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Authors of study within the framework of monograph come to conclusion about the need to improve legal mechanisms functioning of economic entities with respect to accounting policies, tax optimization, restructuring accounts payable, use of land resources. Authors identified the most important factors that hinder the implementation of European and international legislation on the protection of consumers' rights, activities of state bodies, implementing decisions of courts, public procurement system. Research results are also considering the problems of right to acquire a nationality, activity of local self-government of territorial units, resolution of international conflicts. Results obtained during the research can be used in criminal justice system with respect in process to protect the interests of economic entities, detention of suspects, investigation of criminal cases in some countries. Results can be used by students and young scientists on legal regulation of activity of business entities, improve the current legal framework, implementation of European and international legislation, effective functioning of judicial system.

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Chapter 1

CONSTITUTIONAL LAW, MUNICIPAL LAW

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THE RIGHT TO ACQUIRE POLISH CITIZENSHIP BY CHILDREN – SELECTED ISSUES

Aleksandra P. was born on 17th August 2003 in Poland as an illegitimate child of Natalia P. and Krzysztof T. The minor's mother is a Ukrainian citizen, whereas her father – Krzysztof T. is a Polish citizen. On 7th September 2004, Krzysztof T. accepted the minor Aleksandra P. in front of the Head of the Registry Office in Opole. Due to the fact that this fact took place after a year from the Aleksandra's birth, on the basis of the Act on Polish Citizenship [1], a child is not entitled to Polish citizenship only on the basis of the fact that the child's father is Polish. The competent voivode with reference to Article 7 (1) of the Act which was binding at that time (which is currently Article 6 (1)) [2] and judgments of the Province Administrative Court in similar cases, refused to issue a document confirming that the minor Aleksandra P. had Polish citizenship.[3]

Similarly, Kinga D., born on 17th July 1991 in Poland, was not granted the right to be a Polish citizen [4]. The minor's mother is Oleksandra V., a Ukrainian citizen. Wiktor P., her mother's husband, also a Ukrainian citizen, was entered into her birth certificate as her father. By the judgement of the District Court as of 2nd July 1997 in Ukraine, it was acknowledged that Wiktor P., the mother's husband, is not the child's father. The matter of paternity was finally settled by the judgment of the District Court as of 5th February 2001, according to which the Court stated that Artur D., a Polish citizen, is the child's father. The determination of the father in this case also took place after

a year from the child's birth and it was the basis for the refusal to issue a document confirming the acquisition of Polish citizenship by the minor. Finally, by judgement as of 27th October 2005the Supreme Administrative Court refused to grant Kinga D. the right to Polish citizenship.

The legal basis to settle the legal situation of children born outside marriage is currently Article 6 of the Act on Polish Citizenship, pursuant to which:

1. "While deciding on the citizenship of a child, changes in the determination of the child's parent(s) and of the parent(s) citizenship shall be considered provided they occurred within one year from the day of the child's birth.

2. Changes to paternity establishment arising from a court ruling following an action

for the determination of paternity or an action for the annulment of an acknowledgment of paternity shall be considered when determining the child's citizenship unless the child has already came of age or with the child's consent when the child reaches the age of 16" [5].

It is necessary to pay attention to the fact that in spite of the recent amendment of the Act, the wording of this provision was not changed [6]. However, it is worth highlighting the fact that this provision differentiates the legal situation of children in the scope of acquiring the Polish citizenship depending on the way in which their origins were determined. This differentiation is based on privileging children born in marriage, covered by the legal presumption of paternity with respect to the husband, in relation to children of undetermined paternity, in case of whom such a paternity establishment can take place not later than before the lapse of one year from the day of their birth. The aforementioned regulation limits children's rights to acquire Polish citizenship in a considerable scope, even if at least one of parents is a Polish citizen, which was guaranteed by the legislator in Article 14 (1) of the Act on Polish Citizenship, and should be consistent with Article 34 of the Polish Constitution guaranteeing the acquisition of Polish citizenship by birth to parents who are Polish citizens (…).[7]

Such an inequality is reflected by the fact that children of determined paternity at the moment of their birth will be able to acquire Polish citizenship, unlike children (also those coming from both Polish parents), in case of whom the paternity was determined after the lapse of

one year from the day of their birth.

Pursuant to Act on Polish Citizenship, there is a period of one year from the child's birth, before the lapse of which changes in stating parenthood or one parent's citizenship can occur. After the lapse of one year, even if as a result of a court judgement the child's origin is stated as coming from a Polish citizen (and the second parent is a foreigner), this child cannot be granted Polish citizenship. Such a period defined by the legislator excludes gaining citizenship after the child's father on the basis *ius sanguinis* (right of blood).[8]

The amended Act on Polish Citizenship leaves an opportunity of gaining Polish citizenship by acknowledging somebody to be a Polish citizen on the basis of Article 30 (1) subparagraph 4, pursuant to which it is possible to acknowledge a minor foreigner to be a Polish citizen only if one of the minor's parent is a Polish citizen staying in Poland on the basis of a permit to settle, a residence permit for a long-term resident of the European Community or the right of permanent residence and the second parent, who is not a Polish citizen, granted his permission to recognize the child as a Polish citizen. This procedure makes it possible for the child to acquire Polish citizenship on condition that the child obtains a permit from the parent who is not a Polish citizen. However, these conditions can, as a result, pose problems or can even make it impossible for the child to exercise the right to acquire the citizenship.

Taking into consideration the aforementioned regulation, it seems to be necessary to remind the opinion of the National Administrative Court in Warsaw in its judgement as of 30th October 2008, in which the Court states that in relation to the interpretation of the provision of Article 7 of then binding Act on Polish Citizenship, under no circumstances can the term of "changes to paternity establishment" include, besides the denial of paternity and the annulment of paternity recognition, also legal events leading to the statement that a given man is the child's father [9]. According to the National Administrative Court the opinion that the child's legal interest when determining the child's citizenship makes it necessary to take into consideration changes, as a result of which the paternity acknowledgement or establishment took place has to be considered incorrect. The opinion of the National Administrative Court in this case helps us to realize the fact that the wording of Article 6 (Article 7 in the former version of the Act on Polish Citizenship) in fact concerns only the legal events resulting in the denial of the fact that a given child comes from a given man. Such a legal regulation requires an analysis and a trial to determine answers to the question about the

legislator's aim in this scope and the cause of introducing limitations in the acquisition of the Polish citizenship by children, the paternal filiation of whom was determined after the lapse of one year from the date of their birth.

The aforementioned issue is important due to the fact that social and political changes and opening of borders caused a significant development of international relationships between countries and at the same time, the increase of people's movement and migration, which results in the increase in the number of legal problems, the parties of which are citizens of different countries. Transformations of the Republic of Poland, the development of its economy and its position in the international arena, which is getting stronger and stronger, have an influence on the increase in the attractiveness of our country for foreigners who could potentially settle and start their families here.

Examples included in the introduction show that although the Act on Polish Citizenship is based on the right to Polish citizenship on the basis of the right of blood, it does not always guarantee children born in the relationship of a foreigner and a Polish father the right to acquire Polish citizenship after their biological father. Moreover, in case of applying for recognition of a child below 18 years of age as a Polish citizen, it is possible only after obtaining a consent from a parent – the foreigner, what can make it impossible for a Polish citizen to have his child recognized as a Polish citizen (Article 30 (1) subparagraph 4). It can thus be assumed that in case of a conflict between parents, a refusal of one parent who is a foreigner to give a consent to recognize the child as a Polish citizen will cause that the child will have the status of a foreign resident in Poland and will have to bear all its consequences. A preliminary analysis of the Act on Polish Citizenship justifies the necessity of conducting a deep research work on this issue.

The discussion of this controversial issue requires an analysis of the sheer term of citizenship, legal regulations concerning the acquisition of Polish citizenship and provisions of the Family and Guardianship Code [10] in the scope of changes in determining the child's origin. This issue also requires presenting the principle of equality before the law and the prohibition of discrimination on the basis of birth. The presented issues will be shown from the point of view of Polish law and human rights norms and standards as both the prohibition of discrimination on the basis of birth and the right to have Polish citizenship belong to the basic rights, to which everyone is entitled.

DEFINITION OF CITIZENSHIP

This issue is of interdisciplinary character. It is the subject of provisions among others of public and private international law, administrative law and constitutional law. In view of the lack of a statutory definition, this term is subject to a deep analysis in the technical literature [11]. The basic rule is that it is within competence of each country to regulate this institution and determine rules of citizenship acquisition and loss [12]. Pursuant to the definition included in the Dictionary of the Polish Language citizenship is "a nationality connected with certain powers and obligations determined by the law of a given country" [13]. Defining the term of citizenship is not common among theoreticians of law. Authors indicate effects of having or not having citizenship. Bogusław Banaszak defines a citizen as a person of a nationality of a given country and having full rights in this country as its citizen [14]. Wojciech Góralczyk highlights the fact that the obligation of fidelity and loyalty to the country and the country's authority over the citizen arises from citizenship. According to the author, the country has this authority over the citizen wherever the citizen is, so even in areas where there is sovereignty of another country, although in this case the territorial sovereignty competes with the personal authority [15]. Halina Zięba-Załucka draws attention to the fact that according to the opinion expressed in the doctrine, the most characteristic feature of citizenship is its durability in time and space. The durability in time, according to Zięba-Załucka, H., is based on the fact that from the acquisition of citizenship in accordance with internal law (e.g. from the moment of birth), until the moment of its termination, citizenship lasts continuously. The durability in space means that citizenship of an individual exists despite the fact that the individual is not in the country, the citizen of which he is. The individual keeps his rights and obligations resulting from citizenship, although, according to the author, he can have huge difficulties in executing them [16].

POLISH LEGISLATION

The Constitution of the Republic of Poland forms the basis for the term of citizenship in the Polish legal system [17]. Its Article 34 stipulates that Polish citizenship is acquired by birth from parents being Polish citizens. Other cases of Polish citizenship acquisition are provided for by the Act on Polish Citizenship. [18]

The Act on Polish Citizenship foresees different ways of acquiring Polish citizenship by a child. Pursuant to Article 14 of the Act, a child acquires Polish citizenship by birth if at least one of his parents is a Polish citizen or was born in the territory of Poland, and his parents are unknown, do not have any citizenship or their citizenship is not specified. Moreover, the child, pursuant to Article 1 of the Act, acquires Polish citizenship if he is found in the territory of Poland and his parents are unknown, whilst under Article 16, a foreign child, adopted by a person or people having Polish citizenship, acquires Polish citizenship if the adoption took place before reaching by him the age of 16. It is then assumed that the adopted child acquired citizenship on the day of his birth [19].

Coming back to the main part of the paper aiming at finding reasons for which the legislator limits the right to acquire Polish citizenship after Polish parents in the case when parenthood in the legal sense was formed after the lapse of one year after the child's birth, it is necessary to carry out an analysis of ways to establish paternity included in the Family and Guardianship Code and find the cause of such a differentiation under the Act on Polish Citizenship [20].

It seems that a typical situation, in which a child is born during the period of presumption of the child's origin from marriage of his parents, one of whom is a Polish citizen and the other one is a foreigner should not raise doubts in the scope of the child's citizenship [21]. If the child's parents are married, then pursuant to Article 40 (1) subparagraph 3 of the Act – Law on Civil Status Records [22] the parents' data is included in the child's birth certificate, which provides a sufficient basis for the child to acquire citizenship on the basis of Article 14 (1) of the Act on Polish Citizenship .

The legal issue discussed in this paper can occur when the child's mother is a foreigner, whereas the child's biological father is Polish and the father has not been acknowledged to be the child's father in the legal sense before the lapse of one year after the child's birth. Such a situation can take place when the child's origin from the mother's husband (who is Polish) is denied or when the child born outside marriage is not acknowledged or when the paternity of such a man (Polish citizen) is not established before the lapse of one year after the child's birth. Moreover, this problem can occur if a Polish citizen, who at first acknowledged that he is the child's father later led to stating voidance of his paternity acknowledgment and then no other man was acknowledged to be the child's father before the lapse of one year after the child's birth.

In order to carry out a precise analysis of the wording of Article 6 of the Act on Polish Citizenship, it is necessary to pay attention to the fact that this provision expresses a rather laconic opinion that the change in the establishment of parenthood or citizenship of one of the parents or both of them is taken into consideration in the establishment of the child's citizenship. This statement raises doubts concerning its significance. It is worth highlighting the fact that the action for the determination of the child's origin does not lead to the father's establishment but to show that the mother's husband is not the child's father.[23] The wording included in the regulation of Article 6 (1) of the Act on Citizenship "(…) changes in the determination of the child's parent(s) and of the parent(s) citizenship shall be considered while establishing the child's citizenship provided they occurred within one year from the day of the child birth". The legislator used the term "changes in the determination of the child's parent(s)" and he does not say precisely what kind of changes they are to be. Moreover, the legislator used the following wording "(…) changes in determining a father that result from a court's decision based on a claim to exclude fatherhood or the annulment of recognition are taken into consideration while determining a child's citizenship unless the child has come of age." However, court's decisions in such cases do not lead directly to changes in determining the child's father but to the termination of the father- child relationship, what in turn leads to the change in the civil status of the child and the child becomes the one with no determined father. Only the paternity establishment or its acknowledgement by the court leads to the change in determining the father. This is why, according to the authors, using the term "change" in this meaning is not correct and should not concern the child born outside marriage, the paternity of whom has just been established for the first time. The provision of the Act on Citizenship concerning changes in determining a father that result from a court's decision based on a claim to exclude fatherhood is thus hard to understand as this claim does not lead to the determination of the father but to the determination of the fact that the man included in the child's birth certificate as a father is not the child's father. The same thing concerns the provision of the Act on the claim for the annulment of recognition as this decision does not lead to any establishment of the father but to the annulment of recognition made in the way that excludes its effectiveness [24].

The issue discussed above "the formula of changing the father" is not the only allegation concerning the lack of consistence between the Act

on Citizenship and the Family and Guardianship Code. Another inaccuracy is the differentiation of terms in the scope of the possibility of changing the child's citizenship stipulated in the Act on Polish Citizenship, which is inconsistent with provisions of the Family and Guardianship Code. A shorter time limit of one year after the child's birth was foreseen in relation to changes concerning the parent's determination that is establishing and acknowledging paternity by the court and the longer time limit – until the child reaches the age of majority, has been restricted to the determination of paternity and the annulment of recognition. However, the acknowledgment of paternity should be possible from the moment of the child's conception until the moment when the child reaches the age of majority (Article 76 of the Family and Guardianship Code). In the case when the court establishes paternity, it is possible to bring such an action from the moment of the child's birth and in the course of the whole child's life (Article 84 of the Family and Guardianship Code). Pursuant to Article 78 of the Family and Guardianship Code, the man who acknowledged paternity can bring an action for the annulment of recognition within 6 months from the day when he learned that the child was not his. However, in the case of a child born in marriage, the date of bringing an action for the annulment of recognition is 6 months from the child's birth for the woman who gave birth to this child (Article 61^{13}§1), and for her husband – 6 months from the moment when he learned about the fact that his wife gave birth to this child (Article 61^{13}§2). The child has the right to bring such actions even when he attains full age, with a limitation up to three years after reaching the age of majority – in case of a denial of coming from the mother's husband and determining the annulment of recognition. The prosecutor has an unlimited deadline for the establishment and exclusion of the child's origin (Article 86 of the Family and Guardianship Code).

It is thus possible to notice that keeping the period of one year stipulated in the Act on Polish Citizenship will not be possible in many cases. A question then arises what the legislator wanted to achieve by adopting such a time limit, especially that even the Family and Guardianship Code, the main principle of which is the protection of the child's good, makes it possible to establish paternity and make an annulment or an exclusion of it for different reasons within the time limit longer than one year from the child's birth. This differentiation is completely incomprehensible. The argument of the President of the Office for Repatriation and Foreigners in Warsaw seems to be incorrect.

This argument stipulates that the short time limit is due to the elimination of "the state of uncertainty concerning the child's citizenship" and the long time limit included in the Act on Polish Citizenship results from the time limits included in the Family and Guardianship Code [25]. At the same time, it is necessary to pay attention to the fact that the legislator does not guarantee the stability and certainty of the child's civil status under Article 6 of the Act. If as a result of e.g. the annulment of recognition, a Polish citizen ceases to be the child's father, then, drawing conclusions from the wording of Article 6 (2) of the Act and taking into consideration this change while establishing the child's citizenship, it would be necessary to understand that the legislator allowed the possibility of losing Polish nationality by this child. Both the determination of paternity and the annulment of recognition can take place when the child is for example in his teens. In reality it can concern children who have had Polish citizenship for many years and after several years of their lives the determination of paternity took place. However, bearing in mind provisions of Chapter 6 of the Act on Polish Citizenship concerning the loss of Polish citizenship, which stipulate a possibility of losing citizenship as a result of such a situation, it is possible to draw conclusions that the legislator only wanted to make it possible for the "new father" (the fatherhood of whom cannot though result from the determination of paternity or from the court's decision in the proceedings for the establishment of paternity by the court) to give his citizenship to his child under Article 6 (2). This is why, it can be considered to be another inconsistency in law caused by the aforementioned provision as under Article 34 (2) of the Constitution of the Republic of Poland it is not possible to lose Polish citizenship [26]

It appears that the certainty of having citizenship should be one of the most important principles of citizenship acquisition. However, it is supposed that the period of one year after the child's birth has been introduced in order to protect the child's interest and thanks to it the child keeps the citizenship which he has up to this moment in spite of the fact that later it is established that e.g. a Polish citizen is his father. At the same time, the child loses the possibility of acquiring Polish citizenship. According to the authors, such a protection, which is understood in this way, is not justified. Such a child is treated in Poland as a foreigner. This regulation is inconsistent with Article 14 of the Act under which the child acquires Polish citizenship by birth if at least one of his parents is a Polish citizen. Such a system of acquiring citizenship limited by the unjustified time limit of one year makes it possible to

state that the discussed provision of Article 6 of the Act on Polish Citizenship can lead to discrimination on the basis of birth and it will also be a violation of the principle of equality of children born in marriage and those born outside marriage.

In order to confirm the fact that the aforementioned analysis is not hypothetical, besides the examples presented at the beginning, it is possible to assume that a Polish citizen during his stay abroad starts a relationship with a citizen of another country. As a result of this relationship, the woman gives birth to her child in Poland. However, the biological father of this child is a Polish citizen who is still abroad. Pursuant to Article 19 (2) of the Act Private International Law [27], the governing law in case of establishing paternity is the law of nationality (*lex patriae*) at the moment of the child's birth. If the Act foresees the law of nationality jurisdiction and it is impossible to establish the person's citizenship or this person has no citizenship, then the law of the country where the person lives is binding.

However, in the case of the child's acknowledgment – the law of the state, the citizen of which the child is at the moment of the acknowledgment. In the aforementioned state, if the child's origin from a Polish father is not established, the child acquires citizenship after his mother, that is citizenship of another country. It is very probable that the child's mother may encounter various problems connected with finding the child's father who can have no idea that he has a child. Assuming that the child's mother shall do her best to determine the place of residence of the child's father and the father will agree to acknowledge the child, it is hardly possible that they will manage to do everything that is required within the period of one year after the child's birth. Similarly, if the child's mother, citizen of another country, is forced to bring an action for determination of paternity against the child's father, who is Polish, then not keeping to the period of one year can be due to the lack of knowledge on this subject, the necessity of having a passport, visas and other documents. There is no mother's bad will in it, nevertheless, in view of such special circumstances the legislator did not foresee any possibility of extending this period. This is why, there will be a situation in which *in fine* the child will have established a Polish father but will not have the right to have Polish citizenship after the father. It seems that this regulation is unfair also for the father who, under certain circumstances, can have problems with exercising his parental responsibility over the child because of the fact that the child has not Polish citizenship.

THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION ON THE GROUNDS OF PLACE OF BIRTH – INTERNATIONAL STANDARDS

The principle of equality and non-discrimination is the foundation of international law for the protection of human rights. Regulations concerning equality and non-discrimination have already been included in the United Nations Charter, according to which one of the aims of the United Nations Organization should be supporting and encouraging to respect human rights and freedom for everybody regardless of race, sex, language and religion (Article1 (3)).

One of the most important international acts concerning the protection of human rights, being a foundation for the formation of the system of protecting human rights in the world, is the Universal Declaration of Human Rights (UDHR) adopted by the United Nations General Assembly on 10th December 1948. Pursuant to Article 1 of the Declaration "All human beings are born free and equal in dignity and rights".[28] The Declaration proclaims equality before the law stating in Article 7 that "All persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law." It is worth highlighting the fact that the Universal Declaration of Human Rights (UDHR) as one of few documents recognizes the existence of the right to citizenship. Pursuant to Article 15.1. "Each has the right to citizenship. 2. No one shall arbitrarily be deprived of his/her citizenship. No one should refuse a person to change his/her citizenship" [30].

The principle of equality has the status of a written law thanks to including it in the International Covenant on Civil and Political Rights as of 16th December 1966 [30] and the International Covenant on Economic, Social and Cultural Rights as of 16th December 1966 [31]. Pursuant to Article 26 of the International Covenant on Civil and Political Rights "All persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law." This provision forbids all kinds of discrimination and ensures that all people equal and that there is an effective protection from discrimination on the basis of "gender, race, colour, language, religion or belief, political or other opinion, ethnic or social origin, membership of a national minority, property, birth, age, sexual orientation or any other status" [32]. It is also necessary to highlight the content of Article 24, which guarantees each child no discrimination on

the basis of "race, colour, gender, language, religion or belief, ethnic or social origin, property or birth" as well as the right to such measures of protection as are required by his status as a minor, on the part of his family, society and State and the right to acquire citizenship. [33]

Under international law, the fact of having citizenship is one of elements that make up a person's identity. Pursuant to Article 8 of the Convention on the Rights of the Child [34], States Parties undertake actions aiming at respecting the rights of the child to keep his own identity including citizenship, surname, family relationships in accordance with law, with the exclusion of unlawful interference. Moreover, Article 7 of the Convention stipulates that the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. Pursuant to Article 8, States Parties were obliged to undertake actions aiming at respecting the child's right to respect his identity, including citizenship, surname, family relationships in accordance with law, with the exclusion of unlawful interference (…). The prohibition of discrimination on the basis of birth was stated in Article 14 of the Convention, which stipulates that exercising rights and freedoms mentioned in this Convention should be ensured without discrimination resulting from such reasons as gender, race, colour, language, religion or belief, political or other opinion, ethnic or social origin, membership of a national minority, property, birth, or any other status.

In the scope of the European regional system of human rights protection, the European Convention for the Protection of Human Rights and Fundamental Freedoms as of 4th November 1950 is to be considered to be the most important from the point of view of the discussed issues. [35] The principle of non-discrimination was specified in Article 14 and the Protocol 12 to this Convention, pursuant to which it is forbidden to discriminate anyone on the basis of "gender, race, colour, language, religion or belief, political or other opinion, ethnic or social origin, membership of a national minority, property, birth, age, sexual orientation or any other status." However, the equality principle was not directly highlighted in the Convention, thus interpretation of its meaning is considered by the European Court of Human Rights in Strasbourg in the scope of decisions concerning mainly the principle of non-discrimination.[36]

When discussing international standards of human rights protection in the scope of equality and non-discrimination in acquiring citizenship,

it is necessary to pay attention to the regulations included in the European Convention on Nationality [37], which Poland signed on 29th April 1999 but has not ratified it until now. A clear reference to this Convention was made while working on the amendment of the Act on Nationality. In the scope of the issue mentioned in this paper, the Convention states that States Parties to children, the origin of whom was determined as a result of an acknowledgement by the court or in any other way, can foresee that such children will acquire their citizenship in the manner specified by the country's internal law. [38] It is necessary to pay attention to the wording of Article 7 (1) f, pursuant to which the State can include the loss of citizenship in its internal law in case of establishing, before the child comes of age, that conditions foreseen by the internal law, on the basis of which the child acquired his citizenship, are not met any more under law.

The Polish legislator is also obliged to take into consideration the law of the European Union in the scope of regulations concerning Polish citizenship. According to Mielnik, B., EU citizens' rights did not have any influence on the sheer institution of Polish citizenship. The citizenship of EU Member States, according to the author, is the domain of Member States. This is confirmed both in community documents and by the jurisdiction of the Court of Justice of the European Union [39].

CONCLUSIONS

Internationals standards concerning the protection of human rights oblige Poland to guarantee citizens the right to equality and non-discrimination based on birth. A general rule that all persons are equal before the law and that all persons shall have the right to equal treatment by public authorities was introduced into the Polish legal system under Article 32 of the Constitution of the Republic of Poland. The Constitutional Court expressed its view regarding this issue that the equality principle is of a basic character [40]. The role of the Constitutional Court in specifying the wording of this principle, explaining it and detailing it is significant [41]. As it was highlighted by the Constitutional Court in one of its rulings [42], a criterion, on the basis of which the differentiation of addressees of a law takes place, is important in order to state whether the principle of equality is not violated. The Constitutional Court expressed a view that arguments justifying the differentiation of addressees of a law have to be of a relevant and proportionate character. They also have to remain in close

relation to other values, principles or constitutional standards, justifying the different treatment of counterparts.

The differentiation of children's situation in the scope of acquiring Polish citizenship by them, given the way of determining their origin, seems to be incompatible with a democratic state.

Provisions of Article 6 resulting from the Act on Polish Citizenship should be considered to be contrary both to the principle of the child's best interests and to the equality principle. It can be the cause of discrimination of children born outside marriage, in comparison to children born in marriage, which is also contrary to general principles of the family and guardianship law. A child born in marriage is currently in a better situation than the one born outside marriage in view of the right to Polish citizenship. It leads to unjustified and different treatment of children, in case of whom changes of one parent occurred after the lapse of the period of one year from their birth. Article 6 of the Act also causes a violation of the *ius sanguinis* principle binding in case of acquiring Polish citizenship. This regulation also causes various problems in the practical usage. An example reflecting many views on this issue is its extremely differentiated interpretation made by authorities and courts at different stages of one of proceedings [43].

The unclear wording of Article 6 of the Act, stipulating changes in the father's establishment, which result from the court's judgment in cases for the determination of paternity and the annulment of an acknowledgment of paternity, shows the necessity of amending this provision as these cases do not end in the establishment of paternity but they lead to the fact that paternity of such a child is not established. Authorities and courts, while interpreting, do not agree as far as the legislator's intentions in forming this provision are concerned. It results in the uncertainty of the law and in leaving this issue to be completely settled by courts, which is contrary to the legal regulations binding in a democratic country.

It is thus necessary to postulate taking amending of Article 6 of the Act on Polish Citizenship into consideration by the legislator. The amendments should be based on the consolidation of the Act and The Family and Guardianship Code concerning the period in which changes in the father's establishment take place and as a result they should eliminate the unjustified differentiation of children in this scope. Moreover, it seems to be necessary to clarify this regulation in order to avoid problems with its interpretation, especially as far as the term of "changes in the father's establishment" is concerned, which have to be

taken into consideration in the establishment of the child's citizenship. It seems to be justified to postulate that these changes concern not only negative actions, that is denying the child's origin or actions for the annulment of recognition, but also actions defining the child's origin from a parent in a positive sense in accordance with regulations included in the Family and Guardianship Code.

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2. *Changes to paternity establishment arising from a court ruling following an action for determination of paternity or an action for the annulment of an acknowledgment of paternity shall be considered when determining the child's citizenship unless the child has already came of age or with the child's consent when the child reaches the age of 16."*
3. *The Judgment as of 8th February 2005 II SA/Wa 261/04 in Warsaw – in this case the Provincial Administrative Court in Warsaw acknowledging the interpretation of Article 7 (2) considered by administrative bodies to be incorrect stated that this regulation stipulates about changes resulting from the sheer decision on the determination of paternity or annulment of its establishment. If as a result of these judgments, the child's father becomes unknown, then ratio legis of this regulation was to take into consideration further changes in the child's situation that is the situation which occurred as a result of a judgment establishing paternity. The determination of paternity opens the way to state who is the child's father either by means of the child's acknowledgment or establishment of paternity following the court's decision. In view of the Court the wording "changes in the establishment of the father" signifies all changes in the child's situation and the child's rights resulting of it. See also The Judgement as of 27th October 2005 in Warsaw II OSK 1016/05.*
4. *Judgement as of 27th October 2005 of the National Administrative Court in Warsaw II OSK 1016/05.*

5. Article 6 Act on Polish Citizenship (Journal of Laws 2012, item161)

6. However, it is necessary to pay attention to the fact that the legislator in Act on Polish Citizenship as of 2009 uses the term of annulment of acknowledgment, which as a result of amending the Family and Guardianship Code in 2009 was replaced by the following wording – stating ineffectiveness of acknowledgment.

7. The Constitution of the Republic of Poland 2nd April 1997 (Journal of Laws as of 1997 No. 78, item 483 as amended)

Article 34. 1. The child acquires Polish citizenship through descent from the parents at least one of whom is a Polish citizen. Other ways in which it is possible to acquire Polish citizenship are specified in the Act.

2. A Polish citizen cannot lose Polish citizenship unless he renounces it by himself.

8. The right of blood means that a child, the parents of whom are both citizens of a given country acquires their citizenship by virtue of law regardless of the child's place of birth, so even if the child is born abroad, in a country where there is an opposite rule binding that is the right of the soil..

9 The Judgement of the National Administrative Court in Warsaw as of 30th October 2008 II OSK 924/07 LEX 516726.

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17. *Journal of Laws as of 1997 No. 78 item 483 The Constitution of the Republic of Poland*
18. *Act as of 2nd April 2009 on Polish Citizenship (Journal of Laws2012, item161)*
19. *B.Banaszak, Constitutional Law, C.H. Beck Publishing House, Warsaw 2004, s.438.*
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21. *Article 62 of The Family and Guardianship Code:*

§ 1. If a child was born in the course of a marriage or in the period

of time not exceeding three hundred days from the dissolution of marriage or marriage annulment, it shall be presumed that this is a child of the mother's husband. This presumption shall not apply if the child was born after the period of three hundred days from the decree of judicial separation.

§ 2. If a child was born before the period of three hundred days from the dissolution of marriage or marriage annulment but after the child's mother got married for the second time, it shall be presumed that this is a child of the mother's second husband.

§ 3. The aforementioned presumptions can be rebutted only as a result of an action for the annulment of an acknowledgment of paternity.

22. Act as of 29th September 1986 Law on Civil Status Records (Journal of Laws as of 2011 No. 212 item 1264).

23. Article 67 of The Family and Guardianship Code.

24. Article 6 Act on Polish Citizenship :

1. "Changes in the determination of the child's parent(s) and of the parent(s) citizenship shall be considered provided they occurred within one year from the day of the child birth.

2. Changes to paternity establishment arising from a court ruling following an action for determination of paternity or an action for the annulment of an acknowledgment of paternity shall be considered when determining the child's citizenship unless the child has already came of age or with the child's consent when the child reaches the age of 16.

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LEGAL FRAMEWORK FOR ECONOMIC ACTIVITY OF SELF-GOVERNMENT UNITS IN POLAND

From over than 20 years polish legal system is based on dualism of public administration principle. Apart from government administration (central and territorial), in Poland exists also three-party territorial division of the country, covered by self-government. Self-government units are relatively independent – they are equipped with i.e.: legal personality, right for ownership and other property rights. Their independence is guaranteed by Polish Constitution, with right to judicial protection. It is also important, that self-government activity may be supervised only under legality criterion. **Self**-government in Poland rely on assignment of so-called municipal corporations with a special legal status, allowing them for self-management of their own affairs. Self-government in Poland is universal – because it covers the entire state's territory, as well as it covers all its habitants [1].

An important element of self-government's independence is the exclusion of the principle of hierarchical subordination (typical for relations within government administration). There are some specific supervision procedures created to ensure necessary uniformity of the entire public administration system. The Constitution allows to supervise self-government activities by government units, but it simultaneously point out that supervision may be carried using legality criterion only. This means that the supervisory unit may investigate self-government activities only as compatible or non-compatible with law. There is no possibility to conduct supervision using other criteria, i.e.: expediency, economy or reliability.

Whole idea of Polish self-government is based on (contained in preamble to Constitution) subsidiarity rule, which gives a priority in realization of public tasks for structures located closer to citizens. With respect to subsidiarity rule, it is important to point at – also contained in

Polish constitution – presumption of competences in favor of self-government units, which – according to art. 163 of Constitution – are realizing all public tasks not restricted by law for other public authorities.

According to the Polish Constitution, the local self-government participates in exercising public authority by acting in its own name and assuming responsibility for the statutory tasks assigned to it (article 16, paragraph 2 of the Constitution). Although tasks assigned to the local self-government are described in various statutory acts, the Constitution points to two important presumptions. Firstly, the Constitution prescribes that the local self-government may execute only those public tasks that are not statutory stipulated for execution by other public authorities (article 163 of the Constitution). Secondly, any local self-government tasks that are not stipulated for execution by other units of the local self-government fall in the scope of the commune – the smallest unit, being the closest to the members of the public (article 164, paragraph 3 of the Constitution).

The commune is a basic unit of the local self-government, enjoying a special Constitutional protection. The operations of other units are regulated by statutory acts. The three-party territorial division of the country was introduced in 1998 as a result of the government effecting 'the great work of fixing the country and finalizing the reforms initiated in 1989' and executing the Constitutional principle of decentralization of the local public authority. From this moment on counties commenced operations at the local level, while the voivodship self-governments operate at the regional level. Although – in terms of the territory – the area of a county incorporates communes, and voivodships incorporate counties, these units are not hierarchically bound together. They act independently form one another, in their own name, and accepting full responsibility for their actions. To simplify, local self-government tasks of a supra-communal nature are assigned to the county, and the scope of the voivodship self-government tasks does not encroach on the independence of neither county nor commune.

Self-government units are realizing mainly their own tasks which could be characterized as tasks aimed to fulfill needs of self-government community. They may also realize other public tasks which are commissioned by acts if it is justified by state's needs.

System of self-government units in Poland is regulated by three acts (related to three-party division):

- Act on commune self-government,

- Act on county self-government,
- Act on voivodship self-government – collectively named self-government acts.

Commune is the basic self-government unit. According to Polish Constitution, it is the only obligatory self-government unit in Poland. It is also unit located in lowest level in three-party division of the country. Commune is realizing all tasks which are not restricted by law for other self-government units. That presumption of competences in favor of commune epitomize realization of mentioned above subsidiarity rule. County self-government is also acting on local level, but it is realizing tasks which have "over-commune" character. On the other hand, voivodship self-government is functioning on the regional level. The main source of income for self-government units are mainly: bailouts and subventions from state's budget. Moreover, self-government may also gain income from local taxes and charges.

Self-government acts are allowing self-government units to conduct economic activity. The mere existence of such possibility raised some controversies in the doctrine of law. Underlying criticism of creation of such possibility is an argument that conduction of economic activity by public administration subjects is leading to a threat of focusing of self-government units on maximizing economical income, what may simultaneously cause a withdrawal from reaching public aims. But on the other hand it is worth to notice that conducting an economic activity by self-government units may guarantee better and more effective realization of their tasks, especially by raising their budgets. To balance mentioned above standpoints, Polish legislator decides to limit economic activities of self-government units. Other aim of that limitation is also to protect community from monopolistic position of self-government units in some areas of the economy. It should be pointed that freedom of economic activity is one of basic rules of construction of Polish legal system. It is guaranteed by the Constitution. It can be limited only by acts and only on grounds of important public interest. Self-government units ale part of public authorities. Public authorities are bound by the principle of legality (also guaranteed in the Constitution), what means that they do not enjoy freedom of economic activity because they are obliged to act within the border marked by universally binding law.

Unfortunately, in the Polish legal system, rules governing the economic activities of local government are contained in a number of acts (currently up to seven). In addition, these regulations are

inconsistent and contain many vague terms that can be interpreted in many different ways. For this reason, before moving on to the analysis of the principles of conducting economic activity by self-government units, it is required to focus on the definition of economic activity in Polish law.

