transfers and whether they are feasible at all. It is practically impossible to avoid international data transfers, and since the CJEU did not set the transitional period for the implementation of its conclusions into the practice, the exporters had to adopt ad hoc solutions. These included, among others, the adjustments of the data processing agreements aimed at prevention of an access to personal data by the law-enforcement authorities and undertaking of transfer impact assessments in various scope and detail. Such approach was hoped to bring the exporters more lenient approach of public authorities and to minimize the risk of fines according to the GDPR.

It took the Commission and the EDPB almost a year to adopt the relevant legal tools intended to assist and guide the data exporters in fulfilling their duties. These tools are represented by the new set of standard contractual clauses in four

3 Hereinafter referred to also only as the "exporters". Data importers may be shortly referred to also as the "importers".

4 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [online]. In EUR-Lex. OJ L 119, 4.5.2016, p. 1-88. (the "GDPR Regulation" or "Regulation" or "GDPR")

alternative modules (the "Decision on EU SCC")[5], and by the Recommendations on measures that supplement the transfer tools (the "Recommendations")[6].

The aim of this paper will be to examine the way Slovak data exporters dealt with the international data transfers after the adoption of the Schrems II decision, which steps they took to ensure legally compliant data transfers and to provide a descriptive analysis of possible future practices based on the Recommendations. Since the Schrems II decision itself and together with the related legal materials have not been a subject to a detailed scientific and academic scrutiny, but rather to popular articles and legal opinions presented by legal practitioners, we will rely mostly on primary resources published by the relevant European institutions.

1. TURNING POINT IN THE SCHREMS II CONCLUSIONS

Although the biggest uproar following the judgement in the Schrems II case was caused by the CJEU's conclusion that the United States do not provide an adequate level of the protection to transferred personal data[7], it is necessary to look at the Court's other findings in order to understand the legal and practical implications of this decision on day-to-day data processing activities.

1.1 Legal conditions of international data transfers – level of protection and appropriate safeguards

Prior to any data transfer to a third country, the exporter considers, among other, also the following: (1) whether an adequacy decision was issued by the Commission under Art. 45 of GDPR for the respective country, and (2) entering into a data processing agreement in accordance with Art. 28 or Art. 26 of the GDPR, resp. concluding EU standard contractual clauses (the "EU SCC") with the importer[8].

5 Commission Implementing Decision (EU) 2021/914 of 4 June 2021 on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council [online]. In EUR-Lex. OJ L 199, 7.6.2021, p. 31–61.

6 European Data Protection Board. Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data [online]. 2021 [viewed on 09-15-2021].

7 Despite of repeated attempts to adjust a level of data protection and data subject rights in accordance with the results of the previous decision in Schrems I case (Judgement of CJEU of 6 October 2015, Case -362/14), Privacy Shield program replacing the Safe Harbour has retained the option for the US law enforcement authorities to access personal data of the EU data subjects, while the possibility to object such access by data subjects was very limited. In the Schrems II decision the Court adjudged that, in relation to the selected surveillance and national security programs, US law does not provide the data subjects with a sufficient opportunity to seek redress before an independent and impartial court, as required under Art. 7 and 8 of the Charter of Fundamental Rights of the EU. This was one of the reasons for a conclusion that the United States do not provide an adequate level of protection to data subject rights. Therefore, the Court annulled the Decision of the Commission on Privacy Shield. For further details see MESARČÍK, Matúš. Cezhraničné prenosy osobných údajov do Spojeného kráľovstva po Brexite: minulosť, prítomnosť, budúcnosť. Justičná revue. 2021, 74 (4), p 476–491.

8 Alternatively, they can use binding corporate rules or adhere to a code of conduct or certification mechanism.

When the Commission issues a country-specific adequacy decision, it takes into the account a variety of legal aspects and a material background defined in Art. 45 (2) of the GDPR, including a significance of a trading partner, both commercially and in terms of cultural ties to the EU, and strategic objectives in continuing important data flows[9] in order to assesses whether the level of data protection in the respective country corresponds with the requirements of the GDPR and EU legislation. Art. 45 adequacy determinations allow transfers to jurisdictions where the government has secured a formal acknowledgement under the GDPR that their country has "essentially equivalent" legal protections of data subjects. In the typology of a transborder regulation, this is known as a geographically based "adequacy protection".[10] Therefore, if the exporter decides to transfer personal data to the third country on the basis of an adequacy decision, it can rely upon that the data subjects and their personal data are adequately protected and it is not obliged to adopt any additional protective measures or guarantees[11].

