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Glavni urednik

Članci

(Articles, Beiträge, Articoli)

THE PREVENTIVE RESTRUCTURING OF COMPANIES IN DIFFICULTIES – ONE-SIZE-FITS-ALL OR TAILOR MADE SOLUTIONS?

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Summary

The Republic of Croatia is facing the biggest restructuring of companies in difficulties with substantial involvement of international financial investors. Restructuring is implemented according to a newly adopted Act on extraordinary administration proceeding in companies of systemic significance for the Republic of Croatia. The latter Act was adopted in the aftermath of the business failure of the major retailer i.e. the Agrokor group. The restructuring of the group has soon become a very sensitive political issue and a topic of heated public discussions. The Act has been heavily criticized both by legal scholarship and by the public for being designed for a single group of companies in Croatia, as well as for being incoherent with constitutional principles and existing insolvency legislation. It created a type of debtor-not-in-possession in-court extraordinary administration designed for systemic significant (group of) companies in state of insolvency or pre-insolvency. Departing from this background, this paper aims to provide a wider restructuring picture by comparing three different legal models of preventive corporate restructurings for firms in difficulties: the German protective shield proceedings, the English schemes of arrangment and the Italian extraordinary administration. The authors attempt to evaluate each model's effectiveness on the basis of relevant studies which indicate their success rate. As far as the Croatian Act is concerned, the paper provides an overview of the development of the preventive restructuring law, while questioning certain aspect of the Act, especially the concept of the company of systemic significance.

Keywords: *companies' restructuring; companies in difficulties; extraordinary administration; group of companies restructuring; companies of systemic significance.*

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1. INTRODUCTION

The restructuring models for companies in difficulties may take many forms.[1] Attempts to preserve the continuation of bussines of the company debtor, who would otherwise be liquidated, can be designed as "debtor-in-posession" or "debtor-not-in-posession" procedure, conducted "at-the-court" or "out-of-court", "state assisted" or not. The restructuring may start when first pre-insolvency signs become apparent or later, when insolvency or overindebtnessness appears. The closer the restructuring procedure is to insolvency, the more is the whole process of negotiation between interested parties (i.e. distressed company and its creditors) influenced by mandatory insolvency law provisions relevant for composition of creditors' representative body, required majority to render the restructuring plan etc. It has been observed that out-of-court restructurings are generally more efficient.[2] Out-of-court negotiations through less formal procedure allow greater flexibility in reaching a restructuring plan that conciliates interests of many stakeholders, but they suffer from the free-rider issue.[3] In out-of-court restructurings major creditors, or among them, creditors willing to provide new money, usually assume the main role, while state-assisted procedures provide instruments that limit opportunities for free riding.[4]

The timeline of the restructuring procedure also plays a vital role. For successful and efficient company restructuring, an early start is crucial. As is well known, "the later a business initiates restructuring proceedings, the higher the costs of restructuring

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1 See generally: Adeyemo, M. M., Zahralddin-Aravena, R. X. (eds.), Reorganizing Failing Businesses, A Comprehensive Review and Analysis of Financial Restructuring and Business Reorganization, Volume I, Business Bankruptcy Committee, American Bar Association, Chicago, 2017, Part I, 1.1-1.13. Adeyemo, M. M. Zahralddin-Aravena, R. X. (eds.), Reorganizing Failing Businesses, A Comprehensive Review and Analysis of Financial Restructuring and Business Reorganization, Volume II, Business Bankruptcy Committee, American Bar Association, Chicago, 2017, Part IV, General Considerations (sec.17). For US law reorganization model (Chapter 11) see generally: Roe, M. J., Tung, F., Bankruptcy and Corporate Reorganization, Foundation Press, 4th ed., St. Paul, 2016, p. 603 et seq. For comparison between US and UK law which dominate restructuring law, see Mallon, C., Waisman, S., Y., Schrock, R. C., The Law and Practice of Restructuring in the UK and US, Oxford University Press, 2nd ed., 2017, p. 151-220. For types on corporate restructuring and restructuring in bankruptcy see generally: Gaughan, P. A., Mergers, Acquisitions and Corporate Restructurings, Wiley, 6th ed., 2015, p. 391-476.

2 Eidenmueller, H., van Zwieten, K., Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency, European Corporate Governance Institute (ECGI) - Law Working Paper No. 301/2015, Oxford Legal Studies Research Paper No. 52/2015, p. 2., available at: https://ssrn.com/abstract=2662213 (10 May 2018).

3 Eidenmueller, H., Unternehmenssanierung zwischen Markt und Gesetz: Mechanismen der Unternehmensreorganisation und Kooperationspflichten im Reorganisationsrecht, Otto Schmidt, Cologne, 1999, p. 319 et seq.

4 Eidenmueller, H., van Zwieten, K., op. cit., p. 2.

and the lower the management powers and success rate".[5] Companies in difficulities should have the possibility to restructure their debts when the risk of insolvency becomes apparent, not when it actually occurs. Therefore, "preventive" restructuring is gaining prominence, both at the EU and EU member states' level. After its 2014 recommendation, which invited EU member states to modernize their restructuring laws, the European Commission proposed a Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending the Directive 2012/30/EU.[6] Following the recast of European Insolvency Regulation - EIR[7] that came to force on 26 June 2017, significant changes were made in the recasted EIR's scope of application because some pre-insolvency and debtor-in-possession proceedings (though based only on the laws related to insolvency – Art. 1) were included. EIR provides for the automatic recognition of insolvency proceedings throughout the EU. Scope of application is confined to various corporate entities (and individuals) with their centre of main interest (hereinafter: COMI) within a member state of the EU. Now the COMI concept is explicitly defined in the EIR "the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties".[8] If the type of proceedings comes into the scope of application of the EIR, this "main" proceedings would have extraterritorial effects (under presumption that secondary proceedings are not opened in another member state) irrespective of debtor's assets location in the EU - with exception of Denmark.[9] Therefore, some, but not all restructuring models are within the scope of the recast EIR. The most popular restructuring tool, namely the UK's scheme of arrangements (hereinafter: SoA) is however not within its scope.

Due to diversified national approaches in the EU member states distressed companies' restructurings cause both restructuring migration and regulatory competition[10] which is extensively discussed by scholars while it borders on forum

5 EC Comission, Impact Assesment, 2016, p. 14 et seq.

6 Proposal COM (2016) 723 final

7 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2015., p. 19–72. It has provisions governing jurisdiction for opening insolvency proceedings, provisions regarding the recognition and enforcement of judgments issued in such proceedings, and provisions regarding the law applicable to insolvency proceedings, which is lex fori concursus. In addition, EIR aimed to lay down rules on the coordination of insolvency proceedings which relate to the same debtor or to several members of the same group of companies. See more the text in preambule par. (6) et seq.

8 EIR, Art. 3. par. 1, first sentence. Some authors argue that COMI is still not explicitly defined. In that vein see: Block-Leib, S., Reaching to Restructure across Border (without over-Reaching), Even After Brexit, American Bankruptcy Law Journal, Vol. 92, No. 1, 2018, p. 5. fn. 16.

9 Eidenmueller, H., van Zwieten, K., op. cit., p. 3.

10 Ibid., p. 9.

shopping[11] and abuse of insolvency law.[12] English SoA unquestionably offers a very flexible tool for distressed companies to deal with financial difficulties. It is therefore not surprising that non-UK distressed companies have used UK law to facilitate a corporate rescue that would not have been possible under their domestic laws. It has been documented that important German firms, already in the pre-insolvency stage, moved their centre of main interest (COMI) to England in order to be restructured by using UK SoA model, although the use of SoA, according to English law, is permitted whenever there is "sufficient connection" to UK, which even does not require relocation of COMI.[13] However, these "out-of-home" restructuring models are again on trial when its outcomes (i.e. court sanctioned SoA) should be recognized in the country of the restructured company origin.[14] Therefore, it has been observed that SoA's involving EU-registered companies should demonstrate that they are enforceable relying on the concept of court-sanctioned SoA, which will be enforceable according to the Brussels II Regulation.[15] The German regulatory response to that emigration followed with ESUG (*Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen)*, by which Germany tried to restore its "preventive restructuring" attractiveness, offering early restructuring of operative companies by the introduction of the protection scheme proceedings *(Schutzschirmverfahren)*.

11 Ringe, W.-G., Strategic Insolvency Migration and Community Law, in: Ringe, Wolf-Georg at al. (eds.), Current Issues in European Financial and Insolvency Law, 1st ed., Hart Publishing, 2009, p.75-77. Eidenmueler, H., Free Choice in International Company Insolvency Law in Europe, Eur. Bus. Org. L. Rev, No. 6, 2005, p. 423 et seq., available at https://doi.org/10.1017/S1566752905004234 (10 May 2018); Tribe, J. P., Bankruptcy Tourism in the European Union: Myth or Reality?, available at https://ssrn.com/abstract=2781500 (20 May 2018). Ringe, W.-G., Forum Shopping under the EU Insolvency Regulation, Oxford Legal Studies Research Paper No. 33/2008, available at https://ssrn.com/abstract=1209822 (15 May 2018).

12 Armour, J., Abuse of European Insolvency Law, A Discussion, in: Rita de la Feria, Stefan Vogenauer (eds), Prohibitions of Abuse of Law: A new General Principle of EU Law?, Studies of the Oxford Institute of European and Comparative Law, Hart Publishing, 2011, Ch. 11.

13 Extensive analysis of German (and non- German) companies restructured according to UK SoA model, especially in regard to existing "sufficiency of connections" see: Block-Leib, Susan, op. cit., p. 16 et seq. Author notices that "even presence of the English choice of laws clauses has (…) found sufficient to satisfy jurisprudential requirement of connections between the foreign company and England."

14 Eidenmüller, H., Frobenius, T., Die internationale Reichweite eines englischen Scheme of Arrangement, WM 2011, p. 1210.

15 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32. See more, Block-Leib, op. cit., p. 19.

Italy developed tailor-made state-assisted proceedings extraordinary administration (hereinafter: EA) for large businesses in distress.[16] According to Ghia,[17] the aim of the EA is to preserve a business entity both in its value as a whole and in its value as a group of individual assets. The presumption underlying this concept is that "the presence of contracts, the competitiveness of the product, and its marketability are factors that cannot be dispersed through a liquidation procedure while intangible goods (intellectual property assets and goodwill) greatly lose their value.[18] With the introduction of the EA, bankruptcy proceeding was for the first time designed in a way to encourage the recovery of a debtor-company through composition agreements between the debtor and its creditors.[19] According to some authors and relying on an extensive survey, the EA has proven to be generally efficient, although effects on creditors vary – from significant recovery ratios to ratios not far from the ones the creditors could have if the company had gone bankrupt.[20]

At the moment, Croatia is facing the biggest (group of) companies in difficulties restrucuturing ever, with a substantial involvement of international financial investors specialized for distressed firms, also known as vultures.[21] The Act on extraordinary administration proceeding in companies of systemic significance for the Republic of Croatia (hereinafter: EAPA)[22] was introduced when the threat of business failure of the major retailer became imminent. It is a type of debtor-not-in-possession in-court EA designed for large companies in state of insolvency or pre-insolvency. The EAPA was seriously criticized both by legal scholarship and the public for being designed for a single group of companies in Croatia, as well as for being incoherent with

16 Castagnola, A., Sacchi, R. (eds.), La legge Marzano-Commentario, Torino, 2006, p. 1-290., Pacchi, S., Alcune riflessioni in tema di insolvenza, impresa e complesso aziendale, derivanti dalla lettura della legge delega per l'emanazione della nuova legge sull'amministrazione straordinaria, Giur. comm., 1999, I, p. 314; Pacchi, S., L'amministrazione straordinaria delle imprese di «rilevanti dimensioni», in: Trattato di diritto delle procedure concorsuali, Apice, Umberto (ed.) III, Torino, 2011; Zanichelli, V., L'amministrazione straordinaria, in Fallimento e altre procedure concorsuali, diretto da G. Fauceglia, L. Panzani, Torino, 2009. Zanichelli, V., I concordati giudiziali, Torino, 2010. Falini, Alberto, La straordinaria amministrazione: elementi di criticità nella comunicazione e nel controllo delle imprese in amministrazione straordinaria, Milano, Franco Angeli, 2008, p. 1-146.

17 Ghia, L., Restructurings and Reorganizations in Italy - An Overview of Italian Bankruptcy Legislation for Large Insolvent Companies, International Insolvency Institute, Tenth Annual International Insolvency Conference Rome, Italy, June 7-8, 2010, p. 2, available at: https://www.iiiglobal.org/sites/default/files/Lucio_Ghia.pdf (10 June 2018).

18 Loc. cit.

19 Manganelli, P., The Evolution of the Italian and U.S. Bankruptcy Systems: a Comparative Analysis, Journal of Business & Technology Law, Vol. 5, Issue 2, Article 4, p. 242, available at: http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1146&context=jbtl (22 June 2018).

20 Danovi, A., Managing large corporate crisis in Italy: an empirical survey on extraordinary administration, Journal of Global Strategic Management, Vol. 4, No. 2, 2010, p. 61-76.

21 Gilson, S. C., Creating Value through Corporate Restructuring, 2nd ed., Wiley Finance, 2010, p. 17.

22 Zakon o postupku izvanredne uprave u trgovačkim društvima od sistemskog značaja za Republiku Hrvatsku, Official Gazette, No. 32/17.

constitutional principles and the existing insolvency laws.[23] With this law, the Croatian legislator has departed from its general role model in company and insolvency matters, i.e. German law and resorted to the Italian model applied for the first time when Italy faced the financial collapse of the food giant Parmalat.[24]

The EAPA now appears as a "strange puzzle" in the system of preventive restructuring law. Due to its inconsistencies and understatements, its constitutionality was questioned, yet the Constitutional Court dismissed the petitions. The first case of application of the EA in Croatia is still in motion. It seems that this sudden legislative shift needs more probing into both the design and efficiency of the particular preventive restructuring models. This paper focuses on three legal models (as stated above) of preventive corporate restructurings for firms in difficulties, not only to inspect their general features, but also to analyse how they function in practice in terms of their main benefits and drawbacks. As far as the Croatian law is concerned, the paper zooms in on the notion of the company of systemic significance as the cornerstone of the law. On the basis of all findings, the authors offer *de lege ferenda* proposals.

2. REVIEW OF THREE (PREVENTIVE) RESTRUCTURING MODELS

2.1. The German Protective Schield Proceedings (PSP)

The German Insolvency Code (*Insolvenzordnung* – hereinafter: InsO)[25] was significantly changed in 2012 with the Reorganization Facilitation Act *(Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen,* hereinafter: ESUG)[26] with the aim of facilitating early restructuring of operative companies by the introduction of the protection scheme proceedings *(Schutzschirmverfahren,* hereinafter: PSP*)*.[27] With ESUG, the German legislature tried to regain its reorganization attractiveness[28] and prevent further emigration of German companies to the UK in order to be reorganized under the English Scheme of Arrangement (hereinafter: SoA).[29] By virtue of the

23 See Garašić, J., Izvanredna uprava države nad povezanim društvima, Zbornik 55. susreta pravnika Opatija, 2017.

24 Legislative Decree 23. Dec. 2003 n. 347 and amended 18 Feb 2004 n. 39.

25 Insolvenzordnung of 5 October 1994 (BGBl. I S. 2866), last amendment of 23 June 2017 (BGBl. I S. 1693).

26 This amendment of InsO-a was brought on 13 December 2012, entered into force on 1 March 2012 (BGBI I S. 2582).

27 See an overview of changes introduced by ESUG in Trilling, P., Eigenverwaltung und Schutzschirmverfahren nach dem ESUG, Wirkungen dieser Anreizinstrumente auf eine frühzeitige Insolvenzantragstellung des Schuldners, Igel Verlag, Hamburg, 2014; Kann, van J., Redeker, R., Reform Act on German Insolvency Law: New Opportunities for Distressed Investors?, Pratt's Journal of Bancruptcy Law, Vol. 8, No. 5, 2012, pp. 436-442.

28 Sax, S., Ponseck, J., Swierczok, A. M., Ein vorinsolvenzliches Restrukturierungs-verfahren für europäische Unternehmen, Betriebs Berater, Heft 7, 2017, p. 323.

29 English Companies Act 2006, last amended on 26 June 2017, available at: https://www.legislation.gov.uk/ukpga/2006/46/contents. On the impact of regulatory competition on development of national preventive insolvency proceedings see Eidenmüller, H., van Zwieten,

ESUG, the German law tried to increase the number of reorganization proceedings.[30]

It is important to emphasise that the German PSP is not a stand-alone preventive restructuring proceeding, but rather the first stage of ordinary preliminary proceedings.[31]

The PSP is initiated by an order of the insolvency court. A petition for opening PSP (i.e. self-administration or *Eigenverwaltung*) is filed by the debtor together with a petition for the opening of insolvency proceedings on the grounds of imminent insolvency - prospective illiquidity *(drohende Zahlungsunfihigkeit)* or over-indebtedness *(Überschuldung)*.[32] During the PSP, the debtor remains in control of the company's management.[33] Together with the proposal, a debtor encloses a 'restructuring certificate', provided by a person (tax adviser, accountant or lawyer) experienced in insolvency matters confirming imminentilliquidity or over-indebtedness, absence of illiquidity and providing proof that the intended restructuring does not manifestly lack a prospect of success.[34] Within PSP, the debtor will be granted a certain period of time, not exceeding three months, to submit the insolvency plan *(Insolvenzplan)*.[35] Three months is estimated as enough time for debtor to develop the plan for restructuring the company.[36] The competent insolvency court will also appoint a preliminary creditors' trustee *(vorläufiger Sachwalter)*.[37] When exercising its appointing powers, the court should generally accept a preliminary creditors' trustee as proposed by debtor and it can only refuse the proposal on the grounds of the candidate's insufficient qualifications.[38] After opening the PSP, individual enforcement measures are prohibited, allowing the debtor in possession to negotiate the plan.[39] At the request of the debtor, the court can allow the debtor to create preferential claims against the estate, to be satisfied in full (e.g. claims of existing suppliers). That encourages providers of the new money to

K., op. cit., p. 2. See also Schneider, S., Is Germany about to become the most attractive place for business restructurings?, Insolvency nad Restructuring International, Vol. 10, No. 2, 2016, p. 15.

30 See Ahrens, M., Von der Konkurs- über die Gesamtvollstreckungs- zur Insolvenzordnungs, Yonsei Law Journal, Vol. 6, No. 1&2, p. 134; Grell, F., Hauke, H., Splittgerber, D., Pre-Packaged Insolvencies on the Rise in Germany? Evaluating the German ESUG, Expert guide: Bankruptcy & restructuring 2014, March, p. 52, available at: https://www.lw.com/thoughtLeadership/pre-packaged-insolvencies-on-the-rise-in-germany-evaluating-the-german-esug (10 May 2018). Authors point that an important result of the ESUG is a thorough change to German insolvency law 'culture'.

31 Kann, van J., Redeker, R., op. cit., p. 440. See also, Study for the JURI Committee, The Commission Insolvency Proposal and its Impact on the Protection of Creditors, June 2017, p. 32., available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583155/IPOL_STU(2017)583155_EN.pdf (12 May 2018).

32 § 270.b (1) InsO.

33 Moravec, T., Pastorčak, J., Valenta, P., European Regulation of Insolvency Status in the Hybrid Proceeding, US- China Law Review, Vol. 12, 2015, p. 459.

34 § 270.b (1) InsO.

35 § 270.b (1) InsO.

36 Kann, van J., Redeker, R., op. cit., p. 441.

37 § 270.c InsO.

38 § 270.b (2) InsO.

39 § 270.b (2) InsO together with § 21 InsO.

invest in the distressed company.[40] In order to provide for the successful development of an insolvency plan, during a short period of the PSP, the collaboration of at least 51% of the major creditors is required.[41] Preliminary Proceedings and the PSP end when a court initiates the insolvency proceedings.

According to the general opinion, ESUG has proven a success for it enabled both creditors and debtors to use German insolvency law more efficiently with a view to procuring their legitimate interests.[42] Its effectiveness was tested in various independent studies. For our purpose we single out the findings of the following three studies. The first one, carried out by the Boston Consulting Group Study in 2013[43] showed a relatively low number of initiated PSPs in relation to total insolvency proceedings, i.e. only 2.4%.[44] The typical entity using PSP was rather large, with an annual turnover of at least € 15 million and a minimum of 150 employees.[45] In another 2015 McKinsey and Noerr InsO study,[46] German insolvency law received top marks from restructuring and insolvency experts.[47] Improved opportunities for creditors to exercise influence, speediness of restructuring procedure under PSP were deemed a success. However, it was observed that 1/3 of the self-administrations applied for, went into insolvency which was not a sign of high success rate.[48] The weakest point for self-administration proceedings was found in the management's lack of competence. Continued absence of group insolvency law was highlighted by many experts as a considerable drawback.[49] The third, the 2017 Boston Consulting Group study[50] assessed the first 5 years of ESUG since its enactment. It concluded that the law has been largely successful, with a few exceptions. The positive effects include the average duration of the PSP which is shorter then the regular insolvency proceedings.[51] On the other side, there was no evidence that restructuring applications are being submitted any sooner than before the introduction of the ESUG.[52] The study further pointed out some additional noteworthy facts. First, self-administration of corporate restructuring indeed remains

40 Clifford & Chance, A Guide to European Restructuring and Insolvency Proceedings, September 2015, str. 98 available at: https://www.cliffordchance.com/briefings/2015/09/a_guide_to_europeanrestructuringandinsolvenc.html (12 May 2018).

41 § 272 InsO.

42 Schneider, S., op. cit., p. 17.

43 The Boston Consulting Group, Zwei Jahre ESUG, Hype weicht Realtät, March 2014, http://www.ifus-institut.de/fileadmin/pdf/Newsletter/BCG/BCG_2_Jahre_ESUG.pdf (15 April 2018).

44 Ibid., p. 3.

45 Ibid., p. 7.

46 McKinsey & Noerr, InsO study 2015, Are German insolvency statutes internationally competitive after 3 years of ESUG?, Berlin June 2015, available at: https://www.noerr.com/~/media/Noerr/PressAndPublications/News/2015/insolvenzstudie/Insolvency-Study-EN_short.pdf (20 April 2018).

47 Ibid., p. 5.

48 Ibid., p. 8.

49 Ibid., p. 17.

50 The Boston Consulting Group, Fünf Jahre ESUG, Wesentliche Ziele erreicht, March 2017, available at: http://media-publications.bcg.com/13mar2017-Studie.pdf (15 April 2018).

51 Ibid., p. 11.

52 Ibid., p. 3.

the exception. The current share of self-administration proceedings remains at a stable 2.6% of all insolvency proceedings.[53] Second, self-administration remains important for large companies, but is increasingly interesting to small companies as well.[54] More than half (58%) of the largest 50 corporate bankruptcies in 2016 were handled as self-administered proceedings. Third, self-administration remains very attractive to shareholders. In more than half of the proceedings (58%), shareholder's rights were not affected.[55] Fourth, in 90% of total proceedings creditors have had to renounce more than 50% of their claims,[56] which generates a rather modest success for them.

2.2. The English Scheme of Arrangement

In the UK, the preventive restructuring framework is composed of two different proceedings:[57] Company Voluntary Arrangements (hereinafter: CVA)[58] and Scheme of Arrangement (hereinafter: SoA).[59] The latter has been increasingly used in financial restructuring of international (group of) companies.[60]

The CVA is primarily designed for small companies, although it is available to any company, regardless of its size. The moratorium period of up to three months for the company is available to small companies only (companies which satisfy at least two of the following three requirements: turnover of not more than £6.5 million, assets of not more than £3.26 million; and less than 50 employees).[61] One of the reasons why the moratorium is not available to large companies is the legislative intention that large companies should follow administrative procedure and preventive restructuring introduced by SoA.[62] For the CVA proposal to be approved, more than one half (in

53 Ibid., p. 5.
54 Ibid., p. 6.
55 Ibid., p. 16.
56 Loc. cit.
57 For an overview of UK Insolvency Law and the preventive, i.e. rescue proceedings, see Finch, V., Milman, D., Corporate Insolvency Law, Perspectives and Principles, Cambridge University Press, 2017, pp. 409 – 450. See also Armour, J., Hsu, A., Walters, A., Corporate Insolvency in United Kingdom: The Impact of the Enterprise Act 2002, Vol. 5, No. 2, June 2008, pp. 148-171. For comparison with US law, see: Mallon, Christopher, Waisman, Shai, Y., Schrock, Ray C., op. cit., p. 151-220.
58 Regulated in Insolvency Act 1986, in Articles 1 – 7B (http://www.legislation.gov.uk/ukpga/1986/45/contents)
59 Part 26 (articles 895 – 901) of English Companies Act 2006.
60 Sax, S., Swierczok, A., The Recognition of an Englich Scheme of Arrangement in Germany Post Brexit; The Same But Different?, International Corporate Rescue, Vol. 14, No. 1, 2017, p. 38.
61 The moratorium period for small companies using the CVA was introduced by the amendment in 2000 (Insolvency Act 2000), which came into force on 1 January 2003. See Article 3 (2) of Schedule A1 of Insolvency Act 1986. See a brief overview in Finch, V., Corporate rescue: a game of three halves, Legal Studies, Vol. 32, No. 2, June 2012, p. 320.
62 Fletcher, I.F., UK Corporate Rescue: Recent Developments – Changes to Administrative Receivership, Administration, and Company Voluntary Arrangements – The Insolvency Act 2000, The White Paper 2001, and the Enterprise Act 2002, European Business Organization Law Review, Vol. 5, No. 1, 2004, p. 131.

value) of the shareholders and more than three quarters in value of the creditors must vote in favor of it. The creditors' decision holds precedence subject to an appeal by the shareholders before the court,[63] after which the scheme becomes binding. Thus, it makes the decision a compromise between the creditors and the shareholders, without having to involve the court (except for the possibility of appeal).[64] However, there is no clear conclusion whether the CVAs are actually successful in practice.[65]

SoA is a court-assisted reorganization procedure regulated in Part 26, Section 895-901 of the Companies Act 2006. It allows the court to sanction a "compromise or arrangement" that has been agreed between the relevant class or classes of creditors or members and the company.[66] As opposed to CVAs, SoAs are commenced by initial application to the court, which decides whether to order a meeting of the creditors and members of the company.[67] The application for SoA can be filed by the company itself; any creditor of a member of the company, liquidator or administrator.[68] Any arrangement brought by the creditors and shareholders shall be binding if the majority which represents 75% in value of creditors (or class of creditors) or members (or class of members) which are present at the meeting agree, subject to a subsequent court's approval (i.e. to sanction the agreement).[69] Thereby, the majority of creditors binds the minority (cram-down mechanism within each class of creditors) which makes SoA a very efficient restructuring mechanism.[70] Also, a company is free to choose the creditors or class of creditors with whom it wishes to reach an arrangement, all of those subject to a court's final approval.[71] Although the court assumes a more prominent role within the SoA, SoA still remains primarily a private-law agreement between the creditors and shareholders. Directors stay in control, as the SoA does not require engaging an insolvency practitioner in formulating and exercising the scheme.[72]

SoA is a flexible procedure, which could allow for example, a simple extension of duration of the claims, debt to equity swap for highly complicated restructuring measures or combination of different measures.[73] The overall timing of a SoA implementation depends on the complexity of the restructuring but generally, it is

63 Article 4.A (2) of the Insolvency Act 1986 and articles 1.19 – 1.20 of Insolvency Rules 1986. See also McKenzie-Skene, D. W., How insolvency works in Scotland, Juta's Business Law, Vol. 11, No. 2, 2003, p. 108.

64 Finch, V., Milman, D., op. cit., p. 418.

65 See an overview of conducted CVAs in Walters, A., Frisby, S., Preliminary Report to the UK Insolvency Service into Outcomes in Company Voluntary Arrangements, available at https://ssrn.com/abstract=1792402 (8 May 2018); Armour, J., Hsu, A., Walters, A., op. cit., p. 158.

66 Article 895 (1) of Companies Act 2006. Both terms „compromise" and „arrangement" have no legal statutory meaning, but rather ordinary commercial meaning. Thus they pose no obstacle in application of the SoA. See Payne, J., Schemes of Arrangement: Theory, Structure and Operation, Cambridge University Press, Cambridge, 2014, p. 20.

67 Article 896 (1) of Companies Act 2006. See more in Payne, J., op. cit., p. 36.

68 Article 896 (2) of Companies Act 2006.

69 Article 899 (1) of Companies Act 2006.

70 Sax, S., Swierczok, A., op. cit., p. 38.

71 Payne, J., op. cit., p. 42.

72 Finch, V., Milman, D., op. cit., p. 412.

73 Sax, S., Swierczok, A., op. cit., p. 38.

completed in approximately eight weeks which is one of its most important benefits.[74] However, in contrast to the CVA, there is no moratorium period granted towards the company's creditors, which is considered to be one of the main disadvantages of SoAs.[75]

The court not only has the authority to review the SoA and, if satisfied, approve it, but also enjoys a rather wide discretion in this regard. There are three main criteria established in the settled case law which courts examinebefore sanctioning the scheme: compliance with the statutory requirements; making sure that the majority fairly represents the class (which includes the test if the majority of relevant creditors are acting in good faith and are not simply coercing the minority in order to promote their own interests), and that the scheme is such that an intelligent and honest person who may be affected by the scheme might reasonably approve it.[76] The SoA becomes legally effective when filed with the Registrar.[77]

English courts have allowed the application for the SoA even for companies which do not have COMI or an establishment in England, under a relatively flexible condition of having "sufficient connection with England".[78] Thus, the SoA has been successfully used even for restructuring of foreign (predominantly German) companies, including group of companies.[79] These cases are for example Telecolumbus in 2010, Rodenstock GmbH in 2011, Apcoa Parking Holding GmbH in 2014, CBR Fashion in 2016 and others.[80]

However, the main risk for foreign companies is whether the scheme will be recognized in the relevant jurisdiction.[81] The likelihood of recognition in targeted (foreign) country is also one of the factors which English courts take into account when deciding on their jurisdiction.[82] Within the EU, the SoA falls outside of the scope of the Insolvency Regulation (2015/848).[83] On the other side, the prevailing opinion

74 See Weil, Schemes of Arrangement as Restructuring Tools, 2015, p. 11, available at: https://eurorestructuring.weil.com/wp-content/uploads/2015/01/140553_LO_BFR_Schemes_Arrangement_Brochure_v12.pdf (25 April 2018).

75 Finch, V., Milman, D., op. cit., p. 414.

76 For an overview of the case law and standards for approving the scheme under SoA see in Payne, J., Schemes of Arrangement, Takeovers and Minority Protection, Journal of Corporate Law Studies, Vol. 11, 2011, p. 93 and further.

77 Article 899 (4) of Companies Act 2006.

78 Goldrein, A., Ready, Willing and Able, but Perhaps Not Always Acceptable: UK Schemes of Arrangement in Europe, Pratt's Journal of Bankruptcy Law, Vol. 7, No. 2, 2011, p. 115. See also Moravec, T., The Choice of Insolvency Regime in Hybrid Proceeding by Entrepreneuers, Curentul Juridic, 2014, Vol. 57, No. 2, p. 142. Block-Leib, Susan, op. cit., p. 15 et seq.

79 Sax, S., Swierczok, A., op. cit., p. 38.

80 See Weil, op. cit., p. 10. See also, Study for the JURI Committee, cit., p. 17.

81 Sax, S., Swierczok, A., op. cit., p. 39. Block-Leib, Susan, op. cit., p. 1-51.

82 See Sax, S., Swierczok, A., op. cit., p. 39. See also Goldrein, A., op. cit., p. 117 and further; Payne, J., Cross-border Schemes of Arrangement and Forum Shopping, European Business Organization Law Review, Vol. 14, No. 4, 2013, p. 581.

83 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, 5.6.2015, p. 19–72. The SoA is not listed in the Annex A which defines which insolvency proceedings fall within the scope of the Insolvency Regulation. See also Eidenmüller, H., Zwieten, van K., op. cit., p. 20. Payne, J., op. cit., p. 582.

in scholarly writings[84] and in settled case law[85] is that the SoA, i.e. a judgement of the English court should be recognized in EU member states (in accordance with the Brussels I Recast Regulation[86] or in accordance with the Rome Convention[87]). However, this standpoint was seriously questioned by the ruling of a German court in the case of Equitable Life Assurance Society,[88] where it was argued that the scheme does not qualify as a "judgement" within the Brussels I Recast Regulation, and thus cannot be recognized in Germany.[89] Still, it remains unclear whether German courts will follow this line of reasoning or not, as there are dissenting views on this matter in the German case from 2010 before the Potsdam Regional Court.[90] Some authors argue that this is a matter for the interpretation by the Court of Justice of the European Union.[91]

After Brexit, i.e. the official withdrawal of the UK from the EU, the issue of the recognition of SoAs in EU member states remains even more unclear. In the opinion of some German authors, there are several other paths to recognize the SoA after Brexit in Germany, rendering it a useful and effective restructuring tool even after Brexit.[92]

2.3. The Italian Model for large companies – EA

Although Italy has one of the most developed legal systems, with various available insolvency and pre-insolvency restructuring tools for the restructuring of large companies, the EA constitutes the most important. The history of the Italian model for restructuring of large (but insolvent) corporations begins with the Prodi Law,[93] whereby EA was introduced and then revised and replaced with the Prodi-

84 See Sax, S., Swierczok, A., op. cit., p. 39. See also Kuipers, J-J., Schemes of Arrangement and Voluntary Collective Redress: A Gap in the Brussels I Regulation, Journal of Private International Law, Vol. 8, No. 2, 2012, p. 229.

85 See Re Rodenstock GmbH [2011] EWHC 1104, par. 76. Re Primacom Holding GmbH [2012] EWHC 164.

86 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32. Applicable articles should be Article 2 (a) together with Article 36 of the Brussels I Recast Regulation.

87 80/934/EEC: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, OJ L 266, 9.10.1980, p. 1–19.

88 OLG Celle 8 U 46/09, 8 September 2009.

89 For an overview of the case see Payne, J., op. cit., p. 584 and further.

90 LG Potsdam, 2 O 501/07. Likewise, following the appeal on the Equitable Life Assurance Society Case, in the BGH ruling this issue reamins rather vauge. See BGH, 15.2.2012 – IV ZR 194/09.

91 For an overview of the case see Payne, J., op. cit., p. 586.

92 See Sax, S., Swierczok, A., op. cit., p. 46. Block-Leib, Susan, op. cit., p. 1-51, discussing extensively forum shopping issues.

93 Legislative Decree no. 95 of April 3, 1979. For an overview of historical development of Italian law see D'Ambrosio, A., Le nuove tendenze della disciplina sull'amministrazione straordinaria delle grandi imprese alla luce della l. 166/08, doctoral thesis, Universita' degi studi di Napoli Federico II, 2011, p. 9-28. See also Panzani, Luciano, The Italian Bankruptcy Law Reform

bis Law.[94] The Prodi-bis Law applied to companies that have (i) debts equal to two-thirds of both the assets and the ordinary gross profits shown in a company's last fiscal year financial statement; and (ii) more than 200 employees in the last fiscal year. A few years later, in the last days of 2003, Italy was the scene of collapse of the Parmalat group.[95] While none of the restructuring instruments was adequate to handle such complex bankruptcy, the Marzano Law[96] was introduced with "special" EA procedure for "very large" corporations. Its most significant amendment was the Alitalia Decree,[97] because of the state of insolvency of the national air carrier Alitalia, offering a special restructuring tool for providers of public services.[98] While Prodi-bis procedures can be started by: the creditor, debtor, public prosecutor or the court, only the debtor can initiate the Marzano procedure.[99] From the formal standpoint, under the EA insolvency proceedings are separate and distinct for each legal entity of the group, but are coordinated on a common basis.[100]

The Marzano law applied to large businesses that cumulatively fulfill the following criteria: an actual prospect of recovery, by way of an economic and financial restructuring of the business on the basis of a restructuring plan whose duration cannot be more than 2 years or through a transfer of the company's assets, a minimum of 500 employees for at least one year and debts, including obligations arising from guarantees, for an aggregate amount not lower than € 300 million. Once the company has been admitted to the procedure, no individual action may be brought by any creditor.

The Marzano Law represented a significant break with the punitive tradition of Italian bankruptcy law, while for the first time the law was designed to favor a composition of the agreements between the debtor and its creditors.[101] In case of a group of companies, once the parent company has been admitted to the EA, the other insolvent companies belonging to the same group may be involved in such insolvency procedure as well, even if they do not meet the above dimensional and indebtedness

Act III, Norton Annual Review of International Insolvency, 2009, pp. 301-310, where autor highlights the main purposes of the reform of Italian Insolvency Law.

94 Legislative Decree No. 270 of 8 July 1999.

95 For an overview of the Parmalat case see Kaufman Aaron M., The European Union goes COMI-tose: Hazards of harmonizing corporate insolvency laws in the global economy, Houston Journal of International Law, Vol. 29, No. 3, 2007, pp. 626-632.

96 Legislative Decree No. 347 of 23 December 2003, and Law No. 39 of 18 February 2004.

97 Legislative Decree No. 134 of 28 August 2008.

98 Piergrossi, Alberto, Restructurings and reorganizations in Italy, Extraordinary Administration v. Bankruptcy: The Italian Way to Economic Relief of Large Companies in Distress, International Insolvency Institute, Tenth Annual International Insolvency Conference Rome, Italy June 7-8, 2010, p. 1-11, available at https://www.iiiglobal.org/sites/default/files/Alberto_Piergrossi.pdf (20 June 2018).

99 Panzani, L., op. cit., p. 323.

100 Gianni et al., The new extraordinary administration proceedings for large insolvent companies in Italy, p. 1, available at http://www.gop.it/doc_pubblicazioni/19_kdnktppfn9_ita.pdf (22 June 2018).

101 Manganelli, P., op. cit., p. 242. Beye, Mema, Nasr, Joanna, Repaying creditors without imprisoning debtors, available at http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Reforms/Case-Studies/2008/DB08-CS-Italy.pdf (22 June 2018).

requirements. In particular, the notion of the group of companies includes also those companies which are linked in a substantially exclusive way – by contractual relations with the company admitted to the EA for the supplying of services necessary to the performance of their relevant activities.[102]

The EA is a debtor not-in-possession proceeding. The company willing to enter the EA files both an application with the Italian Ministry for Economic Development (hereinafter: MED) and a petition to the bankruptcy court. A petition for the insolvency declaration is a condition for admission to the EA. Once the company enters into EA, one or more extraordinary commissioners are appointed by the MED. The Court ascertains the state of insolvency of the company.[103] The extraordinary commissioners have the same powers and duties as trustees in bankruptcy proceedings. Once the insolvent company is admitted to the EA, creditors are no longer entitled to initiate or continue any enforcement or cautionary proceedings.[104] However it is not clear does the rule apply to all creditors, irrespective whether claims have arisen before or after the insolvent company is admitted to the EA.

The extraordinary commissioner is the one who should file a restructuring plan within 180 days of his/her appointment, to be implemented either through financial restructuring or an assets sale. This period may be extended for a further 90 days. The extraordinary commissioner may provide, as part of the restructuring plan, the payment of creditors through composition agreement, i.e. an agreement among the debtor company and the creditors. The procedure ends when its goals have been achieved, i.e. when the company, after the implementation of the plan, is in a sound financial position. Otherwise, the company will be declared insolvent pursuant to the Bankruptcy Act.

The most notable characteristic of the Marzano Law is the renewed composition agreement procedure (*Concordato* procedure). Creditors are divided in classes, subject to different treatments. *Concordato* must be accepted by creditors representing the majority of allowed claims. If different classes of creditors are formed, *concordato* should be voted for by the creditors representing the majority of allowed claims in each class. Secured creditors are allowed to vote if they give up all or part of their security rights; if so, they can vote only in proportion to the amount of the claim that subsequently becomes unsecured. This instrument was successfully used in the Parmalat case for the first time, whereas the reform of ordinary insolvency procedure that followed during the period 2005-2007 was influenced by it.[105]

While the first version of Marzano law was enacted in the wake of the Parmalat case, and its amendment promptly followed because of Alitalia group of company insolvency,[106] more recently the EA has been applied to Ittierre group, one of the leading payers in the luxury goods sector, that designs, produces and distributes high-

102 Gianni et al., op. cit., p. 1.
103 Ibid., p. 2.
104 Loc. cit.
105 Azzarà, A., Manganelli, P., Klimbacher, S., Italy - The Marzano Law: a Special Procedure for Large Insolvent Companies, Analysis of the Amendments Brought by the Alitalia Case, p. 2, available at https://www.paulhastings.com/docs/default-source/PDFs/1134.pdf (22 June 2018).
106 D'Ambrosio, A., op. cit., p. 79-83.

quality products under fully owned brands such as Gianfranco Ferré, Malo and Extè or under license agreement such as Just Cavalli, VJC Versace, Galliano etc.[107]

According to some authors and their findings[108] there were 360 companies subject to Marzano and Prodi-bis law. Thereof 215 companies were part of 73 business groups and employed 39,119 people. In 49 (out of 73) of these cases the companies were sold to third parties and 15,343 employees were transferred. The other 145 companies, which employed 32,191 workers, were part of large enterprise groups. 15,980 of these employees were relocated in the transferring companies. Other sources reveal that if the companies under EA were sorted by a descending number of "depending persons", the first ten in EA sorted that way, ended with transfer (cession) or restructuring (*ristrutturazione*) and none of these ended with liquidation.[109] A closer look into the biggest Italian EA (Alitalia group) reveals that Alitalia - Societa' Aerea Italiana S.p.a. newly entered in EA by Ministerial Decree of May, 2, 2017 and its group of companies (Alitalia Servizi S.p.a., Alitalia Airport S.p.a., Alitalia Express S.p.a. and Volare S.p.a.) are also admitted into EA. Namely, Alitalia was put under EA again in 2017 after its staff rejected a plan to cut jobs and salaries.[110] Lufthansa, British low-cost carrier EasyJet and U.S. private equity fund Cerberus are among companies that have expressed an interest in Alitalia, but the restructured "NewAlitalia" in their opinion should be smaller in terms of both staff and its fleet.[111]

The flexibility of the EA that allows the company debtor to carry out its business was described as the main advantage of the (amended) Marzano law. On the other hand, less transparent private negotiations, substantial political involvement, weaker role of creditors due to their lack of involvement in the restructuring plan and ability to sell business units even before declaring state of insolvency were underlined as the main disadvantages of the (amended) Marzano law.[112] The above mentioned authors expressed the need to unify, simplify and harmonize that part of the law, because, while the Prodi law applies to medium- and large-sized insolvent companies, the amended Marzano law applies to large-sized insolvent companies, therefore, the unification of those two laws would create a clearer and simplified system in which professionals, creditors and distressed investors can operate.[113] The model in question has three submodels: EA for large corporations (Prodi-bis Law), EA for very large corporations (Marzano Law) and EA for very large corporations offering public services (Alitalia Law). Although the restructuring of Alitalia group is still not a finished story, it poses serious doubt as to the effectiveness of the state driven and assisted restructuring

107 Gianni et al., op. cit., p. 1.

108 Ghia, L., op. cit., p. 8. Danovi, A., op. cit., p. 62.

109 Pellerone, G., Gli strumenti a disposizione delle imprese in crisi per la salvaguardia della continuità aziendale: una valutazione comparativa attraverso case studies, University del Piemonte Orientale, Dipartimento di studi per l'economia el'impresa, 2014, p. 45.

110 See more at http://www.alitaliaamministrazionestraordinaria.it/ (10 April 2018).

111 Wissenbach, I., Exclusive: Lufthansa CEO calls for significant Alitalia cuts – letter, available at https://www.reuters.com/article/us-alitalia-m-a-lufthansa-exclusive/exclusive-lufthansa-ceo-calls-for-significant-alitalia-cuts-letter-idUSKBN1F01RW (12 January 2018).

112 Azzarà, A., Manganelli, P., Klimbacher, S., op. cit., p. 3.

113 Ibid., p. 4.

procedure.[114]

3. THE CROATIAN (PREVENTIVE) RESTRUCTURING LAW

The legislative history of the Croatian pre-insolvency restructuring procedure is not a lengthy one. The pre-insolvency settlement was introduced by the Law on the financial operation and pre-insolvency settlement.[115] Underlying the said legislative experiment was a wrongful assumption that acute nonliquidity and insolvency crisis of domestic companies could be solved by construing a separate law.[116] It was a combination of an administrative and court proceedings with the court as a rather formal verificator of the restructuring plan.[117] Due to serious inconsistencies with existing insolvency laws and criticism in the process of the implementation of that law, this preventive reorganization tool was thoroughly reformed in 2015. With implementation of the new 2015 Insolvency Act (hereinafter: IA 2015), pre-insolvency procedure superseded the abandoned pre-insolvency settlement. That substantial novelty was considered as the regulatory response[118] to 2014/135/EU Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency.[119] Pre-insolvency procedure was, *inter alia*, put back into the hands of the (commercial) court. Imminent insolvency *(prijeteća nesposobnost za plaćanje)* was introduced as a reason to propose the opening of pre-insolvency procedure. Except pre-insolvency debtor, eligible petitioners were also creditors but only if the debtor had consented to that.[120] When filing the proposal to open pre-insolvency proceedings, a restructuring plan[121] should be attached accordingly.[122] Although the IA 2015 - in terms of provisions on determination of voting rights of creditors and voting majority necessary for the acceptance of the restructuring plan - provided that the rules applicable to the insolvency plan apply by analogy,[123] the restructuring plan departed from its role-model, i.e. the insolvency plan and the law was silent on the cram-down rule.[124]

Several drawbacks were noticed in the pre-insolvency proceedings even after the major IA 2015 reform. Creditors were deprived of their representing body in the

114 Grigò, E., Oglio, L., The Alitalia Decree: How Insolvency Affects Antitrust Law, Insolvency and Restructuring International, Vol. 4, No. 2, 2010, p. 20.

115 Zakon o financijskom poslovanju i predstečajnoj nagodbi, Official Gazette, 108/12, 144/12, 81/13, 112/13, 71/15, 78/15.

116 Miladin, P., Markovinović, H., Stečajni plan i nagodba u postupku izvanredne uprave, Zbornik 56. susreta pravnika, Opatija 2018, Hrvatski savez udruga pravnika u gospodarstvu, Zagreb, 2018, p. 68.

117 Dika, M., Predstečajni postupak, Pravo u gospodarstvu, No. 3, 2016, p. 368.

118 Garašić, J., Najznačajnije novine Stečajnog zakona iz 2015. godine, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 38, No. 1, 2017, p. 140.

119 OJ L 74, 14.3.2014., p. 65–70.

120 Art. 25 par. 1 Inslovency Act 2015.

121 Mandatory elements of the plan are provided in Art. 27 IA.

122 Art. 26. Insolvency Act 2015, see: Dika, M., op. cit., p. 388.

123 Art. 56 of Insolvency Act.

124 Garašić, J., op. cit., p. 143.

pre-insolvency proceedings while the judge and trustee were sole procedural bodies.[125] A functional distinction between the pre-insolvency plan and insolvency plan was not clearly confined.[126] Likewise, the legal position of the providers of new money loans was not made clear, although the latter drawback was clarified by virtue of a new Article 62.a in IA 2017 Amendment of the 2015 Insolvency Act.[127]

Unlike the pre-insolvency restructuring plan, the introduction of the main insolvency reorganization tool called the "insolvency plan" *(stečajni plan),* dates back to 1996 reform of the Croatian insolvency law and was inspired by the German *Insolvenzplan* and left substantionally unaltered by the IA 2015 reform.[128]

At the beginning of 2017, Croatia witnessed the financial distress of the Agrokor group. As a fast-track salvatory measure it introduced the tailor-made restructuring law for (group of) companies of systemic significance – i. e. EAPA, creating for the second time a legal experiment outside the scope of the main insolvency law.[129] The problem of insolvency or insolvency-like status of the large (group of) companies is very well known in practice, although the question whether they, due to their size, pose a systemic risk has not been unanimously answered. It has been observed that such intervention would be justified only in case if it seriously threatened the collapse of the entire financial system.[130] However, opinions have been voiced that "ongoing-liquidity-state-guarantee" is *de facto* provided for socially "too-important-to-fail"

125 Ibid., p. 142.

126 Dika, M., op. cit., p. 425.

127 The mentioned article ensures priority to providers of the new money (based on previous agreement reached between debtor and creditors who hold more than two thirds of the legally approved claims). The new money creditors shall be given priority before the other insolvency creditors, except for the creditors of the "first higher payment rank" (i. e. employees and former employees' claims). According to par. 7 of the same new article this "new money creditors" are protected from avoidance actions based on the grounds of "non-equal" or "preferential" treatment of the creditors.

128 The right to file the insolvency plan belongs to debtor but it should be accompanied with the petition to open insolvency procedure. If insolvency procedure is already opened, insolvency administrator has also the right to file the plan, but this can be ordered to insolvency administrator also by creditors' assembly. Creditors are divided in classes and every class votes separately for the plan. The required majority within a class is accomplished if the value of the claims of the creditors who voted for the plan exceeded twice the value of the claims of the creditors who voted against it (absent creditors are not considered in calculation). The plan could not place any creditor into a worse position than that the creditor would face if the plan didn't exist (art. 337 IA). The law has cram down rule (protects majority from disenting minority). Namely, if a voting group has not accepted the plan with the required majority, the majority is deemed to be accomplished if following conditions are cumulatively met: (a) the creditors in that group are not in placed in a position worse than if the plan would not exist, (b) they should adequately participate in the economic benefits of the plan and (c) if majority of the voting groups has accepted the plan with the required majority (art. 331 in relation to 330/1 IA). The plan must be accepted by creditors and debtor (334/1) before confirmed by the court's resolution. The court's confirmation of the plan has erga omnes effect. The court has monitoring powers in implementation of the plan.

129 Miladin, P., Markovinović, H., op. cit., p. 68.

130 In this vein for Croatian law see: Garašić, J., Izvanredna uprava nad povezanim društvima, cit., p. 11.

non-financial institutions such as major hospitals, utility providers or even major employers.[131] Therefore, it remains an open question whether the business failure of a major employer or major utility provider justifies state intervention and/or requires tailor-made solutions, especially if "systemic significance" is the underlying concept of the EAPA.

In the explanatory part of the legislative proposal on EAPA the Government stated: "systemic risk (…) arises from the number of employed persons, business relationship with other business subjects in economy, business ramifications in the entire territory of the Republic of Croatia and/or dominant economic position in the part of the territory of the Republic of Croatia".[132] However, the said proposal did not offer a method for measurement of systemic risk, it merely stated the number of employees and amount of liability as thresholds that should imply the existence of "systemic significance". Yet, a systemic risk is a measurable category. In fact, there are many specialized tools that allow for comprehensive assessment of systemic risk, from complementary perspective including banks and non-banks.[133] As a result of the underlying "systemic significance" concept, it is possible that companies do generate a systemic risk – even if they do not fulfil the respective requirements, and vice versa, i.e. companies that fulfil requirements need not pose systemic risk, but are still admitted to EA procedure.

Adopted in a fast-track parliamentary procedure, the EAPA was heavily criticized in many aspects. The excessiveness of state intervention, absence of requirements related to formal qualification of a person who will act as the extraordinary trustee, absence of firm procedural rules ensuring the protection of substantial rights of the creditor, especially minor and medium creditors, the breach of the fundamental principle of insolvency law which calls for the equality of legal position of the creditors, their right to influence the composition of the bodies relevant for rendering decisions have been pinpointed as the most critical points.[134] Twelwe petitioners hence required judicial review of EAPA before the Constitutional Court of the Republic of Croatia. In its 182 pages long decision (not rendered unanimously), the Court discussed in length all of these alleged unconstitutional elements of EAPA, but in the end rejected petitions for review. Although the mentioned allegation warrants further elaboration from the perspective of insolvency laws, but this paper will only focus on the EAPA's concept of "a company of systemic significance to the Republic of Croatia", since it defines *the ratione personae* application of the law.

131 See generally: Azgad-Tromer, S., Too Important to Fail: Bankruptcy versus Bailout of Socially Important Non-Financial Institutions, Harvard Business Law Review, Vol. 7, 2017. p. 164-169, available at https://ssrn.com/abstract=2551237 (20 June 2018).

132 As quoted in the explanatory part of the Decision of the Constitutional Court of the Republic of Croatia, 2nd May 2018, p. 4.

133 Cortes, F., Lindner, P., Malik, S., Segoviano, M. A., A Comprehensive Multi-Sector Tool for Analysis of Systemic Risk and Interconnectedness (SyRIN), IMF Working Paper, WP/18/14, International Monetary Fund, 2018, pp. 1-46. The paper elaborates the tool (SyRIN) that produces various metrics to evaluate systemic risk from complementary perspectives, including tail risk, cross-entity interconnectedness and the contribution to systemic risk by different entities and sectors.

134 Garašić, J., op. cit., p. 5 et seq.

This notion is defined in Art. 4 (2) EAPA. It is a joint-stock company (and not a company with limited liability, or any other type of company!) which individually or together with its subsidiaries or affiliates, cumulatively meets the condition consisting in the number of employees and amount of balance sheet liablities. As to the first threshold, the company should individually or together with its subsidiaries or affiliates in the calendar year preceeding the year in which the proposal for opening an EA procedure has been submitted, employ more than 5,000 employees on average. As to the second threshold**,** the existing balance sheet liabilities alone or together with their subsidiaries or affiliated companies should amount to more than 7,5 billion of HRK (aprox. 1€ billlion) or, in HRK counter value, if denominated in another currency (at the day of submission of proposals for opening of the EA procedure). When comparing the said employee and liability threshold with the one applicable under Italian law, the authors stress that the number of employees is set ten times higher at the annual level in Croatian law, while the second threshold is approximately three times higher. However, while the Croatian employee threshold takes into account the number of employees at the level of a single company or respectively, at the level of the group, the Italian threshold is calculated at the level of the single company.[135] The existence of insolvency, imminent insolvency or overindebtness of the company is the legal ground to initiate EA proceedings, while in Italian law the state of insolvency is a mandatory precondition for the institution of the EA proceedings. When comparing the above thresholds it is noteworthy that the Italian is tied to the concept of a very large company (and from the Alitalia decree to companies that provide public services), while the Croatian does not rely on the concept of large company, but a company which is capable of creating a systemic risk. As explained in the Government Proposal this is a type of company whose "uncontrolled collapse" can cause a "chain reaction" and could "seriously jeopardize the entire Croatian economic system".[136] It implies a possibility to generate systemic risk, which is linked primarily to banks or to non-banking financial institutions such as investment funds, hedge funds and as of recently, even insurance sector companies. However, as already mentioned, systemic risk is an event which could have important consequences on the entire economic system, but nevertheless a measurable category. Therefore, setting up the "number of employees" and "amount of liabilities" as relevant criteria for *ratione personae* application has two drawbacks. It unjustifiably excludes companies that are not of that "size", but are otherwise capable of generating systemic risk, and vice versa "targeted" companies admitted in tailor-made state-assisted procedure, do not necessarily need to generate a systemic risk which is the implied term under EAPA. Therefore, the authors find that the notion "company of systemic significance" should not be the underlying concept of this law.

Another important difference between the Italian and Croatian law is the

135 There are announcements that the number of employees at the group level in the legislative reform would increase to "at least 800 employees". See Manganelli, P., Chiarugi, A. G., The proposed in-depth reform of the Italian extraordinary administration proceedings, available at: https://www.ashurst.com/en/news-and-insights/legal-updates/the-proposed-in-depth-reform-of--the-italian-extraordinary-administration-proceedings/ (28 June 2018).

136 Decision of the Constitutional Court of the Republic of Croatia, 2 May 2018, p. 4.

involvement of affiliated companies into the EA of the main company. In Italy, in case of a group of companies, once the parent company has been admitted to the EA, the other insolvent companies belonging to the same group may be involved in such insolvency procedure, even though they do not meet the above dimensional and indebtedness requirements. The notion of "group of companies" includes also those companies which are linked, in a substantially exclusive way, by contractual relations with the company admitted to the EA for the supplying of services necessary to the performance of the relevant activities. In that sense the Italian concept of related company is wider, while it relies not only on the concept of control of the parent company, but also involves companies that are suppliers of "substantial goods or services" to the company admitted to the EA. Indeed, the last revision of the Italian law has designed EA as a special restructuring tool for providers of public services.[137] Providers of public services, also sometimes called providers of services of general economic interests are the type of economic activity that deserve special treatment, in light of the fact that the delivery of such services is essential for citizens. Nevertheless, providers of SGEI and companies in difficulties both have access to particular state aid.[138] When comparing the Italian and Croatian concept of affiliated companies eligible to be admitted into the EA, the Croatian solution is based on the concept of control (at least 25% share capital in depending/related company is held by major/parent company), while the Italian is more a "single economic entity" approach.

Under Croatian law, affiliated companies must be involved in the EA of the main company if they are: depending companies *(ovisno društvo)* in the sense of Art. 475 of the Companies Act or related companies *(povezano društvo)*. In order to be admitted to the EA of the main/parent company, depending or related company should be established according to Croatian law and have its seat in Croatia, and the main/parent company should hold in it at least 25% of the shares. The main drawback in this respect is that related/dependent companies will be involved in the EA, whether insolvent or not. That is a corollary of the provision under Art. 4 EAPA which clearly states that the EA procedure will be instituted regardless of fulfiling the state of (pre)

137 The concept is close to "services of general economic interest". Services of general economic interest (SGEI) are economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention. Examples are transport networks, postal services and social services. They have special state aid regime. http://ec.europa.eu/competition/state_aid/overview/public_services_en.html. See more: Liszt, M., Čulinović-Herc, E., Certain Aspects of State Aid to Services of General Economic Interest, in: Tomljenović, V., Bodiroga-Vukobrat, N., Butorac Malnar, V., Kunda I., (eds), EU Competition and State Aid Rules Public and Private Enforcement, vol. 3, Springer, Berlin, Heidelberg, 2017, pp. 291-313.

138 On state aid from companies in difficulties – i.e. rescue and restructuring state aid see: Obradović Mazal, T., Butorac Malnar, V., The Discretionary Power of Competent Authorities in Applying State Aid Rules on Rescue and Restructuring, Potocan, V. Kalinic, P. Vuletic, A. (eds.), 26th International Scientific Conference on Economic and Social Development - Building Resilient Society, Conference Proceedings, Varaždin, 2017, p. 599-607. Obradović Mazal, T., Čulinović-Herc, E., New rules for rescuing and restructuring state aid - sharing burden of present to share gains of future, SGEM 2015 Conference Proceedings on Political Sciences, Law, Finance, Economics & Tourism, Book 2, Vol. 1, 2015, pp. 615–622.

insolvency of dependant or related company of the main company.[139] The involvment of solvent members of the group should depend on consent of the respective solvent member, since the legal interests of the respective company's creditors should also be protected.[140]

The involvement of a group of companies in the EA and envisaged "single settlement approach" for the main/parent company with all its depending/related companies (Art. 42. (6) EAPA), opens the question concerning the nature of consolidation intended in the EAPA. According to Garašić, EAPA opted for substantive consolidation - which allows the creation of one single estate liable for all claims of all creditors of respective members of the group (coupled with involvement of the dependent companies in the EA irrespective of their solvency status). In opinion of Garašić by opening the door to substantive consolidation, the law abandoned the principle of legal separability – the principle which calls that each legal entity with regard to his obligation should be liable with its own assets therefore leading to an unjustified lifting of the corporate veil, which is extremely rarely permitted in insolvency law.[141] Miladin and Markovinović consider that EAPA should be interpereted so as to allow only procedural consolidation, because other interpretation (i.e. substantive consolidation) would be difficult to justifiy from the constitutional-law point of view and would cause a serious departure from the fundamental principle of private law whereby every person should be liable for its own debt with its own assets.[142] In the text of the Settlement Proposal that was submitted to the Commercial Court in Zagreb on 20 June 2018, it is stated that extraordinary administration will be realized as a concept of procedural consolidation, "where each creditor's right of settlement is determined separately for each of its claims filed against each company admitted to the EA".[143] Since the Settlement was rendered by required majority it was confirmed by the decision of the Court.[144] Now, extraordinary trustee should commence a process of its recognition and enforcement abroad. This could cause problems since the recognition of the effects of the initiation of the EA EAPA procedure was declined

139 Miladin, P., Markovinović, H., op. cit., p. 97.

140 Garašić, J., op. cit., p. 21.

141 Loc. cit. Author in her article gives a comprehensive set of critical remarks: from wrongfully defined aim of the law, excesivness of the state intervention and insufficient rules as to qualifications and impartiality of the extraordinary commissioner to the absence of a satisfactory procedural guarantees that protect substantial rigths of the creditors (especially creditors with minor and medium claims) as well as violation of the cornerstone insolvency principle which calls for equal legal position of insolvency debtor's creditors and many other that violates fundamental constitutional values. See in particular p. 8-28.

142 Miladin, P., Markovinović, H., op. cit., p. 98. Authors base their interpretation on following arguments: a single procedure for all companies in the group is conducted, unique procedural bodies for all companies involved in the process are established, all creditors of all involved entities are united and unique proposal of the settlement is submitted, but the law does not require unification of all assets of all involved companies in order to create sigle insolvency estate.

143 Settlement Proposal of 20th June, 2018, p. 91.

144 Decision of the Commercial Court in Zagreb, 47. St – 1138/17 – 28 23 of 6th July 2018

in several adjacent jurisdictions: i.e. Slovenia, Bosnia and Hercegovina, Srbija[145] with the exception of Switzerland, while in England&Wales the case is still pending. The competent court in the UK has initially recognized the effects of EAPA as the "main foreign proceedings" according to EIR, causing the stay of all actions of creditors against the debtor in England & Wales. While the discontented creditor demanded an appeal, the stay of actions remains in force until the final decision on recognition of the effects of EAPA is rendered.[146]

4. CONCLUSION(S)

Solving the (preventive) restructuring puzzle for (large) companies in distress is not an easy task. The here presented regulatory models differ markedly – from fast-track minimally-court-assisted proceedings to very complex restructuring schemes with massive state involvement.

The most impressive feature of the UK SoA model is certainly its predictive timeline and well-established course of actions of the involved stakeholders. The willingness of UK courts to sanction the particular scheme even if the respective company does not have its COMI in the UK (but solely selected English law as applicable law), reveals a high level regulatory competition in the domain of preventive restructuring. Restructuring emigration from Germany to UK borders to abuse and forum shopping, but also confirms the effectiveness of the English reorganization tool. As to the German PSP model, the studies demonstrate general satisfaction in regard to speediness of the procedure and greater creditors' involvement. From the normative point of view, the PSP seems to fit very well into the German concept of two-stage insolvency proceedings. However, at empirical level the data show that proposals of opening PSP, after ESUG came into force, were not made any sooner than prior to its enactment, and that there is a relatively high rate of self-administrations that ended with insolvency. The management's lack of competence was considered as the weakest point in PSP self-administration proceedings. As to the Italian model, it is worth emphasizing that the Italian EA, through its many changes brought about three EA submodels. With a handful of other available restructuring tools, the Italian preventive restructuring law has become extremely complex. It is important to stress that the EA in Italy is conducted in order to preserve separability of each legal entity of the member of the group, but coordinated on a common basis.[147] The notion of the

145 Case is still pending before respective national constitutional courts.

146 Settlement Proposal of 20 June, 2018, p. 49.

147 That is confirmed as a rule in the new law. Legge 19 ottobre 2017, n. 155 Delega al Governo per la riforma delle discipline della crisi di impresa e dell'insolvenza. Official Gazette, n. 254 del 30-10-2017, available at http://www.gazzettaufficiale.it/atto/stampa/serie_generale/originario. In Art. 3 (1) d) it is clearly stated that if there is unified debt restructuring settlement (un accordo unitario di ristrutturazione dei debiti) in all cases the autonomy of respective active and passive masses should be respected ("ferma restando in ogni caso l'autonomia delle rispettive masse attive e passive"). Moreover in Art. 2 per. 2 b) it is stated that when procedure concentrated for all members of the group, simultaneous and separate voting for creditors of each company should be ensured ("nell'ipotesi di gestione unitaria della procedura di concordato preventivo

group of companies follows not only the "control", but also the "single economic entity" approach. Since the number of employees' threshold is set relatively low, the number of companies eligible to be admitted in the EA is relatively high. On the side of effectiveness, the available studies have shown that none of the companies admitted into EA ended in liquidation, which speaks for general efficiency of that procedure. However, repeated use of the same tool in case of identical company (Alitalia group) shows that restructuring problems could not be solved "for all times". Substantial political involvement and a relatively weak role of creditors due to lack of their involvement in the restructuring plan were detected as the main drawbacks of the EA. Others are calling for unification and simplification of that part of the insolvency law, especially because of the mentioned submodels.

As to the Croatian law, a few conclusions seem relevant. If "systemic significance" is the key notion which defines *ratione personae* field of application of EAPA, then it should be measured differently than with lump-sum threshold criteria. It would be more compatible with its Italian role-model, if the Croatian legislator followed "large" or "very large company" as a *ratione personae* criterion. As to thresholds, the number of employees is set ten times higher than in the corresponding Italian model, and three times higher in respect of the amount of liablities. In terms of the number of companies who are *de facto* candidates for the EA, it seems that in Croatia only ten groups of companies match those criteria,[148] which renders it discriminatory. On the other hand, EAPA is inherently incoherent, while it unjustifiably excludes the companies which surpass both criteria, but are not founded as a joint stock company (but e.g. a limited liability company), hence additionally narrowing the "systemic significance" content and reaffirming the thesis that the law was indeed tailor-made for one single (group of) company.

The procedural drawbacks of EAPA go far beyond the scope of this paper and are in length dicussed in one Constitutional Court decision, as well as criticised by law scholars. It seems that the main problem lies behind the law and is tied to a general approach towards the (pre)insolvency status of large corporate groups. In addition, it seems that tailor-made solutions are needed, but regulatory responses vary, especially if the topic is substantial v. procedural consolidation or concentration v. coordination approach. Croatian scholars agree that the procedure should be structured *per minimum* so as to allow the separation of legal personality for each member of the group and for the claim of every creditor of each company. Substantial consolidation is not a solution.[149] Croatian authors thus agree that at least procedural consolidation should be applied, but support a coordination approach, favoured in the German legislation.[150] Recent changes in Italian law strongly confirm that the

di gruppo devono essere previsti (…) la contemporanea e separata votazione dei creditori di ciascuna impresa").

148 According to Explanatory part of the Decision of Constitutional Court of 2 May 2018, p. 69, par. 42.7.

149 Formulating agencies such as UNCITRAL limit substantive consolidation to exceptional circumstances. See UNCITRAL legislative guide on insolvency law: Part Three: Treatment of enterprise groups in insolvency, New York, p.32 Recommendation 202-210.

150 See Garašić, J., op. cit., p. 20. Miladin, P., Markovinović, H., p. 98.

autonomy of respective active and passive masses should be observed in group of companies' restructurings if there is a unified debt restructuring settlement. In order to increase the efficiency and specialization of Italian courts handling insolvency matters, specialized courts adjudicating corporate-law matters shall have exclusive competence in EA proceedings.

To conclude, whether one-size fits all or tailor made solution are appropriate in preventive restructuring for companies in difficulty, authors are of opinion that one size fits all approach should be observed without any deviation in regard fundamental insolvency principles. As far as tailor made approach is concerned, insolvency or insolvency-like status of corporate groups certainly requires tailor made solutions - either by using concentration or coordination approach and not material consolidation, but in any case respecting the principle of legal certainty. Therefore, any new piece of legislation in the field of preventive restructuring should be aligned with basic principles in the existing insolvency laws. However, on the basis of the results of the empirical studies regarding efficiency of analyzed regulatory models, authors find that even when the new law is perfectly matching into the system, it would not be as effective as aimed if the competentices of key stakeholders (especially managers and trustees) are not developed as well.

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Sažetak

PREVENTIVNO RESTRUKTURIRANJE TRGOVAČKIH DRUŠTAVA U POTEŠKOĆAMA – ISTI KROJ ZA SVE ILI ODIJELO PO MJERI?

Republika Hrvatska je trenutno suočena s najvećim restrukturiranjem društva u poteškoćama uz značajno sudjelovanje inozemnih investitora. Restrukturiranje se provodi prema novom Zakonu o postupku izvanredne uprave u trgovačkim društvima od sistemskog značaja za Republiku Hrvatsku. Taj zakon je usvojen u vrijeme izbijanja krize najvećeg trgovačkog diva - Agrokor grupe. Restrukturiranje grupe postalo je ubrzo prvorazredno političko pitanje koje je plijenilo pozornost javnosti. Navedeni zakon kritiziran je u pravnoj doktrini i u javnosti da je osmišljen samo radi spašavanja jedne poslovne grupacije u Hrvatskoj te i da nije u skladu s ustavnim načelima i postojećim stečajnim zakonodavstvom. Njime je kreiran model izvanredne uprave kao posebnog sudskog postupka u kojem glavnu ulogu igra izvanredni povjerenik, a koji je namijenjen trgovačkim društvima od sistemskog značaja za Republiku Hrvatsku koja se nalaze u stanju insolventnosti ili predinsolventnosti. Pošavši od toga ovaj rad namjerava istražiti širu sliku modela restrukturiranja usporedbom tri različita pravna modela restruktuiranja društva u poteškoćama: njemački model *Shutzschirmverfahren*, engleski *Schemes of Arrangment* i talijanski model izvanredne uprave. U radu će se istražiti učinkovitost svakog od pojedinih modela na temelju relevantnih studija koje upućuju na njhovu uspješnost. U radu se daje pregled razvoja hrvatskog prava kojim se uređuje tzv. preventivno restruktuiranje, te se propituju određena pitanja vezano uz navedeni zakonski akt, posebice koncept trgovačkog društva od sistemskog značaja.

Ključne riječi: *restrukturiranje trgovačkih društava; društva u poteškoćama; izvanredna uprava; restrukturiranje povezanih društava; društva od sistemskog značaja.*

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Zussamenfassung

VORBEUGENDE RESTRUKTURIERUNG VON UNTERNEHMEN IN SCHWIERIGKEITEN – EIN UNIVERSALANSATZ ODER MASSGESCHNEIDERTE LÖSUNGEN?

Die Republik Kroatien wird mit der größten Restrukturierung von Unternehmen in Schwierigkeiten konfrontiert. Dabei werden im Wesentlichen internationale Investoren einbezogen. Die Restrukturierung wird gemäß dem kürzlich erlassenen Gesetz über das Verfahren der Sonderverwaltung von den für die Republik Kroatien systemrelevanten Unternehmen umgesetzt. Das Gesetz wurde nach dem Zusammenbruch des größten privaten Einzelhandelsunternehmens (der Agrokor Gruppe) erlassen. Die Restrukturierung der Gruppe wurde bald zu dem politisch heiklen Problem und zu einem aktuellen Thema öffentlicher Diskussionen. Das Gesetz wurde sowohl von den Rechtswissenschaftlern als auch von der Öffentlichkeit stark dafür kritisiert, dass es nur für eine Gruppe von Unternehmen entworfen wurde und dass es mit den verfassungsrechtlichen Grundsätzen und den geltenden Insolvenzgesetzen inkohärent ist. Das Gesetz ermöglichte die Sonderverwaltung als ein besonderes Gerichtsverfahren, in dem der Sonderverwalter die größte Rolle spielt, und wurde den für die Republik Kroatien systemrelevanten Unternehmen gewidmet, welche in Insolvenz gegangen sind oder später in Insolvenz gehen werden. Ausgehend von diesem Hintergrund ist es das Ziel dieses Beitrags ein Gesamtbild der Restrukturierung zu verschaffen, indem man drei unterschiedliche Rechtsmodelle der vorbeugenden Restrukturierung von Unternehmen in Schwierigkeiten vergleicht: das deutsche Schutzschirmverfahren, das englische *Scheme-of-Arrangement* Verfahren, und das italienische Verfahren der Sonderverwaltung. Im Beitrag wird versucht, die Wirksamkeit jedes Modells anhand relevanter Forschungen über ihre Erfolgsquoten einzuschätzen. Bezüglich des kroatischen Gesetzes wird im Beitrag die Entwicklung des Gesetzes über vorbeugende Restrukturierung dargestellt, wobei bestimmte Aspekte des Gesetzes, insbesondere der Begriff des systemrelevanten Unternehmens, hinterfragt werden.

Schlüsselwörter: *Unternehmensrestrukturierung; Unternehmen in Schwierigkeiten; Sonderverwaltung; Restrukturierung der Unternehmensgruppe; systemrelevante Unternehmen.*

Riassunto

LA RISTRUTTURAZIONE PREVENTIVA DI SOCIETÀ IN CRISI – LA STESSA TAGLIA PER TUTTI O UN ABITO SU MISURA?

La Repubblica di Croazia in questo momento si trova dinanzi alla più grande ristrutturazione di società in crisi con una significativa partecipazione di investitori stranieri. La ristrutturazione viene condotta nel rispetto della nuova Legge sull'amministrazione straordinaria nelle società commerciali, che ha un valore sistemico per la Repubblica di Croazia. Tale legge è stata emanata nel momento dell'esplosione della crisi del più grande colosso commerciale – il gruppo Agrokor. La ristrutturazione del gruppo è presto diventata una questione di primo ordine anche sul piano politico, che ha catturato l'attenzione dell'intera collettività. La legge menzionata è stata criticata nella dottrina giuridica e nella collettività in quanto pensata esclusivamente per il salvataggio di un gruppo in Croazia e perché non ritenuta conforme ai principi costituzionali ed all'esistente legislazione in materia fallimentare. Con tale legge viene creato un modello di amministrazione straordinaria alla stregua di un procedimento giudiziale speciale nel quale il ruolo principale viene giocato dal commissario straordinario, rivolto alle società commerciali di valore sistemico per la Repubblica di Croazia, che si trovino in stato di insolvenza oppure di pre-insolvenza. Partendo da ciò il presente lavoro intende indagare circa il più ampio quadro del modello di ristrutturazione mediante la comparazione di tre differenti modelli giuridici di ristrutturazione di società in crisi: il modello tedesco dello *Shutzschirmverfahren*, l'inglese *Schemes of Arrangment* ed il modello italiano di amministrazione straordinaria. Nel lavoro verrà analizzata l'efficienza di ciascuno dei modelli in base a studi rilevanti che orientano verso la loro fattibilità. Nel lavoro si passa in rassegna lo sviluppo del diritto croato mediante il quale si disciplina la c.d. ristrutturazione preventiva e ci si interroga circa determinate questioni relative all'atto legislativo, in particolare al concetto di società commerciale di valore sistemico.

Parole chiave: *ristrutturazione di società; società in crisi; amministrazione straordinaria; gruppo di società in ristrutturazione; società di valore sistemico.*

PRAVNI AKTI USMJERENI NA POTICANJE INOVATIVNOSTI TRGOVACA (ANALIZA PRIMJERA IZ HRVATSKE I RIJEKE OD SREDNJEG VIJEKA DO POČETKA 19. STOLJEĆA)

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Sažetak

Autor istražuje relativno slabo istražen pravnopovijesni aspekt razvoja oblika gospodarskog poslovanja i utjecaja države, tj. vladara na njega. Uz spomen antičkih primjera dana je analiza nekih srednjovjekovnih oblika poslovanja, osobito pomorskoga na prostoru Jadrana. Oni se razvijaju bez posebnog utjecaja vlasti, putem trgovačke prakse. U kontinentalnom dijelu Hrvatske utjecaj vladara kao nositelja javne vlasti na razvoj gospodarstva objašnjen je na primjeru Zlatne bule iz 1242. i osnivanja slobodnoga kraljevskog grada Gradeca. Statut Rijeke iz 1530. sadrži više propisa koji svjedoče o težnji mjesnih vlasti za sigurnošću trgovanja i brzim sudskim rješavanjem sporova među trgovcima i pomorcima. Nova inicijativa za razvoj trgovine, osobito pomorske uslijedila je tijekom 18. stoljeća kada je proglašena sloboda plovidbe Jadranom, a Rijeka i Trst postaju slobodne luke. Vladari donose niz upravnogospodarskih reformi koje prati utemeljenje trgovačkih kompanija, priprostih dioničkih društava koja se bave različitim djelatnostima te rast broja trgovaca pojedinaca. Početkom 19. stoljeća trgovačka društva postupno se specijaliziraju, a prati ih rad trgovačke komore, suvremenih školskih institucija, gospodarskih izložbi i sličnih aktivnosti koje potiču gospodarstvo. Gospodarski razvoj prekinut je Prvim svjetskim ratom i višegodišnjim međunarodnim sporovima o razgraničenju između Italije i Kraljevine SHS koje se ponajviše ticalo pripadnosti luke i željeznice što je dovelo do negativnog utjecaja i pada gospodarstva.

Ključne riječi: *trgovački subjekti; srednji vijek; 18. stoljeće; Hrvatska; Rijeka.*

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1. UVOD

Povijest pruža relevantne primjere o prilagodbama trgovaca u obavljanju svoje djelatnosti, oblicima njihovog organiziranja koji ukazuju na visok stupanj poslovne inventivnosti. S druge strane nalazi se država koja svojim aktivnostima i propisima utječe i usmjerava razvoj gospodarskih aktivnosti pa tako i oblika organiziranja. Međusobni utjecaj gospodarstva, države i prava postoji, ali istraživanje povijesnih primjera pravnih propisa, njihovih međusobnih utjecaja, kao i pravna analiza propisa i rada pojedinih pravnih subjekata u ovom specifičnom području nije česta u pravnopovijesnoj znanosti.

Rijeka, kao luka i industrijski grad bila je predmetom povijesnih istraživanja, ali istraživanje pravnog aspekta relativno je efemerno zastupljeno u postojećoj literaturi. Bilo bi korisno raditi na interdisciplinarnom istraživanju pravnih povjesničara i povjesničara ekonomije.

2. PRIMJERI IZ ANTIČKE POVIJESTI

U starom Egiptu bila je razvijena trgovina, ali vanjska trgovina odvijala se putem države koja je organizirala razmjenu robe sa strancima i time pomagala njezin razvoj.[1] Zaštitu trgovaca u svrhu poticanja trgovine poznavali su i Hetiti pa se u članku 5. „Ubojstvo trgovca" zakonika iz 16. stoljeća pr. Kr. ono kažnjava s vrlo visokom odštetom u visini od 100 mina srebra.[2]

Rimska država pokušala je krizu carstva od sredine 3. stoljeća po Kr. prevladati uvođenjem reformi u doba Dioklecijana, a dio njih odnosio se i na državnu regulativu gospodarskih djelatnosti. U Rimu su postojale udruge obrtnika, trgovaca (*collegia negotiatorum*) i pomorskih prijevoznika (*navicularii*). Ranije su vladari davali povlastice kako bi ih potaknuli, ali su ih i nadzirali, osobito udruge koje su snabdijevale Rim hranom, a kasnije ih stavljaju pod državni monopol. Postupno se obrtnici vezuju za svoja zanimanja i ne mogu ih slobodno birati, a to potvrđuje i Dioklecijan. Trgovci u naseljima također osnivaju svoju udruge. Isključivanje privatnih poduzetnika i intervencionizam države neki autori nazivaju „vojno-industrijski kompleks".[3] Dioklecijanove reforme tek su dijelom polučile privremeni uspjeh.

3. PRIMJERI SREDNJOVJEKOVNOGA NORMIRANJA GOSPODARSTVA

Propašću Rimskog Carstva dolazi do zamiranja robnonovčanoga gospodarstva, pa tako i raznih oblika udruživanja, uz povremene uzlete, npr. u doba karolinške

1 Bartulović, Ž., Povijest prava i države – Opća povijest, Rijeka, Pravni fakultet Sveučilišta u Rijeci, 2014., str. 21.

2 Ibid., str. 33.

3 Karajović, E., Dioklecijanov edikt o cenama, Kragujevac, Pravni fakultet u Kragujevcu, 1997., str. 64-67, 79, 87; Boras, M. i Margetić, L., Rimsko pravo, Rijeka, Pravni fakultet Sveučilišta u Rijeci, 1998., str. 197-198; Bujuklić, Ž., Rimsko privatno pravo, Beograd, Univerzitet u Beogradu – Pravni fakultet, 2016., str. 47.

renesanse. Novi razvoj započinje još za križarskih ratova kada dolazi do izravnih dodira Zapada i Istoka pa i početaka izravne trgovine, osobito od 13. stoljeća. Takav razvoj dovodi do razvoja trgovine u komunama na Apeninskom poluotoku i na istočnoj obali Jadrana, npr. u Zadru i Dubrovniku. I pravna znanost se „budi" marom glosatora i postglosatora. Potonji, proučavaju ne samo rimsko pravo, već i statute sjevernotalijanskih komuna jer sadrže i nove oblike trgovačkih poslova. Tako se i u Veneciji, koja je važna zbog utjecaja na istočnu obalu Jadrana, stvaraju novi oblici poslovanja. Temelj mletačkoga gospodarstva je pomorska trgovina u kojoj nailazimo na nove oblike trgovanja pa i trgovačkog povezivanja.

Takva je, npr. *rogadia* (u Dalmaciji *rogancia*) u kojoj se primatelj stvari obvezuje obaviti posao za davatelja. Trgovac se obvezao prodati robu u ime vlasnika, ali uz svoj rizik, a zarada je u razlici cijene u prodaji i onoga što preda vlasniku. *Collegantia* je, pak, najčešći posao do konca 12. stoljeća. Stranka koja je ostajala u Mlecima (*stans, iactator*) daje dvostruki iznos kapitala, a druga stranka (*procertans, tractator*) putuje i trguje. Dobit dijele napola, a gubitak razmjerno uloženu kapitalu. Splitski statut iz 1312. poznaje koleganciju, ali i socijetet, tj. društvo (*societas*, lib. III., cap 73.) pa Margetić predlaže da je tada riječ o dvostrukoj koleganciji u koju dvije strane unose kapital, a takve ugovore nalazi i u Dubrovniku u 13. stoljeću. Smatra da u Veneciji termin kolegancija označava dvostranu koleganciju dok jednostrana nema svoj poseban pravni naziv.[4]

Entega je ugovor u kojem jedna strana ulaže kapital ili robu, druga strana brod, a mornari rad. To je najrazvijeniji oblik socijeteta u pomorskom poslovanju, svojevrsni srednjovjekovni *joint venture*. Dobit se dijeli na trećine, a izvan Jadrana zbog većeg rizika veći dio dobivaju vlasnik broda i robe, tj. kapitala. Koristio se do 16. stoljeća (Dubrovački statut iz 1272., lib. VII., cap. 42.-53.) *Marinarii ad partem* kategorija su mornara koji ne rade za plaću već za udio u dobiti. Patron broda ugovorom je prepuštao određeni dio dobiti od prijevoza robe ili putnika, pri čemu mornari preuzimaju i obveze u održavanju i popravku broda (lib. VII., cap. 1.) i štetu koja je nastala na teretu ako brod nije dobro održavan (lib. VII., cap. 6.). Tijekom 16. i 17. stoljeća ovaj način plovidbe bio je karakterističan za Dubrovnik, pa su ga zvali „ploviti na dubrovački način". Razlog njegova postojanja nesigurnost je pomorskih putovanja čijim nestankom prevladava mornarski ugovor za plaću. Tu vrstu pomorskog pothvata poznaju statuti Zadra (lib. I., cap. 71.), Ancone (cap. 44.) i Trania (cap. 10. i 12.). Društvo karatista nastaje kada se pri izgradnji ili korištenju broda vlasnički udio idealno dijeli na 12 ili 24 karata. Suvlasnici ovisno o visini udjela stječu pravo na udio u dobiti.[5] To je oblik priprostoga dioničkog društva, koji se također koristio zbog

4 Margetić, L., Antika i srednji vijek, Studije, Zagreb, HAZU, Vitagraf i Pravni fakultet Sveučilišta u Rijeci, 1995., str. 205; isti, Srednjovjekovno hrvatsko pravo, Obvezno pravo, Zagreb – Rijeka, HAZU, Vitagraf, Pravni fakultet Sveučilišta u Rijeci, 1997., str. 263-284, a o socijetetu osobito na str. 275-280; Kostrenčić, M., Pomorsko pravo u statutima primorskih naših gradova i otoka, Zagreb, Mjesečnik pravničkog društva u Zagrebu, 5/1915., str. 287; Beuc, I., Povijest država i prava na području SFRJ, Zagreb, Pravni fakultet Zagreb, 1988., str. 309; Statut Grada Splita, Split, Književni krug Split, 1998.

5 Kostrenčić, M., Pomorsko pravo, 9/1914., str. 962; Šundrica, Z., Prijevod sedme knjige Dubrovačkog statuta, Dubrovnik, Historijski arhiv Dubrovnik, 1972., str. 15; Cvitanić, A., Naše

velikog rizika od propasti broda u to doba.

Ribarska družina oblik je udruživanja u kojem jedna strana daje brod, druga mreže, a ribari ulažu radnu snagu. Dobit se dijeli u različitim omjerima. Ribolov se organizira na mjestima bogatim ribom, tzv. *pošte*, koje su pojedine komune ili naselja smatrala svojima što je oblik specifičnoga srednjovjekovnog skupnog vlasništva. Dio ribe ponekad se davao i feudalcu ili vladaru na temelju njihova regalnog prava.[6]

I u kontinentalnoj Hrvatskoj dolazi do razvoja gradskih naselja čiji gospodarski temelj nije poljoprivreda već obrt i trgovina. Kao i drugdje u Europi, jedan od oblika nastanka takvih naselja su povelje o utemeljenju povlaštenih slobodnih i kraljevskih gradova. Tako su sačuvane povlastice Varaždinu iz 1220., Virovitici 1234., Samoboru 1242., Križevcima 1252., Bihaću 1279., Koprivnici 1356. Zlatna Bula Bele IV. Gradecu iz 1242. sadrži najpotpuniji popis povlastica za hrvatske i ugarske kraljevske gradove. Kralj daje pravo slobodnog naseljavanja pozivajući „goste" (*hospites*) na naseljavanje (usp. danas stjecanje državljanstva i radne dozvole). Za opljačkanu imovinu, ako se ne nađu krivci, odgovara vlast tog teritorija čime se privlače trgovci kojima se jamči zaštita i naknada štete. Građani Gradeca ne plaćaju carine unutar državnih granica (usp. današnje bescarinske zone). Biraju najvišega službenika, gradskog suca na godinu dana, a vladar ga potvrđuje. Osoba bez potomaka slobodno raspolaže pokretninama, a nekretnine nakon savjetovanja sa sugrađanima može ostaviti ženi ili rođaku koji ih ne mogu otuđiti strancima. Ako netko umre bez oporuke, a nema žene i rođaka, ugledni građani podijelit će imovinu, dvije trećine sirotinji i crkvama, a jednu trećinu gradu. Grad je dužan kralju pomoći s deset opremljenih vojnika i dati hranu, tj. „zalazninu" samo kada u grad dođe kralj, vojvoda Slavonije i ban. Kralj je dao naseljenicima zemljište oko naselja i oslobodio građane svih obveza sljedećih pet godina.[7] Zanimljivo je da se u takvoj trgovačko-obrtničkoj sredini tijekom 14. stoljeća spominju žene koje imaju poslovnu sposobnost, zastupnice muževa, ravnopravne partnerice u poslovanju pa čak i da samostalno obavljaju poslovanje. Apostolova Maršavelski upozorava na, npr. „gospođu Margaretu trgovkinju" (*domine Magarethe institricis*), da gradski „statut" iz 1425. spominje „hljebarice", da su „solarice" praktično imale monopol nad ovom važnom trgovinom, a vrela čuvaju podatke o desetinama trgovkinja, krčmarica i „uglednih poslovnih žena" koje se upuštaju i u kreditorske poslove.[8]

srednjovjekovno pomorsko pravo, Split, Zbornik radova Pravnog fakulteta u Splitu, god. XVI, Split, 1979., str. 222; „Dubrovnik", u: Pomorska enciklopedija, knj. 2, Zagreb, Jugoslavenski leksikografski zavod, 1975., str. 272; Margetić, L., Srednjovjekovno, Obvezno pravo, str. 263-279; Bartulović, Ž. i Aflić, M., Sailor's service from medieval time to modern maritime labour conventions, Rijeka, Pomorski zbornik, 55/2018., str. 15.

6 Beuc I., Povijest, str. 309; Bartulović, Ž., Povijest hrvatskog prava i države (kompendij), Rijeka, Pravni fakultet Sveučilišta u Rijeci, 2008./2009., str. 23.

7 Margetić, L., Sirotković, H. i Bartulović, Ž., Vrela iz pravne povijesti naroda SFR Jugoslavije, Rijeka, Pravni fakultet Sveučilišta u Rijeci, 1989., str. 33-35; Margetić, L. i Apostolova Maršavelska, M., Hrvatsko srednjovjekovno pravo – vrela s komentarom, Zagreb, Narodne novine, 1990., str. 54-60 za Gradec. Ne možemo se upuštati u analize kojem je tipu grada pripadao Gradec, njemački, ugarski, slavonski. O tome vidi, npr. Margetić, L., Zagreb i Slavonija, Izbor studija, Zagreb – Rijeka, HAZU, Vitagraf, Adamić, 2000., str. 205-206.

8 Margetić L. i Apostolova Maršavelska M, Hrvatsko, str. 105-106; Apostolova Maršavelski, M., Zagrebački Gradec – Iura possessionaria, Zagreb, Pravni fakultet u Zagrebu, 1986., str. 118-123.

3.1. Srednjovjekovna Rijeka i Statut iz 1530. godine

Prvi propisi koji se mogu dovesti u svezu s gospodarstvom na prostoru današnje Rijeke sadržani su u Statutu Rijeke iz 1530. (*Statutum terrae Fluminis*). Prema Herkovu, Rijeka je u 16. stoljeću bila „ugledan trgovački grad", te se s „obzirom na velike koristi" od trgovine i obrta „nastojalo raznim mjerama… unaprediti i raznim pogodnostima privući što veći broj stranih trgovaca". Statut predviđa isplatu cijene za prodanu robu u najkraćem roku, tj. istog ili sljedećeg dana, a u slučaju prodaje na poček prema dogovorenom roku, kao i kazne za onoga tko ne izvrši preuzete obveze prema trgovcu. Sporovi po pitanju kupovnine rješavaju se prema skraćenom postupku. Stranom trgovcu pripada i naknada za troškove nastale kašnjenjem isplate cijene (lib. I., cap. 53.).[9] Upisi u trgovačkim knjigama smatraju se vjerodostojnima (lib. I., cap. 15.).[10] Sporove u trgovačkim poslovima rješavaju suci u skraćenom postupku do 15 dana (lib. I., cap 3. i 9.).[11] Vodila se briga o kvaliteti robe na tržištu, koja se morala prodavati javno, a vodio se i nadzor nad mjerama. Mjere i utezi bili su pod nadzorom i bili su podložni godišnjoj provjeri koja se potvrđivala žigom (lib. III., cap. 39.-41., lib. IV., cap 14.).[12] Kupci su na zahtjev tržnih nadzornika morali predočiti robu te dati izjavu o količini i cijeni kupljenoga. Trgovački i obrtnički poslovi bili su ograničeni tijekom blagdana i praznika, osim za potkivače, ali ipak uz mogućnost opskrbe živežnim namirnicama (lib. IV., cap. 1.).[13] Postojali su i trgovački cehovi koji su vodili nadzor nad svojim članovima. Statut propisuje cjenike za meso, ribu i kruh te usluge trhonoša.[14] Strancima nije bilo dopušteno kupovati drvo niti tkanine na veliko (lib. IV., cap. 13.).[15] Statut spominje bratovštine (*fraternitates*) (lib. II., cap. 13. i 17.)

9 Tekst i prijevod Riječkog statuta prema: Herkov, Z., Statut grada Rijeke iz godine 1530., Zagreb, Nakladni zavod Hrvatske, 1948. Lib. I., cap 53. „O kupovanju trgovačke robe i o isplatama trgovcima za njihovu robu": „U svrhu da bi naš gradi bio što bogatiji i da našem kralju porastu prihodi od daća množinom trgovaca, koji će dolaziti ovamo u što većem broju svojom robom radi brze isplate njihove robe…".

10 Riječki statut, lib. I., cap. 15. „O vjerodostojnosti isprava i ostalih spisa": "… neka se i knjigama trgovaca, ljekarnika i dućandžija grada Rijeke, ako su uredno pisane, dade puna vjerodostojnost, ali samo u pogledu stvari, koje se odnose na njihovo poslovanje."

11 Riječki statut, lib. I., cap. 3. O sudovanju strancima. „I u parnicama trgovačkim i pomorskim može se postupati u svako doba i presuditi i predati ih na ovrhu, izuzevši praznika u čast Božju". Cap. 9. O parnicama, u kojima nije potrebna tužba: „… i u parnicama o plaći odnosno trgovačkoj robi… bilo kojeg dana, za vrijeme praznika ili izvan toga vremena, za vrijeme sudbenih i izvansudbenih svetkovina, bilo po redoslijedu ili mimo njega, izuzevši svetkovina, određenih u slavu Božju."

12 Riječki statut, lib. III., cap. 39. „O krivotvorenju mjera i utega", cap. 40. „O načinu mjerenja tkanina od lana i vune" i cap. 41. „O patvaranju vina i trgovačke robe", lib. IV., cap. 14 „O tom, da se mjere za žito i ostale svakovrsne mjere imadu providjeti žigom, i koliko ima službenik primiti za označivanje žigom i mjerenje".

13 Riječki statut, lib. IV., cap. 1. „O zabrani, da se na blagdane posluje i drži otvorene trgovine".

14 Riječki statut, lib. IV., cap. 8. „O pekarima ili prodavačima kruha i o cjeniku kruha", cap. 10. „O mesarima i ostalim prodavačima mesa na klaonici"; cap. 11. „O ribarima i ostalim prodavačima riba", cap. 15. „O trhonošama, koje nose terete u gradu Rijeci, i o njihovoj nagradi". Herkov, Z., Statut, str. 109-112.

15 Riječki statut, lib. IV., cap. 13. „O strancima, koji kupuju drvo i tkanine u gradu Rijeci".

koje moguće okupljaju i obrtnike.[16] Tako bratovština sv. Mihaela okuplja obućare (*caligari e zavatini*), a bratovština sv. Nikole mornare i ribare.[17]

4. PRAVNI AKTI I RAZVOJ GOSPODARSTVA U RIJECI TIJEKOM 18. STOLJEĆA

Rijeka je bila dijelom habsburških posjeda te je potpadala pod nadležnost različitih dvorskih tijela koja su skrbila o prihodima države i upravi državnom imovinom. Dvorska komora osnovana je 1527. i vodila je skrb o prihodima i rashodima, nadzoru zemaljskih komora, preuzimanju viška prihoda u zemljama Monarhije, financiranju dvora i vojske. Godine 1705. utemeljena je Bečka gradska banka (*Wiener Stadtbank*), a 1714. Opća banka (*Universalbankalitat*) za novčarske poslove. Komercijalni kolegij za unapređenje trgovine utemeljen je u Beču 1666., a 1718. Glavni komercijalni kolegij (*Haupt-Kommerzienkollegium*). Za područje Hrvatske i Ugarske postojala je Ugarska komora koja je do 1715. ovisna o bečkoj Komori. Ona je nadzirala prihode vladara i upravljanje imanjima, poslovanje kraljevskih gradova te prikupljala vladarske prihode. Od 1772. preuzela je uzdržavanje organa upravnih vlasti u Hrvatskoj, prikupljajući poreze i dostavljajući Hrvatskoj potrebne iznose. Dvorska komora u kraljevo ime upravlja zemljištem čiji prihodi idu za uzdržavanje krajiške vojske.[18]

Habsburška Monarhija do početka 18. stoljeća nije poticala pomorsku trgovinu i razvoj luka. Do promjene dolazi kada na prijestolje dolazi car Karlo VI. 1711. On je stigao iz Španjolske, tadašnje pomorske sile pa želi iskoristiti pomorske potencijale monarhije. Mletačka Republika do tada je polagala prava na Jadransko more nazivajući ga svojim zaljevom (*Gulfum*). Car Karlo VI., 2. lipnja 1717. manifestom proglašava *radi promicanja, uređenja i uvećanja trgovine u našim nasljednim zemljama… da smo smatrali uputnim i korisnim opskrbiti svim važim sredstvima, te prihvatiti i podupirati one koji bi izrazili želju nastaniti se ondje i priznati im među svim drugim sredstvima sigurnu i slobodnu plovidbu Jadranom*. Uslijedio je političko-trgovački ugovor sa sultanom Ahmedom III. o slobodi trgovine podanika na rijekama, moru i kopnu 27. srpnja 1718. godine.[19]

Nov poticaj uslijedio je patentom Karla VI., 18. ožujka 1719. Gradovi Trst i Rijeka proglašeni su slobodnim lukama (toč. 3.). Osobito se ističe pravo na doseljavanje

16 Petranović, A., „Riječko" uz rimsko pravo (ex Statuto Terrae Fluminis anno MDXXX), Rijeka, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 2018., vol. 39/3, str. 36.

17 Bartulović, Ž., Pravni aspekt srednjovjekovnih bratovština sa osvrtom na Rijeku, Rijeka, Sveti Vid: Zbornik, Izdavački centar Rijeka, 1995., str. 120.; Torcoletti, L. M., Le confraternite fiumane, Roma, Fiume, Rivista semestrale di Studi Fiumani, vol 2/1954., str. 83-89; Kobler, G., Povijest Rijeke, knj. druga, Opatija, Preluk, 1996., str. 276-278.

18 Beuc, I. Povijest institucija državne vlasti u Hrvatskoj (1527-1945), Zagreb, Arhiv Hrvatske, 1969., str. 29-31; isti, Povijest institucija državne vlasti Kraljevine Hrvatske, Slavonije i Dalmacije, Pravnopovijesne studije, Zagreb, Pravni fakultet Zagreb, 1985., str. 178-179.

19 Ilustrirana povijest jadranskog pomorstva, Zagreb, Stvarnost, 1975., str. 97 i 100; Lukežić, I., Gospodarska komora u Rijeci od Ilirskih provincija do danas, Rijeka, Hrvatska gospodarska komora – Županijska komora Rijeka, 2015., str. 12.

stranih brodovlasnika i trgovaca i njihova zaštita (toč. 1.). Vladar obećava dovršiti, popraviti ili izgraditi glavne ceste, a trgovci će u svim lukama i vodama pristajati bez pratnje ili dozvole (toč. 2.). Tako je 1728. u promet puštena cesta Karolina (nazvana prema caru) koja je povezivala Rijeku s Karlovcem. To je ujedno i spoj s rijekama Kupom, Savom i Dunavom s, tzv. „žitnim putom". Svaki trgovac i pomorac može slobodno uploviti, isploviti i poslovati uz plaćanje zaštitne pristojbe, uzgredice, regalije i maltarine te 1,5 % konzularne ili admiralitetne carine od vrijednosti prodane robe. Izgradit će se i karantena, što je učinjeno 1726. Brod koji skrivi nasilje smatra se gusarskim pa će naknaditi štetu i kad otplovi u drugu luku. Komora će izgraditi trgovačka skladišta (toč. 4.). Utemeljit će se osiguravajuća banka ili kompanija za pomoć brodovima u slučaju novčane oskudice (toč. 5.). Trgovcima koji dođu u luku sudit će poseban mjenični sud (toč. 6.) koji je utemeljen 20. svibnja 1722. sa sucem i četiri porotnika. Trgovci se smiju nastaniti unutar gradova bez posebnih nameta i poreza (toč. 7.). U slučaju rata trgovci mogu otići u roku od godine dana s robom i ne smiju se uzaptiti (toč. 8.). Zabranjen je *ius naufragii*, tj. pravo prisvajanja spašenih stvari u slučaju brodoloma (toč. 9.). Važna je povlastica kojom su trgovci izuzeti od ukonačivanja vojske (toč. 10.). Unaprjeđenje trgovine trebalo je donijeti oslobađanje brodova od pregleda, ali uz posjedovanje putnih isprava i popisa brodskog tovara (toč. 11.). Konačno, svaka „nacija" može u gradu ili izvan njega sagraditi javnu zgradu za poslovanje, a trgovcima se potvrđuju sve stvarne i osobne slobode koje su moguće (toč. 12.).[20]

Ekonomisti od 16. stoljeća ukazuju na potrebu osnivanja trgovačkih kompanija kojima će vladari davati koncesije i nadzirati ih lakše nego pojedince, tzv. trgovce-avanturiste (*merchant adventurers*). One raspolažu većim kapitalom, pa će sigurnije poslovati i oružano osiguravati brodove. Najstarije su bile engleske Ruska kompanija (*Moskovy Company*, 1554.), Levantska (1581.), Istočnoindijska (1600.) i nizozemska Istočnoindijska kompanija (1602.).[21] Zbivanja u Rijeci možemo promatrati u okviru merkantilističkog sustava, bogatstvo države mjeri se količinom novca, proizvodnja je podređena prometu i stjecanju novca, osobito izvozom.[22]

Važan korak u poslovanju bilo je utemeljenje *Carske privilegirane kompanije* (*Istočnoindijska*, *Orijentalna*) 28. srpnja 1719., sa sjedištem u Beču u svrhu trgovine s Levantom i Dalekim istokom, s podružnicama u Rijeci i Bakru te Beogradu i Messini koji su tada bili unutar Carstva.[23] S kapitalom od 75.000 forinti trebala je oživjeti trgovinu s Turskom i gradnju brodova, osnivati manufakture i mrežu skladišta. Dobiva povlasticu gradnje brodova u Trstu, Rijeci i Bakru. Birokratsko poslovanje i

20 Herkov, Z., Gradnja ratnih brodova u Kraljevici 1764.-1767., Pazin – Rijeka, Historijski arhiv Pazina i Rijeke, pos. izd., sv. 6, 1979., str. 166-169; Lukežić, I., Gospodarska, str. 12.

21 Herkov, Gradnja, str. 30; Margetić, L., Opća povijest prava i države, Rijeka, Pravni fakultet Sveučilišta u Rijeci, 1998., str. 151; Klinger, W., Prva globalizacija: kolonijalna ekspanzija i trgovačke kompanije, u: Doba modernizacije, 1780.-1830, More, Rijeka, Srednja Europa (ur. Dubrović, E.), Rijeka, Muzej grada Rijeke, 2006., str. 16-18.

22 O Rijeci i politici merkantilizma vidi: Šišul, N., Gospodarska politika Austrije i Rijeka 1780.-1830., u: Doba modernizacije, str. 77-99.

23 Herkov, Z., Gradnja, str. 30; Dubrović, E., Rijeka – južni pol Srednje Europe, Rijeka, Društvo povjesničara umjetnosti Rijeke, 2018., str. 39.

slabe financije dovode do stečaja 1731. i ukinuća 1742. Poslovnica u Rijeci imala je monopol trgovine na veliko u gradu, a 1721. osnovala je radionicu za preradu voska i svijeća i tvornicu užadi. Direktora poslovnice, Oesterreichera iz Kemptena, Lukežić opisuje kao *prvog predstavnika modernog managementa merkantilističkog tipa u Rijeci*. Poduzetnici i strani majstori daju gradu kozmopolitsku crtu.[24]

Dio plana bilo je utemeljenje Indijske kompanije u Oostendeu, u Habsburškoj Nizozemskoj 1722., ali nakratko jer su se Britanci tome protivili. Bezuspješni pokušaji nastavljaju se do konca 18. stoljeća. William Bolts 1775. u Trstu osniva Azijsku kompaniju uz pomoć bankara iz Antwerpena, koja je trgovala u jugoistočnoj Africi, Indiji i Kini na temelju desetogodišnje povlastice. Kapital je uvećan 1781. javnom ponudom 1.000 dionica, ali 1785. kompanija bankrotira. Poslovanje je izazvalo otpor Portugalaca, Engleza i Danaca koji nisu htjeli jačanje habsburške trgovine.[25]

Bilo je to doba turskih ratova i potrebe zaštite plovidbe na Jadranu. Car je 1733. htio kupiti brodogradilište u Trstu za potrebe arsenala, ali dvor nije imao kapitala za to. Pokušaj obnove ratne mornarice slijedi 1742. Sklapa se i, tzv. „prijateljski ugovor" o slobodnoj plovidbi s gusarima jer 1748. nema obrane od upada alžirskih, tuniskih i tripolitanskih pirata, tzv. *barbareski*. Država nameće brodovlasnicima „javno-privatno" partnerstvo tražeći da se naoružaju o svom trošku jer ona nema mornaricu za zaštitu pomorske trgovine. Uzaludna je i gradnja fregata *Aurora* i *Stella matutine* u Kraljevici od 1764. do 1766., poslije prodanih Toskani. Uspjeh je bila tek pravna regulacija plovidbe Ediktom o plovidbi 1774. godine.[26]

Dvor se okreće osnivanju upravno-gospodarskih ustanova za razvoj trgovine. Vrhovna trgovačka intendanca *(Kommerzialhauptintedanz, Suprema Intendanza commerciale)* utemeljena je u Trstu 1731. i podređena Predstavništvu Komore kranjske, sa zadaćom istraživanja i razvijanja trgovine na austrijskom primorju, ali bez političkih nadležnosti. Marija Terezija 1746. u Beču osniva Trgovački direktorij *(Commercien Ober-Directorium)*, preustrojen 1753., koji djeluje do 1772., kada mijenja naziv u Trgovački savjet, čime država centralizira razvojnu politiku trgovine. U nasljednim zemljama osniva istoimena niža tijela. U Trstu je 1749. grof Wiesenhutten imenovan intendantom Austrijskog primorja i kapetanom Trsta, ovisnom o Vrhovnom direktoriju u Beču. Time je upravno-politička organizacija proširena na Austrijsko primorje. U Rijeci je 26. siječnja 1753. osnovano *Cesarsko kraljevsko namjesništvo (Komerzasesorij)* za kapetanate Rijeke, Trsata i Bakra za izvršenje politike tršćanske Intendance. Sudbenost u trgovačkim i mjeničnim predmetima prenesena je na *Mjenbeno-trgovačko sudište* i *Pomorski konzulat (Tribunale cambio mercantile e Consolato di mare)*. Primorska trgovinska provincija *(Provincia mercantile del Litorale, Austrijsko primorje)* osnovana 1753. sa sjedištem u Trstu obuhvaća luke: Akvileju, Trst, Rijeku, Bakar, Kraljevicu, Senj i Bag. Podčinjena je tršćanskoj

24 Lukežić, I., Gospodarska, str. 13; Žic, I., Kratka povijest grada Rijeke, Rijeka, Adamić, 1998., str. 47-48; isti, Riječki orao, venecijanski lav i rimska vučica, Rijeka, Adamić, 2003., str. 108.

25 Herkov, Z., Gradnja, str. 32; Fussenegger, G., Marija Terezija, Zagreb, Alfa, 1981., str. 35. Dubrović, E., Rijeka – južni pol Srednje Europe, Društvo povjesničara umjetnosti, Rijeka, 2018., str. 39-40. Vidi i https://en.wikipedia.org/wiki/Austrian_East_India_Company, 19. prosinca 2018.

26 Herkov, Z., Gradnja, str. 31, 41-44, 92 i d.

Intendanci, čiji je intendant, kapetan Trsta nadležan za upravu, trgovinu, pomorstvo i zdravstvo. Rijeka i Trst zadržali su režim „slobodnih luka".[27]

Nakon upravnih promjena usmjerenih razvoju pomorske trgovine dvor je putem Trgovačke direkcije u Beču krenuo u poslovni pothvat i 1750. utemeljio Tršćansko-riječku privilegiranu kompaniju s koncesijom trgovine i prerade šećera u nasljednim zemljama Monarhije, uz pravo izgradnje zgrada i skladišta, oslobođenje carina i daća za uvoz sirovine u Rijeku i Trst, daljnju prodaju bez carine i samo uz trošarinu te izgradnju vlastitih brodova. Svi su zaposleni oslobođeni kmetskih davanja i tlaka te ukonačivanja vojske. Kapital od 1.088.000 forinti podijeljen je u 1.364 dionice između 231 dioničara. Najveći je bio grof de Fries s 256 dionica, a većinu imaju trgovci i bankari iz Beča, Hamburga i Antwerpena, jer je austrijska Nizozemska bila najrazvijenije pomorsko-trgovačko područje onog doba. Mariji Tereziji poklonjeno je 13 dionica. Nizozemski dioničari imali su 43 glasa u skupštini dioničara 1752., a austrijski 22. Dionice su imale pravni status nekretnina, a stranac vlasnik najmanje 20 dionica bio je u nasljednom pravu izjednačen s domaćim osobama. Dionice stranaca nisu se smjele konfiscirati ni u slučaju rata protiv njihove države. Kompanija je kod namirenja potraživanja imala pravo prednosti pred ostalim vjerovnicima. Dioničari prethodne kompanije koji su ušli u novu dobivali su za svoj kapital dionice novog društva. Udjeli onih koji su se povukli isplaćivani su u ratama, ali to je Trgovinsko vijeće utvrdilo kao bespredmetno. Na čelu je bila nizozemska trgovačka kuća Arnold iz Antwerpena, a skupštini dioničara predsjedava načelnik Antwerpena Pierre Wellens. Nizozemci su uspjeli da Rijeka bude sjedište Kompanije, iako se Beč protivio. Zaposleno je oko 1.000 radnika, dok su tadašnje manufakture imale tek nekoliko desetaka. Dok u Monarhiji živi feudalni poredak ovdje je za ostarjele i bolesne radnike osnovana siromaška blagajna. Kompanija ima monopol na trgovinu šećera i podružnice od Trsta, Beča, Temišvara, Hersona na Crnom moru, Carigradu, Solunu, Lisabonu, Vera Cruzu, Krimu, Philadelphiji (komanditnu kuću), Santiago de Chilleu itd. Zbog straha od gubitka monopola na šećer širi lepezu poslovanja kopajući ugljen u Labinu, željezo u Trbižu (Tarvisio), živu, osniva manufakture svijeća, voska i potaše u Rijeci, brodogradilišta te talionicu željeza. Uvozila je robu iz Nizozemske (kavu, čaj, papar, sušenu ribu iz Norveške, indigo iz Nantesa itd.). Direktori Kompanije vodili su manje komisione poslove Azijatskog trgovačkog društva *Carski orao* (*Der kaiserliche Adler*). Plaće stručnih radnika iz Nizozemske i Hamburga bile su dvostruko veće nego u matičnim zemljama kako bi ih privukli na dolazak. Uz sjedište je u Rijeci izgrađena rafinerija šećera. Rafinerija postaje jedna od najvećih tvrtki Monarhije i dobiva povlasticu prerade šećera na 25 godina što je produžavano do 1828. Vrhunac je bio koncem 18. stoljeća, a pad je izazvan Napoleonskim ratovima i korištenjem repe umjesto trske, čemu se nisu uspjeli prilagoditi. Uz to, merkantilističko poslovanje dodjelom vladarskih povlastica potiskuje liberalizacija tržišta. Kompanija je likvidirana odlukom ugarskog sabora u Požunu 1825., a skupština dioničara provela

27 Bartulović, Ž., Sušak 1919.-1947., Rijeka, Pravni fakultet Sveučilišta u Rijeci, Državni arhiv u Rijeci i Adamić, 2004., str. 15-16; Lukežić, I., Gospodarska, str. 13; Faber, E., Carska gospodarska politika na Jadranu od 1717. do 1776., u: Riječka luka: povijest, izgradnja, promet (ur. Dubrović, E.), Rijeka, Muzej grada Rijeke, 2001., str. 78-81.

je dražbu imovine 1829.[28]

Inventivni pojedinci traže nove trgovačke putove, npr. grof Rialf Perles, prvi upravitelj Banata, čiji je posjed bio i Grobnik, traži vezu s Rijekom. Za trgovinu žitom preko Rijeke utemeljena je 1759. Temišvarska kompanija. Dobiva desetgodišnju povlasticu za dopremu proizvoda iz Banata u Rijeku i Trst, no zbog gubitaka 1763. radi se sanacijski elaborat i restrukturiranje u Kompaniju Temišvar-Trst, no ona nakon kratkog oporavka propada. Riječka kompanija tražila je od Temišvarske pomoć za otvaranje kuće za prodaju šećera u Temišvaru. Sličnu suradnju planira Trgovinsko vijeće u Bakru, ali plan izvoza banatskog žita propada.[29]

Trgovačka provincija je ukinuta, a Rijeka reinkorporirana Hrvatskoj 14. veljače 1776. godine. Utemeljena je Severinska županija, a Marija Terezija osniva gubernij u Rijeci s Josephom Maylathom de Szekhelyem na čelu. On postaje i župan nove Severinske županije. Osnutak Riječkog gubernija dao je poticaj izgradnji luke i trgovini žitom iz Panonije. Pod utjecajem Maylatha utemeljena je Trgovačka burza (*La borsa mercantile*) i trgovački Kasino 1779.[30]

Potom je 1778. utemeljen Bakarski municipij u čiji sastav ulazi Rijeka. Bakar je tada bio najveća hrvatska upravna cjelina s 7.656 stanovnika, dok je Rijeka imala 5.956, a Zagreb 2.815. Riječki patriciji strahuju da ih veći Bakar i gospodarski „proguta" pa traže priznanje gradskih povlastica. Marija Terezija je 23. travnja 1779. novim aktom odredila da je Rijeka *corpus separatum* neposredno pripojen Ugarskoj kruni. Takav tekst potiče Ugarsku da Rijeku smatra svojom, iako je to dvojbeno jer je i Hrvatska kraljevstvo „pridruženo" Ugarskoj kruni. Josip II. 20. ožujka 1786. ukida Severinsku županiju i osniva Ugarsko primorje u koji ulazi i riječki kotar. Rijeka je u upravnim i gospodarskim poslovima, kao i čitava Hrvatska, podređena Ugarskom namjesničkom vijeću.[31] Konac razdoblja označava smrt Josipa II. 1790. Uz Ugarski

28 Dubrović, E., Rijeka, str. 19, 30-34; Toševa Karpowicz, Lj., Masonerija, politika i Rijeka (1785.-1944.), Rijeka, Državni arhiv u Rijeci, 2015., str. 31-32, 43-44. Ona navodi da su Nizozemci i Francuzi utemeljili slobodnozidarsku ložu *L'Ami Solitaire Inconnu a l'Oriente de Fiume,* koja se spominje 1769., donoseći liberalan i protuhabsburški duh. Lukežić, I., Trgovačka, str. 14. Lukežić, I., Riječke glose, Opaske o davnim danima, Rijeka, Izdavački centar Rijeka, 2004., str. 19-20; Žic, I., Riječki orao, str. 101-103, navodi da je Marija Terezija kupila 12 dionica, grof Chotek 300, Bečka banka 144, izaslanstvo bečkih bankara 144, a Nizozemci 144 dionice. Trkulja, M., Rijeka – središte manufakturne proizvodnje, u: Temelji moderne Rijeke 1780.-1830., Gospodarski i društveni život (ur. Dubrović, E.), Rijeka, Muzej grada Rijeke, 2006., str. 46. Pasquale Ricci, predsjednik tršćanske Intendance 1762. Vrhovnoj trgovačkoj intendanci daje mišljenje o Rafineriji šećera u Rijeci. On upozorava na skupoću proizvoda kritizirajući tako zaštitu državnog monopola i potrebu konkurencije radi učinkovitosti proizvodnje, predlaže liberalizaciju uvoza sirovine radi prerade u drugim dijelovima države te upozorava da država propisima ne smije previše štititi interese radnika jer će se to odraziti na poslovanje. Opširne podatke o Kompaniji donosi Hofmann, V., Tršćansko-riječka privilegirana kompanija 1775.-1804., u: Doba modernizacije, str. 45-75.

29 Dubrović, E., Rijeka, str. 41-44, 48-49.

30 Dubrović, E., Rijeka, str. 12-13; Tadić, K., Riječka kasina i čitanje novina, u: Temelji moderne Rijeke, str. 143-144; Lukežić, I., Trgovačka, str. 16.

31 Lukežić, I., Trgovačka, str. 14; Žic, I., Kratka, str. 52-53; Hauptman, F., Pregled povijesti Rijeke do Bachova apsolutizma, u: Rijeka, zbornik, Zagreb, Matica hrvatska, 1953., str. 209; Soos, I., Rijeka u središtu interesa mađarske politike, u: Temelji moderne Rijeke, str. 180; Bartulović,

sabor veže se anonimni prijedlog upravne reorganizacije sjevernog Jadrana *Projectum Articuli* prema kojem bi „Ilirskoj naciji" bila prepuštena Rijeka, Bakar i Kraljevica te Karolinška cesta pa bi grad s okolinom postao trgovački emporij.[32]

Važan čimbenik u razvoju gospodarstva je dolazak kvalitetne radne snage. Protestanti u Hrvatskoj nisu imali pravno potvrđen status sve dok Josip II. 1781. nije izdao Patent o vjerskoj toleranciji kada su postali ravnopravni građani i mogli se baviti gospodarstvom, iako su, npr. djelovali u Rijeci. Tako se, prema Dubroviću, u Rijeci širi protestantska radna etika. U tom vremenu dolazi do utemeljenja pravoslavne i židovske općine u Rijeci.[33]

Trgovac Jakov Bradičić iz Rijeke 1787. od cara patentom dobiva povlasticu izvoza žita i druge robe na crnomorskom izvoznom pravcu na deset godina, ali propada zbog rata pa 1791. Ugarskom saboru podnosi Nacrt trgovačko-domoljubnog ugarskog društva, nacionalnog društva sa sjedištem u Pešti. Andrija Ljudevit Adamić, poslovna osoba fascinantnih sposobnosti i ostvarenja, prednost daje riječkom pravcu. Adamić, suprotno od kompanija nije utemeljio jedinstvenu trgovačku kuću te uglavnom ostaje vjeran malim ortačkim partnerstvima i dioničkim udjelima u poslovanju, nekima samo za jednokratni pothvat, trguje duhanom, konopljom, hrastovinom, soli itd, ali ipak osniva i osiguravajuća društva. S ocem je 1786. osnovao tvrtku *Simone Adamich & Figlio*. Predlagao je utemeljenje trgovačke kreditne i diskontne banke 1791., a na saboru u Požunu utemeljenje ugarske nacionalne kompanije *Privilegiranog društva za ugarsku trgovinu* sa sjedištem u Rijeci te podružnicom u Pešti.[34]

U Rijeci su 1804. i 1805./1806. postojale brojne tvornice i manufakture u vlasništvu pojedinaca ili ortaka, kao i 52 trgovca pojedinca.[35] U poslovnom životu bilo je i žena. Johanna Catarina Vierendeels, rođ. Neef, Flamanka, žena direktora Trgovačke kompanije Petera Jana Bernarda Vierendeelsa bila je od 1783. do 1794. s Tomasom Giuliancichem „tihi drug" (*socia tacita*) trgovačke kuće Santa Santarellija za trgovinu drvom i konopljom.[36]

Engleski putopisac Thomas Watkins 1789. piše: *Rijeka je jedna od rijetkih luka*

Ž., Povijest hrvatskog, str. 31, id., Sušak, str. 17-18.

32 Toševa Karpowicz, Lj., Masonerija, str. 61-64.

33 Dubrović, E., Rijeka, str. 81; Milošević, Miodrag, Vjerska i građanska snošljivost u Rijeci, u: Temelji moderne Rijeke, str. 131-141.

34 O Adamiću vidi knjigu: Adamićevo doba 1780.-1830., Riječki trgovac u doba velikih promjena (ur. Dubrović, E.), Rijeka, Muzej grada Rijeke, 2005. Korišteni su podatci: Lukežić, I., Životopis Andrije Ljudevita Adamića, str. 15-75; Dubrović, E., Adamićevi planovi za osnutak prve banke u Rijeci, str. 86-89; id., Adamićevi prijedlozi za razvoj trgovine i izvoza preko riječke luke, str. 184-185; Ress, I., Adamić i Mihanović na Saboru u Požunu, str. 187-221; Adamićev i Mihanovićev prijedlog osnivanja Privilegiranog ugarskog društva, prir. Labus, N., str. 332-338. Vidi i: Dubrović, E., Rijeka, str. 17, 35-36, 49-51; Žic, I., Riječki orao, str. 106-107.

35 Spominju se manufaktura šešira (vlasnik Giuseppe Fulvi), za izradu kamenog posuđa (Giuseppe Pessi) i tvornice: za preradu kože i dugmad (vlasnici Odenigo Minussi i Francesco Rubinić, direktor Giovanni Battista), za konope (braća Cantarelli), za vosak (Giuseppe Pessi), šećer, preradu vune i potaše, a navode se i 52 trgovca, a 1805./1806. rafinerija šećera i tvornica rozolina, šešira, kože, voska, konopa, potaše, duhana sukna. Toševa Karpowicz, Lj., Masonstvo, str. 39-40, Lukežić, I., Trgovačka, str. 17.

36 Lukežić, I., Riječke glose 21.

koje pripadaju austrijskom caru koji je mnogim mudrim povlasticama i zaštitnim mjerama znatno unaprijedio njezin trgovački promet.[37] Lukežić citira Ercega: *Rijeka je bila kapitalistička oaza u moru feudalizma… izlazi iz okvira državne zajednice, te izrasta u svjetski poslovni subjekt. Tomu su znatno pridonijeli središnji državni propisi i povlastice, zatim zemaljske odluke i lokalni propisi te, napokon, sami poslovni ljudi svojom poslovnošću i novcem.*[38]

5. 19. STOLJEĆE – PROCVAT RIJEČKOGA GOSPODARSTVA

Tijekom Napoleonove vlasti od 1809. do 1813. Rijeka je bila dio Građanske Hrvatske i Ilirskih pokrajina. Trgovačke komore nastaju u Francuskoj tijekom 17. stoljeća, a intendant Hrvatske Contades utemeljio je 18. studenoga 1811. Trgovačku komoru u Rijeci. Član komore mogao je postati trgovac s najmanje desetogodišnjim iskustvom. Prvi predsjednik bio je Pavao Scarpa st., a od 1812. de Ridder iz Antwerpena, direktor šećerane. Povratkom austrijske vlasti komora je prestala djelovati 29. rujna 1814. kao francuska ustanova nepoznata u Habsburškoj Monarhiji. U Rijeci i Trstu dekretom su 1812. utemeljene institucije *entrepota* (bescarinske luke za robu namijenjenu daljnjem izvozu), tj. skladišta za austrijsku robu. Iste godine dovršena je Lujzinska cesta od Karlovca do Rijeke. Adamić surađuje s Francuzima i dobiva monopol za trgovinu soli za Ilirske pokrajine i Talijansko Kraljevstvo. Izvješće iz 1814. spominje pet tvrtki za osiguranje (*Camera di sicurita*). I pored ovih aktivnosti stanje gospodarstva u doba francuske vlasti bilo je loše, a engleska pomorska blokada, uvođenje visokih poreza i novačenje stanovništva utječu na njegov pad.[39]

Ideja mađarskoga nacionalnog gospodarstva od Karpata do Jadrana koja predviđa zaštitne carine nastaje 1790., a kulminira 1848. Nasuprot njoj rađa se koncepcija hrvatskoga gospodarskog preporoda.[40] Monarhija 1814. umjesto trgovačke komore uvodi dvojicu trgovačkih izaslanika (deputata) koje će na prijedlog trgovaca imenovati tršćanski Gubernij. Na sastanku europskih vladara 1821. u Ljubljani riječko izaslanstvo od cara je u 16 točaka tražilo gospodarske mjere za oživljavanje Rijeke. Hrvatski sabor tražio je povrat primorja što je vladar Franjo II. učinio 1822. i umjesto Severinske županije utemeljio Severinski okrug. Primorje je u vlasti Riječkoga gubernija kao *Litorale Hungarico maritimum commerciale* (*Breg ugersko morski kupacki*).[41] Nakon prestanka francuske vlasti Marco Susani predlaže proširenje gubernija do Karlovca umjesto ispreplitanja ingerencije s Dvorskim ratnim vijećem i Zagrebačkom županijom. Vicenzo Benzoni predlaže sustav mjeničnih (trgovačkih) sudova radi podizanja kvalitete i sigurnosti poslovanja, a 1829. osnovana je Trgovačka deputacija Rijeke.[42] Kada 1824. kreće izvoz hrastovih dužica iz Karlovca i Slavonije

37 Id., Trgovačka, str. 16.
38 Ibid., str. 15.
39 Ibid., str. 7, 19-21; Žic, I., Riječki orao, str. 103-105; Dubrović, E., Rijeka, str. 58; Sabljić, N., Austrijske i francuske gospodarske prilike, u: Temelji moderne Rijeke, str. 69-73; Bartulović, Ž., Nacija, str. 62-63; id., Sušak, str. 18-19.
40 Lukežić, I., Trgovačka, str. 22-23.
41 Bartulović, Ž., Sušak, str. 19-20; Lukežić, I., Trgovačka, str. 25.
42 Dubrović, E., Rijeka, str. 16; Lukežić, I., Trgovačka, str. 25.

u Francusku Adamić predlaže utemeljenje povlaštenoga trgovačkog društva za unaprjeđivanje mađarske trgovine prema moru, ali do toga nije došlo. Grof Janko Drašković u *Disertaciji* 1832. traži jačanje domaćega kapitala i sjedinjenje Rijeke s hrvatskim i slovenskim zemljama te Bosnom u Veliku Iliriju. Predlaže i utemeljenje trgovačkog društva u Rijeci s jakim kapitalom koje bi pomagalo izvoz hrvatskih i ugarskih proizvoda preko mora.[43]

U revolucionarnim zbivanjima 1848. velikougarska ideja traži izlaz na more i to u Rijeci, što podržava riječki patricijat. Zahtijevanja naroda i Hrvatski sabor ističu pripadnost Rijeke Hrvatskoj. Dvor imenuje Jelačića za guvernera Rijeke, a ustavom 1849. Rijeku priznaje dijelom Hrvatske. Za Bachova neoapsolutizma ukinuto je Ugarsko primorje 1850. i utemeljena je Riječka županija. Niti mađaronska većina pri sklapanju Hrvatsko-ugarske nagodbe 1868. nije htjela priznati Rijeku dijelom Ugarske, ali naknadno prihvaća reskript s izmijenjenim tekstom § 66. Prema njemu *corpus separatumom* privremeno, do konačnoga dogovora, upravljaju zajednički organi vlasti ugarskog dijela Monarhije (sabor i vlada) u kojima Mađari imaju većinu te u praksi ostvaruju svoju upravu. Mađari su privremenost koristili sve do 1918.[44]

Važnu ulogu u razvoju gospodarstva Rijeke imala je Trgovačka komora. Austrijski privremeni zakon od 18. ožujka 1850. predviđa trgovačke komore u Zagrebu, Osijeku i Rijeci (za Hrvatsko primorje i Liku). Svaki je gospodarstvenik bio obvezan učlaniti se u komoru i plaćati prirez. Ban Jelačić dekretom 21. veljače 1852. utemeljuje komoru u Rijeci koja počinje s radom 11. ožujka. Statut je donesen 1864. U poslove Komore ulazili su mjenjački poslovi, trgovački promet, valutni poslovi, *senzali* (mešetari), trgovačka društva i njihova organizacija, skrb o obrazovnim ustanovama u trgovini i pomorstvu, trgovačko i pomorsko zakonodavstvo, proizvodnja, promet, prijevoz, brodogradnja, vode i ceste, specijalistički obrti, manufakture, tvorničke radionice i pogoni, zaštita vlasništva, povlastica, izumi, industrijski patenti, informacije i mišljenja o davanjima, trgovačkim i pomorskim ugovorima, oznakama, konzulatima, karantenama, prometu, telegrafima, pošti, sajmovima, mjerama, uzancama, monetarnoj politici, bankama, štedionicama i osiguravajućim zavodima. Prvi predsjednik Komore bio je Iginio Scarpa. O kozmopolitizmu govori da je u Komori bilo Talijana, Engleza, Francuza, Nijemaca, Austrijanaca, Slovenaca, Židova, Mađara i Čeha te drugih nacija.[45]

Smjer modernizacije, ali i unifikacije propisa, slijedi Pravilnik o industriji uveden carskim patentom 1860. Komora 1866. od vlade traži da se u Rijeci privremeno uvede *Austrijski tergovački zakonik* jer je *nuždno urediti tergovačko pravo, i to u smislu što točnije jednakosti, da tergovina uzmogne napredovati, a vieresija povećati se.* Nakon donošenja Hrvatsko-ugarske nagodbe 1868., Komora je ponovno utemeljena 1872. kao ugarska institucija, a 1875. Marijan Derenčin predlaže osnutak zasebne Trgovačke komore u Bakru, ali ona je osnovana u Senju vjerojatno kako bi manje „smetala“ mađarskim interesima. Riječka Komora je 1878. donijela *Zbirku trgovačkih uzanci* (*Usi di piazza*) izmijenjenih i dopunjenih 1907. godine.[46]

43 Lukežić, Trgovačka, str. 22-23, 25, 28-29; Bartulović, Ž., Povijest hrvatskog, str. 37.
44 Bartulović, Ž., Sušak, str. 22-23; id., Povijest hrvatskog, str. 50.
45 Lukežić, I., Trgovačka, , str. 41-42, 45, 49.
46 Ibid., str. 67, 76, 92, 97-98, 107, 179.

Od Komore treba razlikovati Trgovačku burzu koja je utemeljena 1891. na poticaj gremija trgovaca i uz pomoć ugarske pomorske vlade, ministarstva. Rijeci je tada ukinut status bescarinske luke (*porto franco*) na prijedlog vlade zbog velikoga duga nastalog modernizacijom luke i investicijama, ali je ostala manja bescarinska zona.[47]

Politika se prelama u pitanjima prometnog povezivanja Rijeke, osobito željezničke veze. Dorotejska cesta od Rijeke do Martinšćice otvorena je 1833. Ugarski sabor u Požunu 1836. donosi Zakon o izgradnji željeznice do Rijeke, ali Beč favorizira Trst. U Rijeci je 1845. sklopljen ugovor Ujedinjenog društva za izgradnju željezničke pruge Vukovar-Rijeka sa sjedištem u Pešti i Rijeci i glavnicom od 25 milijuna forinti pod utjecajem programa Lajosa Kossutha. Tek je 1873. otvorena željeznička pruga do Šentpetera (Pivke) kao i do Karlovca. Ugarska Državna željeznica je od Društva južnih željeznica osnovanog austrijskim kapitalom 1880. otkupila prugu Zagreb-Karlovac kako bi otklonila austrijski utjecaj. Željezničkim tarifama bili su izjednačeni troškovi prijevoza za Trst i Rijeku kako bi se roba privukla u Trst, sve do 1881. kada je za Rijeku tarifa smanjena u omjeru prema manjoj kilometraži.[48] Ogroman gospodarski pothvat je i izgradnja čitave riječke luke tijekom 19. stoljeća.[49]

Nova generacija gospodarstvenika okreće se samo jednoj djelatnosti, oni ne svaštare. To su industrijalci 19. stoljeća koji sprovode – *idea industriale*.[50] Umjesto trgovaca pojedinaca koji se bave različitim djelatnostima, nova generacija poduzetnika usredotočila se na jednu djelatnost iako znaju ulagati i u druge tvrtke.

Brodarstvo i brodogradnja među najvažnijim su gospodarskim granama u Rijeci. Opet nailazimo na ženu poduzetnicu, Mariju Franci, rođ. Terzi, za koju je 1853. izgrađen prvi kliper-bark. Radi razvoja brodogradnje Komora 1870. od vlade traži carinske olakšice. Kongres brodovlasnika u Rijeci 1881. raspravlja o stanju i sanaciji austrijske i ugarske mornarice, zamiranju brodogradnje, nezaposlenosti, uvođenju državnih novčanih subvencija kao u Italiji i Francuskoj. Mađari se 1882. povlače iz austrijskog Tršćanskog *Lloyda* i osnivaju kompaniju *Adriu*, početno s 50 % engleskog udjela. Godine 1896. utemeljena je trgovačka udruga *Lloyd Fiumano* s 86 članova, a 1901. utemeljena je karatna zajednica *Indeficienter*, koja 1907. postaje dioničko društvo. Skupština 60 brodovlasnika 1902. zbog toga što brodovlasnici brodove registriraju u Trstu, jer Austrija daje bolje uvjete poslovanja, traži da se brodovi prenesu pod austrijsku zastavu. Brodogradilište *Danubius d.d.* utemeljeno je 1905. i gradi ratne brodove.[51]

Gospodarske subjekte nužno prate financijske institucije. Prva bankarsko-mjenjačka kuća u Rijeci *Francesko Corossacz e figlio* utemeljena je 1848. Osnivač

47 Ibid., str. 132-133.

48 Ibid., str. 25-29, 94; Dubrović, E. Rijeka, str. 81-94; Žic, I., Riječki orao, str. 113; Dobrovšak, Lj., Zaposlenici na željeznicama u Hrvatskoj 1903. godine, Zagreb, Hrvatski časopis za povijest, 2/2008., str. 492; Bartulović, Ž., Sušak, str. 32 .

49 Berkes, J., Izgradnja riječke luke od 1868. do 1918. godine, u: Riječka luka: povijest, izgradnja, promet (ur. Dubrović, E.), Rijeka, Muzej grada Rijeke, 2001., str. 133-164.

50 Dubrović, E., Rijeka, str. 81.

51 Lukežić, I., Trgovačka, str. 52, 84, 114-115, 141, 153, 160, 163; Žic, I., Riječki orao, str. 115-116, 122.

se intabulirao u imovinu riječkih brodovlasnika i ulazio kao karatista u poslovanje. U Rijeci je 1915. djelovalo više privatnih banaka kao i 18 kreditnih banaka i podružnica. Komora 1855. donosi odluku o otvaranju podružnice Austrijske nacionalne banke s kapitalom 500.000 forinti, a 1857. osniva Zajmovnu pomoćnu blagajnu (*Casa usiliaria di credito*) za potporu industrijalaca i obrtnika u slučaju novčanih nedaća. Uz nju rade dva domaća osiguravajuća društva i devet podružnica vanjskih društava. Gradska štedionica (Štedna blagajna) otvorena je 1859. Riječki brodovlasnici su 1865. utemeljili Društvo za pomorsko osiguranje (*Mutua*) s kapitalom od dva milijuna fjorina. Mladi židovski trgovac Carlo Kohen 1868. traži od gospodarstvenika dogovor o osnivanju autonomne riječke banke. Ona je utemeljena 1871. s 500.000 forinti glavnice u 2.500 dionica, a 1873. Pučka štedionica s kapitalom od 60.000 forinti u 2.000 dionica. No, poslovanje banaka nije uvijek idealno pa je u doba gospodarske krize 1895. ministar trgovine isticao problem loše uprave javnom ustanovom Javnih skladišta u Rijeci koje je povjereno Ugarskoj eskontnoj i kreditnoj banci koja daje prednost određenim tvrtkama. Upozorio je na veliki utjecaj banaka koje preuzimaju poslovne djelatnosti pa im manji gospodarstvenici ne mogu konkurirati.[52]

Tijekom 19. stoljeća u Rijeci nastaje niz važnih gospodarskih subjekata od kojih su mnogi dosezali državnu pa i svjetsku važnost. Riječka šećerana likvidirana je 1828., ali iste godine utemeljena je Cesarsko-kraljevska privilegirana manufaktura papira *Smith & Meynier,* koja koristi prvi parni stroj u jugoistočnoj Europi. Riječka domoljubna udruga za otkup prostora nekadašnje šećerane osnovana je 1834., a nju čini 41 dioničar s glavnicom od 35.000 forinti. Duhan se u Rijeci prerađuje od sedamdesetih godina 18. stoljeća, a Karlo Adam Schram iz Rijeke od 1800. trguje duhanom. Država carskim patentom o monopolu na izradu i prodaju duhana 1850./1851. odobrava rad tvornice u nekadašnjoj Rafineriji šećera, najvećoj u Monarhiji s 2.400 radnika. U Rijeci 1851. rade 24 tvornice, 216 trgovaca i veletrgovaca te 180 obrtnika. Proizvodnja torpeda započinje kada je Robert Whitehead 1864. sklopio ugovor o poslovnom pothvatu s Ivanom Vukićem (Luppisom) i Giovannijem Ciottom, kasnijim gradonačelnikom, prema kojem on dobiva 50 % profita, Vukić 40 %, a Ciotta 10 %. Luppis je postupno isplaćen i napušta pothvat, a 1875. utemeljuje se *Whitehead Torpedofabrik & Co.* (*Fabbrica Torpedini*), koji je 1905. preoblikovan u dioničko društvo (*Aktiengesellschaft*). Prvo Prvo mađarsko dioničko društvo za čišćenje riže utemeljeno mađarsko-engleskim kapitalom 1881. bila je najveća tvrtka prehrambene industrije. Inicijativom poslovne kuće *Les Fils de A. Deutsch de la Meurt* i putem Opće ugarske kreditne banke utemeljena je Rafinerija kamenog ugljena d.d. u Budimpešti 1882. na 50 godina za podizanje Rafinerije nafte u Rijeci. S vremenom je najveći udio rafinerije pripao S. M. Rotschildu, Mađarskoj općoj kreditnoj banci i Austrijskom neovisnom kreditnom zavodu. Nakon propasti Monarhije 1918., kako bi se izbjegao ulazak ove važne tvrtke u ugarski dio za isplatu ratne odštete Antanti, u financijskoj manipulaciji kupuje ju nizozemska korporacija *Photogen* iza koje je stajao talijanski kapital. Utemeljena je nova tvrtka *Raffineria di olii minerali S.A. (ROMSA)* 1922., a 1926. talijanska udružena naftna industrija *AGIP* preuzima rafineriju. Ipak, industrijalizacija ne zahvaća hrvatsko zaleđe koje ne uživa državne povlastice (npr.

52 Lukežić, I., Riječke glose, str. 101-106, id., Trgovačka, 58, 61, 66, 75, 80, 88, 140, 158.

porto franco) kao Rijeka.[53]

Uspon gospodarstva praćen je skrbi o kvalitetnom školovanju. Glavna pomorska škola utemeljena je 1852. te privatni pomorsko-trgovački zavod akademija Učilište za brodare-trgovce (*Collegio nautico-commerciale privato convento*). Komora 1855. odlučuje održavati nedjeljna predavanja za mladež koja se kani posvetiti trgovini. Kraljevska vojnopomorska akademija započinje s radom 1856., a 1881. razmatra se otvaranje Trgovačke akademije. Zbog političkih sukoba mađarona i autonomaša talijanski jezik je 1913. ukinut u nastavi na Višoj trgovačkoj školi.[54]

Cjelovitost gospodarskih aktivnosti zaokružuju događanja usmjerena njihovoj promociji. Prva riječka obrtna izložba održana je 1899. Pored Udruženja trgovaca i industrijalaca 1906. utemeljena je Liga tržnih poslodavaca, a Hrvatski gospodarstvenici utemeljili su 1906. zaseban Trgovačko-obrtnički dom koji nije zaživio. Riječki gospodarstvenici su 1908. utemeljili *Bijelu ruku* - organizaciju za suzbijanje privrednoga kriminala, uglavnom krađa i manjih delikata.[55]

Pozornost privlače pojedina pravna pitanja koja su i danas intrigantna. Liberalna ugarska vlada zabranila je 1891. rad nedjeljom. Kritičari su to tumačili „naopako“, čudeći se nazadnom propisu koji ugrožava osobnu slobodu i prava drugih vjerskih zajednica u državi pa predlažu rad barem do 13:00 nedjeljom. U austrijskom dijelu monarhije zakon dopušten je rad do 10:00.[56]

Konac stoljeća obilježava težnja gospodarstvenika usmjerena promjeni carinske politike Monarhije. Napušta se merkantilistički Colberov sustav u korist zaštite interesa nacionalnog rada što guši trgovinsku razmjenu. Komora 1885. upozorava na napuštanje načela slobode trgovine (*free trade*) i pravedne trgovine (*fair trade*) u korist protekcionizma, iako pozitivnim smatra trgovinske ugovore Monarhije s Njemačkom, Italijom, Švicarskom i Belgijom.[57]

Korisno je usporediti Rijeku s Istrom prema istraživanju Alide Perkov koja početak modernizacije simbolično vidi u postavljanju kamena temeljca pomorskog arsenala u Puli 1856. Istra je do 1814. do 1853. i od 1861. do 1880. imala status slobodne carinske zone. Već 1876. u Istri djeluje 1.210 poslovnih subjekata, u industriji 528, trgovini 347, pomorstvu 335, najviše u Puli - 231. Ona ističe aktivnosti Trgovinsko-obrtničke komore u Rovinju (od 1915. u Pazinu), pomoć austrijskih ministarstva financija i željeznica, poljoprivrede i javnih radova. Uspon obilježava rad Ravnateljstva zaklade za rasterećene zemlje, kojim se zemljišni odnosi rješavaju na moderan način, kao i Pomorske uprave u Trstu. Važan je rad državnih novčarskih institucija, npr. Instituta za hipotekarni kredit, Instituta za komunalni kredit, Instituta za promociju malih industrija za Trst i Istru (usporedivo s modernim *start up*-ovima), Komisije za državnu pripomoć Istri 1908. te privatnih, npr. Zajmovnog društva *Istarska posujilnica*, kao i konzorcija industrijalaca. Sve je to popraćeno donošenjem propisa u sferi gospodarstva. To su, npr. Zakon o objavi patentnih prijava 1810.,

53 Id., Trgovačka, str. 25-29, 37, 45; Dubrović, E., str. 81-94; Žic, I., Kratka, str. 95, id. Riječki orao, str. 113, 117-120, Trkulja, M., Rijeka, str. 51.

54 Lukežić, Trgovačka, str. 53, 56, 58, 60, 113, 193.

55 Ibid., str. 144, 177-178, 180.

56 Ibid., 131.

57 Ibid., str. 123-124.

Carski patent o trgovačkim društvima iz 1852., Zakon o vođenju trgovačkih knjiga 1862., Zakon o arbitraži iz 1853., Obrtni zakon 1859. itd. Proklamira se sloboda obrta, a odustaje od koncesija, osim iznimno za kemijske, farmaceutske proizvode, prijevoz osoba, ugostiteljstvo i djelatnosti pod nadzorom policije, npr. tiskovine. Zakon o trgovačkim društvima 1873. utvrđuje ustroj društva, upravljanje, rad tijela uprave, nadzor, razvrgnuće društva i likvidaciju. Izdavali su se certifikati o podrijetlu robe i kompetenciji institucija što zakonom od 1868. radi Komora. U Puli od 1886. radi Ured za robne marke, a održavaju se i izložbene manifestacije.[58] Očiti su napori austrijskih vlasti u Beču na gospodarskom rastu Istre, ali uvijek u okvirima potreba austrijskoga dijela Monarhije.

6. ZAKLJUČNO RAZMATRANJE - SLOM RIJEČKOG GOSPODARSTVA 1918. I MEĐUNARODNI AKTI

Rad pokušava utvrditi različite pravne oblike gospodarske djelatnosti i organiziranja poslovnih subjekata na hrvatskim, osobito obalnim prostorima, kao i u Rijeci od srednjega vijeka do 20. stoljeća. Za uspješan razvoj potrebna je sprega kvalitetnih pravnih propisa kojim država podržava gospodarstvo, poduzetnih pojedinaca i kapitala, kao i geopolitički položaj koji Rijeka ima. Rijeka je, kao „južni pol Srednje Europe“, kako je naziva Dubrović, doživjela uspon tijekom 18. stoljeća, a zenit tijekom postojanja Austro-Ugarske (1867.-1918.) kada je bila najvažnija luka ugarskog dijela Monarhije. Ovaj sklad prekinuo je Prvi svjetski rat i slom Austro-Ugarske 1918. godine.

Suverenitet nad Rijekom preuzela je Država Slovenaca, Hrvata i Srba, 29. listopada 1918., ali ona nije imala međunarodno priznanje pa zbog ekspanzionističke politike talijanskih iredentista dolazi do savezničke okupacije, u kojoj vodeću riječ ima Italija. Započela je višegodišnja borba za riječki gospodarski emporij. Ujedinjenjem Države SHS i Kraljevine Srbije 1. prosinca 1918. u Kraljevstvo/Kraljevinu SHS nova država preuzima ovu borbu. Italija koristi svoj bolji položaj na mirovnoj konferenciji u Parizu, ali velike sile ipak nisu podržale njezine zahtjeve pa dolazi do dvostranih pregovora među državama. Dodatna komplikacija nastala je ulaskom Gabriellea D'Annunzia u Rijeku 12. rujna 1919. i njegovim proglašenjem Talijanske Regencije Kvarnera 8. rujna 1920., kojim je pokušao prvo priključiti Rijeku Italiji, a potom utemeljiti zasebnu državu. On je izbačen iz Rijeke vojnom akcijom Italije na, tzv. „krvavi Božić“ 1920. Italija i Kraljevstvo SHS su 12. studenoga 1920. u Rapallu potpisali sporazum kojim se treba utemeljiti Slobodna Država Rijeka, ali do njenog ostvarenja nije došlo. Iredentisti, iza kojih je stajala službena Italija, onemogućili su riječke autonomaše u izgradnji vlasti nakon pobjede na izborima pa je i dalje djelovala talijanska vojna uprava. Pitanje Rijeke riješeno je Rimskim ugovorima 27. siječnja 1924. kojim je najveći dio Riječke države pripao Italiji.[59]

Je li je razlog višegodišnje borbe za Rijeku bio samo ostvarivanje nacionalnog

58 Perkov, A., Utjecaj državnih institucija na preobrazbu istarskoga gospodarstva – početci od 1850. do 1918., Pazin – Pula, Politehnika Pula, 2018., str. 31-32, 36, 61, 67-68, 81-82, 88, 95.

59 Bartulović, Ž., Sušak, str. 39-50, 56-65.

interesa uz tvrdnju da je Rijeka talijanska ili oprečna želja hrvatskoga naroda u jugoslavenskoj državi? Važan čimbenik bili su gospodarski interesi. Hrvatski i slovenski gospodarski krugovi u državi trebali su Rijeku kao jedinu moderno izgrađenu luku povezanu željeznicom sa zaleđem dok beogradski gospodarstvenici i političari nisu pokazivali veliki interes za to. Italija, nasuprot tomu, nije previše marila za svoje sunarodnjake u Rijeci, već je riječko gospodarstvo „živjelo na državnoj infuziji". Druge talijanske luke nisu htjele ostaviti „kolač" Rijeci, već su preuzele njen promet, a to je dovelo i do propasti gospodarskih subjekata koji su ranije većinom bili povezani s ugarskim gospodarstvom. Italiji je bilo važno dobiti luku i željeznicu kako bi onemogućili da se njima koristi Kraljevina SHS. To se vidi prema graničnim crtama koje su talijanskoj strani osigurale isključiv pristup željeznici i lučkim postrojenjima. Italija je Kraljevini SHS prepustila samo manju, sušačku luku, tzv. Porto Baroš koja se tek trebala urediti za željeznički promet bez dodira s Rijekom. Pritom srbijanski gospodarstvenici i vlada u Beogradu nisu pokazali previše interesa za, npr. uređenje javnih skladišta na Sušaku do čega je došlo kreditom koji je uzeo Grad Sušak 1932./1933.

Navedimo najvažnija gospodarska pitanja i pravne akte kojima su se rješavala.

Prijedlog lučkoga konzorcija spominjan je tijekom pregovora Italije i Kraljevine SHS 1920. i 1923. Talijanska strana predlagala je objedinjavanje svih lučkih postrojenja Riječke države pa i onih na Sušaku u Kraljevini SHS u jednu upravnu cjelinu. Time Italija ne bi dala ništa od svog teritorija, ali bi ušla u, tzv. Upravni savjet koji bi imao šest članova, po dva od svih subjekata, ali bi sa svoja dva glasa mogla „zakočiti" donošenje odluka i rad konzorcija, tj. luke. Inicijativa je zamrla kada je Rimskim sporazumima 1924. Rijeka pripala Italiji.[60]

Nakon višegodišnjih pregovora, Italija i Kraljevina SHS su 20. srpnja 1925. potpisale, tzv. Nettunske konvencije koje je Kraljevina SHS ratificirala 8. listopada 1928. One u gl. V. *Služba u basenu Taon di Revel i u kanalu Rečine* sadrže odredbe o najmu riječkog lučkog bazena za potrebe Kraljevine SHS na 50 godina uz najamninu od jedne zlatne lire godišnje. Ova, naizgled povoljna, mogućnost krila je u sebi talijansku želju da Kraljevina SHS ne razvija svoja lučka postrojenja u sušačkoj luci Baroš, već koristi riječku luku i donosi prihod talijanskoj strani. Na sreću, jugoslavenski, tj. hrvatski gospodarstvenici nisu koristili taj lučki prostor.[61]

Nettunske konvencije sadržavale su u gl. III. *Tarife* propise o visini željezničkih tarifa za proizvode koji se prevoze do Rijeke i Sušaka. Beogradska vlada začudno je pristala na, tzv. „relacione tarife", prema kojima cijena nije ovisila o kilometraži prijevoza pa je oštetila svoje, a ponajviše hrvatsko i slovensko gospodarstvo, jer je cijena prijevoza bila jednaka za strane luke, Rijeku i Trst. Vlada je utvrdila niže tarife za luke u Dalmaciji potičući promet prema njima. Takvo stanje potrajalo je do 1941. godine.[62]

Nettunske konvencije su u *Sporazumima o izvršenju sporazuma o Rijeci, F.*

60 Bartulović, Ž., Sušak, str. 65-68; id., Neke lučke pravnopovijesne teme, u: Riječka luka, str. 110-111; id., Iz povijesti međunarodnopravnog položaja riječke luke, Mostar, Zbornik radova Pravnog fakulteta Sveučilišta u Mostaru, XVI/2003., str. 256-257.

61 Id., Sušak, str. 74; id., Neke, str. 112, id., Iz povijesti, str. 257-258.

62 Id., Sušak, str. 214-219.

Sporazum o sticanju državljanstva uredile pitanje gospodarskih subjekata koji su bili registrirani u Rijeci. Oni subjekti koji imaju sjedište u Rijeci smatrat će se talijanskima. To je logično, ali kako su brojne tvrtke radile na prostoru Delte i Baroša koji je pripao Kraljevini SHS vidi se da vlada u Beogradu nije pokazala previše interesa da privuče takve poslovne subjekte na registraciju u njoj. Dodatno, vlada nije ništa poduzela za zaštitu subjekata u vlasništvu Hrvata registriranih u Rijeci pa je došlo do „udara" na novčarske ustanove, npr. podružnice *Hrvatske poljodjeljske banke* i *Prve hrvatske štedionice* čiji je rad ometan talijanskim imenovanjem „komesara".[63] Osobito je zanimljiv slučaj *Brodogradilišta Lazarus* koje je bilo upisano u trgovački registar u Rijeci. Ono se nalazilo na vanjskoj strani riječkog lukobrana, a dijelom u sušačkoj luci Baroš. Nelogičnim razgraničenjem došlo je do toga da je vanjski dio lukobrana pripao Kraljevini SHS pa je Josipu Lazarusu onemogućena registracija u Rijeci. Vrlo vjerojatan razlog za to je rivalitet talijanskih brodograditelja koji nisu htjeli konkurenciju, a riječki prefekt govori o njemu s izrazito antisemitskog stajališta. Brodogradilište je registrirano na Sušaku 1929.[64]

Posebno je pitanje podjele austrougarske trgovačke flote kojom su države Antante htjele nadoknaditi gubitak svog brodovlja tijekom rata što je utvrđeno mirovnim ugovorima u St. Germaineu i Trianonu. Ugovori nisu vodili računa da je dio brodova bio u vlasništvu Hrvata koji su postali državljani novog Kraljevine SHS i time imaju drukčiji status od državljana Austrije i Mađarske. Vrhovni savjet ipak je uzeo tu činjenicu i odredio da Italija i Kraljevina SHS podijele brodovlje svojih državljana. Stoga su 7. rujna 1920. u Parizu potpisani sporazumi između Trumbića i Bertolinija o podjeli flote. No, talijanska strana prošla je bolje jer je prije sporazuma jeftino kupovala dionice i brodove od mađarskih i austrijskih vlasnika koji bi ih ionako izgubili kao dio ratne odštete, a ovako su dobili nekakvu naknadu. Sporazum je kao kriterij primijenio vlasništvo, ali prema stanju od 4. lipnja 1920., a ne 1918. Dobitak brodova omogućio je talijanskom gospodarstvu još veći utjecaj, a hrvatsko pomorsko gospodarstvo dovelo u težak položaj.[65]

Rijeka je tako gospodarski stagnirala sve do 1945., dok je susjedni Sušak, iako malih kapaciteta, ipak bio najjača luka Kraljevine SHS/Jugoslavije. Novi val gospodarskoga razvoja očekivao je ujedinjene Rijeku i Sušak u poslijeratnoj Jugoslaviji u kojoj je Rijeka ponovno bila najveća luka i sjedište brojnih gospodarskih subjekata, u novim oblicima nastalim na temelju socijalističkih pravnih propisa.

63 Ibid., str. 79.
64 Ibid., str. 212-214.
65 Ibid., str. 54-56; id., Neke, 113-114, id., Iz povijesti, str. 261-262.

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Summary

LEGISLATIVE ACTS IMPROVING INNOVATIVENESS OF MERCHANTS (AN ANALYSIS OF EXAMPLES FROM CROATIA AND RIJEKA FROM THE MIDDLE AGES TO THE BEGINNING OF THE 19TH CENTURY)

To date, the research of the legal historical aspects of the evolution of business activities and the influence of state on it has been scarcely explored. This paper analyses examples of medieval forms of business, in particular maritime types in the Adriatic area and developed without special influence of the public authorities, but by trade usage. In the Croatian inland regions however, the influence of the sovereign as the bearer of public authority on the development of economy is illustrated by the Golden Bull of 1242 and the founding of the free royal city of Gradec. The Statute of Rijeka of 1530 contains even more provisions evidencing the tendency of the local authorities to quick judicial resolving of disputes between merchants and shippers for the sake of the safety of business. A new initiative for commerce growth, particularly maritime, occurred during the 18th century when the freedom of navigation in the Adriatic Sea was proclaimed, and Rijeka and Trieste became "porto franco". The sovereigns initiated a series of administrative and economic reforms followed by the formation of companies, rudimental joint stock companies involved in different activities and rise of individual merchants. At the beginning of the 19th century, business companies were incrementally specialising, which was supported by activities of the chamber of commerce, modern education institutions, merchandise exhibitions and the like. Economic progress was interrupted by the World War I and perennial international disputes concerning the border between Italy and the Kingdom of SHS, most notably in regard to the port and railroad, which caused an economic decline.