According to legal definition of economic activity (which is included in Act on freedom of economic activity), that kind of activity may be: gainful manufacturing, construction, trade, service and prospecting, exploration and exploitation of minerals from deposits, as well as the professional activity carried out in an organized and continuous forms. This definition may rise some doubts, because of mentioned above issue that the main aim for economic activity of self-government units is not profit, but realization of public utility tasks by fulfilling the collective needs of local community. Therefore, the question is whether – in the context of the quoted definition - if this type of activity can be even called economic activity?

An answer to this question has been given by the Supreme Administrative Court in sentence from 17th Jan 1989**[2]**. In that sentence has been signalized that the key factor of economic activity is payment for the services. This thesis is creating the basis for assumption that if mentioned above payment occurred, conducted activity is obviously an economic activity oriented on profit – but the amount of that income is irrelevant and does not affect character of the activity**[3]**. Furthermore, there are many statements in the doctrine of law which are confirming the thesis that the losing character of activity can not be considered as denying economical aspect of this activity **[4]**. It is also important to distinguish – even losing – economic activity of self-government units from the charity which does not contain payment for services.

For proper understanding of the rules of admissibility of economical activities of self-government units it is essential to focus on self-government acts and Act on municipal economy. The last from mentioned acts has the strongest impact on creating a framework for economic activity of self-government units. Unfortunately, this act does not comprehensively deal with this kind of activity. Furthermore it should be noticed that concept of municipal economy is not identical with concept of economic activity of self-government units. It means that if activity is qualified as municipal economy it does not mean it has to be concomitantly economic activity.

The rules made by this act are setting only the main rules and forms of municipal economy of self-government units. In this place, it is worth

to mention that municipal economy is defined as realization of their own tasks aimed for fulfilling the collective needs of local community. It contains especially public utility tasks which are directed for current and uninterrupted fulfilling the collective needs through the provision of universally available services. In this point of article it should be noted that - according to self-government acts - the local community is formed automatically with the force of law, of all the residents of the self-government territory

Hence for defining the rules for conducting economic activity of self-government units it is required to refer to *legi specialis* – contained in self-government acts. These acts are diversifying economic activities of self-government units in two aspects:

- activities in public utility scope,
- activities in other scopes.

According to Act on voivodship self-government, this kind of self-government unit may:

- in public utility scope – create limited liability companies, joint-stock companies and cooperatives, as well as joining that kind of companies or cooperatives;
- in other scopes – create a limited liability or joint-stock companies, as well as joining them, only if their activities consists in carrying out promotional, educational or publishing activities or carrying out activities in the field of telecommunications aimed at the development of the voivodship.

So it means that in scope of public utility activities, voivodship may create and join companies without any restrictions, but aside from this scope it is allowed only in exhaustively listed cases.

In art. 6, the Act on county self-government is establishing the total prohibition of conducting by county economic activities beyond the scope of a public utility. Interestingly, this act does not directly allow counties to conduct economic activity in the public utility scope – nonetheless it may be deducted *a contrario* from the article mentioned above. In the opposition to Act on voivodship self-government, Act on county self-government does not define forms in which this kind of activity may be conducted. It is caused by the *legi specialis* character of self-government acts with the reference to Act on municipal economy. So to define in which forms economic activity of county may be conducted it is required to refer to general rules established by Act on municipal economy which provides two basic forms of economic activity of self-government units: budgetary entity or commercial law

company. It shall also be mentioned, that these two basic form are not only ones allowed by this act. It is also possible to choose other forms, e.g. budgetary unit.

All foregoing forms are belonging to public finances sector. Act on municipal economy provides the possibility to entrust some tasks realized under this act to: natural person, legal person or organizational unit without legal personality. Therefore, county may realize economic activity directly or indirectly – using the subjects acting outside from this kind of self-government unit **[5]**.

Similarly to county case, also Act on commune self-government does not specify possibility of economic activity of commune in public utility scope directly. Existence of that possibility can assumed at the same way as it was in county case – basing on *a contrario* deduction from art. 9 of Act on commune self-government which allows commune to conduct economic activity beyond public utility scope only in cases mentioned in Act on municipal economy. This article allows us also to state – under the rule that what is not forbidden by the law it is allowed – that economic activity of commune in public utility scope is not limited at all. According to Act on municipal economy, beyond the public utility scope:

1. Commune may either create or join commercial law companies if conditions mentioned below are existing altogether:

there are some not fulfilled needs requested by community on local market, especially if unemployment in commune strongly (and negatively) affects standard of living in self-government community, and using other activities and legal instruments taken on the basis on other legal acts does not lead to economic stimulation, especially to significant revitalization if local market or permanent reduction of unemployment.

2. Commune may either create or join commercial law companies if disposal of component of municipal property which could constitute a contribution to a company or disposing it in other way may cause a serious property loss.

3. Mentioned above limitations does not pertain to commercial law companies dealing with: banking, insurance, advisory services, promotion, education, publishing in favor of self-government units. Moreover, limitations does not apply to other companies which are important to commune development, especially sport clubs acting in share-holding company form.

Although every mentioned above act is using the term of “public

utility", neither of them does not contain its legal definition. Only the Act on commune self-government contain an attempt to explanation of "public utility task". According to art. 9 of this act, public utility tasks are commune own tasks (contained especially in art. 7 of Act on commune self-government) which aim is to provide current and uninterrupted fulfilling the collective needs through the provision of universally available services. Literally, it means that public utility tasks are a part of their own tasks. But, it also shall be recalled that not all of commune own tasks are public utility tasks. It may be confirmed by an interpretation of art. 1 of Act on municipal economy. This article defines objective of this act as a regulation of rules and forms of municipal economy conducted by self-government units, consisting in realization of own tasks of these units, adding also a statement that municipal economy contains especially tasks which may be characterized as public utility ones. Using the term of "especially" may lead us to assume that the catalogue of public utility tasks is a part of catalogue of self-government own tasks, but in not covers it completely.

Basing upon systemic interpretation (which was actually used above) and mentioned regulations, it is possible to find the answer for the question: which activities of county and voivodship self-government are belonging to the scope of public utility – it requires just the analysis of the catalogue of the own tasks of self-government units at the specific level of state diversity. It's important to bear in mind that, according to judicature of Constitutional Court, it is allowed to practice broadly interpretation of term of "public utility" **[6]**.

Assuming that deduction presented above is correct, basing on the catalogue of voivodship own tasks, it could be decluded that voivodship may conduct economic activity through creation of limited liability companies, joint-stock companies or cooperatives (as well as joining that companies and cooperatives) on condition that is directed for current and uninterrupted fulfilling the collective needs through the provision of universally available services only on account of realization specific tasks characteristic for voivodship, especially in scope of:

- public education and higher education system,
- promotion and healthcare,
- modernization of rural areas,
- land-use,
- environment preservation,
- water management,
- public transport,

- public roads,
- counter measuring of unemployment,
- activation of local market,
- tasks within the scope of voivodship economy, especially in projecting macro regional economy.

This catalogue should also contain tasks related to creation of voivodship development strategy, because it is one of the most important tasks of this kind of self-government units.

Act on county self-government does not contain full catalogue of tasks belonging to this kind of self-government unit. In art. 4 of this act, it could be found only the scopes in which county may act, but it must be supplied by laws contained in other specific acts. Due to prohibition of conducting by county economic activity beyond public utility scope, it may be assumed that county economic activity is limited to the realization of over-commune public tasks defined altogether by art. 4 of Act on county self-government and other, specific acts.

To summarize this article, the authors would like to point at the importance of allowance to conduct economic activity by self-government units at every level of state diversity. It obviously supports the participation of citizens in exercising public authority, as well as – indirectly – increasing their participation in realization of public tasks. Furthermore, allowance to conduct economic activity of self-government units may also effect on manners and qualities of realization of public tasks. It is important to mention that these units may conduct economic activity – despite it may be linked with payments – without necessity of creating a profit in economic sense. The essence of this solution comes down to existence of the scopes in which economic activity for public tasks realization purposes is – from the economic point of view – unprofitable, nonetheless it may cause other positive effects in social areas.

The analysis of Polish regulations is leading to a statement that the Polis legislator has to face the significantly difficult challenge – consisting in finding the balance between allowance to conducting economic activity by self-government units (which are actually part of public administration) for the necessity for providing possibility for realization of public tasks, and creation of adequate mechanisms which shall prevent conducting this kind of activity only for profit (in economic sense) maximization.

It should be noticed that in the area of legal framework for economic activity of self-government units sources of law are quite diversified. It

also should be noticed that Polish legislator is frequently using imprecise terms what may cause specific consequences. On the one hand, it provides significant flexibility for using either forms or conditions for conducting economic activity by self-government units. On the other hand, it may cause ambiguity which explanation has to be done by judicature of proper courts, especially administrative courts (out front with the Supreme Administrative Court). This circumstances are supporting the recommendation for referring to rationality in execution of these regulations in the manner which provide relatively uniform and consistent appliance of the law.

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Chapter 2

INTERNATIONAL PUBLIC AND PRIVATE LAW

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UNO AS A MEDIATOR IN RESOLVING INTERNATIONAL CONFLICTS

Despite the fact that the international community is committed to peaceful coexistence, the conflicts which sometimes escalate into armed conflicts, have still been an integral part of human life. Unfortunately, some countries purely declaratively agree that peace and harmony is the only correct strategy for further development, and while proclaiming the appropriate values, since only their proclamation allows remaining a full member of the world community, actually use aggression and armed conflicts as a way to solve their problems and protect national interests. Thus, among other armed conflicts, the conflict gnaws at the East of Ukraine, and not only our country seeks to stop it but the entire civilized world, but so far these attempts have not crowned with success. The UNO is involved in resolving this conflict, as well as other conflicts in the world, but in this case it hasn't also succeeded to assist in resolving the situation. This conditions the urgency of finding the best way to respond to this and similar cases.

There are many works in Ukrainian scientific literature dealing with particular issues of UN peacekeeping. This matter was developed from political point of view by Ukrainian scientist V.S. Bruz. Some UN peacekeeping operations were studied by V.I. Morozova. The modern problems of war and peace, and the UN participation in solving them were developed by V.M. Fedorov. Decision-making by UNSC and UNGA was investigated by O.H. Zaytseva. General theoretical issues of the UN activity are developed in the monograph by E.A. Kryvchykova and E.A. Shybaeva. There are other studies, too. However, ongoing conflicts constantly create new challenges that the United Nations have

to respond quickly, new conditions arise, there are always unexplored issues in this area.

This article aims at analyzing the mechanisms of the UN mediation in resolving international conflicts.

In the phase of aggravation of the relationship between potential conflicting parties the possibility of settlement is determined by the fact that they did not advance in using the armed forces and causing each other any harm. Despite the fact that the interest of the parties in the peaceful settlement decreases as the events develop, though there are effective tools that make it possible to prevent the outbreak of armed conflict. They include, first of all, international mediation and preventive diplomacy.

The international mediation in the conflict is that the third party (state or international organization) enters into the relationship between potential adversaries, opposing sides, involving them into the negotiation process. That is a mediator transmits information about the position and demands of the parties. Active mediation should be singled out separately, in which a third party to negotiating process is a source of initiatives and proposals aimed at restoring a compromise between the warring parties.

Preventive diplomacy is the concretization of international mediation, as it implies concrete actions of bodies and institutions responsible for the foreign policy related to the prevention of international dispute, settlement between and likely opponents and preventing armed conflict. It is clear that preventive diplomacy is proactive in nature and it is the more effective the weaker aggravation of the relationship between potential conflicting parties.

Preventive diplomacy aims either at direct or developments or at solving the problems underlying the conflict. The effectiveness of such actions varies considerably depending on the phase of the conflict.

1. In escalation phase peaceful settlement of international conflict is quite hypothetical, since provided that both sides suffer human and material losses, their disposition to reconciliation between them is negligible.

2. In the phase of de-escalation favourableness to peaceful settlement is determined by the fact that:

- both parties to the conflict, because of a significant loss of human and material resources, have a need to end the hostilities;

- at least one of the parties, mainly the one that suffers military defeat, is interested in ending the conflict.

In any situation active international mediation can be effective, especially through special missions, which aim at preliminary convergence (at least achieving agreement in principle to participate in the negotiations) and preparations for the cessation of hostilities and a making peace treaty both bilaterally and through a series of international peace conferences.

In the above situations, steamroller approach is widely used as a causative agent, that is economic and political isolation, threat to use armed force against this party to the conflict, which fundamentally rejects the cessation of hostilities, etc.

3. In the aggravation phase (the crisis) peaceful settlement of the conflict is unlikely, because the two parties, hoping to win, have little interest in any other solution.

The settlement of the conflict in such a situation is possible with the consistent mobilization of both power and non-power means. At the first phase, steamroller approach is applied to both parties to the conflict, forcing them to reconsider the position and agree on a peaceful solution. At the second phase, the party initiating conflict resolution starts actions related to mediation, which aim at encouraging the cessation of hostilities and the final reconciliation. In case of such conflict resolution, however, there is a real possibility of involvement in action the armed forces of the party trying to force the conflicting parties to stop these activities.

The experience of a number of armed conflicts of recent years has shown enormous complexity of the process of peaceful settlement. Often, the conflicts arose again, affected neighbouring countries (the conflict in the former Yugoslavia), became chronic. Despite numerous attempts (eg, establishment and operation of the OSCE), reliable mechanisms for prevention and settlement of armed conflicts have not been worked out. But, of course, it only means that there is a need to look for new and better ways of their settlement. That is what the UN is actively engaged in.

The leading role of the UN in keeping international peace and security is linked, in particular, to the provision of global cooperation and the development of international law, determines its priority in the field of international legal regulation of combating terrorism. Moreover, among the six main UN bodies, the most important in terms of keeping international peace and security as well as ensuring appropriate regulation of international relations are the Security Council and the General Assembly. However, distinguishing competence of the two

bodies, the UN Charter preserves the priority of the Security Council, which, according to paragraph 1 of Article 24 of the Charter, has the primary responsibility for keeping international peace and security and acts on behalf of all UN members in the performance of duties arising from this responsibility. SC activities are focused on solving specific problems related to keeping international peace and security.

In particular, the UN is actively using methods of preventive diplomacy in peacekeeping activities, namely: negotiations, political consultation, mediation to prevent turning of political crisis into armed conflicts. Using neutral status of diplomacy, impartial attitude to the conflicting parties, UN representatives get the opportunity to have a constructive dialogue with the conflicting parties, to identify political institutions within the state interested in ending the conflict, to direct confrontation into a latent state without the use of force followed by resolving the conflict.

The critical step of conflict management is to prevent turning hostility into armed conflicts, to prevent the spread of conflict to other areas involving more actors in the conflict interaction. It is the practice of application of preventive diplomacy that prevents escalation of conflict at the early stage of discords. Preventive diplomacy is a slightly more specific concept than just diplomacy, as it is intended to prevent conflict at the stage of its inception.

Quite apt definition of the objective of preventive diplomacy is worded by the American theorist W. Zartman; according him, 'the methods of preventive diplomacy aim at preventing disputes until they become problems, and problems - until they turn into violent conflicts' [4, p. 1]. Preventive diplomacy methods are complex sequence of tools and techniques that result from or may be formed based on the nature of the conflict between states, parties or other subjects of international relations when a conflict, analytically or even practically, becomes unmanageable [4, p. 1]. In terms of political tension preventive diplomacy is often one of the few ways of preserving peace and, hence, saving lives and preventing severe economic consequences. That is, the primary task of preventive diplomacy is to prevent the situation of unmanageability of conflict escalation and to prevent the development of confrontation and its turning into an open form of struggle using weapons or other methods of pressure on the opponent in order to preserve stability in the conflict-hazardous areas. But sometimes the lack of well-planned activity plan, simultaneous using of several methods of diplomatic regulation of conflicts may confuse and

complicate the situation without giving the desired result, which is the most significant drawback of preventive diplomacy.

The main method of preventive diplomacy is negotiating process as a means of establishing the optimal political and communicative environment. Since the starting point for achieving consensus is constructive dialogue between actors of confrontation. It is preventive diplomacy that aims at establishing this dialogue, facilitating the process of finding a solution to the problems in order to prevent further development of the conflict.

In the modern sense, the concept of preventive diplomacy emerged and developed within the UN system. The UN Secretary General, Dag Hammarskjöld, was the first to have expressed this idea during the XV Session of the General Assembly in 1960. It took place in the period of global confrontation between two political systems of the world, when the mechanisms of collective security enshrined in the UN Charter were, in fact, blocked. At that time, preventive diplomacy has not been regarded as a full-fledged instrument of keeping peace and security in the world. It was only a particular idea to prevent the spread of local conflicts, render interference of the US and the USSR in such conflicts impossible. It was assumed that the said approach had to help restrain the spread of "cold war" and positively affect the authority of the UN as regards resolving conflicts.

Preventive means in a broader sense may also include such methods to keep peace and security as a protest, sanctions, disarmament control, etc. These instruments were often used in practice during the "Cold War". Suffice it to recall the Caribbean crisis of 1962, which was successfully resolved, last but not least, through personal mediation of UN Secretary General U Thant in organizing negotiations between the conflicting parties.

It should be noted that the word "preventive" in the concept of "preventive diplomacy" implies not diplomatic means of conflict prevention, that is such a diplomacy that takes place before the conflict, but diplomatic means of preventing violations of international security. That is, in this case it is referred to the prevention of acute phase of the conflict, the diplomatic ways to prevent escalation of the conflict and prevent the need for military intervention to resolve it.

UN Security Council meeting on the highest level was held for the first time on January 31, 1992. Feeling the need for a new concept in the field of keeping peace and security, the UN Security Council requested the UN Secretary General suggested carrying out an analysis and

making recommendations on ways to improve the capacity of the UN in the field of preventive diplomacy, establishment and keeping peace. Five months later, in June 1992, UN Secretary General B. Ghali presented updated, to fit the new realities, concept of preventive diplomacy, which was outlined in a system report, Agenda for Peace. The report became, in fact, the main conceptual document, which fixed new mechanisms for ensuring security in the world. Not only the emergence of a new quality of armed conflict was observed in it, but new means of settlement, prevention and elimination were offered. In this document B. Ghali presented the idea of a comprehensive approach to ensuring security in the world that is revealed through four main activities: 1) preventive diplomacy; 2) peacekeeping; 3) peacemaking; 4) peacebuilding. In the report of the UN Secretary General, all four concepts are closely interrelated and almost always include preventive measures. Peacemaking is defined as action to persuade the warring parties to reach agreement, mainly through peaceful means provided for in Article 33 of the UN Charter (negotiation, mediation, surveys, conciliation, arbitration, judicial settlement, resort to regional agencies or agreements). Actually, preventive diplomacy itself was defined by B. Ghali as 'actions to prevent disputes between the parties, to prevent existing disputes from escalating into conflicts and limiting the extent of conflicts after they occur'. It was emphasized in the Report that the most effective way of preventive diplomacy is the application of its methods in the early stages of the conflict. The Secretary General pointed out that disputes between the states should further be resolved using established tools, namely, through negotiation, good offices, mediation, surveys, arbitration, judicial settlement and others.

However, UN Secretary General identifies a number of additional tools inherent in preventive diplomacy: 1) establishing trust; 2) early warning based on information collection and analysis; 3) establishing facts (through official and unofficial means); 4) preventive deployment; 5) creation of demilitarized zones [7].

Ideas by B. Boutros-Ghali were developed by the following UN Secretary General K. Annan (1997-2006) at the late 20th - the beginning of the 21st century who supplemented the ideas by using preventive diplomacy in new areas to eliminate economic and social instability in various countries, to eliminate conflicts in the latent phase, added nuclear disarmament, humanitarian assistance to the elements of preventive diplomacy. Later he put forward the idea of creating The High-Level Panel on Threats, Challenges and Change (study of potential

threats to global security), The Peacekeeping Commission (to prevent these threats, their localization and elimination). His ideas have been implemented through the creation of bodies proposed by him. Thus, within the UN conceptual approaches to preventive diplomacy were formed, based on three elements.

The first element "preventive deployment of the UN forces" implies the possibility of deploying troops under the aegis of the UN and the creation of demilitarized zones to end the conflict, prevent its escalation, turning into the regional conflict [2]. In fact, this element was based on ideas by D. Hammarskjöld ("peacekeeping operations"), B. Boutros-Ghali ("preventive deployment").

The second element of "confidence-building" involves diplomatic methods of negotiation, mediation to contain the conflict, dispute settlement [2]. The impact "of "maintaining peace", "peacekeeping" by B. Boutros-Ghali is significant, providing peaceful conflict prevention.

The third element of "far detection" provides for the search of information to identify latent conflict phase for using other elements of the UN preventive diplomacy [2]. In this element, the effect of "early conflict tracking" by B. Boutros-Ghali (search for the conflict preconditions) of the idea of The High Level Group by K. Annan (gathering information) is traced.

It is known that the activities of the UN in the development of the theory of preventive diplomacy gave impetus to studying the problem by political scientists of a number of states that have contributed their own vision in the concept, structure, elements of preventive diplomacy, which views were influenced by the conceptual approaches developed within the UN. These include, but not limited to, the views of such political scientists as Melandera E., K. Pihgache (France). They considered conflict prevention, the effectiveness of which depends on the stage, as the essence of preventive diplomacy. The elements of "promoting peace", "peacekeeping" by B. Boutros-Ghali are seen in the element "preliminary prevention" - the elimination of conflict in its latent phase through diplomatic methods. The influence of the element of "preventive deployment" is seen in the element "secondary prevention" (possibility of using UN troops during the escalation of the conflict). The idea of K. Annan regarding humanitarian aid affected the element of "structural prevention" (improving political, economic and social level for the conflicting parties to eliminate the causes of the conflict). The idea of The High-level Panel on Threats, Challenges and Change, The Peacekeeping Commission is seen in the element "system

prevention" - addressing global challenges within supranational associations.

The influence of the UN conceptual approaches is seen in certain elements of the concept of preventive diplomacy by the US researcher M. Lund, under which preventive diplomacy is a set of actions of an individual state to prevent aggression, threats itself by another actor of international relations, and timely prevention of actions of another party which could lead to a threat to national interests of the state (security of borders, citizens of spheres of influence in other regions), as well as unilateral and collective actions to eliminate the prerequisites for regional or global crisis that could threaten national interests of the states [2]. The impact of elements of "promoting peace", "maintaining peace" by B. Boutros-Ghali is in a non-military element of negotiations (leveling of conflict situations, aggressive ambitions of the potential aggressor to the threat to national interests). Another non-military element "the system of distant information warning" (the activities of reconnaissance, the analysis of potential threats in respect to the state, gathering important information on enemy targets) is formed under the influence of the element of "early tracking of the conflict" by B. Boutros-Ghali (information search). The military elements of direct use of "preventive deployment" (which area the threat to national interests comes from), "the actions to compel peace" (held under the threat of internal political crisis for the allies that threatens the region) are influenced by "preventive deployment", "peacekeeping operations" of B. Boutros-Ghali and D. Hamershelda.

It should be noted that the UN mediation is, above all, peaceful, and consists in negotiating process, organization of negotiations of the parties to the conflict. In fact, ideally the UN mediation is carried out exclusively by diplomatic means. However, an important condition is required for the effectiveness of such activities: the political will of the conflicting parties to solve the problem that arose between them. Sometimes the mediation mission of the UN consists in the formation of a political will, persuading parties to the conflict that they would benefit from its resolution. However, sometimes the parties to the conflict do not come to an agreement to resolve it diplomatically, or in fact sabotage the decisions taken in the course of diplomacy - that is what happening with Ukrainian issues: Russia signs the Minsk agreements without any intention to execute them, and violates those provisions to which it agreed. The conflict will certainly be not resolved until this lasts.

In such circumstances, the UN begins to act in a more active way, and more active actions, even involving peacekeepers, may still remain mediation. For example, if the peacekeepers ensure democratic elections, which is a condition of conciliation of disputes between the parties. Such active steps are made with the approval of the Security Council.

Methods of the Security Council's response to the developments in the world may be different - condemnation, statement of facts, confirmation of resolutions and declarations of GA, decisions of the UN Secretary General, etc. SC repeatedly served for conciliation of disputes and conflicts, sent missions of military observers and peacekeeping forces to the regions of conflict, contributed directly to resolving disputes and conflicts between the states and within them. In addition, one of the important areas of SC activities is cooperation with regional organizations. Thus, it can be stated that the Security Council is the only body of the UN which has the right to carry out preventive actions or coercion on behalf of the UN. Under the Charter, SC is also responsible for the use of allied armed forces of the UN member states 'in the common interest only'.

There is no doubt in great importance of the UN Security Council to keep international peace and security. However, according to many scientists, in certain cases, the decisions of SC may have political colouring. It should also be kept in mind that views and interests of the permanent members who have veto power play an important role in making decisions by the Security Council. This suggests that the UN Security Council may not be able to make a fair decision on sanctions against the state which is a permanent member of the Security Council. Although, the history knows cases of imposing sanctions by the Security Council for international crimes, yet this is a political body, not a judicial one [2, p.125]. Thus, due to applying veto by one or more permanent members important resolutions were not adopted. The US and Russia have greatest power of veto in the Security Council. As for recent events, Russia and China vetoed the Resolution of the UN Security Council concerning Syria. Russia's veto also blocked the Resolution on the issue of annexation of the Crimea [9, p. 173]. Another example - January 21, 2015, when the Russian Federation has blocked adoption of the Resolution of the UN Security Council on the terroristic attack in Mariupol [6].

It is also worth noting that Russian representatives at the UN, in our opinion, use the so-called hidden veto. The essence is that the oral

statement of one of the five permanent members of the Security Council about blocking a specific initiative is enough to "convince" the members of this international body to change their position on the issue planned to be put to the vote [2]. In other words, if the UN Security Council members become aware of the fact that the resolution in its current form would be blocked, they prefer to go directly to amending the text of the resolution or abandon it. We believe that the example of using "hidden" veto by the Russian side is the statement by the Minister of Foreign Affairs of Russia S. Lavrov on blocking the decision to send UN peacekeepers to Donbas if this question is put to a vote in the UN Security Council [7]. Accordingly, the issue of reforming the UN Security Council for the implementation by this UN body of its statutory became ripe long ago, but compromise concept of the reform has not been found so far.

Certainly, the problems of functioning of the UN Security Council (UNSC) and imperfect mechanisms of decision-making arising from shortcomings of the UN Charter adopted in 1945, have now a direct impact on the fate of Ukraine, having forced Ukrainian society and Ukrainian government to take a fresh look at the problem of reforming the UN Security Council. Ukraine emphasized the need to reform the UN Security Council before and its experts even joined drafting of this issue, focusing their attention primarily on the need for expansion of this international body. Today, in our opinion, the issue of reforming the UN Security Council is a matter of principle for Ukraine and can be one of the priorities of its foreign policy.

Therefore, on February 11, 2015, the Permanent Representative of Ukraine to the UN Yuriy Serheev informed about the new official position of Ukraine on the reform of key international security body, namely, that the Ukrainian crisis has become an example of the loss of capacity by the United Nations, and therefore the Security Council should be reformed immediately. At the intergovernmental forum on reform of the Security Council the Ukrainian side stressed that Ukraine experienced the helplessness of the UN Security Council in case when one of the five permanent members is the aggressor, and that this situation must be changed [11].

Unfortunately, today it's impossible to develop a mechanism that would deprive a permanent member of the UN Security Council of a vote if a permanent member is a party to the conflict. This is due to the peculiarities of the United Nations Charter, its Article 108 states that to make such a decision not only the consent of two thirds of the UN

General Assembly members, but its ratification by all permanent members of the UN Security Council, including the Russian Federation, is required [1]. Thus, the actions of the Russian Federation as a permanent member of the UN Security Council force Ukraine to advocate for reforming the right of veto of the five permanent members. For Ukraine it is a matter of principle, because the ability of the UN to influence the Russian aggression in the East of Ukraine will determine the fate of our country.

Speaking about Ukrainian conflict, it should also be noted that many experts and some political forces in Ukraine consider it necessary to deploy the UN peacekeeping mission in Ukraine, and believe that only the aforementioned problems prevent this, but it is not so. It should also be borne in mind that the national legislation of Ukraine does not provide for the tools of preventive diplomacy, which also makes it difficult to use them. As to the analysis of the strategy of national security of Ukraine, which role is played by the Law of Ukraine "On the National Security of Ukraine", it should be noted that despite the very clear definition of threats to the national security of Ukraine (encroachment on state sovereignty, territorial integrity, global, local conflicts in different regions of the world and near national borders) and specific list of military, political and organizational steps to cutoff after their occurrence, the Law specifies no possibility of preventing these threats through preventive measures of preventive diplomacy, as it occurs, for example, in the US national security strategy. Equally important drawback of the Law of Ukraine "On Foundations of the National Security" is the absence of any mechanism of coordination with allies to prevent a threat to its independence. Despite clearly specified need for peacekeeping of Ukraine within the UN for timely elimination of threats to global security and international peace. All identified deficiencies indicate the need of updating the Law of Ukraine "On Foundations of the National Security", its adapting to modern threats and challenges by adding preventive diplomacy to the classic events of national security as a tool to prevent threats to the national security of Ukraine. Now this work is being done, but it is far from being completed.

Summing up, the following is worth noting. Provided the political will of the parties to the conflict, the UN mediation is successfully carried out exclusively through diplomatic means. However, if there is no such political will and the representatives of the UN participating in mediation cannot effectively motivate it to arise, they have to resort to

such forms of peacekeeping which are mostly interference in the internal affairs of the conflicting states. However, there is a number of problems that hinder the effective settlement of conflicts. Therefore, there is an urgent need to reform the UN peacekeeping mechanisms and sometimes the functioning of the organization itself. Developing the ways of such reform is an important challenge both for policy makers and for researchers.

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Chapter 3

LAW OF THE EUROPEAN UNION

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EUROPEAN MODEL OF CONSUMER PROTECTION

MODERN HISTORY OF CONSUMER LEGISLATION

Laws aimed at protecting consumers, there are already many centuries. Initially, they dealt mainly as nonconforming or counterfeit products of everyday use - such as diluted milk, beer, chalk in bread or impurities cheaper metals in gold, and so on. Although the laws were designed to stop fraud, they are equally needed as consumers and traders. Fair artisans and food vendors did not want to lose business because of lower prices or unlawful competition. Parallel interests of producers and consumers remain an important feature of consumer protection in Europe today.

A comprehensive consumer protection, in the form it is discussed and implemented today begun to develop only in the late 19th century in the US and in Europe. This was the result of the industrial revolution. By then, most of what people ate drank and used in their homes, or they are grown and made you or bought from other inhabitants of the area, which they knew personally. Industrialization separates the production and distribution of the congregation, and significantly expanded its range of available products. Market has become impersonal and more and more products have come from afar. Accordingly, significantly increased opportunities for fraud. At the same time it became much harder to get compensation from a large and remote factory than from his neighbor who probably had done their goods. In addition, the development of advertising consumers began receiving a large amount of information that they could not estimate - it could be a realistic and accurate, could be misleading or even false, but they could identify?

Most countries in Western Europe began to develop comprehensive legislation in the period after 1950. First there were separate legislation - specific legislation to address specific issues, such as fair advertising, improving information to consumers through packaging for industrial and food products, and basic safety requirements. Gradually the idea in relation to a recognized list of consumer rights and coherent set of legislation and for its implementation. As a result, in recent years the country for the first time accepted the laws on consumer protection, used extensive acts that apply to many aspects of consumer protection. This approach is used countries that carried out the transition from a planned economy (including those who are now members of the European Union), but also used in many developing countries in Latin America, Asia and Africa, where consumer issues initially drew little attention.

In YEYE are pan-European laws (Directives) to be implemented through legislation of individual countries. On the other hand, the Directive set out the general requirements that must fulfill some countries, but not how to be organized by national laws. Because of this, there are still significant differences in the structure of consumer laws and institutions to ensure its implementation.

CONSUMER POLICY

Idea a list of consumers first proposed by President John F. Kennedy in his address to Congress in 1962. This was the 15th of March - that date international consumer movement later adopted as the International Day of Consumer Rights and the EU adopted its customers a day in Europe.

President Kennedy spoke about the four consumer rights. Since then, through discussions with consumer organizations, the list was expanded to eight rights that are accepted and protected by the international organization "Consumers International" and its members. Most laws on consumer protection designed to protect one or more of these rights or complex "Act on Consumer Protection" covers all of them.

COMPETITION

According to a market economy, consumers' interests are provided in part due to the efficient functioning of the market. When consumers have a choice, this is forcing manufacturers and retailers to offer high quality products and keep prices. If they try to sell products of poor

quality or higher prices, consumers can always "vote down" and buy products elsewhere. At least, that is the theory, and to a large extent this is actually the case. But for the effective functioning of competition there are numerous obstacles.

Where possible, manufacturers try to limit it in order to increase their profits. Accordingly, one of the components of consumer protection - is laws and institutions aimed at the development and regulation of competition and prevent abuses its position in the market by manufacturers. Among the most common anti-competitive practices - private agreements between groups of producers (called "cartels") to "fix" the market, for example through an agreement to establish a uniform price or market division on geographical areas. Competition may also be restricted when the marketplace begins to dominate one firm - if the majority of supermarkets owned by the same company, it can raise prices because consumers will be nowhere else to go. Thus, competition regulations generally provide opportunities to limit individual firms that become too powerful, for example by preventing further expansion of market share if it already controls a significant part of the market. Most governments consider legislation on competition as a positive factor for improving the overall performance of the manufacturers and the service sector, as well as for consumers. The reason for this is that competition increases efficiency, and accordingly - competitiveness on international markets, thereby promoting exports and creating difficulties for importers.

The competition is also limited when consumers can not exercise effective choice. For this, they need reliable information. This means understanding the types of available products (e.g., advantages and disadvantages compared with cotton wool or synthetic fabrics for various kinds of garments, or different types of collateral for buying a home). It also means having detailed facts about all the available brands and models and prices. If manufacturers do not force a lot of them do not provide comprehensive information. Some of them, to provide sales, intentionally injected misleading consumers. Others give information selectively, or focus on the image and not on the merits of their products - which is a typical feature of advertising. Competition therefore increases the ability of consumers to increase the weighted selection. This may involve a restriction that can make enterprise and establish requirements for accurate and consistent information.

IMPROVING THE ABILITY OF CONSUMERS TO ACTION AND CONSUMER PROTECTION

Regardless of whether the high level of market competition, consumer rights is defined as enterprises are much more powerful than individuals. They not only distribute goods and services, some of which are important for consumers, but also have detailed information on products and services, and in many cases also have significant resources for advertising and to counter criticism if they do not work properly. Compared to this, individuals are weak; they can not be experts on all types of products and services they offer; they do not have time and money to conduct market research for the evaluation of competitive products and check prices at dozens of stores, or for the implementation of legal procedures to provide compensation when something goes wrong. Accordingly, the consumer rights relating to changes in the balance of power between companies and individuals.

This is achieved through:

Improving the ability of consumers to action. It provides training and education, the existence of specific information on products and services, and legal rights that can easily provide. Typically, information needs are provided by establishing requirements for labels and provide effective instructions, the minimum amount of factual information in advertising and price indication. Government agencies also publish general information and educational courses on consumer issues can be included in school curricula. Legal rights can provide the right to return products that do not work, or for which consumers were given misleading information.

Setting limits on commercial enterprises. Help consumers in obtaining reliable information does not mean that companies do not resort to different kinds of strategies and tricks of trying to convince to buy your products or escape from responsibility for poor quality goods. Therefore, consumer protection also includes restrictions on what businesses can do. The starting point is that products must be safe and perform the functions that are expected of it for some time (buyers mainly have a chance to check the time of purchase). Enterprises also can not use unfair terms in contracts (which is a particular problem in the case of services). They should also provide accurate information about their products, including the one contained in the advertisement.