However, if there is no adequacy decision in place, the exporter must ensure so-called appropriate safeguards within the meaning of Art. 46 of the Regulation[12]. These safeguards are to be provided as a precondition for any data transfer to the third country without the adequacy decision and so regardless of whether the exporter acts as a controller or as a processor.[13] According to Art. 44 of the GDPR Regulation, the main motivation for adopting such safeguards is to ensure the level of protection of rights of the data subjects essentially equivalent to the protection guaranteed by the GDPR itself[14]. These conditions apply to both, initial transfers to a third country and all subsequent transfers from one third country to any other third country.

Prior to the Schrems II judgement, if a decision on adequacy was not issued, there was no outright instruction for the exporter which of the requirements should be examined in relation to the third country involved in the data transfer, or perhaps, whether any requirements should be reflected on at all. Although Art. 46 par. 1 of the Regulation states that a transfer to a non-EU country may be effected only in the existence of appropriate safeguards, the Regulation and avail-

9 BRADFORD, Laura, ABOY, Mateo, LIDDELL, Kathleen, supra note 2, p. 14–15.

10 KUNER, Christopher. *Transborder Data Flow and Data Privacy Law.* Oxford: Oxford University Press, 2013, 312. ISBN 978-0199674619, p. 64–68.

11 This does not affect the obligation of the data exporter in the position of a controller as stated in Art. 24 par. 1 of the GDPR to implement appropriate technical and organizational measures to ensure that the processing of personal data complies with the requirements of the Regulation.

12 Data transfers are subject to the discretion of the data controller. This means that the burden of proving that, by transferring personal data to third countries, the level of protection there fulfils the minimum requirements in the EU – first and foremost, that data subject rights are not prejudiced and that appropriate remedies are in place – lies upon the data controller. For more details see IOANNIDIS, Nikolaos. Personal data protection. In: BURGESS, I. Peter, KLOZA, Darius, eds. *Border Control and New Technologies Addressing Integrated Impact Assessment*. Brussel: Uitgeverij ASP, 2021, p. 61–79. ISBN 978 94 6117 137 5.

13 WAGNER, Julian. The transfer of personal data to third countries under the GDPR: when does a recipient country provide an adequate level of protection?. *International Data Privacy Law* [online]. 2018, 8 (4), 318–337. [viewed on 10-31-2021]. Available from: https://doi.org/10.1093/idpl/ipy008, p. 320.

14 Art. 45 par. 1 and par. 104 of the recital of the Regulation.

able case-law did not suggest the scope of those safeguards for the data exporter in relation to the third country. The respective detailed conditions under Art. 45 par. 2 only applied to the Commission's adequacy decisions[15], not to the assessment requested from the data exporter (i.e. the exporter was not explicitly committed to examine the conditions before carrying out the transfer).

The precision in this context allows us to declare the Schrems II decision as turning point for the data exporters. On one hand, the judgement clearly indicated that the third country must provide the real and not only formal protection of the data subject rights under the national law and the international treaties, while this protection, in principle, must be essentially equivalent to the protection afforded to the rights of the data subjects within the EU.[16] On the other hand, it required controllers and processors to evaluate the level of the protection afforded to the processed personal data on their own and data subject rights in the third country as a part of the process for ensuring the appropriate safeguards for the transferred personal data in the absence of the adequacy decision.[17] The above conclusions raised a number of practical questions of the exporters about the conditions under which transfers to the third countries can actually take place.

2. STRUGGLES OF DATA EXPORTERS IN SLOVAKIA

As already mentioned, the Court did not provide any transitional period during which the data transfers to third countries should be aligned with the results of the Schrems II decision. This meant that the exporters had to take an immediate action if they did not want to risk complaints from data subjects and fines from the supervisory authorities. Fortunately, the authorities took a relatively lenient approach by not carrying out any immediate controls of compliance but by giving the exporters the room to adjust the transfer conditions[18].