***Keywords**: commercial subjects; the Middle Ages; 18th century; Croatia; Rijeka.*

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Zussamenfassung

DIE AN FÖRDERUNG DER INNOVATION VON HÄNDLERN GERICHTETEN RECHTSAKTE (ANALYSE VON BEISPIELEN AUS KROATIEN UND RIJEKA VOM MITTELALTER BIS ZU BEGINN DES XIX. JAHRHUNDERTS)

In diesem Beitrag wird der wenig erforschte rechtshistorische Aspekt der Entwicklung von Unternehmensformen und der Einfluss des Staates bzw. des Herrschers darauf untersucht. Im Beitrag werden Beispiele aus der Antike gegeben und manche mittelalterlichen Unternehmensformen analysiert, insbesondere diejenigen, die sich mit dem Seehandel an der Adria befassten. Diese Formen entwickelten sich durch die Handelspraxis, wobei die Gewalt keinen besonderen Einfluss darauf übte. Im kontinentalen Kroatien wird der Einfluss des Herrschers als Trägers der öffentlichen Gewalt auf die Wirtschaftsentwicklung am Beispiel der Goldenen Bulle aus dem Jahr 1242 und der Gründung freier Kaiserstadt Gradec erklärt. Das Statut von Rijeka aus dem Jahr 1530 beinhaltet mehrere Vorschriften, welche zeigen, dass die lokale Behörde nach sicherem Handelsverkehr und schneller gerichtlicher Streitbeilegung zwischen Händlern und Seemännern strebte. Neue Initiative für die Entwicklung des Handels, insbesondere des Seehandels, wurde während des XVIII. Jhs. gegeben, als die Freiheit des Seeverkehrs über Adria verkündet wurde und Trieste und Rijeka zu freien Häfen wurden. Die Herrscher führten zahlreiche verwaltungsrechtliche und wirtschaftliche Reformen durch, nach welchen die Handelsgesellschaften, beziehungsweise rudimentäre Aktiengesellschaften, gegründet wurden, die sich mit unterschiedlichen Tätigkeiten befassten. Ebenfalls stieg die Anzahl der Einzelhändler. Anfang des XIX. Jhs. begann die Spezialisierung von Handelsgesellschaften, was durch die Arbeit der Handelskammer und der modernen schulischen Institutionen, sowie auch durch wirtschaftliche Ausstellungen und andere wirtschaftsfördernden Aktivitäten untermalt wurde. Diese wirtschaftliche Entwicklung wurde durch den Ersten Weltkrieg und jahrelange völkerrechtliche Streitigkeiten über die Grenze zwischen Italien und des Königreichs SHS unterbrochen. Diese Streitigkeiten wurden meistens auf die Zugehörigkeit des Hafens und der Eisenbahn bezogen, was negative Auswirkungen für die Wirtschaft hatte.

***Schlüsselwörter*:** *Subjekte des Handels; Mittealter; XVIII. Jh.; Kroatien; Rijeka.*

Riassunto

GLI ATTI GIURIDICI VOLTI A STIMOLARE L'INNOVAZIONE DEI COMMERCIANTI (ANALISI DI ESEMPI DELLA CROAZIA E DI FIUME DAL MEDIOEVO SINO AGLI INIZI DEL XIX SECOLO)

L'autore disamina l'aspetto storico-giuridico poco analizzato relativo allo sviluppo di forme imprenditoriali commerciali, come pure l'influenza dello Stato, ovvero dei regnanti, su di esse. Oltre alla menzione di esempi risalenti all'era antica, viene passata in rassegna anche la disamina di alcune forme imprenditoriali del medioevo, in ispecie relative al campo marittimo nelle zone dell'Adriatico. Tali forme si sviluppano senza uno specifico influsso del governo, e ciò soprattutto mediante le prassi commerciali. Nella parte continentale della Croazia l'influenza dei regnanti, quali detentori del potere pubblico, sullo sviluppo del commercio viene studiato sull'esempio della Crisobolla del 1242 e della fondazione del regno libero della città di Gradec. Lo Statuto di Fiume del 1530 contiene diverse disposizioni che testimoniano la tendenza del governo locale ad assicurare il commercio e la snella risoluzione di liti tra i commercianti e i marittimi. Una nuova iniziativa volta allo sviluppo del mercato, in particolare di quello marittimo, s'è avuta nel corso del XVIII secolo, quando venne proclamata la libera navigazione dell'Adriatico; epoca in cui Fiume e Trieste divennero porti franchi. I regnanti introdussero numerose riforme amministrative nel commercio, che vennero seguite dalla costituzione di compagnie commerciali: primarie società per azioni che si occupavano di diverse attività. Crebbe altresì il numero di commercianti individuali. Agli inizi del XIX secolo le società commerciali iniziarono gradualmente a specializzarsi e vennero affiancate dalla camera di commercio, da moderne istituzioni scolastiche, da fiere commerciali e da attività similari che stimolassero il mercato. Lo sviluppo commerciale venne interrotto dalla Prima Guerra mondiale e da durature liti internazionali tra l'Italia ed il Regno dei Serbi, Croati e Sloveni sul confine tra l'Italia ed il Regno dei Serbi, Croati e Sloveni, che perlopiù riguardavano la spettanza del porto e della ferrovia, il che ebbe ripercussioni negative e condusse al crollo del commercio.

Parole chiave: *soggetti commerciali; medioevo; XVIII secolo; Croazia; Fiume.*

THE POTENTIALS AND LIMITATIONS OF TAX DISPUTE PREVENTION AND ALTERNATIVE RESOLUTION MECHANISMS

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Summary

This paper deals with prevention and alternative dispute resolution (ADR) in tax matters, particularly in the light of the specific nature of administrative relations, which also include tax procedures. Given the involvement of stakeholders, ADR benefits both the taxpayers and the tax authority, enabling greater legal certainty and speedier finalisation of procedures. Yet, ADR also poses an open threat to the public interest and equality as international and constitutional administrative principles, and must therefore be limited in tax procedures. This also derives from the legal acts of the EU and the Council of Europe. In addition to theoretical frameworks and types of dispute prevention and resolution mechanisms studied by means of scientific literature review, legal sources analysis and comparative insights, the paper presents the Slovenian regulation and practice of the Financial Administration (FURS) over the past years. The aim of this research is to examine the de iure and de facto situation at the national level. The analysis shows that, in tax matters, ADR is noticeably more intensive at the international level than within national tax systems. On the other hand, individual countries prefer to establish regulatory mechanisms for prevention, which should result in even more desired avoidance of disputes. It can be concluded that efficient tax procedures require an integrated approach, including both dispute prevention and ADR, in order to ensure the principles of tax justice and systemic inclusion of all stakeholders in its governance.

Keywords*: tax procedures; public interest; equality; dispute prevention; alternative dispute resolution (ADR); international trends; Slovenia.*

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1. INTRODUCTION

Tax procedures constitute the formal legal framework for the assessment, calculation, payment, supervision and recovery of tax liabilities. In such context, tax relations are almost without exception considered a part of administrative relations. They express the relation between a super-, sub- or national authority and individual natural and legal persons, i.e. taxpayers, as defined by the regulator at a specific level of authority. This means that in tax procedures, it is necessary to take into account both the general principles of the administrative procedure[1] and the specifics of tax relations.

Tax matters fall under commercial operations, which mainly aim at profit based on foreseeable relations and a rapid response of the players both within the countries and globally. However, more than other administrative matters, tax matters present a tendency for procedural efficiency. This means that it is already the regulator who creates the conditions for a safer and more responsive legal environment and develop new legal institutions, such as special taxpayers' statuses, advance rulings, or price agreements. Moreover, considerable attention is paid to the active role of participants in procedures, namely to the proactivity of the tax authority in implementing tax regulations and the participation of the taxpayers.[2]

Yet, one should not forget that the supreme principle in any administrative relation is lawfulness, which needs to be pursued when protecting the public interest.[3] This also implies an absolute respect for substantive truth and several restrictions on the disposition of the subject matter of the procedure since, generally, public law relations are not dispositive. In tax matters, the public interest is the lawful repayment of liabilities in order to finance public needs. Namely, according to Article 3 of the Slovenian Tax Procedure Act (hereinafter: ZDavP-2),[4] taxes are collected as revenues of the public budgets that do not represent payment for services rendered or goods supplied and are paid exclusively on the basis of taxation law or self-governing local

1 See Galetta, D.-U. et al., The General Principles of EU Administrative Procedural Law, Brussels, EP, 2015, Jerovšek, T., Kovač, P., Upravni postopek in upravni spor, Ljubljana, Faculty of Administration, 2017, pp. 17ff.

2 See, for instance, Perrou, K., Taxpayer Participation in Tax Treaty Dispute Resolution, Amsterdam, IBFD, 2014, pp. 227ff. Silvani, C., Dispute Resolution Procedures in International Tax Matters, IFA, 2014, pp. 39, 70, Edwards, H.T., ADR: Panacea or Anathema?, Harvard Law Review, vol. 99, 3/1986, pp. 668–684, Rogić Lugarić, T., Porezna tijela i porezni obveznici: od policajca i lopova do suradnika, in: Koprić, I. et al., Građani, javna uprava i lokalna samouprava: povjerenje, suradnja, potpora, Zagreb, Institut za javnu upravu, 2017.

3 Cf. Balthasar, A., ADR in Administrative Law, a major step forward to enhance citizens' satisfaction or rather a Trojan horse for the rule of law?, TAIEX, 2015, Dragos, D.C., Neamtu, B., ADR in European Administrative Law, Berlin, Heidelberg, Dordrecht, London, Springer, 2014, p. 209, Kovač, P., Izzivi alternativnega reševanja sporov v upravnih razmerjih v Sloveniji in širše, Ljubljana, ZZR PFL, vol. 76, 2017, p. 71. Cf. Galetta, D.-U., op. cit., p. 16., Jerovšek, T. et al., ZDavP-2 s komentarjem, Maribor, Ljubljana, Davčni izobraževalni inštitut, Davčno finančni raziskovalni inštitut, 2008, pp. 15ff.

4 Tax Procedure Act (ZDavP-2), Official Gazette of RS, No. 117/06. However, it is also necessary to take into account the subsidiary application of the General Administrative Procedure Act (GAPA), Official Gazette of RS, No. 80/99, see Art. 6 and 7 and related.

community regulations issued on the basis of taxation law, whereby these funds are used for public needs as defined in the budget adoption procedures. Taxes may well be a coercive instrument of the state, but they are returned in the form of budgetary expenditure to all taxable entities, although in different ways.[5] If approaches toward the taxpayers differ, ADR could jeopardise the public interest and equality before the law. Yet, this does not mean that in tax or other administrative procedures the administration should act bureaucratically, since good public governance requires a participatory and efficient public administration which assists the parties in the exercise of their rights and obligations, as long as such does not affect the public benefit or third parties.

This paper aims to determine the factors and legal sources that promote alternative and consensual approaches in tax relations, as well as to define the limitations in order to prevent abuse. With a theoretical analysis, comparative insights and a detailed study of the practice of the Slovenian tax authority – the Financial Administration of the Republic of Slovenia (FURS) – it focuses on the following research questions: What does classifying tax matters under administrative relations mean for the introduction of ADR in tax procedures? In what sense do the specificities of tax relations require or justify alternative approaches? What are the main legal institutions in European and Slovenian tax law that allow ADR? Which mechanisms or forms of ADR are most relevant in taxation matters in the national and international settings? Based on the above, the current state of ADR in tax procedures and the relevant development trends are examined.

In general, and specifically for the empirical part of the paper devoted to the analysis of FURS practice, the following hypothesis is put forward: *Owing to the protection of the public interest and the prevalence of the principle of lawfulness, ADR is rather conservatively introduced in tax matters in Central Europe and particularly in Slovenia*. This suggests that, despite the inevitable concern for lawfulness and equality, there are still possibilities to introduce ADR both at the regulatory and practical levels. The hypothesis is tested by means of an analysis of the relevant scientific literature, a normative analysis of international and national regulations, selected case law, and a statistical survey based on the annual reports of the FURS in recent years and structured interviews with FURS representatives conducted in the spring of 2018.

The second chapter focuses on the basics and the dilemmas concerning ADR in administrative relations in general, taking into account the specificities of tax matters. Next is a brief dogmatic definition of the key ADR institutions in Europe, following the established distinction between: (i) prevention, which leads to the avoidance of dispute, and (ii) dispute resolution when such arises. To illustrate the practice analysed, the third chapter examines the case of Slovenia whose tax system is comparable, for example, to the Croatian.[6] These two countries share the Central

5 Decision of the Constitutional Court, U-I-297/95, 28 October 1998.

6 Cf. Žunić Kovačević, N., "Europeizacija" hrvatskog poreznog postupovnog prava - o dosadašnjim ne/uspjesima kroz prizmu zadanih i imperativnih promjena, GAPZH, vol. 5, 1/2014, pp. 78–91. Cf. Rogić Lugarić, T., op. cit.

European administrative tradition, a (post)socialist legacy, and a relatively high degree of formalism in administrative matters. At the same time, there is a noticeable influence of the European Union (EU) and of the activities of the Council of Europe (CoE) that encourage the Member States to reach convergent solutions in the regulations and their implementation.[7] The paper ends with a summary of the results of the research and a look at future trends.

2. ON ADR IN TAX PROCEDURES AS ADMINISTRATIVE RELATIONS

2.1. Tax procedures and ADR as part of administrative relations – sources, dilemmas and trends

Tax procedures are predominantly defined as administrative procedures since they generally denote the relation between a tax collecting authority and individual taxpayers.[8] In this context, taxes – such as income tax, VAT, customs duties or other public charges – imply a non-voluntary financial charge which, as a rule, is a non-assigned public budget revenue (Article 3 of the ZDavP-2). The fact that they are not assigned is particularly important because it ensures 'stricter' lawfulness in relation to the taxpayers than the one generally applied under the ZUP (GAPA[9]). This, in principle, also limits the disposition of the subject matter of the procedure in the sense of ADR, unless a special act explicitly envisages a particular form of discretion of the tax authority.

In certain cases, tax authorities also conduct other types of procedures. For example, along with administrative powers, tax authorities are often given the power to establish minor offences related to non-compliance with tax legislation. Under the influence of EU practices, quasi-regulatory procedures are developed, for example when issuing abstract legal acts for a future state of facts, such as generalised (anonymised) advance tax rulings or advance price agreements (APA). Nonetheless, most of the tax procedures relate to the assessment, control of accounts and recovery of individual tax liabilities. This classifies them under administrative procedures, which, in the Central European systems, are conducted *ex iure imperio* in individual and concrete administrative relations between individual parties and authorities.[10]

7 Already at the level of administrative principles, see Galetta, D.-U., op. cit., for more on the tax system cf. Lang, M. et al., Procedural Rules in Tax Law in the Context of EU and Domestic Law, Wolters Kluwer, 2010.

8 This applies, despite the specifics of national tax systems and different legal traditions, to most tax procedures. More in Dragos, D.C., Neamtu, B., op. cit., Radvan, M., Tax Law as an Independent Branch of Law in CEE Countries, Lex Localis, vol. 12, 4/2014, pp. 816, 822, 823, Jerovšek, T. et al., op. cit., 2008, Kovač, P., Selected Slovenian tax procedure acts' simplifications and their implementation, Podjetje in delo, vol. 38, 2/2012, p. 396.

9 Jerovšek T. et al., op. cit., 2008, see commentary to Article 4 of the ZDavP-2 on the principle of legality. Cf. Jerovšek, T. et al., ZUP s komentarjem, Ljubljana, IPA, Nebra, 2004, commentary to Article 6.

10 Jerovšek, T., Kovač, P., op. cit., pp. 12–13, cf. Radvan, M., op. cit., p. 822.

Taking into account the constitutionally guaranteed equal protection of rights, this automatically implies a subsidiary application of ZUP, despite the usually wide range of special rules in sector-specific legislation.[11] Listed below are some general characteristics of administrative procedures as well as some specificities relating to tax matters, providing a framework for the analysis of ADR in individual subgroups of administrative processes.

The objectives of administrative procedures are multifaceted, yet at the same time complementary. Any administrative procedure must be conducted in the function of ensuring an efficient implementation of substantive law (e.g. tax laws) while at the same time providing for the protection of (constitutional) rights, with due account of the prevailing protection of the public interest over the *a priori* subordinate party. These are the twin objectives of administrative procedures, which are indeed contrary to each other, but the procedure needs to satisfy both. If the second function is an expression of the rule of law and a classic legal category, the first one is key for good public governance also from a political and sociological point of view. In this context, especially in the European setting, a third function of administrative procedures comes to the fore, namely establishing dialogue between the authorities and the subordinate parties (taxpayers).[12] The latter are not only the subjects of decision-making, but rather active participants in the procedure since it is they who need to accept and implement the decisions issued by the authorities.

Regarding ADR, the main questions are what a dispute is and when a dispute in administrative matters occurs. According to international case law, "a dispute is a disagreement on a point of law or a fact, a conflict of legal views or of interests between two persons."[13] A dispute is not necessarily a hostile conflict – it can merely be a different view of the legal or factual elements of the case, usually solved by means of legal remedies. As regards the occurrence of a dispute, different interpretations are suggested, particularly for procedures initiated *ex officio*, namely that a dispute arises with the beginning of a first instance procedure or when an appeal or different legal remedy is filed, or a dispute is initiated before the court. According to the practice of the European courts,[14] the majority view is that a dispute arises only when the

11 In numerous decisions, the Constitutional Court ruled that tax procedures (also tax execution, for example) were special administrative procedures and required the legislature to consider that special regulations can deviate from ZUP only if there are reasonable grounds to regulate differently than the general regulation (e.g. the non-suspensive appeal under Article 87 of ZDavP-2 is thus considered to be consistent with the Constitution, gl. Jerovšek, T. et al., op. cit., 2008, pp. 227ff). The same can be found in the case law of the CJEU, e.g. in case *Pelati d.o.o. v. Slovenia*, C-603/10, 18 October 2012.

12 Hofmann, H. C. H. et al., The ReNEUAL Model Rules, ReNEUAL, 2014, p. 4. On the significance of personal contacts and dialogue in tax procedures see van Hout, D., Is Mediation the Panacea to the Profusion of Tax Disputes?, World Tax Journal, 2018, p. 95, Fronda, A., ADR: Alleviating burdens all around, ITR, 2014, p. 26, Lowell, C.H., Governale, J.P., Choosing a Dispute Resolution Method: Is an APA Always the Best Alternative?, JIT, 1998.

13 Perrou, K., op. cit., 2014, p. 44. Cf. van Hout, D., op. cit., p. 63.

14 See ECtHR cases *Janssen v. Germany*, 23959/94, 20. 12 2001, *Božić v. Croatia,* 22457/02, 29 June 2006. Thus, as a rule, a dispute does not arise already at the first administrative instance nor only with a procedure before the court, and lasts until the realisation of the administrative

party disagrees with the decision made by the authority, i.e. when an appeal (albeit administrative) is filed. This is important because it leads into a dogmatic separation between the prevention of disputes through legitimate mechanisms before a decision is issued and the resolution of disputes that have already arisen.

Disputes are solved by classic or 'ordinary' mechanisms (the main ones being remedies before the court) and by alternative/consensual/peaceful/amicable mechanisms, friendlier to the participants in the procedure if, of course, an agreement can be reached.[15] ADR is in fact based on certain assumptions, such as admissible disposition of the subject of the relation and willingness of the participants to collaborate. The 'A' in ADR thus stands for alternative (everything-but-litigation), amicable, agreeable or appropriate[16] dispute resolution. The dispute should thus be resolved not only in formal legal terms, but also *de facto*.

It can be said that ADR is a tool that follows the establishment of balance between protection of the public benefit and the rights of parties. Such balance means a fair process.[17] It is therefore not surprising that the Council of Europe recommended, as early as 2001, to introduce ADR also in administrative matters, although with some systemic limitations compared to civil relations from which ADR actually originated. Thus, it adopted the Recommendation Rec (2001)9 on alternatives to litigation between administrative authorities and private parties, together with the CEPEJ Guidelines for a better implementation of the existing Recommendation on alternatives to litigation between administrative authorities and private parties (CEPEJ (2007)15, 7 December 2007). Several approaches are suggested, such as (i) prevention (e.g. consultation), (ii) special non-judicial procedures, e.g. internal reviews, arbitration, negotiated settlement, mediation or conciliation, and (iii) alternative judicial procedures. Altogether, it is an alternative approach, either in the context of classic procedures, such as administrative or judicial procedures, or as a parallel or alternate route. Most often, ADR is a processual form or set of forms rather than a substantive law institution. It is in fact essential that outside the administrative, judicial, or other procedure, the mediator cannot adopt an enforceable decision. As a rule, neither of the parties to the dispute has the possibility to do so, unless ADR is specifically recognised before the otherwise competent administrative authority, a notary public, a court, etc. Therefore, regulators often seek combinations between traditional procedures and ADR.

In the EU, the shift to ADR was initially an academic project to draft the 'EU administrative procedure act' (A regulation for an open, efficient and independent EU administration).[18] Specifically for tax matters, the Council Directive (EU) 2017/1852

relation, including a possible enforcement (Kovač, P., op. cit., 2017, p. 70).

15 Cf. Silvani, C., op. cit., p. 12.

16 Fronda, A., op. cit., p. 28, Silvani, M., op. cit., p. 13, van Hout, D., op. cit., p. 58.

17 Edwards, H.T., op. cit., p. 671.

18 See draft, adopted on 9 June 2016, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0279+0+DOC+XML+V0//EN>. On limits of ADR see Hofmann, H.C.H. et al., op. cit., p. 154: "[…] the working group on this book refrained from drafting a 'law on settlements agreements'. The question whether and under which circumstances settlement agreements and mechanisms of alternative settlements of disputes are licit is assessed very differently in the Member States. This heterogeneity is based on the different views on the

of 10 October 2017 on tax dispute resolution mechanisms in the EU[19] was adopted. In tax disputes, alternative solutions are sought because of several factors. Considering the wish for economic stability through legal certainty and increasingly globalised business transactions resulting in a growing number of tax disputes, it is impossible to tackle the situation if regulators and tax authorities are not more flexible. Examples from different countries show that both tax authorities and the taxpayers avoiding taxes bypass the purpose of the tax procedure.[20]

The above Directive is an expression of the special features of tax matters where, more than usual in administrative relations, there is a need for a quick and realised subject matter. In addition, in the field of taxes, particularly when searching for gaps between national systems in the global economy, there are plenty cases of bypassing the laws, from legalising the commitments by means of tax havens and aggressive tax planning to more or less criminalised tax evasion. In order to stop this, the EU attempted to achieve a more consensual dispute resolution as a win-win approach. Of key importance in such regard is the need for legal certainty, typical of commercial operations.[21] In this respect, the Directive also serves as a model for national regulations, although the EU is focusing on cross-border issues (e.g. avoiding double taxation). Another issue worth mentioning here is the procedural autonomy in the EU Member States. In principle, the EU leaves it to the Member States to regulate the procedural elements, e.g. the legal remedies or the time limits in administrative procedures, at the national level.[22] However, one must bear in mind that in the EU, taxation – and, in particular, customs law[23] – is fairly centralised, contrary to most other legal areas.

The Directive provides for some basic mechanisms, such as (i) complaint, (ii)

principle of legality of administration. In the end this question is a topic of substantive law, not of administrative procedure law. Hence, Book IV does not provide for rules on the question if a settlement agreement or alternative dispute resolution can be closed at all."

19 OJ L 265/1, 14 October 2017. The deadline for transposition into national legislation is 30 June 2019.

20 E.g. in relation to providing for taxpayers' rights see ECtHR cases OAO *Neftyanaya Kompaniya Yukos v. Russia*, 14902/04, 29 January 2009, *Jussila v. Finland*, 73053/01, 23 November 2006. Cf. Perrou, K., op. cit. 2014, p. 37, emphasising fair trial and effective remedy according to ECtHR case law. As regards the actions made by the taxpayers, here is a quote by the British politician Margaret Hodge in relation to off-shores: "We are not accusing you of being illegal; we are accusing you of being immoral."

21 Cf. Galetta, D.-U. et al., op. cit., pp. 2, 17, Perrou, K., The Ombudsman and Process of Resolution of International Tax Disputes – protecting the "Invisible Party" to the MAP, WTJ, 2018, p. 103, Kovač, P., Jovanović, T., Ensuring tax stability through advance rulings in (Slovene) practice, in: Radić, Ž. et al., The legal challenges of modern world, 2017, pp. 338–341.

22 See also CJEU case Pelati C-603/10 (and others not related to taxes), based on principles of equivalence and effectiveness. More on convergence in EU administrative procedural and tax law in Hofmann, H.C.H. et al., op. cit., Lang, M. et al., op. cit., Pistone, P. (ed.), Legal Remedies in European Tax Law, Amsterdam, IBFD, 2009.

23 Particularly as stipulated by Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013, laying down the Union Customs Code (OJ L 269), and delegated regulation of Commission, Nos. 2015/2446 and 2015/2447. Cf. Lang, M. et al., op. cit., pp. 49–70.

mutual agreement procedure (MAP), and (iii) dispute resolution by the Advisory or ADR commissions. The Directive also incorporates several established mechanisms previously promoted by the OECD and, to a limited extent, by the EU, among which MAP and arbitration.[24] For all such mechanisms, it also defines the limitations and tries to overcome their shortcomings. For example, ADR can, as a procedural presumption for the use of legal remedies, lead to prolonged procedures, which is why the Directive pays particular attention to procedural timeframe and deadlines. Prescribed time limits apply *inter alia* to the notification of the receipt of the taxpayer's complaint, the tax authorities' acceptance or rejection of the complaint, requests to arbitrate, set-up of arbitral or ADR body, notification of final decision. In addition, the scope of disputes is extended and the transparency of disputes outcome guaranteed.

Considering the general characteristics of administrative matters and the specific features of tax procedures, it is possible to identify the main strengths and weaknesses or threats of ADR in tax relations. According to various sources and experience, the main strengths of ADR in general and in tax matters are: simpler, more flexible and faster procedures, dispute resolution according to the principle of fairness and not merely following strict legal rules, amicable settlement, as well as greater acceptability of decisions by the parties.[25] The latter seems particularly relevant for administrative relations since the acceptance of a decision (particularly if the decision is a forced one) reflects the respect for the rule of law. Forcible regulation of relations leads to the need for repression, such as – in administrative matters – enforcement, inspection measures, criminal prosecution, all less democratic and more expensive in the long run. Therefore, the procedure is regarded as a tool of democracy, of participative administration or good governance. ADR (and the classic instruments, such as the right to be heard), on the other hand, leads to long-term compliance with regulations and the taxpayers internalising the decisions.[26] Moreover, it is necessary to emphasise increasing taxpayers' autonomy and cooperative compliance, particularly relevant for the field of taxes, as well as acceptance of taxes despite the burden involved, while providing for procedural and distributive justice.[27] In such context, it is crucial that dispute resolution starts as soon as possible or, better still, that dispute is prevented. The stage of dispute dictates the form of the solution, as indicated by Figure 1 below.[28] Another key advantage of ADR is to prevent disputes before the courts, i.e. to reduce court workload, particularly in the light of an increasing scope of tax disputes. Yet again, this depends on the stage of the conflict. In terms of system efficiency and tax

24 More in Perrou, K., op. cit., 2014, Silvani, C., op. cit., pp. 16–76.

25 Similarly Rec(2001).9, ad 8., Hafer, R., Dispute Review Board and Other Standing Neutrals, CPR, 2010, p. 5.

26 Kovač, P., op. cit., 2017, p. 73.

27 Van Hout, D., op. cit., pp. 50, 69, Perrou, K., op. cit., 2018, p. 104, Fronda, A., op. cit., p. 27. On increasing compliance see also Šinkovec, D., Large business approach in Slovenia – granting a special status, 2018.

28 Source: Hafer, R., op. cit., p. 2. Cf. van Hout, op. cit., pp. 64, 91, 97, Fronda, A., op. cit., p. 26, Dragos, D. C., Neamtu, B., op. cit., pp. v, viii, 63, 109, 118. In detail on preventing administrative measures v. resolving judicial disputes also in Perrou, K., op. cit., 2014. Cf. CoE, Rec(2001).9, ad 4 and 5.

justice, this ADR objective is only legitimate when it is one of the accompanying reasons and not the main reason for ADR.

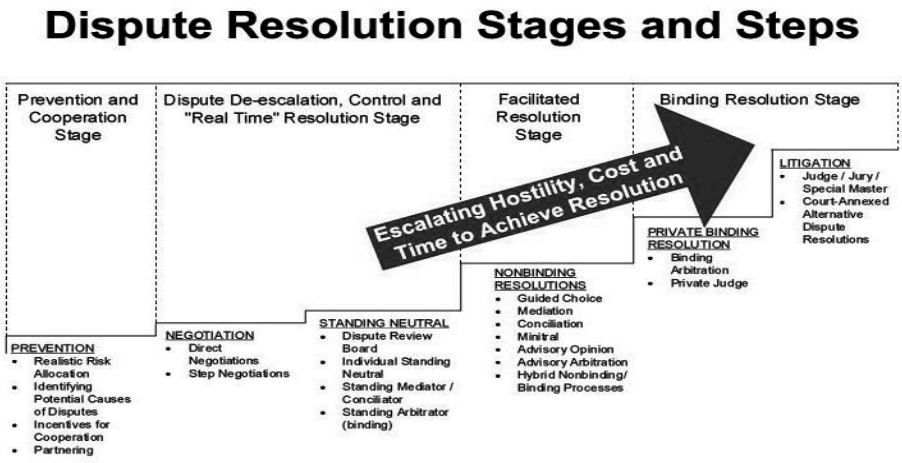

Figure 1: Dispute Prevention and Resolution Stages and Steps

On the other hand, there are a number of reservations or threats concerning ADR in administrative or tax matters. The main limitations are respect for lawfulness (in the sense of the tax authority's commitment to the law adopted in parliament) and equality of taxpayers.[29] In such context, the subject matter of substantive and procedural rules is the definition of the public interest, and the tax authority could jeopardise it if the boundaries of the regulation were considered (too) broadly. Also, from the point of view of separation of powers and the administration being bound to the legislative branch, it is questionable how much discretion can the legislature allow to the tax authority to still comply with the Constitution. This is not *per se* inadmissible, yet it is necessary to define the scope and the explicit purpose of discretion and legal (judicial) protection.[30]

Furthermore, although the taxpayer does not have equal standing as the authority in administrative relations where the latter acts as the guardian of the superior public interest, the taxpayer has the possibility of actual participation and even co-decision. In such regard, the tax authority – based on the (purpose of) sector-specific legislation – should act honestly (v. abusively) and proactively provide for voluntary cooperation. Of course, the taxpayer should also accept ADR openly, without concealment. In addition, there is limited confidentiality, which in civil disputes is one of the key principles of ADR, as tax transparency is an indispensable element in ensuring equality of the parties. The dilemma also arises as to how much a mediator or arbitrator in administrative relations can act impartially if such role is played by the tax authority as the inevitable decision-maker. At the same time, the

29 More in Kovač, P., op. cit., 2017, pp. 74ff.
30 CoE, Rec(2001).9, ad 10.–12. Cf. Jerovšek, T. et al., op. cit., 2004, pp. 52–71.

above opens the possibility for ADR in the administrative procedure, since the dispute exists at least potentially between the public and private interests. On the other hand, however, due to the primary protection of the public benefit, dispute resolution is not as free as in a predominantly dispositive legal relation. The same as in civil procedure also applies in an administrative dispute in the administrative procedure, since the parties – considering the adversarial nature of procedures – are equal before the court, even if action is brought against a public law entity or issuer of an administrative act. Yet, even here, the key principle is lawfulness. The administrative authority and the court may amend the decision only if the previous one was unlawful, and not in order to reconcile public and private interests. One of the main problems in tax matters is that agreements are legally binding, final (*res judicata*) and enforceable.[31] If the agreement is enforceable, it is indeed less 'amicable' – otherwise, the authority has no assurance that what has been agreed will also be realised, which is essential for the administrative relation and the protection of the public interest (i.e. the collected tax). It is also unclear what happens if agreements or related acts (e.g. tax rulings) are challenged before the court[32] or in relation to the related limitation period of the tax liabilities.

Thus, ADR fails to achieve the objectives of administrative procedures unless it meets the statutory goals of a specific relation or the sector-specific public interest. Obstacles to the ADR in tax matters and ultimately all administrative relations include legal and sociological elements. The legal are: (i) lawfulness as the (tax) administration being bound to the regulation and, thus, the non-dispositiveness of administrative matters; and (ii) respect of equality of the parties (taxpayers and parties in non-tax procedures) before the law. The sociological include: (iii) protection of the public benefit as the *ratio* of an administrative relation, and often (iv) lack of proactive administrative culture and institutionalised and qualified ADR holders.[33] Nevertheless, ADR, within the given limits, can be a useful complementary system, which at the same time legitimises the *ratio* of the administrative matter, since without a context the procedure may well be formally legitimate, but it implies maladministration.

2.2. Typical prevention and ADR mechanisms in tax disputes

Based on preliminary data and the analysis of general scientific and tax literature and legal sources, below is a brief dogmatic definition of the key institutions for the prevention and resolution of tax disputes in the European setting. Despite individual specifics, a general systematic scheme can be set up to consider the issue from a comparative and critical point of view. In this respect, it is essential to distinguish between dispute prevention and dispute resolution.[34] Some sources emphasise a progressive approach, depending on the stage of conflict, namely: (i) negotiation

31 Cf. Balthasar, A., op. cit., Silvani. C., op. cit., pp. 14, 28.
32 See de van Velde, E., Tax Rulings in the EU MS, Brussels, EP, 2015, pp. 7, 24, 46; cf. Kovač, P., Jovanović, T., op. cit., pp. 339ff.
33 Kovač, P., op. cit., 2017, p. 80.
34 Cf. Perrou, K., op. cit., 2018, p. 109, Hafer, R., op. cit., p. 2, Kovač, P., op. cit., 2017, pp. 86ff.

when conflict is considered a problem; (ii) mediation when conflict becomes personal; (iii) adjudication or arbitration when conflict is mainly concentrated on winning.[35] This can be further elaborated as follows:

(A) Prevention covers:

i. quasi-tax or even regulatory (although individual) procedures, determining the relation toward a taxpayer for a future state of facts; these include mutual agreement procedures (MAP) under international law and APA, advance rulings and special statuses of (large) companies in national systems;
ii. measures applied during first instance tax procedure, intended to prevent dissatisfaction and use legal remedies; they are, by rule, of procedural nature and include consultation, negotiation, conciliation and, especially, mediation, followed by an individual and concrete administrative decision by the tax authority.

(B) Dispute resolution, generally by means of a less formalised procedure, comprises:

iii. substituted decisions in procedures involving legal remedies, particularly after an appeal or a motion to renew the procedure has been filed;
iv. arbitration as parallel to administrative and judicial protection, normally used in the event of dilemmas on jurisdiction, more in international than in national disputes.

(C) In addition, there are specific forms of agreements in individual tax systems that apply both in the stage of prevention as well as after legal remedies have been filed. Typically, these are:

v. substantive law measures to ease the tax burden, such as write-offs, instalments and suspensions;
vi. possibility of voluntary disclosure, which, *per se*, is not disputable if the tax authority acts as appropriate after the disclosure or tax return has been filed; yet, a dispute can arise after supervision has been carried out and result in an additional tax assessment.[36]
vii. This group also features procedural mechanisms from the first instance procedure, particularly mediation in a second instance administrative procedure or administrative dispute.

Table 1 outlines the mechanisms described above.

35 Van Hout, D., op. cit., pp. 64ff.

36 Cf. Langenmayr, D., Voluntary Disclosure of Evaded Taxes - Increasing Revenues, or Increasing Incentives to Evade?, Journal of Public Economics, vol. 151, 2017, pp. 110–125.

Prevention or resolution/ Prevailing legal character	*Dispute prevention, i.e. before first-instance tax administrative decision is issued*	*Prevention and/or resolution*	*Dispute Resolution*
Substantive and procedural	• *MAP and APA (with negotiation)* • *Special status of large companies*	• *Suspension and instalments* • *Voluntary disclosure* • *Internal reviews*	*Non-devolutive objection or first-instance renewal*
Substantive	*Advance ruling, i.e. tax, tariff and origin customs information*		• *Arbitration* • *Substitution/settlement within legal remedies*
Procedural	*Negotiation, but usually within, e.g. APA or special status*	*Mediation and similar, particularly by ombudsman*[37]	*Mediation, etc.*

Table 1: Types of Tax Dispute Prevention and Resolution Mechanisms (source: own)

Prevention mechanisms, in particular, aim at the issuing of general (implementing) acts or of abstract acts since the facts of taxation have not yet arisen. Both substantive aspects (e.g. subject to taxation, degree, reliefs) and procedural aspects may be involved. Advance price agreements (APA) are mainly a mechanism for bi/multilateral relations, directed against double taxation.[38] Through APA, the tax authority and the taxpayer agree on transfer prices criteria, scope, methodology, prerequisites, and mandate. Similarly, the advance tax ruling is a letter of guarantee or pre-decision, i.e. *a priori* defining the tax assessment, insofar as the anticipated circumstances will arise. This ruling may also have a general character, provided it is anonymised and published. Despite being called an 'agreement', these are unilateral relations.[39] However, there are some entry or eligibility conditions for the APA procedure to be initiated, which raises substantial doubts on the inequality of taxpayers.[40] Moreover, the CJEU can consider a special agreement as a form of state aid against EU law.[41]

37 More on the role of general or special (tax) ombudsman in Dragos, D.C., Neamtu, B., op. cit., pp. 565–588, Perrou, K., op. cit., 2018, van Hout, D., op. cit., p. 59.

38 For Croatia, see Žunić Kovačević, N., Prethodni sporazum o transfernim cijenama: stari izazovi ili nova era u poreznoj praksi, ZPFSR, vol. 39, 1/2018, pp. 457–476. Cf. Silvani, C., op. cit., pp. 86ff, Lowell, C.H., Governale, J.P., op. cit., pp. 8–11.

39 More in van de Velde, E., op. cit., pp. 33ff, Žunić Kovačević, N., Prethodna obvezujuća porezna mišljenja – novi institut hrvatskog poreznog postupka, ZPFSR, vol. 37, 1/2016, p. 275 (on unilaterality, therefore advance ruling is not an administrative agreement). Cf. Kovač, P., Jovanović, T., op. cit., p. 342.

40 Cf. Fronda, A., op. cit., p. 28. The problem escalated in November 2014 following the LuxLeaks scandal when the International Consortium of Investigative Journalists exposed several hundred secret tax rulings from Luxembourg. The LuxLeaks dossier allegedly documented how hundreds of multinational corporations were using the system in Luxembourg to lower their tax rates, in some cases to less than one per cent.

41 See, for instance, the tax scheme in the case Belgium & Forum 187 ASBL v. Commission,

As regards inequality, it is worth mentioning the relatively extensive case law stating that derogations from the general regulation are indisputable as long as there are reasonable grounds for distinction between different (groups of) beneficiaries.[42]

3. EMPIRICAL STUDY ON ADR IN THE SLOVENIAN TAX PRACTICE

3.1. Briefly on the Slovenian tax regulation and the FURS

Until 1996, tax procedures in Slovenia were not regulated separately by a special act. The related procedural issues were regulated by the ZUP as *lex generalis*. On 1 January 1997 and after Slovenia became a full EU member in 2004, the Tax Procedure Act came into force (versions of 1996, 2004 and 2006) and was amended several times. The currently applicable version (ZDavP-2) is very detailed and contains over 424 articles, despite provisional measures to reduce red tape.[43] The Tax Procedure Act is subject to EU regulations (mostly related to customs) and directives, as well as further national substantive laws pertaining to approx. 30 taxes.

A characteristic of the Slovenian public administration and its social, political and legal systems is that they are closely related to the German and Austrian continental circle of the *Rechtsstaat*, which Slovenia made part of before 1930 and has been pursuing in its guidelines since its independence in 1991. Yet, having been part of the socialist Yugoslavia also left its mark. A combination of the rule of law, with constitutionally grounded separation of powers and public administration strictly bound by parliamentary law, and socialism-driven legacies still influences the functioning of the Slovenian public administration, understood primarily through government policies and formal public law. In terms of the economy, it is important to put forward that Slovenia has been part of Eurozone since 2007 and records 83% of EU average GDP *per capita*.

The ZDavP-2 introduces seven basic principles (legality, protection of public interest and taxpayers' rights, proportionality, privacy, etc.) and further legal grounds

C-182/03, C-217/03, 22 June 2006, even if only for the lack of transitional periods allowing the taxpayers to adapt to the necessary conditions. The court ruled as follows: "[…] annuls Commission Decision 2003/757/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium in so far as it does not lay down transitional measures for those coordination centres with an application for renewal of their authorisation pending on the date on which the contested decision was notified or with an authorisation which expired at the same time as or shortly after the notification of the decision."

42 See Jerovšek, T., Kovač, P., op. cit., pp. 56ff. For tax matters according to the Constitutional Court concerning the terms 'large companies', 'transfer prices', 'mothers', etc. (cf. Jerovšek, T. et al., op. cit., 2008).

43 More on the development of tax procedure law in Slovenia in Jerovšek, T. et al., op. cit., 2008, pp. 6ff, Kovač, P, op. cit., 2012, pp. 397ff, Lang, M. et al., op. cit. pp. 591–614. Cf. with profiles in Lang, M. et al., op. cit., stating that for reasons of legal certainty, in Europe in general, the formalisation of tax relations is more a rule than an exception. Legal certainty is of crucial importance in such regard due to the constitutional requirement that taxes may only be imposed by law, as stipulated by Article 147 of the Slovenian Constitution.

for tax collection. The proportionality in regulation, for instance, specifically requires the introduction of general tax reliefs and refrainment from conducting a procedure when the cost thereof would exceed the tax levied. Furthermore, it is important not to regulate a principle or a right merely on paper but also to regulate its efficient protection.[44] Administrative procedures, tax procedures included, are, as a rule, two-instance procedures, providing for the right to appeal and further seek judicial protection before special administrative judiciary, constitutional and European courts. As in all administrative matters, the principle of truth and the official burden of proof lead the tax authority to protect the lawful collection of taxes.

The Financial Administration (FURS) was established in 2014 by merger of tax and customs administrations, today employing 2,695 officials. It operates through 15 regional, one special and one coordination general branch. There are approx. 2.8 mio tax procedures run annually, covering approx. 1.5 mio individual taxpayers and approx. 200,000 VAT and corporate income taxpayers (160,000 legal entities and individual entrepreneurs). Thus, FURS has been collecting around 15 billion EUR per year for the past few years, including social contributions and local taxes.[45] Basically, taxes are determined by tax accounts and deduction, while subsidiary assessment is carried out by individual administrative acts (decisions). Moreover, approx. 61,000 appeals are lodged every year, with slightly less than a half resolved by the Ministry of Finance as the appellate instance.

3.2. Analysis of FURS data and position on tax disputes prevention and resolution

In order to examine a possible gap between theory, regulations and practice, a survey was carried out in the spring of 2018 on the regulation of preventive and resolution mechanisms and its implementation in Slovenia. The findings for Slovenia are illustrative also for other countries with a similar legal and tax system, for example Croatia.

The research was based on the dogmatics presented in the previous chapter (2.2), with an analysis of the work of the Slovenian Financial Administration (FURS) in 2017 and before. In addition to scientific literature and comparisons of practices in other countries, the analysis covered, in particular, annual reports for 2016 and 2017 and, in some cases, data for several years in order to present the trends. Objective data were combined with the results of structured interviews with representatives of different sections/areas within FURS (tax assessment, supervision, enforcement, customs, etc.). FURS was very willing to cooperate. The interviews were held on 4 April 2018 on the basis of the recently published work report for 2017. It is worth mentioning that since 2014, FURS has comprised both the Tax Administration and the Customs Administration, and these two bodies have, at least at a first glance, a different perception of the same institutions (e.g. advance ruling or taxpayers' status),

44 Kovač, P., op. cit., 2012, p. 401, Silvani, M., op. cit., p. 6 (*ubi ius ibi remedium*).

45 Tax statistics is retrieved from public data, mainly annual reports, and available at the FURS website (http://www.fu.gov.si/).

which makes the views of the representatives of different FURS services particularly interesting.

The analysis follows a fundamental division between (A) dispute prevention and (B) dispute resolution. Such distinction is not typical for FURS approaches and the official annual reports do not present this systematic approach. This makes the analysis to some extent more difficult, but also gives grounds to FURS – according to the opinion of the respondents in the April 2018 interview – to take a more comprehensive approach to the mechanisms in question. This would increase the level of proactivity and equality in relation to the taxpayers. Below is a detailed presentation of individual institutions, including when and how they were introduced and how much they apply in practice. The following are pointed out:

(A) Prevention: (A1) APA; (A2) advance rulings; and (A3) taxpayers' special status.

(B) Resolution: (B1) substitution in legal remedies; (B2) arbitration and mediation.

(C) Prevention and/or resolution, since the respective approaches can be seen as a prevention mechanism if applications meet the standards and are granted, otherwise a dispute might arise: (C1) suspensions and instalments of tax payment; (C2) voluntary disclosures.

(A1) APA was introduced into the Slovenian legal order under the influence of the EU with an amendment to the ZDavP-2 (only) in 2017 (Articles 14a to 14g). Detailed rules for the implementation of these provisions are laid down in the rules of the Ministry of Finance. The new regulation follows the OECD guidelines and the Dutch model. An APA is an ahead-of-time (!) agreement between the taxpayer and the tax authority on an appropriate methodology, critical assumptions and other appropriate criteria for determining the transfer pricing for a set of transactions over a fixed period of time. Depending on the role of the taxpayer, the agreements can be uni-, bi- or multilateral; the latter two are based on international double taxation treaties that allow such agreement. The ZDavP-2, however, limits the legitimacy of the beneficiaries depending on the categories in the Corporate Income Tax Act, namely to legal entities related by the nature of the matter operating with transfer prices and according to other prescribed limits.[46] Regarding the preventive nature of the APA, the Act explicitly provides that, based on a written initiative by the taxpayer, the possibility of concluding an APA is discussed first and only after the taxpayer can submit a written application to the tax authority for the conclusion of the APA. Within three months, the tax authority informs the taxpayer whether the procedure will be carried out. The provisions are written in such a way as to emphasise the seriousness and continuous involvement of the taxpayer, but at the same time make the course of the procedure and the final conclusion of the agreement conditional on the consent of the authority. Such a wording indeed shows distrust toward the taxpayer. Along with a number of excluding clauses (see Articles 14h to 14f), this is probably also the reason why this institution does not truly come to life in practice. In fact, until April 2018, i.e.

46 Art. 16 of the Corporate Income Tax Act (ZDDPO-2, Official Gazette of GRS, No. 117/06 and amendments).

over a year from the introduction of the APA, FURS received only two (!) applications. As regards APA, there is no established administrative practice in Slovenia, less so case law. It is completely unclear whether the taxpayer is entitled legal or judicial protection when the procedure is not initiated at all or the agreement is not concluded. According to FURS, this is not a separate tax procedure and an appeal would therefore be rejected as inadmissible.[47] Likewise, the data on such procedures are not included in the annual reports. Considering international and constitutional principles on effective legal remedy and judicial review of the administration, it is impossible to agree with such position, more so in the light of the analogous nature and practice related to the longer-established advance rulings, which are also individual, although abstract acts that can be challenged in a judicial administrative dispute.

(A2) Advance rulings are regulated differently for tax and customs matters (i.e. binding tariff information – BTI and binding origin information – BOI), due to the significant differences in the legal nature thereof. Since 2016, customs rulings have been centrally regulated in the EU with the Union Customs Code as individual administrative acts (decisions, see Articles 33 to 37 of Regulation (EU) No 952/2013), thus allowing legal protection by means of an administrative appeal and before an administrative court. Disputes are rare, although in other countries they are also brought before the CJEU.[48] On the other hand, the legal nature of tax rulings under Article 14 of the ZDavP-2 is not clear, while administrative practice and case law are inconsistent.[49] Furthermore, the Act has several reserve clauses and the deadlines and costs (on average, EUR 4,770 per ruling) are defined rather broadly. According to FURS, tax advance rulings are indeed individual acts, but FURS considers them undisputable, which is systemically unacceptable in view of the Slovenian constitutional order. Moreover, there have been confusion and disputes in practice ever since 2006 when this institution was introduced, as there is no clear difference between the relevant acts that can be published anonymised as general acts and the explanations under Article 13 of the ZDavP-2.[50] Given the above, it is not surprising

47 Article 14b of ZDavP-2 explicitly stipulates that an appeal for non-initiation of procedure is not possible. This is disputable at least in terms of the constitutional principles of lawfulness (discretion admissible only if explicitly determined by law, which must also define its purpose and limitations) and equality before the law. Also, there are no provisions on judicial protection in case of non-conclusion of the agreement.

48 See the Stryker case in the Netherlands, C-51/16, 26 April 2017, where the court classified the screws depending on the purpose of use among medical appliances rather than ironware, thus considerably lowering the customs duties for such products.

49 In details Kovač, P., Jovanović, T., op. cit. Cf. Žunić Kovačević, N., op. cit., 2016, van Velde, E., op. cit., 2014.

50 Cf. Jerovšek, T. et al., op. cit., pp. 24–44, Kovač, P., op. cit., 2012, pp. 400–403. The mandatory instructions for the interpretation of tax regulations under Article 13 were introduced in 2006 in order to avoid different interpretations of the same regulation among the 15 regional offices. The instruction was issued by the Minister of Finance or the Director-General of the tax service online. However, the institution, although its preventive purpose appears to be only added value, was not fairly implemented in practice by the tax authority. Thus, since 2017, it is no longer mandatory. On the efforts for stability see also Klun, M., Slabe-Erker, R., Business views of the quality of tax, environment and employment regulation and institutions: the Slovenian case, IRAS, vol. 75, 3/2009.

that tax advance rulings in Slovenia are practically a dead letter in the law (see Table 2).

Year	*Tax rulings (applications)*	*Binding tariff information*
2007	2 (14)	N/A
2008	3 (7)	N/A
2009	0 (12)	N/A
2010	2 (8)	317
2011	0 (7)	296
2012	0 (4)	215
2013	1 (7)	197
2014	2 (9)	234
2015	1 (5)	176
2016	1 (6)	206
2017	3 (6)	148
Total	15 (85)	1,479 (year 2010-)

Table 2: No of advance rulings in Slovenia 2007 to 2017 (source: FURS)

(A3) The special taxpayers' status is another institution that is regulated and implemented differently in tax and customs matters, which gives rise to dilemmas about the proactive approach of tax authorities toward amicable relations. In the customs field, there is a single EU system provided under Articles 38 to 41 of the Regulation (EU) No 952/2013 on the authorised economic operator (AEO). The Regulation clearly states that the act granting such status is an individual administrative act with adequate legal protection, as is the case for all administrative decisions according to ZUP and before the courts. This is therefore a unilateral act of the customs authority, although the procedure involves some kind of agreement with the taxpayer. About 90 of these decisions are issued annually in Slovenia. In the tax field, this institution is based on Article 99 of the Financial Administration Act.[51] The Act entered into force already in 2014, but due to the failure to adopt the implementing rules, this institution was ineffective until 2016. This was a loss also in the opinion of FURS, since a pilot project of horizontal monitoring with 18 large companies was taking place as early as 2010. The purpose of this project was to promote voluntary tax

51 ZFU, Official Gazette of RS, No. 25/14. Cf. Šinkovec, D., op. cit. The special status is to be acquired by taxpayers who: fulfil that they are liable for auditing according to the Companies Act (ZGD-1) and auditor's opinions without reservation for the last three years; they have implemented internal tax controls or they commit to implement them within two years after granting the special status; management submits a statement that they will inform the FURS about tax risks and enable access to all types of information; fulfil web (OECD) self-assessment questionnaire. The benefits include: transparently and jointly performing the programme, developing understanding and trust, increasing responsiveness and cooperative problem-solving; assigning special FURS contact persons, etc. The FURS naturally also expects higher compliance, albeit no evidence is gathered so far but it seems so, as stated by a FURS representative in the interview: "due to a process *per se"*. Some companies voluntarily disclose this status as a reference, like the trade company Mercator or the Slovenian Post.

compliance and reduce administrative burdens, and was recognised as exemplary in the international community. By April 2018, (only) eight such decisions were issued and two applications were filed for consideration. Considering that there are in Slovenia about 700 large companies and that, for example, an analogous status applies in the Netherlands for about 2,000 to 9,000 companies; the ratio 2% (Slovenia) to 22% (the Netherlands) is significantly low. As in the case of APA, the statistics on these procedures are not included in the FURS annual reports, with the explanation that these are *sui generis* procedures involving tax secrecy, although by their legal nature these acts are defined as administrative decisions. This raises the already exposed dilemma of non-transparency and (possible) inequality of taxpayers. A more favourable tax status of the taxpayer than the one initially granted is always considered to be an interference with equality. But this, according to the established constitutional case law, seems undisputable, since the rules clearly state the criteria and objectives for differentiation and the system provides – both for the AEO and the tax statuses – for a regular verification of the conditions and for exculpatory provisions.

(B1) Regarding ADR, substitution in the application of legal remedies is of key importance in Slovenia for tax dispute resolution.[52] The possibility of a substituted decision derives directly from Article 240 of ZUP. Article 87 of the ZDavP-2, on the other hand, stipulates that an appeal is non-suspensive, although it is possible to determine, on a case-by-case basis, that enforcement is suspended until the appeal is resolved. The substituted decision is issued by a first instance authority if it finds that the appellant is right, otherwise the appeal is referred to the appellate body. The FURS itself considers this institution as an explicit win-win approach for "trust building as well as an easier proceduralisation". This is confirmed by statistical data stating that for over a decade the appeal resolution rate has ranged between 60 and 70% already at the first instance (see Table 3). On the other hand, data show that the taxpayers are not given the possibility to be heard, which would prevent unjustified excessive taxation. This is due to such procedures being defined as shortened procedures as well as to insufficient records of (212!) municipalities about the characteristics of, for example, land for the assessment of real estate tax (here, together with the renewals, 90% positive decisions on legal remedy are issued). This phenomenon points to the urgency of a systematic approach by various parts of the public administration to prevent disputes, as they arise unnecessarily. Therefore, data on ADR success are relative.

Year	*All appeals*	*Substituted decisions* *No %*
2015	21,091	13,207 63
2016	23,241	14,678 63
2017	20,629	12,342 60

Table 3: No of appeals/complaints and substituted decisions in Slovenia 2015–2017 (source: FURS)

52 More in Dragos, D.C., Neamtu, B., op. cit., pp. 383–386.

To get a comprehensive picture, it is necessary to point out, in addition to appeals, also the non-devolutive objections raised by the taxpayers regarding the personal income tax. About 40,000 objections are raised every year, which is only 3% of all cases, but about three quarters of them are justified. Also frequent are proposals to renew the procedure (about 11,000 in 2017). Interestingly, the number of regular and devolutive appeals decreases, while renewals – as an extraordinary non-devolutive legal remedy – increase, since the latter are more favourable for the taxpayers because of suspensiveness and longer time limits. Yet, even these cases could be significantly reduced, since Article 90 of ZDavP-2 provides a special legal remedy to annul or change the decision, if obviously wrong. Unfortunately, however, the Act limits the legitimacy to the taxpayers, even though FURS itself could eliminate such errors when the remedy is applied *ex officio*. This again shows that there are many possibilities of dispute prevention already at the regulatory level.

(B2) To continue, regarding mediation and arbitration as the most recognised ADR tools generally, there are practically no traces thereof in the Slovenian practice. The main reason that there is no sympathy for arbitration (e.g. according to the Portuguese model that has already been studied) is the lack of binding effect and enforceability, which could create more disputes than it would resolve, according to FURS. Moreover, FURS understands arbitration within administrative relations as a possible violation of equality, particularly in the absence of specific conditions for arbitrators and at least some formalisation of the procedure.[53] FURS's perception of mediation is similar, since the respondents expressed doubts about *bona fide* of the taxpayers, as well as about the resulting lower workload of the court or speedier completion of judicial procedures.[54] Likewise, the Ombudsman in Slovenia, unlike in many other countries, is not taken sufficient advantage of. According to the reports,[55] the Ombudsman deals with tax procedures and notes an increasingly excessive duration thereof over the years, particularly as regards the non-suspensiveness of appeal and the tax burden of the socially deprived persons or immigrants, but does not act as a systemic promotor of good administration or a mediator.

Contrary, the Slovenian tax system presents a rather high level of proactivity, on regulatory and implementation levels alike, as regards suspensions, instalments and voluntary disclosures (Slovenian: *samoprijave*).[56] (C1) ZDavP-2 provides for various forms of suspension and payment by instalments, separately for natural and legal

53 On the contrary, it is worth mentioning that the Supreme Court in its decision Cpg 2/2014, 17 June 2014, ruled that also in administrative relations arbitration is generally admissible as parallel to judicial dispute, unless the arbitration agreement interferes with the sector-specific *ius cogens*.

54 As put forward by van Hout, D., op. cit., p. 97: "[…] mediation is no panacea for the profusion of tax disputes. Mediation can be very efficient to prevent disputes or deal with tax conflicts in particular cases, but it will not dramatically reduce the number of tax controversies." More on mediation in administrative law in general in Dragos, D.C., Neamtu, B., op. cit., pp. 589–605. On the comparative experiences of ombudsman, see Perrou, K., op. cit., 2018.

55 See Ombudsman's Annual Report for 2017. By 2017, the Ombudsman dealt with (only) 60 cases related to taxes (out of a total of 4,471); the justification rate was 12.6% (16% for all).

56 Kovač, P., op. cit., 2012, pp. 408ff. Mostly, these institutions have been enacted in order to reduce red tape.

persons (Articles 101 to 110), based on specific forms established by the 2004 version of the Act. Yet, the scope of individual mechanisms has been changing considerably over time (see Table 4 for a comparison between 2007 and 2017). FURS uses these options mainly at discretion or by means of legally required forms of insurance. Thereby, the Act is applied in practice, even though write-offs are limited as they can be considered state aid. The need to consider this a mechanism between prevention and resolution is shown by the fact that it is possible to ask for suspension after the issuance of the decision or in the already disputed enforcement procedure, whereby the interest rate proportionally increases as well. According to its representatives, FURS notes that the Act provides the same conditions for suspension and instalments, but rather grants applications for instalments than those for suspension. This is evident from the 2016 to 2017 trend, showing an increase of instalments and a heavy decline in approved suspensions. In the latter case, a large number of cases concerns 'quasi-suspensions' whereby the taxpayers resolve successive debts. These accounted, for example, for about 16,000 out of 22,000 applications in 2017, with about 5,000 not paying any part of their tax liability.

	2007	*2017*	*2017 v. 2007*	*in EUR mio, 2017*	*2017 v. 2016*
Instalments	4,716	18,129	+ 384%	52.61	+ 5%
Suspensions	819	158	- 81%	3.78	- 45%
Write-offs	1,816	447	- 75%	0.25	- 21%

Table 4: No of instalments, suspensions and write-off in Slovenia (source: FURS)

(C2) Voluntary disclosures are, again, imported into the Slovenian system from the Netherlands. They have been included in ZDavP-2 since 2007 as a win-win approach to increase tax compliance and thus compensate for the lack of FURS resources. This was *inter alia* recognised as good practice by the Fiscalis Risk Management Platform (2012). First, the number of voluntary disclosures was low, i.e. less than 500 in 2006. They increased to 8,562 in 2007 and have ranged around 20,000 per year ever since 2009. The total amount of tax collected based on voluntary disclosure rose from 2006 to 2017 by about 60%, totalling approx. EUR 46 mio (Table 5). In 2017, voluntary disclosures generated approx. EUR 18 mio in 15,315 audits and approx. EUR 9.7 mio in 374 inspection controls. Inequality, which is a frequent criticism in such regard, and the resulting encouragement of a tax avoidance culture[57] are prevented by gradually increasing penalty interest (3, 5, 7%) depending on the time of voluntary disclosure, which under the 2017 amendment to ZDavP-2 can be filed even when inspection is already taking place.[58] According to FURS, despite theoretical concerns, voluntary

57 Contrary in Langenmayr, D., op. cit., pp. 110, that introduction of voluntary disclosure increases tax evasion. However, the author states, based on US and German experience, that while such mechanisms increase the incentive to evade taxes, they nevertheless increase tax revenues net of administrative costs.

58 In one year only, this accounts for as much as EUR 3.8 mil of additional tax paid in 78 procedures, which obviously points to the success of this institution. The interests were considered also by

disclosure is a well-functioning mechanism.

Year	*No. of voluntary disclosures*	*in EUR mio*
2015	21,189	31.1
2016	23,668	28.2
2017	22,293	46.4

Table 5: Voluntary disclosures in No. and EUR in Slovenia (source: FURS)

To summarise: the basic hypothesis that, in Slovenia and in the broader region, ADR is applied rather conservatively in tax matters due to the protection of the public interest, is hereby confirmed. One cannot say that there is no sensitivity for dispute prevention and resolution. Certain institutions, such as voluntary disclosure, are very vivid, but changes are introduced conservatively and partially. Thus, tax advance rulings and similar institutions seems dead in practice, while new mechanisms are introduced as a response to convergence or EU law, i.e. as indirect coercion rather than national activity. In particular, both the regulator and tax authority have reservations in implementing the 'true' ADR, but rather focus on preventive mechanisms. This means that in practice, they are often just a dead letter.[59]

4. CONCLUSIONS

Slovenia is one of the centralised and formalised countries that are rather strong in prevention on paper, but they are weak when it comes to a systematic approach and lack alternative resolution mechanisms. These countries cannot be regarded as forerunners in the field, since they act (too?) slowly and fragmentarily and often face implementation gaps, although new mechanisms are adopted on the basis of EU directives and convergence. For the time being, the prerequisite for agreement in administrative relations (tax relations included) is freedom to dispose of the subject of the procedure, which is, however, limited owing to the protection of the public interest and the equality of the taxpayers. The tax authorities seem to understand this as an *a priori* obstacle to individual permissible and useful comparable mechanisms. In this sense, attention should be drawn to the importance of understanding the efficient and effective tax and administrative systems, and especially legal remedies.[60] The often irreconcilable conflict between lawfulness and economy can only be overcome by balancing formality and flexibility.

the Constitutional Court in case U-I-356/02-14, 23 September 2004, and the Supreme Court on several occasions, e.g. X Ips 63/2017, 6. July 2017, arguing that in terms of equal tax base, voluntary disclosure does not differ from timely tax return.

59 This was established after several analyses (in addition to the research described in chapter 3.2), e.g. for advance rulings in Slovenia (Kovač, P., Jovanović, T., op. cit., p. 345) or similarly for advance rulings and APA in Croatia (Žunić Kovačević, N., op. cit., 2014, 2016, 2018).

60 Cf. Perrou, K., op. cit., 2014, pp. 208 and related, 2018, p. 129, van Hout, D., op. cit., pp. 90–95.

It is therefore necessary to highlight the importance of a systematic approach to parallel prevention and resolution of both tax and administrative disputes. Comparative experience, e.g. from the Netherlands, Austria, Germany as well as the UK and the USA, which are transferable to our environment, show that the reservations toward the new approaches, arising from the protection of the public interest and equality, can be overcome through legally determined assumptions and limitations and by raising awareness about cooperation among the tax authorities and the taxpayers.

This opens up the possibility of introducing a broader or systematic ADR into the *lex generalis* (GAPA), since such regulations at the national and EU levels do not hinder ADR, but do not provide any motivational guidelines either, except for (the almost unused options of) settlement or classic remedies. Moreover, given the tax specifics, it is right (and fair) that tax regulations develop new forms of dispute prevention and resolution with due account of constitutionally permissible differences. These should be encouraged in order to develop a more systematic and widespread approach – possibly by including in the general law (ZUP) a guideline for further special regulations, which are to be arranged systematically, according to the stage of procedure, in the same law or in individual taxation acts, provided that they are applicable to individual taxes. A general regulation is useful for several reasons. First, it would lead to a systematic (re)definition of certain relations between public administration bodies and private stakeholders in a more cooperative way.

Second, administrative relations would be defined more efficiently if the law – the general ZUP for all administrative matters and ZDavP-2 for all tax procedures – provided the possibility of direct referral to a body or a subordinate discretionary clause to harmonise public interest with private ones within certain statutory limits. In doing so, the law should determine the conditions of the derogations, the limits of discretion and the purpose thereof, in order to provide teleologically-supported legal protection against abuses by both the authority and the parties. This is particularly true when such approaches bring more benefits than subsequent disputes, for example through binding information or voluntary disclosure in tax matters.

Despite the restrictions on administrative relations, dispute prevention and ADR in particular show what future development brings. Prevention and ADR in tax matters indeed make sense and have potential, especially in the context of the development of a modern, efficient and democratic administration – a fair and good administration. If the concept is thought-out and integrated into the public administration with systemic and sector-specific legislation and parallel measures for the development of administrative culture, it leads to a state governed by the rule of law with less repression. Since the public benefit is determined by (sector-specific) law, lowering the stringency of the enforcement thereof in terms of settlement between public and private interests might, without safeguards, be unlawful, both on the side of the parties and on the side of the administrative authority since they do not dispose of the public interest in the same way as the regulator. However, comparative experience shows that the public interest, the protection of which is the essence of administrative relations, is even more efficiently protected through ADR. Given the social environment and regional culture, it is not surprising that ADR flourishes primarily in cultures that pursue participation. In the Central European environment, regulatory solutions

and the operational implementation of ADR will need to be consciously developed. Considering the development trends in the EU, this seems to be only a matter of time.

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Sažetak

POTENCIJALI I GRANICE MEHANIZAMA PREVENCIJE I ALTERNATIVNOG RJEŠAVANJA POREZNIH SPOROVA

Ovaj rad bavi se prevencijom i alternativnom rješavanjem sporova (ADR) u poreznim pitanjima, u kontekstu upravnih odnosa. ADR, na temelju sudjelovanja dionika, koristi i poreznim obveznicima i poreznom tijelu, jer donosi osobito veću pravnu sigurnost i brzu konačnu zatvaranje postupaka. Istovremeno ADR znači otvorenu prijetnju javnom interesu i jednakosti po međunarodnim upravnim i ustavnim načelima, zato mora biti ADR u poreznim postupcima ograničeno. Ovo također proizlazi iz akata EU i Vijeća Europe. Osim teorijskih okvira i vrsta ADR na bazi analize znanstvene literature, pravnih izvora i komparativnih uvida u ovom radu bavi se o regulatornom okviru u Sloveniji i praksi Financijske uprave Republike Slovenije (FURS) u posljednjih nekoliko godina. Cilj istraživanja je identifikacija *de iure* i *de facto* stanja na nacionalnoj razini. Analiza pokazuje, da je ADR u poreznim pitanjima znatno intenzivnija u međunarodnim odnosima nego unutar nacionalnih poreznih sustava. S druge strane, pojedine zemlje nastoje uspostaviti osobito regulatorne mehanizme za prevenciju, što bi dovelo do još poželjnijeg izbjegavanja sukoba. U zaključku, istaknuto je, da su za efektivne porezne postupke potrebne integrirane metode prevencije kao i ADR, uzimajući u obzir principe pravednog poreznog sustava i uključenosti svih dionika u njegovo upravljanje.

Ključne riječi: *porezni postupci; javni interes; jednakost; prevencija sporova; (alternativno) rješavanje sporova; ADR; internacionalni trendovi; Slovenija.*

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Zussamenfassung

POTENZIALE UND BESCHRÄNKUNGEN DER VORBEUGUNG DES STEUERSTREITS UND ALTERNATIVE STREITBEILEGUNGSMECHANISMEN

Dieser Beitrag bespricht die Vorbeugung des Steuerstreits und alternative Streitbeilegungsmechanismen (ASB-Mechanismen), insbesondere angesichts des spezifischen Wesens der Verwaltungsverhältnisse, welche auch Steuerverfahren einschließen. Sowohl Steuerpflichtige als auch die Steuerverwaltung haben Nutzen von den ASB-Mechanismen, weil sie hohe Rechtssicherheit und schnellere Beendigung der Verfahren ermöglichen. Die ASB stellt aber ein Risiko für das Gemeinwohl und die Gleichheit dar, die völker- und verfassungsrechtlichen Grundsätze. Deshalb muss die ASB bei Steuerverfahren beschränkt werden. Diese Behauptung geht auch von den Rechtsakten der EU und des Europäischen Rates hervor. Dieser Beitrag untersucht die theoretischen Rechtsrahmen und die Arten der Vorbeugung und Beilegung des Streites durch die Analyse der wissenschaftlichen Literatur, der Rechtsquellen und der rechtsvergleichenden Einsichten. Zusätzlich werden im Beitrag die slowenische Regulierung dieses Bereichs und die Praxis der Finanzverwaltung (der sog. FURS) in den letzten Jahren dargestellt. Das Ziel des Beitrags ist es, die *de iure* und *de facto* Situation in nationalen Rechtsordnungen zu untersuchen. Die Analyse weist darauf hin, dass die ASB öfter auf internationaler als auf nationaler Ebene verwendet wird. Andererseits geben individuelle Länder der Bestimmung von Regulierungsmechanismen für die Vorbeugung den Vorzug, was zur gewünschten Streitvermeidung führen sollte. Es lässt sich schließen, dass man einen integrativen Ansatz zur Erreichung effizienter Steuerverfahren braucht, welcher sowohl die Vorbeugung des Streits und die ASB einschließt, um die Grundsätze der Steuergerechtigkeit und die systematische Einbeziehung aller Interessenvertreter zu gewährleisten.

Schlüsselwörter: *Steuerverfahren; Gemeinwohl; Gleichheit; Streitvorbeugung; alternative Streitbeilegung; ASB; völkerrechtliche Trends; Slowenien.*

Riassunto

IL POTENZIALE E LE LIMITAZIONI DEI MECCANISMI DI PREVENZIONE E DI RISOLUZIONE ALTERNATIVA DELLE LITI TRIBUTARIE

Il presente lavoro si occupa della prevenzione e della risoluzione alternativa delle liti (ADR) nelle questioni tributarie, nel contesto dei rapporti amministrativi. L'ADR, in base alla partecipazione delle parti, serve anche ai contribuenti ed agli enti tributari, in quanto comporta una maggiore certezza del diritto ed una chiusura rapida e definitiva della lite. Al tempo stesso l'ADR rappresenta una minaccia aperta per l'interesse pubblico e per l'uguaglianza secondo i principi internazionali amministrativi e costituzionali. Pertanto, l'ADR nella materia tributaria incontra dei limiti. Ciò deriva altresì dagli atti dell'UE e del Consiglio d'Europa. Oltre che del quadro teorico e dei tipi di ADR in base all'analisi della letteratura scientifica, delle fonti giuridiche e della rassegna comparata, in questo lavoro ci si occupa anche del quadro regolatore in Slovenia e della prassi dell'amministrazione finanziaria della Repubblica di Slovenia (FURS) negli ultimi anni. Lo scopo della ricerca è quello di identificare *de iure* e *de facto* la situazione sul piano nazionale. L'analisi dimostra che l'ADR nelle questioni tributarie è assi più intensa nei rapporti internazionali che all'interno dei sistemi tributari nazionali. Dall'altra parte, i singoli paesi cercano di creare dei meccanismi regolatori di prevenzione, il che porterebbe ad un auspicato scongiuramento del conflitto. Nella conclusione è stato rilevato che per delle procedure tributarie efficienti siano necessari dei metodi di prevenzione integrati come anche l'ADR, tenendo conto dei principi di un sistema fiscale giusto e dell'inclusione di tutte le parti nella sua gestione.

Parole chiave: *procedimenti tributari; interesse pubblico; uguaglianza; prevenzione delle liti; risoluzione (alternativa) delle liti; ADR; tendenze internazionali; Slovenia.*

DOPUSTNOST FINANČNE ASISTENCE ODVISNE DRUŽBE ZA OBVEZNOSTI OBVLADUJOČE DRUŽBE

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Povzetek

Avtorja v prispevku obravnavata dopustnost različnih oblik finančne asistence med družbo in njenimi družbeniki oziroma delničarji. Predstavljena je ureditev v slovenskem pravu družb, vključno z aktualno slovensko in nemško sodno prakso. Njuna temeljna ugotovitev je, da je posojila družbe družbenikom (posojila up-stream) treba presojati z vidika kogentnih splošnih pravil o ohranjanju kapitala, enako pa velja tudi za zavarovanja za posojila tretjih oseb, na primer bank. Finančna asistenca je dopustna le, kolikor ne pomeni prepovedanega vračila vložka. Izpostavljata tudi posebnosti, ki veljajo v primerih koncernsko povezanih družb.

Ključne besede: *delniška družba; družba z omejeno odgovornostjo; posojilo; zavarovanje; prepovedana finančna asistenca.*

1. UVOD

Finančna asistenca med družbo in imetniki njenih deležev lahko v načelu poteka v obeh smereh: tako, da imetnik deleža finančno asistira „svoji" družbi (finančna asistenca *down-stream*), ali pa tako, da družba finančno asistira svojemu družbeniku (finančna asistenca *up-stream*). Pod pojmom „finančna asistenca" razumemo različne oblike prevzemanja obveznosti (družbe za imetnika deležev in obratno), predvsem v obliki zagotavljanja posojil ali pa v obliki zavarovanja za posojila, ki jih (družbi ali imetniku deležev) zagotovi kdo tretji, na primer poslovna banka.

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Za te posle veljajo nekatere pomembne omejitve, v obliki pravil korporacijskega prava o razmerjih med družbo in imetniki deležev, predvsem so relevantna pravila o ohranjanju kapitala. Te omejitve imajo namen preprečiti različna tveganja, predvsem s ciljem zaščite upnikov družbe.

Pravna problematika je zelo kompleksna, v nadaljevanju tega prispevka pa se želimo osredotočiti na položaje, ko družba finančno asistira v korist imetnika svojih deležev (finančna asistenca *up-stream*). Poskušali bomo analizirati, ali in pod katerimi pogoji je dopustno, da kapitalska družba – delniška družba ali družba z omejeno odgovornostjo – neposredno kreditira imetnika svojih deležev ali pa v breme svojega premoženja zavaruje njegove kreditne obveznosti, ki jih ima ta do dajalca kredita, in predvsem, kakšne pravne posledice nastopijo v primeru morebitnih kršitev pravil s tem v zvezi.

Pravne položaje obravnavamo s stališča slovenskega korporacijskega prava in aktualne sodne prakse. Ta problematika je, med drugim v luči urejanja razmerij v družbi Agrokor, d. d., tudi zelo aktualna.

2. ZAŠČITA VEZANEGA KAPITALA KOT TEMELJNI POSTULAT PRAVA KAPITALSKIH DRUŽB

Teorija prava kapitalskih družb temelji na načelu absolutne zaščite vezanega kapitala teh družb. V tej zvezi je relevantno predvsem vprašanje, koliko – če sploh – in v katerih položajih bi smela biti dopustna finančna asistenca kapitalske družbe njenemu družbeniku ter kakšne so posledice morebitne kršitve morebitne prepovedi finančne asistence. Osrednje vprašanje je torej, ali je dopustno, da kapitalska družba – ki ima svojo člansko strukturo in svoje upnike – sprejema finančne obveznosti v korist katerega (na primer večinskega) od svojih družbenikov, in kakšne so posledice, če morebitno prepoved krši.

Za pravilno razumevanje te problematike je najprej treba opredeliti splošne postulate pravne ureditve družb, ki so pravno organizirane kot kapitalske družbe. Slovenska pravna ureditev je v tem delu posnetek nemške.

Osrednja in temeljna značilnost vsake kapitalske družbe je, da imetniki njenih deležev (delničarji ali imetniki poslovnih deležev) za obveznosti družbe ne odgovarjajo, temveč odgovarja le družba sama, in to s tistim, kar ji pravno pripada, torej samo z lastnim premoženjem. Upnik kapitalske družbe lahko ob neizpolnitvi obveznosti v postopku izvršbe zoper družbo – dolžnika poseže samo po tistem, kar ji kot dolžniku njegove terjatve pravno pripada, tj. po njenem premoženju, ne more pa posegati po tistem, kar pravno pripada imetnikom njenih deležev.

Zato je temeljni postulat prava kapitalskih družb izražen v načelu, da je predpostavka za (1) nastanek (katerekoli) kapitalske družbe in tudi za (2) njen obstoj njena ustrezna premoženjska strukturiranost, vezani kapital pa je pravno absolutno zaščitena kategorija. Zaščita vezanega kapitala in zaščita vezanega premoženja sta osrednja instrumenta prava kapitalskih družb in sta namenjena varovanju interesa upnikov teh družb. Normativno se to izhodišče kaže v dveh sklenjenih sklopih „premoženjsko orientiranih" pravil, katerih namen je zaščita vezanega kapitala oziroma vezanega premoženja pred posegi imetnikov deležev.

2.1. Zagotavljanje kapitala z dolžnostjo vplačila vložkov

Prvi sklop pravil zajema vsa tista pravila, ki naj bi – vsako posebej in vsa skupaj – zagotovila, da ustanovitelji kapitalske družbe že v fazi njene inkorporacije vanjo v obliki vložkov v (osnovni) kapital vnesejo konkretne premoženjske pravice, katerih realna ekonomska vrednost naj bi dosegla vsaj višino tako imenovanega osnovnega kapitala. Ta sklop pravil teorija korporacijskega prava imenuje *„pravila o zagotovitvi (zagotavljanju) kapitala"*.

V delniškem pravu – smiselno enako velja tudi pri družbah z omejeno odgovornostjo – mednje spadajo predvsem:

- pravila o prepovedi izdajanja deležev pod njihovo nominalno vrednostjo (prvi odstavek 173. in prvi odstavek 191. člena ZGD-1),
- pravila o statutarni publiciteti v zvezi s posebnimi ugodnostmi in ustanovitvenimi stroški (186. člen ZGD-1) ter s stvarnimi vložki in stvarnimi prevzemi (187. člen ZGD-1),
- pravila o poustanovitvi (188. člen ZGD-1),
- pravila o posebnem režimu vplačila delnic, kadar delniško družbo ustanavlja ena sama oseba (šesti odstavek 191. člena ZGD-1),
- pravila o dolžnosti sestaviti ustanovitveno poročilo, predvsem v zvezi z navedbo o prevzemu delnic za račun članov uprave oziroma nadzornega sveta družbe oziroma o tem, ali so bile zanje zagotovljene posebne ugodnosti (drugi odstavek 193. člena ZGD-1),
- pravila o vsebini in obsegu ustanovitvene revizije (195. člen ZGD-1),
- pravila o zagotavljanju oziroma dolžnosti vplačila vložka za prevzete delnice (prvi odstavek 199. v zvezi s četrtim odstavkom 191. člena ZGD-1),
- pravila o dolžnosti registrskega sodnika, da ob priglasitvi vpisa ustanovitve preveri pravilnost ustanovitvenih postopkov (200. člen ZGD-1), ter
- pravila o predpostavkah odškodninske odgovornosti ustanoviteljev in drugih oseb (203. in 204. člen ZGD-1).

Spoštovanje teh pravil povzroči, da kapitalska družba ob svojem nastanku že razpolaga z lastnim, od družbenikov pridobljenim, a hkrati od njih povsem neodvisnim in pravno ločenim premoženjem, katerega višina je vsaj enaka višini osnovnega kapitala.

2.2. Ohranjanje kapitala s prepovedjo vračila vložkov

Tudi če je bilo v družbo ob njeni ustanovitvi vneseno realno premoženje vsaj v višini osnovnega kapitala, pa ta okoliščina samodejno še ne zagotavlja celovite zaščite pravno priznanega interesa upnikov. Svojo jamstveno funkcijo lahko osnovni kapital izpolni le, če družba trajno (in ne le ob ustanovitvi) razpolaga s premoženjem v višini osnovnega kapitala.

Zato je nadalje uveljavljen še sklop pravil, ki omogočajo ohranjanje premoženja družbe ves čas njenega obstoja, torej do nastopa pravnega dejstva prenehanja oziroma „razpustitve" (na primer do trenutka sprejetja sklepa o prenehanju).

Ta sklop pravil teoretiki označujejo s sintagmo pravila o ohranjanju (vzdrževanju)

kapitala.

V delniškem pravu med pravila za uresničitev načela ohranjanja kapitala – poleg bilančnopravnih – spadajo trije zaokroženi sklopi zakonskih pravil:

- absolutna prepoved kakršnekoli vrnitve oziroma obrestovanja vložka (prvi odstavek 227. člena ZGD-1),
- načelna prepoved pridobivanja lastnih delnic (247. člen ZGD-1) in
- pravilo, da je pred likvidacijo družbe dovoljeno med delničarje razdeliti le bilančni dobiček (osmi odstavek 230. člena ZGD-1).

V pravu družb z omejeno odgovornostjo velja smiselno enako; uveljavljeno je pravilo, da družbenikom ni dopustno izplačati tistega premoženja, ki je potrebno za ohranitev osnovnega kapitala in vezanih rezerv (prvi odstavek 495. člena ZGD-1).

Namen teh pravil je ustvariti pogoje, da bi družba ne le ob ustanovitvi, temveč ves čas svoje pravne eksistence razpolagala vsaj s premoženjem, katerega višina (vrednost) dosega višino njenega osnovnega kapitala (oziroma vezanih rezerv).

Za pravilno razumevanje pomena teh pravil je treba izhajati iz ugotovitve, da pravila, ki so namenjena zaščiti premoženja, tega ne morejo ščititi pred tistimi tveganji, na katera je vpliv prava omejen, kot so tveganja, ki so posledica dogodkov v zvezi s poslovnimi aktivnostmi družbe (na primer izguba, kot negativni poslovni izid) ali ki so povezana z naravnimi dogodki (na primer požar, povodenj ali druge katastrofe, ki na primer uničijo vsa osnovna sredstva družbe in s tem prizadenejo njeno premoženje). Ker je jasno, da pravna ureditev teh tveganj s prepovednimi normami ne more izključiti, je jasno tudi, da je težišče pravil o ohranjanju kapitala nekje drugje.

Namen teh pravil je zavarovati premoženje družbe pred imetniki deležev družbe kot njenimi „ekonomskimi lastniki" oziroma „gospodarji njene pravne usode". Pravila o ohranjanju kapitala preprečujejo, da bi si imetniki deležev – pri uresničevanju svoje korporacijske pravice, pridobljene na temelju vplačila vložka – (v obdobju po ustanovitvi družbe) razdelili premoženje družbe, ga zmanjšali in tako negativno vplivali na finančne zmožnosti družbe, da pravilno (tj. pravočasno in popolno) izpolnjuje svoje obveznosti.[1]

Pravila o ohranjanju kapitala – predvsem s prepovednimi normami – varujejo premoženje družbe tako, da v obdobju po ustanovitvi družbe prepovedujejo razdelitev premoženja med imetnike deležev. Osrednje pravilo je izraženo v (načelni) prepovedi vrnitve vložkov imetnikom deležev (prvi odstavek 227. člena ZGD-1). V delniškem pravu je ohranjanje kapitala posebej poudarjeno tudi v določbi osmega odstavka 230. člena ZGD-1, po kateri je delničarjem pred likvidacijo družbe (to pomeni pred sprejetjem sklepa o prenehanju družbe) dovoljeno razdeliti izključno le bilančni dobiček.

Zakonska zahteva po ohranjanju kapitala se ne nanaša zgolj na osnovni kapital, temveč tudi na 1) kapitalske in 2) zakonske rezerve, torej na ves vezani kapital družbe. Vezani kapital tvorijo torej:

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1 Treba je namreč upoštevati, da bi se dejstvo, da je bilo v družbo ob ustanovitvi vneseno realno premoženje, izkazalo za povsem brezpredmetno, če bi po njeni ustanovitvi imetniki njenih deležev smeli po prosti presoji (in na različnih pravnih podlagah) in brez omejitev posegati po tem njenem premoženju.

- osnovni kapital in
- vezane rezerve, ki so po določbi desetega odstavka 64. člena ZGD-1 sestavljene iz kapitalskih in zakonskih rezerv.

Posebej je to izraženo tudi v pravu družb z omejeno odgovornostjo.

2.3. Zaščita vezanega kapitala

Pravo kapitalskih družb ščiti vezani kapital družbe. Njegova zaščita jamči ohranjanje tistega premoženja družbe, ki je (računovodsko) v kapitalu izražen v njegovih vezanih kategorijah – vezanem kapitalu. Zaščitna funkcija je v tem, da se ta kapital lahko uporabi (sprosti) izključno le za uresničevanje zakonsko določenih namenov, med katere pa ne spada izplačevanje dividend ali drugih izplačil imetnikom deležev. Premoženje, ki ima (računovodsko) kritje v vezanem kapitalu družbe – dokler družba obstaja –, zato ostaja zunaj dosega imetnikov deležev in je na neki način (pred njimi) „zaklenjeno" v družbi. To premoženje je nekakšno *„vezano" premoženje*, ker ne sme biti razdeljeno imetnikom deležev. S stališča upnikov družbe omogoča povečevanje jamstvenega potenciala, s katerim družba odgovarja za svoje obveznosti.

Pravila o zaščiti vezanega kapitala tvorijo skladen sistem, ki naj bi (kot koherentna celota) zagotovil, da med imetnike deležev ne bo razdeljena niti ena sama enota tistega premoženja družbe, ki ima v kapitalu kritje v njegovih vezanih kategorijah. Gre torej za absolutno prepoved izplačil iz vezanega premoženja, kar velja – sicer različno intenzivno – pri obeh pravnoorganizacijskih oblikah kapitalskih družb. Ta pravila kot celota zagotavljajo, da družba oblikuje, dopolnjuje in vzdržuje lastno premoženje, katerega funkcija je tudi, da z njim odgovarja za svoje obveznosti.

2.4. Kogentno določena dovoljena izplačila imetnikom deležev

Zaradi zaščite interesa upnikov je za pravo kapitalskih družb (za delniško pravo pa še posebej) značilno, da na prisilen način opredeljuje katalog prejemkov, ki jih imetniki deležev sploh smejo prejeti od družbe na temelju udeležbe v korporacijskem razmerju (*causa societatis*), oziroma, obrnjeno, katalog izplačil, ki jih družba sme opraviti v korist imetnikov deležev na udeležbenem temelju. Družbi je namreč dovoljeno v breme svojega premoženja in v korist imetnikov deležev opraviti le izrecno dovoljena plačila. Tako sme delniška družba delničarjem (do sprejetja sklepa o prenehanju družbe) izplačati le dividendo (osmi odstavek 230. člena ZGD-1), pri družbah z omejeno odgovornostjo pa je izplačilna prepoved nekoliko ožja in se nanaša na osnovni kapital in vezane rezerve. Premoženje, potrebno za ohranitev osnovnega kapitala in vezanih rezerv, se družbenikom ne sme izplačati (prvi odstavek 495. člena ZGD-1).

Za nadaljevanje razprave je zato relevantna naslednja teza: vsa plačila (tj. prejemki), ki so jih delničarji od družbe prejeli v nasprotju z zakonom (ki torej niso dividenda), pri družbenikih družb z omejeno odgovornostjo pa tista, ki so opravljena v breme vezanega kapitala (osnovnega kapitala ali vezanih rezervah), so nezakonita in so zato prepovedana. Prepovedana so, ker se šteje, da so opravljena v breme vezanega

kapitala oziroma da posegajo v ta vezani kapital, ki je – kot je bilo razloženo zgoraj – „nedotakljiv" in ki je funkcionalni ščit interesa upnikov. Učinkujejo kot vračilo vložka. Ob morebitni kršitvi se uporabi pravilo, po katerem morajo imetniki deležev vsako tako plačilo družbi vrniti in s tem na novo oblikovati vezani kapital, ki je bil prikrajšan s prepovedanim plačilom.

To je racionalno jedro oziroma ekonomsko ozadje načelne določbe prvega stavka 233. člena oziroma prvega odstavka 496. člena ZGD-1.

2.5. Prepovedano vračilo vložka

Družbi je torej prepovedano vrniti (ali obrestovati) vložke. Tveganje je, da se prepoved prekrši, saj bi lahko vložke vrnila na različne načine: bodisi z enostranskim prenosom premoženja družbeniku, ne da bi sama od njega prejela kakršnokoli nasprotno izpolnitev (odkrito vračilo vložka), bodisi bi vložek vrnila posredno, na podlagi sklenitve in izpolnitve dvostranskega pravnega posla, ki ga skleneta družba in imetnik deležev, pri katerem družba sicer sprejme nasprotno izpolnitev, vendar pa je pri tem podano očitno nesorazmerje med izpolnitvami (prikrito vračilo vložka).

2.5.1. Prikrito vračilo vložka

Prikrito vračilo vložka zajema vsa dejanska stanja, ki sicer dobesedno ne pomenijo nujno vračila vložka, a glede na razloge in namen, ki ga imajo, dejansko učinkujejo kot vračilo vložka.[2] Za prikrita vračila vložka je značilno, da praviloma temeljijo na dvostranskih pravnih poslih, ki jih družba sklepa z imetniki deležev, pri čemer pa je obveznost družbe v nesorazmerju z obveznostjo imetnika deležev (obveznost družbe po vrednosti presega prejeto nasprotno izpolnitev – objektivno nesorazmerje), posledica česar je zmanjšanje premoženja družbe ali preprečitev njegovega povečanja. Imetnik deležev je deležen neke posebne koristi, ki se navzven ne kaže kot (pravo in dovoljeno) izplačilo dobička, premoženje družbe pa se zmanjšuje.

Za prikrita vračila vložka je značilno, da:

- so posledica pravnih poslov, ki jih poslovodstvo družbe ne bi sklenilo s tretjimi osebami pod takšnimi pogoji, kot jih sklene z imetnikom deležev,
- na podlagi takšnih pravnih poslov imetnik deležev (oziroma z njim povezane osebe) prejme neko posebno premoženjsko korist.

Na takšnem pojmovanju načela ohranitve kapitala temelji – kot dosleden posnetek nemškega AktG – tudi slovenska korporacijska zakonodaja, ki izrecno opredeljuje prikrito vračilo vložka in ga prepoveduje (prvi odstavek 227. člena ZGD-1). V skladu s tretjim odstavkom 227. člena ZGD-1 so nedopustna plačila za dajatve ali storitve delničarja ali z njim povezanih družb v višini, ki presega njihovo pravo vrednost, ne glede na to, ali je bilo plačilo dano delničarju ali z njim povezani družbi ali tretjemu po naročilu delničarja.

Najbolj tipični primeri prikritih vračil vložka so:

- plačilo za nedopustno pridobitev lastnih deležev;

2 Glej pri Hüffer, U., Aktiengesetz Kommentar; Beck, München, 2004, stran 286.

- prodaja blaga ali oprava storitev po nabavni vrednosti oziroma po vrednosti, ki zadošča le za pokritje stroškov;
- plačilo za umik izpodbojne tožbe, ki jo je zoper sklepe skupščine vložil (ali napovedal) imetnik deležev;
- zagotovitev posojila imetniku deležev pod pogoji, ki so ugodnejši od tržnih: če družba imetniku deležev zagotovi posojilo pod enakimi pogoji, kot bi ga zagotovila tretji osebi, imetnik deležev ne prejme posebne koristi, ki bi bila prepovedana. Gre pač za kreditni posel, kot bi ga družba sklenila tudi s tretjo osebo. Če pa družba pri takšnem poslu imetnika deležev obravnava ugodneje – mu zagotovi brezobrestno posojilo ali posojilo, za katero je sicer dolžan plačevati obresti, vendar je dogovorjena obrestna mera nižja od tržne, ali če družba za dano posojilo sploh ne zahteva ustreznega zavarovanja oziroma če imetniku deležev zagotovi posojilo, ki ga tretji osebi v nobenem primeru ne bi zagotovila –, se premoženje družbe zmanjša, saj v zameno za zagotovitev posojila ne prejme ustreznega nadomestila. Takšno posojilo je prepovedano vračilo vložka;[3]
- zagotovitev zavarovanj za obveznosti imetnika deležev do tretjih oseb, in končno: tudi zavarovanja, ki jih družba zagotovi v korist imetnika deležev (torej jamstva, ki jih prevzame za obveznosti imetnika deležev), se ne glede na njihovo pravno obliko obravnavajo kot prikrita vračila vložkov, če jih družba v nobenem primeru ne bi zagotovila tretji osebi ali če v zameno za ustanovitev takšnega zavarovanja ne prejme ustreznega nadomestila, kot se sicer zaračunava pri tovrstnih poslih v okviru bančnega poslovanja. Družba v takšnih primerih zagotovi imetniku deležev ugodnost na svoje stroške oziroma v breme svojega premoženja. V literaturi se posebej poudarja, da prepovedano dejanje lahko pomeni že sama zagotovitev zavarovanja, ne šele morebitna unovčitev takšnega zavarovanja.[4]

2.5.2. Pravne posledice kršitve prepovedi vračila vložka

Vse oblike vračila vložka so prepovedane.

Takšno enotno pojmovanje je sprejeto glede prepovedi vračila vložka, pri pravnih

3 Po enakih pravilih se obravnavajo tudi primeri, ko družba imetniku deležev omogoči odlog plačila njegove obveznosti, saj to zanjo pomeni povečano tveganje. Takšno posredno kreditiranje bi bilo dopustno (ne bi bilo v nasprotju s prepovedjo vračila vložka) le, če bi bila družba pripravljena tudi tretji osebi pod enakimi pogoji omogočiti odlog plačila in če bi v zameno prejela primerno nadomestilo.

4 *Hüffer, U.,* Aktiengesetz Kommentar; Beck, München, 2004, stran 288. Prepovedano vračilo vložka pa je podano tudi, če družba zavaruje terjatve imetnika deležev do tretje osebe, ki ji je zagotovil posojilo. Družba na ta način imetniku deležev zagotovi posebno korist, ki se šteje za vračilo vložka, in sicer s tem, da minimalizira njegovo tveganje pri takšnem poslu. Tveganje nevračila posojila, ki ga je imetnik deležev zagotovil tretji osebi, prevzame namreč družba, s čimer ogrozi svoje premoženje. Tudi v takšnem primeru se za prepovedano dejanje šteje že zagotovitev takšnega zavarovanja, ne šele morebitna izpolnitev obveznosti, ki jo je družba s takšnim pravnim poslom prevzela. Znotraj koncernskih razmerij pa seveda enako velja tudi, če družba zagotovi zavarovanje za obveznosti sestrske koncernske družbe.

posledicah prepovedanih vračil vložka pa je nekaj razlik, in sicer predvsem glede pravnih posledic odkritega in prikritega vračila vložka. Določene razlike nastopijo tudi, ko se v dejansko stanje prepovedanega vračila vložka vključujejo tretje osebe (bodisi na strani družbe bodisi na strani imetnika deležev).

- Ničnost pravnega posla pri odkritem vračilu vložka

Odkrita vračila vložkov so nedopustna, posledica pa je ničnost pravnega posla (kot celote), ki nasprotuje temeljnemu načelu prepovedi vračila vložka. Ničen je tako zavezovalni pravni posel (kavzalni pravni posel), ki je podlaga za dejansko vračilo vložka, kot razpolagalni pravni posel.[5]

- Usoda pravnega posla pri prikritem vračilu vložka

Glede tega vprašanja se v literaturi pojavljata dve stališči:

- Pravni posel, ki je podlaga za prikrito vračilo vložka, je nedopusten in ima enako usodo kot pravni posel, na podlagi katerega pride do odkritega vračila vložka, torej ničnost zavezovalnega in razpolagalnega pravnega posla:
  prikrito vračilo vložka je (praviloma) posledica pravnih poslov med družbo in imetnikom deležev, pri katerih je podano objektivno nesorazmerje med pogodbenimi obveznostmi (v korist imetnika deležev) – izpolnitev družbe po vrednosti presega nasprotno izpolnitev. Pravni posel, ki je podlaga za nastanek takšne obveznosti družbe (torej zavezovalni pravni posel), je ničen (enako kot v primeru odkritega vračila vložka). Družbi je izpolnitev takšne obveznosti prepovedana, zato poslovodstvo obveznosti ne sme izpolniti.
  Zagovorniki se sklicujejo na strogost zakonskih določb o ohranitvi kapitala, drugačno pojmovanje naj bi bilo v nasprotju z njihovim namenom.[6]
  Objektivnega nesorazmerja med pogodbenimi obveznostmi, ki ima podlago v sklenjenem (zavezovalnem) pravnem poslu, ni mogoče sanirati, ker bi tak pravni posel pomenil nekaj drugega od tistega, kar sta stranki prvotno želeli. Zakon prikrita vračila vložka prepoveduje (enako kot odkrita vračila), ne omogoča pa posegov v vsebino (na primer določitev nove vrednosti) pravnega posla, zaradi česar je zavezovalni pravni posel ničen.
  Družbi je izpolnitev obveznosti, prevzete z zavezovalnim pravnim poslom, prepovedana. Če izpolnitev kljub temu opravi, je tudi razpolagalni pravni posel – izpolnitev obveznosti – ničen. Če v zameno za svojo izpolnitev ne prejme nikakršne nasprotne izpolnitve s strani delničarja (odkrito vračilo

5 *Hüffer, U.,* Aktiengesetz Kommentar; Beck, München, 2004, stran 292. Zakonska prepoved vračila vložka v prvi vrsti prepoveduje prepovedana izplačila v breme vezanega premoženja družbe. V nekaterih primerih pa je lahko dejansko stanje prepovedanega vračila vložka podano že pred kakršnimkoli izplačilom iz vezanega premoženja družbe – zagotovitev zavarovanja za obveznosti delničarja, ki jih ima (delničar) do tretje osebe. V takšnem primeru je dejansko stanje vračila vložka podano že v trenutku zagotovitve zavarovanja, ne šele takrat, ko se premoženje družbe dejansko zmanjša (zaradi dolžnosti plačila delničarjeve obveznosti).

6 *„Die gegenteilige Ansicht, den Verpflichtungsgrund nicht oder nicht insgesamt der Nichtigkeitfolge zu unterwerfen, läßt sich jedoch mit der strengen Kapitalbindung nicht vereinbaren. Außerdem würde dies nicht der Regelung des §62 entsprechen. Denn ein wirksamer Vertrag stünde dem Rückgewäranspruch entgegen: Das kann also vom Gesetz nicht gewollt sein".* Tako *Henze, H.,* Aktiengesetz Großkommentar; deGruyter, 2001, stran 202; smiselno enako tudi *Hüffer, U.,* Aktiengesetz Kommentar; Beck, München, 2004, stran 292.

vložka), je ničnost razpolagalnega pravnega posla edina primerna sankcija. Tudi če družba za izvršeno vračilo vložka prejme (po vrednosti) neprimerno nasprotno izpolnitev (tj. prikrito vračilo vložka), je razlika z odkritim vračilom vložka samo v naslovu. Kot argument za ničnost razpolagalnega pravnega posla se (v obeh primerih) navaja doseganje maksimalnega varstva premoženja družbe.[7]

- Pravni posel, ki je podlaga za prikrito vračilo vložka, je sicer v nasprotju s temeljnim načelom prepovedi vračila vložka, vendar je sankcija ničnosti pretirana; posel je veljaven:
  ničnost zavezovalnega in razpolagalnega pravnega posla, ki je podlaga za prikrito vračilo vložkov, je po mnenju drugih pretirana sankcija, prav tako naj bi ničnost pravnega posla kot celote ne ustrezala namenu normativnega urejanja.[8] Za ponovno vzpostavitev (sicer porušenega) premoženjskega stanja družbe je primernejša izravnava pogodbenih obveznosti (na primer prilagoditev cene). Pravna podlaga za zahtevek družbe na izenačitev (izravnavo) pogodbenih obveznosti pa je korporacijskopravni zahtevek po 233. členu ZGD-1 (oziroma po prvem odstavku 496. člena ZGD-1 za družbe z omejeno odgovornostjo). Imetnik deležev lahko vztraja pri izpolnitvi obveznosti s strani družbe, pri čemer se seveda strinja tudi s povečanjem svoje obveznosti do družbe, družba pa te pravice nima, ker bi sicer imetnik deležev moral izpolniti več, kot se je zavezal s pravnim poslom.
  Sklenemo lahko z ugotovitvijo, da pravni posel prikritega vračila vložka dejansko v manjši meri nasprotuje načelu prepovedi vračila vložka (v primerjavi s poslom, ki je podlaga za odkrito vračilo vložka), vendar so prepričljivejši argumenti tistih, ki zagovarjajo tezo, da je posledica kršitve pravil o prepovedi vračila vložka tudi pri prikritih vračilih ničnost tako zavezovalnega kot razpolagalnega posla. Po našem to stališče velja še zlasti pri tistih pravnih transakcijah, pri katerih je z izravnalno sankcijo nemogoče doseči vzpostavitev prejšnjega stanja. Zlasti to velja pri poslih, pri katerih prejemnik koristi sam ni opravil nobene nasprotne izpolnitve. Pri teh poslih lahko že pojmovno ekvivalenco vzpostavi le zahteva, da prejeti predmet (na primer predmet zavarovanja) vrne.

2.5.3. Uveljavljanje vračila prepovedanih plačil s korporacijskim vrnitvenim zahtevkom

Če družba izvrši plačila, ki nasprotujejo prepovedi vračila vložka, in imetniku deležev vrne vložek, gre za prepovedano vračilo vložka, ne glede na to, ali je to odkrito ali prikrito. Imetnik deležev je družbi zavezan vrniti izplačila, ki jih je prejel v nasprotju z zakonom (prvi stavek prvega odstavka 233. člena ZGD-1), razen če zakon določa drugače (primerjaj drugi stavek prvega odstavka 233. člena ZGD-1).[9]

7 *Henze, H.,* Aktiengesetz Großkommentar; deGruyter, 2001, stran 204.

8 *Schmidt, K.,* Gesellschaftsrecht; Heymanns, 1997, strani 898 in 899.

9 V drugem stavku prvega odstavka 233. člena ZGD-1 je uzakonjena (edina) izjema od splošnega načela dolžnosti vračila prepovedanih plačil. Dolžnost vračila prepovedanih plačil se načeloma

Praktično enako pravilo velja tudi v pravu družb z omejeno odgovornostjo (prvi odstavek 496. člena ZGD-1).

Za vračilo je družbi priznan poseben korporacijski zahtevek za vračilo prepovedanih plačil (korporacijski vrnitveni zahtevek). V materialnopravnem razmerju je njegov nosilec družba, ki je v breme svojega vezanega kapitala opravila prepovedano plačilo. Zahtevek je specialen zahtevek korporacijske pravne narave in je zanj značilno, da je povsem neodvisen od katerihkoli drugih morebitnih zahtevkov. Družba s tem zahtevkom, ki ga naperi proti imetniku deležev, ki mu je bila izplačala prepovedano plačilo, uveljavlja povračilo tega, kar je plačala, v svoje premoženje, s čimer vzpostavi prvotno premoženjsko stanje ter sanira primanjkljaj v vezanem kapitalu. Uveljavljanje korporacijskega vrnitvenega zahtevka v razmerju do imetnika deležev ne predpostavlja obstoja okoliščin, ki so sicer nujne za uveljavljanje zahtevkov na drugih podlagah. Za to, da družba korporacijski vrnitveni zahtevek uveljavi, ni merodajna dobro- oziroma slabovernost, morebitna odgovornost imetnika deležev ali družbe in drugo. V nemškem pravu ni dvoma, da je uveljavljanje korporacijskega vrnitvenega zahtevka neodvisno od splošnih predpostavk, kot jih za uveljavljanje drugih zahtevkov predpisuje civilno pravo, zahtevek pa je po učinkih izenačen z zahtevkom družbe za vplačilo vložka.[10] Položaj, ki nastane, če družba imetniku deležev izplača (izpolni) prepovedano plačilo, je namreč enak, kot če ta vložka sploh ne bi bil vplačal. Za zastaranje tega zahtevka je določen daljši, specialni zastaralni rok (tretji odstavek 233. člena ZGD-1), predvsem pa imetnik deležev svojega morebitnega obligacijskega zahtevka zoper družbo ne sme pobotati s korporacijskim vrnitvenim zahtevkom družbe (četrti odstavek 233. člena ZGD-1).[11]

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nanaša na vsa plačila, ki jih delničar prejme od družbe v nasprotju z zakonskimi določbami. Izjema so plačila, ki jih delničar v dobri veri prejme v obliki dividend. Samo takšnih plačil ne zadeva dolžnost vrnitve.

10 *Lutter, M.,* Kölner Kommentar zum Aktiengesetz; Heymanns, Köln-Berlin-Bonn-München, 1988, komentar § 62 AktG, r. št. 5; *Bayer, W.,* Münchener Kommentar zum Aktiengesetz; Beck/Vahlen, München, 2003, komentar § 62 AktG, r. št. 8.

11 V slovenski sodni praksi se je pojmovanje pravne narave korporacijskega vrnitvenega zahtevka nekoliko spreminjalo, čeprav je pravna teorija ves čas zagovarjala stališče o njegovi posebni (specialni) pravni naravi; glej na primer pri *Kocbek, M.,:* Zakon o gospodarskih družbah s komentarjem; GV Založba, Ljubljana, 2012, I knjiga, stran 670, ki je enako stališče zagovarjal tudi po nadomestitvi ZGD z ZGD-1 (2006): Veliki komentar ZGD-1; GV Založba, Ljubljana, 2006, II. knjiga, strani 218, 266, 267. Sodna praksa je sprva korporacijski vrnitveni zahtevek (oziroma posledice kršitve prepovedi prepovedanih plačil imetnikom deležev) povezovala s pravili obligacijskega prava o ničnosti pravnih poslov; glej na primer sodbo VSRS, opr. št. III Ips 109/2011. Vsako dilemo o tem, kakšna je normativna vsebina zakonske dolžnosti vrnitve prepovedanih plačil (in torej pravna narava korporacijskega vrnitvenega zahtevka), je dokončno odpravila novela ZGD-1B, ki je v 233. členu (prej 230. člen ZGD) jasno poudarila samostojno in od drugih pravil neodvisno pravno naravo tega zahtevka; podrobneje *Kocbek, M., Prelič, S.,* Zakon o gospodarskih družbah (ZGD-1) z novelama ZGD-1A in ZGD-1B; GV Založba, Ljubljana, 2008, strani 62–70. Zato se je spremenilo tudi pojmovanje tega zahtevka v sodni praksi; glej sodbo VSRS, opr. št. III Ips 79/2017. Tudi Vrhovno sodišče RS torej izrecno priznava samostojno naravo korporacijskega vrnitvenega zahtevka.

V primerjalni[12] in tudi slovenski literaturi[13] je enotno sprejeto stališče, da je zahtevek družbe za vrnitev prepovedanih plačil neodvisen od katerihkoli drugih morebitnih zahtevkov oziroma da je to samostojni korporacijski vrnitveni zahtevek. Nemški avtorji dosledno in posebej poudarjajo, da *„aktienrechtliche Anspruch verdrängt Ansprüche aus Kondiktion und Vindikation"*,[14] kar neposredno kaže na neodvisnost in samostojno naravo tega zahtevka.

Vsa dostopna literatura s področja korporacijskega poudarja, da uveljavljenje tega zahtevka v razmerju do delničarja ne predpostavlja obstoja okoliščin, ki so sicer nujne za uveljavljanje zahtevkov na drugih podlagah. Za to, da družba korporacijski vrnitveni zahtevek v razmerju do delničarja uveljavi, tako ni merodajna dobro- oziroma slabovernost, morebitna odgovornost delničarja ali družbe in drugo. Tako v nemškem pravu avtorji trdijo, da je uveljavljanje korporacijskega vrnitvenega zahtevka povsem neodvisno od splošnih predpostavk, kot so za uveljavljanje drugih zahtevkov predpisane v civilnem pravu.[15] Avstrijski pisec *Saurer* je celo izrecno zapisal, da je zahtevek samostojen in neodvisen od temeljnih principov prava neupravičene pridobitve.[16] Pravnodogmatično literatura ta korporacijski vrnitveni zahtevek enači z zahtevkom družbe za vplačilo vložka oziroma mu pripisuje enak funkcionalni pomen.[17]

Slovenska normativna ureditev je enaka ureditvi v primerjalnem pravu. ZGD-1

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12 To stališče je v primerjalnopravni literaturi povsem nesporno. Za ilustracijo glej navedbe naslednjih vodilnih teoretikov: *Henze, H.,* Aktiengesetz Großkommentar; deGruyter, Berlin, 2000, komentar § 62 AktG, r. št. 11; *Bayer, W.,* Münchener Kommentar zum Aktiengesetz; Beck/Vahlen, München, 2003, komentar § 62 AktG, r. št. 7; *Lutter, M.,* Kölner Kommentar zum Aktiengesetz; Heymanns, Köln-Berlin-Bonn-München, 1988, komentar § 62 AktG, r. št. 4; *Hüffer, U.,* Aktiengesetz Kommentar; Beck, München, 2004, komentar § 62 AktG, r. št. 2.
Za avstrijsko pravo enako *Artmann, E.,* Aktiengesetz Kommentar; Manz, Wien, 2004, komentar § 56 AktG, r. št. 4 ter *Saurer, U.,* Kommentar zum Aktiengesetz; Linde, Wien, 2003, komentar § 56 AktG, r. št. 8.

13 *Kobal, A.:* Pravna narava zahtevka delniške družbe za vračilo prepovedanega vračila vložka, PiD, 2/2008, stran 210; *Kocbek, M.,* v Velikem komentarju ZGD-1; GV Založba, Ljubljana, 2007, II. knjiga, stran 267.

14 *Artmann, E.,* Aktiengesetz Kommentar; Manz, Wien, 2004, komentar § 56 AktG, r. št. 4.

15 *Lutter, M.,* Kölner Kommentar zum Aktiengesetz; Köln-Berlin-Bonn-München, 1988, komentar § 62 AktG, r. št. 4, izrecno pravi: *„Tatbestandselemente anderer Normen (insbesondere §§ 812 ff., 823 ff BGB) finden keine Anwenduntg. Der Anspruch is von einem Verschulden unabhängig."* Povsem enako stališče zastopa Bayer, W., Münchener Kommentar zum Aktiengesetz; Beck/ Vahlen, München, 2003, komentar § 62 AktG, r. št. 7, kjer pravi: *„Die Verpflichtung zur Rückgewähr besteht somit unabhängig von einem Verschulden des Empfängers und trägt nicht die Schwachen der §§ 814, 817, 817 BGB in sich."*

16 *Saurer, U.,* Kommentar zum Aktiengesetz; Linde, Wien, 2003, komentar § 56 AktG, r. št. 8, kjer pravi: *„Der Anspruch der Gesellschaft auf Rückzahlung der verbotswidrug empfangenen Leistung nach § 56 ist eigenständiger, aktienrechtlicher Natur und ermöglicht die Rückforderung der Leistung unabhängig von Bereicherungsgrundsätzen."*

17 *Lutter, M.,* Kölner Kommentar zum Aktiengesetz; Heymanns, Köln-Berlin-Bonn-München, 1988, komentar § 62 AktG, r. št. 5; *Bayer, W.,* Münchener Kommentar zum Aktiengesetz; Beck/ Vahlen, München, 2003, komentar § 62 AktG, r. št. 8; *Henze, H.,* Aktiengesetz Großkommentar; deGruyter, Berlin, 2000, komentar § 62 AktG, r. št. 11.

se sicer neposredno zgleduje po določbah § 62 nemškega zakona o delnicah (AktG),[18] enaka pa je tudi ureditev v avstrijskem delniškem pravu (glej § 56 AktG).[19] Po določbi prvega odstavka 233. člena ZGD-1 (prej 230. člena ZGD) morajo delničarji družbi vrniti plačila, ki so jih od nje prejeli v nasprotju s tem zakonom. Nadaljnja specifika korporacijskega vrnitvenega zahtevka je, da ga lahko – v svojem imenu in za račun družbe, kar pomeni, da je nosilec zahtevka v materialnopravnem razmerju vedno izključno družba[20] – uveljavljajo tudi delničarji, katerih skupni deleži dosegajo vsaj desetino osnovnega kapitala ali katerih skupni najmanjši emisijski znesek dosega vsaj 400.000 € (tretji stavek prvega odstavka 233. člena ZGD-1), lahko pa ga uveljavljajo tudi upniki, če jih družba ne more poplačati (drugi odstavek 233. člena ZGD-1). Zahtevek se vedno naperi proti tistim, v korist katerih je bilo opravljeno prepovedano plačilo. Korporacijski vrnitveni zahtevek učinkuje v tem smislu kot sankcija za prejem prepovedanega plačila.[21]

Glede aktivne legitimacije: pravico zahtevati vračilo prepovedanih plačil le družba, ki je v razmerju do prejemnika prepovedanega plačila v obliki prepovedanega vračila vložka torej upnik. Zahtevek za vračilo prepovedanih plačil v materialnem smislu pripada samo družbi, saj je posledica prepovedanih izplačil zmanjšanje premoženja družbe, ki pa je predmet varstva.

Od zahtevka (v materialnem smislu) je treba razlikovati (samo) pravico do uveljavljanja zahtevka za vračilo prepovedanih plačil. Pravico do uveljavljanja zahtevka ima načeloma družba, v nekaterih primerih pa se priznava tudi upnikom družbe (drugi odstavek 233. člena ZGD-1) in manjšinskim delničarjem družbe (tretji

18 § 62 nemškega AktG se glasi:
„(1) Die Aktionäre haben der Gesellschaft Leistungen, die sie entgegen den Vorschriften dieses Gesetzes von ihr empfangen haben, zurückzugewähren. Haben sie Beträge als Gewinnanteile bezogen, so besteht die Verpflichtung nur, wenn sie wußten oder infolge von Fahrlässigkeit nicht wußten, daß sie zum Bezug nicht berechtigt waren.
(2) Der Anspruch der Gesellschaft kann auch von den Gläubigern der Gesellschaft geltend gemacht werden, soweit sie von dieser keine Befriedigung erlangen können. Ist über das Vermögen der Gesellschaft das Insolvenzverfahren eröffnet, so übt während dessen Dauer der Insolvenzverwalter oder der Sachwalter das Recht der Gesellschaftsgläubiger gegen die Aktionäre aus.
(3) Die Ansprüche nach diesen Vorschriften verjähren in zehn Jahren seit dem Empfang der Leistung. § 54 Abs. 4 Satz 2 findet entsprechende Anwendung."

19 § 56 avstrijskega AktG se glasi:
„(1) Die Aktionäre haften den Gläubigern für die Verbindlichkeiten der Gesellschaft, soweit sie entgegen den Vorschriften dieses Bundesgesetzes Zahlungen von der Gesellschaft empfangen haben. Dies gilt nicht, soweit sie Beträge in gutem Glauben als Gewinnanteile bezogen haben.
(2) Ist über das Vermögen der Gesellschaft der Konkurs eröffnet, so übt während dessen Dauer der Masseverwalter das Recht der Gesellschaftsgläubiger gegen die Aktionäre (Abs. 1) aus.
(3) Die Gesellschaft kann Beträge nicht zurückfordern, die Aktionäre in gutem Glauben als Gewinnanteile bezogen haben.
(4) Die Ansprüche nach diesen Vorschriften verjähren in fünf Jahren seit dem Empfang der Zahlung."

20 *Lutter, M.,* Kölner Kommentar zum Aktiengesetz; Heymanns, Köln-Berlin-Bonn-München, 1988, komentar § 62 AktG, r. št. 6.

21 *Lutter, M.,* Kölner Kommentar zum Aktiengesetz; Heymanns, Köln-Berlin-Bonn-München, 1988, komentar § 62 AktG, r. št. 8.

stavek prvega odstavka 233. člena ZGD-1), v pravu družb z omejeno odgovornostjo pa lahko zahtevek kot *actio pro socio* uveljavlja vsak družbenik, na način in pod pogoji, določenimi v 503. členu ZGD-1.[22]

Glede pasivne legitimacije: ker se prepoved vračila vložka nanaša na razmerje med družbo in imetniki njenih deležev, sta naslovnika zakonske prepovedi družba in imetnik deležev (upravičen je le do izplačil iz premoženja družbe, ki niso izvršena v nasprotju s temeljno prepovedjo vračila vložka). Pri tem ni pomembno, ali je plačilo, ki pomeni vračilo vložka, prejel neposredno od družbe ali posredno od tretje osebe, ki je plačilo opravila sicer v lastnem imenu, vendar za račun (v breme premoženja) družbe.

V nekaterih primerih je glede na bistvo in cilje temeljnega načela ohranitve kapitala določena izplačila, ki jih družba sicer opravi v korist tretjih, vendarle treba obravnavati kot izplačila imetniku deležev in jih šteti za prepovedana vračila vložka. Ker se v specifičnih primerih izplačila tretji osebi lahko štejejo za vračilo vložka imetniku deležev, se v tej zvezi seveda zastavlja tudi vprašanje o dopustnosti uveljavljanja korporacijskega zahtevka za vračilo prepovedanih plačil od tretjih oseb, ki so vpletene v dejansko stanje vračila vložka. Gre predvsem za vprašanje, kdaj in ali sploh lahko družba proti tretjemu uveljavlja korporacijski vrnitveni zahtevek, kadar med njima korporacijsko razmerje sploh ni vzpostavljeno.

Če družba izvrši plačilo tretji osebi, ki bi za imetnika deležev pomenilo prepovedano plačilo, takšno plačilo pa se pod določenimi pogoji lahko pripiše slednjemu, se izplačilo obravnava kot (neposredno) izplačilo imetniku deležev. Temu se tako lahko na primer pripišejo izplačila družbe tretji osebi, ki pa dejansko prejme takšno izplačilo za račun imetnika deležev, ali izplačila, ki jih družba izvrši tretji osebi po njegovem naročilu, ali pa izplačila, katerih prejemnik je družinski član imetnika deležev ali druga z njim povezana oseba. Ker se v teh primerih za dejanskega prejemnika prepovedanega plačila šteje imetnik deležev sam, ne tretja oseba, je tudi imetnik deležev tisti, ki je družbi dolžan vrniti ta plačila (in ne tretja oseba). To velja tudi, če predmet prepovedanega vračila vložka dejansko ostane v rokah tretje osebe in ga ta ne izroči imetniku deležev. Družba torej v takšnih primerih zoper tretjega ne more uveljaviti zahtevka za vračilo prepovedanih plačil v smislu prvega odstavka 233. člena ZGD-1 (nima na razpolago korporacijskega vrnitvenega zahtevka), temveč ima tak zahtevek le v razmerju do imetnika deležev (ki je dejanski prejemnik plačila). Zoper tretjega pa ima družba lahko zahtevke na podlagi splošnih pravil civilnega prava, kot so na primer obligacijski (kondikcijski in odškodninski) in stvarnopravni zahtevki (reivindikacija).

Ne glede na to, da družba torej zoper tretje osebe načeloma ne more uveljavljati korporacijskega vrnitvenega zahtevka, se ji ta zoper tretje v določenih primerih vendarle priznava. Ta zahtevek je sankcija za kršitev načela prepovedi vračila vložka, predpostavke katerega pa se presojajo z vidika 227. člena ZGD-1. Obseg dejanskega stanja prepovedi vračila vložka tako določa tudi možnost uporabe sankcije, ki je posledica takega prepovedanega ravnanja. Če so tretje osebe lahko naslovniki

22 *Zabel, B., Prelič, S. et al.:* Družba z omejeno odgovornostjo; GV Založba, Ljubljana, 2009, stran 67.

zakonske prepovedi vračila vložka v smislu 227. člena ZGD-1, lahko družba tudi zoper njih uveljavi korporacijski vrnitveni zahtevek.

3. POSEBEJ O OHRANJANJU KAPITALA IN FINANČNI ASISTENCI V OBLIKI KREDITIRANJA, ZAGOTAVLJANJA POSOJIL IN ZAVAROVANJ

Kako v pravila o ohranjanju kapitala, ki so bila podrobno razložena zgoraj, posežejo položaji, v katerih družba imetniku svojih deležev finančno asistira oziroma mu zagotavlja finančno asistenco na način, da mu bodisi neposredno daje posojila bodisi v breme svojega premoženja prevzema jamstva za obveznosti imetnika deležev?

Pod pojmom *„finančna asistenca"* razumemo:

- neposredno kreditiranje, torej tiste položaje, v katerih družba (neposredno) zagotavlja (daje) kredit oziroma posojilo imetniku svojih deležev (oziroma obrnjeno, ko imetnik deležev zagotavlja kredit oziroma posojilo družbi, imetnik deležev katere je), ter
- zagotavljanje zavarovanja za kredit oziroma posojilo, ki ga družba zagotovi (ustanovi) v korist tretje osebe, ki pa je (kot kreditodajalec) zagotovila (dala) kredit imetniku deležev družbe (oziroma obrnjeno, ko imetnik deležev zagotovi zavarovanje za kredit, ki ga je družbi zagotovila tretja oseba).

Pravno so torej možni različni položaji. Posojila med družbo in imetniki njenih deležev (torej družbeniki oziroma delničarji, v odvisnosti od pravnoorganizacijske oblike, v kateri je družba organizirana) lahko potekajo v obeh smereh: kot posojila družbe imetniku deležev (posojila *up-stream*) ali kot posojila imetnika deležev družbi (posojila *down-stream*). Zato ima lahko v razmerju do posameznega imetnika deležev družba položaj posojilodajalke ali položaj posojilojemalke. Možno je tudi, da družba zgolj zavaruje posojilo, ki ga imetniku njenih deležev odobri tretja oseba, oziroma da imetnik deležev zavaruje posojilo tretje osebe, ki ga je ta dala družbi.

Tovrstni posli (kreditni posli in posli zavarovanja) niso prepovedani sami po sebi, so pa omejeni s pravili korporacijskega prava o pravnih razmerjih med družbo in imetniki deležev (*causa societatis*), med katerimi so relevantna zgoraj razložena pravila o ohranjanju (vzdrževanju) kapitala. Kot je bilo razloženo, so ta pravila različno intenzivna, odvisno od pravnoorganizacijske oblike družbe, pomembna pa je tudi smer posojilnega toka. Pravila (delniškega prava) so strožja, kadar je posojilo dano delničarju, v pravu družb z omejeno odgovornostjo pa so pravila strožja, kadar družba dobi posojilo od družbenika. Te omejitve naj bi preprečile različna tveganja, zlasti za položaj upnikov družbe; kadar družba zagotavlja kredit posameznemu imetniku deležev, pa se ščiti tudi položaj drugih imetnikov deležev (te družbe).

Ker so primerljiva tveganja podana tudi pri zavarovanjih za posojila, ki jih dajo imetniku deležev tretje osebe (na primer banke), se tudi zanje uporabljajo smiselno enaka pravila kot za posojila. To velja še posebej za posojila družbe imetniku deležev.

Iz tega lahko izpeljemo sklep, da so kreditni posli oziroma posli zavarovanja dopustni, vendar le, kolikor ne povzročijo prepovedane posledice, ki se kaže v kršitvi pravil o ohranjanju kapitala. Zato je treba take posle vedno presojati glede na njihove učinke na vezano premoženje.

3.1. Posojila, ki jih družba daje imetniku deležev (posojila up-stream)

ZGD-1 ne vsebuje izrecnih določb glede tovrstnih posojil. Za njihovo presojo so zato merodajna (vsa splošna) pravila o ohranjanju kapitala.

3.1.1. Delniško pravo

V delniškem pravu to prepoved uzakonja določba prvega odstavka 227. člena ZGD-1, po kateri družba vložkov ne sme vrniti in zanje ne sme priznati obresti. Konkretizacija tega načelnega pravila je v določbi drugega odstavka 227. člena ZGD-1, po kateri je delničarjem dopustno izplačati le delež v bilančnem dobičku, kar je bilo zgoraj podrobneje razloženo.[23]

Značilnost delniškega prava je, da pred izplačili delničarjem veže celotno premoženje družbe. Izplačila dovoljuje le v izrecno dopustnih položajih. ZGD-1 transakcij med družbo in delničarji sicer ne prepoveduje, vendar le, kolikor ne zmanjšujejo vrednosti premoženja družbe; to je izraženo tudi v prepovedi prikritih vračil vložka (tretji odstavek 227. člena ZGD-1). Namen pravil je jasen: izplačilna prepoved dolžniškemu kapitalu zagotavlja prednost pred lastniškim.

Posojila *up-stream* (posojila družbe delničarju) sama po sebi (še) ne pomenijo kršenja pravil o ohranjanju kapitala: hkrati z zagotovitvijo posojila se namreč v korist družbe vzpostavi terjatev, katere predmet je obveznost vračila posojila, ki ga je delničarju družba dala. Vendar pa to še ne zagotavlja, da se vrednost premoženja družbe ne more zmanjšati: ni namreč nujno, da je vrednost terjatve družbe identična višini posojila, ki ga je dala. Merodajna je zato *ex ante* presoja vračljivosti posojila, pri čemer se uporabljajo splošna pravila vrednotenja terjatev za potrebe bilanciranja, upoštevaje načelo previdnosti. Ta presoja naj bi pokazala, da ni nobenega utemeljenega dvoma v sposobnost delničarja, da posojilo družbi vrne, oziroma da ni nobenega konkretnega tveganja,[24] da prejemnik posojila ne bi mogel vrniti v celoti. Uveljavitev terjatve za vračilo posojila mora biti verjetna,[25] to pa je tudi pogoj za pripoznanje terjatve v knjigovodskih izkazih in bilanci stanja v njeni celotni višini (SRS, točka 3.8). V nasprotnem se terjatev pripozna v ustrezno nižji vrednosti, za kolikor se posledično zmanjša vrednost premoženja zaradi posojila. Korporacijsko gledano, s tem posojilo dobi pomen prepovedanega vračila vložka.[26]

23 Glej navedbe v razdelku A.4.

24 Primeri, ki utemeljujejo konkretno tveganje, so denimo: neizpolnitev ali zamuda z izpolnitvijo drugih obveznosti, blokiran transakcijski račun, nespoštovanje bistvenih pogodbenih obveznosti, težave z likvidnostjo, izčrpanje kreditnih linij, dolžnikova pogajanja za odlog plačila, dolžnikova izguba, ki je „razjedla" velik del lastnega kapitala, ter previsoke obveznosti glede na dolžnikov lastni kapital. Podrobneje *Cahn, A.,* Kredite an Gesellschafter – zugleich Anmerkung zur MPS-Entscheidung des BGH; Institute for Law and Finance, Working paper series No. 98, 2/2009, stran 12. Podobno *Wirsch, S.,* Die Vollwertigkeit des Rückgewähranspruch; Der Konzern št. 10/2009, stran 447.

25 Sodba nemškega vrhovnega sodišča v zadevi „MPS" (II ZR 102/07, z dne 1. decembra 2008, stran 9). Verjetnost, ki že meji na gotovost, se ne zahteva.

26 Uprava mora torej z vso potrebno skrbnostjo preveriti sposobnost delničarja, da vrne posojilo, in sklenitev pogodbe zavrniti, če je njegova sposobnost dvomljiva. Knjigovodska vrednost

V posledici prepovedanega vračila vložka družba pridobi korporacijski vrnitveni zahtevek (233. člen ZGD-1).[27] Odločilna je presoja *ex ante*, to je presoja, pri kateri se upošteva stanje ob nakazilu posojila, zato naknadno poslabšanje bonitete delničarja (posojilojemalca), ki ga ni bilo mogoče predvideti, in s tem povezana oslabitev terjatve v bilanci stanja ne povzročita naknadne prekvalifikacije posojila v prepovedano vračilo vložka, četudi družbi na koncu nastane izguba.

Z vidika pravil o ohranjanju kapitala se lahko kot sporna izkaže tudi neustrezna višina obresti. Če je dogovorjena višina obresti, ki naj jih delničar plača družbi, nižja od tržno primerljive, ima nastala razlika (tako imenovana *obrestna škoda*) pomen prepovedanega vračila vložka.[28] Bilančno je obrestna škoda okoliščina, ki zmanjšuje vrednost terjatve za vračilo posojila (glavnice) in se v knjigovodskih izkazih in bilanci stanja pripozna v diskontirani višini.[29]

3.1.2. Pravo družb z omejeno odgovornostjo

V pravu družb z omejeno odgovornostjo so meje dopustnega kreditiranja širše, zato je obseg izplačilne prepovedi ožji. Po prvem odstavku 495. člena ZGD-1 družba premoženja, ki je potrebno za ohranitev osnovnega kapitala in vezanih rezerv, torej *vezanega kapitala*, družbenikom ne sme izplačati. Pri teh pojavnih oblikah družb pravna ureditev tako ne veže njihovega celotnega premoženja (kot velja v delniškem pravu), ampak le premoženje, ki ima v kapitalu kritje v njegovih vezanih kategorijah.[30] Kot je bilo že navedeno, tudi pravo družb z omejeno odgovornostjo ob kršitvah izplačilne prepovedi priznava družbi korporacijski vrnitveni zahtevek (496. člen ZGD-1), posebnost pa je subsidiarna odgovornost drugih družbenikov.[31] Z *actio pro socio* ta zahtevek lahko uveljavlja vsak družbenik, in sicer na način in pod pogoji iz 503. člena ZGD-1.

Razloženo velja z vidika pravil o ohranjanju kapitala, ki so namenjena zaščiti upnikov. Vendar pa tudi pri družbah z omejeno odgovornostjo celotno premoženje družbe pripada družbi, ne njenim družbenikom. Enostranski posegi v korist (le) posameznega družbenika niso dovoljeni, čeprav so izvršeni v breme nevezanih kategorij lastnega kapitala (na primer prenesenega dobička ali drugih rezerv iz dobička). Zato je (pri družbah z več družbeniki) potreben še sklep družbenikov, ki je lahko izpodbojen po splošnih pravilih o izpodbojnosti (522. člen v zvezi s 395. členom ZGD-1). Če od izplačil nimajo sorazmerno enake koristi vsi družbeniki, je sklep izpodbojen zaradi kršitve načela enakega obravnavanja družbenikov. To je torej relevantno za družbe z več družbeniki. Sklep, ki je v nasprotju s 495. členom ZGD-1,

terjatve se mora ujemati z nominalno vrednostjo. Če obstaja konkretno tveganje, je posojilo delničarju iz premoženja družbe dovoljeno le, če je ustrezno zavarovano.

27 O pravni naravi tega zahtevka podrobneje v razdelku A.5.3.

28 Glej tudi pri *Kocbek, M.,* Veliki komentar Zakona o gospodarskih družbah; 1. knjiga, GV Založba, Ljubljana, 2014, stran 748, kjer kot primer prepovedanega vračila vložka izrecno šteje brezobrestno posojilo.

29 *Wirsch, S.,* Die Vollwertigkeit des Rückgewähranspruch; Der Konzern št. 10/2009, stran 447.

30 Glej navedbe v razdelku A.2.

31 Podrobneje *Podgorelec, P.,* Ohranjanje osnovnega kapitala pri d. o. o.; PiD, št. 8/2006, strani 1689–1691.

je ničen.[32]

Z vidika posojil *up-stream* to pomeni, da so taka posojila dovoljena, če izpolnjujejo merila dopustnosti, na način in pod pogoji, ki veljajo v delniškem pravu,[33] tako glede glavnice kot glede obresti, ne glede na to, da je družba v času izplačila podbilancirana. Odločilna je namreč bilančna presoja. Drugače od delniškega prava dovoljuje pravo družb z omejeno odgovornostjo tudi bolj tvegana posojila ali posojila z obrestno mero, ki je nižja od tržno primerljive, a le, če družba izkazuje dovolj razpoložljivih kategorij lastnega kapitala, tako da ne more priti do posega v vezane kapitalske kategorije. Potreben je še sklep družbenikov. Če je posojilo dano le enemu od družbenikov, morajo za sklep glasovati vsi drugi družbeniki, sicer je sklep izpodbojen zaradi kršitve načela enakega obravnavanja.

3.2. Zavarovanje družbe za posojilo, ki ga imetniku deležev daje tretja oseba

Za razumevanje zavarovanj je nujna razlaga glede posojil, podana v prejšnjem razdelku. Neposredno zagotavljanje posojil namreč ni edina oblika finančne asistence, ki jo družba lahko opravi v korist imetnika njenih deležev. Namesto da imetniku deležev zagotovi posojilo, lahko posojila, ki jih dajo družbeniku tretje osebe, na primer banke, družba zavaruje.[34]

„Zavarovanje" pomeni zagotavljanje različnih oblik osebnih (na primer

32 *Hueck/Fastrich,* v: *Baumbach/Hueck:* GmbH-Gesetz; 18. izdaja, Beck, München, 2006, stran 413.

33 Glej navedbe v razdelku B.1.1.

34 Kakor tudi, če prevzame poroštvo za terjatev, ki jo ima imetnik deležev do tretje osebe; glej k temu tudi navedbe v opombi 5.
Primer iz slovenske sodne prakse: neka slovenska delniška družba se je kot porok zavezala svojemu delničarju – banki za njeno terjatev do prejemnika kredita, ki mu ga je banka zagotovila. Delniška družba je s tem, ko je prevzela poroštveno obveznost za terjatev banke (svojega delničarja) do prejemnika kredita, v korist banke, to je svojega delničarja, zagotovila zavarovanje za delničarjevo terjatev do tretje osebe. To ravnanje po dejanskih znakih ustreza dejanju, ki ustreza prepovedanemu vračilu vložka. Tudi prevzem poroštva družbe za terjatve njenega delničarja je torej dejanje prikritega vračila vložka; Bayer, W., Münchener Kommentar zum Aktiengesetz; Beck, München [2008], komentar § 57, s tem v zvezi pravi: *„Wird nicht der Kredit eines Aktionärs gegenüber einem Dritten, sondern umgekehrt das von einem Drittem beim Aktionär aufgenommene Darlehen durch die AG besichert, so ist auch diese Sicherheitenbestellung nach § 57 unzulässig ..."* Korist, ki jo je v tem primeru prejela banka, torej delničar poroka, je v tem, da za izpolnitev njene terjatve poleg glavnega dolžnika (kreditojemalca) kot porok jamči še delniška družba, to je družba, katere delničar je banka. Taka pogodbena (poroštvena) zaveza je položaj banke pomembno izboljšala, saj za izpolnitev terjatve v razmerju do kreditojemalca ne jamči le glavni dolžnik, temveč tudi delniška družba kot porok. Ta je s prevzemom poroštva v korist svojega delničarja angažirala svoje premoženje in bi bila, če kreditojemalec svoje obveznosti v razmerju do banke – kreditodajalca ob zapadlosti ne bi izpolnil, zavezanka za izpolnitev kot porok. Ker pa je tak položaj zaradi zaščite vezanega kapitala kapitalske družbe prepovedan, je poroštvena pogodba (ker je sklenjena v nasprotju z zakonom) neveljavna (nična). To je ugotovitev slovenskih sodišč na vseh treh stopnjah (glej k temu sodbo Okrožnega sodišča v Mariboru, opr. št. I Pg 785/2014, sodbo Višjega sodišča v Mariboru, opr. št. I Pg 58/2017, ter sodbo Vrhovnega sodišča RS, opr. št. III Ips 79/2017).

prevzem poroštva) ali stvarnih zavarovanj (na primer zastava premičnega premoženja ali pa ustanovitev hipoteke). Družba s tem podpre položaj, da imetnik deležev posojilo sploh lahko dobi, oziroma mu omogoči ugodnejše posojilne pogoje.

Tak asistenčni angažma družbe odpira enaka tveganja, kot jih odpirajo posojila, zato tudi za zavarovanja veljajo smiselno enaka pravila kot glede posojil. Da bi se zavarovanje lahko štelo za prikrito vračilo vložka, sta potrebna dva pogoja oziroma testa:[35]

- najprej se preizkuša, ali je nastop položaja, da bo zavarovanje uveljavljeno, sploh verjeten. Če ni, je operacija bilančno nevtralna, ker v tem primeru ni treba oblikovati rezervacij. Če je „unovčitev" zavarovanja verjetna, pa je treba nadalje preizkusiti,
- ali ima družba do imetnika deležev regresni zahtevek, za katerega ni nikakršnega konkretnega tveganja, da ga družba od imetnika deležev ne bi mogla uveljaviti.

Velja torej podobno kot pri terjatvi za vračilo posojila. Ker se zavarovanje unovči, ko imetnik deležev ni sposoben vrniti posojila, bo takšna nevarnost praviloma obstajala. Če obstaja konkretno tveganje, pa mora biti regresni zahtevek ustrezno zavarovan. Poslovodstvo družbe mora torej zagotoviti, da je morebitna verjetnost uveljavitve zavarovanja „nevtralizirana" s primerno zavarovanim regresnim zahtevkom; če ni, gre za primer prepovedanega vračila vložka po prvem odstavku 227. člena ZGD-1. Pri družbah z omejeno odgovornostjo je treba v zvezi z omejitvami, ki izhajajo iz pravil o ohranjanju kapitala, opraviti preizkus po 495. členu ZGD-1, torej ali je zagotovljena ohranitev neizplačljivih vezanih kapitalskih kategorij (osnovnega kapitala in vezanih rezerv).

Vprašanje je, ali (in kako) kršitev pravil o ohranjanju kapitala vpliva na veljavnost pravnega posla, sklenjenega med družbo in tretjo osebo (na primer banko), s katerim se ustanavlja zavarovanje (na primer poroštvene pogodbe ali pogodbe o ustanovitvi hipoteke). Nedvomno je položaj družbe najučinkoviteje zavarovan s sankcijo neveljavnosti posla; ničnostna sankcija najučinkoviteje sanira kršitev pravil o ohranjanju kapitala. V to smer gre tudi novejša slovenska sodna praksa.[36]

Ob tem bi se lahko postavil pomislek, da so zastopniška pooblastila poslovodstva družbe v razmerjih s tretjimi neomejena (32. člen ZGD-1). Skladno s tem pristopom poslovodstvo, ki sklene posel, s katerim družba prevzame poroštvo za obveznost imetnika deležev te družbe – torej posel, sklenjen v nasprotju s pravili

35 *Kiefner, A.,* Aufsteigende Darlehen und Sicherheitenbegebung im Aktienrecht nach dem MoMiG; NZG, št. 21/2008, stran 803.

36 Glej naslednje sodne odločbe: sodba in sklep Okrožnega sodišča v Ljubljani, opr. št. V Pg 3131/2013, ter sodbi Višjega sodišča v Ljubljani, opr. št. VSL I Cpg 323/2013 in VSL I Cpg 1474/2012. V tej zvezi je zelo relevantna najnovejša odločba Vrhovnega sodišča RS, opr. št. III Ips 79/2017, ki v jedru poudarja: *„V konkretnem primeru je šlo za pravni posel, sklenjen med delniško družbo in banko (delničarko), s katerim je bilo ustanovljeno zavarovanje v obliki Poroštvene pogodbe, kar predstavlja prikrito obliko prepovedanega vračila vložka in s tem prepovedano plačilo po 233. členu ZGD-1. Družba je namreč svoji delničarki (in to samo njej) zagotovila posebno korist, ki se šteje za vračilo vložka, saj je riziko neplačila kredita, ki ga je delničarka zagotovila tretji osebi (drugi družbi), prevzela delniška družba, in sicer v breme svojega premoženja. Zato se že zagotovitev takega zavarovanja šteje za prepovedano dejanje."*

o ohranjanju kapitala –, zlorabi svoja pooblastila, vendar to ne vpliva na veljavnost posla, sklenjenega s tretjo osebo (na primer banko), in sicer z utemeljitvijo, da je treba varovati tretjo osebo.[37]

Vendar pa to ne velja absolutno, temveč le, če je tretja oseba dobroverna. Če ve ali ji vsaj ne more ostati neznano, da poslovodstvo deluje v nasprotju z omejitvami (in je zloraba zastopniških pooblastil za tretjega očitna), zunanja neomejenost pooblastil – in s tem povezana zaščita tretje osebe – izgubi legitimnost.[38]

Nemško vrhovno sodišče (BGH) je ob obravnavi podobnih položajev poudarilo, da načela o zlorabi zastopniških pooblastil nastopijo, če pogodbeni partner družbe ve ali mu vsaj ne more ostati neznano, da je poslovodja prekoračil svoja zastopniška pooblastila.[39] To naj bi še posebej veljalo takrat, kadar pravni posel za družbo (v konkretnem primeru sicer organizirano kot družba z omejeno odgovornostjo) pomeni prikrajšanje.[40] Za zlorabo ni pomembno, ali poslovodja zavestno ravna v škodo družbe; zadošča že, da je poslovodja objektivno deloval v nasprotju s svojimi dolžnostmi, tretji pa je za to vedel oziroma mu ni moglo ostati neznano. Enako naj bi veljalo, če si poslovodja pred sklenitvijo pogodbe ni pridobil sklepa družbenikov, kadar je ta potreben, pri tem pa v takem primeru sploh več ni pomembno, ali je posel za družbo tudi škodljiv.[41] Za zlorabo zastopniških pooblastil velja tudi delovanje poslovodje v nasprotju z domnevno voljo družbenikov, kar je sopogodbeniku znano oziroma mu ne more ostati neznano.[42]

Pravna posledica zlorabe zastopniških pooblastil v teh primerih je, da je zastopnikova izjava volje brez pravnega učinka. Za takšen zaključek pa mora biti zloraba zastopniških pooblastil evidentna; huda malomarnost tretje osebe, zaradi katere za zlorabo zastopniških pooblastil ni vedela, ne zadostuje.[43] Če je za tretjo osebo očitno, da družba krši izplačilno prepoved, potem je s prekoračitvijo zastopniških pooblastil seznanjena in se zoper družbo ne more sklicevati na zaupanje v neomejenost zastopniških pooblastil; družbe torej v razmerju do tretje osebe

37 Tako je Višje sodišče v Ljubljani, ko je presojalo veljavnost poroštvene pogodbe, s katero je delniška družba prevzela poroštvo za obveznosti svojega delničarja (druge družbe, ki je bila v njenem kapitalu udeležena z 91,5-odstnotnim deležem), ugotovilo ničnost poroštvene pogodbe, v jedru pa poudarilo (sklep VSL, opr. št. I Cpg 323/2013): *„Ničnost zaveze o zavarovanju, ko gre za razmerje med obvladujočo in odvisno družbo, ima nujne posledice za prejemnika zavarovanja. Prejemnika zavarovanja je treba varovati. To pa ne velja takrat, kadar je kreditodajalec opustil skrbnost dobrega strokovnjaka in sprejel poroštvo, ki bi utegnilo predstavljati vračilo vložka po prvem odstavku 227. člena ZGD-1."* Enako je izreklo isto sodišče v podobnem primeru (sodba in sklep VSL, opr. št. I Cpg 1474/2012): *„Kreditodajalca kot prejemnika zavarovanja je treba načeloma varovati, razen, kadar ta ni v dobri veri in bi lahko vedel, da se z zavarovanjem, s katerim se zmanjšuje vrednost premoženja zastavitelja…omogoča izvedba prikritega izplačila delničarju po 3. odstavku 227. člena ZGD-1."*

38 *Flume, W.,* Allgemeiner Teil des bürgerlichen Recht – das Rechtsgeschäft; 4. izdaja, Springer Verlag, Berlin Heidelberg, 1992, stran 789.

39 Sodba v zadevi opr. št. II ZR 337/05, z dne 10. aprila 2006.

40 Sodba v zadevi opr. št. II ZR 113/94, z dne 13. novembra 1995.

41 Sodba v zadevi opr. št. II ZR 211/87, z dne 14. marca 1988.

42 Sodba v zadevi opr. št. II ZR 56/82, z dne 5. decembra 1983.

43 *Altmeppen, H.,* GmbHG Kommentar; 8. izdaja, Beck-Online, Beck, München, 2015, komentar § 30 GmbHG, r. št. 165; v avstrijskem pravu naj bi zadostovala huda malomarnost.

zagotovitev zavarovanja ne zavezuje.[44] Od tretje osebe se ne zahteva, da bi morala o teh okoliščinah aktivno poizvedovati.[45]

Če je zaradi zlorabe zastopniških pooblastil posel brez pravnega učinka, je mogoče šteti, da pogodba med družbo in tretjo osebo sploh ni bila sklenjena, tako da pravni posel zastopanega (torej družbe, katere korporacijski zastopnik je zlorabil svoja zastopniška pooblastila) ne zavezuje, razen če tretja oseba ni vedela in tudi ni bilo očitno, da dano zavarovanje lahko pomeni kršitev izplačilne prepovedi. Ne zahteva pa se, da bi morala tretja oseba ob sklenitvi pravnega posla, s katerim družba krši izplačilno prepoved, sodelovati z družbo z namenom oškodovanja upnikov družbe; zadostuje, da to ve ali je to očitno.[46] Slovenska sodna praksa take posle – pravne posle brez pravnega učinka – sicer obravnava kot primere ničnih pogodb.[47]

4. OMEJITVE ZARADI KONCERNSKIH POVEZAV

Upoštevati je treba tudi koncernske vidike. Vprašanje je, ali ta okoliščina zaradi posebnosti, ki veljajo v koncernih (predvsem dejstvo *koncernskega privilegija*), kakorkoli vpliva na zgoraj navedena pravila o ohranjanju kapitala.

V zvezi s koncerni je vsebinsko treba razlikovati dejanski (glej razdelek 1 v nadaljevanju) in pogodbeni koncern (glej razdelek 2 v nadaljevanju).

Z vidika pravil o ohranjanju kapitala so v dejanskem koncernu položaji domala enaki, kot če koncernske povezave ne bi bilo.

4.1. Dejanski koncern

Čeprav po splošnih pravilih o ohranjanju kapitala zahtevek za vračilo prepovedanih plačil nastane takoj, ima v razmerjih dejanskega koncerna obvladujoča družba možnost odložene izravnave prikrajšanja zaradi *„koncernskega privilegija"*. Prvi odstavek 545. člena ZGD-1 določa, da v koncernskih družbah, v katerih ni sklenjena pogodba o obvladovanju (tj. dejanski koncern), obvladujoča družba ne sme uporabiti svojega vpliva, da bi odvisno družbo pripravila do tega, da bi zase opravila škodljiv pravni posel ali da bi kaj storila ali opustila v svojo škodo, razen če obvladujoča družba prikrajšanje nadomesti. Prikrajšanje pa se lahko nadomesti tudi tako, da se najpozneje do konca poslovnega leta, v katerem je bila odvisna družba prikrajšana, ustanovi izravnalni zahtevek v korist odvisne družbe (drugi odstavek 545. člena ZGD-1).

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44 *Bayer, W.,* Münchener Kommentar zum Aktiengesetz; Beck, München, 2016, komentar § 57 AktG, r. št. 239.

45 *Altmeppen, H.,* GmbHG Kommentar; 8. izdaja, Beck-Online, Beck, München, 2015, komentar § 30 GmbHG, r. št. 166.

46 *Bayer, W.,* Münchener Kommentar zum Aktiengesetz; Beck, München, 2016, komentar § 57 AktG, r. št. 237.

47 Odločba VSRS, opr. št. II Ips 13/1999, z dne 23. septembra 1999. Tudi novejši judikati gredo v to smer (sodba VSRS, opr. št. II Ips 229/2014, z dne 2. julija 2015): *„V skladu z ustaljeno sodno prakso namreč pogodba, ki jo je »sklenila" poslovno nesposobna oseba, sploh ni nastala in je nična."*

Za posojila *up-stream* je uporabnost koncernskega privilegija ozka, upoštevajoč specifičnosti prikrajšanj, ki lahko nastanejo zaradi teh pravnih poslov. Ob konkretiziranem tveganju, da obvladujoča družba ne bo sposobna vrniti posojila, sta praktično edina učinkovita načina izravnave prikrajšanja ustrezno zavarovanje ali takojšnje vračilo posojila, če je bilo to že izplačano. To ne more biti ustanovitev izravnalnega zahtevka, saj ta v teh okoliščinah nima nobenega pravega smisla.[48]

Podobno velja za zavarovanja *up-stream*. Prikrajšanje v obliki verjetnosti uveljavitve zavarovanja je mogoče nadomestiti le z ustreznim zavarovanjem regresnega zahtevka. Teorija pa zastopa še stališče, da zavarovanje *up-stream* pomeni prikrajšanje *per se,* saj se odvisni družbi zmanjšujejo možnosti zavarovanja lastnih obveznosti; zlasti to velja pri stvarnih zavarovanjih. Izjema je, če med koncernskimi družbami obstaja sistem medsebojnih zavarovanj obveznosti do tretjih oseb, s čimer se povečuje kreditna sposobnost odvisne družbe. Nesporna so zavarovanja za posojila, ki jih najame obvladujoča družba, vendar finančna sredstva preusmeri na odvisno družbo, kar pa v konkretnem primeru, po posredovanih podatkih, naj ne bi bilo uresničeno.

Manevrski prostor za izravnalni zahtevek po drugem odstavku 545. člena ZGD-1 obstaja le za prikrajšanja zaradi obrestne mere, ki je nižja od tržno primerljive. Obrestno škodo je torej mogoče (začasno) dopustiti in jo kasneje nadomestiti na enega od siceršnjih načinov izravnave prikrajšanja. Enako velja za provizijo za zavarovanja terjatev tretjih oseb (na primer bank) do drugih koncernskih družb.

Kljub „pritiskom" obvladujoče družbe mora torej poslovodstvo odvisne družbe zavrniti posojilo, če je povezano s prevelikim kreditnim tveganjem, sicer krši svoje dolžnosti (prvi odstavek 263. člena ZGD-1) in tako odgovarja za škodo, ki nastane odvisni družbi, solidarno z obvladujočo družbo in njenimi zastopniki (547. člen ZGD-1). Preveriti mora boniteto obvladujoče družbe in sme posojilo odobriti le, če ni nobenega utemeljenega dvoma o sposobnosti za njegovo celotno vračilo. Paziti mora tudi, da posojilo ne ogroža likvidnosti odvisne družbe.

Dolžnosti poslovodstva odvisne družbe s tem še niso izčrpane. Tudi po tem, ko je posojilo že nakazano, mora sproti preverjati, ali se je kreditno tveganje spremenilo, in se na morebitno poslabšanje posojilojemalčeve bonitete odzvati z zahtevo za ustrezno zavarovanje posojila oziroma z odstopom od pogodbe in z zahtevo za takojšnje vračilo posojila.[49] V zvezi s tem je v posojilno pogodbo treba zapisati ustrezen dogovor o informacijskih upravičenjih in upravičenjih do zavarovanja oziroma do odstopa od pogodbe. V pogodbi naj bi bile čim natančneje definirane okoliščine in dogodki, od nastanka katerih je odvisna pravica do zavarovanja oziroma odstopa od pogodbe (na primer poslabšanja določenih bilančnih kazalnikov, izgube, ki presegajo določen znesek, zamujanje z izpolnitvami v razmerjih z drugimi kreditorji in podobno). Te pogodbene pravice pa odvisni družbi ne pomagajo prav veliko, če obstajajo razlogi za izpodbijanje pravnih dejanj v stečajnem postopku.

48 *Habersack. M.,* v: *Emmerich/Habersack:* Aktien- und GmbH-Konzernrecht; 6. izdaja, Beck, München, 2010, stran 583.

49 Glej sodbo, citirano v opombi 26, stran 10.

4.2. Pogodbeni koncern

V pogodbenem koncernu, katerega podlaga je pogodba o obvladovanju, ima obvladujoča družba pravico odvisni družbi dajati navodila za vodenje poslov. Lahko daje tudi navodila, ki so za odvisno družbo škodljiva (prvi odstavek 541. člena ZGD-1). Vendar pa mora obvladujoča družba prevzeti jamstvo za eksistenco odvisne družbe: zavezana je odvisni družbi poravnati vsako med trajanjem pogodbe nastalo letno izgubo (prvi odstavek 542. člena ZGD-1). Položaj zunanjih imetnikov deležev varuje pravica do primernega nadomestila oziroma odpravnine (552. in 553. člen ZGD-1). Preneseno na polje posojil in zavarovanj to pomeni, da lahko odvisna družba po navodilu obvladujoče družbe daje tudi škodljiva posojila *up-stream,* to je taka posojila, ki ne ustrezajo merilom, utemeljenim na pravilih o ohranjanju kapitala (preveč tvegana in neustrezno obrestovana posojila), obvladujoči družbi ali drugim koncernskim družbam.[50] Omejena je s pogojem, da bo obvladujoča družba sposobna poravnati izgubo,[51] sicer mora poslovodstvo odvisne družbe tudi v pogodbenem koncernu zavrniti izplačilo posojila.

V pogodbenem koncernu se torej dolžnost preizkusa, ali bo prejemnik sposoben vrniti posojilo, izraža kot preizkus verjetnosti poravnave letne izgube, če jo je mogoče pričakovati. Če je ta verjetnost potrjena, so posojila drugim koncernskim družbam dovoljena, čeprav je njihova vračljivost zaradi slabe bonitete prejemnika posojila dvomljiva. Enako velja, če je med obvladujočo in odvisno družbo sklenjena pogodba o prenosu dobička iz drugega odstavka 533. člena ZGD-1.

5. POVZETEK NORMATIVNIH IZHODIŠČ

Na podlagi vseh razloženih spoznanj teorije korporacijskega prava, ki so bila razložena v prejšnjih razdelkih, lahko ugotovimo, da so posojila med družbo in imetniki njenih deležev načeloma dopustna (in jih torej korporacijsko pravo ne prepoveduje *a priori*). Enako velja za zavarovanja (osebna ali stvarna), s katerimi družba zavaruje dolg imetnika deležev do tretje osebe.[52]

Vendar pa lahko hkrati tudi ugotovimo, da v nekaterih primerih taki posli utegnejo povzročiti uresničitev prepovedanega korporacijskega položaja, to je položaja prepovedanega vračila vložka. Če tak položaj nastopi, povzroči nastanek korporacijskega vrnitvenega zahtevka, lahko pa tudi ničnost pravnega posla, vključno z ničnostjo pravnega posla zagotovitve zavarovanja.