CONSUMER RIGHTS

In addition to these rights, consumer support organizations support them (although not listed in this form), "Guidance Document of Consumer Protection," adopted in 1985 and revised in 1999.

The right to security.
The right to receive information.
The right to consumer education.
The right to compensation.
The right to be heard.
The right to choose.
The right to satisfaction of basic needs.
The right to a healthy environment.

CONSUMER PROTECTION IN THE EU

In most EU countries before the recent expansion were adopted national laws to ensure all eight of consumers, or some of them. The main objective of measures taken by the EU is to ensure consistency between countries mainly by setting minimum requirements for specific aspects of consumer protection.

The EU is the result of agreements among member countries regarding joint implementation of specific actions, defined in a series of formal agreements. The main, and still the most important objective is to create a single common market, where businesses can do business wherever they want, and where consumers can buy goods wherever they want without experiencing difficulties and complications caused by different national laws and market crops. The aim of the single market is to promote competition and thus - business efficiency and growth.

The EU itself does not establish laws for member countries. It works through a Directive which, where agreed by all members should be embodied in the legislation of each country. The Council of Ministers adopts Directive (i.e. representatives of member governments). The European Parliament, elected by direct elections, also plays a role in the decision.

Compliance with all guidelines (known as the "Code of the EU" - the original *acquis*, from the French word which means "experience") is a requirement for countries wishing to join the EU. Work related to the extension and complement existing national legislation is one of the reasons why the accession process continues for many years.

First on consumer protection was seen as a separate issue in the EU. Benefits for consumers were provided with effective job market and consumer issues dealt with the development of the single market. Thus, consumer issues were considered as part of the changes in the contract law, transport policy, competition, standards and food safety, and more.

Since the mid-1970s to continue the situation is gradually changing, but only with the adoption of the Maastricht Treaty in 1993 it became possible to take a Directive on consumer rights, which are not directly related to market integration or harmonization. This led to the creation of a separate structure of the European Commission Directorate Consumer Policy. Later his responsibility also includes the issue of health and food safety, and is a body known as the European Union Directorate General for Health and Consumer Protection - DG SANCO.

There are dozens Directives somehow related to consumer protection. But most important of them relate to four major aspects.

SECURITY

Various Directives require that all products sold to consumers were as safe as possible, and contain criteria that products must meet to ensure this. Manufacturers and importers are responsible for the safety of the products they sell. In every country there should be bodies responsible for checking compliance and the withdrawal of dangerous products from the market if necessary.

There are various Directives relating to certain product categories - such as food, toys, chemicals, cosmetics. In addition, there is a Directive on general product safety, the effect of which applies to all, but because it concerns safety requirements regardless of whether there is a separate Directive for that type of product.

The European Commission also manages systems warning of dangerous products, that when any country revealed the existence of the problem, other EU countries (and countries outside it) quickly receive information and, if necessary, may take appropriate measures in its territory.

FOR THAT, WHAT PAID

When consumers buy products or services between the seller and there is a contract. The consumer agrees to pay a certain price, and the seller - to provide exactly what the consumer expects. Details of services

usually contained in a written agreement. The products can be purchased right on the spot (in the store), as described in the catalog or on the website, but if you offer something to buy and the seller agrees to sell, it means the emergence of contractual relationships, even if the terms are not spelled out.

Directive regulating three problems:

Production is not the one you agreed to buy - for example, it is different from the description in the catalog or on the image on the box

Production is not working properly, damaged or breaks down quickly.

In such cases the consumer has the legal right to a refund, replacement products, its repair - depending on the choice of the consumer.

The contract contains unfair terms - which are usually related to service. These include, in particular, the requirements for cash collateral that does not return (and you lose even if the product or service is not satisfactory) or during the performance of indefinite end, so you do not have the opportunity to opt out or receive compensation even if half of the service took longer than it should be.

Unfair terms are recognized simply illegal - they should not be written contracts and are not enforceable even if the consumer signs an agreement containing them. Contracts should also be written in plain language that enables them to easily understand.

There are some specific rules regarding tourism. They do not allow tour operators to raise prices after the order was placed (unless it was caused by changes in taxation or currency fluctuations) and require tour operators to contribute to the fund protection, which allows tourists to return home if the company goes bankrupt while they stay on vacation.

For some time vendors typically include provisions to contracts waiver under which consumers agree that their legal rights are not applied. Now those provisions are illegal and not enforceable.

CONSUMER INFORMATION

The Directive contains a wide range of requirements concerning information on the labels. Food products, for example, must contain a complete list of ingredients and indicate the presence of potential allergens (such as nuts). There are also rules for describing products as "organic," or the use of regional food names, such as cheese "Parmesan" or "Parma" ham. All genetically modified products should be

appropriately labeled.

Similarly, large kitchen appliances must be marked in relation to power consumption under normal conditions.

The law also requires specific pricing information. In particular, supermarkets can not provide prices for package only food or other products, but should also indicate the price per unit - that report, the price of the package refers to the standard unit (ie, 5.5 euros for 100 ml). This enables consumers to easily compare the cost and prices, even in cases where products are sold in different quantities.

Standardized information should be provided also in relation to financial services such as loans or credit cards. Interest rates calculated by the standard method of calculating percent in annual terms (annual percentage rate - APR), consumers should be informed before they put their signature. In this case, consumers are able to compare products easily and correctly.

In this case, there are also special requirements for package (complex) tours; booklets must provide full information about what is offered - moving, location, prices, payment plans. These settings can not be changed after the order was made.

ADVERTISING AND OTHER MARKETING ACTIVITY

Advertising in Europe as a whole must be honest, decent and truthful. Specific rules for settlement cut off in different countries. For example, in the UK there is a system of self-regulation, carried out by the Committee of Advertising Standards (Advertising Standards Authority - ASA), whose activities are governed by and paid for by the advertising industry. It publishes codes of conduct, and it is expected that advertisers will follow them. Generally, this method works - partly due to the fact that he was closely watching the government and the media; in the advertising industry understands that when the ASA will not perform its functions, it will replace the state agency with the authority to ensure implementation of the law. Other countries use the direct involvement of the state and there are stricter rules, especially for advertising aimed at children.

EU adopts Directive on the settlement of certain issues related to marketing.

Remote sales. In cases where the goods and services sold by phone, mail order or via networking, there are easy opportunities to mislead consumers enter or provide them with relevant information. The

Directive requires the vendor to provide a full range of information before a sale takes place, namely - contact information about themselves (including address), a full description of the product or service, full price, terms of delivery, as well as details regarding the right of consumers to refuse. There should also be given written confirmation of agreements on the sale. In the case of the sale of loans and credit cards, must be specified interest rate and period of validity. Consumers have the right to refuse the order within seven days (in some countries - later), and the goods must be delivered within 30 days. Calling customers via automated phone systems or sending them faxes with commercial proposals without their prior consent is illegal.

Sales per inert buyer - sending goods that were not ordered, and then demanding payment. Consumers bear no responsibilities when it happens - they can simply leave the goods themselves or get rid of it at will. (Previously, they had to give the sender the opportunity to pick up goods).

Sales of delivery, unless the seller is a merchant of delivery, or sales catalogs, customers will automatically receive the right to refuse the order within seven days (again, in some countries - for a longer period) if someone sells them all they have at home or elsewhere outside the usual place of business.

Unlawful commercial practices. This includes the use of misleading or aggressive sales techniques. Directive declares illegal provision of false information about products, Vendor, repair, prices or comparisons with other products if it is "likely could significantly distort the behavior of the average consumer." It also prohibits intimidation, coercion or force. Directive 31 counts unacceptable method.

FURTHER DEVELOPMENT

Most of these Directives contain minimum requirements - if necessary, national governments may set higher standards. Some are doing just that, especially extending the period during which consumers can cancel their agreement with the seller at home, by telephone, Internet or mail order.

Currently the European Commission is reviewing eight directives and decides whether to proceed to full harmonization. This would mean that the Directive should be executed entirely the same in all countries, with no possibility of applying stricter rules. Consumer organizations generally oppose it because most stringent rules may not be approved in

25 countries. This means that due to the fixed law of pan-European consumer protection in some countries be weakened.

Equally important is the fact that each of the Directive requires national governments to take responsibility for ensuring control and compliance, which they are. Types and structure of government, which is charged, in various countries cut off. Proposals for such arrangements no unification and no agreement as to whether there is the best method to ensure consumer protection.

SAFETY AND LIABILITY FOR PRODUCTS

In the EU there is a general law relating to product safety - Directive on general product safety.

Its purpose is very simple formulated in the Directive itself: "Manufacturers will bring to market only safe products."

How the manufacturer can ensure that his products - safe? The Directive contains certain criteria:

compliance with applicable national laws

compliance with European standards of health and quality of products that have been adopted as national standards

compliance with other applicable national standards, guidance documents EU Code of Conduct for Business

the use of advanced technologies

compliance with reasonable expectations of consumers

If products create problems related to safety, manufacturers are required to provide information to consumers and to withdraw such products from the market if necessary. Distributors must also maintain appropriate records to enable the tracking of products (as well as ways of origin or defective components), monitoring of products subject to risks and dissemination of information about possible problems.

The government should be appointed body responsible for monitoring and ensuring compliance with safety and who also:

market surveillance exercise, taking samples and checking products;

requires placing warning information in cases where the use of products associated with risk;

taking measures in case of problems - requiring temporary suspension of sales of products or its complete withdrawal from the market;

creating opportunities and mechanisms for complaints by consumers about potentially harmful products, or to submit information on actual

incidents of inappropriate levels of security.

In addition to this general Directive, there are also more detailed requirements on chemicals, toys, personal protective equipment, entertainment business, cosmetics, pharmaceuticals, food products, fire safety in hotels, fireworks. Some products, including cars or plug electrical appliances can not be sold without undergoing testing for safety. But the general approaches such detailed sectoral regulatory rules are the same as in the general Directive, which sets safety requirements in standards and other reference documents if appropriate standards are not available.

The EU is developing other programs aimed at improving safety.

• Developing standards. Work on production holding specialized European standards bodies - the European Committee for Standardization (CEN) and the European Committee for Electrotechnical Standards (CENELEC), which, in turn, work closely with international standards bodies such as the International Organization for Standardization (ISO) and International Electrotechnical Commission (IEC). EU provides grant group that represents consumers in the negotiation of standards - European Association coordinating consumer representation in the process of standardization (ANEC), located in Brussels. Europe is also actively involved in the global standardization body Food Codex Alimentarius.

• Rapid alert systems. Such systems - is an agreement to provide reports that enable national authorities to notify each other about dangerous products so that they can take swift measures in their countries. If necessary, the Commission may take action pan-European scale with a view to removing unsafe products from the market. The main procedures are warning RAPEX (products), and the procedure of foodstuffs.

• European management control over the quality of food (European Food Safety Authority), established in 2002 to monitor the problems and hazards in food production across Europe.

PRODUCT LIABILITY

What happens when a group of people or property harms any products?

The answer is contained in the first paragraph of the Directive on product safety: "The manufacturer is responsible for damages caused by deficiencies of its products."

If the products are imported, the responsibility of the distributor.

This means that consumers can sue manufacturers and demand compensation for damages. They have to prove the extent of damage and the fact that it was caused precisely by this production - which is not always easy to do. But they do not need to prove that this was due to the negligence of the manufacturer; even if the manufacturer correctly completed all procedures to ensure the standards are correct written instructions, etc., will still be responsible in case of adverse effects. On the other hand, compensation may be reduced if the damage occurred in part because of how consumers use products.

Manufacturers have three starting points for protection:

The disadvantage was absent at the time of sale of goods;

Lack came through compliance standards (i.e. same standards were inadequate);

"State of scientific and technical knowledge at the time when the product was put into circulation was not sufficient to detect the presence of deficiency."

The last point, which is called "argument based on aspects of technological development» (development defence), causing heated debate. Consumer groups are always treated him negatively, because it allows producers to be less diligent in providing safety evaluation of new products. It also means that consumers can go without compensation, even when it is clear what caused them harm.

A recent analysis by the EU, concluded that the changes are not needed, and that the Directive provides the right balance between the interests of consumers and producers. It was decided that the strict liability (that does not include arguments based on technological development aspects) will limit the development of new products and funds spent on research on insurance claims for compensation. (Manufacturers usually lay in the cost of certain funds as insurance against product liability). National governments are allowed to apply stricter laws on product liability if they consider it necessary, but only Luxembourg and Finland seized the position of opportunity argument based on aspects of technological development.

BEST PRACTICES IN CONSUMER PROTECTION IN EU

Each of the member countries of the European Union has its own history, traditions and achievements in the field of consumer protection. The experience of each country is unique. However, the European

Community association seeks to create pan-European standards in all spheres public life, including in the field of consumption. These standards define a certain level of economic and social development of the EU and are a model for the new EU members and candidate countries today and in the future.

It is important that the level of the standards of the EU does not deter initiatives developed economies in their quest of the best and most effective practices, particularly in the field of consumer protection. This area of consumer policy and governments are under scrutiny not only of the European Commission, but also the community of consumers. Respect for the needs of the citizen as consumer is rooted in the distant past and belongs to the traditions of old Europe. The challenges of the 21st century, globalization of markets and the rapid pace of change in many countries require the European Space accelerate its movement in the achievement of recognized standards and norms that are the benchmark of development.

Among these important targets belonging to civil society organizations that are non-governmental, and therefore independent in its operations. Consumer organizations are an integral part of civil society and governments in many European countries support this public activity and delegate them of important state functions.

Experience German. A striking example of successful interaction between government and non-customers are Germany, one of the leading EU countries. 50 years ago the German government initiated an independent fund, now known worldwide as the Institute for Consumer Research Stiftung Warentest (Stiftung Warentest, SW) in Berlin. The importance of the work Stiftung Warentest for consumers according to the survey of independent organizations, namely 96% of German citizens are aware of SW activities, and more than a third of residents use the results of tests SW in the exercise of their purchases. Institute Stiftung Warentest informs consumers on the pages of the magazine "Test" and "Finanztest", as well as on the organization. After German unification in 1991, the number of subscribers "Test" reached more than one million, which was a major achievement and testimony SW consumer confidence in the objectivity of the findings of tests.

Experience Sweden. The country also elected its way into compliance and consumer protection. A wide network of information and counseling centers for consumers covering the whole country, reaching nearly every town and village. These centers perform an invaluable aid consumer protection to consumers, particularly in rural

areas and representatives of many farms. In the major cities of consumers collaborating with universities and research institutions on different aspects of consumer issues, as well as government agencies that deal with consumer protection. State strongly supports social activity of consumers.

Experience Slovenia. Slovenia is one of the first countries of the former socialist system raised the prestige of the consumer to the appropriate height. The National Association of Consumer Slovenia deployed active in a wide range of consumer interests: studies of organic cosmetics to financial services. Noteworthy consumer associations cooperation with the government and business. And the government, business recognize the position of the consumer market and consumer rights secured by law, violation of which necessarily disclosed Association. This "advertising" makes unscrupulous businesses to resort to certain measures to address conflicts with the consumer and the law. There are effective European consumer centers that protect consumers' rights on cross-border shopping and implementation of compensation in violation of rights.

Experience Poland. Description and evaluation of the consequences of Poland's accession to the European Union in the field of consumer protection require caution. First, these effects beyond the first year of membership and cover system changes Polish regulations on consumer protection, which were made from the mid 90's due to bring Polish law into line with EU law.

As a result, created the legal basis of the system of consumer protection, as well as institutional and financial framework that led to a significant improvement in consumer protection even before May 1, 2004 second, the assessment of the effects of this accession field depends in particular on the level of compliance with the consumer protection, as well as securing their existence in the minds of market participants in Poland. Due to the therefore, the impact of assuming the position of consumers will be felt much later than in the first year of joining the EU.

Joining the EU has Polish consumers additional opportunities to improve the protection of their rights through the use of tools that operate at EU level, in particular EU consumer organizations. From May 2004 Poland has begun work to create matches of the EU, whose purpose - to provide consumers with the widest help in nomination at a joint complaints European market. These institutions belonging to the European consumer information center (YETSIS), which operates under

the Department of Competition and Consumer Rights of January 2005 under the so-called System EEJ-net (European Extra-Judical Network). Center, besides keeping information policy in the field of consumer rights, also provides legal and organizational assistance in case of cross-border disputes, including non-judicial resolution of disputes concerning violations of consumer rights. Its creation and operation is funded 70% of the EU funds.

In addition, from May 1, 2004 Poland had the opportunity to participate in certain forms of institutional cooperation that guarantee greater security products. In particular, Poland became a member of the system wide notification of dangerous products to the European Union - PAREX. It was established, to ensure a high level of health and consumer protection in the territory of the EU Internal Market. The main and immediate task of the system - to ensure the rapid exchange of information between the Member States and the European Commission about dangerous products and allocated funds in the country to exclude or limit its time to market and possible use. Successfully entering this system information about the products as dangerous and precautions to remove it from circulation, resorted to entrepreneurs. As part of the European Commission informs Poland and other EU countries about dangerous products identified in other Member States. The task of the Polish authorities - to monitor the market to identify whether the product is in Poland, and if so, remove it and provide relevant information to the Commission.

Operation of the system in Poland gives the first impact. As a result of the new rules and joining systems PAREX from 1 May 2004 Office of Competition and Consumer society has provided information on about 20 products, the use of which may endanger the life and health of consumers. Most of them were withdrawn from circulation (eg, impact drill, computer monitors, baby clothes, toothbrushes, toys containing dangerous chemicals) or manufacturers have eliminated their shortcomings (for example, made components by specific brands, models and years of manufacture cars).

The key to the situation of consumers has first level of compliance and implementation of policies that serve their protection. Past experience shows that the legal and institutional changes in the policy of consumer protection have not found yet fully reflected in the minds of market participants in Poland - both consumers and entrepreneurs. Research carried out by the Department of Competition and Consumers, conclusions of the examination Commerce inspections and consumer

complaints point to a lack of knowledge of the law and sometimes disregard the interests of buyers and insufficient dissemination of good market practices. The authorities often do not show sufficient understanding, in response to violations of the interests of consumers by unscrupulous firms. In this context, the full balance of membership implications for consumer protection will depend on the implementation of the relevant provisions, which, in turn, creating "consumer identity", that general awareness of consumers of their rights and protection of these rights.

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THE EXPERIENCE OF THE EU COUNTRIES ON THE ACTIVITY OF STATE BODIES WHICH IMPLEMENT THE DECISION OF THE COURTS, AND ITS EMBODIMENT IN THE LEGISLATION OF THE UKRAINE

Due to the desire of the Ukraine to join the European Union, with the need to introduce European standards of management, there is also a need to reform the bodies of the State Executive Service (hereinafter SES).

It's because the won case in a court is only a 20% success of a lawyer. The court's decision must be implemented, because if it remains unfulfilled, the sense of justice is lost. In this case, the decision of Themis will be only a blank sheet of paper.

In our view, it is necessary not only to study the positive experience of the leading European countries and consistently implement it into the national legislation and to ensure the effective implementation of judgments as well as decisions of other state bodies because when these decisions remain unenforced, first of all the rights of a man are violated.

The Institute for the enforcement of courts' decisions is studied by such Ukrainian and foreign scientists as A. Avtorgov, A. Avakyan, Yu. Baulin, V. Kuznetsov, R. Myronyuk, A. Perepelitsa, M. Rudakevych, S.Seregin, G.Tkachova, C. Shcherbakov, V. Yarkov and others.

In Ukraine the activities of state executive service are governed by the laws of Ukraine "On State Executive Service" and "On proceedings of enforcement".

The ultimate protection of the rights of citizens and judicial persons is made in enforcement proceedings which is de facto the continuation of human rights protective function by a court, although this goes under the "guidance" of the court empowered to make the commonly compulsory "conclusions", as well as on the basis of other executive documents. In this case, one should join the position of those scientists who believe that direct coercion to a person in enforcement proceedings is not applied by the court and not by the body that is the part of its structure. Taking into conclusion that the protection of the rights of citizens and legal entities is exercised by a number of additional public bodies (court,

Economic Court, of notaries, administrative bodies), only in the enforcement proceedings the protection of the rights becomes a real substance[1].

The peculiarity of executive proceedings in Ukraine one can consider the fact that in our country only the executive service (body) functions, and only it performs the court decisions as well as the decisions of other authorities. We note that, unfortunately, that SES is not able to so effectively perform its functions as its counterparts in the European Union.

So if we analyze the state of implementation of court documents in Ukraine it turns to be not the best, as many court decisions remain unfulfilled in the terms established by current legislation. There are also cases where both judicial and physical persons do not receive belonging to them accordingly to the court's decision funds for several years.

Another problem is also the fact that a large percentage of not implemented executive documents is a penalty to the State Budget of Ukraine, that is in this case it comes to filling of the state treasury of our country. These are court decisions on penalty in favor of the Pension Fund of Ukraine, the State Tax Service, Resolution bodies (officials) being authorized to consider cases on administrative offenses and so on.

The problem of non-implementing of the executive documents in Ukraine, to our mind, can be explained by a number of reasons, such as:

- only the State body of the SES is functioning;
- too hard load on the state executors;
- underfunding of this body;
- insolvency of debtors;
- high level of corruption amongst the Ukrainian officials;
- legislative nihilism among the population of Ukraine.

If we consider the first issue, it indicates that SES is unable to effectively carry out the decisions of courts and other bodies. Thus, there is a need to introduce the institute of private executors, which will provide, in our opinion, the best implementation of executive documents. This is because the private performers are more interested in implementation of the documents than the state, because due the results of their work their wages will directly depend on them.

For comparison, let's analyze the legislation of the leading EU countries.

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[1] Fursa, S.Ya., Shcherbak, S.V. (2002). *Executive proceeding in the Ukraine*. Tutorial. Kyiv: Attica, 22.

Force executor in France is an official connected with the administration of justice, but at the same time, this person belongs to a free (or as they say in France, liberal) profession. He is a free professional, to whom the state has delegated the functions of enforcement of decisions in civil cases made by different courts. At the same time he is an officer, because he receives his powers from the state and has a corresponding monopoly on a number of legal actions, namely enforcement; service of summonses, notices; drafting of regulations' relevant evidence and so on[2].

Force executors in each county are organized in county chambers entrusted to represent the profession in the organs of the court and administration, as well as to enforce discipline and professional ethics. That's why such Chambers have disciplinary powers they exercise towards the executors of their district. At the national level the executors are represented by the National Chamber, including 32 members elected by regional district associations. All members of the National Chamber are elected for 6 years by a board of executors, consisting of elected members of district chambers. The main functions of the National Chamber of force executors are reduced to the representation of the profession in state and management bodies, other bodies of liberal professions (e.g. notaries, lawyers), in organizations of professional training, management organizations responsible for social and pension issues, in organizations of the annual Congress of force executors and others[3].

Analyzing the legal forms of construction and operation of the institute of enforcement of court decisions and other non-judicial authorities in other countries, it should be noted that the bailiffs in France are private persons who implement the powers of enforcement of court decisions and other non-judicial bodies according to a special license. The legal status of the executive service in this country combines the features of a public servant and private entrepreneur. The following demands are issued to bailiffs in France: a) it must be a person who has a law degree; b) a person who passed a two-year internship in the office of practicing bailiff; c) a person who passed state exams. To

[2] Yarkov, V.V. (2008). *The main world systems of executive enforcement*. Moscow: The Statute, 462-496.

[3] Myronyuk, R. The abroad experience of executive enforcement of courts' decisions and other bodies of public administration, main direction of its implementation in Ukraine.
<www.legeasiviata.in.ua/archive/2015/4-2/15.pdf>

allow that person to work as a bailiff, the prosecutor of respective district and departmental (regional) Chamber prepares conclusions on the suitability of the applicant to his/her position as a bailiff. Bailiffs are appointed by the order of the Minister of Justice of France, they are subject to the public prosecutors. The work of bailiffs in the country is organized as follows: a bailiff is entitled to exercise his powers alone or join the union of bailiffs and act in the corporation[4].

In Germany the decisions are performed by actuaries (justizwachtmeister) of the court on the territory of which the executive action is held. Actuaries operate under a special certificate that gives them the right to appropriate performance.

To perform this the following should be available: 1) the party should have the final decision on the case; 2) the decision should contain the final indication of the execution; 3) the decision with an indication of the execution should be delivered to the party against which the decision was taken[5].

In Italy the executive enforcement is regulated mainly by the Civil procedural law, that is it's not separated from the proceedings. Significant powers in the enforcement proceedings, besides the enforcement officers, are given to judges, including the magistrates. The actual powers of bailiffs and the procedure of how they should execute the enforcement, are defined in the relevant volume of the Italian Code of Civil Procedure (hereinafter - the CCP). For example, in the third volume of the CCP of Italy there are defined the concept and characteristics of executive documents; the forced expropriation procedures; the expropriation of movable and immovable property of the debtor; in details it's disclosed the procedure for holding auctions and resolving other issues of enforcement actions[6].

The enforcement execution is priored by an announcement of executive document and message (the order to implement the obligations in the period of 10 days). The message loses its force if enforcement execution of the decision has not commenced within 90

[4] Perepelytsia, A.I. (2013). *The executive proceeding.* Kharkiv: National University of «The Juridicial Academy of Yaroslav Mudryj of the Ukraine», 527-528.
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days of its announcement. The main means of enforcement execution of the decision is a forced expropriation of the debtor's property, which is made under the authority of the executive judge. The executive judge is appointed by the chief judge on the proposal of the Secretary on the case within two days after the formation of the case. If the judge considers it necessary to hear the parties and other persons, and also in the cases foreseen by the law, the judge appoints a hearing at which should come the creditor, who had made a request for expropriation of the property, the debtor and other persons. The expropriation of property is carried out in the form of prescription of bailiff to a debtor demanding to refrain from any action aimed at disposal of property and income from the use of this property. Along with this, the debtor may still avoid taking away of his property, provided he had paid the debt and 20% of court expenses. The payment is made through a bailiff [7].

In France, carrying out their duties on behalf of the state, executive enforcers carry also personal responsibility for the legal consequences of their actions. Yes, the performer may be subject to civil liability for negligence when handing in the procedural documents after the deadline, and to criminal liability they can be subject in case of theft of money of clients, or in other different cases of violation of their duties. Property risk of professions are covered by insurance. Besides civil and criminal liability it is also possible to disciplinary proceed a person for non-compliance with professional responsibility and ethics. The initiative may come from a disciplinary committee of the district chamber of enforce executors, and the Ministry of Justice of France and its bodies[8].

In addition, we believe that in connection with the reforms in Ukraine, it is necessary to strengthen on the legislative level the responsibilities of the executors, as it's done, for example, in France.

In practice there are problems regarding the enforcement of court decisions where the Presidential Administration of Ukraine, the Cabinet of Ministers of Ukraine and other state authorities are debtors. State executive service is included in the system of executive power, so to

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<www.legeasiviata.in.ua/archive/2015/4-2/15.pdf>

execute the executive documents against these bodies is practically impossible. State executor as a representative of public authority receives a salary from the State Budget of Ukraine, but he is obliged according to executive documents to act against his own country. Therefore, it would be advisable that the courts had a service which would execute the relevant court decisions towards these bodies.

Every year in Ukraine the burden on state executors increases. This is because in the bodies of SES the working staff is very transient. Usually SES employ the university graduates with no work experience who in order to "earn seniority" work in bodies of SES for 2-3 years and then pass to work in the courts, public prosecutor's office, security service of Ukraine or alike. Therefore, the unprofessional staff is the problem of Ukrainian executive service.

For example, in France, in order to maintain the proper level of competency of bailiffs a special program of continuing education for bailiffs is carried out through the National School of the judiciary and other institutions. Regional seminars on topical issues of enforcement of court decisions are organized and carried out under the guidance of the Institute of continuing education of bailiffs[9].

Almost in every European country there is an institute of private executors. It is therefore an appropriate step for Ukraine to create the private enforcement executive service, which would "unload" the state executors and increase the percentage of solved executive documents.

In Ukraine a problematic issue is also the financing of the SES bodies. Low salaries of bailiffs generate corruption in this body. In order the enforce execution was efficient and state officials properly solve executive documents, there's a need to increase funding for SES. The international experience give us the ways out of this crisis.

An interesting in the French legislation is the fact that force executors receive no salary from the state, but they charge fee for exercising of powers delegated to them by the state, at the state established rates. For example, handing in of documents within the enforcement procedures is rated by the state and paid by the debtor. In case the force executor provides legal services that may be in the same amount provided to other members of the legal professions that are not of monopolistic nature (e.g. consultation, which may also be provided

[9] Sivernin, D.V. (2014). Foreign experience of activity of bodies of exercising powers related to the execution of court decisions and its adaptation to the national legal system *European perspectives*, 3, 82.

by lawyers, notaries), his reward is contractual in nature and paid by the person who addressed to him[10].

The next problem is the insolvency of debtors. This is one of the reasons for which the judgment of a state body can remain unenforced. If we analyze the current Ukrainian legislation, we can find out that an effective mechanism of influence on the insolvent debtor is absent. If the debtor does not work, has no registered property, does not go abroad, the executive instrument will remain only a piece of paper.

In the UK, for example, one of the ways of enforcement is the issueing of the order to arrest the debtor. Failure of a debtor to fulfil the court's judgments or orders is seen as a manifestation of disrespect to the court. In any case where the debtor refuses to do his duties or carelessly performs them within the specified time, the order for his arrest is issued. The debtor goes arrested for exactly specified or undefined period, until the debtor fulfils the prior court's judgment or an order for refusing to fulfil of which he was arrested[11].

The Ukrainian legislation provides the right of the bailiff to go to court with a request to limit the debtor's right to travel abroad. However, in our opinion, it would be reasonable to take more effective measures. We believe that the arrest of "malicious" Ukrainian debtors would have been an effective means of influencing them. Or, for example, the deprivation the debtor of special rights, e.g. a driver's licence. For example, in the neighboring Poland the court already uses restriction special rights of the debtor as an enforcement measure. We believe that this innovation should be introduced in our country.

In Ukraine, besides the war in the East, corruption is a big problem, being present in almost all spheres of public life. The bailiffs are no exception. Therefore, an important step is the prevention of corruption in this body, proper staffing and increasing prestige of work and wages of officials.

We believe that the legislator should reinforce liability of officials for corruption if the latter has been proved by all means.

Another problem in Ukrainian society and in particular of the SES is legal nihilism among the population of Ukraine, which explains the low

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[10] Avakyan, A.V. The general characteristics of the executive proceedings in foreign countries.
<http://www.concourt.am/armenian/con_right/4.222003/A.V.%20Avakya.htm>

[11] Alternative measures during the executive enforcement of the court's decision. Overview of the world's countries. <http://www.informjust.ua/text/752>

level of Ukrainian life, ineffective reforms and political crisis, and is a dangerous legal phenomenon. All this leads to the fact that society is dominated by frustration, uncertainty and insecurity in the future.

To combat this, every Ukrainian official should take measures to ensure the rule of law, its domination in all spheres of public life. While the word "law", "justice" would be just sounds to our officials, including the employees of state executive service, until the legal nihilism will dominate the population.

It should also be minded that there is an International Association of professionals involved in executive enforcement, which is called the "International Union of bailiffs and officials» (L'Union Internationale des Huissiers de Justice et Officiers Judiciaires). The International Union was founded in 1952 in Paris at the First Congress of the National Chamber of bailiffs of France, Belgium, Netherlands, Luxembourg, Italy and Greece, that is countries where a liberal bailiff is the profession. As a result, it was joined by the Canadian province of Quebec, Austria, Germany, Poland and a number of African countries. It currently has in its ranks representatives of over 30 countries from 4 continents[12].

We presume that it would be advisable for Ukraine to join this kind of Association.

Thus, having analyzed the experience of some European Union countries, we can conclude that Ukraine should learn from EU, it should improve existing legislation to effectively reform the executive service, it must take all measures to fight corruption. It is as well ultimately important to increase a legal awareness of citizens and their legal consciousness.

Of positive impact would be also the introduction of mediation in Ukrainian justice. This procedure aims at out-of-court regulation of disputes, which would ensure the reduction in the number of trials in general. Thus, in major European countries, most disputes that are proceeded by court and sent to mediation, are resolved without a court trial.

The following practice will help the Ukraine to become a full member of EU in perspective which is what it is striving for at the moment.

[12] Avakyan, A.V. The general characteristics of the executive proceedings in foreign countries.
<http://www.concourt.am/armenian/con_right/4.222003/A.V.%20Avakya.htm>

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Chapter 4

ENVIRONMENTAL, LAND, AGRICULTURAL LAW

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INSTITUTIONAL BASIS OF THE RECREATIONAL LAND USE SUSTAINABLE DEVELOPMENT IN URBAN AGGLOMERATIONS

Effect of concentrating the large number of people in one place, their livelihoods and development of industrial forces, which together is creating a huge economic, scientific and intellectual potential, stimulates the growth of these places and forms the need to institutionalize their functioning on the principles of sustainable development.

The aim of the study is to define the institutional framework and vectors of eco oriented development of recreational areas in the urban agglomerations.

A large number of domestic and foreign scientists devote their researches to the institutional framework, environmental and economic problems of recreational natural use and certain aspects of urban agglomerations, such as D. Adams, O. Alimov, V. Geyts, V. Golyan [1], E. Hoover, S. Ibatullin [2], G. Lappo [3], V. Novitsky, M.Nudelman, E. Pertsik [4], M. Ruzhe, A. Tretyak [5], M. Hvesik [1]. In their works, scientists consider some aspects of problems of development the recreational areas, preconditions of improving the governance of territorial units. Scientists in their researches reveal the problems of: development and management of both total land fund of the country and the individual territorial entities; geourbanization in general and its respective spheres; separate economic and environmental aspects of territories' development and formation of basic principles of mutually ecological & economic development. But the question of studying the recreational land use of urban agglomerations for ensuring their sustainable development is not enough researched, in our view.

Urban agglomerations are formed by strengthening linkages and suburban areas, which perform both town-service functions and directly develop independently. Classic for the European urbanity is Pierre Merlen's and Francoise Shoe's determination: "Agglomeration is a system, which includes city and its suburbs". Urban agglomerations are influenced by both exogenous and endogenous processes of administrative-territorial formations' development. An avalanche process of expansion the agglomeration's forms of settlements, that form the new urban environment on the large areas, is objective in nature. It meets trends of productive forces and communication forms concentration. In this sense, one of the most important vectors of sustainable development of urban agglomeration is existence of the suburban areas. Appropriate lands must fulfill recreational, environmental and ecological functions, which can't be performed by the large city due to its industrial, economic and commercial development.

According to researches of the UN experts, the number of urban agglomerations in the world amounts many hundreds and they are home to 1300000000 persons, or 56.4% of the world's urban population. In 30 largest agglomeration areas with a population of over 10 million persons there are concentrated 478800000 persons, or 11.6% of the world's urban population.

Today in Ukraine the term "agglomeration", "urban agglomeration" remains almost theoretical in the field of public administration and regional economy. Agglomeration in Ukraine is neither an administrative unit nor entity of government, which is almost virtual in terms of practice. The legal definition of term "urban agglomeration" as implemented in the definition is made in [6]: " urban agglomeration is a compact territorial distribution of urban settlements, combined intense economic, employment and cultural & community links."

Considering the course of synchronization Ukraine's legislation with the EU standards and support of the position about this term usage Directive of the European Parliament and of the Council of the European Union [7] should also be quoted. So art. 2 states: "... 17. "agglomeration" means an area, which is a conurbation with a population of over 250 000 inhabitants or, where the population is 250 000 inhabitants or less, with a given population density per square kilometer that it will be established by State members".

In the absence of legislative which can clearly define the rules on establishment the urban agglomerations, there are 22 largest

agglomerations in Ukraine, where about 17 million people (or 36% of the country's population) live. Big cities of Ukraine, which form the significant urban agglomerations are included to the list of the global system of urban areas (table 4.1).