2.1 First steps after the adoption of Schrems II

At first Slovak data exporters had to trace their existing data transfers into the third countries, either on the basis of existing records of processing operations in compliance with Art. 30 of the GDPR and contractual relations or based on the additional diligence and a data flow detection[19]. After this action, it should be clear to them, where their data is located.

With respect to the data transfer overview it should be noted that advances in technology have made cross-border movement of data a regular feature of many

15 WAGNER, Julian, supra note 13, p. 324.

16 Par. 94 of Schrems II decision.

17 Par. 104 and 105 of Schrems II decision.

18 Obviously, such approach was not officially communicated by the Data Protection Authority in Slovakia.

19 BARREIRO TORRES, João. Data Assessments. In: Densmore, Russell, eds. Privacy Program Management. Portsmouth: International Association of Privacy Professionals, 2019, Chapter 4. ISBN 978-1-948771-24-5.

ordinary business activities[20] and only a very small number of companies do not transfer personal data to third countries. It often happens that the companies are not aware of the data transfer. Sometimes if they have knowledge of the initial transfer, it requires an immense effort to track subsequent transfers, considering the involvement of some multinational corporations providing services worldwide. Therefore, mapping the data flow represented a key step for any data exporter[21].

Subsequently, after mapping the data flows, Slovak data exporters had to identify the legal tools of the conducted transfers. A data processing agreement served as a basis for regulating the relations between the controllers and the processors, but they did not suffice the international data transfers. As stated above, in the absence of the adequacy decision, the exporters must have entered into the EU SCC[22]. However, in the Schrems II decision the CJEU made it clear that the data exporters cannot simply use the EU SCC without the additional diligence.[23] It is worthy to note that until June 2021, the EU SCC were only available in one version to cover the relation between the exporter and the importer[24], which did not reflect the actual setting and the complexity of relations when transferring data to third countries25. Moreover, these EU SCC had de facto unalterable wording, which could be supplemented only by the details related to particular data processing activities (e.g. a scope of the data processed, categories of the data subjects, etc.), by technical and organizational measures concerning a specific transfer and possibly by other arrangements between the parties, which, however, could not contradict the wording and the purpose of the EU SCC26. The new EU SCC retain the possibility to agree on the supplementary measures and expressly encourages the data exporters to do so27 to fulfil the expectations of the CJEU. In addition, the new four modules of the EU SCC should better cover processing variations between the exporters and the importers.

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20 BRADFORD, Laura, ABOY, Mateo, LIDDELL, Kathleen, supra note 2, p. 5.

21 BARREIRO TORRES, João, supra note 19. The EDPB also recommended such approach as an inevitable starting point for further actions in its initial draft of the Recommendations of November 2020 (European Data Protection Board. Recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data [online]. 2020 [viewed on 09-15-2021]).

22 According to Kuner (cited work, p. 66), EU SCC represent organization-based approach that rest accountability of the controller and each concluded EU SCC in fact represents sort of "mini adequacy decision" issued by the data exporter for the purpose of a particular data transfer.

23 LISS, Joseph, PELOQUIN, David, BARNES, Mark, BIERER E., Barbara. Demystifying Schrems II for the cross-border transfer of clinical research Data. *Journal of Law and the Biosciences* [online]. 2021, 8 (2), 1-14. [viewed on 10-25-2021]. Available from: https://doi.org/10.1093/jlb/lsab032, p.4.

24 Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council [online]. In EUR-Lex. OJ L 39, 12.2.2010, p. 5–18.

25 The issues related to the use of generic data protection clauses of previous version of the EU SCC are described in detail in DRECHSLER, Christian. Data Transfers Within Europe: Contractual Data Protection Clauses in Practice Why contract clauses in countries with adequate level of data protection provide more difficulties. *Computer law revie international* [online]. 2011, (6), p. 161-165. ISSN 1610-7608 [viewed on 10-13-2021]. Available from: https://sci-hub.se/10.9785/ovs-cri-2011-161

26 The possibility for the parties to agree on additional terms of data transfer follows from par. 109 of the recital of the Regulation.