Slovensko korporacijsko pravo torej z določbami 227. (v delniškem pravu) oziroma 495. člena ZGD-1 (v pravu družb z omejeno odgovornostjo)

50 Sklenitev pogodbe o obvladovanju ali prenosu dobička suspendira splošna pravila o ohranjanju kapitala. Četrti odstavek 533. člena ZGD-1 določa, da se plačila družbe na podlagi pogodbe o obvladovanju ali pogodbe o prenosu dobička ne štejejo za kršitev 227. in 230. člena ZGD-1. To pravilo se smiselno uporablja tudi za družbe z omejeno odgovornostjo.

51 *Altmeppen, H.,* „Upstream-loans", Cash Pooling und Kapitalerhaltung nach neuem Recht; Zeitschrift für Wirtschaftsrecht, št. 2/2009, stran 55.

52 Ali pa tudi, kot v primeru, opisanem v opombi 35, če prevzame jamstvo za terjatev imetnika deležev do tretje osebe.

generalnopreventivno prepoveduje nastop položaja, v katerem bi prišlo do kršitve pravil o ohranjanju kapitala s prepovedanimi vračili vložka. Jasno pri tem je, da tak položaj ne more nastopiti sam od sebe, ampak ga utegnejo povzročiti različna (pravnoposlovna) ravnanja, ki jih družba opravi v razmerju do imetnikov svojih deležev (oziroma v njihovo korist). Med taka ravnanja spada, kot je bilo razloženo, tudi sklepanje kreditnih poslov v korist imetnikov deležev, predvsem pa tudi poslov, s katerimi družba v zavarovanje kredita, ki ga imetniku deležev podeli tretja oseba, prevzame svoje (osebno ali stvarno) jamstvo. Hkrati s tem je treba upoštevati, da sklepanje takih poslov družbi ni prepovedano samo po sebi, temveč le, kolikor ti posli privedejo do posledice, ki je korporacijsko prepovedana (učinek vračila vložka). Zato taki posli niso neveljavni sami po sebi, ampak le, če povzročijo nastanek prepovedane posledice, to je, da učinkujejo kot vračilo vložka: pravni posel zavarovanja, ki ga družba prevzame do banke (bodisi kot porok bodisi kot zastavitelj za kredit, ki ga je banka dala družbeniku), je torej lahko ničen, če gre pri tem za prepovedano vračilo vložka in če pri tem ni podana dobra vera banke. V to smer se nagiba slovenska sodna praksa.[53]

Pri zavarovanjih velja, da sta potrebna dva testa presoje, ki pokažeta, ali gre za nezakonito transakcijo. Najprej je treba pretehtati verjetnost uveljavitve zavarovanja, torej presoditi verjetnost, da bo kreditodajalec (banka) dejansko unovčil predmet zastave ali pa terjal izpolnitev od družbe kot poroka. Tak položaj bo v praksi skoraj zanesljivo uresničen tedaj, ko imetnik deležev, ki najema posojilo, sam niti ne more zagotoviti zavarovanja in nujno potrebuje zavarovanje s strani tretje osebe (bodisi hčerinske družbe ali družbe, v kateri je kapitalsko udeležen). Gre torej za položaje, ko je družba kreditojemalka v času najemanja kredita va slabem finančnem stanju (denimo plačilno nesposobna) in posojila brez finančne asistence v obliki zavarovanja tretjega ne more dobiti. To je pomemben kazalnik finančnega položaja, na katerega bi kreditodajalci morali biti še posebej pozorni, saj nakazuje na potencialno korporacijsko spornost zavarovanja.

Drugi test pa mora pokazati, da družba zaradi unovčitve zavarovanja ne bo mogla realizirati regresnega zahtevka zoper imetnika deležev, čigar obveznost je zavarovala, ker je ta neplačevit. Ker imetnik deležev ne more vrniti kredita, tudi ne more tudi poplačati regresne obveznosti do družbe, te pa pred tem tudi ni zavaroval. Če torej regresni zahtevek družbe zoper družbenika ni ustrezno zavarovan in obstaja konkretno tveganje glede obeh testov, potem je v korporacijskem smislu učinek posla, s katerim je družba prevzela zavarovanje, tak, da gre za prepovedano vračilo vložka po 227. oziroma 495. členu ZGD-1.

Pri tem je treba upoštevati, da ni ničen kreditni pravni posel, torej kavzalni pravni posel, na temelju katerega je banka zagotovila kredit imetniku deležev, temveč se morebitna ničnost nanaša na pravni posel, katerega predmet je zavarovanje, torej pogodba o poroštvu ali zastavna pogodba. Z zagotovitvijo zavarovanja je namreč podan povod za prepovedano vračilo vložka, ki ima pojavno obliko »zagotovitve zavarovanja«.

Banka – kreditodajalka pri transakciji z družbo sodeluje pri nezakonitem

53 Glej sodne odločbe, citirane v opombah 37 in 38.

prepovedanem vračilu vložka. Zato je pravni posel, ki ga sama sklene z družbo – to pa je sklenitev pogodbe o poroštvu ali zastavne pogodbe –, ničen, če ob tem ni podana njena dobrovernost, torej da je za potencialno nezakonitost v delovanju druge pogodbene stranke vedela. Banka je torej tista, ki naj bi bila v slabi veri glede vseh elementov in predpostavk, da ima posel ustanovitve zavarovanja, ki ga sklepa z družbo, učinek (družbi) prepovedanega vračila vložkov. Zato mora poznati razmerje med družbo in imetnikom deležev, vključno z bonitetnim stanjem slednjega kot posojilojemalca, ki je táko, da mu onemogoča, da bi najeti kredit mogel zavarovati sam (in je zato kot dajalec zavarovanja nastopila družba, imetnik deležev katere je).

Pri tem naj poudarimo, da je problem ugotavljanja dobro- oziroma slabovernosti banke vprašanje ugotavljanja standarda. Ta se ugotavlja v vsakem konkretnem primeru posebej, upoštevaje vsakokratni okvir dejanskih okoliščin, kot so podane. Dokazovanje dobrovernosti banke – torej da ni poznala korporacijskega razmerja med družbo in imetnikom deležev (posojilojemalcem) ter da ni poznala tveganj pri prevzetih posojilih ali danih zavarovanjih –, je, predvsem ob upoštevanju standardov bančnega poslovanja oziroma zahtev po ustrezni profesionalni skrbnosti bank pri odobravanju posojil, bržkone težavno. Vsekakor je to problem banke – kreditodajalke.

Tudi če je zavarovanje ustrezno, tveganje unovčitve zavarovanja pa sploh ni podano, mora biti zavarovanje, ki ga družba zagotavlja za obveznost imetnika njenih deležev, še ustrezno odplačno z njegove strani. Če je neodplačno, je v tem delu izvršeno prepovedano vračilo vložka.

Naj še enkrat opozorimo, da je pri delniških družbah vezano celotno premoženje družbe, ne le vezani kapital, saj so izplačila dopustna le iz bilančnega dobička. Zato je posel prepovedan tudi, če bi zavarovanje bremenilo proste (nevezane) sestavine kapitala, torej proste rezerve iz dobička. Tudi v takem primeru bi – v primeru delniške družbe kot dajalca zavarovanja – šlo za prepovedano vračilo vložka in s tem za nedovoljeno transakcijo. V pravu družb z omejeno odgovornostjo pa se prepoved nanaša na osnovni kapital in vezane rezerve, ki jih tvorijo kapitalske rezerve in zakonske rezerve (kot prva sestavina rezerv iz dobička). Transakcije torej ne smejo biti opravljene v breme vezanega kapitala.[54]

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54 Posledično to pomeni, da so v pravu družb z omejeno odgovornostjo dopustna zavarovanja (in posojila), ki so dana v breme nevezanega kapitala, torej v breme razpoložljivih prostih kapitalskih kategorij. V tem primeru se šteje, da interes upnikov ni prizadet, lahko pa bi bil prizadet interes družbenikov. Zato so prepovedana enostranska razpolaganja družbe v obliki dajanja posojil ali zagotavljanja zavarovanj, če bi ti posli pomenili korist zgolj za posameznega družbenika. Zato mora odločitev potrditi še skupščina.

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Sažetak

DOPUSTIVOST FINANCIJSKE ASISTENCIJE OVISNOG DRUŠTVA ZA OBVEZE VLADAJUĆEG DRUŠTVA

Autori u radu obrađuju dopustivost različitih oblika financijske asistencije između trgovačkog društva i njegovih članova, odnosno dioničara. Prikazano je pravno uređenje u slovenskom pravu društava te aktualna slovenska i njemačka sudska praksa. Temeljni je zaključak da zajmove društva članovima (*up-stream* zajmovi) treba prosuđivati sukladno prisilnim općim pravilima o očuvanju kapitala društva, a isto vrijedi i za davanje osiguranja za zajmove trećih osoba, primjerice banaka. Financijska asistencija će biti dopuštena samo ako ne predstavlja zabranjeni povrat uloga u društvo. Također se obrađuju posebnosti koje vrijede u slučajevima koncernsko povezanih društava.

Ključne riječi: *dioničko društvo; društvo s ograničenom odgovornošću; zajam; osiguranje; zabranjena financijska asistencija.*

Summary

PERMISSIBILITY OF FINANCIAL ASSISTANCE OF SUBSIDIARY FOR OBLIGATIONS OF PARENT COMPANY

This paper deals with the financial assistance between a company and its shareholders. In particular, it sheds light on the current regulations in Slovenian company law, while analysing the relevant Slovenian and German jurisprudence. The authors emphasize that upstream loans and upstream insurances for loans given by third party (e.g. banks), have to be monitored by virtue of strict capital maintenance rules. Financial assistance is allowed if not in contradiction with capital preservation. The authors also underline the regulation pertaining to groups of companies.

Keywords: *public limited company; private limited company; loan; insurance; prohibited financial assistance.*

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Zussamenfassung

DIE ZULÄSSIGKEIT DER FINANZIELLEN UNTERSTÜTZUNG AN DIE TOCHTERGESELLSCHAFT ANGESICHTS DER VERPFLICHTUNGEN DER MUTTERGESELLSCHAFT

In diesem Beitrag wird die Zulässigkeit unterschiedlicher Formen finanzieller Unterstützung bearbeitet, welche die Handelsgesellschaft ihren Mitgliedern, beziehungsweise Aktionären, gewährt. Die Rechtsregelung im slowenischen Gesellschaftsrecht sowie auch die aktuelle slowenische und deutsche Rechtsprechung werden im Beitrag dargestellt. Es lässt sich schließen, dass man die *Upstream*-Darlehen gemäß den aufgezwungenen allgemeinen Regeln über Kapitalaufbewahrung bewerten muss, was auch für Drittsicherungsgeber, beispielsweise Banken, gilt. Die finanzielle Unterstützung wird nur dann zugelassen, wenn es sich nicht um die verbotene Rückgabe der Einlage an die Gesellschaft handelt. Es werden auch die Besonderheiten bezüglich Konzerne bearbeitet.

Schlüsselwörter: *Aktiengesellschaft; Gesellschaft mit beschränkter Haftung; Darlehen; Sicherung; verbotene finanzielle Unterstützung.*

Riassunto

L'AMMISSIBILITÀ DELL'ASSISTENZA FINANZIARIA DELLA SOCIETÀ DIPENDENTE PER LE OBBLIGAZIONI DELLA SOCIETÀ DOMINANTE

Gli autori nel lavoro analizzano l'ammissibilità delle diverse forme di assistenza finanziaria tra la società commerciale ed i suoi soci, ovvero azionisti. Viene illustrata la disciplina giuridica nel diritto societario sloveno, come anche l'attuale giurisprudenza slovena e tedesca. La conclusione fondamentale cui si perviene è che i finanziamenti della società ai soci (*up-stream* finanziamenti) vanno valutati nel rispetto alle regole generali cogenti relative alla protezione del capitale della società; ciò vale anche per la prestazione di garanzia per i finanziamenti a soggetti terzi, quali le banche. L'assistenza finanziaria sarà ammessa soltanto allorquando non costituisca una restituzione vietata dell'investimento nella società. Si trattano altresì le peculiarità che valgono nei casi di società collegate in un gruppo.

Parole chiave: *società per azioni; società a responsabilità limitata; finanziamento; garanzia; assistenza finanziaria vietata.*

SOCIAL PROTECTION OF WORKERS IN NON-STANDARD FORMS OF EMPLOYMENT IN SLOVENIA

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Summary

The article deals with legal position of individuals who work in various non-standard forms of employment in Slovenia. The author analyses labour law protection and social position of workers, carrying out the work in forms of temporary work (fixed-term employment, temporary and occasional work of students and retired people), in employment relationships with more than two parties (temporary agency work), and also the position of false self-employed and economically dependent persons. It is evident that these forms of work are not precarious on their own, since Slovenian legislation provides the workers with rather proper protection during the period, in which they work, and moreover, these workers are also entitled to rights from social insurance schemes (in narrower of broader scope). The situation is different in cases of abuse of these forms of work and in cases of false self-employed persons and other disguised employees, when workers are only entitled to a limited scope of rights in spite of working in relationships with elements of a standard employment relationship. In order to prevent these cases, not only additional legislation solutions and labour market measures are needed, but labour inspection will also have to be increased and furthermore, the awareness of employers and the society regarding long-term impacts of use of such non-standard forms of work will have to be raised.

Keywords: *non-standard forms of work; atypical employment contracts; student work; temporary agency work; false self-employed; economically dependent persons.*

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1. ABOUT NON-STANDARD FORMS OF EMPLOYMENT IN GENERAL

In the past decades, factors such as globalization, greater competitiveness, fast technological development, the expansion of services and consequentially modified forms of work organization, have affected employment relationships. New forms of work have started to develop (e.g. a zero-hour contract) and more flexible ones have started to grow (e.g. fixed-term employment contract, part-time employment contract). Moreover, the employers have started using outsourcing, franchising, subcontracting, supply chains, concessions, temporary agency work and similar business models, which caused (or possibly were the purpose of) externalization of employment relationships (transfer of employment relationships outside the company) or the so called avoidance of labour law obligations. This can take two courses of action: either the employer enters into a business cooperation with his former, now self-employed, employees (and other individuals), even though these individuals are in fact in a dependent relationship, or the employer (a leading company) transfers his/her formal obligations towards his/her employee to contractual partners, but in fact maintains a considerable influence over the employment relationships of those employees.[1]

The so called non-standard forms of employment[2] have become a key characteristic of today's labour markets both in developed and underdeveloped countries. They represent different forms of employment, which deviate from the standard one – a dependent relationship between a worker and an employer, concluded for an indefinite term and for full-time. Considering their differences from standard employment forms, they can be divided into four groups – temporary employment (not for indefinite duration), part-time employments and on-call employments (not full-time), triangular employment relationships (not a direct relationship between the worker and the employer), and disguised employment relationships or economically dependent relationships (not an employment relationship).[3]

The spread of non-standard forms of employment affects the workers, the employers and also the labour market as a whole. Workers are often faced with precariousness – employment uncertainty and very poor working conditions. They receive low payment, work on unfavourable working hours, have few possibilities for internal training, are faced with the increased risk in relation to safety and health at work, they are also not included in worker representations and often not even in social

1 See Reconsidering the notion of Employer in the Era of Fissured Workplace: Should Labour Law Responsibilities Exceed the Boundary of the Legal Entity, JILPT Report No. 15, The Japan Institute for Labour Policy and Training, Tokio, 2016, p. 2.

2 Different expressions are used in this regard (atypical form of employment, non-standard forms of work etc.). The use of the term non-standard forms of employment in this article covers atypical employment contracts as well as other non-standard forms of work, in which individuals carry out work for a contracting party for payment.

3 Classification that follows from ILO study, Non-standard employment around the world: Understanding challenges, shaping prospects, International Labour Office, Geneva, 2016, pp. 7-8 (hereinafter: ILO, Non-standard…2016).

insurance schemes or are not entitled to all of the rights in those systems.[4] Although the definitions of non-standard and precarious[5] forms of employment cannot be considered equal, studies show that non-standard forms of employment are more often related to precariousness than standard forms.[6] This is especially true for the abuse of atypical forms of employment or for the various forms of disguised employment relationships,[7] in which workers end up because they have no other employment option. Even the employers, who choose non-standard forms of employment due to their flexibility and expenses benefits eventually figure out that these are only short-term advantages, while in the long run this means that the employer will lose specialized knowledge, creativity and loyalty, all of which can affect productivity and competitiveness of the employer. From the labour market perspective, the problem of non-standard forms of employment is the increased segmentation on the market and employment uncertainty, which mostly has an impact on the younger population, affects their credit capacity and consequentially their ability to become financially independent from their parents and to create their own family.[8]

The International Labour Organization[9] therefore warns of the need for appropriate national legislation solutions in relation to the minimum rights of workers in non-standard forms of employment, prevention of abuses in these forms of employment, especially in disguised employment relationships as well as a proper sharing of obligations in triangular forms of employment. It also highlights the importance of trade union organizations in these forms of employment, which defend their interests before the employers, and the validity of collective agreements also for workers in those forms of employment. In order to grant social security rights to the workers in non-standard forms of employment, countries should accommodate social insurance schemes and enable all workers an easier transition between employments with proper social policies.

The European Union, which in general encourages the development of new forms of employment, innovative business models and self-employment, simultaneously alerts of the necessity to prevent their abuse. In its resolution adopted in 2010,[10]

4 These are all risks, of which ILO warns in relation to non-standard forms of work in its study, as well as other studies. See *infra*, the next footnote.

5 About precariousness see Rogers, G. and J., Precarious jobs in labour market regulation: The growth of atypical employment in Western Europe, International Institute of Labour Studies, Free University of Brussels, Brussels, 1989, p. 3; Koukiadaki, A., Katsaroumpas, I., Temporary contracts, precarious employment, employees' fundamental rights and EU employment law, study for the Committee on Petitions of European Parliament, 2017, pp. 20-22; ILO, Non-standard…, 2016, cit., p. 18; McKay, S. et al., 2012, p. 82ff; see also ILO, Meeting the challenge of precarious work, International Journal of Labour Research, 2013, Vol. 5, Issue 1, International Labour Office, Geneva.

6 ILO, Non-standard…, 2016, cit., p. XXIII.

7 More about this see Eurofound, Exploring the fraudulent contracting of work in the European Union, Publications Office of the European Union, Luxembourg, 2016.

8 ILO, Non-standard…, 2016, cit., p. XXIV.

9 See ILO, Non-standard…, 2016, cit., pp. XXIV, XV.

10 European Parliament resolution from 6 July 2010 on atypical contracts, secured professional paths, flexicurity and new forms of social dialogue, OJ C 351 E/39, 2. 2011.

the European Parliament condemned the replacement of regular employments with atypical forms of contracts, the latter leading to poorer and uncertain work conditions,[11] and it also stressed the need to ensure basic rights to all workers regardless of their employment status and pointed out the issue of false self-employment.[12] The European Commission issued a Communication in 2012,[13] in which it invited the Member States to consider ensuring proper contractual regulations to fight labour market segmentation in their labour reforms, in which regard it also emphasized the need to stop excessive use of non-standard forms of employment and abuse of false self-employment.[14] The European Pillar of Social Rights signed in 2017[15] follows this direction and it applies to three areas (equal possibilities and labour market access, fair work conditions and social protection and inclusion) and includes 20 basic principles. It follows from the 5th principle that workers have the right to a fair and equal treatment with respect to working conditions, access to social security and training regardless of the form and duration of employment; it specifies that the transition to indefinite employment is encouraged (first paragraph). Fourth paragraph of the same principle states that the employment relationships, which lead to precarious work conditions, should be prevented and it prohibits the abuse of non-standard forms of employment contracts. As for the 12th principle, workers and self-employed individuals in comparable conditions must have the right to proper social protection regardless of the form and duration of their employment relationship.

2. NON-STANDARD FORMS OF EMPLOYMENT IN SLOVENIA

The Slovenian legislation tolerates and regulates different forms of paid work for an employer (contracting party).[16] Apart from the employment relationship (carrying out the work based on an employment contract) there are also other relationships, which are based on civil law or commercial contracts. In practice, employers cover most of their work needs by employing employees, but also often include individuals,

11 They include part-time work, temporary work, occasional work, fixed-term work, work from home and on distance and part-time work which lasts 20 hours a week at most. See point A of the resolution.

12 See points 36, 6 in 26.

13 Commission Communication "Towards a job rich recovery", Brussels, 18. 4. 2012, COM (2012) 173 final.

14 In this regard see also Opinion of the European Economic and Social Committee on 'Threats and obstacles to the single market' (own-initiative opinion), OJ C 161, 6. 6. 2013.

15 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Establishing a European Pillar of Social Rights, Brussels, 26. 4. 2017 COM (2017) 250 final; also the working document, appendix to the communication, Brussels, 26. 4. 2017 SWD (2017) 201 final.
European Pillar of Social Rights was announced on 17 November 2017 in Göteborg, at Social Summit for Fair Jobs and Growth by European Parliament, Council and European Commission. See <https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_sl>(20.06.2018).

16 See Senčur Peček, D., Zakonite oblike opravljanja dela, Podjetje in delo, 6-7/2013, Ljubljana, pp. 921-943.

employed by temporary work agencies, and students (who work through student referrals) into the work process or transfer the work to self-employed individuals (who work based on a service agreement or business cooperation contracts).

According to the Statistical Office of the Republic of Slovenia[17] in 2017 there were 974.000 economically active individuals in Slovenia, most of whom were employees – 771.000 (individuals in an employment relationship),[18] 14.000 were temporary agency workers, 44.000 were working based on student referrals, 14.000 were working based on other forms of employment (for example based on a service agreement, occasional and temporary service agreement for retired people etc.), 115.000 were self-employed (among whom 12,5% or 14.000 were working without employees and for a single client).

The data on the development of widely spread forms of employment paints an even clearer picture. They show that in the past ten years, while the percentage of employees (people with an employment contract) has decreased,[19] the percentage of self-employed individuals and temporary agency workers has increased.[20] The structure of employment contracts is also changing, since the percentage of part-time employment contracts is increasing and new employment contracts are mostly concluded for fixed terms.[21]

Thus, Slovenia also witnesses an increasing growth of atypical employment contracts and an even stronger growth of other forms of work, which replace the typical employment relationships. Even though the employers and their trade unions often state that the Slovenian labour market is stiff and demand more flexible labour legislation, the research shows that this is not true (anymore).[22] Quite the opposite – as the president of the largest trade union confederation claims, the "flexibility has gone wild in the past few years" and as a consequence thereof, more and more people have to work in precarious working conditions.[23]

The problem of precarization of employment in Slovenia is not only highlighted

17 See Statistical office of the Republic of Slovenia, Active and inactive population, 3rd quarter 2017, available at <http://www.stat.si/StatWeb/News/Index/7092>(20.06.2018).

18 Regular employment workers prevail (indefinite duration, full-time), 16,9% of workers carried out work based on a fixed-term employment contract, 10,2% based on a part-time employment contract.

19 In the period from 2008 to 2016 it dropped by 7,6%. See Statistical office of the Republic of Slovenia, Database SI-STAT 2017, available at <http://pxweb.stat.si/pxweb/Dialog/statfile2.asp> (20.06.2018).

20 See Ministry of Labour, Family Social Affairs and Equal Opportunities, For Decent Work, 2016, p. 6.

21 loc.cit.

22 Kanjuo Mrčela, A., Ignjatović, M., Od prožnosti do prekarnosti dela: stopnjevanje negativnih sprememb na začetku 21. stoletja, Teorija in praksa, 13/2015, p. 361.

23 Statement of Lidija Jerkič, the president of The Association of Free Trade Unions in Slovenia, the largest trade union in the private sector; consultation on precariousness. See STA, Nova normalnost na slovenskem trgu dela, 18.4.2018, available at <https://cekin.si/clanek/izobrazevanje_in_zaposlitev/to-so-novi-trendi-dela-ki-se-jim-ne-bomo-mogli-izogniti-prekarnost-delo-samostojni-podjetnik-fleksibilnost-zaposlitev-delovno-razmerje.html> (20.06.2018).

by the trade unions[24] and nongovernmental organizations,[25] but also by the labour law theory, which has been dealing with the problem of growth of non-standard forms of employment, their abuses and possible solutions for years.[26] Some of them have been taken into account in the labour market reform that took place in 2013, and which, among other things, also aimed to decrease the segmentation of labour market.[27] In the new Employment Relationship Act (hereinafter: ZDR-1),[28] the amended Labour Market Regulation Act (hereinafter: ZUTD)[29] and in other regulations, amendments considering fixed-term employment, agency and student employment applied, and a new category of economically dependent persons was introduced. As the analysis of a special commission for following the impacts of the legislation reform[30] has shown, the direction of the reform was right and it has already begun to create the first impacts. However, we cannot expect that the reform will yield results immediately, which is why new challenges have started to arise. The Ministry of Labour, Family and Social Affairs has announced its willingness to deal with these challenges in its document *For decent work* issued in 2016.[31] This also demonstrates the fact, that non-standard forms of employment and the precariousness related thereto are a growing problem of the Slovenian labour market.

The following part of the article presents the most common forms of non-standard forms of employment and the risks they represent for the social position of workers in Slovenia. It also analyses the already implemented measures and proposed solutions that are yet to be accepted.

3. TEMPORARY WORK

3.1. General facts

The requirement of greater flexibility, desired by the employers, often applies to the possibility of the simplest, fastest and cheapest adjustment of the number of workers to the work process needs. Considering the protection in regard to the

24 Also 'Sindikat prekarcev'. See http://www.sindikat-prekarcev.si/

25 As Movement for decent work and welfare society (see https://socialna-druzba.si/about-us/), Delavska svetovalnica (see http://www.delavskasvetovalnica.si/) and others.

26 For example, see Kresal, B., Fleksibilne ali prekarne oblike zaposlitve, Delavci in delodajalci, 2-3/2011, pp. 169-183; Kresal, B., Primerljivost delovnopravnega varstva v različnih oblikah zaposlitve, Delavci in delodajalci, 2-3/2012, pp. 245-262; Senčur Peček, D., Zakonite …, cit., pp. 921-943.

27 See Senčur Peček, D., Spremembe in novosti, ki jih prinaša ZDR-1, Podjetje in delo, 3-4/2013, 39, pp. 414-445; Kresal, B., Pravna vprašanja nove ureditve zaposlitve za določen čas in agencijskega dela, Delavci in delodajalci, 2-3/2013, pp. 169-193.

28 Employment Relationship Act, Official Gazette of the Republic of Slovenia, no. 21/2013 with amendments (ZDR-1).

29 Labour Market Regulation Act, Official Gazette of the Republic of Slovenia, no. 80/2010 with amendments (ZUTD).

30 See Second report of the Working group for following the impacts of the legislation reform, 21. 5. 2015.

31 See Ministry of Labour, Family and Social Affairs, "Za dostojno delo", March 2016.

termination of employment contract which labour law guarantees the employees in standard employment relationships, such flexibility is only possible in an atypical, fixed-term employment contract. Furthermore, in different legal systems, employers can also opt for different forms of occasional and temporary work (the so called casual work), which represent short-term work with no employment contract.[32] In Slovenia, these forms of employment mostly include student work – temporary and occasional work of secondary school students and university students, and less commonly temporary and occasional work of retired persons. Employers who are in need of short-term workers sometimes conclude service agreements or agreements for providing copyrighted work, according to which the contractor is obliged to produce a certain result[33] and which are often a cover-up for disguised employment relationships.[34]

3.2. Fixed-term employment contract

A fixed-term employment contract has been a common form of non-standard employment in Slovenia for a long time.[35] It differs from a typical employment contract in the fact that its duration is decided in advance – either specifically (by indicating a deadline or a date) or by description, which is why it is terminated upon the lapse of time or after the reasons for which it was concluded cease to exist.

Since the employment contract establishes an employment relationship, the employee, who concludes a fixed-term employment contract is also guaranteed labour law protection. The Slovenian legislation complies with Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (Directive 1999/70/ES),[36] which is based on the non-discrimination principle. The purpose of the Directive is to ensure that the employees, who are employed for a fixed-term, cannot be treated less favourably than the ones who work based on employment contracts of indefinite duration, except

32 See ILO, Non-standard…, 2016, cit., p. 7.

33 The subject of contract on ordering a copyrighted work is the creation of a copyrighted work in accordance with Article 5 of Copyright and Related Rights Act (Official Gazette of the Republic of Slovenia, no. 16/2007 with amendments, ZASP – UPB-3), the subject of a service agreement is the completion of a certain job such as creation or repair of things, some physical or intellectual work (Article 619 of the Obligations Code, Official Gazette of the Republic of Slovenia, no. 97/07 with amendments, OZ UPB-1), by which the contractor does the work independently and guarantees success (see Kresal Šoltes, K., Podjemna pogodba (pogodba o delu) in presoja elementov delovnega razmerja, Gospodarski subjekti na trgu na pragu EU, Inštitut za gospodarsko pravo, Maribor, 2003, p. 409). None of the civil law contracts can be the legal basis for a more permanent, dependent work which contains elements of an employment relationship (see art.13(2) ZDR-1).

34 See *infra*, chapter 6.

35 In 2006, Slovenia was fourth among EU Member States regarding the percentage of fixed-term employment contracts (17,3%). See Employment in Europe 2007, Office for Official Publications of the European Communities, Luxemburg, pp. 284-315.

36 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (Directive 1999/70/ES), OJ L 175, 10. 7. 1999.

where unequal treatment is justified due to objective reasons. Payment, working hours and other working conditions have to be the same as those granted to the employees with an employment contract of indefinite duration.

Insurance of equal level of safety and health at work is specifically covered by Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to improve health and safety in the workplace of temporary workers.[37] Slovenian ZDR-1 also imposes upon the employer (who must ensure safe and healthy work to all workers) a special obligation to inform the professional worker or the professional department, carrying out tasks in the field of safety and health at work, of employing employees for a fixed-term (thus ensuring that they are included in all activities in regard to safety and health at work).[38] The reason for such regulation is in the discoveries of different lines of international research suggesting that fixed-term workers (and also temporary agency workers and other workers in non-standard forms of work) were often less included in the measures in relation to safe work and other forms of training.[39]

Directive 1999/70/ES emphasizes that the employees, employed for fixed-terms, have to be taken into account when calculating the threshold, which the national legislation determines as relevant for creating representative bodies of employees. The Slovenian legislation does not contain any special provisions in this regard, but the Employees Participation in Management Act (hereinafter: ZSDU)[40] mentions "employees" when stating the requirements of establishing a works council, which includes all employees, both those who concluded a typical employment contract as well as those in an atypical employment relationship. The same applies to trade union organizations, participation in a strike and other collective rights.

The Slovenian legislation also does not exclude fixed-term employees from regulations applying to the rights of employees (even those, based on EU directives), for example, the protection of employees in the case of transfer of undertaking.[41]

Working conditions during fixed-term employment are therefore in general not less favourable (or should not be) solely due to the fact, that this is a non-standard form of employment. The same also applies to the inclusion of those employees in social insurance schemes. An employee, who is only employed for a fixed term, is, similarly as the employee who works permanently for the employer, also included in all four social insurance schemes in Slovenia – pension and disability, health, unemployment and parental security insurance, and is entitled to the rights, deriving from these insurances upon fulfilling the conditions.

37 Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to improve health and safety in the workplace of temporary workers, OJ L 206, 29. 7. 1991.

38 See art. 45(2) ZDR-1.

39 See ILO, Non-standard…, 2016, cit., pp. 200 and 207. Even though Directive 1999/70/ES specifically imposes upon the employers an obligation to provide these employees with as wide access as possible to training and improvement, professional growth and mobility, the Slovenian ZDR-1 contains no special provisions in this regard.

40 Employees Participation in Management Act, Official Gazette of the Republic of Slovenia, no. 42/07 with amendments (ZSDU).

41 See Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 082, 22. 3. 2001.

The fundamental difference between a fixed-term employment contract and an employment contract of indefinite duration becomes apparent in regard to the termination of employment contract. The Slovenian labour legislation (which is harmonized with the ILO Convention no. 158 on Termination of Employment at the Initiative of the Employer) protects the employee, employed for an indefinite period of time from the termination of his/her employment contract by forcing the employer to prove one of the termination reasons prescribed by law and follow a number of procedural demands (give the employee an opportunity for defence and upon his request notify the employees' representatives) as well as by granting some categories of employees special protection from termination.[42] On the other hand, a fixed-term contract is, according to law, terminated upon the expiration of the term for which it was concluded. This occurs without the employer having to do anything, regardless of the circumstances on employee's part (even if he/she is ill, on sickness leave, pregnant, etc.).[43] The employee therefore faces the possibility of losing employment for the entire term of the fixed-term employment contract, is insecure about finding a new employment after termination (with the same or other employer, on employment contract of an indefinite duration or again for a fixed-term). In the case of shorter duration of an employment contract, the employee must also face the issue of fulfilling the conditions for obtaining the right to unemployment cash benefit (and also other rights from social insurance schemes). The amended ZUTD has also introduced a more appropriate regulation regarding this issue, since it prescribes that the person obtaining unemployment cash benefits must have been insured at least 9 months prior to the entitlement to such benefits (in the case of an unemployed person, younger than 30 it even only requires 6 months of prior insurance in the past 24 months).[44]

Both Directive 1999/70/ES and the Slovenian ZDR-1 derive from the proposition, that a fixed-term employment contract is rather an exception, while an employment contract of indefinite duration is a rule.[45] In accordance with the Directive, ZDR-1 encourages the transition of employees in a standard form of employment by imposing an obligation upon the employer to inform fixed-term employees of a vacant job position for an indefinite term.[46] An easier transition from the fixed-term employment to the one of indefinite duration is also enabled by the possibility, that a fixed-term worker can be employed without the employer having to post a public announcement

42 In case of regular termination, the employee is also entitled to a period of notice and in some cases also to severance payment.

43 Since this is not a termination, but a lapse of time, the employee is not entitled to a notice period, but ZDR-1 grants an employee whose fixed-term contract expires (in some cases) the right to severance payment. This way, the position of an employee whose employment contract expires is somehow more similar to the position of an employee with an employment contract of indefinite duration, and severance payment also makes conclusion of fixed-term contracts less attractive to the employers from the perspective of expenses.

44 Under provisions of Parental Protection and Family Benefits Act (Official Gazette of the Republic of Slovenia, no. 26/14 with amendments, ZSDP-1) to obtain the right to parental compensation, one must have been insured twelve months the past three years. See Article 41 ZSDP-1.

45 See Art. 12(1) ZDR-1.

46 See Art. 25(4) ZDR-1.

of vacancy for this position.[47]

The practice often displays a different trend. Despite seeking employees for a permanent period of time, employers do not offer employment contracts of indefinite duration to employees but rather conclude (also several times in a row) fixed-term contracts. Even though according to Directive 1999/70/EC, the Slovenian labour law legislation has introduced measures for preventing such chaining of fixed-term employment contracts fifteen years ago,[48] the data on the widely spread fixed-term employment contracts in the past show, that the employers have managed to bypass legal limitations.[49] Scholars have been warning of this issue for a long time[50] and the legislator has also provided stricter conditions for concluding fixed-term contracts in ZDR-1 with the intention of preventing the abuses of those contracts (the reason for concluding a fixed-term contract must be specified in the contract itself;[51] time limitation is further specified[52]) and has tried to discourage employers from concluding fixed-term contracts by raising some of the expenses related to them[53] and encourage the conclusion of contracts of indefinite duration by eliminating some formal requirements for terminating such contracts and by implementing a more employer-friendly regulation for probationary periods.

47 This is an exception to otherwise compulsory public advertisement. See fifth indent of Article 26(1) ZDR-1.

48 An employment contract could be concluded only upon the existence of one of the legally specified reasons; it was only possible to conclude one or more fixed-term employment contracts which could sum up to two years at the most; in case of the conclusion of a fixed-term employment contract in breach of legal provisions, the employee could demand acknowledgement that the fixed-term employment contract was transformed into employment contract of indefinite duration. See provisions 52 to 54 ZDR (Official Gazette of the Republic of Slovenia, no. 42/2002 with amendments). There is also extensive case law regarding the claims with respect to the existence of employment contracts of indefinite duration.

49 Different ways to bypass legal provisions were for example the conclusion of consecutive fixed-term employment contracts for the same work position with different workers, at two formally different but actually the same work positions and with rotation of workers between an employer and an agency for providing work to users.

50 See Kresal, B., Zaposlovanje za določen čas v luči domače sodne prakse in primerjalno-pravne ureditve, Delavci in delodajalci, 2-3/2008, volume VIII, pp. 215-245.

51 If such a reason is not stated in the contract, it is considered that an employment contract of indefinite duration was concluded. See judgments of the Slovenian Supreme Court, no. VIII Ips 39/2016 and VIII Ips 87/2017.

52 An employer must not conclude one or several fixed-term employment contracts (with the same or a different worker!) for the same job, whose continuous duration would be longer than two years, except in extreme (legally specified) cases. It is also specifically stated that the time limitation for carrying out the work for a fixed-term at user's premise includes the time for carrying out work through an agency. According to the legal provision, the same work means work at the work position and the same kind of work, which is actually carried out based on a certain fixed-term employment contract. See Article 55 ZDR-1. All provisions state that if the employer needs workers permanently, an employment contract of indefinite duration must be concluded.

53 Implementation of severance payment after termination of a fixed-term employment contract and raising contributions for compulsory insurance for unemployment in case a fixed-term employment contract is concluded.

Most recent data show that the number of fixed-term employment contracts in Slovenia is not increasing.[54] Nevertheless, we cannot conclude that the practice of fixed-term employment contracts in cases where workers are needed for a permanent period of time, is abolished. As a matter of fact, more than 70% of all new employment contracts in Slovenia are still fixed-term.[55] It is also not surprising that the number of fixed-term employment contracts is the highest among the age group between 15 and 24 years, since this is the young population, who normally seeks new employment.[56] Young people and those who lost their employment are therefore exposed to the risk of being forced to accept fixed-term employment, even if they are needed for a longer period of time.[57]

The employment contract in itself, if concluded for a range of justifiable reasons and for the time period of the existence of such reasons, is not problematic. What is problematic is the chaining of fixed-term contracts in cases where workers are needed permanently and where concluding an employment contract of indefinite duration should have been the employer's first choice.[58] Such employment relationships can be considered as precarious forms of employment. Their characteristics are consistent uncertainty with respect to one's future employment and the necessity of constantly having to prove oneself, which causes high stress and far-reaching effects upon one's health. Furthermore, employees work even if they are ill despite having an option to take sick leave (presenteeism),[59] in order to impress their employers and keep their job. Employers also often decide the future of the employment relationship (whether they will conclude a new fixed-term contract and with which employees) based on employees' personal circumstances (maternity leave, disability, age), which means that this form of employment is very much discrimination-related.[60]

3.3. Temporary and occasional work of students and retired persons

Temporary and occasional work of university and secondary school students

54 See Eurostat, Statistics Explained, Employment statistics, August 2015, table 5, available at <http://ec.europa.eu/eurostat/statistics-explained/index.php/Employment_statistics> (20.06.2018)

55 In 2015 there were supposedly 72,7%. See second report of the Working group for following the impacts of the legislation reform, 21. 5. 2015, p. 17.

56 According to Eurostat data from 2015 the percentage was 69,1% and Slovenia supposedly stood in second place in the EU. See Eurofound: New forms of employment, Publications Office of the European Union, Luxembourg, 2015.

57 Considering the fact that after the implementation of legal amendments, a fixed-term employment contract was more expensive for the employer than an employment contract of indefinite duration, it is safe to assume that the key motive for these contracts is still the flexibility they grant the employers.

58 It is disguising the true nature of the relationship.

59 Regarding the connection between employment insecurity and presenteeism see Eurofound, Report on Psychosocial risks in the workplace in Slovenia, 2012, p. 13 and Kanjuo Mrčela, A., Ignjatović, M., Od prožnosti…, cit., p. 372.

60 See also Kresal, B. v Bečan, I. et al., Zakon o delovnih razmerjih s komentarjem, Ius Software, GV Založba, Ljubljana, 2016, p. 294.

(the so called student work) is a well established form of work in Slovenia,[61] while temporary and occasional work of retired persons has not been regulated until the 2013 amendment of ZUTD.

What both forms of work have in common, is that they can only be carried out by a certain group of people (persons with secondary school and the ones having university student status[62] and retirement status in the Republic of Slovenia[63]) and they are both based on a civil law contract. Students carry out work based on a special referral, issued by an intermediary (normally student service)[64] and retired persons based on the contract for temporary or occasional work as a special contractual relationship between an employer and a beneficiary.[65] The employer can easily include a student or a retired person in the work process for an agreed period.

Neither student work nor occasional and temporary work carried out by retired persons is an employment relationship. Nonetheless, students and retired people who carry out work on this basis, are granted limited labour law protection.[66] Namely, provisions of ZDR-1 regarding the prohibition of discrimination, sexual and other harassment, equal treatment of men and women, limitations with respect to the working hours, breaks and rests as well as civil liability,[67] and provisions regarding safety and health at work still apply. There is also a provision prescribing the minimum wage per hour, which in 2018 amounted to 4,53 EUR gross for retired persons and 4,73 EUR gross for students. Possible disputes between the employer and secondary school/university students or retired persons in relation to such work fall under the jurisdiction of labour law courts.[68] When carrying out temporary or occasional work, students and retired persons are entitled to the same working conditions as the employees (working hours, safety and health at work, etc.), as well as to minimum payment. However, in

61 Currently covered by the Employment and Insurance Against Unemployment Act (Official Gazette of the Republic of Slovenia, no. 107/2006, ZZZPB – UPB-1). It is a regulation that was cancelled and replaced by ZUTD, except for provisions from Articles 5 to 8, which regulate student work. These remain valid until the implementation of another special law covering student work.

62 Also, participants in adult education (who study according to the curricula of grammar, vocational, secondary and higher vocational education) younger than 26.

63 It does not include people who exercised the right to partial old-age or preliminary pension (and are still included in compulsory insurance for part-time).

64 The activity of providing work (which includes providing temporary and occasional work to secondary and university students) can be carried out by organizations, which meet requested staff, organizational and other requirements and obtain concession from the Ministry of Labour, Family, Social Affairs and Equal Opportunities.

65 ZUTD allows that the contract with a retired person is concluded for the provision of work, which has elements of an employment relationship (when normally an employment contract should be concluded). This is an allowed exception to the general rule, deriving from Article 13 ZDR-1. This Article stipulates that work containing elements of an employment relationship cannot be carried out based on civil law contracts, unless otherwise specified by a special law.

66 This is specifically allowed by Art. 211(7) ZDR-1 as well as by Art. 27a. ZUTD.

67 For secondary and university students, provisions of ZDR-1 on the special protection of workers, who have not yet reach the age of 18 also apply.

68 See Art. 5 of the Labour and Social Courts Act (Official Gazette of the Republic of Slovenia, no. 2/2004, ZDSS-1) and Art. 27a(3) ZUTD.

general their position is not entirely equal to the one of employees.[69]

The purpose of temporary and occasional work is to enable students and retired people to earn extra money and the employer to easily fill his/her short-term need for workers. In order to prevent abuse of this form of work, which would substitute employment contracts,[70] ZUTD has imposed limitations on retirement work both for retired persons and for the employer. A retired person can only carry out work in the amount of 60 hours per calendar month[71] and his/her income cannot exceed the sum of 6.775,36 EUR in a calendar year. Limitations with respect to the working hours also depend on the number of employees – the more employees an employer has, the greater the number of hours of occasional and temporary work can be carried out by an individual employee (from 60 hours per month if the employer has no employees to 1.050 if the employer has more than 100 employed workers).[72]

Due to the stated limitations as well as the expenses required for this form of work,[73] retirement work has not been widely used in practice, which points to the fact it is indeed used in line with its purpose – when employers wish to fill temporary job positions.

The situation is entirely different with respect to student work. Despite the fact that this form of work is defined as occasional and temporary, no regulation prescribes its range neither for the student nor for the employer. Considering the fact that until 2015 this extremely flexible form of work has also been most favourable in terms of costs/expenses (due to low contributions), it is clear why student work in Slovenia is so common.[74] It has in fact become a form of regular, permanent employment for systemized work positions and has started to replace employment relationships. Even in these cases, when students are employed permanently and are in a dependent

69 Employees offer the employer their work permanently and exclusively and thus ensure their own existence; so labour law has to fully protect their position (by protection payment, the right to compensation in case of justified absences from work, protection from termination, etc.). For students and retired people carrying out occasional and temporary work is not their main activity. The legal position of students and retired people is therefore regulated by other regulations (not in the framework/scope of labour law).

70 Especially since based on a contract for temporary or occasional work of retired people it is allowed to carry out work, for which normally employment contracts should be concluded.

71 This limitation applies regardless of whether he/she works for only one employer or several employers (in this case the sum of the hours of work for all employers cannot exceed 60 hours). Furthermore, unused hours cannot be transferred into the next calendar month.

72 See Art. 27b (4, 5, 6 and 7) ZUTD.

73 The employer must pay the tax authority a special contribution in the amount of 25% (of the gross payment) as well as calculate and pay at his own burden the contributions for special cases of insurance under the Pension and Disability Insurance Act (Official Gazette of the Republic of Slovenia, no. 109/06 with amendments, ZPIZ-2) in the amount of 8,85% (of the gross payment) and a lump sum for insurance for injury at work or work illness (in the year 2018 this costed 4,86 EUR) and at the burden of the retired person he must also pay a contribution for health insurance under the Health Care and Health Insurance Act (Official Gazette of the Republic of Slovenia, no. 72/06 with amendments, ZZVZZ) in the amount of 6,36% (of his/her payment).

74 While in 2000, student work only accounted for 0,9% of economically active persons in Slovenia, in 2010 this percentage was 3,8%. See Kanjuo Mrčela, A., Ignjatović, M., Od prožnosti…, cit., p. 369.

relationship (similarly as employees), because they work based on student referrals, they are only granted limited labour law protection (they are not entitled to annual leave, reimbursement of expenses related to work, paid absence, etc.). This is a form of disguised employment relationship[75] and can be categorized as a precarious form of work.[76]

Student work should undoubtedly undergo a thorough reform,[77] by taking into account the regulation of occasional and temporary work carried out by retired people. Albeit there have been certain attempts in this direction, a reform has not yet happened. Employers have temporarily lost interest in this form of work[78] due to their obligation to include student workers in social insurance schemes[79] and, consequently due to the increase of expenses for this form of work.[80]

Under new legislation, apart from the rights entitled to for work injuries and illness insurance, students are also entitled to a proportional pension insurance period. This is calculated based on the payment they received for student work, so for every 60% of average monthly salary in the Republic of Slovenia[81] that the student earns, they are granted one month of insurance period (but not more than 12 months for a single calendar year).

The latest data show that the number of student workers is slowly increasing again.[82] Even though student work is burdened by the payment of contributions, it is still

75 Case law also includes cases when students, who formally carried out work based on student referrals (as student work), managed to prove the existence of elements of an employment relationship and, thus also recognizing their employee status. The first case, where the Supreme Court of the Republic of Slovenia has made such a decision (in relation to students who worked as stewardesses), was the judgment in case no. VIII Ips 129/2006 from 18. 12. 2007; the later judgments referring to student work are, for example, judgments VIII Ips 266/209 from 5.9.2011; VIII Ips 82/2013 from 14. 10. 2013, VIII Ips 54/2014 from 13. 5. 2014; VIII Ips 145/2014 from 17. 2. 2015; VIII Ips 16/2015 from 8.6.2015.

76 More on this, see *infra*, chapter 6.

77 Slovenia has already been warned by the European Commission about the need to reform student and contractual work as factors of segmentation of the labour market, which do not offer workers proper social insurance schemes and labour rights.

78 In 2014, student work accounted for 2,6% of economically active persons. See Kanjuo Mrčela, A., Ignjatović, M., Od prožnosti, cit., p. 369.

79 See the Act Amending the Fiscal Balance Act (Official Gazette of the Republic of Slovenia, no. 95/14, ZUJF-C).

80 Based on the amount on the referral, the employer is obliged to pay contributions for pension and disability insurance in the amount of 8,85%, a contribution for health insurance in the amount of 6,36%, contribution for work injuries and work illness in the amount of 0.53% and also the concession duty in the amount of 16,00% and an extra concession duty of 2,00% (money, raised on this account is used for scholarships, student housing and student organizations). The contribution for pension and disability insurance is also covered by students (in the amount of 15,50% of the amount stated in the referral). If, for instance, the amount stated in the referral is 100,00 EUR, the employer's expense amounts to 133,74 EUR and the amount paid to the student to 84,50 EUR. See also Scortegagna Kavčnik N., Plačilo in drugi pravni vidiki študentskega dela, Delavci in delodajalci, 2-3/2017, pp. 243-262.

81 In the year 2017 it equaled 1.626,95 EUR gross, which means that 60% of that amount was 979,17 EUR.

82 See UMAR, Report on development 2017, p. 33, available at <http://www.umar.gov.si/

one of the most flexible and cheapest forms of employment. Substituting employment contracts with student referrals therefore remains an issue on the Slovenian labour law market, which is why revealing disguised employment relationships remains an important task of the labour inspectorate. [83]

4. PART-TIME WORK

4.1. General facts

The employer's demand for flexibility also applies to the adaption of working hours to the work process needs. The demand for including the work of workers only when is needed and for the needed time is often in breach of rules of labour law in regard to working time, which protect employees (mostly those in a standard employment relationship). This is also one of the reasons for the expansion of non-standard forms of employment and for the occurance some of them. These are different types of contracts, by which the employer is not obliged to offer a certain amount of work to the other party, since the amount of work depends on the actual need, whereas the other party is obliged to address the need of the employer and accept the offered work (the so called zero hour contracts in English law or on-call contracts in some other legal systems).[84]

Even in countries, where these special contractual forms have not yet been implemented (Slovenia being among them), there seems to be a practice of including short-term and part-time workers (even for very short hours) in the work process, whereby their working time is adjusted to the needs of the employer. What all these forms of work have in common is a short (often minimum) number of hours, which brings a low income; and also a variation in the number of hours and unpredictable working hours, all of which has a negative effect on both professional and personal life. This comes especially to the foreground with lower paid workers, who are not members of trade unions, which further decreases their power to exert influence over their working hours.[85]

The data on the prevalence of on-call work in the EU for the year 2004[86] are also interesting. While on average this percentage has amounted to 2,5% of total workers, it was the highest in Netherlands[87] and in Slovenia (more than 5%). It can be assumed that this percentage in Slovenia can be attributed to working under a service agreement, but also under a self-employed (false) contractor agreement as well as to

fileadmin/user_upload/razvoj_slovenije/2017/POR_2017.pdf>, also Kanjuo Mrčela, A., Ignjatović, M., p. 370.

83 See *infra*, chapter 6.

84 See Tičar, L., Vpliv digitalizacije na pojav novih oblik dela, Delavci in delodajalci, 2-3/2016, p. 243ff. See also ILO, Non-standard…, 2016, pp. 8, 29.

85 ILO, Non-standard…, 2016, cit., p. 227. See also Eurofound, Sixth European Working Conditions Survey – Overview report, Publications Office of the European Union, Luxembourg, 2016, p. 56.

86 See ILO, Non-standard…, 2016, p. 85.

87 Where the percentage of part-time workers is also the highest.

student work. It may also be assumed (considering the substitution of employment with these forms of work) that the percentage is much higher today.

4.2. Part-time employment contract

For years, the Slovenian labour law legislation has regulated two forms of part-time employment contracts among atypical employment contracts.

The first form includes contracts, where special laws determine the right of an employee to work part-time due to disability, health reasons or parenthood. Apart from being entitled to remuneration (which depends on the employee's actual obligations) and work breaks (which is regulated differently in the 2nd paragraph of Article 154 ZDR-1),[88] according to these special regulations a part-time worker has equal rights and obligations under this employment relationship as an employee working full-time.[89] Normally, an employment contract in these cases is concluded for half-time and the employer is forbidden to overload the employee, much less instruct him to work overtime,[90] since this would be in contrast with the purpose according to which the employee is entitled to part-time employment. Special laws – the Pension and Disability Insurance Act (ZPIZ-2), the Health Care and Health Insurance Act (ZZVZZ), and the Parental Protection and Family Benefits Act (ZSDP-1) - cover the rights of employees for the remaining time (to full-time), hence, while the employee is not working (partial pension, partial sickness cash benefit, payment of contributions). In this form of part-time employment, which is quite common in Slovenia, the employees are properly protected both from the labour law and from the social security perspective.

The other form of employment relationship is a classical part-time employment,[91] which occurs when the employer announces the need for part-time work and the employee accepts such employment, either because such form of work suits him or because he/she is unable to obtain full-time employment. Entering into a part-time employment contract can therefore either be his/her preference or merely an emergency exit. Special regulations of the position of part-time workers are covered in ZDR-1 in line with the ILO Part time Work Convention no. 175 (hereinafter: ILO Convention no. 175)[92] and Council Directive 97/81/EC of 15 December 1997, concerning the Framework Agreement on part-time work, concluded by UNICE, CEEP and the ETUC; Annex – Framework Agreement on part-time work (hereinafter Directive 97/81/EC).[93]

Similarly as in fixed-term employment contracts, a transition to a standard form of full-time employment is also encouraged in part-time employment contracts, which ZDR-1 ensures by obliging the employer to inform part-time employees of full-time

88 It is granted to them in proportional duration, but only if they work at least four hours a day.
89 See Article 67 ZDR-1.
90 See the last indent of Art. 146(2) ZDR-1.
91 The article only further explains this form of part-time employment.
92 Which was also ratified by Slovenia. See Official Gazette of the Republic of Slovenia – International Contracts, no. 4/2001.
93 OJ L 14, 20. 1. 1998, pp. 9 – 14.

job vacancies and grants them the possibility to apply for these job positions without having to publicly announce those vacancies.[94]

It thus follows from Directive 97/81/EC, that part-time employees cannot be treated less favourably in regard to employment conditions than full-time employees merely due to the fact that they work part-time. A different treatment is only permitted when justified by objective reasons. The principle of proportionality should be used where appropriate. Moreover, ILO Convention no. 175 also emphasizes the equal treatment principle regarding the right to organize and represent employees with respect to professional safety and ZDR-1 stipulates that a part-time employee has equal rights and obligations as a full-time employee but can enforce them proportionally with the term for which the employment relationship was entered into, unless otherwise specified by the law (Art. 65(3) ZDR-1). The principle of proportionality mostly applies to wages and compensation for wages, but also to annual leave payment and severance pay at retirement.[95] A different regulation of some of the rights and obligations of a part-time employee is found in the provisions:

- which regulate the rights to which the principle of proportionality does not apply and grant full rights to part-time workers (e.g. the right to participation in management, annual leave)[96]
- which state that some rights are not granted to the employees working less than a certain number of hours per day (e.g. breaks during work)[97] or are not granted to part-time employees at all (e.g. breastfeeding breaks) [98]
- which enable consideration of the nature of part-time work in regard to certain working conditions (prohibition of overtime, if this is not yet agreed in the employment contract,[99] the possibility of prolonging internship).[100]

Due to implementing the equal treatment principle and proportionality principle, the employer in Slovenia must reimburse the employee's expenses for his/her travel to and from work and if he/she works at least four hours a day, the employer must also ensure a paid break during employee's working hours and reimburse the meal expenses. This financial aspect could be the reason why employers mostly refrain from hiring part-time employees. The percentage of part-time employment in Slovenia is therefore constantly below the EU average.[101]

94 See Art. 25(4) and seventh indent of Art. 26(1) ZDR-1.

95 See provisions of Art. 131(5) and Art. 132f(4) ZDR-1.

96 See Art. 65(4 and 5) ZDR-1. The principle of proportionality cannot be used with some other rights such as the right to safety and health at work, the right to education, the right to the reimbursement of expenses for transfer to work and home and others. Only the principle of equal treatment can be applied to those rights, which means that these rights must also be granted to part-time workers. See Senčur Peček, D., Pogodba o zaposlitvi s krajšim delovnim časom, Podjetje in delo, 6/7/2005, p. 1678.

97 See Art. 154(2) ZDR-1, which states that the worker is entitled to a (proportional) break during working hours only if he/she works at least four hours a day.

98 See Article 188 ZDR-1.

99 See Art. 65(6) ZDR-1.

100 See Art. 122(2) ZDR-1.

101 See Eurofound, the European Company Survey 2009: Part-time work in Europe, Luxembourg:

However, in the past years, the situation in regard to this non-standard form of work has begun to change. Different strands of research[102] show that most European countries witness an increase in employing part-time workers, especially on less paid job positions (for example, in shops or cleaning industry). In Slovenia, this number is still below the European average (which is approximately 20% of all workers), but has been increasing faster than in the EU in the past few years.[103] It also needs to be pointed out that Slovenia also has the highest percentage of these kinds of employments among new EU Member States.

Some employers in Slovenia (larger retail chains) state that the reason for concluding more and more part-time employment contracts lies mostly in the fact that they enable adjustment to the needs of the employer.[104] It has been noted that in practice the working hours of part-time workers often differ, hence, they often also work over the contractually agreed working hours (or sometimes even full-time).[105] Labour inspectors also warn of these kinds of occurrences[106] which have also been the subject of recent case law.[107] If employees conclude a part-time employment contract, but permanently carry out work in addition to the employee's agreed working hours, this represents a misuse of the part-time employment institute.[108] In such cases the true nature of the contract is disguised with the purpose of depriving the employees of the rights deriving from full-time employment contracts.

Part-time employment contracts concluded for very short hours (only a few hours a week), based on which employees work full-time (or even overtime) and the employers pay them the extra hours in cash in net amount, are especially problematic.[109]

Publications Office of the European Union, p. 12.

102 Loc. cit., ILO, Non-standard…, 2016, p. 78, Eurostat, Statistics Explained, Employment statistics, 2015. See also Eurofound, Upgrading or polarisation? Long-term and global shifts in the employment structure: European Jobs Monitor 2015, Publications Office of the European Union, Luxembourg, 2015, p. 26.

103 According to ILO data, 2016, from 12% in 2004 to 17% in 2014, according to Eurostat data from 5,8% in 2003 to 10% in 2014.

104 See Answers to the questions of editorial board of the show Tarča, TV Slovenija, 26. 11. 2014, available at: <http://www.lidl.si/sl/6262.htm> (20.06.2018).

105 An additional issue is the non-payment for these hours or the question of the amount of payment. If the employer does not pay the extra hours to part-time employees who worked over the agreed working time (which is pointed out by employees on online forums), this means that these employees work full-time for the payment proportional to their reduced working hours. If this holds true, it is also clear why employers benefit from employing part-time workers.

106 See Labour Inspectorate of the Republic of Slovenia, Public notice on 26. 2. 2013 (Employers also order the employees to work over the agreed working time); see also Labour Inspectorate of the Republic of Slovenia, Annual Report 2016, page 64, where it is stated that 42 breaches have been noted when the employer ordered a part-time worker to work over the agreed working time, despite the fact that this possibility was not foreseen in the employment contract.

107 For example, see judgment of the Supreme Court of the Republic of Slovenia, no. X Ips 41/2013 on 18. 12. 2014 and judgment of the Higher Labour and Social Court no. Pdp 598/2014 on 17. 7. 2014.

108 The fact that this represents an abuse of the situation also follows from the judgment of the Supreme Court of the Republic of Slovenia, no. X Ips 41/2013 on 18. 12. 2014.

109 These cases are referred to in the Labour Inspectorate of the Republic of Slovenia, Annual Report 2016 (p. 64), and also in the latest Annual Report for 2017 (pp. 60 and 61).

A part-time employee is only protected by a proportional minimum wage,[110] entitled to a proportional payment for annual leave and to proportional retirement severance pay. The employee is especially deprived of his/her rights specified in social insurance schemes. The level of cash benefits deriving from these schemes (sickness cash benefit in case of sick leave, parental leave etc.) depends on the basis for the payment of contributions (which is minimal in the case of part-time employment for only a few hours per week). According to ZPIZ-2 part-time employees are also entitled to a proportional insurance period[111] and their pension base is calculated separately.[112] A part-time employee who wishes to avoid the risk of an extremely low pension, can cover the difference to full-time by voluntarily entering into the compulsory disability and pension insurance,[113] but is in this case obliged to cover the contributions of employer as the insured person himself.[114]

Similarly as fixed-term employment, part-time employment (according to the Slovenian regulation) is not problematic in itself, especially if this form of employment is chosen by the employee himself. The situation is different if employees conclude a part-time employment contract because they have no other choice (this is mostly the case with young people),[115] especially when this contract is false and the employees in fact work full-time. Since this represents a disguise of the true nature of the relationship, the employees should have the possibility to prove the existence of a full-time employment contract and the corresponding rights before the court. Possible labour inspection measures in such cases should also be regulated by law.[116]

5. EMPLOYMENT RELATIONSHIPS WITH MORE PARTIES

5.1. General facts

Non-standard forms of employment are also a consequence of a phenomenon called a vertical disintegration of companies,[117] fragmentation of work[118] or

110 See Article 2 of the Minimum Wage Act (Official Gazette of the Republic of Slovenia, no. 13/2010 with amendments).

111 See Art. 130(3) ZPIZ-2.

112 See Art. 33 ZPIZ-2.

113 See Art. 25(3) ZPIZ-2.

114 In year 2018 the contributions from a minimum wage amount to (60% of the last known average wage in Slovenia) 237.70 EUR. See Art. 149 and Art. 410(7) ZPIZ-2.

115 The percentage of part-time employments is up to five times higher among younger people than the percentage of these employments among all employees. They resemble fixed-term employments, which is why scholars already suggest that this we are facing the so called ghettoization of young people in these flexible forms of employment. See Kanjuo Mrčela, A., Ignjatović, M., Od prožnosti…, cit., p. 367.

116 Labour inspectors warn about this and suggest certain solutions. See Labour Inspectorate of the Republic of Slovenia, Annual Report 2017, pp. 59 and 60.

117 See Collins, H., Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Law, Oxford Journal of Legal Studies, 3/1990, pp. 353-380.

118 See Fudge, J., Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation, Osgoode Hall Law Journal, 4/2006, p. 216.

fissurization.[119] Employers (contracting entities), instead of employing employees themselves, outsource certain jobs based on various contracts and different contractual models (outsourcing, subcontracting, franchising, temporary agency work) to contractual partners and their employees, but to a certain degree maintain influence over these employees. By doing so, the contracting entities reduce the expenses and simultaneously avoid employer's duties, since workers are (formally) employed by contracting partners. Given the fact that these partners often represent smaller, less stable subjects functioning under high competition conditions and under actual pressure of the leading companies (contracting entities), the position of employees of the contracting partners, is often worse than the position of employees employed by the contracting entities.[120]

With these so called "triangular" (or multi-party) relationships, where more than one subject is present next to the official employer and which influence the working conditions of employees, it is important, whether law imposes obligations upon the employees only towards the official employer (the one who concludes an employment contract with the employee) or also (or instead of towards him) towards these subjects (for example, the contracting entity, the main contractor, the user of temporary agency workers). The problem of appropriate protection of employees in triangular relationships is also pointed out by ILO in its Recommendation no. 189 (2006) and the preparatory material, which emphasizes that the cases where the identity of the true employer is disguised (so that the one listed as the employer is in fact only an intermediary and the true employer is relieved of any responsibilities towards employees) are a form of disguised employment relationships.[121]

Slovenia regulates only one type of a triangular relationship, namely, temporary agency work. Similarly as in other EU countries, the valid regulation is harmonized with Directive 2008/2014/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (hereinafter: Directive 2008/104/EC),[122] the purpose of which is, among other things, to ensure protection for workers employed by these agencies by applying equal treatment principle.[123]

There are also other relationships in the practice of Slovenian labour market, which include several parties (outsourcing, subcontracting, franchising etc.), but are (with a few exceptions)[124] not specifically covered by labour law legislation with

119 We owe the term "fissured working place" (divergent, broken work places) to professor David Weil, who defined this term in his work The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It, Harvard University Press, 2014.

120 See ibid., p. 9; see Fudge, J., The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection, and Davidov G., Langille B (Eds), Boundaries and Frontiers of Labour Law, Oxford and Portland, Oregon, 2006, p. 297.

121 See Report V (1), 2006, International Labour Conference, 95th Session, 2006, p. 12.

122 OJ L 327, 5.12.2008, pp. 9–14.

123 See Article 2, which states the goals of the directive and Article 5, which applies to the equal treatment principle.

124 An exception is the Health and Safety at Work Act (Official Gazette of the Republic of Slovenia, no. 43/2011, ZVZD-1), which pursuant to ILO Convention no. 167 concerning Safety and Health at Work (1988) does not only define an employer as the person, who has an employment contract with the worker, but also with other subjects, who in fact organize work and should

respect to the definition (division) of employer's obligations. Slovenian scholars, who have been warning of the issue of triangular relationships and disguised employment relationships for a while,[125] have recently been intensively dealing with the question of distributing employers' duties as a possibility for a more accurate protection of employees.[126]

5.2. Temporary agency work

The purpose of temporary agency work is that the worker concludes an employment relationship with an agency for providing temporary work services,[127] and carries out work temporarily in time periods needed to complete certain assignments required by the user, while being supervised and receiving his/her instructions.[128]

This form of employment represents a possibility for employers to obtain workers quickly and easily (which is especially important if the workload increases), but at the same time also to dismiss them easily. For workers, this form of employment is normally only an emergency exit and an opportunity for potential regular employment with one of the users. The fact remains, however, that the legal position of employees employed by agencies is less favourable than the position of employees with other employers, even if we only consider the uncertainty of employment and the constant changing of work environment. This especially applies to cases where users treat temporary agency workers less favourably than their own employees and in cases of breaches of their rights by the agency.[129]

The purpose of the legislation amendment in Slovenia in 2013 and 2014 was therefore to ensure the stability of agencies,[130] to properly regulate labour law position

ensure safe working conditions – apart from the user in case of temporary agency workers also the contractor in case of subcontractors' workers. See first indent of the Art. 3 ZVZD-1 and judgement of the Supreme Court of the Republic of Slovenia no. VS RS II Ips 210/2010 from 25. 7. 2013.

125 Senčur Peček, D., Delavci - zunanji izvajalci?, Delavci in delodajalci, 2-3/2012, pp. 223-244. See for examples Article 2, which applies to goals of directive and Article 5, which applies to equal treatment principle.

126 A plenary sesson on the most important labour law congress "Days of labour law and social security" was devoted to this topic on 31. 5. and 1. 6. 2018 in Portorož. See http://www.planetgv.si/dnevi-delovnega-prava-socialne-varnosti. See also Senčur Peček, D., Franšizing in delovna razmerja, Delavci in delodajalci, 2-3/2018, pp. 233-252 and Kresal Šoltes, K., Razmejitev obveznosti med agencijo in podjetjem uporabnikom ter načelo enakega obravnavanja – je lahko model tudi za druge nestandardne oblike dela?, Delavci in delodajalci, 2-3/2017, pp. 199-220.

127 ZDR-1 uses the term "employer, who carries out the activity of providing work to other users" (see Article 59 and the following). Article uses the term "agency".

128 See Schlachter, M., Transnational Temporary Agency Work: How Much Equality Does the Equal Treatment Principle Provide?, The International Journal of Comparative Labour Law and Industrial Relations, 2/2012, p. 179. See also Article 1 of the Directive 2008/104/EC on Temporary Agency Work, OJ L 327, 5. 12. 2008.

129 This is shown by studies, carried out within the framework of ILO (see Meeting the challenge of precarious work, International Journal of Labour Research, 2013, Vol 5, Issue 1, International Labour Office, Geneva, p. 17), and also cases in Slovenia.

130 The activity of providing work to other employers (users) can only be carried out by those

of workers in agencies and to improve their position towards the users (also by imposing greater responsibilities upon users) as well as to prevent using temporary agency work as a replacement for employment contracts.[131]

Due to the inappropriate practice of agencies, which only employed workers for fixed terms,[132] ZDR-1 now clearly states that an employment contract between the agency and the worker is normally concluded indefinitely. Fixed-term employment is only allowed, if the user[133] demonstrates any of the general reasons for a fixed-term employment.[134] Even if the agency concludes a fixed-term employment contract with the worker and the need for workers at user's premises ceases to exist before the contract expires, the employment contract cannot be terminated on these grounds and the worker is entitled to a wage compensation in the amount of 80% of his average wage for the past three months.

ZDR-1 considers the fact, that with temporary agency work a portion of employer's powers (instructions, supervision) is transferred to the user, when dividing the obligations and responsibilities of the agency and the user towards the worker.[135] Article 62 therefore states that the user is obliged to respect the provisions on working hours, rests and breaks and ensure safety and health at work to agency workers;[136] he is also subsidiarily responsible for payment and other benefits arising out of the employment relationship during the time period for which the worker was carrying out work for him.[137] Ensuring education, improvement and training is primarily an

natural and legal persons (agencies) who meet certain requirements obtain a license to carry out this activity and are entered into a special register, kept by the Ministry of Labour, Family, Social Affairs and Equal Possibilities. With 2014 amendments to ZUTD extra conditions were implemented – a physical or a legal person can carry out the activity of providing work only if they were not punished for a breach of labour law provisions in the past two years and if they did not have any unsettled obligations towards workers and were not on the list of tax non-payers. Further conditions are an obligation to register the activity of providing work as a main activity, a submission of a bank guarantee in the amount of 30.000,00 EUR; for a legal and physical person with a seat in another EU Member State, EEA or at Swiss Confederation there is also an obligation of establishing a branch. An agency and the user must not be connected companies.

131 For this purpose, there is a legal maximum percentage of temporary agency workers at user's premises (25% with some exceptions). See Art. 59(3) ZDR-1.

132 Normally for the time period of assignment to the user.

133 Even though the employment contract is concluded between the agency and the worker, the admissibility of a fixed-term contract is related to the existence of reasons on the part of the user. With such (improper) regulation, the difference between agency employment and the assignment of worker to the user is actually disappearing, given the fact that the duration of employment depends upon the user's need for work.

134 See Art. 60(2). The user is also responsible for the adequacy and completion of data on the existence of conditions for the conclusion of fixed-term employment contracts (Art. 62(5).

135 The law follows the Directive. See Končar, P., Ureditev zagotavljanja začasnega dela in vpliv Direktive 2008/104/ES, Delavci in delodajalci, 2-3/2012, pp. 143-159.

136 According to Article 45 ZDR-1 the employer is also obliged to notify the professional worker or the department, who handle the tasks regarding safety and health at work, of the beginning of temporary agency work.

137 Primarily, the payment of wages is the responsibility of the agency, which considers the data forwarded to it by the user (and is also responsible for their correctness). If the agency does

obligation of the agency, but during the time when the worker works for the user, this is subject to discussion between the agency and the user.[138]

ZDR-1 also emphasizes equal treatment of agency workers, who must be granted the same working and employment conditions as the workers of the user. According to the 3rd paragraph of Article 63 this also applies to the benefits, which the user provides to his workers (for example, the use of cafeteria).

Similarly as in other non-standard forms of employment, ZDR-1 also encourages transition to regular employment, within the framework of temporary agency work by imposing the obligation upon the user to notify temporary agency workers about vacant job positions. Additionally, ZUTD specifically obliges the agency to allow the assigned worker to conclude an employment relationship with the user after completing the work and without imposing any limitations and forbids the agency to request payment from the worker for concluding an employment contract with the user.[139]

This is also in accordance with Directive 2008/104/EC which is based on a temporary nature of the assignment provided to the user[140] and one of its goals is encouraging temporary agency work as a step towards regular employment with the user.[141] This goal is accomplished if (in the case of user's permanent need for work) the temporary agency worker is hired directly by the user after completing his assignment. This does not happen if the worker is consecutively (or permanently) assigned to the same user. The Directive therefore compels the Member States to implement appropriate measures in order to prevent consecutive assignments, whose purpose is to circumvent the provisions of the Directive.[142]

Several European countries thus determine the longest allowed period of assignment or a maximum number of consecutive assignments.[143] Slovenia was also among those countries, since ZDR[144] stipulated a (one year) time limitation for carrying out work for the user. New ZDR-1 does state that the work carried out through an agency is temporary,[145] but does not include the exact time limitation of

not pay the worker his wage or other benefits, the worker can demand them from the user. See provision in Article 62 ZDR-1.

138 On the other hand, Slovenian legislation does not cover the possibility of temporary agency workers to participate in management at the user. The general regulation which enables the worker to participate in the management of their employer, also applies to temporary agency workers, who can participate in management of the agency. But in practice they rarely use this possibility.

139 See Art. 165(1 and 3).

140 See Article 1; and also definitions of terms in Article 3, 1b, c and d.

141 See Art. 6(3).

142 See Art. 5(5) of the Directive.

143 See Voss, E. et al., The Role of Temporary Agency Work and Labour Market Transitions in Europe: Institutional frameworks, empirical evidence, good practice and the impact of social dialogue Final Report for the Joint Eurociett / UNI Europa Project: "Temporary Agency Work and Transitions in the Labour Market" Hamburg, 2013, pp. 35, 36.

144 Employment Relationship Act, Official Gazette of the Republic of Slovenia, no. 42/2002 with amendments (ZDR), valid before ZDR-1. See Article 59.

145 See Article 61 para. 1.

such work anymore, which is also highlighted by some scholars.[146]

Even though in the time of validity of ZDR it was still possible to avoid the time limitation (for instance, by means of rotation of the worker between two agencies, the agency and the user), the path towards employment relationships, in which the worker is formally employed by the agency, but carries out work for the user for a longer period (permanently), is now easier. In such relationships the user has all the benefits of an employment relationship (regular, competent workers), but has no employer obligations.[147] Considering the principle of the primacy of facts[148] such relationship that does not have the characteristics of a temporary assignment despite being manifested as one, and should be considered as an employment relationship between the worker and the user.[149]

5.3. Business cooperation contract (outsourcing, subcontracting)

Unlike temporary work, where the agency assigns the workers to the contracting party and who then carry out work under the supervision of that contracting party, carrying out work and providing services to clients means the contractor uses his/her own workers and equipment to carry out the work or the service for his client.[150] These workers carry out work under the instructions and supervision of their employer – the contractor. In this case it is clear who the employer is even though the workers carry out work at the client's premises.

There are cases in practice, where the relationship only seems to be based on providing services (for example, a business cooperation contract), although what is carried out is the assignment of the workers to the contractor (although legal requirements for temporary agency work are not fulfilled). These sometimes include short-term contractual relationships of smaller scope, but also cases of forwarding an important part of the business to "outside contractors". The most famous case, revealed by the media in Slovenia, was the case of a Slovenian company which forwarded a reloading job to 40 subcontractors, who employed more than 500 workers. These workers, who all had employment contracts with those subcontractors had actually carried out work exclusively for the contracting party (client). The subcontractor

146 See Končar, P., Ureditev…, cit., p. 157; Kresal, B., Pravna …, cit., p. 187; Senčur Peček, D., Zakonite…, cit., pp. 939-940.

147 Except those, which ZDR-1 and ZUTD impose upon him as the user.
Despite the generally adopted equal treatment of temporary agency workers and workers of the user, temporary agency workers are not in equal position as the workers of the user in practice, mostly in regard to the security of employment, education, trade union participation, etc. In case of permanent assignment to a single user, they are also not given the possibility of transition to the regular employment with this user.

148 See *infra*, chapter 6.

149 These kinds of solutions can be found in other legal systems. See ILO, Meeting…, 2013, cit., p. 18.

150 See Report V (1), 2006, International Labour Conference, 95 th Session, 2006, pp. 42, 43; available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf> (20.06.2018). See also Schlachter, M., Transnational…, cit., p. 179; Končar, P., Ureditev…, cit., p. 152.

ordered them to work at the premises of the contracting party, hence, the workers had no further contact with him, since both the work and the working hours were determined by the contracting party. The pay check was actually given to them by the subcontractor, but instead of getting reimbursements for food expenses during work they got coupons for food in the cafeteria at the premises of the contracting party.[151]

The Slovenian legislator has reacted to these and similar cases of disguising the true nature of the relationship by defining the term "the activity of providing work of workers (temporary agency work)" and other terms in Article 163 ZUTD more specifically (where it is emphasized that temporary agency work means that "the worker carries out work under the supervision and in line with the instructions of the contracting party or mostly uses the equipment, which is part of the work process of the contracting party"), which clearly separated this activity from providing services for the contracting party.[152] It also raised penalties with respect to the breaches of obligations applying to temporary agency work. If the employer (the manifested contractor) carries out the activity of assignment of workers without having a licence to carry out this activity (which is demanded for agencies), he/she will be charged with an offence and will have to pay a 10.000,00 to 50.000,00 EUR penalty, whereas the contracting party, who accepts the assigned worker in such cases will have to pay a 10.000,00 to 30.000,00 EUR penalty.[153]

Nonetheless, the question of the legal status of workers, who concluded an employment contract with the (apparent) contractor, but are actually included in the work process of the (apparent) client, in accordance with his instructions and under the client supervision, remains open. Obviously, the contracting party wishes to avoid having an employer status in these cases, which is why he/she gives an impression that the real employer is the contractor. When defining the term 'employer', the principle of the primacy of facts should be considered, similarly as when defining the terms 'worker' and 'employment relationship'.[154] Since the courts consider a person to be a worker regardless of the name of the relationship the parties chose, they should also consider that the employer is the subject, which manifests the characteristics of an employer.[155] The one who organizes the work process, gives the instructions to workers and supervises them, and gains profit from their work should also bear obligations and responsibilities with respect to those workers. In this regard, an amendment to the

151 The data is taken from the report of Labour Inspectorate of the Republic of Slovenia from 2. 8. 2011, published on website Nevidni delavci sveta, available at <http://www.njetwork.org/Prijava-Republiskemu-inspektoriatu> (20.06.2018).

152 See Draft law on amendments to ZUTD, EVA 2013-2611-0073, from 2. 10. 2013.

153 In 2016 labour inspectors have recorded 112 breaches of ZUTD, applying to providing employment to users, of which 49 applied to the fact that the user accepted the assigned workers from an employer who did not have a license to carry out this activity, followed by 51 breaches where the employer was providing the employment activity to users without obtaining a proper permission and other breaches. The number of indicated breaches in 2014 does not essentially deviate from the findings in 2013, when 110 breaches were recorded in this area. See also Labour Inspectorate of the Republic of Slovenia, Annual Report 2016, p. 64.

154 See *infra*, chapter 6.

155 See in this regard also Kresal, B., Primerljivost…, cit., p. 258.

existing legislation is definitely needed.[156]

6. FALSE SELF-EMPLOYED (AND OTHER DISGUISED EMPLOYMENT RELATIONSHIPS) AND ECONOMICALLY DEPENDENT PERSONS

6.1. General facts

Outsourcing, subcontracting and other contractual relationships, in which the employers outsource certain jobs to outside contractors also account for the increase in the percentage of self-employed workers, who do not employ any workers (but carry out the work themselves). These include not only people, who carry out work on the market at their own risk and independently, but also the ones who are only officially self-employed, but in fact work in a relationship which has the elements of an employment relationship. We can claim that the latter are false self-employed workers, who are in fact employees (a disguised employment relationship).[157] The other group are the real self-employed, who are in an economically dependent relationship with the client (the so called economically dependent persons).[158]

False self-employment and disguised employment relationships are a general problem, about which the scholars in Slovenia have been warning for a while.[159] Additionally, such relationships are also revealed by labour inspectors,[160] and their existence is also evident in extensive case law in relation to determining the existence of employment relationships.[161] The situation is different with economically dependent persons. The Slovenian ZDR-1 does define economically dependent persons and grants them a limited scope of protection, but it seems that this institute has not yet come into existence in practice.[162]

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156 Both in cases of false business cooperation contracts as well as in cases of permanently assigned workers (see *supra*, chapter 5.1.).

157 A disguised employment relationship occurs when the relationship between a worker and an employer is manifested differently as it really is, with the purpose of elimination or decreasing the protection granted to workers or for the purpose of the evasions of taxes and contributions. See Report V (1), 2006, International Labour Conference, 95th Session, 2006, available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf> (20.06.2018), p. 12.

158 More about this Senčur Peček, D., Samozaposleni, ekonomsko odvisne osebe in obstoj delovnega razmerja, Delavci in delodajalci, 2-3/2014, pp. 201-220.

159 See Kresal, B., Prikrita delovna razmerja – nevarno izigravanje zakonodaje, Delavci in delodajalci, 2-3/2014, pp. 177-199; Senčur Peček, D., Prikrita delovna razmerja: ali bodo "samozaposleni" nadomestili delavce?, Lexonomica: revija za pravo in ekonomijo, 1/2015, pp. 1-17.

160 See Labour Inspectorate of the Republic of Slovenia, Annual Report 2016, pp. 64-66.

161 See Robnik, I., Sodna praksa v zvezi z obstojem delovnega razmerja in fleksibilnimi oblikami zaposlitve, Delavci in delodajalci, 2-3/2012, pp. 405-421; Mlakar Sukič, N., Franca, V., Sodna praksa na področju prikritih delovnih razmerij, Pravna praksa, 15/2017, appendix, pp. II-VIII

162 See, for example, a parliamentary question to the minister of labour, available at <http://imss.dz-rs.si/imis/f57f10f0d1c2e13eb36a.pdf> (20.06.2018).

6.2. Disguised employment relationships

Labour law mostly protects only employees, persons who carry out work based on an employment relationship. The Slovenian legislation defines an employment relationship in Article 4 ZDR-1. The fact that the employer makes decisions about pursuing the activity (about work process) and also bears the responsibility for business success is the very essence of the employment relationship. An employee is only part of this organized work process and he/she is subordinated to the employer and dependent on him. In return for this subordination, the employee, as a weaker party in the relationship, is granted labour law protection.

If there are elements of an employment relationship[163] in the relationship between the employer and the worker, where the worker carries out a dependent work for the employer, the contractual parties cannot freely choose the legal definition of this relationship. According to the established principle of the primacy of facts,[164] such relationship is considered an employment relationship. This also follows from Art. 13(2) ZDR-1, which stipulates that, if there are elements of an employment relationship (in accordance with Article 4 and in regard to Articles 22 and 54 ZDR-1), the work must not be carried out based on civil law contracts unless this is expressly specified by law.[165]

Despite legal prohibition such cases still occur in practice. Individuals, who are included in the work process and who regularly carry out work in accordance with the instructions and under the supervision of the employer, formally have contract for services or a contract for copyrighted work, work based on a student referral and more recently often as self-employed persons based on business cooperation contracts. These contractual relationships are formally regulated by civil and commercial laws (mostly by the Civil Obligations Code), which are based on freedom of contract and equality of the contractual parties. The contractual parties are thus free to regulate their mutual relationships. They are not limited by labour legislation, which otherwise determines minimum standards (regarding minimum wage, maximum working hours, periods of notice, termination protection, etc.), since these normally only apply to workers,[166] they are also not included in trade unions, and collective agreements do

163 According to Article 4 ZDR-1 these include: bilateralism (relationship between the worker and the employer), voluntary work, payment, personal and continuous work and inclusion of the worker in the organized work process of the employer and work according to the instructions and under the supervision of the employer.

164 The principle of the primacy of facts (content of relationship) over the form of contract is implemented in the legislation of most countries. See The Employment Relationship: An annotated guide to ILO Recommendation No. 198, available at <http://www.ilo.org/public/english/dialogue/ifpdial/downloads/guide-rec198.pdf> (20.06.2018), p. 32.

165 A case in point may be illustrated by Article 27.a ZUTD, which states that retired people can carry out work containing the elements of an employment relationship based on a temporary or occasional work contract.

166 Two exceptions are discrimination, from which even the self-employed are protected, and safety and health at work, where some international and national regulations (even Slovenian ZVZD-1) provide special provisions for the self-employed too. Moreover, limited legal protection also applies to the self-employed who fulfil conditions for economically dependent persons (see

not apply to them.[167] As a consequence, these self-employed persons often face low earnings and irregular payments, long and non-standard working hours, uncertainty about the duration of employment, stress in relation to work and health problems related thereto.[168]

In connection with ensuring health care and other rights from social insurance schemes, self-employed workers also have a different position than the employees.

Persons, carrying out work based on civil law contracts (contracts for services or contracts for copyrighted work) are actually included in compulsory pension and disability insurance in Slovenia and are entitled to a proportional insurance period based on the payment of contributions.[169] Contributions for health insurance also have to be paid out of one's payment, received on the basis of contracts for services or contract for copyrighted work, but only grant the person carrying out work a reimbursement of expenses in relation to a work accident. To obtain all other health care services a person can voluntarily be included in compulsory health insurance.[170] However, even in this case the person is not entitled to sickness cash benefit (wage compensation during temporary absence from work due to illness or injury). Based on a civil law contract the person is also not included either in parental security insurance or in unemployment insurance.

Persons, carrying out work based on business cooperation contracts and having a self-employed person status, are on this basis included in all four social insurance schemes in the Republic of Slovenia (pension and disability, health, parental and unemployment). For them, this means an obligation to pay minimum contributions for social insurance determined by the legislation (regardless of one's actual income).[171] This way the self-employed are also granted minimum rights (minimum pension, unemployment cash benefit etc.), but only if they actually pay these contributions.[172] In a situation when self-employed persons often do not have a constant source of work and receive low and irregular payments, this can be a big problem. Due to insufficient income (from which they must also pay contributions), self-employed

infra, chapter 6.3.).

167 Regarding this see Kresal Šoltes, K., Nestandardne oblike dela in kolektivne pogodbe, Delavci in delodajalci, 3-4/2018, pp. 253-266.

168 See the study 'Precarious workers and health' by the National Institute for Public Health, available at <http://www.skupajzazdravje.si/media/posvet_prekarni_knjizica_koncno.pdf> (20.06.2018).

169 This is calculated based on the payment received on the basis of a contract for services or a contract for copyrighted work, in a way that for every reached 60% of the average monthly wage in the Republic of Slovenia, one month of insurance period is granted. See Article 130 ZPIZ-2.

170 Payment of the contribution for compulsory health insurance and the premium for supplementary health insurance is a condition for obtaining the rights.

171 The law also specifies the amount of the contribution (in a percentage of the basis). Self-employed persons pay contributions in the same amount as employers and insured persons in case of an employment relationship, but the self-employed needs to contribute both.

172 If contributions are not paid, they are not entitled to the rights. Health insurance is an exception – in the case of non-payment of contributions the insured person is still entitled to an emergency treatment. See Article 78 ZZVZZ.

persons therefore often fall below the poverty line.[173] When contributions are paid and conditions are fulfilled, self-employed persons are generally entitled to equal rights from social insurance schemes as the employees. Despite this fact, a self-employed person is in a less favourable position than an employee in case of absence from work due to illness or injury. On account of health insurance both employees and self-employed are entitled to sickness cash benefits only from the 31st day of sick leave onwards, which means that during the first 30 days of sick leave self-employed persons have no income at all (while employees are paid the compensation by the employer).[174]

In order for the self-employed (and also other disguised employees) to be guaranteed labour law protection and the rights from social insurance schemes granted to the employees, their employment relationship must be recognized. Claims for determining the existence of an employment relationship are resolved by labour courts. Considering Article 18 ZDR-1, which determines an assumption of the existence of an employment relationship,[175] a disguised employee does not have to prove the existence of an employment relationship, but only has to prove the elements of an employment relationship (which derive from Article 4 ZDR-1).[176] If he/she manages to prove them, the court finds that the relationship, which was formally established by concluding a civil or commercial contract,[177] is an employment relationship, and can on these grounds grant the employee the rights requested in the lawsuit.[178]

Given the fact that persons, who formally carry out work based on civil law or commercial contracts, they are often afraid to file a lawsuit and claim their rights from an employment relationship before the court, labour inspection plays the main role in revealing disguised employment relationships. If the inspector finds that the Art. 13(2) ZDR-1 was breached (and that despite the existence of the elements of employment relationship the work is carried out based on a civil law contract), he/she can impose a penalty on the employer. Furthermore, according to the amended Labour Inspection Act[179] the labour inspector can order the employer to issue a written

173 A quarter of self-employed persons in Slovenia are below poverty line. See Zabukovec, M., Samozaposlovanje: Podjetno v siromaštvo, Delo from 11. 3. 2014, available at <http://www.delo.si/novice/slovenija/samozaposlovanje-podjetno-v-siromastvo.html> (20.06.2018).

174 See Article 29 ZZVZZ and Article 137 ZDR-1.

175 It stipulates that in case of disputes regarding the existence of an employment relationship it is presumed that the employment relationship exists, if the elements of an employment relationship are evident.

176 A worker can prove these elements (work under instructions, carrying out the work personally, permanent work, etc.) using different evidence (registers, witnesses, etc.).

177 As follows from the case law of the Slovenian labour courts, a disguised employment relationship mostly takes the form of a contract for services, contract for copyrighted work, occasional and temporary work of students (student referrals), business cooperation contracts with sole traders, business cooperation contracts with freelance journalists, etc.

178 Since workers normally file lawsuits only after the termination of a contractual (disguised employment) relationship, they request the establishment of illegal termination of an employment relationship, reintegration and monetary claims.

179 See the Act Amending the Labour Inspection Act, Official Gazette of the Republic of Slovenia, no. 55/17, which came into force on 21. 10. 2017.

employment contract within three days to the person who carries out work based on a civil law contract.[180] This is an appropriate measure for fighting disguised employment relationships. However, to make this measure effective, Slovenia would need a larger number of labour inspectors.[181]

6.3. Economically dependent persons

Unlike false self-employed persons who are only formally self-employed but actually carry out work in a dependent relationship (as employees), economically dependent persons are actually self-employed. There are no elements of an employment relationship in their relationship with the client. But since they are economically dependent on their client, they are in need of certain protection.[182]

By implementing ZDR-1, Slovenia has joined the European countries[183] which regulate this category of people and grant them a limited labour law protection.[184] Article 213 ZDR-1 stipulates that an economically dependent person is a self-employed person, who fulfils the following legal conditions – that he/she is in a long-lasting relationship with a client, that he/she carries out work for payment personally (does not employ other workers), and that he/she is economically dependent on his/her client (which means that at least 80% of his yearly income comes from the same client).

Since economically dependent persons are not employees, the entire labour law protection does not apply to them, but since due to their economic dependence they need a similar protection as employees, the law grants them a certain range of protection in Article 214. The provisions of ZDR-1 regarding discrimination prohibition, minimum periods of notice, prohibition of terminating a contract without a justified reason, ensuring payment comparable to the payment the client ensures for comparable work[185] and civil liability, also apply to economically dependent

180 If the employer does not impose this obligation, the worker has the right to judicial protection and a labour inspector can additionally punish the employer by imposing another penalty. See Article 19 ZID-1.

181 The current number of labour inspectors (around 40) does not enable the effective control of employers, considering the number of employers (around 200.000). The Labour Inspectorate itself also warns about this. See Labour Inspectorate of the Republic of Slovenia, Annual Report 2016, p. 14.

182 This group of self-employed and the need for their protection has already been addressed/discussed several years ago within the framework of the EU and ILO. See Supiot, A., Transformation of labour law and future of labour law in Europe, European Commission, 1999; Report V (1), International Labour Conference, 95th Session, 2006. See also Perulli, A., Economically dependent/quasi subordinate (parasubordinate) employment: legal, social and economic aspects, a study for European Commission, 2003.

183 For example, Germany, Austria, Netherlands, Spain and others. See Perulli, A., Economically…, 2003, cit.; Thematic Report 2009, Characteristics of the Employment Relationship, European Network of Legal Experts in the field of Labour Law, 2009, pp. 34 -37.

184 More about this see Tičar, L., Delovnopravno varstvo ekonomsko odvisnih oseb – novost ZDR-1, Delavci in delodajalci 2-3/2013, pp. 151-165.

185 The amount of payment under collective agreements, general acts obliging the clients as well as the obligation to pay taxes and contributions (which economically dependent person must pay)

persons.[186] It mostly protects the self-employed from the client being able to one-sidedly determine disproportionally low payment or to cancel a contract without a notice period.

The client can only ensure such protection to economically dependent person, if by the end of the calendar or business year, economically dependent person notifies them of the conditions under which he/she operates (about the existence of economic dependence) and provides the client with all information and proofs, based on which the client can determine the existence of economic dependence.

It seems that self-employed persons in practice almost never request protection, which is granted to them by ZDR-1 in case of economic dependence. Since there is no research in this regard yet, it is only possible to assume why this is so. On one hand, the legal criteria limit the range of potential economically dependent persons, since they only include persons working alone (without employees) and for practically one client but at the same time independently. Even if a self-employed person fulfils these conditions, they must notify their client about it, which they often do not want to, because they are afraid of losing the client. Another reason might lie in the fact that there are many self-employed persons who work for a single client, both economically and personally depend on the client and fulfil the criteria of an employment relationship.[187] In such cases, the self-employed can demand a recognition of their employment relationship and protection as an employee (not just limited protection as an economically dependent person).

Hopefully, a special law, which is supposed to extensively regulate the legal position of economically dependent persons,[188] will contribute to the implementation of this institute in practice.[189] Contractual rights of self-employed persons, who do not request their protection despite their economic dependence, are subject to the will of their only client.[190]

7. CONCLUDING REMARKS

The Slovenian labour legislation grants the employees in non-standard forms of employment (fixed-term, part-time, agency) principally equal protection as to the employees with a similar status in standard forms of employment and also provides minimum protection (mostly in regard to payment for work, working

are also considered.

186 More about this see Senčur Peček, D., Bečan I. et al., Zakon o delovnih razmerjih s komentarjem, Ius Software, GV Založba, Ljubljana, 2016, pp. 1120-1124.

187 This is also indicated in the findings of labour inspections and case law regarding the identification of an employment relationship.

188 Pursuant to Article 223 ZDR-1, provisions in Article 213 and 214 ZDR-1 should only be applied until the implementation of law that would regulate work and protection of economically dependent persons. To this day, not even a draft law has been proposed.

189 A law should regulate several issues, arising in regard to requesting protection, sanctions for clients not ensuring this protection, jurisdiction for determining the rights of economically dependent persons etc.

190 Regarding the inclusion of the self-employed in social insurances and the rights they are entitled to see *supra*, chapter 6.2.

hours, discrimination prohibition, safety and health at work) to students and retired people, who work temporarily or occasionally; it also grants limited protection (regarding discrimination prohibition, payment for work and termination of contract) to economically dependent persons. Only false self-employed persons and other disguised employees are excluded from labour law protection.

Individuals who carry out work in any of the considered non-standard forms of work are (to various extents) also included in compulsory social insurance. While employees in non-standard forms of employment and self-employed persons (including false self-employed and economically dependent persons) are included in all four social insurance schemes and are based on the payment of contributions also entitled to all rights deriving from these insurances, individuals who carry out work based on civil law contracts and student referrals are only included in pension and health insurance and are only entitled to a limited scope of rights despite the payment of full contributions.

Considering all of the stated facts, it cannot be concluded that individuals in Slovenia who work based on non-standard forms of work are in a precarious position. However, this only applies if non-standard forms of employment are used when the conditions for them are met (for example for the conclusion of a fixed-term employment contract), certain limitations are considered (with fixed-term, occasional and temporary work of retired people), and the workers can make a transition into a standard form of employment. If these limitations are not applied (for example with student work) and these forms of employment (part-time, temporary agency work) are abused, thus disguising the true nature of the employment relationship (in triangular relationships, with false self-employed), the position of (mostly younger) workers, trapped in these forms of employment, is completely different.

To ensure decent work to all workers, apart from adopting and implementing additional legal solutions and measures in the labour market, we will also have to promote the inspection supervision and raise awareness among the employers and the society of the long term consequences of non-standard forms of employment.

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Darja Senčur Peček*

Sažetak

SOCIJALNOPRAVNA ZAŠTITA RADNIKA U NESTANDARDNIM OBLICIMA RADA U SLOVENIJI

Članak se bavi pravnim položajem osoba koje obavljaju rad u različitim nestandardnim oblicima rada u Sloveniji. Autorica analizira radnopravnu zaštitu i socijalnopravni položaj radnika koji rade u nekom od oblika privremenog rada (radni odnos na određeno vrijeme, privremeni i povremeni rad studenata i umirovljenika), s nepunim radnim vremenom (ugovor o radu s nepunim radnim vremenom), u radnim odnosima u kojima se javljaju više od dvije stranke (privremeni agencijski rad), kao i položaj prividno samozaposlenih osoba i ekonomski ovisnih osoba. Očito je da ovi oblici rada nisu prekarni sami po sebi jer slovensko zakonodavstvo jamči radnicima zaštitu tijekom razdoblja u kojem rade te ovi radnici imaju prava (u užem ili širem opsegu) iz sustava socijalnog osiguranja. Situacija je drukčija kod zloupotrebe ovih oblika rada i prividno samozaposlenih osoba ili drugih prikrivenih posloprimaca, kada radnici uživaju samo ograničeni opseg prava, iako rad obavljaju u odnosima koji imaju elemente standardnoga radnog odnosa. Kako bi se spriječili takvi slučajevi, potrebna su ne samo dodatna zakonska rješenja i mjere tržišta rada, već i jačanje inspekcije rada te svjesnosti poslodavaca i društva o dugoročnim učincima korištenja takvih nestandardnih oblika rada.

Ključne riječi: *nestandardni oblici tada; atipični ugovori o radu; studentski rad; privremeni agencijski rad; prividno samozaposlena osoba; ekonomski ovisne osobe.*

Zusammenfassung

SOZIALER SCHUTZ VON ARBEITERN BEI NICHTSTANDARDARBEITSVERHÄLTNISSEN IN SLOWENIEN

Dieser Beitrag setzt sich mit der rechtlichen Position von Personen, welche in unterschiedlichen Nichtstandardarbeitsverhältnissen in Slowenien stehen, ein. Der arbeitsrechtliche Schutz und die rechtliche Position der Arbeiter in unterschiedlichen temporären Arbeitsformen (befristetes Arbeitsverhältnis, befristete Beschäftigung

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von Studenten und Rentnern) sowie auch in den Arbeitsverhältnissen, welche mehr als zwei Parteien betreffen (befristete Leiharbeit), werden in diesem Beitrag analysiert. Ebenfalls bespricht der Beitrag die Position der scheinselbstständigen und wirtschaftlich abhängigen Personen. Es ist offensichtlich, dass diese Arbeitsformen per se nicht prekär sind, weil die slowenische Gesetzgebung den Arbeitern während solcher Arbeitsverhältnissen einen angemessenen Schutz bietet. Gleichzeitig haben sie Recht auf Sozialversicherung (in unterschiedlichem Umfang). Die Situation ist anders, wenn es sich um Misshandlungen dieser Arbeitsformen, Scheinselbstständigkeit, und um verschleierte Arbeitsverhältnisse handelt, bei welchen die Rechte der Arbeiter eingeschränkt sind, ungeachtet der Tatsache, dass ihre Arbeitsverhältnisse die Elemente der Standardarbeitsverhältnisse aufzeigen. Um solche Fälle vorzubeugen, ist es notwendig, nicht nur zusätzliche Gesetzesbeschlüsse und Maßnahmen bezüglich des Arbeitsmarktes zu verabschieden, sondern auch den Einfluss der Arbeitsinspektion zu erhöhen. Nicht weniger wichtig ist es, das Bewusstsein der Arbeitgeber und der Gesellschaft für die Langzeitwirkung solcher Nichtstandardarbeitsverhältnisse zu steigern.

Schlüsselwörter: *Nichtstandardarbeitsverhältnisse; atypische Beschäftigungsverhältnisse; Beschäftigung von Studenten; befristete Leiharbeit; Scheinselbstständigkeit; wirtschaftlich abhängige Personen.*

Riassunto

LA TUTELA GIURIDICA DEL LAVORATORE NELLE FORME DI LAVORO ATIPICHE IN SLOVENIA

Il contributo tratta della posizione legale dei singoli che prestano attività lavorativa sotto varie forme di impiego atipiche in Slovenia. L'autrice analizza la protezione giuslavoristica e la posizione sociale dei lavoratori, mettendo in rilievo il lavoro nelle forme del lavoro temporaneo (impiego a tempo determinato, lavoro temporaneo ed occasionale degli studenti e dei pensionati), dei rapporti di lavoro con più di due parti (lavoro interinale temporaneo), come pure la posizione dei falsi lavoratori autonomi e delle persone economicamente dipendenti. E' evidente che queste non sono forme di lavoro precario di per sé in quanto il legislatore sloveno tutela i lavoratori con standard di protezione piuttosto appropriati durante il periodo in cui lavorano e, per dipiù, questi lavoratori vantano i diritti previsti dalle strutture della previdenza sociale. La situazione è differente nel caso di abuso di queste forme di lavoro e in caso di falsi lavoratori autonomi e di altri impiegati camuffati, quando i lavoratori vantano diritti limitati benché svolgano mansioni che hanno elementi di lavoro tipico. Al fine di evitare tali situazioni, sono necessarie non soltanto ulteriori soluzioni giuridiche e misure di tutela del mercato del lavoro, ma occorre anche un rafforzamento dell'ispezione del lavoro ed uno sviluppo della consapevolezza dei

datori di lavoro e della società circa gli effetti a lungo termine dell'utilizzo di tali forme di lavoro atipico.

Parole chiave: *forme di lavoro atipiche; contratti di lavoro atipici; studenti lavoratori; agenzie di lavoro interinale; falsi lavoratori autonomi; soggetti economicamente dipendenti.*

TAXES AS MOTIVATORS AND PREDICTORS OF COMPANY RESTRUCTURING

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Summary

There seems to be a common pattern in the way Member States have addressed taxation of company reorganizations. After some uncertainty, operations affecting corporate and shareholding structures were considered as sources of taxable capital gains. As might have been expected, this hindered a more efficient capital allocation, leading to the enforcement of special laws granting limited and conditional exemption aiming to ease the transfer of undertakings, often with extra advantages than what would be necessary. A deeper rethinking about the very nature of corporate finance transactions at a later stage defined the problem and brought an across-the-board enactment of general provisions for corporate restructuring, inspired by tax-neutrality: roll-over relief and tax deferral, further underpinned by Community law, have since become standards for addressing mergers, divisions, and, to some extent, transfer of assets and exchange of shares. It is arguable whether tax neutrality granted to reorganizations does represent a waiver to the realization principle, or whether instead it is a consistent development of the legal concept of taxable income. In the former case there would be some grounds to challenge tax neutrality in company restructuring operations that lack commercial reasons through purposive construction or anti-abuse clauses or principles. In the latter, anti-avoidance rules should be limited to thwart circumvention of the statutory scope and the spirit of tax law, irrespective of the business purposes of the transactions carried out.

Keywords: *company restructuring; roll over relief; cross-border mergers and acquisitions; tax avoidance; business purpose.*

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1. COMPANY RESTRUCTURING: THE LONG ROAD TO FISCAL NEUTRALITY

For decades, companies' restructurings – encompassing operations such as mergers, divisions, transfers of going concerns, exchanges of shares and so on – have been targeted by academics as well as in the courts for lacking focused legal rules within the framework of „realized income". It was quite common to come across opinions that would deem business combinations carried out through mergers or divisions as sources of taxable income in the form of capital gains on transferring companies' assets, warehouse stocks or goodwill, or at the shareholders' level.

Sometimes it was due to pure misconceptions, such as for the treatment of the transformation of companies – the change in the company's legal form – as an incorporation of a new company and the liquidation of the old one.[1]

However, it was with respect to mergers that the realized-income theory came to the foreground. Apparently, in case of a merger, the consolidated company extinguishes or winds up, and its assets and liabilities are transferred to the incorporating company. On this basis, some prominent scholars sustained that mergers should be classified as cases of realized capital gains accrued on the assets of the incorporated company, to be ascertained in the name of the incorporating company as being the overall successor of the former. In other words, mergers were seen as cases of contributions in kind and asset transfers, and thus as sources of taxable capital gains.[2]

That opinion was debunked once it became clear that, from a civil standpoint, corporate mergers do not entail a liquidation of the incorporated company, nor a transfer of assets, and not even an exclusion of the latter from the application of the business tax regime.

Rather than a termination of the legal entities involved and a transfer of assets, mergers imply a pure modification of the statutes of the companies affected by the business restructuring. The incorporated company does not cease existing but goes on „living" within the incorporating company. Accordingly, no real transfer of assets and liabilities takes place, let alone for a consideration.

It was therefore awkward to claim that mergers are chargeable events since capital gains are taxed if realized, *id est* when the assets are transferred to a third party in exchange for a consideration, or when they fall outside the scope of the business regime in which they are placed, e.g. when their ownership passes on to a private individual or to a non-business legal entity.[3]

In the wake of that achievement tax law expressly excluded mergers as a source of taxable capital gains: within the Italian legal system, for instance, starting from

1 See Uckmar, V., *L'imposta di ricchezza mobile sulle plusvalenze patrimoniali*, in Aa.Vv., La tassazione delle plusvalenze patrimoniali, Cedam, Padova, 1967, pp. 54-55.

2 Falsitta, G., *Realizzo di plusvalenze assoggettabili ad imposta di ricchezza mobile nella fusione di società commerciali*, Rivista di diritto finanziario e scienza delle finanze, 1964, I, pp. 643 ff.

3 For a clear and comprehensive explanations of the reasons underlying the tax-neutrality of mergers, in terms of non-realization of the capital gains belonging to the incorporated companies, see Lupi, R., *Profili tributari della fusione di società*, Cedam, Padova, 1989.

Art. 16 of D.p.r. no. 598/1973,[4] which enforced the new corporation income tax, to the current Art. 172 of D.p.r. no. 917/1986, it has been established that mergers do not give rise to the realization or distribution of capital gains and losses of the assets of the merging companies, including those related to the inventory stock and goodwill, and that the same non-realization principle applies also to the accrued capital gains of the shareholders of the merging companies.

After a period of uncertainty, tax neutrality for restructurings involving a change in the statutes of the legal entities affected, such as mergers and divisions, became a standard. Tax neutrality remained, however, bound to the aforementioned transactions (transformation, merger and division) while other business reorganizations and acquisitions taking place through different arrangements - contribution in kind of undertakings, exchange of shares and so on - fell outside the scope of the rule of tax-neutrality, with the inherent capital gains taxed on an accrual basis.

A different and longer path has been followed for the transfer of going concerns. Certainly, the selling of assets has always been considered a source of taxable income, in other words as a realized capital gain (or loss). This is not necessarily the case, however, for contributions in kind, namely the transfers of assets in exchange for shares of the company receiving them. As contributions in kind are operations aimed at increasing the capital or the equity reserves of the receiving company, there is reason to treat the contribution not so much as an instrument to cash capital gains, even from the shareholder's perspective, but more as a non-generating income operation.

The tax treatment of contributions in kind has long been uncertain, reflecting the belief that taxable income should stem from a stable and recurrent source, raising cyclic revenues, as in the agricultural paradigm of „tree and fruit". Income from movable property was addressed by drawing from the long-standing concept of landed income. On top of that, many believed that taxable income should be limited to the excess of production disposable for current expenses without impairment of capital, thus fostering capital gains and the increase of capital as non-taxable items.

Moreover, contribution in kind does not raise any money-income in strict terms as in exchange the transferring company receives shares which, in turn, can be seen as an indirect participation in the same undertaking previously run and not as a kind of consideration (although, to a certain extent, it could be converted to cash). It is indeed a sound reason underpinning contributions in kind as tax-exempt operations: after all, the net wealth of the transferring company or individual receiving the shares of the company whose capital has been increased, reflects the value and plays the same role as the assets transferred. Following the contribution in kind, the transferor still has a stake in the previous business that is in an indirect form, through its holding in the receiving company.[5] Admittedly, contributions in kind could be considered as ordinary operations involving the receiving of shares in exchange for assets, that is to say as something very similar to a trade-in, if not a sale. Accordingly, the tax exemption for

4 "D.p.r." stands for Decree of the President of the Republic, meaning a legislative decree issued by the Government on the basis of a Parliament's law of delegation.

5 Cf. Stevanato, D., *Inizio e cessazione dell'impresa nel diritto tributario*, Cedam, Padova, 1994, pp. 274 ff.

the contribution of undertakings should be seen as an advantage and a deviation from the ordinary income tax rules.[6] As it is, contributions in kind to company capital are two-fold, being both a partnership and an exchange agreement, and this dual nature is the main reason for long-standing uncertainty in treating the subject for tax purposes.

Indeed, at some point the initial belief about the tax exemption of contributions in kind began to waver, along with the new statutory rule, embedded in the Italian income tax code, that any business's capital increase, ascertained in its financial statements, whether realized or distributed, should be included in the taxable base.[7]

Notwithstanding that the new rule made reference, literally, to money income (*price*), the final detachment of the assets from the business's transferor and the prospect to consider as „price" also a consideration in kind, such as shares issued by the receiving company, would persuade the jurisprudence to consider contribution in kind as source of taxable capital gains.[8] The taxability of in-kind contributions was afterwards definitely affirmed with the tax reform enacted in the early 1970s: since then, the transfer of assets in exchange for shares has had the same tax regime as an asset sale,[9] with capital gains to be determined – cash consideration lacking – using the market value of the assets transferred to the acquiring company.[10]

The taxability of all types of contribution in kind, however, somehow ironically led to pressures for temporary tax breaks focused on the contribution of undertakings. It soon became clear that by considering contributions in kind as sources of taxable income, the shortcoming was to hinder company restructuring.

As a remedy, the chance was exploited for special regimes aimed at suspending the taxation of transfers of branches of activity in exchange for securities representing the capital of the receiving company. With some mid-seventies statute laws[11] the taxability of capital gains arising from such transfers was deferred to the selling of the shares received by the transferring company,[12] while the company whose capital was increased could, for tax purposes, enter the assets received at their market value.

The aim was actually to avoid hampering company restructuring. Nevertheless, the revaluation for tax purposes of the assets in the financial statement of the transferee changed the very nature of the relief: notwithstanding the postponement of the tax due by the transferor, the transferee could immediately deduct amortization, depreciation and capital losses on the market value of the assets. This opportunity gave rise to the exploitation of the tax relief just to achieve a substantive tax break (a tax-free revaluation of the assets transferred) without there being a real business purpose and/or the need for company restructuring.

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6 See Turchi, A., *Conferimenti e apporti nel sistema delle imposte sui redditi*, Giappichelli, Torino, 2008, pp. 120 ff..

7 Law 1/1956 and D.p.r. 645/1958.

8 On the topic see Turchi, A., *op. cit.*, pp. 25 ff.

9 See Art. 9 of the current Italian Income Tax Code (ITC), in which contributions in kind are made equal to transfers with consideration.

10 Except in the case of contribution to the capital of a listed company, in which market's value of the shares is relevant for tax purposes.

11 Reference is in particular made to Laws 170/1965 and 576/1975.

12 The value for tax purposes of the transferred assets was rolled-over the participation received by the transferring company.

For this reason, subsequent statute laws[13] put in place a different scheme whereby the tax-exempt transfer of undertakings would bind the receiving company to take over the tax book values of the transferring company, thereby designing the tax-neutrality regime in terms of tax deferral, avoiding permanent abatements and the related risks of tax avoidance.

It is worthwhile noting that the foregoing regimes were just temporary, and sometimes limited to specific categories of taxpayers (small enterprises, banks, etc.). Indeed, it was only with the legislative decree 358/1997 that a comprehensive and stable tax-neutral regime aimed at company restructuring - on which Community law exerted significant influence - was enacted.

Within its provisions, two different regimes for the contribution of undertakings and of relevant participations[14] were set up: a realization-regime in which any neutrality depends indeed on the maintenance of the assets' tax-book values in the financial statement of the receiving company;[15] a non-realization regime – aligned to the roll-over relief outlined by the Merger Directive (MD)[16] – stating that no capital gains or losses are realized by the transferor. In the latter regime the shares received by the transferring company are registered for tax purposes at the same value previously ascribed to the undertaking, while the receiving company carries over the tax values of the assets contributed.

It this fashion, within the general framework of taxation of in-kind contributions according to the realization principle, a special treatment is granted to the contribution of undertakings, thus raising the issue of tracking a clear dividing line between what is a "branch of activity" and what is not, in order not to incur the consequences – in terms of tax not paid and penalties - of a mistaken identification of the operation carried out.

Eventually, in 2008, the above mentioned regimes were split into two: according to Art. 175 of the Italian ITC, the taxability of capital gains arising in the transfer of shares which exceed a certain threshold depends on the values assigned in the account entries of the transferee.[17] On the other side, Art. 176 grants to contributions in kind of undertakings the roll-over relief and full tax-neutrality, with the receiving company stepping-in the tax values previously ascribed to the transferring company. Considering that the „succession" of tax values can lead to differences with respect to book entries at the market value, the law allows the receiving company to align the values for tax purposes by paying a reduced rate on the hidden capital gains,[18] which

13 Laws 17/1985 and 218/1990.

14 *Id est* participations of such an entity to permit the shareholder to control the participated company or to hold a substantive corporate connection, according to Art. 2359 of the Italian civil code.

15 In such a way that a capital gain for the transferring company could arise only whether and to the extent to which the receiving company decides to account the assets received at higher values than they had before. See art. 3 of D.Lgs. 358/1997.

16 Directive 90/434/EEC, amended several times and lastly restated by the Directive 2009/133/EC.

17 The same scheme applies to „exchange of shares", through which the receiving company acquires or enhances its participation in the target company to the extent of gaining its control.

18 According to paragraph 2-ter of Art. 176, the receiving company has the right to enhance tax

in turn leads to a situation of „taxes as motivators" of company restructuring, offering scope for tax arbitrage.

Interestingly enough, the path so far described, which focuses mainly on the Italian tax system, is quite common across the Member States, whose legislations have roughly developed from the taxation of capital gains accrued on the assets of merging or transferring companies, to the succession principle and tax neutrality granted to company restructuring.

2. THE MERGER DIRECTIVE AND ITS ENDURING INFLUENCE ON TAXING DOMESTIC COMPANY RESTRUCTURING

The building of the common market raised the need to lower tax barriers and discrimination between cross-border and purely domestic business restructurings. Before the Merger Directive, cross-border corporate restructurings – if ruled at all by the Member States' company law – were by and large treated as taxable events, whereas the capability of the State of the transferring or acquired company to tax the „hidden reserves" could fade away.[19]

In that event, an unconditional tax-neutral regime would go too far, hampering permanently the power to tax with regard to the accrued capital gains of assets ending up in a non-resident acquiring company. The need for a compromise between the objective of removing tax obstacles in cross-border restructuring on the one hand, and the safeguarding of the financial interests of the Member States on the other, has been satisfied by requiring, for the tax relief, that assets and liabilities be connected to a permanent establishment of the acquiring company in the origin State and kept for tax purposes at the same values they had before.

In the pursuit of a suitable tax-neutral regime for company restructuring, as

values of both tangible and intangible assets applying, to the difference between such values and the ones recorded in the books, the substitute tax of 12 to 16 per cent (depending on the amount affranchised) instead of the ordinary corporate tax rate (24 per cent) and the regional business tax (3.9 per cent).

19 In the Advocate General Sharpston's opinion delivered on 6 November 2008, Case C-285/07, A.T., par. 1, «when the assets of one company are transferred to another in the course of a corporate restructuring operation, that can result in taxable event. The transfer constitutes a disposal for the purpose of capital gain tax and, if those assets have increased in value since the transferor originally acquired them, a chargeable gain may arise. Some Member States provide for relief by allowing deferral of any immediate charge to tax since the assets are not in fact realized. However, relief is rarely granted where the transfer is to a non-resident company, for fear that the payment of tax may be avoided altogether rather than simply being deferred». See also Lang, M., et al., *Introduction to European Tax Law: Direct Taxation*, 4th ed., 2016, Linde, Wien, p. 158: „reorganizations – in absence of any specific tax provisions – will generally trigger taxation of unrealized capital gains. For domestic reorganizations Member States typically provide for tax deferrals of the capital gains tax levied on the hidden reserves of the transferred assets under their domestic tax law. Often, losses not yet utilized by the transferring company may also be carried over to the acquiring company. Therefore, domestic reorganizations are tax neutral… Similar tax provisions for reorganizations of companies of different Member States are necessary for the completion of an internal market within the European Union".

we have seen before, the Merger Directive has played an overall prominent role. Although intended to address cross-border transactions, it has influenced in many ways the Member States' legislations also on their domestic spheres.

On the one side, the Directive set the boundary of corporate restructuring by fostering the enactment of corporate operations in the Member States' company law. When the Directive was enforced, some Countries did not even have specific rules for mergers, the effects of which were obtained indirectly.[20] As for the concept of „division", foreseen by the Sixth Directive, no. 82/891/CEE, this was far from being a common heritage in the Member States, some of which would hardly conceive the division or demerger as a specific kind of corporate restructuring.[21]

Furthermore, many domestic legislations did not foresee - or allow at all - mergers or divisions involving the absorption of a national company into a foreign one, as such operations entail the transfer of the registered headquarters and a change in the nationality of the transferring company, whose substantive effects could take place only as a result of the liquidation of the transferring company.[22]

Secondarily, the Merger Directive encompassed in the qualified operations to rule both the „transfer of assets" (*id est* the transfer of a branch of activity) and the „exchange of shares", thereby upholding their belonging to „corporate reorganizations" and thus deserving of tax deferral on the accrued capital gains. Actually, if the „transfer of assets" identifies a particular kind of contribution in kind, the „exchange of shares" was not previously defined in the Member States' civil or tax law, which indeed were influenced by the Directive's legal definition, as it happened in Countries[23] where the concept was previously unknown, with the exchange of shares being treated as a simple taxable alienation of shares.[24]

Even more importantly, the Merger Directive outlined a kind of benefit – the roll-over relief – which marked the path for the forthcoming tax treatment of purely domestic company restructuring, at the same time picking up on the legacy of certain Member States, which already provided for the succession principle as a tax-neutral

20 As for instance in Ireland or in Belgium, where before the early 1990s the merger was not foreseen, while its effects could be reached indirectly through the winding up and dissolution of the companies involved, the transfer of all the assets and liabilities to a newly created company (by the liquidator) in exchange of his shares, the distribution of the shares to the shareholders of the liquidating companies in exchange of their own shares, and finally the dissolution of the two companies. As liquidation, the capital gains accrued on the assets of the transferring company were taxed. See Wijnen, W.F.G., *Survey of the Implementation of the EC Corporate Tax Directives*, IBFD, Amsterdam, 1995, pp. 78 ff.

21 In Italy, for instance, the division was regulated only once the D.Lgs 22/1991 implemented the aforementioned Sixth Directive, but the same happened in other countries, like The Netherlands.

22 This is somewhat true for Belgium, Denmark, France, Germany, Luxembourg. See Wjinen, W.F.G., *op. cit.*, *passim*.

23 Like Belgium, Italy, Greece, Luxembourg and Portugal.

24 The „exchange of shares" was probably included in the qualified operations listed by the Merger Directive considering that, in a few countries (such as Ireland and United Kingdom), mergers and divisions took the form of a take-over and an exchange of shares, and not as an amalgamation of corporate assets and liabilities into one legal entity. The ECJ, accordingly, considers that Art. 2.d of Directive 90/334/CEE „defines mergers by exchange of shares" (Case C-28/95, par. 35).

alternative to subject-to-tax alienation or liquidation.[25]

The 7th recital of the MD states that the „*system of deferral of taxation of the capital gains relating to the assets transferred until their actual disposal, applied to such of those assets as are transferred to that permanent establishment, permits exemption from taxation of the corresponding capital gains, while at the same time ensuring their ultimate taxation by the Member State of the transferring company at the date of their disposal"*.

This sheds light on the reasons for tax neutrality also at a domestic level. The capital gains accrued on the assets transferred as a result of mergers and divisions can benefit from deferral simply because taxation is postponed upon the disposal of the assets and not definitely ruled out, as it would happen should the link between the assets and the domestic corporate tax break up as roughly happens without a permanent establishment, or – in purely domestic operations – when the incorporating legal entity does not qualify for the application of business tax.

All of this is not overshadowed by the fact that cross-border mergers or divisions are infrequent, both due to the Member States' reluctance to allow the loss of nationality of the transferring company and to the incomplete harmonization of company law, which has long hampered intra-community corporate reorganizations.

Notwithstanding the harmonization brought about by the Cross-Border Merger Directive 2005/56/EC,[26] the most common way to carry out an acquisition is still by means of a share deal, where the participation in the target company is acquired (sometimes after the branch of activity is spun off through a division or a contribution in kind to a new company), or through an asset deal, with the undertaking acquired by the foreign holding or by a local company set up by the acquiring group.

Generally speaking, acquisitions – even purely domestic ones – seldom take place by means of a merger/division of the target company into the acquiring company, with integration between different groups of shareholders. Rather, are carried out through the purchasing of the majority of the shares of the target company, which could also be created on purpose by carving out[27] the target undertaking among those belonging to the vendor.

In this scheme the merger, if any, follows the acquisition, being deliberated within the acquiring group[28] as a more efficient allotment of branches of activity, reducing-cost tool, and final step of the take-over process. And even when the operation takes place in the form of an „asset deal", involving the selling of a going

25 Reference should be made, for instance, to Denmark, Greece, The Netherlands, Portugal, the United Kingdom. It is questionable, therefore, whether the Merger Directive entails a deviation from the realization principle allegedly prevailing in all Member States, as asserted by Englisch, J., *National measures to counter tax avoidance under the Merger Directive*, Oxford University Centre for Business Taxation, WP 11/13, p. 1.

26 On the topic, which cannot be addressed here, see Bech-Brune/Lexidale, *Study on the Application of the Cross-Border Merger Directive*, 2013; Dutcik, M., *The legal analysis of mergers and acquisition in the EU. Does it get us where we want to be?*, http://arno.uvt.nl/show.cgi?fid=143831.

27 By means of a contribution of a going concern or a division into a new company whose shares are then sold to the acquiring group.

28 Where it often takes the form of a merger by absorption of a fully-owned subsidiary.

concern, the acquisition is more often conducted not directly from abroad (in such a case, a permanent establishment of the foreign company would arise in the other State), but through a vehicle incorporated in the same jurisdiction in which the assets are located.[29]

Within this general framework one major exception can be made for the „exchange of shares", defined by Art. 2.e MD as „*an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company, or, holding such a majority, acquires a further holding, in exchange for the issue to the shareholders of the latter company, in exchange of their securities, of securities representing the capital of the former company"*.

The inclusion of the exchange of shares under company restructuring is everything but trivial if we define „company restructuring" as only those operations involving a change in the corporate legal structure and net wealth (mergers, divisions) and in corporate assets (transfer of a branch of activity). With the exchange of shares, instead, the act of restructuring takes place at the shareholders' level, whilst at the corporate one the „exchange" entails an increase in the company's share capital.

Although it determines a shift in the controlling shares of the target company, the exchange hardly concerns the organization of the business. However, it is nonetheless an operation that affects the shareholding structure, with sound grounds for granting tax relief.[30] It is also worthwhile noting that in many Member States the exchange of shares is considered as an indirect form of merger, where the merger process involves the companies' holdings (stock-for-stock merger, or stock swap), not the corporate assets.

In order to achieve the intention of the Merger Directive (to shield cross-border operations from restrictions or disadvantages arising from the tax provisions of the Member States involved), those operations are granted roll-over relief, meaning that the allotment of securities representing the capital of the acquiring company to a shareholder of the acquired company (in exchange for securities in the latter company) shall not give rise to any taxation of the capital gains of that shareholder (Art. 8.1 MD), provided that the shareholder does not attribute to the securities received a value for tax purposes which is higher than the value the exchanged securities had immediately prior to the exchange of shares (Art. 8.4 MD).

A prominent reason of interest in the „exchange of shares" is indeed a fiscal one. Through such an operation, the shareholders of an operating company resident in one Member State put between them and the participated company a sub-holding resident in a different Member State. Here, an advantage of doing so is if the latter State has enforced a (more favourable) regime of participation exemption, which can be exploited in a subsequent sale of the shares of the operating company. The matter requires further investigation in the light of tax-avoidance issues brought up by company restructurings as tools for minimizing taxation on the subsequent sale of

29 Actually, in many practical handbooks on „taxation of cross-border mergers and acquisitions" that address the most common legal means for acquisitions, cross-border operations such as mergers and divisions are not even mentioned.

30 Stevanato, D., *Le riorganizzazioni internazionali di imprese*, in Diritto tributario internazionale, edited by V. Uckmar, Cedam, Padova, 2005, p. 548.

the shares.

3. TAX AVOIDANCE CONCERNS IN REGULATING COMPANY RESTRUCTURING

As they play an important role in underpinning corporate restructuring, tax motives pose a key question: to what extent does the attempt to obtain some tax benefits undermine the feasibility of the related transactions, raising tax-avoidance issues and risks of challenges by the tax authorities.

Admittedly, company restructuring has always been linked to tax avoidance, as it was in the U.S. leading case Gregory vs. Helvering,[31] where the Supreme Court established, with a far-reaching decision, that notwithstanding „*the legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits*", the capacity of a business reorganization to affect tax liabilities is subject to the business purpose test and must have an economic substance and not be merely a tool for reducing tax.

Indeed, even in the last recital of the Merger Directive, Member States may refuse to apply the provisions of the Directive if the corporate operations carried out have tax evasion or tax avoidance as their objective or one of their principal objectives.

More recently, the Council of the European Union has issued a Directive laying down rules against tax avoidance practices which impair the functioning of the single market and which could affect also business integrations and corporate restructurings.[32]

In Italy too, the first GAAR (General Anti-Avoidance Rule) was focused on and limited to business restructuring, just as Art. 15 (formerly Art. 11) MD is. Aware of the great discretionary power that a GAAR would have entitled the tax authority, Parliament carefully limited the scope of the tax avoidance rule to operations of corporate restructuring.[33]

There certainly was no desire to assert that company restructuring entails tax avoidance *per se*, but that a tax avoidance challenge could be filed only if one of the listed operations (spin-off, merger, sale of a business, and so on) have occurred. Nevertheless, although intended to limit the powers of tax offices, the reference made by the Italian first mini-GAARs[34] stems from the extensive exploitations of corporate

31 293 U.S. 465, 466, decision of 7 January 1935.

32 The wording of Art. 6 of Directive 2016/1164 of 12 July 2016, namely of the general anti-abuse rule, is somewhat similar to Art. 15 MD: „1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part. 2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality".

33 See Art. 10 of Law 408/1990, which first made reference to economic operations (concentration, spin-off) rather than to juridical deeds (merger, division, contribution in kind, and so on).

34 Art. 10 of Law 408/1990 was substituted by Art. 37-*bis* of Pres. Decree 600/1973.

reorganizations as strategies for reducing taxes in ways that fall outside the statutory scope for which tax neutrality is granted.[35]

A few examples may illustrate this. Before the full acknowledgment of the roll-over relief in the years to come, contributions of undertakings were at first ruled so as to suspend taxation of capital gains for the transferring company, while allowing the receiving company to step up the values of the assets for tax purposes, thereby creating an incentive for carrying out operations even without any real business purpose.

Similarly, the long-standing exemption of an individual's capital gains[36] would trigger the selling of the shares to a New-Co owned by the same shareholders, which then was merged by incorporation into the former, with subsequent allocation of the purchase price on the assets of the merged operating company and tax-free increasing of their values. Not to mention mergers of non-operating companies acquired only for their heritage in terms of non-exhausted losses.

All in all company restructurings, mainly due to their tax-neutral regime, have steadily been used as tools for exploiting tax benefits and loopholes, sometimes far beyond the scope of the law, to the extent that they have become a main field for anti-avoidance tax regulation.

The matter requires more in-depth attention however, by making a distinction between tax breaks embedded in the very statement of the rules, and loopholes resulting from a mischievous use of legal means in order to reap tax results beyond the spirit of the law.

As an example of the former, the foregoing regulation of contribution of undertakings granting the deferring of capital gains tax, while allowing the transferee to raise the assets' value for tax purposes without any payment, or with a payment at a reduced tax rate. In such a situation, tax breaks can hardly be considered as unintended consequences of the law, being rather the outcome of the legislative choices.

This further clue leads us to discuss the boundary between the reduction of a tax burden „by means which the law permits" as an unalienable legal right of the taxpayer, and tax avoidance. Focus first must be put on the concept of tax avoidance as circumvention of the spirit of the law; and subsequently on the role of the business purpose.

4. CORPORATE RESTRUCTURING AND THIRD-PARTY SALE

The implementation of one or more corporate-restructuring operations – such as divisions, contribution of branches of activity, exchange of shares etc. – may be motivated by the attempt to remove or reduce tax burdens related to the selling of the business, in whatever form it takes place. The key point is that the amount of taxes to pay is often strictly related to the patterns chosen by the taxpayers, meaning

35 After all, the business purpose doctrine in challenging transactions motivated by tax avoidance arose within the context of reorganizations, and was later extended to other areas: Waizer, H., *Business Purpose: The Effect of Motive on Federal Income Tax Liability*, Fordham Law Review, 49, 6, 1981, p. 1078.

36 In Italy it was only following Law 102/1991 that capital gains realized by individuals was actually taxed as realized income.

that, other things being equal, the legal solutions that minimize tax liabilities for both parties of the deal will be preferred. It is nonetheless true that other priorities of civil, commercial or other natures, could prevail in choosing a tax arrangement more burdensome than others.

Nevertheless, tax reasons are rarely the sole driver of company restructuring. More often, they are intertwined with business purposes, which may or may not be the predominant factor in the choice of the operations.

This is true in particular when selling is the ultimate aim of the corporate restructuring. It would be naive, indeed, to consider the latter an unnecessary step and an illegitimate use of private autonomy. For instance, it could be suitable to carve out the business to sell into a new company in order to open the capital to new partners who are not interested in other activities of the selling group. In other situations, the acquiring company may prefer a share deal to an asset deal as a matter of civil responsibility. It is also true, though, that corporate restructuring could be triggered by the desire to reap tax savings, thereby raising issues under anti-avoidance regulations.

From this perspective, the contribution or the demerger of a branch of business could give rise, for example, to such an issue. Consider an asset deal producing taxable money-income compared to a share deal qualifying for participation exemption or for a reduced tax rate. It could be stated, as the Italian tax authority did for a long time, that a demerger followed by the selling of the shares of the receiving company falls within the tax avoidance rule when the individual income tax faced by the shareholders is lower than the business tax that would have been paid on the transfer of corporate assets for a consideration.[37]

As to corporation tax, it is worthwhile noting that, following the participation exemption enactment, Art. 176 of Italian ITC states clearly that the tax-neutral contribution of a branch of activity followed by the disposal of the shares received in exchange does not qualify as an avoidant scheme.

The rule sheds light on the very nature of tax avoidance in terms of circumvention of the spirit and scope of the law, which does not recur when taxpayers choose, from among the legal instruments at their disposal, the one able to achieve their business purposes at the same time reducing the related tax burden. In the recent words of the Italian tax administration, „*the transfer of a branch of activity may take place through a direct transfer or an indirect transfer. In the first case, the company which owns the business sells it directly to the buyer, realizing a taxable capital gain or a deductible capital loss… The purchaser is entitled to set the assets for tax purposes at the transfer value… In the second case, on the contrary, the shareholders of the company owner of the business may sell their shares, realizing a capital gain which could be tax exempt (if participation exemption applies) or taxed at the rates foreseen*

37 For a while, the Italian ITC considered the demerger of single assets as non-compliant with the anti-avoidance rule, on the assumption of a subsequent sale of the shares at a lower tax rate. Although the rule has been cancelled, the low tax rates that would apply for a long time to capital gains earned by individuals was a sound reason for the tax authority to challenge demerger and subsequent disposal of the shares as an abusive tax scheme. The premise of that opinion has fallen since the tax hike on individual capital gain and the reduction of the corporation tax rate put them at a roughly similar level.

for individuals… Unlike the direct sale of the undertaking, the share deal does not entitle the purchaser to book the assets of the company sold at market value ... These two different tax regimes, as for the transfer of a business… represent alternatives which, although involving different tax burdens and values, are made available to taxpayers to pursue their business purpose, and therefore the tax benefit concerned cannot be classified as undue."[38]

The above seems to be quite a general achievement. Similar statements can be found in the academic literature[39] as well as in jurisprudential opinions such as the one delivered by the Advocate General of the ECJ in case C-352/08 where, in criticising the distinction between the ultimate commercial aim as „legitimate" in itself and the route chosen for that purpose as „abusive", she stated that „*drawing such a distinction between aim and method excessively restricts economic freedom. A whole number of legally permissible set-ups might often be available to enable a legitimate economic proposal to be achieved, some of which might prove to have a more favourable tax regime than others. The fact that the parties ultimately choose the option that is most favourable for tax purposes cannot by itself be sufficient grounds on which to base charges of tax avoidance."*[40]

The dividing line between attaining tax benefits „by means which the law permits" and tax avoidance is however blurred, and this apparently affects the judgment on corporate restructuring. Access to the „conditional tax neutrality" outlined by Art. 175 of Italian ITC, for instance,[41] is denied if the shares contributed, which do not qualify for participation exemption, are exchanged for shares which on the contrary qualify for the exemption; hence one could argue that reducing taxes otherwise due on third-party selling is beyond the scope of company restructuring, even if the comprehensive picture is anything but clear.

In the various interpretations of the Merger Directive delivered by the ECJ, however, this seems not to be the case. Both transfer of assets and exchange of shares could be exploited, indeed, to shift the undertakings or the shares to sell – through an in-kind tax-neutral contribution – towards a tax jurisdiction where the participation exemption is enacted, or where the latter is more favourable than in the transferring jurisdiction.

38 Resolution no. 97/E, 25 July 2017.

39 Inter alia, Waizer, H., *Business Purpose: The Effect of Motive on Federal Income Tax Liability*, cit., p. 1086, note 78: „A taxpayer is not legally required to maximize tax… Whatever the [business purpose] doctrine's validity, it should never apply when a taxpayer selects between alternate transactions, such as sale of stock and sale of assets, that have different practical consequences".

40 Cf. Advocate General Mrs. Kokott's opinion delivered on July 2009 in the Case C-352/08, *Modehuis A. Zwijnenburg BV*, par. 44. On the shortcomings of the theory which describes tax avoidance as an abuse of contractual forms in order to obtain tax advantages, rather than focusing on the circumvention of tax rules and principles, see Stevanato, D., *Elusione e abuso delle forme giuridiche, anatomia di un equivoco*, Diritto e pratica tributaria, 2015, I, pp. 695 ff.

41 As already discussed the foregoing regime provides for the non-taxation of capital gains accrued on securities exchanged provided that the acquiring company maintains the participations received at the same book values they had before. A similar approach has been followed also by German law, see ECJ case C-285/07, 11 December 2008, *A.T.*

In the case of a transfer of assets the shares received by the transferring company could be transferred tax-exempt if participation exemption applies, whilst the straightforward sale of the factory would face full taxation of hidden reserves. In the case of an exchange of shares, on the other hand, the shares received by the acquiring company could have access, in a following sale, to an exemption regime not granted to the shareholder. The latter, alternatively, with the exchange could modify the nature of his holding from a non-exempt to an exempt one. In this case, there would possibly be grounds for the Member State to apply Art. 8 paragraph 6 of the Directive, under which the tax relief provided therein „*shall not prevent the Member States from taxing the gain arising out of the subsequent transfer of securities received in the same way as the gain arising out of the transfer of securities existing before the acquisition"*. This means that the roll-over principle could extend its scope, besides the value for tax purposes of the securities received, to preserve unchanged the State-of-origin's previous right to tax the hidden capital gain.[42]

Even if the foregoing would in many cases lead only to a deferral and not to a permanent tax break, the questions are whether such events (transfer of assets or exchange of shares within the same group of shareholders followed by the transfer of the shares to a third-party) still qualify as company restructuring according to the definitions and the scopes of the Directive and, if so, whether the tax benefits attained could represent an infringement of the anti-abuse clause which the Member States are entitled (if not advised) to enforce when it appears that one of the operations involved „has as its principal objectives tax evasion or tax avoidance" (Art. 15 MD).

According to the ECJ it seems that both questions deserve a positive answer, since an integration of different groups of shareholders or a modification in the chain of company's control, as well as an enduring relationship between the acquiring and the acquired company, are not required.[43] From the foregoing, one might argue that company restructuring aimed at a subsequent third-party selling is still Directive-compliant. The conclusion could however be controversial, since the scope of the Merger Directive is to allow enterprises to adapt to the requirements of the internal market in order to enhance their productivity and international competitiveness, much less to grant substantive tax advantages, albeit in terms of tax-deferral, in case a capital gain is realized as a consequence of a third-party sale.[44]

Furthermore, quite often the difference between a matter of interpretation and one of tax avoidance on the issue we are addressing, may be very subtle. Consider the case C-321/05,[45] in which the ECJ faced the problem raised with regard to an

42 As we've seen before, according to Art. 175 and 177 of the Italian ITC, tax deferral is ruled out (and capital gains immediately taxed) if the securities received in exchange are differently entitled to tax exemption. On this point, it can be noted that the Merger Directive is more compliant with the proportionality principle since it does not impair the right to roll over relief, and merely puts a backstop on subsequent transfer of securities for consideration.

43 Case C-28/95, 17 July 1997, *Leur-Bloem*.

44 According to the opinion of Advocate General Kokott, Case C-321/05, par. 59, „an exchange of shares by which it is sought purely to attain tax advantages does not serve a valid commercial purpose within the meaning of the Directive".

45 ECJ case C-321/05, 5 July 2007, *Kofoed*.

exchange of shares that was shortly afterwards followed by a distribution of dividends from the acquired company to the acquiring company, and then from the latter to the shareholders.

Whilst the shareholders considered the exchange of shares exempt from tax according to the Merger Directive, the tax authority challenged that statement, taking the view that the distribution of dividends formed part of the consideration paid for the exchange of shares, and that as this sum exceeds the threshold to qualify for Art. 2.d of the Directive, the exemption should be denied.

Aside from the question of interpreting what should be considered as „cash payment" being part of the consideration for the acquisition, the *Kofoed* case raised a crucial point for grasping the spirit of the law of the Merger Directive. Its direct purpose, namely to lower barriers to cross-border restructuring of undertakings, is fulfilled *„by ensuring that any increases in the value of shares are not taxed before they are actually realised and by preventing operations involving high levels of capital gains realised on exchanges of shares from being exempt from income tax simply because they are part of a restructuring operation."*[46] This last concern is in accordance with the other milestone on which the Directive is founded, that is to ensure the State-of-origin ultimate taxation of capital gains arising upon disposal of the shares, as one of the Directive's recitals reads.

The instrument of tax deferral outlined by the Directive should not therefore be exploited to exempt capital gains altogether, dropping the power to tax originally granted to the State where the transferring company or the shareholders of the acquired company are located for tax purposes.[47]

In purely domestic situations too, corporate restructuring as a means of transferring assets with a reduced taxation could be seen as abusive or framed, for tax purposes, within a different legal scheme from that elected by the parties, as in the interpretation of the Italian Court of Cassation within the realm of registration tax.

At first, the Court assessed the application of the proportional registration tax (instead of the fixed amount) to the contribution of a branch of activity followed by the selling of shares in the acquiring company, as if it was a direct sale of the factory, on the supposed need to interpret tax law according to the economic substance underlying the legal transactions and the contractual links.[48] The foregoing opinion, based on a rule of the registration tax law which assigns a prominent role to the very

46 ECJ, case C-321/05, point 32.

47 As recently stated by ECJ in Joined cases C-327/16 and C-421/16, 22 March 2008, *Marc Jacob* and *Marc Lassus*, par. 50, „the purpose of that fiscal neutrality is not however to avoid such a capital gain from being taxed by the Member States with fiscal competence in respect of that gain, but only to prohibit them from considering that exchange as the chargeable event for the purposes of taxation".

48 *Inter alia* Cass. 25487/2015 and 6758/2017, according to which the real intention of the parties and the very nature of the legal transaction should be taken into account for tax purposes, so that the contribution of a business of activity for shares and the following sale of the shares by the transferor to a third party shall be qualified as a direct transfer of the business assets to the purchaser of the shares if, in looking at the comprehensive operation, the aim of a transfer of assets can be envisioned. These judgments recall the US *step transaction doctrine*.

nature and the legal effects of the deeds submitted to registration,[49] is the result of an evident misunderstanding: the aforementioned rule means to frame correctly the contracts submitted to registration, notwithstanding the name or the form used by the parties. If these forms are incorrect, obviously they need to be discharged and substituted for tax purposes; however this does not involve any primacy of economic effects, since the law clearly states that „legal effects" do matter.

In a subsequent and even more radical vision regarding registration tax applicable, the Court altogether denies any distinction between the share and the asset deal, on the basis of an alleged functional identity of the sale of the entire shareholding with the sale of the assets belonging to the company whose shares have been sold, addressing the *substance over form* doctrine.[50] In the opinion of the Court, as tax provisions aim to collect revenues from facts expressing wealth, they should be interpreted consistently with their very nature. However, what remains unclear is why, given two or more legal patterns mirroring a certain economic result, taxation should be always settled on the more burdensome one, superseding the choices embedded in the legislation. It is indeed quite naive to establish an identity between an economic result and a legal scheme representing the „model" to follow and the benchmark to which to trace back the taxes to pay, and hence to consider any other legal path allegedly aiming at the same economic result as tax-avoidant.[51]

This point involves some more in-depth examination of the tax-avoidance rules and will be addressed more extensively in the paragraphs below.

Up to that point, what can be asserted is a more straightforward approach to corporate operations such as mergers or divisions not aiming at a real „reorganization" of branch of activities, as could happen when the above mentioned operations are used to allot real estates or single assets, material or immaterial, within a group of companies, as a preliminary step to a share deal exploiting the participation exemption and the like. In other words, if fiscal neutrality has become the natural regime for reorganizations of undertakings, things run differently when single assets are involved in corporate operations.

On this issue there are reasonable grounds for believing that company restructuring such as mergers and divisions, although tax-neutral irrespective of what has been transferred, could hardly be exploited to ease an exempt or tax-reduced share deal without having to face a tax-avoidance challenge. It is one thing to admit as an equivalent share deal to asset deal in case of a transfer of a branch of activity, given the legislative trend to ease corporate reorganizations as a means of efficient allocation of manufacturing facilities and factories; but it is a very different thing to exploit a tax-neutral scheme (and of course, if any, loopholes) in order to avoid the ordinary taxation on any asset disposal whatsoever, channelled through a share deal.[52]

49 See art. 20 of Pres. Dec. 131/1986.

50 Cass. 24594/2015; 11877/2017. Given the alleged „economic" identity between the sale of the entire shareholding and that of the branch of activity run by the company, both intended to transfer the right to use and to dispose of the undertaking from one group to another, registration tax should be assessed consequently.

51 See Stevanato, D., *Elusione e abuso delle forme giuridiche*, cit., *passim*.

52 It is useful to remember, for instance, that the Italian participation exemption is not granted

5. CORPORATE RESTRUCTURING AS A MEANS OF LOWERING TAXES WITHIN THE SAME PARTICIPATING GROUP

So far, we have addressed corporate restructuring as a means to channel the sale of an undertaking in that it reduces taxes otherwise due.

Corporate restructuring could however be used to minimize the taxes currently borne by the restructuring group itself, out of any purpose of a transfer to a third-party. The tax-neutral features of mergers, divisions, transfers of assets and the like could be seized to devise strategies aimed at reducing overall tax liabilities. Some examples may shed light on this topic.

As discussed above, in the past it was quite common to come across special laws that would allow, through a contribution of a branch of activity, a tax-free revaluation of the assets transferred to a controlled company. Currently, Art. 176 of the Italian ITC, within a tax-neutral scheme for contributions of undertakings, grants the acquiring company the option of paying a reduced tax on the difference between the book and market values of the fixed assets received, and from that point forward to deduct amortization and depreciation on the increased values so as to reduce taxes on future income.

For a paradigmatic example of exploitation of loopholes, take the „family buy-out" widely used at times when an individual's capital gains were not taxed at all. In that scenario, the merger between the new company and the old operating company whose shares had been transferred to the former, granted the carryover of the acquisition cost of the securities (transferred tax-exempt by the individual shareholders) on the assets of the company merged by absorption. Indeed, the cancellation deficit in the merger process (i.e. the excess of the cost of the shares to be cancelled compared with the book values of the subsidiary's assets) was at that time an amount recognized for tax purposes.

Furthermore, it has to be considered that transfers of rights and entitlements connected to mergers and divisions are commonly used to avoid or postpone tax liabilities otherwise due, as happens exploiting losses carry-over of a company merged by absorption, or through a merger instead of a liquidation of a controlled company to obtain its reserves without paying taxes on dividends.[53]

There is no doubt that the compensation of losses is strictly inherent to mergers and divisions, being one of the rights pertaining to the incorporating company as universal legal successor of the incorporated company: accordingly, tax credits, losses, carry-forwards and the like are in that way transferred from one legal entity to another. However, according to the legal traditions of many Member States, losses carry-over is somewhat limited or denied when the acquired company no longer carries out

if the company concerned, whose shares are being sold, doesn't run an undertaking, as it is presumed when it owns mainly immovable property (see Art 87 ITC). Also, company restructuring having, as a result, the creation of a corporate vehicle addressee of single assets to be sold through the transfer of the shares, discussed above with regard to divisions, has been often considered as an abusive scheme.

53 This obviously does not mean that such a choice should be considered as tax-avoidant. See Englisch, J., *op. cit.*, p. 20.

any activity at the time of the merger. This seems a plain application of the business purpose doctrine, which considers as tax avoidant any operation lacking commercial reasons, as it is the merging of a company that has ceased its activity.[54] This issue is however more nuanced. Indeed, the exploitation of carryover losses within the same group is admitted within tax consolidation or group relief regardless of the activity (if any) currently carried out by the surrending company.

Again, non-proportional demerger is a common and legitimate way to pursue the breakup between shareholders interested in the different activities carried out by the demerged company, without taxation on the accrued capital gains that would otherwise arise in the case of a proportional demerger followed by a share swap deal.

In all these cases tax motives could well be the principal (if not the only) objective of the corporate restructuring, which can sometimes be argued by the fact that, after the operations, the corporate and shareholder structures remain substantially unchanged (in other words, by the „circular" nature of the construction). However, this would be too little a ground to assess a tax-avoidance scheme. Indeed, the very nature of tax advantages enjoyed by the taxpayers – in other words, if they qualify as „abusive" or as a legitimate way for reducing taxes – cannot be established only on the basis of the alleged lack of a business purpose, as we will briefly discuss in the next and final section.

6. TAX AVOIDANCE AND COMPANY RESTRUCTURING: THE UNEASY ROLE OF BUSINESS PURPOSE

In addressing corporate restructuring, tax avoidance is quite an involved topic. This is due overall to the inherent uncertainty embedded in expressions like „abuse of law" or „tax avoidance", as things to be set apart from tax planning as a legitimate practice, that is the reduction of taxes „by means which the law permits". This uncertainty becomes all the more serious in corporate restructuring schemes, mainly for two supposedly divergent reasons. On the one hand, business reorganizations are granted some sort of tax relief, mainly in the form of capital gains tax deferral, which could be esteemed as benefits or tax breaks compared to those being applied in the ordinary course of business. On the other, restructuring involves - almost by definition - some changes to the corporate statutes and assets as well as to the shareholding structure, so as to meet the „business purpose" test on which tax avoidance rules commonly rely.

Both the foregoing points need to be addressed in greater depth.

First, it is very arguable to consider fiscal neutrality inherent to corporate operations as a kind of tax advantage. As discussed before, tax-neutrality of mergers

54 See also ECJ, case C-126/10, 10 November 2011, *Foggia – SGPS*. The point cannot be extensively addressed here, but we can observe, across the different legal systems, a trend in considering business losses as strictly linked to the group, legal entity or undertaking within which they have accrued. Hence, the transfer of losses as a consequence of a company restructuring in the absence of a going concern of the transferring entity, is targeted by specific or general anti-avoidance clauses.

and divisions, for instance, is consistent with the legal concept of income, so far as it excludes unrealized capital gains from the taxable base, and with the very nature of mergers and divisions, which are far from being operations entailing the „transfer of assets" to a third party, let alone for a consideration.

As for business purpose, in theory any corporate operation has one, since after the merger, division, contribution in kind, or whatever, the outcome is different, in terms of corporate holding and shareholder structure, with respect to what it was prior to completion of the process. However, this is true only from a very formal perspective: what needs to be ascertained is whether the corporate operations have brought about substantive modifications in terms of reduction of costs, efficiency, financial structure, opening of the capital to third-party, and so on.[55]

Very briefly, some key points should be laid down in order to correctly identify the rule of business purpose in tax avoidance reasoning, and regarding the actual nature of what can be considered abuse of tax law.

It could be superficially asserted that tax avoidance is the absence of business purpose in making arrangements or in deciding corporate restructuring. In other words, that transactions without a business purpose are therefore motivated by tax avoidance.[56] This would however be far from true. The lacking of business purpose is, at the most, only a symptom of a possible abuse of tax law, which depends upon a very different element, namely on the outflanking of the spirit of the law.

This idea is to an extent laid down by Art. 15 MD, which reads as follow: „*the fact that the operation is not carried out for valid commercial reasons such as the restructuring or rationalisation of the activities of the companies participating in the operation, may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives."* However, the reference to „presumptions" is, in such a context, misleading as it conveys the idea that, in the absence of commercial reasons, the onus of proving the legitimacy of the operations should fall upon the taxpayer. Admittedly, the absence of a valid commercial reason is far from conclusive as it is not a proxy for tax avoidance, which requires a circumvention of the purpose of the law. It appears, therefore, to be more consistent to consider the lack of valid commercial reasons as a hint for a closer examination of the individual case, whereas tax avoidance must be demonstrated on wholly different grounds, namely arguing the breach of the spirit of the tax law.

55 Along this line ECJ, case C-126/10, Foggia – SGPS. While affirming that „a merger operation based on several objectives, which may also include tax considerations, can constitute a valid commercial reason provided, however, that those considerations are not predominant in the context of the proposed transaction" (par. 35), the Court points out that „the cost savings resulting from the reduction of administrative and management costs, when the acquired company disappears, is inherent in any operation of merger by acquisition as this implies, by definition, a simplification of the structure of the group" (par. 48); however, „by automatically accepting that the saving in the cost structure resulting from the reduction of the administrative and managements costs constitutes a valid commercial reason, without taking account of the other objectives of the proposed operation, and particularly the tax advantages, the rule set out in Article 11(1)(a) of Directive 90/434 would be entirely deprived of its purpose".

56 See Waizer, H., *op. cit*, p. 1078, who notes that „business purpose is usually considered the exclusive alternate motive to tax avoidance".

Business purpose, in other words, is not a strong signal as its absence does not *per se* imply any assumption on the nature – legitimate or non - of the tax benefits involved. On the other hand, valid commercial reasons, if any, could co-exist with distortive tax advantages, which actually, from a purely theoretical viewpoint, should be dismissed, but which in fact are not denied according to the traditional trend in conceiving tax avoidance, long-since established across the legal systems of EU Member States. In other words, although a circumvention of the spirit of the law should occur, the positive allegation of a business purpose forestalls any tax avoidance challenge.

Irrespective of any economic substance, the pursuit of a tax mitigation is unchallengeable as far as it is in line with the spirit (and of course the letter) of the law, as is the case when the taxpayer makes a choice between alternatives clearly endowed by the legal system.[57] Tax benefits, therefore, may well be a legitimate reason for company restructuring, out of any abuse of law indictment, as the ECJ has correctly affirmed in interpreting the Merger Directive.[58]

7. CONCLUSION

Domestic company restructuring has long since gained the status of non-taxable events. Notwithstanding the transfer of assets triggered by corporate reorganizations, the lack of a consideration is sufficient reason for tax deferral of unrealized capital gains, the future taxability of which is granted by the continuing business tax regime within the receiving company. Tax deferral can therefore be devised neither as a deviation from the established concept of legal income for tax purposes, nor as a tax break.

In this framework, the *rationale* for taxing capital gains when cross-border business restructurings are carried out is not inherent to the intrinsic nature of business

57 This occur, giving same examples, with the option for a voluntary substitutive tax granting a mitigation of the burden, or with the choice between asset or share deal, or between winding up a company or merge it through absorption, and so on. See also Englisch, J., *op. cit.*, pp. 16 ff.: „not every tax advantage that possibly accrues to the taxpayer due to a complex scheme exploiting the gap between, on the one hand, the statutory rule, construed strictly, and, on the other hand, a consistent implementation of statutory purpose, can be denied based on tax avoidance allegations. It is furthermore necessary to distinguish tax avoidance from legitimate tax planning… Equality before the law is thus not impaired by tax planning that exploits legislatively tolerated or willfully created loopholes, rifts or options within the tax system, because the differently taxed situations have to be regarded as dissimilar in the light of the standards set by the legislator". Along the same lines Advocate General Mrs. Kokott's opinion in the case C-352/08, *Modehuis*, par. 47, where she states that „the mere fact that in order to achieve a legitimate economic aim a taxpayer chooses, out of several lawful options, the one that is most favourable to it for tax purposes is not by itself sufficient grounds for a charge of tax avoidance within the meaning of Article 11(1)(a) of Directive 90/434".

58 Case C-321/05, *Kofoed*, par. 30: „it is clear… from the general scheme of Directive 90/434 that the common tax rules which it lays down, which cover different tax advantages, apply without distinction to all mergers, divisions, transfer of assets or exchanges of shares irrespective of the reasons, whether financial, economic or simply fiscal, for those operations" (see also Case C-28/95, *Leur-Bloem*, par. 36).

reorganizations. Rather, it is inherent to preserving the financial interest of the State of the transferring company. Accordingly, tax relief granted by the Merger Directive is in keeping with the above-mentioned principle as the permanent establishment requirement is the equivalent of the continuing business income regime in domestic operations.

The foregoing comments shed light on the fact that tax neutrality should not be seen as a concession to grant only in cases of perceivable restructuring contents. Rather, as the natural regime of corporate operations not involving a cash consideration (like mergers, divisions, stock swaps and so on) as capital gains should not be taxed solely on an accrual basis.

Whatever the case may be, in most situations company restructurings have some kind of valid commercial purpose even if they are prompted by tax-saving motives. If we consider, for instance, demergers or contributions of branches of activities as preliminary steps to a third-party sale in view of the share deal's tax advantages, the lack of a reorganization of the activities involved in the sale (which, at the end of the process, will be owned by a different group along with the more efficient legal structure, including tax outcome, desired by the parties) couldn't be asserted, nor any tax avoidance argued, without the clear identification of the tax rules allegedly circumvented.