Table 4.1

Place of the largest agglomeration's forming cities of Ukraine in the global structure*

№ in the global	Town	Population, persons	Area, sq.miles	Density, pers./	Area, sq.km	Density, pers./
451	Dnipropetrovsk	1,000,000	125	8,000	324	3,100
480	Donets'k	962,000	174	5,500	451	2,100
321	Kharkov	1,449,000	180	8,100	466	3,100
152	Kiev	2,816,000	210	13,400	544	5,200
589	Krivoy Rog	750,000	64	11,700	166	4,500
787	Lugansk	525,000	47	11,200	122	4,300
589	Lviv	750,000	75	10,000	194	3,900
823	Mariupol	500,000	66	7,600	171	2,900
449	Odessa	1,010,000	80	12,600	207	4,900
577	Zaporizhzhia	772,000	100	7,700	259	3,000

** Compiled by authors on the basis of [8]*

Urban agglomerations are referenced to specific areas of regions, resources of which are taking a direct part in the recreational use of land or affect it. Taking into consideration dynamics, economic development and human impacts on the territory of urban agglomerations, recreational direction of these lands is a prerequisite for further rational environmental usage. Therefore, determination of conditions and priorities of recreational nature usage and diagnosing its effectiveness is becoming increasingly urgent problem because of the high environmental, ecological and socio-economic value of these areas.

Natural recreational resources that constitute a system of recreational nature usage are the components of environment: climate, lands, surface water and groundwater, vegetation, etc., used to meet the recreational needs.

In the subjective sense freedom of recreational usage is the possibility of specific persons to use natural resources for meeting their recreational needs in the case of general or recreational nature usage or for mass recreational needs of others in case of special recreational nature usage. In the objective sense freedom of recreational nature usage

is defined by scientists as interdisciplinary institute within the recreation law, which is considered as sector of environmental law.

During research of recreational land resources, as part of the appropriate type of nature resources' management, it should be noted that an important feature of recreational land use is its organizational normative & legal regulation, provisions of which are enshrined in the Constitution of Ukraine, the Land Code, laws of Ukraine and other legal acts that are inherent in the regulation of the land relations. In fact, according to the Constitution of Ukraine, the land is the main national wealth that is under special state protection.

At the same time, scientific & conceptual apparatus, which is used in recreational studies, is characterized by the absence of a clearly defined system of definitions and by their ambiguity and diversity. This is because scientific researches that are conducted in this area started recently; they are dynamic and studies are conducting in several areas: recreational geography, economics of recreation and tourism, recreational environmental management, sociology, tourism, education, tourism management and marketing etc.

In the area of recreation land use there are outstanding aspects of the regulatory and legislative fixing of differences in terms of "recreation area" and "recreational land". According to Art. 63 of the Law of Ukraine "On Environmental Protection" recreational areas are areas of land and water intended for organized mass recreation and tourism. The Land Code of Ukraine in the Art. 50 added one more feature of recreational areas: "for sporting events".

Thus, organizational & economic foundations of recreational land use in urban agglomerations are reflecting the relationship and interdependence of both organizational regulation, standardization and methodological instruction, and economic leverage in terms of planning, investment, financing, crediting, taxation, leasing, pricing, material and monetary stimulus, ensuring of profitability in the economic, social and environmental process of land use in urban agglomerations for renewing strength of citizens and their rest.

In this sense, there is a pressing problem that territory of Ukraine has no regime for single usage of recreational zones. In addition to the above mentioned legislation, some legislative acts include special provisions about usage of these lands. So Art. 413 of the Commercial Code of Ukraine determines that economic activity in territories and objects of natural reserve fund of Ukraine, spa, therapeutic, recreational and other territories and objects, related by legislation to such territories,

is carried out according to legal requirements of these areas, made by law and other legislative acts. Tax Code of Ukraine states certain features of taxation of recreational land use; payment of fees; term of recreation facilities etc. Among other legal acts, regulating the process of recreation land use is worth noting the Law of Ukraine "On Land Protection", "On land management," On Basic Principles (strategy) of the State Environmental Policy of Ukraine till 2020", "Concept of the State Target Program Development of land relations in Ukraine till 2020","On tourism ","On ecological network of Ukraine", "On the Fundamentals of Urban Development", "On regulation of urban development", state building codes and health rules etc.

Considering modern recreational land use of urban agglomerations in the context of international integration, the attention must be paid to the fact that there is a double imposition of interests and spheres of influence, fragmented governance, discrepancy of list of regulations for today requirements. This situation is so because of inconsistency of management personnel and a clear delineation of areas. Recreational functions, partly, are carried out by lands with another intended purpose. These include: forests and other wooded area, perennial plants, hayfields, pastures, mixed-use land, land with special vegetation and territory covered by surface water. This creates additional challenges for effective management of areas.

Disadvantages of settlement systems of urban agglomerations include:

- inconsistency of social, economic, urban and environmental aspects of human settlements and surrounding areas;
- excessive concentration of population and production in large cities;
- slow development of most medium and small cities, towns and villages;
- eccentric geographical location of most regional centers, insufficient development of social and cultural services and transport links for population of surrounding areas, which makes it impossible to provide equal conditions for access to these facilities for every citizen;
- insufficient development of social and engineering & transport infrastructure of settlements.

Sustainable development of the recreational land use in urban agglomerations is defined by us as the process of introduction of innovative ecologically arrangements for mutually socio-ecological-economic development of recreational areas in order to receive

appropriate services, pleasure and leisure, when the use and recovery of natural resources of recreation lands is taking into account the needs of future generations.

The primary objective towards sustainable development is to develop the improved institutional framework of recreational land use. For addressing the major problems of formation the institutional model of recreational land use it is necessary to clarify the definitions of basic concepts such as "institutionalization". Nobel Laureate D. Nort considers institutions as structure that people put on their relationship, defining thus the incentives and limitations which outline the limits of choice. The above mentioned ones define the limits of the economy and society over a period of time. Polish economist H. Kolodko understands institutions as the "rules" established by law and organizations that ensure compliance with these "rules" by economic actors. Institutionalization is the process of identifying and fixing norms, rules, statuses and roles, bringing them into the system that can work towards meeting some public need [1]. Exploring the institutional basis for the development of recreational land use, it is needed to determine the structure of management and cooperation in this sphere on the example of Odessa urban agglomeration (fig. 4.1).

Research of institutional framework of recreational land use in the system of spatial development of urban agglomerations gives rise to the following general conclusions:

- Socio-economic characteristics, environmental status and institutional support of urban agglomerations, formed in Ukraine are not fully complying with the parameters established in the world in general and in EU.
- Development of recreational land of urban agglomerations that serve as opened socio-economic systems largely depends on their institutional framework, balance of its components and impact of factors surrounding the macro and micro environment. The scale of recreational land use is determined, on the one hand by the demand for recreation, cultural and cognitive activities, and on the other - by level of anthropogenic load state of the environment and set of institutional reforms aimed at sustainable development of the territory and meet of the recreational needs.
- The current regulatory and legal framework of recreational land use include gaps, especially regarding distribution of authorities and intended use of areas, the availability of basic law on recreational lands and strategies conformed with the requirements of international law.

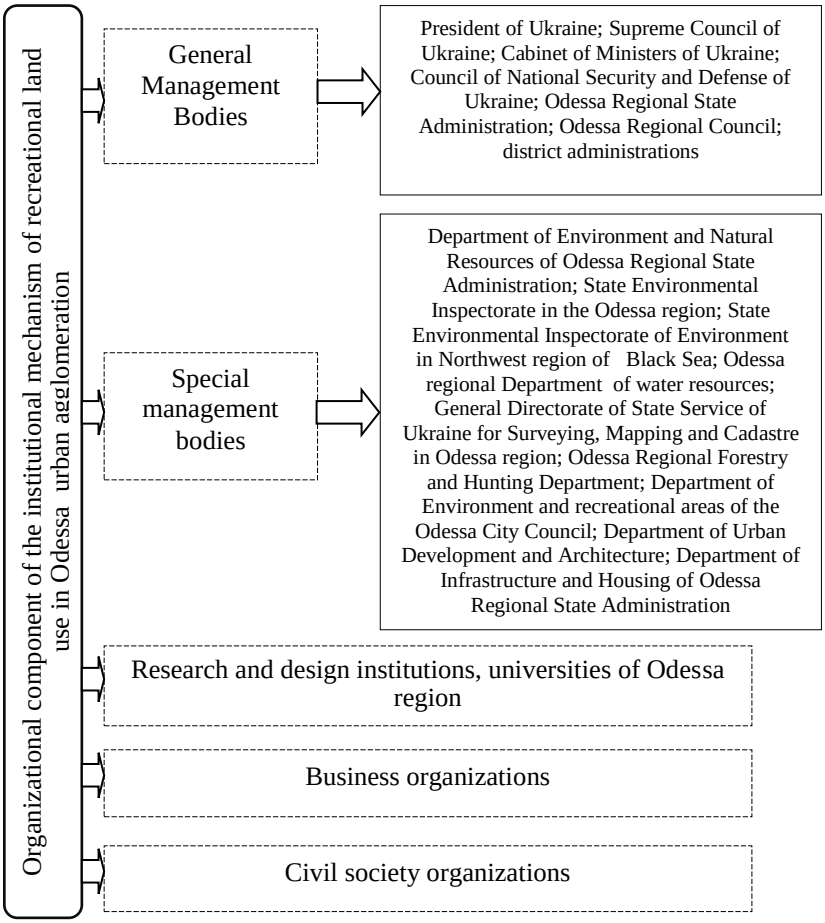

Figure 4.1. Organizational principles of institutional development of recreational land use in Odessa urban agglomeration

- There is a lack of systemic support of stakeholders in financing of business projects of recreational and social structures in which economic interests dominate on the environmental and social.
- The lack of established links and information provision in the sphere of government, business sector, NGOs and society interaction.

The primary source of solving the above problem is to develop mechanisms and institutional basis of greening the relevant areas. Basic principles of improving the institutional support of recreational lands are founded in figure 4.2.

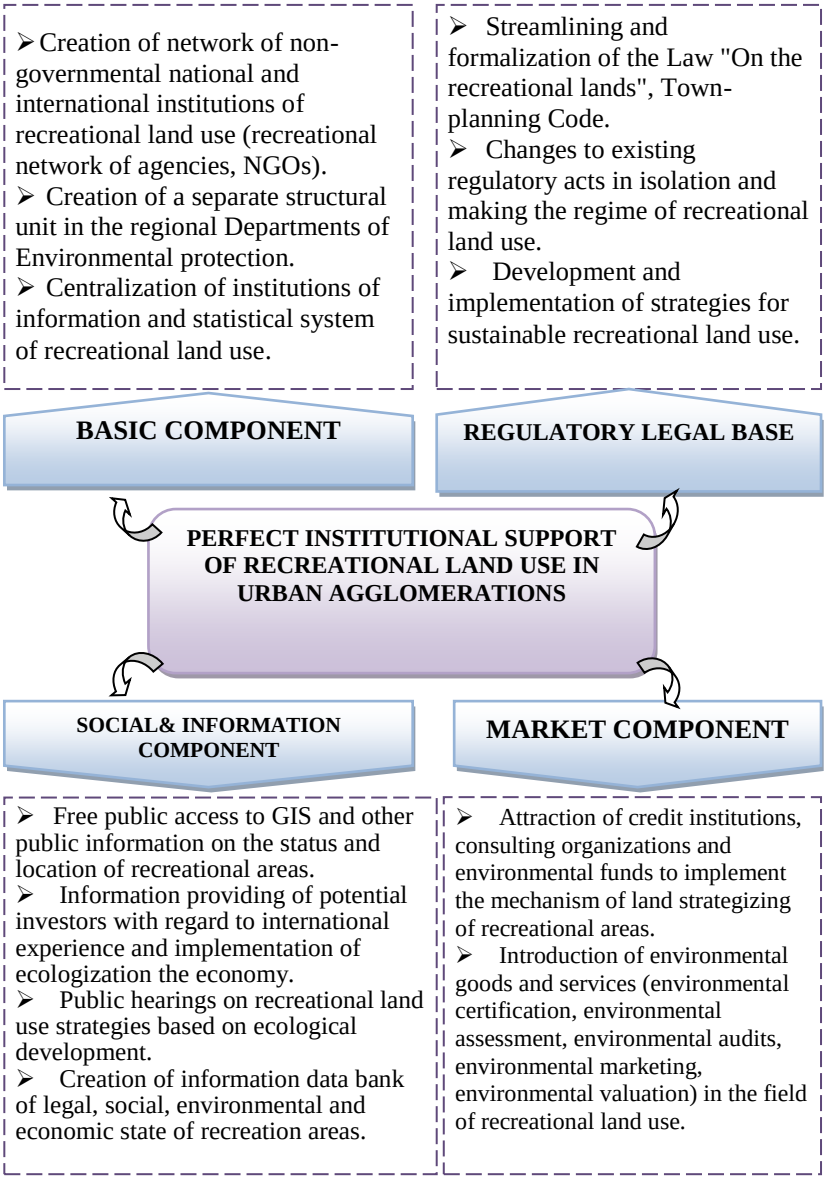

Figure 4.2. Institutional support of recreational land use of urban agglomerations

Taking into account market transformations in Ukraine, the problem of substantial correction of mechanism for management and development of areas, socio-environmental and economic aspects of development are raised. The above mentioned is needed because development of recreational land use largely depends on their correct positioning, differentiation, resource's potential, and impact of factors surrounding the macro and micro environment. Designing the institutional changes, it is important to take into account the factor of promoting the innovation updating the methods of management and labor.

The developed market of innovations can accelerate this process. So institutional transformations should focus on formation of innovative structures, which will provide the opportunity for development of ecologically oriented projects. Institutional environment of recreational land use should be the mutually agreed activities of government, business and public institutions on transactional operations and other land relations. This is the most important condition for sustainable recreational land use.

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FORMATION LEGAL AMBUSHES OF LAND USE

Against the background of agricultural production within the agricultural sector in Ukraine as an important component of the national economy, forming the foundations preserve the sovereignty of the state (food, economic, environmental and energy security) need a scientific study of the constituent elements of economic mechanism of land use, developing measures for its improvement based on resource saving land use, conservation and environmental protection. It should be emphasized that the efficiency of land use management is provided only on condition that appropriate mechanisms to take into account the interests of both the direct user and consumer products agricultural sector. Land use control mechanisms based on various forms of financial security economic process that leads to the need to find reliable investors, both

domestic and foreign. These processes require legal support with current global trends.

Land and property complex of us regarded as an object of management that requires formation within this approach effectively manage land use solely on a legal basis. The results of this control affect the state of the national consumer market.

The importance of research problems requires economic mechanism of land use and directions for further improvement taking into account the existing legal provision, his critical thinking.

Currently, a number of issues remain on the improvement of economic mechanism of land use, land-functioning property complexes, the needs of the national consumer market, improvement of current legislation in all these aspects.

Agricultural production within the agricultural sector in Ukraine we see as a significant component of the national economy, which, to all forms principles preserves the sovereignty of the state – food, economic, environmental and energy security, ensures the development of organizational and economic relations technology-related sectors of the national economy is socio-economic basis for rural development.

Agricultural land is the most important component of the resource potential of the agricultural sector. Rational use of agricultural land and reduce the anthropogenic impact on the environment of the agricultural sector should ensure the effectiveness of managing a farm and the consumer market of Ukraine, which is reflected in a number of legislative acts of the state.

The efficiency of land use management is provided only on condition that the relevant mechanisms into account the interests of both the direct user and consumer products agricultural sector. Thus, consumers of the agricultural sector as the main actors distinguish economic relations.

Describing the mechanisms of management of land use, it should be noted that agricultural land is an integral part of the economic environment of the region or the country as a whole, which receives a permanent boost to development in a competitive environment. Effective management of land use should be based on the action of economic laws functioning market environment, and appropriate mechanisms should take into account the systemic nature of interaction with the environment. We conclude that the elements of land use control mechanisms have both direct and feedback, subject to the principles of competition, taking into account the economic interests of such

relationship should be clearly regulated in the legal field.

The elements of land use control mechanisms provide interconnection with fixed assets used for the cultivation of agricultural land. Now the problem is debatable as to which elements of land use control mechanisms is a specific regulator of its value in a competitive environment. The most common is the view that such a role is land. This view is because the absolute increase in land value (it's proven in numerous scientific publications) associated with increasing population and decreasing share of free economic use of land. Recall that makes sense as a factor that leads to higher land, consider that some lands are attractive because of their convenient location, transport, environmental and so on.

However, in economic calculations usually take into account the factors that contribute to the growth of the absolute value of the land, and the factors that determine its relative growth, which is influenced by time (the effect of uneven price changes of individual land), almost ignored.

From the standpoint of practices and the organizational and economic relations between enterprises of the agricultural sector, it is easy to notice the effects of the absolute increase in the cost of land. The reason is that the outside observer is more accessible information about the rising cost of land in absolute amount and this trend carried over to other components of the property complex of agricultural enterprises in general.

Improving the management provides for land use in agricultural production of appropriate strategies based on informed legal basis and involves among other things the reconstruction of production, formation of an effective technical and technological base on innovative principles.

Land use control mechanisms based on various forms of financial security of the economic process, involving both internal and external sources of resources. In this respect, there is a need to find reliable investors, domestic and foreign [1, p. 93-117].

It should note that sales generated by agricultural land production must be organized through a multi-channel system, the advantage of which, in our belief, is to provide wholesale link.

Important not resolved by the end of the problems in Ukraine is the formation of private land, land market development, and the legal basis of this process remains virtually unnoticed by lawmakers. In addressing these extremely important social and economic problems the state has to stand by, because this area of conspicuous importance is the need to

provide support for the development of land relations, preparation of relevant legislation. We consider the main directions of state support for land relations in two aspects: financial support, organizational and legal support. Support for financial support should be provided in the financing of measures to preserve soil fertility, protection and preservation of the environment; have left aside the question of funding for land management activities; in the establishment of mechanisms of credit cooperation is in the agricultural sector; creating a reliable system of agriculture insurance; support guaranteed purchase prices for agricultural products and raw materials and so on.

Organizational and legal support concerning issues such as the legal base and the formation of an effective system of monitoring the use of agricultural land; implementation of secured transactions in agricultural products; promotion of information and advisory services on commercial use of land and property complexes of land use management and more.

Further development of the legal provision and control over land resources should be aimed at forming a system of protection and soil protection, optimization measures for land reform and others. As a result, there should be provided economically sustainable land-use and reliable system management.

Note that in absence of real owner is not provided and efficiency of national consumer market.

We are convinced that the real owner must realize their potential, and the state has drastically support in the organizational and economic point of owners of agricultural units, providing preserve the integrity of the land and property complexes, land use management efficiency, social development of rural communities.

Land reform through a series of legislative acts must provide for the implementation of land redistribution for the intended purpose in order to create conditions for equal development of different forms of ownership and management, the formation of mixed land and property complexes that will ensure sustainable use and protection of land, respect for the principles of social equality.

The basis of the formation and development of the land is land ownership. This property, a multifaceted category reflects the social relations between members of business processes on the appropriation of means of production and labor, distribution, exchange and consumption of agricultural commodities and products.

The property is a set of relations of individuals with regard to the

means of production and consumption. Given the competitive business processes determine the need to regulate land use and land relations on the basis of clear legal provision.

Among the regulators that are able to optimize land use is attributed to the change of ownership of land, development of organizational forms of economic use of land and the system of economic relations in the enterprise, monetary value of land, its tax, rent land, mechanisms of motivation and economic promotion resource-use and land protection, formation and development of the land.

The main principles of economic mechanism of land use and regulation of land relations are the following: justification criterion laid the basis for the monetary value of land; processing techniques of monetary valuation of agricultural land; elaboration of approaches to determining land tax; introduction of state regulation of land treatment and legal support functioning land market; introduction of economic incentives for landowners and land users for conservation, sustainable use and protection of land; introduction of economic sanctions for violation of legislation on the use and protection of land and so on.

The introduction of economic regulators in land relations will contribute, in our belief, more efficient land use by creating a secondary market of land [2, p. 121-174].

The legal aspect is the property settlement applicable rules of law of economic relations of ownership by consolidating production facilities and products work on specific persons or their teams.

Given that the property is characterized social relations in the production and appropriation of the fruits of labor, such a category can be viewed in the political context. Competence owner's ownership is in actual possession of their own thing, which is located on the farm owner. The right to use – this entitlement holder, which is that it has a right to withdraw from the way its useful qualities, receives income. Use a thing can be done within the current legislation in various forms and ways namely transfer of lease, rent, consumption. The right to use the most important thing is considered the legality of the owner, because there is the possibility to satisfy his personal, household, household and other needs. Finally, the right of disposal is entitlement holder by which it determines the legal nature of things, the ability to dispose of all permitted means. Listed as the owner is his most significant and collectively make up the content of economic property relations.

Hence we conclude that combine personal interest with the public interest, the person-owner creates their wealth, and with it and the

welfare state. From these positions land reform can be seen as a set of legal, economic, technical and organizational measures, whose implementation aims at improving land relations, the transition to the new system of land use proprietary systems, adequate nature of socially oriented national economy. For a long time in Ukraine within the legal support are handled and implemented in economic activity mechanisms of land reform, phased implementation of a range of legal, technical and organizational measures.

It should be stated and that the permanent crisis of national economy in Ukraine has created extremely unfavorable conditions for the exercise of the right of private ownership of land. From this perspective, it is important to reinforce the necessity of deepening the study of patterns and driving forces of land relations and land use management. The mechanism of management of land use, in our belief, based on three positions, determined by the land owner, the property complex located on it; built industrial relations; emerging organizational, economic and legal relations.

Note that it is still not made regular use of methods of state regulation of relations in the field of land use. Thus, the economic mechanism of land use needs further improvement.

Low efficiency of the implementation of land reform in Ukraine slows solve a number of important economic and social issues, not the growth of economic efficiency and ecological safety of land use does not contribute to the creation of regulated land turnover hardly secure rights of land property and land users. According to our belief, this contributes to the imperfection of the organizational-economic mechanism of functioning of the national economy in Ukraine. Among the most significant factors affecting the land reform, the results we see imperfect legal support, low level of awareness among the population, abuse of the land market.

Further improvement of economic mechanism of land use needs to intensify land reform, finding innovative methods and forms of this process, the growth of state influence, formation of effective economic, environmental and moral motives to land users that will encourage efficient use of land and property complexes, located on them.

Improving the economic management mechanism provides for land use and the cost of land as part of his productive capital, ensuring the effectiveness of the national economy, forming partnerships with other actors in the consumer market. It should be remembered that the relations of production remain economically handicapped if they will be

excluded from the land tax, which artificially reduces the amount of capital. Do not hide the fact that the main cause of low land, in our belief, is a conscious disregard owner, local authority's fundamentals of a market economy.

Information component we see as an important element of economic mechanism of land use. A lot of what is now the current information systems in the agricultural sector is not adequate relevant industrial relations.

The stabilization process of land use and ensuring the effectiveness of economic mechanism of this process urgently a number of measures, namely: ensuring economic treatment of agricultural land; complete the privatization of land; justification rent regulations allowing for the regions; creating market infrastructure (including online mortgage banks) and others.

Do not lose relevance and issues of economic incentives for sustainable use and protection of land. The experience of the world is considered to be an efficient use of land, which provides reasonable economic impact of economic activities while maintaining soil fertility and of the environment.

In Ukraine, according to the land code, the system rational use of land has environmental, resource, reproductive in nature and involves the conservation of soil, limiting the negative impact on them, as well as the flora and fauna, geological rocks, water sources and other components of the environment. Code defined as a basic list of measures for land protection, namely the rational organization of territory; conservation and improvement of soil fertility; protection of lands from water and wind erosion, landslides, flooding, waterlogging, salinization, drying, compaction, pollution, waste production, chemical and radioactive substances and other processes of destruction; protection of agricultural land overgrown shrubs and undergrowth, and other processes worsening cultural and technical state lands; reclamation of disturbed lands, increase fertility and improve other useful properties of land; temporary conservation of degraded agricultural land, if other means cannot restore soil fertility and more.

The research results suggest that the economic mechanism of land use in Ukraine is imperfect, a number of his constituents did not work, and sometimes creates adverse conditions for users of land and property complexes. Prospects for further research in this area should include the problem of formation of effective organizational and economic relations, including on the use of land resources.

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Chapter 5

COMMERCIAL LAW AND PROCEDURE

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HARMONIZATION OF UKRAINE'S PUBLIC PROCUREMENT SYSTEM WITH THE EU STANDARDS: THE CONCEPT OF SPECIAL AND EXCLUSIVE RIGHTS

Over the last few years Ukrainian legislation has been substantially updated which was stipulated by different reasons and aims, in particular to prevent corruption, to simplify public procurement rules, to promote competition and transparency, etc. With ratification of the EU-Ukraine Association Agreement [1] Ukraine assumed obligations to harmonize national legislation with the basic requirements of the EU Treaty and the detailed provisions of the EU Directives on public procurement according to the Chapter 8 of Section IV and Appendix XXI of the Association Agreement which address the relationships in the public procurement field, providing for the public procurement market liberalisation. Currently, the main amendments to the Ukraine's legislation on public procurement are based on the need to harmonize national laws with the EU requirements. One of the recent and most essential amendments envisages that not only contracting authorities and public undertakings but also private entities may fall within the scope of public procurement legislation because they carry on the activities in utilities sector on the basis of exclusive or special rights. Since the notion of special and exclusive rights in Ukraine in the context of public procurement is new it is important to define its concept.

Since there are a lot of scientific papers and articles on Ukraine's public procurement system reform in the context of euro-integration processes [2, p. 12-18; 3, p. 197-214; 4, p. 263-265; 5], there is still lack of literature and research on the concept of special or exclusive rights as well as problems of legal status of private undertakings which pursue an activity covered by the utilities sector under special/exclusive rights. This makes the study on special/exclusive rights more relevant and defines the main aim of research.

For the purpose of the harmonization with the EU legal acts in the sphere of public procurement Ukrainian Parliament has already entered a considerable number of amendments into the Laws. One of the most significant steps towards the European standards was the enactment of an important Law on 'The Peculiarities of Public Procurement in Certain Spheres of Economic Activity' (Law on Peculiarities) [6]. This Law aims at establishing the legal and economic principles of conducting public procurement in certain sectors of economic activity, namely, in the so-called "utilities", which, in the EU, are regulated by the Utilities Directive. Thanks to this Law the European approach when the legislation on public procurement covers not only public but also private undertakings, which carry on one of the activities referred to in the Law on peculiarities (e.g. production, transportation and supply of heat, electric energy and drinking water), was introduced. However, private entities fall within the scope only subject to the supplementary condition that they carry on the activity on the basis of exclusive or special rights. According to the Ukrainian Law 'On Public Procurement' [7] special and exclusive rights are rights granted within the powers of public authorities or local self-governing authorities on the basis of a legal act and/or an individual act, which restrict the performance of the activities in the areas defined by this Law to one or more persons, which significantly affects the ability of others to carry out such activities.

The notion of special and exclusive rights was introduced in the Ukrainian legislation in compliance with the EU Utilities Directive. According to the Green Paper of the European Commission on the modernization of EU public procurement policy the main reason for introducing public procurement rules for the utilities sector was the closed nature of the markets in which undertakings operate, owing to the existence of special or exclusive rights granted by the Member States [8, p. 11]. Generally special and exclusive rights exist where a license is required to carry out an activity. Undertakings engaged in the activities covered by the Utilities directives have traditionally depended on state

licenses: it is almost not possible for anyone to set themselves up, for example, as a water supplier or electricity producer [9, p. 223]. The main reason for regulating procurement of private undertakings was that it was considered that the state can influence these entities, because of the power that the state has over their operating licenses. In the absence of sufficient competitive pressure, the mandatory public procurement rules were considered to be necessary in order to ensure that procurement in the utilities sector would be carried out in a transparent and non-discriminatory manner. Otherwise, it was feared that procurement decisions by the utility undertaking could be influenced by favoritism, local preferences and other factors [8].

According to the first European Utilities Directive 93/38/EEC **coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [10], namely Article 2, special and exclusive rights meant rights deriving from authorizations granted by a competent authority of the Member State concerned, by a law, regulation or administrative action, having as their result the reservation for one or more entities of the exploitation of an activity defined in the Utilities Directive. The aforementioned Directive clearly defined when the contracting entity should be considered to enjoy special or exclusive rights, in particular where: 1)** for the purpose of constructing the networks or the facilities referred to in the Directive, it may take advantage of a procedure for the expropriation or use of property or may place network equipment on, under or over the public highway; 2) the entity supplies with drinking water, electricity, gas or heat a network which is itself operated by an entity enjoying special or exclusive rights granted by a competent authority of the Member State concerned. Such concept of special and exclusive rights did not cause problems and provided for an understanding of the necessity for private operators to follow public procurement rules.

However, on 15 September 2015 the Ukrainian Parliament adopted the Law 'On Amendments to Some Legislative Acts on Public Procurement in Order to Ensure the Compliance with International Standards and to Combat Corruption' [11], which altered the notion of special and exclusive rights. According to this Law the rights, which were granted within the open procedure (tendering) on the basis of objective criteria with adequate publicity before the procedure, do not constitute exclusive or special rights. The substantiation of the need to adopt the mentioned amendment is missing. However, the Ukraine's

Strategy of Reforming the Public Procurement System (”Roadmap”) [12] defines stages of the harmonization process of Ukrainian legislation with the requirements of the EU where special and exclusive rights play an important role. Thus, the introduction of the new provisions is based on the need to harmonize Ukrainian legislation with the requirements of the EU Directives on public procurement. In order to determine the aim of making the procedure for acquiring exclusive and special rights as the main criteria which defines whether special or exclusive rights exist or not, it is rational to appeal to the EU law on public procurement.

Since the adoption of the first European Utilities Directive the gradual liberalization processes have been pursued either at EU level or at the national level for many sectors (e.g. electricity supply, postal services, etc.), which essentially influenced the concept of special and exclusive rights. Now within the EU the need for an operating license granted by government will not necessarily constitute a special or exclusive right. In 1996 the European Court of Justice (the Court) in the *Telecommunications* case [13] substantially updated the notion of special and exclusive rights. The Court stated “that the exclusive or special rights in question must generally be taken to be rights which are granted by the authorities of a Member State to an undertaking or a limited number of undertakings **otherwise than according to objective, proportional and non-discriminatory criteria** (Emphasis added), and which substantially affect the ability of other undertakings to provide or operate telecommunications networks or to provide telecommunications services in the same geographical area under substantially equivalent conditions”. The Court pointed out that exclusive or special rights for the provision of a public telecommunications network cannot be characterized by the possibility for the authorized telecommunications organizations to enjoy certain prerogatives, in particular the right to acquire land compulsorily, to enter land for exploratory purposes and to acquire land by agreement or to place network equipment in, over or under the public highway and to place apparatus on private land with the consent of the persons having an interest in that land, which consent can be dispensed with by the Court, inasmuch as such rights, “which are merely intended to facilitate the provision of networks by the operators concerned and are or may be conferred upon all those operators, do not give their holders any substantial advantage over their potential competitors”.

The unacceptable situation appeared when the concept of special and exclusive rights had two different meanings both in the Court's

Judgment and the Utilities Directive 93/39/EEC. In 2004 the new Utilities Directive 2004/17/EU coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [14] accepted the notion of special and exclusive rights which was elaborated by the Court. According to this Directive special and exclusive rights were determined as rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision, the effect of which was to limit the exercise of activities defined in the Directive to one or more entities, and which substantially affected the ability of other entities to carry out such activity. Additionally the Preamble of the Directive 2004/17/EU emphasized the need to have an appropriate definition of the concept of special and exclusive rights. The consequence of the definition is depicted in three ways: firstly, the availability of a procedure for the expropriation or use of property and the ability of an entity to place network equipment on, under or over a public highway for the purpose of constructing networks, port or airport facilities, do not automatically constitute exclusive or special rights within the meaning of the Directive; secondly a special or exclusive right does not exist merely due to the fact that an entity supplies drinking water, electricity, gas or heat to a network which is itself operated by an entity enjoying special or exclusive rights granted by a competent authority of a Member State; and thirdly, rights granted by a Member State through acts of concession, to a limited number of undertakings **on the basis of objective, proportionate and non-discriminatory criteria that allow any interested party fulfilling those criteria** (Emphasis added) to enjoy those rights are not considered special or exclusive rights.

The practical implication of the definition of special or exclusive rights under the new Utilities Directive 2004/17/EU is the non-applicability of the regime to the entities that do not meet the conditions but are still covered under the existing regime solely because they are considered to benefit from exclusive or special rights. With adoption of the Directive 2004/17/EU it will therefore no longer be possible to conclude the existence of exclusive or special rights solely on the basis of the activity pursued. As stated by the European Commission in the explanatory note concerning the special and exclusive rights under the Directive 2004/17/EU, it is in effect unthinkable in practice that an entity might for example distribute electricity without having at least the right to install its pylons on public land. Thus, according to the conclusion of the European Commission it is necessary to analyze on a

case-by-case basis whether the entity in question does or does not possess exclusive or special rights [15].

In 2014 the new Utilities Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services [16] was adopted. The definition of the concept of special and exclusive rights in this Directive was altered under the influence of the aforementioned Court's Judgment and the Preamble of the Utilities Directive 2004/17/EU. Currently, the analysis of presence or absence of special or exclusive rights must also include the analysis of the way or procedure how these rights were gained by the private undertaking. According to the new Directive 2014/25/EU the definition of special and exclusive rights was supplemented with the following provision 'rights which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria shall not constitute special or exclusive rights'. The European Commission emphasizes that if a private undertaking gained rights to exercise one of the activities covered by the Utilities Directive on the base of objective and non-discriminatory criteria it is not subject to the provision of the Directive. However, it is necessary that the procedure used to grant the rights in question should take place after adequate publicity has been guaranteed – in effect, without such publicity it cannot be guaranteed that the criteria effectively open up to any interested party which fulfills them the possibility of obtaining the right in question [15]. The new Directive 2014/25/EU lists the procedures of granting the rights and when such rights do not constitute special or exclusive rights. This list includes all procedures under the Directive on public procurement with the exception of the negotiated procedure without prior publication. The list also includes procedures established by a number of Directives on liberalization of the EU utilities sector in order to provide the system of competitive distribution of licenses/permits, which aims at providing equal access to all interested entities [17].

One of the justifications for implementation of the aforementioned provision to legislation is the following. If any undertaking, which meets certain criteria, can obtain the license and the process of its obtaining is transparent, the state cannot detrimentally influence the procurement behavior of the recipient of such rights, for example to buy only from local producers. Thus, there is no need to apply the utilities procurement regime [18, p. 9].

In this context it is worth specifying another position of the EU on

special and exclusive rights the effect of which is to limit the exercise of activities defined in the Utilities Directive to one or more entities, and which substantially affects the ability of other entities to carry out such activity and place the private companies in a monopoly or oligopoly situation. The entities which operate in the utilities sector usually hold a monopoly position. This means in turn that these entities do not have to worry about making good and economical purchases, they can simply transfer their extra costs onto public who has no alternative source of supply available [19, p. 6]. Thus, in order to meet the requirements for quality, price etc., the entity has to comply with the rules on public procurement in the utilities sector, since the activity of such undertaking aims at rendering of public services. According to the European Commission where an entity has the right to operate utilities as a result of an open and advertised procurement procedure there is enough competitive pressure in that market so as to negate the need for the extra protection for consumers which would exist otherwise had these rights been designated "special and exclusive" [20]. Because everyone can obtain the right to carry on the activities in the utilities sector, competitive pressure on those who already have licenses exists. Such companies therefore must minimize their costs and procure goods on the best commercial conditions but not on the terms of favoritism. Otherwise there is a risk of being eliminated from the market and going bankrupt [19, p. 6]. Thus, according to the European Commission if any company has the right to obtain the license without limitations in their number, special and exclusive rights do not exist. Back in 1977 the European Court in the Case 13/77, Inno v ATB, which does not directly concern activities in the utilities sector, ruled that no special or exclusive rights exist where they have been conferred upon the undertaking as a member of a class carrying on the activity which is open to everyone [21].