27 See par. 3 of Commission Decision 2021/914.

In seeking a legal tool for the data transfer, Slovak data exporters often encountered a reluctance on the data importers' side to proceed with the conclusion of the EU SCC. Furthermore, even if the initial transfer of the data to the third country had been already mapped and contractually covered, the subsequent transfers remained in a vacuum due to the technical complexity. The importers in the third countries were not always able to demonstrate to data exporters in Slovakia that the subsequent transfers are governed by the same terms and conditions as originally agreed between them in the concluded EU SCC, which is confirmed by the contractual language used by the data importers[28]. Since these initial steps caused practical obstacles resulting in the fact that the data exporters were not able to guarantee full compliance of the international data transfers with the conditions of the GDPR and the Schrems II decision, in order to avoid a risk, some of the Slovak data exporters might resort to data localization in the EU[29], if such solution was feasible from the business perspective.

2.2 The obligation to carry out an assessment of the third country laws

Even if the exporters could rely on the existence of a sufficient legal basis for data transfer to a third country, they faced another difficult task – the obligation to perform an assessment of the legal system of a third country in order to assess whether it provides an essentially equivalent level of data protection[30]. In accordance with the Court's conclusions, the exporters were obliged to perform such transfer impact assessment within the scope of Art. 45 par. 2 of the Regulation for each of the data transfers[31]. In addition, they were requested to document the results of the assessment and to deduce whether the third country provides the required level of protection, so that the proceeding data transfers to the selected third country are allowed. Moreover, based on the Recommendations from November 2020 it could be concluded that the transfer impact assessment ought to be conducted for virtually all types of data transfers to the third countries, regardless of the risk such transfer carries to the data subject rights (e.g.

28 Data importers very often try to avoid their responsibility for mirroring the processing obligations in the relation with their subcontractors by using phrases such as "within the reasonable effort" or "when justifiable", etc.

29 This approach of "soft data localization" was recommended, e.g. by Berlin Data Protection Authority in its statement calling for the data controllers based in Berlin storing personal data in the US to transfer the same to Europe. More about "soft data localization" in CHANDER, Anupam. Is Data Localization a Solution for Schrems II?. *Journal of International Economic Law* [online]. 2020, 23 (3), 771-784. [viewed on 10-31-2021]. Available from: https://doi.org/10.1093/jiel/jgaa024, p. 772.

30 If the country did not provide a required level of protection, the data exporters are obliged to suspend the data transfer. Within the meaning of Art. 58 par. 2 (f) of the GDPR such action can be requested from the data exporters also by data protection authority if it finds that third-country data transfer does not meet the conditions of the Regulation. This authority's power was confirmed by the CJEU in par. 121 of Schrems II decision including in relation to the transfers made based on an adequacy decision.

31 At least, the analyses shall include a rule of law situation in a third country, available mechanisms for individuals to obtain (judicial) redress against an unlawful government access to personal data, existence of comprehensive data protection law or an independent data protection authority, as well as an adherence to international instruments providing for data protection safeguards, etc. For details see also sec. 38 and following of the Recommendations of November 2020, resp. sec. 37 of the Recommendations of June 2021.

regardless of scope of the processed data, possibly for the time and the purpose of processing)[32].

As can be assumed, Slovak data exporters faced certain issues with accomplishing such assessments. The task to assess the data protection situation of the third country from the legal perspective might be undertaken by large corporations with sufficient financial and human resources, but small and medium-sized enterprises, which are considered a key part of the economy[33], struggled to do so. Similar observation was made by Anupam Chander, who declared that although large firms might be able to afford the expensive legal advice reviewing a foreign nation's surveillance law for compatibility with EU law, smaller firms will not.[34] His general conclusion is applicable also to the Slovak situation.

After assessing the level of protection in the selected third countries, Slovak data exporters should have a picture of whether the country sufficiently protects the data subject rights and whether it is possible to continue with already ongoing data transfers, resp. to establish new transfers in the future. If they identified areas where the data subject rights and processed personal data might be under a risk, they had to adopt the supplementary measures to eliminate or at least to reduce the identified risks. These measures could be of a contractual, technical, and organizational nature as outlined in the Recommendations from November 2020[35]. Their adoption might require the re-opening of already concluded contracts and negotiations with the data importers. Interfering with the established operations and activities with personal data and the need to implement supplementary measures is always conditioned by the bargaining power of the data exporter, as well as by the pressure on the other contractual partner.