Moreover, even corporate operations led by a pure fiscal purpose could be perfectly legitimate and compliant with the anti-avoidance general rules if they are intended to exploit exemptions and preferential regimes embedded within the tax systems, and made available to taxpayers.

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Sažetak

POREZI KAO ČIMBENIK RESTRUKTURIRANJA TRGOVAČKIH DRUŠTAVA

Među državama članicama Europske unije (EU) postoji uvelike ujednačeni pristup porezno-pravnim aspektima restrukturiranja trgovačkih društava. Potencijalno nametanje poreza na kapitalne dobitke, ocijenjeno štetnim iz perspektive ekonomske učinkovitosti, uglavnom se uklanja propisivanjem posebnih pravila o jamstvu, tzv. porezne neutralnosti. Davanje olakšice odgode plaćanja poreza na kapitalni dobitak u tom je smislu standardno rješenje kad je riječ o transakcijama poput spajanja, pripajanja, podjele društava, prijenosa imovine te zamjene dionica. U tom smislu postavlja se pitanje predstavlja li načelo porezne neutralnosti poslovnih restrukturiranja iznimku od načela realizacije ili refleksiju pravnog koncepta oporezivog dohotka/dobiti. U potonjem slučaju, porezna tijela mogu odbiti priznavanje relevantnih olakšica u odnosu na transakcije koje nemaju valjani komercijalni smisao, temeljem tumačenja porezno-pravnih propisa ili izričitih protuevazijskih pravila. Pritom valja naglasiti da primjena protuevazijskih pravila mora biti ograničena samo na slučajeve kod kojih se izigrava smisao i duh mjerodavnih zakonskih odredbi.

Ključne riječi: *restrukturiranja trgovačkih društava; porezna neutralnost; prekogranična spajanja i preuzimanja; izbjegavanje plaćanja poreza; komercijalni smisao transakcije.*

Zussamenfassung

STEUER ALS ANTREIBER UND ANZEICHEN FÜR UNTERNEHMENSUMSTRUKTURIERUNGEN

Es scheint ein gemeinsames Muster zu geben, mit welchem die EU-Mitgliedsstaaten die Besteuerung von Unternehmensumstrukturierungen angesprochen haben. Nach einigen Unsicherheiten wurden die Aktivitäten, welche auf die Unternehmens- und Beteiligungsstrukturen einen Einfluss üben, als Quellen der steuerpflichtigen Kapitalerträge angesehen. Wie man hätte erwarten können, hat das die effiziente Kapitalzuweisung gehindert und zur Erlassung spezieller Gesetze zur Gewährleistung begrenzter und bedingter Steuerbefreiung geführt, um

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Unternehmensübertragungen zu erleichtern, wobei zusätzliche Vorteile öfter als notwendig erteilt wurden. Danach hat man über die Natur der Finanztransaktionen eines Unternehmens tiefer nachgedacht, was zur Erlassung allgemeiner steuerneutraler Bestimmungen für Unternehmensumstrukturierungen führte: den Abzügen für reinvestierte Gewinne (den sog. „Rollover") und dem Aufschub der Besteuerung. Diese durch das EU-Recht zusätzlich verstärkten Bestimmungen sind zum Standard bei Fusionen, Teilungen, aber einigermaßen auch bei Übertragungen der Vermögenswerte und Aktientausch geworden. Es lässt sich darüber streiten, ob diese Steuerneutralität ein Verzicht auf das Realisationsprinzip oder eine Weiterentwicklung des Rechtsinstituts des steuerpflichtigen Einkommens darstellt. Im ersten Fall würden Gründe bestehen, die Steuerneutralität bei Unternehmensumstrukturierungen mit fehlenden wirtschaftlichen Gründen durch zweckorientierte Auslegung oder Anti-Missbrauchsklausel infrage zu stellen. Im zweiten Fall sollte man die Regeln zur Bekämpfung der Steuervermeidung begrenzen, um die Umgehung des Gesetzes und des Steuerrechts zu verhindern, ungeachtet des Geschäftszwecks der Transaktionen.

Schlüsselwörter: *Unternehmensumstrukturierung; Abzüge für reinvestierte Gewinne; grenzüberschreitende Fusionen und Übernahmen; Steuervermeidung; Geschäftszweck.*

Riassunto

TASSE COME MOTIVATORI E PREDITTORI DELLA RISTRUTTURAZIONE AZIENDALE

L'esame comparatistico sembra evidenziare un percorso comune nell'approccio alla tassazione delle riorganizzazioni societarie da parte degli Stati membri dell'UE. Dopo alcune iniziali incertezze, le operazioni aventi impatto sulle strutture societarie e partecipative sono state considerate fonte di plusvalenze e capital gains. Come ci si poteva aspettare ciò finì per ostacolare una efficiente allocazione dei capitali, ponendo le premesse per l'approvazione di speciali leggi agevolative volte a esentare il trasferimento dei complessi aziendali, a volte con concessione di benefici addizionali non necessari. In una fase successiva, un profondo ripensamento della reale natura delle operazioni di ristrutturazione societaria ha portato all'approvazione di norme generali sulle riorganizzazioni societarie, ispirate al principio di neutralità fiscale: il trasferimento in continuità dei valori e la postergazione della tassazione delle plusvalenze, accolti dalla normativa comunitaria, sono diventati il regime standard di fusioni, scissioni e in una certa misura di trasferimenti d'azienda e scambi di partecipazioni. Si può discutere se la neutralità fiscale garantita alle riorganizzazioni rappresenti una deviazione rispetto al principio del realizzo, o invece uno sviluppo coerente del concetto legale di reddito tassabile. Nel primo caso vi sarebbero argomenti per contestare la neutralità fiscale in operazioni di ristrutturazione privi di ragioni economiche, attraverso interpretazioni finalistiche o regole e principi anti-abuso.

Nel secondo caso, le regole anti-elusive dovrebbero invece tendere a disconoscere i vantaggi ottenuti aggirando lo spirito delle leggi fiscali, a prescindere dagli scopi economici perseguiti.

Parole chiave: *ristrutturazione aziendale; ribaltamento; fusioni e acquisizioni transfrontaliere; elusione fiscale, finalità commerciale.*

UČINKOVITO UPRAVLJANJE U KONCERNU

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Sažetak

Rad razmatra modalitete učinkovitog upravljanja u različitim oblicima koncerna. Definicija koncerna, kao skup društava objedinjenih jedinstvenim vođenjem, podrazumijeva određeni stupanj integracije upravljanja. S druge strane, okolnost da svako od društava zadržava vlastitu pravnu osobnost sugerira barem djelomičnu upravljačku samostalnost. Granice međusobnog utjecaja društava koncerna su, dakle, određene suprotstavljenim centrifugalnim i centripetalnim silama. Na pravu povezanih društava je da jasno definira te granice i stavi ih na raspolaganje poduzetnicima da ih najbolje iskoriste prema svojim potrebama. Kao što će se pokazati takve granice nisu iste za sve vrste koncerna. U radu se detaljnije razmatraju tri oblika koncerna vladajućeg i ovisnog društva – ugovorni koncern, koncern priključenih društava i faktični koncern.

Ključne riječi: *učinkovito upravljanje; uprava; ugovorni koncern; koncern priključenih društava; faktični koncern; vladajuće i ovisno društvo.*

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Ovaj je rad izrađen uz potporu Hrvatske zaklade za znanost, projekt br. 9366 "Pravni aspekti korporativnih akvizicija i restrukturiranje društava utemeljenih na znanju" i Sveučilišta u Rijeci, projekt br. 13.08.1.2.01 "Zaštita korisnika na hrvatskom i europskom tržištu financijskih usluga".

1. UVOD

Koncern je skup dvaju ili više društava objedinjenih jedinstvenim, odnosno zajedničkim vođenjem (čl. 476. Zakon o trgovačkim društvima, dalje: ZTD[1]).[2] Jedinstveno vođenje podrazumijeva da se društva koncerna vode kao gospodarski jedinstvena cjelina (uži pojam koncerna) ili barem kao gospodarsko jedinstvo neke od temeljnih poduzetničkih djelatnosti (širi pojam koncerna).[3] Okolnost da su društva koncerna objedinjena jedinstvenim vođenjem sugerira da se društvima koncerna upravlja kao da je riječ o jednom jedinom društvu. Svako od društava koncerna zadržava, međutim, vlastitu pravnu osobnost.[4] Drugim riječima, svako od društava koncerna ima svoju imovinu s kojom odgovara svojim vjerovnicima. Između koncerna kao jedinstveno vođene cjeline i odvojenih pravnih osobnosti pojedinih društava nužno postoji određena napetost pa čak i proturječje.[5] Slikovito govoreći, upravljanje koncernom se nalazi pod pritiskom suprotstavljenih centrifugalnih i centripetalnih sila. Iz toga proizlazi temeljno pitanje ovoga rada – što znači da se koncernom učinkovito upravlja?

Pod pojmom upravljanja u ovom se radu u prvom redu razmatra vođenje poslova i vođenje društva, dakle aktivnost uprave ili upravnog odbora i izvršnih direktora (čl. 240. st. 1., čl. 272.h st. 1., čl. 272.l st. 2. ZTD). U širem smislu upravljanje obuhvaća i upravljačke aktivnosti ostalih organa, nadzornog odbora pa i glavne skupštine, kroz koju članovi ostvaruju svoja upravljačka prava).[6]

Na prvi pogled se može činiti da je učinkovitost upravljanja gospodarski pojam, kojim se određuje sposobnost koncerna za ostvarivanjem dobiti i koje uopće nije nužno pravno uobličiti. Pravni aspekt učinkovitosti postaje vidljiv kad se postavi pitanje iz čije je perspektive upravljanje učinkovito? Odvojene pravne osobnosti društava koncerna znače da se učinkovitost, odnosno sposobnost ostvarivanja dobiti mora procjenjivati za svako od društava zasebno. Ono što je učinkovito iz perspektive vladajućeg društva ne mora biti učinkovito iz perspektive ovisnoga društva i obrnuto. Pravni aspekt učinkovitosti upravljanja se, dakle, sastoji u uspostavljanju pravila

1 NN br. 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 111/12, 68/13 i 110/15.

2 Tako i § 18 njemačkoga AktG.

3 Barbić, J., Pravo društava, Knjiga prva, Opći dio, Zagreb, Organizator, 2008., str. 649; Koch, J. u: Hüffer, U.; Koch, J. (ur.), Aktiengesetz, München, C. H. Beck, 2015., § 18, para. 8-19; Bayer, W. u: Goette, W.; Habersack, M. (ur.), Münchener Kommentar zum Aktienrecht, Band 1, München, C. H. Beck, 2016., § 18, para. 29-30; Emmerich, V., u: Emmerich, V.; Habersack, M.; Schürnbrand, J. (ur.), Aktien- und GmbH-Konzernrecht, München, C. H. Beck, 2016., § 18, para. 10-11.

4 Čl. 473. st. 1. ZTD, za sudsku praksu v. VSRH Revt 60/04-2 od 6.10.2004.; VSRH Revr 344/08-2 od 17.6.2009.; VSRH Revt 159/11-2 od 24.1.2012.; VTS Pž-1934/06-3 od 22.4.2009.

5 Barbić, J., Opći dio, op. cit. u bilj. 3, str. 636-637; Altmeppen, H. u: Goette, W.; Habersack, M. (ur.), Münchener Kommentar zum Aktienrecht, Band 5, München, C. H. Beck/Franz Vahlen, 2015., § 311, para. 22 i dalje.

6 V. Barbić, J., Vođenje poslova i upravljanje u trgovačkim društvima (povezana društva), Hrvatska gospodarska revija, vol. 45, 11/1996, str. 1574-1582, kao i Wiesner, G. u: Hoffmann-Becking, M. (ur.), Münchener Handbuch des Gesellschaftsrechts, Band IV, München, C. H. Beck, 2015, § 19, para. 1 i dalje.

do koje razine zajednička tržišna strategija mora uzeti u obzir odvojene pravne osobnosti društva koncerna. Pitanje učinkovitosti tako se postavlja kao pitanje granica učinkovitosti jednih društava na račun drugih.

Cilj je ovog rada, dakle, objasniti mogućnosti i granice učinkovitog upravljanja društvima u sastavu koncerna. Iz toga će se izvesti zaključci u kojim je situacijama koncern optimalan oblik poslovanja, a kada je preporučljivije poslovati putem jednoga jedinog društva. Koncern sa značajnijim stupnjem sudjelovanja vladajućeg društva u ovisnim društvima, s preko tri četvrtine temeljnoga kapitala bi se, naime, lako mogao preobraziti u jedno jedino društvo putem statusnih promjena pripajanja ili spajanja (čl. 512. i dalje ZTD). Zbog toga se većina pripajanja i spajanja odvija upravo između društava koncerna.[7]

Pri izvođenju zaključaka rad polazi od analize odredaba ZTD-a o granicama utjecaja u koncernu. Ta su pravila, osobito u slučaju faktičnoga koncerna, međutim, neodvojiva od općih pravila prava društava o korporativnom upravljanju društvima kapitala.[8] Pravila i načela korporativnog upravljanja, naime, ovisno o tomu o kojem je društvu riječ (dioničkom društvu ili društvu s ograničenom odgovornošću) su više ili manje kogentna i postojanje koncerna ne smije dovesti do toga da se gube granice ovlasti (a slijedom toga i odgovornosti) pojedinih organa društava. To nije puko formalno pitanje, nego pravila korporativnog upravljanja i odnosi koji se njima uspostavljaju između organa društva teže tomu da se upravo njihovim poštivanjem postignu optimalni preduvjeti za uspješno i učinkovito upravljanje društvom. Kako u koncernu postoji navedeni koncept zajedničkog vođenja društava koja čine koncern, a koji je nesumnjivo ekonomski opravdan i racionalan, ključno je pitanje kako postaviti ravnotežu između potrebe da se više društava „jedinstveno (objedinjeno) vodi", a da pritom svako društvo ne samo formalno, nego i suštinski zadrži samostalnost u odlučivanju, u skladu s pravilima korporativnog upravljanja društva nekoga pravnog oblika. Zbog toga će se puno pažnje posvetiti pravilima o vođenju poslova dioničkog društva i društva s ograničenom odgovornošću.

Rad uzima u obzir i sudsku praksu hrvatskih sudova.[9] Nažalost, dostupna sudska praksa se ne dotiče izravno upravljanja koncernom. Relativno mali broj presuda koji govori o povezanim društvima uglavnom se bavi pitanjem odgovornosti društava za obveze drugih društava.[10] Rad uzima u obzir i postojeću hrvatsku znanstvenu i stručnu literaturu o povezanim društvima koja o koncernu najčešće govori općenito, bez posebnog izdvajanja problema učinkovitog upravljanja.[11]

7 Stengel, A. u: Semmler, J; Stengel, A. (ur.), Umwandlungsgesetz, München, C. H. Beck, 2017, § 2, para. 20.

8 Barbić, J., Opći dio, op. cit. u bilj. 3, str. 637.

9 Riječ je o ukupnoj sudskoj praksi koja je objavljena na mrežnim stranicama Vrhovnoga suda i portala IUSinfo.

10 Osobito u kontekstu proboja pravne osobnosti, v. VSRH Revt 159/11-2 od 24.1.2012., VSRH Revt 60/04-2 od 6.10.2004.; VTS Pž-1760/02 od 15.4.2003. (sentenca na IUSinfo); VTS Pž 2859/04-3 od 6.11.2007.; VTS Pž 7222/04-3 od 11.10.2005.; VTS Pž 6097/05-3 od 29.5.2007.).

11 O upravljanju koncernom se osobito govori u: Barbić, J., Vođenje poslova i upravljanje, op. cit. u bilj. 6. Općenito o koncernu: Barbić, J., Opći dio, op. cit. u bilj. 3, str. 633-673; Barbić, J., Koncern i društva koncerna, Pravo u gospodarstvu, vol. 46, 4/2007, str. 57-94; Gorenc, V., Povezana društva prema Zakonu o trgovačkim društvima, Računovodstvo, revizija i financije,

Rad se uvelike oslanja i na izvore njemačkoga prava imajući u vidu da je hrvatsko pravo povezanih društava izravno inspirirano njemačkim rješenjima. Većina odredbi ZTD-a o povezanim društvima imaju, naime, izravni predložak u pravilima njemačkoga Zakona o dioničkim društvima (*Aktiengesetz*).[12]

Rad prvo objašnjava polje primjene odredaba o učinkovitom upravljanju koncernom, osobito s obzirom na ostala povezana društva i eventualni vladajući položaj fizičkih osoba (2.). Nakon toga će se objasniti mogućnosti učinkovitog upravljanja ugovornim koncernom (3.) i koncernom priključenjem (4.). Središnji dio rada će posvetiti svoju pozornost učinkovitom upravljanju u faktičnom koncernu, pri čemu će se ukazati na razlike između dioničkih društava i društava s ograničenom odgovornošću (5.). Naposljetku će se donijeti zaključci, s osobitim naglaskom na eventualne prednosti i mane koncerna u odnosu na jedinstveno društvo nastalo statusnom promjenom pripajanja ili spajanja (6.).

2. NA KOGA SE SVE PRIMJENJUJU PRAVILA O UČINKOVITOM UPRAVLJANJU POVEZANIH DRUŠTAVA?

Pravo povezanih društava poznaje više vrsta koncerna, ovisno o tomu na koji se način provodi jedinstveno upravljanje. Tako postoji koncern vladajućeg i ovisnog društva (čl. 476. st. 1. ZTD) i, u praksi puno rjeđi, koncern ravnopravnih društava (čl. 476. st. 2. ZTD). Koncern vladajućeg i ovisnog društva se može podijeliti na ugovorni koncern, koncern priključenjem i faktični koncern. Zakon postavlja neoborivu pretpostavku da sklapanjem poduzetničkog ugovora o vođenju poslova društva nastaje ugovorni koncern, kao i da priključenjem društava nastaje koncern priključenjem (čl. 476. ZTD). Faktični koncern je otvorena kategoriju koja obuhvaća sve oblike jedinstvenog upravljanja koji se ne mogu podvesti pod ugovorni koncern ili koncern

vol. 4, 10/1994, str. 1786-1797; Ledić, D., Povezana društva - začetak hrvatskog prava koncerna, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 16, 1/1995, str. 37-51 O nekim posebnim pitanjima koncerna v. Ceronja, P., O odgovornosti članova nadzornog odbora ovisnog društva za štetu zbog povrede obveze nadzora tražbina iz ugovora o zajmu sklopljenih između ovisnog i vladajućeg društva, Pravo u gospodarstvu, vol. 50, 5/2011, str. 1158-1176; Cindori, V., Izvješće o ovisnosti trgovačkih društava s aspekta poslovanja društava, Informator, 5436/2006, str. 6-8; Jurić, D., Odgovornost vladajućeg društva za obveze ovisnog društva u hrvatskom i usporednom pravu, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 23, 2/2002, str. 507-540; Jurić, D., Transparentnost statusnih i financijskih odnosa povezanih društava, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 27, 2/2006, str. 939-984; Braut Filipović, M., Odgovornost društva majke za obveze društva kćeri, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 32, 2/2011, str. 795-828; Moslavac, B., Pitanje odgovornosti u slučaju ovisnosti društva kada nema ugovora o vođenju poslova društva, Informator, vol. 56, 5695-5696/2008, str. 5-7; Vidović, A., Koncern - aktualna pitanja povezivanja društava, Računovodstvo, revizija i financije, vol.18, 3/2008, str. 194-195. O upravljanju koncernom bilo je govora i u ranijem radu autora ovoga članka, čija je glavna tema odgovornost članova organa u društvima koncerna, v. Bilić, A.; Petrović, S., Odgovornost članova društava u faktičnom koncernu, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 39, 2002., br. 2, str. 727-751.

12 Osobito §§ 15-22, § 291 i dalje AktG.

priključenjem.[13] Tako apstraktna definicija faktičnoga koncerna konkretizirana je oborivom presumpcijom da vladajuće i ovisno društvo čine koncern (čl. 476. st. 1. ZTD). Odnos vladajućeg i ovisnog društva postoji na temelju posredno ili neposredno prevladavajućeg utjecaja koji vladajuće društvo može imati u ovisnome društvu (čl. 475. st. 1. ZTD). Nije, dakle, nužno da prevladavajući utjecaj stvarno postoji, nego je dovoljno da vladajuće društvo ima mehanizme kojima bi takav utjecaj moglo vršiti, primjerice da može poduzimati mjere protiv ovisnoga društva ili osoba koje u njemu vode poslove.[14] Dokazivanje prevladavajućeg utjecaja se, osim toga, olakšava oborivom presumpcijom prema kojoj je društvo koje ima većinu udjela u temeljnom kapitalu u nekom društvu ili većinu prava glasa u tome društvu, vladajuće u odnosu na to društvo (tzv. većinsko sudjelovanje čl. 475. st. 2., čl. 474. ZTD).

Ovaj će rad razmotriti učinkovito upravljanje u svim oblicima koncerna vladajućeg i ovisnoga društva. Rad se neće baviti koncernom ravnopravnih društava, zbog toga što je on u praksi manje zastupljen i zbog toga što počiva na bitno drukčijim odnosima moći.

Koncern je, međutim, samo jedan od više pojavnih oblika povezanih društava. Ostali su oblici društva s većinskim sudjelovanjem, vladajuće i ovisno društvo, društva s međusobnim udjelima i društva povezana poduzetničkim ugovorima (čl. 473. ZTD). Kao što je već rečeno, glavna funkcija društava s većinskim sudjelovanjem te vladajućeg i ovisnog društva je stvoriti oborivu presumpciju da postoji faktični koncern. Za oblike povezanih društava koji ne dovode do nastanka koncerna nije, međutim, moguće govoriti o učinkovitom upravljanju u smislu ovoga rada. Za koncern je, naime, svojstveno upravo jedinstveno upravljanje (čl. 476. ZTD), odnosno okolnost da ne postoji koncern znači da se povezanim društvima ne upravlja jedinstveno. Ako ne postoji jedinstveno upravljanje ne može se ni govoriti o njegovoj učinkovitosti. Iako se može govoriti o učinkovitom upravljanju svakoga od više povezanih društava, to se ne razlikuje od pitanja učinkovitog upravljanja bilo kojega pojedinačnog društva i, kao takvo, nije osobitost prava povezanih društava.

Koncern, kao i ostali oblici povezanih društava, podrazumijevaju da se radi o više društava, neovisno je li riječ o društvima osoba ili društvima kapitala.[15] *A contrario* to bi značilo da se pravila o povezanim društvima ne mogu primjenjivati na fizičke osobe pa ni one koje se bave gospodarskom djelatnošću. Ipak, ne smije se smetnuti s uma da i fizičke osobe mogu biti povezane s trgovačkim društvima na isti način na koji mogu biti povezana i druga društva. Očito je, primjerice, da i fizička osoba može imati većinu udjela ili većinsko pravo odlučivanja u pojedinom društvu i da na taj ili drugi način, može predstavljati vladajuću osobu. Jednako tako, trgovac fizička osoba bi mogao jedinstveno voditi svoje poduzeće i poduzeće društva u kojemu ima prevladavajući utjecaj. Zbog toga se postavlja pitanje ne bi li se pravila o povezanim društvima pa tako i pravila o učinkovitom upravljanju koncernom mogla na odgovarajući način primjenjivati i na fizičke osobe, u najmanju ruku fizičke osobe

13 Barbić, J., Opći dio, op. cit. u bilj. 3, str. 650-651.

14 VTS Pž 3289/2017-2 od 29.5.2017.; Barbić, J., Opći dio, op. cit. u bilj. 3, str. 643-644; Bayer, W., op. cit. u bilj. 3, § 17, para. 11.

15 Barbić, J., Opći dio, op. cit. u bilj. 3, str. 634, 637.

koje su trgovci. U prilog takvoj primjeni govorilo bi ustavno načelo prema kojemu država osigurava svim poduzetnicima jednak položaj na tržištu (čl. 49. st. 2. Ustava Republike Hrvatske[16]).[17] Drugim riječima, dok god zakon vladajućim društvima postavlja ograničenja ili im daje određene povlastice, jednaka ograničenja i povlastice morao bi pružiti fizičkim osobama koje se nalaze u usporedivom položaju.

Usporedbe radi, njemačko pravo povezanih društava ne govori o društvima nego o poduzećima (*Unternehmen*).[18] U tom specifičnom kontekstu pojam poduzeća ne označava, kao obično, gospodarsku cjelinu kao objekt pravnog prometa[19] nego pravni subjekt, adresata pravne norme, koji se bavi gospodarskom djelatnošću neovisno o sudjelovanju u povezanom društvu.[20] Izraz „poduzeće" odabran se upravo zbog toga da bi ista rješenja mogla vrijediti za funkcionalno istovjetne pravne oblike pa i za fizičke osobe.[21] Bavljenje gospodarskom djelatnošću nužna je pretpostavka jer je jedna od najvažnijih funkcija pravila o povezanim društvima zaštita od opasnosti da će član društva, koji se i sam bavi gospodarskom djelatnošću, prisiliti ovisno društvo da djeluje u njegovu, a ne vlastitom gospodarskom interesu.[22] Za rješavanje eventualnog sukoba interesa članova društva koji se ne bave gospodarskom djelatnošću dostaju opća pravila prava društava. Zbog toga se „poduzećem" mogu smatrati samo one fizičke osobe koje su trgovci neovisno o svojem sudjelovanju u povezanom društvu, kao i fizičke osobe koje znatno sudjeluju u nekom drugom društvu, najčešće većinom udjela ili većinskim pravom odlučivanja.[23]

S obzirom na prednosti koje nudi njemačko rješenje, kao i okolnost da hrvatsko pravo društava u drugim pogledima vjerno slijedi njemački predložak, trebalo bi preporučiti da se pojam „društva" u smislu pravila ZTD-a o povezanim društvima, teleološki protumači na način da obuhvati i poduzetnike fizičke osobe te fizičke osobe s većinskim sudjelovanjem u nekom drugom društvu.[24] Takvo široko tumačenje riječi „društvo" ne bi trebalo smatrati *contra legem*. Kod ugovora o vođenju poslova, čl. 494. st. 1. ZTD, primjerice, spominje da vladajuće društvo može biti i trgovac pojedinac.[25] Slično tomu, opće odredbe ZTD-a o sjedištu i predmetu poslovanja govore samo o sjedištu trgovačkog društva (čl. 32-40. ZTD), iako se iz okolnosti da trgovac pojedinac također ima registrirano sjedište i predmet poslovanja (čl. 3. st. 3. ZTD) može zaključiti da se i na njega primjenjuju spomenute odredbe. Neovisno o tomu, moglo bi se razmisliti i o eventualnoj izmjeni ZTD-a, kojom bi se pojam društva u kontekstu povezanih društava zamijenio pojmom poduzetnika ili nekim

16 NN br. 56/1990, 135/1997, 113/2000, 28/2001, 76/2010, 5/2014.
17 V. i Bilić, A.; Petrović, S., op. cit. u bilj. 11, str. 735.
18 § 15 AktG i dalje.
19 Za pojam koncerna u tom smislu v. Barbić, J., Opći dio, op. cit. u bilj. 3, str. 223.
20 Koch, J., op. cit. u bilj. 3, § 15, para. 9; Bayer, W., op. cit. u bilj. 3, § 15, para. 9.
21 Emmerich, V., Habersack, M., Konzernrecht, München, C. H. Beck, 2008., § 2, para. 9; Koch, J., op. cit. u bilj. 3, § 15, para. 8, 10.
22 Emmerich, V., Habersack, H., op. cit. u bilj. 21, § 2, para. 6; Bayer, W., op. cit. u bilj. 3, § 15, para. 7; Koch, J., op. cit. u bilj. 3, § 15, para. 10.
23 Emmerich, V., Habersack, H., op. cit. u bilj. 21, § 2, para. 11-12; Koch, J., op. cit. u bilj. 3, § 15, para. 11.
24 Slično Cindori, op. cit. u bilj. 11, str. 6.
25 Tako i Barbić, J., Opći dio, op. cit. u bilj. 3, str. 695.

odgovarajućim terminom.

Za potrebe ovog rada, široko tumačenje pojma „društvo" značilo bi da se daljnja izlaganja o učinkovitom upravljanju u koncernu na odgovarajući način mogu primijeniti i na situaciju kada poduzetnik fizička osoba ima vladajući položaj u nekom društvu. Po naravi stvari fizička osoba se ne bi mogla nalaziti u odnosu ovisnosti. Ovisnost u smislu prava povezanih društava, naime, može nastati samo na temelju korporativnoga statusnog prava, dakle većinom udjela, većinskim pravom odlučivanja ili organizacijskim poduzetničkim ugovorom.[26] Ne bi dostajala puka ovisnost na temelju obveznopravnog ugovora, primjerice, na temelju ugovora o kreditu, koliko god bi takav ugovor bio važan njegovom korisniku.[27] Podrazumijeva se da u fizičkoj osobi nije moguće imati većinu udjela ili većinsko pravo odlučivanja. Jednako tako, fizička osoba ne može se obvezati poduzetničkim ugovorima, jer to mogu samo društva kapitala (čl. 479., 480. ZTD).[28]

3. UČINKOVITO UPRAVLJANJE UGOVORNIM KONCERNOM

Ugovor o vođenju poslova društva, kojim nastaje ugovorni koncern (čl. 476. st. 1. ZTD), zakon određuje kao ugovor kojim društvo kapitala podvrgava vođenje poslova društva drugome društvu (čl. 479. st. 1. ZTD). Već iz zakonske definicije je, dakle, jasno da je vladajuće društvo ovlašteno objediniti upravljanje vlastitim i ovisnim društvom. To je iznimka od općeg pravila prema kojemu svako društvo treba voditi prema njegovim vlastitim interesima. Time se relativiziraju granice među odvojenim pravnim osobnostima društava koncerna. Ključno je utvrditi koje su granice te relativizacije, odnosno u kojoj mjeri ovisno društvo zadržava upravljačku samostalnost.

Odgovor se može izvesti iz čl. 493. ZTD prema kojem je vladajuće društvo ovlašteno upravi, odnosno izvršnim direktorima ovisnoga društva davati upute glede vođenja poslova društva makar te upute bile i štetne po ovisno društvo (čl. 493. st. 1. ZTD), a uprava, odnosno izvršni direktori ovisnoga društva moraju slijediti takve upute vladajućega društva (čl. 493. st. 2. ZTD). Iz toga se mogu izvući četiri zaključka. Prvi je da vladajuće društvo može odlučujuće utjecati na upravu društva (ili izvršne direktore) ovisnoga putem obvezujućih uputa. To se razlikuje od općeg pravila dioničkih društava prema kojemu je uprava svakog društva dužna voditi poslove društva na vlastitu odgovornost (čl. 242. ZTD), nezavisno o uputama glavne skupštine i nadzornog odbora. Uprava ovisnoga društva, dapače, mora slijediti i upute koje su za ovisno društvo štetne. Kada bi ovisno društvo bilo ovlašteno odbiti štetne upute ne bi se ni moglo govoriti o „podvrgavanju vođenja poslova".[29]

Mogućnost centraliziranog upravljanja stavlja članove i vjerovnike ovisnoga društva u nepovoljan položaj. Zbog toga zakon predviđa različite mehanizme kojima

26 Barbić, J., Opći dio, op. cit. u bilj. 3, str. 644; Emmerich, V., Habersack, H., op. cit. u bilj. 21, § 3, para. 21.

27 Barbić, J., Opći dio, op. cit. u bilj. 3, str. 644; Bayer, W., op. cit. u bilj. 3, § 17, para. 29.

28 Tako i njemačko pravo, § 291, 292 AktG.

29 Slično i Barbić, J., Opći dio, op. cit. u bilj. 3, str. 714, koji govori da je to bit toga ugovora.

nastoji poboljšati njihov položaj. Kao prvo, zakon postavlja zahtjevne pretpostavke za sklapanje ugovora o vođenju poslova društva. Uprava ovisnoga društva tako mora u pisanom izvješću obrazložiti razloge za sklapanje poduzetničkog ugovora i njegov sadržaj (čl. 481. st. 4. ZTD), poduzetnički ugovor moraju pregledati revizori i o tomu izraditi pisano mišljenje (čl. 481.a ZTD), za sklapanje ugovora nužna je suglasnost skupštine ovisnoga društva glasovima koji predstavljaju najmanje tri četvrtine temeljnoga kapitala zastupljenog na skupštini društva (čl. 481. st. 1. ZTD), a ugovor stupa na snagu tek nakon što se upiše u sudski registar (čl. 482. st. 2. ZTD). Vjerovnici ovisnoga društva osobito su zaštićeni pravilima o izdvajanju u zakonske rezerve ovisnoga društva (čl. 487. st. 1. toč. 3. ZTD), dužnošću vladajućeg društva da pokrije ovisnome društvu svaki godišnji gubitak nastao tijekom trajanja ugovora koji ne bi bio pokriven iz zakonskih rezervi (čl. 489. ZTD) i pravom vjerovnika na osiguranje tražbina nastalih prije objave upisa prestanka ugovora o vođenju poslova društva u sudski registar (čl. 490. st. 1. ZTD). Vanjski dioničari ovisnoga društva su zaštićeni pravilima o primjernoj naknadi najmanje u visini godišnjih iznosa koji bi se mogli isplatiti kao predvidiva prosječna dividenda za pojedinu dionicu (čl. 491. ZTD) te opcijom izlaska iz društva uz primjerenu otpremninu u dionicama vladajućeg društva ili u novcu (čl. 492. ZTD).

Drugi je zaključak da vladajuće društvo ne može davati obvezujuće upute organima ovisnoga društva kojima nije povjereno vođenje poslova ovisnoga društva. To se ponajprije odnosi na nadzorni odbor i glavnu skupštinu.[30] Što se tiče upravnog odbora, kojemu su povjerene i upravljačke i nadzorne funkcije (čl. 272.h st. 1. ZTD), vladajuće društvo bi mu moglo davati obvezujuće upute samo u pogledu njegovih upravljačkih funkcija (vođenja društva, nasuprot vođenju poslova društva, za što su ovlašteni izvršni direktori). To se može posredno zaključiti iz čl. 493. st. 3. ZTD prema kojemu ako se upravi, odnosno izvršnim direktorima ovisnoga društva daju upute da obavi neki posao za koji je potrebna suglasnost nadzornog, odnosno upravnog odbora ovisnoga društva, pa taj odbor ne da suglasnost u primjerenome roku, uprava, odnosno izvršni direktori to moraju priopćiti vladajućemu društvu, a ako vladajuće društvo ponovi uputu, suglasnost nadzornog, odnosno upravnog odbora više nije potrebna.[31] Pritom treba imati na umu da su, za razliku od uprave i nadzornog odbora, izvršni direktori dužni slijediti upute upravnog odbora.[32] Drugim riječima, iz okolnosti da vladajuće društvo ponavljanjem upute izvršnim direktorima može „nadvladati" upravni odbor može se zaključiti da je ono podređeno vladajućem društvu u pogledu upravljanja društvom.

Treći je zaključak da vladajuće društvo nije dužno davati obvezujuće upute upravi ovisnoga društva, odnosno voditi poslove ovisnoga društva.[33] To je vidljivo

30 Barbić, J., Opći dio, op. cit. u bilj. 3, str. 713; Altmeppen, H., op. cit. u bilj. 5, § 308, para. 86.

31 Ako vladajuće društvo ima nadzorni, odnosno upravni odbor, uputa se može ponoviti samo uz odobrenje toga odbora (čl. 493. st. 3. ZTD).

32 Barbić, J., Pravo društava, Knjiga druga, Društva kapitala, Svezak I., Dioničko društvo, Zagreb, Organizator 2013, str. 1106.

33 Emmerich, V., op. cit. u bilj. 3, § 308, para. 34; Altmeppen, H., op. cit. u bilj. 5, § 309, para. 50 i dalje; Krieger, G. u: Hoffmann-Becking, M. (ur.), Münchener Handbuch des Gesellschaftsrechts, Band IV, München, C. H. Beck, 2015, § 71, para. 160.

već iz zakonskog izričaja koji govori samo da je vladajuće društvo „ovlašteno" davati upute.[34] Vladajuće društvo nije dužno voditi poslove ovisnoga društva, među ostalim, i jer uprava ovisnoga društva nastavlja postojati i voditi poslove ovisnoga društva.[35] U odsustvu uputa vladajućeg društva, uprava ovisnoga društva mora voditi poslove prema općim pravilima, u interesu ovisnoga društva, pozornošću urednog i savjesnoga gospodarstvenika (čl. 252. st. 1. ZTD).[36] Drugim riječima, ugovor o vođenju poslova društva daje vladajućem društvu samo mogućnost, ne i obvezu upravljanja ovisnim društvom.

Od toga treba razlikovati dužnost vođenja poslova ovisnoga društva koju uprava vladajućeg društva može imati prema vladajućem društvu.[37] Ako, naime, upravljanje ovisnim društvom i općenito koncernom, ulazi u predmet poslovanja vladajućeg društva, njegova uprava ovlaštena je i dužna upravljati čitavim koncernom. Ta dužnost ne proizlazi iz ugovora o vođenju poslova društva, nego iz općih pravila prava društava o dužnostima i odgovornosti uprave prema vlastitom društvu (čl. 252. ZTD).

Četvrti je zaključak da, čak i kada daje obvezujuće upute, vladajuće društvo ne preuzima izravno upravljačke funkcije ovisnoga društva, nego je na upravi ovisnoga društva da ih provede. To je osobito očito u odnosu s trećim osobama prema kojima i dalje uprava ovisnoga društva zastupa društvo.[38] Ako se vođenje poslova ovisnoga društva podvrgava vladajućem društvu, postavlja se pitanje zašto uopće zadržati upravu ovisnoga društva? Ne bi li bilo učinkovitije kada bi vladajuće društvo izravno vodilo poslove ovisnoga društva pa čak ga i zastupalo prema trećim osobama (naravno uz odgovarajući upis u sudski registar)? Problem je što u tom slučaju, barem iz perspektive upravljanja, ne bi bilo razlike između ugovora o vođenju poslova društva i pripajanja društava, odnosno došlo bi do potpunoga zanemarivanja odvojenih pravnih osobnosti. Vladajuće se društvo koje želi osigurati maksimalni stupanj kontrole, dakle treba poslužiti odgovarajućom statusnom promjenom s odgovarajućim pretpostavkama i pravnim učincima. S druge strane, odvojena pravna osobnost povezanih društava uvijek podrazumijeva i određeni stupanj upravljačke samostalnosti.

Odvojena pravna osobnost kao i njezina upravljačka samostalnost bi, međutim, ostale puki naziv i apstrakcija kada bi uprava ovisnoga društva morala slijediti baš svaku uputu vladajućeg društva. Da postoje određene iznimke vidljivo je već iz čl. 493. st. 1. ZTD koji kaže da vladajuće društvo može davati upute koje su štetne za ovisno društvo samo ako služe interesima vladajućega društva ili drugih društava istoga koncerna. Svrha pravila o ugovoru o vođenju poslova društva je unaprijediti gospodarski položaj vladajućeg društva i čitavoga koncerna, a ne eventualno

34 Usp. s čl. 252. st. 1. ZTD prema kojemu članovi uprave "moraju" voditi poslove društva s pozornošću urednog i savjesnoga gospodarstvenika.

35 Barbić, J., Opći dio, op. cit. u bilj. 3, str. 715.

36 Koch, J., op. cit. u bilj. 3, § 291, para. 37. Iako bi se i u tom slučaju uprava ovisnoga društva o bitnijim odlukama trebala konzultirati s vladajućim društvom (Veil, R. u: Spindler, G.; Stilz, E. (ur.), Kommentar zum Aktienrecht, Band 2, München, C. H. Beck, 2015., § 308, para. 23).

37 Emmerich, V., op. cit. u bilj. 3, § 308, para. 35; Krieger, G., *op. cit.* u bilj. 33, § 71, para. 160.

38 VSRH Revt 60/04-2 od 6.10.2004.

privilegirati određenu (fizičku) osobu u njezinu nepoduzetničkom svojstvu.[39] Zbog toga se, kao što je već rečeno, pravila o povezanim društvima primjenjuju na „poduzeća". Ovisno bi društvo teoretski moglo zlorabiti to pravilo, tako da upute koje su za njega štetne odbije slijediti pod izlikom da su štetne i za vladajuće društvo i ostala društva koncerna. Da bi se to izbjeglo, zakon predviđa da uprava ovisnoga društva može odbiti postupiti po uputama samo kada je očito da one ne služe interesima vladajućeg društva ili ostalih društva koncerna (čl. 493. st. 2. ZTD). Kad god nedostaje očitost, uprava ovisnoga društva nije ovlaštena ignorirati upute vladajućeg društva, iako su one možda stvarno protupravne.[40]

Osim toga, uprava ovisnoga društva mora odbiti slijediti upute koje su protivne zakonu, statutu društva ili odredbama ugovora o vođenju poslova društva.[41] Tako, primjerice, vladajuće društvo ne bi moglo uputiti upravu ovisnog društva da ne izdvaja predviđeni iznos u zakonske rezerve (čl. 487. st. 1. toč. 3. ZTD), da ne zahtijeva pokriće gubitaka (čl. 489. ZTD) da oslobodi članove društva obveze uplate uloga (čl. 212. ZTD) ili da stječe vlastite dionice protivno zakonskim pravilima (čl. 233. ZTD).[42] Bitno je, međutim, primijetiti da u odnosima između vladajućeg i ovisnog društva vladajuće društvo ne mora poštovati načelo očuvanja kapitala. Prema čl. 479. st. 3. ZTD plaćanja društva na temelju ugovora o vođenju poslova društva ne smatraju se suprotnima odredbama čl. 217. ZTD (zabrana povrata plaćenog), čl. 220. ZTD (upotreba dobiti) i čl. 223. ZTD (podjela dobiti). Da isto vrijedi i za društvo s ograničenom odgovornošću proizlazi iz čl. 407. st. 1., prema kojemu se na činidbe vladajućem društvu iz ugovora o vođenju poslova društva ne primjenjuje pravilo o nedopuštenim primanjima. To znači da bi ovisno društvo moralo staviti svoju imovinu na raspolaganje vladajućem društvu da ju ono koristi za potrebe koncerna. Uprava ovisnog društva, primjerice, ne bi smjela odbiti prenijeti neki imovinski predmet drugom društvu koncerna ispod tržišne cijene.[43] Ipak, vladajuće društvo ne bi moglo uputiti ovisno društvo da mu prenese svoju dobit ako nije usporedno sklopljen ugovor o prijenosu dobiti ili ugovor o djelomičnom prijenosu dobiti (čl. 479. st. 1., čl. 480. st. 1. toč. 2. ZTD). Odlučivanje o upotrebi dobiti je, naime, u nadležnosti glavne skupštine, a ne uprave društva.[44]

Često se ističe da nisu dopuštene upute koje bi za vrijeme trajanja ugovora ili nakon njegovog prestanka ugrozile opstanak ovisnoga društva.[45] Opstanak društva bi, međutim, u oba slučaja morao biti dostatno zaštićen obvezom vladajućeg društva da pokriva gubitke ovisnoga društva (čl. 489. ZTD).[46] Moguće je da već u trenutku

39 Altmeppen, H., op. cit. u bilj. 5, § 308, para. 102-103.

40 Veil, R., op. cit. u bilj. 36, § 308, para. 35.

41 Barbić, J., Opći dio, op. cit. u bilj. 3, str. 713; Koch, J., op. cit. u bilj. 3, § 308, para. 13; Veil, R., op. cit. u bilj. 36, § 308, para. 28-30.

42 Altmeppen, H., op. cit. u bilj. 5, § 308, para. 95.

43 Barbić, J., Opći dio, op. cit. u bilj. 3, str. 713; Altmeppen, H., op. cit. u bilj. 5, § 308, para. 96-98.

44 Emmerich, V., op. cit. u bilj. 3, § 308, para. 43; Veil, R., op. cit. u bilj. 36, § 308, para. 21.

45 Barbić, J., Opći dio, op. cit. u bilj. 3, str. 713; Koch, J., op. cit. u bilj. 3, § 308, para. 19; Altmeppen, H., op. cit. u bilj. 5, § 308, para. 120.

46 Altmeppen, H., op. cit. u bilj. 5, § 308, para. 122-133; Veil, R., op. cit. u bilj. 36, § 308, para. 31. Drukčije je jedino kada bi štetne upute dovele do nastanka stečajnog razloga prije nego što bi vladajuće društvo krajem poslovne godine stiglo pokriti gubitke. U tom bi slučaju vladajuće

davanja štetne upute vladajuće društvo nije u stanju pokriti gubitak. U tom bi slučaju uprava ovisnoga društva trebala odbiti štetnu uputu čak i kada takva uputa ne bi ugrozila opstanak društva.[47] Pokrivanje gubitaka ovisnoga društva, naime, nužna je protuteža davanju uputa koje su štetne za ovisno društvo.[48]

Pod učinkovitim upravljanjem ugovornim koncernom podrazumijeva se, dakle, upravljanje koje je učinkovito iz perspektive vladajućeg društva, odnosno koncerna kao cjeline kojim upravlja vladajuće društvo. Okolnost da određena uputa nije učinkovita iz perspektive ovisnoga društvo ne ovlašćuje to društvo da ju odbije provesti. Ipak, čak i takvo objedinjavanje upravljanja nailazi na nužne granice koje proizlaze iz odvojene pravne osobnosti društava koncerna. Ovisno društvo tako zadržava svoju upravu čija je funkcija kontrola zakonitosti uputa vladajućeg društva. Najvažniji element zakonitosti upravo je ostvarenje svrhe ugovora o vođenju poslova društva. Zbog toga bi uprava ovisnoga društva mogla odbiti uputu koja bi dovela do gubitaka ovisnoga društva koje vladajuće društvo ne bi bilo u stanju pokriti ili uputu koja ne služi interesima vladajućeg društva ili drugih društava koncerna.

Takva kontrolna funkcija uprave ovisnoga društva kogentne je naravi. U tome se smislu može kazati da su opća pravila o korporativnom upravljanju i odnosima organa društva kod ugovora o vođenju poslova društva dijelom izmijenjena zbog postojanja ugovornog koncerna, no da i dalje opstaju kogentna pravila koja postavljaju granice koliko se ta opća pravila o korporativnom upravljanju mogu izmijeniti. Zbog toga bi se vladajućem društvu mogao osigurati izravan utjecaj u ovisno društvo samo uz poštivanje općih pravila prava društava o granicama utjecaja na vođenje poslova i zastupanje društva. Primjerice, članovi uprave vladajućeg društva mogli be zastupati ovisno društvo samo ako im ovisno društvo dade prokuru ili neki drugi oblik punomoći.[49] Jednako tako, uprava ovisnog društva ne bi mogla ovlastiti vladajuće društvo da izravno daje upute zaposlenicima ovisnoga društva, barem bez da je uspostavila odgovarajući sustav kontrole takvih uputa.[50] Uvijek je moguće da, uz poštovanje općih pravila prava društava, iste osobe budu izabrane u upravu i ovisnog i vladajućeg društva.[51]

Izloženi sustav upravljanja u ugovornom koncernu nužno se odražava na pravila o odgovornosti za štetu koja nastane ovisnome društvu. Tako pravilo o odgovornosti zakonskih zastupnika vladajućeg društva ako pri davanju upute ovisnome društvu ne primijene pozornost urednog i savjesnog voditelja poslova (čl. 494. st. 1. i 2. ZTD) treba shvatiti na način da su zakonski zastupnici odgovorni samo ako ne primijene

društvo bilo dužno spriječiti nastanak stečajnog razloga odgovarajućim ranijim pokrivanjem gubitaka (Altmeppen, H., op. cit. u bilj. 5, § 308, para. 125).

47 Altmeppen, H., op. cit. u bilj. 5, § 302, para. 40.; Heidinger, A. u: Michalski, L.; Heidinger, A.; Leible, S.; Schmidt, J. (ur.), Kommentar zum GmbHG, Band 1, München, C. H. Beck, 2017., § 30, para. 214.

48 V. Bilić, A., Uzlazna sredstva osiguranja (Upstream guarantees), Zbornik 56. susreta Pravnika u gospodarstvu, Opatija 2018, Zagreb, 2018., str. 206.

49 VSRH Revt 60/04-2 od 6.10.2004.; Altmeppen, H., op. cit. u bilj. 5, § 308, para. 21.

50 Emmerich, V., op. cit. u bilj. 3, § 308, para. 19-20.

51 Emmerich, V., op. cit. u bilj. 3, § 308, para. 29.

odgovarajuću pozornost u odnosu na koncern kao cjelinu.[52] Jednako tako, pravilo da članovi organa ovisnoga društva odgovaraju solidarno za nastalu štetu ako svojim djelovanjem povrijede svoje obveze (čl. 495. st. 1. ZTD) odnosi se ponajprije na situaciju kada članovi uprave ovisnoga društva povrijede svoje dužnosti kontrole uputa vladajućeg društva.[53]

Usprkos mnogim očitim prednostima koje nosi, čini se, ipak da ugovor o vođenju poslova društva nije zaživio u praksi. Dostupna sudska praksa pokazuje da se naziv „ugovor o vođenju poslova" najčešće koristi u netehničkom smislu, kao naziv za svojevrsni menadžerski ugovor između društva i njegovih direktora.[54] Sudovi ispravno koriste naziv „ugovor o vođenju poslova društva" najčešće pri utvrđivanju da takav ugovor nije postojao u konkretnom slučaju.[55] Iako se o razlozima relativne nepopularnosti ugovora o vođenju poslova društva može samo nagađati, ne bi začudilo da je to posljedica okolnosti što vladajuća društva često smatraju da ih već i faktični koncern ovlašćuje voditi poslove društva zanemarujući interese ovisnoga društva. O razlikama u tom pogledu između ugovornog i faktičnog koncerna bit će više govora u nastavku rada.

4. UČINKOVITO UPRAVLJANJE KONCERNOM PRIKLJUČENIH DRUŠTAVA

Kao i ugovor o vođenju poslova društva, priključenje društava kapitala stvara neoborivu presumpciju da između povezanih društava postoji jedinstveno vođenje, odnosno koncern (čl. 476. ZTD). Do priključenja društava kapitala dolazi na temelju odluke glavne skupštine priključenoga (ovisnoga) društva uz uvjet da glavno (vladajuće) društvo ima sve dionice ili poslovne udjele u ovisnom društvu (čl. 503. st. 1. ZTD). Do priključenja može doći i ako glavno društvo ima barem 95% dionica, odnosno poslovnih udjela u ovisnome društvu, s time da tada upisom priključenja u sudski registar priključenoga društva sve dionice, odnosno poslovni udjeli u ovisnome društvu prelaze na glavno društvo (čl. 504.a st. 1. ZTD).[56] Dotadašnji manjinski članovi priključenoga društva imaju pravo na primjerenu otpremninu, u prvom redu u dionicama, odnosno poslovnim udjelima glavnoga društva (čl. 504.a st. 2. ZTD).[57]

Za učinkovito upravljanje u koncernu priključenjem ključna je odredba prema kojoj je glavno društvo ovlašteno glede vođenje poslova davati upute upravi, odnosno izvršnim direktorima priključenoga društva (čl. 507. st. 1. ZTD). Ona podsjeća na

52 Altmeppen, H., op. cit. u bilj. 5, § 309, para. 71; Emmerich, V., op. cit. u bilj. 3, § 309, para. 33.

53 Emmerich, V., op. cit. u bilj. 3, § 310, para. 11.

54 VSRH Revt 328/12-2 od 14.1.2014.; VSRH Gr1 374/2010-2 od 16.12.2010.; VSRH VSRH Gzp 74/2007-5 od 24.4.2007.; VTS Pž 4506/04-3 od 13.6.2007.; Pž 7763/2015-5 od 13.9.2017.

55 VSRH Revt 60/04-2 od 6.10.2004.; VSRH VSRH I Kž 510/2005-7 od 20.3.2017.; VTS Pž 7252/07-3 od 15.1.2008. Samo u jednoj pronađenoj presudi (ŽS Split Gžrs 99/2013-2 od 25.2.2016.) drugostupanjski sud se pozvao na zaključke prvostupanjskog suda da je između društva s ograničenom odgovornošću i dioničkog društva postojao ugovor o vođenju poslova društva u smislu čl. 479. ZTD-a.

56 Riječ je o svojevrsnom *squeeze out*-u, usp. s. čl. 300.f ZTD.

57 Više o priključenju v. Barbić, J., Opći dio, op. cit. u bilj. 3, str. 733 i dalje.

odgovarajuće pravilo u ugovornom koncernu (čl. 493. st. 1. ZTD). To znači da se i na koncern priključenjem načelno mogu primijeniti četiri već izložena zaključka – glavno društvo može vršiti odlučujući utjecaj na priključeno društvo putem obvezujućih uputa; glavno društvo može davati upute samo poslovodnim organima priključenoga društva, dakle upravi ili izvršnim direktorima; glavno društvo nije dužno davati obvezujuće upute priključenom društvu i naposljetku, čak i kada daje obvezujuće upute, glavno društvo ne upravlja izravno priključenim društvom, nego provođenje uputa ostaje u nadležnosti uprave priključenog društva. Zbog toga, među ostalim, ne začuđuje da odredbe o vođenju poslova i odgovornosti u koncernu priključenjem upućuju na odgovarajuću primjenu određenih odredaba o vođenju poslova u ugovornom koncernu (čl. 507. st. 1. ZTD).

Priključenje društava kapitala ipak je intenzivniji oblik povezivanja od ugovora o vođenju poslova. To se u prvom redu očituje u okolnosti da je glavno društvo jedini dioničar, odnosno član priključenoga društva. Drugim riječima, uz davanje odgovarajuće otpremnine, prestaju postojati manjinski, vanjski dioničari priključenoga društva o čijim bi interesima trebalo voditi računa. Od negativnih posljedica priključenja je, dakle, potrebno zaštititi isključivo treće osobe, odnosno vjerovnike priključenoga društva. Zbog intenzivnijeg oblika povezivanja ne čudi da je i zaštita trećih osoba intenzivnija. Od upisa priključenja glavno društvo odgovara vjerovnicima priključenoga društva kao solidarni dužnik za sve obveze toga društva, neovisno o tomu jesu li nastale prije ili nakon priključenja (čl. 506. st. 1. ZTD).

Budući da je priključenje najintenzivniji oblik povezivanja dvaju društava ne čudi da glavno društvo ima šire ovlasti davanja obvezujućih uputa od vladajućeg društva u ugovornom koncernu. Tako odredbe o vođenju poslova priključenog društva ne sadrže i ne upućuju na pravilo ugovornog koncerna prema kojemu vladajuće društvo može davati upute koje su štetne za ovisno društvo samo ako služe interesima vladajućega društva ili društva koja su s njime i s ovisnim društvom povezana u koncern (čl. 493. st. 1. ZTD). Drugim riječima, uprava priključenog društva bila bi dužna slijediti čak i one upute glavnog društva koje nisu u interesu niti jednoga od društava koncerna.[58] Pritom ništa ne mijenja na stvari što bi davanjem takvih uputa uprava glavnog društva povrijedila svoje dužnosti prema glavnom društvu.[59] Čl. 507. st. 1. ZTD, doduše, poziva na odgovarajuću primjenu čl. 493. st. 2. ZTD, što bi se moglo shvatiti na način da uprava priključenog društva može odbiti upute glavnog društva ako je očito da one ne služe interesima glavnog društva ili drugih društava koncerna. Ipak, ako se uzme u obzir da je zakonodavac svjesno propustio uputiti na čl. 493. st. 1. ZTD, kao primarno pravilo o nužnosti interesa vladajućeg društva i drugih društava koncerna, upućivanje na čl. 493. st. 2. ZTD trebalo bi ograničiti na prvu rečenicu toga stavka prema kojoj uprava, odnosno izvršni direktori ovisnoga društva moraju slijediti upute vladajućeg društva.[60]

58 Barbić, J., Opći dio, op. cit. u bilj. 3, str. 745.

59 Grunewald, B. u: Goette, W.; Habersack, M. (ur.), Münchener Kommentar zum Aktienrecht, Band 5, München, C. H. Beck/Franz Vahlen, 2015., § 323, para. 2; Singhof, B. u: Spindler, G.; Stilz, E. (ur.), Kommentar zum Aktienrecht, Band 2, München, C. H. Beck, 2015., § 323, para. 6.

60 To je izričito navedeno u odredbama njemačkoga prava koje su poslužile kao uzor za čl. 507. i

Nadalje, glavno društvo je ovlašteno upravi priključenog društva davati upute koje bi ugrozile opstanak priključenog društva.[61] Kao što je već rečeno, priključeno društvo nema vanjske dioničare koje bi trebalo zaštititi, a njegovi vjerovnici dostatno su zaštićeni pravilom o solidarnoj odgovornosti vladajućeg društva.

Glavno društvo ipak ne bi bilo ovlašteno upravi priključenog društva davati upute koje su protivne zakonu ili statutu, a uprava priključenog društva bila bi ovlaštena odbiti takve upute.[62] Ipak, slično kao i kod ugovora o vođenju poslova, to se ne odnosi na načelo očuvanja kapitala ovisnoga društva. Prema čl. 507. st. 2. ZTD, činidbe koje priključeno društvo ispunjava glavnom društvu nisu u suprotnosti s odredbama čl. 217. ZTD (zabrana povrata plaćenog), čl. 220. ZTD (upotreba dobiti) i čl. 223. ZTD (podjela dobiti). Isto bi, analogijom, trebalo primijeniti i na odredbe očuvanja kapitala u društvu s ograničenom odgovornošću (čl. 407. ZTD). Ne postoji, naime, razlog zašto bi, u kontekstu priključenja društava, načelo očuvanja kapitala društva s ograničenom odgovornošću bilo znatno strože nego za dioničko društvo.

Učinkovito upravljanje u koncernu priključenih društava slično je, dakle, učinkovitom upravljanju u ugovornom koncernu, odnosno učinkovitost upravljanja ocjenjuje se u prvom redu iz perspektive glavnog društva. Glavno je društvo toliko dominantno u odnosu na priključeno društvo da bi mu moglo nametnuti uputu koja ne bi koristila ni jednome od društava istoga koncerna. Kao rezidua posebne pravne osobnosti priključenog društva upravi priključenog društva ostaje još samo ovlast odbiti upute koje su protivne zakonu ili statutu priključenog društva. Zbog takve radikalne integracije priključenih društava smatra se da se institut priključenja nalazi na pola puta između ugovornog koncerna i statusne promjene pripajanja.[63]

Izgleda da je institut priključenja društava u praksi još rjeđe korišten od ugovora o vođenju poslova društva. U svakom slučaju, indikativno je da se u dostupnim sudskim presudama uopće ne spominje. Mogući razlog tomu je što je priključenje toliko blizu statusnoj promjeni pripajanja da se društva kapitala radije odlučuju na taj, manje „egzotičan" institut. Drugim riječima, ako glavno društvo već mora, uz odgovarajuću otpremninu, preuzeti sve dionice priključenoga društva te odgovarati za obveze priključenoga društva, nema razloga zašto ne bi pripojilo priključeno društvo i time steklo izravnu ovlast vođenje njegovih poslova.

5. UČINKOVITO UPRAVLJANJE U FAKTIČNOM KONCERNU

Faktični koncern svaki je oblik jedinstvenog upravljanja vladajućim i ovisnim društvom koji se ne temelji na ugovoru o vođenju poslova društva ili priključivanju društava. Zakon predviđa oborivu presumpciju da ovisno i vladajuće društvo čine

čl. 493. st. 2. ZTD (§ 323 (1) i § 308 (1) AktG).

61 Barbić, J., Opći dio, op. cit. u bilj. 3, str. 745.; Grunewald, B., op. cit. u bilj. 59, § 323, para. 3.; Habersack, M. u: Emmerich, V.; Habersack, M.; Schürnbrand, J. (ur.), Aktien- und GmbH-Konzernrecht, München, C. H. Beck, 2016., § 323, para. 2. Drukčije Singhof, B., op. cit. u bilj. 59, § 323, para. 2.

62 Grunewald, B., op. cit. u bilj. 59, § 323, para. 5.; Habersack, M., op. cit. u bilj. 61, § 323, para. 2; Singhof, B., op. cit. u bilj. 59, § 323, para. 2.

63 Barbić, J., Opći dio, op. cit. u bilj. 3, str. 734.

koncern (čl. 476. st. 1. ZTD). Takav se koncern naziva faktičnim jer ne postoji posebna pravna osnova koja bi ovlašćivala vladajuće društvo na jedinstveno upravljanje, nego vladajuće društvo koristi moć koja proizlazi iz općih pravila korporativnoga statusnog prava, u prvom redu iz većine udjela u temeljnom kapitalu ili iz većinskoga prava glasa (čl. 474. ZTD). To utječe i na pravila o učinkovitom upravljanju u faktičnom koncernu. Ako nadređenost jednog društva drugome proizlazi iz općih statusnih pravila, onda granice njegovog utjecaja ne smiju znatno odudarati od općih granica utjecaja člana na vođenje poslova društva. U suprotnom bi se, naime, vladajuća društva u sastavu koncerna našla u neopravdano privilegiranom položaju u odnosu na većinske članove koji se ne nalaze u koncernu.[64]

Izgleda da je faktični koncern u hrvatskoj poslovnoj praksi rasprostranjeniji od ugovornoga koncerna i koncerna priključenih društava, najvjerojatnije i zbog toga što nastaje „automatski", stjecanjem većine udjela ili prava glasa. Njegovu veću učestalost sugerira i sudska praksa.[65]

Osnovno pravilo je sadržano u čl. 496. st. 1, ZTD prema kojemu ako nije sklopljen ugovor o vođenju poslova društva, vladajuće društvo ne smije koristiti svoj utjecaj da ovisno društvo uputi na to da poduzme štetne pravne poslove ili da poduzme ili propusti radnje na svoju štetu, osim ako se vladajuće društvo obveže da će ovisnome društvu nadoknaditi štetu koja bi mu time nastala. Na prvi je pogled vidljivo da je to pravilo uobličeno dijametralno suprotno od pravila o upravljanju ugovornim koncernom i koncernom priključenjem. Dok pravila o upravljanju ugovornim koncernom i koncernom priključenjem ovlašćuju vladajuće društvo na davanje uputa, pravila o upravljanju faktičnim koncernom usmjerena su na zabranu uputa. Primarna svrha takvog pravila je zaštititi manjinske članove i vjerovnike ovisnoga društva.[66]

Nije sporno da između faktičnog i ugovornoga koncerna (i koncerna priključenjem) postoje i mnoge sličnosti. Za početak, ovisno društvo uvijek zadržava svoju vlastitu upravu, odnosno izvršne direktore (v. čl. 497., 502. ZTD). Uprava ovisnoga društva dužna je voditi poslove ovisnoga društva prema općim pravilima, pozornošću urednog i savjesnoga gospodarstvenika (čl. 252. ZTD). [67] Ne može se, dakle, dogoditi da vladajuće društvo izravno vodi poslove ovisnoga društva.

Nadalje, vladajuće društvo nema obvezu prema ovisnome društvu voditi njegove poslove.[68] Kao što je već objašnjeno, vladajuće društvo nema takvu obvezu ni u ugovornom koncernu kao ni u koncernu priključenjem. Ona tim više ne bi trebala postojati u faktičnom koncernu u kojem vladajuće društvo ima znatno manji utjecaj na ovisno društvo. Na to ne utječe okolnost da je, u okviru zakonskih granica, uprava

64 Osobito u odnosu na većinske članove koji su fizičke osobe i ne obavljaju gospodarsku djelatnost izvan sudjelovanja u konkretnom društvu. V. i Bilić, A.; Petrović, S., op. cit. u bilj. 11, str. 735.

65 VSRH Revt 159/11-2 od 24.1.2012. i VTS Pž-1760/02 od 15.4.2003. (sentenca na IUSinfo); VTS Pž-1934/06-3 od 22.4.2009.

66 Barbić, J., Opći dio, op. cit. u bilj. 3, str. 656, gdje kaže da je riječ o zaštitnom pravilu; Habersack, M., op. cit. u bilj. 61, § 311, para. 1.; Altmeppen, H., op. cit. u bilj. 5, § 311, para. 3 i dalje.

67 Müller, H-F. u Spindler, G.; Stilz, E. (ur.), Kommentar zum Aktienrecht, Band 2, München, C. H. Beck, 2015., § 311, para. 62.

68 Habersack, M., op. cit. u bilj. 61, § 311, para. 10.

vladajućeg društva prema vladajućem društvu dužna zastupati njegove interese u ovisnim društvima. Riječ je, naime, o općim dužnostima uprave prema njezinu vlastitom društvu koje ne predstavljaju osobitost faktičnoga koncerna.[69]

Između faktičnog i ugovornog koncerna postoje dvije temeljne razlike. Prva je da vladajuće društvo ne smije uputiti ovisno društvo na poduzimanje radnji koje bi bile štetne po ovisno društvo. Za razliku od ugovornoga koncerna nije dostatno da su upute korisne za vladajuće društvo ili neko drugo društvo istoga koncerna. Nužno je, dakle, utvrditi što se smatra radnjom štetnom po ovisno društvo.[70] Štetnost se shvaća kao svako smanjenje ili ugrožavanje imovine ovisnoga društva.[71] To se utvrđuje usporedbom s hipotetskim ponašanjem fiktivnog, neovisnog, uredno vođenog društva, koje je, uz iznimku ovisnosti, istovjetno ovisnome društvu.[72] Ako bi, dakle, uredan i savjestan voditelj poslova nekoga nezavisnog društva ušao u određeni pravni posao ili bi poduzeo ili propustio određenu radnju ne može se govoriti o radnji štetnoj po ovisno društvo (čl. 501. st. 3. ZTD).[73] Štetnost radnje ocjenjuje se *ex ante*, u trenutku njezinog poduzimanja.[74]

U tom pogledu, pravila o faktičnom koncernu u potpunosti se podudaraju s općim pravilom prava društava prema kojemu članovi društva ne smiju društvu nanositi štetu. To proizlazi već iz temeljne članske obveze na lojalno postupanje koja, među ostalim, podrazumijeva zabranu nanošenja štete društvu i ostalim članovima društva.[75] U širem, građanskopravnom kontekstu, to je odraz opće zabrane prouzročenja štete (čl. 8. Zakona o obveznim odnosima[76]), koja tim više vrijedi u društvima kao privatnopravnim zajednicama nastalim na temelju pravnog posla. Članska bi dužnost lojalnosti, doduše, izgubila na važnosti u društvu s ograničenom odgovornošću s jednim članom.[77] U takvom bi društvu jedini član mogao davati upute koje su štetne po društvo dok god se njima ne vrijeđaju propisi koji služe zaštiti vjerovnika.

Okolnost da vladajuće društvo ne smije uputiti ovisno društvo na poduzimanje radnji koje bi bile štetne po ovisno društvo ne znači automatski da uprava ovisnoga društva može odbiti takvu štetnu uputu. Budući da pravo povezanih društava o tomu ništa ne govori, odgovor treba pronaći u općim pravilima za svaki pojedini oblik ovisnoga društva. Tako u dualistički ustrojenom dioničkom društvu uprava vodi poslove društva na vlastitu odgovornost (čl. 240. st. 1. ZTD) pažnjom urednog i

69 Habersack, M., op. cit. u bilj. 61, § 311, para. 11.

70 Detaljnije v. Bilić, A.; Petrović, S., op. cit. u bilj. 11, str. 735-736.

71 Barbić, J., Opći dio, op. cit. u bilj. 3, str. 658.

72 Barbić, J., Opći dio, op. cit. u bilj. 3, str. 658, 671; Habersack, M., op. cit. u bilj. 61, § 311, para. 41, 53.

73 Habersack, M., op. cit. u bilj. 61, § 311, para. 40.

74 Barbić, J., Vođenje poslova i upravljanje, op. cit. u bilj. 6, str. 1581; Müller, H-F., op. cit. u bilj. 67, § 311, para. 29; Habersack, M., op. cit. u bilj. 61, § 311, para. 44.

75 Barbić, J., Pravo društava, Knjiga treća, Društva osoba, Zagreb, Organizator 2002., str. 75, 357; Barbić, J., Dioničko društvo, op. cit. u bilj. 32, str. 540; Barbić, J., Pravo društava, Knjiga druga, Društva kapitala, Svezak II., Društvo s ograničenom odgovornošću, Zagreb, Organizator, 2013., str. 234.

76 NN 35/2005, 41/2008, 125/2011, 78/2015.

77 Merkt, H. u: Fleischer, H.; Goette, W. (ur.), Münchener Kommentar zum GmbHG, Band 1, München, C. H. Beck, 2018, § 13, para. 105-106.

savjesnoga gospodarstvenika (čl. 252. ZTD). To znači da bi uprava bila dužna odbiti svaku uputu nadzornog odbora ili glavne skupštine koja bi umanjivala ili ugrožavala imovinu društva. Uprava bi bila dužna slijediti upute glavne skupštine samo u pogledu relativno malog broja odluka koje su zakonom stavljene u nadležnost glavne skupštine ili ako je uprava samoinicijativno zatražila da glavna skupština odluči o nekim pitanjima vođenja poslova.[78] Uprava, međutim, ne bi smjela provesti ništetne odluke glavne skupštine. Ako je odluka glavne skupštine pobojna, a njezina provedba bi društvu prouzročila štetu, uprava bi trebala odgoditi njezino provođenje i pokušati ju pobiti (čl. 362. st. 1. toč. 4-5. ZTD).[79]

Ista pravila načelno vrijede i za monistički ustroj ovisnoga dioničkog društva. Iako su tamo izvršni direktori hijerarhijski podređeni upravnom odboru i dužni su slijediti njegove upute,[80] upravni odbor morao bi voditi društvo u najboljem interesu društva (čl. 272.k ZTD), neovisno o glavnoj skupštini, a onda i o većinskom dioničaru.[81] U monističkom ustroju ipak su veća vjerojatnost da će vladajuće društvo, makar protuzakonito, nametnuti svoju upute ovisnome društvu zbog toga što, za razliku od članova uprave, glavna skupština izravno bira članove upravnog odbora (čl. 272.c ZTD) i zbog toga što nije potreban važan razlog za njihov opoziv (čl. 272.e ZTD).

Izloženo se, međutim, ne može primijeniti na ovisno društvo s ograničenom odgovornošću. U društvu s ograničenom odgovornošću uprava vodi poslove društva u skladu s društvenim ugovorom, odlukama članova društva i obveznim uputama skupštine i nadzornog odbora, ako ga društvo ima (čl. 422. st. 2. ZTD). Iz toga se može zaključiti da je uprava dužna slijediti čak i one upute koje su štetne za društvo.[82] Ne bi se, naime, moglo govoriti o podvrgavanju uprave skupštini i nadzornom odboru kada bi uprava bila slobodna samostalno prosuđivati koje su upute štetne za društvo i odbijati takve upute. To ne znači da uprava ne bi mogla, u okviru svojih ovlasti vođenja poslova, upozoriti da je neka uputa štetna. Jednako tako, to, ne znači da je članovima društva dopušteno davati upute koje bi bile štetne za društvo, jer bi, kao što je već rečeno, to bilo protivno obvezi lojalnog postupanja.[83] Uprava, međutim, ne bi mogla odbiti takve nedopuštene štetne upute nego bi eventualno mogla tražiti naknadu štete pod pretpostavkama čl. 273.[84] i čl. 501. ZTD.[85]

Uprava društva s ograničenom odgovornošću, ipak, može, pa čak i mora, odbiti slijediti upute članova, skupštine ili nadzornog odbora koje bi zadirale u neotuđivu nadležnost uprave brinuti se o zakonitosti postupanja društva (*compliance*).[86] Takve

78 Barbić, J., Dioničko društvo, op. cit. u bilj. 32, str. 779.

79 Spindler, G. u: Goette, W.; Habersack, M. (ur.), Münchener Kommentar zum GmbHG, Band 2, München, C. H. Beck, 2014., § 93, para. 237.

80 Barbić, J., Dioničko društvo, op. cit. u bilj. 32, str. 1054-1055.

81 O razdvojenosti funkcija upravnog odbora i glavne skupštine v. Barbić, J., Dioničko društvo, op. cit. u bilj. 32, str. 1055-1056.

82 Stephan, K-D.; Tieves, J. u: Fleischer, H.; Goette, W. (ur.), Münchener Kommentar zum GmbHG, Band 2, München, C. H. Beck, 2016, § 37, para. 120.

83 Barbić, J., Društvo s ograničenom odgovornošću, op. cit. u bilj. 75, str. 235-236.

84 Na koji upućuje čl. 430. ZTD.

85 Merkt, H., op. cit. u bilj. 77, para. 210.

86 Barbić, J., Društvo s ograničenom odgovornošću, op. cit. u bilj. 75, str. 381. Stephan, K-D.;

će upute redovito biti ništetne jer se njima vrijeđaju propisi kojima se isključivo ili pretežno štite interesi vjerovnika društva ili javni interesi (čl. 448., čl. 355. st. 1. toč. 3. ZTD). Uostalom, kao što je već objašnjeno, čak i u ugovornom koncernu, kao i koncernu priključenjem uprava ovisnoga društva morala bi odbiti nezakonite upute vladajućeg društva. Međutim, za razliku od ugovornoga koncerna i koncerna priključenjem, u društvu s ograničenom odgovornošću (pa i onome koje se nalazi u sklopu faktičnog koncerna) vrijedi temeljno načelo očuvanja kapitala društva (čl. 407. st. 1. ZTD). Drugim riječima, uprava ne bi smjela slijediti uputu koja bi dovela do nedopuštenih isplata članovima društva (čl. 407. st. 3. i 7. ZTD).[87] S druge strane, uprava društva načelno je dužna slijediti upute koje nisu ništetne nego samo pobojne,[88] ali bi morala pričekati s njihovim provođenjem ako je izgledno da će biti pobijane.[89]

Može se zaključiti da koncernska zabrana vladajućem društvu da daje štetne upute ovisnom društvu (čl. 496. ZTD), kao svoje naličje, nema uvijek ovlast uprave ovisnoga društva da odbije takve upute. To će ponajprije biti slučaj u ovisnom dioničkom društvu, u kojem uprava ne mora provoditi upute drugih organa osim onih koje se nalaze u uskoj nadležnosti glavne skupštine, a koje nisu ništetne ili pobojne. S druge strane, u ovisnome društvu s ograničenom odgovornošću uprava mora načelno slijediti upute skupštine, čak i one koje su štetne za društvo. Uprava društva s ograničenom odgovornošću ovlaštena je i dužna odbiti samo one upute kojima bi se vrijeđala zakonitost postupanja društva, osobito načelo očuvanja kapitala. Može se, dakle, dogoditi da je uprava ovisnoga društva dužna slijediti uputu koja je iz perspektive vladajućeg društva nedopuštena. Drugim riječima, postoji diskrepancija između onoga što vladajuće društvo smije i onoga što može provesti. Ako bi takva nedopuštena uputa dovela do štete za ovisno društvo, njegova uprava mogla bi tražiti naknadu štete od vladajućeg društva i njegovih zakonskih zastupnika po posebnim koncernskim pravilima (čl. 501. ZTD) koja su za ovisno društvo povoljnija od opće odgovornosti za štetu osobe koja je s nakanom iskoristila svoj utjecaj u društvu (čl. 273. st. 1. ZTD).

Tieves, J., op. cit. u bilj. 82, § 37, para. 25, 118.

87 Stephan, K-D.; Tieves, J., op. cit. u bilj. 82, § 37, para. 120.

88 Barbić, J., Društvo s ograničenom odgovornošću, op. cit. u bilj. 75, str. 381. Iz perspektive hrvatskoga prava u najmanju ruku je upitno je li uprava društva s ograničenom odgovornošću ovlaštena pobijati odluke skupštine. Okolnost da čl. 449. ZTD upućuje na odgovarajuću primjenu čl. 360-366. ZTD (pa tako i čl. 362. st. 1. toč. 4-5.), sugerira da je to moguće. U njemačkom pravu društava, koje je poslužilo kao uzor za uređenje hrvatskih društava kapitala, se smatra da uprava i njezini članovi nisu ovlašteni pobijati odluke članova društva i skupštine zbog toga što u društvu s ograničenom odgovornošću, za razliku od dioničkog društva, uprava ne vodi poslove na vlastitu odgovornost nego je vođenje poslova društva ultimativno podvrgnuto članovima društva (Wertenbruch, J. u: Fleischer, H.; Goette, W. (ur.), Münchener Kommentar zum GmbHG, Band 1, München, C. H. Beck, 2016, § 47 Anh., para. 191). Drugim riječima, ovlast uprave da pobija odluke skupštine teško bi se mogla pomiriti s podređenošću uprave tim istim uputama. Zbog toga bi se i za hrvatsko pravo moglo zaključiti da „odgovarajući način" primjene odredaba o pobijanju odluka glavne skupštine u društvu s ograničenom odgovornošću isključuje ovlast uprave da pobija odluke skupštine.

89 Stephan, K-D.; Tieves, J., op. cit. u bilj. 82, § 37, para. 122; Barbić, J., Društvo s ograničenom odgovornošću, op. cit. u bilj. 75, str. 381.

Pravilo o granicama utjecaja u faktičnom koncernu iznimno dopušta vladajućem društvu da uputi ovisno društvo na poduzimanje štetnih pravnih radnji uz uvjet da se vladajuće društvo obveže da će ovisnome društvu nadoknaditi štetu koja bi mu time nastala (čl. 496. st. 1. ZTD). Bitno je primijetiti da se ne radi o klasičnim odštetnom zahtjevu nego o posebnom zahtjevu prava društava čije ispunjenje sprječava protupravnost štetnih uputa, a time i odgovornost za štetu u smislu čl. 501. st. 1. ZTD.[90]

Šteta mora biti nadoknađena putem prednosti konkretno izrazivih u novcu. Ne bi dostajale apstraktne buduće prednosti zbog same činjenice postojanja koncerna.[91] To je vidljivo iz pravila prema kojemu vladajuće društvo mora nadoknaditi štetu najkasnije do kraja poslovne godine u kojoj je društvu počinjena šteta ili u tom razdoblju ovisnome društvu mora dati odgovarajući zahtjev na nadoknadu štete (čl. 496 st. 2. ZTD). Nadoknada štete, odnosno zahtjev na nadoknadu štete mora se moći iskazati u istim godišnjim financijskim izvješćima u kojima se iskazuje šteta.[92] Hrvatsko pravo se, dakle, drži njemačkoga predloška, a ne usvaja originalno francusku, a u Europi sve popularniju, Rozenblum doktrinu prema kojoj se uprava ovisnog društva može voditi za interesom koncerna kao cjeline, dok god može razumno očekivati određene buduće prednosti za vlastito društvo.[93]

Budući da ova iznimka iz čl. 496. st. 1. ZTD predstavlja iznimku koncernskoga prava u odnosu na opća pravila prava društava, ona se naziva koncernski privilegij vladajućeg društva.[94] Njega je moguće opravdati samo ako ne ugrožava manjinske članove i vjerovnike ovisnoga društva ne dovodi u lošiji položaj.[95] To je moguće samo ako je u trenutku davanje štetne upute bilo izgledno da vladajuće društvo može nadoknaditi štetu ovisnome društvu, odnosno da mu može dati zahtjev za nadoknadu štete, koji se u bilanci može iskazati u nominalnom iznosu.[96]

Druga temeljna razlika između faktičnog i ugovornoga koncerna je u tomu što pravila o faktičnom koncernu ne nameću ovisnome društvu dužnost da slijedi bilo koje upute vladajućeg društva, dakle ni one upute koje za njega nisu štetne pa čak ni one koje su za njega očito korisne.[97] To proizlazi iz izričaja čl. 496. st. 1. ZTD, koji je

90 V. Bilić, A.; Petrović, S., op. cit. u bilj. 11, str. 737.

91 Altmeppen, H., op. cit. u bilj. 5, § 311, para. 306, 340; Müller, H-F., op. cit. u bilj. 67, § 311, para. 50.

92 Barbić, J., Opći dio, op. cit. u bilj. 3, str. 661-662.

93 Winner, M., Group Interest in European Company Law: an Overview, Acta Univ. Sapientiae, Legal Studies, vol. 5, 2016, br. 1, str. 88; Hansen, J. L., The Report of the Reflection Group on the Future of EU Company Law—As seen from a Nordic perspective, Nordic & European Company Law Working Paper no. 10–15, 2011., str. 17-18 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1869817, 31.8.2018.); Funatsu, K., Trends in European Corporate Group Law Systems and the Future of Japan's Corporate Law System, Policy Research Institute, Ministry of Finance, Japan, Public Policy Review, vol. 11, no.3, July 2015,, str. 477-478. V. i 16. odjeljak European Model Company Act (EMCA).

94 Habersack, M., op. cit u bilj. 61, § 311, para. 2.

95 Altmeppen, H., op. cit. u bilj. 5, § 311, para. 305 i dalje.

96 Altmeppen, H., op. cit. u bilj. 5, § 311, para. 465, 471.

97 Altmeppen, H., op. cit. u bilj. 5, § 311, para. 464.; Habersack, M., op. cit. u bilj. 61, § 311, para. 78, gdje kaže da uprava ovisnoga društva u najboljem slučaju može imati prema ovisnome društvu dužnost slijediti povoljnu uputu.

oblikovan na način da vladajućem društvu zabranjuje štetne, a ne da ga ovlašćuje na davanje ne-štetnih uputa. Ni tzv. koncernski privilegij, odnosno davanje zahtjeva za nadoknadu štete, ne ovlašćuje vladajuće društvo na davanje takvih uputa.[98] To znači da su za granice utjecaja vladajućeg društva davanjem ne-štetnih uputa ponovno mjerodavna opća pravila za pojedini oblik ovisnoga društva. Drugim riječima, u tomu se slučaju primjenjuju opća pravila korporativnog upravljanja.

Pravilo da uprava dioničkog društva vodi poslove društva na vlastitu odgovornost (čl. 240. st. 1. ZTD), znači da, u okviru svoje nadležnosti, uprava samostalno procjenjuje što je u najboljem interesu društva, pri čemu nije dužna slijediti upute ostalih organa ili članova društva.[99] Iz toga slijedi da uprava ne mora slijediti ni upute koje bi bile povoljne za ovisno društvo. Pri ispitivanju određene upute, članovi uprave društva morali bi, naravno, primijeniti pažnju urednog i savjesnog gospodarstvenika (čl. 252. st. 1. ZTD). Sama činjenica da je odbijena uputa bila povoljna za ovisno društvo ne znači, međutim, da je uprava povrijedila dužni standard pažnje. To treba procjenjivati prema općim pravilima o odgovornosti članova uprave, uzimajući u obzir i pravilo o poslovnoj prosudbi (tzv. *business judgement rule*, čl. 252. st. 1. ZTD). Članovi uprave neće povrijediti dužnu pažnju ni ako odbiju uputu za koju su znali da je povoljna, ako su imala razloga vjerovati da bi, umjesto predložene, društvo trebalo poduzeti neku drugu, još povoljniju radnju. Moguće je, naravno, da odbijanjem povoljne upute članovi uprave povrijede pažnju urednog i savjesnoga gospodarstvenika što bi moglo dovesti do njihove odgovornosti za štetu. Čak ni u tom slučaju ne postoji način kojim bi glavna skupština mogla „preventivno" prisiliti upravu da slijedi njezinu povoljnu uputu. Isto se, na odgovarajući način, primjenjuje i na članove upravnog odbora koji samostalno vodi društvo (čl. 272.h st. 1. ZTD).

S druge strane, uprava društva s ograničenom odgovornošću vodi poslove društva u skladu s društvenim ugovorom, odlukama članova društva i obveznim uputama skupštine i nadzornog odbora, ako ga društvo ima (čl. 422. st. 2. ZTD). Budući da, kao što je već rečeno, uprava mora slijediti upute koje su štetne za društvo, uprava tim više mora provesti upute koje su neutralne ili čak povoljne za društvo. Uprava bi mogla odbiti samo upute koje su ništetne jer, primjerice, vrijeđaju propise kojima se štite vjerovnici društva ili javni interes.

Izloženo razmatranje dovodi do zaključka da je učinkovitost koja se može tražiti od upravljanja u faktičnom koncernu sasvim različita od učinkovitog upravljanja u ugovornom koncernu ili koncernu priključenih društava. U ugovornom koncernu i koncernu priključenih društava vladajuće društvo je ovlašteno posredno upravljati svim društvima koncerna kako ono smatra da je najučinkovitije za vladajuće društvo, odnosno koncern u cjelini. Ovisna društva zadržavaju vrlo ograničenu samostalnost kroz ovlasti uprave da ispita upute vladajućeg društva i odbije upute koje su nezakonite ili koje očito nisu u interesu nijednog od društava koncerna. Za razliku od toga, u faktičnom koncernu svako od društava koncerna načelno zadržava onu upravljačku samostalnost koju bi imalo da ne postoji koncern. Svrha zakonskih odredbi je zabraniti vladajućem društvu da zlouporabi svoj položaj i navede ovisno društvo na radnje

98 Altmeppen, H., op. cit. u bilj. 5, § 311, para. 466.
99 Barbić, J., Dioničko društvo, op. cit. u bilj. 32, str. 777.

koje su štetne po ovisno društvo. Ovisno društvo, međutim, ne mora slijediti čak ni one upute vladajućeg društva koje bi bile povoljne za ovisno društva kada to ne bi proizlazilo iz općih pravila prava društava za taj pravni oblik. Ukratko rečeno, to znači da ovisno dioničko društvo nije dužno slijediti poslovodne upute vladajućeg društva, dok je ovisno društvo s ograničenom odgovornošću dužno slijediti takve upute dok god nisu ništetne.

To se može činiti čudnim ako se uzme u obzir da je za faktični koncern, kao i ostale oblike koncerna, konstitutivan pojam jedinstvenog vođenja (čl. 476. st. 1. ZTD). Ovisno dioničko društvo u faktičnom koncernu bi se, dakle, nalazilo u naizgled proturječnoj situaciji u kojoj je objedinjeno jedinstvenim vođenjem, iako njegova uprava nije dužna slijediti niti jednu uputu vladajućeg društva. Ta se proturječnost, međutim, može objasniti pomoću dvije okolnosti. Prva je da je za pojam prevladavajućeg utjecaja, na temelju kojeg se presumira koncern, dostatno da vladajuće društvo ima mehanizme kojima bi faktički moglo provoditi svoju volju čak i kada na to nije ovlašteno. Primjerice, većinski dioničar, o kojemu ovisi imenovanje nadzornog odbora (čl. 256. st. 1. ZTD) i davanje razrješnice upravi (čl. 275. st. 1. toč. 3. ZTD) ima faktičnu mogućnost izvršiti pritisak na upravu i bez da na to ima pravo. Zbog toga je, uostalom, i glavna svrha odredaba o granicama utjecaja u faktičnom koncernu zaštititi manjinske dioničare i vjerovnike ovisnoga društva.

Druga je okolnost da će upute vladajućeg društva, iako ih uprava dioničkog društva teoretski nije dužna slijediti, najčešće biti korisne za ovisno društvo. Vladajuće društvo će, naime, redovito ustrojiti koncern na način da se svako od povezanih društava specijalizira za određene aktivnosti ili određeni segment tržišta. U tom kontekstu za ovisno društvo može biti iznimno na korist „krupna slika" kojom raspolaže vladajuće društvo. Interesi dvaju društava, osobito kada se radi o vladajućem i ovisnom društvu, nisu nužno suprotstavljeni, tako da će vrlo često ista radnja biti korisna za oba društva. Uostalom, gospodarski je pa i pravno logično razmišljanje da vladajuće društvo neće davati upute koje nisu korisne barem za koncern kao cjelinu, a time posredno zapravo bivaju korisne i za ovisno društvo. Ipak, uprava ovisnoga društva se ne bi smjela „uspavati" i slijepo vjerovati vladajućem društvu u pogledu svake upute. Na njoj leži dužnost da prepozna koje su upute vladajućeg društva štetne po ovisno društvo i da odbije provesti, barem dok joj se vladajuće društvo ne obveže nadoknaditi štetu.

6. ZAKLJUČAK

Dosadašnje razmatranje pokazalo je da se, neovisno o jedinstvenom vođenju kao zajedničkoj pretpostavci, pojam učinkovitog upravljanja znatno razlikuje u tri opisane vrste koncerna – ugovornom koncernu, koncernu priključenih društava i faktičnom koncernu. U ugovornom koncernu i koncernu priključenjem dolazi do značajnog „probijanja" upravljačke samostalnosti ovisnoga društva na način da je ovisno društvo načelno dužno provoditi upute vladajućeg društva. U tim je oblicima koncerna, dakle, dominantna centripetalna tendencija. Upravi ovisnoga društva ostaje samo rezidualna funkciju prepoznavanja i odbijanja uputa koje očito ne služe interesima ni vladajućeg društva ni drugih društava koncerna niti koncernu kao cjelini u kojoj se poslovi vode

objedinjeno (ugovorni koncern) te uputa koje su protivne zakonu (ugovorni koncern i koncern priključenih društava).

Takvo zanemarivanje upravljačke samostalnosti ovisnoga društva uravnoteženo je svojevrsnim „probijanjem" neodgovornosti članova za obveze društva kao jednoga od najvažnijih načela društava kapitala. U ugovornom koncernu do toga dolazi samo zaobilazno, preko dužnosti vladajućeg društva da pokrije gubitke ovisnoga društva. U koncernu priključenih društava dolazi do izravnog probijanja prema trećima, na način da je glavno društvo solidarno odgovorno vjerovnicima priključenog društva za obveze priključenog društva. Manjinski dioničari ovisnoga društva dodatno su zaštićeni pravom na naknadu i otpremninu.

Za razliku od toga, u faktičnom koncernu načelno nastavljaju vrijediti opća pravila korporativnog upravljanja prema kojima ovisno društvo ima veću ili manju upravljačku samostalnost. Svrha koncernskih pravila o granicama utjecaja upravo je spriječiti vladajuće društvo da, iskorištavajući svoj položaj, zaobiđe ta pravila. Koncernska pravila tako konkretiziraju opće načelo lojalnosti zabranjujući vladajućem društvu da uputi ovisno društvo na poduzimanje štetnih pravnih radnji. Iznimka postoji jedino ako se vladajuće društvo do kraja poslovne godine obveže ovisnome društvu konkretno nadoknaditi štetu i ako je izgledno da će vladajuće društvo to biti u stanju učiniti. U faktičnom je koncernu, dakle, dominantna centrifugalna tendencija.

Ako bi vladajuće društvo povrijedilo svoju dužnost i dalo ovisnome dioničkom društvu štetnu uputu, uprava ovisnog društva mogla bi, dapače, morala odbiti takvu uputu. Uprava bi društva s ograničenom odgovornošću, naprotiv, bila dužna slijediti tu uputu dok god se njome ne vrijeđaju neotuđive ovlasti uprave nadzirati zakonitost poslovanja društva, osobito očuvanje njegovoga kapitala.

Iz neotuđive nadležnosti uprave dioničkog društva da vodi poslove društva proizlazi da bi uprava ovisnoga dioničkog društva mogla odbiti čak i upute koje su korisne za ovisno društvo. Ipak nije vjerojatno da će do toga u praksi često doći, među ostalim i jer bi uprava ovisnoga dioničkog društva zbog toga mogla biti odgovorna vlastitom društvu prema općim pravilima o odgovornosti uprave. S druge strane, uprava ovisnog društva s ograničenom odgovornošću ne bi mogla odbiti korisne upute, barem dok god se kreću u zakonom postavljenim granicama.

Izloženi zaključci pokazuju da se pod jedinstvenim nazivom koncerna kriju vrlo različiti upravljački modaliteti koji se više ili manje približavaju jednoj od dviju krajnosti – društvima kojima se neovisno upravlja ili potpunom upravljačkom jedinstvu. Pojednostavljeno rečeno, faktični koncern se, barem u pogledu štetnih uputa, približava neovisnim društvima, dok se ugovorni koncern i koncern priključenih društava približavaju društvima kojim se jedinstveno upravlja.

Iz perspektive vladajućeg društva za svaki od oblika koncerna postavlja se pitanje ne bi li bilo oportunije da je ovisno društvo pripojeno vladajućem društvu ili eventualno spojeno s njime u novo društvo, naravno uz uvjet da vladajuće društvo ima dostatnu većinu za donošenje takve odluke. Pripajanjem ovisnoga društva iz faktičnog koncerna vladajuće bi društvo napokon vodilo njegovo poduzeće jedinstveno s vlastitim poduzećem bez prepreka koje bi mogla postavljati uprava ovisnoga društva. Protiv pripajanja može, međutim, govoriti nekoliko razloga. Kao prvo, jedinstveno

upravljanje nije samo povlastica nego i obveza. Uprava vladajućeg društva time bi preuzela dužnost voditi poduzeće do tada ovisnoga društva. Nadalje, vladajuće društvo bi dioničarima ovisnoga, pripojenog društva u zamjenu moralo ponuditi vlastite dionice uz eventualnu doplatu u novcu. To, među ostalim, može zahtijevati povećanje temeljnoga kapitala (čl. 519. ZTD). Na posljetku, do tada vladajuće društvo steklo bi ne samo imovinu, nego i obveze ovisnoga društva. Uostalom, time nestaju sve eventualne prednosti odvojenosti pravnih subjekata.

U odnosu na ugovorni koncern i koncern priključenih društava, imajući na umu da vladajuće društvo ionako mora angažirati svoju imovinu radi pokrivanja gubitaka ovisnoga društva, plaćanja naknade i otpremnine manjinskim dioničarima, pripajanje ili spajanje ovisnoga društva može biti prirodan korak. Pripajanju je osobito blizak koncern priključenih društava jer kod njega, kao i kod pripajanja, dolazi do istiskivanja manjinskih dioničara uz davanje primjerene otpremnine. Ako se tomu doda solidarna odgovornost vladajućeg društva za obveze priključenog društva, otpada većina argumenata za zadržavanje odvojenih pravnih osobnosti. Iz perspektive učinkovitog upravljanja pripajanje ili spajanje društava ugovornog koncerna ili koncerna priključenih društava dovodi do toga da uprava društva preuzimatelja preuzima izravno upravljanje nad pripojenim društvom, isključujući njegovu upravu kao posrednika.

Može se zaključiti da je hrvatski zakonodavac društvima ponudio široke mogućnosti izbora do kojeg će stupnja integrirati vlastito upravljanje. Ključno je, međutim, da se, nakon što se opredijele za jedan oblik, društva pridržavaju odgovarajućih pravila upravo za taj oblik. Samo se tako može postići zadovoljavajuća razina pravne sigurnosti i zaštite manjinskih članova društva i njegovih vjerovnika.

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Summary

EFFECTIVE MANAGEMENT IN A GROUP OF COMAPNIES

The paper discusses different modalities of effective management in various types of corporate groups. The definition of a group of companies – two or more companies with a common management – presupposes a certain degree of managerial integration. On the other hand, the fact that each of the companies retains its own legal personality suggests at least a partial managerial independence. Therefore, the limits of mutual influence of companies that belong to the same group are determined by opposing centrifugal and centripetal forces. The law of group of companies has to precisely define those limits and to place them at disposal to entrepreneurs. It will be demonstrated that those limits are not the same for all types fo corporate groups. The paper analyses three types of corporate group between a parent and a subsidiary company – contractual group of companies, group of integrated companies and factual (*de facto*) group of companies.

Keywords: *effective management; management board; contractual group of companies; group of integrated companies; factual (de facto) group of companies; parent company; subsidiary company.*

Zussamenfassung

WIRKSAMES KONZERNMANAGEMENT

Dieser Beitrag bespricht die Modalitäten eines wirksamen Managements in unterschiedlichen Konzernformen. Selbst die Definition des Konzerns, die besagt, dass der Konzern den Zusammenschluss mehrerer Unternehmen unter einheitlicher Leitung darstellt, impliziert einen bestimmten Grad der Managementintegration. Andererseits weist der Umstand, dass jedes der Unternehmen die eigene Rechtspersönlichkeit behält, wenigstens auf eine partielle Unabhängigkeit des Managements hin. Die Grenzen des gegenseitigen Einflusses von Unternehmen in einem Konzern sind deswegen durch entgegengesetzte zentrifugale und zentripetale Kräfte bestimmt. Das Recht der verbundenen Unternehmen muss diese Grenzen klar definieren und sie den Unternehmern zur Verfügung stellen, so dass die Unternehmer diese Grenzen gemäß

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ihren Bedürfnissen ausnutzen können. Wie es in diesem Beitrag gezeigt wird, sind diese Grenzen nicht für alle Konzerne gleich. Der Beitrag bespricht detaillierter drei Formen des aus dem herrschenden und dem abhängigen Unternehmen bestehenden Konzerns: den Vertragskonzern, den Eingliederungskonzern und den faktischen Konzern.

***Schlüsselwörter*:** *wirksames Management; Verwaltung; Vertragskonzern; Eingliederungskonzern; faktischer Konzern; herrschendes und abhängiges Unternehmen.*

Riassunto

GESTIONE EFFICIENTE DEL GRUPPO

Nel lavoro di disaminano le modalità di gestione efficiente nelle diverse forme di gruppi societari. La definizione stessa di gruppo, quale insieme di società riunite sotto la stessa gestione, presuppone un determinato grado di integrazione nell'amministrazione. D'altra parte, la circostanza che ciascuna delle società mantenga la propria personalità giuridica suggerisce una perlomeno parziale autonomia gestionale. I confini dell'influenza reciproca delle società del gruppo sono, pertanto, determinate dalla contrapposizione di forze centrifughe e centripete. Sta, dunque, alla disciplina giuridica delle società collegate definire chiaramente tali confini e porli a disposizione degli imprenditori, al fine del migliore uso possibile a seconda delle loro esigenze. Come si dimostrerà, tali confini non sono gli stessi per ogni tipo di gruppo societario. Nel lavoro si esaminano in maniera dettagliata tre forme di gruppo di società dominante e dipendente – il gruppo contrattuale, il gruppo di società annesse ed il gruppo di fatto.

Parole chiave: *gestione efficiente; amministrazione; gruppo contrattuale; gruppo di società annesse; gruppo di fatto; società dominante e dipendente.*

RESTRUKTURIRANJE DRUŠTAVA U POTEŠKOĆAMA I TRŽIŠTE KAPITALA – VRSTE I UPRAVLJANJE SUKOBOM INTERESA

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Izvorni znanstveni rad

Sažetak

Predmet rada je istražiti na koji način tržište kapitala može biti platforma za restrukturiranje društava u poteškoćama te koji su financijski posrednici tipično uključeni u te postupke. Nakon toga analizirat će se sukobi interesa koji se mogu pojaviti u tom procesu te izložiti kako ih se može prevenirati, odnosno kako njima upravljati. Rad je usmjeren isključivo na društva u poteškoćama dionice kojih su (ili drugi financijski instrumenti) uvršteni na uređeno tržište Zagrebačke burze d.d. te na alternativne investicijske fondove, odnosno private equity i hedge fondove kao dominantne predstavnike segmenta tržišta kapitala koji ulažu u društva u poteškoćama. Nakon prikaza osobitosti, odnosno pravnih i drugih čimbenika koji utječu na restruktuiranje trgovačkih društava u poteškoćama putem tržišta kapitala, u radu se uspoređuju alternativni investicijski fondovi koji su specijalizirani za ulaganja u društva u poteškoćama, s prikazom njihovih sličnosti, razlika i posebnosti kao i fondova za gospodarsku suradnju koji su osobitost upravo hrvatskoga tržišta kapitala. Zatim se pojašnjava pojam sukoba interesa na tržištu kapitala odnosno razlučuje ga se od suprotstavljenih interesa, da bi se nakon toga iscrpno prikazalo kako se sukobi interesa manifestiraju tijekom pojedinih etapa ulaganja u odnosu na društvo u poteškoćama, odnosno kako se navedenim sukobima interesa može upravljati. Također se ističe uloga Hrvatske agencije za nadzor financijskih usluga, kao nadzornika i regulatora hrvatskoga tržišta kapitala te se skreće pozornost na okolnosti koje bi ona trebala uzeti u obzir pri obavljanju svojih javnopravnih nadzornih ovlasti, u odnosu na uočene sukobe interesa, ali pritom ne zadirući u privatnopravnu razinu odnosa koji su predmet nadzora.

Ključne riječi: *tržište kapitala; restrukturiranje; private equity; hedge fond; sukob interesa.*

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1. UVOD

U ovom se radu istražuje kako tržište kapitala može biti platforma za restrukturiranje društava u poteškoćama, na koji način, tj. putem kojih sudionika tržišta kapitala i koja je njihova uloga u tim slučajevima, zatim koje se vrste sukoba interesa pritom mogu pojaviti i na kojim stranama te može li se on spriječiti ili se njime mora upravljati i kako, te u konačnici koja je uloga nadzornika i regulatora tržišta kapitala u tim slučajevima i kakva je hrvatska praksa u tom pogledu.

Uvodno se ističe da je rad usmjeren isključivo na društva u poteškoćama kojih su dionice (ili drugi financijski instrumenti) uvrštene na uređeno tržište Zagrebačke burze d.d. te na točno određene sudionike tržišta kapitala kao potencijalne financijere takvih društava, a to su alternativni investicijski fondovi, i to *private equity* i *hedge* fondovi. Također, kada se u radu govori o restrukturiranju tih društava misli se na restrukturiranje kao proces koji može dovesti do spašavanja toga društva, neovisno o tomu unutar kakvog se režima ono provodi bilo putem ulaska u pregovore sa strateškim partnerom, bilo korištenjem postojećih instrumenata restruktuiranja u kontekstu predstečajnog, odnosno stečajnog postupka.

Time je uvjetovana i struktura samoga rada. Zbog toga se najprije izlažu osobitosti i čimbenici restrukturiranja društava u poteškoćama putem tržišta kapitala. U tom se dijelu pojašnjavaju posebnosti tržišta kapitala, kao i veze s tržištem kapitala SAD-a, te upućuje na važnost stečajnog zakonodavstva, jer je učinkovitost toga zakonodavnog okvira iznimno važna za uspješno restrukturiranje društava na tržištu kapitala.

Nakon toga se prelazi na prikaz alternativnih investicijskih fondova koji su specijalizirani za ulaganja u društva u poteškoćama, s prikazom njihovih sličnosti, razlika i posebnosti te osvrtom na fondove za gospodarsku suradnju koji su i zbog toga osnovani u Republici Hrvatskoj.

Zatim se pojašnjava sukob interesa u kontekstu tržišta kapitala i društava u poteškoćama, s navođenjem najvažnijih dionika postupka restrukturiranja i mogućih pojavnih oblika sukoba interesa u radu alternativnih investicijskih fondova koji ulažu u takva društva, ali i općenito. Na kraju se prikazuje uloga Hrvatske agencije za nadzor financijskih usluga, kao nadzornika i regulatora hrvatskoga tržišta kapitala u tom segmentu.

Ova je tema, premda naoko jednostavna, u osnovi višedimenzionalna i složena, jer ispreplićе i povezuje različite segmente koji su, sami po sebi, zahtjevni – tržište kapitala, stečajne propise, fiducijarne dužnosti, tj. odnos povjerenja (povjerenički odnos) koji nastaje uvijek kada se imovina drugome povjeri na upravljanje, bankocentrični sustav i univerzalno bankarstvo, povlaštene informacije i asimetričnost informacija i dr. Sve je te elemente potrebno međusobno povezati u cjelinu kako bi se razumjela navedena materija.

Ovaj je rad izrađen uz potporu Hrvatske zaklade za znanost, projekt br. 9366 "Pravni aspekti korporativnih akvizicija i restrukturiranje društava utemeljenih na znanju" i Sveučilišta u Rijeci, projekt br. 13.08.1.2.01 "Zaštita korisnika na hrvatskom i europskom tržištu financijskih usluga".

Za potrebe ovog rada pribavljeni su podatci od Središnjeg klirinškog depozitarnog društva d.d. o broju izdavatelja nad kojima je od 2008. godine do danas otvoren stečajni postupak. Ti su podatci uspoređeni s podatkom o izvrštenim i uvrštenim financijskim instrumentima izdavatelja na Zagrebačkoj burzi d.d., kako bi se dobio podatak o broju društava u poteškoćama koji su potencijalna ciljna društva za ulaganje. Također su provjeravani javno dostupni podatci o konkretnim ulaganjima društava za upravljanje alternativnim investicijskim fondovima te je na mrežnim stranicama sudskog registra provjeren način na koji su ta društva ulazila u konkretna društva, kako bi realizirala svoja ulaganja i ostvarila kontrolu, a sve kako bi se stekao uvid u način njihova rada na hrvatskom tržištu kapitala. Pored navedenoga, od Hrvatske agencije za nadzor financijskih usluga zatraženi su podatci o broju *hedge* fondova osnovanih u Republici Hrvatskoj i njihovim nazivima, *hedge* strategijama koje ti fondovi proklamiraju u svojim pravilima, zatim primjenjuju li *hedge* fondovi te strategije u praksi, u što je uložena imovina *hedge* fondova u Republici Hrvatskoj i u kojim postotcima, ulažu li *hedge* fondovi u Republici Hrvatskoj u društva u poteškoćama (predstečaj, stečaj, restrukturiranje), koliko su ulaganja od 2010. do 2018. realizirali *private equity* i *venture capital* fondovi u Republici Hrvatskoj (postojeća i bivša ulaganja – zbirni broj) te koja je ukupna vrijednost imovine *hedge* fondova u Republici Hrvatskoj (zbirno za sve *hedge* fondove) i koliko je to u postotku u odnosu na vrijednost imovine svih AIF-ova u Republici Hrvatskoj i isti takav podatak u odnosu na *private equity* fondove u Republici Hrvatskoj.

2. OSOBITOSTI I ČIMBENICI RESTRUKTURIRANJA DRUŠTAVA U POTEŠKOĆAMA PUTEM TRŽIŠTA KAPITALA

Kako bi se razumjela uloga tržišta kapitala u restrukturiranju, ali i općenito financiranju društava, pa tako i društava u poteškoćama, potrebno je pojasniti nekoliko bitnih elemenata, budući da će se oni, na ovaj ili onaj način, provlačiti kroz cijeli rad:

1. Najrazvijenije i najnaprednije tržište kapitala je ono u SAD-u i gotovo sve što ono generira prenosi se na europski kontinent i potom prilagođava (više ili manje uspješno) europskim potrebama.
2. U Europi, pa tako i u Republici Hrvatskoj, dominantno je univerzalno bankarstvo, dok je u SAD-u i angloameričkim zemljama dominantno investicijsko bankarstvo.[1]

1 Razlika između ta dva sustava je u širini poslovanja tih banaka, jer su univerzalne banke financijske institucije koje obavljaju sve ili gotovo sve bankovne poslove za svoje komitente, pa se tako bave i kreditno-depozitnim poslovima sa stanovništvom i gospodarskim sektorom, ali i poslovima s financijskim instrumentima. Za razliku od toga, angloameričko bankarstvo tradicionalno se dijeli na investicijsko i komercijalno bankarstvo, od kojih komercijalno obuhvaća tradicionalno poslovanje (polaganje novčanih sredstava (ugovor o novčanom pologu), platni promet (žiro-ugovor) i kreditni posao), dok investicijsko bankarstvo obuhvaća poslovanje financijskim instrumentima u najširem smislu (od pribavljanja i otuđivanja financijskih instrumenata, preko njihova pohranjivanja i upravljanja njima za račun klijenta, do sudjelovanja subjekata pri izdavanju novih financijskih instrumenata). Više o tome vidi Vučković, S., Prvulović, V., Uspon i pad univerzalnog bankarstva, Bankarstvo br. 5, 2013, str.

3. Tržište kapitala iznimno je dinamično, inovativno i fluidno te se nevjerojatno brzo razvija, njegova se struktura mijenja, a gotovo svakodnevno se stvaraju novi, brojni, sve složeniji proizvodi i usluge, uz brojne tehnološke inovacije koje to prate.
4. Od financijske/ekonomske krize 2000. godine nadalje, tržište kapitala pokazalo se kao korisno i pristupačnije mjesto alternativnog financiranja u odnosu na klasično financiranje putem banaka, što je dodatno utjecalo na njegov razvoj, razvoj sudionika tržišta kapitala koji su specijalizirani za takva ulaganja i na potražnju za ulaganje u društva u poteškoćama.[2]

Pri ulaganju u društva u poteškoćama na tržištu kapitala valja uzeti u obzir brojne vanjske i unutarnje čimbenike koji uvelike utječu na takva ulaganja i njihov smjer. Od vanjskih čimbenika ističemo ekonomsko i pravno okruženje te stupanj razvoja i stanje na tržištu kapitala, dok od unutarnjih ističemo način financiranja, kvalitetu menadžmenta društva u poteškoćama te volju i snagu za inovacijama i promjenama.[3] Zbog toga je svako takvo ulaganje potrebno razmotriti sa strateškog, operativnog i financijskog aspekta, na strani ulagatelja i na strani društva u poteškoćama. Poznavanje lokalnoga zakonodavnog okvira, posebice u odnosu na stečajne propise, iznimno je važno za uspješno restrukturiranje društava u poteškoćama i tu važnu ulogu ima stručan i iskusan menadžment i profesionalni tim onih koji u takva društva ulažu.[4]

Hrvatsko zakonodavstvo ne donosi definiciju društva u poteškoćama (engl. *distressed companies*), dok se prema brojnoj inozemnoj literaturi, prvenstveno engleskoga govornog područja, time podrazumijevaju društva u kojima se odvijaju neplanirani i vremenski ograničeni procesi koji prijete osnovnim ciljevima toga društva i u najgorem slučaju mogu dovesti do prestanka društva.[5] Riječ je, dakle, o raznim

54 – 79 i Miladin, P., Trgovina financijskim instrumentima (vrijednosnim papirima, efektima), u: Prilagodba hrvatskog prava i ekonomije europskom tržištu kapitala, Zagreb, Zbornik radova, 2013., str. 469 – 561.

2 Naime, regulativa bankarskog sektora (kreditnih institucija) također je sve složenija i zahtjevnija, pa banke zbog propisa o adekvatnosti kapitala, izloženosti i rizika više nemaju toliko prostora za financiranje (kreditiranje) društava općenito, a posebice kada su u pitanju društva u poteškoćama, što se dodatno komplicira ako su takva društva članovi pojedinih grupa kojima je banka već izložena. U tom smislu vidi brojne izvore: Kucher, A. B., Meitner, M., Private Equity for distressed companies in Germany, The Journal of Private Equity vol. 8. no. 1., 2014., str. 58.;Tenhunen, P., Suominen, S., Svartström, S. C., FINLAND, The Restructuring Review, ed. Mallon, C., 8. izd., 2015., str. 123.; Financial Restructruring Study 2015, Instruments and success factors in practice, Restructuring & Corporate Finance CC, 2015, str. 9. i 10.; Gilson, S., Coming Through in a Crisis: How Chapter 11 and the Debt Restructuring Industry Are Helping to Revive the U.S. Economy, Journal of Applied Corporate Finance, vol. 24., no. 4., 2012., str. 24.; Jain, S., Investment Strategies, Investing in Distressed Debt, Alternative Investment Analyst Review, vol. 1, izd. 2, 2012., str. 35.; Lehmann, A., Risk reduction through Europe's distressed debt market, Policy Contribution, izd. no. 2., 2018., str. 2.

3 Tako i Kucher, A. B., Meitner, M., op. cit., str. 55.

4 U tom smislu vidi i DePonte, K., An Overview of the Private Equity Distressed Debt and Restructuring Markets, The Guide to Distressed debt & Turnaround Investing, a tako i Aggarwal, S., Private Company Restructuring: Conflicts of Interest Between Various Stakeholders, The Journal of Private Equity, vol. 6, no. 2., 2003., str. 51 – 60, str. 54.

5 Vidi primjerice Kucher, A. B., Meitner, M., op. cit., str. 55. Nadalje se *distress* kategorizira

poteškoćama u kojima se društvo može naći, od kratkotrajne tekuće nelikvidnosti, do predstečajnog ili stečajnog postupka.

Odredbama novoga Stečajnog zakona[6] u jednom je propisu uređen i predstečajni i stečajni postupak. Cilj provođenja predstečajnog postupka uređivanje pravnoga položaja dužnika i njegova odnosa prema vjerovnicima i održavanja njegove djelatnosti, dok je to u stečajnom postupku skupno namirenje vjerovnika stečajnoga dužnika, unovčenjem njegove imovine i podjelom prikupljenih sredstava vjerovnicima.[7] Tijekom stečajnog postupka moguća je provedba i stečajnog plana, kojim se odstupa od navedenog općeg režima SZ. Pritom valja istaknuti da je koncipiranje SZ-a, posebice kada je riječ o stečajnom planu, izrađeno po uzoru na odredbe njemačkoga stečajnog zakonodavstva, a na koje je znatno utjecala ekonomska teorija stečajnog, insolvencijskog prava SAD-a.[8] Upravo je američki *Bankruptcy Code*, i to njegovo Poglavlje 11, poslužilo kao uzor uređenja stečajnog plana koji omogućava privatnopravno uređenje važnih stečajnopravnih pitanja, premda je u konačnici njihov koncept ipak različit, jer američki propis predviđa čisti sanacijski postupak koji društvu u poteškoćama treba omogućiti novi početak (zbog čega je i njegova pozicija u tom postupku iznimno snažna), dok je putem stečajnog plana moguća likvidacija, reorganizacija i prijenosna sanacija društva u poteškoćama, sve kako bi se nadišle te poteškoće i opasnosti koje nosi stečajni postupak.[9] Tu je razliku važno stalno imati na umu, jer ona odlučno utječe na poziciju, a samim time i prava, dionika u takvim postupcima i slučajevima (posebice ulagatelja u takva društva), te je evidentno da hrvatsko zakonodavstvo u tom smislu ne nudi rješenja koja bi bila primjerena dinamici i fluidnosti tržišta kapitala, kao mjestu putem kojeg je moguće riješiti probleme i poteškoće u kojima se društva mogu naći, na brži i jednostavniji način. Nastavno na navedeno svakako treba ukazati i na rizik promjene zakonskih propisa koji u Republici Hrvatskoj, nažalost, može biti znatan, što je pokazalo i nedavno donošenje Zakona o postupku izvanredne uprave u trgovačkim društvima od sistemskog značaja za Republiku Hrvatsku, poznatijeg kao *Lex Agrokor*, kao i prethodno uređenje predstečajnog postupka u zasebnom propisu.[10]

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kao strateška poteškoća (koja prijeti strateškim ciljevima društva, primjerice tržišnom udjelu društva), operativna poteškoća (koja prijeti operativnim ciljevima, primjerice ostvarivanju dobiti), financijska poteškoća (koja prijeti strateškim i financijskim ciljevima društva, primjerice *cash flow*) i na kraju stečaj.

6 Stečajni zakon (NN 71/15 i 104/17, dalje: ZS).

7 Čl. 2. st. 1. i 2. SZ.

8 Više o tome vidi u Miladin, P., Markovinović, H., Stečajni plan i nagodba u postupku izvanredne uprave, Zbornik Susreta pravnika Opatija '18., str. 70 – 73.

9 Ibid., str. 72. O važnosti koncepta i odredaba Poglavlja 11 (*Chapter* 11) američkog Bankruptcy Codea pri ulaganju u društva u poteškoćama i njihovom restrukturiranju vidi i Gilson, S., op. cit., te Lemmon, M., Yung-Yu, M., Tashjian, E., Survival of the fittest? Financial and economic distress and restructuring outcomes in Chapter 11, 2009. – oni navode i razliku između financial *distress* i *economic distress* (str. 9.); Jain, S., op. cit., str. 36.

10 Zakon o postupku izvanredne uprave u trgovačkim društvima od sistemskog značaja za Republiku Hrvatsku (NN 32/17). Miladin i Markovinović opravdano pišu o različitim *ad hoc* bočnim udarima na sustav stečajnog prava, koji su uzrokovani pogrešnim shvaćanjem da se akutna kriza stanja glede nelikvidnosti i insolventnosti domaćih trgovačkih društava nije kadra

Hrvatsko tržište kapitala je mlado, malo i u mnogočemu još nerazvijeno, što je vidljivo, primjerice, i prema financijskim instrumentima koji su dostupni za trgovanje na Zagrebačkoj burzi d.d., kao i nedostatku algoritamskog i visokofrekventnog trgovanja.[11] To bez daljnjega utječe na volju, želju i mogućnosti raznih sudionika tržišta kapitala da svoju imovinu usmjeravaju prema zanimljivim projektima, poput društava u poteškoćama, koji za njih mogu biti lukrativna ulaganja, bilo na primarnom ili sekundarnom tržištu. Za razliku od hrvatskog, američko tržište kapitala takvim ulagateljima nudi mogućnost ulaganja „klasične" financijske instrumente, kao što su dionice, obveznice, komercijalni zapisi, varanti, certifikati, ali i druge financijske instrumente nalik vlasničkim instrumentima, koji su kombinacija vlasničkog kapitala i duga (primjerice *debentures*, *notes*, *mortgage/other asset-backed instruments*, *residetial sub-performing or non-performing loans, subordinated loans, participating loans, convertible bonds, bonds with warrants, silent participation, profit participating rights*...).[12] I ti čimbenici utječu na razvijenost, napredak i atraktivnost američkog tržišta koje ima i konkretne rezultate i istraživanja provedena na tu temu. Zemlje zapadne i središnje Europe u tom pogledu ne zaostaju, dok je pred Republikom Hrvatskom još dugi put, ali ipak se kreće.[13]

3. ALTERNATIVNI INVESTICIJSKI FONDOVI KAO FINANCIJERI DRUŠTAVA U POTEŠKOĆAMA NA TRŽIŠTU KAPITALA U REPUBLICI HRVATSKOJ

Ulaganje u društva u poteškoćama, a osobito ona koja su u fazama predstečaja ili stečaja smatra se segmentom tzv. kontrarijanskog ulaganja, dakle ulaganja u financijske instrumente kojima vrijednost i cijena padaju i o kojima na tržištu općenito, pa tako i na tržištu kapitala, nema optimizma.[14] U tim slučajevima ulagatelj bi trebao biti svjestan da kupuje financijski instrument koji, s jedne strane, ima nisku cijenu, ali s druge nosi i veći rizik, pa ulagatelj mora imati i „želudac" i dovoljno resursa da prebrodi eventualni neuspjeh takvog ulaganja te apsorbira mogući gubitak.

rješavati sustavno unutar matičnog SZ-a – vidi Miladin, P., Markovinović, H., op. cit., str. 67 – 68. Predstečajni postupak je do 2015. godine bio uređen Zakonom o financijskom poslovanju i predstečajnoj nagodbi (NN 108/12, 144/12, 81/13, 112/13, 78/15 i 71/15).

11 Zagrebačka burza d.d. (dalje: ZSE) osnovana je 1991. godine, elektroničko trgovanje uvedeno je 1994. godine i tek krajem devedesetih godina 20. stoljeća moglo se govoriti o razvoju dioničarstva i prave burzovne trgovine (vidi i http://zse.hr/default.aspx?id=26). Što se tiče financijskih instrumenata uvrštenih na uređeno tržište ZSE, riječ je o dionicama, obveznicama i komercijalnim zapisima. Više nema certifikata, kao strukturiranih proizvoda (vidi http://zse.hr/default.aspx?id=26472), a da ne govorimo o ostalim financijskim instrumentima koje predviđa čl. 3. T. 24. Zakona o tržištu kapitala (NN 65/18, dalje: ZTK).

12 Tako i Jain, S., op. cit., str. 33 – 34.

13 Primjerice, u Njemačkoj su ulaganja *private equity* fondova od 2009. do 2014. više nego udvostručena, prema Financial Restructuring Study 2015, str. 10.

14 Više o kontrarijanskom ulaganju vidi na https://www.investopedia.com/video/play/what-is-contrarian-investing/; https://www.investopedia.com/university/introduction-stock-trader-types/contrarian-traders.asp; https://www.forbes.com/sites/investor/2014/04/28/5-rules-of-contrarian-investing/#3909a1f3c360.

Investicijski fondovi kao ulagatelji u „uvrštena društva“[15] mogu biti i UCITS i alternativni fondovi.[16] U ovom je radu fokus stavljen na AIF-ove, jer UCITS-i po prirodi stvari trebaju ulagati likvidnu financijsku imovinu, pa ne bi trebali težiti takvim ulaganjima, već naprotiv izlasku iz društava u poteškoćama. Što se tiče AIF-ova, ZAIF:

a. ne uređuje AIF-ove, nego ponajprije upravitelje tih fondova, dakle društvo za upravljanje alternativnim investicijskim fondovima (dalje: UAIF) te donosi minimum odredaba o ulaganjima i ograničenjima ulaganja AIF-ova,[17]
b. ne propisuje koje vrste AIF-ova postoje, nego kod navođenja njihove razlikovnosti propisuje da UAIF u Republici Hrvatskoj može osnovati sve vrste AIF-ova s privatnom ponudom koji imaju strategiju ulaganja iz Dodatka IV. Delegirane uredbe 231/2013. Hrvatska agencija za nadzor financijskih usluga (dalje: Hanfa) pravilnikom detaljnije propisuje obilježja AIF-ova koji se mogu osnovati na temelju ZAIF-a, klase imovine u koje mogu ulagati, ograničenja ulaganja i kriterije za procjenu ispunjavanja uvjeta za kvalificirane ulagatelje.[18] U Dodatku IV. Delegirane uredbe 231/2013 navode se *hedge* fondovi, fondovi rizičnog kapitala (*private equity/venture capital*), nekretninski fondovi, fond fondova te drugi fondovi. Takvu logiku slijedi i još uvijek važeći Pravilnik o vrstama alternativnih investicijskih fondova.[19]

15 Društva kojih su financijski instrumenti uvršteni na uređeno tržište ZSE. Uređeno tržište dijeli se na tri segmenta – vodeće, službeno i redovito tržište (vidi http://zse.hr/default.aspx?id=36768, stranica posjećena 5.8.2018.).

16 UCITS fondovi su otvoreni investicijski fondovi s javnom ponudom, uređeni Zakonom o otvorenim investicijskim fondovima s javnom ponudom (NN 44/16, dalje: ZOIFJP), koji su namijenjeni malim ulagateljima, pa im sam zakon točno određuje dozvoljena ulaganja i ograničenja ulaganja, kao i temeljne odrednice poslovanja radi zaštite malih ulagatelja. Alternativni investicijski fondovi (dalje: AIF) uređeni su Zakonom o alternativnim investicijskim fondovima (NN 21/18, dalje: ZAIF) i to su fondovi namijenjeni institucionalnim/profesionalnim i kvalificiranim ulagateljima, za koje se presumira da imaju veće znanje, iskustvo i razumijevanje rizika. Investicijskim fondovima upravlja društvo za upravljanje i oni su u Republici Hrvatskoj ponajprije osnivani kao otvoreni investicijski fondovi bez pravne osobnosti, stoga je jasno da investicijski fond ne može sam ulagati svoju imovinu (on jest ukupnost imovine), nego to u svoje ime, a za račun fonda/ulagatelja čini društvo za upravljanje, kojim upravljaju profesionalci koji su za to dobili odobrenje nadležnog tijela. Stoga, kada se u ovom radu govori o ulaganju fonda, misli se na ulaganje njegove imovine, koje poduzima društvo za upravljanje. O AIF-ovima kao ulagateljima u trgovačka društva vidi i Braut Filipović, M., Derenčinović Ruk, M., Grković, N., Alternative investment funds and their role in portfolio companies – state of art in Croatian law and practice, Zbornik radova sa skupa 18th International Scientific Conference on Economic and Social Development – „Building resilient society“, str. 234 - 244.

17 Što je u potpunosti u skladu s odredbama Direktive 2011/61/EU Europskog parlamenta i Vijeća od 8. lipnja 2011. o upraviteljima alternativnih investicijskih fondova i o izmjeni direktiva 2003/41/EZ i 2009/65/EZ te uredbi (EZ) br. 1060/2009 i (EU) br. 1095/2010 (tzv. AIFM direktiva), koja je kroz stari ZAIF (NN 16/13 i 143/14) implementirana u hrvatski pravni sustav.

18 Čl. 6. st. 5. i 6. ZAIF.

19 Pravilnik o vrstama alternativnih investicijskih fondova (NN 105/13 i 28/15), čl. 16. st. 1.

U društva u poteškoćama ulažu u prvom redu *hedge* fondovi i fondovi rizičnog kapitala (*private equity* fondovi). Riječ je o fondovima koji imaju mnoge sličnosti i razlike, stoga ćemo u nastavku navesti neke od njih, kako bi samo razumijevanje *ratia* njihova postupanja, pa tako i u odnosu na društva u poteškoćama, bilo lakše.[20]

Hedge fond je, najjednostavnije rečeno, vrsta AIF-a koji je namijenjen institucionalnim / profesionalnim / kvalificiranim ulagateljima i čije poslovanje obuhvaća širok krug investicijskih ciljeva, tehnika i strategija te fleksibilnost pri njihovom izboru, a karakterizira ga u pravilu kratkoročni vremenski horizont ulaganja, visoki rizik, ali i potencijal visokog profita te visoke naknade upravitelja *hedge* fonda.[21] Premda su ciljevi većine *hedge* fondova očuvanje prikupljenoga kapitala, sigurnost povrata uloženih sredstava i amortizacija tržišne nestabilnosti, neki *hedge* fondovi veliku prednost daju ostvarenju visokih profita, pa i uz veliki rizik koji to prati, a pritom važnu ulogu ima profesionalni tim visoko specijaliziranih menadžera.[22] Prema načinu rada i strategijama ulaganja *hedge* fondovi se najčešće dijele na:

1. tržišno neutralnu grupu (*Market Neutral*)
2. dugoročno/kratkoročnu dioničku grupu (*Long/Short Equity*)
3. usmjerenu trgovačku grupa (*Directional Trading*)
4. grupu specijalnih strategija (*Special Strategies*).

Neke od najpoznatijih *hedge* strategija ulaganja su *Long Bias, Long/Short, Market Neutral, Short Bias, Fixed Income Arbitrage, Convertible Bonds Arbitrage,*

20 O sličnostima i razlikama *hedge* fondova i *private equity* fondova vidi više u: Orezyk, S., The Benefits of Investing in Alternatives: The Understanding Hedge Funds, Private Equity, and Managed Futures, 2008.; Achleitner, A., Kaserer, C., Private Equity Funds and Hedge Funds: A Primer**,** Center for Enterpreneurial and Financial Studies**,** CEFS Working Paper No. 2005-03, 2005.

21 *Hedge* fondovi su posljednjih dvadesetak godina postali javnosti zanimljivi zbog brojnih priča o njihovu negativnom, čak, presudnom utjecaju na ekonomsku krizu 2000-ih godina i potom onu od 2007. do 2009. godine. Negativnu percepciju dodatno su pojačale i informacije o enormnim prihodima upravitelja tih fondova, njihovim nagradama, kao i javno isticanim neuspjesima u nekim od ulaganja. Pritom je važno napomenuti kako oni do nedavno uopće nisu bili pravno uređeni ni u SAD-u ni u EU te su umnogome iskorištavali upravo tu nereguliranost i netransparentnost koja iz nje proizlazi za ostvarivanje svojih ciljeva. Mnogi ih i danas nazivaju „strvinarskim" fondovima, no na području EU-a su od 2011. godine regulirani upravitelji svih AIF-ova, pa tako i *hedge* fondova, odredbama AIFMD direktive koja je implementirana u nacionalna zakonodavstva država članica. Naknade upravitelja *hedge* fondova često se određuju kao „2 and 20" - od toga 2 % kao naknada za upravljanje, a 20 %, pa i do 22 % kao tzv. *performance fee*. Povijest *hedge* fondova seže u kraj 19. i početak 20. stoljeća. O povijesti, razvoju, određenju, uređenju i potrebi regulacije *hedge* fondova vidi više u: za Republiku Hrvatsku Mijatović, N., Špoljarić, D., Teorijsko određenje i pravno uređenje hedge fondova, Zagreb, Zbornik Pravnog fakulteta u Zagrebu, vol. 61., no. 3., 2011., str. 897 – 926; ostalo: Anbar, A., Hedge Funds and Effects of Hedge Funds on Financial System, Marmara Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi, Cilt: XXVI, Sayı: 1, 2009., str. 415 - 442; Ganchey, A., Hedge Funds - Evolution and Perspectives, Narodnostopanski arhiv, 4, 2015., str. 37 - 46; Jain, S., What are Hedge Funds?, UBS Alternative Investments, 2011.; Kameni, E., Corporate Governance Implications of the Regulation of Hedge Funds in the Aftermath of the Financial Crisis, 2010.; Shadab, H. B., Hedge Funds and the Financial Crisis, Mercatus on Policy, br. 24, 2009., NYLS Legal Studies Research Paper No. 09/10 #31, 2009.

22 Tako Mijatović, N., Špoljarić, D., op. cit., str. 905.

Volatility Arbitrage, Event Driven - Distressed/Restructuring, Risk Arbitrage/Merger Arbitrage, Equity Special Situations, Credit Long/Short, Credit Asset Based Lending, Multy Strategy hedge Fund i dr.[23]

U društva u poteškoćama ulažu ponajprije *hedge* fondovi koji pripadaju tržišno neutralnoj grupi i čija strategija ovisi o događajima (*Event Driven*), zbog čega se ponekad nazivaju i *event driven* grupom. Njihova se strategija svodi na ulaganje u dugove/financijske instrumente društava koja imaju poteškoće u poslovanju ili dugove/financijske instrumente društava koja se restrukturiraju (*Distressed/ Restructuring*), premda ponekad koriste i *Merger Arbitrage* strategiju. To, konkretno, znači da se dugovi/financijski instrumenti društva otkupljuju uz znatne diskonte, a ako se društvo „spasi", to jest uspješno restrukturira i nastavi dalje stabilno poslovati, fond ostvaruje veliki profit jer vrijednost i cijena financijskih instrumenata kojih je izdavatelj to društvo tada dostižu realnu vrijednost te se otkupljeni dugovi naplaćuju u cijelosti i s kamatom.[24] Ako se društvo ne uspije spasiti, fond i dalje zarađuje zbog zakonskoga reda naplate, premda ne ostvaruje toliki profit. Također je moguće da fond otkupi dug u obliku obveznica, opet uz veliki diskont, i istodobno smanjenje temeljnog kapitala društva povlačenjem dionica, pa ako se društvo spasi fond dug naplaćuje u cijelosti i vrijednost dionica društva raste i ostvaruje se dobit, a ako se društvo ne spasi fond ne gubi toliko jer vrijednost dionica pada ispod vrijednosti obveznica koje su u likvidaciji ili stečaju prema redoslijedu naplate ispred dionica.[25] Upravo zbog velike fleksibilnosti pri izboru konkretne strategije za pojedino ulaganje *hedge* fondovi su itekako pogodni i poželjni ulagatelji u društva u poteškoćama, a inozemna praksa je pokazala da njihovo aktivno sudjelovanje u tim slučajevima uvelike povećava mogućnost uspješnog i bržeg restrukturiranja i smanjenja dugova, da tzv. aktivni *hedge* fondovi stvaraju dodanu vrijednost u tim postupcima svojim iskustvom te uvode disciplinu u upravljanje društvom.[26]

Private equity fondovi također su s vremenom postali važna alternativa ulaganju u tradicionalne financijske instrumente, također su namijenjeni institucionalnim / profesionalnim / kvalificiranim ulagateljima, a ulažu u posebnu klasu imovine, pritom koristeći niz različitih investicijskih tehnika, strategija i oblika imovine.[27] *Private*

23 Tako navodi i ibid., str. 906. Popis *hedge* strategija vidi u Prilogu IV. Delegirane uredbe Komisije (EU) br. 231/2013.

24 loc. cit.

25 Tako i loc. cit.

26 O ulozi *hedge* fondova u restrukturiranju vidi Rosenberg, R. J., Riela, M. J., Hedge funds: The new masters of the bankruptcy universe, International Insolvency Institute, Eight Annual International Insolvency Conference, 2008.; Lim, J., The Role of Activist Hedge Funds in Financially Distressed Firms, Journal of financial and quantitative analysis, vol. 50. no. 6, 2015., str. 1321 – 1351; Lim, J., The Role of Activist Hedge Funds in Financially Distressed Firms, 2010.; Allaire, Y., The Case for and Against Activist Hedge Funds, Institute for governance of private and public organizations, 2015.; Obrestad, S. O., The role of vulture investors in the governance and reorganization of distressed firms, HEC, 2009. O dioničarskom aktivizmu AIF-ova u RH i usporedno vidi i Braut Filipović, M., Derenčinović Ruk, M., Grković, N., op. cit.

27 Više o *private equity* fondovima vidi u: Hotchkiss, E., Smith, D. C., Strömberg, P., Private Equity and the Resolution of Financial Distress, 2011.); DePonte, K., op. cit., str. 17.; Kucher, A. B., Meitner, M., op. cit.; Osnove Private Equity-a s osvrtom na fondove gospodarske

equity fondove karakterizira srednje do dugoročan horizont ulaganja (3 do 7 do 10 godina), predanost razvoju poslovanja i uspjehu društva u koje se ulaže sve do trenutka izlaza (dezinvestiranja), stjecanje (preferiranog) vlasničkog udjela od najmanje 25% u ciljnom društvu, kontrolni utjecaj pri upravljanju društvom i kod donošenja strateških odluka te nadzor nad korištenjem sredstava društva. Osnovne strategije ulaganja *private equity* fondova jesu:

1. *Venture Capital*
2. *Growth/Expansion*
3. *Leveraged Buyout (LBO)*
4. *Mezzanine*
5. *Distressed/Special Situations* te
6. preostale strategije.

Za ulaganje u društva u poteškoćama koristi se *Distressed/Special Situations* strategija koja podrazumijeva ulaganje u vlasničke ili dužničke vrijednosne papire takvih društava te obuhvaća dvije široke pod-strategije:

- *Distressed-to-Control* ili *Loan-to-Own* strategiju kod koje fond ulaže u dužničke vrijednosne papire u nadi da će nakon provedenoga korporativnog restrukturiranja kontrolirati vlasnički kapital (dionice) tog društva i
- *Special Situations* ili *Turnaround* strategiju kod koje fond osigurava i dužnički i vlasnički kapital, najčešće, tzv. „*rescue financing*" društvima koja su operativno i/ili financijski u izazovnoj situaciji.

Private equity fondovi rade u etapama, pa sam početak rada fonda karakterizira etapa prikupljanja obveza i sredstava, u kojoj se zainteresiranim ulagateljima predočavaju okviri strategije i ulaganja fonda (sektorska orijentacija i sl.). Zatim slijedi etapa ulaganja, u kojoj se provodi detaljno tržišno, financijsko, pravno, okolišno i upravno dubinsko snimanje (engl. *due diligence*) ciljnog društva, što može trajati i više mjeseci prije no što se formira i donese konačna odluka o ulaganju. Kada se fond odluči za konkretno ulaganje, ovisno o strategiji, dio vlasničkog udjela u ciljnom društvu prepušta se *private equity* fondu koji time dobiva dio kontrole nad tim društvom. Nakon toga slijedi etapa upravljanja ulaganjima u kojoj se unaprjeđuje i razvija poslovanje društva, potencijalno mijenja veličina društva i repozicionira njegov tržišni udio, uvode novi proizvodi i usluge i sl. Na kraju je izlazna etapa (dezinvestiranje), kada se monetizira dio stvorene imovine, prodaje dio ili cijelo društvo, već ovisno o strategiji za koju se *private equity* fond u konkretnom slučaju odlučio. Stoga možemo reći da *private equity* fondovi imaju važnu socio-ekonomsku funkciju, jer omogućavaju kontinuiranu dostupnost potrebnog financiranja u svim etapama razvoja nekog društva, a kada su u pitanju društva u poteškoćama oni postaju katalizator razvoja i restrukturiranja te efikasne alokacije kapitala.[28] Pored navedenog, istraživanja pokazuju da društva u poteškoćama u koja ulažu *private equity* fondovi brže rješavaju te poteškoće i imaju veću vjerojatnost za uspješno restrukturiranje kao

suradnje, Akademija Zagrebačke burze.

28 U tom smislu vidi i Osnove Private Equity-a s osvrtom na fondove gospodarske suradnje, op. cit. O dioničarskom aktivizmu AIF-ova u RH i usporedno vidi i Braut Filipović, M., Derenčinović Ruk, M., Grković, N., op. cit.

samostalno reorganizirana društva, na što utječe kapital koji unose *private equity* fondovi, ali i njihov menadžment i profesionalni tim.[29]

Posljednjih je godina u inozemnoj praksi čest slučaj kombiniranog djelovanja *private equity* i *hedge* fondova, pa se tako ti fondovi udružuju i zajednički djeluju, neki *hedge* fondovi ulažu u *private equity* fondove, neki UAIF-ovi unutar krovnih fondova formiraju i *hedge* i *private equity* pod-fondove, međusobno se pripajaju *hedge* i *private equity* fondovi i dr.[30]

Specifičnost hrvatskoga tržišta kapitala u odnosu na private *equity fondove* su tzv. fondovi za gospodarsku suradnju (dalje: FGS), koji su osnovani 2010. godine, radi prevladavanja teškoća u gospodarstvu, uklanjanja negativnih učinaka globalne krize na hrvatsko gospodarstvo, uz stvaranje uvjeta za dugoročno održivi gospodarski rast, kao jedna od mjera za gospodarski oporavak i razvitak kojima se potiče kreditna aktivnost. Njihova je svrha bila poticanje razvoja gospodarstva, očuvanje postojećih i stvaranje novih radnih mjesta, jačanje postojećih i pokretanje novih gospodarskih subjekata, putem vlasničkog restrukturiranja ulaganjem dodatnoga kapitala, i to uz suradnju Vlade Republike Hrvatske i zainteresiranih privatnih ulagatelja.[31] Specifičnosti FGS-ova su sljedeće:

1. FGS se osniva kao otvoreni investicijski fond rizičnoga kapitala s privatnom ponudom, dakle kao *private equity* fond i na određeno vrijeme od deset godina uz mogućnost produljenja za maksimalni dodatni rok od dvije godine.
2. FGS će isključivo ulagati u trgovačka društva koja imaju sjedište u Republici Hrvatskoj i koja isključivo ili pretežno obavljaju svoju djelatnost na području Republike Hrvatske.
3. HBOR djeluje kao kvalificirani ulagatelj u svoje ime, a za račun Vlade Republike Hrvatske.
4. Vlada Republike Hrvatske ulaže ukupno do najviše jednu milijardu kuna.
5. veličina FGS-a iznosi najmanje 150.000.000,00 kuna.
6. Za osnivanje FGS-a privatni ulagatelji zajednički moraju preuzeti obvezu uplate u iznosu od najmanje 75.000.000,00 kuna.

29 Tako Hotchkiss, E., Smith, D. C., Strömberg, P., op. cit.

30 Achleitner, A., Kaserer, C., op. cit., str. 4. Navode se primjeri *Texas Pacific Groupa*, kao *hedge* fonda koji se udružuje s *private equity* fondovima, zatim *UBS Global Asset Management* koji je 2005. u Njemačkoj osnovao *hedge* fond fondova koji ulaže u *private equity*, pa *Fortress and Partners Group* koji pod jednim krovnim fondom nude *hedge* i *private equity* fondove te upravitelja *private equity* fondova *AEA Investors* iz SAD-a koji se spojio s upraviteljem *hedge* fondova *Aetos Capital*, kako bi stvorili veću i snažniju platformu za rad.

31 Što se tiče „zakonodavnog" okvira tih fondova, Vlada Republike Hrvatske prvo je donijela Odluku o namjeri sudjelovanja u osnivanju fondova za gospodarsku suradnju (NN 8/10), zatim Pravilnik o uvjetima i postupku sudjelovanja Vlade Republike Hrvatske u osnivanju fondova za gospodarsku suradnju (NN 21/10, 42/12), Odluku o imenovanju kvalificiranog ulagatelja za sudjelovanje u osnivanju fondova za gospodarsku suradnju (96/10) te Pravilnik o sudjelovanju Vlade Republike Hrvatske u Fondovima za gospodarsku suradnju (NN 42/12, 138/12, 18/13 i 47/13), dok su danas na snazi Pravilnik o sudjelovanju Vlade Republike Hrvatske u Fondovima za gospodarsku suradnju (NN 47/13) i Odluka o sudjelovanju u fondovima za gospodarsku suradnju (NN 40/13).

7. Maksimalna obveza uplate Vlade Republike Hrvatske prema jednom FGS-u može iznositi do 30.000.000,00 kuna.
8. Jedno društvo za upravljanje može upravljati samo jednim FGS-om.

Taj je projekt rezultirao osnivanjem tri nova društva za upravljanje fondovima rizičnoga kapitala, a do 2011. godine osnovano je ukupno pet FGS-ova, koji su započeli s radom početkom 2011. godine.[32] Samim time, možemo zaključiti da je navedeni projekt dao dodatni vjetar u leđa industriji *private equity* fondova u Republici Hrvatskoj, a s obzirom na njegov cilj i svrhu jednim je dijelom otvorio prostor upravo ulaganjima u društva u poteškoćama.

Trenutačno u Republici Hrvatskoj posluje 21 društvo za upravljanje investicijskim fondovima, od kojih šest upravlja samo UCITS fondovima, šest samo AIF-ovima, a devet ih upravlja i UCITS fondovima i AIF-ovima. Od navedenih šest društava koja upravljaju samo AIF-ovima, četiri su specijalizirana za *private equity* fondove.[33] Ta društva trenutačno upravljaju sa šest *private equity* fondova i jednim *venture capital* fondom.[34]

Informacije radi, kako bi se stekao uvid u veličinu hrvatskoga *hedge* i *private equity* tržišta, ukupna vrijednost imovine pod upravljanjem *hedge* fondova u Republici Hrvatskoj 30.6.2018. iznosila je 513.988.417,50 kn, što je 14,45% vrijednosti imovine pod upravljanjem svih AIF-ova u Republici Hrvatskoj. Ukupna vrijednost neto imovine *private equity* fondova u Republici Hrvatskoj (zbirno za sve *private equity* fondove 30.6.2018., uključujući FGS-ove) iznosila je 1.110.356.247,59 kn, što je 31,23% vrijednosti imovine svih AIF-ova u Republici Hrvatskoj. Usporedbe radi, vrijednost imovine pod upravljanjem *hedge* fondova za euro zonu znatno se povećala od listopada 2017. do travnja 2018., za 9% i iznosi 494 milijarde eura,[35] a europska *private equity* industrija upravlja s otprilike 640 milijardi eura, dok na svjetskoj razini iznosi 2,8 trilijuna američkih dolara vrijednosti imovine pod upravljanjem *private equity* fondova.[36]

32 Do 2010. godine u Republici Hrvatskoj bila su osnovana dva društva za upravljanje fondovima rizičnog kapitala – *Quaestus Private Equity* d.o.o. i *Nexus Private Equity Partneri* d.o.o., a tada su osnovani *Prosperus Invest* d.o.o., *Honestas Private Equity Partneri* d.o.o. i *Alternative Private Equity* d.o.o.

33 To su *Quaestus Private Equity* d.o.o., *Prosperus Invest* d.o.o., *Honestas Private Equity Partneri* d.o.o. i *Inspire Investments* d.o.o. (društvo je osnovano 2016. godine).

34 Prema podatcima iz Hanfinog registra (https://www.hanfa.hr/investicijski-fondovi/registri/alternativni-investicijski-fondovi/?page=2), riječ je o fondovima *Honestas FGS - otvoreni alternativni investicijski fond rizičnog kapitala s privatnom ponudom, Nexus ALPHA - otvoreni alternativni investicijski fond rizičnog kapitala s privatnom ponudom, Nexus FGS - otvoreni alternativni investicijski fond rizičnog kapitala s privatnom ponudom, Nexus FGS II - otvoreni alternativni investicijski fond rizičnog kapitala s privatnom ponudom, Prosperus FGS - otvoreni alternativni investicijski fond rizičnog kapitala s privatnom ponudom, Quaestus Private Equity Kapital II - otvoreni alternativni investicijski fond rizičnog kapitala s privatnom ponudom te Inspire Fusion otvoreni alternativni investicijski fond poduzetničkog kapitala (venture capital) s privatnom ponudom*.

35 Prema podatcima ESMA-e, ESMA Report on Trends, Risks and Vulnerabilities, No. 2, 2018. (ESMA 50-165-613).

36 Prema podatcima https://www.consultancy.uk/news/16266/private-equity-firms-see-assets-under-management-approach-3-trillion-mark i https://www.investeurope.eu/media/711867/

Osnivanje *hedge* fondova u Republici Hrvatskoj krenulo je tek nakon implementacije AIFMD direktive u pravni sustav Republike Hrvatske i prvi takav fond osnovan je 2014. godine.[37] Trenutačno u Republici Hrvatskoj posluje ukupno 12 *hedge* fondova,[38] koji imaju različite strategije ulaganja, od *multy-strategy*, *global macro*, *macro hedge* do kombinacije *macro hedge* i *equity long bias* strategije, no nijedan od *hedge* fondova koji su osnovani i posluju u Republici Hrvatskoj u svojoj strategiji nemaju predviđenu mogućnost ulaganja u dugove/financijske instrumente društava koja imaju poteškoće u poslovanju ili dugove/financijske instrumente društava koja se restrukturiraju (*Distressed/Restructuring* strategija).

Prema podatcima Hanfe, imovina hrvatskih *hedge* fondova ulaže se pretežno u dužničke vrijednosne papire (63,38 %), znatno manje u dionice (17,72 %), zanimljivo mnogo u novac na računu (čak 15,24 % !), minimalno u udjele u investicijskim fondovima (2,63 %), nešto u depozite (1,71 %) te gotovo ništa u izvedenice (0,29 %). Što se tiče ulaganja u društva u poteškoćama, šest *hedge* fondova uložilo je imovinu u dionice društava u poteškoćama koja su uvrštena na uređeno tržište ZSE, a riječ je o ukupno četiri društva u poteškoćama.[39] Slijedom navedenog, u ovom trenutku ne možemo govoriti o tomu da u Republici Hrvatskoj *hedge* fondovi aktivno sudjeluju u ulaganjima u društva u poteškoćama, a možemo zaključiti da im je struktura imovine pomalo neobična, s obzirom na iznimno visoki postotak ulaganja u dužničke vrijednosne papire i novac na računu, koji se tradicionalno smatraju sigurnijim oblikom ulaganja, što inače i nije tako karakteristično za *hedge* fondove.

invest-europe-2017-european-private-equity-activity.pdf.

37 Prvi *hedge* fond osnovan u Republici Hrvatskoj je P*rimus, otvoreni alternativni investicijski fond s privatnom ponudom*, koji je osnovao UAIF *Locusta Invest* d.o.o. (danas je to UAIF *KD Locusta Fondovi* d.o.o.), rješenje Hanfe izdano je 12.9.2014. Pravilima fonda propisano je da je *investicijski cilj fonda postizanje dugoročne kapitalne aprecijacije cijene udjela sukladno preuzetom riziku. Društvo će pokušati stvoriti apsolutni prinos, odnosno kapitalnu dobit ne ograničavajući se pri tome na pojedinu vrstu financijskih instrumenata za ostvarenje takvog prinosa. Da bi se postigao investicijski cilj, društvo će u upravljanju fondom upotrebljavati alternativnu investicijsku strategiju ulažući u sve dozvoljene vrste imovine, koristeći pritom tehnike za učinkovito upravljanje portfeljem (pozajmice na tržištu novca, repo poslove, kupnje i povratne prodaje vrijednosnih papira te zajma vrijednosnih papira). Takav pristup trebao bi dovesti do prinosa fonda koji nije uopće ili je manje koreliran prinosu dioničkih ili drugih indeksa*.

38 Riječ je o sljedećim *hedge* fondovima: *Adria Value Fund - otvoreni alternativni investicijski fond s privatnom ponudom, ICAM Outfox Macro Income Fund,, ICAM Total Return, CGS Alpha alternativni otvoreni investicijski fond s privatnom ponudom, CGS Beta alternativni otvoreni investicijski fond s privatnom ponudom, CGS Gamma alternativni otvoreni investicijski fond s privatnom ponudom, Inspire Alpha otvoreni alternativni investicijski fond s privatnom ponudom, Locusta Value I, otvoreni alternativni investicijski fond s privatnom ponudom, Locusta Value III, otvoreni alternativni investicijski fond s privatnom ponudom, Locusta Value IV, otvoreni alternativni investicijski fond s privatnom ponudom, Primus, otvoreni alternativni investicijski fond s privatnom ponudom, Anchor, otvoreni alternativni investicijski fond s privatnom ponudom* (s time da je tom fondu 26.6.2018. pripojen *hedge* fond *Mooring otvoreni alternativni investicijski fond s privatnom ponudom*, koji je osnovan 17.3.2017.)

39 To su društva OT-Optima Telekom d.d., Dalekovod d.d., HTP Korčula d.d., HTP Orebić d.d., dakle društva koja su u postupku predstečajne nagodbe, a od nedavno je i za jedno društvo u koje je uložena imovina jednog *hedge* fonda podnesen zahtjev za otvaranje stečajnog postupka.

Ovaj dio priče o ulaganju u društva u poteškoćama završit ćemo s podatcima koji mogu dati uvid u stanje na tržištu kapitala u Republici Hrvatskoj u odnosu na ta društva. Prema podatcima prikupljenima od Središnjeg klirinškog depozitarnog društva d.d. (dalje: SKDD), od 2008. do 2018. godine nad 187 društva koji su članovi izdavatelji SKDD-a otvoren je stečajni postupak. Najveći broj tih postupaka otvoren je 2012. godine (33), s time da su i 2010. i 2011. godine bilježile veći broj otvaranja stečajnih postupaka, 2010. ih je bilo 18, a 2011. ih je bilo 19, a u 2017. godini je nad 15 članova izdavatelja otvoren i postupak izvanredne uprave, prema odredbama tzv. *Lex Agrokora*.[40]

Istodobno, od tih 187 društava koja su se evidentno našla u ozbiljnim poteškoćama, 45 ih je imalo financijske instrumente (pretežno dionice) uvrštene na uređeno tržište ZSE i svi su ti financijski instrumenti od 2008. do 2018. izvršteni.[41] Dakle, upravo u razdoblju kada su FGS-ovi bili otprilike u etapi provođenja *due dilligencea* budućih ulaganja i ulaganja imovine, na ZSE nije nedostajalo društava u poteškoćama koja su mogla biti predmetom ulaganja kao ciljna društva. Osim toga, u tom su razdoblju otvarani i brojni predstečajni postupci.

Javno dostupni podatci o ulaganju *private equity* i *venture capital* fondova u Republici Hrvatskoj pokazuju:

- da su ti fondovi ulagali podjednako u dionička društva (njih 11) i društva s ograničenom odgovornošću (njih 14),
- da je od 11 dioničkih društava u koja su ulagali ti fondovi njih osam imalo financijske instrumente (prvenstveno dionice) uvrštene na ZSE,[42]
- da je od tih osam dioničkih društava (financijski instrumenti kojih su uvršteni na ZSE) pet bilo u postupku predstečajne nagodbe, a nad jednim je otvoren stečajni postupak,[43]
- da ti fondovi ulaze u vlasničku strukturu društava u koja ulažu te kao kontrolni mehanizam postavljaju svoje predstavnike (članove uprave UAIF-a ili zaposlenike UAIF-a) u nadzorni odbor tih društava, gotovo nikada u upravu.[44]

40 U 2008. godini stečajni postupak je otvoren nad sedam izdavatelja, 2009. nad 10, 2010. nad 18, 2011. nad 19, 2012. nad 33, 2013. nad 14, 2014. nad 16, 2015. nad 15, 2016. nad 16, 2017. nad 15 (+15 izvanredna uprava), te 2018. nad devet izdavatelja. Napomena: za potrebe ovog rada nije provjeravano otvaranje predstečajnih postupaka nad članovima izdavateljima SKDD-a (kojih je u trenutku provođenja istraživanja, kolovoz 2018., bilo 799), jer iz naziva tvrtke nije vidljiv taj podatak.

41 U odnosu na 15 društava zahvaćenih *Lex Agrokorom*, njih sedam nema financijske instrumente uvrštene na uređeno tržište ZSE, dok ih osam ima, a od tih osam za jedno su društvo dionice izvrštene.

42 HTP Korčula d.d., HTP Orebić d.d., Hrvatska poštanska banka d.d., Drvna industrija Spačva d.d., Metronet telekomunikacije d.d., Vaba banka d.d., Centar banka d.d., Dalekovod d.d.

43 Postupak predstečajne nagodbe: HTP Korčula d.d., HTP Orebić d.d., Drvna industrija Spačva d.d., Metronet telekomunikacije d.d., Dalekovod d.d. Na dan 6.8.2018. prema podatcima iz sudskog registra evidentirano da je za sva ta društva i odobrena predstečajna nagodba. Stečajni postupak: Centar banka d.d.

44 Iz javno dostupnih podataka o njihovim ulaganjima, na mrežnim stranicama tih društava (investicije/portfolio/ostvareni izlazi) ili iz medija, proizlazi da je bilo riječ o 27 ulaganja.

Na temelju tih podataka možemo zaključiti da hrvatski *private equity* fondovi ulažu u društva u poteškoćama financijski instrumenti kojih su uvršteni na ZSE te da nastoje doprinijeti uspješnom restrukturiranju tih društava.