The same position is set out in the recommendations on the concept of exclusive and special rights, which should be applied in the Ukraine's legislation on public procurement. These recommendations were elaborated by the project funded by the EU 'Harmonization of Public Procurement System of Ukraine with EU Standards'. According to the mentioned recommendations the risk that procurement decisions by utilities operators could be influenced by the state, which resulted in local preferences and favoritism, exists only in those cases where the utilities operators have received the right in a non-transparent manner and is managed at the discretion of the state [17].

The experts of the mentioned project arrive at the conclusion that special/exclusive right does not exist in case when: 1) relevant activities may be carried out by any economic operator and the right is aimed only at facilitating such activities (the land access right, the right to store equipment on, under or over public highway and even the right to mandatory land acquisition), provided that everyone has a de facto equal opportunity to obtain such rights; 2) the right constitutes a condition for carrying out certain activities, but it is automatically granted to everyone willing to obtain it as a kind of a formality (most cases of licensing, for instance, licenses for different construction works, for rendering taxi services, etc.); 3) the right constitutes a condition for carrying out certain activities, but is granted pursuant to the method that includes: - open acceptance of applications accessible to all interested undertakings; the right is granted based on objective criteria, thus leaving less possibility for the states' discretion. In particular, it may be the case when local authorities select local suppliers of transport services, apart from municipal transport (for instance, buses and minibuses for short and medium distance carriage), by means of the competitive procedure or select suppliers of certain utilities (for instance, garbage removal services). However, when the State or local authorities grant by their decision rights to carry out certain activities directly and solely to one or several economic operators, eliminating or significantly restricting the possibility to carry out such activities for other entities, it shall be considered as granting special or exclusive rights. The relevant examples for Ukraine are: formal licensing of electricity distributors and suppliers possessing a technical (natural) monopoly as confirmed by the license; operation of a telecommunication network for rendering general access services (Ukrtelecom's private natural monopoly) [17].

Thus, special or exclusive rights exist where rights: 1) are limited in number; 2) are granted otherwise than in accordance with objective and non-discriminatory criteria and are granted by a competent authority by way of any legislative, regulatory or administrative provision; 3) limit the exercise of activities in the utilities sector to one or more entities, and which substantially affects the ability of other entities to carry out such activity. Special or exclusive rights do not exist where: 1) there is no limit to the number of such rights; 2) such rights are granted on the basis of objective and non-discriminatory criteria; 3) do not limit the exercise of activities in the utilities sector to one or more entities.

However, the EU Directive, the Court as well as Ukrainian legislation on public procurement do not solve, as the C. Bovis

emphasizes [18, p. 9], the complicated situation when a private entity compete for special or exclusive rights such as concessions on the basis of objective criteria but these rights substantially restrict the market access to other undertakings and limit the number of interested parties. For example, a private undertaking received a service concession, for instance was entrusted to provide and manage a municipal tramway system for 10 years. Although this entity will be the only concession-holder for such a long period of time, it competed in an open procedure to win this concession.

In addition, the new provision on special and exclusive rights in Ukrainian legislation on public procurement arises questions on difference between the legal status of a private undertaking which obtained special or exclusive rights within the competitive procedure on the base of objective criteria, for example according to the procedure envisaged in the Law of Ukraine 'On Concessions' [22] it received the right to carry on the activities in the water sector for 30 years, and the private entity which obtained such right directly on the base of regulatory provisions of competent authority.

In the first case the entity does not have to follow the requirements of public procurement legislation and in the second case it falls within the scope of such legislation. The European Commission and some authors say that even if only a limited number of undertakings can enjoy the rights, they are open to all to enjoy, as anyone can compete for them and, if the awarding process is transparent there is no possibility for the state to influence the concessionaire [9, p. 224]. Moreover, if private companies operating in the utilities sector, won a contract in a public procurement process they are not subjected to the provisions of the Utilities Directive, even if they end up in a monopolistic or oligopolistic position. Such companies are considered to already have had to streamline their procurement in order to submit a competitive offer [19, p. 6]. Furthermore, the Preamble of the Utilities Directive 2014/25/EU states that an entity, which has won the exclusive right to provide a given service in a given geographic area following a procedure based on objective criteria for which adequate transparency has been ensured would not, if a private body, be a contracting entity itself, but would, nevertheless, be the only entity that could provide the service concerned in that area.

Still, the actual situation of undertakings in the first and the second cases is the same, because in both cases the entities are the only companies that carry on activities in the certain markets. In other words

they both have monopolistic position. However, the determinative criteria of defining whether the undertaking is subject to the legislation on public procurement or not is only the procedure of acquiring special or exclusive rights.

In the first case the undertaking as a single entity that carries on certain activities in the utilities sector may not fall within the state's influence on purchase decision-making in favor of certain economic operators, since it was selected in accordance with the open procedure based on objective criteria, but with the course of time this undertaking can start to use money ineffectively transferring extra costs onto the population who has no alternative source to buy goods, services and works from. If there is no incentives for the undertaking in the utilities sector to keep their costs down it could affect the competitiveness of other industries which in turn have to raise their prices. The purchasing power of the population would then be affected, to the detriment of a nation's whole economy [19, p. 8].

In summary the research revealed the following:

1. Currently, according to the novels in the Ukrainian legislation on public procurement in order to define whether a private undertaking in the utilities sector has special and exclusive rights or not, one must analyze the way of obtaining such rights, that is to say, the way of granting rights plays a decisive role.

2. In the case when a private undertaking obtained the right to carry on the activity in the utilities sector within the open procedure based on the objective criteria but this right substantially affects the ability of other entities to carry on such activity, which is examined on a case-by-case basis, it is proposed to establish the duty for such undertaking to observe the basic public procurement principles set out in the Law of Ukraine 'On Public Procurement', namely the fair competition, economy and efficiency, transparency, non-discrimination, equal treatment, preventing corruption and objective assessment of proposals. Such private undertakings are not required to follow the procurement procedures set out in the Law 'On Public Procurement', however they have to ensure the level of transparency which allow all interested economic operators who meet certain criteria to participate in the procurement of relevant goods, services and works. For these purposes and with the aim to select a supplier of commodities the private undertakings in the utilities sector may use the e-procurement system according to the Law of Ukraine 'On Public Procurement'. By analogy with Article 2 of the Law 'On Public Procurement' concerning the

coverage of legislation, in case of procurement of goods, works and services without using the e-procurement system provided that the value of procurement is equal or more than UAH 50 000 (approximately USD 20 000), the private undertakings in the utilities sector have to publish a report on concluded contracts in the e-procurement system according to the Law of Ukraine 'On Public Procurement'. It helps to ensure the compliance of legislation with the Ukraine's obligations within the EU-Ukraine Association Agreement, to be more specific, with the principle of transparency in procurement which is not covered by the EU Directives.

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REMEDIES FOR NON-PERFORMANCE IN BUSINESS TO CONSUMER CONTRACTS

The remedies and time limits affecting the non-performance of Business to Consumer Contracts (B2C) continue to represent a point of interest for practitioners in consumer and business law. In Romanian law, there are two different cases in which the partial non-performance

of a divisible duty is such as to justify termination of the B2C or B2B contract as a whole: (i) when the partial non-performance is regarded as essential by the interested party, rendering the entire contract distorted from what it should have amounted to pursuant to the original contractual agreement of the parties; (ii) when termination is sought for minor yet repetitive non-performance.

In the case of contractual duties implying progressive or continuous performance, the aggrieved party may seek for total or partial termination of the contract, provided that the minor non-performance has repeatedly occurred.

In B2B contracts, the buyer may consider that the partial non-performance of a divisible obligation is such as to justify termination of the contract as a whole, provided that the seller deliberately refuses to perform in accordance with an essential contractual term stipulated in favour of the buyer, as long as the contractual term expressly mentioned the essential character of a totally complete performance within a fixed period of time and the aggrieved party had a legitimate interest in stipulating such an essential term. In this context, the purpose of this paper is to put into evidence the possibility of offsetting the different conceptual and normative constraints in return for more efficient remedies for contractual non-performance, such as the unilateral termination of contract and the use of penalty clauses. Both in B2C and B2B contracts, the buyer may also terminate the contract in cases in which the seller or supplier did not perform within the additional time fixed in the notice. The non-performing debtor may be given notice either by written request of performance, either by a judicial action before a court of law, fixing an additional time for performance, according to the nature of the obligation and the particular circumstances. Should the notice not stipulate an additional time for performance, the debtor may complete performance within a reasonable time, from the date on which he had been put on notice.

The term B2C contract or "Business to Consumer contract" describes a contract conlcuded between a professional seller or supplier and a consumer (natural person acting on purposes outside a professional activity), as opposed to the B2B contracts or "Business to Business contracts", which are concluded either by two professionals from the same type of business, either between professionals from different types of economic activities (Chirica, 2008; Popa, 2012).

As a starting point for the discussion, it should be pointed out that there are two different cases in which the partial non-performance of a

divisible obligation is such as to justify termination of the B2C or B2B contract as a whole:

(a) The partial non-performance is regarded as essential by the interested party, rendering the entire contract distorted from what it should have amounted to pursuant to the original contractual agreement of the parties.

In this case, the total completion of the performance within a the period of time fixed by an express contractual term was stipulated as essential for the purpose of the contract and thus a partial performance does not meet the essential requirements stipulated in favour of the buyer. In the hypotheses similar to those mentioned in art. 1417(3) of the Romanian Civil code, the aggrieved party may request that the additional time for the performance of the other party has no effect against its rights, when the debtor deliberately refuses to perform in accordance with an essential contractual term stipulated in favour of the aggrieved party. The buyer may consider that the partial non-performance of a divisible obligation is such as to justify termination of the contract as a whole, provided that: (i) the seller deliberately refuses to perform in accordance with an essential contractual term stipulated in favour of the buyer; (ii) the contractual term expressly mentioned the essential character of a totally complete performance within a fixed period of time; (iii) the aggrieved party has a legitimate interest in stipulating such an essential term.

(b) Termination for minor yet repetitive non-performance. The partial non-performance of a divisible obligation is such as to justify termination of the contract as a whole, in the case of contractual duties implying progressive or continuous performance, when the aggrieved party may seek for total termination of the contract, provided that the minor non-performance has repeatedly occurred.

In the case of successive performance, the creditor has the right to terminate the contract, even if the failure is of little significance, but is part of a series of such failures. Thus, in the case of contractual duties implying progressive or continuous performance, the aggrieved party may seek for total or partial termination of the contract, provided that the minor non-performance has repeatedly occurred. Art. 1551 of the Romanian Civil code holds that the aggrieved party is not allowed to seek for termination of the contract each time that a minor non-performance occurs. Nevertheless, in the case of contractual duties implying progressive performance, the aggrieved party may seek for termination of the contract provided that the minor non-performance

repeatedly occurred. Any contractual term contrary to these provisions shall be non-binding on the party.

This study explores the types of hypotheses in which unilateral termination of the contract by the buyer may occur (i) , as welle as the unilateral termination in cases in which the debtor is considered to be automatically in delay for performance (ii). It also argues that in B2B contracts, the relevant time for establishing conformity is the day of the delivery, same as for B2C contracts (iii). The insight is also centered on the fact that, in Romanian law, an agreement derogating from conformity requirements imposed on the trader is void (struck by absolute nullity) in a B2C contract (iv).

Unilateral termination of the contract by the buyer may occur in three different types of hypotheses: (a) the right to unilateral termination has been provided for by a resolution clause; (b) whenever the debtor is considered by a provision of law to be automatically in delay for performance; (c) when the debtor did not perform within the additional time for performance fixed in the notice.

Art. 1552 of the Romanian Civil code on unilateral termination holds that unilateral termination of a contract occurs by the giving of notice, in the cases in which the right to unilateral termination has been provided for by a resolution clause, or when the debtor is considered by a provision of law to be automatically in delay for performance, or when the debtor did not perform within the additional time for performance fixed in the notice. The notice of unilateral termination shall be given during the period fixed by law for the prescription of the action in the judicial termination of the contract:

(I) Unilateral termination of contract based on contractual terms. Resolution clauses are contractual terms authorising one party to unilaterally put an end to the contract based on the other party's non-performance of contractual duties. Art. 1553 Civil code holds that resolution clauses must expressly indicate the obligations, the non-performance of which will result in the termination of the contract. In these cases, â the termination is subject to the defaulting party being put on formal notice, if it has not been agreed that termination would result from the mere fact of non-performance. The formal notice is only effective if it restates in clear terms the resolution clause.

(II) Cases in which the debtor is considered to be automatically in delay for performance. Art. 1523 Civil code enumerates the cases in which the unilateral termination of the contract as a whole is justified by the fact that the seller is automatically in breach of the additional time

set for performance: (1) whenever the utility of the performance ceased within a certain period of time or the immediate performance was urgently due ; (2) whenever the debtor intentionally made the performance impossible by his actions; (3) whenever the debtor has manifested obvious refuse to perform or when the debtor repeatedly refuses or neglects to perform for an obligation implying repetitive performance; (4) whenever the non-performance concern a duty contracted in the exercise of a business; (5) whenever the obligation was generated by an extra-contractual illicit conduct.

(III) Cases in which the debtor did not perform within the additional time fixed in the notice. The buyer may also terminate the contract in cases in which the seller or supplier did not perform within the additional time fixed in the notice, according to art. 1522 Civil code – the non-performing debtor may be given notice either by written request of performance, either by a judicial action before a court of law. The notice should fix an additional time for performance, according to the nature of the obligation and the particular circumstances. Should the notice not stipulate an additional time for performance, the debtor may complete performance within a reasonable time, from the date on which he had been put on notice.

As stated in art. 1417(3) of the Romanian Civil code, the aggrieved party may request that the additional time for the performance of the other party has no effect against him, when the debtor deliberately refuses to perform in accordance with an essential contractual term stipulated in favour of the aggrieved party. Should this be the case, the contractual term must expressly mention the essential character, as well as the sanction of forfeit of the additional time, and the aggrieved party should have a legitimate interest in stipulating such an essential term.

Additionally, in hypotheses in which the creditor's unjustifiable fault has contributed to the increase of the final losses, the judges may impose a liability disclaimer in favor of the debtor, on the basis of article 1534 of the New Civil Code. Thus the non-performing party is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the damages by taking reasonable steps.

(**IV). Remedies in B2B sales and relevant time for establishing conformity.** In B2B contracts, the relevant time for establishing conformity is the day of the delivery, same as for B2C contracts. A first provision of the Romanian Civil code establishes the rule of the immediate notification of the seller, in the hypotheses of noticeable deficiencies, in which case the buyer has the duty of immediate

examination of the goods at the time of the delivery.

In the case of hidden deficiencies, there is a time of 3 months for real estate or a period of two months in the case of other type of goods, in which the buyer shall inform the seller on the discovered deficiencies. These rules have a non-mandatory character; therefore, the parties may agree on another contractual period applicable to the notification of the seller. As mentioned in art. 1690 of the Romanian Civil code, the buyer has the duty to verify the state of goods immediately after the delivery according to the habitual practices. Should the buyer discover any deficiencies, he shall inform the seller immediately. In lack of the notification, the seller is considered to have complied with the duty of conformity.

On the other hand, art. 1709 of the Romanian Civil code states that the buyer who discovered hidden deficiencies of the good has the duty to inform the seller during a period fixed in the contract or, in lack of a fixed contractual period, during a period of 3 months for real estate or a period of two months in the case of other type of goods. In lack of the notification, from the seller's obligation to cover the damages, the seller's loss due to the lack of notification on the deficiencies, shall be deducted. Should the deficiencies manifest gradually, the period mentioned in paragraph (1) of art. 1709 Civil code is considered to run from the time that the buyer identified the gravity and the extent of the deficiencies. Nevertheless, the seller who has maliciously hidden the deficiencies shall not be protected by the provisions of article 1709 of the Romanian Civil code.

In B2B contracts, the buyer has a duty to immediately verify the conformity of the goods at the time of the delivery, as opposed to B2C contracts, where there is no rule conditioning the consumer's right to invoke the lack of conformity by the examination of goods at the time of the delivery. However, if the seller has maliciously hidden the lack of conformity, he will remain liable nonetheless.

As stated in art 1707 of the Romanian Civil code, the seller warrants the buyer against any hidden defects that make the asset sold improperly according to the use for which it is intended or if the extent of the use is reduced or if the value is affected in such a way that that if the buyer had known about them, he would not have bought or would have paid a smaller price. The deficiency is concealed if at the date of passing the good on it could not be found, without specialized assistance, by a prudent buyer. The guarantee is owed if the defect existed at the time that the good was passed on. Nevertheless, the seller does not guarantee

against deficiencies that the buyer knew of at the time the contract was concluded.

It is worth underlining that, according to art. 1690 of the Romanian Civil code, concerning the conformity of sold goods; these are to be passed on in the state in which they were at the time of concluding the contract. The purchaser shall check the good immediately after acquisition of the property, in accordance with the usages. If after checking, the existence of apparent defects is determined, the buyer must inform the seller about this without delay. In the absence of information, it is considered that the seller has executed his obligation. However, in respect to hidden defects, the provisions of art. 1707-1714 Civil code remain applicable.

One should mention that no specific rules in Romanian law are incident on the burden of proof establishing the lack of conformity at the required moment. There are no presumptions in B2B contracts as those provided for in B2C contracts and which establish who bears the burden of proof of the lack of conformity.

Thus, the buyer must notify the seller on the lack of conformity during a period fixed in the contract or, in lack of a fixed contractual period, during a period of 3 months for real estate or a period of two months in the case of other type of goods. No time limits for the notice are binding on the buyer in the case of deficiencies maliciously hidden by the seller.

As established in art. 1709 of the Romanian Civil code, the buyer who discovered hidden deficiencies of the good has the duty to inform the seller during a period fixed in the contract or, in lack of a fixed contractual period, during a period of 3 months for real estate or a period of two months in the case of other type of goods. In lack of the notification, from the seller's obligation to cover the damages, the seller's loss due to the lack of notification on the deficiencies, shall be deducted. Should the deficiencies manifest gradually, the period mentioned above is considered to run from the time that the buyer identified the gravity and the extent of the deficiencies, except in the case of hidden deficiencies.

It is considered to be unfair a term that has the object or the effect to enable the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract (Popa, 2012). In Romanian law, subparagraph (a) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is

required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

In addition, according to subparagraph (t) of Annex to Law 193/2000 on unfair terms in consumer contracts, it is considered to be unfair a term that has the object or the effect to enable the seller or supplier to terminate a contract of indeterminate duration without ***reasonable notice***. The first part of the Annex f) has a correspondent in the Romanian Annex to Law 193/2000 on unfair terms in consumer contracts, paragraph s), which holds that the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer.

The second part of the provision has an equivalent in Article 1554(1) of the Romanian Civil code, thus being a general provision applicable to contracts in general (including those which are B2B contracts). Article 1554 (1) holds that a contract which has been terminated is considered to have never been concluded. Unless the law provides otherwise, each party has the obligation, in this case, to refund the sums paid by the other party.

According to subparagraph (r) of Annex to Law 193/2000 on unfair terms in consumer contracts, it is considered to be unfair a term that has the object or the effect to permit the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract.

As mentioned in subparagraph (h) of Annex to Law 193/2000 on unfair terms in consumer contracts, it is considered to be unfair a term that has the object or the effect to inappropriately exclude or limit the legal rights of the consumer against the seller or supplier in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, while according to subparagraph (o) of Annex to Law 193/2000 on unfair terms in consumer contracts, it is considered to be unfair a term that has the object or the effect to exclude or limit consumer's option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against the seller.

Concerning the B2C contracts, the provisions of subparagraph h)-j) in Annex to Law 193/2000 on unfair terms hold nullity for unfair character for contractual terms which exclude or limit the liability of the trader for any loss or damage to the consumer caused by the trader's

non-performance; or requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation; or excluding or hindering the consumer's right to unilaterally terminate the contract in cases in which: (1) the seller or the supplier has unilaterally modified the contractual terms; (2) the seller or the supplier has not performed with his contractual duties; (3) the seller or the supplier imposed to the consumer a contractual term binding the consumer to pay a fixed amount in the case of unilateral termination of the contract.

Conclusions. As resulting from art. 8 of Law 449/2003 on the sale of consumer goods and associated guarantees, any lack of conformity resulting from incorrect installation of the consumer goods shall be deemed to be equivalent to lack of conformity of the goods if installation forms part of the contract of sale of the goods and the goods were installed by the seller or under his responsibility. The provisions of paragraph (1) apply equally if the product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions.

The remedies available to the consumer in the case of lack of conformity are as following: (I) repair or replacement of goods; (II) reduction of the price / rescission of the contract. The first remedies are non-litigious (being directly obtained from the seller), while the second ones are litigious (the admission of an action in reduction of the price / rescission being necessary). According to article 11(1) of Law 449/2003 on the sale of consumer goods and associated guarantees, in the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate.

The seller and the consumer may derogate from this rule by agreement, only if the contractual term is more favourable to the consumer than the legal provision (for instance, the seller may agree to automatically offer a refund in cases of lack of conformity, upon consumer’s request, no judicial action in rescission thus being necessary). According to article 22(1) of Law 449/2003 on the sale of consumer goods and associated guarantees, any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which directly or ***indirectly waive or restrict*** the consumer’s rights resulting from this law shall be considered void. Therefore, only derogatory contractual terms which are more favourable to the consumer (not restricting or excluding the rights resulting from the provisions of Law 449/2003) are binding.

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PROTECTION OF THE ECONOMIC VALUE OF AN ENTERPRISE AND THE RESPECT OF CREDITORS' RIGHTS IN RESTRUCTURING

Introduction

On 1 January 2016 a Restructuring Law came into force, which largely changed the legal situation of an insolvent debtor or the one who is endangered by bankruptcy, as well as his creditors. Therefore, it is legitimate to point out in the hereby publication that the new solutions on one hand aim at strengthening the effectiveness of the debtor's restructuring actions, which is supposed to ensure his further functioning, while on the other hand they are to guarantee the proper protection of creditors.

Bankruptcy Law versus Restructuring Law

Till the end of 2015 in the Polish legal system the Bankruptcy and Remedial Law of 28 February 2003 (Journal of Laws 2015, item 233) had been in force. It had been used by the entities in business trading mainly in the field of bankruptcy proceedings which took two forms: of a bankruptcy proceedings with a possibility to conclude an arrangement and the one comprising the liquidation of the debtor's assets. A remedial proceedings had been used in a marginal scope only regarding the entities endangered by insolvency. The legal solutions adopted by this law had been used mainly in order to conduct bankruptcy proceedings, while remedial actions, being often less effective, had ended in bankruptcy. Therefore, there had dominated an opinion among creditors that a declaration of bankruptcy had been connected with an impossibility to regain their claims.

In connection with the postulates of not only economic practitioners, but also judicature, the legislator separated a bankruptcy proceedings from the remedial (restructuring) one by placing relative regulations in two single legal acts: the statute of 15 May 2015 – Restructuring Law (Journal of Laws 2015, item 978) and the statute of 28 February 2003 – Bankruptcy and Remedial Law (Journal of Laws 2015, item 233). Derogating the provisions on the remedial proceedings in the Bankruptcy and Remedial Law (and putting them into the Restructuring law) enforced a necessity to change the statute's title into 'the Bankruptcy Law'. The thorough revision of the law concerned the institutions which did not meet the practice requirements. Among others, there were deleted the provisions which had been the source of occurring uncertainties for the interpretation. Moreover, a part of the provisions were arranged according to the postulates declared by the practitioners which were an effect of their experience to execute bankruptcy and remedial law for ages [1]. In this state of affairs the principle changes of the statute mostly concerned the necessity to ensure the coherence between the restructuring (remedial) and bankruptcy proceedings.

The above solution refers to the legal regulations of the interwar period which were contained in the Order of the President of the Republic of Poland of 24 October 1934 – Law on the Arrangement Proceedings (Journal of Laws 1934, no 93, item 836) and the Order of the President of the Republic of Poland of 24 October 1934 – Bankruptcy Law (Journal of Laws 1934, no 93, item 834).

Referring to the statistical data of the years 2012–2015 relating to the

conducted bankruptcy and remedial proceedings is an important element of the carried discussion (table 5.1).

Table 5.1

The record of business cases in the years 2012–2015

Types of business cases	District courts, cases in the field of bankruptcy and remedial proceedings (in absolute numbers)			
	years			
	2012	2013	2014	2015
	lodging of cases			
	10 615	11 447	10 887	18 781
	decided			
	9 642	10 303	11 199	13 932
	remaining			
	5 036	6 182	5 871	10 720
In the field of the bankruptcy law	4 589	4 806	4 469	10 147*
After declaring bankruptcy	944	963	906	3 096
In the field of remedial proceedings	**39**	**23**	**12**	**20**
On the prohibition of conducting business activity started before the bankruptcy court	1 428	1 553	1 842	1 916
Cases considered according to the provisions on the proceedings	670	674	629	666
On the change and derogation of the arrangement concluded during the bankruptcy and remedial proceedings	109	103	137	133
Complaints considered by the bankruptcy court	946	1 201	1 145	849
Legal remedies considered by a judge-commissioner	1 885	2 122	1 741	1 948
Other registers	5	2	4	3

** 5 616 cases out of it is so-called consumer's bankruptcy*

See: the record of cases in common courts according to the fields of law and instances in the years 2012-2015. The Ministry of Justice, Statistical Information

The analysis of the above statistics of the years 2012-2015 shows that in Poland on the same level there were lodged motions on declaring bankruptcy, in which proceedings on the enterprise liquidation prevailed. Files examination demonstrates unsatisfactory elements of gratifying creditors from bankruptcy estate and a high rate of dismissing of such motions because of the estate indigence. In the last years cases in the field of remedial proceedings show marginal entering.

Table 5.2

Record of business cases in 1st quarters of 2015-2016

Types of business cases	District courts lodging of 4 112 cases in the field of bankruptcy and remedial proceedings (in absolute numbers) 1st quarter 2015	District courts lodging of 5 120 cases in the field of bankruptcy and remedial proceedings (in absolute numbers) 1st quarter 2016
In the field of bankruptcy law	2 252	2 712
After declaring bankruptcy	416	1 064
In the field of remedial proceedings	10	-
On the prohibition of conducting business activity	506	399
Cases considered according to the provisions on the proceedings	124	241
On the change, derogation or stating the fulfilment of the arrangement	33	11
Complaints considered by the bankruptcy court	244	214
Legal remedies considered by a judge-commissioner	523	366
Other registers	2	-
On opening the restructuring proceedings	-	**89**
On approving the arrangement	-	**-**
On opening the accelerated restructuring proceedings	-	**14**
On opening the arrangement proceedings	-	**3**
On opening the reorganizational proceedings	-	**5**
On the change, derogation or stating the fulfilment of the arrangement in the proceedings	-	-
Complaints considered by the restructuring court	-	-
Legal remedies considered by a judge-commissioner	-	-
Complaint on stating invalidity	2	2

See: the record of cases in common courts according to the fields of law and instances in 1st quarters of the years 2015 and 2016. The Ministry of Justice, Statistical Information

Comparing the statistics of cases in 1st quarters of 2015 and 2016 (see table no 2) after 1 January 2016 there were lodged 89 cases on opening restructuring proceedings, 14 cases after starting an accelerated proceedings, 3 cases after opening the arrangement proceedings and 5 ones on opening the reorganizational proceedings. In 1st quarter of 2016 there were more cases (111) on restructuring (remedy) than during the years 2012-2015 (94). Therefore it is legitimate to ask a question whether coming into force of the act the Restructuring Law will cause the increase of the number of motions on starting restructuring proceedings. One may forecast that in 2nd quarter 2016 the number of such motions will increase. 1st quarter 2016 has shown the first interested entrepreneurs, who have used the possibility of undertaking actions leading to the reorganization of their enterprises, and can be examples for others.

The New Legal Frames of Restructuring Enterprises

It is worth to point out in the conducted discourse that restructuring ought to be comprehended as an economic process which has been enclosed into the legal frames. According to art. 1 the Restructuring Law regulates: firstly, concluding an arrangement with creditors by the insolvent or endangered by bankruptcy debtor and its effects; secondly, conducting reorganizational actions. The law determines in detail the restructuring proceedings which enable the entities (1. entrepreneurs as provided by art. 43^1 of the law of 23 April 1964 – Civil Code, consolidated text: Journal of Laws 2014, item 121 with amendments; 2. capital companies not conducting business trade; 3. the partners of commercial personal companies baring responsibility for the company's obligations by their whole estate without any limit and 4. the partners of a professional partnership) to choose the way depending on their economic and financial situation (meeting the criteria) or their needs in order to conclude an arrangement with the creditors.

It is justified to point out that the subject of the restructuring proceedings is 'a restructuring case' which ought to be comprehended as a civil case on the complex solution of the conflict of interests between the debtor and his creditors, as well as between the creditors themselves, which has arisen in connection with the debtor's insolvency or its endanger, in the way unanimously approved by the debtor and the determined majority of the creditors [2].

The restructuring law detects four kinds of proceedings: on approving the arrangement (art. 210–226 of the Restructuring Law), an accelerated arrangement proceedings (art. 227–264 of the Restructuring

Law), an arrangement proceedings (art. 265–282 of the Restructuring Law) and a reorganizational one (art. 283–323 of the Restructuring Law), which are to let the entrepreneurs conduct actions intending to repair the enterprise's economic situation. The depicted above remedial mechanisms will be determined by certain criteria (contentiousness <15%/>15%, protection of the debtor's assets, their management or individual collecting of the votes), which will influence the choice of a particular proceedings in order to enable conducting the restructuring of the debtor's obligations, and moreover, to different extent, also his assets, the way they are managed and the employment [3]. Restructuring proceedings will not only show 'good' business practice, but also point the entities other ways out of the crisis situations.

The Objectives of the Restructuring Proceedings *de Lege Lata*

Here, it is necessary to point the principle objectives which the legislator intends to reach by the Restructuring Law. Firstly, the implemented regulations are supposed to ensure entrepreneurs and their contractors the effective instruments for restructuring along with the simultaneous maximization of the creditors' rights protection. Secondly, the legislator's intention was to guarantee institutional autonomy of the restructuring proceedings in isolation from the stigmatizing bankruptcy proceedings. Thirdly, it was introducing a principle of the bankruptcy proceedings' subsidiary as *ultima ratio* towards the business restructuring fiasco. Fourthly, it was increasing the rights of the active creditors through maximizing the rapidity and effectiveness of restructuring. It is worth underlining, that the adopted regulation is supposed to enable exercising the policy of 'a new chance', i.e. ensuring a possibility of a 'new start' to those entrepreneurs, in case of whom their business enterprise fiasco is an effect of an unfavourable change of the economic facilities[4].

The Principles of a Restructuring Proceedings

It ought to be noticed that the above-mentioned aims satisfy the needs of not only entrepreneurs, but also their creditors. Effective restructuring proceedings should be conducted quickly and effectively (the principle of the proceedings' rapidity), enable both debtors and creditors to use certain means in order to protect their interests (the principle of the equality of the proceedings' participants), moreover guaranteeing the openness of considering cases before the courts (the principle of publicity).

Deciding on restructuring cases is entrusted to the commercial courts of the district courts (art. 15 point 1 of the Restructuring Law). Moreover, the public nature of the proceedings is particularly guaranteed by the obligation to announce all the decisions in the Central Restructuring and Bankruptcy Register – CRBR). According to art. 5 point 2 the Register will serve to: 1) place and announce the orders, rulings, documents and information connected with the restructuring and bankruptcy proceedings; 2) provide the data contained in the orders, rulings, documents and information connected with the restructuring and bankruptcy proceedings, announced in the Register regarding a certain entity; 3) enable lodging pleadings and documents, as well as exercising deliveries; 4) assist work organization and conducting restructuring and bankruptcy proceedings; 5) provide the patterns of the pleadings and documents determined by the law. The Register will be conducted in the IT system, administrated and made available by the Minister of Justice, who will determine its organization in his order. The planned term of providing the Register is 1 January 2018, which is to enable its designing, testing and implementing. Such a notice comes to the mind here, that the legislator eloquently exposes the principle of rapidity and effectiveness of the proceedings, which may be reached, among others, through efficiently acting CRBR still being under construction. Till that time the announcements are made either by the Court and Commercial Monitor or the relative orders, rulings and documents are laid out in the courts' secretaries.

It seems that exercising the above principles ought to effectively protect the participants of the restructuring proceedings, but their efficiency is still expected to come, while the conclusions will be possible to be made after a certain period of time of the Restructuring Law provisions' functioning. It is important that the restructuring regulations should be exercised rationally. The picture of this process will undoubtedly be seen on the grounds of the judicature, which on one hand will disclose the effectiveness of the new normative solutions, while on the other hand will point out interpretation directives.

In this place it is worth to notice, that taking into account the needs of practitioners, the entrepreneurs will be able to implement the remedial proceedings on the stage of insolvency endanger with the help of a restructuring advisor (the advisor who is obliged to possess the license for exercising his functions according to the Law of 15 June 2007 on the License of the Restructuring Advisor – consolidated text: the Journal of Laws of 2014, item 7760). According to art. 24 point 1 of

the Restructuring Law a restructuring advisor will exercise the function of a supervisor or manager of the arrangement, or of a court supervisor, depending on the chosen restructuring proceedings.

An Alternative to Restructuring

When the restructuring proceedings does not reach the intended goal or when the court refuses starting a procedure provided by the law, a bankruptcy proceedings against the debtor ought to be opened according to the rules determined by the Bankruptcy Law. According to its art. 2 the bankruptcy proceedings ought to be conducted so, that the creditors' claims could be satisfied to the largest extent (a vindicating function), and if the rational factors allow also so, that the hitherto debtor's enterprise could remain. This provision is a general clause in which interpretation directives for the remaining provisions of the Bankruptcy Law are included. Besides the vindicating function, the Bankruptcy Law is to also exercise a prophylactic one, which means that the provisions of the law are supposed to guarantee a quick start of a bankruptcy proceedings, as well as an educating function so, that it is to form a picture of a 'reliable' entity among entrepreneurs[5].

Conclusion

The statutes Restructuring Law and Bankruptcy Law undoubtedly create a canon of the legal acts being the basics of the Polish economy functioning. The main aim of the Restructuring Law for an entrepreneur is his enterprise's remedy, its debt relief and, first and foremost, restoring his ability to compete on the market. The possibilities provided by the Bankruptcy Law ought to be treated by entities as an extremity[6]. Through the provisions of these laws the legislator wishes to enable the reorganization of the entities which may be saved, and eliminate unprofitable subjects from the market. The time will show how the practice of the judicature will be shaped, as well as what problems all the entities participating in the restructuring proceedings (debtor, restructuring advisor, creditor, his proxies and the courts) will have to manage. In the legal state being in force the change of the debtors' way of thinking about restructuring and bankruptcy, as well as their wish to adapt to the new legal solutions are necessary.

The presented discourse evidently proves that the restructuring law ought to be seen as an entrepreneur's ally. As a result, many authors assume that the restructuring law is supposed to support entrepreneurs who have found themselves in a 'temporary' crisis situation. However, it

is underlined in the doctrine, that the legal solutions cannot let insolvent entrepreneurs be removed from the turnover by way of an informal liquidation. On one hand, such a situation would be disadvantageous for the creditors, on the other however, it would be endanger for the turnover safety. In this context one should consider a possibility to conclude an arrangement with the creditors, which will enable the improvement of the enterprise's condition and give definitely better results than those which are connected with a bankruptcy proceedings.