If Slovak data exporter could not agree with the data importer on the adjustment of the conditions ensuring that the data transfer and the subsequent data processing activities did not pose a risk to the rights of data subjects (i.e. the risk to data subject rights remained high), the data exporter was obliged to immediately suspend the data transfer. Indeed, this was not the last step in the exporter's activities, as it was also required to carry out an ex-post control of the effectiveness of the adopted measures and, if necessary, to re-evaluate them. In addition, the exporter was expected to continuously monitor the situation in the

32 The new Recommendations of June 2021 partially clarified and adjusted missing risk-based approach. See details in the next chapter of this paper.

33 DYKER, David A., Economic performance in the transition economies: A comparative perspective. Science and Public Policy [online]. 2000, 27 (4), 275–283. [viewed on 10-02-2021]. Available from: https://doi.org/10.3152/147154300781781922

34 CHANDER, Anupam, supra note 29, p. 774.

35 Adoption of the measures requires not only legal knowledge of the data protection situation in a third country, but also the extensive technical understanding of the entire chain of processing operations. Data exporters could, to some extent, rely on the knowledge and support of the data protection officer (the "DPO"), if appointed in their organization. However, even the DPO cannot guarantee the absolute compliance with the GDPR in the given case, as the assessment of the laws of third countries and the setting of conditions for the data transfer to third countries is not included among the DPO's obligations under Art. 39 GDPR.

third country[36] and, if necessary, to adjust the data transfer and data processing conditions.

3. IS THERE FINAL SOLUTION AVAILABLE?

After almost a year of data exporters trying to bring their processing activities into the line with the requirements of the Schrems II decision, the EDPB published the final, long-awaited version of the Recommendations. These should provide clearer instructions and explanations of the specific steps for the data exporters. It is encouraging for the data exporters that no additional steps are required to be taken compared to the original version of the Recommendations from November 2020[37]. Thus, if they followed the original version of the Recommendations, they certainly did not take a step aside. The most interesting expectation was whether the EDPB would move closer to a risk-based approach or remain faithful to the rigid, formal approach of conducting a transfer impact assessment[38]. The EDPB eventually opted for a mixed approach. Based on the Recommendations it can be concluded that the exporters have been given a margin of discretion and acceptance of a certain degree of risk when transferring data to the third countries[39], but at the same time reiterate the ultimate responsibility of the exporter and the right of the supervisory authorities to differently evaluate the conclusions reached by the exporter[40].

We will not deal with the whole text of the Recommendations, but rather focus on two key points that will significantly affect the future practice of the data exporters. The first is the obligation to carry out an assessment of the legislation of the third country to which the data transfer takes place. This request caused

36 In the data processing agreement (or EU SCC), the exporter may partially bind the importer to perform such step, since it corresponds with the obligation of the data recipient to inform the controller established in the EU without an undue delay of any inability to comply with the obligations arising from the concluded data processing agreement. Nevertheless, the accountability for performing an assessment and deriving a conclusion to proceed with the data transfer lies with the data exporter. In determining what is considered accountability, the EDPB refers to the wording of the Opinion of Advocate General Sharpston in joined cases C-92/09 and C-93/02. Specifically, in sec. 3 of the Recommendations, it cites as follows: "The right to data protection has an active nature. It requires exporters and importers (whether they are controllers and/or processors) to go beyond an acknowledgement or passive compliance with this right." Further, it states that "controllers and processors must seek to comply with the right to data protection in an active and continuous manner by implementing legal, technical and organisational measures that ensure its effectiveness. They must also be able to demonstrate these efforts to data subjects and data protection supervisory authorities. This is the so-called principle of accountability".

37 Both, the original and the new Recommendations proposed data exporters a 6-steps procedure, which was partially described in the chapter above.

38 When talking about a risk in data protection one should begin from the premise that data processing is by default an activity that raises risks. This is the reason why a right to data protection was introduced in the first place. The legislature introduces the risk as a criterion for the determination of the particular measures to be applied. This is a choice that adds scalability when it comes to compliance, in the sense that the scope of the legal duties of data controllers depends on the risk posed by their processing operations, and more specifically the likelihood and severity of that risk. See: DEMETZOU, Katerina. Data Protection Impact Assessment: A tool for accountability and the unclarified concept of 'high risk' in the General Data Protection Regulation. *Computer Law & Security Review* [online]. 2019, 35 (6). ISSN 0267-3649 [viewed on 10-31-2021]. Available from: https://doi.org/10.1016/j.clsr.2019.105342.