4. SUKOB INTERESA PRI ULAGANJU U DRUŠTVA U POTEŠKOĆAMA I ULOGA HANFE

U svakom društvu postoje različiti interesi različitih dionika (*stakeholdera*), a situacija se može dodatno zakomplicirati kada se društvo nađe u poteškoćama. Pritom valja imati na umu ne samo različite dionike i njihove interese, nego i različitu regulativu koja uređuje prava i obveze tih dionika. Uspješno restrukturiranje društva u poteškoćama zahtijeva izvrsno poznavanje društva, svih dionika tog procesa i mjerodavne regulative te uspješno balansiranje različitih interesa kako bi se postigao optimalni cilj. Dionike društva u poteškoćama možemo podijeliti u sljedeće kategorije:[45]

- dioničari, a društvo može imati različite rodove dionica (redovne, povlaštene) pa imatelji različitih dionica mogu imati različite interese
- imatelji obveznica ili komercijalnih zapisa, koji predstavljaju dug toga društva
- imatelji drugih financijskih instrumenata kojih je društvo izdavatelj
- uprava društva, koja bi uvijek trebala voditi poslove društva pozornošću urednog i savjesnog gospodarstvenika[46]

Hanfini podatci potvrđuju da je riječ o 27 ulaganja *private equity* fondova i tri ulaganja *venture capital* fonda. Od 27 javno dostupnih podataka o ulaganjima (neovisno o vrsti fonda) usporedbom podataka s mrežnih stranica sudskog registra, utvrđeno da su ti fondovi ušli u vlasničku strukturu 11 društava (i to iznad 50 % udjela u temeljnom kapitalu, u pravilu od 55 % do 86 %) i u nadzorni odbor devet društava, a u upravu samo jednog društva. Za dva društva ulazak u vlasnički kapital ne možemo točno utvrditi jer su prikazani podatci o skrbničkom računu, ali to nije skrbnički račun na ime. Vidi http://www.quaestus.hr/o-nama/rizicni-kapital/portfolio/, http://www.quaestus.hr/o-nama/rizicni-kapital/portfolio/ostvareni-izlazi/, http://www.prosperus-invest.hr/content/investicije, http://www.inspire.investments/hr/category/investicije-hr/, https://www.tportal.hr/biznis/clanak/sto-su-uopce-fgs-ovi-skegrin-izum-koji-je-drzavi-zarobio-novac-u-agrokoru-20170728/print, https://www.jutarnji.hr/vijesti/hrvatska/fondovi-gospodarske-suradnje-u-krizi-su-pomogli-samo-7-tvrtki.-za-to-ih-je-drzava-nagradila-sa-34-milijuna-kuna/4042593/. Napominjemo da nisu sva ulaganja javno dostupna, a od Hanfe nisu traženi podatci o konkretnim ulaganjima.

45 Praktičan shematski prikaz dionika društva u poteškoćama, s njihovim interesima, dan je u Financial Restructruring Study 2015, op. cit., str. 19. Dionike restrukturiranja navodi i Aggarwal, S., op. cit., str. 52.

46 Tu obvezu propisuje čl. 252. Zakona o trgovačkim društvima (NN 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, dalje: ZTD). Izmjenama i dopunama ZTD-a iz 2015. godine, u ZTD su prvi put uvedene odredbe koje izravno uređuju sukob interesa. Čl. 248.a (i 429.a) propisuje da član uprave ne može bez suglasnosti nadzornog odbora sudjelovati u odlučivanju ili sklapanju pravnog posla ako:

1. je zastupnik po zakonu, zakonski zastupnik, prokurist ili punomoćnik druge ugovorne strane,
2. mu je druga ugovorna strana ili zastupnik po zakonu, zakonski zastupnik, prokurist ili

- zaposlenici društva, kojima je očuvanje posla i društva od presudne važnosti
- vjerovnici, koji mogu imati različite interese, već ovisno o vrsti (ugovornog) odnosa s društvom, trajanju tog odnosa, iznosu duga, njihovom položaju u slučaju predstečaja, stečaja, likvidacije društva
- poslovni partneri društva (dobavljači, kupci i dr.), koji se također mogu naći u poziciji vjerovnika, a i njihovi interesi mogu biti različiti opet ovisno o vrsti (ugovornog) odnosa s društvom, trajanju tog odnosa, iznosu duga, njihovom položaju u slučaju predstečaja, stečaja, likvidacije društva
- *private equity/hedge* fondovi kao ulagatelji u društvo
- država, ne samo zbog naplate svih potrebnih davanja, nego i očuvanja radnih mjesta, te kao jedan od vjerovnika ili partnera.

U odnosu na mjerodavnu regulativu, treba poznavati i voditi računa o odredbama ZTD-a, SZ-a, različitih sektorskih propisa, poput ZAIF-a i ZTK kada su u pitanju *private equity* i *hedge* fondovi, kao i *lex specialis* koji za neko društvo može propisivati vlastite posebnosti.

Međutim, važno je naglasiti da različitost i suprotnost interesa navedenih dionika ne znači i ne podrazumijeva ujedno i sukob interesa. Nesporno je da njihovi interesi mogu biti, a često sigurno i jesu, različiti, pa i suprotstavljeni. No, sukob interesa, posebice imajući u vidu odnose na tržištu kapitala, postoji tek u situaciji u kojoj je jedna osoba dužna odlučiti kako će postupiti, i to isključivo u interesu druge osobe, a taj njen izbor ujedno utječe/ima posljedice i na njene vlastite interese (sukob interesa i dužnosti) ili na interese drugih/trećih osoba, čije je interese ta osoba, također, dužna štititi (sukob dužnosti).[47] Stoga je transparentnost svih uključenih, a posebice onih koji vode postupak restrukturiranja presudna i važno je omogućiti, koliko je god to moguće, razumno i potrebno, sučeljavanje različitih interesa svih dionika radi rješavanja poteškoća koje su zadesile društvo, kako bi se ono spasilo.[48]

Uzevši u obzir prethodno spominjanu specifičnost hrvatskoga financijskog tržišta, pa tako i tržišta kapitala, koje karakteriziraju bankocentričnost i univerzalno bankarstvo, kao i činjenicu da su u Republici Hrvatskoj banke povezane s društvima za upravljanje, bilo kao jedan od osnivača ili kao depozitar fondova kojima upravlja

punomoćnik druge ugovorne strane srodnik po krvi u pravoj liniji do bilo kojeg stupnja, a u pobočnoj liniji do drugog stupnja ili mu je bračni drug, izvanbračni drug ili srodnik po tazbini do drugog stupnja, bez obzira na to je li brak prestao ili nije, ili je posvojitelj ili posvojenik druge ugovorne strane, njezina zastupnika po zakonu, zakonskog zastupnika, prokurista ili punomoćnika,

3. vezano uz pravni posao o kojem se odlučuje ili se sklapa postoji sukob interesa između člana uprave i društva.

47 Tako Derenčinović Ruk, M., Razvoj i pravno uređenje sukoba interesa i instituta usklađenosti na hrvatskom tržištu kapitala, doktorska disertacija, 2016., str. 199.

48 O sukobu interesa društava u poteškoćama općenito, pa i u čije su restrukturiranje uključeni *private equity* i *hedge* fondovi vidi Miller, H. R., Restructuring under a microscope: Cautionary tales for directors and officers in "distressed land", Navigating in Today's Environment: The Directors' and Officers' Guide to Restructuring; Financial Restructruring Study 2015, op. cit., str. 19.; Gilson, S., op. cit., str. 30.; Rosenberg, R. J., Riela, M. J., op. cit., str. 3.; Lemmon, M., Yung-Yu, M., Tashjian, E., op. cit; a o različitim interesima sudionika stečajnog plana pišu i Miladin, P., Markovinović, H., op. cit., str. 76.

društvo, kao tipičan primjer sukoba interesa nameće se situacija u kojoj banka (kao majka) kroz fondove želi riješiti svoje loše plasmane, pa *private equity* ili *hedge* fond ulaže u društvo u poteškoćama ne bi li ga spasilo. Takav se slučaj sukoba interesa može dodatno potencirati u izlaznoj etapi, ako primjerice dođe do inicijalne ili sekundarne javne ponude financijskih instrumenata tog društva, a investicijski savjetnici, brokeri ili pokrovitelji/aranžeri izdanja povezani su s bankom i *private equity* ili *hedge* fondom.

Međutim, takav slučaj sukoba interesa u Republici Hrvatskoj se, barem za sada, teže može realizirati, jer od šest UAIF-ova koji upravljaju samo AIF-ovima, niti jedan nije vlasnički povezan s nekom od banaka u Republici Hrvatskoj. Doduše, moguć je istovjetan slučaj, ali u kojem je osnivač UAIF-a pravna ili fizička osoba koja, zbog personalne, kapitalne ili kakve treće povezanosti s trećom osobom utječe na UAIF da putem *private equity* ili *hedge* fonda ulaže u društvo u poteškoćama povezano s tom trećom osobom, ne bi li ga spasilo.

Međunarodna organizacija komisija za vrijednosne papire IOSCO (*International Organization of Securities Commissions*) proteklih se dvadesetak godina podosta bavila sukobom interesa različitih sudionika tržišta kapitala, pa je tako 2009. godine izradila konzultacijski dokument o sukobu interesa *private equity* fondova u kojem navodi neke od pojavnih oblika sukoba interesa koji se javljaju u njihovom poslovanju.[49] Sukob interesa je moguć u različitim oblicima u svim etapama životnog ciklusa *private equity* fonda, od prikupljanja obveza i sredstava, preko etape ulaganja, zatim etape upravljanja ulaganjima do izlazne etape.[50]

U etapi prikupljanja obveza i sredstava sukobi interesa su ponajprije mogući između ulagatelja u fond te ulagatelja i UAIF-a, zbog preferiranja određenih ulagatelja (tzv. engl. *most favoured nation clause*), dogovora UAIF-a s financijskim posrednicima oko provizija, naknada i pogodnosti pri nuđenju udjela fonda, kao i zbog veličine fonda i s time povezanih naknada, no ne i u odnosu na ulaganje u neko društvo u poteškoćama, jer se tada takva ulaganja još ne razmatraju u toj mjeri, nego samo na razini ideje (u smislu sektorske orijentacije i sl.).

U etapi ulaganja moguć je sukob interesa između UAIF-a i AIF-a ako UAIF pruža određene usluge društvu u koje ulaže (primjerice usluge savjetovanja, analize, kasnije pokroviteljstva izdanja u javnoj ponudi i sl.) i naplaćuje ih, a prihod od toga ostvaruje UAIF, a ne AIF, premda je riječ o prihodima koji su ostvareni za potrebe ulaganja imovine AIF-a.[51] Također je moguć sukob interesa između dva ili više AIF-a kojima upravlja isti UAIF, a čije su investicijske strategije slične ili se uvelike podudaraju. Tada UAIF mora odlučiti koji će AIF imati prednost, što se, u pravilu, određuje prema pravilu koji je AIF stariji.[52] Već je bilo riječi i o biranju ulaganja na temelju kapitalne ili personalne povezanosti UAIF-a s trećim osobama, što na malim i bankocentričnim tržištima može rezultirati sukobom interesa jer se ulaže u neko

49 IOSCO, Private Equity Conflicts of Interest (Consultation Report), 2009.

50 Detaljnije o tim pojavnim oblicima vidi i u Derenčinović Ruk, M., op. cit., str. 374 – 378.

51 IOSCO, Private Equity, op. cit., str. 14. Slično i Frase, D., Law and Regulation of Investment Management, 2. Izd., 2011., London, Rbr. 20-020.

52 Tako i Spangler, T., The Law of Private Investment Funds, 2. izd., 2012, Oxford, Rbr. 8.48., kao i Frase, D., op. cit., Rbr. 20-020.

društvo (u poteškoćama) u prvom redu vodeći se interesom tih povezanih osoba i „spašavanjem" njihova plasmana, a ne samoga AIF-a, to jest ulagatelja. U toj etapi, također, treba paziti na potencijalni sukob interesa koji mogu imati i suradnici UAIF-a, poput savjetnika. Naime, u inozemnoj su praksi česti tzv. *advisory boards*, koji savjetovanjem znatno pomažu UAIF-u u upravljanju AIF-om, posebice pri traženju i izboru prikladnih ulaganja. U tim slučajevima ugovorom koji se sklapa između UAIF-a i savjetnika (*advisory agreement*) treba utanačiti postupanja koja sprječavaju nastanak sukoba interesa između savjetnika i s njima povezanih osoba s jedne strane te UAIF-a i/ili AIF-a s druge. Pored navedenoga, u praksi se često propisuje i da UAIF mora osigurati da povezane osobe ne ulažu u društvo u koje AIF, nakon razmatranja ulaganja, ipak nije uložio. Nadalje je moguć sukob interesa u slučaju tzv. *rescue financinga*, kada je društvu iz portfelja AIF-a potreban dodatni kapital koji taj AIF više nema, jer je pri kraju svoga životnog ciklusa, pa s kapitalom „uskače" drugi AIF kojim upravlja isti UAIF. U tom se slučaju moraju točno i jasno odrediti uvjeti financiranja, te se mora osigurati da drugi AIF ne služi samo spašavanju navedene investicije prvog AIF-a, nego da takva investicija odgovara i njegovoj investicijskoj strategiji i ciljanoj strukturi.[53] Sukob interesa moguć je i zbog tzv. *co-investmenta*, kada članovi uprave UAIF-a (koji su često i osnivači UAIF-a) imaju pravo sudjelovati u investicijama AIF-a, što može biti vrlo korisno i poticajno jer jača povjerenje ulagatelja.[54] No, jednako tako to može dovesti do *cherry pickinga*.[55] Moguć je i *co-investment* pojedinih ulagatelja u vezi s konkretnim investicijama AIF-a, pri čemu valja voditi računa o tomu da se određeni ulagatelji ne favoriziraju na račun drugih.[56]

U etapi upravljanja ulaganjima treba paziti na razne naknade koje se naplaćuju AIF-u (*director's fees, monitoring fees, consultancy fees*), jer one moraju biti transparentne i jasne, te ne smiju ići na štetu AIF-a.[57] Tu je, posebice kada su u pitanju društva u poteškoćama, iznimno važno pitanje imenovanja ključnih osoba u društvima u koja AIF ulaže – bilo u upravu ili nadzorni odbor. Naime, te osobe najčešće dolaze iz samog UAIF-a, pa se postavlja pitanje njihove lojalnosti i sukoba interesa, jer one imaju fiducijarne dužnosti prema društvu u koje su postavljene kao članovi uprave ili nadzornog odbora, ali i prema UAIF-u, to jest prema AIF-u (jer ta društva predstavljaju ulaganje AIF-a).[58] Situacija se može dodatno zakomplicirati ako određeni dioničari

53 IOSCO, Private Equity, op. cit., str. 15.

54 Tako i Spangler, T., op. cit., Rbr. 8.46.

55 IOSCO, Private Equity, op. cit., str. 16. Tako i Frase, D., op. cit., Rbr. 20-020. *Cherry picking* označava situaciju u kojoj društvo izabire najprofitabilnije financijske instrumente za svoj vlastiti račun, dok na račune investicijskih fondova ili ulagatelja/klijenata alocira manje atraktivne, manje profitabilne ili čak neprofitabilne financijske instrumente.

56 Ibid. str. 16 – 17.

57 Ibid. str. 17.

58 Tako i Aggarwal, S., op. cit., str. 51., 53 – 54. Posebno napominjemo da je odredbama ZOIFJP i ZAIF-a predviđeno da su društvo za upravljanje, članovi njegove uprave, nadzornog odbora i prokuristi dužni:

1. u obavljanju svoje djelatnosti, odnosno svojih dužnosti, postupati savjesno i pošteno te u skladu s pravilima struke
2. u izvršavanju svojih obveza postupati s pažnjom dobrog stručnjaka
3. postupati u najboljem interesu UCITS fondova i ulagatelja u UCITS fondove kojima

društva u poteškoćama imaju pravo birati neke članove uprave društva, zbog čega članovi uprave mogu zanemariti svoje (fiducijarne) dužnosti prema društvu i među članovima uprave dođe do sukoba interesa, koji se nadovezuje i na sukob interesa među dioničarima. U tom se smislu posebna pozornost mora posvetiti i povlaštenim informacijama, *front runningu*[59] te manipulaciji tržištem.[60] Kada se u portfelju AIF-a nalazi društvo za koji postoje naznake da se ulaganje neće uspješno realizirati, moguće je da UAIF više ne posvećuje dovoljno pažnje tom ulaganju i zanemari ga, odnosno sve ljudske resurse preusmjeri na neko drugo uspješnije ulaganje, što može štetiti interesima AIF-a i ulagatelja.[61]

upravljaju, kao i štititi integritet tržišta kapitala (čl. 47. st. 1. ZOIFJP i čl. 52. st. 1. ZAIF). Navedeni propisi, dakle, pred upravu UAIF-a stavljaju viši standard pažnje od onog iz ZTD-a, pažnju dobrog stručnjaka, jer je riječ o licenciranim profesionalcima.

59 *Front Running* označava situaciju kada osoba zlorabljuje informacije u vezi s još neizvršenim nalozima ulagatelja/klijenta, iako je dužna poduzeti sve razumne postupke u svrhu sprječavanja zlorabljenja takvih informacija. Naime, osoba ne smije, nakon što zaprimi nalog ulagatelja/klijenta, a prije no što ga izvrši, s ciljem da preduhitri izvršenje ulagateljeva/klijentova naloga, kupiti (veću) količinu financijskih instrumenata na koje se ti nalozi odnose, kako bi ih potom skuplje prodala ulagatelju/klijentu i na tome nepovlasno zaradila. Osoba, također, ne smije na tržištu brzo prodati svoje financijske instrumente, prije no što izvrši veću količinu ulagateljevih/klijentovih naloga za prodaju financijskih instrumenata kojima će cijena, s obzirom na okolnosti, padati i koji će se, stoga, prodati jeftinije od onoga što je osoba zaradila za svoje financijske instrumente (što osobito dolazi do izražaja kod financijskih instrumenata koji su likvidniji i atraktivniji na tržištu). Tako Derenčinović Ruk, M., op. cit., str. 332.

60 IOSCO, Private Equity, op. cit., str. 18. Tako i Spangler, T., op. cit., Rbr. 8.49. Manipulacija tržištem je kazneno djelo zlouporabe tržišta kapitala (čl. 260. Kaznenog zakona, NN 125/11, 144/12, 56/15, 61/15 i 101/17):

(1) Tko suprotno propisima o tržištu kapitala:

1. obavi transakciju ili da nalog za trgovanje ili obavi bilo koji drugi postupak koji daje ili bi mogao dati neistinite ili obmanjujuće znakove o ponudi, potražnji ili cijeni financijskih instrumenata ili povezanog promptnog ugovora za robu ili drži cijenu jednog ili više financijskih instrumenata ili povezanog promptnog ugovora za robu na neuobičajenoj ili umjetnoj razini,
2. pri sklapanju transakcije ili davanju naloga za trgovanje ili pri bilo kojoj drugoj aktivnosti ili postupku koji utječe na cijenu jednog ili nekoliko financijskih instrumenata ili povezanog promptnog ugovora za robu upotrebljava fiktivne postupke ili druge oblike obmane ili prijevare,
3. širi informacije putem medija, internetom ili bilo kojim drugim načinom ili sredstvom kojim daje ili bi mogao davati neistinite ili obmanjujuće znakove glede ponude, potražnje ili cijene financijskih instrumenata ili povezanog promptnog ugovora za robu ili održava cijenu jednog ili nekoliko financijskih instrumenata ili povezanog promptnog ugovora za robu na neuobičajenoj ili umjetnoj razini kada osobe koje su proširile informaciju stječu, za sebe ili drugu osobu, prednost ili korist od širenja dotičnih informacija ili financijskih instrumenata, uključujući širenje glasina i neistinitih ili obmanjujućih vijesti,
4. prosljeđuje ili daje neistinite ili obmanjujuće informacije ili osnovne podatke ili bilo kojim drugim postupkom manipulira izračunom referentnih vrijednosti, kaznit će kaznom zatvora od šest mjeseci do pet godina.

(2) Ako je postupanjem iz stavka 1. ovoga članka pribavljena imovinska korist velikih razmjera ili je drugome prouzročena imovinska šteta velikih razmjera, počinitelj će se kazniti kaznom zatvora od jedne do osam godina.

61 Ibid. str. 19. Tako i Spangler, T., op. cit., Rbr. 8.49. te Tako i Aggarwal, S., op. cit., str. 57.

U izlaznoj etapi sukob interesa je moguć kod produljenja roka trajanja fonda. Naime, UAIF može nastojati produljiti rok trajanja AIF-a kako bi i dalje ostvarivao naknade i provizije, premda nema realnog opravdanja za takvo produljenje.[62] Moguće je i da UAIF nerealno, odnosno pretjerano vrednuje imovinu AIF-a kako bi naplatio veće naknade.[63] Problematično može biti i vrijeme izlaska iz konkretnog ulaganja, osobito ako je riječ o ulaganju u kojem sudjeluje više AIF-ova pod upravljanjem istog UAIF-a, a svaki od AIF-ova ima drukčiji životni ciklus pa time i drukčiji ciklus ulaganja. No, izlazak iz konkretnog ulaganja za jedan AIF može biti nepovoljan za drugi AIF koji je na početku ili u sredini ulagačkog ciklusa.[64]

Kada su u pitanju *hedge* fondovi, prethodno navedeni primjeri uvelike su primjenjivi i na njih, s time da sukob interesa kod njih može nastati i zbog činjenice da su oni u pravilu kratkoročni ulagatelji, koji što prije nastoje ostvariti profit, a to ne mora nužno biti u interesu društva koje je u poteškoćama (niti njegovih dioničara, vjerovnika, zaposlenika i ostalih).

U mnogim se od navedenih slučajeva situacije sukoba interesa između ulagatelja i AIF-a te UAIF-a i AIF-a mogu izbjeći ili se barem njima kvalitetno može upravljati,[65] za početak, jasnim određivanjem načina i uvjeta ponašanja u dokumentaciji AIF-a, a podredno i razotkrivanjem sukoba interesa. Naime, riječ je AIF-ovima koji u pravilu nemaju velik broj ulagatelja i kod kojih je, stoga, prisutan blizak i neposredan odnos između UAIF-a i ulagatelja pa se redovitom komunikacijom i transparentnošću, a osobito i kroz povjereničke odbore, u koje ulaze predstavnici ulagatelja, mogu riješiti mnoge potencijalno problematične situacije. Kada je u pitanju sukob interesa među najrazličitijim kategorijama dionika društva u poteškoćama i AIF-a, tada je situacija složenija, no razotkrivanje i transparentnost su pravi put upravljanja takvim sukobima interesa.

Kao jedan od mehanizama sprječavanja ili upravljanja sukobom interesa, UAIF može ustrojiti i tzv. *conflict clearance* funkciju, koja prati potencijalnu transakciju/posao od početka do kraja (od ideje, njenog razvoja do implementacije), kako bi se identificirali i riješili potencijalni rizici i sukobi interesa. U Republici Hrvatskoj ustrojavanje takvih funkcija nije praksa, pogotovo ne kod UAIF-ova koji su specijalizirani za *private equity* fondove, jer je mahom riječ o malim društvima s malim brojem zaposlenih (manje od 10), pa je takvo što dodatni trošak. Mnogi sudionici na tržištu kapitala već sada koriste procjene sukoba (interesa) novih poslova (ulaganja) i proizvoda, kako bi se smanjili njihovi troškovi, odredila kompleksnost i vremenski okvir implementacije novog proizvoda. Prije sklapanja novih poslova provjerava se sukob interesa u odnosu na drugu stranu i ako postoji, ugovor se ne sklapa. Za mnoga su društva takve procjene sukoba (interesa) novih poslova i proizvoda dio poslovnog planiranja i implementacijske etike društva, a u tim procjenama sudjeluju službenici

62 IOSCO, Private Equity, op. cit., str. 20.

63 Ibid. str. 20 – 21.

64 Ibid. str. 21. Tako i Spangler, T., op. cit., Rbr. 8.47.

65 Kao strategije za izbjegavanje, sprječavanje i upravljanje sukobom interesa razlikuju se organizacijske mjere (*chinese walls, watch list, restricted list, conflict list*…), razotkrivanje sukoba interesa (*disclosure*) te izbjegavanje postupanja (*removing, refraining*) – više o tomu vidi Derenčinović Ruk, M., op. cit., str. 297 – 300.

za usklađenost (engl. *compliance officer*), osobe zadužene za upravljanje rizicima (engl. *risk manager*), ponekad pravnici i osoblje zaduženo za financije i IT te često članovi višega rukovodstva društva.[66]

Budući da Hanfa, kao nadzornik i regulator hrvatskog tržišta kapitala, nadzire poslovanje investicijskih fondova i društava koja njima upravljaju, kao i uređenog tržišta (ZSE) na kojem kotiraju financijski instrumenti izdavatelja koji mogu biti u teškoćama, u nastavku se razmatraju neka pitanja koja bi Hanfa mogla uzimati u obzir:

- izvori financiranja društava u poteškoćama, zbog prethodno spominjane i opisane povezanosti (kapitalne, personalne) UAIF-a s osnivačem ili drugim izvorom financiranja društava u problemima (primjerice društvo u poteškoćama A svojedobno je dobilo kredit od banke B, a zatim AIF C (koji je povezan s bankom B ili u njenom vlasništvu) ulaže u društvo A),
- nastavno na prethodno - detektiranje i analiza svih mogućih oblika povezanosti izvora financiranja i društava u poteškoćama s AIF-ovima (poslovne odluke, transakcije i općenito svi oblici povezanosti između fizičkih/pravnih osoba u upravama ili nadzornim odborima ili drugih relevantnih osoba između AIF-a i društava u poteškoćama),
- provjera jesu li većinski dioničari interesno povezani s mogućim ulagateljima (i depozitarom),
- kontrola procesa odlučivanja o ulaganjima – provjera procesa i načina odlučivanja o ulaganjima AIF-a, posebice dokumentacije o radu povjereničkih odbora (rasprave i njihova komunikacija), je li se o ulaganjima u društva u poteškoćama razmišljalo i kada takvih poteškoća nije bilo,
- općenito kontrola informiranosti ulagatelja, osobito o dokumentiranosti procesa donošenja investicijske odluke (npr. koji su daljnji planovi ulaganja: realizacija hipoteka, oživljavanje društva u poteškoćama i ostajanje u njemu ili planiranje izlaza nakon restrukturiranja, traženje novih partnera; troškovi postupka, osnivanje društva posebne namjene (*special purpose vehicle*, SPV) radi realizacije ulaganja, usluge odvjetnika, izbor i izrada stečajnog plana, kvalitetan *due diligence*…) sve kako bi se izbjeglo da se kasnije u poslovanju društva i/ili AIF-a pojavljuju „repovi“ i naknadni sudski postupci koji vremenski i troškovno opterećuju cijeli postupak,
- odnos s (pred)stečajnim upraviteljem i postojećim dioničarima (informiranost) i ima li nekih specifičnosti postupka nad društvom u poteškoćama prema *lex specialis,*
- uloga revizora i kolanje informacija (eventualno „curenje“ i vrijeme „curenja“ informacija), a osobito ako su revizori AIF-a (bili) isti kao i revizori društva u poteškoćama,
- pitanje kolanja/objave povlaštenih informacija (npr. na sjednici povjereničkog odbora donosi se odluka o ulaganju u društvo A i odmah toga dana neke osobe koje su očito dobile informaciju od osoba koje su bile prisutne na toj sjednici rade transakcije s financijskim instrumentima društva A. To mogu biti osobe iz UAIF-a/AIF-a, ali i predstavnici ulagatelja) te

66 Tako Derenčinović Ruk, M., op. cit., str. 405.

- interni akti UAIF-a u odnosu na ulaganja i sukob interesa, no nikada ne smije provjeravati samo akte, nego postupa li se u skladu s njima, a kako je to u prethodnim točkama primjerice navedeno.

Prema navedenim točkama jasno je da Hanfa ne može ulaziti u privatnopravne odnose dioničara/ulagatelja/AIF-a, nego se mora držati svojih javnopravnih ovlasti. Samim time Hanfa ne može provjeravati odnose i sukob interesa između dioničara međusobno, između dioničara i društva, uprave i društva, unutar uprave društva u poteškoćama i dr., jer je riječ o privatnopravnim odnosima koji se u privatnopravnoj sferi trebaju i rješavati. Hanfa mora paziti na integritet tržišta kapitala i zakonito poslovanje svojih subjekata nadzora.

5. ZAKLJUČNA RAZMATRANJA

Restrukturiranje društava u poteškoćama za Republiku Hrvatsku nedvojbeno je već neko vrijeme aktualna tema, i u ovom je radu razmatrana s aspekta tržišta kapitala, kao alternativnog izvora financiranja. Pritom su u radu prikazani i analizirani samo pojedini aspekti tržišta kapitala – ulaganje u društva u poteškoćama financijski instrumenti kojih su uvršteni (kotiraju) na uređeno tržište ZSE i to od strane *private equity* i *hedge* fondova. Od vanjskih čimbenika koji utječu na ulaganje u takva društva, u kontekstu Republike Hrvatske ističu se stupanj razvoja i stanje na tržištu kapitala te pravno i ekonomsko okruženje. Naime, nesporno je da je hrvatsko tržište kapitala znatno manje, gotovo neusporedivo prema takvim tržištima u zapadnoeuropskim zemljama, a kamoli tek u SAD-u. Ono je, također, i znatno mlađe, pa mu treba vremena da evoluira, zajedno sa svim sudionicima toga tržišta. Što se tiče pravnog okruženja, ono u formalnopravnom smislu slijedi regulativu EU, koja je tu pod utjecajem prava SAD-a, no i dalje ne nudi sve mehanizme koji već godinama postoje na razvijenim tržištima i to može biti jedna od prepreka aktivnijem i važnijem ulaganju u društva u poteškoćama na tržištu kapitala. Međutim, to nikako ne znači da Republika Hrvatska automatski mora preuzeti sva rješenja izvana i transplantirati ih u svoj pravni sustav, jer su mnoga strana rješenja našem sustavu još uvijek neprimjerena, upravo zbog našega kasnijeg starta u razvoju.

Pri ulaganju u društva u poteškoćama na tržištu kapitala mora se voditi računa o privatnopravnim i javnopravnim aspektima takvog ulaganja. Privatnopravni uključuju odnose i sukob interesa između dioničara međusobno, između dioničara i društva, uprave i društva, unutar uprave društva u poteškoćama i dr., i ti odnosi i problemi do kojih u njima može doći trebaju se rješavati u privatnopravnoj sferi, između uključenih osoba, uz mehanizme koje im za to nude mjerodavni propisi. Javnopravni aspekti uključuju zakonito poslovanje sudionika na tržištu kapitala, transparentnost toga tržišta i očuvanje njegova integriteta. To su aspekti o kojima vodi računa nadzornik i regulator tržišta kapitala.

Kada je u pitanju sukob interesa pri takvim ulaganjima, njega ne treba miješati i poistovjećivati s različitim ili suprotstavljenim interesima različitih uključenih dionika, nego se uvijek treba zapitati postoji li sukob, koji je to sukob i kojih interesa. UAIF (tj. njegova uprava) u obavljanju svoje djelatnosti mora postupati savjesno i

pošteno te u skladu s pravilima struke, postupati s propisanim stupnjem pažnje te u najboljem interesu AIF-ova i ulagatelja, kao i štititi integritet tržišta kapitala, što bi trebalo pridonijeti sprječavanju sukoba interesa pri ulaganju općenito, pa i u društva u poteškoćama. No unatoč tomu sukob interesa je moguć i ako do njega dođe, UAIF ulagateljima treba unaprijed proklamirati kako će tada postupati, s time da je najčešći slučaj upravljanja sukobom interesa tada njegovo razotkrivanje ulagateljima.

Podatci prikupljeni prilikom u ovom radu pokazuju da hrvatski *private equity* fondovi ulažu u društva u poteškoćama na tržištu kapitala i da nastoje doprinijeti uspješnom restrukturiranju tih društava, dok hrvatski *hedge* fondovi, unatoč tomu što ih je više, uopće ne koriste strategije koje ovise o događajima (*Event Driven*), niti se bave ulaganjima u društva u poteškoćama (*Distressed/Restructuring*). No, ponavljamo, hrvatsko je tržište kapitala mlado i ima potencijala za razvoj takvog segmenta ulaganja, što može biti korisno i za fondove, kao ulagatelje u takva društva, i za društva u poteškoćama, jer, između ostaloga, omogućava rješavanje problema na privatnopravnoj osnovi, brže, jednostavnije i učinkovitije, uz lakši pristup financiranju te korištenje specifičnih znanja upravitelja fondova.

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Summary

DISTRESSED COMPANIES RESTRUCTURING AND CAPITAL MARKET – TYPES OF CONFLICT OF INTERESTS AND THEIR MANAGEMENT

The paper investigates how the capital market can be a restructuring platform for companies in difficulties and financial intermediaries who are typically involved in it and analyzes the conflicts of interest that may arise in that process and the way the conflicts could be prevented or managed. The paper focuses solely at the companies in difficulties whose shares (or other financial instruments) are listed on the regulated market of the Zagreb Stock Exchange d.d. and alternative investment funds, i.e. private equity and hedge funds and their managers as dominant players of the capital market segment that invests in companies in difficulties. After the presentation of the peculiarities, i.e. legal and other factors affecting the restructuring of the companies in difficulties through the capital market, the paper compares alternative investment funds specializing in investments in companies in difficulties, showing their similarities, differences and specific features, including funds for economic co-operation, which is a peculiarity of the Croatian capital market. The paper aims to clarify the concept of conflict of interest on the capital market from the similar concepts (i.e. opposing interests) and presents in detail which types of conflicts of interest are typically manifestated in the each phase of the investment process in relation to the company in difficulties and how those should be governed. The role of the Croatian Financial Services Supervisory Agency as supervisor and regulator of the Croatian capital market is also accentuated and attention is drawn to the circumstances that should be taken into account by regulator when conducting its public surveillance powers in relation to observed conflicts of interest but not extending its powers to the private-law aspects of the relationships that are subject to supervision.

***Keywords**: capital market; restructuring; private equity; hedge fund; conflict of interests.*

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Zussamenfassung

RESTRUKTURIERUNG VON UNTERNEHMEN IN SCHWIERIGKEITEN UND DER KAPITALMARKT – RESTRUKTURIERUNGSMODELLE UND UMGANG MIT INTERESSENKONFLIKTEN

Dieser Beitrag analysiert den Kapitalmarkt als eine Plattform für die Restrukturierung von Unternehmen in Schwierigkeiten sowie auch die in diese Verfahren involvierten finanziellen Vermittler. Es werden auch die Interessenkonflikte, welche in diesem Prozess auftauchen können, analysiert. Es wird vorgeschlagen, wie man sie vorbeugen und mit ihnen umgehen kann. Der Beitrag konzentriert sich ausschließlich auf die Unternehmen in Schwierigkeiten, wessen Aktien (oder andere Finanzinstrumente) am regulierten Markt der Zagreber Börse AG und an alternativen Investmentfonds, beziehungsweise an Private-Equity-Fonds und Hedge-Fonds als Vertreter des Kapitalmarktes, welche in die Unternehmen in Schwierigkeiten investieren, notiert sind. Nachdem man im Beitrag die Besonderheiten, die rechtlichen und anderen Faktoren, welche auf die Restrukturierung von Unternehmen in Schwierigkeiten durch den Kapitalmarkt einen Einfluss üben, analysiert, werden alternative Investmentfonds, welche für das Investieren in die Unternehmen in Schwierigkeiten spezialisiert sind, verglichen. Dabei stellt man ihre Ähnlichkeiten, Unterschiede und Besonderheiten dar und legt besonderen Wert auf die Fonds für wirtschaftliche Zusammenarbeit, als eine Besonderheit des kroatischen Kapitalmarktes. Danach erklärt man den Begriff des Interessenkonfliktes, wobei man betont, dass dieser Begriff vom Begriff der entgegengesetzten Interessen zu unterscheiden ist. Anschließend stellt man detailliert dar, wie sich die Interessenkonflikte während den einzelnen Phasen des Investierens in Bezug auf das Unternehmen in Schwierigkeiten manifestieren, und wie man mit ihnen umgehen kann. Die Rolle der Kroatischen Agentur für Kontrolle von finanziellen Leistungen als der Aufsichts- und Regulierungsbehörde des kroatischen Kapitalmarktes wird auch apostrophiert, wobei man auf die Umstände, welche die Agentur bei der Ausübung ihrer Aufsichtsbefugnisse bezüglich der festgestellten Interessenkonflikte in Betracht ziehen musste, ohne dass sie dabei in die privatrechtliche Sphäre des Verhältnisses, welches der Gegenstand der Aufsicht ist, eingreift.

Schlüsselwörter: *Kapitalmarkt; Restrukturierung; privates Beteiligungskapital; Hedge-Fond; Interessenkonflikt.*

Riassunto

LA RISTRUTTURAZIONE DI SOCIETÀ IN CRISI E MERCATO DEI CAPITALI – GENERI E GESTIONE DEL CONFLITTO D'INTERESSI

Il lavoro ha ad oggetto l'analisi delle modalità in base alle quali il mercato dei capitali può essere una piattaforma per la ristrutturazione delle società in crisi e degli intermediari finanziari che comunemente sono inclusi in tali procedure, al fine di analizzare successivamente i conflitti di interessi che possono emergere in tale processo e di esporre come questi possano essere evitati, o perlomeno come vadano gestiti. Il lavoro è orientato esclusivamente verso le società in crisi le cui azioni (o altri strumenti finanziari) sono quotate sulla borsa di Zagabria ed ai fondi di investimento alternativi, ovvero ai fondi private equity e fondi hedge, quali rappresentanti dominanti del segmento del mercato dei capitali che investono nelle società in crisi. Dopo l'illustrazione delle peculiarità, ovvero dei fattori giuridici e di altra natura che influiscono sulla ristrutturazione delle società commerciali in crisi mediante il mercato dei capitali, nel lavoro si comparano i fondi di investimento alternativi che sono specializzati nell'investimento in società in crisi, con particolare attenzione alle loro similitudini, alle diversità ed alle specificità, come pure i fondi per la collaborazione commerciale che costituiscono appunto una peculiarità del mercato dei capitali croato. Di seguito si chiarisce la nozione in sé del conflitto di interessi sul mercato dei capitali ovvero lo si distingue rispetto agli interessi contrapposti, al fine di potere successivamente illustrare in maniera esaustiva in quali modi i conflitti di interesse si manifestino nel corso delle singole fasi dell'investimento rispetto alla società in crisi ovvero come tali conflitti possano venire gestiti. Si sottolinea altresì il ruolo dell'Agenzia croata per la vigilanza sui servizi finanziari, nella sua veste di vigilante e regolatore del mercato dei capitali croato e si osserva quali circostanze andrebbero tenute in conto in occasione dell'espletamento dei poteri pubblici di vigilanza rispetto ai conflitti di interessi, senza però entrare nella spera privatistica dei rapporti sottoposti a vigilanza.

Parole chiave: *mercato dei capitali; ristrutturazione; private equity; fondi hedge; conflitto di interessi.*

OWNER-MANAGED CLOSED IT COMPANIES IN CROATIA: CORPORATE GOVERNANCE AND IP PROTECTION ISSUES

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Summary

Intellectual property protection is an important ingredient in the market success of knowledge-intensive enterprises operating in the information technology industry. The governance and the extent of protection of intellectual property related to software often seem to be connected to certain characteristics of an enterprise, such as its type and size. By analyzing the publicly available data, the author identifies various patterns primarily concerning the structure of ownership and management of the software enterprises in Croatia. The analysis reveals that all of the top 500 software enterprises according to revenue are closed, with the overwhelming majority being owner-managed and small or micro-sized. This would suggest that most software enterprises in Croatia are passive when it comes to their intellectual property. In relation to this, the author describes three profiles of enterprises depending on their attitude towards the governance of intellectual property. The author also formulates and explores four possible complementary approaches to the protection of intellectual property, both legal and non-legal, in addition to discussing various types of intellectual property rights with the aim of identifying those that are more suitable for the protection of different types of software.

Keywords: *intellectual property; software; patents; copyright; trade secrets; governance.*

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1. INTRODUCTION

Knowledge-intensive industries are widely considered as the key driver of innovation and economic development today.[1] One of such industries deserves special attention, if not for anything else then because it is single-handedly responsible for more than a half of the overall productivity growth in the European Union. This is the information technology or IT industry.[2]

The revenue and, therefore, the existence and survival of knowledge-intensive IT enterprises revolves around one thing and one thing only – the product for which the terms software, computer program or application are often used interchangeably as they are also used in this paper.[3] The product, intangible in its nature, is developed and refined predominantly by using the collective knowledge, creativity and intellectual efforts of various persons engaged by the IT enterprise, whether the founders themselves, the employees, outsourced personnel or a combination thereof. The unique blend of their inputs embodied in the product is key to the success of any knowledge-intensive IT enterprise. Accordingly, it is no wonder that intellectual property protection often plays an essential role in the well-being of any such enterprise. However, there are many issues that might complicate the protection and the management of intellectual property in software enterprises. The complications may be connected to governance issues and behavioral patterns characteristic for the type or size of enterprise concerned, but many of them also arise from the facts that the product to be protected is of intangible nature, that it can be disseminated with ease via the internet, and that it can usually be relatively quickly imitated by competitors.

Bearing this in mind, the first part of this paper is dedicated to the analysis of the Croatian software industry with the purpose of determining the types of enterprises operating therein, their size and any patterns related to the structure of ownership

1 Päällysaho, S., Kuusisto, J., Informal ways to protect intellectual property (IP) in KIBS businesses, Innovation: Management, Policy & Practice, vol. 13, no. 1, pp. 62-76, p. 62.

2 See IDC European Competitiveness and Innovation Expertise Centre (IDC Italy), Study on Innovative ICT SMEs in Europe (EU 25) - Final Study Report, IDC EMEA, 2007, p. 6. and Organization for Economic Co-operation and Development, Innovation and Knowledge-Intensive Service Activities, OECD Publishing, 2006, p. 73.

3 Even though these terms are almost always used as synonyms, at least colloquially, there is a technical difference between them. Software is the broadest of the three terms and encompasses both applications and computer programs. It is often used to denote everything on the computer that is not hardware, including preparatory designs (description of the program) and additional or auxiliary (user) documentation. An application is a type of software the purpose of which is to help end users perform certain tasks. It can consist of one or more computer programs and is characterized by a user interface. For example, a word processor is an application. A computer program is a set of instructions that can be executed by a computer. Although many computer programs are applications, some are not. One example of the latter is BIOS – a computer program used to perform hardware initialization during the booting process. BIOS does not communicate with the end user but directly with the computer hardware. For a similar discussion about the technical and legal definitions of computer programs and software see Kunda I., Matanovac Vučković R., Raspolaganje autorskim pravom na računalnom programu - materijalnopravni i kolizijskopravni aspekti, Zbornik Pravnog fakulteta u Rijeci, vol. 31, no. 1, pp. 85-132, p. 90-92.

and management of these enterprises, which might point to the possible general governance issues. The second part of the paper focuses on specific issues related to the protection of intellectual property in software enterprises, with the purpose of identifying the types of intellectual property rights suitable for the protection of particular types of software, classifying the possible legal and non-legal methods of protection and formulating the possible behavioral patterns of software enterprises in relation to the governance of intellectual property.

2. GENERAL CORPORATE GOVERNANCE ISSUES IN KNOWLEDGE-INTENSIVE IT COMPANIES

The initial plan when researching for this paper was to draw some general conclusions about the possible governance issues in knowledge-intensive IT enterprises in Croatia from the already available statistical data, and then focus on and deal with the specific issues related to the governance of intellectual property in such enterprises on a more theoretical basis. However, due to the fact that neither official nor unofficial statistical data concerning knowledge-intensive IT enterprises in Croatia was available, which would be sufficiently complete to achieve the defined goal, it was necessary to first collect such data independently from various sources and then analyze it in order to identify any patterns related to the structure of ownership and management of such companies. Therefore, the following three sections concern the methodology used (2.1.), the analysis of the collected data (2.2.) and the conclusions made in the process (2.3.).

2.1. Scope and methodology of research

The data listed in section 2 of this paper concerns the top 500 enterprises according to the revenue generated in 2017, which reported "J6201 computer programming" as their main business activity according to the Croatian National Classification of Activities (Official Gazette No. 58/07; hereinafter: NKD 2007).[4] Even though NKD 2007 lists many other activities which would broadly speaking fall into the information technology category,[5] only the enterprises in the computer programming segment were considered because this is one of the most knowledge-intensive parts of the IT industry, in which intellectual property plays a much more important role than with most other activities related to IT. The revenue was chosen because it is an important criterion in determining the size of an enterprise and it can also be viewed as one of the most straightforward, albeit one-dimensional indicators

4 Note that the activity category is reported by the enterprises themselves, based on their own decision. This means that it is possible that some of the enterprises from the sample do not have computer programming as their predominant activity in reality, even though they officially claim so. One possible explanation as to why an enterprise would report computer programming as its main activity when this is not so in reality is the fact that more government and EU subsidies are available for the computer programming activity than any other activity related to IT.

5 For example, J6311 Data processing, server services and related activities, J6202 Computer-related consulting and etc.

of success of an enterprise on the market.

The data was collected from the following publicly available sources and was then combined and cross-checked: the list of top 1000 technology enterprises in Croatia prepared by the "Who is Who in IT" online platform,[6] the Registry of Annual Financial Statements maintained by the Financial Agency (FINA),[7] the Court Register of the Republic of Croatia,[8] the Registry of Business Subjects maintained by the Croatian Bureau for Statistics,[9] the Registry of Crafts maintained by the Ministry of Economy, Entrepreneurship and Crafts,[10] and the Registry of Business Subjects maintained by the Croatian Chamber of Economy.[11]

The statistical data listed in the following section is, in principle, substantiated by listing the names of the enterprises the data refers to in footnotes. This was not done only in the case of larger numbers. In such cases, the names of enterprises the data refers to were not listed for practical reasons. However, the data is available with the author.

2.2. Statistics related to the top 500 software enterprises in Croatia

The data related to enterprises having computer programming as their main business activity is sorted below under three sections: general data (2.2.1.), data concerning the structure of ownership of the enterprises (2.2.2.) and data concerning the structure of management and supervisory boards (2.2.3.).

2.2.1. General statistics

Among the observed 500 enterprises none of them have their shares listed or otherwise publicly traded. Only one of them is a joint stock company.[12] However, its shares are not listed on the Zagreb Stock Exchange for public trading.[13] With the exception of 3 registered crafts[14] and 5 branch offices of foreign limited liability companies with headquarters outside of Croatia[15] which made the top 500 list given their revenue, all other 491 enterprises are Croatian limited liability companies, albeit

6 TOP 1000 hrvatskih visoko-tehnoloških tvrtki, available at https://www.whoiswhoinit.com/novosti/26-top-1000-hrvatskih-visoko-tehnoloskih-tvrtki, 2018 (15 September 2018).

7 Available at http://rgfi.fina.hr/IzvjestajiRGFI.web/main/home.jsp (15 September 2018).

8 Available at https://sudreg.pravosudje.hr/registar/f?p=150:1 (15 September 2018).

9 Available at https://www.dzs.hr/hrv/important/roj/roj.asp (15 September 2018).

10 Available at https://or.portor.hr/pretraga.htm (15 September 2018).

11 Available at http://www1.biznet.hr/HgkWeb/do/extlogon?lang=hr_HR (15 September 2018).

12 Namely, MEĐIMURJE IPC d.d. This company was formed through transformation from a socially-owned company in Informacijsko-projektantski centar and has been active on the market since 1976 through various organizational forms. See the company's website available at http://www.ipc.hr/hr/o-nama/povijest (15 September 2018).

13 See the information on the IPC-R-A share at the website of the Zagreb Stock Exchange, available at http://zse.hr/default.aspx?id=10006&dionica=688 (15 September 2018).

14 Namely, E-COMPUTING, Tinjan; IDEA STUDIO, Samobor; and OPTIMUS DATA, Zagreb.

15 Namely, AMPLEXOR ADRIATIC D.O.O. SLOVENIA, ATRON ELECTRONIC GMBH GERMANY, T-MATIX SOLUTIONS GMBH AUSTRIA, HERE EUROPE B. V. THE NETHERLANDS AND SKILJA GMBH GERMANY.

7 of them are still in the form of simple limited liability companies.[16] It is interesting to note that some of these simple limited liability companies were established as early as 2012, yet they still haven't transformed into full-fledged limited liability companies.

In 2017, the joint total revenue of the top 500 enterprises in class J6201 amounted to 5.860.414.215,00 HRK,[17] whereas the average revenue per enterprise amounted to 11.720.828,43 HRK. The top enterprise in the observed sample generated the revenue of 625.785.704,00 HRK,[18] whereas the 500th company on the list earned the revenue of 1.606.405,00 HRK in 2017.[19]

As of 31st December 2017, the observed 500 enterprises employed a total of 9476 persons based on employment contracts or an average of 18.95 person per company. The largest number of employees in a single company was 375,[20] whereas 11 companies operated without a single employee hired on the basis of an employment contract.[21] The highest of such companies on the list generated a revenue of 8.627.401,00 HRK in 2017.[22] Interestingly, 5 of such companies operating without employees are foreign-owned, including the company with the highest revenue amongst them.[23]

By applying the criteria laid down in the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, only 2 enterprises on the list could be categorized as large enterprises,[24] 10 could be categorized as medium-size enterprises,[25] 94 could be categorized as small enterprises, whereas the remaining 394 enterprises would fall into the category of micro enterprises.

In 2017, 117 enterprises that were founded in 1995 or earlier generated a total revenue of 1,801,028,567 HRK, with an average of 15,393,407 HRK. The 42 enterprises that were established in the period between 1996-2000 had a total revenue of 1,379,235,538 HRK, with an average of 32,838,941 HRK.[26] The total revenue

16 Namely, PEGASUS RJEŠENJA J.D.O.O., MT MOBILE TICKETING J.D.O.O., HEXIS J.D.O.O., BIOINFO J.D.O.O., CONSEMEL J.D.O.O., FACTORY X J.D.O.O. and LOOP J.D.O.O.

17 Or roughly the equivalent of 781.388.174,80 EUR.

18 Namely, KING ICT D.O.O.

19 Namely, WEB BITE MEDIA D.O.O.

20 Namely, APIS IT D.O.O.

21 Namely, BROADSTREAM SOLUTIONS D.O.O., CALIGO PROGRAMSKA RJEŠENJA D.O.O., CAPITAL EXECUTIVE GROUP D.O.O., EURO-REAL D.O.O., FARMERON D.O.O., ITURUS SUM D.O.O., IMPLEMENTACIJA SNOVA D.O.O., PRAVI KLIK RAZVOJ D.O.O., SEM D.O.O., CODETECH D.O.O., MARSHALLING D.O.O.

22 Namely, BROADSTREAM SOLUTIONS D.O.O.

23 BROADSTREAM SOLUTIONS D.O.O., CALIGO PROGRAMSKA RJEŠENJA D.O.O., CAPITAL EXECUTIVE GROUP D.O.O., EURO-REAL D.O.O., FARMERON D.O.O.

24 KING ICT D.O.O. and APIS IT D.O.O.

25 SPAN D.O.O., ASSECO SEE D.O.O., IN2 D.O.O., CROZ D.O.O., MICROSOFT HRVATSKA, ERSTE GROUP CARD PROCESSOR D.O.O., NANOBIT D.O.O., B4B D.O.O., PIS D.O.O., DANIELI SYSTEC D.O.O.

26 However, if we excluded KING ICT D.O.O. from the list, which was on the very top of the 500 list according to earnings and is sort of an abnormality because the earnings of the second enterprise on the list were almost half that amount, then the total revenue of the enterprises established between 1996 and 2000 would be a much less 753,449,834 HRK, with an average

of the 65 enterprises established in the period between 2001-2005 amounted to 1,116,728,466 HRK, with an average of 17,180,438 HRK per enterprise. The 109 enterprises, which were established between 2006-2010 earned a total of 789,213,739 HRK or a mean of 7,240,493 HRK per enterprise. The 136 enterprises on the list were founded in the period between 2011-2015 and have made a total of 749,274,277 HRK or an average of 5,509,370 HRK per enterprise. Finally, the remaining 26 enterprises that were established in 2016 or in 2017 have earned a total of 85,266,416 HRK in the period between 2016-2017 or 3,279,478 HRK per enterprise.[27]

The overwhelming majority of enterprises had their registered office in Zagreb and the Zagreb metropolitan area (313),[28] followed by Split (34), Rijeka (18), Čakovec (13), Varaždin (13), Osijek (11), Pula (8), Dubrovnik (5) and others.

2.2.2. Structure of ownership

For reasons unknown to the author, the online court register does not show information about the ownership of one company.[29] Unlike this company for which the information is lacking, the 5 registered branch offices of foreign companies were not excluded from the analysis even though their ownership structure is self-explanatory. Therefore, the sample used for this particular purpose was 499 enterprises from the top 500 list according to revenue.[30]

In relation to the number of shareholders per enterprise, the vast majority of enterprises (286) had a sole shareholder, which was a natural person in 194 cases and a legal person in 92 cases. The total revenue of enterprises with one shareholder was 3,574,900,890 HRK, with an average of 12,499,653 HRK per enterprise with one shareholder. The 194 enterprises in which natural persons were sole shareholders jointly earned the total revenue of 1,733,602,005 HRK in 2017. On average one such enterprise earned 8,936.093 HRK. If we excluded the top earning company in the J6201 class, KING ICT d.o.o., the total earned revenue of enterprises in which natural persons were sole shareholders would be a much less 1,107,816,301 HRK.[31] In this case the average per company with a single shareholder who is a natural person would be 5,739,981 HRK. In comparison, the 92 enterprises in which legal persons were sole owners jointly earned the total revenue of 1,841,298,885 HRK in 2017, whereas on average one such enterprise earned 20,014,118 HRK.

Two shareholders were present in the case of 112 enterprises. Out of these, both shareholders were natural persons in 103 enterprises, one was a natural person and the other was a company in 5 enterprises,[32] and both were companies in the remaining

of 18,376,825 HRK per enterprise.

27 These numbers do not include the five registered branch offices of foreign companies.

28 To be more precise, 295 in Zagreb proper and remainder in the nearby towns of Samobor, Zaprešić, Jastrebarsko and Velika Gorica.

29 Namely, LUATECH D.O.O.

30 Namely, LUATECH D.O.O.

31 KING ICT D.O.O. alone had the revenue of 625,785,704.00 HRK in 2017. In comparison the revenue of the second company on the list, SPAN D.O.O., was almost half than amount – 323,442,489.00 HRK.

32 2E SYSTEMS D.O.O., ITURUS SUM D.O.O, EMAKINA.HR D.O.O., PARDUS D.O.O.,

4 cases.[33] The total revenue earned by all enterprises with two shareholders in 2017 amounted to 1,121,332,997 HRK, whereas the average revenue per enterprise was 10,011,902 HRK. The total revenue earned by the 103 enterprises in which both shareholders were natural persons was 842,151,876 HRK, with an average revenue per enterprise of 8,176,232 HRK. The total revenue of the enterprises in which one shareholder was a natural person and the other was a company was 27,684,526 HRK. The average revenue of such enterprises was 5,707,279 HRK. Furthermore, the total revenue of enterprises in which both shareholders were companies was 250,644,627 HRK, whereas the average per enterprise was 62,661,157 HRK. Finally, it might be interesting to note that in 20 of those 103 enterprises in which both shareholders were natural persons, the two shareholders were spouses or relatives. The total revenue of such enterprises was 197,823,523 HRK, while the average revenue was 9,891,176 HRK.

Furthermore, 49 enterprises had three shareholders, of which all of them were natural persons in 41 companies, whereas in 8 observed companies one or two shareholders were companies in addition to natural persons.[34] There were no enterprises in which all three shareholders were legal persons. The total revenue of enterprises with 3 shareholders was 331,721,581 HRK, with an average revenue of 6,769,828 HRK per enterprise. The total revenue of enterprises in which all shareholders were natural persons was 275,584,447 HRK, whereas the average revenue of such enterprise was 6,721,572 HRK. The total revenue of enterprises in which the three shareholders were natural and legal persons was 56,137,134 HRK. On average, such enterprises earned 7,017,142 HRK in 2017. In none of those 41 enterprises in which the three shareholders were natural persons, all shareholders were spouses or relatives. In 10 enterprises two shareholders were spouses or relatives, whereas the third one was unrelated to them or a legal person.[35] The total revenue of such enterprises amounted to 276,169,946 HRK, with an average earning of 9,205,665 HRK per enterprise.

The remaining 52 enterprises had 4 or more shareholders, all of which were natural persons in 43 of them. The total revenue of all enterprises with 4 or more shareholders was 936,308,956, with an average revenue per enterprise in the amount of 18,005,941 HRK. The 43 companies in which all shareholders were natural persons earned the joint revenue of 830,208,408 HRK and an average revenue of 19,307,172 HRK per enterprise. Various companies had shares along with natural persons in 9 observed companies. Such enterprises earned the total revenue of 106,100,548 HRK, whereas their average revenue was 11,788,950 HRK per enterprise. In 18 enterprises

INFTEC D.O.O.

33 APIS IT D.O.O., LIBUSOFT CICOM D.O.O., CENOSCO CROATIA D.O.O., AGRIVI D.O.O.

34 MINUS5 D.O.O., TIS - OBJEKTNI INFORMACIJSKI SUSTAVI D.O.O., DOVIKIVATI D.O.O, INTENDA NET D.O.O., IDONEUS D.O.O., LOGNET D.O.O., INEO D.O.O., SOFTWARE AUTOMATION CONCEPTS D.O.O.

35 POSLOVNA INTELIGENCIJA D.O.O., ZMS INFO D.O.O., INTEGRIRANI POSLOVNI SUSTAVI D.O.O., ENVOX D.O.O., RAZVOJ TEHNOLOGIJA D.O.O., MAŠINERIJA D.O.O., LOGNET D.O.O., PROSPEKT D.O.O., SAND PLUS D.O.O., INEO D.O.O.

two or more shareholders were spouses and/or related to each other.[36] However, given the number of additional shareholders who are not related with them or each other, it seems that the vast majority of companies with 4 or more shareholders, with two possible exceptions,[37] were established and/or grew into partnerships of several persons brought together by reasons other than family or marital relations. In none of the 52 enterprises with 4 or more shareholders all of the shareholders were spouses and/or related to each other. Excluding the one joint stock company in the sample, the highest number of shareholders in an enterprise – a limited liability company – was 10.[38]

Regarding the gender of the shareholders who are natural persons, women held shares in 81 enterprises. Merely 17 enterprises were 100% owned by women, whether as sole shareholders (14) or two shareholders (3).

Concerning the origin of the shareholders,[39] legal or natural persons with registered headquarters or residence outside of Croatia held 100% of shares in as many as 85 enterprises from the list,[40] whereas foreign companies or foreign natural persons held shares in further 19 enterprises, along with companies or natural persons from Croatia. All shareholders of the remaining 395 enterprises had registered headquarters or residence in Croatia.

Only two enterprises on the list were state-owned, one directly[41] and the other indirectly,[42] whereas 497 were owned by private legal or natural persons.

2.2.3. Structure of management and supervisory boards

In relation to the management of 194 enterprises with the sole owner who was a natural person, the following was observed. The owner was the sole director in 141 enterprises. In 11 of those 140 enterprises, commercial powers of attorney (in

36 CROZ D.O.O., DIVERTO D.O.O., BLINK D.O.O., INFODESIGN D.O.O., ENEL SPLIT D.O.O., INFOMARE D.O.O., KONTO D.O.O., ZAGREB DATA D.O.O., QUALITY IN QUALITY OUT D.O.O., JADRIJA D.O.O., INTERCORONA D.O.O., MICRONIC D.O.O., TASK POSLOVNA INFORMATIKA D.O.O., GOINFOZG D.O.O., NET MEDIA SISTEMI D.O.O., TIS-GRUPA TELEMATIČKI INŽENJERING I SOFTWARE D.O.O., PANDORA STUDIO D.O.O., NET MEDIA MEĐUNARODNE USLUGE D.O.O.

37 KONTO D.O.O. and INTERCORONA D.O.O., in which there are more related or married shareholders than the other shareholders.

38 Namely, ISTRA TECH D.O.O.

39 Due to the fact that the information on the citizenship of natural persons is not available to the author, the criteria of residence in or outside of Croatia as listed in the court registry was used for the purpose of determining the origin of shareholders who are natural persons. Therefore, it is possible that persons who hold Croatian citizenship, yet have their residence abroad, are labeled as foreign natural persons and that persons who do not hold Croatian citizenship, yet have their residence in Croatia are labeled as domestic natural persons.

40 This number includes the branch offices of foreign companies.

41 Namely, APIS IT D.O.O. is jointly owned by the Republic of Croatia and the City of Zagreb.

42 However, MIPS D.O.O. is owned by HRVATSKA POŠTA D.D., which is, in turn, a stated-owned company.

Croatian *prokura*) were conferred upon one (in 8 enterprises),[43] two (in 2 enterprises)[44] or three additional persons (in 1 enterprise).[45] All holders of these commercial powers of attorney were relatives or spouses of the owner[46] in the case of 6 enterprises (4 enterprises had 1 such holder,[47] 1 enterprise had 2 such holders[48] and 1 enterprise had 3 such holders).[49] In one of the 140 enterprises with the owner as the sole director, the director was supervised by a two-member supervisory board.[50]

The owner was one of the directors in further 30 of the 194 enterprises with a sole owner, along with one other (in 26 enterprises)[51] or two other directors (in 4 companies).[52] The other directors were all relatives or spouses of the owner in the case of 18 of those 30 enterprises. In 2 of such family-managed enterprises in which one person was the owner, non-family holders of a commercial power of attorney were also present.[53] Furthermore, in 1 enterprise in which the other director was not a relative or a spouse of the owner, a relative or a spouse of the owner was the holder of a commercial power of attorney.

The owner was not the manager, but he/she has participated in managing the enterprise as the holder of a commercial power of attorney in further 11 of the 194 enterprises.[54] In those 11 enterprises, in addition to the owner as the holder of the commercial power of attorney, other persons participated in the management of the enterprise as per the following structure: a spouse or a relative was the holder of the other commercial power of attorney and another spouse or a relative was a director in 2 enterprises;[55] a spouse or a relative was the sole director in 2 enterprises;[56] two

43 ANALYTICOM D.O.O., MEDIA-SOFT D.O.O., ADRIA SCAN D.O.O., S.D. INFORMATIKA D.O.O., VITAM AGERE D.O.O., 234 D.O.O., FERIA PROJEKT D.O.O., INFO NOVITAS D.O.O.

44 DRAP D.O.O., STANIĆ AUTOMATION D.O.O.

45 IMAVES D.O.O.

46 The cumulative criteria used to determine whether a person is a relative or a spouse were the same surname and the same address as the owner.

47 MEDIA-SOFT D.O.O., ADRIA SCAN D.O.O., S.D. INFORMATIKA D.O.O., INFO NOVITAS D.O.O.

48 STANIĆ AUTOMATION D.O.O.

49 IMAVES D.O.O.

50 JADRAN - INFORMATIKA D.O.O.

51 ACQUISITUM MAGNUM D.O.O., ETRANET GRUPA D.O.O., NETCOM D.O.O., AMPHINICY D.O.O., TOMSOFT D.O.O., CENTAR MCS D.O.O., ELEKTRONIKA PERHOČ D.O.O., FILOS D.O.O., TETRA NAVIS D.O.O., GDI GRUPA D.O.O., VENIO INDICIUM D.O.O., CITUS D.O.O., SWING INFORMATIKA D.O.O., ENSO D.O.O., KLISING D.O.O., MOLA MOLA D.O.O., INTERSOFT D.O.O., NOMEN D.O.O., WEB STUDIO D.O.O., EURO-REAL D.O.O., PROGIS D.O.O., EURO-TERA D.O.O., FIDENS ALARM D.O.O., PROMONA D.O.O., SICOM D.O.O., UNIQCAST D.O.O.

52 ALFATEC GROUP D.O.O., GDI TECHNOLOGY PLATFORMS D.O.O., ICE D.O.O., INPRO D.O.O.

53 GDI GRUPA D.O.O. and GDI TECHNOLOGY PLATFORMS D.O.O.

54 SEKOM D.O.O., INFOPROJEKT D.O.O., RI-ING NET D.O.O., MARCO D.O.O., C TIM D.O.O., GRC GRUPA D.O.O., DODIG D.O.O., EXCEL COMPUTERS D.O.O., LOGIKA D.O.O., POSLUH D.O.O., ANADA D.O.O.

55 SEKOM D.O.O., DODIG D.O.O.

56 GRC GRUPA D.O.O., EXCEL COMPUTERS D.O.O.

relatives were directors in 1 enterprise;[57] a spouse or a relative was a director, along with another non-related director in 3 enterprises;[58] a spouse or a relative was a director along with another two non-related directors in 1 enterprise;[59] a non-related person was the sole director in 1 enterprise; and two non-related persons were directors in 1 enterprise.[60]

The owner was neither the manager nor has he/she participated in managing the enterprise as the holder of a commercial power of attorney, but his/her spouse or relatives were managers or holders of a commercial power of attorney in further 6 enterprises.

Persons not related to the owner managed the remaining 6 enterprises, in which neither the owner nor his/her spouse or relatives were officially involved in management, neither through commercial powers of attorney nor the position of the director.[61] In one of those enterprises, however, the owner was a member of the supervisory board.[62]

In relation to the management of 20 enterprises in which both shareholders were natural persons and spouses or relatives of each other, the following was observed. Both shareholders were directors, with no other directors or holders of commercial powers of attorney present, in 8 enterprises.[63] One of the shareholders was the sole director, with no other directors or holders of commercial powers of attorney present, in 6 enterprises.[64] One shareholder was the sole director, while the other shareholder was the sole holder of a commercial power of attorney in 2 enterprises.[65] One of the shareholders was one of the three directors, whereas the other two were both related to the shareholders, in 1 enterprise.[66] Both shareholders were directors with a non-owner relative as an additional director in 2 enterprises.[67] Finally, both shareholders were directors, with the third director unrelated to them, in 1 enterprise.[68]

The two prevailing management structures for the 83 enterprises with two shareholders who are natural persons not related to each other were as follows. Both shareholders were directors, without the participation of other persons in the management, in 47 enterprises and one of the shareholders was the sole director, without the participation of other persons in the management, in 17 enterprises. Various other management structures were present in the remaining 19 enterprises.

57 POSLuH D.O.O.
58 RI-ING NET D.O.O., ANADA D.O.O., C TIM D.O.O.
59 INFOPROJEKT D.O.O.
60 MARCO D.O.O.
61 KING ICT D.O.O., CROSSVALLIA D.O.O., OPTIMUS LAB D.O.O., SOFISTIKA D.O.O., SAAN RAČUNALA D.O.O., S.O.E. ICT D.O.O.
62 KING ICT D.O.O.
63 MANAS D.O.O., POINTER D.O.O., NUCLEUS D.O.O., POLITEC AUTOMATIKA D.O.O., TRIA D.O.O., IMPADDO D.O.O., FORMEL D.O.O., ZELENE TEHNOLOGIJE D.O.O.
64 PIS D.O.O., SERENGETI D.O.O., INFOSIT D.O.O., DIVERSITAS IT SUSTAVI D.O.O., APLIKACIJA D.O.O., D.L.D. D.O.O.
65 HARD JURA D.O.O., PRATI ME D.O.O.
66 DUPLICO D.O.O.
67 CODE EXPERT D.O.O., INFO EXPERT D.O.O.
68 INGEMARK D.O.O.

In the 10 enterprises in which two of the shareholders were spouses or relatives, whereas the third one was unrelated to them or a legal person, the structure of management was as follows. All three shareholders were directors in 1 enterprise.[69] One of the two shareholders who were spouses or relatives was the sole director in 6 enterprises.[70] Both shareholders who were spouses or relatives were directors with no other directors or holders of commercial power of attorney, in 1 enterprise.[71] A non-owner relative of the two shareholders who were spouses or relatives was the sole director in 1 enterprise.[72] Finally, the unrelated shareholder was the sole director in only one instance.[73]

In the remaining 39 enterprises with three unrelated shareholders and 52 enterprises with 4 or more shareholders all sorts of shareholder participation in the management were observed. Importantly, all of those enterprises had at least one shareholder participating in managing the company. There wasn't a single case where the management was composed exclusively of persons who were not shareholders.

As of 31st December 2017, merely 7 companies on the top 500 list had supervisory boards.[74] This is, however, not surprising, given that the vast majority of enterprises on the list do not meet the legal thresholds for mandatory supervisory boards as prescribed by the Croatian Company Act (Official Gazette Nos. 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15). As per the composition of the 7 supervisory boards, in 3 companies they had 5 members,[75] in 3 companies they had 3 members,[76] whereas in the remaining company, the supervisory board had 2 members.[77]

With regard to the gender of the managers or holders of commercial powers of attorney, a total of 74 women participated in the management of 70 enterprises as directors and 27 in the management of 24 enterprises as holders of commercial powers of attorney. Merely 19 companies had only women as directors, albeit in some of them men sometimes participated in the management as holders of commercial powers of attorney. Compared to the number of male directors or proxies, the numbers pertaining to women are truly negligible.

2.3. The takeaways

The data presented in the previous section shows that the most successful part of the Croatian computer programming segment of the IT industry is fully composed

69 POSLOVNA INTELIGENCIJA D.O.O.
70 ZMS INFO D.O.O., INTEGRIRANI POSLOVNI SUSTAVI D.O.O., MAŠINERIJA D.O.O., LOGNET D.O.O., PROSPEKT D.O.O., SAND PLUS D.O.O.
71 INEO D.O.O.
72 ENVOX D.O.O.
73 RAZVOJ TEHNOLOGIJA D.O.O.
74 MEĐIMURJE IPC D.D., KING ICT D.O.O., APIS IT D.O.O., ASSECO SEE D.O.O., LAUS CC D.O.O., JADRAN - INFORMATIKA D.O.O., INTENDA NET D.O.O.
75 LAUS CC D.O.O., KING ICT D.O.O., APIS IT D.O.O.
76 MEĐIMURJE IPC DD, ASSECO SEE D.O.O., INTENDA NET D.O.O.
77 JADRAN - INFORMATIKA D.O.O.

of closed companies, with none of the companies having their shares publicly traded. Some of the reasons for this might be the still young age of the Croatian market and its small size, coupled with the complexities that arise from a bumpy transition to the market economy and a socialist mindset that is still present in parts of the Croatian society. Given that there are no listed enterprises in the sample, it is unsurprising that the enterprises are almost exclusively organized as limited liability companies.

Furthermore, the Croatian computer programming sector is almost in its entirety driven by SMEs, considering that as many as 99.6% of the top 500 enterprises are medium-sized, small or micro enterprises. This percentage is even higher and it rises to 99.99% if one considers not just the top 500 list, but the entire computer programming segment in which more than 4000 enterprises operate. Among the SMEs on the top 500 list, as many as 97.99% are small and micro enterprises, which shows that even middle-sized enterprises are a rarity. To reiterate, this might be owing to the small size of the Croatian market and its relatively young age.

Regarding the age of the enterprises on the list, according to the revenue criteria the enterprises established before 2005 are much more successful than those established after 2005. This might be the consequence of many things, of which two should be highlighted. First, the enterprises established before 2005 that are still in business today were filtered by many different types of crises the Croatian economy has been through since the inception of the Croatian state and the transition to the market economy, meaning that only the fittest and the most capable enterprises managed to survive until the end of 2017. These enterprises are, therefore, on average probably more shock-proof and possess more efficient tools for generating revenue than the younger enterprises on the list, which, for example, did not have to survive the uncertainties of the Homeland War and the period that followed shortly thereafter. The younger enterprises, even if they might enjoy a certain level of success which landed them on the list, did not have a chance to go through such extensive filtering, so as a whole are not as capable to generate high revenues, amongst other things. And second, in knowledge-intensive companies, technological processes are cumulative and an enterprise's experience might play a significant role that contributes positively to innovative results,[78] which usually increases the chances of generating higher revenue.

Considering the number of enterprises having their main business address there, Zagreb is the absolute center of the Croatian software industry. This is unsurprising, since more than 1/4 of the Croatian population lives in and in the close proximity of Zagreb and all other major business sectors are concentrated there as well.

The analysis of the structure of ownership, coupled with the analysis of the structure of management has revealed that the sector is largely dominated by owner-managed enterprises.[79] Most of those enterprises had a sole shareholder and in almost

78 Gomez Vietes, A., et. al., A Study of Innovation Activities and the Role Played by Ownership Structure in Spanish Industrial Companies, in Smyrnios, K. X., et. al., Handbook of Research on Family Business, Second Edition, Edward Elgar Publishing, Cheltenham, 2013.

79 The European Commission defines a family business as a business where: 1. The majority of decision-making rights are in the possession of the natural person(s) who established the firm, or in the possession of the natural person(s) who has/have acquired the share capital of

all cases the sole shareholder participated in managing the company in some way. In the overwhelming majority of such enterprises, the sole shareholder was the sole director, but there were also cases in which the management involved other persons as well, albeit in many cases the members of the owner's family, including spouses. Similar patterns were observed in the enterprises with two or more shareholders, although not so predominantly. This, read together with the fact that an overwhelming majority of the enterprises are small or, rather, micro in size, suggests that the computer programming segment of the IT industry in Croatia is largely vulnerable to many risks arising from the disadvantages generally recognized in scholarly literature as inherent to family businesses, such as succession problems, possible family conflicts, a high degree of nepotism, unstructured governance, inadequate capital and lack of professional management.[80] An additional observation related to the computer programming segment of the Croatian IT industry, which is not specifically related to family businesses, is that it is extremely male-dominated.

Even though owner-managed enterprises certainly have a greater chance to exhibit longevity in leadership which leads to the overall stability of the enterprise in the long run, it seems that at least in Croatia, this is not enough to overcome the lack of financial sources for growth and the lack of professional management. Namely, the comparison between such enterprises and enterprises which are owned by domestic or foreign companies and that are, therefore, more likely to have professional management and access to the necessary capital, shows that the latter enterprises are on average almost four times more successful in Croatia in terms of revenue then those that are owner-managed. This might also be the consequence of the fact that smaller enterprises are more prone to unstructured governance lacking planning or strategy in any business area. One of such areas that is particularly important for the enterprises having computer programming as their main activity is the protection of intellectual property. The following sections deal with the specific issues related to the governance of intellectual property in such knowledge-intensive IT companies.

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the firm, or in the possession of their spouses, parents, child, or children's direct heirs, 2. The majority of decision-making rights are indirect or direct, 3. At least one representative of the family or kin is formally involved in the governance of the firm, 4. Listed companies meet the definition of family enterprise if the person who established or acquired the firm (share capital) or their families or descendants possess 25 per cent of the decision-making rights mandated by their share capital. However, this paper opts for the use of the term "owner-managed enterprises" instead, because it seems to be more precise given that the enterprises that have a sole shareholder or two non-related shareholders, which participate in the management are not necessarily family businesses, even though they are encompassed by the aforementioned definition of family businesses. In principle, the term "owner-managed enterprise" as used in this paper means an enterprise in which the natural persons who are controlling shareholders are substantially the same set of persons who run the enterprise.

80 For more on family business see, for example, Smith, N., Advising the Family Owned Business, Bristol, LexisNexis, 2017; Smyrnios, K. X., et al., (eds.), Handbook of Research on Family Business, Second Edition, Cheltenham, Edward Elgar Publishing, 2013; Koeberle-Schmid, A., et. al., Governance in Family Enterprises, Basingstoke, Palgrave MacMillan, 2014; May, P., Bartels, P. (eds.), Governance im Familienunternehmen, Köln, Bundesanzeiger Verlag, 2017; Vogt, H.-U., et. al., Recht der Familiengesselcshaften, Tübingen, Mohr Siebeck, 2017.

3. SPECIFIC ISSUES RELATED TO THE GOVERNANCE OF INTELLECTUAL PROPERTY IN KNOWLEDGE-INTENSIVE IT ENTERPRISES

Placing intellectual property in the front and in the center of an enterprise's agenda is one of the ways to help maximize the potential for commercial success of software. Unfortunately, many small and micro-sized knowledge-intensive IT enterprises more often than not lack the awareness of the importance and the potential of protecting and properly managing intellectual property. Such an enterprise, in addition to two other types, is profiled in section 3.3. concerning the behavioral patterns in the governance of intellectual property in knowledge-intensive IT companies. Before that, section 3.1. explores the types of intellectual property rights relevant for particular types of software, whereas section 3.2. classifies the methods of protection of intellectual property related to software.

3.1. Types of intellectual property rights relevant for software

Basically, there are four types of intellectual property rights relevant for software: (3.1.1.) patents, (3.1.2.) copyrights, (3.1.3.) trade secrets and (3.1.4.) trademarks. Whereas the first three protect the product itself, trademarks are more applicable to the marketing side of the story, participating in the overall market success of the product in a different way. One must always bear in mind that all four of these rights are not universal in nature, but are rather territorially limited rights. According to the territoriality principle, which is one of the underlying principles of intellectual property rights, they do not extend beyond the territory of the sovereign that has granted the rights in the first place.[81] In other words, different requirements for protection might apply in different countries or regions and different persons might be the holders of those rights in different countries or regions. The following sections primarily touch upon the requirements for intellectual property protection of software as applicable in Croatia and the EU.

3.1.1. Patents

A patent is a registered intellectual property right that provides its holder, who is at the same time not necessarily the inventor,[82] a 20-year exclusive monopoly to make, use and sell the invention in exchange for a public disclosure of the invention.[83]

81 See Drahos, P., The Universality of Intellectual Property Rights: Origins and Development, in Intellectual Property and Human Rights, Geneva, World Intellectual Property Organization, 1999, pp. 13-41, p. 16.

82 See infra section 3.2.1.

83 There is general consensus amongst the patent law scholars that a patent is actually a bargain between the inventor (or rather the holder of the patent) and the public. The inventor/patent holder gets the monopoly for a limited time covering all ways of implementing the technology, whereas in return the invention is not kept secret, but rather enters the public domain and once the time of patent protection expires it becomes free to use by everyone. See, for example, Ghosh, S., Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor after

Patents are perhaps the most powerful intellectual property rights, because they basically allow the monopolization of an idea, not just the monopolization of a single original expression of that idea. In the context of software, this would mean that one might be able to obtain a monopoly on, for example, certain user-interface features and not only on one of the many possible sets of source or object code by which these user-interface features were built. Therefore, competitors would not be allowed to use their own original set of source or object code to arrive to and use the same user-interface features.[84] Due to this very broad grasp, patents could obviously be used as game-changing economic tools by software companies. Of course, there are certain downsides to software patenting too, which will be mentioned at the end of this section.

The most important question to be answered here is the one that has been a matter of much controversy in Europe over the years: is software even eligible for patent protection, i.e., can it be considered an invention?[85] The controversy stems from the fact that the Convention on the Grant of European Patents of 5 October 1973 (hereinafter: the European Patent Convention), to which Croatia is a party and which is arguably the most important legal instrument dealing with both substantive and procedural aspects of patenting in Europe,[86] in Article 52 paragraph 2 prescribes that "programs for computers", in addition to discoveries, scientific theories, mathematical methods, aesthetic creations, schemes, rules and methods for performing mental acts, playing games or doing business and presentations of information, shall not be regarded as inventions within the meaning of the Convention.[87] Many national patent laws in Europe, including the Croatian Patent Act (Official Gazette Nos. 173/03, 87/05, 76/07, 30/09, 128/10, 49/11, 76/13, 46/18, hereinafter: the Patent Act) in Article 5 paragraph 6 essentially contain the same provision. However, even though European countries traditionally have a more restrictive stance towards the patenting of software compared to, for example, the US where software patents were not a matter of debate until very recently,[88] it is actually a myth that software or, as the

Eldred, Berkeley Technology Law Journal, vol. 19, no. 4, 2004, pp. 1315-1388.

84 This does not, however, mean that source and object code can be patented. See, for example, Soininen, A., The Software and Business-Method Patent Ecosystem: Academic, Political, Legal and Business Developments in the U.S. and Europe, IPR Series B, No 1/2005, IPR University Center Publications, p. 51.

85 Amongst Croatian legal scholars, computer program patents were explored by Parać, Zoran, Patentna zaštita kompjutorskog programa u europskim i prekomorskim pravnim sustavima, Privreda i pravo, vol. 30, br. 9-10, 1991., str. 570-587.

86 Currently, 38 states are parties to the European Patent Convention, including all 28 members of the European Union. European patents, as granted under the European Patent Convention, are actually a bundle of national patents granted for the countries designated in the patent application.

87 These items as such are considered "non-inventions", devoid of any technical character and are deemed to be purely abstract concepts. See, for example, Technical Board of Appeal, Decision of 21 April 2004, no. T 0258/03 (Auction method/HITACHI).

88 See, for example, Volpe S., A., Vartanian, H., Alice and the Search for Patent Eligible Software Patents, The Legal Intelligencer, 1 May 2018, available at https://www.law.com/thelegalintelligencer/2018/05/01/alice-and-the-search-for-patent-eligible-software-patents/?slreturn=20180827121046 (15 September 2018).

European Patent Office calls them, computer-implemented inventions[89] cannot be patented in Europe at all.[90]

The key to software patenting in Europe lies in the qualification laid down in Article 52 paragraph 3 of the European Patent Convention, and the corresponding counterpart in the national patent laws – in the case of Croatian Patent Act, Article 5 paragraph 7 – which prescribes that computer programs and other items from the Article 52 paragraph 2 EPC list are excluded from patentability only if the patent application or patent refers to them "as such". Over the years, the practice of the Boards of Appeal of the EPO and the national courts in the Members States, who strive to align with the decisions of the EPO even though they have no obligation to do so apart from the practical necessity,[91] have come to an interpretation that the words

89 According to the EPO Guidelines for Examination, "Inventions involving programs for computers can be protected in different forms of a "computer-implemented invention", an expression intended to cover claims which involve computers, computer networks or other programmable apparatus whereby at least one feature is realized by means of a program.". European Patent Office, Guidelines for Examination in the European Patent Office, November 2017, available at http://documents.epo.org/projects/babylon/eponet.nsf/0/D94333C1A028BC0AC12581C90057921F/$File/guidelines_for_examination_2017_en.pdf (15 September 2018), Part F– Chapter IV-8, Section 3.9. The European Patent Office has decided to use the term "computer-implemented inventions" because the term "software" lacks precision and because Article 52 EPC refers indeed to the exclusion of computer programs from patenting. Quinn, Gene, Exclusive with Grant Philpott: Patenting Computer Implemented Inventions in Europe, 12 September 2017, available at http://www.ipwatchdog.com/2017/09/12/grant-philpott-patenting-computer-implemented-inventions-europe/id=87865/ (15 September 2018).

90 In the period between 2008 and 2017, the total number of submitted European patent applications in the field of computer was 93,404, out of which 27,571 patents were granted by the EPO. Whereas the average number of patents granted per year between 2008 and 2015 was 2,450, the number of granted patents grew to 3,384 in 2016 and to 4,584 in 2017. See European Patent Office, "European patents granted 2008-2017 by field of technology", 22nd January 2018, available at http://documents.epo.org/projects/babylon/eponet.nsf/0/5F76E784867AC2D2C125824700558F7A/$File/Granted_patents_by_technology_field_2008-2017_en.xlsx (15 September 2018) and European Patent Office, "European patents applications 2008-2017 by field of technology", 22nd January 2018, available at http://documents.epo.org/projects/babylon/eponet.nsf/0/5F76E784867AC2D2C125824700558F7A/$File/Applications_by_field_of_technology_2008-2017_en.xlsx (15 September 2018).

91 For example, the UK Court of Appeal in its judgement of 6 March 1997 in the matter of application no. 9204959.2 by Fujitsu Limited said the following: "From this brief reference to the European Patent Convention one point which emerges is that it is of the utmost importance that the interpretation given to section l of the Act by the courts in the United Kingdom, and the interpretation given to Article 52 of the European Patent Convention by the European Patent office, should be the same. The intention of Parliament was that there should be uniformity in this regard. What is more, any substantial divergence would be disastrous. It would be absurd if, on an issue of patentability, a patent application should suffer a different fate according to whether it was made in the United Kingdom under the Act or was made in Munich for a European patent (UK) under the Convention. Likewise, in respect of opposition proceedings." See England and Wales Court of Appeal (Civil Division), FUJITSU LIMITED [1997] EWCA Civ 1174 of 6 March 1997, available at http://www.bailii.org/ew/cases/EWCA/Civ/1997/1174.html (15 September 2018).

"as such" from Article 52 paragraph 3 EPC separate the patent-ineligible computer programs, which do not to have any technical features beyond the "normal physical interactions between the program (software) and the computer (hardware) on which it is run", from patent-eligible computer programs, which have technical features, i.e. a "further technical effect".[92] Simply put, it matters what the computer program does. For example, if a program is only a sequence of computer-executable instructions running on a computer used for automatic alphabetical sorting of pdf files, it will not be patent-eligible subject-matter because it only has organizational features and not a further technical effect. On the other hand, if at the same time the described program automatically reduces the size of the files during the sorting without compromising the quality of the files, thus also reducing the computer disk space necessary to save the files, it has a further technical effect along with the business features and is patent-eligible.

In addition to having technical features, in order to be patented software must also satisfy the three substantive patentability requirements: novelty, inventive step and industrial applicability. Whereas industrial applicability has proven not to be a particularly difficult hurdle to surpass for inventions in any field of technology,[93] most software would most likely fail at the inventive step requirement, which is a much larger bite compared to eligible subject-matter. Namely, when assessing whether a computer-implemented invention satisfies this requirement or not, only the technical features of the invention are assessed and compared with the solutions to a certain technical problem, which are already offered by the prior art. The many possible non-technical features, such as business features of the software, no matter how revolutionary they may be, cannot contribute to the inventive step.[94] Even the novelty

92 This approach to patenting of computer programs was first formulated in a landmark decision by the Technical Board of Appeal of the EPO in the case T 1173/97, also known as Computer program product/IBM or simply Computer program product. In its decision of 1st July 1998, the Board held that "a computer program claimed itself is not excluded from patentability if the program, when running on a computer or loaded into a computer, brings about, or is capable of bringing about, a technical effect which goes beyond the "normal" physical interactions between the program (software) and the computer (hardware) on which it is run". See Technical Board of Appeal, T/1173/97 of the 1 July 1998 in T/1173/97 (Computer program product/IBM), available at https://www.epo.org/law-practice/case-law-appeals/recent/t971173ex1.html (15 September 2018).

93 For general information about industrial applicability, see, for example Tritton, G., et. al., Intellectual Property in Europe, London, Sweet & Maxwell, 2002, 2nd edition, p 103; Cornish, W., Llewelyn, D., Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights, London, Sweet & Maxwell, 2003, 5th edition, p. 206-207; Hacon, R., Pagenberg, J. (eds.), Concise European Patent Law, Alphen aan den Rijn, Kluwer Law International, 2007, p. 59-60; European Patent Office, Case Law of the Boards of Appeal of the European Patent Office, 8th Edition, July 2016, available at http://documents.epo.org/projects/babylon/eponet.nsf/0/5148B6F13CBE8990C1258017004A9EF6/$File/case_law_of_the_boards_of_appeal_2016_en.pdf (15 September 2018), p. 254-260.

94 To assess whether an invention satisfies the inventive-step requirement, the EPO uses the so-called "problem-and-solution approach". This approach includes establishing the closest prior art, determining the differentiating features and technical effects of the invention and the closest prior art, formulating an objective problem and then deciding whether the solution to

requirement might prove difficult in many cases, because it mandates that the idea to be patented was not a part of the state of the art at the time of filing the patent application, i.e. that it has not been made publicly available by any means prior to submitting the patent application.[95] This might be particularly hard to satisfy in the case of software, because many ideas and possible solutions to problems are discussed and put forward amongst programmers and developers publicly online. Furthermore, the *modus operandi* of the ever-growing open-source community, which strives to provide free or freeware software, is to make source codes and extensive documentation for such software available to everyone. This might also be detrimental to novelty in certain cases, in the same way patents may be detrimental to the open-source community.[96]

Even though a lot might be gained by successful software patenting, one must always consider the downsides too. Primarily, patenting is an extremely lengthy process. It usually takes several years from the moment the patent application is submitted until the possible grant of the patent, which might as well be a life-time. Things are moving at light-speed in the software world and very few products can survive on the market for more than a few years, thus making a patent obsolete. A patent would, therefore, make sense only in the case of fundamental pieces of software, which could remain relevant for a longer time. Furthermore, given that a patent is a territorial right and as such neither globally registered nor enforced, while the use of software knows no boundaries, it can be too expensive for small or medium enterprises to obtain and then enforce patents in all countries where their potential market lies. The unattractiveness of the large expense is particularly enhanced considering the unsecure outcome of the patenting process. Such enterprises might, therefore, be keener to rely on copyright and even more-so on trade secret protection.

3.1.2. Copyright

Copyright is an exclusionary intellectual property right that protects original literary, scientific and artistic works. Copyright protection begins *ipso iure* at the moment a work is created, with no further formal requirements to be met in order for protection to begin, such as filing an application or registering the copyrighted work.[97]

this problem would be obvious to the person skilled in the art. For more on the "problem-and-solution" approach see, for example Szabo, Gabriel S.A., The Problem and Solution Approach in the European Patent Office, International Review of Intellectual Property and Competition Law, vol. 26, no. 4, 1995, p. 457-487.

95 According to the EPO Guidelines for Examination, "state of the art" is defined as "everything made available to the public by means of a written or oral description, by use, or in any other way, before the date of filing of the European patent application". European Patent Office, Guidelines…op. cit., Part G – Chapter IV-1. For general information about the novelty requirement, see, for example, Tritton, Guy, et. al., op. cit., pp. 88-93; Cornish, W., Llewelyn, D., op. cit., pp. 174-191; Hacon, R., Pagenberg, J. (eds.), op. cit., pp. 36-48.

96 In fact, the open source community has been one of the loudest in voicing concerns about software patenting in relation to the failed proposal of the Directive on the Patentability of Computer-Implemented Inventions. See, for example, Szattler E., Patentability of Computer Programs, Masaryk University Journal of Law and Technology, Vol. 1, No. 1, 2007, pp. 97-108, p. 103.

97 See Gliha, I., Part I. Copyright, in: Sikirić, H., et. al., Intellectual Property Croatia, International

The duration of copyright protection is the life of the author plus 70 years thereafter.[98] Article 5 paragraph 2 of the Croatian Copyright and Related Rights Act (Official Gazette Nos. 167/03, 79/07, 80/11, 125/11, 141/13, 127/14, 62/17, hereinafter the Copyright Act)[99] explicitly lists computer programs as literary works which are protected by copyright.[100] This is further elaborated in Article 107, which states that a computer program is protected if it is original in the sense that it represents an own intellectual creation of its author. Unlike patents, however, copyright does not protect the novel ideas and principles around which any element of the computer program or its interfaces is built. Instead, copyright protects "the expression of a computer program in any form, including preparatory design work."[101] This means that ideas, concepts, principles and the like embedded in the software are fair-game to competitors, to the extent, of course, they are not protected by patents or trade secrets. Therefore, competitors are allowed to independently create computer programs with exactly the same functions and achieving the same results, provided they use their own sets of original source code to achieve those results and their own original graphics in the case of applications.

The key requirement for copyright protection of computer programs is originality, as for any other type of work. However, the originality threshold for computer programs is lower than in the case of other works. This is the result of Article 1 paragraph 3 of the Directive on the Legal Protection of Computer Programs, which mandates the fulfilment of only one simple requirement for the computer program to be deemed original – it must be the author's own intellectual creation.[102]

Encyclopedia of Laws, Supl. 36, Kluwer Law International, The Hague, 2006, p. 67. See also Kunda, I., Pravo mjerodavno za povrede prava intelektualnog vlasništva, Doctoral dissertation, University of Zagreb, Faculty of Law, 2008, p. 148.

98 Article 99 of the Copyright and Related Rights Act.

99 The Copyright and Related Rights Act is the key piece of legislation regulating copyright in Croatia. It is fully harmonized with the Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version) (hereinafter: The Computer Program Directive), and other relevant EU directives concerning copyright.

100 For more about the historical development of copyright protection of computer programs see Kunda, I., Matanovac Vučković, R., op. cit., pp. 87-90, Katulić, T., Protection of Computer Programs in European and Croatian Law - Current Issues and Development Perspective, Zbornik Pravnog fakulteta u Zagrebu, vol. 65, no. 2, 2015, pp. 237-262, pp. 241-244. For more about the introduction of copyright protection of computer programs to Croatian law see, for example, Parać Z., Autorskopravna zaštita komputerskih programa, in: Hennenberg I. (ed.), Nove tehnologije i autorsko pravo, Autorska agencija za SR Hrvatsku, Zagreb, 1989., pp. 21-32, Parać, Z., Autorskopravna zaštita kompjuterskih programa nakon izmjene Zakona o autorskom pravu, I.: kategorizacija kompjutorskog programa, pretspostavke za pružanje zaštite, zaštita algoritama i programa u ROM-u, Privreda i pravo, vol. 29, no. 9-10, 1990, p. 645-661; Parać, Z., Autorskopravna zaštita kompjutorskih programa nakon izmjene Zakona o autorskom pravu, II.: nosilac autorskog prava, autorskopravna ovlaštenja, ograničenje autorskog prava, Privreda i pravo, vol. 29, br. 11-12, pp. 793-807. Fikeys Krmić, N., Problemi autorskopravne zaštite kompjuterskih programa, Zakonitost, vol. 44, no. 1, 1990, pp. 96-101;

101 Article 107, Copyright and Related Rights Act.

102 In addition to this provision, recital (8) of the Directive lays down the following: "In respect of the criteria to be applied in determining whether or not a computer program is an original work,

Even though this should not be a particularly difficult barrier to overcome, one should certainly consider the fact that many programmers, in search of efficiency, like to take shortcuts. Instead of taking the time to create their own sets of code, for example, to emulate a certain function which is to be a part of the product they are working on, they might avail themselves of the ready-made solution for the function which is shared online by their peers and simply copy substantial chunks of code already written by someone else, or copy the code while making only slight amendments. It is also not uncommon that employees attempt to reuse a substantial amount of code created while they were working for their previous employer and, thus, belonging to another company. This is certainly less time-consuming and is very tempting in the rush to put the product on the market as soon as possible. However, it often results in programs which are not completely the programmers' own intellectual creations but at best an amalgam of the programmers' original code and code taken from various other sources or code belonging to someone else. This might later lead to problems in relation to successful enforcement of copyright protection.

Even though copyright is obtained immediately and automatically, taking the time and costs associated with the granting process of registrable intellectual property rights out of the equation, copyright protection of computer programs also has its weaknesses. This is particularly true for types of software in which the functional manifestations of code are what attracts the customers, such as business software,[103] unlike types of software in which the expressive manifestations of code is what makes a market difference, such as in the case of computer games.[104] The problem with copyright protection of the former type of software stems from the fact that there are numerous ways to write the source code in order to achieve exactly the same functions. On top of that, especially in the case of static on-premises software,[105] any skilled programmer could analyze the behavior of a competitor's program and reproduce all of its functions without even once having to take a look at the original code. Unfortunately for the programmer or programmers who were first to write the program with the wanted functions, such reverse engineering is often less time

no tests as to the qualitative or aesthetic merits of the program should be applied". For more on the originality criteria as applied to computer programs see Margoni, T., The Harmonization of EU Copyright Law: The Originality Standard, SSRN, 29 June 2016, available at http://dx.doi.org/10.2139/ssrn.2802327 (15 September 2018).

103 As one legal scholar has recently put it: "no one would purchase a software that did not function, no matter how elegant or creative the program's code might be." Ballardini, Rosa Maria, Scope of IP Protection for the Functional Elements of Software, In Search of New IP Regimes, IPR University Center, 2010, pp. 27-62, p. 33.

104 See Mann, R. J, Do Patents Facilitate Financing in the Software Industry, Texas Law Review, vol. 84, no. 4, pp. 961-1030, p. 1012-1013.

105 On-premises software is a type of software that is installed and runs on computers on the premises of the person or organization using the software, so it is more readily accessible, rather than software-as-a-service or on-demand software, which runs on a server farm or cloud. On-premises software is usually purchased and not rented, unlike in the case of software-as-a-service, where the users subscribe to use to software. See Sweeney, M., The Difference Between SaaS Applications and On-Premises, Clearcode, 17 December 2014, available at: https://clearcode.cc/blog/saas-applications-vs-on-premises/ (15 September 2018).

and labor-consuming.[106] Due to this, it could be argued that copyright is a relatively weak intellectual property right if the goal is to protect the functional rather than the expressive aspects of the software from competitors, because it will only prevent competitors to reuse the same code and not to rewrite the program with their own code. This might be one of the reasons why there is a relatively small number of cases related to copyright infringement between IT companies in Europe.[107] However, if the goal is to limit the ability of customers to obtain or use the software without payment to the holder of the copyright than copyright is a much stronger intellectual property right in relation to software.[108] This is particularly so if the software was a commissioned work custom-made for use of one large client and the copyright remained with the software company.[109]

3.1.3. Trade secrets

A trade secret is a less conventional form of intellectual property rights that protects commercially valuable and sensitive information generally not known to others, which is kept secret by the owner to gain a competitive advantage on the market. However, unlike patents and copyright, trade secrets are not exclusionary rights. As long as the information can be kept secret, the protection may continue indefinitely, i.e. it has no time limit. Legal rules about trade secrets were recently harmonized within the EU through the Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use

106 Carleton, D. M., A Behavior-Based Model for Determining Software Copyright Infringement, Berkeley Technology Law Journal, vol. 19, no. 2, September 1995, pp. 405-432, p. 416. See also, Mann, R. J, op. cit., p. 1014-1015.

107 One of the most known such cases concerning the EU is SAS Institute Inc v World Programming Ltd. In its decision number C-406/10 of 2 May 2012, the EU Court of Justice ruled that "neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program and, as such, are not protected by copyright in computer programs". It further ruled that "a person who has obtained a copy of a computer program under a license is entitled, without the authorization of the owner of the copyright, to observe, study or test the functioning of that program so as to determine the ideas and principles which underlie any element of the program, in the case where that person carries out acts covered by that license and acts of loading and running necessary for the use of the computer program, and on condition that that person does not infringe the exclusive rights of the owner of the copyright in that program".

108 There are quite a few cases in which copyright was used as an argument to prevent the customers from using the software the customers have stopped paying or in similar situations. In Croatia, see for example, High Commercial Court of the Republic of Croatia, Pž 6945/04-3 of 26 April 2006; High Commercial Court of the Republic of Croatia, Pž 343/06-3 of 14 February 2006; High Commercial Court of the Republic of Croatia, Pž 2501/05-3 of 7 August 2007; Supreme Court of the Republic of Croatia, Gr1 250/2005-2 of 22 August 2005; High Commercial Court of the Republic of Croatia, Pž 6122/06-3 of 30 October 2006; Supreme Court of the Republic of Croatia, Revt 167/2003-2 of 7 September 2004, Supreme Court of the Republic of Croatia, Revt 76/2002-2 of 27 May 2003.

109 For the statutory provisions regarding the presumed holders of copyright see infra section 3.2.1.

and disclosure (hereinafter: The Trade Secret Directive).[110] The recent adoption of the Trade Secret Directive highlights the increasing importance of trade secrets in the current business climate. According to Article 2 of the Trade Secret Directive, in order to merit protection as a trade secret, the information has to meet the following requirements: (a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) it has commercial value because it is secret; (c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret. While trade secret holders may apply for the measures, procedures and remedies prescribed by the Directive in order to prevent, or obtain redress for, the unlawful acquisition, use or disclosure of their trade secret,[111] the Directive also explicitly lists the cases in which the acquisition, use or disclosure of a trade secret will be considered lawful. These are: (a) independent discovery or creation; (b) observation, study, disassembly or testing of a product or object that has been made available to the public or that is lawfully in the possession of the acquirer of the information who is free from any legally valid duty to limit the acquisition of the trade secret; (c) exercise of the right of workers or workers' representatives to information and consultation in accordance with Union law and national laws and practices; (d) any other practice which, under the circumstances, is in conformity with honest commercial practices.[112]

Obviously, trade secrets can play a very important role in the software industry. However, due to the fact that they are not a defense against reverse-engineering, in the cases where software is distributed to the end-user and is thus more directly accessible making it more prone to reverse-engineering, they will be most valuable in the phase of software development, prior to putting the product on the market or filing for a patent (provided the software is patent-eligible in the first place). Taking every reasonable step to preserve the secrecy of what and how is being developed in the pre-market stage is in many such cases exactly what makes or breaks an advantage over

110 The Trade Secret Directive was transposed into Croatian law through the Act on the Protection of Undisclosed Information with Commercial Value (Official Gazette 30/18; hereinafter: The Trade Secret Act), which came into force on 7 April 2018. Interestingly, the Trade Secret Act did not repeal the 1996 Act on the Protection of Confidential Information (Official Gazette 108/96), which is still in force and regulates the same subject-matter, albeit in not so much detail. One can hardly find a reason why this might be done on purpose instead of consolidating all the rules on trade secrets in one piece of legislation. It might very well be that the legislators simply omitted to repeal the 1996 law. In fact, the Final Proposal of the Act on the Protection of Undisclosed Information with Commercial Value does not even mention that there is a law in force, which specifically regulates matters related to trade secrets. See Government of the Republic of Croatia, Final Proposal of the Act on the Protection of Undisclosed Information with Commercial Value, Zagreb, March 2018, available at: http://www.sabor.hr/fgs.axd?id=52578 (15 September 2018). Whatever the case, having two pieces of legislation regulating exactly the same subject-matter is fertile ground for legal uncertainty and might lead to serious problems in practice.

111 See Article 4 and Chapter III of the Trade Secret Directive.

112 Article 3 paragraph 1 of the Trade Secret Directive.

competitors. Of course, trade secrets can be used to gain or maintain that advantage even after the software is marketed, provided that the software is not easily reverse-engineerable. This is, in fact, increasingly likely to be the case, for two reasons. First, because the industry-trend in the last few years has been to develop and offer cloud-based software to end-users instead of on-premises software[113] and second, more and more software is developed using the so-called agile software development methodologies.[114] These result in software that is not static but is undergoing constant change. Thus, it is more difficult for the programmers to reverse-engineer by observing and analyzing the behavior of software, since its code is dynamic.

The biggest advantages of trade secrets, which come to the forefront especially in the case of small and medium enterprises, are that they are relatively straightforward, they do not entail any registration costs or lengthy registration processes, the protection may last indefinitely as long as they are not revealed to the public and they protect a broader array of software information than patents or copyright. On the other hand, a software enterprise must always consider the fact that the entire software package is unlikely to remain a trade secret, as trade secret protection can do nothing in the case a competitor arrives to a substitute product or a partial substitute through independent development or even reverse engineering. It also has to make sure that reasonable steps to keep the information secret under the given circumstances are always taken and observed without an exception, or otherwise the information will lose the trade secret protection. One little mishap, such as giving only one single person a trial of the software without concluding a confidentiality agreement may be destructive to the trade secret status.

3.1.4. Trademarks

A trademark is an intellectual property right that protects words, designs, letters, numerals, colors, the shape of goods or of the packaging of goods, or sounds, with the purpose to distinguish goods and services of one enterprise from those of another. Trademark registration is one of the most effective ways to build and to protect a brand. In theory, a trademark can last for an indefinite period of time, provided the relevant renewal fees are regularly paid. With the exception of well-known trademarks, which are afforded a somewhat different status, in general, two basic requirements need to be met in order to register a trademark. The trademark has to be distinctive and

113 See above footnote no. 105. However, on-premises software is still very much used in large organizations, amongst other reasons because it is considered to be more secure. Furthermore, buyers of software-as-a-service are at the mercy of the vendor because they do not have any rights in the code in most cases. Should the vendor decide to take a different product direction or if it goes bankrupt, the consequences for the buyers can be serious and their entire business may be at risk. See Barney, D., "The death of on-premises IT is greatly exaggerated", 26 May 2015, Network World, available at: https://www.networkworld.com/article/2926337/cloud-computing/the-death-of-on-premises-greatly-exaggerated.html (15 September 2018).

114 Agile software development is an approach to software development under which requirements and solutions evolve through the collaborative effort of self-organizing and cross-functional teams and their customer(s)/end user(s). Collier, K. W, Agile Analytics: A Value-Driven Approach to Business Intelligence and Data Warehousing, Pearson Education, 2011, pp. 121 ff.

it has to be non-descriptive. There is a dual system of trademark protection within the European Union. One can register an EU trademark through the European Union Intellectual Property Office, which is then applicable on the territory of the entire European Union.[115] The EU trademark is unitary in character, which means that an objection against the validity of the EU trademark in one EU Member State can defeat the validity of the entire application. Equally so, it can be enforced in all Member States of the EU.[116]

The second route to take is the national route. In case an enterprise wishes to protect a trademark only in one or merely in a few EU Member States, then it makes more sense to apply for a national trademark through the national intellectual property offices in the chosen EU Member States or state – State Intellectual Property Office in the case of Croatia. The national trademark will then be applicable only on the territory of the chosen EU Member States or states. Importantly, given that trademark protection in EU Member States coexists with the EU trademarks, in order to reduce the areas of divergence within the trademark system in Europe as a whole, the national trademarks laws in the European Union[117] have been harmonized through the Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks (Recast).[118]

Even though in software development most would probably single out only the technical aspects of an application when trying to determine what contributed to its success, one must always bear in mind that, without exception, anything that is being purchased or sold has a name and/or some other sort of identity label. Trademarks are, hence, an extremely important piece of the puzzle. Not all software is revolutionary regarding the functions it offers and there are many applications out there on the market that are actually substitute products. If a customer can remember only what the software does, but not its name or visual identity then it might very well end up using a substitute product produced by a competitor next time. Arguably, this is

115 This is regulated by the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union Trade Mark (Codification) (hereinafter: The EU Trade Mark Regulation), Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trademark, and repealing Delegated Regulation (EU) 2017/1430 and Commission Implementing Regulation (EU) 2018/626 of 5 March 2018 laying down detailed rules for implementing certain provisions of Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trademark, and repealing Implementing Regulation (EU) 2017/1431.

116 Article 1 paragraph 2 of the EU Trade Mark Regulation.

117 Including the Croatian Trademark Act (Official Gazette Nos. 173/03, 54/05, 76/07, 30/09, 49/11, 46/18).

118 For more on trademark protection on the level of the EU and in Croatia see, for example, Kunda, I., Pravo mjerodavno…cit., p. 56-68 and 174-182, Kunda, I., Matanovac, R., Žig Zajednice i dizajn Zajednice – osnovna obilježja i mjesto u novelama hrvatskih zakona iz 2007. Godine, in: Matanovac, R. (ed.), Prilagodba hrvatskog prava intelektualnog vlasništva europskom pravu, Narodne novine, Zagreb, 2007, pp. 53-86. Marinković Rački, A., Žigovi prijavleni u zloj vjeri u hrvatskom pravu i pravu Europske unije, Zbornik Pravnog fakulteta u Zagrebu, Vol. 59, br. 2-3, 2009, pp. 307-341, Matanovac Vučković, R., Razlikovnost kao pretpostavka za registraciju žiga, Zbornik Pravnog fakulteta u Zagrebu, Vol. 62, no. 3, 2012, pp. 929-960.

particularly true in the case of online or mobile-phone applications, where trademarks consisting of words or icons coupled with domain names[119] play a crucial role, especially with the ever-growing importance of search engines such as Google search and Bing in the case of online applications, or mobile app distribution platforms such as Google Play and iOS App Store in the case of mobile-phone applications. Mobile app distribution platforms are perhaps a place where the fight between application developer enterprises is the fiercest. Therefore, trademarks with characteristic and distinguishing features, which are at the same time in accordance with the rules of the chosen mobile app distribution platform, might be exactly what makes a customer opt for one run-of-the-mill application over another.[120]

3.2. Approaches to the protection of intellectual property in software

As the above analysis of the intellectual property rights relevant for software illustrated, there is no one-size-fits-all approach to the protection of software. Equally so, there is no single strategy for the protection of intellectual property in software applicable to all knowledge-intensive IT enterprises. Each enterprise should adopt, diligently apply, and also constantly adapt and improve its own protective policy in order to obtain the maximum possible protection for their current specific software product, but also in order to have a general framework and action plan in place in case of software yet to be developed. In theory, one could formulate four possible approaches or, rather, levels of protection of intellectual property in software an enterprise might apply:[121] (3.2.1.) protection through contracts (3.2.2.) protection through registration, (3.2.3.) protection through enforcement and (3.2.4.) protection through non-legal actions. Whereas contracts, registration and enforcement are all primarily legal methods of protection, non-legal actions relate to alternative ways of protection achieved mostly through specific business conduct and processes. The approaches are not mutually exclusive, but complement each other and should, therefore, be applied cumulatively by knowledge-intensive IT enterprises in accordance with their specific needs and capacities, particularly those related to finance and personnel.

119 Although there is an on-going discussion among legal scholars whether domain names are contractual or property rights, in principle, legislators do not classify them as intellectual property rights. For more on the legal nature of domain names see, for example, Alramahi, M., The Legal Nature of Domain Names Rights, Journal of International Trade Law and Policy, vol. 8, no. 1, 2009, pp. 84-94, Bakhtiarvand, M., Legal Nature and Protection of Domain Names with Emphasis on Iranian Law, Journal of Intellectual Property Rights, vol. 21, 2016, pp. 166-174.

120 For more on the intricacies of mobile apps trademarks see, for example, Asbell, M. D., Cassidy, M., Protecting Trademarks for Mobile Apps, Ladas.com Education Center, 30 April 2014, available at: https://ladas.com/education-center/protecting-trademarks-mobile-apps/ (15 September 2018).

121 These approaches were formulated on the basis of the author's personal experience and insights accumulated during almost a decade of managing IT enterprises in Croatia in combination with the insights gained in the process of studying the relevant scholarly writings and surveys.

3.2.1. Contracts

If not the most important, then certainly the most basic step any knowledge-intensive IT enterprise must take if it is to act diligently in relation to the protection of its intellectual assets, is to contractually regulate the relationship with all the persons involved in developing and marketing the software, as well as with other persons who gain insight into the information related to the software in any other way, be it employees of the enterprise or outsourced personnel. The contracts must be concluded in a timely manner, that is beforehand in order to avoid any problems, and must regulate three crucial issues: the rights in the software, the confidentiality of information related to the software and competition.

When regulating the rights in the software, one must never forget to consider the statutory provisions dealing with certain types of intellectual property rights, because they may prescribe presumptions as to the holders of the right, if the matter is not otherwise contractually regulated. With some exceptions, this issue is not harmonized on the level of the European Union, so it is possible that the legal status of intellectual creations of employees differs in different Member States.[122]

In the case of an employer-employee relationship, there are several such provisions in Croatian law. A general rule in the case of copyright is laid down by Article 76 of the Copyright Act.[123] According to the latter, an employment contract must explicitly prescribe that the employer will have the right to exploit the copyrighted work created by an employee as part of the work performed under an employment contract, as well as the scope and the duration of such a right. Otherwise, the copyright on the work will belong to the employee, without any limitations. However, Article 108 contains an exception to the general rule that relates specifically to copyright in computer programs and was taken verbatim from Article 2 of the Computer Programs Directive: "Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract". Therefore, the employer has all economic rights in the program and does not have the obligation to pay the employee anything on top of his or her salary, unless something different is agreed.[124] On the other hand, the employer is not automatically given those rights if a computer program is written by the employee outside of his duties or absent any instructions of the employer.[125] In relation to patents,

122 For more on the regulation of intellectual property rights in employment see, for example, Matanovac Vučković, R., Kunda, I., Materijalnopravno i kolizijskopravno uređenje intelektualnog vlasništva nastalog u radnom odnosu, Zbornik Pravnog fakulteta u Rijeci, vol. 32, no. 1, 2011, pp. 75-125.

123 For more on copyright for works made under an employment contract or for commissioned works see Gliha, I., Prava na autorskim djelima nastalim u radnom odnosu i po narudžbi, Zbornik Pravnog fakulteta u Zagrebu, vol. 56, no. Posebni broj, 2006, pp. 791-836.

124 Such a presumption to the benefit of the employer represents a statutory copyright license which is not typical for civil law regimes. It is the only instance in the Croatian copyright law in which a person other than the author is given the right to use the work on the basis of law. Gliha, I., Prava…cit., p. 819.

125 However, one must also bear in mind that, according to Article 101 of the Employment Act

the Employment Act (Official Gazette Nos. 93/14,127/17, hereinafter: Employment Act) differentiates between inventions made at work or in relation to work and those related to the employer's business activities, but made outside of work. The former type of inventions belongs to the employer, whereas the employee has the right to a contractually agreed reward.[126] The latter type of inventions belongs to the employee, but the employee has the obligation to notify the employer of the invention and to offer the assignment of the rights in the invention to the employer.[127] Only if the employer does not accept the offer within one month, the employee is free to dispose of the invention as he or she wishes.[128]

In this day and age, cooperation between companies or with freelance personnel related to research and development is becoming more and more common. Software industry is no exception to this trend. One should, therefore, be aware of the possible statutory provisions regulating the situation in which the work on software is outsourced to other companies or freelance developers. In this context, the Copyright Act lays down the presumption that the copyright remains with the external developers without any limitation, unless it is otherwise contractually agreed.[129] Therefore, the transfer of the economic rights in the software to the enterprise that has commissioned the work and the extent thereof must be explicitly prescribed in the contract between the enterprise and the external developers. In relation to patents, the Patent Act prescribes that the right to obtain a patent belongs to the inventor,[130] who is defined as a natural person that made the invention through his or her creative work.[131] If there is more than one person participating in the inventing process, then all those persons have a right to a joint patent.[132] However, the Patent Act also allows for the possibility to transfer the right to obtain a patent to a legal successor by means of a contract.[133] Therefore, if there is any chance of the software being patented, the contract regulating the relationship between the enterprise, which commissioned the software or which is developing the software jointly with external developers, and the external developers should include

(Official Gazette Nos. 93/14, 127/17), the employee is not allowed to compete with the employer for the duration of the employment contract, i.e. conclude business transactions related to the employer's business activities. Otherwise, the employer has the right to damages or earnings from such transactions.

126 Article 98 paragraph 3 of the Employment Act. The employee is statutory bound to keep the information about the invention confidential and treat it as a trade secret. Article 98 paragraph 2 of the Employment Act. Furthermore, Article 14 paragraph 2 of the Patent Act prescribes that the Employer is to be considered a legal successor of the inventor when the right to obtain a patent for the invention made by the employee under the employment contract belongs to the employer according to applicable law or the employment contract.

127 Article 99 paragraph 2 of the Employment Act.

128 Article 99 paragraph 2 of the Employment Act.

129 This is prescribed by Article 74 of the Copyright Act which pertains to commissioned works in general. There is no provision in the Act that would pertain to computer programs specifically.

130 Article 12 paragraph 1 of the Patent Act.

131 Unlike a person who only provided technical support in the process. See Article 13 paragraphs 1 and 2 of the Patent Act.

132 Article 12 paragraph 2 of the Patent Act.

133 See Article 14 of the Patent Act.

a clause to that effect.[134] Otherwise, the enterprise might be in a precarious position to inadvertently lose the patent to or be forced to share the patent and all of its benefits with the external developers.[135]

The second issue that needs to be covered contractually is confidentiality of any information in connection to the software being developed. The most important item to regulate is the scope of information that is to be treated with confidentiality. In this respect, both laws regulating this issue in Croatia seem to allow a very broad array of subject-matter to be eligible for trade secret protection.[136] Considering that in any type of cooperation the companies necessarily gain professional knowledge from each other, the contract should delimit as clearly and as precisely as possible the protected information from the kind of know-how that the contracting party has the right to make use of in its own business.[137] As for the parties involved, it goes without saying that non-disclosure agreements should be concluded with all in-house personnel, not just the personnel having direct access to information about the software. The next on the bucket list, but not any less imperative, are partner software companies and freelance developers participating in the development of the software, if any are used. Finally, due to the fact that many auxiliary activities are nowadays being outsourced, especially by SMEs, one mustn't forget any other external participants which are not perhaps directly involved in the development, but might possibly come into contact with any information related to the software being developed, such as those providing accounting, legal, administrative, cleaning or similar services. Importantly, non-disclosure agreements can be a precondition for the successful implementation of the other two legal levels of protection – registration and enforcement. For example, patents cannot be registered without satisfying the novelty requirement, for which maintaining secrecy before filing the patent application is of the utmost significance to avoid any disclosure, which might be deemed novelty-destructive by the patent authorities. On the other hand, trade secrets revolve in their entirety on the notion that confidentiality is diligently maintained and implemented by all the parties involved. Therefore, non-disclosure agreements are absolutely necessary for legal enforcement of trade secret protection.

The third issue that should be contractually resolved is the matter of competition between the enterprise and the developers, be it in-house or external. The software start-up sector is particularly characterized by employees rapidly moving from firm to firm.[138] This can make such enterprises vulnerable to the plundering by larger and established companies, because there is a danger that the employees will take large

134 However, note that Article 13 paragraph 3 and 4 of the Patent Act give the inventors non-transferable moral rights to be named as inventors in the patent application.

135 Lose if the external developers developed the software without any participation of the in-house personnel and share if the external developers developed the software with participation of the in-house personnel.

136 See Article 3 of the Trade Secret Act and Article 19 of the Act on the Protection of Confidential Information.

137 Jämes, S., Protecting the Unprotected Methods of Protecting Knowledge and Innovations in Finland, International Journal of Business, Economics and Law, vol. 1, 2012, pp. 91-97, p. 94

138 Mann, R. J, op. cit., p. 1018.

pieces of the innovative up-and-coming product to their new powerful employer, as a sort of dowry. The statutory provisions in Croatia do regulate the matter to an extent, but the enterprise has to take active steps via contracts in order to make the most of them. In particular, in addition to the statutory non-compete arrangement,[139] the Employment Act prescribes the possibility for the employer and the employee to conclude a non-compete contract under which the employee would agree not to work for any competitor of the employer and not to partake in any transactions which would compete with the employer.[140] The Employment Act limits the duration of such contract to two years after the termination of employment.[141] In return, during the validity of the contract the employer must pay half of an average monthly salary, which was paid to the employee in the three months before the termination of employment.[142] Such compensation might be too big of a financial burden for smaller companies, but there is a way around it, which is often overlooked even by practicing lawyers. Namely, Article 106 of the Employment Act allows for the possibility to agree on the contractual penalty even if the employer does not agree to pay the compensation. In practice, this means that if such a clause is included in the contract, the employer does not have to pay any compensation for the duration of the contract to the employee, who regardless must obey the non-compete contract or otherwise he or she will be liable for payment of the contractual penalty. As for the non-compete contract with external developers, anything really goes, provided it is in line with the general principles of the Croatian obligations law.[143]

3.2.2. Registration

Unlike copyright and trade secrets, which are not registrable rights in the European Union as a whole or in Croatia in particular, the rights that have to be registered in order to enjoy protection are patents and, in principle, trademarks.[144] The most important aspects of these two types of intellectual property rights were already discussed at length in sections 3.1.1. and 3.1.4., so in order to avoid the unnecessary reiteration, the reader is referred to those sections respectively. What was not explicitly mentioned before is the fact that both of those rights are registered on the first-come-first-served basis. In other words, it is, generally speaking, not important who invented first or who used a trademark first, but who was first to file the application with the relevant registration authorities. Even though it would certainly be a setback to lose a great

139 See infra footnote 125.

140 Article 102 paragraph 1 of the Employment Act.

141 Article 102 paragraph 2 of the Employment Act.

142 Article 103 of the Employment Act.

143 Subject-matter related to contracts in Croatia is regulated by the Obligations Act (Official Gazette Nos. 35/05, 41/08, 125/11, 78/15, 29/18).

144 Whereas the European Union trademark system is based on registration, the laws of some EU Member States also protect unregistered rights, which can be held against the use and registration of later EU trademarks. Von Bomhard, V., Geier, A., "Unregistered Trademarks in EU Trademark Law", The Trademark Reporter, vol. 107, no. 3, 2017, pp. 677-700, p. 679. Croatian Trademark Act acknowledges the validity of unregistered well-known, trademarks. See Article 6 paragraph 2 subparagraph 4 of the Trademark Act.

name or logotype if someone else files a trademark application for it first, arguably it would be much easier to come up with a new trademark for the software than to come up with the new software. Therefore, the preference of the first-to-file over the first-to-invent system[145] is extremely important in the case of software that is patent-eligible, because having someone else filing a patent application for such software first could be a blow from which an SME which lost the patent race, especially if it is a start-up, would hardly be able to recover. Therefore, the possibility of filing for a patent should not be rejected in advance, but should always be considered, regardless of its complex and expensive registration process. If finances are the main problem, which is most likely to be the case, in order to mitigate the costs in some way while not giving up on patenting independently, the enterprise might consider filing the patent application only in the most important markets for its particular type of software, or the largest markets. If not even that is a possibility, then the enterprise might consider non-legal methods of protection, which might at least prevent the competitors from registering the patent.[146]

3.2.3. Enforcement

Conceivably, the statutory provisions that convey a certain level of protection by default, as well as the conclusion of contracts and registration of trademarks and patents are likely to serve as a deterrent for many clients, competitors, people involved in the development of software and people within reach of the information about the software. They might, absent these legal instruments, be more prone to infringing the intellectual property rights in the software or to theft of information considered a trade secret. However, if the infringement or the theft actually occurs,[147] the default statutory protection and all the contracts and registrations will be completely useless, unless the enterprise uses them to legally enforce its intellectual property rights. As for the venues which might be used for this purpose, generally speaking there are four possibilities: the patent and trademark registration authorities, in the quasi-judicial proceedings commonly known as opposition proceedings; the civil courts, for example in the case of infringement; arbitration, for example in case where it is so agreed between the parties to the dispute; and criminal courts, for example in the case of counterfeiting. Regarding the possible particularities as per different types of software there are many possibilities. For example, enforcement of intellectual property rights in software is relatively straightforward in cases when a software company is specially developing custom software for some specific local clients only

145 Actually, as of 15 September 2018, all countries in the world use the first-to-file system. The last one to use the first-to-invent system was the United States. The United States have switched to the first-to-file system on 16 March 2013 after the enactment of the America Invents Act, albeit to a modified version, which is dubbed by the United States Patent and Trademark Office (hereinafter: the USPTO) as the first-inventor-to-file system. See the website of the USPTO at https://www.uspto.gov/patent/first-inventor-file-fitf-resources (15 September 2018).

146 See infra section 3.2.4.

147 Ironically, the budding technologies which are so intrinsic to the world of today, are exactly what has enabled infringement of intellectual property rights in software to a previously unparalleled degree.

and uses only local staff to this end. In this case, it is likely that the infringement or any other reason for a dispute, such as a breach of contract, will be contained to the country where the software enterprise is located.

On the other hand, in the case of software developed for the international mass-market, especially if external developers from other countries are also used, it might not prove to be a simple task, but a costly and a long-lasting process instead. One of the issues concerning enforcement of intellectual property rights that is exacerbated in the case of the latter type of software is the fact that the enterprise which is a holder of any intellectual property right has to be its own policeman, meaning it has to monitor for any infringement itself. However, because such software is truly a global product that transcends borders particularly due to the ubiquitous nature of the internet, software enterprises would have to constantly keep an eye on users and competitors not only on the markets where they actually sell it, but in the entire world. Anyone with a bit of common sense can conclude that this is virtually impossible for SMEs and it is difficult even for largest IT companies, therefore some sort of compromise or filtering must be used instead.

A similar issue related to the enforcement of IPRs in mass-produced software intended for the global market is the antagonism between its universal nature and the territoriality of intellectual property rights. To be more precise, the effects of infringement of such software by a competitor in one country might spread like a virus to many other countries, which in turn might, at least in theory, lead to the need to apply a country-by-country enforcement scenario in which a separate legal case has to be brought in each country concerned.[148] Even though such a scenario is unlikely, issues regarding jurisdiction are still quite complex. For example, in the scenario where copyright related to the software is infringed by one person by offering it for sale in several EU Member States, according to Article 4 of the Regulation (EU) No. 1215/2012 of the European parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (hereinafter: Brussels I bis Regulation), an action may be brought against this person in the Member State where the person is domiciled. However, if the infringement relates to a software patent and the defendant raises the issue of patent validity, then this issue would have to be judged by the courts of every Member State in which the patent is registered, because they have exclusive jurisdiction according to Article 24 paragraph 4 of the Brussels I bis Regulation. In a different scenario in which the copyright in software or a software patent is infringed by multiple persons in multiple Member States, then there is a possibility of joint proceedings according to Article 8 paragraph 1 of the Brussels I bis Regulation provided there is a risk of irreconcilable judgments. However, this is very problematical and the case law of the Court of the European Union does not give any specific answers or guidelines in this respect.[149]

148 For more on the jurisdiction for cross-border intellectual property infringement cases in Europe see, for example, Torremans, P., Jurisdiction for Cross-Border Intellectual Property Infringement Cases in Europe, Common Market Law Review, vol. 53, no. 6, pp. 1625-1645.

149 See Torremans, P., Jurisdiction for Cross-Border Intellectual Property Infringement Cases in Europe, Common Market Law Review, vol. 53, no. 6, pp. 1625-1645.

Even in cases in which only one court has jurisdiction, the issue of enforcement might be legally complicated by the conflict of laws rules. For example, in the case of infringement, the court might have to apply the law of each country for which the protection is sought.[150] In contractual disputes, such as those between the enterprise and foreign external developers, depending on the agreement of the parties to the contract, enforcement for each country in which the contract was breached could be subject to the law of the country or countries chosen by the parties.[151] In this context, it would be wise from the governance point of view for the parties to choose the applicable law of only one country to govern their entire contract. Besides contractual and non-contractual disputes, an enterprise can find itself in disputes related to some core intellectual property issues, such as initial ownership. In these types of disputes as well, the law of each country for which the protection is sought should be applied.[152] Finally, in the case of initial ownership disputes when software was developed under an employment contract, there might be different approaches to determining applicable law. However, in the EU, the tendency is to apply the law which is applicable to employment contracts.[153]

3.2.4. Non-legal actions

On top of the previous three levels of protection, many other non-legal methods can be used in order to at least partially mitigate some shortcomings of the former. These methods should seriously be considered by SMEs in the software industry because they can be effective at least to an extent, and, what's more, they are certainly cheaper than any of the three legal levels of protection and they are always in full control of the enterprise.[154] However, one has to bear in mind that the effects of the non-legal methods of protection are primarily of preventive nature, protecting against both external and internal risks. In this paper the methods are catalogued in four groups: organizational, technological, psychological and market-related.

There are many steps an enterprise could take from the organizational aspect to protect its intellectual property. First, non-disclosure agreements could be reinforced by restricting the access to information only to key personnel. Keeping crucial information

150 On the EU level this issue is codified in Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). See Kunda, I., Uredba Rim II: ujednačena pravila o pravu mjerodavnom za izvanugovorne obveze u Europskoj uniji, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 28. no. 2, 2007, pp. 1269-1324.

151 See Kunda, I., Law applicable to intellectual property rights in the European Union, Korea Private International Law Journal, vol. 22, no. 2, 2016, pp. 451-472.

152 See Kunda, I., Law applicable to intellectual property rights in the European Union, Korea Private International Law Journal, vol. 22, no. 2, 2016, pp. 451-472.

153 See Matanovac Vučković, R., Kunda, I., Materijalnopravno i kolizijskopravno uređenje intelektualnog vlasništva nastalog u radnom odnosu, u Čulinović-Herc, E., Jurić, D., Žunić Kovačević, N. (ur.), Financiranje, upravljanje i restrukturiranje trgovačkih društava u doba recesije, Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2011., pp. 303-336.

154 See Dabić, M., Bašić, M., SMEs' Needs for Intellectual Property: Harry Potter's Magic or Systematic Education Support?, in Martin, L. (ed.) Conference of the Institute for small business and entrepreneurship, Cardiff, 2013, pp. 1-12, p. 5.

only in the hands of a very narrow circle of employees might prevent a trade secret ending up in the hands of a competitor.[155] Another similar method would be to divide the duties between several members of staff in a way in which none of the staff would know or understand the entire concept of the software, but only the necessary bits and pieces.[156] However, these methods should be applied with care and measure because they might have some unwanted results. One of the possible consequences is the negative effect on innovativeness, which can arise as the employees are not allowed to see the big picture and as the interaction between them might be hindered.[157] Another deficiency which is particularly prominent in smaller companies with less staff is the problem of losing knowledge if a key employee or employees suddenly leave the enterprise. Since mobility is very high in the software industry, there is always such danger, especially if moderation is not used. Therefore, in some cases, it might even make more sense to apply a completely different approach and to circulate the staff between tasks in order to make sure that the enterprise does not become dependable on a small circle of personnel and to make sure that the knowledge is preserved within the enterprise.[158] This might also be achieved by documenting the ideas, resources and latest development steps automatically and simultaneously as soon as the idea or the development step takes place.[159] One more organizational method which is often disregarded when non-disclosure agreements are in place is regularly informing and reminding the personnel who have access to information of its secrecy and of the obligations they have in relation to that information. Especially when an enterprise has diligently taken the step of implementing non-disclosure agreements, it is often wrongly presumed that the employees who have signed them actually understand their scope. Even if the scope was clearly understood at the time of signing such contracts, it is possible that as time goes by and since the issue never comes up, employees simply forget their obligations and later, innocently, disclose something valuable which should have remained a secret. To raise awareness, it would also be meaningful to periodically organize educational sessions to familiarize both managers and staff of the statutory provisions related to trade secrets.[160]

As for the methods of protection that are technological in nature, perhaps the most important and the most complex one to apply is the so-called code obfuscation. This is an act where the software code is deliberately obfuscated by programmers, either manually or using an automated tool. In the process, the code is made unintelligible but still identical to the original code in its functional manifestation. This can be done for many reasons, but the crucial motive to do it is the fact that programs with obfuscated code are more difficult to understand to human beings. Therefore, such programs will be more resistant to reverse engineering, which might prevent the infringement of intellectual property rights vested in the program. Many other technological measures are available and could be applied in addition to obfuscation, such as encryption of

155 See Päällysaho, S., Kuusisto, J., op. cit., p. 69; Jämes, S., op. cit., p. 95.
156 Loc. cit.
157 Loc. cit.
158 See Päällysaho, S., Kuusisto, J., op. cit., p. 69, Jämes, S., op. cit., p. 96.
159 See Päällysaho, S., Kuusisto, J., op. cit., pp. 70-71.
160 Jämes, S., op. cit., p. 96.

information, firewalls and password protection. One sneaky method that is sometimes also used is incorporating specific identification codes into the software. These codes can later be very valuable for the purpose of proving the copyright.[161]

When it comes to the human factor, one of the most efficient and powerful tools is building commitment and loyalty of the personnel. This is a purely psychological method and, if successfully applied, may completely alleviate the need to restrict information only to the key members of staff, thus facilitating the free exchange of ideas and supporting innovativeness. Perhaps the easiest way to achieve individual staff loyalty is by using financial incentives. At the same time, this must be done carefully because if some employees receive financial rewards while others don't there is a danger of increasing the negative competition between employees and, hence, discouraging productive cooperation within the enterprise. However, the financial rewards are absolutely a necessity with key employees, especially in the case of smaller companies, where it is possible that only a few people carry the whole business operation by themselves while others are in reality just supporting and replaceable staff. With the former type of employees, it makes sense to even take it up a level and offer them some sort of an ownership arrangement. Other ways to increase loyalty are providing ample training and personal development opportunities.[162]

The fourth group of non-legal actions are those related to the marketing of software. Again, there are many available, but there are two which might be very effective for software specifically.[163] The first one is the application of short innovation cycles. This means that new software is launched to the market at a steady, but quick pace, with no lingering whatsoever. The result of such behavior is a constant step ahead of competitors, who might still be busy creating and launching their own version of the same-purpose software when the enterprise already launches a new and more advanced product, which will make the old software redundant. With such behavior, the effects of imitation, which might equal the infringement of intellectual property rights, are reduced to the smallest possible degree.[164] The second method is particularly important if the software is patent-eligible and the enterprise has no financial means to seek patent protection in the relevant markets. In that case, an enterprise might resort to a very unexpected tactic and that is publishing the information which would be a part of the patent application, particularly the information related to the concept behind

161 Päällysaho, S., Kuusisto, J., op. cit., p. 71.

162 Ibid., p. 69.

163 As for the other methods which would be, according to this paper, qualified as market-related methods, in addition to the two mentioned in the further text of this paper, Päällysaho and Kuusisto, Jämes and Kitching and Blackburn also mention customer relationship management. See Päällysaho, S., Kuusisto, J., op. cit., p. 64; Jämes, S., op. cit., p. 96, Kitching, J., Blackburn, R., Intellectual Property Management in the Small and Medium Enterprise (SME), Journal of Small Business and Enterprise Development, vol. 5, no. 4, pp. 327-335, p. 332. Kitching and Blackburn also mention the method of occupying a market niche which reduces any threat. See Kitching, J., Blackburn, R., op. cit., p. 332.

164 Birk, F., The Use of Intellectual Property Rights among Nordic Service Companies, Nordic Innovation Centre, 2006, available at: http://nordicinnovation.org/Global/_Publications/Reports/2006/Use%20of%20Intellectual%20Property%20Rights%20in%20Service%20Companies.pdf (15 September 2018), p. 7.

the software. This might seem a bit of controversial after all the talk about the need to maintain secrecy, but it may produce some priceless effects for the enterprise in the long run. First, the enterprise might become widely recognized and well-known as the initial developer of the concept – the enterprise that was first, i.e. the original innovator. This can have positive effects on the marketability of other software produced by the enterprise and significantly increase overall sales. And second, publishing is novelty-destructive. This means that, by publishing key software information, the enterprise not able to patent the software itself due to financial constraints will have effectively prevented any other company which was working on similar software from obtaining a patent and the monopoly to sell it.

3.3. Behavioural patterns in the governance of intellectual property in knowledge-intensive IT enterprises

Theoretically speaking, one could formulate three general patterns of behavior in relation to the governance of intellectual property in knowledge-intensive software enterprises: passive, reactive and active. The following are the profiles of such enterprises laid down in general terms, leaving aside the many possible nuances within and between each profile.[165]

Passive enterprises[166] would be those which are either completely unaware of the concept of intellectual property or, which is more likely, are on some level aware of what intellectual property rights entail, but are ignorant or completely rejective as to their potential and importance for their own software business. In such enterprises, the only beneficial effects in relation to the protection of intellectual property are purely accidental. They are the result of activities taken by the enterprise as part of running the business in general and without the intent to protect intellectual property. For example, an enterprise decides to hire an initially freelance collaborator on an employment contract basis in order to have more control over his or her workflow and hence unintentionally gains the status of the holder of economic copyrights for the work on software performed by the collaborator as of the date of the employment contract. Another example would be if the very organization of work was incidentally

165 These profiles were formulated on the basis of the author's personal experience and insight accumulated during almost a decade of managing IT enterprises in Croatia in combination with the insights gained in the process of studying the relevant scholarly writings and surveys.

166 In scholarly literature not necessarily concerning software enterprises, enterprises with more or less similar descriptions are also called dormant and inactive. See Gibb, Y., Blili, S., Small Business and Intellectual Asset Governance: An Integrated Analytical Framework, GSTF Journal on Business Review (GBR), vol. 2, no. 2, October 2012, pp. 252-259, p. 254; Kern, Sander, van Reekum, A. H., The Use of Patents in Dutch Biopharmaceutical SME: a Typology for Assessing Strategic Patent Management Maturity, Paper presented at 16th Annual High Technology Small Firms Conference, HTSF 2008, Enschede, Netherlands, available at: https://www.researchgate.net/profile/Rik_Van_Reekum2/publication/255639961_The_Use_of_Patents_in_Dutch_Biopharmaceutical_SME_a_Typology_for_Assessing_Strategic_Patent_Management_Maturity/links/55debe0b08ae79830bb590db/The-Use-of-Patents-in-Dutch-Biopharmaceutical-SME-a-Typology-for-Assessing-Strategic-Patent-Management-Maturity.pdf (15 September 2018), p. 4.

conducive to intellectual property protection.

Whereas they are at least partially aware of the concept and the potential and importance of intellectual property rights for their own software business, reactive enterprises[167] are generally characterized by the absence of any plan or strategy regarding the protection of intellectual property. In such enterprises the protection of intellectual property is usually not an item very high on the priority list for various reasons, mostly because the focus of the management and staff is on the day-to-day activities more directly contributing to the financial well-being of the enterprise, such as software development, sales and nurturing relationships with the existing clients. In smaller companies especially, taking strategic action in relation to intellectual property would in many cases mean taking time away from those people who are the creative brains behind the software. This time would otherwise be used for software development. Therefore, actions related to the protection of intellectual property are taken in reactive enterprises only when deemed necessary, which is usually in response to external incentives. For example, the enterprise might implement technological measures of protection as a response to a security breach of their cloud-based application or it might file a trademark application as a reaction to a competitor starting to use a similar name for a same-purpose mobile application.

In contrast to passive and reactive enterprises, active enterprises[168] are fully aware of the concept, the potential and the importance of intellectual property rights for their software business. On top of that, they are making conscientious efforts in order to protect their intellectual property as much as their circumstances allow, particularly considering the available staff and finances. Importantly, active enterprises will plan their governance of intellectual property and will have internal policies and strategies in place specifically directed at its protection, adapting them in the course of time. Furthermore, they will actively enforce their intellectual property rights, if necessary.

Since to the best of the author's knowledge no studies related to the intellectual property protection were conducted in relation to the Croatian IT industry, it is difficult to say what is the percentage of software enterprises in Croatia corresponding to each of the presented profiles. However, supported by the results of certain studies conducted in relation to the software industry of some other EU Member States,[169]

167 Kern and van Reeken use the same name for enterprises with similar behavioral patterns in the Dutch biopharmaceutical industry. Loc. cit. Other authors use "ad-hoc" and "defensive". See Gibb, Y., Blili, S., op. cit., p. 254.

168 Other authors have formulated several different levels of what would roughly correspond to the active enterprises as described in this paper. Amongst other names, they are called dynamic, ambitious, pioneering, visionary, active and proactive. See Gibb, Y., Blili, S., op. cit., p. 254.

169 For example, some studies have shown that most micro-businesses (i.e. businesses with less than 10 employees) in the UK and Finland software sectors, compared to their larger counterparts, do not see any reason to hide information from their staff or external business partners, have rather negative attitudes towards secrecy and thus the limitation of key information only to selected staff is not very common, enforce the most relaxed rule in relation to visitors, provide very few financial incentives, training opportunities or other motivational incentives to improve their staff loyalty, protect their intellectual property through documentation less frequently, are less likely to hold any registered intellectual property rights and only a minority have a planned strategy. See Päällysaho, S., Kuusisto, J., op. cit.. See also Kitching, J., Blackburn, R., op. cit.

one can claim with relative certainty that the business size plays a significant role in determining the possible profile of an enterprise. The rule of thumb would be that the larger an enterprise, the more likely to match the active profile and vice versa, the smaller the enterprise, all the more likely to match the passive profile.

4. CONCLUSION

The governance of intellectual property rights in case of software is a complicated, but a very necessary step to take for any software enterprise if it is to maximize the value of software produced by the enterprise and to minimize or at least mitigate any risks associated with competitors or clients. The analysis of the types of intellectual property rights available to protect software has shown that the efficiency of each of the three rights protecting the technology, i.e. patents, copyright and trade secrets, depends on the type of software to be protected, but it can also depend on the purpose which an enterprise wants to achieve. Copyright seems like a very efficient tool of protection in the case of software wherein the expressive manifestation of code is the most important feature and as protection against the acts of users, such as in the case of the use of pirated software. Patents might be cost-effective in the case of software with longer shelf-life. Even though patents provide very broad monopolies, trade secrets would be even more useful then patents when reverse engineering is not as probable, because they last indefinitely and no information is shared with the public, thus preventing the competitors to use the concept of "inventing-around". The fourth right – a trademark – is somewhat different than the other three because it does not protect the technology and it would seem to be the most useful in the case of applications which are sold at online app market places, where customers sometimes decide on which application to choose based solely on the name and look of the icon labeling the application.

It is probable that most software enterprises in Croatia, given their small and micro size, as well as the structure of ownership, do not have the financial or human resources required for the registration and enforcement levels of protection, at least concerning patents. However, as illustrated in this paper, there are many non-legal methods which could not only be implemented in an enterprise without any substantial costs, but would at least partially decrease both the external and internal risks for infringement of intellectual property or theft of valuable information belonging to the enterprise. The contractual level of protection in most cases also does not require any particular financial or human resources, but it does require a little vision by the management, which must have sufficient knowledge of the concept of intellectual property rights in order to realize the importance of timely conclusion of non-disclosure and similar contracts with the persons participating in the growth of the enterprise or specifically in software development. However, given the fact that the majority of the Croatian software enterprises is sole-owner-controlled and managed and probably never seeks any professional guidance related to matters not strictly concerning the technology itself, the majority of the enterprises operating in the computer programming segment of the Croatian IT industry is very likely to belong to the passive profile of enterprises

as described in this paper, with the possibility to transform to a reactive enterprise over the course of time and with the right external incentive.

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Jasmina Mutabžija*

Sažetak

ZATVORENA IT DRUŠTVA U HRVATSKOJ KOJIMA UPRAVLJAJU VLASNICI: PITANJA VEZANA UZ UPRAVLJANJE I ZAŠTITU INTELEKTUALNOG VLASNIŠTVA

Zaštita intelektualnog vlasništva važan je sastojak tržišnog uspjeha društava znanja koja djeluju u informatičkoj industriji. Upravljanje i opseg zaštite intelektualnog vlasništva vezanog uz *software* često su povezani s određenim značajkama trgovačkog društva, kao što su njegova vrsta i veličina. Analizirajući javno dostupne podatke, autorica identificira različite obrasce koji se prvenstveno odnose na strukturu vlasništva i uprave društava koje se bave računalnim programiranjem u Hrvatskoj. Analiza pokazuje da je svih 500 najboljih društava po kriteriju prometa koja se bave računalnim programiranjem zatvorenog tipa, a ogromnom većinom upravljaju vlasnici te su po veličini mali ili mikro poduzetnici. To upućuje na zaključak da je većina takvih društava pasivna u odnosu na svoje intelektualno vlasništvo. S tim u svezi autorica opisuje tri moguća profila društava ovisno o njihovom odnosu prema upravljanju intelektualnim vlasništvom. Također uobličuje i raspravlja o četiri moguća komplementarna pristupa zaštiti intelektualnog vlasništva, pravne i nepravne prirode, a raspravlja i o različitim vrstama prava intelektualnog vlasništva s ciljem utvrđivanja koja su prikladnija za zaštitu različitih vrsta softwarea.

Ključne riječi: *intelektualno vlasništvo; software; patent; autorsko pravo; poslovna tajna; upravljanje.*

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Zussamenfassung

INHABERGEFÜHRTE GESCHLOSSENE IT-UNTERNEHMEN IN KROATIEN: FRAGEN DES MANAGEMENTS UND SCHUTZES DES GEISTIGEN EIGENTUMS

Schutz des geistigen Eigentums ist ein wichtiger Bestandteil des Markterfolgs von wissensintensiven Unternehmen in der IT-Branche. Das Management und der Schutzumfang des auf *Software* bezogenen geistigen Eigentums sind oft mit manchen Eigenschaften der Handelsgesellschaft, beispielsweise mit derer Art und Größe, verbunden. Durch die Analyse öffentlich verfügbarer Daten identifiziert man in diesem Beitrag die Muster der Eigentums- und Vorstandstruktur von Softwareunternehmen in Kroatien. Die Analyse weist darauf hin, dass alle nach Umsatzkriterium gewählten 500 besten Softwareunternehmen geschlossen sind, dass sie meistens inhabergeführt sind und der Größe nach Klein- oder Mikrounternehmen darstellen. Daraus lässt sich schließen, dass die meisten dieser Unternehmen ihrem geistigen Eigentum gegenüber passiv sind. Damit verbunden beschreibt man in diesem Beitrag drei mögliche Unternehmensprofile bezüglich des Managements von geistigem Eigentum. Ebenfalls diskutiert man im Beitrag über vier komplementäre juristische und nicht-juristische Ansätze zum Schutz des geistigen Eigentums und über unterschiedliche Arten und Rechte des geistigen Eigentums, alles mit dem Ziel, die angemessene Ansätze und Rechte für den Schutz unterschiedlicher Softwarearten zu bestimmen.

Schlüsselwörter: *geistiges Eigentum; Software; Patent; Urheberrecht; Geschäftsgeheimnis; Management.*

Riassunto

LE SOCIETÀ IT CHIUSE AMMINISTRATE DA PROPRIETARI IN CROAZIA: QUESTIONI RELATIVE ALL'AMMINISTRAZIONE ED ALLA TUTELA DELLA PROPRIETÀ INTELLETTUALE

La tutela della proprietà intellettuale costituisce un importante tassello della concorrenzialità delle società del sapere che operano nell'industria informatica. La gestione e la portata della tutela della proprietà intellettuale connessa al *software* sovente sono collegate con determinati elementi della società commerciale, come ad esempio il suo genere e la sua grandezza. Analizzando i dati accessibili, l'autrice identifica i diversi tipi che in primo luogo si riferiscono alla struttura della proprietà

e dell'amministrazione delle società che si occupano di programmazione informatica in Croazia. L'analisi dimostra che tutte le 500 migliori società in base al criterio del reddito, le quali si occupano di programmazione informatica di tipo chiuso e nella stragrande maggioranza dei casi sono amministrate dai proprietari stessi, per grandezza sono rappresentate da piccole o micro imprese. Ciò porta alla conclusione che la maggiore parte di tali società è passiva rispetto alla propria proprietà intellettuale. Al riguardo l'autrice descrive tre possibili profili di società a seconda del loro rapporto nei confronti della gestione della proprietà intellettuale. Altresì si inquadrano, discutendone, quattro possibili approcci complementari di tutela della proprietà intellettuale di carattere giuridico e no; mentre si dibatte anche dei diversi generi di diritti della proprietà intellettuale al fine di accertare quali siano maggiormente idonei alla tutela dei diversi tipi di software.

Parole chiave: *proprietà intellettuale; software; brevetto; diritto d'autore; segreto professionale; gestione.*

TAX-RELATED RISKS OF MERGERS AND ACQUISITIONS IN CROATIA: DRAWING THE LINE BETWEEN LEGITIMATE BUSINESS RESTRUCTURING AND AGGRESSIVE TAX PLANNING

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Summary

Mergers and acquisitions of Croatian target companies may involve significant tax risks for domestic and foreign acquirers. Over the recent years, Croatian tax authorities have started to vigorously assess the economic substance of the envisaged M&As, often denying the acquirer different tax benefits, thus making the entire restructuring costlier. In doing so, Croatian tax authorities rely on a myriad of domestic anti-tax avoidance rules according to which M&A operations may be characterised as abusive. Accordingly, this paper offers a descriptive and systematic account on how Croatian anti-tax avoidance legislation may hinder M&A activity. Thereby, our aim is primarily to explore, both from a substantive and procedural point of view, the imagined boundary between legitimate and abusive tax planning.

Keywords: *mergers and acquisitions; tax planning; lawfully avoiding payment of taxes; tax neutrality; burden of proof; the general rule against tax evasion.*

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1. INTRODUCTION

It is well accepted in the business community that mergers and acquisitions (hereinafter: M&As) may offer significant tax benefits to the participating parties, but concurrently involve significant tax risks.[1] Thus, the structuring of the overall scheme of M&A, both in domestic and cross-border setting, necessarily calls for a healthy degree of tax planning, with the aim to mitigate pertinent tax hazards, e.g. related to the deduction of interest expenses, valuation of acquired assets, capital gains tax liability etc.[2]

Choosing the right "tax structure" of M&A transactions has become even a greater challenge recently as tax authorities worldwide started to scrutinize the transactions with ever more vigilance, putatively worried about potential tax abuse and ensuing losses of tax revenues in the post-structuring period.[3] While transfer pricing rules denote the most prominent legal instrument at the disposal of revenue bodies in challenging M&A transactions, in a number of countries significant role is also played by domestic anti-tax avoidance rules, such as a general anti-avoidance rule (hereinafter: GAAR).[4] Comparative experience shows that the application of domestic anti-abuse rules to M&A transactions boils down to the examination of commercial substance and rationale of the restructuring taken as a whole, as well as its individual steps.[5]

Insights from the Croatian M&A practice reveal that Croatian Tax Administration (hereinafter: CTA) may go to great lengths in fully or partially denying the right of the acquirer to utilize some valuable tax assets or other tax attributes of the target company. In doing so, CTA relies upon a hotchpotch of anti-avoidance rules that have been enshrined in domestic legislation over the past decade or so, particularly in the post-EU accession period.[6] As a result, not only does the tax terrain of M&As in Croatia become very risky from a substantive point of view, but also, from a procedural perspective, it may be very cumbersome for the taxpayer to demonstrate proper business purpose(s) underlying the restructuring and thus quash the presumption of abusive behaviour.

Against this backdrop, this paper explores how Croatian anti-tax avoidance legislation interacts with M&A activities involving Croatian target companies. In

1 See e.g. Endres, D., Spengel, C. D., (eds.), International Company Taxation and Tax Planning, Kluwer Law International, 2015, p. 489.

2 For a general overview see Blessing, P. H., Key Global Tax Concerns, in Blessing, P. H., (ed.), Tax Planning for International Mergers, Acquisitions, Joint Ventures and Restructurings, Kluwer Law International 2017, pp. 1-17.

3 See e.g. Cotrut, M., Ambagtsheer-Pakarinen, L., Business Restructurings: The Toolkit for Tackling Abusive International Tax Structures, in: Cotrut, M. (ed.), International Tax Structures in the BEPS Era: An Analysis of Anti-Abuse Measures, Online Books IBFD 2015, sec. 7.1.

4 See Kroppen, H., Silva, J. C., General Report, in IFA Cahiers Vol. 96a: Cross-border business restructuring, 2011, pp. 27-31.

5 See Cotrut, M., Ambagtsheer-Pakarinen, L., op. cit., sec. 7.3.

6 For a recent general overview of Croatian anti-tax avoidance legislation see Žunić Kovačević, N., Croatia, in Dourado, A. P., (ed.), Tax Avoidance Revisited in the EU BEPS Context, IBFD 2017.

doing so, particular attention is drawn to some selected issues that breed uncertainties and disputes, such as carry-forwards of transferring entity's tax losses. Our principal aim is to try to delimit when an M&A tax structure crosses the imaginary boundary between legitimate tax planning and tax abuse.

2. MERGERS AND ACQUISITIONS IN THE LIGHT OF CROATIAN ANTI-ABUSE LEGISLATION

On a raft of concerns regarding tax structuring of M&A transactions, a key issue is whether and under which conditions potentially valuable tax assets and other tax attributes of the target company (e.g. loss carry-forwards, excess tax credits, benefits approved by a tax ruling) survive the transaction, i.e. whether the acquirer may use these attributes in the post-acquisition period.[7] Typically, if an M&A transaction is carried on in the form of a "share deal", where the legal ownership of target's shares is transferred from the seller to the buyer, such tax attributes of the target are preserved and may be subsequently utilized by the buyer.[8] In other words, share transactions generally ensure tax neutrality, which is one of the key concepts in M&A tax planning.

2.1. Legal requirements for tax-neutral mergers and acquisitions

Under Croatian law, tax neutrality in the course of M&As has been assured by the provisions of Articles 19 and 20 of the Profits Tax Act (hereinafter: PTA).[9] Art. 19(1) PTA sets out that the key requirement for a tax-neutral merger or division is the so-called "continuity in taxation" (*kontinuitet u oporezivanju*). As per Art. 19(2) PTA, the continuity requirement is deemed to be satisfied if, during the transfer to the acquiring company, there are no changes in the assessment of assets and liabilities, i.e. if there is a roll-over of book values, for tax purposes, of the assets and liabilities involved.

Herein the acquirer encounters some risk stemming from the target's financial accounting practices in the pre-restructuring period. Namely, in case the acquiring company had opted for the use of the revaluation model in measuring the value of its on-balance-sheet assets[10], there is a possibility that transferring assets are not valued at their fair value at the date of the acquisition. The Croatian Tax Administration has addressed this issue in a non-binding tax ruling of 11 March 2011, faced with the factual situation of a partial division transaction, in which immovable property, deemed to constitute a separate branch of activity for tax purposes, has been transferred from one existing company to another in exchange for the shares of the latter; with regard to the question at stake, the CTA convincingly argued that the continuity requirement

7 See Blessing P. H., op. cit., pp. 5-6.

8 See ibid., p. 4. Compare also Endres, D., Spengel, C., op. cit., pp. 491-494.

9 Official Gazette of the Republic of Croatia, nos., 177/04, 90/05, 57/06, 146/08, 146/08, 80/10, 22/12, 148/13, 143/14, 50/16, 115/16.

10 Generally on the difference between the cost model and the revaluation model see Koek, M., Van den Berg, T., Special Items, in Bakker, A., Van den Berg T., Janssen, B., (eds.), Tax Accounting: Unravelling the Mystery of Income Taxes, IBFD 2015, sec. 9.6.1.2.

for a tax-neutral transaction is not fulfilled, since the value of the counter-payment for the transferred assets far exceeded their book value.[11] For our purpose it is particularly interesting to note that the CTA also used an anti-tax abuse thread of thinking in assessing the given set of facts, especially because the transferor and the transferee were associated persons.

In any case, important legislative developments in this area have arisen following Croatia's accession to the European Union (hereinafter: EU) on July 1st 2013. Most notably, on that very date the amendments to the PTA came into force, by virtue of which the provisions of the EU Merger Directive were transposed into Croatian domestic law.[12] In this regard it has to be noted first that the aims and legal consequences of the Merger Directive[13] are fully aligned with the general rules of the PTA on tax-neutrality as regards M&As, laid out above.[14] Second, the Croatian legislator has opted, presumably wittingly, to extend the scope of application of the domestic provisions transposing the Merger Directive covering purely domestic corporate reorganizations as well.[15] This becomes clear upon reading the relevant administrative regulations, specifically, the then Ordinance on Profits Tax (hereinafter: OPT)[16], explicitly laying down uniform procedural requirements for domestic and cross-border intra-EU M&As.[17] Moreover, such equal treatment has been confirmed in the CTA's non-binding tax ruling dated May 28th 2014.[18] Accordingly, it seems that administrative practice affirms the view that the relationship between Articles 19 and 20 PTA on the one hand, and the newly enacted Articles 20.a-20.r PTA corresponds to the one between general and special norms.

The portrayed benefits of tax neutrality in the M&A context may be obtained only upon completion of several procedural steps, as set out in Articles 41.g – 41.j OPT. First of all, the acquirer is obliged to notify the CTA of the planned transaction – i.e. merger, division, exchange of shares or transfer of assets – and enclose all relevant information, most importantly the financial statements of the target company and a detailed depiction of the commercial and financial reasons underlying the transaction.[19] On this basis, tax authorities have a deadline of 90 days to issue the administrative

11 See Croatian Tax Administration, opinion No. 410-01/10-01/2163, 11 March 2011.

12 See Articles 20.a – 20.r PTA.

13 Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, OJ L 310, 25.11.2009.