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THE ACCOUNTING POLICY OF THE ENTERPRISE ENTITY: A LEGAL ASPECT

Topicality. The organization of the entity's work and the accounting process begins with the formation of the accounting policy. Formation of the accounting policy presupposes the selection of methodological techniques, procedures and ways of organizing accounting records maintenance out of a set of the approved normative legal acts according to the characteristics of the specific entity's activities. Thoroughly elaborated accounting policies provide the effective financial and economic activity of a relevant entity and the maximum effect of the accounting records maintenance. The formation of complete, accurate, truthful information that would effectively disclose the data about the entity's activities for concerned users should serve as the basis for making decisions regarding the accounting policy.

Analysis of recent publications and determination of unsolved problems. Various issues of accounting policy have been addressed in the research of many home economists including: M.O. Bliakharchuk (2012), F.F. Butynets (2001, 2005, 2006), O.M. Haniaylo (2008), Ya.V. Oliynyk (1999), S.M. Mishchenko (2004), V.A. Shpak (2009) Yu.B. Slobodianyk (2010), etc. However, there remain many unexplored or insufficiently studied issues form the legal viewpoint, that need attention in the context of elaborating suggestions for the further improvement of accounting and / or economic legislation.

The aim of the article is to suggest the definitions for the concepts "organization of the entity's accountancy" and "the entity's accounting policies" with the purpose of their economic and legal regulation, as well as to determine and disclose a range of problems which need to be solved through the improvement of the applicable accounting and/or economic legislation.

Presentation of the basic material. The concept of "accounting policy" has been introduced into contemporary economic and legal science, and domestic agricultural practice together with the adoption of the law "On Accounting and Financial Reporting in Ukraine" (16.07.1999), a set of National Provisions (Standards) of accounting (NP(S)A). It is a key notion in the system of IFRS, which is predetermined by the very idea of standardizing accounting and reporting. According to NP(S)A 1 "General Requirements to Financial Reporting" (p.3, ch. I), accounting policies are a set of principles, methods and procedures used by the enterprise for the preparation and presentation of financial statements (General Requirements to Financial Statements, 07.02.2013). According to IFRS 8 "Accounting Policies, Changes in Accounting Estimates and Errors", accounting policies are the specific principles, bases, conventions, rules and practices applied by an entity in preparing and presenting financial information (1.01.2012). To avoid ambiguity in developing and covering the main provisions of accounting policies, the Ministry of Finance of Ukraine (hereinafter - MFU) issued the Letter "On accounting policies" (of 21.12.2005), which stipulates that the establishment of accounting policies lies within the competence of the owner (owners) of the enterprise, the institutional body authorized to manage state property and state corporate rights. It is expedient to reflect the evaluation methods, accounting and procedures, in respect of which the legal framework provides more than one option and the list of questions regarding the methods of evaluation, which should be elucidated in the document on accounting policies; the changes in accounting policies are possible (On Accounting Policy, 21.12. 2005). Accounting policies are applied taking into consideration the consistency principle that assumes constant (year by year) application of the adopted stable accounting policies. Changes in accounting policies may occur in the following cases: changes in the company charter; changes in the demands of the body that performs the functions of government regulation of the methodology of accounting and financial reporting; if the change in accounting policy results in a more accurate and reliable reflection of economic transactions in accounting and financial reporting.

The concept of "accounting policies" is the subject of heated debate. There is no unanimous approach to the definition of the term among scholars. Thus, one group of authors interpret accounting policies as a set of accounting methods selected by the business entity (Kanayeva, 2004: 9-10; Otenko, 2002: 190). The second group of scholars

understand accounting policies as the principles and rules of accounting in a certain economic organization (Shara, 2004: 10; Verbylo, 2004: 9; Voynarenko, 2002: 16). The third group consider accounting policies to be a totality of forms and methods of bookkeeping by the business entity (Kocherha, 2004: 182-184; Shepitko, 2003: 11). One of the most profound definition of accounting policies has been elaborated by S. Svirko (2003: 26) who considers the notion to be a set of accounting principles, methods, procedures and measures to ensure quality, continuous flow of information from the stage of initial observation to the stage of its synthesis, i.e. reporting.

The organization of accounting policies formation consists in choosing currently applicable methods suitable under specific conditions which are selected out of the totality of all methods. Selected methods of accounting records maintenance must ensure the accounting process which results in a complete and reliable picture of the financial status of the entity. The methods of accounting records maintenance include: methods of grouping and evaluating facts of economic activity; reimbursement of the cost of deprecated property; organization of the document flow and inventory check, etc. Accounting policies are not just a set of accounting methods selected according to the conditions of management, but the choice of accounting methodology enabling to use different options of reporting facts of economic life in the account (depending on the set goals). Therefore, accounting policies are defined in the broadest sense as the organization of managing accountancy, and in the narrow sense they are understood as a set of methods of accounting (Butynets, 2006: 51). O.M. Petruk (2006: 18-19) notes that accounting policy is a manifestation of a mixed approach to accounting, which nowadays gains considerable popularity and presupposes the combination of the centralized regulation (by state or professional organizations) with its own rules of organizing accounting process, based on the industry sector affiliation, features of the enterprise. S.M. Mishchenko (2004: 19) suggests subdividing accounting policies into: state, sectoral and accounting policies of the business entity. In addition to state and intra-company accounting policies, F.F. Butynets (2006: 42) also singles out the multinational policy. Ya.V. Oliynyk (2013: 124-129) believes that accounting policies can be represented as a triangle "interstate - nationwide - local (business entity) policies". M.O. Blyakharchuk (2012: 37-41) subdivides them into the following levels: international, national, sectoral, entity's.

Thus, the effective and rational organization of accounting begins

with the formation of the entity's accounting policy. The entity's economic activity and profitability depends directly on accounting policies, since the choice of method and form of accounting ensures optimization of costs and, as a consequence, affects the effectiveness of economic activities. The establishment of accounting policies is conducted in several stages: 1) identification of problems regarding the usage of the objects of accounting, in relation to which the accounting policies should be elaborated (since each entity performs business activities with its specific set of objects of accounting, it is necessary to establish the subject of accounting policies); 2) identification, analysis, evaluation and ranging of factors influencing the choice of the principles, procedures and methods of accounting, as well as financial reporting (depending on the composition of accounting objects, specific conditions, phenomena and processes are determined which directly affect the development of accounting policies); 3) identification of possible principles, techniques and methods of accounting (selection of those that are potentially usable by the business entity); 4) selection of principles, techniques and methods of accounting and financial reporting, which correspond to the activity conditions of the entity and meet the requirements of the users of accounting information; 5) design of the accounting policies selected in accordance with the formal requirements.

General requirements that are put forward to the accounting policy of the entity include: a) the accounting policy should be uniform for a business entity, it presupposes the mandatory application of the selected methods, techniques, of bookkeeping by all structural divisions, including those that were allocated on the independent balance sheet, regardless of the type of the performed activities and their location (it is necessary to ensure comparability and information consolidation); b) the same principles, methods and techniques of accounting must be applied in respect of analogous business processes; c) the application of accounting policies should be consistent (the technique of business transactions presentation, evaluation of assets and liabilities during the year, as well as from one reporting period to another, as a rule, remains unchangeable).

The company's director and chief accountant are responsible for the accounting policy. They must approve its key provisions for the new fiscal year to the end of December of the current year (Part 2 of Art. 8 of the Law "On Accounting and Financial Reporting in Ukraine"). It is expedient to form the accounting policy by newly established

enterprises prior to their registration, since starting with the date of registration, they are required to keep accounting (Part 1 of Article 8). Forming its accounting policy, the enterprise should choose such principles, methods and accounting procedures that allow to reliably display the enterprise's property status, its economic activity and to ensure comparability of financial statements. Therefore, in the process of developing accounting policies, it is necessary to take into account the requirements for quality characteristics of accounting and financial reporting, the principles of preparing statements enunciated in Ch.III. Of NP(S)A 1 "General Requirements to Financial Reporting", approved by the MFU on 07/02/2013 p., as well as in Guidelines on accounting policies approved by the MFU's decree (06.27.2013).

The documentary registration of the entity's accounting policy is implemented in the form of the decree on the accounting policy (it acquires the status of the local legal act on its approval). It represents the main internal document regulating the organization of the entity's accounting process and is mandatory for all departments, employees of the enterprise. The legislation does not determine the number of decrees (one or two) serving as the basis for the formation of accounting policies, organization of the entity's accounting. Therefore, large business entities can issue two separate decrees, one of which establishes principles of formation of accounting policies and the other - the procedure of accounting. The necessity to issue a decree is predetermined by two factors: the normal activity of the company is impossible without the regulation of its inner life, one aspect of which is accounting; the impact of accounting policy on the results of the entity's activities is so significant that it requires the general manager's decision (Pylypenko, 2005: 133).

There is no consensus on the structure of the decree on accounting policy in home scientific literature as well as in the practice of management. Some authors believe that the decree on accounting policies should include two sections: "Accounting policies of the enterprise" and "Organization of accounting in the enterprise (Volynets, 2004: 22; Zahorodniy, 2004: 136), while other scholars suggest to include three sections: "Organization of the work of the accounting department", "The methods of accounting", "Organizational and technical aspects of accounting" (Pushkar, 2004: 35; Butynets, 2005: 33; Butynets, 2001: 11). However, M. Shchyrba (2010: 382) notes that the allocation of the provision "Organization of the work of the accounting department" into a separate section is inexpedient since the issues

reflected in it relate only to the organizational aspect. The author suggests the following structure of the decree: "General provisions (or preamble)", "Accounting methodology", "Accounting techniques" and "Organization of accounting". G. Andruschenko (2008: 11-14) believes that it is necessary to single out the following components of the decree: methodological (contains provisions regulating the methodology of accounting), methodical (consisting of accounting methods that describe the procedure of displaying financial and business transactions in the accounting system and accounts for the disclosure of the accounting objects in accounting statements) and organizational (describes organization of accounting and answers the question about its operation). In contrast, according to Yu.B. Slobodianyk, O.Yu. Khomenko (2010: 16), it is rational to regulate the issue of accounting in another internal regulatory document (provision on accounting organization), singling out its three structural parts: general, organizational and methodological provisions.

Two groups of problems, immediately arising while implementing accounting policies, have been singled out in scientific literature: (1) the problem arising in the process of selecting principles, techniques and methods of accounting out of the existing regulatory basis; (2) the problem related to the absence or unclear wording of instructions on accounting reflection and reporting of certain business transactions in the regulatory basis (Korobko, 2003: 12). Since the effective formation of accounting policy presupposes the knowledge of current legislation as well as the ability to use it creatively, the major problems that occur during the formation of the entity's accounting policies are considered as follows: the current accounting and tax legislation serving as the basis for the principles, techniques and methods of accounting, used by the entity, is imperfect in many respects; there exists a risk factor in the formation of accounting policies by managers and accountants since decisions are made under the influence of the subjective judgment; the lack of the knowledge of the users of financial information on the new accounting methods requires additional justification of evidence regarding the appropriate usage of accounting principles and methods; the impossibility to address issues that are not directly within the entity's competence and are not regulated by the normative acts through the mechanism of formation of the entity's accounting policies (Haniaylo, 2008: 14). A.M. Bondarenko, M.P. Bilan (2001) note that the formation of entity's accounting policy has a number of problems arising at the very beginning of the work on the formation of accounting policies,

namely, in determining the top-priority directions in accounting development. As the matter of fact, the questions that arise in the process of developing and implementing accounting policies are to some extent related to the normative basis: a) due to the limited normative base, since the current accounting and tax legislation that defines the principles, methods and techniques of accounting is imperfect, narrowly directed that does not allow to solve many issues by means of accounting policies; b) the current normative base does not contain recommendations on accounting and reporting of certain business transactions – the decisions taken by the entity do not have the objective foundation, not all issues can be resolved by using accounting policies since they are not included in a range of its assignments (such situations may include: issues of commercial classified information, changes in accounting estimates, disclosure of accounting policy provisions in financial statements, etc.). Instead, accounting policy is intended to be a tool that ensures effective data connection between the entity and the users of reporting. Its careful processing and disclosure in the notes to the financial statements together with the accounting estimates ensures the implementation of quality characteristics of clarity and comparability, and partly – of its completeness.

There exist certain ambiguity in the relationship between the entity's accounting policy and accounting organization. According to Art. 8 of the Law "On Accounting and Financial Reporting in Ukraine" (16.07.1999), the organization of accounting in the enterprise presupposes determining its accounting policies. Most scientists adhere to this approach to accounting. However, there is the contrary approach presupposing the inclusion of elements of accounting into the accounting policy. This approach is supported by such scholars as: F.F. Butynets (2001, 2005, 2006), N.M. Maliuha (2001), etc. By contrast, V.A. Shpak (2009: 204) is convinced that there is no controversy about understanding accounting policies as a part of accounting at the enterprise level. At this level, accounting is understood as a tool for implementing the state accounting policy, therefore, the accounting policy as accounting and management mechanism includes a clearly defined organizational aspect which gives the impression that accounting as well as its regulation is subordinate to accounting policies, which, according to the author, is not entirely correct, since somewhat different concepts are compared. The relationship of bookkeeping and accounting policies can be represented as follows: since the accounting policy provides organizational preconditions (security) for accounting, it

means that it is the subject of accounting, on the other hand, the variability (alternativeness) of accounting organization allows its reference to the objects of accounting policies. This relationship is explained by the economic nature of the concept of "accounting policies" which contains both accounting and management aspects (Shpak, 2009: 204-205). In any case, we believe that accounting policies are to a greater extent a component of accounting, and therefore of accounting organization, rather than vice versa. Accounting policies of the business entity is the object of accounting organization and the decree on accounting policies is the method of accounting organization.

Conclusions. For the purposes of economic and legal regulation, ***the entity's accounting organization*** *can be defined as a system of rules established by acts of economic legislation (including local legal acts), which ensures the collection, processing, use, analysis and storage of accounting information for the purpose of internal operational control of the appropriate use of the entity's property, providing external users with clear and reliable financial reporting.* ***Accounting policies of the entity*** *are defined as a determined and modeled on the local and legal level set of principles, methods, and procedures used by the entity to perform the current accounting, preparation and presentation of financial statements to the extent permitted by applicable law.*

The formation of accounting policies consists in the fact that out of the totality of ways to implement accounting methods, the entity choses those that are acceptable at currently in particular economic conditions. The chosen methods of accounting must provide the accounting process, resulting in the formation of complete and reliable information on financial status of the entity. *The main purpose of accounting policies* is to ensure obtaining reliable information (about the entity's financial status, results of transactions) necessary for the users of financial statements with the aim of making appropriate decisions. A positive aspect of the formation of accounting policy consists in the fact that, providing a certain method of accounting business transaction is not legally regulated, the entity may develop its own version of accounting and reflect it in its accounting policy. In the case when regulations on accounting do not take into account the specifics of the entity and do not accurately reflect a particular transaction, the entity does not have to apply the accounting rules established by law, but must disclose and justify the facts of deviations from the accounting rules first in its accounting policies and then in the explanatory note to the financial statements.

The range of issues to be solved by improving the current accounting and / or economic legislation includes:

- Ukraine does not have a single legal act which would regulate the content of accounting policies, the procedure for its registration, approval and amendment. The only specialized document on the organization of accounting policy until recently was the MFU's Letter "On accounting policy" issued on 21.12.2005, however, it does not contain any serious methodological guidelines as well as clear recommendations, except for the general provisions and the incomplete list of elements of accounting policies for the standards applicable at the time of publication of the above-mentioned letter. The MFU's Letter "Concerning accounting policies" issued on 14.05.2012 has not solved the existing problems, but only clarified the concept of an accounting estimate, which may be reviewed in case of changed circumstances serving as the basis of these estimates, or acquired additional information, as well as clarified the concept of changes in accounting policies and changes in accounting estimates. The only normative accounting document, which contains the reference to accounting estimates and reveals the mechanism of their change is NP(S)A 6 "Error corrections and changes in the financial statements", approved by the MFU's decree on 28/05/1999, however, it does not contain examples of such estimates, which impairs its practical significance (Slobodianyk, 2010: 15). As a result of this ambiguity, the content of accounting policies (under the condition that the approach to their development is not formal) in practice includes a number of organizational issues, becoming to a greater extent a provision on the organization of accounting in addition to covering the totality of principles, methods and procedures actually used for the preparation and presentation of financial statements;
- the basic definition of the "accounting policies" is presented in the Law "On Accounting and Financial Reporting in Ukraine" which runs as follows: "a set of principles, methods and procedures used by the enterprise for the preparation and presentation of financial statements", however, no normative document specifies the constituents of accounting policies that are meant by the legislator. No act of the applicable legislation (except for NP(S)A 1 "General requirements to Financial Reporting", approved by the MFU on 02/07/2013 p., containing evaluation principles of the reporting articles employed to disclose accounting policies) specifies the nature of these principles, methods and procedures of accounting policies. Accordingly, each

business entity establishes its own policies at its discretion. In this case, the very wording is incorrect, since the word "totality" - the total number, the amount of something – does not disclose the relationship and subordination between components of accounting policies but presents them as equivalent. In reality, there is a clear hierarchy of the relationship of principles, methods and procedures, since the principles are observed by employing the methods and implementing the procedures. Therefore, it is expedient to substitute the word "totality" by the word "system" accentuating the relationship of the principles within it - in the Law "On Accounting and Financial Reporting in Ukraine", and detailing of compliance with the relevant procedures - in 1 "General requirements to financial reporting", approved by the MFU on 07/02/2013 p., with the concurrent correcting of its name, which is extrovertive, since it lacks the term "accounting". That is why, even the formulation of these principles according to these normative legal acts allows the eclectic mix of them with the methods, and the latter – with the procedures (Khomyn, 2007: 260);

- there appeared the need to adopt a separate legal act NP(S)A "Accounting Policies". Standardization of the approach to the definition, adoption and disclosure of accounting policies for enterprises and organizations regulates and organizes bookkeeping, without limiting the entities in their selection of means, methods and forms of accounting stipulated by the current legislation. The activity of any of the economic entities requires adherence to the principle of effectiveness or efficiency (rationality) of accounting. This NP(S)A must state that the accounting policies of the enterprise should provide efficient bookkeeping. This means that expenses for accounting should not be too high compared to the benefits. The adoption of this normative document will enable to systematize all issues concerning accounting policies, significantly reduce the time spent on its formation which would facilitate the clear organization of accounting at enterprises;
- as per requirement of clarity, accounting policies and their changes should be disclosed in the explanatory notes by describing the evaluation principles of reporting articles and the methods of accounting, and this definition is applicable to only certain provisions of practical accounting policies, the rest is not the subject to disclosure, being the information undesirable for disclosure or a trade secret;
- most economic entities treat accounting policies as a necessary document but do not consider them as an essential tool to provide the accounting process. The most common errors made in the process of

their compilation are: lack of reference in the text to the current legislation that would allow to monitor changes in legal acts and accordingly make changes and adjustments in accounting policies; accounting policies are mostly an absolutely "typical" document which does not take into account the specifics of the entity and includes only a list of accounts and subaccounts used in bookkeeping; the amendments to the accounting policies are not properly legalized; the alternative elements of separate taxes, fees and obligatory payments are not defined; the elements of accounting policies are formed without the proper assessment of the tax consequences for the respective subject of taxation, etc. This document is mostly superficially organized, without taking into account the individual characteristics of the entity. There does not exist the decree template on the accounting policy since its content and formation procedure are not regulated by any normative document;

- the interconnection and interdependence of bookkeeping accounting (financial, internal (management)) and tax accounting are not taken into consideration in the process of the accounting policy formation. Despite existing differences, the financial accounting policy and accounting policy for tax purposes are the two sides of a single accounting process of the entity, based on common principles. It is possible to single out the contemporary accounting policy of the entity as a set of principles, methods and procedures for conducting bookkeeping and tax accounting. The essence of this approach, the application of the principle of unity of accounting policies is explained as follows: both bookkeeping and tax accounting are organized according to practically the same source documents; objects of both bookkeeping and tax accounting are: assets, capital, liabilities and business transactions. Complete division of accounting policies into separate independent parts - bookkeeping and tax, is impossible on the one hand, and inappropriate on the other hand, therefore, accounting policies for tax purposes should be an integral part of the general accounting policies of the entity;
- there exists some ambiguity in the relationship between the entity's accounting policy and organization of accounting.

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NON-COMPETITION AGREEMENTS IN THE POLISH LEGAL SYSTEM AS A WAY OF SAFEGUARDING THE INTERESTS OF EMPLOYERS

Entrepreneurs worldwide, irrespective of the geographical latitude of their actual base of operations, face similar dilemmas concerning the creation of conditions for efficient functioning and further development of their business. One of the most vital areas that have an impact on long term success of a business in its economic market is undoubtedly wise risk management related to employment. The employer's interest is exposed to a plethora of threats, which can be, to a varying extent, controlled by the implemented adequate mechanisms and legal tools.

One of the major threats to the employer interests is the risk of starting up competitive businesses by their employees. Such risk surely exists regardless of the country in which the business is located. However, the possibilities of legal management of this risk, depending

on the applicable law system, certainly do vary. Polish employers most often sign non-competition clauses with their employees, which besides the general norm stating the freedom of contracts, are also based on the clear regulation of the Polish Labour Code (Polish Civil Code, Articles 101^1-101^4). In accordance with Polish legislation, these clauses can bind the employee during employment and when the employment has ended, which is regulated separately in the generally applicable law (different conditions for the application, different principles of liability, different degree of freedom in contract formation, etc.). In view of limitations in publishing and the fact that the threat of employee's competition for the employer's interests significantly increases with the moment of employment termination, the subject of further considerations will only include contracts that are fully realised only after the employment termination (known in Poland as competition clauses).

In accordance with the Polish Labour Code (hereinafter referred to as PLC), within the limits specified in a separate contract, an employee must not conduct any activity competitive with the activities of the employer and must not work, on the basis of an employment contract or on another basis for an entity conducting such activity (PLC, Article 101^1 § 1). In this case, competitive activity should be understood as any activity of a former employee that objectively could adversely affect the employer's interests, in particular an activity consisting in provision of the same product or a substitute thereof, with the same or similar utility, offered to customers of the same expectations and living in the same geographical area (S. Płażek and A. Sobczyk, Zakaz działalności konkurencyjnej według Kodeksu pracy, Kwartalnik Prawa Prywatnego 1997, No. 1, p. 120), regardless of whether the activity in question is the core or a side activity, actually conducted or potentially possible to conduct, independent or co-dependent, charged or free of charge, direct (a contract) or indirect (actual and non-contractual business). Therefore, such activity can include conducting a competitive business on the employee's own behalf or through a third party, providing advice for entities that are competitive to the employer, participation in a competitive partnership or capital company as a partner or a shareholder (assuming that the employee holds a large stake of shares that guarantees genuine influence on the company's operations), or even unofficial working for any entity that is competitive to the employer (more about the understanding of competitive activity on the grounds of discussed regulations in Polish literature, see e.g.: W. Masewicz, Zakaz działalności konkurencyjnej wobec pracodawcy, Warszawa 1996, p. 60

ff.; K. Roszewska, Ograniczenia w swobodzie konkurencji na podstawie umów Kodeksu pracy – part 1, Monitor Prawa Pracy 2006, No. 2, p. 69; P. Nachmann, Pojęcie i rodzaje klauzul konkurencyjnych, Praca i Zabezpieczenie Społeczne 1997, No. 1, p. 21; J. Stencel, Zakaz konkurencji w prawie pracy, Warszawa 2001, p. 185; J. Czerniak-Swędzioł, Pracowniczy obowiązek ochrony interesów gospodarczych pracodawcy, Warszawa 2007, p. 135; M. Zieleniecki, Zakaz konkurencji w projekcie kodeksu pracy, Praca i Zabezpieczenie Społeczne 1995, No. 1, p. 14; R. Tazbir, Ochrona interesów pracodawcy przed działalnością konkurencyjną pracownika, Kraków 1999, p. 26; K. Walczak, [in:] Kodeks pracy. Komentarz, Ed. *W. Muszalski*, Warszawa 2009, p. 419).

Agreement prohibiting competitive activities in the above sense, if it is to be implemented only after the termination of employment, can be under Polish law concluded only with the employee who has access to information especially important for the employer, the disclosure of which could expose the employer to damage (Article 101^2 § 1 PLC). Such attaching conditions are reasonable and reflect the fact that the unquestioned rule of labour law, besides legally grounded even in the Polish Constitution, is freedom of work and freedom of business activity. However, the agreement discussed here undoubtedly limits the possibility of earning to a former employee, regardless of the legal structure in which competitive activity is to be conducted. Assessment of whether the employee is in contact with the information referred to above shall be primarily made by the employer who, after the conclusion of non-competition clause cannot effectively claim that the employee did not have access to such information (a judgement of Polish Supreme Court of 16 May 2001, file ref. I PKN 402/00, Orzecznictwo Sądu Najwyższego. Izba Pracy i Ubezpieczeń Społecznych 2003, No. 5, item 122 and of 18 April 2007, I PK 361/06, Monitor Prawa Pracy 2007, No. 7, p. 371).

A non-competition agreement after employment termination must be made in writing under pain of invalidity (Article 101^3 PLC) and must contain at least a provision forbidding carrying out of the competitive activity and also the duration of such prohibition is effective. Precise indication of the scope of prohibited activities is undoubtedly in the interest of both parties, and the duration of this contract is necessary to determine entitlement to compensation for the employee under the provisions of PLC. Such compensation for the employee should be obligatory due to the fact that, after the contract conclusion he/she has the limited earning opportunities on the labour and the economic

market. It should be noted, however, that the duration of non-competition after termination of employment should not be too long (cf. R. Tazbir, *op. cit.*, p. 45), while in accordance with Article 101^2 § 3 PLC a compensation for an employee may not be lower than 25% of the remuneration received by that employee before termination of employment for a period equal to the period of the prohibition of competition. The latter regulation may, however, raise doubts regarding the method of determining the amount of compensation payable to the employee. This is because it does not specify how to do that, what enables the adoption of one of at least three solutions. The first is to determine compensation in the amount of 25% of the total remuneration received by an employee in the period of employment (so, inter alia K. Roszewska, Klauzula konkurencyjna w kodeksie pracy po ustaniu stosunku pracy, Praca i Zabezpieczenie Społeczne 1999, No. 3, p. 25, same in the Supreme Court decision of 31 March 2001, file ref. I PKN 315/00, Orzecznictwo Sądu Najwyższego. Zbiór Urzędowy. Izba Administracyjna, Pracy i Ubezpieczeń Społecznych 2002, No. 24, item 596). It seems, however, that this method leads to a significant detriment of employees whose employment, compared to the duration of the competition clause, took a very short time. The second solution is based on a calculation of the average monthly salary received by the employee in a period of employment and then dividing that sum by four and multiplying it by the number of months of the competition clause effectiveness (so, inter alia K. Walczak, Zasady ustalania wysokości odszkodowania za ograniczenie prowadzenia działalności konkurencyjnej po zakończeniu stosunku pracy, Problemy Zarządzania. Zeszyt specjalny 2007 Wydział Zarządzania Uniwersytetu Warszawskiego; such a view was also shared by the Supreme Court in its judgment of 8 January 2008, file ref. I PK 161/07, Orzecznictwo Sądu Najwyższego. Izba Pracy i Ubezpieczeń Społecznych 2009, No. 3-4, item 42). The third method is based on determining compensation by adopting a fictitious assumption that the employee throughout the period representing the difference between the duration of the employment contract and the time of the competition clause received the same salary as in the last month of work (J. Stencel, *op. cit.*, p. 311).

Regardless of the method adopted for determining the amount of compensation for the employee it is worth noting that in any case it can be paid not only once, but also in instalments (monthly, quarterly, semi-annually, etc.). Besides, this second method should be considered much more favourable for employer. Because in the case if for example the

employee died after termination of employment, it also a basis to pay him compensation would be eliminated. If, however, he received it in advance in the full amount, the money would be included the estate and its recovery would be much more complicated.

At this point it is also worth mentioning that in accordance with Article 101^2 § 2 PLC the non-competition clause established by a contract ceases to apply before the deadline for which the contract was concluded, in the event of cessation of the reasons justifying such a prohibition, or failure of the employer to comply with the obligation to pay compensation. The employer does not comply with the abovementioned obligation not only when it does not pay compensation due to the employee at all, but also when it does so untimely or lowers the amount of the amount due, although not entirely clear is how large the negligence has to be, that the employee recognised that non-competition clause ceases to apply to him. In turn, the reasons for the termination of non-competition clause will usually involve the cessation of the employer's conduct of the particular type of business or making public the contractually protected information or procedures.

A serious problem is also the fact whether in the event of the abovementioned circumstances the non-competition clause alone ceases to apply, as suggested by the wording of previously cited provision, or if also any obligations arising from competition clause expire, in particular the obligation of the employer to pay compensation. The latter solution is supported by the fact that the competition ban is set primarily in the interest of the employer, and if the interest is no longer in danger, a *causa* falls for which the contract was concluded (so, inter alia S. Płażek, A. Sobczyk, *op. cit.*, p. 134). Moreover, in case of the occurrence of the abovementioned circumstances, there is a situation in which the performance by the employee as one of the mutual performances, became impossible to accomplish, in result of what, according to the proponents of the view the Article 495 of the Polish Civil Code (hereinafter PCC) will apply, pursuant to which if one of mutual performances has become impossible due to circumstances for which neither party is liable, the party was to make that performance cannot demand the mutual performance, and if received it already, it is obliged to return it in accordance with the provisions on unjustified enrichment (§ 1), and if the performance by one of the parties became impossible only partially, that party loses the right to the appropriate part of the mutual performance (§ 2) (so, inter alia M. Świątkowski, Kodeks pracy. Komentarz, Warszawa 2010, p. 520 ff. Similar approach

to the matter is presented also by Z. Salwa, Skutki ustania przyczyn zakazu konkurencji po ustaniu stosunku pracy, Praca i Zabezpieczenie społeczne 2001, No. 1, p. 22 ff.). Nevertheless, Polish Supreme Court does not agree with such arguments (see inter alia a judgement of 14 May 1998, file ref. I PKN 121/98, Orzecznictwo Sądu Najwyższego. Zbiór Urzędowy. Izba Administracyjna, Pracy i Ubezpieczeń Społecznych 1999, No. 10, item 342; of 17 November 1999, file ref. I PKN 358/99, Orzecznictwo Sądu Najwyższego. Zbiór Urzędowy. Izba Administracyjna, Pracy i Ubezpieczeń Społecznych 2001, No. 7, item 217; of 28 March 2002, file ref. I PKN 6/02, Orzecznictwo Sądu Najwyższego. Zbiór Urzędowy. Izba Administracyjna, Pracy i Ubezpieczeń Społecznych 2002, No. 15, item 84; of 5 February 2002, file ref. I PKN 873/00, Orzecznictwo Sądu Najwyższego. Zbiór Urzędowy. Izba Administracyjna, Pracy i Ubezpieczeń Społecznych 2002, No. 22, item 9), as well as a large group of authors who prefer a concept based, however, on the literal wording of the regulation discussed here (see J. Iwulski, Kodeks pracy. Komentarz, Warszawa 1999, p. 331; G. Wierczyński, Koniec obowiązywania klauzuli konkurencyjnej lub zawartego w niej zakazu konkurencji – artykuł dyskusyjny, Praca i Zabezpieczenie Społeczne 2001, No. 9, p. 33 ff.; K. Jaśkowski [in:] Kodeks pracy. Komentarz. Vol. I, Ed. K. Jaśkowski, Warszawa 2009, p. 388).

Very important, though controversial issue is the problem of legal nature of the non-competition agreement after termination of employment, which affects among other things the scope of freedom of the parties in shaping the content of this agreement, as well as the principles of liability of the parties in the event of failure to observe its provisions. Two concepts essentially come into the picture (cf. still M. Lewandowicz-Machnikowska, Klauzula konkurencyjna w Kodeksie pracy, Kraków 2004, p. 64). The first, that this agreement has a labour law nature and complements the content of the existing employment relationship between the parties (this concept seems to dominate in Poland – see e.g. R. Tazbir, *op. cit.*, pp. 22-23; T. Kuczyński, Klauzule autonomiczne prawa pracy związane z działalnością podmiotów gospodarczych w warunkach rynkowych, Przegląd Ustawodawstwa Gospodarczego 1994, No. 5, p. 13; P. Milczarek, Dopuszczalność zawierania klauzul autonomicznych chroniących przez zakazaną konkurencją, Biuletyn Rzecznika Praw Obywatelskich 1995, No. 27, p. 138). The second, that it is of a civil law nature and does not modify the content of the employment relationship, but creates a separate from it

relationship under civil law (so S. Płażek, A. Sobczyk, *op. cit.*, pp. 137-138). It seems that the second concept should be considered right, although its proponents are now in the minority. Despite this fact a non-competition clause shows the vast majority the characteristics typical for the civil law contracts, as it relates to the duties of the former employee and former employer, which are implemented only after the termination of employment, and the liability of the employee by virtue of their proper execution, as well as the limitation periods of claims under the contract are regulated by the provisions of PCC. Added to this is the fact that the arguments against that stance, such as submitting of disputes arising from it to the jurisdiction of the labour courts or the fact it is signer even during the existence of an employment relationship, and its essence and content is subject to the provisions of the Labour Code, are not strong enough (more on this subject I wrote in a monograph titled Weksel między stronami stosunku pracy, Warszawa 2015, pp. 213-218). Besides, the existing ambiguity of stances in this field is also indicated by inconsistent judicial decisions (cf. e.g. the judgment of the Supreme Court of 26 February 2003, file ref. I PK 16/02, Orzecznictwo Sądu Najwyższego. Izba Pracy i Ubezpieczeń Społecznych 2004, No. 14, item 239; of 2 November 2003, file ref. I PK 453/02, Orzecznictwo Sądu Najwyższego. Izba Pracy i Ubezpieczeń Społecznych 2004, No. 19, item 331; of 19 May 2004, file ref. I PK 534/03, Orzecznictwo Sądu Najwyższego. Izba Pracy i Ubezpieczeń Społecznych 2005, No. 5, item 63; of 23 September 2004, file ref. I PK 501/03, Orzecznictwo Sądu Najwyższego. Izba Pracy i Ubezpieczeń Społecznych 2005, No. 4, item 56).

In Polish literature and case law there is a consensus that a breach by a former employee of the provisions of the non-competition clause gives rise to his liability under the provisions of the PCC, and not under the protective provisions of labour law (see e.g. A. Kasimowicz-Auer, Skutki naruszenia klauzuli konkurencyjnej, Monitor Prawniczy 2001, No. 11, p. 585). Therefore, the liability of former employee for breach of non-competition clause and limitation periods for the related claims is shaped, or can be shaped in particular by the Articles 118, 361-363, 471-473, 477, 480, § 2 and 3 PCC.

According to the provisions of the Polish Civil Code, the debtor is liable for damages if in the result of non-performance or improper performance of his obligation he caused damage to the creditor (Article 471 PCC), including, in principle, both the losses incurred by the former employer (*damnum emergens*), as well as benefits, which could be

achieved, had the damage not occurred (*lucrum cessans*), and between the damage and the wrongful conduct of the debtor the adequate causal link arose (Article 361 § 1 PCC). Failure or improper performance of an obligation consists primarily in the non-observance by the debtor of due diligence (Article 472 PCC), i.e. diligence generally required in the relationships of a given kind (Article 355 PCC). Faulty implementation of obligation in the case of a non-competition clause occurs primarily when the former employee takes up a contractually prohibited competitive activity or starts providing work for the entity conducting such activity.