39 As can be derived from the wording of sec. 43.3 of the Recommendations.

40 Sec. 48 of the Recommendations.

a great deal of resentment and brought considerable criticism to the EDPB[41]. Not only did the exporters lack a clear scope and detail for carrying out such an assessment, but they also referred to the practical impossibility of carrying it out and to its legal non-binding nature in the event of another assessment by the data protection authorities. In this respect, the EDPB made a slight concession when it clearly specified in sec. 32 of the Recommendations that the assessment is limited to the legislation and practices relevant to the protection of the specific data of the respective data transfer.

It follows from the above that the exporters should first take into an account the basic circumstances of the transfer itself (purpose of the processing, scope of the data processed, categories of data subjects, sector within which the transfer takes place, material transfer, etc.) and then proceed accordingly with an assessment of the legislation related to the transfer in question. Nevertheless, we still consider such limitation only very formal and not simplifying the overall process due to the resolute obligation to assess different aspects of legal system of the third country related to that particular transfer, which may obviously include all elements listed in Art. 45 (2) of the GDPR. This procedure must also be performed for any envisaged onward transfers, which further multiplies the difficulties mentioned above.

Closer examination of this obligation additionally reveals that in order to carry out this assessment, the exporters must have a thorough knowledge of all parts of the data transfer, of the conditions under which such transfer takes place, about the actors involved, etc. They also needed to understand how these facts are reflected in the law of a third country, i.e. which aspects of the law are relevant to a particular transfer[42]. Although EDPB states that the exporters should focus primarily on publicly available resources, the selection and scope of the resources to be taken into an account already requires the involvement of a legal advisor or consultant in a third country who would be able to make such an assessment[43]. The exporter may benefit from the importer's informal knowledge of the legal situation in the third country related to the specific transfer[44], however, such procedure will serve only as a source of additional information and should not replace the legal analysis carried out by the exporter. Assessing legal situation is not the ultimate task of the data exporter. In addition, the exporter must conclude what level of protection the third country

41 See e.g. feedback of Austrian Federal Economic Chamber, Ministry of Justice and Security of the Netherlands, University of Leuven, and many others available on: https://edpb.europa.eu/our-work-tools/documents/public-consultations/2020/recommendations-012020-measures-supplement_sk

42 Sec. 51 of the Recommendations simplifies the position of the exporter by declaration that the assessment does not have to be repeated every time when the same transfer of a specific type of data is conducted to the same third country. However, the meaning of the term "same transfer" is not explained thus it is ambiguous if this exception applies only to the transfers identical in all aspects, or also to the transfers of a similar nature. This missing precision of which aspects should be decisive to confirm that the transfer is "the same" will cause issues in practice.

43 This is associated with a financial burden on the part of data exporters, which certainly does not contribute to the competitiveness and further development of business in the EU.

44 It may be possible to expect that the exporters will require the importers to complete questionnaires on the legal systems of the third country and on the transfer conditions before the data transfer takes place. These are likely to become part of the transfer impact assessments that the exporters will perform.

provides in relation to the particular transfer (i.e. whether it is essentially equivalent to the level of data protection within the EU). It is questionable whether such conclusion is at all the responsibility of the data exporter, since in our view such a declaration can only be made by the Commission or the Court under the European law.

The EDPB further states that the assessment can be completed de facto with four alternative results. First, the third country provides essentially equivalent level of data protection, when the data exporter is not required to adopt additional steps except for ensuring required contractual landscape. The remaining three results include, to varying degree, the possibility that the third country does not provide essentially equivalent data protection, either due to the practice of public authorities despite the formal existence of relevant laws, or due to the lack of legislation, or on the grounds that the legislation of the third country contradicts the requirements of EU law. In such case the data exporter always has the possibility to suspend the transfer or to adopt supplementary measures or to decide to carry out the transfer despite these shortcomings, if it is proven and documented[45] that the problematic legislation will not affect a specific transfer (i.e. the rights of data subjects will not be compromised by legislation and data exporter will be able to fulfil its obligations under the Article 46 of the GDPR).[46] The implications associated with the wrong results of the assessment are clear – the competent supervisory and judicial authorities have the right to hold the exporter accountable for any decision taken[47] and whatever alternative the exporter chooses, the supervisory authority is not bound by its conclusions48.