14 For a general overview of the objectives of the Merger Directive see e.g. Helminen, M., EU Tax Law – Direct Taxation 2017, Online Books IBFD 2017, sec. 3.3.1.2.; Hofstätter M., Hohenwarter-Mayr, D., The Merger Directive, in: Lang, M., et al., Introduction to the European Tax Law on Direct Taxation, Linde 2013, pp. 158-159.

15 On this possibility see Helminen, M., op. cit., sec. 3.3.2.1.

16 Official Gazette of the Republic of Croatia, nos. 95/2005, 133/2007, 156/2008, 146/2009, 123/2010, 137/2011, 61/2012, 146/2012, 160/2013, 12/2014, 157/2014, 137/2015, 115/2016, 1/2017, 2/2018.

17 See Article 41.j(1) of the OPT.

18 Croatian Tax Administration, opinion No. 410-01/14-01/1387, 28 May 2014.

19 See Article 41.h – 41.j OPT.

decision which either allows or denies the benefits of tax neutrality for the pertinent transaction.[20] In essence, this amounts to a process of prior administrative approval, wherein eligibility of the taxpayer to obtain relevant tax advantages is assessed by the tax authorities.

2.2. The Application of the anti-abuse rule stemming from the implementation of the Merger Directive

In transposing the requirements of the Merger Directive in its national legislation, Croatia opted to exercise the option envisaged in Article 15(1)(a) of the Directive[21] and adopt an explicit anti-tax abuse provision on the domestic legal plane. Accordingly, under Article 20.p PTA, the above-described tax benefits will be denied if it is evident that the principal objective, or one of the principal objectives, of the transaction at hand is tax evasion or tax avoidance. Moreover, Article 41(h)(6) OPT lays down that Croatian tax authorities will issue an administrative decision refusing to grant the advantages of tax neutrality if they determine the objective of tax avoidance/evasion underlying the transaction, especially if there are no valid business reasons for the transaction, such as reorganization or financial rationalization of the business in question. While the wording of the quoted provision suggests that the lack of a valid business or commercial motives amounts to only one example of tax avoidance – leading to the conclusion that the taxpayer might be engaged in abusive behaviour also in other circumstances – administrative practice suggests that revenue bodies use it as a presumption of tax avoidance, as explicitly provided in the Merger Directive itself.[22] Such an approach of the CTA is clearly affirmed in the previously-cited non-binding tax ruling.[23]

Even more important for the participants of M&As is the way tax authorities apply the said provisions in practice. Anecdotal evidence suggests that the CTA relies on the wording of Article 41(h)(6) to fully shift the burden of proof on the taxpayer, i.e. that it is up to the taxpayer to prove that tax avoidance or tax evasion is not the primary purpose behind the reorganization. Put differently, administrative practice shows that when deciding on the granting of the benefits envisaged by Articles 20.a-20.r PTA, the CTA starts from the presumption that the intended transaction is being conducted with tax avoidance as one of its main purposes, even if there is no evidentiary substratum whatsoever supporting this position. In the second step, the onus is on the taxpayer to rebut this presumption, by bringing forward evidence of valid commercial purpose(s) underlying the reorganization, including, *inter alia*, the calculation of its commercial

20 See Article 41.h(4) OPT.

21 Article 15(1)(a) Merger Directive reads as follows: „*A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Articles 4 to 14 where it appears that one of the operations referred to in Article 1 (...) has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that the operation is not carried out for valid commercial reasons such as the restructuring or rationalisation of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives.*"

22 See the second sentence in Article 15(1)(a) Merger Directive.

23 See Croatian Tax Administration, *supra* n. 18.

and financial benefits.[24] In the third and final step, the CTA assesses the economic substance and rationale of the reorganization and issues the authoritative decision on whether the legal requirements for a tax-neutral transaction have been fulfilled or not. In the latter case, the taxpayer can make use of the ordinary system of legal remedies in tax matters, including the right to an administrative review and, subsequently, the right to a judicial appeal.[25]

In some cases tax authorities have took an unusually stringent approach, denying the tax advantages on the basis of purely formal errors in the documentation submitted by the taxpayer, even though the tax avoidance motive of the reorganization has not been reasonably substantiated. Accordingly, some taxpayers have found it very cumbersome to quash the presumption of tax avoidance, even if making a plausible case why the transaction at hand makes sense from a business point of view and tax authorities failing to submit counterevidence. Absence of clear and detailed rules on the required standard of evidence makes matters even more troubling.

In our view, such practice potentially runs contrary to EU law, more specifically the principle of effectiveness, which sets limits on the procedural autonomy of EU Member States in cases where rights derived from EU law are at stake.[26] We base this argument on recent jurisprudence of the European Court of Justice (ECJ), in which the Court examined the compatibility with the primary EU law of the domestic provisions, by which the option prescribed in (now) Article 15(1) of the Merger Directive has been implemented.[27] First of all, it needs to be underlined that, under the EU principle of procedural effectiveness, Member States should refrain from actions that render virtually impossible or excessively difficult exercise of the rights derived from primary or secondary EU law, including the rights resulting from EU tax directives.[28] Secondly, a strand of ECJ's case law dealing with the substantive aspects of tax abuse in the context of the Merger Directive, confirms that Member States' tax authorities may not confine themselves to applying predetermined general criteria for assessing whether a tax abuse is taking place, but must subject each particular case to a general examination of that issue.[29] In other words, the implementation of the anti-abuse clause contained in Article 15(1)(a) Merger Directive should not take the form of general presumptions of tax abuse, without more detailed case-by-case inquiries.

Against this backdrop, in the *Euro Park Service* case, decided in March 2017, the ECJ addressed a more specific issue of the procedural rules applied in Member States in relation to granting pertinent tax advantages. The Court first affirmed the

24 See Article 41.h(2)(8) and 41(j)(2)(10) of the OPT.

25 Generally on the system of legal remedies in Croatian tax law see Žunić Kovačević, N., Upravnosudska kontrola u poreznim stvarima, Zbornik radova Pravnog fakulteta u Splitu, 53(1), 2016, pp. 279-295.

26 On the national procedural autonomy within the EU and the principles of effectiveness and equivalence see Terra B., Wattel, P., European Tax Law, Kluwer Law International 2012, pp. 120-130.

27 See in particular Judgment of 8 March 2017*, Euro Park Service*, EU:C:2016:806; Judgment of 18 October 2012, *Pelati*, EU:C:2012:639.

28 See e.g. Judgment of 9 February 1999, *Dilexport*, EU:C:1999:59, para. 25. Compare also Terra B., Wattel, P., *op. cit.*, p. 123 et seq.

29 See e.g. Judgment of 10 November 2011, *Foggia*, EU:C:2011:718, para. 37.

right of Member States to set up procedural schemes for approval or refusal of Merger Directive benefits.[30] However, in observance with the principle of effectiveness and, more specifically, the requirement of legal certainty, the ECJ found that relevant procedural rules "*(...) should be sufficiently precise, clear and foreseeable to enable taxpayers to know precisely their rights in order to ensure that they are able to benefit from tax advantages under the directive and to rely on them, if necessary, before the national courts*."[31] In the particular set of facts, the Court established that the pre-approval procedure envisaged in French domestic law failed to meet these standards, due to the apparent lack of detailed procedural rules and the level of discretion exercised by the tax authorities in delivering their decisions.[32] For the purposes of the present paper it is even more important how the Court addressed what is essentially the burden of proof issue: "*(...) However, in so far as the legislation at issue in the main proceedings, in order to grant the benefit of the deferral of the taxation of the capital gains under Directive 90/434, systematically and unconditionally requires the taxpayer to show that the operation concerned is justified on economic grounds and does not have as its principal objective, or as one of its principal objectives, tax evasion or tax avoidance, without the tax authority being required to provide even prima facie evidence that there are no valid commercial reasons or evidence of tax evasion or tax avoidance, that legislation introduces a general presumption of tax evasion or tax avoidance.*"[33] Put another way, the ECJ apparently shares the view that national revenue bodies, in the course of procedures related to tax-neutral reorganizations, should initially present at least some degree of evidence that the abstract notion of tax avoidance has materialized with regard to the individual situation. Failing to respect this essentially amounts to creating the general presumption of tax avoidance, which is prohibited under EU law. Accordingly, in our view, the ECJ's decision in *Euro Park Services* has to be read as demanding concrete substantiation of the tax authority's claim that tax avoidance is indeed at work, lest the full burden of proof be borne by the taxpayer.[34]

Taking another look at Croatian rules and administrative practices against the backdrop of the above findings, it is reasonable to conclude that taxpayers involved in M&A transactions in Croatia may find it excessively difficult to exercise the rights

30 *Euro Park Service*, *op. cit.*, para. 36. Compare in that regard the ECJ's reasoning in *Pelati*, *op. cit.*, paras. 21-37.

31 *Euro Park Service*, *op. cit.*, para. 40.

32 *Ibid.*, paras. 40-46.

33 *Ibid.*, para. 56.

34 Compare also the experience with the abuse of Merger Directive benefits in Denmark, as accounted by Bolander J., Graff Nielsen, J., Denmark, in Meussen G., (ed.), The Burden of Proof in Tax Law, IBFD 2013, pp. 97-98. As put by the authors: "*(...) Hence, the taxpayer has to present the relevant considerations in connection with the operation to the tax administration while the administration – in accordance with the inquisitorial procedure principle – may ask questions of the taxpayer who is required to answer these questions to the best of his ability. The consequence is that a presupposition of tax avoidance eo ipso requires a secure evidentiary foundation, and that the taxpayer and the tax administration in effect share the burden of proof – each pulling on different ends of the rope so to speak – to establish whether tax avoidance or tax evasion is the primary purpose of a given reorganization*."

provided for in the Merger Directive. The most problematic aspect is that Croatian tax authorities ostensibly share the view that the evidentiary onus *de facto* lies completely with the taxpayer; it is fully up to the taxpayer, upon initiating the pertinent procedure, to prove that the transaction at hand makes commercial and economic sense and to debunk the presumption of tax avoidance.[35] While it is important to reiterate that taxpayers wanting to make use of the Merger Directive benefits are bound to encounter some evidentiary requirements, particularly related to a more or less detailed description of the planned reorganization, ECJ's case law suggests that tax authorities should refrain from relying on blanket statements that tax avoidance is the aim underlying the transaction, without either providing any counter-evidence, or making a reasonable effort to clarify open issues in a two-way communication with the taxpayer(s).

Furthermore, one also needs to take into account the general rules of Croatian tax law on the burden of proof in tax matters, enacted in the General Tax Act (hereinafter: GTA).[36] In accordance with Article 88 GTA, tax authorities bear the burden of proof in relation to all facts that establish tax liability or lead to the increase in tax burden, while the taxpayer bears the burden of proof in relation to the facts pertaining to a minimization of tax or tax exemptions. Since the potential existence of tax avoidance motive is a fact that results in higher tax liability in cases of corporate reorganizations, it should be up to the tax authority to submit proper evidence thereto. In addition, one should take note of the principle of good faith, which has been enshrined in Croatian tax law ever since 2000, providing that the parties in the tax relationship should act conscientiously and fairly in accordance with the law.[37] While this principle demands stronger co-operation, even partnership-like relations, between taxpayers and tax authorities, administrative practice in the area dealt with in this paper certainly does not fit the bill.[38]

2.3. Relevance of other anti-abuse rules and principles

The rule contained in Article 20.p PTA is known in the tax doctrine as a targeted anti-avoidance rule (TAAR), i.e. a rule aimed at curbing a specific tax avoidance technique, in this case a solely-tax-motivated business restructuring operation.[39] But the question arises as to whether tax authorities may also challenge the transaction(s)

35 See the previously-cited non-binding tax ruling, Croatian Tax Administration, *supra* n. 18.

36 Official Gazette of the Republic of Croatia, no. 115/2016.

37 For the current version of the codification of the principle of good faith, see Article 9 of the GTA.

38 Generally on the features of tax relationship in Croatia see Gadžo,S., Tax Procedure Law in Transition: Croatian Experience, in: Milosavljević, B., et al. (eds), Law and Transition: Collection of Papers, University of Belgrade, Faculty of Law, 2017, pp. 177-189.

39 For a general description of TAARs (or SAARs, as they are also known in the academic literature), see e.g. Čičin-Šain, N., Analyse comparée des dispositifs de lutte contre l'évasion fiscale en droit fiscal croate et français Le cas de l'impôt sur les sociétés, L.G.D.J 2017, pp. 89-92.; Gadžo S., Klemenčić, I., Time to stop avoiding the tax avoidance issue in Croatia? A proposal based on recent developments in the European Union, Financial theory and practice 38(3), 2014, pp. 282.

at hand on the basis of other anti-tax avoidance rules enshrined under the Croatian legislation. In this regard, comparative experiences tell us that revenue bodies sometimes do not shy away from relying on anti-avoidance rules or judicial doctrines of more general application in denying the tax benefits for envisaged M&As.[40]

While it is beyond the scope of the present paper to give full details of the Croatian anti-avoidance legislative framework[41], some recent developments in this area are particularly worth exploring, especially the introduction of a new GAAR by virtue of 2016 amendments to the PTA.[42] As set out in the newly adopted Article 5.a of the PTA – curiously drafted on the basis of Article 2(1) of the EU Parent-Subsidiary Directive[43] – taxpayers shall not be granted any benefits envisaged in corporate tax legislation in case they make use of an arrangement or a series of arrangements which are classified as *non-genuine*. The article defines "non-genuine arrangements" as any business transaction, scheme, action, operation, understanding, promise or event, comprising of one or more than one steps or parts, which has been put into place for the main purpose or one of the main purposes of obtaining a tax advantage, having regard to all relevant facts and circumstances.[44] In addition, it is made clear that such arrangements may be considered non-genuine only to the extent that they are not put into place for valid commercial reasons which reflect economic reality, i.e. if they are put into place for the purposes of tax evasion or fraud.[45]

Further instructions on the application of the new GAAR are found in the OPT. Accordingly, it is clarified that in the assessment of the arrangement's genuineness, it is important to establish whether the arrangement, regardless of any subjective intention of the taxpayer, defeats the object, spirit and the purpose of the pertinent tax provision.[46] Moreover, some typical examples of non-genuine arrangements are provided, including the so-called U-turn transactions and transactions that entail a mismatch between tax benefits and associated business risks.[47]

40 See Kroppen, H., Silva, J. C., op. cit., pp. 27-31; Cotrut, M., Ambagtsheer-Pakarinen, L., op. cit., sec. 7.3.1.

41 For more details see e.g. Žunić Kovačević, N., et al., Croatia in M. Lang et al. (eds.), GAARs - A Key Element of Tax Systems in the Post- BEPS World, IBFD 2016, pp. 205-218.; Gadžo, S., Klemenčić, I., op. cit., pp. 290-293.; Rogić Lugarić, T., Promišljanja o općem pravilu za sprječavanje zakonitog izbjegavanja porezne obveze in Arbutina, H., Rogić Lugarić T., (eds.), Spomenica prof. dr. sc. Juri Šimoviću, Pravni fakultet Sveučilišta u Zagrebu, 2017, pp. 237-239.

42 A detailed account of this legislative development is given in Čičin-Šain, N., Opće pravilo za sprječavanje izbjegavanja poreza uvedeno u sustav poreza na dobitak, Pravo i porezi, 10 (2016), pp. 12-17.

43 Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 345, 29.12.2011, with subsequent amendments. For criticism of such approach of Croatian legislator in implementing the 2015 amendments to the Parent-Subsidiary Directive see Čičin-Šain, N., op. cit., p. 13.

44 Article 5.a(1) and 5.a(2) of the PTA.

45 Article 5.a(3) of the PTA.

46 Article 11.c(2) of the OCT.

47 Article 11.c(2) of the OCT. The examples are essentially copy-pasted from an earlier attempt of the EU institutions to introduce a uniform GAAR in the internal market. See *Commission Recommendation on aggressive tax planning*, C (2012) 8806 final, OJ L 338, 12.12.2012.

Although the necessity for a comprehensive reform of the Croatian anti-tax avoidance framework has been articulated in academic literature[48], the newly introduced GAAR inevitably breeds uncertainty. The lack of case law hitherto makes it even harder to speculate how the tax authorities will interpret contentious elements of the GAAR, such as "arrangements", "valid commercial reasons", "economic reality", etc.[49] For the purposes of the present paper, it is, however, vital to explore possible ramifications of the newly-introduced GAAR on M&A transactions involving Croatian target companies.

Three points deserve special attention. First, regarding the legal compatibility between the GAAR and the TAAR found in Article 20.p PTA, a question may arise whether tax planning structures that passed the CTA's scrutiny under the special rule may still be assessed, potentially resulting in the denial of pertinent tax benefits, by virtue of the GAAR.[50] If one strictly applies the *lex specialis* doctrine, the answer would be in the negative, i.e. the application of the GAAR would be precluded. Such inference seems rather convincing if one takes into account the legal nature of the Croatian GAAR, which is essentially a copycat of the GAAR laid down in the Parent-Subsidiary Directive. If one acknowledges that the latter is not a "principles-based GAAR" akin to its counterparts found in some domestic tax systems (e.g. that of the United Kingdom), but rather a rule having a narrower and more specific remit[51], we share the view that the CTA should abstain from applying the GAAR to business restructuring transactions previously tested under Article 20.p of the PTA. Second, and more important for practical purposes, if one compares the wording of these rules, the room for possible conflict between the two is ostensibly very limited. Namely, as already mentioned above (section 2.2), the taxpayer may escape the application of the TAAR if he demonstrates valid business reasons for the business restructuring operation. Very similarly, under the newly-adopted GAAR, taxpayer's arrangements are considered non-genuine only to the extent that they are not put into place for *valid commercial reasons* reflecting economic reality.[52] One may even go a step

48 See e.g. Prebble, R., Does Croatia Need a General Anti-Avoidance Rule? Recommended Changes to Croatia's Current Legislative Framework, Financial theory and practice, 29(3), 2005, pp. 211-227; Gadžo, S., Klemenčić, I., op. cit., pp. 290-297; Čičin-Šain, N., op. cit., pp. Rogić Lugarić, T., op. cit., pp. 237-239.

49 For a critical overview of these elements found in the GAAR enshrined in Parent-Subsidiary Directive see e.g. Weber, D., The New Common Minimum Anti-Abuse Rule in the EU Parent-Subsidiary Directive: Background, Impact, Applicability, Purpose and Effect, Intertax 44(2), 2016, pp. 98–129.

50 Generally on the relationship between GAARs and TAARs see Krever, R., General Report: GAARs in Lang, M., et al. (eds.), GAARs - A Key Element of Tax Systems in the Post- BEPS World, IBFD 2016, pp. 13-14.; Rosenblatt, P., Tron, M. E., General Report, in: IFA Cahiers Vol. 103a: Seeking anti-avoidance measures of general nature and scope - GAAR and other rules, 2018, pp. 23-24.

51 See Tavares, R., Bogenschneider, B., The New De Minimis Anti-Abuse Rule in the Parent-Subsidiary Directive: Validating EU Tax Competition and Corporate Tax Avoidance?, Intertax 43(8/9), 2015, pp. 488-489.

52 For a detailed analysis of this "artificiality test" or "substance test" of the GAAR enshrined in Parent-Subsidiary Directive see Weber, D., op. cit., pp. 113-115.

further and embrace the introduction of the GAAR as a step towards clarifying the ambiguities in application of the pertinent TAAR. This line of argument resonates well with a standard role played by GAARs in comparative tax systems, namely that of drawing the legislative boundary between legitimate tax planning and unacceptable tax avoidance.[53] Third, and related to the previous point, the "substance test" or the objective prong of the new GAAR should not be all that unfamiliar to Croatian tax practitioners, since the principle of "economic approach" – or, using the comparative tax jargon, "substance-over-form" principle – has been one of the keystones of Croatian tax law for almost two decades now.[54] This principle sets out the approach of interpretation of tax laws, giving legal basis to the CTA to disregard taxpayers' structures that are deemed abusive and impose the tax directly on the underlying commercial reality. The jurisprudence of the Croatian administrative courts regarding substance-over-form principle confirms that taxpayers may not rely solely on the classification of their actions under civil or commercial law in order to obtain tax benefits envisaged in relevant tax laws.[55] Conversely, the points of departure for classifying facts for tax-law purposes are various elements associated with economic substance, including commercial rationale of the transaction, actual behaviour of the parties, existence and usage of tangible assets etc.

Accordingly, if we imagine a business restructuring in the form of company division, where certain valuable assets are carved-out and transferred to a newly formed entity, both the TAAR of Article 20.p CTA and the newly-adopted GAAR would call for an assessment of whether the transaction as a whole, and its individual steps, make commercial sense. Relatedly, in order to get the benefits of tax neutral restructuring, the taxpayer should be able to demonstrate that the spin-off entity is able to have commercial life of its own, e.g. that it has adequate premises, employees, operating assets, separate business activities and is able to bear significant risks.[56] If this is not the case, then it is safe to conclude that the transaction lacks valid business rationale and amounts to a "non-genuine arrangement". In more practical terms, this testing of economic substance will usually boil down to an analysis of the relevant documentation.[57] This makes the above analysis of the *onus probandi* issue even more vexing.

3. THE LIMITATIONS ON CARRY-FORWARDS OF TRANSFERRING ENTITY'S TAX LOSSES

As already explained in the present paper (section 2), an M&A transaction carried through a "share deal" offers, as a general rule, the benefit of preserving the target company's tax attributes and enables their subsequent utilization at the hand of

53 See Gadžo, S., Klemenčić, I., op. cit., pp. 282-283 and the sources referred to therein.

54 Generally on this, Žunić Kovačević, N., et al., op. cit., pp. 206-207. The principle is enshrined in Article 11 of the current version of the GTA.

55 See e.g. Decision of the Administrative Court in Rijeka, Case No. 6 UsI-792/13-9, 18 July 2014.

56 Compare also Kroppen, H., Silva, J. C., op. cit., pp. 30.

57 See also Cotrut, M., Ambagtsheer-Pakarinen, L., op. cit., sec. 7.3.2.

the acquirer. In the M&A environment special attention in this regard is paid to the preservation and usage of tax losses incurred by the target company, i.e. rules on loss carryovers. Within the due diligence process it is vital to examine the possibility that some tax losses of the target may be lost due to rules prohibiting tax loss trafficking, enshrined in the domestic law of a number of countries.[58] Such anti-tax loss trafficking provisions may be branded as another species of TAARs.[59]

Against this backdrop, it has to be noted first, that Croatian corporate tax law allows only for loss carry-forwards, not carry-backs.[60] Loss carry-forward is limited for the period of five years, i.e. five future taxable periods, and earlier losses are to be offset before the later ones.[61] Domestic anti-loss trafficking rules employ both an "activity test" or "economic identity test" and an "ownership test".[62]

More precisely, under Article 17(5) of the PTA, the right to use earlier tax losses of the target company (legal predecessor) ceases for the acquirer (legal successor) in two specific cases: 1) where, within the period of two years after the transaction, business activity of the target is significantly changed;[63] 2) if the target company did not perform any business activities within two years preceding the transaction. In addition to this business activity test, Article 17(7) of the PTA sets out an ownership test, prescribing that tax losses may not be carry-forwarded in case of a significant change in the ownership of the target company, i.e. when more than 50% of target's equity change owner(s) in relation to the beginning of the tax year.[64] However, in the described cases there is also an "escape rule": under Art. 17(8) of the PTA, the legal successor of the target may still utilize target's losses if the change of business activity, or the change of ownership, had the aim to preserve employment or the aim of business recovery.[65] The elements of this escape rule are further clarified in the OPT.[66] Importantly, the concept of "business recovery" (*sanacija poslovanja*) is deemed to include all procedures aimed at increasing revenue through the revival and continuation of business activities, along with job preservation.[67]

Regarding the application of the ownership, there has been some ambiguity in tax practice, particularly concerning cases where the economic identity of the target remains unchanged after the share transaction, i.e. where only ownership of the company is significantly changed. In its public ruling the CTA offered a pro-taxpayer

58 Generally on loss trafficking and the rules aimed at curbing it, see Endres, D., Spengel, C. D., op. cit., pp. 99-100.

59 On the discussion on the role of TAARs and GAARs see section 2.3. above.

60 This is provided in Article 17(2) PTA. For a concise comparative overview of loss carryovers see e.g. Endres, D., Spengel, C. D., op. cit., p. 98; Avi Yonah, R., Sartori, N., Marian, O., Global Perspectives on Income Taxation Law, Oxford University Press, 2011, pp. 84-85.

61 Art. 17(4) of the PTA.

62 Generally on these typical criteria used in anti-loss trafficking rules see Endres, D., Spengel, C. D., op. cit., p. 99.

63 What constitutes a „significant change of activity" is clarified in Article 38(5) OPT, by reference to the National Classification of Activities (NKD 2007).

64 Art. 17(7) of the PTA.

65 Art. 17(8) of the PTA.

66 Article 38, paras. 6-9 of the OPT.

67 Article 38(8) of the OPT.

interpretation of the relevant statutory provision, making clear that loss-carry-forwards will be denied only if the change in ownership is accompanied with the change in economic identity of the target.[68]

4. PROCEDURAL INSTRUMENTS FOR ENHANCING TAX CERTAINTY IN BUSINESS RESTRUCTURING TRANSACTIONS

Within the maze of anti-tax avoidance rules relevant for M&As involving Croatian target companies – explored in previous sections of this paper – tax risks abound for prospective investors. Particularly disconcerting is the increasing number of cases in which tax authorities deny the sought-after tax benefits by qualifying a transaction as abusive, often on arbitrary grounds and without offering reasonable evidentiary substantiation for such findings.[69] These concerns only add to the plethora of issues related to the overall tax environment in Croatia. Namely, recent studies using data collected from business representatives and tax advisors display that key problems include, *inter alia*, the following: (i) frequent changes and complexity of tax legislation, which is sometimes even applied retrospectively; (ii) tax authorities' prejudicial view of the taxpayers as tax evaders; (iii) excessive length of tax dispute procedures; (iv) unwillingness of the tax authorities to truly co-operate with taxpayers; (v) practice of non-uniform application of tax legislation by different organizational units within the CTA; (vi) legal framework and practice of tax audit procedures (vii) unsatisfactory statutory provisions on advance tax rulings, resulting in their underuse in practice.[70] All of these factors contribute to the conclusion that legal uncertainty is a pervasive feature of the Croatian tax system.[71] This should be particularly worrying for policymakers, since there is ample evidence that tax uncertainty, particularly regarding corporate income tax and value added tax (VAT), has serious impact on investment and location decisions.[72]

Against this backdrop, it may be somewhat comforting that in recent years Croatian tax procedure law underwent significant modernization, with the introduction of new, compliance-oriented instruments.[73] In addition, this was coupled with other institutional and regulatory developments important especially for big businesses, such as the formation of a special Large Taxpayers Unit within the CTA, introduction

68 See Croatian Tax Administration, opinion No. 410-01/10-01/1624, 16 August 2010. This clarification has been subsequently included in Article 38(4) of the OPT.

69 On the problem of burden of proof in this context see section 2.2 of this paper.

70 See Stojić H., *et al.*, White Book 2017, Foreign Investors Council 2017, 39-44; Gadžo, S., op. cit., pp. 182-183, and the sources referred to therein.

71 Quite interestingly, one recent survey, conducted among tax professionals operating in 28 European countries, shows that only France and Italy fare worse than Croatia in terms of tax uncertainty. See Deloitte (2015), European tax survey 2015: Transparency, simplification and collaboration, https://www2.deloitte.com/global/en/pages/tax/articles/european-tax-survey.html (accessed 12 November 2018).

72 See IMF & OECD (2017), OECD/IMF Report on Tax Certainty, http://www.oecd.org/tax/tax-policy/tax-certainty-report-oecd-imf-report-g20-finance-ministers-march-2017.pdf (accessed 12 November 2018), pp. 25-32.

73 For an overview see e.g. Gadžo, S., op. cit., pp. 184-188.

of "tax settlements" within tax audit procedures etc. Accordingly, *de lege lata* there are some instruments prospective investors may rely upon in order to mitigate the risk of overstepping the boundary of legitimate tax planning within the M&A context.

Most notably, as of 2015 Croatian taxpayers may obtain an advance ruling regarding the planned transaction, as set out by Article 10 of the GTA.[74] While the objective scope of the advance ruling scheme is, as it stands today, severely limited, assessment of the corporate tax base related to corporate restructurings is explicitly mentioned as one of the questions taxpayers may seek clarification on from the CTA.[75] Accordingly, taxpayers may obtain beforehand the opinion of the tax authorities' whether the benefits of tax neutrality would apply to the planned transaction – e.g. also with regard to loss carry-forwards – thus increasing the level of legal certainty.

An even stronger level of tax certainty is guaranteed where Croatian target companies have, prior to the planned business restructuring transaction, been engaged in the recently introduced horizontal monitoring scheme, regulated in Article 70 of the current version of the GTA. Within this scheme, the taxpayer obliges to be fully transparent on his activities and tax risks, while complying with all duties prescribed by tax legislation in a timely manner. Conversely, tax authorities need to adjust the extent of using their supervisory discretion to the quality of the taxpayer's internal control and auditing processes. Moreover, they are obliged to interact with the taxpayer quickly and transparently, so to avoid any potential disputes.[76]

Taking a brief look *de lege ferenda*, Croatian M&A landscape would undeniably benefit from further improvements on the procedural plane. Since it seems that the resolution of tax disputes is the Achilles heel of the entire tax system, possible answers lie in: (i) the creation of a more robust compliance programmes[77]; (ii) introduction of an additional tier of dispute resolution, in the form of quasi-judicial, independent panels or committee, which may issue (non-binding) opinions on the application of pertinent tax-law provisions, including GAARs and other anti-tax avoidance rules[78]; (iii) usage of (mandatory) arbitration, especially in the cross-border context[79]. Against the background of recent developments in Croatian anti-tax avoidance framework, even some more modest steps, such as timely and more systematic publication of tax

74 For general information on advance ruling system in Croatia see Žunić Kovačević, N., Prethodna obvezujuća porezna mišljenja – novi institut hrvatskog poreznog postupka, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 37(1), 2016, pp. 267-289.

75 See Article 10(2)(3). Even more notably, within the recently proposed amendments to the GTA, the objective scope of the scheme will be severely broadened.

76 See Gadžo, S., op. cit., pp. 187-188 and the sources referred to therein.

77 See e.g. IMF & OECD (2017), op. cit., pp. 50-52.

78 For some comparative experiences with this instrument see e.g. Rosenblatt, P., Tron, M. E., op. cit., p. 38;

79 See, e.g. IMF & OECD (2017), op. cit., pp. 49-50, 57; Del Campo, C., General report in IFA Cahiers de Droit Fiscal Vol. 101a: Dispute resolution procedures in international tax matters, 2016, pp. 59-62. For an analysis of alternative dispute resolution instruments in the context of Croatian tax law see Rogić Lugarić, T., Čičin-Šain, N., Alternativno rješavanje sporova u poreznom pravu: utopija ili rješenje?, Zbornik Pravnog fakulteta u Zagrebu 64(3), 2014, pp. 347-375; Žunić Kovačević, N., Upravnosudska kontrola u poreznim stvarima, op. cit., pp. 288-295.

authorities' positions and guidance on specific issues, may go a far way in abating legal uncertainty for taxpayers.

5. CONCLUDING REMARKS

Drawing the line between legitimate tax planning and illegitimate tax avoidance is one of the Gordian knots in tax law theory and practice. This paper has tried to offer a descriptive and systematic account of anti-tax avoidance rules that may be used the Croatian tax authorities in order to deny the tax benefits of a business restructuring operation. What emerges from the analysis is that prospective investors should, more than ever before, structure all the steps of an M&A transaction in a way that reflects the underlying economic substance and makes commercial sense. Failing to do so may trigger the scrutiny of tax authorities, on the basis of either targeted anti-avoidance rules (TAARs) or the general anti-avoidance rule (GAAR). We have underlined how in this context a special set of problems arises from a procedural perspective. Most notably, practical application of the rules on burden of proof result in great difficulties for the taxpayer to demonstrate proper business purpose(s) underlying the restructuring and thus quash the presumption of abusive behaviour. The resulting uncertainties are bound to increase in light of newly adopted rules, such as the GAAR that is based on the ambiguous interpretation of the "genuineness" or "artificiality" of taxpayers' arrangements.

Based on the above, it comes as no surprise that the answer to the main research question seems rather inconclusive. It is, however, safe to assume that M&A transactions the conduct of which may be substantiated with detailed due diligence analyses and that offer clear, tangible benefits to the participants will remain on the safe side of the CTA's inquiry. The role of documentary requirements in this regard cannot be overstated. Furthermore, as discussed above, taxpayers may rely on some procedural instruments to mitigate future tax risks in the M&A environment. While advance tax rulings appear to be particularly useful for this purpose *de lege lata*, future modernization of dispute resolution framework would serve a great deal in enhancing legal certainty for prospective investors. As to this last point, some optimism is in order, considering how in recent years the Croatian policymakers have responded relatively quickly to relevant developments at the global and EU level.

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Sažetak

POREZNI RIZICI SPAJANJA I PREUZIMANJA TRGOVAČKIH DRUŠTAVA U HRVATSKOJ: GDJE JE GRANICA IZMEĐU LEGITIMNOG POSLOVNOG RESTRUKTURIRANJA I AGRESIVNOG POREZNOG PLANIRANJA?

Transakcije spajanja i preuzimanja često su izvor raznovrsnih poreznih rizika. U recentnoj praksi hrvatskih poreznih tijela sve su češći slučajevi odbijanja poreznih pogodnosti za navedene transakcije, temeljem različitih protuevazijskih pravila ugrađenih u domaće zakonodavstvo. Riječju, analizom gospodarske biti planiranog restrukturiranja porezna tijela izvode zaključak kako je posrijedi (zakonito) izbjegavanje plaćanja poreza. Cilj je rada, u svjetlu važećeg protuevazijskog pravnog okvira, ocrtati granicu između dopuštenog i legitimnog poreznog planiranja s jedne strane te porezne evazije s druge. U tom smislu posebno će se upozoriti i na relevantne postupovno-pravne aspekte, poput pravila o teretu dokazivanja.

Ključne riječi: *spajanja i preuzimanja; porezno planiranje; zakonito izbjegavanje plaćanja poreza; porezna neutralnost; teret dokazivanja; opće pravilo protiv izbjegavanja poreza.*

Zusammenfasssung

STEUERBEZOGENE RISIKEN DER FUSIONEN UND ÜBERNAHMEN IN KROATIEN: ABGRENZUNG ZWISCHEN LEGITIMER UNTERNEHMENSUMSTRUKTURIERUNG UND AGGRESSIVER STEUERPLANUNG

Durch Fusionen und Übernahmen der kroatischen Zielunternehmen können bedeutende Steuerrisiken für heimische und fremde kontrollierende Unternehmen entstehen. In den letzten Jahren haben kroatische Steuerbehörden begonnen, den

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wirtschaftlichen Gehalt vorgesehener Fusionen und Übernahmen zu bewerten. Dabei werden dem kontrollierenden Unternehmen oft die Steuervorteile verwehrt, was den ganzen Umstrukturierungsprozess teurer macht. Die kroatischen Steuerbehörden stützen sich dabei auf unzählige Regeln der Bekämpfung von Steuervermeidung, gemäß welchen die M&A-Transaktionen als missbräuchlich bezeichnet werden können. Demgemäß wird in diesem Beitrag beschreibend und systematisch erklärt, wie die kroatische Gesetzgebung zur Bekämpfung von Steuervermeidung die Fusions- und Übernahmeaktivitäten hindern kann. Dabei ist es das Ziel dieses Beitrags sowohl aus der Perspektive des materiellen Rechts als auch des Verfahrensrechts zu untersuchen, wo die imaginäre Grenze zwischen der legitimen und missbräuchlichen Steuerplanung liegt.

Schlüsselwörter: *Fusionen und Übernahmen; Steuerplanung; gesetzlich Steuerzahlungen vermeiden; Steuerneutralität; Beweislast; die allgemeine Regel gegen Steuerhinterziehung.*

Riassunto

I RISCHI FISCALI DI FUSIONE E RILEVAMENTO DELLE SOCIETÀ COMMERCIALI IN CROAZIA: DOV'È IL CONFINE TRA LA RISTRUTTURAZIONE LEGITTIMA ED UNA PIANIFICAZIONE FISCALE AGGRESSIVA?

Le operazioni volte alla fusione ed al rilevamento sovente sono fonte di vari rischi fiscali. Nella recente prassi degli enti fiscali croati sono sempre più frequenti i casi di rigetto di agevolazioni fiscali per dette operazioni, in ragione di differenti regole antievasione radicate nella legislazione domestica. In sostanza, mediate l'analisi del contenuto economico della ristrutturazione pianificata gli enti fiscali giungono alla conclusione come si tratti di una (legale) elusione del pagamento del fisco. Lo scopo del lavoro, alla luce del vigente quadro normativo anti-evasione, è quello di delineare il confine tra la pianificazione fiscale ammessa e legittima da una parte e l'evasione fiscale dall'altra. In tale senso, in particolare se ne sottolineeranno gli aspetti procedurali, quali le regole sull'onere probatorio.

Parole chiave*: fusioni e rilevamenti; pianificazione fiscale; elusione del pagamento del fisco; neutralità fiscale; onere probatorio; regola generale contro l'evasione fiscale.*

INTERNET DISTRIBUTION OF LUXURY PRODUCTS: IS THERE A DELUXE VERSION OF EU COMPETITION LAW?

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Summary

Owing to its particular features, the market of luxury goods is a point of interest to lawyers as much as to other professions such as economists or sociologists. These features play an important role in legal regulation of the market. While the starting point is competition law, the assessment of anti-competitive conduct under Article 101 of the TFEU cannot be complete without resorting to intellectual property law policies and rules. With the rise of the importance of internet sales, novel issues have been put before the competition authorities and reviewing courts, such as legality of various types of online restrictions in the selective distribution systems. Employing a combined IP law and competition law approach to these issues, this paper offers insights and comments on EU case law, with primary focus on the recent CJEU judgment in Coty. The intricacies of the interplay among different competition law rules and exemptions is particularly evidenced in this case. However, limited by its fact-pattern, the Coty judgment may serve as a clarification about the deluxe competition law treatment only of certain online sale prohibitions within the SDSs, while there will certainly be continuing discussions and national case law developments on other internet related competition law restrictions awaiting further elucidations by the CJEU.

Keywords: *EU law; competition law; intellectual property; trademark; luxury products; internet; selective distribution; vertical agreements.*

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1. INTRODUCTION

Luxury goods market is growing fast. According to Delloite, in the fiscal year 2015 the top 100 luxury brand companies generated sales in the amount of US$212 billion,[1] while in 2017 Bain and Co. reporters estimate that the overall sales of luxury goods reached €1.2 trillion.[2] In this apparently huge market, it is important to maintain and possibly improve one's market position. These economic considerations needs to be adequately regulated, which is currently achieved through several branches of law. Luxury goods, recognisable to consumers by their brands, are legally protected mostly as trademarks. Trademark law and intellectual property (hereinafter: IP) law in general, confer exclusive rights to trademark holders, which means that the rightholder may prevent certain acts of third parties, such as producing, importing, and distributing of goods bearing the trademark in question. This exclusivity may be seen to stand in opposition to protecting free competition, one of the objectives of competition law. However, the flipside is true, as both IP law and competition law strive to promote consumer welfare and efficient allocation of resources. The history of relationship between these two branches of law has been very intense and dynamic. With the technological and economic developments, new issues are raised requiring a profound understanding of the underlying principles of both disciplines.

Most recently the CJEU has rendered its judgment in the *Coty* case on the topical issue of European Union competition law treatment of a selective distribution system (hereinafter: SDS) as employed by the luxury brand producers.[3] This paper thus intends to offer a combined IP-law and competition-law analysis showing how the two disciplines can work hand in hand to produce both economically and legally sound results. In doing so, the following section deals with the main features and functions of trademarks, especially when they serve as a legal protector of a luxury brand. The subsequent section focuses on the rationale of the luxury brand producers when deciding to opt for the SDS, while the next one is concerned with the competition-law framework for the SDSs in the EU. The remainder of the paper discusses in details the most recent CJEU case law on the topic, in particular the judgment in *Coty*, with the concluding remarks summarised in the end.

2. TRADEMARK FUNCTIONS AND JUSTIFICATIONS

Trademarks, along with other IP rights, are recognised as one of the human rights by the Charter of Fundamental Rights of the European Union,[4] in its Article 17(2). It is also accepted as one of the justifiable restrictions to trade among MSs under the

1 Deloitte Luxury Multicountry Survey for Global Powers of Luxury Goods 2017, https://www2.deloitte.com/content/dam/Deloitte/global/Documents/consumer-industrial-products/gx-cip-global-powers-luxury-2017.pdf (last visited 2 August 2018).

2 Bain and Co. Luxury Goods Worldwide Market Study, Fall–Winter 2017, http://www.bain.de/Images/BAIN_REPORT_Global_Luxury_Report_2017.pdf (last visited 2 August 2018), p. 1.

3 CJEU, C-230/16, *Coty Germany GmbH v Parfümerie Akzente GmbH*, 6 December 2017, EU:C:2017:941.

4 OJ C 326, 26 October 2012, pp. 391-407.

Treaty on the Functioning of the European Union (hereinafter: TFEU)[5] in its Article 36. The early proclamation of the CJEU about the IP rights was in the context of the principle of non-discrimination, free movement of goods (in particular with regard to the doctrine of exhaustion) and competition.[6] In several cases, the CJEU developed the concepts of "essential function" and "specific object" ("specific subject-matter").

"Essential function" of the trademark has been defined by the aim "to guarantee the identity of the origin of the trade-marked product to the consumer or ultimate user, by enabling him without any possibility of confusion to distinguish that product from products which have another origin".[7] This is traditionally the most important function of trademark and consists in clearly marking the source or origin of the goods (or services) in relation to which the trademark is being used.[8] As may be concluded from the use of the adjective "essential", the function of indicating the origin is not the only trademark function recognised in EU law.[9] Besides function of origin which "the trademark is always supposed to fulfil", recent CJEU case law has repeatedly emphasised the advertising and investment functions as well.[10] While advertising function is activated when the rightholder is "using its mark for advertising purposes designed to inform and persuade consumers",[11] the investment function comes into

5 Codified version, OJ C 202, 7 June 2016, pp. 47-197.

6 Toth, A. G., Intellectual Property Rights, in: Oxford Encyclopaedia of European Community Law, Volume II: The Law of the Internal Market, (Oxford: Oxford University Press, 2005), pp. 504-506.

7 CJEU, C-102/77, *Hoffmann-La Roche & Co. AG v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH*, 23 May 1978, EU:C:1978:108, para 7; C-119-75, *Terrapin (Overseas) Ltd. v Terranova Industrie CA Kapferer & Co*., 22 June 1976, EU:C:1976:94, p. 1049 and 1054; CJEU, C-3/78, *Centrafarm BV v American Home Products Corporation*, 10 October 1978, EU:C:1978:174, para. 12; CJEU, C-10/89, *SA CNL-SUCAL NV v HAG GF AG*, 17 October 1990, EU:C:1990:359, para. 14

8 Tritton, G., *et al.*, Intellectual Property in Europe, 2nd ed., (London: Sweet & Maxwell, 2002), p. 506. This is confirmed in the recital 10 of the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, OJ L 40, 11.2.1989, pp. 1–7, which is equivalent to recital 11 of the Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (codified version), OJ L 299, 8 November 2008, pp. 25–33, as well as in the *Memorandum on the Creation od the EEC Trade Mark*, SEC (76) 2462 final, 6 July 1976), Bulletin of the European Communities, Suppl. 8, 1976., para. 68.

9 Advocate general Ruiz-Jarabo Colomer has qualified as "simplistic reductionism" the view limiting the function of the trademark to an indication of origin. Opinion of Advocate General Colomer in CJEU case C-206/01, *Arsenal Football Club plc v Matthew Reed*, 12 November 2002, EU:C:2002:373, para. 46. It is interesting to see that Advocate General Jacobs perceived the other functions as derivatives of the function of origin and merit not too wide an interpretation. See Opinion of the Advocate General Jacobs in CJEU case C-337/95, *Christian Dior SA and Parfums Christian Dior BV v Evora BV*, 29 April 1997, EU:C:1997:222, para. 42.

10 CJEU, C-323/09, *Interflora Inc. and Interflora British Unit v Marks & Spencer plc and Flowers Direct Online Ltd.*, 22 September 2011, EU:C:2011:604, paras. 38-40.

11 CJEU, joined cases C-236/08 to C-238/08, *Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08)*, 23 March 2010, EU:C:2010:159, para. 91.

play when the rightholder is using its trademark "to acquire or preserve a reputation capable of attracting consumers and retaining their loyalty".[12]

One of the contemporary approaches to viewing the plurality of functions of the trademark is known as the theory of information. The trademark is seen as a means to convey information to consumers, at the same time improving the efficiency on the market.[13] According to this theory, the functions of trademark may be divided into several subfunctions where a crucial one is the traditional essential function of communicating the origin of goods (or services). Other, more recently recognised functions, came about as a result of the transformation in trade practices, where consumers are distanced from the producers because the distribution channels are increasingly diverse. An important secondary function is the information about the quality, according to which a trademark guarantees the quality (and price) level, which the consumer expects from the product (or service) bearing that trademark.[14] There is also a descriptive function, which may sometimes exist although in principle descriptive trademarks are not registrable. However, some trademarks suggest certain characteristics of goods (or services) in relation to which they are used.[15] An increasingly important function in the todays' commercial practices is the advertising function enabling the consumer to connect a specific overall image, aura or lifestyle with an individual trademark, which occurs as a result of the way in which the trademark is being advertised.[16] Griffiths describes this as a physiological possessing

12 CJEU, C-323/09, *Interflora*, EU:C:2011:604, para. 60.

13 On trademarks as a means of communication of information see, Opinion of the Advocate General Ruiz-Jarabo Colomer in CJEU case C-273/00, *Ralf Sieckmann*, 6 November 2001, EU:C:2001:594, paras. 16-21. See also Schreiner, R., Die Dienstleistungsmarke, Typus, Rechtsschutz und Funktion (Munich: Heymanns, 1983), pp. 448 et seq.; Strasser, M., Rational Basis of Trademark Protection Revisited: Putting the Dilution Doctrine into Context, 10 Fordham Intellectual Property Media & Entertainment Law Journal (1999–2000), pp. 375-432, especially p. 382.

14 On this issue see more Griffits, A., Trade Marks and Quality Assurance, in: Dinwoodie, G. B. (ed.), Methods and Perspectives in intellectual Property, (Cheltenham: Edward Elgar, 2013), pp. 129-150.

15 Kitchin D. *et al.* (eds.), Kerly's Law of Trade Marks and Trade Names, 14th ed., (London: Thomson Sweet & Maxwell, 2005), p. 143.

16 Opinion of Advocate General Colomer in CJEU case C-206/01, *Arsenal Football Club plc v Matthew Reed*, 12 November 2002, EU:C:2002:373, para. 47: "The messages it sends out are, moreover, autonomous. A distinctive sign can indicate at the same time trade origin, the reputation of its proprietor and the quality of the goods it represents, but there is nothing to prevent the consumer, unaware of who manufactures the goods or provides the services which bear the trade mark, from acquiring them because he perceives the mark as an emblem of prestige or a guarantee of quality. When I regard the current functioning of the market and the behaviour of the average consumer, I see no reason whatever not to protect those other functions of the trade mark and to safeguard only the function of indicating the trade origin of the goods and services." (notes omitted). The idea of protection of image of the trademark has been present in national case law, see e.g. *L´Oréal S.A. & others v. Bellure & others, Perfume Smell-Alikes*, 4 October 2006, [2006] EWHC 2355 (Ch), accessible at http://www.bailii.org/ew/cases/EWHC/Ch/2006/2355.html (last visited 25 August 2018), where High Court for England and Wales, Chancery Division explained that brand is a wider concept than trademark and that it is intended to convey the message about its distinctiveness to the consumer, where the

of the consumer's mind, which attributes to the trademark the market power above the one that would be consistent to its reputation.[17] On the other side, Chronopoulos argues that the advertising function is justified by welfare aspects of dynamic competition with differentiated products, meaning that it ultimately benefits the consumers.[18] Hence, the functions of trademarks are inseparably related to the consumer society and enable the consumer to make an informed choice among a variety of goods (and services) on the market. Besides, trademarks are an indispensable means of promoting trade, and in the EU they also facilitate inter-MS trade and further interpenetration of MS national markets.[19]

From the perspective of the rightholder, the trademark, being an exclusive right, induces the rightholder to promote the reputation of its trademark, and of goods (and services) in relation to which it is used, resting assured that others will not be able to free-ride on that reputation.[20] This corresponds to the concept of the "specific subject-matter" recognised in the CJEU case law. It means "in particular the guarantee to the proprietor of the trademark that he has the exclusive right to use that trademark for the purpose of putting a product into circulation for the first time and therefore his protection against competitors wishing to take advantage of the status and reputation of the mark by selling products illegally bearing that trademark."[21] This may be explained under the utilitarian theory because exclusiveness of the trademark provides incentives for rightholders to maintain and improve goods (and services) offered to the public and set appropriate price, by giving them property rights in what they create. If captured by the ethical argument based on the principle of justice and fairness, persons other than rightholders should not be able to benefit from reputation and other attributes of the trademarks. This is also an element of the wider protection which traders should be able to acquire based on the competition rules,[22] leading to the above statement that the IP law and competition law may not only be in opposition to each other but may also overlap. Whatever the case, both sets of rules reflect an attempt to establish the balance between public and private interests. In trademark law, the notions of "essential function" (but also other functions) and "specific subject-matter" serve as a measure.[23]

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trademark is just one element of the brand structure. Therefore, the trademark holder has the right to protection of the image represented by the trademark.

17 Griffiths, A., The Impact of the Global Appreciation Approach on the Boundaries of Trade Mark Protection, (2001) Intellectual Property Quarterly 5, pp. 326-360, especially p. 329.

18 Chronopoulos, A., Legal and economic arguments for the protection of advertising value through trade mark law, (2014) Queen Mary Journal of Intellectual Property (4)4, pp. 256-276, especially 267.

19 Memorandum on the Creation of the EEC Trade Mark, SEC (76) 2462 final, 6 July 1976), Bulletin of the European Communities, Suppl. 8, 1976, para. 21.

20 See, defining the "specific subject-matter", CJEU, C-10/89, *SA CNL-SUCAL NV v HAG GF AG (Hag II)*, 17 October 1990, EU:C:1990:359, para, 14; Opinion of Advocate General Jacobs in CJEU case C-10/89, *SA CNL-SUCAL NV v HAG GF AG (Hag II)*, 13 March 1990, EU:C:1990:112, para. 19.

21 CJEU, C-3/78, Centrafarm, EU:C:1978:174, para. 11.

22 Bently, L., Sherman, B., op. cit., pp. 700-702.

23 CJEU, C-10/89, *Hag II*, EU:C:1990:359, para. 18. See also, CJEU, C-102/77, *Hoffmann-La*

3. WHY CHOOSE THE SDS FOR LUXURY PRODUCTS?

Because of these trademark functions and economic conditions in which the luxury brands in particular operate in an optimum level, luxury products have always been under special distribution regimes controlled by their producers. Despite global digitalisation of the market and developing e-commerce models, a few producers prefer to retain full control by maintaining their own distribution network and some even refuse to sell over the internet.[24] Many others wish to capitalise on the fast-growing online sale of luxury goods[25] and have embraced e-commerce to improve accessibility of their products.[26] Having said that, accessibility is actually at odds with the definition of luxury, which is basically revolving around (very) high price and unavailability to (vast) majority of consumers. With that comes prestige as a more important feature than the product's functionality.[27] For this reason, luxury brand producers are extremely concerned about preserving the image of their brands by maintaining the high-end experience and exclusivity perception also in the digital environment. They wish to create an internet distribution system which would mirror their brick-and-mortar distribution strategy, but at the same time to create an omnichannel approach with synergic effect among all communication and distribution channels resulting in a single brand presence. In order to accommodate these goals, luxury brand producers often rely on the selective distribution system (hereinafter: SDS).

In competition law, SDS is defined as "a distribution system where the supplier undertakes to sell the contracts goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system."[28] Such a system seems to accommodate well the suppliers' need to differentiate between luxury products and potentially competing non-luxury products, because it enables them to control the distribution network, both online and offline, by way of setting up quality criteria that a distributor has to fulfil in order to become an authorised distributor. In order to preserve the "aura of luxury" in the context of online sales, the supplier may, for instance, want to impose quality standards relating to the high-end look and feel of

Roche v Centrafarm, 23 May 1978, EU:C:1978:108, para. 7; CJEU, C-3/78, *Centrafarm*, EU:C:1978:174, paras. 11-12; CJEU, C-10/89, *Hag II*, EU:C:1990:359, para. 14; CJEU, C-317/91, *Deutsche Renault v Audi*, 30 November 1993, EU:C:1993:908, para. 21.

24 For instance, Chanel is not selling its fashion items over the Internet, merely marketing them. See at www. chanel.com (last visited 22 August 2018).

25 Online sales continued to climb, increasing by 24% in 2017 according to Bain and Co. Luxury Goods Worldwide Market Study, Fall–Winter 2017, http://www.bain.de/Images/BAIN_REPORT_Global_Luxury_Report_2017.pdf (last visited 2 August 2018), p. 15.

26 Major retailer sites include, for instance, www.24sevres.com, www.net-a-porter.com, www.farfetch.com and www.bonobos.com (last visited 22 August 2018).

27 See Eastman, J. K., Goldsmith, R. E., Flynn, L. R., Status Consumption in Consumer Behavior: Scale Development and Validation, (1999) Journal of Marketing Theory and Practice 7, pp. 41-52, especially p. 41.

28 Article 1(e) of the VBER (see fn. 54).

the website; product presentation and website design, criteria for the domain name, the use of navigation tools, the use of banners and the like. These are the online counterparts of the traditional offline quality standard, which include a certain size of the bricks-and-mortar shops, a specific geographic location, well-designed interior using particular fixtures, furnishing, and lightening all of which reflect the luxury image of the product in question, or imposing some specific criteria linked to the nature of the product.[29]

With the purpose of fully controlling the distribution network, in addition to setting up the distribution network criteria, the supplier will normally also impose to the appointed distributors a prohibition not to sell the products in question to non-approved distributors (cross-selling). As such, an SDS is of closed character. Not only that the luxury brand producers avoid price pressure from low-cost retailers or discounters, they also protect their investment in the brand's reputation and prevent its dilution because they are able to ensure that sales are carried out within conditions which benefit the prestige of their luxury goods.[30] In explaining his economic arguments in favour of the SDS for branded products, Winter reiterates the conflict of interests between producer of the luxury products and downstream distributors. While the former is interested in the profitability of its overall distribution system, the distributors are concerned only about their own sales. Not having a sufficient share in the profits to invest in the brand's image, sales conditions with individual retailers need to be controlled by the producer.[31] If the producer would be denied the control over the entirety of the distribution system, it would run the risk of some retailers free-riding off the investment of other participants in the system.[32] By restricting sales only to authorised distributors, luxury brand suppliers succeed in controlling market positioning, distribution quality and information flows in addition to the core brand integrity. SDS also facilitates client specific investment and know-how transfers which make two important factors in maintaining the reputation of a luxury brand.[33] Already in the 1990s, the GCEU recognised that preserving an "aura of luxury" in distributing luxury products is a legitimate interest of the luxury brand owners. The two *Lecrec* judgments[34] dealt respectively with Yves Saint Laurent and Givenchy luxury products and for its eloquence, the Court's reasoning merits being cited in full:

> "[I]t is in the interests of consumers seeking to purchase luxury cosmetics that the luxury image of such products is not tarnished, as they would otherwise no longer be regarded as luxury products. The

29 European Commission, Staff Working Document, Preliminary Report on the E-commerce Sector Inquiry, SWD (2016) 312 final, para. 216 (b).

30 Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, pp. 1-46, para. 178.

31 Winter, R. A., Pierre Fabre, Coty and Restrictions on Internet Sales: An Economist's Perspective, (2018) Journal of European Competition Law & Practice 9(3), pp. 183-187, especially 187.

32 Waelbroeck, D., Davies, Z., Coty, Clarifying Competition Law in the Wake of Pierre Fabre, (2018) Journal of European Competition Law & Practice 9(7), pp. 431-442, p. 435.

33 See in details Ezrachi, A. The Ripple Effects of Online Marketplace Bans, (2017) World Competition 40(1), pp. 47-65, chapter 3.

34 GCEU, T-19/92, *Leclerc v Commission (YSL),* 12 December 1996, EU:T:1996:190; GCEU, T-88/92, *Leclerc v Commission (Givenchy*), 12 December 1996, EU:T:1996:192.

> current segmentation of the cosmetics sector between luxury and non-luxury cosmetics reflects the varying needs of consumers and thus is not improper in economic terms. Although the 'luxury' nature of luxury cosmetics also derives, inter alia, from their high intrinsic quality, their higher price and manufacturers' advertising campaigns, the fact that they are sold through selective distribution systems which seek to ensure that they are presented in retail outlets in an enhancing manner also contributes to that luxury image and thus to the preservation of one of the main characteristics of the products which consumers seek to purchase. Generalized distribution of the products at issue, as a result of which Yves Saint Laurent would have no opportunity of ensuring that its products were sold in appropriate conditions, would entail the risk of deterioration in product presentation in retail outlets which could harm the 'luxury image' and thus the very character of the products."[35]

The GCEU thus confirmed that the luxury image of a product is not only linked to its quality, but to other factors as well, and that it is in the interest of consumers to enable manufacturers to safeguard the luxury image of their branded goods through a qualitative SDS, which might enhance competition. There are also other potential benefits to an SDS from the competition-law standpoint.[36] For one, it promotes non-price competition and improves the quality of services;[37] it brings about uniformity and quality standardisation on the distributors, thereby making the product in question more attractive to buyers which increases its sales;[38] it provides protection from free-riding and hold-up problems;[39] and by helping to create a brand image of luxury, it may foster inter-brand competition.[40] Having in mind all these benefits, SDS is often selected as the means of distributing branded products.[41]

4. EU COMPETITION LAW FRAMEWORK FOR SDS

Distribution contracts, including those on selective distribution, have always been an issue of interest to competition lawyers due to their potential negative effects on the market. Designed to restrict the number of authorised distributors and

35 GCEU, T-19/92, Leclerc v Commission (YSL), EU:T:1996:190, para. 120.

36 For a detailed analysis of SDS in the context of Internet sales in particular see, Iacobucci, E., Winter, R. A., European Law on Selective Distribution and Internet Sales: An Economic Perspective, (2016) Antitrust Law Journal 81, pp. 47-64.

37 Guidelines on Vertical Restraints, para. 106.

38 Guidelines on Vertical Restraints, para. 107(i).

39 Guidelines on Vertical Restraints, para. 107(a)-(e). A more detailed discussion on effects of SDS see, Buccirossi, P., Vertical Restraints on E-Commerce and Selective Distribution, (2015) Journal of Competition Law & Economics 11(3), pp. 747-773.

40 Rose V., Baily, D., (eds.), Bellamy & Child European Union Law of Competition, 7th ed., (Oxford: Oxford University Publishing, 2013), p. 453.

41 Guidelines on Vertical Restraints, para. 174.

the possibilities of resale[42] they risk reducing intra-brand competition,[43] foreclosing some type of distributors, softening competition and facilitating collusion between suppliers or buyers,[44] all of which are very serious competition concerns. For these reasons, such contracts might be qualified as anti-competitive under EU primary law, i.e. Article 101 of the TFEU.

Article 101(1) is one of the cornerstones of EU competition law, prohibiting agreements which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition. This very broadly worded provision is by no means simple or self-explanatory, as the TFEU does not even attempt to define any of the concepts used within it – that was left to the CJEU, which has developed a vast body of case law on this complex topic. For the purposes of this paper, it is important to stress only a few basic features of the functioning of Article 101 TFEU.

In order to be caught by the prohibition of Art 101(1), the conduct in question must amount to an agreement between two or more independent undertakings, a concerted practice or a decision by the association of undertakings as defined by the CJEU.[45] Such an agreement must be restrictive either by *object* or *effect* which should not be read in conjunction, as it is settled case law, that agreements are examined for their effects on competition only insofar as their object is not the restriction of competition.[46] This divide will prove to be important in cases of SDS as will be explained below. In addition, such agreements must threaten to restrict competition in an appreciable manner,[47] and must affect trade between Member States.[48] Article 101 offers a non-

42 Guidelines on Vertical Restraints, para. 174.

43 Intra-brand competition is competition among retailers or distributors of the same brand. Intra-brand competition may be on price or non-price terms. Glossary of Industrial Organisation Economics and Competition Law, compiled by Khemani, R. S., and Shapiro, D. M., commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, (1993), available at https://stats.oecd.org/glossary/detail.asp?ID=3153 (last visited 10 September 2018).

44 Guidelines on Vertical Restraints, para. 175.

45 For a more detailed discussion see, Rose, V., Baily, D. (eds.), op. cit., pp. 99 et seq.

46 CJEU, C-56/65, *Société Technique Minière v Machinenbau Ulm*, 30 June 1966, EU:C:1966:38, p. 249. In other words, if it is found that the object of the agreement is to restrict competition, it is not necessary to carry out a detailed market analysis to examine its actual effects on competition. See CJEU, joined cases 56 and 58-64, *Consten and Grundig v Commission*, 13 July 1966, EU:C:1966:41, p. 342; and other (for a more detailed discussion see Rose, V., Baily, D., (eds.), op. cit., pp. 149 et seq.). Conversely, where the object is not restrictive it is necessary to undertake a full competition analysis, which in the context of vertical agreements such as selective distribution agreements, imply taking into account a number of factors such as the nature of the agreements, market position of the parties, competitors and buyers, entry barriers, maturity of the market, level of trade, nature of products and other factors. See Guidelines on Vertical Restraints, paras. 111 et seq.

47 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) (Text with EEA relevance), OJ C 368, 22.12.2001, pp. 13-15.

48 If an agreement does not affect trade between MSs, Article 101 of the TFEU will not apply. However, it is likely that such a conduct will fall under the scope of the comparable competition law provision of the affected MS.

exhaustive list of types of agreements covered by prohibition which includes examples of both horizontal and vertical restraints, the latter covering the SDSs.[49] By wording of Article 101(2) such agreements are *ex lege* void and undertakings involved may as a result be subject to high administrative fines.[50] Having regard to the fact that most market conducts rarely bring about only negative effects on the market, Article 101(3) sets out an exception rule to the above-described prohibition in cases where the benefits outweigh negative effects on competition.[51] Exemption criteria of Article 101(3) are presumed to be fulfilled in cases of agreements falling under any of the block exemption regulations[52] enacted by the Council or the Commission, in which case the prohibition in Article 101(1) does not apply.[53]

Falling under the category of vertical agreements, selective distribution agreements may be exempt from application of competition law under the Vertical Block Exemption Regulation (hereinafter: VBER),[54] which creates a general presumption of legality for vertical agreements, provided that the market share of

49 The respective part of Article 101(1) of the TFEU reads:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

50 CJEU, C-230/96, *Cabour SA and Nord Distribution Automobile SA v Arnor "SOCO" SARL, supported by Automobiles Peugeot SA and Automobiles Citroën SA.*, 30 April 1998, EU:C:1998:181, para. 48; CJEU, C-39/92, *Petróleos de Portugal – Petrogal SA v Correia Simões & CO. Ld[a] and Correia Sousa & Crisóstomo Ld[a]*,10 November 1993, EU:C:1993:874, para. 68.

51 The exception rules serve as a defence against the finding of an infringement if the parties involved successfully prove that the agreement in question: a) contributes to improving the production or distribution of goods or to promoting technical or economic progress, b) allows consumers a fair share of the resulting benefit, and which does not c) imposes on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; d) affords such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

52 Block exemption regulations are "Regulations, issued by the Commission or by the Council pursuant to Article 101(3) of the TFEU specifying the conditions under which certain types of agreements are exempted from the prohibition of restrictive agreements laid down in Article 101(1) of the TFEU. When an agreement fulfils the conditions set out in a block exemption regulation, the agreement is automatically valid and enforceable. Block exemption regulations exist, for instance, for vertical agreements, R&D agreements, specialisation agreements, technology transfer agreements and car distribution agreements." Glossary of competition terms available at https://www.concurrences.com/en/glossary-of-competition-terms/Block-exemption-regulation (last visited 16 September 2018).

53 Rose, V., Baily, D., (eds.), Bellamy & Child European Union Law of Competition, 7th ed., Oxford: Oxford University Publishing, 2013, p. 214.

54 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices OJ L 102, 2010, 23.4.2010, p. 1.

each of the parties of the agreement does not exceed the 30% threshold and that the agreement does not contain any of the listed hard-core restrictions to competition.[55] Undertakings themselves have to verify whether the agreement that they have entered into is covered by the presumption of legality set out in the VBER. Very helpful in that regard are the Guidelines on Vertical Restraints,[56] a soft law document issued by the Commission which is meant to help undertakings in self-assessing their vertical agreement under EU competition law. Guidelines explain that even if the agreement does not fall within the exemption of VBER, this does not automatically imply that such an agreement is void. If covered by Article 101(1), the agreement may still benefit from an individual exemption under Article 101(3).[57] Following the structure of Article 101, the undertakings of a selective distribution agreement will usually take the following self-assessment steps: (a) They establish their respective market shares. (b) They have to make sure the agreement does not contain any of the hard-core and excluded restrictions set out in VBER. If the relevant market share of each party does not exceed the 30 % threshold and there are no hard-core and excluded restrictions, the agreement is covered by the safe harbour of VBER and the agreement is presumed to be legal. (c) If the 30 % market share threshold is exceeded for either and/or both of the parties, the undertakings should assess whether their agreement falls within Article 101(1). (d) If falling under Art 101(1), it is necessary to examine whether the agreement fulfils the conditions for exemption under Article 101(3).[58]

Whether an SDS will be caught by Article 101 depends on a variety of factors. To begin with, it depends upon the type of SDS put in place. Guidelines on Vertical Restrains differentiate between purely qualitative and quantitative selective distribution, the latter referring to the selection of "dealers only on objective criteria required by the nature of the products," and the application of such criteria does not limit the number of dealers.[59] It is generally considered that purely qualitative selective distribution falls outside the application of Article 101(1) when the criteria developed by the CJEU in cases *Metro I*[60] *and Metro II*[61] have been met.

The first Metro criterion refers to the characteristics of the product. The CJEU ruled that the nature of goods must necessitate setting up an SDS to maintain the quality of products and ensure their proper use.[62] Second, the dealers must be chosen on the ground of objective qualitative criteria applicable to all potential dealers equally and non-discriminatory. Third, the selection criteria must be proportionate, i.e. they should not go beyond what is necessary to achieve the legitimate objective.[63] Almost

55 Article 3(1) of the VBER.
56 Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, pp. 1-46.
57 Guidelines on Vertical Restraints, para. 96.
58 Guidelines on Vertical Restraints, para. 110.
59 Guidelines on Vertical Restraints, para. 175.
60 CJEU, C-26/76, *Metro v Commission (Metro I)*, 25 October 1977, EU:C:1977:167
61 CJEU, C-75/84 *Metro v Commission (Metro II)*, 22 October 1986, EU:C:1986:399
62 The most typical category of such products are hi-technology items requiring specialist advice and appropriate after-sale service, such as cars, cameras, certain electronic equipment, clocks and watches and computers. Whish, R., Baily, D., Competition Law, 7th ed., Oxford: Oxford University Press, 2012, p. 642.
63 CJEU, C-26/76, *Metro I*, EU:C:1977:167, paras. 20-21; Guidelines on Vertical Restraints, para.

a decade into this judgment, the CJEU in *Metro II*[64] acknowledged a limitation to the presumptive legality of an SDS upon the fulfilment of the named criteria. Namely, the CJEU found that an SDS might nevertheless be restrictive where the number of such distribution systems operating on the market negatively influences competition by way of their collective effect. In such a situation, there might be no room left for other forms of distribution systems or, it might result in rigidity of the price structure.[65] With that in mind, the CJEU formulated the fourth requirement to the presumptive legality of an SDS under Article 101(1) – the cumulative effect of SDSs must not preclude other forms of distributions on the market.[66] Although some have criticised the Metro criteria for being, *inter alia*, overly formalistic,[67] they continue to be successfully applied as demonstrated by the structure of the CJEU judgments that followed, including the recent ones discussed below.

However, prior to dealing with those judgments one needs to keep in mind the background to part of the current controversy related to the justification of the SDS for luxury products, which becomes relevant under the first Metro criterion. As already mentioned,[68] back in the 1990s, in the two *Lecrec* judgments[69] the GCEU ruled that the characteristics and the "aura of luxury" of branded products justify setting up an SDS. Its reasoning mentions sophistication and high-quality of luxury cosmetics, and in particular luxury perfumes, and their distinctive "luxury image" which is important in the eyes of consumers. The characteristics of those products cannot be limited to their material characteristics, but also encompass the specific perception that consumers have of them, in particular their "luxury image", which thus arises from their very nature. In the GCEU's view, it is in the interests of consumers seeking to purchase such products that they are appropriately presented in retail outlets and that their luxury image is preserved in that way. The Court reasoned that "criteria aimed at ensuring that the products are presented in retail outlets in a manner which is in keeping with their luxury nature constitute a legitimate requirement of such a kind as to enhance competition in the interests of consumers within the meaning of the case-law."[70] Therefore, in the luxury cosmetics sector, qualitative criteria for the

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64 CJEU, C-75/84, *Metro II*, EU:C:1986:399.

65 CJEU, C-75/84, *Metro II*, EU:C:1986:399, para. 40.

66 Subsequently, the GCEU held that where most suppliers use qualitative SDS that does not necessarily mean they are covered by Article 101(1), as this will depend on the existence of the barriers to entry on the relevant market and the strength of price competition. See GCEU, T-19/92, *Leclerc v Commission (YSL),* 12 December 1996, EU:T:1996:190, para. 182; GCEU, T-88/92, *Leclerc v Commission (Givenchy*), 12 December 1996, EU:T:1996:192, para. 174. For a more detailed account see, Rose, V., Baily, D., (eds.), Bellamy & Child European Union Law of Competition, 7th ed., Oxford: Oxford University Publishing, 2013, pp. 461-462.

67 Witt, A. E., Restrictions on the use of third-party platforms in selective distribution agreements for luxury goods, (2016) European Competition Journal 12, pp. 435-461, especially p. 442 and fn. 35.

68 See Chapter 3.

69 GCEU, T-19/92, *Leclerc v Commission (YSL),* 12 December 1996, EU:T:1996:190; GCEU, T-88/92, *Leclerc v Commission (Givenchy*), 12 December 1996, EU:T:1996:192.

70 GCEU, T-19/92, *Leclerc v Commission (YSL),* EU:T:1996:190, para. 120.

selection of retailers which do not go beyond what is necessary to ensure that those products are suitably presented for sale are in principle not covered by what today is Article 101(1) of the TFEU, in so far as they are objective, laid down uniformly for all potential retailers and not applied in a discriminatory fashion.

While the two *Lecrec* judgments dealt with SDS in the context of offline sales of luxury products, with the rise of the importance of online selling, more recently the CJEU explored the extent to which manufacturers may restrict online sales as a legitimate means of protecting the luxury image of their goods. Particularly important in that regard are judgments in *Pierre Fabre*[71] and, more recently, *Coty*.[72] The former judgment, dealing with an SDS for branded cosmetics and personal care products which contained a clause *de facto* banning internet sales by limiting the sales to pharmacies with the pharmacist present, prompted vivid debates as it appeared to have reversed the findings in the *Lecrec* judgments. What soon proved to be a controversial part of CJEU reasoning in *Pierre Fabre* states that "[t]he aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU."[73] This one-sentence paragraph has triggered many reactions. Because it fails to take account of the consumers' interest in having the option of purchasing prestigious products at higher price, and not necessarily in promotion of lower prices over the product image, the judgment in *Pierre Fabre* has been criticised as a "paternalistic decision".[74] That the focus of the consumers of the luxury products is on the prestigious image of that product (inducing happiness and confidence, being first to have it, having the latest trend, showing off, distinguishing from common), rather than simply on the quality of the product may be concluded based on some consumer behaviour research.[75] In addition, the critics of the *Pierre Fabre* emphasised the more theoretical problem with the lack of logic in the argument that the general internet sale prohibition is restriction by object if not objectively justified, and at the same time, maintaining prestigious image may not constitute justification despite being the foremost reason for putting an SDS in place.[76] In a view of potentially adverse effects the cited paragraph in *Pierre Fabre* could have had upon the future of the luxury brands, the judgment in *Coty* is seen as a welcome step towards recognising the economic arguments and softening down the hardness of *Pierre Fabre*. Along these lines is also the comment that competition law should be dealing with IP rights in a way to protect their substantive core from the scrutiny of

71 CJEU, C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi*, 13 October 2011, EU:C:2011:649.

72 CJEU, C-230/16, *Coty*, EU:C:2017:941.

73 CJEU, C-439/09, *Pierre Fabre*, EU:C:2011:649, para. 46.

74 Winter, R. A., *Pierre Fabre, Coty* and Restrictions on Internet Sales: An Economist's Perspective, (2018) Journal of European Competition Law & Practice 9(3), pp. 183-187, especially 187.

75 According to the Deloitte Luxury Multicountry Survey for Global Powers of Luxury Goods 2017, https://www2.deloitte.com/content/dam/Deloitte/global/Documents/consumer-industrial-products/gx-cip-global-powers-luxury-2017.pdf (last visited 2 August 2018).

76 Buccirossi, P., op. cit., pp. 768-769.

competition law.[77] Therefore, the following pages discuss *Coty* in detail. The analysis evolves around the question of whether a producer of luxury products may by virtue of the SDS prohibit its distributors from selling these products through a third-party internet platform without infringing Article 101 of the TFEU. The answer given by the CJEU suggests that the internet sales of luxury goods need deluxe competition law treatment in order to enable the producers to preserve the deluxe image. However, the situation is not without complexity as explained below.

5. THE FACTS IN COTY

The dispute has arisen out of the long-term business relationship between the company Coty Germany GmbH, which is one of the leading producers of luxury cosmetic products in Germany, and company Parfümerie Akzente GmbH, which acts as an authorised distributor for those products. Distribution on the German market and markets of some other MSs is traditionally carried out in physical stores, and more recently over the internet.[78] Internet sales are made through Parfümerie Akzente's online store[79] and through the platform amazon.de managed by several companies belonging to the Amazon group of companies established in Luxembourg.[80] Coty Germany was not in agreement with the retail via Amazon and requested Parfümerie Akzente to cease using this distribution channel.

Prior to that, the two companies concluded a selective distribution contract which provides that each of the distributor's sales locations must be approved by Coty Germany, which implies compliance with a number of requirements relating to their environment, décor and furnishing. The contract also states that "the décor and furnishing of the sales location, the selection of goods, advertising and the sales presentation must highlight and promote the luxury character of Coty Prestige's brands", what was the earlier company name of the plaintiff.[81] In addition, the contract included a supplemental agreement on internet sales according to which "the authorised retailer is not permitted to use a different name or to engage a third-party undertaking which has not been authorised".[82] Subsequent to entry into force of the VBER,[83] Parfümerie Akzente refused to accept the modifications to the selective distribution contract and the supplemental agreement whereby "the authorised retailer is entitled to offer and sell the products on the internet, provided, however, that that internet sales activity is conducted through an 'electronic shop window' of the authorised store and the luxury character of the products is preserved". Likewise,

77 Schmidt-Kessen, M. J., Selective Distribution Systems in EU Competition and EU Trademark Law: Resolving the Tension, (2018) Journal of European Competition Law & Practice, 9(5), pp. 304-316,

78 CJEU, C-230/16, *Coty*, EU:C:2017:941, paras. 8 and 9.

79 See https://www.parfumdreams.de/ (last visited 15 August 2018).

80 See https://www.amazon.de/gp/help/customer/display.html?ie=UTF8&nodeId=505050 (last visited 15 August 2018).

81 CJEU, C-230/16, *Coty*, EU:C:2017:941, paras. 11 and 12.

82 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 14.

83 OJ L 102, 23 April 2010, p. 1.

the supplemental agreement expressly prohibits the use of a different business name as well as the recognisable engagement of a third-party undertaking which is not an authorised retailer of Coty Prestige.[84]

In the wake of disagreement between the companies, Coty Germany logged a lawsuit against the Parfümerie Akzente before the Regional Court, Frankfurt am Main (*Landgericht Frankfurt am Main*), seeking an order prohibiting the defendant from distributing products bearing the brand at issue via the platform amazon.de. The court of first instance dismissed the application holding that a contractual clause in supplemental agreement is in violation of the German law against the restriction of competition (*Gesetz gegen Wettbewerbsbeschränkungen*) or Article 101(1) of the TFEU, and in particular in the light of the earlier CJEU judgment in *Pierre Fabre*.[85] The national court explained that the aim of preserving a prestige brand image does not justify the introduction of an SDS which by definition restricts competition. It further stated that not only that it does not merit block exemption, but also does not qualify for an individual exemption, since it has not been shown that the general exclusion of internet sales via third-party platforms entails efficiency gains of such a kind as to offset the disadvantages for competition that result from the clause at issue. The national court also considered that such general prohibition was not necessary because there are alternative means less restrictive of competition, such as the application of specific quality criteria for the third-party platforms.[86]

Deciding on the plaintiff's appeal, the Higher Regional Court, Frankfurt am Main (*Oberlandesgericht Frankfurt am Main*) stayed the proceedings seeking assistance by the CJEU in the preliminary ruling proceedings.

6. THE JUDGMENT IN COTY

6.1. The compatibility of SDS for luxury goods with Article 101(1) of the TFEU

The first question addressed by the CJEU related to the compatibility of SDSs, having as their aim the distribution of luxury goods and primarily serving to preserve a "luxury image" of the goods, with Article 101(1) of the TFEU. Essentially, the CJEU ruled in the affirmative. Its reasoning recalls that although an SDS necessarily affects competition, it may nevertheless be compatible with Article 101(1) provided the Metro criteria described above are fulfilled. This entails that dealers are chosen on the ground of qualitative, objective criteria laid down in a non-discriminatory manner, that the nature of the product in question necessitates an SDS to preserve the quality of products and ensure their proper use and, finally, that the selection criteria are proportionate to this objective.[87]

84 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 15.

85 CJEU, C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence, Ministre de l'Économie, de l'Industrie et de l'Emploi*, 13 October 2011, EU:C:2011:649.

86 CJEU, C-230/16, *Coty*, EU:C:2017:941, paras.16-18.

87 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 24.

The CJEU found those criteria to have been met. In particular, in relation to the third Metro criterion, it analysed the necessity of an SDS for luxury goods, invoking its judgment in *Copad*,[88] stemming from trademark protection context, rather than competition law. According to *Copad*, "the quality of luxury goods […] is not just the result of their material characteristics, but also of the allure and prestigious image which bestows on them an aura of luxury. Since luxury goods are high-class goods, the aura of luxury emanating from them is essential in that it enables consumers to distinguish them from similar goods. Therefore, an impairment to that aura of luxury is likely to affect the actual quality of those goods."[89] It is on these grounds that the CJEU found that "the characteristics and conditions of a selective distribution system can, in themselves, preserve the quality and ensure the proper use of such goods,"[90] again referring to *Copad* which relied on a former case law on negative clearance under Article 101(3) and by applying the Metro criteria.[91]

Following that, the CJEU dealt with the controversial paragraph in the *Pierre Fabre*. It attempted to limit that statement to the facts in *Pierre Fabre*, which distinguish that case from *Coty*. Namely, in *Pierre Fabre* a specific contractual clause imposing on authorised distributors in SDS a comprehensive prohibition on the online sale of the contract goods was at issue,[92] while in *Coty* the clause precluded retailers only from selling the contract goods online on third-party platforms which are discernible to the customers. Besides, in *Pierre Fabre* the goods were ordinary hygiene and body cosmetics, whereas in *Coty* the goods were luxurious.[93] In a view of this CJEU's technical manoeuvre, the *Coty* judgment may be seen as a consolidation of the established case law,[94] but the possible understanding might be that second factual distinction reveals CJEU intention to limit the benefits of the *Coty* judgment to luxury goods only.

6.2. The compatibility of the online marketplace ban with Article 101(1) of the TFEU

Having found that the SDS of luxury goods, designed to preserve the luxury image of those goods, is compatible with Article 101(1), provided Metro criteria are fulfilled, the CJEU turned to the legality of the clause prohibiting authorised distributors from using, in a discernible manner, third-party platforms for online sale of those goods.

88 CJEU, C-59/08, *Copad SA v Christian Dior couture SA and others*, 23 April 2009, EU:C:2009:260.

89 CJEU, C-59/08, *Copad*, EU:C:2009:260, paras. 24-26, cited in CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 25.

90 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 26, citing CJEU, C-59/08, *Copad*, EU:C:2009:260, para. 28.

91 CJEU, C-31/80, *NV L'Oréal and SA L'Oréal v PVBA "De Nieuwe AMCK"*, 11 December 1980, EU:C:1980:289, para. 16.

92 Such general prohibition of online sales is considered a hard-core restriction. See e.g. Buccirossi, P., op. cit., pp. 763 and 767.

93 CJEU, C-230/16, *Coty*, EU:C:2017:941, paras. 31-34.

94 Waelbroeck, D., Davies, Z., op. cit., p. 432.

The CJEU applied the same analytical structure to the assessment of the named contractual clause as for the entire SDS. In other words, here again the Metro criteria played the central role. Most sensitive in that regard was the analysis of the proportionality of the measure with the pursued aim. It was necessary to explore whether the prohibition to use third-party marketplaces as online selling points is appropriate prohibition for preserving the luxury image of the goods, and not going beyond what is necessary to achieve that goal. [95]

Noting that an evaluation of the facts of the case is still indispensable,[96] the CJEU found that such a prohibition is in principle appropriate[97] for a number of reasons. Firstly, it noted that such a prohibition provides the supplier with an assurance that his luxury goods will be linked solely with the authorised dealers[98] allowing him to verify that the goods are sold online under the agreed qualitative conditions.[99] Rightly, the CJEU pointed that such a possibility would not exist in relation to third-party platforms due to the lack of a direct contractual relationship between them. This fact prevents the supplier from requiring compliance with the SDS quality conditions,[100] risking the deterioration of the online presentation of the products, which in turn might "harm their luxury image and thus their very character."[101] The CJEU as well pointed out that because such marketplace platforms regularly sell all kinds of goods, they cannot preserve the luxury image of luxury goods. This aim, on the other hand, is achieved when luxury goods are being sold in the online shops of authorised distributors.[102] In addition, as AG Wahl noted, such prohibition serves the purpose of assuring the "identification of origin of the products", which is very important "in the face of the phenomena of counterfeiting and parasitism, which are likely to restrict competition".[103] Although not specifically endorsed by the CJEU, the opinion of AG Wahl remains a valid supportive argument to the CJEU's finding. In fact, a recent OECD study shows that e-commerce is a „major enabler for the distribution and sale of counterfeit and pirated tangible goods as it opens new possibilities to get access to such goods in areas that were traditionally beyond the scope of counterfeiters."[104] This is so because counterfeiters can operate across a number of jurisdictions without being caught, and are able to switch websites instantly without losing their customer base.[105]

Furthermore, the CJEU's motives largely revolve around recognising that the

95 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 43.
96 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 41.
97 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 51.
98 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 44.
99 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 47.
100 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 48.
101 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 49.
102 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 50.
103 AG Wahl, *Coty Germany GmbH v Parfümerie Akzente GmbH*, 26 July 2017, EU:C:2017:603, para. 102.
104 OECD/EUIPO, Trade in Counterfeit and Pitted Goods: Mapping the Economic Impact. (OECD Publishing Paris 2016), p. 35 available at https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/Mapping_the_Economic_Impact_study/Mapping_the_Economic_Impact_en.pdf (last visited 23 September 2018).
105 Loc. cit.

prestigious image is the most important feature of luxury goods in the eyes of the consumers.[106] This conclusion has to be viewed also against the backdrop of the current online market situation. Thus, the CJEU, referring to the results of the 2016 Preliminary Report on the E-commerce Sector Inquiry, confirmed in the 2017 Final Report on the E-commerce Sector Inquiry, sided with the arguments of the Commission and Advocate General Wahl pointing out that, regardless of the growing importance of online marketplaces operated by third parties, the main distribution channel is still the retailers' own online shops.[107]

When it comes to the analysis of proportionality, the CJEU took into account in particular the fact that, under the restriction at issue, the authorised distributors were still allowed to use internet as a selling means. This included selling though their own websites, on condition they have an electronic shop window for the authorised store and they preserve the luxury character of the products. Likewise, unauthorised third-party platforms could have been used as well, so long as the use of such platforms was not discernible to the consumer.[108] It is on this ground that the CJEU distinguished the clause at issue from the absolute ban on online sales found to be incompatible with Article 101 of the TFEU in the *Pierre Fabre* judgment.[109] While *Pierre Fabre* related to a *de facto* absolute ban on online sales, in *Coty* that was not the case. It is clear that both rulings are fact-sensitive and with that in mind, the finding of CJEU in *Coty* should not be understood as endorsing a blanket ban on the use of third-party platforms, as the latter might not always be proportionate to the objective pursued. However, the main proportionality objection that comes to mind – the authorisation to use third-party platforms subject to their compliance with predefined quality conditions – has been rejected by the CJEU as not being equally effective as the prohibition actually used by Coty due to the lack of direct contractual relationship between the suppliers and third-party platforms. The argument used is not all that persuasive, as there might be platforms specializing in the sale of luxury goods and which are consequently likely to meet the qualitative criteria imposed on authorised dealers.[110] All considered, the CJEU found the identified vertical restraint presumably lawful under Article 101(1).

6.3. The legality of the online marketplace ban under the VBER

Lastly, the referring Court asked whether the clause at issue might benefit from the exemption under VBER. In order to fully appreciate the practical implications of the interpretation given by the CJEU, it is necessary to reemphasise that the VBER

106 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 50.

107 Commission Staff Working Document, Preliminary Report on the E-commerce Sector Inquiry, Brussels, 15.9.2016, SWD(2016) 312 final, http://ec.europa.eu/competition/antitrust/sector_inquiry_preliminary_report_en.pdf (last visited 15 September 2018), para. 48; Report from the Commission to the Council and the European Parliament, Final Report on the E-commerce Sector Inquiry, Brussels, 10.5.2017, COM(2017) 229 final, http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf (last visited 15 September 2018), para. 39.

108 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 53.

109 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 52.

110 For a more detailed discussion on this issue, see Witt, A., op. cit., p. 456.

applies only to agreements caught by the prohibition of Article 101(1) TFEU.[111] Because the CJEU in the previous two questions answered that an SDS for luxury products as well as the clause restricting the use of third party platforms are compatible with Article 101(1) as long as Metro criteria are fulfilled, VBER would be applicable only when these criteria would not be met. In other words, if all the conditions were satisfied, the VBER would not be applicable at all and the vertical agreements would be considered compatible with EU competition rules. Conversely, if caught by Article 101(1), an agreement such as the present SDS would be covered by the VBER and could benefit from the block exemption if the parties to the agreement do not exceed the market share threshold defined by the VBER and do not contain any of the hard-core restrictions listed therein.

In relation to SDS, and in particular in the context of online sales, the hard-core restrictions prone to produce most severe damage to competition are listed in Article 4 of the VBER, particularly relevant to the case at hand, are points (b) and (c). Article 4(b) relates to clauses partitioning the market either by territory or by consumer group which may be done through an obligation not to sell the products in question to a certain group of costumers or in certain territories.[112] Article 4(c) on the other hand, relates to a restriction of active[113] or passive[114] sales to end users by members of an SDS operating at the retail level of trade. With that in mind, the referring Court asked whether the clause prohibiting the use of third-party platforms for the distribution of contracted luxury goods, partitions the market by costumer group, or whether it restricts passive sales to end consumers.[115]

The problem underlining these questions arises from the generally accepted understanding that internet sales are a form of passive selling and thus most types of restriction to internet sales are likely to be considered as hard-core restraints invalidating the safe harbour of the VBER.[116] It is in this regard that various forms of restrictions on internet sales become very intriguing, and questionable as to their compatibility with EU competition law. For instance, the Guidelines on Vertical

111 Guidelines on vertical restraints, para. 8.

112 In this regard, an exception is a restriction of sales by the members of SDS to unauthorised distributors within a territory reserved to the supplier, which is considered to be justified by the objectives of an SDS. See Article 4(b)(iii) of the VBER.

113 Guidelines on vertical restraints, para. 51, states: Active sales mean actively approaching individual customers inside another distributor's exclusive territory or exclusive customer group by for instance direct mail or visits; or actively approaching a specific customer group or customers in a specific territory allocated exclusively to another distributor through advertisement in media or other promotions specifically targeted at that customer group or targeted at customers in that territory; or establishing a warehouse or distribution outlet in another distributor's exclusive territory."

114 Guidelines on vertical restraints, para. 51: "Passive sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion in media or on the Internet that reaches customers in other distributors' exclusive territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in non-exclusive territories or in one's own territory, are passive sales."

115 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 64.

116 See Guidelines on Vertical Restraints, para. 52.

restraints state that "within a selective distribution system the dealers should be free to sell, both actively and passively, to all end users, also with the help of the internet. Therefore, the Commission considers any obligations which dissuade appointed dealers from using the internet to reach a greater number and variety of customers by imposing criteria for online sales which are not overall equivalent to the criteria imposed for the sales from the brick-and-mortar shop as a hard-core restriction."[117] The CJEU first made it clear that this was not the case of an online selling ban, such as the one in *Pierre Fabre*. Further, it found that it was impossible for a producer to identify the third-party costumers among the entirety of its online customers."[118] In addition, it held that under certain conditions, the SDS permitted authorised dealers to advertise on third-party platforms, and to use online search engines. Using such search engines, buyers were usually able to find online offers of authorised dealers.[119] With these arguments in mind, the CJEU found that the prohibition at issue does not amount to either the hard-core restriction of the customers, or a restriction on online sales within the meaning of Articles 4(b) and (c) of the VBER.

This finding raised an important question: Is the above exemption under VBER applicable only in cases of SDS of luxury goods? This is not surprising, as the compatibility of the SDS with Article 101(1) rested mainly on the nature of goods, i.e. the appropriateness and proportionately of the measures with the objective of safeguarding the luxury image of goods. Because of that, one may easily be misguided into reading too narrowly the CJEU's judgment in respect of VBER, limiting its exemption to the nature of goods, which "may generate litigation over the prestige of some goods".[120] However, such an interpretation would be incorrect.

First, it should be noted that the Guidelines on Vertical Restraints expressly state that the VBER exempts both qualitative and quantitative SDS irrespective of the nature of the product or the selection criteria.[121] This position is very logical for a variety of reasons, well explained by the Commission in its brief on the *Coty* case. Because the main purpose of the VBER is to provide legal certainty to parties as to the validity of their agreement in relation to Article 101(1) of the TFEU, the assessment of hard-core restrictions should not be dependent upon the nature of goods. In addition, the Commission points out that while Article 4(c) applies specifically to SDS, Article 4(b) applies to other types of vertical agreements as well, and thus the nature and category of goods cannot be of relevance for its application.[122] The repercussions are great, as it may be concluded that online marketplace bans, irrespective of the nature of the goods concerned and, potentially, irrespective of non-selective distribution

117 Guidelines on Vertical Restraints, para. 56.
118 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 66.
119 CJEU, C-230/16, *Coty*, EU:C:2017:941, para. 67.
120 Colangelo, G., and Torti, V., Selective Distribution and Online Marketplace Restrictions under EU Competition Rules after Coty Prestige, (2018) European Competition Journal 14 (1) pp. 81-109, p. 104.
121 Guidelines on Vertical Restraints, para. 176.
122 EU Commission, EU competition rules and marketplace bans: Where do we stand after the *Coty* judgement? (2018) Competition policy brief 4, p. 4.

schemes,[123] are in CJEU's view, not hard-core, i.e. restrictions by object under the VBER.[124] Because marketplace bans are not considered restrictions by object where market share threshold does not exceed 30%, even where parties exceed the market threshold of 30%, such bans will in all likelihood not constitute restrictions by object under Article 101 either.

7. CONCLUSION

In the context of online retail sales of luxury products, economic policies underlying the IP law seem at first sight to run contrary to economic policies inspiring competition law. This is because the control exercised by the producer within its SDS limits the potential for competition. However, upon careful consideration of the fact that in the market segment concerned with luxury product a low price is not the measure of competition, the policies seem perfectly aligned. Maintaining prestige and "aura of luxury" is a form of effective non-price competition benefiting the consumers. Hence, it is desirable to allow SDSs and clauses prohibiting third-party sales via discernible platforms as they well-accommodate present needs of the luxury brand producers in preserving their investment and successfully operating in the current e-commerce environment.

Due to their intrinsic nature, the distribution of luxury goods is best accommodated by establishing an SDS. While for decades this was confirmed by CJEU's case law in both competition and trademark fields, *Pierre Fabre* broke the sequence causing uncertainty to the luxury brand producers. In *Coty*, the CJEU re-established the previous case law by limiting the findings in *Pierre Fabre* to concrete facts of that case, i.e. overall internet sale prohibition. The *Coty* judgments clarifies that when Metro criteria are met, SDS and online marketplace prohibition for luxury goods are not contrary to competition law and fall outside Article 101(1) of the TFEU, not being restrictive either by object or by effect. If Metro criteria are not met, exemption under the VBER is available provided the market share threshold is not exceeded since the clause is not a hard-core restriction. This rule applies irrespective of the nature of the goods. In cases where the 30% market share threshold is exceeded, an individual assessment becomes necessary. At this point one may argue that if an online marketplace ban is not a restriction by object under VBER, no matter the nature of goods, it should not be a restriction by object under 101(1) either, again no matter the nature of goods. Turning to the question in the title of this paper about the deluxe version of competition law

123 Clerckx, S., et al., CJEU Issues Long-Awaited Coty Decision on Luxury Goods Supplier's Online Platform Ban, (2018) *The Licencing Journal* 2, p. 4.

124 Colomo, P., Case C-230/16, Coty Germany GmbH: Common sense prevails, Chillin' Competition blog, 6 December 2017, https://chillingcompetition.com/2017/12/06/c%E2%80%91230-16-coty-germany-gmbh-common-sense-prevails/ (last visited 7 September 2018); Buccirossi, P., op. cit.; Clerkx, S., op. cit.; Wealbroeck, D., Davies, Z., *Coty*, Clarifying Competition Law in the Wake of Pierre Fabre, (2018) Journal of European Competition Law & Practice, 9(7), pp. 431-442; Wijckmans, F., *Coty Germany GmbH v Parfümerie Akzente GmbH*: Possibility in Selective Distribution System to Ban Sales via Third-Party Platforms, (2018) Journal of Competition Law & Practice 9(6), pp. 373-375.

for luxury products, it is apparent that no straightforward answer may be given at this point. Such understanding would practically erase a distinct competition law treatment of luxury and non-luxury goods, contrary to what *Coty* seems to suggest. However, the conundrum created is rather a theoretical concern. For all practical purposes, it is may be seen as a hands-off competition policy approach to luxury goods. This should ideally benefit the luxury brand producers who will attempt to put in place a carefully designed SDS intended to preserve its brand prestige. However, the issue of online sales in competition law is far from being solved as demonstrated by recent *Asics* case before the German *Bundeskartellamt* and *Bundesgerichtshof* finding the prohibition on the use of price comparison sites to be restrictive by object, due to the fact that the goods were non-luxury.[125] This brings us back to our initial question about the deluxe version of competition law for luxury products. It became apparent by now that no straightforward answer may be given. After *Coty*, it is certain that only luxury goods enjoy the deluxe competition law treatment in relation to third-party online platform bans. For eventual spill-over effects, we will have to wait for new rulings.

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Sažetak

INTERNETSKA DISTRIBUCIJA LUKSUZNIH PROIZVODA: POSTOJI LI *DE LUXE* INAČICA PRAVA TRŽIŠNOG NATJECANJA EU-A?

Zbog svojih posebnih odlika, tržište luksuznih proizvoda područje je zanimanja pravnika kao i drugih stručnjaka poput ekonomista ili sociologa. Te odlike imaju ključnu ulogu u pravnom uređenju toga tržišta. Polazeći od prava tržišnog natjecanja, valja imati na umu da je analiza u okviru članka 101. UFEU-a nepotpuna nedostaje li osvrt na politike i pravila prava intelektualnog vlasništva. S porastom važnosti internetske prodaje, nova pitanja postavljaju se pred tijela nadležna za tržišno natjecanje, poput zakonitosti raznih vrsta *online* ograničenja u okviru sustava selektivne distribucije. Oslanjajući se na pristup koji kombinira pravo intelektualnog vlasništva i pravo tržišnog natjecanja, ovaj rad nudi uvid i komentar prakse EU-a s prvenstvenim fokusom na noviju presudu Suda EU-a u predmetu *Coty*. Kompleksnost interakcije među različitim pravilima i izuzetcima u pravu tržišnog natjecanja posebno je očigledna u tom predmetu. S obzirom na ograničenost presude na konkretne okolnosti, presuda u predmetu *Coty* može poslužiti kao razjašnjenje situacije u odnosu na *de luxe i*načicu prava tržišnog natjecanja samo za određene zabrane online prodaje unutar sustava selektivne distribucije, dok će se rasprava i razvoj nacionalne prakse nastaviti u očekivanju novih pojašnjenja sa Suda EU-a.

Ključne riječi: *pravo EU-a; tržišno natjecanje; intelektualno vlasništvo; žig; luksuzni proizvod; internet.*

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Zussamenfassung

LUXUSPRODUKTE IM ONLINE-VERTRIEB: GIBT ES EINE DELUXE VERSION DES EU-WETTBEWERBSRECHTS?

Der Markt für Luxusgüter ist aufgrund seiner Besonderheiten interessant sowohl für die Juristen als auch für andere Berufe, wie Wirtschaftler und Soziologen. Die Charakteristiken der Luxusgüter spielen eine wichtige Rolle bei der rechtlichen Regulierung des Marktes. Obwohl man dabei immer vom Wettbewerbsrecht ausgeht, die Bewertung des unter Art.101 AEUV fallenden wettbewerbswidrigen Verhaltens kann nicht vorgenommen werden, ohne auf die Grundsätze und Regeln des Rechts des geistigen Eigentums zurückzugreifen. Mit dem Anstieg des Umsatzes im *Online*-Handel wurden Wettbewerbsbehörden und Berufungsgerichte mit neuen Fragestellungen konfrontiert, beispielsweise mit der Legalität verschiedener Restriktionen im Internet bezüglich des selektiven Vertriebssystems. Durch den kombinierten Ansatz, der das Recht des geistigen Eigentums und das Wettbewerbsrecht einbezieht, bietet dieser Beitrag eine Einsicht in und einen Kommentar der EU-Rechtsprechung, wobei man auf die *Coty*-Entscheidung des EuGH besonderen Wert legt. Die Probleme des Zusammenspiels von Regeln und Ausnahmen des Wettbewerbsrechts kommen im Fall *Coty* besonders in den Vordergrund. Wegen des beschränkten Sachverhalts kann das *Coty*-Urteil zur Erklärung der Deluxe Wettbewerbsrechtbehandlung nur bei manchen *Online*-Verkaufsverboten im Rahmen des selektiven Vertriebssystems dienen. Es wird sicherlich weitere Diskussionen und nationale Rechtsprechungen bezüglich anderer wettbewerbsrechtbezogenen Restriktionen im Internet geben, die der EuGH erläutern wird.

Schlüsselwörter: *EU-Recht; Wettbewerbsrecht; geistiges Eigentum; Marke; Luxusprodukte; Internet; selektiver Vertrieb; vertikale Vereinbarungen.*

Riassunto

LA DISTRIBUZIONE VIA INTERNET DEI PRODOTTI DI LUSSO: ESISTE UNA VERSIONE *DE LUXE* DEL DIRITTO DELLA CONCORRENZA IN UE?

In ragione delle sue forme particolari, il mercato dei prodotti di lusso è un campo di interesse per i giuristi come per altri esperti, quali gli economisti ed i sociologi. Tali specificità giocano un ruolo centrale nella disciplina di tale mercato. Partendo dal diritto della concorrenza, occorre tenere in conto che l'analisi nell'ambito dell'art.

101 del TFUE è parziale, se manca una riflessione sulle politiche e le regole del diritto della proprietà intellettuale. Con il crescere dell'importanza della vendita in rete nuove questioni si presentano dinanzi agli organi competenti per la concorrenza, come quella della legalità di alcuni tipi di limitazioni *online* nell'ambito del sistema della distribuzione selettiva. Appoggiandosi all'approccio che combina il diritto della proprietà intellettuale ed il diritto della concorrenza, il presente lavoro offre accesso e commento della prassi dell'UE con primaria attenzione per la recente decisione della Corte di Giustizia dell'UE nel caso *Coty*. La complessità dell'interazione tra le diverse regole ed eccezioni nel diritto della concorrenza è particolarmente evidente in questo caso. In ragione della limitazione della decisione alle circostanze concrete, la sentenza nel caso *Coty* può servire a chiarire la situazione rispetto alla versione *de luxe* del diritto della concorrenza soltanto con riguardo a certi divieti di vendita online all'interno del sistema di distribuzione selettiva; mentre, il dibattito e lo sviluppo della prassi nazionale continueranno rispetto alle altre limitazioni relative agli acquisti in rete, rimanendo in attesa di nuovi chiarimenti della Corte dell'UE.

Parole chiave: *diritto dell'UE; concorrenza; proprietà intellettuale; marchio; prodotto di lusso; internet; distribuzione selettiva; accordi verticali.*

MANAGING INNOVATIVE COMPANY'S CAPITAL: THE CASE OF PERSONAL DATA TRANSFER

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Summary

Not many areas of European law proved themselves as controversial as data protection. The only case in which this issue could become more debatable is if personal data crosses EU borders. The transfer of personal data to third countries proved its disputed status when the CJEU invalidated the Safe Harbour Agreement, one of the frameworks for the transfer of personal data to the US and several more came under the CJEU's scrutiny, including the Safe Harbour Agreement's successor, the Privacy Shield Agreement. It has been suggested that some of these instruments for transfer need to be repealed or amended in order to be brought in conformity with the GDPR. The paper, after analysing each of the grounds for transfer which may be used by EU companies, argues that regardless of the recent entry into force of the GDPR, the data protection "revolution" is still not complete, at least as far the transborder data flows are concerned.

Keywords: *data protection; EU law; General Data Protection Regulation; privacy; transborder data flows; transfer of data.*

1. INTRODUCTION

In the wake of Snowden revelations in 2013 on mass surveillance and collection of data, the issue of privacy protection, particularly the transfer of personal data, was brought to the attention of the European legal public. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection

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Regulation, hereinafter: the GDPR)[1], effective from May 2018, maintained the rules of personal data transfer from its predecessor in most part. Regardless of the fact that GDPR interventions in data transfer rules were not as extensive as in certain other areas, this matter remains to be one of the most controversial ones in data protection. Grounds for the transfer of personal data to third countries enacted under the GDPR's predecessor are still in force, albeit their validity and compliance with the new regime has been brought into question. The aim of this paper is to analyse the grounds which may be invoked by EU companies to transfer data outside the EEA and outline the development of these instruments in recent years, especially after the GDPR entered into force; compare the transfer of personal data from EU companies to non-EEA companies with the transfer between EEA companies, as well as to pinpoint certain issues which might be problematic and still require the attention of the EU legislator and the CJEU.

2. INNOVATIVE COMPANIES AND DATA

The rapid development of information technology in the last two decades has significantly altered the way businesses operate. There is virtually no part of the business landscape that has not been affected by technological advancement in terms of browsing, collecting, and storing information, marketing, offering and acquiring goods and services, completing transactions, communicating and interacting etc. However, innovative companies are the ones which managed to take advantage of information progress for leveraging large amount of data into revenue and making data the foundation of their income, since data is considered to be the commodity of the 21st century.[2]

In such environment, data transfer becomes a part of daily activities of companies, especially innovative ones. To borrow economic terminology, data represents a nonrivalrous good, meaning that its "consumption" by one person does not prevent simultaneous consumption by another.[3] Data as a nonrivalrous good, sometimes

1 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016, pp. 1-88; Corrigendum to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016), OJ L 127, 23.5.2018, pp. 2-5.

2 See Janal, R., Fishing for an Agreement: Data Access and the Notion of Contract, in: Lohsse, S./Schulze, R./Staudenmayer, D. (eds.), Trading Data in the Digital Economy: Legal Concepts and Tools, Münster Colloquia on EU Law and the Digital Economy III, Baden-Baden, Nomos, 2017, p. 283.

3 See Lohsse, S./Schulze, R./Staudenmayer, D., Trading Data in the Digital Economy: Legal Concepts and Tools, in: Lohsse, S./Schulze, R./Staudenmayer, D. (eds.), Trading Data in the Digital Economy: Legal Concepts and Tools, Münster Colloquia on EU Law and the Digital Economy III, Baden-Baden, Nomos, 2017, p. 15; Zimmer, D., Property Rights Regarding Data, in: Lohsse, S./Schulze, R./Staudenmayer, D. (eds.), Trading Data in the Digital Economy: Legal Concepts and Tools, Münster Colloquia on EU Law and the Digital Economy III, Baden-

referred to as informational good, may be subdued to a binary information, which makes it, by its very nature, susceptible to being easily transferred. The described setting of large amount of data flowing from one subject to another facilitates and multiplies data abuses and privacy violations.

3. DATA TRANSFERS

The GDPR represents the principal, horizontal source of EU law on data protection effective from 25 May 2018, thus replacing its predecessor, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter: the DPD)[4]. The conditions under which EU companies may transfer data to third countries or international organisations will differ depending on whether that data is being transferred to the controllers and processors outside of the EEA or within the EEA. In both cases, only personal data of natural persons is protected.[5] That encompasses personal data of companies employees, as well.[6] The fact that information is connected to professional activity does not mean it will be stripped of protection as personal data. Such information encompasses for instance names and surnames of persons appearing in minutes from a meeting,[7] record of employees working time,[8] information on which expert is author of a particular comment made by external experts group,[9] names and surnames mentioned on a reserve list for an open competition and individual decisions concerning the appointment of officials,[10] surnames belonging to members of decision-making bodies who participated in the meetings of those bodies in connection with the exercise of their public duties which were published in the OJ or on the internet.[11]

3.1. Transfers of Data Outside the EEA

The transfer of personal data to third countries[12] and international organisations is regulated by Chapter V of the GDPR (previously Chapter IV of the DPD). The

Baden, Nomos, 2017, p. 105.

4 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, pp. 31-50.

5 Both the GDPR and the DPD protect only natural persons' personal data. See Art. 1(1) of the GDPR and Art. 1(1) of the DPD.

6 However, the notion of natural person's personal data does not necessarily cover personal data of a sole director of a company which is included in the company register. See judgment of 9 March 2017 in *Manni*, C-39/15, EU:C:2017:197.

7 Judgment of 29 June 2010, *Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68-70.

8 Judgment of 30 May 2013, *Worten*, C-342/12, EU:C:2013:355, paragraph 19.

9 Judgment of 16 July 2015, *ClientEarth*, C-615/13 P, EU:C:2015:489, paragraphs 29-34.

10 Judgment of 7 July 2011, *Jordana*, T-161/04, EU:T:2011:337, paragraph 91.

11 Judgment of 11 June 2015, *McCullough*, T-496/13, EU:T:2015:374, paragraph 66.

12 The term third country refers to countries other than EU Member States, Norway, Liechtenstein and Iceland.

territorial scope of the GDPR is set rather broadly. It applies to data processed by an establishment of a controller[13] or a processor[14] in the EU regardless of whether the processing takes place on the territory of the EU. It also covers the processing of personal data of data subjects who are in the EU by a controller or processor not established in the EU, if the processing activities are related to the offering of goods or services, irrespective of whether payment of the data subject is required, to such data subjects in the Union or to the monitoring of their behaviour as far as their behaviour takes place within the EU.[15] However, the ambit of chapter on transfer of personal data to third countries and international organisations concerns only data which is being exported from the EU to a third country or an international organisation. It does not cover the transfer of personal data of EU data subjects which are being transferred by non-EEA based controllers and processors to third country or international organisation.[16] Such limitation of the scope of provisions on cross-border data transfer leaves personal data of EU data subjects processed by non-EEA based controllers and processors out of reach from GDPR protection when it comes to the transfer of such data.

As a principle, the transfer of personal data to third countries and international organisations is forbidden.[17] However, there are three possible exceptions or grounds for the transfer of personal data to third countries and international organisations which were taken over from the DPD. Those are: adequacy decisions, appropriate safeguards and derogations. EU companies may transfer personal data to third countries or international organisations if one of those grounds exists in a particular case.

3.1.1. Adequacy decisions

Adequacy decisions are European Commission decisions that a third country, a

13 GDPR defines controller as a natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law. Art. 4(7) of the GDPR. See also Art. 2(d) of the DPD. The definition of the controller was taken from the Council of Europe Convention No. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data concluded in 1981 with a slightly different wording. Council of Europe, Convention No. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data, 28.1.1981, Strasbourg, Art. 2(d), available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108 (31.8.2018).

14 Processor is a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller. Art. 4(8) of the GDPR. See also Art. 2(e) of the DPD.

15 Art. 3(1) and (2) of the GDPR. By protecting EU data extraterritorially, EU data protection rules are considered to set the global standard of data protection. See Suda, Y., The Politics of Data Transfer, Transatlantic Conflict and Cooperation over Data Privacy, New York, London, Routledge, 2018, pp. 113-115; Bradford, A., The Brussels Effect, Northwestern University School of Law, Vol. 107, 1/2012, pp. 22-26. Compared to the GDPR, the DPD set the scope of application more narrowly. See Art. 3 of the DPD.

16 See the wording of Recital 101 of the GDPR Preamble.

17 Art. 44 of the GDPR. The same general principle was prescribed by Art. 25(1) od the DPD.

territory or one or more specified sectors within that third country, or the international organisation ensures an adequate level of protection.[18] If the European Commission reaches an adequacy decision, an EU company does not have to seek authorisation or fulfil additional conditions in order to transfer data to third country or international organisation. Currently in force are adequacy decisions with respect to eleven countries: Andorra,[19] Argentina,[20] Faroe Islands,[21] Guernsey,[22] Israel,[23] Isle of Man,[24] Jersey,[25] New Zealand,[26] Switzerland,[27] Uruguay[28] and the US.[29] With respect to Canada, the EU recognised that Personal Information Protection and Electronic Documents

18 Art. 45(1) of the GDPR. See also Art. 25(1) of the DPD.

19 2010/625/EU: Commission Decision of 19 October 2010 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data in Andorra (notified under document C(2010) 7084) Text with EEA relevance, OJ L 277, 21.10.2010, pp. 27-29.

20 2003/490/EC: Commission Decision of 30 June 2003 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data in Argentina (Text with EEA relevance), OJ L 168, 5.7.2003, pp. 19-22.

21 2010/146/: Commission Decision of 5 March 2010 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection provided by the Faeroese Act on processing of personal data (notified under document C(2010) 1130) (Text with EEA relevance), OJ L 58, 9.3.2010, pp. 17-19.

22 2003/821/EC: Commission Decision of 21 November 2003 on the adequate protection of personal data in Guernsey (Text with EEA relevance) (notified under document number C(2003) 4309), OJ L 308, 25.11.2003, pp. 27-28.

23 2011/61/EU: Commission Decision of 31 January 2011 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data by the State of Israel with regard to automated processing of personal data (notified under document C(2011) 332) Text with EEA relevance, OJ L 27, 1.2.2011, pp. 39-42.

24 2004/411/EC: Commission Decision of 28 April 2004 on the adequate protection of personal data in the Isle of Man, OJ L 151, 30.4.2004, pp. 48-51.

25 2008/393/EC: Commission Decision of 8 May 2008 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data in Jersey (notified under document number C(2008) 1746) (Text with EEA relevance), OJ L 138, 28.5.2008, pp. 21-23.

26 2013/65/EU: Commission Implementing Decision of 19 December 2012 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data by New Zealand (notified under document C(2012) 9557) Text with EEA relevance, OJ L 28, 30.1.2013, pp. 12-14.

27 2000/518/EC: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data provided in Switzerland (notified under document number C(2000) 2304) (Text with EEA relevance.), OJ L 215, 25.8.2000, pp. 1-3.

28 2012/484/EU: Commission Implementing Decision of 21 August 2012 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data by the Eastern Republic of Uruguay with regard to automated processing of personal data (notified under document C(2012) 5704) Text with EEA relevance, OJ L 227, 23.8.2012, pp. 11-14.

29 Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176), C/2016/4176, OJ L 207, 1.8.2016, pp. 1-112.

Act (PIPEDA) provides an adequate level of protection. Since PIPEDA is a federal law which concerns only private-sector organisations, Canada adequacy decision is limited to transfer of data solely to these companies.[30] European Commission is at the moment conducting negotiations for adequacy decisions with respect to South Korea and Japan.[31]

Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (hereinafter: the Privacy Shield) is an adequacy decision with respect to the US which replaced the previous adequacy decision, i.e. Commission Decision 2000/520 of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (hereinafter: the Safe Harbour)[32] in July 2016. The Safe Harbour was invalidated by the CJEU in the proceeding brought by Mr. Schrems against Irish Data Protection Commissioner. In the light of the Snowden revelations in 2013, Mr. Schrems sought from Facebook Ireland, a subsidiary of Facebook Inc., to stop transferring his personal data to a server in the US. After the Data Protection Commissioner rejected his claim, Mr. Schrems instituted the proceedings before the Irish High Court which sought clarification from the CJEU. The CJEU established that Safe Harbour cannot prevent national supervisory authorities from calling into question the level of privacy protection in the US and established that its provisions do not contain sufficient finding according to which the level of protection in the US would be essentially equivalent to the one in the EU, especially taking into account the US intelligence services overreach in collecting and processing data.[33]

In addition to Art. 1 of the Safe Harbour, Art. 3 was found problematic since it prevented national supervisory authorities from examining claims of persons calling into question the level of protection in the third country to which the Commission decision refers to. Given that Arts. 2 and 4 of the Safe Harbour are inseparable from Arts. 1 and 3, the entire decision was invalidated.[34]

30 2002/2/EC: Commission Decision of 20 December 2001 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data provided by the Canadian Personal Information Protection and Electronic Documents Act (notified under document number C(2001) 4539), OJ L 2, 4.1.2002, pp. 13-16.

31 The European Union and Japan agreed to create the world's largest area of safe data flows, 17 July 2018, European Commission, available at http://europa.eu/rapid/press-release_IP-18-4501_en.htm (accessed 27.8.2018); Exchanging and Protecting Personal Data in a Globalised World, 10.1.2017, COM(2017) 7 final, European Commission, available at https://ec.europa.eu/newsroom/document.cfm?doc_id=41157 (accessed 27.8.2018).

32 Commission Decision 2000/520 of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, notified under document number C(2000) 2441, OJ L 215, 25.8.2000, pp. 7-47.

33 Judgment of 6 October 2015, *Maximillian Schrems v Data Protection Commissioner*, C-362/14, EU:C:2015:650.

34 Judgment *Maximillian Schrems v Data Protection Commissioner*, C-362/14, EU:C:2015:650,

Both the Safe Habour Decision and the Privacy Shield are based on a mechanism according to which a US company which seeks to receive data collected in the EU has to self-certify[35] before the US Department of Commerce and both of them rely on seven principles (Notice, Choice, Onward Transfers, Access, Security, Data Integrity, and Enforcement).[36] The main improvements in the Privacy Shield concern the Notice Principle, Onward Transfer Principle and Recourse, Enforcement and Liability Principle. Notice principle requires companies to provide data subjects with greater quantity of information. Onward Transfer Principle prescribes the obligation for companies transferring data to third party controllers to conclude contracts with these third parties which will oblige them to ensure the same level of protection as the Privacy Shield Principles, as well as to process data only for limited and specified purposes. If the company processes data using a third party agent, a GDPR compliant agreement has to be concluded with the third party agent. Under Recourse, Enforcement and Liability Principle the position of data subjects has been strengthened. Data subjects may file complaints before independent dispute resolution bodies and supervisory authorities. The US Department of Commerce also has a role in resolving complaints. Data subjects have at their disposal binding arbitration by a "Privacy Shield Panel" of at least 20 arbitrators chosen by the US Department of Commerce and the European Commission.

The proceedings of rendering the adequacy decision has changed to some extent with the GDPR. First of all, GDPR prescribes with more scrutiny which elements should be taken into consideration. According to Art. 45(2) the Commission should particularly take into account three categories of elements. The first one is the rule of law, respect for human rights and fundamental freedoms, relevant general and sectoral legislation, including the one concerning public security, defence, national security and criminal law and the access of public authorities to personal data, as well as the implementation of such legislation, data protection rules, professional rules and security measures, including rules for the onward transfer of personal data to another third country or international organisation which are complied with in that country or international organisation, case law, as well as effective and enforceable data subject rights and effective administrative and judicial redress for the data subjects whose personal data are being transferred. The second one is the existence and effective functioning of one or more independent supervisory authorities in the third country or to which an international organisation is subject, with responsibility for ensuring and enforcing compliance with the data protection rules, including adequate enforcement

paragraphs 79-106.

35 On 18 September 2018, there are 3739 active companies certified under the Privacy Shield. See Privacy Shield Framework, available at: https://www.privacyshield.gov/list (18.9.2018).

36 The Privacy Shield was supplemented with 16 supplemental principles: 1. Sensitive Data, 2. Journalistic Exceptions, 3. Secondary Liability, 4. Performing Due Diligence and Conducting Audits, 5. The Role of the Data Protection Authorities, 6. Self-Certification, 7. Verification, 8. Access, 9. Human Resources Data, 10. Obligatory Contracts for Onward Transfers, 11. Dispute Resolution and Enforcement, 12. Choice – Timing of Opt-Out, 13. Travel Information, 14. Pharmaceutical and Medical Products, 15. Public Record and Publicly Available Information, 16. Access Requests by Public Authorities.

powers, for assisting and advising the data subjects in exercising their rights and for cooperation with the supervisory authorities of the Member States. The third one are international commitments the third country or international organisation has entered into, or other obligations arising from legally binding conventions or instruments as well as from its participation in multilateral or regional systems, in particular in relation to the protection of personal data. The DPD in Art. 25(2) mentioned the nature of the data, purpose and duration of the proposed processing operation or operations, country of origin and country of final destination, rules of law - both general and sectoral - in force in the third country in question and the professional rules and security measures which are complied with in that country.

Furthermore, the GDPR has introduced a mechanism for periodic review at least every four years of the level of privacy protection in the third country or international organisation with respect of which an adequacy decision was enacted.[37] All of the adequacy decisions were enacted under the DPD. Even though the GDPR does not contain the sunset clause concerning adequacy decisions brought under the previous DPD regime,[38] it has been argued that these decisions will have to be replaced or amended to be brought in conformity with the GDPR.

The validity of the Privacy Shield has been called into question before the General Court of the EU. Digital Rights Ireland, a non-profit organisation for protecting internet freedoms challenged the Privacy Shield by stating that it is contrary to the EU Charter of Fundamental Rights. However, the applicant did not have standing.[39] Another non-profit organisation from France, La Quadrature du Net instituted the proceedings challenging the Privacy Shield, which is still ongoing, claiming that the level of data protection in the US is not essentially equivalent to the level of protection in the EU.[40] Apart from being challenged before the CJEU, the Privacy Shield was justifiably criticised for not tackling some of the Safe Harbour major concerns. This primarily refers to the fact that Privacy Shield did not solve the matter of intelligence services collecting data indiscriminately, in bulk and without the data subject's knowledge.[41]

In *Schrems*, the CJEU explained that assessing adequacy of a third country means establishing whether data protection rules in third country are "essentially equivalent" to data protection in the EU where privacy and data protection are raised to the highest level of protected fundamental rights by Arts. 7 and 8 of the Charter of Fundamental Rights of the European Union.[42] Essential equivalence thus requires

37 Art. 45(3) of the GDPR.

38 Art. 45(9) of the GDPR.

39 Judgment of 22 November 2011, *Digital Rights Ireland v Commission*, T-670/16, EU:T:2017:838.

40 Order of 25 October 2016, *La Quadrature du Net and Others v Commission*, T-738/16.

41 See Kuner, C., Reality and Illusion in EU Data Transfer Regulation Post Schrems, German Law Journal, Vol. 18, 4/2017, p. 912; Schrems, M., The Privacy Shield is a Soft Update of the Safe Harbor, Foreword, European Data Protection Law Review, 2/3016, p. 3; WP 238, Article 29 Working Party Opinion 01/2016 on the EU – U.S. Privacy Shield draft adequacy decision, 13.4.2016, available at: https://www.pdpjournals.com/docs/88536.pdf (31.8.2018).

42 Charter of Fundamental Rights of the European Union, OJ C 202, 7 June 2016. See also Boehm, F., Information Sharing and Data Protection in the Area of Freedom, Security and Justice, Towards Harmonised Data Protection Principles for Information Exchange at EU-level,

that a third state ensures a high level of protection of fundamental rights which is established based on the content of the applicable rules in that country resulting from its domestic law or international commitments and practice, as well as effective means of protecting fundamental rights. Reasons of national security, public interest or law enforcement requirements should not have primacy over data protection and privacy. Self-certification is not in itself contrary to essential equivalence. However, there has to be a mechanism for establishing and effective detection, supervision and punishment of infringements of the rules ensuring the protection of fundamental rights, in particular the right to respect for private life and the right to protection of personal data. Furthermore, essential equivalence has to be periodically checked by the Commission.[43] It is not entirely clear how the US, based on these conditions and extensive requirements from Art. 45(2) of the GDPR, can be assessed as a country ensuring an adequate level of data protection. The US has a completely different approach to protecting data compared to the EU. What is more, the US legal system does not provide for the horizontal protection of data, but rather a sectoral one and the enforcement of data protection is not as effective as the one in the EU, especially for non-US citizens.[44]

3.1.2. Appropriate Safeguards

If the EU company wants to transfer data to a third country or an international organisation which is not covered by the adequacy decisions, it may do so if it provides appropriate safeguards and under the condition that enforceable rights and effective

Cham, Springer, 2012, pp. 12-173; Boehm, F., Assessing the New Instruments in EU-US Data Protection Law for Law Enforcement and Surveillance Purposes, European Data Protection Law Review, 2/2016, pp. 178-190; González Fuster, G., The Emergence of Personal Data Protection as a Fundamental Right of the EU, Cham, Springer, 2014.

43 Judgment *Maximillian Schrems v Data Protection Commissioner*, C-362/14, EU:C:2015:650, paragraphs 73-89. For more on essential equivalence and adequacy see Kuner, C., op. cit., pp. 895-902; Roth, P., Adequate Level of Data Protection in Third Countries Post-*Schrems* and under the *General Data Protection Regulation*, Journal of Law, Information and Science, Vol. 25, 1/2017, pp. 49-67; Essentially Equivalent, A comparison of the legal orders for privacy and data protection in the European Union and United States, Sidley Report, January 2016, available at: https://www.sidley.com/-/media/publications/essentially-equivalent---final.pdf?la=en (31.8.2018).
Besides the "essential equivalence", a standard developed by the CJEU, Art. 29 Working party established "European essential guarantees" standard which is to be differentiated from "essential equivalence" and provide guidance when assessing if an interference with a fundamental right can be justified and applied to all data processing operations. See WP 237, Working Document 01/2016 on the justification of interferences with the fundamental rights to privacy and data protection through surveillance measures when transferring personal data (European Essential Guarantees), Art. 29 WP, 13 April 2016, available at: http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2016/wp237_en.pdf (31.8.2018.)

44 Coley, A., International Data Transfers: The Effect of Divergent Cultural Views in Privacy Causes Déjà vu' in Hasting Law Journal, Vol. 68, 2017, pp. 1118 -1129; On data protection in the US see also Milanovic, M., Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age, Harvard International Law Journal, Vol. 56, 1/2015, pp. 88-89; Weber, R. H., Staiger, D., Transatlantic Data Protection in Practice, Cham, Springer, 2017, pp. 39-61.

legal remedies are available for data subjects.[45] Appropriate safeguards are binding corporate rules (hereinafter: the BCRs), contractual clauses, agreements between public authorities, approved codes of conduct and certification mechanisms.

3.1.2.1. Contractual Clauses

Contractual clauses may be standard contractual clauses or ad hoc clauses. Standard contractual clauses may be adopted by the European Commission in accordance with the examination procedure referred to in Art. 93(2) of the GDPR[46] or adopted by a national supervisory authority and approved by the European Commission under the same procedure[47]. Contractual clauses adopted by a national supervisory authority and approved by the European Commission were introduced as a ground for transfer with the GDPR. Ad hoc contractual clauses are authorised by the competent supervisory authority in accordance with the consistency mechanism[48]. Data transfers based on approved standard contractual clauses and approved ad hoc clauses do not require any further authorisation by supervisory authority.

Standard contractual clauses adopted by the Commission are the most commonly used ground for data transfer, not just among contractual clauses but in general. It has been suggested that standard contractual clauses offer the most efficient and reliable way for companies transferring data to and from the US.[49] Standard contractual clauses may be inserted into a wider contract and additional safeguards may be added provided that they do not contradict the provisions of standard contractual clauses.[50] European Commission has adopted four sets of standard contractual clauses decisions based on Art. 26(2) of the DPD, which are still valid until amended, repealed or replaced.[51] The first set adopted in Decision 2001/497/EC of 15 June 2001 on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC European Commission is intended for data transfers from EU data controller to non-EEA data controller (Set I controller-controller).[52] Decision 2001/497/EC was amended by Decision 2004/915/EC as regards the introduction of an alternative set of standard contractual clauses for the transfer of personal data to third countries which introduced a new set of model clauses for transfers from EU controllers to non-EEA controllers (Set II controller-controller).[53] The two sets differ on matters of liability and

45 Art. 46(1) of the GDPR.
46 Art. 46(2)(c) of the GDPR
47 Art. 46(2)(d) of the GDPR
48 Art. 46(3) of the GDPR.
49 Weber, R. H., Staiger, D., op. cit., p. 35.
50 Recital 109 of the GDPR Preamble.
51 Art. 46(5) of the GDPR.
52 2001/497/EC: Commission Decision of 15 June 2001 on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC (notified under document number C(2001) 1539), OJ L 181, 4.7.2001, pp. 19-31.
53 2004/915/EC: Commission Decision of 27 December 2004 amending Decision 2001/497/EC as regards the introduction of an alternative set of standard contractual clauses for the transfer of personal data to third countries (notified under document number C(2004) 5271), OJ L 385, 29.12.2004, pp. 74-84.

third-party beneficiary rights. The Set I controller-controller model clauses, prescribes that the data exporter and the data importer are jointly and severally liable for the damage suffered by the data subject as a consequence of a breach of data importer and data exporter's obligations. Under Set I controller-controller, data subjects who are third-party beneficiaries may enforce clauses prescribing obligations of the data exporter and importer. The liability regime in Set II controller-controller is based on due diligence obligations under which the data exporter and the data importer are liable towards the data subjects for their breach of contractual obligations. In exercising third-party beneficiary rights by data subjects, data exporters have a more active role. If the data subject alleges breach by the data importer, the data subject must first request the data exporter to take appropriate action to enforce his rights against the data importer. If the data exporter does not do so within a reasonable period (which under normal circumstances would be one month), the data subject may enforce his rights against the data importer directly. The data exporter is also liable for not using reasonable efforts to determine that the data importer is able to satisfy its legal obligations under the clauses (*culpa in eligendo*) and the data subject can take action against the data exporter in this respect. EU companies which perform controller processing activities wishing to transfer data to non-EU controller may choose between the two sets. Set II seems to be less burdensome for EU companies wishing to transfer data outside of the EEA since it does not prescribe joint and several liability.[54]

The European Commission adopted two decisions intended for transfers of personal data from EU controller to non-EEA processor. Set I controller-processor standard contractual clauses from Decision 2002/16/EC of 27 December 2001 on standard contractual clauses for the transfer of personal data to processors established in third countries, under Directive 95/46/EC[55] cannot be used any longer, but remains to be in force for transfers agreed prior to 15 May 2010. Set II controller-processor enacted with the Decision 2010/87/EU of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC[56] of the European Parliament and of the Council replaced the previous set. Set I controller-processor prescribed primary liability of the data exporter, while the Set II controller-processor, similarly to Set II controller-controller, provides that the data exporter and the data importer are liable for their own breach. Set II controller-processor contains another crucial difference compared to Set I

54 For a similar reasoning see Kong, L., Data Protection and Transborder Data Flow in the European and Global Context, The European Journal of International Law, Vol. 21, 2/2010, p. 451; Kuan Hon, W., Data Localization Laws and Policy, The EU Data Protection International Transfers Restriction Through a Cloud Computing Lens, Cheltenham, Northampton, Edward Elgar, 2017, p. 190.

55 Decision 2002/16/EC: Commission Decision of 27 December 2001 on standard contractual clauses for the transfer of personal data to processors established in third countries, under Directive 95/46/EC (Text with EEA relevance) (notified under document number C(2001) 4540), OJ L 6, 10.1.2002., pp. 52-62.

56 2010/87/EU: Commission Decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council (notified under document C(2010) 593), OJ L 39, 12.2.2010, pp. 5-18.

controller-processor, i.e. the fact that it allows for sub-processing. Introducing the possibility of outsourcing by the processor of its processing activities (sub-processing) to other sub-processor or sub-processors while ensuring the protection of data subjects was, in fact, the main reason for introducing Set I controller-processor.[57] Pursuant to Set II controller-processor clauses, the data importer has to acquire prior written consent of the data exporter before subcontracting any of its processing operations performed on behalf of the data exporter under the provisions of the Decision 2010/87/EU. When the data importer subcontracts its obligations under the provisions of the Decision 2010/87/EU, it has to enter into a written agreement with the sub-processor which imposes the same obligations on the sub-processor as are imposed on the data importer under the Decision 2010/87/EU. Where the sub-processor fails to fulfil its data protection obligations under such written agreement the data importer remains fully liable to the data exporter for the performance of the sub-processor's obligations under such agreement. The prior written contract between the data importer and the sub-processor has to contain a third-party beneficiary clause for cases in which the data subject is not able to bring the claim for compensation against the data exporter or the data importer because they have factually disappeared or have ceased to exist in law or have become insolvent and there is no successor entity assuming the entire legal obligations of the data exporter or data importer. Even though the Set II controller-processor clause presents an improvement taking into consideration the requirements of technological advancement and data economy, it was criticised for not being well adjusted to situations in which there are multiple data importers, since it proved to be cumbersome for companies in terms of paperwork and time requirements. Furthermore, Set II controller-processor cannot be used in the event EU controller transfers data to EU-processor which further transfers it to non EEA sub-processor.[58]

In the aftermath of the *Schrems* decision, the European Commission adopted the Implementing Decision (EU) 2016/2297 of 16 December 2016 amending Decisions 2001/497/EC and 2010/87/EU on standard contractual clauses for the transfer of personal data to third countries and to processors established in such countries, under Directive 95/46/EC. Decision 2001/497/EC and Decision 2010/87/EU were amended since the CJEU's established in *Schrems* that rule according to which national supervisory authorities remain competent to oversee the transfer of personal data to third country should *mutatis mutandis* apply to European Commission decisions which envisaged limited powers of national supervisory authorities in this respect.

Following the decision in *Schrems* which invalidated Safe Harbour, Facebook, along with other multinational technology companies,[59] started relying on Decision

57 Decision updating the standard contractual clauses for the transfer of personal data to processors established in non-EU countries, Press Release, Brussels, 5 February 2010, available at: http://europa.eu/rapid/press-release_MEMO-10-30_en.htm?locale=en (31.8.2018).

58 Wojtan, B., The new EU Model Clauses: One step forward, two steps back?, International Data Privacy Law, Vol. 1, 1/2011, available at: https://academic.oup.com/idpl/article/1/1/76/759672 (31.8.2018.).

59 Bu-Pasha, S., Cross-border issues under EU data protection law with regards to personal data protection, Information & Communications Technology Law, Vol. 26, 3/2017, p. 221; Voss, G.

2010/87/EU for transfer of Facebook users' personal data to the US. As a result, Mr. Schrems reformulated his claim and sought from Irish Data Protection Commissioner to suspend data transfer under Decision 2010/87/EU without questioning the validity of the Decision. However, the Data Protection Commissioner decided to investigate the validity of all three sets of standard contractual clauses. The Irish High Court found that Commissioner's allegations that standard contractual clauses might be invalid are convincing. The Court found that standard contractual clauses do not ensure an adequate level of EU citizen's data protection nor have an effective remedy at their disposal in the US which is contrary to Art. 47 of the Charter.[60] In April 2018, it decided to refer a question for preliminary ruling to the CJEU.[61] The future of standard contractual clauses, as a ground for transfer frequently used by EU companies, including multinational internet technology companies, is thus in the hands of the CJEU.

3.1.2.2. Binding Corporate Rules

BCRs[62] are appropriate safeguards intended for companies forming a corporate group allowing them to transfer data to their non-EEA affiliates. Even though they were not expressly mentioned by the DPD as one of the appropriate safeguards, they were nonetheless accepted as one of the grounds for transborder data flows.[63] BCRs are suitable for various types of corporate groups which may vary in different EU Member States. However, they are considered to be most effective for multinational companies. Under the DPD, it was suggested that BCRs might not be the best option for loose conglomerates of diverse member companies due to their broad range of

V., The Future of Transatlantic Data Flows: Privacy Shield or Bust, Journal of Internet Law, Vol. 19, 11/2016, p. 10. The European Court of Justice to rule on the validity of standard contractual clauses, Linklaters, 30 May 2016, pp. 1-2, available at: https://lpscdn.linklaters.com/-/media/files/linklaters/pdf/mkt/brussels/160530_alert_the_european_court_of_justice_to_rule_on-the_validity_of_standard_contractual_clauses.ashx (31.8.2018).
See, for instance, Google Cloud Platform, EU Model Contract Clauses, available at: https://cloud.google.com/terms/eu-model-contract-clause (18.9.2018); Facebook, What is a standard contractual clause?, available at: https://www.facebook.com/help/566994660333381?ref=dp&locale=en_GB (18.9.2018), https://www.facebook.com/about/privacy/update (18.9.2018); Microsoft Office, Frequently Asked Questions, available at: https://products.office.com/en-us/business/office-365-trust-center-eu-model-clauses-faq (18.9.2018).

60 High Court, *The Data Protection Commissioner v Facebook Ireland Ltd and Maximilian Schrems*, 3 October 2017 [2016 No. 4809 P.], available at: https://dataprotection.ie/docimages/documents/Judgement3Oct17.pdf (18.9.2018).

61 High Court, *The Data Protection Commissioner v Facebook Ireland and Maximilian Schrems, Request for a Preliminary Ruling,* 12 April 2018 [2016 No. 4809 P.], available at: http://www.europe-v-facebook.org/sh2/ref.pdf (18.9.2018).

62 Art. 47 of the GDPR.

63 See Kuner, C., op. cit., pp. 906-907. BCRs were acknowledged as an appropriate safeguard by WP 74, Working Document: Transfers of personal data to third countries: Applying Article 26 (2) of the EU Data Protection Directive to Binding Corporate Rules for International Data Transfers, Art. 29 WP, 3 June 2003, available at: http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2003/wp74_en.pdf (31.8.2018).

processing activities. In the latter cases, it was recommended to set up subgroups within loose conglomerats which will have separate BCRs.[64] However, the GDPR seems to have broadened the variety of undertakings which may use BCRs. Art. 47(1)(a) of the GDPR, besides group of undertakings, mentions group of enterprises engaged in a joint economic activity which suggests that BCRs may be used by groups of undertakings without formal structure, such as business partner companies. Although neither the GDPR, nor the DPD, formally set a hierarchy among appropriate safeguards, it has been argued that BCRs should be used as an additional tool for transborder data transfer when existing instrument for transfer prove to be problematic.[65]

In order to be a valid ground for data transfer, BCRs have to be legally binding and apply to and be enforced by every member concerned of the group of undertakings, or enterprises engaged in a joint economic activity, including their employees. Additionally, BCRs have to expressly confer enforceable rights on data subjects with regard to the processing of their personal data. The GDPR prescribes the minimum content of the BCRs.[66] The DPD did not contain equivalent provision, but the content of BCRs was prescribed by Art. 29 Working Party in several working papers.[67] It has been pointed out that the GDPR prescribes lesser requirements concerning the BCRs

64 WP 74, Working Document: Transfers of personal data to third countries: Applying Article 26 (2) of the EU Data Protection Directive to Binding Corporate Rules for International Data Transfers, Art. 29 WP, 3 June 2003, p. 9., available at: http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2003/wp74_en.pdf (31.8.2018).

65 WP 74, Working Document: Transfers of personal data to third countries: Applying Article 26 (2) of the EU Data Protection Directive to Binding Corporate Rules for International Data Transfers, Art. 29 WP, 3 June 2003, p. 6., available at: http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2003/wp74_en.pdf (31.8.2018).

66 Art. 47(2) of the GDPR. See also WP 256, Working Document setting up a table with the elements and principles to be found in Binding Corporate Rules, Art. 29 WP, 29 November 2017, available at: https://iapp.org/media/pdf/resource_center/wp256_BCR_11-2017.pdf (31.8.2018) and WP 257, Working Document setting up a table with the elements and principles to be found in Processor Binding Corporate Rules, Art. 29 WP, 29 November 2017, available at: https://iapp.org/media/pdf/resource_center/wp257_BCR-processor.pdf (31.8.2018).

67 Art. 29 WP indicated the content of the BCRs in their working papers. See, for instance WP 74, pp. 14-15; WP 108, Working Document Establishing a Model Checklist Application for Approval of Binding Corporate Rules, Art. 29 WP, 14 April 2005, available at: http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2005/wp108_en.pdf (31.8.2018); WP 153, Working Document setting up a table with the elements and principles to be found in Binding Corporate Rules, Art. 29 WP, 14 June 2008, available at http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2008/wp153_en.pdf (31.8.2018); WP 154, Working Document Setting up a framework for the structure of Binding Corporate Rules, Art. 29 WP, 24 June 2008, available at: http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2008/wp154_en.pdf; WP 195, Working Document 02/2012 setting up a table with the elements and principles to be found in Processor Binding Corporate Rules, Art. 29 WP, 6 June 2012, http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2012/wp195_en.pdf (31.8.2018); WP 204 rev 1.0, Explanatory Document on the Processor Binding Corporate Rules, Art. 29 WP, 19 April 2013, last revised and adopted on 22 May 2015, available at: http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2015/wp204.rev_en.pdf (31.8.2018)

content.[68]

The BCRs have to be authorised by a supervisory authority in the relevant Member State in accordance with the consistency mechanism set out in Art. 63 of the GDPR, under which the European Data Protection Board (EDPB) will issue a non-binding opinion on the draft decision submitted by the competent supervisory authority.[69] Companies have to identify the leading supervisory authority based on elements suggested in WP 263 rev 1.0, the most important of which is the location of the group's European headquarters, to which they submit the BCRs draft which will manage the cooperation process with other relevant supervisory authorities, i.e. authorities of those Member States from which the data will be exported.[70] Once the BCRs are authorised under the described scheme, unlike under the DPD, no further specific authorisation will be required from the supervisory authority. By 24 May 2018, there were 130 companies using BCRs which were authorised under the DPD.[71] These BCRs, just as it is the case with adequacy decisions and standard contractual clauses, remain to be in force until they are amended, repealed or replaced.

3.1.2.3. Other appropriate safeguards

Both the GDPR[72] and the DPD[73] encourage drawing up codes of conduct.

68 Pateraki, A., EU Regulation Binding Corporate Rules Under the GDPR—What Will Change?, Bloomberg BNA World Data Protection Report, Vol. 16, 3/2016, pp. 2-3, available at: https://www.huntonak.com/images/content/3/2/v3/3291/EU-Regulation-Binding-Corporate-Rules-Under-the-GDPR.pdf (31.8.2018).

69 Art. 64 of the GDPR.

70 WP 263 rev 1.0, Working Document Setting Forth a Co-Operation Procedure for the approval of "Binding Corporate Rules" for controllers and processors under the GDPR, Art. 29 WP, 11 April 2018, available at: http://ec.europa.eu/newsroom/article29/document.cfm?action=display&doc_id=51031 (31.8.2018).
For a comparison with the previous authorization procedure under the DPD, see Pateraki, A., op. cit., pp. 3-5 and working papers: WP 108, WP 107, Working Document Setting Forth a Co-Operation Procedure for Issuing Common Opinions on Adequate Safeguards Resulting From "Binding Corporate Rules", Art. 29 WP, 14 April 2005, available at: http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2005/wp107_en.pdf (31.8.2018); WP 102, Model Checklist Application for approval of Binding Corporate Rules, Art. 29 WP, 25 November 2012, available at: http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2004/wp102_en.pdf (31.8.2018); WP 133, Recommendation 1/2007 on the Standard Application for Approval of Binding Corporate Rules for the Transfer of Personal Data, Art. 29 WP, 10 January 2007, available at: http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2007/wp133_en.doc (31.8.2018); WP 153; WP 195a, Recommendation 1/2012 on the Standard Application form for Approval of Binding Corporate Rules for the Transfer of Personal Data for Processing Activities, Art. 29 WP, 17 September 2012, available at: http://ec.europa.eu/justice/article-29/documentation/opinion recommendation/files/2012/wp195a_application_form_en.doc (31.8.2018).

71 Binding corporate rules, European Commission, available at: https://ec.europa.eu/info/law/law-topic/data-protection/data-transfers-outside-eu/binding-corporate-rules_en#listofcompanies (31.8.2018).

72 Art. 40 and 41 of the GDPR.

73 Art. 27 of the DPD.

However, under the GDPR they may be used for the transfer of personal data to third countries and international organisations if they provide for binding and enforceable commitments of the controller or processor in the third country to apply the appropriate safeguards, including as regards data subjects' rights.[74] Under the same condition, certification mechanism may be used as a ground for the transfer of personal data to third countries, which is also a novelty introduced by the GDPR.[75]

The GDPR introduced appropriate safeguards which are of less importance for private companies: agreements between public bodies[76] and judgments of a court or tribunal and decisions of an administrative authority of a third country.[77]

3.1.3. Derogations

According to Article 29 Working Party layered approach to crossborder data transfers,[78] companies wanting to transfer personal data to third countries and international organisations should use an adequacy decision as a ground the for transfer if there is one. In the absence of the adequacy decision, they should resort to one of the appropriate safeguards and if this ground is also unavailable, the last option are grounds for transfer referred to as derogations. The majority of them were taken over from the DPD. Apart from conditions prescribed for each derogation in Art. 49 of the GDPR, the processing activity must comply with other relevant GDPR provisions, in particular with Art. 5 prescribing processing principles and Art. 6 laying down conditions for lawful processing. Therefore, a two-step test has to be applied.[79]

The first derogation mentioned in Art. 49(1)(a) is consent. Whereas the DPD[80] required the consent to be unambiguous, the GDPR prescribes that it has to be explicit, which is a more strict requirement. Prior to giving consent, the data subject has to be informed of possible risks. Furthermore, consent has to be specific, meaning that it

74 Art. 46(2)(e) of the GDPR.

75 Arts. 42, 42 and 46(2)(f) of the GDPR.

76 Public authorities or bodies may conclude legally binding enforceable agreements which do not require specific authorisation of a national supervisory authority (46(2)(a) of the GDPR) or administrative arrangements which include enforceable and effective data subject rights and which are not legally binding, such as memorandum of understanding, and have to be authorized by competent supervisory authority (Art. 46(3)(b) of the GDPR).

77 Such judgments and decisions requiring a controller or processor to transfer or disclose personal data may only be recognised or enforceable if they are based on an international agreement in force between the EU or an EU Member State and a third country, such as a mutual legal assistance treaty (Art. 48 of the GDPR).

78 WP 114, Working document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995, Art. 29 WP, 25 November 2005, p. 9, available at: http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2005/wp114_en.pdf (31.8.2018). See also Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679, EDPB, 25 May 2018, available at: https://iapp.org/media/pdf/resource_center/edpb_guidelines_2_2018_derogations_en.pdf (31.8.2018).

79 Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679, EDPB, 25 May 2018, p. 3, available at: https://iapp.org/media/pdf/resource_center/edpb_guidelines_2_2018_derogations_en.pdf (31.8.2018).

80 Art. 26(1)(a) of the DPD.

has to be given for a particular data transfer or set of transfers. Therefore, it will not always be possible to request prior consent of the data subject for a future data transfer at the time of collecting data.[81] Personal data transfer may take place if it is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request or if the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person.[82] Apart from being necessary, the transfer under these derogations has to be occasional.[83] Personal data may be transferred to a third country or international organisation if it is necessary for the important reason of public interest.[84] The respective derogation may only be applied if under EU law or the law of the Member State to which the controller is subject, data transfers at issue are allowed for important public interest reasons. Furthermore, it may be deduced from the wording of Recital 111 that data transfers based on public interest reasons may be non-occasional. Even though this derogation will be more frequently used by public entities, private companies are not excluded from its application.[85] Transfer necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent[86] refers to situations in which the risk of serious harm to the data subject outweighs data protection concerns, such as medical emergencies.[87] Transfer made from a public register[88] refers to registers which are either open to public or a person who can demonstrate a legitimate interest. Transfer necessary for establishment, exercise or defence of legal claims is a derogation which may only be used by public authorities.[89]

Finally, the EU companies acting as data exporters may benefit from another derogation the GDPR introduced as a last resort, for residual cases. Personal data may be transferred to a third country or international organisation if the following conditions are fulfilled: it is not repetitive, concerns only a limited number of data subjects, is necessary for the purposes of compelling legitimate interests of the controller which are not overridden by the interests or rights and freedoms of the data subject, and the controller has assessed all the circumstances surrounding the data transfer and has accordingly provided suitable safeguards with regard to the protection of personal data. The controller has to inform the supervisory authority of the transfer and inform

81 See Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679, EDPB, 25 May 2018, pp. 6-8, available at: https://iapp.org/media/pdf/resource_center/edpb_guidelines_2_2018_derogations_en.pdf (31.8.2018).

82 Art. 49(1)(b) and (c) of the GDPR. See also Art. 26(1)(b) and (c) of the DPD.

83 Recital 111 of the GDPR Preamble.

84 Art. 49(1)(d) of the GDPR. See also Art. Art. 26(1)(d) of the DPD.

85 Recital 112 of the GDPR Preamble.

86 Art. 49(1)(f) of the GDPR. See also Art. 26(1)(e) of the DPD.

87 See Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679, EDPB, 25 May 2018, pp. 12-13, available at: https://iapp.org/media/pdf/resource_center/edpb_guidelines_2_2018_derogations_en.pdf (31.8.2018).

88 Art. 49(1)(g) of the GDPR. See also Art. 49(1)(f) of the DPD.

89 Art. 49(1)(e) of the GDPR. See also Art. 26(1)(d) of the DPD.

the data subject of the transfer and on the compelling legitimate interests pursued.[90] The data exporter has to be able to demonstrate that it could not use appropriate safeguards or other derogations because, for instance, the data exporter is a small company so it is not reasonable to expect that it uses some of the appropriate safeguards or the data importer refuses to use standard contractual clauses or the data subject did not give his or her consent. Compelling interest should be interpreted restrictively, for instance in cases in which there is a risk of harm or penalty for the data exporter and should be balanced with the data subjects rights.[91]

3.2. Transfers of Data Within the EEA

The conditions for transferring personal data within the EEA will depend upon whether the data is being transferred from one controller to another controller or from controller to processor. It is not always apparent whether a particular company processes data as a controller or a processor. With respect to one set of data, a company may act as a processor, while with respect to other data it may be in the role of the controller.[92] Art. 29 Working Party suggested that the controller is a functional concept, intended to allocate responsibilities and thus the assessment should be based on factual rather than a formal analysis. The controller is the party which makes a decision to process, the one which initiates it.[93] Controllers choose which data will be collected and processed, for which purpose, who will have access to data, for how long will the data be processed etc.[94] Technical and organisational decisions such as which software will be used may be delegated to processor.[95] The

90 Art. 49(1) of the GDPR.

91 See Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679, EDPB, 25 May 2018, pp. 14-15, available at: https://iapp.org/media/pdf/resource_center/edpb_guidelines_2_2018_derogations_en.pdf (31.8.2018).

92 See for instance the case of SWIFT, a Belgian worldwide financial messaging service which facilitates international money transfers which considered itself a data processor, but the Belgian data protection authority, concluded it had the role of data controller. See Decision of the Belgian data protection authority of 9 December 2008, https://www.autoriteprotectiondonnees.be/sites/privacycommission/files/documents/swift_decision_09_12_2008.pdf (31.8.2018). See also WP 128, Opinion 10/2006 on the processing of personal data by the Society for Worldwide Interbank Financial Telecommunication (SWIFT), Art. 29 WP, 22 November 2006, https://iapp.org/media/pdf/resource_center/wp128_SWIFT_10-2006.pdf (31.8.2018)

93 WP 169, Opinion 1/2010 on the concepts of "controller" and "processor", 16 February 2010, p. 8, available at https://iapp.org/media/pdf/resource_center/wp169_concepts-of-controller-and-processor_02-2010.pdf (31.8.2018).

94 For in Google Spain, the CJEU clarified that the search engine when it performs the activity of finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference acts as a controller. Activity of search engines plays a decisive role in the overall dissemination of those data in that it renders the latter accessible to any internet user making a search on the basis of the data subject's name, including to internet users who otherwise would not have found the web page on which those data are published. Judgment of 13 May 2014, *Google Spain*, C-131/12, EU:C:2014:317, paragraphs 33-41.

95 WP 169, Opinion 1/2010 on the concepts of "controller" and "processor", 16 February 2010, p. 14, available at: https://iapp.org/media/pdf/resource_center/wp169_concepts-of-controller-

GDPR explicitly states that processor which infringed the GDPR determining the purposes and means of processing, i.e., makes its own decision instead of following the controller's instructions, will be considered to be a controller.[96] The criteria which might help differentiate the controllers from processors are for instance "freedom from instructions by the contracting entity that delegated the data processing to the processing entity in question; merging of the data received upon delegation with own databases; use of the data for own purposes that may have not been agreed upon with the contracting entity; processed data having been collected by way of a legal relationship between the processing entity and the data subjects; responsibility of the processing entity for the lawfulness and accuracy of the data processing."[97]

3.2.1. Transfer Controller – Processor

The transfer of personal data from the controller to processor is expressly regulated by the GDPR.[98] Controllers wishing to delegate processing to processors have to make sure that they choose processors providing sufficient guarantees to implement appropriate technical and organisational measures which will be in line with the GDPR and ensure sufficient protection of the data subject's rights. Processing by the processor has to be regulated by a contract or other legal act under EU or Member State law, binding for the processor. The contract or legal act has to regulate the subject-matter and duration of the processing, the nature and purpose of the processing, the type of personal data and categories of data subjects and the obligations and rights of the controller. The DPD required that the binding agreement between the controller and the processor prescribes the obligation of the processor to act under the controller's instructions and ensure security of the processed data.[99] The GDPR prescribes several more obligations to be included into the binding agreement: persons processing data are under confidentiality obligations, acting in accordance with the rules regarding appointment of sub-processors, implementing technical and organisational measures so that controller complies with the rights of data subjects; deleting or returning the personal data after the end of provision of services unless EU or Member State law prescribes otherwise, assisting the controller in obtaining approval from DPAs where required; assisting the controller to comply with the obligations of security of data, notification of data breach to supervisory authority and data subject, impact assessment and prior consultation; and provide the controller all information necessary to demonstrate compliance with its obligations, allow and contribute to audits, including inspections, conducted by the controller or another auditor mandated by the controller.[100]

The processor may engage a sub-process only with a prior specific or general

and-processor_02-2010.pdf (31.8.2018).

96 Art. 28(10) of the GDPR.

97 Voigt, P., von dem Bussche, A., The EU General Data Protection Regulation (GDPR), A Practical Guide, Cham, Springer, 2017, p. 19.

98 Art. 28 of the GDPR.

99 Art. 17 (2) and (3) of the DPD.

100 Art. 28(1) and (3) of the GDPR.

written authorisation of the controller and in such case the sub-processor is bound by the same obligations as the processor by a contract or other legal act and liable to the controller.[101] Instead of relying on a contract or a legal act, the GDPR provides the possibility that a processor adheres to an approved code of conduct or an approved certification mechanism in order to demonstrate that it provides sufficient guarantees. The European Commission and national supervisory authorities may adopt standard contractual clauses in accordance with the examination procedure and consistency mechanism, respectively. In the latter case, the contract and the legal act may be based on standard contractual clauses.[102] No such codes of conduct, certification mechanisms or standard contractual clauses have been drafted so far. Under the GDPR, the processor has the obligation of immediately informing the controller if, in its opinion, acting in accordance with the controller's instructions infringes the GDPR or other EU or Member State data protection provisions.

3.2.2. Transfer Controller – Controller

The GDPR contains one provision on the transfer between controllers. It regulates the obligation of, the so-called, joint controllers. Joint controllers are controllers which jointly determine the purposes and means of processing. They have an obligation of concluding an agreement by which they will determine their respective responsibilities for compliance with the GDPR in a transparent manner, their roles and responsibilities, unless the respective responsibilities of the controllers are determined by EU or Member State law. Particularly, this obligation refers to exercising the rights of the data subject and their right to be informed on data obtained from data subject and data not obtained from the data subject. The arrangement may designate a contact point for data subjects. The summary of the agreement has to be made available to data subjects. Data subjects may exercise their rights against each of the controllers.