In addition to the abovementioned conditions of the liability in Polish civilistic literature there is assumed that also the debtor's fault is necessary (Z. Radwański, A. Olejniczak, Zobowiązania – część ogólna, Warszawa 2006, p. 311), which in this case is presumed. Because in accordance with the final portion of Article 471 PCC, the debtor may be released from liability if he proves that the failure or improper performance of his obligation is the result of circumstances for which he is not responsible. In addition, in accordance with Article 362 PCC, if the injured person contributed to the emergence or increase of the damage, the duty to remedy it is appropriately reduced according to the circumstances, and especially to the degree of the fault of both parties.

At this point it is also worth noting that an employer can further protect its interests in the non-competition agreement after termination of employment by including the clause on contractual penalty in it (so, inter alia R. Skowron, Kara umowna we współczesnych stosunkach pracy, Praca i Zabezpieczenie Społeczne 2007, No. 10, *passim*; A. Kamińska, Pracownicza odpowiedzialność materialna a kara umowna, [in:] Jedność w różnorodności. Studia z zakresu prawa pracy, zabezpieczenia społecznego i polityki społecznej. Księga pamiątkowa dedykowana Profesorowi Wojciechowi Muszalskiemu, Ed. A. Patulski and K. Walczak, Warszawa 2009, pp. 116-117; cf. also a judgement of the Supreme Court of 8 November 2012, file ref. II PK 103/12, Monitor Prawa Pracy 2013, No. 3). Contractual penalty, according to Article 483 PCC, may be reserved in the event of non-performance or improper performance of non-pecuniary obligation (and this is the withholding by the employee of conduct that would violate the prohibition of competition), and the employer is entitled to it in principle regardless of the extent of the loss suffered (Article 484 § 1 PCC).

Some controversy is raised, however, by the employers' possibility to secure their claims arising from the non-competition agreement after

termination of employment with a bill of exchange, in particular having the form of a blank promissory note. *De lege lata* it seems that more arguments currently speak for admissibility of such practices (widely on the subject M. Rylski, *op. cit.*, pp. 221-234), hence it should be assumed that with a bill of exchange it is possible to secure at least three types of employer's claims. Firstly, the claims for compensation for damage suffered by the employing entity as a result of non-performance or improper performance by the employee the obligation under the non-competition clause. Secondly, the claims for repayment of suspension compensation unlawfully collected by the employee when such compensation was paid to the employee in advance, for the entire duration of the prohibition of competition, and the employee before the expiry of the contract has ceased to fulfil its provisions. Thirdly, the claims for payment of contractual penalty for breach by an employee of the provisions of the non-competition clause, unless of course the penalty is reserved in the contract.

The conducted in this paper analysis of the provisions of Polish legal system shows that Polish legislature has not only recognized the problem of the threat for the interests of employers from employees taking up competitive activity, but also has created extensive possibilities and legal tools to minimize the risk of such situations as much as possible. The most common way to do this is a non-competition contract, and in particular one that binds the employee after termination of employment. Of course, even if such a contract has not been signed by the employee, still to some extent he is bound by non-competition requirement resulting from generally applicable law (Article 101^4 PLC). Among such regulations is above all the Act of 16 April 1993 on Suppression of Unfair Competition, which covers with protection e.g. the employers' company secret. Nevertheless, to ensure the long-term development of their business, the employers should also apply in relations with employees the non-competition agreements, and even use the additional collateral, such as a contractual penalty or a blank promissory note.

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Chapter 6

ADMINISTRATIVE LAW AND PROCESS, FINANCIAL, BANKING, TAX, TRADE, INFORMATION LAW

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TAX OPTIMIZATION - A LEGALLY WAY TO REDUCE THE FISCAL IMPACT IN FIRMS ACTIVITY

Introduction

Tax optimization involves the identification of methods or techniques that companies, as taxpayers, can enforce tax legislation in the sense most favourable to their own interests, respectively in order to reduce tax costs related to the operations or transactions performed. The effect of tax optimization methods must be to reduce or streamline the tax burden of companies, i.e. to pay as few taxes to the state budget, but in conditions of respecting the law.

According to Assidi and Omri (2014), tax optimization could improve the information quality within the firm and the firm's value should increase with the practice of tax optimization [1]. Also, tax optimization consists in minimizing mainly the income tax in order to maximize the result after taxes [2].

Tax optimization interest managers to reduce tax burden and maximise level of profits [3]. Assidi et al. (2016) define tax optimization in terms of legal activity such as minimizing the taxable base for investment and financing [4].

Tax optimisation is linked by tax planning that means tax optimization based on economic, economical calculations, what is a combination of the different taxpaying obligations and the profitability that gives the enterprise the most favourable result according to the given conditions [5].

Thus, the purpose of tax optimization for the company is to benefit from existing tax incentives and favourable provisions of the legislation, which generates, legally, mitigating the impact of tax.

To achieve tax optimization is necessary a deep understanding of firm activities and transactions, of mechanisms and its limitations, and in this context, finding those routes offered by both the national tax law, as well as the international one, leading to a reduction in financial impact that taxes can have on that business.

In addition to decreasing the amount of taxes, the tax optimization may have the effect of postponing their maturity, during which companies can reduce or properly manage their impact on cash flow.

Tax optimization should not be applied only at a certain time. It is a continuous process, since only thus can provide a concrete advantage in terms of competitiveness by reducing the impact of taxes on cash flows and redirect this cash-flow to investment in fixed assets and / or current assets, development of operating activities, repayment of loans contracted etc.

Regarding fiscal optimization, not only the paid value of taxes is important, but also the competitiveness of the tax, that is the choice of those tax solutions suitable for customers or other third parties directly involved.

There are numerous practical tax optimization methods and techniques, some of them being summarized in the next sections, but regardless of the measures implemented, tax optimization involves the following steps:

- operational analysis of firm activity;
- finding suitable tax incentives for this type of activity, at national and international levels;
- finding those trade routes so that tax incentives can be applied;
- implementation of tax optimization measures.

The main taxes among which firms may choose to optimize the fiscal vector are: tax on salary income and similar income and related social contributions; corporation income tax and micro enterprises income tax; value added tax etc.

1. The tax on wages and on incomes assimilated to salaries

According to the Romanian Tax Code [6] from 1 January 2016, companies can register social expenses, in the limit of up to 5%, applied on the value of expenses with staff salaries. These social expenses can be used to: providing gifts during the holidays, holiday vouchers or gift vouchers instead of premiums or bonuses. They are exempt from

compulsory social security contributions.

Thus, gifts in cash and in kind provided by employers to employees, those offered for the benefit of minor children, including gift vouchers, at Easter, June 1st, Christmas and similar holidays of other religions and cash gifts and in kind offered to employees with the occasion of March 8th are not included in the monthly calculation basis of wages income tax to the extent that their value on each person, at every opportunity mentioned above, does not exceed 150 RON (about 33 euro).

Also, the maximum amount that may be granted to employees in the form of holiday vouchers represents the equivalent of six minimum gross salaries guaranteed in payment for an employee during a fiscal year. For these holiday vouchers is payable the wages income tax, but they are exempted from paying social contributions.

Until 30 April 2016, the minimum gross salary guaranteed in payment was 1,050 RON (about 233 euro)/ month, but from 1st May 2016, this is 1,250 RON (about 278 euro)/ month. Moreover, the corresponding amounts of holiday vouchers granted by the employer are deductible for calculation the wages income tax, within the limit of six minimum gross salaries guaranteed in payment for each employee in a calendar year. An important aspect to note is that the employee that benefit from holiday vouchers don't receive premium holiday during the fiscal year.

Same for gift vouchers is payable the wage income tax, but they are exempted from paying social contributions.

2. Corporate income tax and revenue tax of microenterprises

In the case of corporate income tax and the revenue tax of microenterprises can be exploited the following tax incentives offered by the Romanian Fiscal Code [6]:

a) tax benefits of depreciation

1. The possibility of choice of tax depreciation period for fixed assets

Firms may have the opportunity to apply two depreciation methods: the tax depreciation used to calculate the corporate income tax and which is established by law, and the accounting depreciation that will be used for calculating the net result of the company and which is established by the company management.

The functioning duration in terms of tax is determined using the catalogue for the classification and normal operational periods of fixed assets [7]. Firms can choose the period of fiscal depreciation of fixed assets according to the range specified by the Ministry of Finance, in the rules related to the classification and normal operational periods of fixed

assets.

If a firm chooses the minimum depreciation period, it will record a higher monthly depreciation expense, which will lead to a lower taxable income and therefore to paying a lower tax.

For example, we consider that a company has purchased a fixed asset amounting to 50,000 euro for which, the functioning duration mentioned in the catalogue is between 5 and 8 years. The company may choose to depreciate linear the equipment over a period ranging in this interval. If the company choose the minimum period of 5 years, the annual depreciation is 10,000 euro, and if the company choose the maximum period of 8 years, the annual depreciation is 6,250 euro. By amortization on minimum period, the company reduces its annual profit tax with 1,600 euro, while by amortization on maximum period the company reduces its annual profit tax with 1.000 euro. So, tax savings related to fiscal depreciation is greater in the first case, in the first 5 years, than in the second case. Overall, the company deduce the same amount for depreciation in determining taxable income (the value of fixed asset acquisition), but in the first case, we can say that the company has deferred the payment of corporate income tax.

2. The possibility of choice of tax depreciation method for equipments

Firms can use three depreciation methods: accelerated, degressive and linear method, according to Law no. 15/1994 [8]. If the company holds equipments or industrial installations, it may use accelerated depreciation. This type of depreciation allows the company to depreciate in the first year up to 50% of the asset value, according to Fiscal Code [6], which means a substantial reduction in corporation income tax in this first year.

If in the above example would have opted for accelerated depreciation, then the depreciation in the first year would reduce profit tax with 4,000 euro, and in the next 7 years with 571.43 euro annually.

Thus, the profit tax impact on cash flow will be lower in the first year of equipment depreciation, the benefit being that diminishes the income tax payable by the company in the year when financial pressure is higher as a result of the investment.

But, in connection with the method of depreciation, Order no. 3055/2009 [9] makes some clarifications [10]:

- the depreciation method used should reflect how an asset's future economic benefits expected to be consumed by the company;
- depreciation method applies a consistent manner for all assets of

the same nature and having identical terms of use, depending on the accounting policy adopted;

- depreciation method can be changed only when it is caused by an error in the estimation of the consumption of that tangible asset.

b) providing sponsorships for income tax reduction

According to art. 25, para. 4, lit. i) of the Romanian Fiscal Code [6], companies can record expenses of sponsorship and / or patronage and expenditure for private scholarships, granted by law.

Taxpayers who make sponsorships and / or patronage, according to the Law no. 32/1994 [11], regarding sponsorships, as amended and supplemented, and the Law of libraries no. 334/2002, republished [12], as amended and supplemented, and those granting private scholarships under the law, may decrease the corresponding amounts of income tax payable at the minimum value of the following:

1. the amount calculated by applying 0.5% to the turnover; for situations in which applicable accounting regulations do not define the turnover indicator, this limit shall be determined according to the rules of the Fiscal Code;

2. the value of 20% of the corporate income tax payable.

The amounts that are not deducted from the profit tax, according to these provisions, are reported in the following 7 years. The recovery of these amounts will be in the order of their registration, under the same conditions, at every payment term of corporate tax.

c) the use of facility reinvested profit by purchasing of computers, software, equipments, etc.

According to art. 22 of the Fiscal Code [6], the profit invested in technological equipments, computers and peripheral equipments, machines and cash registers, of control and billing, as well as in software produced and / or purchased (including under financial leasing contracts) and put in service, used for business purposes is tax exempt. Tangible assets for which is applied the tax exemption shall be those stipulated in subgroup 2.1, respectively in the class 2.2.9 of the catalogue for the classification and normal operational periods of fixed assets [7].

Taxpayers who benefit from these provisions have the obligation to keep these assets in the patrimony at least a period equal to half of the duration of economic use, established by the applicable accounting regulations, but no longer than 5 years. Failure to observe this condition, for respective amounts is recalculated profit tax and is levied accessories tax receivables according to the Fiscal Procedure Code [13], from the

date of application facility, according to law. In this case, the taxpayer is required to submit corrective fiscal declaration.

d) the option to pay corporate income tax or revenue tax for microenterprises

For microenterprises, in order to achieve tax optimization of firm, for establishing the option for corporate income tax or revenue tax on microenterprises, the company must compare the trade margins or value added that is estimated with trade margins or value added "barrier" for which corporate income tax equals revenue tax on microenterprises.

If the firm practices a trade margin or get a added value lower than trade margins or value added "barrier", then to cut costs the firm will opt for taxation of profit, otherwise, if the company wants practicing of a trade margin or get added value higher than trade margins or value added "barrier" than, for optimizing fiscal cost will choose revenue tax on microenterprises.

e) the option to prepay the corporate income tax, when the firms profit is increasing from year to year

According to art. 41, para. 2 of the Romanian Tax Code [6], firms can opt for calculation, declaration and payment of profit tax annually, with prepayments made quarterly. The date by which the annual tax payment is made is the deadline for submission of the declaration on corporation tax. Tax benefits can be obtained only if the company estimates that the profit will grow from year to year. Thus, the company will pay a less profit tax during the year, and the difference of liquidity can support the development of the company. This method is basically a deferment of payment of most part of the profit tax for next year. The method further includes other benefits for firms such as: predictability of payments related to corporate income tax and the ease of calculation for the corporation tax.

3. Value added tax

In the case of value added tax can be identified the following tax incentives offered by the Romanian Fiscal Code [6]:

a) the option to be or not registered as payer of value added tax

The option to be or not registered as payer of value added tax (VAT) is exercised not only to reduce the tax cost, but also to maintain a competitiveness similar to our competitors and avoid cost increases. Such entities that have end customers, mainly people who are not registered for value added tax, in the tax vector will choose not to be registered for value added tax, instead, entities whose customers are entities that are registered for the value added tax will opt to be

registered for value added tax.

The option to be non-payer is exercised if end customers are not registered for value added tax and do not benefit of tax deduction mechanisms.

b) the option to apply VAT collection system compared to the standard VAT regime

According to art. 282, para. 3 of the Romanian Fiscal Code [6], the taxable persons who chooses to apply VAT collection system, and which are eligible for VAT collection system, VAT chargeability occurs on the date of cashing all or a part of the value of the supplied goods or services, which offers to provider an advantage by the absence of VAT payment obligation before the collection of trade receivables.

c) creation of a tax group in terms of value added tax, which helps to optimize VAT payments

Legally independent firms that: are closely linked in terms of financial, economic and organizational issue; the share capital is held in the proportion of 50% minimum by the same shareholders; and are assigned to the same taxation authority may opt to be treated as a single tax group, and may constitute a single tax group in terms of VAT, according to art. 269, para. 9 of the Fiscal Code [6].

The tax group helps the group of companies in which some companies registered VAT for payment, and others registered VAT recoverable.

d) the use of pro-forma invoices, for supplies of goods or services that require several stages of execution, in order to pay VAT only upon receipt of invoice

The services which determines successive settlements or payments such as construction-assembly services, consultancy, research, expertise and other similar services are considered made on the date they are issued statements of work, work reports, and other similar documents on which are established services performed, as appropriate, depending on the terms of the contract, the date of their acceptance by the beneficiaries, according to art. 281, para. 7 of the Fiscal Code [6]. Thus, the supplier may issue pro-forma invoices, so the company will record incomes and will pay VAT only upon receipt of invoice.

e) delivery of goods under consignment regime, in case of constant deliveries of goods to certain customers, helping to optimize VAT payments

In the case of companies that consistently deliver the goods to certain customers, these can choose their delivery under consignment regime,

according to art. 320, para. 5-7 of the Fiscal Code [6]. In the case of goods delivered under consignment regime, there is the obligation of billing when the goods are taken from the administration of custody by the customer. This way the seller will pay VAT only when takes place lifting of goods from the consignment regime.

In addition to the above, domestic companies can benefit from the following tax incentives related to taxes: deductions applicable for expenses with employees training; facilities related to research and development or additional deduction of 50% of eligible expenditure in research and development; facilities related to the exemption from local taxes and income tax (i.e. - tax exempt of income earned by IT staff); customs facilities (certificates that makes possible postponement of chargeback in customs, VAT exemption from customs if the import is followed by an intra-Community supply, etc.). Related to VAT exemption, there are many companies that struggle with application of the exemption, especially in chain transactions [14].

From a practical standpoint, the following activities have the effect of tax optimization:

- sale of non-performing loans by specialized vehicles when is estimated that the chances of recovery are small in relation to efforts;
- dividing compared with the contractual transfer of a business;
- intra-group financing in euro versus the national currency financing;
- the agreements of double taxation avoidance;
- establishing a company in an offshore or onshore jurisdiction with a favourable tax climate.

4. Conclusions

Companies that apply for tax optimization methods may face some risks:

- arbitrary interpretation of the tax inspectors on those activities of firms that lead to reducing the fiscal impact;
- sometimes, unclear Romanian tax legislation may induce a risk on firms using tax optimization methods, meaning that the tax authorities may interpret the law differently, and those actions may fall on tax evasion.

But we must not forget that as long as the levers used are legal, accurate and economically and commercially substantiated, these risks disappear, companies can support their operations / transactions in front of tax authorities.

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GLOBAL ADMINISTRATIVE LAW – A VOICE IN THE DISCUSSION

Globalization of administrative law means harmonization of dogmas, organizational structures and activities. A kind of amalgamation in the sphere of information, action and control is developed between the participants of administration [1]. In the literature the attention is paid to the fact that nowadays there exists a sufficient amount of global and transnational administration, with the help of which it is possible to identify a complex 'administrative space', a concept covering not only states by its subject range, but also economic entities or NGO-s [2].

One of the fundamental terms appearing in the discourse over the global administrative law is 'an administrative space'. In the subject literature one can find two competing hypotheses which relate to constituting administrative space. On one hand it is a global convergence hypotheses, but on the other hand it is an institutional robustness one [3]. The first one is based on the Anglo-Saxon concept of New Public Management (NPM), which is a paradigmatic deviation from the classical public management and assumes, that administrative convergence does not only have a European scope but also a global one[4]. The supporters of the new public management underline that this concept is not a fading fashion, but a necessary change, which means a progress on the way of public administration development. Moreover, this change is perceived as an element of passing from government to governance or governance without government, which is supposed to follow both in particular states and organization [5]. However, the institutional robustness hypothesis grows from the assumption that both convergence hypotheses overestimate the range and rate of administrative convergence, for both in Europe and in other parts of the world different models of public administration will exist for a certain period of time [6].

Competence of the pictured above hypotheses makes ask a question about the range and facilitation of administrative convergence. A possibility of the most advanced convergence is pointed by the old and evoked from time to time idea, according to which there is one best way

of organizing public administration. Their exponents may be found both among administration theorists and practitioners, who search and propose universal organization solutions, which thanks to their effectiveness are to spread all over the world, independently from the national context. Naturally, this hypothesis also has its definite opponents. The supporters of the so-called situational approach think that an administration structure is determined by the following variables: aims, values, strategies and processes. If they are right, no universal public administration unification is possible, at least in any predictable time.

It is ought to be noticed that convergence (global or regional) can occur either because of the attraction of a certain model solution, or through its enforcement. Convergence through attraction means learning and voluntary following administrative solutions perceived to be the best, either on the global scale or in the European context [7].

The problems pointed out above are a subject of a wide debate being presently conducted in the legal and economical literature. In the carried discussion two questions have been paid attention to. Firstly, how to make global management more adjusted to the common interests of the world community, more responsible and sensitive towards the common values, which according to traditions and national solutions public authorities are usually in charge of. Secondly, the global governance phenomenon has been paid attention to, in the context of which vivid discussions over the disappearance of the borders between the national and supranational legal systems are being conducted [8].

The consequences of the progressing globalization, dealing not only with the problems of public health protection, but also the law itself, can be found, among others, in the direct influence of the non-state regulations on the legal and factual situation of an individual. As it is underlined in the subject literature, it has influenced the forming, next to the classically comprehended *ius gentium*, of the global administrative law, seen as either a new field of law being constituted on the borderline of the international and national law, or as a new way of perceiving the relations between these legal systems, with the particular consideration of the regulations and norms created by international organizations [9].

In the literature such statements can be found, that the global administrative law theory grows from two observations. Firstly, in the present globalizing world (global administrative space) not only the range and catalogue of the legislative forms have been expanded, but also the circle of specialized public, private and public-private entities,

which possess the features of administrative subjects and participate in the decision-making processes important for states and individuals. The reasons of such state of affairs ought to be looked for in the necessity of facing the consequences of the growing role of global interdependencies in such fields, as: public health protection, including anti-epidemic actions, public security and environment protection. The pointed out problems are managed to be solved efficiently with the help of regulative and administrative means undertaken independently by particular states in a less and less range. As a result, creating transnational regulative systems and models of regulative cooperation, by using the form of international treaties and other formalized nets of international collaboration, appear to become necessary [10].

This leads to transferring the competences of creating law in the abovementioned areas from the national level to the global one. Moreover, the detailed determination of the new regulations and principles of their implementation presently belongs to transnational administrative authorities.

The theorists of the global administrative law differentiate five types of global institutional administrative solutions. Besides the administration exercised by formal international organizations, such administration types belong here, as: administration performed by the informal transnational nets of the officials of national regulators; administration executed by national regulators within the frames of treaty, net or other cooperation regimes; administration in the frames of hybrid public law arrangements and, at last, administration by purely private entities equipped with the regulative functions.

The second reason supporting the theory of the global administrative law is even more important and connected with the mechanisms which shape the responsibility of global administrative bodies. Generally, the national legal requirements put on public entities do not refer to them, because either they are the subjects of the international law (which does not comprise the rules identical to the national law ones, putting on the public entities the demands of responsibility, rationality, proper process, clarity, non-discrimination), or though they are the national law subjects, they still belong to the international nets, which legal functioning cannot be subjected to the national law.

In the literature the so-called holistic opinions are also presented. Their supporters think that the global administrative law refers to the concept of the international administration and international administrative law, which were formed since the middle of 19th century

and popularized in the 1920-s and 1930-s. The leading representatives of such an approach were: B. Kingsbury, N. Krisch and R.B. Stewart. It is interesting to notice, that the starting point of these conceptions were the establishments made by the social reformers and creators of the legal institutions at the end of 19th century, including L. von Stein. This distinguished German scientist, honourably called 'the farther of the administration science', pointed out that the idea on transnational governance is subjected to the principles characteristic for administrative law, for instance in the scope of the actions undertaken for the benefit of the international public health.

Here, it is worth noticing, that the global administrative law theory corresponds to the concept of P. Négulesco, who treated the international administrative law as a 'field of public law, which, estimating the legal phenomena co-creating international administration, strives for finding and determining the norms managing it and their systematizing' [11].

The global administrative law joins the principles and procedures, which are helpful in assuring the global administration responsibility and particularly concentrates on administration structures, clarity and a possibility to participate in the administrative procedure. That is why the general goal of the global administrative law in the presented approach comes down to guaranteeing submissiveness of the global subjects to the proper procedures and controlling mechanisms. However, the global administrative law theory does not refer to the problem of what the global subjects ought to do, what objectives they should realize or what values they should serve. A possible contribution of the global administrative law theory into the identification of global public goods may be restricted to the improvement of the legislative procedures serving to determine the ways of achieving the goals of the global administrative subjects.

An interesting point of view may be come across in the literature, that the global administrative law was originated from the change of a paradigm implemented by Gaius and modified for the needs of the international law by E. de Vettel, which is seen in the division of law into the fields relating to persons, objects and complaints (*personae*, *res*, *actiones*) [12]. Nowadays, it is pointed to the necessity to adapt a new paradigm based on the following triad: global human community, global issues instead of the object and global rule of law in the place of the subjects. A so-called 'cosmopolitan constitutionalism' is to assist in its creation. This paradigm would allow to construct a global legal system

(*ordo iuris universalis*) based on the principle of the rule of law and integrating the legal systems existing in the world [13].

Although the critics of this conception construct their arguments basing on its phantasmagoria, it allows however to seize the changes occurring in the contemporary international community and international law. More and more non-state creatures exercise administrative functions in international relations (e.g. international organizations, both governmental and non-governmental), creating legal regulations (which is exemplified by the International Health Provisions) and issuing the decisions addressed to individuals. The international community itself is also changing, although the horizontal system of relations between the sovereign states still remains the basic determinant [14].

Here, it is worth referring to an opinion of B. Kingsbury, N. Krisch and R.B. Stewart, who underlined that the researchers and creators of the global administrative law did their best in order their effort to be treated as the work over the normative drafts, not only as conducting doctrinal arguments being an attempt to classify the already existing concepts, or as using practical technical solutions in well defined and accepted problems, which follow from the regulative global administration.

One of the questions appearing in the literature is a debate on the functions of the global administrative law. A starting point of some works is determining that it ought to perform the same functions as administration on the transnational or international level [15]. Another opinion, that the constructions proper for the global administrative law, formulated in the theory, often meet numerous obstacles in practice, is also popular. Two principle reasons of such state of affairs can be distinguished. Firstly, one can have doubts, whether presently the international community accepts using democratic standards as the foundation of the common global administration to the adequate extent. Secondly, the model of the national administrative law is constructed on the grounds of a special institutional structure, which is based on a centrally situated in the democratic system legislative authority, as well as the law created by it. A similar system of the representative global administration is presently forced by some researchers, however, more often it is considered to be unreal and even carrying endangers.

Some authors point out the danger of the lack of independent judicial supervising authorities on the global level, which activity is of fundamental significance for the system of public administration control

in democratic states. Therefore, one ought to agree with the postulate formulated in the science, that the global administrative law will have to be based on absolutely different foundations. Among the announced proposals, two of them deserve attention. According to one, the global administrative law will have to democratize the process of international law creation so, that assuring the legalism of administrative activities would influence the level of democratic responsibility. The other one assumes, however, creating an administrative proceedings, which will be able to individually cope with the load connected with the democratic character of the system [16]. It ought to be underlined, that both solutions will face the same problem, i.e. a clear respond to the questions connected with the global space theory.

In this state of affairs there seem to be adequate numerously presented opinions, that the goal of the global administrative law ought not to be striving for the democratic global administration in the first place, but focusing on other objectives justifying its existence. Such aims are ranked among them in the literature, as: protection of the rights, creating considerable and effective responsibility mechanisms in order to control the power overuse and protection of the values connected with the rule of law. According to the presented conception, focusing on achieving more restricted, though still significant objectives, will be a more effective solution. While a question, whether it is possible to perform and really desired, belongs to the basic problems of the discourse over the shape of the global administrative law.

Analysing the literature discussing the ways of constructing the global administrative law delivers many interesting examples. From the perspective of the hereby reflections two conceptions are particularly essential. The first one is based on the assumption to implement the institutions and solutions developed in the national administrative law into the global administration. This method is grounded on the principle 'from the bottom to the top'. The opposite conception of constructing the mechanisms of the global administrative law refers to the principle 'from the top to the bottom'. Here appears a question, whether any conception of the global administrative law development is able to reasonably start itself from the assumptions originated in the frames of the legal control of administration in the internal context, and if the answer is positive, to what extent.

Considering the problem of creating the global administrative law, one ought to reflect whether the transposition of the tools and conceptions elaborated on the grounds of the national administrative law

can be useful for the global governance. This question is fully justified, especially if such factors, as: the distinctness of the global administration structures, a relative informality of many institutions, a multi-layer character or, at last, the role which private subjects play in it, will be taken into account.

It is worth to point out one more essential question here. As it is underlined in the literature, despite all the evolutional changes which took place in the last decades [17], the national administrative law is still created around the core of ordering and controlling administration, with the administrative power belonging to it [18]. While in the global administration such kind of a root does not usually exist: the global administration, with some exceptions, mainly consists of administrative authorities (empowered with the right to issue recommendations, not binding rules) and a net of regulative or international agreements on cooperation with informal decision-making procedures.

The further controversies deal with the way of capturing a cooperative character of the governing structures on the global level, which are of a multi-layer nature, as it has already been signalized. In case of such complex structures there appears a problem connected with the difficulties in the precise establishment of responsibility. The decisions in such situations will often be attributed to internal, external and international subjects simultaneously. There is a right reason for that, because usually these subjects have to co-act. Under certain accounts, this problem reflects similar difficulties within the European Union, which may also remain unsolved.

At the end of these deliberations, it should be underlined that the literature presents opinions, that on the grounds of the global administrative law the concept of law is often comprehended in the spirit of realism, not legal positivism. This apprehension enables to also cover the norms, which formally do not connect the addressees, but *de facto* direct their actions. The sources of the global administrative law also consist of the instruments of soft law, which in spite of their 'soft' character do not deprive them of their effectiveness. Here, it is worth paying attention to the fact, that an administrative character of the activities performed within the global administrative law possesses certain features differentiating it from the similar functioning on the national law level. One of them is self-regulating, caused by the fact that the subjects, being the norm addressees, are often their authors as well.

In the conclusion of the above deliberations it ought to be pointed out, that conducting public affairs in the international sphere demands

complex connections of two and more levels of governance to a wider and wider extent, while allocation of the roles between the different levels of public activities is not obvious because of this reason. It leads, among others, to the situation, when identification and delivering public goods on the international area is never a duty of exceptionally one institution on one level, but always comprise several institutional levels of a complex connection. Therefore, using the global administrative law as a legal order regulating the process of global administration, defined as governance, not government, which attribute is not monopolizing activities of public subjects, is an interesting proposition [19].

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Chapter 7

CRIMINAL TRIAL, CRIMINALISTICS, OPERATIVE-SEARCH ACTIVITY, SHIP EXAMINATION, SHIP AND LAW ENFORCEMENT AGENCIES

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PROVISIONAL SEIZURE AND ATTACHMENT OF PROPERTY IN CRIMINAL PROCEEDINGS IN CONTEXT OF PROTECTION OF BUSINESS ENTITIES' INTERESTS

In criminal proceedings, the rights and legitimate interests of business entities may be restricted during conducting of investigative (conductive) activities (inspections, searches, investigative experiments) and other procedural actions. However, the most serious limitations occur during application of measures to ensure criminal proceedings related to property rights and the interests of business entities, namely, the provisional seizure of property and attachment of property. That is why it's important to have clear understanding and make correct evaluation of the grounds and procedure to apply the measures to prevent unlawful infringement of the principle of inviolability of the ownership right in criminal proceedings.

According to Article 167 of the Criminal Procedure Code of Ukraine (hereinafter – the CPC), the provisional seizure of property is the actual deprivation of the suspect's or the person's possibility to possess, use, and dispose certain property referred to in the second part of this article, till the issue of attachment or return of property is decided. Provisionally seized property may be in the form of objects, documents, money, etc., and it may be seized if there is sufficient grounds for the belief that such property: 1) has been found, fabricated, adapted, or used as means or instruments of the commission of criminal offence and/or preserved signs of it; 2) has been intended (used) to induce a person him to the commission of a criminal violation, financing and/or providing material

support to or as a reward for its commission; 3) has been an object of a criminal violation related inter alia to its illegal circulation; 4) has been gained as a result of commission of a criminal violation and/or is proceeds of such as well as any property to which they have been converted in full or in part (Article 167 of the CPC).

Code of Criminal Procedure provides for the temporary seizure of the property in three cases: 1) from the detainee; 2) during the inspection; 3) during the search. The property is temporarily seized until it's returned or there is a decision on its attachment. Article 236 § 7 of the CPC provides that the seized objects and documents not included in the list of those directly allowed to be found in the ruling authorizing the search, and are not among objects withdrawn by law from circulation, shall be deemed provisionally seized property. Similar rules apply to property seized during the inspection.

We consider it possible to propose the following wording of Article 167 § 1 of the CPC, which will bring the definition of provisionally seized property and a list of objects that can be temporarily removed in compliance, "the provisional seizure of property is the actual deprivation of the suspect's or the other persons' possibility to possess, use, and dispose certain property referred to in the second part of this article, till the issue of attachment or return of property is decided". We believe it is more correct to refer to "other persons" rather than "other participants of criminal proceedings" [1, p. 121], as search and review and, accordingly, the provisional seizure of property may be carried out in the premises of a person who is not a participant of criminal proceedings.

Based on the analysis of the norms of Articles 167, 168, 236 of the CPC, the following may be temporary seized: property seized from any person during his detention in accordance with Articles 207 and 208 of the CPC; property seized during inspection (objects and documents not included in the list of those directly allowed to be found in the ruling authorizing the inspection, and are not among objects withdrawn by law from circulation) property seized during the search (objects and documents not included in the list of those directly allowed to be found in the ruling authorizing the search, and are not among objects withdrawn by law from circulation). However, objects and other property, withdrawn by the ruling of the investigating judge on the provisional access to objects and documents is not deemed to be provisionally seized property according to Chapter 15 of the CPC [2, p. 114].

The question of whether to consider material objects that contain signs of a criminal offense as provisionally seized property is a problematic one in the literature. Some scientists believe that material objects cannot be considered provisionally seized property [3, p. 150; 4, p. 312]. However, in judicial practice it's quite widespread to seize material objects that contain signs of a criminal offense as the temporarily seized property [5; 6; 7]. Given that Article 167 § 2 (1) of the CPC provides that the property in the form of objects, documents, money, etc. may be provisionally seized if there is sufficient grounds to believe that such property has preserved signs of criminal offence, thus consideration of such objects as provisionally seized property is justified. Along with this, there is a problem that it cannot be said that objects such as hair and nails, etc., have kept the signs of a criminal offense, as they are the signs per se.

There is a proposal in the literature, to set forth the third sentence of Article 236 § 7 of the CPC read as follows: "The seized objects and documents not included in the list of those directly allowed to be found in the ruling authorizing the search, and are not among objects withdrawn by law from circulation, or physical evidence under Article 98§ 1 of this Code shall be deemed provisionally seized property" [8, p. 165]. However, the present Code does not provide for a separate procedural ruling to append material objects as evidence for criminal proceedings, and that is why such proposals does not comply with the general rules of the Code on obtaining objects and acquiring the status of physical evidence; given the regulation of this matter, doubts may arise later as to whom and in which order the ruling that certain material objects are physical evidence, as it may lead to find evidence as inadmissible.

Chapter 17 of the CPC– "Attachment of Property" – has been changed six times in total (in different articles). The first version of this article (as of 13.04.2012) really had serious flaws and gaps that needed to be eliminated, on what attention was drawn in previous studies. Later changes were made in the context of changes in the definition of attachment, goals of attachment of property, the list of property which may be attached, the list of persons, which property may be attached, the introduction of provisional attachment, requirements to motion for attachment of property, the local subject of proof, procedure and participants of consideration of the motion by the investigating judge and the court, the requirements for the ruling of the investigating judge, court, procedure to revoke the attachment of property etc. Some of these

changes and additions are certainly progressive in nature and represent an example of better normative regulation of this measure to ensure criminal proceedings; it applies, for example, to the definition and purpose of the attachment, a clear distinction between the circle of persons which property can be attached, depending on its purpose, respectively, differentiation of requirements to the content of the motion and the ruling of the investigating judge, clarifying deadline for submission of a motion for attachment of property, implementation of provisional attachment of property or funds of individuals or legal entities from accounts in financial institutions, prohibition of attaching the property if it's owned by a bona fide purchaser, except for the attachment of property in order to preserve evidence etc. However, some of the shortcomings in the Chapter 17 of the CPC have not been addressed, and some drawbacks were at the very beginning of the introduction of amendments and additions.

Analysis of the concept of attachment of property given in Article 170 § 1 of the CPC, demonstrates the possibility of attachment of property, "according to which there is a set of grounds or reasonable suspicion to believe that it is a proof of the crime." However, given the wording of Article 91 § 1 (1-4, 6) and Article 98 § 1 of the CPC, where the terminology "criminal offense" is used, there is a doubt in expediency to use the term "crime" within the context of the attachment of the property, because it turns out that in case of conducting a criminal misdemeanor, this measure cannot be applied. Of course, it is not known exactly which criminal offences are classified as criminal misdemeanors and whether there would be a need for such differentiation in the application of attachment, but right now the wording of above mentioned article collides with the Article 299 of the CPC, which limits the application of measures of restraint to three during the pre-trial investigation of criminal misdemeanors, but does not limit the application of other measures to ensure criminal proceedings.