Following the possibility of taking supplementary measures, the Recommendations present the examples of measures (organizational, technical, and contractual) and link them to short case-studies to help the exporters to choose the appropriate measures applicable for the particular data transfer. The practical question arises as to whether any measures can be used, when the law alone, whether private and contractual or public and general, would be insufficient to protect data subject rights49 in the third country. If e.g. a data importer took some steps to prevent such an approach, would it be realistically expected that such steps would be effective? If, for example, the data importer is to take steps to prevent such access, can its effectiveness realistically be expected? Is it possible at all to oblige the data importer

45 It is to the dossier that the EDPB places considerable emphasis on by briefly defining what at least the assessment must contain (both materially and formally). The EDPB requires that in addition to comprehensive information on the legal assessment of the legislation and practices, and of their application to the specific transfers, the dossier should follow internal procedures of data exporter (including dates and names of persons responsible for the assessment) and should be endorsed by legal representative of exporter.

46 Sec. 43 et seq. of the Recommendations.

47 Sec. 48 of the Recommendations.

48 It will be interesting to see whether and how specific the supervisory authorities will deal with the assessment of transfer conditions, because as the EDPB requires extensive knowledge from data exporters for this purpose, the data protection authority will need to dispose with the same as well in order to be able to evaluate transfer conditions and legal situation in the third country.

49 BRADFORD, Laura, ABOY, Mateo, LIDDELL, Kathleen, supra note 2, p. 3.

to act in this way in relation to the authority of the state to which he is subject under the law? These are only a few examples of our doubts whether the adoption of supplementary measures is only a formal step and thus does not meet the basic requirement for the effective protection of the rights of the data subjects.[50] Moreover, if in some cases the conditions of the data transfer do not allow supplementary measures to be implemented and it is the interest of the exporter as well as the data subject to carry it out despite the risks involved, can the data protection authority subsequently conclude that the transfer could not be carried out under the circumstances? These and many other issues arise despite EDPB's efforts to clarify the conditions for conducting data transfer impact assessments and data transfers in general.

CONCLUSION

From what we have seen, it will be extremely difficult to bring data transfers into line with the requirements of the Regulation and the Schrems II decision. The time required to perform the transfer impact assessment is only one of the negatives. Another one is the financial cost of carrying out an assessment of the third country legislation. Detailed knowledge of the terms of the transfers will in some cases only be illusory, and thus the main objective with which the Schrems II decision and, in fact, the GDPR itself was adopted, will not be met. In this way, the protection of data subject rights and provision of an adequate level of protection during personal data processing will be burdensome. In addition to the great deal of effort that the exporters will have to invest, the procedure envisaged by the EDPB can be expected to slow down the processes in the exporters' organizations, if not to completely cease some activities. Such a result will not always be beneficial for data subjects and will certainly not enhance the business development. We also believe that it is naïve in the globalized world to expect data transfers to be suspended and replaced by processing in the EU.

Slovak data exporters face the above difficulties. Although it was generally hoped that the final form of the Recommendations and the new wording of the EU SCC would bring certain clarity into this situation, we assume that these expectations have not been met. Maybe it is too early to draw any conclusions and we would like to be wrong in a relatively sceptical view of the situation. The steps taken during the previous period have helped to improve the situation regarding general knowledge of data transfers to the third countries, but these steps are sufficient. In the future we can expect more decisions from the supervisory authorities, which will perhaps better guide the exporters and other parties involved in

50 The EDPB itself has doubts about the effectiveness of the measures, when in sec. 53 of the Recommendations it admits that contractual and organizational measures alone will generally not overcome an access to personal data by public authorities. Indeed, such situations may require technical measures and the remaining two types of the measures may complement them to strengthen the level of data protection.

data processing activities. It will also be interesting to see whether a comprehensive analysis of the third country legal orders in the field of data protection will emerge in the future so the exporters can refer to them without fear of questioning the final outcome.

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