Not all transfers between controllers will fall into the category of joint controllers. It is possible that controllers act independently, without agreeing on processing means and purposes.[103] The GDPR does not contain provision on the transfer between such independent controllers. It may be concluded based on GDPR provisions that in these situations, processing by each controller is considered as separate processing which has to be justified by one of the legal bases for processing prescribed in Arts. 6 or 9 of the GDPR. A separate legal basis necessity would be in line with the purpose limitation principle from Art. 5(1)(b) of the GDPR according to which data may be collected for specified, explicit and legitimate purposes and not further processed in a manner

101 Art. 28(4) of the GDPR.

102 Art. 28 (5)-(8)of the GDPR.

103 Under Data Protection Act 1998, English law distinguished the category of controllers in common, which do not determine purpose and manner of data processing jointly but share a pool of personal data that they process independently of each other. See Data Protection Act 1998, Part I; Guide to data protection, Information Commissioner's Office, available at: http://webarchive.nationalarchives.gov.uk/20180524151709/https://ico.org.uk/for-organisations/guide-to-data-protection/key-definitions/ (31.8.2018).

that is incompatible with those purposes, as well as accountability principle under which controller has to demonstrate compliance with data processing principles.[104] Wenderhorst indicated that if the separate legal basis necessity or principle of separate justification, as she refers to it, is accepted, the independent controller – controller transfer has to be justified on both ends, i.e. both the transfer from the initial controller and the receipt of data on the part of the receiving controller have to be separately justified by one of the GDPR legal bases. However, if EU controller-EEA controller transfer is subjected to separate legal basis necessity, in certain situations it might be more burdensome compared to EU controller-non-EEA controller transfer. Under Privacy Shield, Accountability for Onward Transfer principle, in order to transfer personal information to a third party acting as a controller, organisations must comply with the Notice and Choice Principles. Notice principle refers to information which have to be provided to the data subject, whereas Choice principle gives the option to data subject to opt out if they do not want their personal information to be disclosed to a third party or used for a purpose that is materially different from the purposes for which it was originally collected or subsequently authorised by the individuals. Therefore, no equivalent requirement to the legal basis from Art. 5 of the GDPR is prescribed under Privacy Shield. A similar situation is with the Set II controller-controller standard contractual clauses enacted with Decision 2004/915/EC. According to Clause II(i) the controller importing data may further disclose or transfer personal data to non-EEA controller (which does not processes the personal data Commission decision finding that a third country provides adequate protection and is not signatory to standard contractual clauses or another data transfer agreement approved by a competent authority in the EU), if it notifies the data exporter about the transfer, and data subjects have been given the opportunity to object after having been informed of the purposes of the transfer, the categories of recipients and the fact that the countries to which data is exported may have different data protection standards, or if sensitive data is at issue, data subjects have given their unambiguous consent to the onward transfer.[105]

Transfers between controllers within the EEA compared to transfers between EU-controller and non-EEA controller seem to be more burdensome from another aspect. In cases in which the joint controllers transfer data within EEA, the standard of liability is more burdensome compared to the transfer between EU-controller and non-EEA-controller which jointly determine the purpose of processing and use Set II controller-controller. While the standard of liability according to Set II controller-controller is fault-based, joint controllers which transfer data within EEA might be held jointly and severally liable pursuant to Art. 82(4) of the GDPR.[106]

104 Wenderhorst, C., How to Reconcile Data Protection and the Data Economy, in: Lohsse, S./Schulze, R./Staudenmayer, D. (eds.), Trading Data in the Digital Economy: Legal Concepts and Tools, Münster Colloquia on EU Law and the Digital Economy III, Baden-Baden, Nomos, 2017, pp. 334-336.

105 For a similar argument see ibid, pp. 337-338.

106 For a similar reasoning, see Van Alsenoy, B., Liability under EU Data Protection Law, from Directive 95/46 to the General Data Protection Regulation, Journal of Intellectual Property, Information Technology and E-Commerce Law, Vol. 7, 2016, p. 287. See also Bukovac Puvača,

4. CONCLUSION

Data transfers pose a grave risk to privacy. Yet, European data economy, which is a part of the Digital Single Market strategy, requires that data crosses borders of the EU. Such dichotomy requires a careful balancing of protecting data and creating an environment in which the data can flow freely to and from the EU. With the aim of striking the right balance, the EU legislator has developed instruments based on which EU data may be transferred outside the EU, while prescribing safeguards with the aim of maintaining a sufficient level of protection. These instruments or grounds for transfer, namely adequacy decisions, appropriate safeguards and derogations were developed under the DPD regime and taken over by the GDPR. EU companies which act as data exporter will benefit from the fact that the GDPR has proliferated the variations within each of the grounds for transfer in comparison to the DPD. Even though efforts have been made to improve these instruments, even prior to the enactment of the GDPR, they still present some concerns, both for data subjects and companies acting as data exporters. Furthermore, transfers between companies within EEA, in contrast to transfers from EU companies to non-EEA companies, demonstrate some impracticalities given that the former impose more requirements on onward transfers than the latter.

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Danijela Vrbljanac*

Sažetak

UPRAVLJANJE INOVATIVNIM KAPITALOM TRGOVAČKOG DRUŠTVA: SLUČAJ PRIJENOSA OSOBNIH PODATAKA

Malobrojna su područja europskoga prava koja su se pokazala kontroverznima do mjere do koje je to zaštita osobnih podataka. Posebice se to odnosi na pitanje prijenosa osobnih podataka izvan Europske unije. Pitanje prijenosa osobnih podataka u treće zemlje aktualiziralo se posebice nakon što je Sud Europske unije proglasio je nevaljanim sporazum "Safe Harbour", jedan od mehanizama prijenosa osobnih podatka u SAD, a valjanost nekolicine ostalih je dovedena u pitanje, uključujući i sporazum "Privacy Shield", sljednik sporazuma "Safe Harbour". U pogledu dijela pravnih osnova za prijenos osobnih podataka u treće zemlje, istaknuto je da trebaju biti ukinute ili izmijenjene kako bi bile u skladu s Općom uredbom o zaštiti podataka. Nakon analize svake od pravnih osnova za prijenos osobnih podataka koje stoje na raspolaganju društvima iz EU-a, u radu se ističe da "revolucija" osobnih podataka koja je nastupila nedavnim stupanjem na snagu Opće uredbe o zaštiti podataka, nije završila, barem što se tiče prekograničnog prijenosa osobnih podataka.

Ključne riječi: *zaštita podataka; pravo EU-a; Opća uredba o zaštiti podataka; privatnost; prekogranični prijenos podataka; prijenos podataka.*

Zussamenfassung

KAPITALMANAGEMENT BEI INNOVATIVEN UNTERNEHMEN: ÜBERMITTLUNG PERSONENBEZOGENER DATEN

Es gibt nicht viele Bereiche des Europäischen Rechts, welche so kontrovers wie Datenschutz sind. Nur beim grenzüberschreitenden Verkehr personenbezogener Daten könnte dieses Problem noch umstrittener werden. Der Status der Übermittlung personenbezogener Daten in Drittländer hat sich bei der Entkräftung der Sicheren-Häfen-Vereinbarung vom EuGH, einer der Rechtsrahmen für die Übermittlung personenbezogener Daten in die USA, als strittig erwiesen. Weitere Abkommen wurden vom EuGH geprüft, einschließlich des Datenschutzschilds, des Nachfolgers

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der Sicheren-Häfen-Vereinbarung. Es wurde vorgeschlagen, dass manche dieser Instrumente der Übermittlung aufgehoben oder geändert werden müssen, um mit der DSGVO im Einklang gebracht zu werden. Dieser Beitrag analysiert die Rechtsgrundlagen, welche die Unternehmen in der EU für die Übermittlung personenbezogener Daten anwenden. Es wird behauptet, dass, ungeachtet des Inkrafttretens der DSGVO, die "Revolution" des Datenschutzes noch nicht beendet ist, wenigstens was den grenzüberschreitenden Datenverkehr betrifft.

Schlüsselwörter: *Datenschutz; EU-Recht; Datenschutz-Grundverordnung; Privatsphäre; grenzüberschreitender Datenverkehr; Datenübermittlung.*

Riassunto

LA GESTIONE DEL CAPITALE DELLE SOCIETÀ INNOVATIVE: IL CASO DEL TRASFERIMENTO DI DATI PERSONALI

Pochi settori del diritto europeo risultano sì controversi come quello della protezione dei dati personali. L'unico caso in cui tale questione può diventare ancora più discutibile è quello in cui i dati personali valicano i confini dell'UE. Il trasferimento dei dati personali a stati terzi fece sorgere questioni giuridiche quando la Corte di Giustizia dell'UE annullò il Safe Harbour Agreement, e cioè uno dei quadri regolatori del trasferimento di dati personali verso gli USA, come pure in occasione dell'attento scrutinio della stessa Corte rispetto ad un successore del Safe Harbour Agreement, ossia il Privacy Shield Agreement. Venne infatti suggerito come alcuni di questi strumenti atti al trasferimento dei dati necessiti una rivisitazione e delle modifiche al fine di conformarsi al GDPR. Il contributo, dopo l'analisi di ciascuno dei fondamenti per il trasferimento dei dati che potrebbe venire utilizzato dalla compagnie europee, argomenta che nonostante la recente entrata in vigore del GDPR, la "rivoluzione" della protezione dei dati non sia ancora interamente compiuta, perlomeno per quanto concerne il flusso transfrontaliero dei dati.

Parole chiave: *protezione dei dati; diritto dell'UE; Regolamento generale per la protezione dei dati; privacy; flusso transfrontaliero di dati; trasferimento di dati.*

PROTECTION OF SKILLS IN EMPLOYMENT RELATIONSHIPS AND IN THE LABOUR MARKET: AN OVERVIEW OF THE ITALIAN SITUATION

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Summary

Globalisation and technological changes have a dramatic impact on the labour market. For this reason, skills need to be strengthened and protected and workers have to respond to these great transformations by improving their professionalization. Focusing the attention on the Jobs Act, this paper offers an overview of the change that Italy may undertake, analysing the most innovative aspects of the new reform and paying particular attention to the protection of skills within the employment contract and the labour market. In this regard, the research highlights how the Jobs Act has strengthened the protection of skills. On the one hand, it specifies that in case of 'changes in job tasks' the employer shall provide training activities in order to develop the employee's skills (art. 2103 Civil Code). On the other hand, from the perspective of the labour market, it provides efficient active labour market policies in order to tackle the lack of skills protection. These are all considerable positive steps: the Jobs Act Reform represents a move in the right direction and the first important step towards the development of an enhanced skill system.

Keywords: *Jobs Act, ius variandi; protection of skills; training activities; active labour market policies.*

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1. INTRODUCTION

In a world characterised by rapid technological changes, where advanced economies have to adapt to globalisation and where countries are strictly interconnected, regulations should respond to these huge transformations by bolstering a dynamic skill-based society.

The so-called Industry 4.0[1] with its epochal changes calls into question the traditional educational models, work organisation patterns and welfare schemes.

The skills that are important today will cease to be so in the future and the workforce is expected to develop both new skills and knowledge.

In this scenario, to foster inclusive and sustainable growth across the countries, each country has to adopt proper actions in order to make its workforce highly qualified and responsive to these unique challenges.

In Italy, the strengthening of skills has become a milestone of recent reforms involving different areas.

Moving from the 2014 labour market Reform (Act no. 183/2014, the so-called 'Jobs Act'[2]), the legislator has also introduced significant policy measures into the Innovation System (through the 2015 National Plan for Digital Schools and Industry 4.0, National Plan 2017-2020), which intends to develop modern and digitalised learning amongst teachers and students, and a new education system (through the so-called 'Good School Act', Act no. 107/2015[3]). The goal of the latter is to help students succeed in the transition from school to the labour market. In this sense, an important part of the 'Good School Act' is the so-called '*Alternanza Scuola Lavoro*' ('alternation between learning and training', art. 1, par. 7, letter o, Act no. 107/2015) which allows students to do traineeships during the last three years of secondary school, thus helping them make better academic or professional decisions.

As suggested by the OECD Skills Strategy Diagnostic Report, there are significant differences between the regions of Italy regarding the first application of '*Alternanza Scuola Lavoro'* and they may be attributed to the economic gap between northern and southern areas of the country.[4] As pointed out by the mentioned OECD report, the '*Alternanza Scuola Lavoro*' project will be more difficult to apply in areas

1 The expression 'Industry 4.0' has been coined in 2011 by Henning Kagermann, Wolf-Dieter Lukas and Wolfgang Wahlster. See Kagermann, H., Lukas, W.D., Wahlster, W., Industrie 4.0: Mit dem Internet der Dinge auf dem Weg zur 4. industriellen Revolution, in VDI Nachrichten, Ausgabe 13, <https://www.vdi-nachrichten.com/Technik-Gesellschaft/Industrie-40-Mit-Internet-Dinge-Weg-4-industriellen-Revolution>, 1st April 2011.

2 Law conferring the competence to the Government in reforming the social block absorbers, active policies, employment relationships, inspection activities and work-life balance, Official Gazette no. 290/2014.,183/2014. The research will especially focus on the systematic discipline of employment contracts and on the review of the rules regarding the job tasks (Official Gazette no. 144/2015, 81/2015) as well as on the reorganisation of the matter concerning Active labour market policies (Official Gazette no. 221/2015, 150/2015)

3 Law on the Educational and Learning National System ('*Riforma del sistema nazionale di istruzione e formazione e delega per il riordino delle disposizioni legislative vigenti*'), Official Gazette no. 162/2015., 107/2015.

4 OECD Skills Strategy …, cit., p. 22

where companies are lower in number and are less developed than the northern industries.[5] Nevertheless, the 'Good School Act' is an essential step forward within the Italian education system, which has traditionally been based merely on a theoretical approach and has excluded practical experience for a considerably long time, thus leading to the difficult transition of young workforce to the labour market.

Whether or not the issue of increasing skills among the young population is being effectively tackled by the introduction of the last education system reform (Act no. 107/2015), it is necessary to improve and protect the skills of adult workforce.

In this regard, the research aims to analyse the impact of recent reforms (Decree no. 81/2015 and Decree no. 150/2015) on the Italian labour law system.

Firstly, the research will compare the modes of protection of skills in employment relationships before and after the entry into force of Decree no. 81/2015. Thereafter, it will analyse the protection of skills in the labour market after the introduction of Decree no. 150/2015.

2. PROTECTION OF SKILLS IN EMPLOYMENT RELATIONSHIPS: AN OVERVIEW OF THE ITALIAN DISCIPLINE BEFORE THE 'JOBS ACT'

The recent reform has completely changed the wording of art. 2103 of the Italian Civil Code (c.c.),[6] which concerns the duties of workers.

According to the first version of art. 2103 c.c.,[7] the employee should be assigned job tasks for which he was hired. However, in case of continued economic needs (organisational and productive reasons), the employer would have the right to assign different duties to the employee, even the ones carried out by low-level employees (the so-called '*ius variandi*'). Formally, the unique limits imposed to the unilateral downgrading power were represented by the maintenance of the previous wage amount and by the impossibility of substantial changes in tasks. In other words, it was not possible to assign the worker a duty belonging to a different staff category.[8]

Nevertheless, the employer was allowed to unilaterally change the terms of the employment contract after entering into it.

On the other hand, the employee did not have the chance to refuse these variations, hence, the absence of legal protection against unfair dismissal increased the instability of the employment relationship, leaving the employee in a position of serious subjugation by the employer.

5 OECD Skills Strategy …, cit., p. 23.

6 Royal Decree including the text of the Civil Code, Official Gazette no. 79/1942., 262/1942.

7 According to the original version of art. 2103 c.c., "*Il prestatore di lavoro deve essere adibito alle mansioni per cui è stato assunto. Tuttavia, se non è contenuto diversamente, l'imprenditore può, in relazione alle esigenze dell'impresa, adibire il prestatore di lavoro ad una mansione diversa, purché essa non importi una diminuzione nella retribuzione o un mutamento sostanziale nella posizione di lui. Nel caso previsto dal comma precedente, il prestatore di lavoro ha diritto al trattamento corrispondente all'attività svolta, se è a lui più vantaggioso.*"

8 Art. 2095 c.c. individuates four different staff categories: executives, middle management, clerical staff and blue-collar workers.

In 1970, art. 13 of the '*Statuto dei Lavoratori*' (Act no. 300/1970[9]) modified art. 2103 c.c.[10] and established that the worker should be assigned duties for which he was engaged or those corresponding to any substantially acquired superior category, or duties equivalent to those actually performed until the variation, without any reduction of remuneration. Any employment contract in breach of this principle would be considered void.

The principal purpose of such legal intervention lies in the concrete protection of worker's position in employment relationships. In particular, the new Legislation aimed to ensure that workers could continue to carry out tasks that they had performed throughout their entire working lives.

The main innovations introduced by *Statuto dei Lavoratori* were firstly the 'criterion of equivalent tasks' and secondly, the nullity of any employment contract in violation of art. 2103 c.c.

According to the established labour case law, the criterion of equivalent tasks constituted the milestone of the Legislation. In fact, it achieved the protection of the set of acquired professional competences.

The main issue concerned the meaning of the expression 'equivalent tasks'. As a matter of fact, there was no consensus whatsoever amongst academics and practitioners as to the common approach to this issue. Nevertheless, it is possible to identify two views adopted by the *Corte di Cassazione* and the most important scholars in their contributions.

The first view attributes a 'static' meaning to the expression 'equivalent tasks' (Italian: *orientamento statico*). In other words, the newly assigned tasks have to be considered equivalent to those that were performed last if they do not compromise the worker's skills and his/her professional growth. This especially holds true, when the new assignment allows the employee to develop new skills, at the same time benefiting from his/her previous practical experience and thus achieving professional growth.[11]

9 Law on the protection of the freedom and dignity of workers, of trade union freedom and union activity in the workplace and on the public employment service, Official Gazette no. 131/1970., 300/1970.

10 According to art. 13 '*Statuto dei Lavoratori*', which amended art. 2103 c.c., "*Il prestatore di lavoro deve essere adibito alle mansioni per le quali è stato assunto o a quelle corrispondenti alla categoria superiore che abbia successivamente acquisito ovvero a mansioni equivalenti alle ultime effettivamente svolte, senza alcuna diminuzione della retribuzione. Nel caso di assegnazione a mansioni superiori il prestatore ha diritto al trattamento corrispondente all'attività svolta, e l'assegnazione stessa diviene definitiva, ove la medesima non abbia avuto luogo per sostituzione di lavoratore assente con diritto alla conservazione del posto, dopo un periodo fissato dai contratti collettivi, e comunque non superiore a tre mesi. Egli non può essere trasferito da una unità produttiva ad un'altra se non per comprovate ragioni tecniche, organizzative e produttive. Ogni patto contrario è nullo.*"

11 In this sense, the *Corte di Cassazione* ruled that: "*Le nuove mansioni possono considerarsi equivalenti alle ultime effettivamente svolte soltanto ove risulti tutelato il patrimonio professionale del lavoratore, anche nel senso che la nuova collocazione gli consenta di utilizzare, ed anzi di arricchire, il patrimonio professionale acquisito con lo svolgimento della precedente attività lavorativa, in una prospettiva dinamica di valorizzazione della capacità di arricchimento del proprio bagaglio di conoscenze ed esperienze*" (Cass. Civ., 30th July 2004,

On the other hand, according to the second view, the expression 'equivalent tasks' has to be considered in a dynamic sense (Italian: *orientamento dinamico*), based on the potential working capacity and a rather elastic concept of skills. In this regard, the analysis is focused on what the worker is effectively able to do rather than what he has previously done. In other terms, skills are considered from an evolving perspective and are projected for future professional life.[12]

To put it simply, *Corte di Cassazione* pointed out that assigned duties have to be considered equivalent to the ones for which the worker has been engaged if they could lead to the same professional category (as suggested by the Collective bargaining).[13]

The principal remedy in case of assignment to inferior duties is the action for damages.

In fact, in case of assignment to lower tasks that may cause discrimination against the worker, he/she has the right to claim compensation for the harm suffered (Italian: *danno da demansionamento*). This principle includes a variety of material and non-material damages, such as the ones for wage and career loss, the loss of skills improvement, as well as damage to the worker's personality; all of which are caused by the employer's breach of articles 2103 and 2087 c.c. within the framework of contractual liability. In particular, according to the latter, the employer is required to take all appropriate measures to avoid both the risks inherent to the work environment, and those resulting from external factors and related to the location where that environment is based.[14]

According to the view of some scholars, this damage does not need to be proven by the injured person. In other words, damage automatically results from the mere violation of art. 2103 c.c.[15]

The majority of scholars, however, believe that such damage has to be demonstrated by the injured person, who also has to prove the causal link between the occurred damage and the employer's breach of contract.[16] The amount of compensation is calculated considering the wage, which would have been earned by the employee if he hadn't been assigned lower duties. Moreover, it has to be calculated by taking into

no. 14666, in Diritto e Pratica del Lavoro, 2004, 3077).

12 Cass. civ., 2nd May 2006, no. 10091, in Rivista italiana di Diritto del Lavoro, 2007, II, p. 654.

13 Brollo, M., La mobilità interna del lavoratore. Mutamento di mansioni e trasferimento, in Codice civile commentato, diretto da Schlesinger, Milano, Giuffrè, 1997, sub art. 2103 c.c., p. 259; See Cass. civ., 2nd May 2006, no. 10091; Cass. Sez. Un., 4th April 2008, no. 8740, in Foro Italiano, 2008, I, p. 2534; Cass. civ., 11th May 2010, no. 11405, in Rivista Italiana di Diritto del Lavoro, 2011, II, p. 149.

14 According to art. 2087 c.c.: "L'imprenditore è tenuto ad adottare nell'esercizio dell'impresa le misure che, secondo la particolarità del lavoro, l'esperienza e la tecnica, sono necessarie a tutelare l'integrità fisica e la personalità morale dei prestatori di lavoro."

15 Cass. civ., 13th April 2004, no. 7043, in Giustizia civile, 2004, I, p. 3204.

16 Cass. S.U., 24th March 2006, no. 6572, in Foro italiano 2006, 5, I, p. 1343. Regarding the issue concerning the proof of the so-called 'danno da demansionamento', see Brollo, M., La mobilità interna … cit., p. 259; Caiafa, L., Demansionamento: onere della prova e risarcimento del danno, in Diritto del lavoro, 2004, p. 53; Morone, A., Alcune considerazioni sulla giurisprudenza in tema di prova e di quantificazione del c.d. danno alla professionalità, in ADL Argomenti di diritto del lavoro, 2000, p. 747.

account the time period for which the employee conducted such inferior tasks.

The worker can also claim non-pecuniary damages when performing lower tasks has had a negative impact in the workplace as well as on the worker's personal life, hence, when it has significantly disrupted his/her way of life and living habits.[17]

3. MODIFICATION OF ART. 2103 C.C. BY THE JOBS ACT

The last legislative intervention in art. 2103 c.c. by art. 3 Decree no. 81/2015 has completely changed its wording.[18] Unlike art. 13 of the *Statuto dei Lavoratori* that aimed to protect the workers' position, the Jobs Act Reform fosters productivity and competitiveness, with the aim of tackling Italy's economic precariousness. Its purpose is to modernise the discipline and to meet the needs of both the employer who is interested in optimising and increasing his/her production and the employee, whose prospects are dependent on job retention and the implementation of his/her skills.[19] Since human workforce is one of the least adaptable production factors, the Jobs Act aspires to link human workforce capacities to technological innovations and to the epochal changes in entrepreneurship.

For this purpose, the 2015 Reform increases internal flexibility in employment relationships. Removing previous limitations of the right to unilaterally change the terms of the employment contract after it was entered into, the new version of art. 2103 c.c. introduces mobility within and between staff levels, allowing employers to assign workers different duties of the same, or lower rank.[20]

In particular, it is possible to identify three different modifications in the assignment of tasks: the first one consists of assigning duties belonging to the same staff rank (Italian: *mobilità orizzontale*), the second one in relocating the employee to lower staff rank (Latin: *ius variandi in peius*) and the third one in assigning upper level duties to the employee. (Latin: *ius variandi in melius*).

As regards the first modification, art. 2103 par. 1 c.c., which confirms that workers should be assigned tasks for which they were contracted, allows employers to

17 Bonaccorsi, F., I percorsi del danno non patrimoniale da demansionamento tra dottrina e giurisprudenza, in Responsabilità civile e previdenza, IV, 2007, p. 843.

18 As clearly highlighted by Carinci, the new version of art. 2103 c.c. definitely marks «the decline of the Statuto dei Lavoratori». Carinci, F., Il tramonto dello Statuto dei lavoratori (dalla L. n. 300/1970 al Jobs Act), Adapt University Press, p. 12, e-book series no. 41, (2015) <https://moodle.adaptland.it/pluginfile.php/21449/mod_resource/content/4/ebook_vol_41.pdf> .

19 For this purpose, see art. 1, co. 7, let. E, Law 183/2014, cit.

20 There are several contributions concerning the reform of art. 2103 c.c. Above all, see Brollo, M., Inquadramento e ius variandi, in G. Santoro Passarelli (a cura di), Omnia, Trattati giuridici. Diritto e processo del lavoro e della previdenza sociale. Privato e pubblico, 2017, Torino, Utet, pp. 768-872.; Id., Disciplina delle mansioni, (art. 3), in Carinci, F. (a cura di), Commento al d.lgs. 15 giugno 2015, n. 81: tipologie contrattuali e lo ius variandi, Adapt University Press, e-book series no. 48, (2015) <https://moodle.adaptland.it/pluginfile.php/24135/mod_resource/content/1/ebook_vol_48.pdf>; Id., La disciplina delle mansion dopo il "Jobs Act", in ADL Argomenti di Diritto del Lavoro, 6, 2015, p. 1156 ff., Miscione, M., Jobs Act: le mansioni e la loro modificazione, in Lavoro nella giurisprudenza, 2015, 5, p. 437; Pisani, C., La nuova disciplina del mutamento delle mansioni, Torino, Giappichelli, 2015.

assign workers different tasks of the same staff rank. In this regard, the main difference from the previous version of the article is the omission of the 'criterion of equivalent tasks'. Instead, the new article refers to the 'tasks belonging to the same staff rank or legal category,[21] thus leading to the ambiguities in the interpretation of the concept and consequently to different applications by the courts.

In other words, as clearly suggested by some scholars[22] – the new legislation adopts a different approach in order to protect the worker's skills.

While judges have thus far measured the 'criterion of equivalent tasks' based on the comparison of the new tasks and the ones previously performed by the worker, the new art. 2103 c.c. abandons this kind of evaluation in favour of an easier one based on the description of staff ranks in collective agreements.[23]

Instead of discretional assessment, in order to check the legitimacy of unilateral contractual modifications the courts will only verify whether the assigned duties belong to the same staff ranks by adopting an objective perspective. In other words, in these cases it is not necessary to compare worker's previous tasks and new ones, hence, judges will be able to apply the article easier than before.

Consequently, while the role of judges will become less important in the new legal framework, collective agreements describing different staff ranks that are used as parameters in judges' decisions will assume a central role.

As regards the second modification in the assignment of tasks, art. 2103 par. 2, 4, 5 and 6 c.c. allows the employer to assign employee lower tasks (*ius variandi in pejus*) in several cases: firstly, if internal modifications directly affect the employee's work position (art. 2103, par. 2 c.c.). This provision is strictly connected with the principle of free enterprise enshrined in art. 41, par. 1 Constitution, according to which, the employer has the right to freely organise his/her activity. In other words, judges can only verify the internal influence of that modification on the employee's work position without interfering with the employer's organisational choices.

Furthermore, the collective agreements can identify other cases in which the worker is assigned lower duties. As highlighted by the scholars, this provision, enshrined in art. 2103 par. 4 c.c., has significantly augmented the role of collective agreements. Despite the ambiguity of the expression "other cases of assignments to lower duties",[24] the cases to which the Act refers are exclusively limited to the situations of organisational changes.[25]

21 Art. 2103 par. 1 c.c. establishes that: «Il lavoratore deve essere adibito alle mansioni per le quali è stato assunto o a quelle corrispondenti all'inquadramento superiore che abbia successivamente acquisito ovvero a mansioni riconducibili allo stesso livello di inquadramento delle ultime effettivamente svolte».

22 Brollo, M., La disciplina delle mansioni dopo il Jobs Act, in Argomenti di Diritto del Lavoro, 6, 2015, p. 1161.

23 Pisani, C., Lo "jus variandi", la scomparsa dell'equivalenza, il ruolo dell'autonomia collettiva e la centralità della formazione nel nuovo art. 2103, in ADL Argomenti di diritto del lavoro, 2016, 6, pp. 1114-1146.

24 Art. 2103, par. 4 establishes that «Ulteriori ipotesi di assegnazione di mansioni appartenenti al livello di inquadramento inferiore, purché rientranti nella medesima categoria legale, possono essere previste dai contratti collettivi».

25 Brollo, M., La disciplina delle mansioni dopo il Jobs Act, in Argomenti di Diritto del Lavoro,

Finally, according to par. 6, individual agreements may be concluded which change the duties related to a given level of classification and the relative remuneration, all for the purpose of the workers retaining their jobs, increasing the level of their professionalization or improving their living conditions.

Nevertheless, in order to protect the employee's position, art. 2103 c.c. stipulates that the employer must only assign the worker the duties of the staff category immediately below the one for which he was contracted. Since the employee occupies a weaker position in employment contracts, these contracts have to be concluded by the parties before the so-called *sedi protette*[26] (bodies responsible for the effectiveness of the employee's will).

Such unilateral modification could also lead to the employee performing higher tasks and to his/her promotion if he does not refuse this modification in his employment contract (art. 2103, par. 7 c.c.). The provision has been criticised by some renowned scholars, who believe that the refusal to be assigned a higher job position should be communicated within a protected environment.[27]

3.1. Increase of Skills as a Response to the Worker's Need to Improve His/her Set of Professional Competences

The lifeblood of art. 2103 c.c. is the employer's obligation to provide training if there are 'changes in job tasks' (par. 3). This innovation includes both horizontal and vertical mobility, notwithstanding the fact that the employer has unilaterally modified the contract or that the parties have signed an individual employment contract.

Nevertheless, the employer is obliged to provide training only 'where necessary'; in other words, the training is required only if assignment of new duties requires an expansion of employee's knowledge.

In this sense, the training represents an important tool to tackle the problem of worker's vulnerability, which is caused by the inadequacy of his/her skills in relation to organisational needs.

The most effective response to the employee's need to adapt himself/herself to new job assignments is improving knowledge and skills through training activities and lifelong learning programmes. Therefore, by increasing skills it is possible to tackle the problem of worker's precariousness. For this reason, the Jobs Act Reform

6, 2015, p. 1173.

26 The so-called *sedi protette* is the official body established by the Commission for the purpose of conciliation. It is represented by the Territorial Labour Office (Direzione Territoriale del Lavoro), a trade union's delegate or a certification office (as authorised universities and foundations, bilateral institutions) according to art. 76, Legislative Decree on the reform of employment system and the labour market, Official Gazette no. 235/2003., no. 276/2003. Workers may also give mandate to a lawyer or a labour consultant in this regard.

27 Brollo, M., La disciplina …, cit., p. 1183; Liso, F., Brevi osservazioni sulla revisione della disciplina delle mansioni contenuta nel decreto legislativo n. 81/2015 e su alcune recenti tendenze di politica legislativa in materia di rapporto di lavoro, in Working Papers C.S.D.L.E. "Massimo D'Antona".IT - 257/15, 15, <http://csdle.lex.unict.it/docs/workingpapers/Brevi-osservazioni-sulla-revisione-della-disciplina-delle-mansioni-contenuta-nel-decreto-legislativo/5416.aspx>, 23th July 2015.

has embarked upon this issue in the right direction and it thus represents the first important step towards the development of a strengthened skill system.

On the other hand, the provision in art. 2103 par. 3 c.c. seems to be approximative. In fact, a breach of this obligation does not invalidate the new job assignment. Therefore, the deterrent effect of this provision should be called into question and the gap with respect to the sanctions needs to be filled, in order to effectively protect employee's interests and enforce his/her position within the employment relationship and in the labour market.

The analysed obligation therefore reflects the general principles of good faith.[28]

4. PROTECTION OF SKILLS IN THE LABOUR MARKET: 'WORK-FIRST NEED' VS. HUMAN CAPITAL DEVELOPMENT

The need to reallocate workers as soon as possible in order to reduce unemployment could have negative influences on workers professional competences. In other words, the need to find a job in a short space of time could lead to shortage of skills.

For this purpose, the Jobs Act's Legislative Decree no. 150/2015 has introduced an important shift away from the passive to active measures, by strengthening the welfare system (e.g. unemployment benefits) on the one hand and creating passive benefits conditional on activation measures with respect to the so-called *principio di condizionalità* ('conditionality' or 'welfare to work' principle) on the other.

This principle has to be considered a milestone of the most important remedies introduced by the Legislative Decree no. 150/2015 and, as figuratively highlighted by some authors, it has nowadays become "a core element of the legislator's D.N.A."[29]

From this perspective, in order to achieve a 'workfare system', the Jobs Act envisages a new model of personalised support for job seekers,[30] the so-called *patto di servizio personalizzato* ('customized service agreement', art. 20 Legislative Decree no. 150/2015), which foresees a contract between the employment agency and the job seeker. The conditionality mechanisms are strengthened by means of gradual sanctions in case the job seeker fails to respect the 'customized service agreement' (i.e., he/she does not participate in the proposed orientation or training measures or refuses a job offer).[31]

This agreement will oblige the agency to provide a range of opportunities tailored to the job seeker and the job seeker to accept them, where appropriate. The definition

28 Amendola, F., Commento all'art. 2103 c.c., in Amoroso, G., Di Cerbo, V., Maresca, A., (a cura di), Diritto del Lavoro, vol. 1, Milano, Giuffrè, 2017, p. 924.

29 Filì, V., L'inclusione da diritto a obbligo, in Brollo, M., Cester, C., Menghini, L., (a cura di), Legalità e rapporti di lavoro. Incentivi e sanzioni, Trieste, EUT Edizioni Università di Trieste, 2016, p. 118.

30 Olivieri, A., La condizionalità nel d.lgs. 150/2015: luci e ombre, in Ghera, E., Garofalo, D., (a cura di), Organizzazione e disciplina del mercato del lavoro nel Jobs Acts 2, Bari, Cacucci Editore, 2016, p. 187.

31 Filì, V., Il patto di servizio personalizzato, in Ghera, E., Garofalo, D., (a cura di), Organizzazione e disciplina del mercato del lavoro nel Jobs Act 2, Bari, Cacucci Editore, 2016, p. 175.

of an 'adequate job offer' (art. 25 Legislative Decree no. 150/2015), introduced by the Monti-Fornero Reform[32] (Law 28 of June 2012, No. 92), will be replaced by a ministerial decree and will take into account several criteria. In particular, it will consider the appropriateness of the duties for the job seeker, the distance between home and workplace, the duration of the unemployment period, the minimum level of proposed wage (at least 20% more than the amount of the latest unemployment allowance received).

In this regard, the main issue concerns the effectiveness of the protection of worker's skills offered by art. 25 Legislative Decree no. 150/2015. Considering that the definition of 'adequate job offer' enshrined in the mentioned article does not depend exclusively on the job seeker's previous work experience of or his/her set of professional competences, but is accompanied by the other three analysed criteria, we can assume that the norm lacks in skills protection.

As pointed out elsewhere in this paper, although job seeker reallocation job could prevent negative economic consequences for the welfare system, the rapidness of this process could also bring negative consequences in terms of a loss of professionalism.

More attention to the protection of skills is paid by art. 21, which regulates the mechanism of conditionality for the beneficiaries of social insurance,[33] by art. 22, which describes the conditionality of wage supplement schemes for industrial crises (Italian: *cassa integrazione guadagni*) and by art. 23, which is dedicated to the so-called *assegno di ricollocazione*, an employment service voucher.[34] In these cases, the worker is obliged to attend special learning and training programmes to preserve and improve his/her level of professionalisation.[35]

Additionally, by limiting the scope and duration of wage supplement schemes for industrial crises (*Cassa Integrazione Guadagni*), the Jobs Act intends to decrease the loss of skills and promote quick reallocation of workers in the labour market.

In order to achieve those goals, the Jobs Act introduces the National Agency for Active Labour Market Policies (Italian: *Agenzia Nazionale per le Politiche Attive*, hereinafter: ANPAL), the first-ever national agency for the provision of active labour market policies,[36] which has been fully active since December 2016. The national agency is expected to provide guidance to the regions as well as homogenising standards and practices across the country.[37]

32 Law on the Reform of the Labour Market, Official Gazette no. 153/2012., 28/2012.

33 As the so-called *Nuova Assicurazione Sociale per l'Impiego - NASpi* reserved to the employees, or the *DIS-COLL*, directed to the self-employed.

34 This voucher allows the worker to attend specific training and learning programmes directed to the requalification of his/her skills, in order to adapt him to the new job position.

35 Garofalo, D., Le politiche del lavoro nel Jobs Act, in Carinci, F., (a cura di), Jobs Act: un primo bilancio. Atti del convegno di Bertinoro–Bologna, Adapt University Press, e-book series no. 54, (2015) p. 165 <https://moodle.adaptland.it/pluginfile.php/26830/mod_resource/content/1/ebook_vol_54.pdf >.

36 Alaimo, A., L'Agenzia Nazionale per le Politiche Attive del Lavoro (ANPAL), in Ghera, E., Garofalo, D., (a cura di), Organizzazione e disciplina del mercato del lavoro nel Jobs Act 2, Bari, Cacucci Editore, 2016, p. 19 ff.

37 ANPAL Decision, 20th February 2018, no. 1, http://www.anpal.gov.it/Normative/delibera-1-2018-cdv-approvazione-linee-indirizzo.pdf. See Garofalo, D., Riforma del mercato del lavoro

The rejection of the constitutional reform proposed through the national referendum held in December 2016 has, however, modified the initial plan for ANPAL to centralise the responsibility for the delivery of Active Labour Market Policies (ALMP) in Italy. At the moment ALMP remains a competence shared between ANPAL and the regions.

5. CONCLUSIONS

The issue of protecting and developing skills has been tackled by the Jobs Act through a fundamental reform of the Italian labour law system. On the one hand, by making employment relationships more flexible, for art. 2103 c.c. allows modification of employee's duties in order for the employee to adapt to the new tasks. Since human workforce is one of the least adaptable production factors, the Jobs Act aims to link human workforce capacities to technological innovations by obliging the employer to provide learning and training programmes to the employee.

On the other hand, from the labour market perspective, the development of the so-called 'welfare to work' principle leads to the strengthening of the welfare system. This mechanism, in fact, increases the means of gradual sanctions if the job seeker does not actively participate in the learning and training programmes and it consequently contributes to the protection of worker's skills.

These are all considerable positive steps that bring Italy closer to the practices already implemented in many OECD countries.[38]

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Sažetak

ZAŠTITA VJEŠTINA U RADNIM ODNOSIMA I U OKVIRU TRŽIŠTA RADA: TALIJANSKO ZAKONODAVSTVO I PRAKSA

Globalizacija i tehnološke promjene dramatično utječu na tržište rada. Zbog toga je potrebno ojačati i zaštititi vještine radnika koji moraju odgovoriti na takve velike promjene unaprjeđujući svoje profesionalne kvalifikacije. U radu se daje pregled promjena u talijanskom zakonodavstvu, analiziraju se inovacije koje donosi nova reforma, posebno zaštita vještina s aspekta ugovora o radu i tržišta rada. S time u vezi u istraživanju se analizira utjecaj zakona *Jobs Acta* u jačanju zaštite vještina. S jedne strane, ovaj zakon utvrđuje da u slučaju „promjene zadataka radnog mjesta" poslodavac mora osigurati osposobljavanje kako bi se omogućio razvoj radnikovih vještina (čl. 2103. Građanskog zakonika). S druge strane, iz perspektive tržišta rada, on je temelj za aktivne politike tržišta rada koje mogu biti učinkovite u zaštiti vještina radnika. Reforma povezana s donošenjem *Jobs Acta* važan je korak u pravom smjeru i za razvoj naprednog sustava vještina.

Ključne riječi: *Jobs Act; ius variandi; zaštita vještina; osposobljavanje; aktivne politike tržišta rada.*

Zusammenfassung

SCHUTZ VON KOMPETENZEN IN ARBEITSVERHÄLTNISSEN UND AM ARBEITSMARKT: EIN ÜBERBLICK ÜBER DIE SITUATION IN ITALIEN

Der Arbeitsmarkt wird stark von der Globalisierung und dem Technologiewandel beeinflusst. Deshalb müssen Kompetenzen gestärkt werden. Arbeitnehmer müssen auf diese großen Transformationen reagieren, indem sie ihre Professionalisierung verbessern. Mit Schwerpunkt auf die Arbeitsrechtreform mit Namen „Jobs Act" bietet dieser Beitrag ein Überblick über die von Italien vorgenommenen Änderungen.

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Ebenfalls werden die innovativsten Aspekte dieser neuen Reform, insbesondere der Schutz von Kompetenzen im Arbeitsvertrag und am Arbeitsmarkt, analysiert. Diesbezüglich wird in diesem Beitrag betont, wie man mit diesem Jobs Act den Schutz von Kompetenzen gestärkt hat. Einerseits legt das Gesetz fest, dass im Falle der „Änderungen von Arbeitsaufgaben" der Arbeitgeber die Ausbildungsaktivitäten sichern muss, um die Kompetenzen von Arbeitnehmern zu entwickeln (Art. 2103 Bürgerliches Gesetzbuch). Andererseits bietet die Reform effiziente aktive Arbeitsmarktpolitik, um den Mangel an Kompetenzschutz in Angriff zu nehmen. Diese Änderungen stellen bemerkenswerte positive Schritte dar. Sie zeugen davor, dass die Arbeitsrechtreform den richtigen Weg und den ersten wichtigsten Schritt zur Entwicklung eines verbesserten Kompetenzsystems darstellt.

Schlüsselwörter: *Jobs Act; ius variandi; Schutz von Kompetenzen; Ausbildungsaktivitäten; aktive Arbeitsmarktpolitik.*

Riassunto

LA TUTELA DELLA PROFESSIONALITÀ NEL RAPPORTO DI LAVORO E NEL MERCATO DEL LAVORO: UNO SGUARDO ALL'ORDINAMENTO ITALIANO

La globalizzazione e l'evoluzione tecnologica hanno effetti radicali sul mercato del lavoro. Per questo motivo, se da una parte è necessario che i lavoratori adeguino le proprie competenze a questi grandi mutamenti, dall'altro la professionalità è un bene che necessità di essere protetto. La presente ricerca, incentrata sull'analisi del *Jobs Act*, intende mettere in luce il percorso di profondo cambiamento intrapreso dall'Italia, ponendo l'accento sul tema della tutela della professionalità all'interno del contratto di lavoro e del mercato del lavoro. Sotto questi profili, la recente riforma ha rafforzato gli strumenti protettivi a favore del lavoratore. Da un lato, infatti, il *Jobs Act* prevede che il mutamento di mansioni del lavoratore è accompagnato da un obbligo formativo in capo al datore di lavoro (art. 2103 Codice civile). Dall'altro lato, per quanto concerne la tutela della professionalità nel mercato del lavoro, la recente riforma ha introdotto una serie di misure di politica attiva volte a contrastare il problema del vuoto di tutele. In considerazione di ciò, il *Jobs Act* deve essere accolto positivamente.

Parole chiave: *Jobs Act; ius variandi; tutela della professionalità; formazione; strumenti di politica attiva e passiva.*

ODGOVORNOST ZA ŠTETU ZAKONSKOG REVIZORA I OBVEZA OSIGURANJA OD ODGOVORNOSTI ZA ŠTETU

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Sažetak

Odgovornost zakonskih revizora za štetu počinjenu subjektu revizije i trećim osobama pri obavljanju revizorskih usluga jedno je od otvorenih pitanja koja nisu usklađena odgovarajućim direktivama Europske unije. Ono je uređeno nacionalnim propisima država članica EU-a koji upućuju na primjenu općih ili posebnih odredbi o odgovornosti za štetu ili kombiniranu primjenu tih odredbi. Zakon o reviziji iz 2017. godine ne sadrži posebne odredbe o odgovornosti zakonskih revizora za štetu, već se primjenjuju opće odredbe o odgovornosti za štetu iz Zakona o obveznim odnosima. Zakon o reviziji predviđa obvezu zakonskog revizora sklopiti ugovor o osiguranju od odgovornosti za štetu koja može nastati subjektu revizije i trećim osobama te propisuje najmanju svotu pokrića. Također uvodi opće zahtjeve za obavljanje zakonskih revizija u svim obveznicima zakonske revizije te posebne zahtjeve koji se primjenjuju na zakonske revizije u subjektima od javnog interesa. Cilj je tih odredbi jačanje neovisnosti i objektivnosti zakonskih revizora u odnosu na subjekte revizije te osiguravanje njihova pravilnog i zakonitog rada.

Ključne riječi: *zakonski revizor; odgovornost za štetu; osiguranje od odgovornosti; subjekti revizije; treće osobe.*

1. UVOD

Svrha je zakonske revizije provjera i ocjenjivanje godišnjih financijskih izvješća, godišnjih konsolidiranih financijskih izvješća i drugih financijskih izvješća

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Ovaj je rad izrađen uz potporu Hrvatske zaklade za znanost, projekt br. 9366 "Pravni aspekti korporativnih akvizicija i restrukturiranje društava utemeljenih na znanju" i Sveučilišta u Rijeci, projekt br. 13.08.1.2.01 "Zaštita korisnika na hrvatskom i europskom tržištu financijskih usluga".

te podataka i metoda korištenih pri njihovom sastavljanju od strane subjekata revizije. Na temelju toga, revizori daju neovisno stručno mišljenje o tomu prikazuju li financijska izvješća u svim bitnim odrednicama istinit i fer prikaz financijskog položaja i uspješnosti poslovanja te novčanih tokova u skladu s primjenjivim okvirom financijskog izvještavanja ili, ako je to primjenjivo, jesu li financijska izvješća u skladu s propisima. Izvješće o reviziji služi različitim korisnicima u subjektu revizije i izvan njega (organima subjekta revizije, njegovim članovima i vjerovnicima, s njime povezanim društvima, potencijalnim ulagateljima i kreditorima, javnosti i sl.). Oni se njime izvješćuju o točnosti sastavljenih financijskih izvješća i solventnosti subjekata revizije, o postojanju prijevarnih radnji, poštovanju pravnih obveza subjekata revizije te njihovu odgovornom ponašanju u odnosu na zaštitu okoliša i općedruštvena pitanja.[1] Obveznici su zakonske revizije određeni čl. 20. Zakona o računovodstvu (dalje: ZRač).[2] Zakonsku reviziju mogu obavljati samo revizorska društva.

Za točnost financijskih izvješća i solventnost subjekta revizije odgovaraju članovi njegovih upravnih i nadzornih organa. Revizor ima zadaću ocijeniti jesu li financijska izvješća izrađena u skladu sa zakonom i računovodstvenim standardima i prikazuju li istinitu i fer sliku financijske situacije poduzetnika, pri čemu konačni sud o izvješću revizora daje nadzorni organ poduzetnika. To proizlazi iz odredbi Zakona o trgovačkim društvima (dalje: ZTD)[3] koje uređuju postupak utvrđivanja godišnjih financijskih izvješća u trgovačkim društvima.[4]

Korisnici izvješća o reviziji očekuju od zakonskog revizora utvrditi postojanje prijevarnih radnji ili povreda pravnih propisa koje mogu imati za posljedicu

1 European Commission, Green Paper of the Commission 1996, The Role, the Position and the Liability of the Statutory Auditors within the European Union, dostupno na: http://europa.eu.int/comm/internal_market/en/company/audit/docs/acten.pdf, 30. listopada 2003., str. 10.

2 Zakon o računovodstvu, Narodne novine, br. 78/15, 134/15, 120/16. To su: a) subjekti od javnog interesa te veliki i srednji poduzetnici koji nisu subjekti od javnog interesa, b) poduzetnici koji su vladajuća društva velikih i srednjih grupa ako nisu obveznici zakonske revizije sukladno točki a), c) dionička društva, komanditna društva i društva s ograničenom odgovornošću koja ispunjavaju posebno propisane uvjete, a nisu obveznici zakonske revizije sukladno točkama a) i b), d) poduzetnici koji su podnijeli zahtjev za uvrštavanje svojih vrijednosnih papira na uređeno tržište kapitala, a nisu obveznici zakonske revizije prema točkama a), b) i c) te e) poduzetnici koji su sudjelovali u poslovnim pripajanjima, spajanjima, odnosno podjelama kao preuzimatelji ili novoosnovana društva ako nisu obveznici revizije prema prethodnim točkama. Ostali poduzetnici na koje se primjenjuju odredbe ZRač-a mogu svojim osnivačkim (temeljnim) aktima ili odlukom svojih članova odrediti obvezu revizije godišnjih financijskih izvješća i/ili godišnjih konsolidiranih financijskih izvješća (dragovoljna revizija). Pod poduzetnicima se podrazumijevaju trgovačka društva i trgovci pojedinci određeni ZTD-om.

3 Zakon o trgovačkim društvima, Narodne novine, br. 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15.

4 Godišnja financijska izvješća i izvješće o stanju društva te prijedlog odluke o upotrebi dobiti sastavlja uprava, odnosno izvršni direktori dioničkog društva, a utvrđuju ih uprava i nadzorni odbor, odnosno izvršni direktori i upravni odbor društva (čl. 300.a-300.d ZTD). Iznimno to može činiti i glavna skupština društva (čl. 300.e ZTD). U društvu s ograničenom odgovornošću ta izvješća sastavlja uprava društva, a utvrđuje ih skupština društva (čl. 428. st. 2. i čl. 441. st. 1. t. 1. ZTD). Ako društvo ima nadzorni odbor, uprava izvješća mora dostaviti na pregled tom organu.

netočnosti u financijskim izvješćima koja su predmet revizije. I ovdje je ponajprije uloga nadzornog organa subjekta revizije utvrditi moguća protuzakonita postupanja upravnog organa te obveza upravnog organa izgraditi sustav unutarnje revizije. Obveza je zakonskog revizora planirati i provoditi reviziju tako da se može razumno očekivati da će utvrditi nedostatke i nepravilnosti u financijskim izvješćima poduzetnika, bilo da su oni izazvani prijevarom, nenamjernim pogreškama ili povredama pravnih propisa.[5] Neutvrđivanje prijevare ili povrede zakona osnova su za uspostavu odgovornosti zakonskog revizora prema subjektu revizije, ali i trećim osobama uz ispunjenje određenih dodatnih pretpostavki.[6]

2. POSTUPAK IMENOVANJA ZAKONSKOG REVIZORA U SUBJEKTU REVIZIJE I SKLAPANJE UGOVORA O REVIZIJI S IMENOVANIM ZAKONSKIM REVIZOROM

Glavna skupština, odnosno skupština subjekta revizije ima ovlast imenovanja zakonskog revizora.[7] Prijedlog odluke za imenovanje zakonskog revizora sastavlja nadzorni, odnosno upravni odbor dioničkog društva. Oni daju i nalog imenovanom zakonskom revizoru za ispitivanje godišnjih financijskih izvješća društva i konsolidiranih godišnjih financijskih izvješća povezanih društava (čl. 263. st. 2. ZTD).[8] Ako je subjekt revizije subjekt od javnog interesa imenovanje zakonskog revizora obavlja se u skladu s odredbama čl. 41. Zakona o reviziji (dalje: ZRev)[9] i čl. 16. Uredbe o zakonskim revizijama u subjektima od javnog interesa iz 2014. godine (čl. 41. st. 4. ZRev).[10] U čl. 16. Uredbe iz 2014. godine uređuju se posebnosti

5 Green Paper of The Commission 1996, str. 13-16.

6 European Commission, A study on systems of civil liability of statutory auditors in the context of a Single Market for auditing services in the European Union, 15 January 2001, dostupno na: http://europa.eu.int/comm/internal_market/en/company/audit/docs/auditliability.pdf, 31. listopada 2003., str. 44-46. i 123-125.

7 U dioničkom društvu tu ovlast ima glavna skupština, a odluku o tomu donose dioničari većinom danih glasova (obična većina), osim ako statutom nije određena neka veća većina ili se traži i ispunjavanje dodatnih pretpostavki (čl. 275. st. 1. t. 4. i čl. 290. ZTD). U društvu s ograničenom odgovornošću ovlast imenovanja zakonskog revizora imaju članovi društva, odnosno skupština društva (čl. 441. st. 1. t. 7. ZTD). Odluka o tomu također se donosi većinom danih glasova na skupštini, osim ako društvenim ugovorom nije određena neka veća većina ili se traži i ispunjavanje dodatnih pretpostavki. Ako odluku o imenovanju zakonskog revizora donose članovi društva u pisanom obliku izvan skupštine, ta se većina računa prema ukupnom broju glasova kojima rspolažu članovi društva (čl. 440. st. 2. ZTD).

8 Svaki dioničar može dati i protuprijedlog za imenovanje zakonskog revizora prije ili tijekom održavanja glavne skupštine (čl. 282. i 283. ZTD). U društvima s ograničenom odgovornošću prijedlog za imenovanje i nalog za rad daje nadzorni odbor, ako društvo ima taj organ te mu je ta ovlast dana društvenim ugovorom. Ako društvo nema taj organ, o tomu odlučuju članovi društva, odnosno skupština. U društvima s ograničenom odgovornošću koja nisu obveznici zakonske revizije, svaki član društva može predložiti reviziju posljednjih godišnjih financijskih izvješća, a ako članovi, odnosno skupština društva to odbije, zahtjev za imenovanjem revizora trgovačkom sudu mogu podnijeti manjinski članovi društva (čl. 450. ZTD).

9 Zakon o reviziji, Narodne novine, br. 127/17.

10 Tako se u čl. 3. t. 1. ZRač-a kao subjekti od javnog interesa određuju: a) poduzetnici koji su

imenovanja zakonskih revizora u subjektima od javnog interesa koji moraju imati revizijski odbor.[11] U tomu slučaju revizijski odbor podnosi preporuku nadzornom, odnosno upravnom odboru subjekta revizije za imenovanje revizorskog društva (čl. 16. st. 2. Uredbe iz 2014. godine). Preporuka revizijskog odbora priprema se nakon provedbe javnog natječaja za odabir revizorskog društva od strane subjekta revizije, a za provedbu tog postupka odgovoran je revizijski odbor (čl. 16. st. 3. Uredbe iz 2014. godine). Prijedlog odluke nadzornog, odnosno upravnog odbora za imenovanje revizorskog društva koji je upućen na glavnu skupštinu, odnosno skupštinu subjekta revizije ili njegovim članovima mora sadržavati preporuku i opredjeljenje koje je donio revizijski odbor. Ako prijedlog odluke o imenovanju revizorskog društva odstupa od opredjeljenja revizijskog odbora, u prijedlogu se moraju navesti razlozi za odstupanje od preporuke revizijskog odbora (čl. 16. st. 5. Uredbe iz 2014. godine).[12] Time se u postupak izbora i imenovanja zakonskog revizora uključuju i dioničari, odnosno članovi subjekta revizije.

Nakon imenovanja revizorskog društva subjekt revizije sklapa s njime ugovor o reviziji, kojim se uređuju njegova prava i obveze u svezi sa zakonskom revizijom.[13] Revizorsko društvo mora obavijestiti Ministarstvo financija o prvom sklapanju ugovora o reviziji sa subjektom od javnog interesa u tekućoj poslovnoj godini (čl. 40. st. 1. i 2. ZRev). Ugovor se sklapa u pisanom obliku, a mora sadržavati iznos naknade za obavljanje zakonske revizije (čl. 40. st. 3. ZRev). Revizorsko društvo ne smije ugovorene revizorske usluge ustupati drugim revizorskim društvima (čl. 40. st. 4. ZRev). Time se osigurava da zakonsku reviziju u subjektu revizije provodi onaj zakonski revizor kojega je i imenovao subjekt revizije te koji ispunjava propisane uvjete. Ugovor o reviziji može se raskinuti u skladu s odredbama Zakona o obveznim odnosima (čl. 40. st. 5. ZRev).[14] U slučaju raskida ugovora o reviziji revizorsko društvo mora o tomu obavijestiti Ministarstvo financija u roku od 15 dana od datuma raskida te detaljno obrazložiti razloge koji su doveli do raskida ugovora. Nakon primljene obavijesti Ministarstvo financija može odlučiti o provedbi postupka nadzora nad

osnovani u skladu s propisima RH i čiji su vrijednosni papiri uvršteni na uređeno tržište kapitala bilo koje države članice EU-a kako je određeno zakonom kojim se uređuje tržište kapitala, b) taksativno određene kreditne i financijske institucije te c) trgovačka društva te druge pravne osobe od strateškog interesa za RH i trgovačka društva od posebnog interesa, u kojima RH ima udjele manje od 50 %, sukladno odluci Vlade RH kojom se utvrđuje popis trgovačkih društava i drugih pravnih osoba od strateškog i posebnog interesa za RH, osim pravnih osoba koje vode poslovne knjige i sastavljaju financijska izvješća u skladu s propisima kojima se uređuje proračunsko računovodstvo ili računovodstvo neprofitnih organizacija (čl. 3. t. 1. ZRač).

11 Revizijski odbor koji može biti samostalno tijelo ili pomoćno tijelo nadzornog, odnosno upravnog odbora subjekta revizije (čl. 65. st. 1. ZRev).

12 U tom je slučaju revizorsko društvo koje preporučuje nadzorni, odnosno upravni odbor moralo sudjelovati u postupku javnog natječaja za odabir zakonskog revizora. To se ne primjenjuje ako ovlasti revizijskog odbora obavlja nadzorni, odnosno upravni odbor subjekta revizije.

13 U ime i za račun subjekta revizije taj ugovor sklapa uprava, odnosno izvršni direktori trgovačkog društva, odnosno zastupnici po zakonu toga subjekta.

14 Razlike u mišljenjima, koje se odnose na područja računovodstva i revizije, predstavnika subjekta revizije i revizorskog društva ne mogu biti opravdana osnova za raskid ugovora. Odredbe čl. 40. st. 1. do 5. ZRev-a na odgovarajući se način primjenjuju i na druge ugovore o obavljanju revizorskih usluga (čl. 40. st. 7. ZRev).

revizorskim društvom (čl. 40. st. 6. ZRev).[15]

3. ZAKONODAVNE AKTIVNOSTI TIJELA EUROPSKE UNIJE U PODRUČJU ZAKONSKE REVIZIJE

Kvaliteta rada i neovisnost zakonskih revizora u odnosu na subjekte revizije osobito je postala aktualna u posljednja dva desetljeća. To je bilo uvjetovano velikim financijskim skandalima u američkim i europskim uvrštenim dioničkim društvima početkom ovog stoljeća, kao i krizom u financijskom sektoru tijekom razdoblja od 2007. do 2009. godine. Stoga se javila potreba za poduzimanjem odgovarajućih mjera tijela EU-a i uvođenja mehanizama za poboljšanje točnosti i pouzdanosti izvješća o reviziji te osiguravanje neovisnosti zakonskih revizora u odnosu na subjekte revizije.[16]

Stoga je 2006. godine donesena Direktiva 2006/43/EZ o zakonskim revizijama godišnjih financijskih izvješća i konsolidiranih financijskih izvješća,[17] a 2005. godine Odluka Komisije 2005/909/EZ o uspostavljanju skupine stručnjaka za savjetovanje Komisije i olakšavanje suradnje između sustava javnog nadzora ovlaštenih revizora i revizorskih društava.[18] Temeljni su ciljevi Europske komisije bili jačanje neovisnosti zakonskih revizora u odnosu na subjekte revizije, unaprjeđenje obavještavajuće vrijednosti izvješća o reviziji u odnosu na ulagatelje i druge dionike, olakšavanje prekograničnog pružanja usluga revizije, unaprjeđenje i poboljšavanje nadzora rada zakonskih revizora te promicanje usklađenosti i suradnje u području revizije s trećim državama.[19] Cilj je Direktive iz 2006. godine bio usklađivanje nacionalnih propisa država članica EU-a koji uređuju materiju zakonske revizije. Rješenja Direktive pratila su rješenja iz prava SAD-a.[20]

Kriza u financijskom sektoru koja je započela 2007. godine ponovno je ukazala na nedostatke u radu zakonskih revizora te točnosti i pouzdanosti njihovih izvješća o reviziji godišnjih i konsolidiranih financijskih izvješća kreditnih i financijskih institucija te uvrštenih dioničkih društava. U međuvremenu su se povećala očekivanja

15 ZRev u čl. 43. određuje obvezu imenovanja i sklapanja ugovora o reviziji s više revizorskih društava u slučaju zakonske revizije u određenim subjektima od javnog interesa. Time se dodatno osigurava neovisnost zakonskih revizora u obavljanju revizije te osigurava kvaliteta njezine provedbe u određenim subjektima od javnog interesa koje obilježava složenost poslovanja ili su od strateškog interesa za RH.

16 Jurić, D., Uloga revizora u dioničkom društvu, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 25, br. 1, 2004., str. 323-325 i 347-349.

17 Direktiva 2006/43/EZ Europskog parlamenta i Vijeća od 17. svibnja 2006. o zakonskim revizijama godišnjih financijskih izvještaja i konsolidiranih financijskih izvještaja, kojom se mijenjaju direktive Vijeća 78/660/EEZ i 83/349/EEZ i stavlja izvan snage Direktiva Vijeća 84/253/EEZ (tekst značajan za EPG), Službeni list EU, L 157, 9. lipnja 2006., str. 87-107.

18 Odluka Komisije od 14. prosinca 2005. o uspostavljanju skupine stručnjaka za savjetovanje Komisije i olakšavanje suradnje između sustava javnog nadzora ovlaštenih revizora i revizorskih društava (2005/909/EZ), Službeni list EU, L 329, 16. prosinca 2005., str. 38-39.

19 European Commission, Auditing of companies' financial statements, https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/auditing-companies-financial-statements_en, 5. prosinca 2017., str. 1.

20 Jurić, D., op. cit., str. 324-325. i 349-350.

javnosti i ulagatelja u rad zakonskih revizora koja premašuju njihovu stvarnu ulogu. Konačno, uočena je koncentracija na tržištu revizorskih usluga, što onemogućava širi izbor zakonskih revizora subjektima revizije te otežava prekogranično pružanje usluga revizije na unutarnjem tržištu EU-a malim i srednjim revizorima i ulazak novih sudionika na to tržište.[21]

Zbog toga je Europski parlament i Vijeće EU-a 16. travnja 2016. godine donijelo Direktivu 2014/56/EU o izmjeni Direktive o zakonskim revizijama iz 2006. godine (dalje: Direktiva iz 2014. godine)[22] te Uredbu br. 537/2014 o posebnim zahtjevima u svezi sa zakonskom revizijom subjekata od javnog interesa (dalje: Uredba).[23] Cilj je Direktive iz 2014. godine poboljšati kvalitetu zakonske revizije jačanjem neovisnosti revizora te njihove profesionalne skeptičnosti u odnosu na subjekte revizije i njihove organe, postaviti zakonodavni okvir za sve zakonske revizije te ojačati javni nadzor nad revizorskom djelatnošću i unaprijediti suradnju između nacionalnih nadležnih tijela u EU-u. Kada se radi o zakonskoj reviziji u subjektima od javnog interesa, Europska se komisija odlučila za donošenje Uredbe koja se neposredno primjenjuje na području svih država članica EU-a (čl. 44. Uredbe). Njome se dopunjuju odredbe Direktive iz 2014. godine kada se radi o zakonskoj reviziji u subjektima od javnog interesa.

Navedene se direktive i Uredba iz 2014. godine nisu detaljnije pozabavile pitanjem odgovornosti zakonskih revizora za štetu nastalu subjektima revizije i trećim osobama u slučaju njihova nepravilnog i nezakonitog rada. One su predvidjele samo preventivne mjere kojima je cilj osiguravanje neovisnosti i objektivnosti zakonskih revizora u odnosu na subjekte revizije te točnosti i pouzdanosti njihovih izvješća o reviziji. Europska je komisija provela istraživanje i izradila studiju o odgovornosti za štetu zakonskih revizora u nacionalnim pravnim poredcima država članica EU-a 2001., a koja je dopunjena 2006. godine.[24] Navedeno je istraživanje pokazalo bitne razlike između država članica EU-a u uređivanju te materije. Države članice EU-a većinom kombiniraju primjenu općih pravila i posebnih pravila o odgovornosti za štetu zakonskih revizora. Sve države članice EU-a prihvaćaju postojanje odgovornosti

21 Republika Slovenija, Zakon o spremembah in dopolnitvah Zakona o revidiranju, EVA 2016-1611-0002, dostupno na: http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7354, 18. prosinca 2017., str. 10.

22 Direktiva 2014/56/EU Europskog parlamenta i Vijeća od 16. travnja 2014. o izmjeni Direktive 2006/43/EZ o zakonskim revizijama godišnjih financijskih izvještaja i konsolidiranih financijskih izvještaja (tekst značajan za EPG), Službeni list EU, L 158, 27. svibnja 2014., str. 196–226.

23 Uredba (EU) br. 537/2014 Europskog parlamenta i Vijeća od 16. travnja 2014. o posebnim zahtjevima u vezi zakonske revizije subjekata od javnog interesa i stavljanju izvan snage Odluke Komisije 2005/909/EZ (tekst značajan za EGP), Službeni list EU, L 158, 27. svibnja 2014., str. 77-112.

24 European Commission, A study on systems of civil liability of statutory auditors in the context of a Single Market for auditing services in the European Union, 15 January 2001 i European Commission, Annex I to the Commission Staff Working Paper The legal systems of civil liability of statutory auditors in the European Union, Update of the study carried out on behalf of the Commission by Thieffry & Associates in 2001, October 2006, dostupno na: http://ec.europa.eu/internal_market/auditing/docs/liability/consultation_annex1_en.pdf, 3. srpnja 2018.

za štetu zakonskih revizora prema subjektima revizije, pri čemu ta odgovornost počiva na ugovornom odnosu između zakonskog revizora i subjekta revizije (ugovorna odgovornost zakonskog revizora za štetu).[25] Kada se radi o odgovornosti prema trećim osobama, koje nisu u ugovornom odnosu sa zakonskim revizorom (izvanugovorna odgovornost zakonskog revizora za štetu),[26] nacionalna pravna pravila država članica EU-a ne uređuju jednoobrazno tu materiju. Prisutno je opće stajalište o potrebi uspostave te odgovornosti, budući da se zakonska revizija obavlja i u javnom interesu. Postavlja se pitanje može li svaka treća osoba, neovisno o tomu nalazi li se u pravnoj vezi s ugovornim stranama iz ugovora o reviziji (zakonski revizor i subjekt revizije), postaviti zahtjev za naknadu štete. Pritom se razlikuju one države članice EU-a koje dopuštaju svakoj trećoj osobi koja je pretrpjela štetu nesavjesnom djelatnošću zakonskog revizora podići tužbu za naknadu štete[27] i one koje dopuštaju takve tužbe uz određena ograničenja.[28]

Uzimajući u obzir nalaze svojega istraživanja, Europska je komisija uočila problem nejedinstvenoga pristupa država članica EU-a u pravnom uređenju ograničenja iznosa do kojega zakonski revizori odgovaraju za štetu počinjenu subjektima revizije i trećim osobama.[29] Nepostojanje takvog ograničenja može ugroziti poslovanje zakonskih revizora zbog potencijalno visokih tužbenih zahtjeva za naknadu štete, a i otežati sklapanje ugovora o osiguranju od odgovornosti za štetu s osiguravajućim

25 U svim državama članicama EU-a subjekt revizije može postaviti zahtjev za naknadu štete protiv zakonskog revizora. To u ime subjekta revizije čini njegova uprava, odnosno izvršni direktori te likvidatori. U većini njih ta odgovornost zakonskog revizora počiva na povredi njegovih ugovornih obveza, pri čemu je na subjektu revizije teret dokaza postojanje povrede ugovorne obveze zakonskog revizora u svezi s pruženim revizorskim uslugama. Vidi u: European Commission, Annex I to the Commission Staff Working Paper The legal systems of civil liability of statutory auditors in the European Union, Update of the study..., str. 2.

26 U tu kategoriju spadaju trgovačka društva koja su povezana sa subjektom revizije, pojedinačni dioničari, odnosno članovi subjekta revizije, njegovi vjerovnici i radnici, potencijalni ulagatelji i kreditori, javnost i sl.

27 U većini država članica EU-a treće osobe mogu ponijeti zahtjev za naknadu štete protiv zakonskog revizora, uz uvjet dokazivanja postojanja krivnje, štetne radnje, nastale štete te uzročne veze između štete i štetne radnje. Loc. cit.

28 Cipar, Irska, Malta i Ujedinjeno Kraljevstvo traže da treće osobe dokažu i postojanje dužne pozornosti zakonskog revizora prema njima (zakonski revizor je znao ili morao znati da će njegovo izvješće o reviziji ili njegov rad služiti tužitelju za određenu svrhu). U Austriji i Njemačkoj treće osobe mogu postaviti zahtjev za naknadu štete na temelju općih pravila o odgovornosti za štetu ili na temelju prešutnih ugovora te sklapanja ugovora sa zaštitnim učinkom prema trećim osobama. Vidi u ibid., str. 2-4, Mićović, M., Bukovac Puvača, M., Odgovornost za štetu prouzročenu trećim osobama obavljanjem zakonske revizije, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 39, br. 1, 2018., str. 162-163.

29 Prema istraživanju iz 2006. godine Austrija, Belgija, Grčka, Njemačka i Slovenija predviđale su zakonsko ograničenje iznosa do kojega zakonski revizori odgovaraju za počinjenu štetu. Ta se ograničenja ne primjenjuju u slučaju prijevarnog postupanja ili postojanja namjere zakonskog revizora pri obavljanju revizorskih usluga. U manjem broju država članica EU-a to se ograničenje moglo predvidjeti ugovorom o reviziji. Vidi u European Commission, Annex I to the Commission Staff Working Paper The legal systems of civil liability of statutory auditors in the European Union, Update of the study..., str. 6 i 8.

društvima.[30] Stoga je Europska komisija 2008. godine donijela Preporuku br. 2008/473/EZ o ograničenju građanskopravne odgovornosti samostalnih revizora i revizorskih društava.[31] Odredbe se Preporuke odnose na odgovornost za štetu samostalnih revizora i revizorskih društava koja obavljaju zakonsku reviziju godišnjih i godišnjih konsolidiranih financijskih izvješća poduzetnika koji su registrirani u državi članici EU-a i čiji su vrijednosni papiri uvršteni na uređeno tržište kapitala države članice EU-a (t. 1. Preporuke). Europska komisija preporuča ograničenje odgovornosti za štetu zakonskih revizora koja može nastati u svezi s njihovim pružanjem revizorskih usluga subjektima revizije, pri čemu se to ograničenje ne primjenjuje pri namjernom kršenju njihovih dužnosti (t. 2. Preporuke). To ograničenje odgovornosti treba postojati u odnosu na subjekta revizije te treće osobe, kada ih nacionalni propisi države članice EU-a ovlašćuju na podnošenje zahtjeva za naknadu štete (t. 3. Preporuke). Pritom ograničenje odgovornosti ne smije onemogućiti pravično obeštećenje subjekta revizije ili treće osobe (t. 4. Preporuke). Preporuka ostavlja slobodu državama članicama EU-a izabrati jednu ili više ponuđenih metoda ograničenja te odgovornosti (t. 5. Preporuke).[32]

4. ODGOVORNOST ZA ŠTETU ZAKONSKOG REVIZORA U HRVATSKOM PRAVU

Zakon o reviziji iz 2017. godine ne sadrži posebne odredbe o odgovornosti za štetu zakonskoga revizora prema subjektu revizije i prema trećim osobama. Stoga se

30 Obveza sklapanja ugovora o osiguranju postojala je u 23 države članice EU-a 2006. godine. Vidi u ibid., str. 9.

31 Preporuka Komisije br. 2008/473/EZ o ograničenju građanskopravne odgovornosti samostalnih revizora i revizorskih društava od 5. lipnja 2008. godine (notificirano pod dokumentarnim brojem C(2008) 2274) (tekst značajan za EGP), Službeni list EU, L 162, 21. lipnja 2008., str. 39-40.

32 Ograničenje odgovornosti za štetu zakonskih revizora može se odrediti: a) određivanjem najvišega novčanog iznosa ili jednadžbe za izračun tog iznosa, do kojega zakonski revizor odgovara za naknadu štete, b) određivanjem niza načela na temelju kojih je zakonski revizor odgovoran samo za štetu koja je nastala njegovim stvarnim doprinosom nastanku štete oštećeniku te stoga nije solidarno odgovoran s drugim štetnicima te c) donošenjem odredbe kojom se subjektu revizije i zakonskom revizoru daje mogućnost ograničiti tu odgovornost ugovorom o reviziji. U slučaju izbora ove posljednje metode ograničenja odgovornosti za štetu, države članice EU-a moraju osigurati: a) sudsku kontrolu ugovora o reviziji, b) o ograničenju odgovornosti zakonskog revizora u subjektu revizije moraju zajednički odlučiti članovi uprave, odnosno izvršni direktori te članovi nadzornog, odnosno upravnog odbora tog subjekta te tu odluku mora potvrditi glavna skupština, odnosno članovi (skupština) subjekta revizije te c) ograničenje odgovornosti za štetu zakonskog revizora i svaka izmjena sporazuma o tomu moraju biti objavljeni u bilješkama uz financijska izvješća subjekta revizije (t. 6. Preporuke). Prije usvajanja neke od predloženih ili neke druge metode ograničenja odgovornosti za štetu zakonskog revizora sukladno Preporuci, država članica EU-a mora uzeti u obzir utjecaj na tržište kapitala i ulagatelje te na uvjete za pristup tržištu zakonske revizije za uvrštena društva, kao i utjecaj na kvalitetu revizije, osigurljivost rizika te subjekte revizije (t. 7. Preporuke). Države članice EU-a moraju obavijestiti Europsku komisiju o poduzetim mjerama u skladu s Preporukom (t. 8. Preporuke). Vidi u Mićović, M., Bukovac Puvača, M., op. cit., str. 160.

na to pitanje primjenjuju opće odredbe o odgovornosti za štetu iz Zakona o obveznim odnosima (dalje: ZOO).[33] ZRev u čl. 60. i 61. propisuje obvezu revizorskog društva sklopiti ugovor o osiguranju od odgovornosti za štetu koja može nastati subjektu revizije i trećim osobama pri obavljanju revizorskih usluga te propisuje najmanju svotu pokrića. Njegove su odredbe relevantne i za određenje obveza koje zakonski revizor ima pri pružanju usluga subjektu revizije.

4.1. Revizorsko društvo kao štetnik

U ulozi štetnika pojavljuje se revizorsko društvo koje je imenovano za zakonskog revizora i koje je sklopilo ugovor o reviziji sa subjektom revizije. Radi obavljanja revizorskih usluga revizorsko društvo određuje glavnoga revizijskog partnera,[34] ovlaštene revizore[35] te druge osobe koje nisu ovlašteni revizori,[36] a koje obavljaju zakonsku reviziju u subjektu revizije u ime revizorskog društva (čl. 54. st. 1. ZRev).[37] Oni su radnici u revizorskom društvu, pa se stoga primjenjuje odredba čl. 1061. ZOO-a o odgovornosti poslodavca za rad radnika. Za štetu koju radnik u radu ili u svezi s radom prouzroči trećoj osobi odgovara poslodavac kod kojega je radnik radio u trenutku prouzročenja štete. Odgovornost poslodavca se predmnijeva, osim ako on dokaže da su postojali razlozi koji isključuju odgovornost radnika (čl. 1061. st. 1. ZOO). Oštećenik u tom slučaju zahtijeva popravljanje štete od poslodavca (revizorskog društva). Iznimno, ako je radnik štetu prouzročio namjerno, oštećenik će moći zahtijevati popravljanje štete i izravno od radnika (čl. 1061. st. 2. ZOO). U tom slučaju oštećenik može birati hoće li zahtjev za popravljanje štete usmjeriti prema poslodavcu, radniku ili istodobno protiv oboje. Poslodavac koji je oštećeniku nadoknadio štetu ima pravo zahtijevati od radnika naknadu troškova popravljanja štete, ako je radnik štetu prouzročio namjerno ili iz krajnje nepažnje (čl. 1061. st. 3. ZOO). Takav zahtjev poslodavac mora postaviti prema radniku u roku od šest mjeseci od dana kad je šteta popravljena (čl. 1061. st. 4. ZOO).[38]

33 Zakon o obveznim odnosima, Narodne novine, br. 35/05, 41/08, 125/11, 78/15, 29/18.

34 Glavni je revizijski partner ovlašteni revizor koji je glavna odgovorna osoba za obavljanje zakonske revizije ili drugih revizorskih usluga u ime revizorskog društva te koji potpisuje izvješće o reviziji (čl. 4. t. 22. ZRev). On je radnik revizorskog društva koje je imenovano za zakonskog revizora određenog subjekta revizije.

35 Ovlašteni revizor je fizička osoba koja ima odobrenje za rad koje je izdalo Ministarstvo financija u skladu s odredbama ZRev-a te mora biti zaposlen u revizorskom društvu. On ne može sklopiti ugovor o radu niti smije za svoj ili tuđi račun na bilo koji drugi način obavljati revizorske usluge s drugim revizorskim društvom (čl. 4. t. 9. i čl. 5. st. 3. ZRev). Revizorsko društvo mora imati najmanje jednoga zaposlenog ovlaštenog revizora, a ako se radi o obavljanju zakonske revizije u subjektima od javnog interesa ono mora imati zaposlena u punom radnom vremenu najmanje tri ovlaštena revizora (čl. 5. st. 1. i čl. 63. ZRev).

36 U obavljanju pojedinih revizorskih usluga u revizorskom društvu mogu sudjelovati i osobe koje nisu ovlašteni revizori ako njihov rad planira i nadzire glavni revizijski partner (čl. 5. st. 5. ZRev).

37 Jurić, D., Neovisnost zakonskog revizora u odnosu na subjekte revizije prema Zakonu o reviziji iz 2017. godine, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 39, br. 1, 2018., str. 145.

38 Gorenc, V., et al., Komentar Zakona o obveznim odnosima, RRIF plus, Zagreb, 2005., str. 1640-1642.

Zakon o reviziji posebnu pozornost posvećuje jačanju neovisnosti ovlaštenih revizora i revizorskih društava u odnosu na subjekte revizije. U tu se svrhu uvode stroži zahtjevi za neovisnost i objektivnost te se propisuju organizacijski zahtjevi koje moraju ispunjavati ovlašteni revizori i revizorska društva. Kada se radi o zakonskoj reviziji u subjektima od javnog interesa, propisuju se posebni zahtjevi koji se odnose na obvezu rotacije ovlaštenih revizora i revizorskih društava, određivanje zabranjenih nerevizorskih usluga, ograničenje iznosa naknada za dopuštene nerevizorske usluge, jačanje uloge i proširenje ovlasti revizijskog odbora u subjektima od javnog interesa te suradnja ovlaštenih revizora i revizorskih društava s Ministarstvom financija kao javnim nadzornim tijelom. Ovi zahtjevi imaju za cilj spriječiti pojavu nepravilnosti i nezakonitosti u radu zakonskih revizora, što za posljedicu može imati nastanak njihove odgovornosti prema subjektima revizije i trećim osobama. Ti se zahtjevi primjenjuju prije, tijekom te nakon prestanka revizijskog angažmana.[39]

Prije prihvaćanja, odnosno produljenja revizijskog angažmana revizorsko društvo i ovlašteni revizor moraju procijeniti i dokumentirati: a) ispunjavaju li zahtjeve koji se odnose na njihovu neovisnost u odnosu na subjekta revizije iz čl. 48. i 49. ZRev-a, b) postoje li prijetnje njihovoj neovisnosti i zaštitne mjere koje su primijenjene kako bi se ublažile te prijetnje, c) ima li revizorsko društvo stručne radnike, vrijeme i resurse potrebne za obavljanje revizorske usluge na primjeren način te d) ima li glavni revizijski partner, kojega je imenovalo revizorsko društvo, odobrenje za rad u državi članici EU-a u kojoj se obavlja zakonska revizija (čl. 52. ZRev). Ako te uvjete ne ispunjavaju, ne smiju prihvatiti obavljanje revizorskih usluga u subjektu revizije. Eventualnu pojavu sukoba interesa i odnosa koji ugrožavaju njihovu neovisnost moraju pratiti i tijekom trajanja revizijskog aranžmana te o tomu obavještavati subjekta revizije i Ministarstvo financija te poduzimati potrebne mjere radi sprječavanja njihovog utjecaja na neovisnost zakonskog revizora. Revizorsko društvo, ovlašteni revizor, glavni revizijski partner i svaka osoba koja može izravno ili neizravno utjecati na rezultat revizorskih usluga, moraju tijekom razdoblja koje obuhvaćaju financijska izvješća koja su predmet zakonske revizije i tijekom obavljanja revizorskih usluga biti neovisni u odnosu na subjekta revizije te ne smiju sudjelovati u donošenju odluka subjekta revizije (čl. 48. st. 1. ZRev).

Revizorsko društvo, ovlašteni revizori te druge osobe koje nisu ovlašteni revizori, a sudjeluju u obavljanju revizorskih usluga, moraju djelovati u skladu s temeljnim načelima profesionalne etike o integritetu, objektivnosti, profesionalnoj kompetentnosti i dužnoj pozornosti (čl. 47. st. 1. ZRev). Pri obavljanju revizorskih usluga moraju zadržati profesionalnu skeptičnost te moraju biti svjesni mogućnosti postojanja bitno pogrešnog prikazivanja zbog činjenica ili ponašanja koja upućuju na nepravilnosti, uključujući prijevaru ili pogreške, neovisno o proteklom iskustvu revizorskog društva i ovlaštenog revizora o iskrenosti i integritetu članova uprave, odnosno izvršnih direktora ili članova nadzornog, odnosno upravnog odbora subjekta revizije (čl. 47. st. 2. ZRev). Profesionalne skeptičnosti osobito se moraju pridržavati pri provjeravanju procjena upravljačkih struktura u svezi s fer vrijednostima, umanjenjem imovine, rezerviranjima i budućim tokom novca relevantnima za

39 Jurić, D., op. cit., str. 138-151.

sposobnost subjekta za vremenski neograničeno poslovanje (čl. 47. st. 3. ZRev). Oni moraju pri ispunjavanju svojih obveza postupati s povećanom pozornošću, prema pravilima struke i običaja (pažnja dobrog stručnjaka), budući da djeluju kao profesionalci (čl. 20. st. 2. ZOO).[40]

Revizorsko društvo mora sastaviti izvješće o reviziji godišnjih financijskih izvješća ili godišnjih konsolidiranih financijskih izvješća subjekta revizije u skladu s Međunarodnim revizijskim standardima, odredbama ZRev-a i drugim propisima (čl. 58. st. 1. ZRev). U njemu zakonski revizor daje neovisno stručno mišljenje o tomu prikazuju li financijska izvješća u svim bitnim odrednicama istinit i fer prikaz financijskog položaja i uspješnosti poslovanja te novčanih tokova u skladu s primjenjivim okvirom financijskog izvještavanja ili, ako je to primjenjivo, jesu li financijska izvješća u skladu s propisima (čl. 4. t. 2. ZRev). Izvješće o reviziji mora biti u pisanom obliku te sadržavati propisane bitne sastojke (čl. 58. st. 2. ZRev).[41] Revizorsko mišljenje glavni je dio izvješća o reviziji, a može biti pozitivno, s rezervom ili negativno. Ako ovlašteni revizor ili revizorsko društvo nije u mogućnosti izraziti revizorsko mišljenje, revizorsko izvješće sadrži navod o suzdržavanju od izražavanja mišljenja (čl. 58. st. 3. ZRev). Odgovornost zakonskog revizora za štetu može nastati kada da pozitivno mišljenje, a naknadno se utvrdi da financijsko stanje subjekta revizije nije onakvo kakvo je bilo prikazano u revidiranim godišnjim financijskim izvješćima. Pogrešno mišljenje će postojati ako je zakonski revizor dao pozitivno mišljenje, a trebao je dati mišljenje s rezervom, negativno mišljenje ili se trebao suzdržati od izražavanja mišljenja. Pritom pogrešno mišljenje mora biti rezultat njegova protupravnog postupanja, što znači da je zakonski revizor postupao protivno propisima i pravilima struke, odnosno bez upotrebe pažnje dobrog stručnjaka.[42]

Valja naglasiti da se revizija godišnjih financijskih izvješća ili godišnjih konsolidiranih financijskih izvješća subjekata revizije provodi tako da se osigura razumno uvjerenje o otkrivenim bitnim pogreškama u financijskim izvješćima. Zakonski revizor ne jamči za točnost podataka sadržanih u financijskim izvješćima.[43] Okvir financijskog izvještavanja koji je primijenjen pri sastavljanju godišnjih financijskih izvješća ili godišnjih konsolidiranih financijskih izvješća subjekta revizije određuje njegova uprava, odnosno izvršni direktori. Oni odgovaraju i za točnost podataka u financijskim izvješćima.[44] Zakonski revizor sam ocjenjuje u kolikoj će mjeri ispitivati transakcije i koje će dokaze pribavljati pri obavljanju zakonske revizije u svakom konkretnom slučaju. Pritom u izvješću o reviziji mora opisati opseg

40 Pri procjeni jesu li postupali s takvom pozornošću u obzir se uzimaju pravila Međunarodnih revizijskih standarda, Kodeks profesionalne etike revizora, smjernice Hrvatske revizorske komore te odredbe ZRev-a. Vidi u Mićović, M., Bukovac Puvača, M., op. cit., str. 171-173.

41 Izvješće o reviziji mora potpisati najmanje ovlašteni revizor koji obavlja zakonsku reviziju (glavni revizijski partner) i zastupnik po zakonu revizorskog društva (čl. 58. st. 5. ZRev). Njemu se prilažu godišnja financijska izvješća ili druga izvješća koja su bila predmet zakonske revizije (čl. 58. st. 12. ZRev).

42 Ibid., str. 171.

43 To bi zahtijevalo ispitivanje svih transakcija i pribavljanje brojnih dokaza tijekom obavljanja zakonske revizije, što je neekonomično.

44 Primijenjeni okvir financijskog izvještavanja mora biti naznačen u izvješću o reviziji.

zakonske revizije i navesti revizijske standarde koje je primijenio pri obavljanju zakonske revizije. Mišljenje zakonskog revizora izraženo u izvješću o reviziji odnosi se na godišnja financijska izvješća kao cjelinu, što znači da se odnosi i na one transakcije koje nisu bile obuhvaćene njegovim ispitivanjem (čl. 58. st. 9. ZRev). Stoga se radi utvrđivanja njegove odgovornosti za štetu mora ispitati je li zakonski revizor stvarno obavio sve postupke koje je prema revizijskim standardima trebao obaviti. Zakonski revizor ispituje sadrže li financijska izvješća bitne nepravilnosti (pogreške i prijevare) te prema svojoj stručnoj prosudbi ocjenjuje koje nepravilnosti imaju takvo svojstvo. On svoju pozornost usmjerava na materijalno važne podatke. Bitan će biti onaj podatak čije izostavljanje ili pogrešno prikazivanje može uvjetovati pogrešnu odluku ili prosudbu korisnika financijskih izvješća. Kada uoči pogreške ili prijevare u revidiranim financijskim izvješćima mora ocijeniti njihov učinak na financijska izvješća i o tomu obavijestiti upravne i nadzorne organe subjekta revizije. Ako između njih postoji nesuglasje u pogledu uočene pogreške ili prijevare, zakonski revizor može i odustati od preuzete obveze revizije.[45]

Što se tiče opsega revizije godišnjih financijskih izvješća i godišnjih konsolidiranih financijskih izvješća, ono ne obuhvaća izražavanje uvjerenja o budućoj održivosti subjekta revizije ili učinkovitosti članova uprave, izvršnih direktora ili upravnog odbora pri dotadašnjem ili budućem vođenju poslova subjekta revizije (čl. 55. ZRev). Time se žele otkloniti pogrešne predodžbe trećih osoba u svezi s ulogom zakonskih revizora te dodatno ukazati da za točnost i pouzdanost sadržaja godišnjih financijskih izvješća odgovaraju članovi upravnih i nadzornih organa subjekta revizije.[46]

Odgovornost revizorskog društva za štetu nastalu subjektu revizije može proizaći i iz povrede obveze čuvanja revizorske tajne. Revizorsko društvo mora kao revizorsku tajnu čuvati sve podatke koje je saznalo obavljajući revizorske usluge (čl. 57. st. 1. ZRev).[47] Obvezom čuvanja revizorske tajne vezani su članovi uprave i nadzornog odbora, odnosno izvršni direktori i članovi upravnog odbora revizorskog društva, kao i osobe koje rade ili su radile u revizorskom društvu i kojima jesu ili su bili na bilo koji način dostupni podatci obuhvaćeni revizorskom tajnom. Oni se tim podatcima ne smiju koristiti za svoj račun niti ih priopćiti trećim osobama ili im omogućiti da se njima koriste (čl. 57. st. 3. ZRev). U određenim slučajevima dopušteno je priopćavanje tih podataka (čl. 57. st. 4. ZRev).[48] Time se štiti odnos povjerljivosti

45 Ibid., str. 174-175.

46 Ibid., str. 168-169.

47 Revizorska tajna smatra se poslovnom tajnom revizorskog društva. U odnosu na glavnoga revizijskog partnera, ovlaštene revizore i druge osobe koje su sudjelovale u obavljanju zakonske revizije ona ima obilježje profesionalne tajne. Ona se čuva u skladu sa Zakonom o zaštiti tajnosti podataka, osim ako ZRev-om nije određeno drukčije (čl. 57. st. 2. ZRev). Ako se tijekom obavljanja revizorskih usluga revizorsko društvo treba koristiti dokumentacijom, podatcima i informacijama koji su klasificirani odgovarajućim stupnjem tajnosti, moraju se primijeniti odredbe Zakona o tajnosti podataka i Zakona o informacijskoj sigurnosti (čl. 57. st. 5. ZRev).

48 To će biti slučajevi kada se podatci priopćavaju trećim osobama uz prethodnu pisanu suglasnost subjekta revizije, Ministarstvu financija radi provedbe nadzora, odnosno drugih postupaka u okvirima njegove nadležnosti, drugom revizorskom društvu u svrhu obavljanja

između revizorskog društva i subjekta revizije te se štite njegovi podatci, a koje su navedene osobe u revizorskom društvu saznale obavljajući revizorske usluge.

4.2. Oštećenici

U ulozi oštećenika mogu se pojaviti subjekt revizije (ugovorna odgovornost za štetu revizorskog društva) te treće osobe izvan subjekta revizije koje se pojavljuju kao korisnici izvješća o reviziji (izvanugovorna odgovornost za štetu revizorskog društva).

U ime subjekta revizije zahtjev za naknadu štete prema revizorskom društvu podnosi njegova uprava, odnosno izvršni direktori.[49] Ako je nad subjektom revizije pokrenuta likvidacija, to čine likvidatori društva, a ako je nad njime otvoren stečajni postupak to čini stečajni upravitelj. To proizlazi iz odredbi ZTD-a i Stečajnog zakona o osobama koje su ovlaštene zastupati trgovačka društva. Zahtjev za naknadu štete u ime subjekta revizije koji je društvo kapitala ne mogu podnijeti njegovi dioničari, odnosno članovi, budući da ga oni nisu ovlašteni zastupati.[50] Oni moraju dokazati štetnu radnju, nastalu štetu te uzročnu vezu između štete i štetne radnje. Revizorsko društvo odgovara za svaki stupanj krivnje (namjera, krajnja i obična nepažnja). Predmnijeva se samo obična nepažnja, a namjera i krajnja nepažnja se moraju dokazati.[51] Šteta se može sastojati u umanjenju imovine (obična šteta), sprječavanja njezinog povećanja (izmakla korist) te neimovinske štete (npr. povreda poslovnog ugleda, poslovne tajne i sl.) koja je nastala subjektu revizije. Štetna radnja mora biti rezultat protupravnog postupanja revizorskog društva pri pružanju revizorskih usluga.[52] To znači da revizorsko društvo odgovara po kriteriju predmnijevane krivnje, a njegova odgovornost počiva na povredi obveze iz ugovora o reviziji kojega je sklopilo sa subjektom revizije.[53]

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revizije godišnjih konsolidiranih financijskih izvješća u skladu sa ZRev-om, sudu na njegov pisani zahtjev u kaznenom postupku ili postupku koji mu prethodi, nadležnom tijelu radi sprječavanja pranja novca i financiranja terorizma, ako je to propisano drugim zakonom ili pravno obvezujućim aktima EU-a te tijelima ovlaštenim za nadzor poslovanja subjekata od javnog interesa, u okvirima njihove nadležnosti.

49 Ako je subjekt revizije komanditno društvo to čine njegovi komplementari koji su ga ovlašteni zastupati.

50 Time se isključuje mogućnost podnošenja, tzv. derivativnih tužbi. Šteta nastala subjektu revizije utječe i na tržišnu vrijednost dionica, odnosno poslovnih udjela društva koje drže njegovi dioničari, odnosno članovi. Time im nastaje, tzv. refleksna šteta. Dioničar, odnosno član subjekta revizije ne može samostalno podnijeti zahtjev za naknadu te refleksne štete, već to mora učiniti subjekt revizije. Vidi u Barbić, J., Pravo društava, Knjiga druga – društva kapitala, Svezak I.: dioničko društvo, Organizator, Zagreb, 2010., str. 806-807.

51 O dokazanom stupnju krivnje ovisi opseg naknade štete. Ako se dokaže postojanje prijevare, namjere ili krajnje nepažnje, štetnik odgovara za cjelokupnu štetu. Ako je šteta nastala zbog obične nepažnje, koja se predmnijeva, štetnik odgovara samo za predvidivu štetu (čl. 346. ZOO). Vidi u Gorenc, V. et al., op. cit., str. 511-515.

52 Revizorsko se društvo može osloboditi odgovornosti za štetu ako dokaže da šteta nije nastala ili da nije bilo njegove krivnje, odnosno da je postupalo u skladu s propisima i pravilima struke te s pažnjom dobrog stručnjaka.

53 Gorenc, V. et al., op. cit., str. 45-48, 503-517, 1604-1616 i 1622-1625.

Pod istim pretpostavkama zahtjev za naknadu štete prema revizorskom društvu mogu podnijeti i treće osobe koje se pojavljuju kao korisnici izvješća o reviziji (vjerovnici subjekta revizije, trgovačka društva koja su povezana sa subjektom revizije, ulagatelji i kreditori subjekta revizije, javnost i sl.).[54] Pritom će oni biti u nepovoljnijem položaju u pogledu dokazivanja uzročne veze između nastale štete i štetne radnje revizorskog društva. To je zbog toga što nastanak njihove štete proizlazi iz financijskog stanja u subjektu revizije, a za to odgovaraju članovi njegovih upravnih i nadzornih organa.[55] Objava revizorovog pogrešnog mišljenja nije dovoljna za dokazivanje postojanja uzročne veze između njegove štetne radnje i štete koja je nastala trećim osobama. Potrebno je stoga dokazati vezu između financijskog stanja u subjektu revizije i pogrešnog mišljenja koje je revizorsko društvo iskazalo u izvješću o reviziji te vezu između pogrešnog mišljenja i radnje koji je oštećenik poduzeo ili propustio poduzeti, uslijed čega mu je nastala šteta. Ako oštećenik uspije dokazati da je revizorsko društvo sudjelovalo u pogrešnom prikazivanju financijskog stanja u subjektu revizije (zakonski je revizor znao ili morao znati za to), nalazi se u povoljnijem položaju. To znači da je revizorsko društvo sudionik prijevare te se time uspostavlja njegova odgovornost za štetu prema trećim osobama. U drugim je slučajevima mogućnost ostvarivanja naknade štete od revizorskog društva vrlo mala.[56]

4.3. Zastara zahtjeva oštećenika za naknadu štete prema revizorskom društvu

U slučaju ugovorne odgovornosti za štetu zahtjev subjekta revizije za naknadu štete prema revizorskom društvu zastarijeva za vrijeme određeno za zastaru obveze čijom je povredom nastala šteta (čl. 230. st. 3. ZOO). Budući da ugovor o reviziji ima obilježje trgovačkog ugovora o prometu robe i usluga, zahtjev za naknadu štete subjekta revizije zastarijeva u roku od tri godine od kada je šteta nastala (čl. 228. ZOO). U slučaju izvanugovorne odgovornosti za štetu zahtjev treće osobe za naknadu štete prema revizorskom društvu zastarijeva u roku od tri godine od kada je treća osoba doznala za štetu i osobu koja je štetnik (subjektivni rok), odnosno u svakom slučaju u roku od pet godina od kada je šteta nastala (objektivni rok) (čl. 230. st. 1. i 2. ZOO). Ako je šteta prouzročena kaznenim djelom, a za kazneni je progon predviđen dulji rok zastare, zahtjev za naknadu štete prema odgovornoj osobi zastarijeva kad istekne vrijeme određeno za zastaru kaznenog progona (čl. 231. st. 1. ZOO).[57] Nastupanjem zastare utuživa se obveza na naknadu štete pretvara u neutuživu, a štetnik ima pravo uskratiti ispunjenje svoje obveze. Na zastaru sud ne pazi po službenoj dužnosti, već

54 U slučaju izvanugovorne odgovornosti za štetu, štetnik mora nadoknaditi cjelokupnu štetu bez obzira na stupanj njegove krivnje.

55 Oni odgovaraju za vođenje poslova društva i nadzor nad vođenjem poslova društva, kao i za utvrđivanje godišnjih financijskih izvješća te točnost prikazanoga financijskog stanja subjekta revizije.

56 Mićović, M., Bukovac Puvača, M., op. cit., str. 175-176.

57 Ta će se se odredba primjenjivati ako je kazneni postupak završen osuđujućom presudom. Odgovorna osoba ne mora biti počinitelj kaznenog djela (npr. poslodavac koji odgovara za rad radnika koji je počinitelj kaznenog djela).

se na nju štetnik mora pozvati u sudskom postupku.[58] Odredbe ZOO-a o zastari su prisilne naravi.[59]

4.4. Ograničenje odgovornosti za štetu revizorskog društva

ZRev ne propisuje ograničenje iznosa do kojega zakonski revizori odgovaraju za štetu počinjenu subjektima revizije i trećim osobama. Stoga bi bilo korisno da se to propiše zakonom, sukladno Preporuci Europske komisije iz 2008. godine, što bi doprinijelo pravnoj sigurnosti te olakšalo poslovanje revizorskih društava i sklapanje ugovora o osiguranju od odgovornosti za štetu s osiguravajućim društvima. To bi se ograničenje odgovornosti primjenjivalo u odnosu na štetu nastalu subjektima revizije i trećim osobama, osim ako je šteta nastala prijevarom ili namjernim postupanjem revizorskog društva pri pružanju revizorskih usluga.

Kada se radi o ugovornoj odgovornosti revizorskog društva za štetu nastalu subjektu revizije, ZOO određuje da se ta odgovornost ugovorom može proširiti, ograničiti ili isključiti (čl. 344. i 345. ZOO).[60] Ugovorom se ne može isključiti ili ograničiti odgovornost za štetu ako je ona nastala zbog namjere ili krajnje nepažnje štetnika pri povredi ugovornih obveza (čl. 345. st. 1. ZOO).[61] To znači da se ograničenje odgovornosti za štetu može predvidjeti samo ako je revizorsko društvo uzrokovalo štetu postupajući s običnom nepažnjom. Ipak, takva se egzoneracijska klazula može poništiti odlukom suda, ako takav zahtjev postavi subjekt revizije, a klauzula je rezultat sporazuma ugovornih strana koji je proizašao iz monopolskog položaja revizorskog društva ili uopće iz neravnopravnog odnosa ugovornih strana (čl. 345. st. 2. ZOO).

Egzoneracijska se klauzula može unijeti u ugovor o reviziji ili se o ograničenju odgovornosti revizorskog društva za štetu može sklopiti poseban ugovor prije nastanka štete.[62] Preporuka iz 2008. godine određuje da u tom slučaju države članice moraju osigurati: a) sudsku kontrolu ugovora o reviziji, b) o ograničenju odgovornosti revizorskog društva za štetu u subjektu revizije moraju zajednički odlučiti članovi uprave, odnosno izvršni direktori te članovi nadzornog, odnosno upravnog odbora tog subjekta te tu odluku mora potvrditi glavna skupština, odnosno članovi (skupština) subjekta revizije te c) ograničenje odgovornosti za štetu revizorskog društva i svaka izmjena sporazuma o tomu mora biti objavljena u bilješkama uz financijska izvješća subjekta revizije (t. 6. Preporuke). Stoga bi trebalo mogućnost ugovornog ograničenja

58 Nastupanjem zastare oštećenik gubi mogućnost prisilnim putem ostvariti naknadu štete pred sudom (pravo na tužbu). U slučaju nastupanja zastare zahtjeva za naknadu štete, oštećenik može zahtijevati od štetnika, po pravilima stjecanja bez osnove, ustupiti mu ono što je štetnik dobio radnjom kojom je prouzročena šteta (čl. 1110. ZOO). Taj tužbeni zahtjev za ustupanje zastarijeva za pet godina od dana nastupanja zastare zahtjeva za naknadu štete (čl. 225. ZOO).

59 Gorenc, V. et al., str. 310-312, 313-317 i 1738-1739.

60 U slučaju proširenja odgovornosti to se neće primijeniti ako bi to bilo protivno načelu savjesnosti i poštenja (čl. 344. st. 2. ZOO). Proširenje, ograničenje ili isključenje odgovornosti za štetu mora se predvidjeti ugovorom prije nastanka štete. Vidi u ibid., str. 508-509.

61 Ugovor s takvom egzoneracijskom klauzulom ili poseban ugovor o ograničenju odgovornosti za štetu u tom slučaju bili bi ništetni. Sud postupa po službenoj dužnosti.

62 Ibid., str. 509-510.

odgovornosti zakonskog revizora za štetu uskladiti s Preporukom.

ZOO posebno uređuje ograničenje odgovornosti za štetu s obzirom na najviši iznos naknade štete. Takva se klauzula može unijeti u ugovor o reviziji te će ona biti pravovaljana, osim ako taj iznos naknade štete nije u očitom nerazmjeru sa štetom i ako za određeni slučaj nije što drugo određeno zakonom (čl. 345. st. 3. ZOO). Ako je šteta uzrokovana namjerno ili krajnjom nepažnjom revizorskog društva, ograničenje iznosa naknade štete neće se primijeniti, a subjekt revizije ima pravo na naknadu cjelokupne štete (čl. 345. st. 4. ZOO).[63]

Odredbe ZOO-a o ugovornom ograničenju odgovornosti za štetu revizorskog društva prema subjektu revizije ne primjenjuju se kada se radi o izvanugovornoj odgovornosti revizorskog društva prema trećim osobama.[64]

5. OBVEZA OSIGURANJA OD ODGOVORNOSTI ZA ŠTETU ZAKONSKOG REVIZORA

5.1. Općenito

Zakonom o reviziji propisana je obveza revizorskog društva sklopiti i redovito obnavljati ugovor o osiguranju od odgovornosti za štetu koju bi trećim osobama moglo počiniti obavljanjem revizorskih usluga (čl. 60. st. 1. i 3. ZRev). Valjana polica o osiguranju od odgovornosti revizora uvjet je za obavljanje revizorske djelatnosti. Naime, Ministarstvo financija izdaje revizorskom društvu rešenje o odobrenju za rad tek nakon što mu društvo dostavi dokaz o osiguranju (čl. 17. st. 10. ZRev). Isto se zahtijeva i kao uvjet za registraciju revizorskog društva koje ima odobrenje za rad od nadležnog tijela u svojoj matičnoj državi članici EU-a (čl. 25. st. 3. ZRev).

Propisivanje osiguranja od odgovornosti revizorskog društva kao obveznog osiguranja posljedica je velike važnosti revizije kao djelatnosti od javnog interesa te ima za cilj (imovinsku) zaštitu potencijalno velikog broja trećih oštećenih osoba koje postupaju s povjerenjem u rad i mišljenja zakonskih revizora u pogledu financijskih izvješća.[65]

5.2. Ugovor o osiguranju od odgovornosti revizorskog društva

Ugovor o osiguranju od odgovornosti revizora može se odrediti kao ugovor kojim se osiguratelj obvezuje revizorskom društvu, kao ugovaratelju osiguranja, da će u granicama svojih obveza propisanih Zakonom o reviziji, odnosno preuzetih ugovorom, trećoj oštećenoj osobi nadoknaditi štetu za koju je prema pravilima građanskoga prava odgovorno revizorsko društvo kao osiguranik, a ugovaratelj osiguranja (revizorsko društvo) obvezuje se platiti premiju osiguranja.[66]

63 Ibid., str. 510-511.

64 Njima revizorsko društvo mora nadoknaditi cjelokupnu štetu bez obzira na stupanj svoje krivnje. Vidi u ibid., str. 513.

65 Ćurković, M., Osiguranje od izvanugovorne i ugovorne (profesionalne) odgovornosti, Inženjerski biro, Zagreb, 2015., str. 15 i 183.

66 Prema Ćurković, M., op. cit., str. 60.

Revizorsko društvo ima položaj ugovaratelja osiguranja i položaj osiguranika. Ugovaratelj osiguranja osoba je koja sklapa ugovor o osiguranju, a revizorsko društvo, kako je navedeno, mora sklopiti ugovor o osiguranju od odgovornosti te ga redovito obnavljati, odnosno produljivati (čl. 60. st. 3. ZRev). Iznimno se kao ugovaratelj osiguranja može pojaviti i Hrvatska revizorska komora koja u korist svojih članova revizorskih društava (kao osiguranika) sklapa ugovor o osiguranju od odgovornosti (čl. 61. st. 3. ZRev). U tom slučaju radi se o, tzv. kolektivnim ugovorima o osiguranju od odgovornosti koje sklapa Komora za svoje članstvo. Prednost takvih ugovora o osiguranju od odgovornosti je da se pokriće ne mora prilagođavati svakom pojedincu, već se ono dogovara samo s Komorom, osiguranicima se omogućuju povoljniji uvjeti osiguranja, niže premije i šire pokriće. No takvo kolektivno ugovaranje pokrića ima i loše strane jer ne odgovora specifičnostima rizika kojima su izloženi pojedini članovi - osiguranici (npr. istom policom osigurani su članovi s malim opsegom posla i članovi s velikim opsegom posla uz jednaku svotu osiguranja).[67]

Osiguranik je osoba čija je odgovornost za štetu pokrivena osiguranjem, a to je opet revizorsko društvo. S gledišta pravila osiguranja nije nedopušteno da ista osoba bude ugovaratelj osiguranja i osiguranik, tj. da ugovaratelj osiguranja „pokrije" vlastitu odgovornost.

Osiguratelj je pravna osoba, trgovačko društvo (dioničko društvo za osiguranje ili društvo za uzajamno osiguranje) koje je dobilo dozvolu HANFE obavljati poslove osiguranja od odgovornosti. Revizorsko društvo samo odlučuje kod kojeg će osiguratelja sklopiti ugovor o osiguranju od odgovornosti, ovisno o ponuđenim uvjetima osiguranja i premiji. Obveza sklapanja ugovora o osiguranju od odgovornosti je na strani revizorskog društva, a ne osiguratelja. Stoga ako revizorsko društvo želi sklopiti ugovor o osiguranju od odgovornosti mora prihvatiti uvjete i premiju koju mu nudi osiguratelj. No, osim kod osiguravajućih društava u Republici Hrvatskoj, revizorsko društvo može se odlučiti na sklapanje ugovora o osiguranju od odgovornosti u drugoj državi članici EU-a. U tom slučaju jednakovrijedno osiguranje od odgovornosti za štetu koje je sklopljeno u drugoj državi članici priznaje se i u Republici Hrvatskoj (čl. 60. st. 2. ZRev).

U pogledu osiguranja od odgovornosti revizorsko društvo ima i određene obveze prema Ministarstvu financija (čl. 60. st. 2 ZRev): a) dostaviti presliku police osiguranja koja se odnosi na produljenje ugovora o osiguranju od odgovornosti i b) izvijestiti o svakoj promjeni koja nastane tijekom osiguranja (npr. promjena osiguratelja, promjena uvjeta osiguranja, premije, pokrića, itd.).

Navedene obveze prema Ministarstvu financija revizorsko društvo mora izvršiti u roku od osam dana od sklapanja police osiguranja (tj. produljenja ugovora o osiguranju od odgovornosti) ili od dana nastale promjene tijekom osiguranja.

Stoga se nameće pitanje što ako revizorsko društvo nije Ministarstvu financija dostavilo presliku police o produljenju osigurateljskog pokrića. U tom slučaju Ministarstvo financija mora pozvati revizorsko društvo da u roku od 15 dana od poziva dostavi dokaz o osiguranju. Ako po isteku toga roka ne dostavi dokaz o osiguranju, Ministarstvo financija izriče nadzornu mjeru privremene zabrane ovlaštenom revizoru,

67 Ibid., str. 62-63.

revizorskom društvu i glavnom revizijskom partneru za obavljanje zakonskih revizija i/ili potpisivanje revizorskog izvješća, pritom postupajući po odredbama propisa kojima se uređuje prekršajni postupak (čl. 60. st. 4., u vezi s čl. 94. st. 1. toč. 4. ZRev).

5.3. Treće osobe u osiguranju od odgovornosti zakonskih revizora

Kod osiguranja od odgovornosti općenito, pa tako i kod osiguranja od odgovornosti zakonskih revizora, iznimno je bitno pitanje tko se to smatra trećim (oštećenim) osobama. Ovo iz razloga što treće osobe po zakonu imaju vlastito i neposredno tužbu (tzv. *actio directa*) prema osiguratelju od odgovornosti, do visine ugovorene svote osiguranja (čl. 965. st. 1. i 2. ZOO). To znači da treće (oštećene) osobe mogu izravno od osiguratelja od odgovornosti zahtijevati naknadu štete koju su pretrpjele događajem (osiguranim slučajem) za koji odgovara osiguranik (revizorsko društvo).

Načelno govoreći, trećim osobama smatraju se osobe koje nisu ugovorne strane ugovora o osiguranju od odgovornosti. Prema Uvjetima za osiguranje od odgovornosti osoba ovlaštenih za pružanje usluga revizije Hrvatskog ureda za osiguranje iz 2011. godine (dalje Uvjeti HUO)[68] treća osoba je oštećena osoba koja nije ugovorna strana ugovora o osiguranju, odnosno osoba za koju osiguranik na temelju ugovora o reviziji obavlja usluge revizije (pojam u odlomku br. 5., u dijelu Uvjeta HUO koji nosi naziv „Značenje pojedinih izraza"). Prema čl. 1. st. 1.2., odlomak 5 Općih uvjeta za osiguranje od odgovornosti revizora ERGO osiguranje d.d. iz 2018. godine (dalje: Uvjeti ERGO) oštećenikom (dakle, trećom osobom) smatra se pravna ili fizička osoba kojoj je prouzročena šteta koja je posljedica revizije koju je obavljao osiguranik. Također, trećom oštećenom osobom smatra se i osoba koja ima pravo postaviti zahtjev za naknadu štete koju mu je prouzročio osiguranik.

S obzirom na izneseno, može se zaključiti kako se radi o neodređenom broju osoba koje mogu imati položaj treće osobe (tzv. negativno određivanje pojma trećih osoba). To su uvijek one osobe koje imaju ujedno i položaj oštećenika, odnosno one koju su pretrpjele štetu zbog propusta ili pogreške u obavljanju djelatnosti revizije. Primjerice, ovdje spadaju: trgovačko društvo, odnosno subjekt nad kojim se provodi revizija te ostale treće osobe koje se javljaju kao korisnici izvješća o reviziji (vjerovnici, povezana trgovačka društva, ulagatelji, kreditori, javnost i sl.) (supra 4.2.).

5.4. Predmet osiguranja (osigurani rizik)

Predmet osiguranja odgovornost je osiguranika za štetu koja je prouzročena trećim osobama pri obavljanju usluga / djelatnosti revizije (čl. 1. Uvjeta HUO, čl. 7. st. 7.1. Uvjeta ERGO). Osiguranje od odgovornosti revizora temelji se na općim pravilima odgovornosti za štetu sukladno ZOO-u, a koja su ranije detaljno obrađena u radu (supra 4.1.). Ako prema navedenim pravilima ne postoji odgovornost revizora

68 Iz preambule Uvjeta HUO: „Objavljivanjem Uvjeta za osiguranje od odgovornosti osoba ovlaštenih za pružanje usluga revizije Hrvatski ured za osiguranje ne preporučuje njihovu doslovnu primjenu. Društva za osiguranje slobodna su ugovarateljima osiguranja ponuditi Uvjete različite od ovdje objavljenih."

(osiguranika), neće postojati niti odgovornost osiguratelja od odgovornosti. Potrebno je napomenuti da se predmet osiguranja odnosi samo na, tzv. čisto imovinsku štetu. To je šteta koja je nastala obavljanjem djelatnosti revizije, a nije posljedica oštećenja ili uništenja stvari, odnosno smrti, povrede tijela ili narušavanja zdravlja (pojam u odlomku br. 7., u dijelu Uvjeta HUO koji nosi naziv „Značenje pojedinih izraza", čl. 1. st. 1.2., odlomak br. 15 Uvjeta ERGO).

5.5. Isključenja iz pokrića

Isključenje pokrića znači da osiguratelj od odgovornosti ne odgovara za pojedine štete koje bi nastale u određenim slučajevima (tj. ne postoji njegova obveza naknade štete). Uvjetima osiguranja predviđeni su brojni slučajevi takvih isključenja od odgovornosti. Mogu se podijeliti na, tzv. opća isključenja iz pokrića te na isključenja koja su specifična za osiguranje od odgovornosti revizora.

Među opća isključenja spadaju: štete koje su prouzročene ratom i sličnim događajima (revolucija, ustanak itd.), građanskim nemirima, nasiljem, mjerama konfiskacije ili rekvizicije, djelovanjem nuklearne energije, ionizirajućim zračenjem, svemirskim materijalom, djelovanjem energije sunca, vulkana, potresa, prirodnih sila i sl. Potom ovdje spadaju štete zbog uništenja ili oštećenja stvari te zbog smrti, tjelesne ozljede i narušavanja zdravlja osoba (čl. 12. st. 12.3 Uvjeta ERGO, čl. 3. toč. 1., 10. i 11. Uvjeta HUO).

Među posebna isključenja koja su karakteristična za osiguranje od odgovornosti zakonskih revizora spadaju: šteta prouzročena zbog toga jer je osiguranik propustio obaviti plaćanje za koje je bio ovlašten (plaćanje poreza, doprinosa, računa i slično); šteta prouzročena osobi koja je povezana s osiguranikom (povezane pravne osobe su one u kojima osiguranik ima udio ili koje u društvu osiguranika imaju udio veći od 25 % temeljnoga kapitala; povezane fizičke osobe su osiguranik i osiguranikovi roditelji, braća i sestre, djeca, bračni ili izvanbračni partner, članovi kućanstva); šteta prouzročena pravnoj ili fizičkoj osobi u kojoj osiguranik ili djelatnici osiguranika imaju ovlasti rukovođenja i upravljanja (direktori, ravnatelji, članovi uprave ili nadzornog odbora i slično); šteta prouzročena za vrijeme dok revizorsko društvo ili samostalni revizor nemaju valjane licence, dozvole za rad i slično; štete zbog prijevare, prisile, prijetnje ili drugih kažnjivih dijela; štete zbog ugovornog proširenja odgovornosti osiguranika i na slučajeve kad po zakonu ne odgovara; štete koje su prouzročene namjerno ili krajnjom nepažnjom osiguranika ili zbog šteta nastalih kao posljedica svjesnog postupanja suprotno propisima po kojima se obavlja osiguranikova djelatnost; štete koje su posljedica nesolventnosti ili nelikvidnosti osiguranika, odnosno prestanka obavljanja djelatnosti; štete zbog neodržavanja ugovorenih i zakonskih rokova ako je za to odgovoran osiguranik, odnosno njegova ovlaštena osoba itd. (čl. 12., st. 12.4 Uvjeta ERGO, čl. 3. toč. 2.-9. i toč. 13. Uvjeta HUO).

5.6. Osigurani slučaj

Osigurani slučaj općenito, pa tako i u osiguranju od odgovornosti događaj je koji je prouzročen osiguranim rizikom (čl. 922. st. 1. ZOO). Za razliku od osiguranog

rizika koji mora biti budući, neizvjestan i nezavisan o isključivoj volji ugovaratelja osiguranja ili osiguranika (zakonskog revizora), osigurani slučaj je stvarni događaj koji je nastupio.

S obzirom na to da je osigurani rizik, odnosno predmet osiguranja odgovornost zakonskog revizora za obavljanje djelatnosti revizije (supra 5.4.), osigurani je slučaj propust ili pogreška revizora (tj. osiguranika) koja ima za posljedicu nastanak štete trećoj (oštećenoj) osobi. Sukladno tomu smatra se da je osigurani slučaj nastao onda kada je osiguranik skrivljeno povrijedio neku od svojih propisanih dužnosti revizora, odnosno kada se ostvario propust ili pogreška u obavljanju poslova revizije (čl. 2. st. 1. Uvjeta HUO, čl. 8. st. 8.3. i st. 8.5. Uvjeta ERGO).

Nije potrebno posebno naglašavati kako je ugovor o osiguranju od odgovornosti revizora ništetan ako je u trenutku njegova sklapanja već nastao osigurani slučaj (propust ili pogreška zakonskog revizora), ili je taj bio u nastupanju, ili je bilo izvjesno da će nastupiti, ili je prestala mogućnost da on nastane (čl. 922. st. 3. ZOO).

Posebnu pozornost valja posvetiti razlikovanju osiguranog slučaja kod uzastopnih šteta od osiguranog slučaja kod serijskih šteta. U prvom slučaju, tijekom trajanja ugovora o osiguranju od odgovornosti pojavljuje se više šteta koje nemaju isti uzrok pa je svaka od njih zasebni osigurani slučaj. U tom slučaju, osigurnina za svaki osigurani slučaj koji je nastupio isplaćuje se s obzirom na cijeli iznos osiguranja, bez njegova umanjenja za iznos prije isplaćenih naknada u tom razdoblju (čl. 949. st. 6. ZOO, čl. 8. st. 8.8. Uvjeta ERGO). U drugom slučaju (serijske štete), ako tijekom trajanja osiguranjskog pokrića nastupi više šteta koje imaju isti ili istovrsni uzrok, odnosno čiji je nastanak posljedica jednog vremenski i uzročno povezanog događaja, sve te povezane štete čine jedan osigurani slučaj[69] i to bez obzira na broj oštećenih osoba (čl. 2. st. 3. Uvjeta HUO). U tom se slučaju smatra da je osigurani slučaj nastupio kada je nastala prva šteta u seriji, a osiguratelj je u obvezi maksimalno do ugovorene jedne svote osiguranja. Pogreška i propust u obavljanju postupka revizije ima za posljedicu pogreške i propuste u davanju revizorskih mišljenja, pa bi se u tom smislu radilo o jednom osiguranom slučaju (serijskim štetama), a ne o više njih, jer pogreška/propust u revizijskom izvješću stoji u uzročnoj vezi s ranijom pogreškom/propustom u obavljanju postupka revizije.

5.7. Specifična obveza osiguranika glede pridržavanja zaštitnih mjera radi sprječavanja nastupa osiguranog slučaja

Opće je pravilo ugovornog prava osiguranja da je osiguranik dužan poduzeti sve potrebne mjere (propisane, ugovorene ili razborite) da spriječi nastanak osiguranog slučaja (čl. 950. st. 1 ZOO-a). Ako osiguranik tu svoju obvezu ne ispuni, obveza osiguratelja smanjuje se za onoliko za koliko je nastala šteta veća zbog toga neispunjenja (čl. 950. st. 4. ZOO), a što može dovesti i do potpunog prestanka obveze osiguratelja prema osiguraniku. Niti osiguranje od odgovornosti revizora nije od toga iznimka. Štoviše, uvjetima osiguranja pojedinih osiguratelja izričito je predviđeno koje to specifične zaštitne mjere mora poduzimati osiguranik (naravno o

69 Ćurković, M., op. cit., str. 98-99.

svom trošku, no njihovo poduzimanje može rezultirati i nižom premijom), ako ne želi da mu osiguratelj ne odbije ili ne smanji isplatu naknade štete ako dođe do nastupa osiguranog slučaja. Prema čl. 11. st. 11.5. toč. 1.-7. Uvjeta ERGO ovdje bi spadale sljedeće zaštitne mjere: a) edukacije, školovanje i stručno usavršavanje osoblja, b) dobivanje licence za osoblje i osiguranika, c) korištenje informatičkih sustava koji su licencirani te njihovo redovito održavanje i ažuriranje, korištenje antivirusne zaštite informatičkih sustava, d) redovito održavanje ostale informatičke i ostale potrebne opreme, e) držanje dokumentacije u urednom stanju (ona je u urednom stanju ako stručnjak iste struke može bez zastoja preuzeti posao i nastaviti s upotrebom dokumentacije), f) držanje dokumentacije u prostoru u kojem se provode mjere protiv krađe, požara, poplave, oluje i drugih prirodnih nepogoda, g) organiziranje rada i poslovnih procesa na način da se izbjegne kašnjenje u rokovima za izvršenje posla, predaju izvješća, slanja pismena i slično.

5.8. Minimalne svote osiguranja

Kod osiguranja od odgovornosti općenito, pa tako i kod osiguranja od odgovornosti zakonskih revizora, svota osiguranja gornja je granica osigurateljeve obveze, bez obzira na to koja je visina prouzročene štete.[70] Svotom osiguranja unaprijed je određen maksimalni iznos obveze osiguratelja, budući da nije moguće unaprijed utvrditi štetu koju može pretrpjeti osiguranik, tj. revizorsko društvo. Ugovorena maksimalna svota osiguranja vrijedi za jedan osigurani slučaj te se odnosi na sve oštećene kao i na sve osiguranike u tom osiguranom slučaju.[71] Dakle, ako je nastupom istog osiguranog slučaja (propust ili pogreška u obavljanju revizije / pružanju revizorskih usluga) štetu pretrpjelo više oštećenika, ugovorena svota osiguranja dijeli se među njima ovisno o visini štete koju je svaki od njih pretrpio. Ako je zbog toga svota osiguranja nedostatna za naknadu cjelokupne štete, glede preostalog iznosa visine štete koja je ostala nepokrivena osiguranjem, oštećenicima preostaje da zahtijevaju naknadu od štetnika, tj. revizorskog društva. Po istom načelu, ako je istim ugovorom o osiguranju od odgovornosti pokrivena odgovornost više osiguranika, tj. revizorskih društava, ugovorena svota osiguranja ne zbraja se za svakog od njih, već svi oni dijele istu svotu osiguranja.

Minimalna svota osiguranja je ona koja je propisana zakonom (u ovom slučaju čl. 61. st. 1. i 2. ZRev), niže od koje se ne može ugovoriti svota osiguranja. Dopušteno je svakako ugovoriti svotu osiguranja u višem iznosu od minimalno propisane svote. Pri propisivanju minimalnih svota osiguranja Zakon o reviziji razlikuje vrstu obavljanja revizijske djelatnosti kao i subjekte nad kojima se provodi revizija. Tako, u čl. 61. st. 1 ZRev propisuje da minimalna svota pokrića po štetnom događaju (osiguranom slučaju) iznosi 300.000,00 kuna za štetu koju bi revizorsko društvo moglo prouzročiti obavljanjem revizorskih usluga. No, za štetu koju bi revizorsko društvo moglo prouzročiti obavljanjem zakonske revizije u subjektu od javnog

70 Pavić, D., Ugovorno pravo osiguranja - komentar zakonskih odredaba, Tectus, Zagreb, 2009., str. 323.

71 Ćurković, M., op. cit., str. 114.

interesa[72] minimalna svota osiguranja po jednom štetnom događaju (osiguranom slučaju) iznosi 3.000.000,00 kuna (čl. 61. st. 2 ZRev). Dakle, ako revizorsko društvo kao osiguranik obavlja zakonsku reviziju (čl. 4. toč. 4. ZRev) subjekata od javnog interesa, minimalna svota osiguranja je znatno viša. S druge strane, ako revizorsko društvo osiguranik obavlja revizorske usluge (čl. 4. toč. 1. ZRev) pri čemu ne obavlja zakonsku reviziju subjekata od javnog interesa, minimalna svota osiguranja je znatno niža.

S obzirom na činjenicu da se osiguranje pokriće ugovara za osiguranje godinu, a za koju se plaća i premija osiguranja te da obveza osiguratelja na naknadu štete do visine ugovorene svote osiguranja (tj. minimalne propisane svote osiguranja) postoji uvijek kada nastupi novi osigurani slučaj, moguće je da ukupna obveza osiguratelja bude znatno viša, ovisno o tomu koliko je nastupilo osiguranih slučajeva iz istog ugovora o osiguranju od odgovornosti revizora. Da bi se izbjegla takva, za osiguratelja nelagodna situacija, u uvjetima osiguranja često je predviđena, tzv. agregatna osigurana svota, odnosno agregatni limit (čl. 5. st. 2 Uvjeti HUO, čl. 9. st. 9.2. Uvjeta ERGO). To je gornja granica obveze osiguratelja za sve osigurane slučajeve unutar jedne osiguranje godine.[73] Ako se u tom razdoblju dogodi više osiguranih slučaja iz istog ugovora o osiguranju od odgovornosti revizora, ukupna obveza osiguratelja iz istog ugovora o osiguranju ne može biti viša od iznosa ugovorenog agregatnog limita. Bitno je pritom naglasiti da visina agregatnog limita mora biti znatno viša, odnosno da ne bude blizu ili čak jednaka osiguranoj svoti po jednom osiguranom slučaju jer bi to onda bilo znatno ograničenje u osiguranju od odgovornosti. Naime, u tom slučaju osiguranikova odgovornost *de facto* ne bi bila pokrivena za novonastale osigurane slučajeve u istoj osiguranjnoj godini.

6. ZAKLJUČAK

Zakon o reviziji iz 2017. godine ne sadrži posebne odredbe o odgovornosti za štetu zakonskog revizora prema subjektu revizije i prema trećim osobama. Stoga se na to pitanje primjenjuju opće odredbe o odgovornosti za štetu iz Zakona o obveznim odnosima. Zakonsku reviziju mogu obavljati samo revizorska društva, a ne i samostalni revizori. ZRev propisuje obvezu revizorskog društva sklopiti ugovor o osiguranju od odgovornosti za štetu koja može nastati subjektu revizije i trećim osobama pri obavljanju revizorskih usluga te propisuje najmanju svotu pokrića. Njegove su odredbe relevantne i za određenje obveza koje revizorsko društvo ima pri pružanju usluga subjektu revizije.

U ulozi štetnika pojavljuje se revizorsko društvo, a ono odgovara i za rad glavnoga revizijskog partnera, ovlaštenih revizora te drugih osoba koje nisu ovlašteni revizori, a koji su sudjelovali u obavljanju zakonske revizije u subjektu revizije u ime revizorskog društva. Budući da su oni radnici u revizorskom društvu, za njihov rad odgovara društvo.

72 Subjekt od javnog interesa je subjekt koji je kao takav određen zakonom kojim se uređuje računovodstvo poduzetnika (čl. 4. toč. 21. ZRev) (vidi o tomu više: *supra* 2, bilješka br. 11).

73 Ibid., str. 115.

Odgovornost za štetu revizorskog društva prema subjektu revizije počiva na povredi ugovornih obveza iz sklopljenog ugovora o reviziji (ugovorna odgovornost za štetu), a odgovornost prema trećim osobama izvan subjekta revizije je izvanugovorna. U ime subjekta revizije zahtjev za naknadu štete prema revizorskom društvu podnose njegovi zastupnici po zakonu, a taj zahtjev ne mogu u ime subjekta koji je društvo kapitala podnijeti njegovi dioničari, odnosno članovi, budući da ga oni nisu ovlašteni zastupati. Revizorsko društvo odgovara po kriteriju predmnijevane krivnje (obična nepažnja), a namjeru i krajnju nepažnju mora dokazati subjekt revizije. On mora dokazati štetnu radnju, koja mora biti rezultat protupravnog postupanja revizorskog društva pri pružanju revizorskih usluga, nastalu štetu te uzročnu vezu između štete i štetne radnje.

Pod istim pretpostavkama zahtjev za naknadu štete prema revizorskom društvu mogu podnijeti i treće osobe koje se pojavljuju kao korisnici izvješća o reviziji, a nalaze se izvan subjekta revizije. Oni su u nepovoljnijem položaju u pogledu dokazivanja uzročne veze između nastale štete i štetne radnje revizorskog društva. Potrebno je stoga dokazati vezu između financijskog stanja u subjektu revizije i pogrešnog mišljenja koje je revizorsko društvo iskazalo u izvješću o reviziji te vezu između pogrešnog mišljenja i radnje koji je oštećenik poduzeo ili propustio poduzeti, zbog čega mu je nastala šteta. Ako treće osobe dokažu da je revizorsko društvo sudjelovalo u pogrešnom prikazivanju financijskog stanja u subjektu revizije (prijevara) moći će ostvariti naknadu štete od revizorskog društva. U drugim je slučajevima mogućnost ostvarivanja naknade štete od revizorskog društva vrlo mala.

Zahtjev oštećenika za naknadu štete u slučaju ugovorne odgovornosti zastarijeva u roku od tri godine od kada je šteta nastala, a kod izvanugovorne odgovornosti zastarijeva u roku od tri godine od kada je oštećenik doznao za štetu i osobu koja je štetnik (subjektivni rok), odnosno u svakom slučaju u roku od pet godina od kada je šteta nastala (objektivni rok). Odredbe ZOO-a o zastari su prisilne naravi.

ZRev ne propisuje ograničenje iznosa do kojega revizorska društva odgovaraju za štetu počinjenu subjektima revizije i trećim osobama. Stoga bi bilo korisno da se to propiše zakonom, sukladno Preporuci Europske komisije iz 2008. godine. To bi se ograničenje odgovornosti primjenjivalo u odnosu na štetu nastalu subjektima revizije i trećim osobama, osim ako je šteta nastala prijevarom ili namjernim postupanjem revizorskog društva pri pružanju revizorskih usluga. U slučaju ugovorne odgovornosti revizorskog društva za štetu ona se može ograničiti ugovorom o reviziji sukladno odredbama ZOO-a. Te se odredbe ne primjenjuju kada se radi o izvanugovornoj odgovornosti revizorskog društva prema trećim osobama izvan subjekta revizije.

Zbog velike važnosti koju ima djelatnost revizije za subjekte revizije, korisnike revizije, ali i kao djelatnost od javnog interesa, Zakonom o reviziji propisano je obvezno ugovaranje osiguranja od odgovornosti revizorskih društava kao preduvjet odobrenja za njihov rad. Osiguranje od odgovornosti pokriva i ugovornu i izvanugovornu odgovornost revizora. Ono, naravno, ne pokriva odgovornost za prekršajne novčane kazne izrečene revizorskom društvu, odnosno ovlaštenim revizorima. Za razliku od građanskopravne odgovornosti revizora koja načelno može biti neograničena, odgovornost osiguratelja od odgovornosti ograničena je do visine zakonom

propisanih minimalnih svota osiguranja. S obzirom na izloženost rizicima svako revizorsko društvo može odlučiti je li potrebno ugovoriti svote osiguranja i u višem iznosu od minimalno propisanih (što povlači za sobom i plaćanje višeg iznosa premije osiguranja). Ne treba zanemariti i činjenicu da se u Republici Hrvatskoj priznaje kao jednakovrijedno osiguranje od odgovornosti koje je sklopljeno u drugoj državi članici EU-a, što može biti korisno revizorskim društvima u potrazi za povoljnijim uvjetima osiguranja i premijom osiguranja.

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Dionis Jurić*
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Summary

CIVIL LIABILITY OF STATUTORY AUDITOR AND MANDATORY INSURANCE OF ITS CIVIL LIABILITY

Civil liability of statutory auditors toward audited entities and third parties is not harmonized by EU directives. It is regulated by national provisions of Member States (general provisions, special provisions or combined application of these provisions). Croatian Audit Act from 2017 does not contain special provisions on civil liability of statutary auditors. This topic is regulated by general provisions on civil liability of the Civil Obligations Act. The Audit Act envisages mandatory insurance of statutory auditors' civil liability toward audited entities and third parties and sets the minimum amount of coverage. It also sets general requirements for statutory audits in all audited entities and special requirements for statutory audits in public interest entities. Aim of these provisions is strengthening of independence and objectivity of statutory auditors towards audited entities.

Keywords: *statutory auditor; civil liability; insurance; audited entities; third parties.*

Zussamenfassung

HAFTUNG DES ABSCHLUSSPRÜFERS UND DIE HAFTPFLICHTVERSICHERUNG

Die Haftung des Abschlussprüfers für den an geprüfte Unternehmen und Dritte verursachten Schaden bei der Ausübung von Jahresabschlussleistungen stellt eine der offenen Fragen, welche an die einschlägigen Richtlinien der Europäischen Union nicht angepasst ist. Die Frage ist durch nationale Vorschriften der EU-Mitgliedstaaten, welche auf die Anwendung von allgemeinen oder besonderen Bestimmungen über Schadenshaftung oder auf kombinierte Anwendung genannter Bestimmungen hinweisen, reguliert. Das Gesetz über Jahresabschlüsse aus 2017 beinhaltet keine besonderen Bestimmungen über die Haftung des Abschlussprüfers. Es werden dabei die allgemeinen Bestimmungen über Schadenshaftung aus dem Schuldrechtsgesetzes angewendet. Das Gesetz über Jahresabschlüsse schreibt vor, dass der Abschlussprüfer

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bezüglich des eventuellen an geprüfte Unternehmen und Dritte verursachten Schaden dazu verpflichtet ist, die Haftpflichtversicherung abzuschließen. Ebenfalls wird die minimale Deckungssumme der Haftpflichtversicherung im Gesetz vorgeschrieben. Allgemeine Forderungen für die Durchführung von Jahresabschlüssen in allen zum Jahresabschluss pflichtigen Unternehmen sowie auch besondere Forderungen, welche an die in Subjekten von öffentlichem Interesse durchgeführten Jahresabschlüsse angewendet werden, werden auch im Gesetz bestimmt. Das Ziel dieser Bestimmungen ist es, die Unabhängigkeit und die Objektivität von Abschlussprüfern in Bezug auf die geprüften Unternehmen zu erhöhen. Ebenfalls versucht man auf diese Weise abzusichern, dass die Abschlussprüfer richtig und im Einklang mit dem Gesetz arbeiten.

Schlüsselwörter: *Abschlussprüfer; Schadenshaftung; Haftpflichtversicherung, geprüfte Unternehmen; Dritte.*

Riassunto

LA RESPONSABILITÀ PER DANNI DEL REVISORE LEGALE E L'OBBLIGO ASSICURATIVO PER DANNI

La responsabilità per illecito del revisore legale per il danno cagionato al soggetto della revisione ed ai terzi in occasione dell'espletamento dei servizi di revisione rappresenta una delle questioni aperte che non trova soluzioni armonizzate nelle relative direttive dell'Unione europea. L'illecito viene disciplinato dalla legislazione nazionale dei singoli Stati membri dell'UE che indirizzano all'applicazione di disposizioni generali o speciali riguardanti i danni oppure all'applicazione combinata di tali disposizioni. La legge sulla revisione del 2017 non contiene disposizioni particolari in materia di illecito dei revisori legali; bensì si applicano le disposizioni generali sulla responsabilità per danni dettata dalla Legge sui rapporti obbligatori. La Legge sulla revisione prevede l'obbligo a carico del revisore legale di concludere un contratto di assicurazione per i danni che potrebbero sorgere in capo al soggetto della revisione ed ai terzi e dispone l'importo minimo di copertura. Introduce altresì pretese generali per l'espletamento delle revisioni legali con riguardo a tutti i soggetti sottoposti ad obbligo di revisione legale e pretese specifiche che si applicano nel caso di revisioni legali di soggetti di interesse pubblico. Lo scopo di tali disposizioni è quello di rafforzare l'autonomia e l'obbiettività dei revisori legali rispetto ai soggetto della revisione e di garantire l'espletamento regolare e conforme alla legge del loro operato.

Parole chiave: *revisore legale; responsabilità per danni; assicurazione per danni; soggetto della revisione; soggetti terzi.*

INNOVATION AND GROWTH OF SKILLS: CHALLENGES TO THE CROATIAN LEGISLATURE

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Summary

This paper analyses the strategic and legislative framework of innovation and growth of skills in Croatia. Emphasis is placed on the life-long learning system, especially the legal duty of the employer to education and training of his or her employees. The paper will present the results of the research carried out in the scope of the scientific research project Flexicurity and New Forms of Employment about the issues of flexicurity, atypical and new forms of employment, as well as the respective opinions of the employers operating in several branches and trade-unions. Finally, the author analyses different active labour market policy measures directed to the growth of skills and innovations.

Keywords: *innovations; employee's skills; Croatia; flexicurity; life-long learning; employers; trade-unions.*

1. INTRODUCTION

European Union is strongly oriented toward innovation, research and development as the basis to increase competitiveness and employment. Research and innovation are considered a "key component of thematic policies": the Digital Single Market, development of new, clean technologies, EU as a stronger Global Actor… As the science plays a critical role, it is necessary to improve interactions between science and policy.[1]

Innovations and development are the key words of different strategies and programmes in Croatia. Yet, in comparison with other EU Member States such as

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1 Juncker, J-C., Foreword, in: European Commision, Open Innovation, Open Science, Open to the World – a vision for Europe, p. 5, available at: <https://publications.europa.eu/en/publication-detail/-/publication/3213b335-1cbc-11e6-ba9a-01aa75ed71a1>; accessed 6.11.2018.

the Netherlands,[2] in Croatia different actors still have to do much more regarding innovation, despite some promising, world-wide known examples of entrepreneurship, such as Rimac Automobili d.o.o.

Strengthening the Croatian innovation system and innovation potential of the economy is one of the measures towards achieving the main objectives of the Europe 2020 Strategy.[3] According to Eurostat, the share of investments in research, development and innovation in the GDP in Croatia in 2016 amounted to 0.85%, whereas the aim is 1.4%. This represents a slight increase compared to 2015 when it was 0.84% and compared to 2014 when it was 0.78%.[4] In 2016 small and medium-sized enterprises (SMEs) continued with the implementation of the new research and development (R&D) funding model developed for the period 2013-2015 that focuses on the allocation of multi-annual funds from the state budget (total funds of HRK 50 million per year, approximately 6,666 million EUR).[5] Different programmes provide funding for SMEs and public science institutions, encouraging commercialisation of research results, collaboration between the scientific community and the business sector and the establishment of knowledge-based enterprises.[6]

Nevertheless, according to the report of the European Innovation Union Scoreboard for 2017 and 2018 Croatia is at the 26th place as the last country in the group of "Moderate Innovators" (just before Romania and Bulgaria, as "Modest Innovators"). This is a corollary of the above mentioned small share of investments of the business sector in research and development; lack of technologically relevant enterprises and systematic and efficient innovation policy, as well as the complexity and fragmentation of the innovation system.[7] According to the EC, the efficiency of the R&I system "lags behind that of other EU Member States… This is largely due to scarce public investment in R&D but also to a fragmented landscape of higher education institutions, a lack of incentives for researchers' careers and a significant neglect of the relevance of internationalising Croatia's science and innovation arena."[8]

2 See: Pennings, F., Encouraging growth of skills and innovation in the Netherlands, in this issue of Zbornik Pravnog fakulteta Sveučilišta u Rijeci.

3 European Commission (EC), Europe 2020 Strategy, available at: <http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf>; accessed 10.6.2018.

4 Eurostat, available at: <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=t 2020_20&plugin=1>; accessed 10.3.2018.

5 National Reform Programme 2017, Government of the Republic of Croatia, April, 2017, p. 75, available at: https://vlada.gov.hr/UserDocsImages/Europski%20semestar/NRP%20HR%202017.pdf; accessed 10.3.2018.

6 In 2016 and 2017 the implementation of PoC, RAZUM, IRCRO and UTT programmes by HAMAG-BICRO continued, the projects financed by loan from the International Bank for Reconstruction and Development, within the framework of the Second Technological Development Project (STPII), within the competence of the MSE.

7 European Commission, European Innovation Scoreboard 2018 (EIS 2018), p. 7, available at: <https://ec.europa.eu/docsroom/documents/30233; ETAY18001ENN.pdf>; accessed 10.3.2018. Compared to 2016, Croatia is among 10 Member States in which performance declined, and together with Romania (14.8%) has the strongest declines (13.1%). The EU average increased by 2.4% between 2016 and 2017. Ibid., p. 23.

8 European Commission, Brussels, Commission Staff Working Document, Country Report

In order to overcome the underlined problems and encourage private sector investment in research, development and innovation as well as enable continuous entrepreneurial discovery and innovation dialogue between the public, business and scientific research sectors, different activities have been undertaken. To give an example, the National innovative council has been recently established as a body that should promote a uniform innnovation policy system in Croatia.[9]

The labour law legislation represents one of the bases for an efficient system of innovations, development and the growth of skills. In the following sections the author analyses the existing Croatian regulatory framework for innovations and growth, illustrating examples of R&D in practice, the organization of the labour market (including life-long learning system, flexibility approach, labour market trends and active labour market policy (ALMP) measures), giving proposals *de lege ferenda*.

This paper presents the results of the research carried out within the project *Flexicurity and New Forms of Employment (the Challenges Regarding the Modernization of Croatian Labour Law),*[10] especially the results of the questionnaire filled out by employers and trade unions. They are supported by the results of the individual interviews that the author carried out with employers and trade unions. Emphasis is placed on several branches of economic activity considered important for the Croatian economy.

2. REGULATORY (STRATEGIC AND LEGAL) FRAMEWORK FOR INNOVATIONS AND GROWTH

In general, the Croatian regulatory framework for innovations is based on different national strategic documents adopted in line with the Europe 2020 Strategy and other EU instruments. Lately, there has been an increase of such strategies which is a sign of good will and high expectations.

The Croatian Ministry of Economy, Entrepreneurship, and Crafts has drafted and is responsible for the realization of the Incouraging innovations' Strategy 2014-2020.[11] This Ministry is responsible for the Strategic Project for support of establishment of Innovation Network for Industry and Thematic Innovation platforms (Project INI), carried in partnership with the Croatian Chamber of Economy (CCE), and co-financed by the European Regional Development Fund (with 85%). The main purpose of the Project is to create an efficient and self-sustainable support framework and encourage private sector investment in research, development and

Croatia 2018 Including an In-Depth Review on the prevention and correction of macroeconomic imbalances, 7.3.2018
SWD(2018) 209 final (hereinafter: EC, Country Report Croatia 2018), p. 43, available at: <https://ec.europa.eu/info/sites/info/files/2018-european-semester-country-report-croatia-en.pdf>; accessed 2.6.2018.

9 Nacionalni program reformi 2018, pp. 64, 65, available at: <https://ec.europa.eu/info/sites/info/files/2018-european-semester-national-reform-programme-croatia-hr.pdf>; accessed 12.05.2018.

10 See more at: www.pravri.hr/fleksinora.

11 Strategy 2014-2020, Official Gazzette (OG), no. 153/2014.

innovation as well as raise awareness of the importance of R & D and innovation in the business sector to identify new potential for industrial growth and job creation, improve competitiveness, modernize and diversify the Croatian economy. This can be achieved, by, among others, the establishment of an institutional platform for R & D that will enable continuous entrepreneurial discovery and innovation dialogue between the public, business and scientific research sectors, i.e. companies and the scientific and research community. In line with the Strategy for Promoting Innovation of the Republic of Croatia 2014-2020, it is envisaged that further development of the National Innovation System (NIS) will lead to the establishment of a stable framework for cooperation between the public sector, research and development and industry, which has not been the case so far. The ultimate result of this Project is the establishment and operational functioning of Innovation Network for Industry.

By establishing thematic innovation platforms, support will be given to the work of the established Innovation Council for Industry, with the aim of coordinating all stakeholders of the innovation system, with special and primary focus on the business sector. That is expected to effectively shift the focus of the Croatian economy to knowledge-based activities and use of the existing territorial capital including resources, tradition in industrial production, and the innovation and creativity of innovation chain members.[12]

An important role in fostering innovations and growth is given to state aid for research and development projects. The Act and Ordinance on State Aid for Research and Development Projects has been adopted recently.[13] It will regulate conditions for granting state aid in this field (in the horizontal aid category for R&D and innovation). This state aid is envisaged as "a right to further reduced profit tax base for justified costs of research and development projects of taxpayers who are classified into the categories of underlying research, industrial research and experimental development … with the goal … to increase private sector investments in research and development, and ultimately increase overall R&D investments, i.e. contribution to achieving the strategic goal of 1.4% of GDP by 2020."[14] It should affect the efficiency of granting state aid and increase the number of beneficiaries, and consequently increase the investments in the development of new products and value-added services, as well as competitiveness on the global market and exports. The unfavourable position of SMEs on the market, as well as the great potential for cooperation between the scientific-research institutions and the economic sector are targeted by the state aid measure. Even though it is possible to conclude that the results of such projects and large investments remain uncertain, they are considered instrumental in creating new jobs.

12 <http://www.ciraz.hr/en/projekt-ii/o_projektu/>; accessed 12.05.2018.

13 Zakon o državnoj potpori za istraživačko-razvojne projekte, OG, no. 64/2018.

14 National Reform Programme 2017, op. cit., p. 76; Nacionalni program reformi 2018, available at: <https://ec.europa.eu/info/sites/info/files/2018-european-semester-national-reform-programme-croatia-hr.pdf>; accessed 12.05.2018. According to Tax Act data, beneficiaries of state aid for research and development projects realised a total of HRK 124 million in tax relief in 2014. <https://vlada.gov.hr/UserDocsImages/Europski%20 semestar/NRP%20HR%202017.pdf>, accessed 10.3.2018.

3. POSITIVE EXAMPLES – SCIENCE AND TECHNOLOGY PARK OF THE UNIVERSITY OF RIJEKA (STEP RI)

Despite the not so favorauble environment for innovations, there are some promising, even world-wide known examples of entrepreneurship and innovations. One of them, *Rimac Automobili d.o.o.* has been gaining momentum with its new electric battery that was produced for the car of the newly-wed British royal couple, and the most recent investment to the company made by Porsche. It is expected that within 2 years this company will employ 1.200 workers.

Another positive case of synergy between business and universities is found in the City of Rijeka. The Step Ri Science and Technology Park of the University of Rijeka (Step Ri) was established in 2008 by the University of Rijeka in order to become the unique science and technology hub, facilitating the commercialisation of R&D and fostering cooperation between the scientific community and industry. It is a widely recognised centre of innovative and entrepreneurial support infrastructure of the Ministries of Economy and Entrepreneurship and Crafts in Croatia, a partner in the Proof of Concept programme organised by the Croatian agency for SMEs and investments (HAMAG-BICRO), as well as a major regional provider of business know-how. Step Ri has been participating in several EU and nationally funded programmes and U.S. State Department grants and has gained experience in project management, procedures and regulations.[15] Step Ri Park offers the members of the University of Rijeka's academic community valuable support in marketing application of knowledge, innovations and inventions, their licencing and development of products and services based upon them; assists in establishing start-up companies, whether autonomously or in co-operation with the University. As a hub of science and economy, Step Ri is the starting point in finding a partner in economy that needs knowledge and research-analytical capacity of the University. Apart from offering the basic business and incubation services, the Step Ri Science and Technology Park of the University of Rijeka offers innovation management consulting.[16]

Located in a modern, recently renovated building at the Campus of the University of Rijeka, Step Ri provides state-of-the-art work space (for offices and laboratories, but also fully equipped multimedia facilities) combined with integrated business support and internationalisation services. In 2016, 28 companies – tenants of the Step Ri Park had 334 employees and exported goods and services in the value of more than 55 milion kuna (approximately 7,33 million EUR).

Rijeka is a city with an excellent geographic location at the Northern Adriatic coast. Its long industrial tradition has been, unfortunately, (almost) destroyed in the last three decades, due to the processes of privatization and unsuccessful management. The big metal industry companies (Torpedo, Rikard Benčić, Vulkan, etc.) and shipowner Croatia Line filed for bankruptcy. Recently, the business of one of the oldest Croatian shipbuilding companies *3. maj* has been jeopardised, while the shipyard *Viktor Lenac*, after a long period of business difficulties, managed to find an escape route by focusing

15 <http://www.step.uniri.hr/en/about-us/>; accessed 13.05.2018.
16 Ibid.

on special ship overhauls… Therefore, any idea of innovation is most welcome from the perspective of Rijeka's economy.

In the last 20 years in Croatia numerous companies in almost all branches have undergone restructuring, that led to thousands of redundancies. At the same time, unemployment benefits are low, and do not guarantee any economic security, as opposed to other countries, such as the Netherlands …

Asked to express their opinion about more flexibility in exchange for more security, the interviewed trade unions in Croatia voiced firm opinions against more flexibility, while employers still deem Croatian employment legislation too rigid.

4. THE ORGANIZATION OF THE LABOUR MARKET

4.1. Croatian labour market trends, labour force demand and employment

The available statistical data about labour market trends indicate that 2016 and 2017 were good years for Croatia marked by positive economic trends, and a Gross Domestic Product growth of 3.2%, resp. 2.8%. After several years of oscillating growth, the trend in registered employment finally shifted in 2016 and continued in 2017 and 2018. The changes mainly refer to a strong decrease in the number of unemployed persons and unemployment rate and a slight increase in the number of employed persons. In February 2018 the registered unemployment rate was 12,3% and the surveyed unemployment rate 10,9% (Oct-Dec 2017) comparing to 7,3% for EU 28. The largest decrease of unemployment was recorded in younger age groups: persons aged 15 to 19 – 29.1% and 20 to 24 – 24.4%). Regarding the level of education, in 2017 the number of unemployed persons with no education or unfinished elementary school amounted to 6,2% (11.997); the unemployed persons who finished elementary school 20,6% (39.775); the unemployed persons who finished a three-year secondary school 30,1% (58.474); the unemployed persons who finished a four-year vocational secondary school or grammar school 28,2% (54.744); the unemployed persons with undergraduate university or post-secondary non-university 6,4% (12.415), while those with graduate/post-graduate university or academy education amounted to 8,5% (16.562).[17]

According to the latest EU Labour Force Survey (LFS), in 2016 there was a total of 1,599.000 employed (a drop of 10,2% comparing to the pre-crisis level in 2008 when there were 1,780.000 employed)[18] and 240,000 unemployed persons in 2016. The employment rate of population aged 20-64 increased from 60.5% in 2015 and 61,4% in 2016 to 63,6% in 2017. The average LFS-based unemployment rate amounted to 11.1% in 2017, thus declining compared to the previous two years (from 13.4% in 2016 and 16,1% in 2015). The youth unemployment rate amounted to 31,1%

17 Croatian Employment Service (CES), 2017 Yearbook, pp. 14ff, available at: <http://www.hzz.hr/UserDocsImages/YEARBOOK%202017.pdf>; accessed 1.6.2018.

18 <http://ec.europa.eu/eurostat/statistics-explained/index.php?title=Employment_statistics_within_national_accounts#Employment_at_highest_level_in_persons_but_still_under_pre-crisis_level_in_hours_worked>; accessed 28.4.2018.

in 2016 (comparing to 42,3% in 2015 and 44,9% in 2014).[19]

Croatia was among the countries (with France, Spain and Poland as well as the candidate countries Montenegro and Turkey) with the highest overall proportion of persons in precarious employment relations (having a work contract of only up to 3 months).[20]

Here we can observe a continued growth in labour force demand in most areas of activity and in a large number of counties. In 2017, the employers reported 25,0216 vacancies to the CES, which represents a 7.7% increase compared to 2016.[21] On a monthly basis, e.g. in March 2018, the employers reported 25,461 job vacancies (and for the Januar – March: 75,672).[22] However, after a positive growth in the past several years, registered employment, i.e. the number of persons from the CES Unemployment Register who found employment during the year, decreased in 2017 by 10.1% compared to 2016 (in total 196,820 persons). In 2017, 90.4% of unemployed were employed on an employment contract basis (177,875) and 9.6% on the basis of engaging in other business activities (vocational training for work without an employment contract, starting a company or a sole proprietorship, signing a temporary service contract etc.) (18,945). It should be emphasized that compared to 2016, both the number of persons employed on the basis of an employment contract and those employed on the basis of engaging in other business activities decreased (the former by 9.7%, the latter by 13.0%).[23]

It is worth mentioning that seasonal employment of unemployed was especially important in 2017 because it accounts for 20.4% of the total number of persons from the CES unemployment register employed on a work contract basis (36,288 persons, comparing to 40,682 in 2016, what represents a decrease in the number of seasonal workers of 10.8%). The largest number of seasonal workers was employed in accommodation and food service activities (58.2% of the total number). Most seasonal workers came from the coast (63.3%) and Slavonian (22.0%) counties, while the north-western and central regions of Croatia accounted for a relatively small share in seasonal employment (14.3%).[24]

19 <http://ec.europa.eu/eurostat/statistics-explained/index.php?title=Unemployment_statistics#Main _statistical_findings>; accessed 28.4.2018.

20 <http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa_qoe_4ax1r2&lang=en>; accessed 28.4.2018.

21 The major share of new job vacancies was reported by employers: in manufacturing (36,550 or 14.6%), accommodation and food service activities (35,330 or 14.1%), in wholesale and retail trade (28,921 or 11.6%), construction (22,238 or 8.9%), education (25,583 or 10.2%), public administration and defence (21,119 or 8.4%) and human health and social work activities (20,596 or 8.2%). CES, 2017 Yearbook, op. cit., p. 21.

22 CES, available at: <http://www.hzz.hr/default.aspx>; accessed 21.4.2018.

23 Croatian Employment Service (CES), Yearbook 2018, p. 7-8, available at: <http://www.hzz.hr/UserDocsImages/YEARBOOK%202017.pdf>; accesssed 21.6.2018.