The lawmaker in the Article 170 § 1 of the CPC has introduced a new standard of proof - a reasonable suspicion. The CPC does not provide the definition of this standard, although the draft Law of Ukraine "On Amendments to the Criminal Procedural Code of Ukraine regarding the improvement of the legal regulation of criminal proceedings" [9] proposed the interpretation of reasonable suspicion as a fair assumption that a person has committed a particular offense, which is based on information that can be checked in the proceedings and that would encourage fair and reasonable man to resort to practical actions to

determine whether such suspicion is reasonable. Although we have previously proposed to apply the reasonable suspicion standard when making a decision on attachment of property (in particular, to assess the data on the possibility to seize the property [10, p. 125]), we believe that introduction of the reasonable suspicion standard, as well as others, including the "beyond reasonable doubt" standard to the text of the CPC without definitive, clear rules, which are necessary due to the evaluative nature of standards of proof, is inappropriate.

In addition, the wording "a set of grounds or reasonable suspicion" is questionable in the context of the qualitative characteristic of the grounds required for taking a procedural decision on attachment of property; we think it would be more logical to formulate "set of sufficient grounds or reasonable suspicion."

In order to ensure the preservation of physical evidence (which finally allocated as a separate goal of attachment) attachment of the property is imposed on the property of any individual or legal entity if there are sufficient grounds to believe that it meets the criteria specified in Article 98 of the CPC, that is, in fact, it has signs of physical evidence. Attention should be drawn to the fact that the person's property rights are not protected; it is not recognized in the CPC as a third party whose property is the subject to the issue of attachment of property (which indirectly indicate the provisions of Article 170 § 1 of the CPC, which delimit the property, which is a proof of the crime, and property, which is subject to special confiscation including from third parties, as well as an indication of§ 4 of the article on the attachment of a third party property if there are reasonable grounds to believe that it is subject to special confiscation in the cases stipulated by the Criminal Code of Ukraine. Attachment is imposed on the third party property if it was acquired free of charge or for the higher or lower than market value, and it knew or should have known, that such property meets any of the grounds specified in Article 96-2 § 1 (1-4) of the CPC); that is, as opposed to a third party whose property is the subject to the issue of attachment of property, he has no rights and duties under Article 64-2 § 3 and 7 of the CPC. In addition, the investigative judge and court should take into account the effects of attachment for the suspect, accused, convicted, a third party; meanwhile, the CPC doesn't provide the consequences for the property owners, whose property has been attached in order to ensure the preservation of evidence that seems illogical.

Article 171 § 3 differs from other provisions of Chapter 17 of the CPC which provides that "in the motion filed by a civil plaintiff in

criminal proceedings for attachment of property of the suspect, the accused, the legal entity in whose respect proceedings are taken, third parties for compensation of damage caused by a criminal offense". Firstly, in order to compensate the damage caused by a criminal offence (a civil lawsuit), or to exact received undue advantage from a legal entity, attachment is imposed on the property of suspect, accused, convicted, natural or legal person who, by virtue of the law shall be civilly liable for the damage caused by actions (inaction) of a suspect, accused, convicted or deranged person who committed socially dangerous act, as well as a legal entity in whose respect proceedings are taken in the presence of reasonable size of the civil lawsuit in criminal proceedings, as well as reasonable size of undue advantage that is obtained by a legal entity in whose respect proceedings are taken (Articles 6 and 170 of the CPC). That is, when it comes to ensuring the civil lawsuit, the attachment is imposed on the property of suspect, accused, convicted, natural or legal person who, by virtue of the law shall be civilly liable for damage caused by actions (inaction) of a suspect, accused, convicted or deranged person who committed socially dangerous act, which, by the way, fully consistent with the definition of the concept of a civil defendant in Article 62 of the CPC. Secondly, Article 64-2 § 2 of the CPC provides: "The third party whose property is the subject to the issue of attachment of property, occurs after the prosecutor's request in court for the attachment of property." Despite the lack of technical part of the article, what was reasonably pointed out in the literature [11], we note that the appearance of the criminal procedural status of a third party is associated with a motion filed by the prosecutor only, but not by the civil plaintiff, which again confirms the thesis about the falsity of the provisions of Article 171 § 3 of the CPC on attachment the property of third parties for compensation of damage caused by a criminal offense. Thirdly, with regard to the attachment of the property of a legal entity in whose respect proceedings are taken, then, in accordance with Article 170 § 5 of the CPC, the attachment is applied when there are sufficient grounds to believe that the court in the cases stipulated by the Criminal Code of Ukraine may apply a measure of criminal law in the form of confiscation of property to a legal person, and to exact received undue advantage from a legal entity – if there is reasonable size of undue advantage obtained by a legal entity in whose respect proceedings are taken (Articles 6 and 170 of the CPC). That, among other things, indicates the need for separation of purpose of compensation of damage caused as a result of a criminal offense (civil

lawsuit), or to exact received undue advantage from a legal entity on two separate and, therefore, to differentiate the number of persons on whose property is subject to the attachment, the initiation subjects and motion requirements. Moreover, Article 170 § 6 of the CPC state nothing about the property "of third parties to compensate the damage caused by a criminal offense". Therefore, to avoid misinterpretation the first sentence of Article 171 § 3 of the CPC on the unlawful seizure should be reformulated as follows: "The motion of civil plaintiff in the criminal proceedings on the attachment of property in order to secure the civil lawsuit must be specified."

The second sentence of Article 173 § 7 of the CPC establishes two important guarantees for the suspect, the third person: the right to counsel and the right to appeal against the court decision to attach the property. However, the right to counsel for the suspect or accused has already been provided for in Articles 20 and 42 of the CPC, and the references to this right here is excessive. With regard to the third party, the provision on his right to counsel is contrary to Article 642 of the CPC, which establishes the representation of third parties, but not in the form of protection. Therefore, in this part the corresponding norm should be removed. As regards the right to appeal against the court decision to attach the property, it should be worded more generally: the person whose property is attached, his defense counsel, the legal representative, the representative have the right to appeal against the court decision to attach the property.

In addition, another regulatory shortcoming of deciding on an attachment hasn't been removed yet. During consideration of the motion for the attachment of the property investigating judge may, upon motion of participants of the hearing or on his own initiative, hear any witness or examine any materials which are important for deciding the issue of property attachment (Articles 4 and 172 of the CPC). Although it is not expressly provided for in Article 172 § 4 of the CPC, court should have similar rights since the purpose of application of this measure, the procedure of initiation and grounds of the attachment of the property are the same.

Thus, to ensure the implementation of one of the most important principles of criminal proceedings – the principle of inviolability of the ownership right in the context of property rights and interests of business entities requires changes and additions to the CPC in the context of: 1) clarifying the concept of provisional seizure of property and a list of objects that can be temporarily withdrawn; 2) to replace the

term "crime" in the context of the attachment of the property by "criminal offense"; 3) to define the meaning of evidentiary standards in Article 3 of the CPC, including "reasonable suspicion"; 4) to clarify the definition of attachment in respect of "a set of sufficient grounds or reasonable suspicion"; 5) to determine the criminal procedural status of persons whose property is subject to the attachment to ensure the preservation of physical evidence; 6) the first sentence of Article 171 § 3 of the CPC should be stated as follows, "The motion of civil plaintiff in the criminal proceedings on the attachment of property in order to secure the civil suit should be specified"; 7) the following wording should be embedded in Article 173 § 7 of the CPC, "A person whose property is seized, its defense counsel, the legal representative, the representative shall have the right to appeal against the court decision to attach the property."

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ON THE CONCEPT OF DETENTION OF SUSPECTS IN A CRIMINAL PROCESS OF UKRAINE

As is known, the criminal procedure institute "detention of a person suspected (accused) of committing a crime" regulates complex processes of relations arising between the individual, society, the state

and even the international community. It is natural that with the adoption of the new Criminal Procedure Code of Ukraine in 2012 level of excellence of this institution requires a rethinking in the light of the scientific requirements of the Constitution and the European Convention on Human Rights 1950, in terms of ambiguity, or even complete lack of interpretation of some theoretically and practically relevant aspects procedural regulation of detention of suspects.

The study and analysis of the legal and literary sources allowed the author to conclude that the detention of a suspect in a crime related to the legal phenomena, the existence of which is always accompanied by a tangle of problems, and sometimes carried out by attempts to solve them, not making quite clear, often generates new ones. This situation is typical for the Soviet period, and for the modern development of Ukraine. In particular, in the last 15 years in the domestic legal science and practice of criminal justice prevails the opinion that the detention of a suspect in a crime (allegedly due to requirements part 3 of art. 29 of the Constitution of Ukraine 1996 [1]) is a temporary preventive measure, consisting in short-term isolation of the detainee by placing it in a special institution – detention isolator. This is the status of the "Institute for the detention of a suspect in the commission of a crime" and got in the new Criminal Procedure Code of Ukraine from 13.04.2012 years [2, p. 176].

Meanwhile, the integrated system of measures regulating the use of which is associated with the restriction of rights and freedoms of the suspect, nor the Criminal Procedure Code of the Ukrainian SSR in 1922 (art. 147), nor the Criminal Procedure Code of the Ukrainian SSR in 1927 (art. 142) does not apply to the latter procedure is compulsory action, as "detention of the suspect". On the contrary, according to the art. 104 Criminal Procedure Code of the Ukrainian SSR in 1960 the detention of the suspect (the accused) of committing a crime for decades was considered urgent Initial investigations aimed at the actual capture of the suspect red-handed in the act, was aimed at obtaining and verifying evidence linking him to the alleged crime. In addition, each lawyer clearly understood its inherent organizational and tactical, sometimes dangerous nature: possess tactical methods of criminal detention in a particular situation – hold it, but not, so he runs away, and then even worse – cause you bodily harm. It is also clear that in case of escape and concealment of the suspect from pretrial investigation initiated criminal proceedings is deprived of judicial perspective.

With this in mind, the author of this article aims to realize an attempt to identify the etymological and legal essence of the "detention of the

suspect", to formulate its concept and the actual content of the theory of criminal procedural law and criminology.

Unfortunately, Articles 3, 207-208 Code of Criminal Procedure 2012 does not contain a definition of "detention". Apparently, therefore, the legislator allows for arbitrary interpretation of the term. Indeed, a number contained in the Criminal Procedure Code of Ukraine in 2012 of short stories, in particular, regulation of the so-called citizen's arrest of a suspect in a crime (art. 207), with the exception of the range of grounds for his detention (p. 2, art. 207 and p. 1 art. 208) of those who are not covered by the situation the urgent need to prevent a crime or stop as required p. 3 art. 29 of the Constitution of Ukraine, no doubt, can be regarded as positive legal novels. However, it must be noted that a number of laws, and even some of the rules of the Code of Criminal Procedure interpret "the detention of a suspect" in different ways. Thus, according to paragraph 8 of part 2 of article 131 Code of Criminal Procedure detention is a measure to ensure the criminal proceedings, the investigator used as tougher measures to achieve the effectiveness of criminal proceedings in the case where a suspect is not on call. Several different positions "detention" p. 2 art. 176 Criminal Procedure Code, seeing it as a temporary preventive measure, consisting in short-term isolation of the suspect from his room in the detention center, which is used by the investigating judge in pre-trial and trial. Finally, since as a method of detection and fixing of fact, content and results of the "detention" of a person suspected of committing a crime, the legislator (p. 1, art. 104; p. 5, art. 208 and p. 6, art. 223 CCP) requires preparation protocol, which is a mandatory attribute not preventive measures and investigation (investigation) activities and covert investigation (search) action, then this fact is a convincing argument that "the detention of the suspect," belongs also to the number of investigation (investigation) activities that aim of gathering and checking the evidence.

Consequently, more than one interpretation of such an important institution of the criminal procedure, as is the "detention of a criminal suspect" rather confusing than making perfectly clear. In other words, in three ways defining the nature, content and procedural form of detention of a suspect: whether it is a measure to ensure the criminal proceedings, whether it is a temporary security measure, whether it is procedural (investigative) operation, the legislator contributes to about this difference of opinion of scientists and practical workers. Our analysis of the statements of many authors on the concept, nature and the practical application of the "Institute of Criminal Procedure detention" shows that

they have, unfortunately, there is no common point of view. However, many of the existing discrepancies are caused by ambiguous solution fundamental question: what exactly you mean by "detention", a range of activities it covers?

For example, some scientists, including the author of this article is traditionally considered the "detention" in a unique way of gathering evidence and testing of the suspect's guilt, which is a characteristic feature of all the investigating (investigative) Action, distinguishing them from the preventive measures [3]. Others, not sharing this view argue that the detention does not contain any search or cognitive or operations of identification [4], with which we can not agree. In an effort to convince the reader interested in the fact that the detention of a suspect is a preventive measure, consisting in a temporary isolation of a detainee by placing it in a temporary detention facility (for a decision on the feasibility of the election of a preventive measure "detention"), some authors in their thinking contrary to common sense. Thus, A. Protopopov states that "can not be regarded as detention apprehension of the suspect (the accused), who escaped from the detention center, jail or out of the convoy. His procedural position determined preventive measure already chosen and it is not necessary to duplicate the" [5, p. 135]. It is difficult to find common sense in the logic of this and similar arguments, and they, unfortunately, are the result of an unjustified substitution of the content of "detention" similar "taken into custody". According to them it turns out that the delay (ie to isolating) fugitive is not necessary, because he has long been in detention (or detention). Sorry, but in the above situation, the offender fled, hiding and it is necessary to catch, especially there is a need not in isolation as a preventive (which may have previously been elected), and in the organizational and tactical investigation (search) actions aimed at the establishment of places of finding the fugitive, in its physical seizure and delivered in the pre-trial investigation authority. We believe that these organizational and tactical (investigative) actions are the terms of detention. By the way, the way it is treated in other laws, such as "On the Internal Forces of Ukraine", which is among the main tasks of these units determines the "harassment and detention of arrested and convicted persons who have escaped from custody" [6, art. 2].

Indeed, the term "detention" is used in the domestic legislation, the content is quite voluminous and versatile, so do not accidentally its interpretation was a stumbling block. It seems that all the differences of opinion about the nature of "arrest" due to the fact that neither the

"Dictionary" or "etymological dictionary of the Ukrainian language" does not contain a long time and are widely used in law and in practice the term "zatrimannya" (a synonym in Russian "Detention") [7]. Although, if we refer to the "Ozhegov", or "Explanatory Dictionary of Russian language of Vladimir Dal', you can make sure that the terms" detention", "delay "shall be interpreted as" stop, do not let, do not give freedom, will travel, to prevent the movement of someone to keep someone"[8]. As can be seen from the point of view of literary language, the term "detention" contains many shades of meaning, of which most are close in meaning: to stop, to prevent the movement of someone to grab. There is no doubt that it is not to limit the freedom of a suspect by temporarily placing it in custody, and his physical seizure (according to American and European legislation such actions correspond to the "arrest without warrant").

By the way, in law and practice of its application in the Russian Federation, Belarus Republic, the United States and other countries, the Institute expressed the most progressive. For example, of the many detective movies we detention procedure citizen well known to exist in America. At the same time, we have a clear vision of "tough" cop or FBI agent, who in arms loudly commanded the offender: "Freeze! Rolise! (FBI)», that is, "Do not move! Police! (FBI!)". In this case all further actions of the police – verification of documents, dressing handcuffs, body searches, delivering to the police station, the interrogation, and so may be groundless and illegal, if the person suspected of committing a crime, even at the stage of physical restraint will not be announced so-called "Miranda warnings" [9], embodying the constitutional guarantees of the rights and freedoms of individuals in criminal proceedings.

As detention is used to ensure the criminal proceedings, and establishing proof of guilt of a suspect in the commission of an offense which can have varying degrees of public danger, the event state coercion is used as the administrative (art. 259-261 of the Administrative Code), and the Criminal Procedure legislation (art. 207-208 of the CPC) of Ukraine. In both cases, the analysis of the actions that make up the arrest of the offender, leads to the conclusion that the administrative and criminal-procedural detention almost splits into at least two separate stages: the actual detention and procedural design. The purpose of detention is to ensure the effectiveness of the criminal proceedings (trial), participation in which the suspect (the accused) is mandatory.

Thus, the "detention" in order articles 207-208 Code of Criminal

Procedure should be regarded as procedural action that is the physical capture (at the scene, as a result of persecution or investigation), disarming and delivered in the pre-trial investigation, the body of a person suspected, accused or convicted of a crime for which the penalty is imprisonment, in order to identify the arrested person, finding his involvement in the commission of criminal offenses and, if confirmed existing suspicions, a decision on the expediency and form of the preventive measures that should be applied to it to ensure its proper participation in the pre-trial and trial criminal proceedings.

Criminal Procedure detention should be distinguished from the similar actions of law enforcement bodies – the detention of offenders in cases stipulated by the legislation of Ukraine on Administrative Offences (articles 259-261 of the Administrative Code), In particular delivering the person with his consent in the law enforcement body for identification, which can not last more than one hour, unless otherwise specified, as well as the implementation of the "drive" – activities, which consists in a temporary restriction of the freedom of action and movement and forced support person - a witness, victim, suspect or accused refuses to appear on-call body of pre-trial investigation, the prosecutor's office or a court (articles 66 p. 2; 133; 140 of the CCP).

It is worth noting that the understanding of "detention" as a complex of organizational and tactical (search) actions to seize, disarm and delivered the suspect to the competent authority, accompanied by the fixation of fact, the circumstances and the arrest of the results by recording their final legal registration in the corresponding protocol is fully consistent the real interpretation of "detention" in the substantive law (art. 38 of the Criminal Code), according to which "is not a crime for a victim and the other persons directly after the attacks, to apprehend the offender, and delivering it to the appropriate authorities ...". Furthermore, a correct understanding of "the detention of the suspect" allows to obtain important evidence in the course of its production and use in the future to expose the detainee. Not coincidentally, these practices are guided by consideration in everyday work on the disclosure of especially dangerous crimes such as extortion, giving and receiving bribes, extortion arrest when the act becomes final and effective enough point in the process of documentation and the termination of his criminal activities. A well-planned arrest bribe-handed – at the time of receiving a bribe, or immediately thereafter, is one of the most effective ways to expose, as it gives the opportunity to record the fact that the subject of the transfer and withdrawal of a bribe (or a public destruction,

etc...). In this case, the detention of the act produces such a dramatic psychological impact on the bribe, which leaves the latter no option but to confess to the crime. The usefulness of such tactical operations in practice is obvious.

In summary, we note that ignoring the continuity inconsistency in the interpretation of criminal procedure "detention" status in fact it leads to loss of its original purpose in the criminal process, because it is actually a little different from what was a preventive measure, as "detention". In this context, it seems appropriate to add to the existing Code of Criminal Procedure the following addition: "Actual detention of a person suspected of having committed a criminal offense (capture him red-handed at the scene of the offense or immediately after its completion) can be made to the entry in the "Unified Register pre-trial investigations" for a period of up to 3 hours on the grounds stipulated p. 2, art. 207 and p. 1 art. 208 of this Code, in order to prevent criminal activities of this entity, establishing his act signs of criminal offense structure, determine the involvement of a person to commit it by obtaining evidence incriminating him in the offense, and the offense of forced participation of the subject in an open criminal proceedings".

We believe that such a (materialized) clarifying the concept of "criminal-procedural detention" is appropriate. The proper expression in the law of the state will need to be treated with special attention to the language of the law, in particular to the ambiguous understanding of the Ukrainian words "*zatrimannya*" (eng. – "*detention*") and "*trimannya pid wartou*" (eng. – "*custody*"). In other words, if p. 3 art. 29 of the Constitution speaks of "custody" as a temporary security measure, it does not mean that this category will automatically apply actions to "detain a suspect," for insulating the preventive measure applied to it – house arrest, detention guardhouse or may not follow his detention.

Of course, lack of attention to the terminology, the lack of unity in the interpretation of the term "detention" hinder not only research, but also, and more seriously, can disorient the practical activities of the bodies of pre-trial investigation or, at least, greatly complicate the work of the law enforcer. We are confident in the fact that it is the lack of appropriate tactical and forensic knowledge and practical skills required police officers to effectively perform their duties, often leads them to the unavailability of adequate (qualified) to act in a situation related to the detention of wanted criminals or "hot pursuit". By the way, in favor of the immediate exclusion from the preventive "detention" measures (such

as investigative, investigative actions) speaks for itself ominous trend in loss of personnel of internal affairs bodies in extreme conditions of detention of criminals. This conclusion is confirmed by the relevant statistical data: during the years of independence in Ukraine during the performance of official duties to arrest criminals police officers were killed in 1016 and 7500 – were injured [10].

So let us be faithful to the blessed memory of the lost employees! Criminal Procedure detained the suspect of a crime, of course, has all the attributes to be met by scientists [11, p. 7-19] to the procedural (investigating) action – has its purpose, objectives, grounds and conditions, organizational and tactical methods of implementation, remedial policies of its progress and results and is an important procedural way of obtaining evidence in criminal proceedings, and compiled on the basis of detention protocol, being the bearer of procedural evidence with probative value and satisfying the requirements of admissibility and reliability, no doubt, is a source of evidence. However, to eliminate the practice of fatal outcomes, it is possible during the arrest of suspects in criminal offenses, we believe that the concept and content of "detention" should be disclosed in the disposition of the legal norms regulating this procedural act, and the relevant provisions of the Constitution of Ukraine, the Criminal Code, Criminal Procedure Code and other laws and regulations in Ukraine should be harmonized and coordinated among themselves and with the dictionary.

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SOME THOUGHTS ABOUT CODIFICATION PROPOSALS REGARDING THE DEADLINE OF INVESTIGATION IN HUNGARY

Introduction

"*The law about the deadline of investigation is mainly addressed to investigating authority and the prosecutor. However, quickness and effectiveness of investigation, and its completion in time cannot be indifferent either for the injured party or for the society in general*." [1] Delay may frustrate and endanger the security of the traces of crime and obtaining evidence. The possible fastest conduct of current criminal procedure can be regarded public interest from several points of view. Furthermore, it should be taken into consideration that in several cases the fact that one is involved in the effect of criminal proceeding may begin such difficult and disadvantageous procedures in the assignor's life that it may cause fatal moral and material injury later.

So it is important how long one is or can be involved in a criminal proceeding and how long one can be the object of investigation with the guarantee rules less protected that in the hearing before the court. Basically, it depends on the discretional decision of the investigating authority and the prosecutor what kind of strategy and tactics will be applied in investigation in relation to the effectiveness of investigation but within wide broad legal limits. Substantiated and quick exposition basically depends on the applied criminal technique and criminal tactics and act XIX of 1998 on Criminal Proceedings (later: Be.) ensures only framework norms. [2] It should be emphasized that the Rome Convention of 04 November 1950 (later: Convention) [3] about the protection of human rights and basic freedom would be breached if the investigating authority delays and does not pay special attention to close investigation as soon as possible. [4] On the other hand, the emergence of justizmords (wrong judgments) makes hard the rate of work of authorities being between the requirements of thoroughness and quickness. [5] Csaba FENYVESI states that some of the criminological mistakes in Hungary are the wrong organization of investigation, loss of time, delay, [6] but on the other hand, quickness – regarded more important that thoroughness – as consequence of public pressure can be cited here.

The role of investigating period in Hungarian criminal proceeding

In reaching the correct regulation the first question to decide is the relation between investigation and judicial section, keeping equal or disregarding investigatory and hearing evidence. Naturally, if the aim of investigation is to establish the facts comprehensively and gathering procedural evidences, the situation is more complicated for the acting authorities and it should be taken into consideration when working out legal rules of deadline of investigation. However, if evidence is focused on the hearing period, mainly before the court of first instance, less formal, not procedural investigation can be proceeded within shorter deadline. Undoubtedly, these two main sessions of criminal procedure have been discussed for a long time.

In Hungary the theory that investigation is an independent main section of criminal procedure is ingrained for decades: "*in it evidence is made the same way with the same force like at hearing before the court and justice is declared here like there*." [7] Act I of 1973 (later: second Be.) orders on basic level about that the authority's task is in all segment of procedure to clear conclusion of fact substantiated and perfectly in accordance with reality, consequently the investigating authority also conducted conclusion of facts, and the aim of investigation was not to inform the prosecutor, but to cover the same evidence in the investigatory period as in the hearing. [8] It should be added that this law ensured the rights of defence in broader circle during investigation than the present law.

The effective Be. with its codification of 1990 tried to change these circumstances [9] and to enforce the specialities of the system of party's hearing and evidence could be made only before the court and during investigation non-judicial evidences should be gathered. Árpád ERDEI who took part in the preparation of the Be. also states: "*in the conception strengthening the contradictional type of hearing was very emphatic*", [10] since the best place to decide legal disputes is the contradictional hearing before the court. Regarding this conception it is worth mentioning that Resolution 8/2013. (III. 1.) AB of the Hungarian Constitutional Court – later nearly 20 years – declares the following in relation to the differences between these two sections of the criminal proceeding: "*Publicity of hearing is a guarantee rule under the protection of decent procedure which helps the fulfilment of social control over administration of justice […] On the other hand,*

investigation is not open according to the main rule […] Hearings during investigation do not have independent parties. The consequence of the lack of public is that the happenings during hearing can hardly be controlled and reconstructed later." [11] In my opinion it is not correct if evidence acquired during investigation – under circumstances less controlled or not controlled at all – is regarded equal with the evidence in hearing period. But the Be. did not follow this conception not only when creating the law [12] but mainly when it entered into force, and the only change was that on the basis of the second sentence of paragraph (2) of article 164. § of the Be. the aim of the investigation is to conduct an inquiry into the criminal offence, identify the offender, as well as to locate and secure the means of evidence; the facts of the case shall be probed to such an extent that enables the accuser to decide on presenting a case for the prosecution. Consequently, investigation becomes a procedure preparing prosecution and the real part of evidence would be proceeded before the court. On the basis of guarantee aspects the priority of hearing before the court would be ensured what is reasonable, since it is the contradictional part regulated "*most closely and strictly*" [13] by the law.

On the other hand, practical experiences prove that investigation is more emphatic than the judicial procedure, and "*the faith of crimes mainly depends on the result of the investigation, and in many cases the hearing before the court is a rather formal control of the results and details of the investigation and serves authentication*." [14]

During investigation the intention to over-prove a case can be observed even today, and the quality of evidence has priority to the quantity of evidence. [15] In fact, regarding the priority of hearing a breakthrough has not been achieved yet and it is still questionable whether the client-model will ever be established in Hungary. To achieve it a change of aspect would be necessary from both the parties of investigating authority and the prosecutor's office, but it has not performed yet. [16] Present concept of the role of investigation would require the definition of longer deadlines.

At present the Be. states about the deadline of investigation as follows:

> *176. § (1) The investigation shall commence within the shortest possible period and concluded within two months following its order or start. If justified by the complexity or an insurmountable obstacle, the deadline of the investigation may be extended by two months by*

the prosecutor, and after the lapse of that deadline, by the county prosecutor general up to the lapse of one year from the commencement of the criminal proceedings. (2) After one year, the deadline of the investigation may be extended by the Prosecutor General. If the investigation is conducted against a specific person, the extension may not be longer than two years following the questioning of the suspect under Section 179 (1). (3) If the prosecutor conducts the investigation, its deadline may be extended by the head of the prosecutor's office by two months, by the superior prosecutor up to the lapse of one year from the commencement of the criminal proceedings and thereafter by the Prosecutor General up to the deadline specified in subsection (2). Implementing an investigatory action

On the basis of paragraph (3) of article 193. § of the Be. the decision on the motion of the suspect or the counsel for the defence shall be made by the prosecutor or the investigating authority and according to the second sentence of paragraph (2) of article 176. § of the Be. If the investigation is conducted against a specific person, the extension may not be longer than two years following the questioning of the suspect under paragraph (1) of article 179. §, referring to the prosecutor's presentation the chief prosecutor can extend the deadline of the investigation to 90 days at longest in order to complete the investigation.

After a little more than half a century we have got to the point that the chief prosecutor has to permit the extension of investigation only longer than two years instead of two months length. It is clear that the tendency is that investigations and investigations against certain persons have become longer over time. On the basis of statistical data growth of duration of proceeding can be seen up to this day. [17] These days the average duration of investigation is 220, 7 days, and 410, 7 days of the hearing before the court [18] According to the experiences of administration even investigation of "light" cases "*drag unsubstantiatedly, and measures to evidentiary proceeding which seem to be necessary in advance in a certain case are taken with unsubstantiated delay.*" [19]

By all means, it is correct that the Be. attaches greater – guarantee – importance to the deadline of investigation [20] than its predecessors which has been justified since 1st July 2003 referring to the guarantee rule for the deadline of investigation in connection with investigation against a defined person (in personam) not more than two years which

can be extended with 90 days in certain cases. At this construction article 6 of the Convention influenced the legislator; since an investigation proceeded during unreasonably long time discloses judging in reasonable time. [21] The explanation of continuous lengthening the investigatory deadlines is the higher importance of the practical importance of the investigation as it was explicated above. The legal regulation of in personam absolute investigatory deadline is reasonable and necessary in order to compensate this, and regarding the public authoritative overweigh of the authority proceeding in criminal case on the basis of guarantee rules it seems to be indispensable and its maintenance in the future statute of criminal proceeding seems to be justified.

Proposals for codification in relation to the deadline of investigation

Two drafts about deadline of investigation have come out recently in the present state of the codification of statute of criminal proceeding. [22] Version A) leaves the present Be. unchanged, namely, investigation against certain person can be proceeded for two years from the statement of accusation, and Version B) would classify the absolute deadline into a system unified with the legal institution of statute of limitations as below:

- 1 year in case of imprisonment of up to 3 years
- 2 years in case of imprisonment of up to 5 years
- 3 years in case of imprisonment of up to 10 years
- 4 years in case threatened by longer punishment
- no absolute deadline in case of el crimes with no limitation. [23]

In the case of Version B) a new model of proceeding would be introduced, under which after statement of accusation statute of limitation could be interrupted exclusively by indictment on contrary to the present solution where statute of limitations is interrupted by proceeding (in some cases meaninglessly). In the new version final decision of judicial procedure should be declared as late as statute of limitations of crime since only indictment would interrupt statute of limitations.

In this proposal there are some elements which I can agree, e. g. in personam absolute deadline of investigation applied to material weight of crime as object of suspicion beyond reasonable doubt as the principle of future regulation, furthermore, change in the question of statute of limitations. Professor Andor KOVÁTS, who examined the legal

institution of statute of limitations the most carefully in Hungarian legal literature, emphasized nearly a century ago that tactics of interruption left here from the inquisitorial system on which basis practically any act of the authority can interrupt the period of limitation, consequently makes impossible its fulfilment, easily may cause misuse. [24] So it is high time to remedy this problem.

I think the introduction of the more than two years long absolute deadline of investigation should be considered especially regarding crimes with no limitation. In my opinion even the two years long deadline is too long, which absolutely does not encourage the investigating authorities to finish the investigation as soon as possible. From an investigation-tactics point of view the time of the communication of reasonable grounds to suspect can be a good solution for the problems connected to the present regulation of the already mentioned two years long deadline. However, the significantly heavy workload of the acting authorities, the growing number of criminal cases, or the problems emerging in connection to the reform of the expert system – for example the expert opinions submitted significantly late – cannot result the assignor to be in an even more disadvantageous situation during the proceeding. Cases that are only one of a million for the authorities usually mean the assignor's life or existence. In my opinion three or four years long investigation against certain people are unacceptable, and they could function only along with the reform of the norms of indemnification. Crimes with no limitation must be highlighted because the present text of Draft B) would eliminate even the remaining guarantees: in these cases it would be possible to investigate without the hope of a judicial decision in reasonable time without maximum of custody. I think it is unacceptable both from legal and moral aspect and very dangerous based on the dark eras of history; and would be totally opposite to the rule of law and the assignor's fundamental rights.

Closing remarks and proposals

The legislator has to take into consideration that the rewording of the rules of investigation deadline – especially if the present two years long deadline could be exceeded under certain circumstances – does not result the faster proceeding or close in reasonable time. Unfortunately, experiences show that "*the prosecutor very often extends the deadlines without application of legal consequences even if the investigating*

authority investigates tardily or does not investigate without acceptable reason at all." [25] It would be justified – even a stricter system with the progress of deadline of investigation – to limit the extension of deadlines of investigation, and to force the acting authorities to end the investigation really within the shortest period of time, especially in the case of assignors in custody; namely nowadays the extraordinary procedure is an expectation based on the law, but not in the practice. It is a fact that the Office of the Prosecutor General "*has been trying to demand from the prosecutors – who are allowed to extend the deadline of investigation – to end the wrong practice of extension and to extend the deadlines only based on reasons stated in the law and by justifiable reasons and only for the justified time for a long time*." [26] In a great number of cases it is not enough because even in the case of assignors in custody – despite the extraordinary procedure – that there are no investigatory actions in merit for months.

The consideration of the deadline of in personam investigation according to criminal tactical reasons concerning the time of communication of suspicion is very important. It is advisable to suspect after the acquisition of evidences but with the following restriction: the defence should have the chance to present its defence in merit after the communication of suspicion and to have enough time for the investigation of possible extenuating circumstances. Nowadays it is not too rare that immediately or within one or two days after the communication of suspicion presentation of the documents and investigation is closed allowing the defence only to explain its arguments before the criminal court. Even though within the framework of the present system of investigation – which is basically based on the German model – it is the obligation of the "lord of investigation" – the prosecutor – to consider both the circumstances aggravating and extenuating for the defendant and the circumstances aggravating and mitigating the criminal liability in all phases of the proceedings according to the second sentence of paragraph (3) of article 28. § of the Act on Criminal Proceedings. How can the prosecutor act according to this obligation if the assignor's defence in merit and possible motions are not examined during the investigation?

It would be important from a guarantee point of view that there should be procedural sanctions for the failure to act within the deadline of investigation because there are no such sanctions in the law at the moment. "*The validity of an investigating action, the applicability of data acquired during this or the conclusive force of evidence are not*

affected by the fact that they were possibly finished or acquired after the expiration of the deadline of investigation." [27] The proper legal consequence would be to nullify the result of the proving after the deadline stated in the law therefore its utilization should be excluded. At present we can talk about procedural irregularity in connection to the investigation after the deadline of investigation but it has no real effect on the future judgment. I think such a rule of exclusion is absolutely needed in the Act on Criminal Proceedings.

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21. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*
22. *MISKOLCZI: ibid., 24-26.p.*
23. *Ibid., 26.p.*
24. *Professor Andor Kováts (1884-1942), was regular professor of law in criminal law and criminal procedural law at m. kir. István Tisza University Faculty of Law and State Sciences from 1923 till his death. He dealt with the problem of limitation regarding its substantive and procedural aspects mainly. In his papers Bevezető tanulmányok a büntetőjogi elévülés tanába (Bp., 1915) and A büntetőjogi elévülés dogmatikája (Szeged, 1922) he was against the interruption of limitation, he would have imputed only recidivism such effect. See in connection to his life and works by the author the present paper: Andor Kováts in: A Debreceni Tudományegyetem jogtanárai I. [ed. Béla P. SZABÓ – Sándor MADAI], Debrecen, 2004, 63-98.p. and Andor Kováts In: »Ernyedetlen szorgalommal…« A Debreceni Tudományegyetem jogász professzorai (1914-1949) [ed. Béla P. SZABÓ], Debrecen, 2014, 387-410.p.*
25. *GÖRÖG: ibid., 23.p.*
26. *Ibid., 23.p.*
27. *BÓCZ: i.m., 178.p.*

Legal mechanisms to ensure the activities of economic entities

Collective monograph

Saimniekojošo subjektu darbības tiesiskais mehanisms

Kolektīva monogrāfija