24 CES, Yearbook 2018, op. cit., p. 8.

4.2. Life-long learning in Croatia

4.2.1. Strategy ...

Innovations are based on human capital. Our knowledge, skills, talents and abilities are crucial for the economic success of countries and individuals.[25] Education is the generator for social, economic and other changes and prosperity of the country. If we want to develop the society, we have to increase the education level of its members. The faster the development of the society, the more developed the economy, and life-long learning.[26] Since the Lisbon Process 2010 "the dominant role of life-long learning in Europe is mirrored in the strengthening of competences for the labour market".[27] It can be defined as a transformation of the life-long learning concept into a concept of acquiring the right skills for the labour market.[28]

Accordingly, in different national documents, life-long learning is determined as one of the foundations of the Croatian education system that provides new vocational skills for the labour market. The Strategy of Education, Science and Technology[29] pinpoints life-long learning as one of the foundations of the Croatian education system.[30] In the VET System Development Programme (2016 – 2020) referring to initial and continuous vocational education, life-long education and continuous vocational education are understood as synonyms.[31] "Continuous vocational education acquires the central place in adult learning precisely because it provides new vocational skills for the labour market."[32] In Croatia, vocational training is regulated by the Vocational Education and Training Act.[33]

The educational system and unemployment rate are interconnected.[34] It should be emphasised that in Croatia primary school education represents a basic, mandatory

25 OECD, Human Capital, How what you know shapes your life, available at: <www.oecd.org/insights/humancapital>; accessed 10.5.2018.

26 Keely, B. (2007), Ljudski kapital, Zagreb, EDUCA; Jarvis, P. (2004), Adult Education and Lifelong Learning (3rd ed) London and New York: RoutledgeFalmer, p. 15. Cit. according to Vican, D., Obrazovna struktura i obrazovne potrebe građana RH – platforma za promjene prakse obrazovanja odraslih, Andragoški glasnik, Vol. 17, no. 2, 2013, p. 88.

27 Strategic Framework from Promotion of Lifelong Learning in the Republic of Croatia 2017-2021 (ed. M. Vučić et al.), Zagreb, Agency for Vocational Education and Training and Adult Education (Strategic Framework), pp. 10-11, available at: <https://ec.europa.eu/epale/hr/node/41815>; accessed 18.5.2018.

28 Nóvoa, A., The blindness of Europe: New fabrications in the European educational Space, Sisyphus Journal of Education 1 (1), 2013, p. 114. Cit. according to Strategic Framework, op. cit., p. 11.

29 Strategija obrazovanja, znanosti i tehnologije, OG 124/2014.

30 Strategic Framework, op. cit., p. 10.

31 Loc. cit.

32 Loc. cit.

33 Zakon o strukovnom obrazovanju, OG no. 30/09, 24/10, 22/13, 25/18. It encompasses formal and non-formal education and informal learning. Likewise, all forms are comprised in the Adult Education Act (Zakon o obrazovanju odraslih), OG, no. 17/07, 107/07, 24/10.

34 Bejaković, P., Situation and consequences of long-term unemployment in Croatia and measures for its decrease, p. 5ff, available at: <ec.europa.eu/social/BlobServlet?docId=12057&langId=en>; accessed 6.11.2018.

level of education and, consequently, the "point zero" in a life-long learning strategy. Therefore, in comparison with other countries, like the Netherlands, where the basic education ends with a diploma of one of the forms of secondary education, and a person without such a qualification who leaves school does not have a right to social assistance benefits,[35] the situation with workforce qualifications and life-long learning in Croatia is from the very onset less favourable.

Scientific research dealing with life-long learning in Croatia remains scarce. The Eurostat data show that the level of participation in vocational education and training on the secondary school level in Croatia is among the highest in the EU amounting to 71,3%. Nevertheless, the employment rate of secondary school graduates that recently finished school of 46,1% in 2014 is significantly below the EU average of 73%. A serious objection to the Croatian education system is that the competences that the students acquire in school do not match the needs of the labour market. Even more concerning in terms of life-long learning, is that those competences are not upgraded. The employed adults in Croatia "seldom continue to upgrade their skills". In 2016 only 3,2% of adults (aged 25 to 64) in Croatia participated in education and training, which is much lower comparing to the European average and objectives of the European and national strategies. Likewise, only 23,8% of employees participated in non-formal training organized by employers, comparing to the EU average of 34,1%.[36]

The benefits of adult learning regard the benefits for learners themselves, for employers and for the wider community. One of them is that "provision of employment- and work-related training is the key driver in increasing the overall rate of adult participation in learning; and improving learners' disposition to learning increases participation in learning".[37] Employers play an important role in promoting a learning culture and promoting participation in learning. "The research evidence highlights employers' investment in learning as important for increasing the availability of learning opportunities as well as for increasing participation, especially among their workforce. As work-related motivations are among the main reasons for adults to take up learning, job-related training is particularly effective in attracting learners."[38]

To conclude, the employers play the central role in encouraging and creating possibilities for additional education of their employees. Employers can motivate their employees with appropriate jobs that require new knowledge. This is true mostly of big companies that have possibilities for efficient education, better utilization of

35 See more: Pennings, F., Encouraging growth of skills and innovation in the Netherlands, in this issue of Zbornik Pravnog fakulteta Sveučilišta u Rijeci.

36 Strategic Framework, op. cit., pp. 11-13. In the period from 2006 to 2016 the percentage varied between 2,6 and 3,2%. „This data is considered the main indicator of life-long learning and is one of the key indicators of improvement of education systems in the period up to 2010 and in the new Europe 2020 strategy." One of the important issues is a preschool education in the context of life-long learning, and the rate of participation in preschool and adult education in Croatia is at a very low level comparing with other EU countries. EC, Overview of Education and Training for 2016. Education in Croatia. Luxembourg, Publication Office of the European Union, available at: <https://ec.europa.eu/sites/education/files/monitor2016-hr_hr.pdf>; accessed 28.4.2018; Strategic Framework, op. cit., p. 12.

37 An in-depth analysis, op. cit., p. 3.

38 Loc. cit.

the employee's new knowledge and a more flexible relationship to work assignments. Workers are often motivated by improvement of their employability, but also by requests of everyday life, i.e. computer literacy, foreign languages etc. The state on the other hand has its own social reasons to improve the position of the vulnerable and marginalized groups through their participation in education.[39]

4.2.2. Duty of the employer to provide education and training at work and paid educational leave

According to the Labour Act,[40] the duty of the employer is to ensure schooling, education, vocational, as well as professional training for the worker, in line with the employer's capacities and business requirements (Art. 54/1).[41] This means that the employer who does not need the worker to master higher education and abilities is not obliged to ensure schooling, education etc. to the worker who may have made such a demand and wants to improve his or her skills. Therefore, it is possible to conclude that such legislative approach is narrow and shortsighted, not oriented towards the employability and adaptability of the workers, (defined) as the request that the workers are expected to continuously improve knowledge and skills, so that workers are prepared for the case they lose their jobs or face transfers to other positions etc. Much more has to be done also to make the worker aware of the importance of life-long learning in his/her carrier. On the other hand, a different legislative approach leaning towards a stringent duty of the employer to educate the worker would be better suited for looking after the interests of the society (decrease of unemployment, less costs for the state resp. social security system in case of redundancies etc.).

Exceptionally, according to Art. 54/3 LA, a worker needs additional education in the event of changes to or introduction of new patterns or organisation of work when the employer shall, in line with capacities and requirements of work, provide the worker with vocational or professional training.

According to Art. 36/1, 3 LA, "the worker who has exercised the rights to maternity, parental and adoptive leave, a leave for the purpose of taking care of and nursing a child with severe developmental disabilities and the abeyance of the employment relationship until the child's third year of age in accordance with specific provisions, shall be entitled to additional training, where there has been a change in the technique or method of work, and to benefit from any improvement in working conditions during his absence to which he would have been entitled".

However, when the employer requires the worker to be further educated or trained, the worker should take part in schooling, education, vocational and professional training, but only if that is "in line with his working abilities and business requirements" (Art. 54/2). In this case, the worker's refusal to act according to the employer's request may represent valid reason for dismissal due to the worker's misconduct (Art. 115) or for a "dismissal with the offer to the worker to conclude an employment contract under different terms (dismissal with the offer of alternative

39 Strategic Framework, op. cit., pp. 12-13.

40 Zakon o radu, OG, no. 93/2014, 127/2017.

41 „Obligation to provide education and training for work".

employment)" (Art. 123).[42] In case of a dispute about the validity of dismissal the court should analyse the existence of the worker's abilities and the business requirements.

In addition, LA does not regulate a very important issue, namely the burden of the educational costs. Therefore, the collective agreements or working rules, as well as employment contract play an important role in the regulation of such an issue. In the lack of respective regulations, the employer who requested the worker to take part in education seems to be obliged, by nature, to pay these costs. If the worker has requested the education, he or she carries the costs. In case of a dispute, the court should take charge of it on its own motion and examine whether the legal provisions of collective agreements, working rules or employment contract that regulate the amount and burden of educational costs are in line with the legal regulation (especially general law on obligations) and the moral principles.[43]

In practice, if the employer covers the educational costs, the worker often has a duty to remain employed by the employer for a certain period of time, unless he or she reimburses the costs (in total or in part) to the employer. Such stipulation is lawful.[44] The courts have ruled that the employee has to reimburse to the employer only the real costs the employer had, i.e. the costs of the examination, and not the costs the employer had regarding the engagement of his own workers that helped the worker to prepare the examination, because that cannot be considered a real cost.[45] Here it is worth mentioning a recent case before the County Court in Zagreb,[46] in which the worker had to reimburse the costs even independently of how long she remained employed by the same employer, and independently of who terminated the employment contract, worker or employer.[47] The Court decided that such contractual stipulation was contrary to the constitutional principle of the freedom of work and freedom to choose the profession and employment, as well as the statutory workers's right to terminate the employment contract by dismissal without the duty to specify any reason for doing so (Art. 115/4, LA). The Court ruled that the real goal of the doubtful stipulation was the ban of the competition between the worker and his employer, but the employer wanted to circumvent his statutory duty to pay the wage compensation to worker during the contractual ban of competition. If the employer wanted to ban competition, he should have stipulated the contractual prohibition of competition that can last up to two years after the termination of the employment contract (Art. 102, 103, LA).[48]

Besides, the courts have found doubtful the use of the legal institution of the

42 Cf. Rožman, K., Čl. 54, in: Frntić et al., Detaljni komentar Zakona o radu, Zagreb, Radno Pravo, 2018, p. 277.

43 Rožman, Čl. 54, op. cit., pp. 277-278.

44 Gović Penić, I., Sudska praksa u području dopuštenosti ugovaranja povrata troškova edukacije za slučaj prestanka ugovora o radu, Radno pravo, no. 9, 2018, p. 7.

45 County Court in Zagreb (Županijski sud u Zagrebu, Gžr-115/15, 20.01.2015)

46 County Court in Zagreb (Županijski sud u Zagrebu, Gž R-1998/13, 6.12.2017)

47 The employer was the owner of the hair-salon in which non-standard hairdressing techniques were applied, that requested the special education of the hairdressers.

48 See more: Penić Gović, I., op. cit., pp. 8-11.

contractual penalty. Settled case law of the county courts[49] states that the stipulation of the contractual penalty in case the employment contract terminated before its contractual duration expired, in which the educational costs should have been written off, is not allowed. The opinion is that it is contrary not only to LA provisions regulating the ban of competition between the worker and the employer, but also immoral because it stipulates the undue material benefit for one contractual party, that has no corresponding countervalue on the other side. This was approved by the Croatian Constitutional Court. On the other side, the High Commercial Court was of a different opinion, arguing that the contractual penalty is allowed, based on the provisions of the Obligations Act, while the amount of the penalty should be decided by the court, in proportion to the worker's duty to remain employed by the same employer for a certain period of time.[50]

In a dispute the court applies the existing rules of the collective agreements and working rules, or if they do not exist, the general rules on obligations,[51] in line with the legal nature of the employment contract. Also, the opinion in the labour law literature is that it should take into account the teleological interpretation of the LA and other applicable provisions, and the subsidiary implementation of the Obligations Act.[52]

The issue of the reimbursement of the educational costs for the medical doctors' specialization is actual in Croatia because of the migration of medical staff to other EU countries. The courts accept the requests of the hospitals, ruling that the medical doctors should reimburse the educational costs, with the arguments that such stipulation does not violate the constitutional freedom of work and employment, nor the Croatian Constitution, mandatory rules and the moral of the society in general (the conditions for the nullity of the contract, regulated in the Obligations Act).[53] Moreover, the opinion of the Civil Depatment of the Croatian Supreme Court is that the "medical doctor – specialist who has terminated his employment contract before the term stipulated in the contract of specialization expired, is obliged to return the gross amount of wages he received (as a part of the educational costs for specialization) to the medical institution who is a party to the contract of specialization, irrespective of the place where he performed the medical specialization".[54] The Constitutional Court was of the opinion that this does not represent a violation of constitutional rights of the worker.[55]

Paid educational leave is an important instrument for the realization of the workers' right to education and training. In this context it is instructive to note that Croatia has not ratified the ILO Paid Educational Leave Convention (1974, No. 140).[56]

According to Art. 86/4, 5 of the LA, a worker shall be entitled to paid leave

49 County Court in Pula (Gž-811/11-3, 20.6.2011) and County Court in Osijek (Gž-493/17, 1.2.2018).

50 See more: Penić Gović, I., op. cit., pp. 4-7.

51 Obligations Act (Zakon o obveznim odnosima), OG no. 35/05, 41/08, 125/11, 78/15, 29/18.

52 Rožman, Čl. 54, op. cit., p. 278.

53 County Court in Zagreb, Gž R-2542/15-2, 11.4.2017.

54 Supreme Court, Civil Department (Su-IV-168/16-11, 28.11.2016)

55 Constitutional Court, U-III-792/18 (3.5.2018). More: Gović Penić, I., op. cit., pp. 11-12.

56 Convention concerning Paid Educational Leave, Geneva, 59th ILC session (24 Jun 1974).

during education, vocational or professional training, and during education for the purposes of engaging in the works council or trade union work.[57] The conditions, the duration and remuneration can be determined by collective agreement, agreement between the works council and the employer or working rules. The periods of paid leave shall be regarded as time spent at work, for the purpose of acquiring the rights arising from employment or related thereto.

The problem arises if the conditions are not regulated by those autonomous rules. In that case the worker would not be entitled to the paid educational leave, nor could he realize such a right invoking this LA provision.[58] The right to a paid educational leave can be guaranteed by the employment contract or the autonomous employer's decision, but this renders the realization of this right very problematic and dependent on the employer's arbitrary decision. An especially unfavourable position is that of workers employed by a small employer (employing less than 20 workers), who is not obliged to endorse (draft and implement) working rules.[59]

We can conclude that a different legislative approach is needed to strengthen the duty of the employer to educate a worker (e.g. by precisely defined employer's duties), that will at the same time contribute to the interests of the community (reduce unemployment, costs for the social security benefits etc.).

4.2.3. ... and Practice

Data about life-long learning as a part of human resources management presented in this paper have been collected by means of a questionnaire.[60] The results show divergences in opinions of trade unions and employers, as well as in respect of different branches of economic activities. At the same time, a commonality is that life-long learning is present in all the branches.

According to the opinion of trade unions,[61] life-long learning is crucial in achieving job security or security of employment. The existing life-long learning system in Croatia is not used enough and/or lacks quality and hence should be improved.

The situation in the construction industry can be taken as a case in point. The Trade Union of Construction Industry in Croatia (TUCIC)[62] advocates for the

57 Cf. Art. 140-191.

58 Rožman, Čl. 54, op. cit., p. 278.

59 LA, Art. 26/1.

60 The questionnaire concerning flexicurity of the Croatian labour legislation addressed to the employers and trade unions in Croatia was carried in 2017 and 2018, as part of the *Project Flexicurity's* research.

61 The interview included: Association of Croatian Trade Unions (Matica hrvatskih sindikata), Union of the Autonomous Trade Unions of Croatia (Savez samostalnih sindikata Hrvatske), Croatian association of workers' trade unions (Hrvatska udruga radničkih sindikata), Trade Union of Construction Industry in Croatia (TUCIC, Sindikat graditeljstva Hrvatske), Trade Union of the Tourism and Services of Croatia (Sindikat turizma i usluga Hrvatske).

62 It has approximatelly 5.500 members that regularly pay member's fee, the additional 2.000 – 3.000 non-regular payers, employees of the companies included in the insolvency proceedings. The Trade Union occasionally provides legal protection.

implementation of the system of dual vocational education and the recognition of the professional informal education. In fact, it is an old problem since already in 2007, TUCIC and Croatian Employment Association – Association of the Employers' in Construction Industry have drafted a model of dual education, and proposed it to the Ministry of Science, but it was not accepted. In this branch scholarhips for pupils and students are rarely used because vocational schools have a small number of pupils. Schools are not attractive because of low wages in the construction industry, bad working conditions and work being performed off-site. TUCIC assesses that human resources management department at the employer's level is important and its size should depend on the size of the company. Special importance is given to social dialogue at different bargaining levels and development of additional models of vocational/professional education developed by employers and trade unions, besides the public model.

In tourism and hospitality industry, according to the interviewed employers, life-long learning is a continuous commitment. The workers attend different seminars and workshops. In the recruitment of the future workers scholarships are often used, mostly for pupils of secondary schools, but also for professional training as part of life-long learning programs.[63] The opinion of the Trade Union of the Tourism and Services of Croatia is that education should include more field work and hands-on experience (dual system).

Innovative practices are important for this economic activity. Professional, qualified workers are one of the key factors for the implementation of innovations. The research[64] carried out in 2016 on the sample of 13 companies in the branch of tourism and hospitality industry[65] in the region of Istria and Kvarner demonstrated that the majority of companies desire and strive to achieve a certain level of innovations, while 38% of the companies consider themselves open to innovations and new ideas; 62% of companies appreciate innovations, and recognise and adopt new ideas. The experience of the customers, products and services are the fields in which they planned to implement the innovations (28%, 27%, resp. 24%, in total 79% of the examinees). It should be emphasised that the lack of talented resp. "true" employees is considered one of the obstacles for introducing more innovations in the company (30%), along with "political and legislative obstacles" (30%) and "actual culture of the company" (30%). Accordingly, the Government and companies should pay more attention to "educated and capable workforce that has certain skills" (68%), "high level of employment" (21%) and "appropriate infrastructure (spatial and digital)" (11%), while

63 One of the programs, "Specialist of the food and drink department", carried out by the Faculty of Tourism and Management (FTHM) in Opatija, offers training for persons with different levels of qualifications: those with secondary school diploma, as well for those with higher-education or university diploma. The program (subjects) focuses on innovative practice in the preparation of food and drinks (such as current gastronomic trends, healthy nutrition, or the safety of food).

64 Batković, A., Inovacije u turizmu u Europi, (PhD thesis), University Juraj Dobrila u Puli, Faculty of economy and tourism „Dr. Mijo Mirković", Pula, 2016, available at: <https://zir.nsk.hr/islandora/object/unipu%3A1068/datastream/PDF/view>; accessed 11.6.2018.

65 Among them, 2 medium-sized enterprises, 5 small enterprises and 6 big enterprises.

nobody allocates importance to "health and well-being of the workforce", "diversity of the workforce and its higher inclusion in the society", "higher equality in the basic income of the citizens" and "reduction of the impact on the environment" (0%).[66]

The examinees were asked about the activities they took "in order to enable their employees resp. the people the examinees were working with, to streamline their work towards better, new ideas and innovation". They focused on: the investigation of better solutions, supporting the ideas of colleagues, creating a pleasant working atmosphere, stimulation of opinion sharing, motivation and support, equal treatment of team members, critical and creative thinking. The use of new technologies is considered important for innovations in the company (5%). We can conclude that the given answers reflect an orientation towards innovation and growth of skills of employees. But there are also different opinions, like the one that "innovations are not the priority in relation to the market on which the company operates", as was asserted by 15% of the examinees.[67]

The professional, educated staff is considered one of the most important driving forces of innovations in general.[68] One research indicated that "hotels that are part of a chain innovate more easily than the ones that are operating individually because they can benefit from managements' know-how … Human capital skills and the ability of their update is materialized in trainings and reflected in HR investments, both important for innovation success ... The most innovative hotels have a higher classification (3 or 4-5 stars)."[69]

Life-long learning in IT sector is seen as the key condition for the development of the company and its survival in the demanding technological market.

This branch is strongly marked by innovations in new technologies, both infrastructural and software products, in projecting, montage and maintenance of the equipment. Sophisticated technologies request continuous investment in knowledge and competencies of the employees. In the questionnaire the employers emphasized that the workers are considered the most precious value for the company. Highly qualified workers with experience and knowledge are seen as the precondition for the competitive advantage of the company. The workers gain special and general knowledge, by the supplier of the equipment, at conferences and seminars in Croatia or abroad, and in-house seminars. Therefore, as the number of workers included in the education increases, so does the total investment into education. The possibilities of education and training represent one segment of the improvement of the working environment.[70] Consequently, the employment on indefinite term is most often used.

66 Batković, A., op. cit., p. 80ff.

67 Batković, A., op. cit., pp. 79-87.

68 Nemeth, C. J., Managing Innovation: When Less Is More, California management review, 40 (1), October 1997, available at: <https://www.researchgate.net/publication/246756495_Managing_Innovation_When_Less_Is_More>; accessed 12.6.2018.

69 Nagy, A., A Review of Tourism and Hospitality Innovation Research, available at: <http://steconomiceuoradea.ro/anale/volume/2012/n2/051.pdf>; accessed 12.6.2018.

70 Odašiljači i veze d.o.o., Godišnje izvješće za 2016. godinu, p. 22ff, available at: <https://www.oiv.hr/tvrtka/izvjesca/izvjesca-god/files/godisnji_izvjestaj_oiv_2016.pdf>; accessed 6.6.2018.

4.3. More flexibility – (as) the key to fostering innovations in Croatia?

As Frans Pennings points out, innovative companies, such as start-ups, "often need particular flexibility if they employ workers" not knowing "whether their enterprise or idea will become successful."[71]

Open-ended employment contracts represent a predominant form of employment in Croatia.[72] Fixed-term contracts are an instrument of flexibility for the employers. But is there any space for more flexibility in Croatian legislation? According to the answers given in the questionnaire, trade unions strongly oppose further flexibilization of the fixed-term contract, emphasizing that it is misused by employers and arguing for a change of the existing regulation. Invited to express their opinion about more flexibility in exchange for more security, the interviewed trade unions in Croatia are, in general, very much against more flexibility, as previously stated. In its Report,[73] the European Commision has also pointed out a high share of temporary employees in Croatia.

This paper analyses the current state of affairs in the mentioned economic branches also using the data collected by the questionnaire. Besides the fixed-term contract, other non-standard and atypical forms of employment are analysed too.

4.3.1. Construction industry

According to the statistics of the Croatian Bureau of Statistics[74], in 2016 the legal entities employing five or more persons[75] engaged in construction activities had on average 1,5% more workers on sites and 3.0% more working hours done on sites than in 2015. In 2016, the value of construction works done by workers on sites increased by 4,6%, as compared to 2015, and amounted to 15.842.907 Kuna (approximately 2.112 milion EUR).[76] The average number of workers engaged on sites in 2016 was 41.639, hours done on sites ('000 hours) was 78.014. The evident lack of workers in the construction industry was resolved by the employment of foreign workers. According to the Government of the RC Decision,[77] the annual quota for the employment of foreign workers in the construction industry for 2018 is 10.770 workers.[78]

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71 Pennings, F., Encouraging growth of skills and innovation in the Netherlands, in this issue of Zbornik Pravnog fakulteta Sveučilišta u Rijeci.

72 Grgurev, I., Vukorepa, I., Flexible and New Forms of Employment in Croatia and Their Pension Entitlement Aspects, in: Transnational, European, and National Labour Relations (Flexicurity and New Economy), ed. G. Sander, V. Tomljenović, N. Bodiroga – Vukobrat, Cham, Springer, 2018, pp. 246ff.

73 EC, Country Report Croatia 2018, op. cit.

74 Croatian Bureau of Statistics, Statistical Reports, 2016, available at: <https://www.dzs.hr/>; accessed 3.6.2018.

75 They do not cover legal entities employing less than 5 persons and tradesmen, nor individual citizens who do some construction works themselves, without involving business entities.

76 By types of constructions, 48,1% out of the total works were done on buildings and 51,9% on civil engineering works. By types of works, 53,5% out of the total works were done on new constructions and 46,5% on reconstructions, adaptations, repairs and maintenance works.

77 OG, no. 122/2017.

78 By qualification: 2.900 carpenters, 2.600 bricklayers, 1.500 monteurs, 1.500 steel-benders, 500

It should be emphasized that the employment contract on indefinite term still prevails in the construction industry. Nevetheless, the number of (predominantely) newly employed workers with the fixed-term contract is constantly growing, including cases in which it is, according to the TUCIC, misused or used as a substitute for the trial period. This trend is expected to continue because of insolvency and liquidation of the big and middle-size enterprises and the growth of small enterprises in this branch. Fixed-term contracts are often of a seasonal character because of the highly seasonal nature of the activity. Other atypical forms of employment are not so relevant in this branch.

Part-time work is not attractive because of the low level of wages for full-time work that are approximately 18% lower than the average wage in Croatia. Students' work and employment of the pensioners is used rarely, and predominantly for administrative work. Temporary agency work is used occasionally, as well as outsourcing, that is mostly used for the security protection jobs. "Vocational training for work without an employment contract"[79] is also not used because many companies in this branch had collective redundancies, which is an obstacle for the use of this type of work.[80] Job sharing is not appropriate because it increases the costs of workforce when the work is performed offsite and this happens often. Employee sharing is used occasionally in order to meet the requirements for public procurement (for the project managers – engineers). *Ad hoc* employee sharing to "a company associated with the employer" within the meaning of a specific provisions on companies (Art. 10/2 LA) is also used. In practice the workers perform their duties for the main and the dependent company without the contract-based sharing … Interim management is used occasionally and casual work often as fixed-term employment.[81]

Innovative practices in Croatian construction industry can gain importance when, accompanied with the renewable sources of energy that are completely adapted to the Croatian climate and geographic specificities, they are based on the so-called green industry. The savings of energy and construction of buildings that are cooled and heated depending on the environmental influences will become important because of the request that new buildings, both public and private, must be issued energy certificates (attesting to their energy efficiency) as of 2021.[82] Thus, this renders skilled workers or continuous vocational education all the more important.

Some companies in construction industry took advantage of the project "Strengthening the Capacities of the Chambers and Partners to Help SMEs to Engage in Apprenticeship" - Cap4App, which started in October 2016.[83]

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master bricklayers.

79 See more *infra*, 4.4.1.

80 It is regulated by LA, but also as an ALMP measure by *lex specialis*.

81 Questionnaire Flexicurity, op. cit.

82 <https://www.hgk.hr/zk-split-sjednica-strukovne-grupe-graditeljstva-n-izvjestaj-1>, accessed 3.6.2018.

83 As a prerequisite for a stronger involvement in vocational education and training reform, CCE secured funding under ERASMUS+ KA3. The aim of the project is to strengthen the organizational capacity of the CCE by educating CCE employees in order to provide the best possible support to small and medium-sized enterprises, already participating or planning to

4.3.2. Tourism and hospitality industry

Tourism and hospitality industry is one of the most important economic branches in Croatia.

Aside such positive results and great expectations of this economic activity, the sector is overshadowed by a lack of workers. The annual quota for the employment of foreign workers in this branch in 2018 is 4.660 workers.[84]

What characterizes the employment in this branch are fixed-term contracts, especially with regard to new employment. Some employers have 25% or even 50% of fixed-term workers in the total number of employees.[85]

According to the Art. 12/3 LA, the cumulative duration of all successive fixed-term employment contracts, including the first employment contract, may not exceed three consecutive years, unless where this is necessary for the purpose of replacing a temporarily absent worker or where it is, due to *objective grounds* allowed by law or a collective agreement. The latter possibility of longer duration prescribed by a collective agreement is used in the tourism and hospitality industry. National collective agreement of the hospitality industry (signed and in force since 2018)[86] allows the employer to conclude one or more consecutive fixed-term employment contracts with the same worker for the seasonal work with the redistribution of working time (LA, Art. 67) for a consecutive period longer than 3 years if employment contract has been concluded for permanent seasonal jobs. As "objective grounds allowed by a collective agreement" lower level (employers') collective agreements prescribe the following grounds: for temporary jobs for which the employer has an extraordinary need, the accomplishment of the set business undertaking, temporary actual limited order or other temporary increase of the workload that is characteristic of the hospitality industry particularly in the summer season when numerous tourists visit Croatia.[87]

Such wide definition of the objective grounds goes hand in hand with the business needs in summer season and therefore seems to be justified. On the other hand, trade unions strongly oppose such trend of excessive use of fixed-term contracts, with the slogan "Human being – the key to success in tourism". Several years ago they hence proposed a regulation of the duty of the employer who requests a higher

participate in vocational training programs. One of the objectives is „to improve the perception and popularity of certain vocational professions as well as raise employers' awareness of the importance of participating in vocational education programs." The collaboration with Austrian Federal Economic Chamber and the introduction of good practices were planned in order to acquire knowledge and experience applicable in the Croatian context. <http://www.dualnoobrazovanje.hr/cap4app-project>; accessed 3.6.2018.

84 By qualification: Animator in tourism 80; masseur of the specific massage techniques 100; international kitchen's cook 300; cook 400; agent in tourism 50; diving instructor 10; professional educator of mindfulness meditatation's 5; assistant workers (assistant cook, assistant waiter, cleaner, room-maid) are especially numerous - 3.715.

85 Questionnaire Flexicurity.

86 The same rule was prescribed in Collective agreement in the hospitality industry (2015), OG, no. 16/2015.

87 Collective agreement Jadranka Hotels d.o.o., Mali Lošinj, 2005. See also: Barjaktar, B., Što donosi novi Kolektivni ugovor ugostiteljstva, Radno pravo, 2015, no. 6, pp. 13ff.

categorization of its object (according to the Regulation on the categorization of the hotel objects[88]) to employ workers on indefinite time, in proportion to the number of beds offered in its premises.[89]

Besides this, their opinion is that education should include more practical work (dual system). The Trade union of tourism and services of Croatia also complains about the violation of the rules regulating working time, especially in regard to unjust redistribution of working time (demanding that it should be paid as overtime work, instead of time free from work), low wages and low level of accommodation of seasonal workers in tourism and hospitality industry. Therefore, Croatian workers are forced to leave the country and search for (often identical) work elsewhere in European countries. Consequently, foreign workers are employed, with no experience of work in tourism and problems in communication, adaptation and low level of income (since they send their wages to their families in the homeland). The result is dubious quality of service, while at the same time tourists are more and more demanding. Trade unions also plea for a more flexible ALMP measure of seasonal employment and employment of retired persons based on the contract for services.[90]

Besides the fixed-term employment contract, one of its forms, "permanent seasonal work" is especially represented in this branch (more *infra* 4.4.3.).

The analyses show that other atypical forms of employment, such as part-time work, temporary agency work and outsourcing are rarely used, as well as Vocational Training for work without an employment contract (both regulated by LA and ALMP). Employers utilize full-time students' employment during the summer season (2 or 3 months), with a share of 2 % up to 9,4 % of students in the total number of employed. Contract for services is also rarely used, although in one case, the share of persons under the contract for services was 17% in the total number of the employed.[91] An employer has implemented *ad hoc* employee sharing to an employer associated with him for 10 workers (which represents less than 2% of the total number of employees), for a one-year period.

The employers argued in favour of more flexible regulation of the occasional part-time work, which they often need during the summer season (e.g. several days a month, for banquets, weddings or preparation of more meals), requesting less strict conditions for approval for such type of work that according to the Art. 62, LA should be given by the first employer.

4.3.3. Banking and financial sector

When asked about the Croatian labour legislation, the employers within this sector consider it too rigid, suggesting instead less administration concerning flexible working time, and more flexible and less expensive health and safety at work

88 Signed and in force from April 1, 2018 until December 31, 2019. Kolektivni ugovor ugostiteljstva, OG 36/2018.

89 Questionnaire Flexicurity, op. cit.

90 Galeb, the bulletin of the Trade union in Tourism and Services of Croatia, available at: <https://issuu.com/uploaderv/docs/stuh_-_galeb_114>; accessed 1.6.2018.

91 Questionnaire Flexicurity, op. cit.

protection when the employment contract is concluded for tele-work and ICT work. Also, they find the employer should be liable for an offence only for fundamental violations of employment rules, and not for almost every rule, as is now. What's more, they consider the criteria and terms regulating the working status of the employee with low performance and results when he/she acts without guilt, too lenient.

In this sector students' employment is often used (and amounts to 4% of the employer's stable workers). Crowd employment was used too (only 2 workers in 2016). Workers are organized in the Trade Union of the Employees in Banks and Financial Insitutions of Croatia (Sindikat bankarskih i financijskih djelatnika Hrvatske).

4.3.4. IT sector

The results of the research show that employment on indefinite term is the rule in the IT sector, while fixed-term contracts are rarely used (according to the questionnaire, e.g. 1,33 %, or 3,86 %). As already elaborated above, this is a highly innovative branch making life-long learning all the more important, as well as having a stable work-force. The following types of flexible work are represented: work at an alternative workplace (at worker's home or outside the employer's premises/tele-work); temporary agency work and student work, as well as work performed based on contract for services.[92]

4.3.5. Pharmaceutical sector

According to the analysis agency work is used (120 workers in total of 2.300 workers) for ancillary jobs in production and administration; outsourcing for maintenance, cleaning, washing, transport, work in restorants; students' work (80) for some administrative jobs; contract for services, work of retired persons based on contract for services. ICT work is present as work of employees that perform IT support and have set availability periods.

The employers prefer more flexibility in the organization of working time, especially when workers work at home or outside the employer's premises, and also think more flexibility is necessary for the determination of the place of work by the worker. Furthermore, they call for introducing more flexible forms of work in the Croatian legislation ("deregulation") that could be used in pharmaceutical companies for certain jobs perfomed outside the plant, for instance a sort of combination of employment contract and contract for services. This should be accompanied by an appropriate modification of the pension insurance scheme that would be based not on the amount of the contributions, but on the actual working time of the employee. The modification of the pension insurance scheme itself would enable an appropriate application of the employment regulation in force (including job sharing and other flexible forms of employment).[93]

92 Questionnaire Flexicurity, op. cit.
93 Questionnaire Flexicurity, op. cit.

4.4. Active Labour Market Policy Measures

In combating unemployment, especially long-term unemployment active labour market policy (ALMP) measures are most important. Croatian Employment Service (CES) as the central institution in Croatian labour market implements ALMP measures in order to facilitate the transition from unemployment to employment and to lower the rising unemployment rate. In Croatia there has been a range of active labour market measures. Nevertheless, their disadvantages are that they are comparatively small scale and suffer from a funding mechanism that treats them as residue once the costs of passive measures are met.[94]

It has to be emphasized that, although monitored, in the past ALMP measures have not been systematically evaluated for net effect, i.e. in terms of fitness for improving the employment opportunities of the participants. Exceptionally, an evaluation has been made of ALMP measures which were carried out from 2010 to 2013, in order to determine their success and impact on the employment opportunities in comparison with members of the control group whose members did not participate in the measures.[95] In the period from 2009 up to today the active labour market policy measures carried out by CES were defined by different national employment promotion plans and guidelines.[96]

According to Guidelines 2018 – 2020 the vision is a competent and adaptable work force that is capable to respond to the labour market demands, while interconnected labour market institutions are able to offer high-quality service. The mission is to increase employability and adaptability of the work force and guarantee education and training in line with the labour market demands, as well as the wishes and capabilities of workers, promote life-long learning and plead for equal opportunities in access to labour market for everyone, and especially for persons in disadvantageous positions.[97]

One of the goals is to increase employment from 58,5% (in 2017) to 65,2% (in 2020); special subgoals are to achieve in 2020 an increase of youth employment rate of 45,7%, of older (+50) persons' employment rates of 55,5%, decrease the percentage of long-term unemployed at 43,9% in total unemployment in 2020, and to increase the inclusion in the ALMP measures, especially of the vulnerable groups of unemployed,

94 Bejaković, P., Situation and consequences, op. cit., p. 6.

95 Croatian Employment Service (CES), External Evaluation of Active Labour-Market Policy Measures 2010-2013, Summary evaluation report 2016, p. 5, available at: <http://www.hzz.hr/UserDocsImages/Sumarno%20evaluacijsko %20izvje%C5%A1%C4%87e_ENG_Vanjska%20evaluacija%20mjera%20aktivne%20politike%20tr%C5%BEi%C5%A1ta%20rada%202010%20-2013.pdf>; accessed 13.9.2017.

96 In August 2017 a special Working group for the monitoring of the realization of the active employment policy measures was appointed with the task to analyse the efficiency of the measures, propose their betterment and draft the Guidelines for the development and implementation of the active employment policy in Croatia (2018 – 2020), adopted in December 2017, hereinafter: Guidelines. (Smjernice za razvoj i provedbu aktivne politike zapošljavanja u Republici Hrvatskoj za razdoblje od 2018. do 2020. godine, available at: <https://vlada.gov.hr/UserDocs Images/Sjednice/ 2017/12%20prosinac/73%20sjednica%20VRH/73%20-%201.pdf>; accessed 13.9.2017.)

97 Guidelines, op. cit., p. 6.

of 1,5%.

In order to answer to the challenges of the labour market the goal of harmonization of the supply and demand on the labour market is envisaged.[98]

It must be emphasized that in February 2017 a new package of measures was adopted that reduced the number of measures, albeit to the purpose to achieve more clarity and availability. It also allows the possibility of combining individual measures. The measures were coordinated with the Ministry of Labour and Pension System. Focus is placed on groups that have difficulties with employability and on educational measures. The new, nine-measure plan called "From a Measure to a Career" ("Od mjere do karijere") includes the following measures: employment incentives, training of the employed, self-employment (start-up) incentives, training of the unemployed, workplace training, occupational training without commencing employment, public work, job preservation subsidies, and permanent seasonal worker status.

Since 2017 the ALMP measures aimed at, first of all unemployed persons who are disadvantaged in the labour market, especially young and long-term unemployed, at strengthening the educational and training activities at work-place and at employers who need assistance in job retention, i.e. at employed persons facing job loss. The CES has also implemented active labour market policies which stimulate employment, self-employment, training, occupational training and participation in public work programmes of specific target groups. It aimed to improve the competitiveness of employers, increase the professional, geographical and educational mobility of labour force and ensure a good match between demand and supply in the labour market and ensure quality work force by increasing the qualification level of unemployed persons.[99]

In 2018 two new ALMP measures have been introduced: subsidy for the apprenticeship and training in order to achieve appropriate work experience (30+).

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98 The subgoals are: to increase the adaptability of the educational system in line with the labour market's demands, a way to increase the employment of persons aged 25 – 64 with secondary and high education at 83,2% in 2020; increase the part of the citizens aged 25 – 64 included in life-long learning at 5,6% in 2020; development of the system of recognition and evaluation of the previous education/learning (by drafting and adopting special Regulation).

99 Statistical data show that in 2017, a total of 64,797 persons participated in the measures implemented by the CES, i.e. 8.4% less than in 2016. Most of them participated in vocational training for work without an employment contract (25,649 persons or 39.6%) or took advantage of the following measures: employment incentives (11,556 persons or 17.8%), public works (11,479 persons or 17.7%), self-employment (start-up) incentives (5,824 persons or 9.0%), training for the unemployed (5,543 persons or 8.6%) and permanent seasonal worker status (4,233 persons or 6.5%). A significantly smaller number of them participated in workplace training (273 persons or 0.4%) or took advantage of the training for the employed (200 persons or 0.3%) and job preservation subsidies (40 persons or 0.1%). Most new entrants took advantage of: public works (28.1% of the total number) and occupational training without commencing employment (26.2% of the total number), employment incentives (15.9%), training for the unemployed (11.7%), self-employment (startup) incentives (9.5%) and permanent seasonal worker status (7.5%). Besides, a relatively small number of them joined: workplace training (0.7%), training for the employed (0.4%) and job preservation subsidies (0.1%). CES, Yearbook 2018, op. cit., pp. 8, 37, 38.

4.4.1. Vocational training for work without an employment contract

It is an active labour market policy measure introduced in 2010 (by the National Employment Promotion Plan 2009 – 2010) and regulated by the Employment Promotion Act.[100] It represents a type of professional traineeship.

Under the recent employment promotion package (2017), employers can obtain subsidies (for 12 or 24 months) for the employment of an unemployed person up to 30 years of age, that has up to 12 months of work experience in the occupation he/she is trained for and who has been enrolled in the CES register for at least 30 days. The subsidy includes the payment of obligatory pension and health insurance contributions as well as a part of educational costs (cca 950 EUR) to the employer. The examination costs (professional or vocational) plus a monetary benefit are paid to the trainee. Monetary benefit amounted to 2.751,84 kn (cca 370 EUR) in 2018. Employer is obliged to pay travelling costs to the trainee. Also, the employer has to appoint a mentor to the trainee and prepare a program of workplace training. Furthermore, the measure can be used where no examination or work experience is prescribed as a prerequisite for the performance of the occupation.

It is one of the most frequenty used measures.[101] Accordingly, it is criticised as a tool providing employers with cheap labour where a regular employment contract should be concluded. Trade unions strongly oppose this model because of its negative impact on the labour market.[102] Nevertheless, as a tool for gaining practical knowledge it is useful, but should be adjusted.[103]

The conditions the employer has to fulfil to obtain this subsidy are several. One of them is that the employment of the trainee has to increase the number of the workers employed by the employer, in relation to the average number of employees in the last 12 months (with the trainees included) etc.[104]

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100 Employment Promotion Act (Zakon o poticanju zapošljavanja), OG no. 57/2012, 120/2012, 16/2017.

101 Veljača, M., Mjere aktivne politike zapošljavanja iz nadležnosti Hrvatskog zavoda za zapošljavanje u 2018. godini, u: Radni odnosi – aktualnosti u 2018. godini, Zagreb, Inženjerski biro, 2018, p. 117.

102 <http://www.nsz.hr/tag/strucno_osposobljavanje_bez_zasnivanja_radnog_odnosa/>; accessed 12.6.2018; http://www.sssh.hr/hr/vise/nacionalne-aktivnosti-72/mlade-radnice-i-radnici-porucuju-vrijedimo-vise-od-osposobljavanja-na-minimalcu-2845, 12.6.2018.; the Act was named „Act for the Promotion of the Emigration“, <https://www.nszssh.hr/novostigal.php?what=1&tip=1&id=716&subgroupeid=716&bck=2>; accessed 5.11.2018.

103 Bejaković, P., in "U mreži Prvog": Nezaposleni - 40% dugo čeka posao, 30% stariji od 50 god., <https://vijesti.hrt.hr/437780/u-mrezi-prvog-nezaposleni-40-dugo-ceka-posao-30-stariji-od-50-g>; accessed 6.4.2018.

104 During the workplace training the number of workers should not decrease below the number of workers the empoyer had at the moment when filing the request for this subsidy. If the number of workers decreases, the employer has 60 days to compensate the number of employees. The employer has to inform CES of every decrease below this minimum number of employees (if not, it has to return the received subsidy). The number of the trainees cannot exceed 50% of the average number of employees in the last 12 months. The employers that use the subsidy for self-employment can employ a maximum of 2 trainees. The subsidy can be used again for the same number of trainees, if the employer has kept all of the previously engaged trainees

Employers in a non-profit sector are not subject to such restrictions, but they can employ exclusively sufficitary professions and persons with employment difficulties. These restrictions do not apply on mandatory trainees in the field of health, social care and education. An employer who has dismissed workers because of business reasons in the last 6 months (a level of a particular organisational unit is taken as relevant) is not entitled to this subsidy. Regarding the working conditions, trainees cannot be ordered to work at night (22 to 6), on Sundays, holidays etc. Their working time is limited to 40 hours per week.

4.4.2. Subsidy for the apprenticeship

This subsidy for the achievement of the very first work experience can be used for employment of several groups of persons: persons who have no insurance period, long-term unemployed persons; particular groups of unemployed; persons older than 50; ex-beneficiary of workplace training without an employment contract; persons with disabilities; persons with disabilities with no previous length of service (insurance periods). The subsidy amounts up to 50% of the yearly gross wage costs or up to 75% for the person with disabilities for the employer that performs an economic activity. For the employers – public services, i.e. education, health and social care, and culture, it amounts up to 100% of the yearly gross wage costs. The maximum duration of the subsidy is 12 months. The amount of the subsidy depends on the educational level of the apprentice. In addition, travelling costs for the worker are covered.[105] There are several groups of employers who are not entitled to use the subsidy: an employer who has not employed worker(s) because the apprentice has to be made familiar with the work and controlled at work; employer that has unpaid tax duties; employer facing business difficulties; for the *ad hoc* sharing of workers and for the workers posted abroad etc.

This new measure has been introduced at the begining of 2018 in order to replace the criticized measure of the vocational training for work without an employment contract. Croatian ombudsman objected that the restriction of the measure only for the employment of apprentices in specific fields of public services (education etc.) neglects numerous other professions for the performance of which state exam or licence is needed (e.g. lawyers, architects, engineers etc.), that need protection because of the low demand of the labour market for such professions.[106]

4.4.3. The "permanent seasonal worker" subsidy ("stalni sezonac")

This subsidy aims to support those workers who work only during the season,

employed and pays them from his budget, or has employed 50% of the previously engaged trainees with the subsidy of CES.

105 Similarly to the workplace training, the employment of the apprentice has to increase the number of the workers employed by the employer in relation to the average number of workers in the last 12 months or to employer whose jobs have become vacant because of valid reasons, that do not include collective redundancies or dismissals because of business reasons.

106 <https://ombudsman.hr/hr/dis/cld/1345-diskriminacija-u-provedbi-mjera-aktivne-politike-zaposljavanja-moduldiskriminacija>; accessed 5.11.2018.

and therefore do not receive wage and have no pension insurance in the non-seasonal period.[107] The measure can be used by employers in all branches of activities that due to the seasonal nature of activity have a period of decreased business activity. The condition that needs to be met is a continuous 6-month employment by the same employer and the continuation of the employment for at least one (before: three) season. The duration of the subsidy is 6 months.

The amount of the subsidy for employer is a 100% payment for the so-called extended pension insurance contribution for the first three months, and 50% for the next three months.[108] The worker receives financial compensation for a maximum of six months. The amount of compensation is calculated based on the compensation for unemployment. Workers can receive up to the 70% of the average salary paid off in the real sector for the first 90 days, and 35% for the rest of the period.

According to the research carried by P. Bejaković, the employers who have been using the permanent seasonal worker measure continuously notice improvements. "Its positive effects include retaining quality labour force, showing concern for employees, creating a safe working environment, and continued employment over seasons. This measure enables more stable business activities and a safer position on the market due to retaining of some employees, particularly the best ones, for the next season. The purpose of this measure has been achieved because employees have exercised all of their rights, they have a secure job over a given time period, and the number of unemployed persons in the register has decreased due to the workers' stable, seasonal work." Workers feel rewarded by their new status, and consequently a healthy competitiveness and increased productivity and professionalism are achieved. According to the opinion of the CES staff "this measure is attractive to employers due to low costs, which helps retain seasonal workers and enables participation in all of the related benefits." The problem is a surprisingly low participation in the measure despite the fact that employers can benefit from lower expenses for this type of workers. The measure is usually used by larger entities with operational resources and knowledge necessary for participation and realisation of rights. Smaller businesses (employers) do not use it often, because of the limitations with respect to the number of allowed permanent seasonal workers in relation to the number of regular employees. "There have been proposals for redefining the quotas for the allowed number of permanent seasonal workers with respect to company size."[109]

In this context the legal institution of employment contract for permanent seasonal jobs should also be mentioned, as it aims to promote permanent seasonal employment. It is regulated by the LA. According to Art. 16, where the employer is mostly engaged in seasonal activities, a fixed-term employment contract may be concluded for permanent seasonal jobs. In the case of concluding this type of contract,

107 A person permanently employed in a particular period of the year at the same or similar job for at least 6 months.

108 The employer has a duty to keep the same number of employees as on the date he requested a subsidy, ensure the employment of the worker(s) in the next or three subsequent seasons, and pay the pension insurance contributions for the period in which the number of employees decreases.

109 External evaluation, op. cit., p. 62.

the employer shall be responsible for the application of the so-called extended pension insurance, for contributions and calculation and payment thereof.

Seasonal employment is important in Croatia. It represents a significant share of total employment of persons from the CES Unemployment Register (CES UR): in 2017, 36,288 persons found employment as seasonal workers, i.e. 20,4% of the total number of persons from the CES UR. Compared to 2016, total seasonal employment decreased by 4,394 persons or 10,8%. It is primarily associated with tourism and the accompanying activities, such as accommodation and food service activities, but also trade, transportation, administrative and support service activities etc. It is frequent in other activities, in particular agriculture, forestry and fishing, and some parts of the manufacturing industry.[110] Most seasonal workers came from the coast (a total of 63,6%) and Slavonian (22,0%) counties. The regions in which tourism is the predominant economic activity are those which normally provide a significant number of seasonal workers for employment in towns at the seaside, but which are also focused on agriculture and manufacturing as seasonal activities. "In terms of occupation, waiters (3,126 persons or 8,6%) and sales workers (3,114 persons or 8,6%), cooks/chefs (2,951 or 8,1%), cleaning ladies (1,659 or 4,6%), assistant cooks/chefs (1,587 or 4,4%) and chambermaids (1,562 or 4,3%) accounted for the largest shares of seasonal workers."[111] In 2018 the lack of seasonal workers mostly in tourism and hospitality industry caused the increase of the quota-employment of foreign workers, mainly from the non-tourist counties and other neighbouring countries (Bosnia and Herzegovina, Serbia).

4.4.4. Job preservation measures - ('potpore za očuvanje radnog mjesta')

We now turn to a brief analysis of the job preservation measures. These measures serve as "an alternative to dismissal" and are therefore important in achieving employment security and preventing unemployment. The measures carried out by CES are directed to employers in difficulties trying to preserve jobs, employers facing temporary decrease of the business activities and/or loss in business. Compared to other ALMP measures, those had the smallest number of beneficiaries, e.g. in 2016, there were only 82 beneficiaries and in 2017 only 40. Further analysis is needed to detect the reasons for such low interest for such measures.

The two measures for job retention are: subsidy for the reduction of working time ('potpora za skraćivanje radnog vremena') and subsidy for worker's education ('trošak obrazovanja radnika'). In both cases, the employer should make an appropriate programme for job preservation. The novelty is that the measures can also target workers older than 50 employed by the employer facing difficulties or who cannot fulfil their working duties in full due to personal working or other characteristics. The

110 In 2017, the largest number of seasonal workers was recorded in the accommodation and food service activities (21,132 workers or 58,2%), trade (4,102 workers or 11,3%), administrative and support service activities (3,152 workers or 8,7%), manufacturing (1,627 workers or 4,5%), transportation and storage (1,180 workers or 3,3%) and agriculture, forestry and fishing (1,049 workers or 2,9%). CES Yearbook 2017, op. cit., p. 26-27.

111 CES Yearbook 2017, op. cit., p. 27.

maximum period for awarding the subsidy is six months for each worker. In case of reduction of working time, the subsidy is proportionate to the amount of wage for the number of working hours that were reduced (up to 40 % of reduction of working time and up to 40 % of the gross salary) up to the amount of the minimum wage, according to a special regulation (for 2018, cca. 450 EUR). The works council, resp. trade union and employer should sign an agreement on the acceptance of the programme on job preservation. If works council is not organized or trade union does not operate, the employer should inform the workers of the mentioned programme. Here it should be mentioned, that on the other side, the Croatian trade unions themselves proposed different job retention measures to their employers, some of the measures employers accepted and carried out. The only available data we have about the role of trade unions in mitigating the negative effects of economic crisis are the results of the research of Ivana Grgurev and Ivana Vukorepa, carried out by way of a questionnaire sent out via e-mail to 160 trade unions in Croatia. Unfortunately, answers were received from only 22 trade unions (organized at different levels), rendering the results incomplete.[112]

5. CONCLUSION

Strengthening of innovations in Croatia is one of the measures to be achieved under the Europe 2020 Strategy. While national strategic documents, programmes and platforms carried out by different public bodies have promoted the innovation climate in Croatia, life-long learning remains of fundamental importance. On the one hand, Croatia lacks a high-quality dual system of education. On the other hand, it is necessary to strengthen the duty of the employer to educate a worker *de lege ferenda.* Only innovative and educated workers can contribute to the competitiveness and improvement of Croatian economy. Training funds based on collective agreements characteristic of the Netherlands as elaborated by F. Pennings in his article are an interesting concept, however, heavily dependent on the will of social partners. Unfortunately, in Croatia social dialogue remains one of the weakest points of industrial relations and at a very low level, whereas a general training fund may be too futuristic for Croatia at the moment, but nevertheless worth thinking about.

Dialogue between the universities, polytechnics and the employers in order to meet the labour market demands should be strengthened, as shown on the example of StepRi Technology Park in Rijeka.

Based on the results of the research carried out among employers and trade unions it is possible to conclude that for trade unions, more flexibility in employment legislation, especially of fixed-term employment contract is for the time being not acceptable. On the flipside, employers can gain the needed flexibility by hiring self-employed persons to perform certain work. The status of this group of persons calls for in-depth research and analysis that do not exist in Croatia. *Ad hoc* employee sharing is a form of employment that is interesting as a tool to prevent dismissals, but this institution needs some modification, i.e. more clarity. Croatian labour law

112 Grgurev, I., Vukorepa, I., The Role of Trade Unions in Period of Economic Crisis in Croatia, Zbornik Pravnog fakulteta u Zagrebu, vol. 65, no. 3-4, 2015, pp. 387-408.

is not familiar with the strategic employee sharing that could be an appropriate form of employment in tourism or other seasonal economic activities, and therefore worth regulating. Last but not least, the Active Labour Market Policy Measures assisting companies that start with innovations could be an efficient instrument, but it is necessary that they are regulary evaluated for their nett effect and consequently adjusted to the labour market demands.

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Sandra Laleta*

Sažetak

INOVACIJE I UNAPRJEĐENJE VJEŠTINA: IZAZOVI ZA HRVATSKO ZAKONODAVSTVO

U radu se analizira strateški i zakonski okvir za inovacije i unaprjeđenje vještina radnika u Republici Hrvatskoj. Rad se bavi pitanjem cjeloživotnog obrazovanja te posebice obvezom poslodavca da radniku omogući obrazovanje i osposobljavanje. U radu se iznose rezultati izvornog istraživanja autora o konceptu fleksigurnosti, atipičnih i novih oblika rada, provedenog u okviru projekta *Fleksigurnost i novi oblici rada*. Analiziraju se prikupljena stajališta poslodavaca koji djeluju u okviru nekoliko gospodarskih sektora, kao i stajališta sindikata o ovim institutima. Zaključno, analiziraju se i mjere aktivne politike tržišta rada usmjerene unaprjeđenju vještina i inovacija.

Ključne riječi: *inovacije; vještine radnika; Hrvatska; fleksigurnost; cjeloživotno obrazovanje; poslodavci; sindikat.*

Zusammenfassung

NEUERUNGEN UND KOMPETENZENTWICKLUNG: HERAUSFORDERUNGEN FÜR DIE KROATISCHE GESETZGEBUNG

Die vorliegende Arbeit untersucht den strategischen und rechtlichen Rahmen für Neuerungen und Kompetenzentwicklung für Arbeitnehmer in der Republik Kroatien. Den Schwerpunkt bilden lebenslanges Lernen und die Pflicht des Arbeitgebers den Arbeitnehmern Weiterbildung und Qualifizierung zu ermöglichen. In der Arbeit werden die Ergebnisse der Forschung über Flexicurity, atypische und neue Beschäftigungen skizziert, die im Rahmen des Forschungsprojekts „Flexicurity und neue Beschäftigungsverhältnisse“ durchgeführt wurde. Standpunkte der in verschiedenen Sektoren tätigen Arbeitgeber und Gewerkschaften zu genannten Rechtsinstituten werden auch untersucht. Zum Schluss werden aktive Maßnahmen der Arbeitsmarktpolitik für die Förderung von Kompetenzentwicklung und Neuerungen unter die Lupe genommen.

Schlüsselwörter: *Neuerungen; Arbeitnehmerkompetenzen; Kroatien; Flexicurity; lebenslanges Lernen; Arbeitgeber, Gewerkschaften.*

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Riassunto

INNOVAZIONI E POTENZIAMENTO DELLE COMPETENZE: UNA SFIDA PER LA LEGISLAZIONE CROATA

Nel lavoro si analizza il quadro strategico e normativo per le innovazioni ed il potenziamento delle competenze dei lavoratori nella Repubblica di Croazia. Il lavoro tratta della questione della formazione continua ed in particolare dell'obbligo del datore di lavoro volto a permettere al lavoratore la formazione e la preparazione. Nel lavoro si illustrano gli esiti dell'indagine originale condotta dall'autrice circa il concetto di *flexycurity* delle forme di lavoro atipiche e tipiche, condotta nell'ambito del progetto *Flexycurity e le nuove forme di lavoro*. Si disaminano le opinioni raccolte dai datori di lavoro appartenenti ad alcuni settori economici, come pure le opinioni dei sindacati con riguardo a tali questioni. In conclusione, l'autrice offre una cernita delle misure di politica attiva del mercato del lavoro volte al potenziamento delle competenze e delle innovazioni.

Parole chiave: *innovazioni; competenze dei lavoratori; Croazia; flexycurity; formazione continua; datori di lavoro; sindacato.*

FLEXICURE LABOUR MARKET STRUCTURES – THE *GRETCHENFRAGE* OF THEIR ADDED VALUE

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Summary

The article discusses the added value of social policy approaches which can be characterized as 'flexicure' based on a comparison of Germany and Austria. It offers an insight into some of the central labour market and policy developments in these countries, which share a number of common principles and structures but differ quite strikingly when viewed through the lenses of the flexicurity concept. This comparison serves as a basis for a discussion about the desirability of reforms to reinforce the 'flexicurity score' of any national legal order as well as the multitude of forms which the concept can take to match diverse legal and socio-economic traditions.

Keywords*: flexicurity; Germany; Austria; labour market policies; labour market dualization.*

1. INTRODUCTION

It has been more than a decade since the European Commission formally designated flexicurity as a core – if not the core – concept of its approach to the European labour market and the policy advice it provided to the governments of the member states. And although today's approach is definitely more nuanced with less explicit reference to the concept in the context of the European Semester as the main channel for specific policy advice to member states,[1] it is clear that it still forms the baseline of what is considered a sound approach to future challenges in the world of

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1 Bredgaard, T. and Madsen, P., Farewell Flexicurity? Danish Flexicurity and the Crisis, in: Transfer: European Review of Labour and Research, 2/2018, p. 1; Zeitlin, J. and Vanhercke, B., Socializing the European Semester: EU Social and Economic Policy Co-Ordination in Crisis and Beyond, in: Journal of European Public Policy, 2/2018, pp. 150 et seqq.

work.

Over the last two decades, the concept has been discussed and evaluated from a variety of perspectives, a closer examination of which would clearly be beyond the scope of the present contribution. Yet, a distinct impression that flows from a macro review of the literature concerned mostly with flexicurity's potential to further social rights, working and living conditions is that it depends crucially on the credibility of the narrative that it serves to improve the scope, inclusiveness and fairness of social protection and welfare.[2] This is rooted in the concept's promise to replace mechanisms of security which are in fact benefitting only particular groups ("insiders") by mechanisms that will effectively reach and enable all parts of the workforce. In this sense, a substantial part of the critically inclined literature on flexicurity has voiced concerns about the concept's potential of being used as a fig leave for policies the main purpose is the abolition of traditional cornerstones of worker's rights (such as employment protections). This points to the risks that crucial achievements of what one might term social market economies or the "European social model" will be given up in exchange for a vague idea of "flexible security", which would flow from the policy design on the macro level rather than clear and tangible entitlements under labour law.[3]

Specifically in the context of the economic downturn which affected labour markets around Europe in the aftermath of the financial crisis, flexicurity approaches came increasingly under fire for failing to provide security in a context of large-scale redundancies across the national economy.[4] It is in this context that a number of observers pointed at the advantages of the security model of Germany, which – quite opposed to the idea of flexible contractual relationships – has traditionally emphasised a solid and durable bond employer-employee, ideally starting from vocational education under the dual training system inside the undertaking, entailing strong intra-company participation of employee representatives in shaping company policies, and not allowing for easy or cost-saving termination of an employment relationship.

The present article will offer an insight into some of the central labour market and policy developments in Germany over recent years and address the question of the

2 Cf. Ingham, H., Economic Growth in the EU: Is Flexicurity a Help or a Hindrance? In: Lancaster University Economics Working Papers Series, 2018, pp. 4, 7.

3 Cf. Heyes, J., Flexicurity in crisis: European labour market policies in a time of austerity, in: European Journal of Industrial Relations, 2013/1, p. 72; Keller, B. and Seifert, H., Flexicurity – the German Trajectory, in: Transfer: European Review of Labour and Research, 2/2004, pp. 227 et seqq., Eichhorst, W., and Konle-Seidl, R., The Interaction of Labor Market Regulation and Labor Market Policies in Welfare State Reform, Institut für Arbeits- und Berufsforschung Discussion Paper, 19/2005, pp. 19 et seq.; Ingham, op. cit., p. 7.

4 Auer, P., Does Flexicurity Work in Economic Crisis? Paper for IIRA European Congress, Symposium on 'Goodbye Flexicurity, Welcome Transitional Labour Markets?', Copenhagen, 2010, <http://www.bollettinoadapt.it/old/files/document/8013AUER_05_10.pdf>, 5 May 2010., 14 June 2018>; Id., What's in a Name? The Rise (and Fall?) of Flexicurity, in: Journal of Industrial Relations, 3/2010, pp. 371 et seqq.; Wilthagen, T., Thematic Paper – Flexicurity: The Way Forward. Peer Review on 'Flexicurity', Copenhagen, Denmark, 20–21 November 2014, Mutual Learning Programme, DG Employment, Social Affairs and Inclusion, 2014; Bredgaard and Madsen, op. cit., pp. 1 et seq. Ingham, op. cit., p. 3.

degree to which these can be estimated to represent an alternative path – a *Sonderweg* – which has ultimately proven more sustainable than concepts of flexicurity. It will then turn to focus on Austria as an interesting example of a combination of most of the features generally viewed as cornerstones of the German social model with a high degree of orientation along principles that match the flexicurity concept. It will conclude by posing the litmus test question – the *Gretchenfrage* – about the degree to which "flexicure elements" in policy design are and can be expected to make a difference for a country's socio-economic progress and the working and living conditions of its citizens.

2. A GERMAN STRONGHOLD RESISTING THE FLEXICURITY HYPE?

Germany has, in a way, represented the classic "counter example" in the flexicurity discourse for various observers, be it in a positive or negative regard. It represents the prototype of a "dualist" regime,[5] which is bound to produce and sustain a non-negligible level of workforce inequality and segregation,[6] by offering rather high-level protection and security for "insiders" combined with "flexibility at the margins" for employers in the form of a substantial and growing share of low-paid and atypical employment.[7] This is in essence the very situation that flexicurity is meant to rectify: a division of the labour market into "secure but inflexible" work on the one hand and "flexible but insecure" work on the other.

Despite such characteristics of the system, which have been widely discussed, one cannot but note that Germany's comparative position in areas that are meant to be improved by flexicurity approaches is indeed very favourable, largely comparable to (and at times surpassing) exemplary "flexicurity countries" – ranging from economic performance to employment and unemployment rates, income equality, poverty levels etc. More than anything else, though, it is its impressive resilience during the economic crisis that caused the German model to be very much en vogue again in recent years.[8]

5 Heyes, op. cit., p. 73.

6 Which is also reflected in a substantial gender gap: cf. e.g. Klammer, U., Flexicurity in a Life-Course Perspective, in: Transfer: European Review of Labour and Research, 2/2004, pp. 286 et seq.

7 This is regarded as a major reason for the "surprisingly stable" employment rate e.g. by Keller and Seifert 2004: 237. Cf. also Ebert, M., Flexicurity auf dem Prüfstand–Krisenperformance unterschiedlicher Strategien. Europäische Arbeitsmarktstrategien auf dem Prüfstand, 28, 2015, p. 143; Bothfeld, S., and Rosenthal, P., The End of Social Security as We Know it – the Erosion of Status-Protection in Labour Market Policy in Germany, in: Journal of Social Policy, 2017, pp. 282, 288; Beckmann, Fabian, Minijobs in Deutschland: Erwerbsarbeit zwischen objektiver Prekarität und subjektiver Zufriedenheit. Minijobs in Deutschland, Springer VS, Wiesbaden, 2019, pp. 46 et seq.

8 Cf. Auer, Does Flexicurity…, cit., p. 371 et seq.; Ebert, op. cit., pp. 150 et seq.

2.1. Distinctive characteristics of the German continental-corporatist model

While self-evidently the elements of Germany's labour market setup that impact issues of flexibility and security are far more complex and ambiguous, prominent characteristics that set the model apart from other continental European countries present it as a system that constructs the employment relationship as a strong bond of mutual relations going far beyond the basic elements of exchanging labour provision for wages.

As has been alluded to above, this starts from a culture in which the education system has traditionally focused on a dual system of vocational training which (though declining in the recent past) still covers large parts of the population. In short, this is a system which allocates not only the task of defining training contents[9] with the social partners but endows undertakings with the responsibility of providing the lion share of a state-approved regular programme of educational training for the future workforce of the respective branch of the economy.[10] Over the duration of education, apprentices spend only about a quarter of the programme time at school, the rest in the training firm, which must designate a competent person as educator. The examination of skills after programme completion is strictly regulated, thereby ensuring that apprentices are taught pre-defined general and not firm-specific skills.[11] Empirical research suggests that young people having completed an apprenticeship in the German system occupy a similar position within the wage structure as high-school graduates in other countries,[12] more pronounced differences between ex-apprentices and unskilled workers.[13]

Next, the participation of workers' representatives at company level is institutionalised to an exceptional degree. The internationally most well-known aspect of this is certainly the mandatory representation of workers on the company's supervisory board, thereby providing them with a channel for directly tabling their interests and opinions concerning general strategic decisions of corporate policy ("co-determination"). Equally relevant in practice is the involvement of the works council, which goes far beyond concepts of information and consultation as they prevail in EU policies and includes notably veto rights on a range of issues and thereby gives strong incentives to genuine close cooperation and in-depth consultation between management and labour in the undertaking.

Where this cooperation works well, the social partners can rely on broad legal

9 On those see e.g. Arrich, R., The Austrian Vocational School System and Quality Management as an Example of Cooperation between Schools, Industry and Social Partners, in: European Association for the Education of Adults Country Report on Adult Education, 2011.

10 Hofer, H. and Lietz, C., Labour market effects of apprenticeship training in Austria, in: International Journal of Manpower, 2004, p. 104.

11 Ibid., pp. 105 et seq.

12 Harhoff, D., and Kane, T., Is the German apprenticeship system a panacea for the US labour market? in: Journal of Population Economics, 1997/2, pp. 171 et seqq.; Hofer and Lietz, op. cit., p. 104.

13 Hofer and Lietz, op. cit., p. 119.

entitlements to design various aspects of company workplace rules also in ways that would not be permissible if imposed unilaterally by the employer – e.g. in the area of working time.[14] This includes the use of "working time accounts" as a particularly flexible form of dealing with working time fluctuations that can be caused both by employer-sided variations in demand and by employee-sided preferences of re-arranging working hours. For employees, this "deal" involves the acceptance of working-time variations imposed by the employer, which serves their collective interest in keeping up jobs (including their enterprise-specific human capital) also at times of low demand, when all will work shorter hours.[15] Comparative studies show that, compared to business practices in other European countries, German enterprises react to capacity fluctuations with more pronounced working time adjustments, and in turn resort to adjusting the number of employees more rarely.[16] This illustrates the win-win potential of arrangements which have "greatly extended the freedom of action of companies" while keeping down expenses also for the public unemployment insurance provider.[17]

A further development of this concept can be seen in the famously successful use of short-time work schemes to avoid redundancies due to temporary situations of economic slowdown – whereby the financial burden is shared by employers, employees and public sources based on agreements. As these schemes were already well established in Germany, they could be launched in a timely fashion when the global crisis started to affect German undertakings. In this framework, support by the government was provided for a maximum duration of 24 months (abrogating previously much lower limits), reaching 1.5 million workers in May 2009, whereby training opportunities for the partially unemployed were often financed by the European Social Fund (ESF).[18]

Also more generally, German companies, social partners, local governments and employment offices are renowned for a cooperative hands-on approach to tackling economic redundancies in a timely and effective manner – particularly when it comes to the planned preparation of collective redundancies and the elaboration of perspectives for the workers concerned by it. A noteworthy example are 'transfer companies' (*Transfergesellschaften*), i.e. structures put in place by undertakings to prepare employees facing redundancy dismissal – and their colleagues – early on and

14 See e.g. Schneider, H., and Rinne, U., The labor market in Germany 2000–2016, IZA World of Labor, Institute for the Study of Labor (IZA), 2017, p. 6.

15 Keller and Seifert 2004: 233 et seq. This may be seen as a further fine-tuning of the generally remarked readiness of the German workforce to lower demands – also in terms of individual wages – in favour of securing a high level of job protection (cf. Leschke, Janine, Schmid, Günther and Griga, Dorit, On the Marriage of Flexibility and Security: Lessons from the Hartz-Reforms in Germany, 2006, p. 6).

16 Schneider and Rinne, op. cit., pp. 6 et seq.

17 Klammer, op. cit., p. 288.

18 For a chronology see Heyes, op. cit., pp. 78 et seq. Cf. also Wotschack, P. et al., Gesetzlich garantierte" Sabbaticals"-ein Modell für Deutschland? Argumente, Befunde und Erfahrungen aus anderen europäischen Ländern, No. SP I 2017-501, WZB Discussion Paper, 2017, pp. 3 et seq.

work on solutions for the long-term perspective.[19] This involves 'outplacement' and/or activities of further training directed towards the external labour market.[20]

All of this illustrates the frequent characterisation of the German model as one that focuses on internal rather than external forms of flexibility. The high degree of commitment that the law requires from both parties of the employment relationship, combined with the possibilities of both tailor-made training and tailor-made design of the work process based on mutual understanding between management and labour representatives all favour the undertaking's adaptability to the requirements of the market without necessitating changes in the composition of its workforce. Employees, vice versa, benefit from the security of high barriers to dismissal, and particularly the mentioned working time accounts and similar schemes definitely include a very meaningful element of flexibility opportunities for the worker, potentially enhancing also the reconcilability of work and family life.[21] Consequently, the German model could be characterised as one that promotes intra-company rather than economy-wide flexicurity.

2.2. Germany and the concept of flexicurity

Very much in line with what has been set out in the last subsection, the concept of flexicurity as advocated by the European Commission has been at best "hesitantly received"[22] by representatives of German management and labour, but also a sizable share of the national academic literature. The strong emphasis put on external flexibility, which is to be matched by equally external sources of security such as social security benefits and active labour market policies (ALMPs) sit uneasily with the German premise of the mutual benefits of a strong bond between employer and employee, secured by strong employment protection.[23]

19 Ebert, op. cit., p. 143.

20 Keller and Seifert, op. cit., p. 228.

21 Wotschak et al., op. cit., pp. 18 et seq.; Klammer, op. cit., pp. 290 et seq.

22 Tangian, A., Monitoring Flexicurity Policies in the EU with Dedicated Composite Indicators, Wirtschafts- und Sozialwissenschaftliche Institut (WSI) der Hans-Böckler-Stiftung Discussion Paper, No. 137, 2005, pp. 8 et seq., Leschke, op. cit., p. 5. Cf. the reasoned criticism of the concept launched e.g. by Keller and Seifert, op. cit., pp. 227 et seqq., and Wilthagen, T. and Tros, F. (The Concept of 'Flexicurity': A New Approach to Regulating Employment and Labour Markets, in: Transfer: European Review of Labour and Research, 2/2004)'s characterisation of the German system as a model of "security above flexibility" (11), respectively of a "low-flexibility equilibrium" (20).

23 Ebert, op. cit., p. 142; Heyes, op. cit., p. 72; Viebrock, E. and Clasen, J., Flexicurity and welfare reform: a review, in: Socio-Economic Review, 7/2009, p. 318. Cf., However, also the Confederation of German Employers (BDA)'s explicit endorsement of the flexicurity concept in a joint paper with other European business federations, published in May 2007, as pointed out by Viebrock and Clasen, op. cit., p. 323, as well as intriguing academic suggestions on how to integrate ideas of flexicurity into the German labour market without disturbing the well-functioning elements of the present model (e.g. Keller and Seifert, op. cit., pp. 228 et seq., Klammer, op. cit., pp. 289 et seq., Langelüddeke et al., Flexible Anwartschaften und Anwartschaftszeiten. Ein Vorschlag zum Ausbau der eigenständigen Frauenalterssicherung und zur Anpassung der Rentenversicherung an den Wandel der Arbeit,

This reluctance to deviate from a well-established model is reflected in the labour market policies pursued by governments in recent decades, which essentially did not feature reforms that would have put any elements of the German standard employment relationship (SER) into question. Much to the contrary, significant political activity has shaped what has been referred to above as "flexibility at the margins" – particularly low-paid, marginal[24] and/or temporary forms of work[25] and small-scale self-employed[26] which essentially cater to the flexibility needs of undertakings that are not addressed by the mentioned internal sources of flexibility.[27]

Crucial reforms of the recent past decades that have attracted also a significant degree of international attention include, first and foremost, the *Hartz* reforms of 2002-03[28] and their predecessors.[29] This refers to a bundle of reforms involving increases of contribution levels, reductions of replacement rates and the duration of benefits, and enhanced pressure on the unemployed to accept work irrespective of its nature (including marginal work).[30] The most notable of these is indisputably the controversial merger of unemployment assistance and social assistance as a result of "Hartz IV". If anything, that reform has served to reinforce rather than attenuate the divide between the so-called labour market insiders, who continue to be able to

in: Die Angestelltenversicherung, 46/1999, p. 10).

24 Generally, the German part-time rate is high in international comparison, and its use is a key ingredient in the realisation of the mentioned focus on internal-numerical flexibility (Keller and Seifert, op. cit., pp. 238 et seq). Whereas also voluntary part-time is connected to social concerns, particularly regarding its very substantial impact on pension entitlements in the German system, it is particularly the steep rise in involuntary part-time (now constituting the majority of cases: Beckmann, op. cit., p. 99) that raises concerns. Marginal part-time employment has grown considerably since the 1990s (cf. the numbers provided by Keller and Seifert, op. cit., p. 239, Klammer, op. cit., p. 285, Leschke et al., op. cit., pp. 14 et seq.) and has been instrumental in increasing firms' flexibility in dealing with work peaks and extended opening hours: trade, cleaning, gastronomy and tourism (Beckmann, op. cit., pp. 75 et seq.).

25 Fixed-term contracts have constantly and gradually increased since the 1980s. the obvious concern regarding the present situation is the significant share of employees for whom temporary employment constitutes a dead-ends loop without opportunities for transition to more stable forms of employment. The gap in relation to the 'standard' workforce is often reinforced by the temporary staff's factual exclusion from enterprise-specific training, severance pay etc. (Keller and Seifert, op. cit., p. 241). As for temporary agency work, its share is still small, but its growth rates are most impressive without signs of a trend reverse in the near future (Ebert, op. cit., p. 142).

26 On its expansion in the present labour market situation cf. Klammer, op. cit., p. 285.

27 Cf. Ebert, op. cit., pp. 142 et seq; Heyes 2013, op. cit., p. 78. This mainly affected cohorts newly entering the labour market and low-qualified workers: Klammer, op. cit., p. 284.

28 Named after Peter Hartz, head of the commission (Kommission für moderne Dienstleistungen am Arbeitsmarkt) which delivered its proposal about the direction of desirable reforms on 22 February 2002. On its association wth flexicurity approaches cf. Keller and Seifert, op. cit., p. 227.

29 Starting essentially with a law passed in 2001 with the explicit aim of moving the focus from "passive" protection to active labour market inclusion by pressing for activation, qualification, training, investment and placement (Job-AQTIV-Gesetz – "Aktivieren, Qualifizieren, Trainieren, Investieren, Vermitteln": cf. Leschke et al., op. cit., p. 6).

30 Beckmann, op. cit., pp. 75 et seq.; Leschke et al., op. cit., pp. 6, 15.

bridge short-term spells of unemployment by relatively generous benefits, and the more marginalised part of the workforce, for whom now very low rates of benefits are coupled with a workfare-type approach to compelling re-employment under any conditions.[31]

In line with this, the significant rise of the "active" share of German spending on unemployment might fall short of corresponding wholeheartedly to the call for extensive ALMPs inherent in the flexicurity concept. Observers of the concrete measures pursued in this context have noted that investments into employability in a long-term perspective have in practice been overshadowed by those that favour fast reemployment with a pronounced coercive element.[32]

Research on the "Personal Service Agencies" (PSAs) which have been introduced in this context indicates that an assessment of the success or failure of innovations may be subject to considerable controversy. These agencies are legally required to hire out employees to private firms under favourable conditions.[33] While this obviously served to put a substantial number of unemployed to work, the number of those who could be placed in this setting was much lower than expected, with deadweight and substitution effects estimated to be very significant. Only a small minority was offered further employment after placement, and the PSA's obligation to deliver training was mainly implemented in the form of 'coaching and assisted placement' with presumably limited effects of human capital enhancement.[34] Moreover, critics have pointed to frequent cases of misuse (such as violations of the prohibition on limiting the duration to the first temporary hire and non-observance of the collective agreement which permits a particular 'entry' wage only for the long-term unemployed).[35] Such criticism intensified after the bankruptcy of a large provider, and it has increasingly been remarked that over-optimistic expectations provoked by the Hartz-report have been used to justify the abolishment of regulations of the temporary work market.[36]

As for those in active employment, the most noteworthy legislative changes have significantly extended possibilities for introducing "flexible" types of work outside the SER.[37] Apart from temporary agency work, which is on the rise also beyond the described PSAs,[38] well-known example concerns the introduction and expansion of the "mini job" and "midi job" schemes, which essentially amount to an exemption from full mandatory social insurance coverage for low-paid jobs, with

31 Heyes, op. cit., p. 78; Ebert, op. cit., p. 144. See also Bothfeld and Rosenthal, op. cit., pp. 278, 282 et seq.

32 Bothfeld and Rosenthal, op. cit., p. 286. Cf. also the remark by Heyes, op. cit., p. 78, that, compared to the reinforced push for rapid re-employment, "job creation and vocational education and training programmes, correspondingly declined in importance". In a similar fashion Bothfeld and Rosenthal, op. cit., pp. 275 et seq.

33 For details see Leschke et al. , op. cit., pp. 10 et seq.

34 Ebert, op. cit., p. 144; Leschke et al., op. cit., pp. 11 et seq.

35 Keller and Seifert, op. cit., pp. 240 et seq.

36 Cf. the references given by Leschke et al., op. cit., pp. 10 and Ebert, op. cit., p. 143.

37 Erlinghagen, M., Langfristige Trends der Arbeitsmarktmobilität, Beschäftigungsstabilität und Beschäftigungssicherheit in Deutschland, No. 2017-05, Duisburger Beiträge zur soziologischen Forschung, 2017, pp. 19 et seq.

38 See Ebert, op. cit., p. 143.

different degrees of partial contribution obligations and partial protection coverage as the wage increases.[39] The main objectives of its introduction were to curtail illegal work, facilitate small-scale employment and thus offer a stepping stone into the labour market for groups likely to remain outside of it.[40] Specific further reductions and privileges exist for private households hiring marginal employees.[41] And while growing employment rates suggest that the measures are effective in this sense, the fact that marginal employment is found to be involuntary in the majority of cases and the rate of transitions into regular employment very low[42] raises doubts as to the justification of exemptions. Observers have repeatedly cautioned that marginal forms of employment are, just like temporary agency work,[43] strategically used for substituting regular employment.[44]

Beside these measures, which have produced an unprecedented rise in marginal employment,[45] a number of measures was targeted at supporting small-scale self-employment, which reveal a similar tendency of giving financial and other incentives while decidedly not aiming for an integration into social security under similar terms as those mandated under the SER. Whereas certain support services had existed before,[46] a new self-employment grant introduced in the framework of the Hartz reforms has reinforced the approach of reducing barriers to own-account work. Take-up has been much higher than expected,[47] and while quantitative data on self-employed activity are scarce, a clear overall increase can be observed since its introduction in 2003.[48] This concerns mainly services, construction, trade, craft and IT[49] and is increasingly performed as a part-time activity, especially in case of women.[50] In this context, one cannot but note that the unaltered conception of the German social security system as an insurance system for employees (to the exclusion of the self-employed) appears increasingly questionable in terms of its potential to target vulnerable categories of workers.[51]

39 Thereby, the "mini job" variant (under EUR 450) gives rise to no social security entitlements despite limited contribution obligations for the employer. For details cf. Keller and Seifert, op. cit., pp. 239 et seq., Ebert, op. cit., pp. 142 et seq.

40 Bundesministerium für Wirtschaft und Arbeit, Brücken in den Arbeitsmarkt – Wirtschaftsbericht 2003, Berlin, 2003, <http://www.bmwi.de/Redaktion/Inhalte/Pdf/W/wirtschaftsbericht-03,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf, p. 4; Bundesregierung, Bericht 15-758 der Bundesregierung zu den Auswirkungen des Gesetzes zur Neuregelung der geringfügigen Beschäftigungsverhältnisse auf dem Arbeitsmarkt, 2003, pp. 2 et seqq.; Leschke et al. 2006: 13.

41 For details cf. Keller and Seifert, op. cit., p. 239, Leschke et al. , op. cit., p. 15.

42 Beckmann, op. cit., pp. 60 et seq., 102 et seq.

43 Ebert, op. cit., pp. 142 et seq.

44 Ibid., 15.

45 Keller and Seifert, op. cit., p. 239, Klammer, op. cit., p. 285, Leschke et al., , op. cit., pp. 14 et seq.

46 A so-called bridging money paid for up to 3 years, as well as various credit programmes: Keller and Seifert, op. cit., p. 242.

47 Leschke et al., op. cit., pp. 7.

48 Keller and Seifert, op. cit., p. 242; Erlinghagen, op. cit., pp. 24 et seq.

49 Leschke et al., op. cit., pp. 8.

50 Loc. cit., 9.

51 Keller and Seifert, op. cit., pp. 242 et seq.

In conclusion, while self-evidently the preceding paragraphs could provide only a selective insight into labour market-related policy making in Germany, they are indicative of a general policy orientation that upholds the SER and the related "internal flexicurity" as the core of the labour market, which continues to function in a highly effective manner particularly for larger undertakings.[52]

The "price to be paid" for this stability in the core seems to have been the creation of a "secondary", atypically employed workforce which supplements external flexibility and is largely excluded from security beyond modest minimum subsistence. Revealingly, according to OECD data, Germany is one of the three countries where the subjective feeling of job insecurity increased most in the 1980s and the mid-1990s.[53] Needless to say, this cements the image of the German model as one that inherently produces labour market and societal segmentation.[54]

3. THE FLEXICURE VARIANT: AUSTRO-CORPORATISM

3.1. Distinctive characteristics of the Austrian model

All of the above indicates that the existence of a very well-functioning model of "internal flexicurity", which understandably will and probably should not be abandoned or undermined light-heartedly, puts constraints on the degree to which new demands for flexibility by both employers and (potential) employees can be accommodated without producing a significant degree of segmentation.

In this respect, it is of interest to consider as a point of reference the labour market model of Austria as the country which can in many ways be said to resemble the German example most closely, but which has been distinguished as an exemplary "flexicurity country" in the European discourse right from the start. Indeed, virtually all aspects that have been mentioned above as distinctive for the German model of standard employment relations – dual vocational education,[55] board-level co-determination and intensive mandatory works council involvement, and effective tripartite cooperation in preventing and managing economic redundancies – exist in a very similar form and extent in the Austrian context. Yet, particular in the EU context, Austria emerges as the probably third most cited example of successful pathways of flexicurity after Denmark and the Netherlands.[56]

52 See Erlinghagen, op. cit., pp. 24 et seq. Naturally, smaller firms have only restricted options of internal adjustment in this sense. Cf. Klammer, op. cit., pp. 288.

53 Together with the UK and the Netherlands. Kammer, op. cit., p. 287.

54 Ebert, op. cit., p. 143.

55 Cf. Hofer and Lietz, op. cit., pp. 104 et seqq., 119; Arrich, op. cit.; Dauth, W. et al., Macroeconometric Evaluation of Active Labour Market Policies in Austria, Forschungsinstitut zur Zukunft der Arbeit Discussion Paper No. 5217, 2010, p. 10.

56 With Austria being the only country example to which the European Commission refers in a more lengthy fashion in its Green Paper that officially established the flexicurity model as the key concept of its labour market policy: European Commission, Modernising labour law to meet the challenges of the 21st century, COM/2006/0708 final, Brussels, 22/11/2006, pp. 9 et seq. Equally in 2006, the success of the Austrian flexicurity model was praised by the General Secretary of the ETUC (European Commission, Employment in Europe 2006, Brussels). Cf.

More specifically, it has been opined at various instances in the academic literature that although the concrete measures employed are hardly showing a particular degree of similarity, the "trade-off between employment protection at firm level and social protection at macro level seems to work just as well as in Denmark"[57] in the sense that weaker job security is counter-balanced by greater employment security in the labour market.[58] In European comparison, low-skilled jobs are much less common in Austria, unemployment – and particularly youth unemployment – is low, and income differences are less pronounced.[59] Industrial relations are remarkably peaceful, with strikes and lock-outs virtually absent in employer-employee relations.[60] Wrongful termination lawsuits are seldom and mostly result not in reinstatement but in the payment of a financial compensation.[61]

The basis of the similarity of outcomes just cited[62] certainly lies in a particularly deeply entrenched form of social partnership[63] that has shaped the development of the Austrian labour market, welfare state, and policy approaches more generally.[64] This can at present be assessed as a striking contrast to the German development, which – in line with what has been described above – intra-company labour-management relations have persisted at an outstandingly well-developed level, but industrial relations at higher levels have been waning in magnitude and importance for an extended period, with no signs of a trend reversal to be expected.[65]

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also Viebrock and Clasen, op. cit., p. 323; Bredgaard and Madsen, op. cit., pp. 1 et seq.

57 Auer, P., Flexibility and Security: Labour Market Policy in Austria, Denmark, Ireland and the Netherlands, Cheltenham, 2002, p. 38; Viebrock and Clasen, op. cit., p. 315.

58 Leschke et al., op. cit., pp. 10.

59 Hofer and Lietz, op. cit., p. 104; Dauth, op. cit., p. 2.

60 See Wirtschafts- und Sozialwissenschaftliches Institut 2017, 7. In fact, those strikes taking place in practice are almost exclusively of a political nature. Tálos, E. and Kittel, B., Austria in the 1990s: The Routine of Social Partnership in Question? In: Berger, S. and Compston, H. (eds.), Social Partnership in Europe, 1999, p. 11 have called this a structure of "class struggle at the negotiating table".

61 Winter-Ebmer, R., Evaluating an Innovative Redundancy-Retraining Project: The Austrian Steel Foundation, Forschungsinstitut zur Zukunft der Arbeit Discussion Paper, No. 277, 2001, p. 4.

62 Which starts with similar (top-level) positions in comparative European rankings concerning socio-economic indicators such as GDP, social spending and specifically ALMP spending per unemployed (where the still uniquely high Danish level is decreasing, whereas the Austrian one has increased substantially in recent years), employment and unemployment rates etc. Cf. also Hofer, H. and Weber, A., Active Labor Market Policy in Austria: Practice and Evaluation Results, in: Deutsches Institut für Wirtschaftsforschung Berlin, Vierteljahrshefte zur Wirtschaftsforschung, 75/2006/3, pp. 155, 158; Bothfeld and Rosenthal, op. cit., pp. 281 et seq.

63 Viebrock and Clasen, op. cit., p. 315, Ionete, Anca, The Worlds of Flexicurity-Labour Market Policies in Europe, in: Dodescu, A. (Ed.), The Annals of the University of Oradea Economic Sciences, 2012, p. 135.

64 Allinger, B., Austria: Social Partners' Involvement in Unemployment Benefit Regimes, in: Eurofound Country Information 2012, <https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/austria/austria-social-partners-involvement-in-unemployment-benefit-regimes>, 20 December 2012., 14 June 2018.

65 Membership in trade unions declined to 27% in 1994 and further to 21% in 2012 and 15% until 2014 according to Anders, C. et al., Gewerkschaftsmitglieder. Mitgliederentwicklung und

In Austria, by contrast, the de facto strength of the labour movement and social partnership of the past has long ago been imbedded into a legislative and institutional setup that reinforced its continued paramount importance and has provided a foundation for its endurance also in the current economic environment, which has proven unfavourable for the development of industrial relations across countries for widely discussed reasons. In the literature, this has been referred to as a distinctive model of "Austro-corporatism".[66] In short, the Austrian system of industrial relations is characterised by an extraordinary degree of centralisation, with the "Big Four" (one voluntary and one compulsory membership-based association for management and labour each) dominating not only typical social partner domains but also the administration of social security and actually the very process of policy making.[67]

As indicated in the last paragraph, both employees and employers are in fact subject to legally mandated membership in social partner organisations known as chambers, which ensures representativeness also at times of declining membership in voluntary organisations, which – though to a lesser degree than in Germany – has deprived also the two relevant voluntary associations in Austria of much of their membership, currently constituting a clear minority of both employers and employees. This ensures not only universal access to free legal advice and representation for labour and social issues, counselling and a variety of further services, but also near-universal coverage by branch-level collective agreements, from which employers cannot withdraw by discontinuing their membership in the association.[68] Contrary to other countries, these agreements settle not only minimum wages for different occupations in great detail but mandate also minimum year-on-year increases for the actual wages ("Ist-Lohn") currently paid for these categories. These annual collective wage negotiations (under the leadership of the metalworkers' agreement to be negotiated first) based on a thorough consideration of aspects such as economy-wide and sector-specific growth, inflation, but also labour market and international competitiveness.[69] The practice of consulting the social partners with reference to legislative proposals has long been institutionalised to the degree that, where the social partners do not

politische Einflussnahme: Die deutschen Gewerkschaften im Aufbruch?, 2015, and Institut der deutschen Wirtschaft, Organisationsgrad: Gewerkschaften verlieren europaweit an Rückhalt, 2016, and the national trade union federation DGB (Deutscher Gewerkschaftsbund)'s member count accessible at http://www.dgb.de/uber-uns/dgb-heute/mitgliederzahlen shows a decline to barely above 6 million members in 2016. Coverage by collective bargaining agreements remains higher but still fell significantly. Until 2015, coverage decreased to 31% of undertakings (59% of employees) in the West and 21% of undertakings (49% of employees) in the East (cf. Ellguth, P. et al., Das IAB-Betriebspanel: (Analyse-)Potenzial und Datenzugang, in: Liebig, S. et al. (eds), Handbuch empirische Organisationsforschung, 2016). This compares to still 27% union density in Austria, and mainly the still over 98% coverage by collective agreements. For an overview of all EU countries' development between 1980 and 2014 see Hyman, R., What Future for Industrial Relations in Europe? Employee Relations, 2018, table 1.

66 Tálos and Kittel, op. cit., p. 2.

67 Hofer and Weber, op. cit., p. 156; Tálos and Kittel, op. cit., p. 5.

68 Allinger, op. cit.; Tálos and Kittel, op. cit., p. 5.

69 Hofer, H. et al., Labor Market Policy in Austria during the Crises, Johannes Kepler University Working Paper No. 0906, 2014, p. 4.

initiate the draft themselves, they will receive it long before it is first tabled before the parliamentary plenary.[70]

This illustrates the generally elevated degree of "collectivity" at the heart of the Austrian labour market model, which has proven fruitful grounds for moving much of what is concentrated at intra-company level in the German model to a higher level.[71] Arguably, this is to a certain degree an expectable tendency in a market composed of 93.7% micro enterprises (under 10 employees) and 99.8% SMES (under 250 employees: these also employ over 60% of the workforce)[72] with accordingly limited capacity of intra-company accommodation, and partly in fact an automatic consequence of the described social partner structure (with more centralised actors on the employees' side being not only closely interlinked with works councils, providing training and expertise for them, but actually taking over various tasks that would otherwise confront intra-company representatives). Beyond these effect, though, the enhanced reliance on mechanisms of a more collective nature is also reflected in policies, including recent reform developments.

3.2. Elements of Austrian-style flexicurity

The probably most frequently cited example of such policy approaches in the European flexicurity debate is the Austrian severance pay reform of 2003,[73] which removed payment obligations at the event of employer-sided termination and replaced them by a funded system. It obliges employers to pay contributions for all employees to an external fund over the duration of their employment, so employees build up an "external" entitlement to severance pay in case of unemployment in the long term, independent of the duration of employment with a specific employer. Needless to say, this effectively removed an important deterrent for dismissal, which was at the same time a major source of segmentation (as the dependence on seniority meant that payment obligations could be avoided by termination within the first three years, while the entitlements of long-term employees posed serious financial concerns especially for SMEs[74]). The European Commission has identified this as a particularly "interesting example of a radical shift away from a system based on the traditional

70 Allinger, op. cit.; Tálos and Kittel, op. cit., pp. 5 et seq., Ehrlich, P. et al., Corporatism in Crisis: Stability and Change of Social Partnership in Austria, in: Political Studies, 36/1988, p. 222.

71 Cf. more generally on the role of social partnership for flexicurity Ingham, op. cit., pp. 7, 19.

72 Wirtschaftskammer Österreich, Unternehmen und unselbständig Beschäftigte – Größenklassenauswertung für die gewerbliche Wirtschaft (Dezember 2017), 2018; https://www.wko.at/service/zahlen-daten-fakten/betriebsgroessen-kmu.html, 2018., 14 June 2018.

73 Cf. the 2002 Austrian Severance Pay Act (Betriebliches Mitarbeitervorsorgegesetz) – Viebrock and Clasen, op. cit., p. 315, Hofer, H. et al., Effects of the Austrian Severance Pay Reform, in: Holzmann, R. and Vodopivec, M. (ed.), Improving Termination Pay: An International Perspective, World Bank, 2011, p. 2; Ionete, op. cit., p. 136.

74 For a discussion of the effects of the old vs. the new system see Hofer et al., op. cit., pp. 4 et seq., 12; Kristen, S. et al., Abfertigung Neu: Überblick über die Neuregelungen durch das Betriebliche Mitarbeitervorsorgegesetz, in: Recht der Wirtschaft, 2004, pp. 7 et seqq.; Holzmann, R. et al., Severance Pay Programs around the World: History, Rationale, Status, and Reforms, Forschungsinstitut zur Zukunft der Arbeit Discussion Paper No. 5731, 2001, p. 22.

employment relationship between one worker and one firm to one [that] reduces the cost of job mobility since workers no longer lose all of their entitlement to severance payments when taking a new job"[75] and more generally it has been "shown an example of best practice around Europe".[76]

In an overall assessment of the described system change regarding severance pay entitlements, it needs to be stressed that the new funded scheme is certainly not living up to the expectations that accompanied its introduction. This is essentially due to the fact that a funded defined contributions scheme bound to invest in low-risks products is not able to produce the sums as they were over-optimistically projected in the years before the financial crisis.[77] The merits of the change are therefore probably not to be seen in the creation of substantial financial entitlements in case of unemployment, but rather in the establishment of a universal system that now includes all forms of short-term, self-employed etc. work and ensures that entitlements accrue independently of the stability of employment and are not lost under any circumstances (thus paid as a retirement benefit if not consumed earlier).[78]

Consequently, one might conclude that while the reform's overall assessment is ambiguous, the flexicurity-centred aims have been met, in that litigation about the termination of employment contracts has been declining ever since[79] and job mobility increased, especially for females, though at a limited overall level in the years after the reform.[80] Concerning employment relationships, the reform has doubtlessly further lowered the degree of legally mandated individual employment protection, which was already outstanding among European countries for not requiring employers to specify a reason for dismissal. Instead, the works council has extensive entitlements of early information and consultation even about individual dismissals and can intervene legally against them, with enhanced competences in case of collective dismissals.

This may have contributed significantly to the fact that Austria avoided redundancies during the economic downturn in a similar fashion and with similar success as Germany[81] – as the level of dismissal protection is effectively high for redundancies that worker representatives consider to be of collective importance. Regarding unemployment, the Austrian rate stood out as the lowest among EU countries over the years in the immediate aftermath of the crisis.[82] The use of enterprise-

75 European Commission, Modernising…, cit., pp. 9 et seq.

76 Leschke et al. , op. cit., p. 2.

77 Leschke et al., op. cit., p. 10; Holzmann et al., op. cit., pp. 22 et seq., Hofer et al., op. cit., p. 5 et seq., 9 et seq.

78 Klec, G., Flexicurity and the Reform of the Austrian Severance-Pay System, European Economic and Employment Policy Brief, 4/2007, pp. 5 et seq.; Leschke et al., op. cit., p. 9; Hofer et al., op. cit., p. 7.

79 Klec, op. cit., p. 7.

80 Hofer et al., Effects…, cit., pp. 15, 22, Holzmann et al, op. cit., p. 22.

81 Hofer et al., Labor Market Policy…, cit., pp. 4 et seq.

82 Hofer et al., Labor Market Policy…, cit., pp. 3 et seq. The rate has, however, increased significantly after the abolition of early labour market exit opportunities, which were effectively covering difficulties of employability in old age. Cf. Hofer et al., Labor Market Policy…, cit., pp. 15 et seq.; Allinger, op. cit.; Hofer and Weber, op. cit., p. 156.

specific means such as short-time work[83] was complemented by the high sensitivity for economic fluctuations in the institutionalised system of determining sectoral standards on the macro level. Thus, the branch-level collective agreements with their economy-wide universal coverage proved an effective leverage for enabling wage and working time adjustments as far as necessary for undertakings to overcome the crisis – but not beyond that degree.[84] In a way, this puts into perspective the oft-cited opinion[85] that the economic crisis has shown the superiority of "unflexicure" strong individual employment protection, considering the particularly pronounced level of rises in unemployment in model "flexicurity countries" such as Denmark.

Also the second element that tends to be emphasised in the European Commission's remarks about Austria – the instrument of "labour foundations" (*Arbeitstiftungen*) for managing economic redundancies and outplacement – is effectively one that takes German-style redundancy management to a higher level that may involve a number of enterprises (with larger companies taking the lead). This concept of joint action for early intervention for employees facing a threat of redundancy (outplacement foundations) was first used in the framework of the formerly state-owned steel corporation VOEST in 1987, and subsequently at the event of staff reductions within larger enterprises food and haulage sectors. Labour foundations offer a combined package of job-search assistance with psychological counselling, retraining and occupational re-orientation, which is jointly financed by firms and a "solidarity supplement" by the employees not affected by the redundancies, whereas social security funds contribute by granting unemployment benefits over the time of foundation participation and not collecting contributions on the mentioned "solidarity supplement".[86]

The success of the model of institutionalising measures and services that serve the common interests of companies, employees and the regions led to the institution of similar mechanisms in case of staffing bottlenecks of companies in need of qualified workforce (implacement foundations). This concept of highly targeted training of jobseekers for the very jobs where firms currently face shortages, organised and largely funded by those very firms was soon expanded and the number of participants in such implacement foundations has long superseded that of classic outplacement foundations – being about three times higher in recent years. These foundations have come to fulfil a particularly vital role in addressing shortages in the health and care sectors. Notable examples include the broadly conceptualised Implacement Cluster Programme (for employment in the geographical vicinity of Vienna), Forum Personal (for the IT and electromechanical sectors) and the Qualifizierungsverbund (health

83 Hofer et al., Labor Market Policy…, cit., p. 6.

84 In the same way, this setting has traditionally enabled wage growth in Austria to be more in line with the economic development – which has attenuated (though not eliminated) tendencies of workers ripping an ever declining "slice of the pie" in relation to most countries: cf. Hofer and Weber, op. cit., p. 156, Hofer et al., Labor Market Policy…, cit., pp. 3 et seq.

85 Cf. Auer, Does Flexicurity …, cit., pp. 371 et seqq.; Ebert, op. cit., p. 150.

86 For a detailed description see Winter-Ebmer, op. cit., pp. 3 et seq.; Holzer, C., The Implacement Foundation: Country Example, Austria, in: Thematic Review Seminar of the European Employment Strategy, 2006, p. 34; Hofer and Weber, op. cit., p. 163.

professions).[87]

Finally, also the administration of unemployment is firmly in the hands of the social partners, who are generally responsible for the administration of the social security system.[88] The Public Employment Service (AMS) responsible for unemployment insurance as well as various tax-funded labour market-related schemes and measures (in the framework of social assistance, the bankruptcy contingency fund, educational and family-related leave allowance etc.) is characterised by the equal tripartite composition of the federal governing board and regional and local offices.[89] The (high) ALMP expenditure is focusing on employability enhancement[90] and comparatively strong safeguards exist against placement into jobs not corresponding to the applicant's skills level.[91]

Since 1997, a range of measures have further strengthened the focus on training and lifelong learning. Most importantly, a reform package to address bottlenecks in vocational training introduced publicly funded apprenticeships, reducing the costs of training firms, created over 100 new or reoriented apprenticeship occupations and launched preparation courses.[92] Since 2006, apprenticeships have constituted the largest focus area of the AMS' activation approach.[93] Beyond this, the year 2005 saw the introduction of educational leave (*Bildungskarenz*), which was expanded in 2008 and further in 2009 – initially as a crisis amendment.[94]

As for "passive" benefits, the described segmentative German approach is opposed by a system with much smaller entitlement differences between insurance- and assistance-type benefits, which are both set at the moderate level of 60% of prior wages but income-(not means-)tested in case of the temporarily unlimited assistance benefit.[95] The insurance-based receipt can be extended if the beneficiary takes part in labour market measures.[96] Particularly with a view to the mentioned PSAs in Germany as they have been criticised for promoting precarious work funded by public resources, it is interesting to contrast this with the Austrian variant of placing job seekers through an agency, which has been praised as showing that "temporary agency work with high social standards is possible in a competitive market".[97] Again, the Austrian scheme is

87 Viebrock and Clasen, op. cit., p. 315; Ionete, op. cit., p. 136; Holzer, op. cit., pp. 33 et seq. For further examples in the area of manufactoring see Krenn, M., Voestalpine Stahl, Austria: Increasing the Participation of Underrepresented Groups in the Labour Market – Young People, in: Eurofound Case Studies 2009, <https://www.eurofound.europa.eu/observatories/eurwork/case-studies/attractive-workplace-for-all/flexwork-austria-integration-into-the-labour-market-of-people-at-risk-of-exclusion>, 28 October 2009., 14 June 2018.

88 Allinger, op. cit.

89 For details see Tálos and Kittel, op. cit., p. 5; Allinger, op. cit.; Dauth, op. cit., p. 8.

90 Hofer and Weber, op. cit., pp. 158 et seq, 165.

91 Viebrock and Clasen, op. cit., p. 315, Ionete, op. cit., p. 135; Allinger, op. cit. For comparison, see Bothfeld and Rosenthal, op. cit., pp. 288 on the German stuctures.

92 Hofer and Lietz, op. cit., pp. 107 et seq.

93 Dauth, op. cit., p. 10.

94 Allinger, op. cit.; Viebrock and Clasen, op. cit., p. 315; Ionete, op. cit., pp. 135 et seq.

95 Hofer et al., Labor Market Policy…, cit., p. 12, Allinger, op. cit.

96 Allinger, op. cit.

97 Krenn, M., Flexwork, Austria: Integration into the Labour Market of People at Risk of Exclusion,

a result of a tripartite initiative leading to the foundation of an agency ("Flexwork") aimed at labour market integration through "socially acceptable temporary agency work". It is a non-profit subsidiary of the Vienna Employee Promotion Fund (*Wiener ArbeitnehmerInnen Förderungsfonds*) of the City Council of Vienna. It competes on the open labour market, gearing its pricing policy to current market prices. 98% of its staff (former long-term unemployed, job-seekers with alcohol problems or without vocational education, ex-convicts and former recipients of social assistance) are employed full-time, with trade union density standing at 60%. As its objective of a full permanent integration of temporary agency workers into its client companies, it charges no payment for the "take over" of a worker as private agencies would. Most employees are enrolled in training programmes, in areas such as IT or German as a foreign language, but also basic skills relating e.g. to health, literacy or the handling of debts. This and the generally low number of employees enrolled (not more than several hundreds) evidences that the programme's aim is not the fast re-employment of the unemployed in general, but the creation of basic skills and experiences for groups facing particularly serious barriers in case of a direct job application. At the end of their contract with Flexwork, around two thirds of the employees are integrated into the "regular" labour market, though a majority under a temporary contract.[98]

Other elements that effectively counteract segmentation tendencies are, apart from the universal coverage by collective agreements (that includes marginalised groups such as temporary agency workers), notably to be found in the area of social security. Whereas German social insurance is essentially worker-centred in all its branches, Austria includes entrepreneurs basically on the same basis in all areas apart from unemployment insurance and the wage-replacing aspect of health insurance (which are open to voluntary affiliation) and mandates that "employee-like" self-employed be treated like employees in all aspects of social security (including contribution payment by the "quasi-employer"). All steps of the reforms leading to this current regulation were heavily influenced by initiatives and input from the social partners.[99]

Summing up, the example of Austria shows in an impressively clear fashion that essentially none of the labour market approaches usually seen as most characteristic for the German model would as such be unsuitable for existing in a "more flexicure" variant that seems significantly less prone to produce segmentation.

4. THE GRETCHENFRAGE – LESSONS TO BE LEARNED?

While the juxtaposition of Germany and Austria viewed through the "flexicurity lens" delivers intriguing results in itself, is it any suitable for drawing more general conclusion about the concept of flexicurity and its potential?

in: Eurofound Case Studies 2009, <https://www.eurofound.europa.eu/observatories/eurwork/case-studies/attractive-workplace-for-all/flexwork-austria-integration-into-the-labour-market-of-people-at-risk-of-exclusion>, 28 October 2009., 14 June 2018.

98 Loc. cit.

99 Allinger, op. cit.

To stress again what has been stated above, caution is warranted in discussing the ultimately abstract potential of a specific system design to produce outcomes of a certain kind where this is not supported by any empirical insights. Most notably, in indicators aimed at measuring inequality, relative poverty etc., Germany does not appear as a country concerned by the worrying consequences of segmentation such as the US[100] but still occupies a very favourable comparative ranking.[101] At best, one may note that – consistent with a form of segmentation concerning essentially different segments of the working population – Germany now shows the highest rate of in-work poverty among Western European countries.[102] Together with the mentioned fast progressing and very visible erosion of social partnership and changes in the social security setup that some have qualified as 'the end of social security as we know it',[103] one may of course speculate about the long-term consequences of the current developments. Particularly the lack of social security coverage for a substantial share of the (economically active) population under a rigid scheme (with limited reach regarding contributing obligations, limit redistributive elements and equally limited opportunities for voluntary participation of those excluded) has been found to require urgent redress.[104]

In this regard, it needs to be recalled that the principal promotion of flexicurity approaches by EU institutions and a significant part of academic commenters has typically stressed the meaningful contribution to be expected from these approaches to lie less in addressing visible existing problems and more in a long-term orientation that anticipates further changes in labour markets that can be expected from today's perspective. Most crucially, this concerns the expectation that technical and economic developments will further diminish the scope for European labour markets to produce employment opportunities resembling traditional forms of standard employment for which current legal approaches were originally designed. Germany with its strong and internationally competitive industrial sector might at present be said to offer (still) a very substantial share of such employment opportunities, which is widely anticipated to decline at a constant or even increased rate in the years to come. Scattered remarks in the literature[105] observe patterns of internal flexibility waning in their effectiveness in the recent past.

This would seem to suggest that, on the one hand, more attention might be warranted for those who currently fail to set foot on the "primary labour market" that offers access to the benefits of the mentioned internal flexicurity-based structure of

100 Cf. Central Intelligence Agency, The World Factbook, 2018; <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2172rank.html?countryname=United%20States&countrycode=us&regionCode=noa&rank=41#us>, 2018., 14 June 2018.

101 See Keuschnigg, C., and Busemeyer, M., Soziale Inklusion in Deutschland: Wenig Reformeifer, aber hohe Reformqualität, 2017, p. 13.

102 Loc. cit.

103 Bothfeld and Rosenthal, op. cit., pp. 275 et seq.

104 Klammer, op. cit., pp. 295 et seq. Most notably, the pension system is clearly not equipped for biographies characterized by different degrees and types of economic activity and varying levels of income: cf. Klammer, op. cit., p. 293.

105 E.g. Leschke et al., op. cit., pp. 6.

the German model, and increasingly need to combine very low-paid employment or insufficient pensions with means-tested social benefits.[106] On the other hand, it suggests a reconsideration of the question to what extent the current setup and distribution is striking a fair balance between stakeholders. More specifically, one might state that the balance is well-established when considering only this "primary labour market" with its focus on strong mutual responsibilities of both parties to the labour relationship to cater also to the flexibility and security needs of the other parties. By contrast, to the degree that German labour market policies have increasingly enabled external flexibility for business to be supplemented by forms of employment outside this setting of the SER, they have in essence fostered the expansion of low-paid and low-security work heavily funded by public revenues without asking the companies benefitting from this significant source of additional flexibility to "pay their fair share".[107]

It may be in this respect that the Austrian example is most instructive as a point of comparison, as it seems considerably more likely to strike this fair balance. As described above, the Austrian model attenuates employers' responsibilities vis-à-vis own employees by facilitating what one might term comparatively cheap and non-bureaucratic individual dismissals. In turn, these employers are not only obliged to assure and finance the affiliation of their workforce (including dependent self-employed) to an extensive system of social security, chamber representation and the mentioned severance pay fund, but must also affiliate themselves to comprehensive social security and chamber representation, both of which feature important elements of redistribution between actors on the employers' side, and are in further consequence bound by collective agreements that have been negotiated by strong organisations with significant expertise based on general economic considerations for the sector at issue rather than the individual bargaining power and union affiliation of a company's workforce. In such a system, particularly large undertakings seem less able to rip all the benefits of a system in which the public takes over significant responsibility for the general workforce's employability and security without contributing their share to the collective system in accordance with their individual potential.[108]

106 Brenke, K., and Grabka, M., Schwache Lohnentwicklung im letzten Jahrzehnt, DIW Wochenbericht, 78.45, 2011, pp. 3 et seq.; Ebert, op. cit., pp. 144, 152 et seq. Various suggestions to create substitutes for these benefits for the marginalised workforce can be found e.g. at Keller and Seifert, op. cit., pp. 239 et seq. and Ebert 2015: 153 et seq.

107 Revealingly, even in respect of measures targeted at "insiders", it has been remarked that the famous tripartite burden-sharing has usually proven to be an exceptionally cheap deal for undertakings. Whereas the contribution demanded from employers usually included the provision of training opportunities for short-time workers, in reality on 2% were included in training programmes, and the call for obliging companies to the creation of 600,000 new apprenticeship places in this context was met with outright rejection: cf. Heyes, op. cit., pp. 78 et seqq. A look at comparable numbers for Austria, as they are given e.g. by Hofer et al., Labor Market Policy…, cit., p. 6, shows that although short-time work covered a relatively lower share of the workforce (just over 1.5%, compared to 4% in Germany), a much larger share of them (over 13%) were covered by training measures.

108 Cf. also the differences in the Country-Specific Recommendations for Austria and Germany: European Commission, Final Recommendation for a Council Recommendation on the 2018 National Reform Programme of Austria and delivering a Council opinion on the 2018 Stability

Importantly, the comparative approach taken here is not intended to offer any comprehensive assessment of two specific national policy approaches, and should particularly not be misunderstood as suggesting the recommendability of the Austrian approach. Much rather, the naturally selective account of those elements that seem particular relevant for the two countries' flexicurity dimension is meant to illustrate the thesis that policy measures that are essentially similar in both their goal and their approach can have diametrically opposed consequences for countries' flexicurity status. therefore, rather than attempting to draw conclusions about recommended policy directions for any specific country, this case study implies a number of more general conclusions. One is that the considerations that have brought the concept of flexicurity to the forefront of European policy recommendations have by no means lost their relevance. Another is that flexicurity approaches do not inherently make states more vulnerable to economic fluctuations such as the downturn after 2007. And, most importantly, the much-debated[109] practical impossibility of policy transfer from systems based on fundamentally different traditions may appear in a different light when considering that in many cases there might be a flexicure variant coming very close to a country's traditional policy pattern, and paying attention to developments in the European neighbourhood might offer an intriguing source of inspiration in this regard.

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Sažetak

FLEKSIBILNE STRUKTURE TRŽIŠTA RADA – VJEČNO PITANJE NJIHOVE DODANE VRIJEDNOSTI

Rad analizira pitanje dodane vrijednosti koju stvaraju ona stajališta socijalne politike koja se mogu okarakterizirati „fleksigurnim“, usporedbom situacije u Njemačkoj i Austriji. Daje se uvid u ključne promjene tržišta rada i politika u tim zemljama, koje dijele brojna zajednička načela i strukture, ali se i razlikuju ako ih se promatra kroz prizmu koncepta fleksigurnosti. Ova usporedba služi kao temelj za raspravu o poželjnosti reformi koje osnažuju „obilježja fleksigurnosti“ svakoga nacionalnog pravnog poretka, kao i brojne oblike koje ovaj koncept može imati, kako bi se prilagodio različitim pravnim i socijalno-ekonomskim tradicijama.

Ključne riječi: *fleksigurnost; Njemačka; Austrija; politike tržišta rada; dualnost tržišta rada.*

Zusammenfassung

„FLEXICURE” ARBEITSMARKTSTRUKTUREN – DIE GRETCHENFRAGE DES MEHRWERTES

Der Artikel bespricht den Mehrwert sozialpolitischer Ansätze, die als „flexicure“ bezeichnet werden können, auf der Grundlage eines Vergleichs von Deutschland und Österreich. Sie bietet einen Einblick in einige der zentralen Entwicklungen des Arbeitsmarktes und der Politik in diesen Ländern, die eine Reihe gemeinsamer Prinzipien und Strukturen teilen, sich jedoch im Hinblick auf das Flexicurity-Konzept auffallend unterscheiden. Dieser Vergleich dient als Grundlage für eine Diskussion darüber, ob Reformen wünschenswert sind, um die „Flexicurity-Performance“ einer nationalen Rechtsordnung zu stärken, sowie über die Vielzahl von Formen, die das Konzept annehmen kann, um verschiedenen rechtlichen und sozioökonomischen Traditionen zu entsprechen.

Schlüsselwörter: *Flexicurity; Deutschland; Österreich; Arbeitsmarktpolitik; Dualisierung des Arbeitsmarktes.*

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Riassunto

STRUTTURE DI MERCATO DEL LAVORO FLESSICURO – LA DIFFICILE COMPRENSIONE DEL LORO VALORE AGGIUNTO

Nel lavoro si disaminano le questioni relative al valore aggiunto che creano quegli orientamenti della politica sociale che si possono caratterizzare come „flessicuri“, comparando all'uopo le realtà in Germania ed in Austria. Si illustrano altresì i cambiamenti cruciali sul mercato del lavoro e le politiche sociali in questi paesi, i quali pur condividendo numerosi principi e strutture, si differenziano notevolmente se li si osserva attraverso il prisma della flexycurity. Questa comparazione funge da fondamento per il dibattito sull'opportunità della riforma con la quale si rafforzano le „caratteristiche della flexycurity“ di ciascun ordinamento giuridico nazionale come anche le numerose forme che questo concetto può avere al fine di conformarsi alle diverse tradizioni giuridiche e socio-economiche.

Parole chiave: *flexycurity; Germania; Austria; politiche del mercato del lavoro; dualità del mercato del lavoro.*

THE SPECIFICITY OF SOME ASPECTS OF TEMPORARY AGENCY WORK IN ITALY AND CROATIA

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Summary

The paper offers a short introduction into the legal framework of the Croatian and Italian labour law system with respect to agency work. The European Union legal framework, some of the most important cases of the Court of Justice of the European Union as well as common issues in both countries are also elaborated upon. More importantly, the paper also addresses some specificities which could be used de lege ferenda in both countries.

Keywords*: agency work; European Union; Italy; Croatia.*

1. INTRODUCTION

Agency work is a model of new forms of employment which substitute the standard, full time employment relationship of indefinite duration in the employer's workplace. Employment agencies have become real employers, instead of ordinary intermediaries.[1] Agency work opens a lot of questions regarding the status of agency workers and sometimes also raises fears of strong abuses of such an employment and service relationship. We may conclude that it is an important tool not only for preventing unemployment but also as an important form of a flexible employment, which in order to gain the security suffix in the light of flexicurity needs to have much stronger workers protection mechanism. This is the reason why this paper focuses on the legal framework of two countries, Italy and Croatia, and analyses them for the purpose of providing some examples of good practice which could be implemented in both legal systems.

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1 Raday, Francis, The Insider-Outsider Politics of Labour-Only Contracting, Comparative Labour Law and Policy Journal, Vol. 20, No. 413, 1999, p. 414 in Laleta, Sandra, Križanović, Anamarija, Rad putem agencija za privremeno zapošljavanje u hrvatskom, europskom i usporednom pravu, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 36, No. 1, 2015, p. 306.

Firstly, as a general introduction we will provide some of the definitions of employment of work agencies in the international and European Union (hereinafter: EU) context.

The International Labour Organisation (hereinafter: ILO) Convention No. 181[2] suggests that the term 'private employment agency' includes any natural or legal person, independent from the public authorities, which provides one or more of the following labour market services:

- services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom,
- services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as the "user enterprise") which assigns their tasks and supervises the execution of these tasks,
- other services relating to job seeking, determined by the competent authority after consulting the most representative employers and workers organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment.[3]

It needs to be pointed out that Italy has ratified the ILO No. 181 Convention, while Croatia is not a party to it. The author is of the opinion that there are no reasons why Croatia should not ratify it since there are 33 countries which have ratified it, 12 of which are EU Member States.[4]

Directive 2008/104/EC[5] on temporary agency work, on the other hand, defines 'temporary-work agency' as any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction, while a 'temporary agency worker' is defined as a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction.

Since special attention is given to Italy and Croatia as EU Member States, in the next part of the paper the author will give a short overview of the EU legal framework on agency work.

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2 ILO Convention No. 181 (1997) Convention concerning Private Employment Agencies, available: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312326 (20 April 2018).

3 ILO Convention No. 181, Article 1(1).

4 Belgium, Bulgaria, Czech Republic, Finland, France, Hungary, Italy, Lithuania, Netherlands, Poland, Portugal, Slovakia, Spain. See, ILO official webpage, available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312326 (12 June 2018).

5 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5 December 2008, Article 3.

2. EU LEGAL FRAMEWORK ON TEMPORARY AGENCY WORK

As has already been mentioned above, temporary agency work in the EU is primarily regulated by a specific directive, which represents a minimum standard measure.[6] Directive 2008/104/EC on temporary agency work (hereinafter: Directive 2008/104/EC) was adopted by the European Parliament and the Council under Art. 137(2) of the EC Treaty (now Art. 153(2) TFEU).

The purpose of Directive 2008/104/EC is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to job creation and to the development of flexible forms of working. In particular, Directive 2008/104/EC establishes the principle of equal treatment in user undertakings, while allowing for certain limited derogations under strict conditions; it provides for a review by the Member States, during the transposition period, of restrictions and prohibitions on the use of agency work; it improves agency workers' access to permanent employment, to collective facilities in user undertakings and to training and it includes provisions on the representation of agency workers.

Under Art. 11(1) of Directive 2008/104/EC, Member States had an obligation to transpose the Directive into national law by 5 December 2011, either by adopting and publishing laws, regulations and administrative provisions necessary to comply with it, or by ensuring that their social partners introduce the necessary provisions by way of an agreement. All Member States have transposed the Directive 2008/104/EC, including Italy and Croatia.

In a number of cases, the transposition occurred late and only after the European Commission had launched infringement proceedings. In early 2012, the European Commission sent letters of formal notice for the non-communication of transposition measures to 15 Member States. Later that year, reasoned opinions were sent to three Member States. In the Member State that was the last to transpose Directive 2008/104/EC, the implementing legislation entered into force on 1 July 2013. Three Member States (France, Luxembourg and Poland) were of the opinion that their national provisions already comply with the Directive and those three Member States did not require any amendment upon its entry into force.[7]

6 For agency work in the EU please consult Barnard, Catherine, EU Employment Law, 4th Edition, Oxford University Press, Oxford, 2012, pp. 446-453 and Smith, Ian, Baker, Aaron, Smith&Wood's Employment Law, 11th Edition, Oxford University Press, Oxford, 2013, pp. 61-64.

7 Report from the Commission to the European parliament, the Council, the European economic and social committee and the Committee of the regions on the application of Directive 2008/104/EC on temporary agency work, COM(2014) 176 final, 21 Mar 2014, p. 3.

3. EU CASE LAW ON AGENCY WORK

In this section of the paper the author will give a short overview of some judgments/cases of the Court of Justice of the European Union' (hereinafter: the Court) with respect to agency work.

In Case C-290/12, *Oreste Della Rocca v Poste Italiane SpA,*[8] the Court dealt with the issue of the limits on the duration of the fixed-term employment relationship of the agency worker in line with Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP[9] and especially the Framework agreement's Clause 5, which determines the measures which should be taken by the Member States in order to prevent abuses of successive fixed-term employment contracts. The Court ruled that Directive 1999/70/EC and the Framework Agreement must be interpreted as not applying either to the fixed-term employment relationship between a temporary worker and a temporary employment business or to the employment relationship between such a worker and a user undertaking.[10]

In Case C-533/13, *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuote ry and Shell Aviation Finland Oy*,[11] on the other hand, the Court ruled on the issue of "Review of Restrictions or prohibitions" of the use of temporary work.[12] The Court declared that Art. 4(1) of Directive 2008/104/EC must be interpreted as addressing only

8 CJEU Case C-290/12, Oreste Della Rocca v Poste Italiane SpA, ECLI:EU:C:2013:235.

9 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10 July 1999, pp. 43 – 48.

10 CJEU Case C-290/12, Oreste Della Rocca v Poste Italiane SpA, para. 42-45.

11 CJEU Case C-533/13, Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuote ry and Shell Aviation Finland Oy, ECLI:EU:C:2015:173.

12 Article 4 of Directive 2008/104/EC, entitled 'Review of restrictions or prohibitions', which forms part of Chapter I, entitled 'General Provisions', states:
"1. Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.
2. By 5 December 2011, Member States shall, after consulting the social partners in accordance with national legislation, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned in paragraph 1.
3. If such restrictions or prohibitions are laid down by collective agreements, the review referred to in paragraph 2 may be carried out by the social partners who have negotiated the relevant agreement.
4. Paragraphs 1, 2 and 3 shall be without prejudice to national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporary-work agencies.
5. The Member States shall inform the Commission of the results of the review referred to in paragraphs 2 and 3 by 5 December 2011."
In accordance with Article 11(1) of Directive 2008/104, the Member States were required to adopt and publish the laws, regulations and administrative provisions necessary to comply with the directive by 5 December 2011, or to ensure that the social partners introduce the necessary provisions by way of an agreement.

the competent authorities of Member States, and imposing on them the obligation to review the restrictions or prohibitions, so, as to ensure that any potential prohibitions or restrictions on the use of temporary agency work are justified. Therefore, the provision does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions on the use of temporary agency work which are not justified on the grounds of general interest within the meaning of Art. 4(1).[13]

In Case C-216/15, *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH,*[14] the Court[15] ruled that the concept of 'worker' as referred to in Directive 2008/104/EC must be interpreted as covering any person who carries out work, that is to say, who, for a certain period of time, performs services for and under the direction of another person, in return for which he receives remuneration (as determined in the Court's Case C-232/09 *Danosa,*[16] para. 39 and 40), and who is protected on that basis in the Member State concerned, irrespective of the legal characterisation of his employment relationship under national law, the nature of legal relationship between those two persons and the form of that relationship. Art. 1(1) and (2) of Directive 2008/104/EC on temporary agency work must be interpreted so as to cover the assignment by a not-for-profit association, in return for financial compensation, of one of its members to a user undertaking for the purposes of that member carrying out, as his main occupation and under the direction of that user undertaking, work in return for remuneration, where that member is protected on that basis in the Member State concerned, this being a matter for the referring court to determine, even if that member does not have the status of worker under national law on the ground that he has not concluded a contract of employment with that association.[17]

In the next section of the paper the author will focus on the legal framework of the Italian and Croatian labour law system concerning agency work, while paying special attention to the examples of good practice noted in both countries which could be implemented *de lege ferenda.*

4. THE LEGAL FRAMEWORK OF THE REPUBLIC OF CROATIA WITH RESPECT TO AGENCY WORK

The Labour Act (hereinafter: LA) defines[18] temporary employment agency (hereinafter: the agency) as an employer who, based on worker assignment contract,

13 CJEU Case C 533/13, Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuote ry and Shell Aviation Finland Oy*,* op. cit., para. 22-32.

14 CJEU Case C 216/15, Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*,* ECLI:EU:C:2016:883.

15 For a general picture on the case consult Laleta, Sandra, Križanović, Anamarija, Rad putem agencija za privremeno zapošljavanje u hrvatskom, europskom i usporednom pravu, op. cit., pp. 332-335.

16 CJEU Case C-232/09, Dita Danosa v LKB Līzings SIA, ECR 2010 I-11405.

17 CJEU Case C 216/15, Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*,*,para. 43 and 49.

18 Labour Act (*Zakon o radu*), Official Gazette No. 93/14, 127/17 (hereinafter: LA), Article 44.

assigns workers to another employer (hereinafter: the user undertaking) to work there temporarily. The agency may also perform economic activities pertaining to employment, provided that it holds an appropriate license under specific provisions. An assigned worker is the worker employed by the agency and assigned to the user undertaking. The agency may perform the activity of assigning workers to the user undertakings provided that it is established in accordance with specific provisions and registered with the ministry responsible for labour[19] and may not perform such activities prior to the registration with the appropriate ministry responsible for labour.[20]

While performing activities of assigning workers to user undertakings, the agency is not allowed to charge the worker a fee for being assigned to the user undertaking or a fee for the entry into an employment contract between the assigned worker and the user undertaking. The agency must deliver to the ministry responsible for labour the statistical data on the activities with regard to the assignment of workers[21], while a ministerial ordinance[22] should stipulate the contents and the method of and time limits for the submission of such data.

A worker assignment contract[23] between the agency and the user undertaking must be in written form. In addition to the agency's general terms of operations, the elements of the contract referred include: the number of assigned workers required by the user undertaking, the period of assignment, the place of work, the works to be performed by assigned workers, the method and period during which the user undertaking must deliver to the agency the calculation for remuneration to be paid and the regulations applied at the user undertaking for the purpose of determining the remuneration, and the person authorised to represent the user undertaking before the assigned workers.

If workers are assigned to the user undertaking located abroad, the contract must, in addition to the previously mentioned data contain the information concerning: the legislation applicable to the assigned worker's employment relationship, the assigned worker's rights, which the user undertaking must ensure to the worker and which

19 Ministry of Labour and Pension System (*Ministarstvo rada i mirovinskog sustava Republike Hrvatske*).

20 Currently there are 92 temporary employment agencies registered before the ministry responsible for labour, available at: http://www.mrms.hr/ministarstvo-rada-i-mirovinskoga-sustava/trziste-rada-i-zaposljavanje/popis-agencija-za-privremeno-zaposljavanje/ (10 April 2018). It is interesting that the number is increasing since in 2014 there were 75 agencies, compared to 45 agencies in 2013. Laleta, Sandra, Križanović, Anamarija, Rad putem agencija za privremeno zapošljavanje u hrvatskom, europskom i usporednom pravu, op. cit. p. 315.

21 In 2014-15 only 0,3%-0,4% of employed persons in Croatia were agency workers, hence, around 8.000 persons according to the data by the Croatian Employers Association. Laleta, Sandra, Križanović, Anamarija Rad putem agencija za privremeno zapošljavanje u hrvatskom, europskom i usporednom pravu, op. cit., p. 305. In 2016 according to the ministry responsible for labour, 19.327 activities of assigning workers were recorded, but that does not mean that these figures represent the real number of persons since one person may be assigned more than just once in a year. The official webpage of the ministry responsible for labour, available at: http://www.mrms.hr/ministarstvo-rada-i-mirovinskoga-sustava/rad/ (11 June 2018).

22 Pravilnik o sadržaju, načinu i roku dostave statističkih podataka o privremenom obavljanju poslova, Official Gazette No. 125/15.

23 LA, Article 45.

are exercised pursuant to the LA and other laws and regulations of the Republic of Croatia, and the obligation to bear the costs of repatriation. The worker's assignment contract shouldn't be concluded for the purpose of replacing the workers in strike at the user undertaking, performing works that were performed by workers subject to the collective redundancy procedure effected by the user undertaking in a previous period of six months, works that were performed by the workers whose employment contracts were terminated by the user undertaking due to business reasons in a previous period of six months, works that are, under the regulations on safety protection at work, regarded as works under special working conditions, while the assigned worker does not meet the particular requirements, and in case of assigning workers to another agency. By virtue of the worker assignment contract the agency and the user undertaking may agree that the user undertaking must keep record of the assigned worker's working time during the assignment period as well as specify the time limits and method for the delivery of that record to the agency.

The temporary assignment contract is defined by Art. 46 of the LA in more specific detail. Such a contract stipulated between the agency and the worker may be concluded as a temporary assignment contract of fixed or indefinite duration. In addition to the information determining the content of every employment contract[24] or, in the case of assignment of worker by the agency to the user undertaking located abroad,[25] the contract must contain the information concerning: the contract concluded for the purpose of assigning a worker for temporary work at the user undertaking, a reference to works that the worker will perform, and obligations of the agency towards the worker during the period of the assignment. In the period during which the assigned worker with an employment contract of indefinite duration is not assigned to the user undertaking, he/she is entitled to the remuneration determined by the LA.[26] The contract concluded for an indefinite period equal to the period of the worker's assignment to the user undertaking must contain the information concerning: the names of contracting parties and their residence or registered place of business, the expected duration of the contract, the registered place of business of the user undertaking, the place of work, the works to be performed by the assigned worker, the date of the beginning and the end of employment, remuneration, bonuses and pay periods and finally the duration of a regular working day or week.

The agreed conditions concerning remuneration and other matters (including working time, breaks and rest periods, safety at work protection measures, protection of pregnant workers, parents, adoptive parents and youth, and non-discrimination, in accordance with specific anti-discrimination regulations) applicable to the assigned workers may not be lower or less favourable when compared to the remuneration or working conditions applicable to the worker employed with the user undertaking for the performance of the same tasks, which would be applicable to the assigned worker

24 LA, Article 15(1).

25 LA, Article 18(1).

26 LA, Article 95(5): "Unless otherwise provided for by the LA or another law, regulations or administrative provisions, collective agreement, working regulations or employment contract, the worker shall be entitled to compensation amounting to the average remuneration he received over the preceding three months."

should he have concluded an employment contract with the user undertaking. By way of derogation from such a guarantee, less favourable working conditions applicable to the worker assigned to the user undertaking as compared to those applicable to the worker employed at the user undertaking may be agreed upon by a collective agreement concluded between the agency or an association of agencies and trade unions.[27] Where the remuneration and other working conditions cannot be determined in accordance with the above mentioned provisions, they must be determined in the worker's assignment contract. This research suggests that there are no collective agreements in Croatia applicable to agency workers. Without a strong 'state run campaign', hence, through the social dialogue in the context of the Economic and Social Council, it seems unlikely that employers will be willing to sign collective agreements, which would grant more rights (both economic and non-economic) to that category of workers.

The issue of termination of temporary assignment contracts is defined in Art. 47 of the LA. It specifies that the provisions of the LA on collective redundancies do not apply to the termination of temporary assignment contracts. The agency may in extraordinary circumstances terminate a temporary assignment contract if such circumstances result in the extraordinary notice of termination where the continuation of employment relationship is regarded as impossible due to a severe breach of obligations from the employment relationship or due to any other fact of critical importance,[28] and if the user undertaking informs the agency thereof in writing within fifteen days of the date of discovery of the fact providing for the grounds for an extraordinary notice of dismissal. The extraordinary notice of dismissal takes effect as of the day of the written notification to the agency. On the other hand, the fact that the need for assigned worker at the user undertaking ceased to exist prior to the expiration of assignment period may not constitute a ground for the termination of temporary assignment contract. Where an assigned worker finds that during his assignment at the user undertaking any of his/her rights arising from the employment relationship were violated, he/she must seek protection from the court of the violated right with the employer.[29]

Regarding the length of the assignment, the LA[30] specifies that the user undertaking may not use the work of the assigned worker for the performance of the same works for an uninterrupted period exceeding three years unless this is necessary for the purpose of replacing a temporarily absent worker or where it is allowed by collective agreement on the grounds of some other objective reasons. An interruption of less than two months is not regarded as the interruption of the three-year period.

27 The specific provision suggests that such standard may be derogated only through collective agreements. See, in this regard, the Opinions of the ministry responsible for labour, Opinion as of 15 July 2015, available at: http://www.iusinfo.hr/OfficialPosition/Content.aspx?SOPI=MMIN201D20150715N443&Doc=MMIN_HR (22 April 2018) and Opinion on 11 September 2014, available at: http://www.iusinfo.hr/Official Position/Content.aspx?SOPI=MMIN201D20140911N442&Doc=MMIN_HR (22 April 2018)

28 LA, Article 116(1).

29 LA, Article 133.

30 LA, Article 48.

The agency's obligations towards the assigned workers are determined by Art. 49 of the LA. Before assigning the worker to the user undertaking, the agency must submit an assignment letter to the worker, which must contain all pieces of information discussed above. Before assigning the worker to the user undertaking, the agency must inform the worker about any specific professional qualifications or skills required for the performance of works at the user undertaking, and about any work-related risks regarding health and safety protection at work. Furthermore, the agency must ensure training for the assigned worker in accordance with the regulations on health and safety protection at work, unless the worker assignment contract imposes this obligation upon the user undertaking. The agency must also train the assigned worker with respect to new technologies applicable to the work to be performed by the assigned worker, unless the user undertaking is obliged to provide the training according to the worker assignment contract. The agency must pay the assigned worker the remuneration for the work performed at the user undertaking as defined by contractual provisions even if the user undertaking fails to deliver to the agency the calculation of remuneration to be paid.

Art. 50 of the LA lays down the obligations of the user undertaking. According to the provisions of this article, the user undertaking is regarded as the employer of the assigned worker, within the meaning of the obligation of implementing the provisions of the LA and other laws and regulations governing the safety and health protection at work and a special protection of particular categories of workers. In case of entering into the worker assignment contract, the user undertaking must fully and truthfully and in writing inform the agency about the working conditions applicable to its permanent workers performing the same work which the assigned worker will be required to perform. The user undertaking is obliged at least once a year notify the works council about the number of assigned workers and the reasons for such assignments. In addition, it must inform the assigned workers about vacancies for which they meet the requirements.

Regarding the issue of indemnity,[31] it must be pointed out that any damage to a third party caused by the assigned worker during his/her work at the user undertaking or the work related thereto must be indemnified by the user undertaking, which is regarded as the employer considering the recourse liability of the assigned worker. The agency is held responsible for any damage caused by the assigned worker to the user undertaking during his/her work or the work related thereto, pursuant to the general provisions of the law of civil obligations.[32] If the assigned worker suffers any damage at work or in relation to the work at the user undertaking, he/she may file a claim against the agency or the user undertaking, in accordance with the LA provisions on employer's liability for damages caused to the worker.[33]

31 LA, Article 51.

32 Civil Obligations Act (*Zakon o obveznim odnosima*), Official Gazette No. 35/05, 41/08, 125/11, 78/15, 29/18.

33 LA, Article 111, Employer's liability for damages caused to the worker: "(1) In the case of any damage caused to the worker at the workplace or in relation to his work, the employer shall be obliged to indemnify the worker in accordance with the general provisions of the law of civil obligations. (2) The indemnification right referred to in paragraph 1 of this Article shall also

The final provision of the LA deals with the obligation on record keeping.[34] The agency must submit a written application for the registration with the ministry responsible for labour. The agency is also required to send a supporting documentation, which proves that the agency was established in accordance with specific provisions. The ministry issues a registration certificate containing the agency's registration number and the date of registration. The agency is thus obliged to indicate its registration number in its legal transactions, business documents, letters and contracts.

5. THE LEGAL FRAMEWORK OF THE REPUBLIC OF ITALY WITH RESPECT TO AGENCY WORK

In Italy the employment agencies were introduced by D. Lgs. No. 276 of 2003 and are regulated by Art. 4 and subsequent articles.[35] Currently, the issue of providing employment is regulated by Art. 30 and subsequent articles of D. Lgs. No. 81 of 2015, known as the *Jobs Act*.[36] In this section, we will point out some of the most important elements of the Italian legal framework concerning agency work.

The dual purposes, one aiming at the prevention of abuses and the other aiming at the prevention of overusing that institute have made the Italian legislator opt for a compromised approach in order to achieve balance between the two opposite interests.[37]

According to Art. 30, the on-supply agreement, which could be of permanent[38] or temporary duration, is "*an agreement by which a supply agency places at the disposal of the user one or more of its employees, who, for the entire duration of the assignment, perform his/her activity in the interest and under the direction and control of the user"*. Here we must point out, that the agency worker is in a subordinate employment relationship. If it is a permanent one, it is subject to the rules stipulated for indefinite employment relationships, and if it is a fixed-term contract, it is subject to the regulations governing fixed-term employment, without prejudice to the application of the rules on the maximum duration of the single agreement or the maximum duration of consecutive contracts, with the exception of the stipulation of

apply to any damage caused by the employer to the worker on the grounds of violation of his rights arising from employment relationship."

34 LA, Article 52.

35 Decreto Legislativo 10 settembre 2003, No. 276, "Attuazione delle deleghe in materia di occupazione e mercato del lavoro, di cui alla legge 14 febbraio 2003, No. 30", Official Gazette No. 235, 9 October 2003 (hereinfurther: D. Lgs. no. 276 of 2003).

36 Decreto Legislativo 15 giugno 2015, No. 81, "Disciplina organica dei contratti di lavoro e revisione della normativa in tema di mansioni, a norma dell'articolo 1, comma 7, della legge 10 dicembre 2014, No. 183, Official Gazette No. 144, 24 June 2015 (hereinafter: D. Lgs, No. 81 of 2015).

37 Fili, Valeria, Riccardi, Angelica, La somministrazione di lavoro, pp. 293-336, pp. 295-296, in Ghera, Edoardo, Garofalo, Domenico, Contratti di lavoro, mansioni e misure di conciliazione vita-lavoro nel Jobs Act 2, Cacucci Editore, Bari, 2015.

38 Introduced in the Italian labour law system in 2003 with the D.Lgs. 276. of 2003. It is important to note that only workers who have a permanent contract of employment with their agency could be assigned for an indefinite period (Article 31 D.Lgs, No. 81 of 2015).

the last contract (Art. 19), the renewal of the contract (Art. 21), the quantitative limits (Art. 23), and the right of first choice (Art. 24).[39]

The employment agencies not only carry out brokering activities, but can also perform various functions, such as administrative activities, human resources selection and research and support for staff 're-collocation'. Similarly as in Croatia, the agencies in Italy must also register with the ministry responsible for labour.[40] The register is divided into five sections.[41]

This registration requires that specific financial and judicial requisites be met, such as, that the agency is established as a corporation or a cooperative (with the exception of human resources research, selection and 're-collocation' support agencies, which may also be organised as partnerships), that it has a registered office or a branch office in Italy or another EU Member State, that it possesses suitable premises as well as adequate professional skills, that it is part of the National Labour Exchange network, etc. It must be pointed out that different types of agencies must meet different conditions. The ministry responsible for labour issues a temporary authorization to exercise the activities specified in the registration application and puts the agency on the list of registered agencies. Naturally, this depends upon the fulfilment of judicial and financial requisites stipulated by law. After two years, this temporary authorisation can be turned into an indefinite one. The reason for such rigorous regime is the protection of workers who make use of the services offered by such agencies.[42]

The Table below shows the number of agency workers and their percentage compared to the number of employed persons in Italy according to INPS[43] data.[44] Based on the figures below, we can conclude that agency work is twice as much used in Italy as in Croatia.

39 Article 34(2-3), D.Lgs, No. 81 of 2015.

40 Ministry of Labour and Social Policy (*Ministero del Lavoro e delle Politiche Sociali*).

41 Article 4(1), D.Lgs. No. 276 of 2003: "Five sections of the Register are: 1) administration agencies authorised to perform all the activities indicated in Art. 20 as "general" employment administration agencies because they are permitted to carry out multiple activities; 2) permanent duration employment administration as "specialist" administration agencies; 3) brokering agencies; 4) human resources research and selection agencies; 5) support for professional re-collocation agencies."

42 Cataudella, Maria Cristina, The Regulation of the Labour Market, pp. 41-57, pp. 45-46 in Labour Law and Industrial Relations in Italy (Eds. Franco Carinci, Emanuele Menegatti), IPSOA, Wolters Kluwer, Milano, 2015.

43 Istituto nazionale della previdenza sociale.

44 INPS official page with data base statistics on employed persons in Italy, available at: https://www.inps.it/webidentity/banchedatistatistiche/menu/dipendenti/main.html (10 May 2018). See also: http://www.bollettinoadapt.it/trend-di-sviluppo-della-somministrazione-italia-alcune-riflessioni-alla-luce-dei-dati-inps/ (10 May 2018).

Year	No. of agency workers	No. of employed persons	Percentage of agency workers
2012	*210.000*	*22.570.000*	*0,93%*
2015	*275.100*	*22.470.000*	*1,22%*
2016	*294.867*	*22.760.000*	*1,29%*

Source: INPS data base, 2018.

The number of workers in Italy hired permanently on the basis of an on-supply agreement (agency workers agreements) may not exceed 20% of the number of workers employed on the basis of the contract of indefinite duration, who have already been working for the user as of the first of January of the year in which the on-supply agreement was concluded.[45] This limit may be higher if this is specified in the collective agreements of companies.[46] If the percentage limit is exceeded, the worker may request the establishment of the employment relationship as the user's employee.[47] For the agency workers employed on a fixed term, however, the limits can be regulated only through a collective agreements.[48]

Similarly as in Croatia, in Italy the worker employed on the basis of a permanent agreement has the right, unless he/she performs his/her service at the user's enterprise but remains at the disposal of the supply agency, to an available indemnity determined by the employment contract, whose sum is foreseen by the collective agreement applicable to the user and, which in any case, may not be lower than the amount foreseen by the decree of the ministry responsible for labour.[49] The purpose of the indemnity is, of course, to compensate the worker for his/her availability guaranteed to the supply agency in those periods when he/she was not engaged by the user.[50]

If the user decides to entrust the agency higher-profile workers or the ones performing non-equivalent tasks, the user must immediately inform the agency in writing in this regard. If the user fails to do so, he/she is exclusively liable to compensate the worker for the differences in the amount of remuneration.[51]

Regarding the right to an equal treatment and non-discrimination, the supplied worker has the right to the basic working and occupational conditions, which are altogether not inferior to those applied to same-level workers employed by the user. In other words, no comparison should be made between the single elements of the relationship, but only based on the overall treatment.[52] The worker has the right *"when with the user, for the entire duration of the assignment, to exercise the right*

45 In case of a "start-up" the percentage is calculated on the day when the contract for providing the agency worker was concluded between the agency and the user. Fili, Valeria, Riccardi, Angelica, La somministrazione di lavoro, op. cit., p. 300.
46 Article 31(2-3), D. Lgs, No. 81 of 2015.
47 Article 38(2), D. Lgs, No. 81 of 2015.
48 Fili, Valeria, Riccardi, Angelica, La somministrazione di lavoro, op. cit., p. 312.
49 Article 34(1), D. Lgs, No. 81 of 2015.
50 Cataudella, Maria Cristina, The Regulation of the Labour Market, op. cit., p. 49.
51 Article 33(5) and Article 35(5), D. Lgs, No. 81 of 2015.
52 Article 35(1), D. Lgs, No. 81 of 2015.

to freedom and trade-union activities as well as to participate in meetings of human resources employed by the user".[53] This means that the right to participate in trade union activities is guaranteed twice, once before the agency and once before the user.[54]

Similarly as in Croatia, in Italy it is prohibited for employment agencies to demand or receive payment from the worker, directly or indirectly.[55] This rule is also enacted in the ILO Convention No. 181 Art. 7(1) and in Directive 2008/104/EC Art. 6(3). In Italy, on the other hand, it is determined that collective agreements stipulated by workers and employers' associations, comparatively more representative on a national or territorial level, may foresee derogations from this rule for specific categories of high-profile, professional workers.[56]

6. GOOD PRACTICE EXAMPLES

In this section of the paper, the author will give a short summary of some of the good practices of both countries regarding the regulation of agency work.

With respect to Croatia, the author points out that the LA:

1. defines the obligation to issue data to the Ministry (with a specific ministerial regulation in this regard),
2. forbids the payment of a fee by a worker,
3. sets the total length of the loan of agency workers to 3 years (with a few exceptions),
4. determines the content of the contract if supplying the work is supplied in a foreign country,
5. foresees high penalties for not respecting the rules on agency work (€4.133 to € 13.333 as compared to €250 to €1.250 in Italy).

In Italy, on the other hand, the Act (D. Lg/L.), determines the following:

1. the conditions to be registered as an agency are determined by the Act, not a ministerial regulation
2. the authorisation for employment agencies providing services is temporary, but may after a two-year period of monitoring become permanent,
3. trade union rights are guaranteed both before the agency and before the user,
4. there are quantitative restriction on the number of agency workers:

- more than 20% of workers employed for an indefinite period,
- only the workers employed by the agency for an indefinite period may be employed,
- the collective agreement defines the number of agency workers with a fixed-term employment contract.

Italy, however, unlike Croatia, has the *National Collective Agreement for the category of agency work*.[57] Although the collective agreement was concluded on 1

53 Article 36(2), D. Lgs, no. 81 of 2015. Cataudella, Maria Cristina, The Regulation of the Labour Market, op. cit., p. 49.

54 Fili, Valeria, Riccardi, Angelica, La somministrazione di lavoro, op. cit., p. 329.

55 Article 11, D. Lgs. No. 276 of 2003.

56 Cataudella, Maria Cristina, The Regulation of the Labour Mark*et*, op. cit., p. 46.

57 Contratto Collettivo Nazionale di Lavoro per la categoria delle Agenzie di Somministrazione

January 2014 for a three-year period, it remains in force until a new collective contract is concluded. This collective agreement applies to the whole national territory and to all agency workers. The agreement specifies that agencies must provide education and vocational training to their workers, safety and work protection, but it also determines their trade union rights, protection of their labour rights in general, the content of the written contract of employment, the length of the trial period and notice period both in a fixed-term employment contract and in the one of an indefinite duration. Furthermore, some of the rules determined by the collective agreement demonstrate a higher level of labour and social protection of agency workers. These include the following:

1. female workers have the priority in being supplied to the user after their maternity leave (if they are not allowed the maternity leave allowance – they have the right to receive the amount of €2.250 from EBITEMP – a national bilateral body),
2. detailed determination of contractual clauses,
3. determination of apprenticeship,
4. monthly fee of €750,00 payed to the agency if the worker is employed permanently (after the first 12 months and until the expiration of 36 months), whereby it is forbidden to dismiss the relationship in the next 12 months, thus granting security to the worker.

7. CONCLUSION

To sum up, we can claim that both in Croatia and in Italy agency work is fairly well regulated, although, as shown in this paper, there are some good practice examples from Croatia which could be implemented in Italy and *vice versa*.

The paper thus suggests that Croatia should introduce some *de lege ferenda* regulations which are present in the Italian labour law system.

For instance, temporary authorisation, which after a two-year period of monitoring may become permanent, is a very good example of how the State can ensure that the agency provides more quality, given the fact that two years is a long enough period to see how the agency is performing its activity. Quantitative restrictions on the use of agency workers also seem a very good tool for preventing abuses, but the general number of employees by the user should also be taken into consideration, especially concerning 'small employers'. Additionally, trade union rights, which may be exercised both before the agency as the main employer but also before the user represent a big step forward in providing more security to agency workers.

Finally, the national collective agreement for agency workers is a great achievement for Italy. The social dialogue in Croatia, supported by the State through the Economic and Social Council, on the other hand, could represent an excellent tool which could give the part of the notion 'security' to the notion 'flexible' meaning that agency work could become a good 'flexicurity' model.

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Vanja Smokvina*

Sažetak

POSEBNOST NEKIH ASPEKATA AGENCIJSKOGA RADA U ITALIJI I HRVATSKOJ

Rad obuhvaća kratki uvod u pravni okvir hrvatskoga i talijanskog sustava radnog prava u pogledu agencijskog rada. Osim toga, u radu se daje prikaz pravnog okvira Europske unije u tom području, predstavljaju se neke od najvažnijih odluka Suda Europske unije, kao i zajednička rješenja oba pravna sustava. Zaključno, rad daje prikaz određenih posebnosti i rješenja *de lege ferenda* za obje države.

Ključne riječi: *agencijski rad; Europska unija; Italija; Hrvatska.*

Zusammenfassung

BESONDERHEITEN MANCHER ASPEKTE DER BEFRISTETEN LEIHARBEIT IN ITALIEN UND KROATIEN

In diesem Beitrag wird eine kurze Einführung in den Rechtsrahmen des kroatischen und italienischen Arbeitsrechtssystems bezüglich der Leiharbeit gegeben. Der Rechtsrahmen der Europäischen Union, die wichtigsten Rechtsprechungen des Gerichtshofs der Europäischen Union und gemeinsame Probleme beider Länder werden auch in diesem Beitrag besprochen. Insbesondere werden in diesem Beitrag manche Besonderheiten angesprochen, welche in beiden Ländern *de lege ferenda* benutzt werden können.

Schlüsselwörter: *Leiharbeit; die EU; Italien; Kroatien.*

Riassunto

LA PECULIARITÀ DI ALCUNI ASPETTI DELLA SOMMINISTRAZIONE DI LAVORO IN ITALIA ED IN CROAZIA

Il lavoro rappresenta una breve introduzione nel quadro giuridico del sistema

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giuslavoristico croato ed italiano relativamente alla somministrazione di lavoro. Oltre a ciò, nel lavoro si illustra il quadro giuridico dell'Unione europea in tale ambito; si disamina la giurisprudenza più rilavante della Corte di Giustizia dell'Unione europea, come anche le soluzioni giuridiche che accomunano i due ordinamenti giuridici e, più importante ancora, si offre una rassegna delle peculiarità e di soluzioni *de lege ferenda* per entrambi i paesi.

Parole chiave: *somministrazione di lavoro; UE, Italia; Croazia.*

EU RESCUE AND RESTRUCTURING STATE AID GUIDELINES: AN OPPORTUNITY TO RESTRUCTURE CORPORATE GOVERNANCE AND CORPORATE CULTURE

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Summary

Undertakings in difficulty, having exhausted all market options, may resort to State aid to rescue and/or restructure its operations in order to return to viability. the author looks closer into the opportunity for such undertakings to change within so as to abandon practices which may have represented at least one of the roots of the deficiencies leading them to difficulties. The stringent rules of rescue and restructuring of firms in difficulties provide a second chance to restore their business, account of debts, take stock of actions and potentially rise again. Yet, the overall restructuring given as a second chance by the State aid and the role of the state, should not present a carte blanche for old policies and approaches to be repeated with the taxpayers' money. The restructuring should also be a stock-taking opportunity, an internal scrutiny where the corporate culture and the governance of the undertaking changes as well. There should be room to (re)consider corporate governance and audit of corporate culture as elements of restructuring process as well as restructuring plans, to prevent the undertaking on the receiving end of State aid to lapse again. Being given a second chance, applying practices and exercising behaviour that (may) have lead the undertaking to its difficulties, is not a guarantee of successful restructuring and return to viability but may, indeed, represent an internal subjective peril to the objective restructuring goals to be achieved. Hence, the author explores whether non-tangible elements such as an enhanced corporate governance and change of corporate culture, should be introduced

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as mandatory in the course of undertaking restructuring. The author does not probe into corporate governance and corporate culture as such, but perceives them as welcoming factors to achieve the desired outcome of restructuring aid, namely a successful return to viability using restructuring aid.

Keywords: *undertaking in difficulty; restructuring aid; state aid; corporate culture; corporate governance.*

1. INTRODUCTION

Resorting to rescue and/or restructuring aid once all the market options have been exhausted in order to return to viability[1], represents "a last call" for undertakings that have found themselves in difficulty. The use of market option may refer to commercial loans by commercial banks providing sufficient collateral is secured, sale of assets, insolvency proceeding etc. Should no market option be available, the risk of ongoing and potential partners to do business with such an undertaking is higher than the usually accepted and calculated standard under the risk management process. Thus, the undertaking in difficulty may initiate the rescue and/or restructuring aid to attempt, once and for all, to change within its approach (depending on the sector where it operates) to its production, to modernize, downsize, cut costs, implement new policies and change management, take stock of human resources in future restructured circumstances, reorganize marketing and sales, target new opportunities and return to the market.[2] Largely, the undertakings resorting to rescue and/or restructuring aid are of public character, entirely or partially owned by public authorities (namely, the State/Central government), providing services of public or strategic interest of the citizens,[3] yet the privately-owned companies are also eligible to take that path since the relevant soft law applicable to rescue and restructuring aid[4] makes no difference between sources and structures of undertakings' ownership providing that "(…) a well-defined objective of common interest"[5] is to be achieved. Addressing the public resources to overcome difficulties, either in the form of direct financial injection to overcome a liquidity gap or state guarantee(s) to manage getting a loan or other type of rescue and restructuring aid, represents state aid and thus falls under stringent rules of the European Union acquis. Primarily, this refers to the Treaty on the Functioning of the European Union (hereinafter: TFEU)[6] whereby state aid is generally incompatible with internal market as it distorts market competition, but allows for state aid to be

1 European Commission, Communication — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249, 31.7.2014, point 1.8. (21 July 2018).

2 More on modalities of restructuring see Lubián, F. J. L. L., The Executive Guide to Corporate Restructuring, IE Publishing Series, Palgrave Macmillan UK, 2014.

3 State Aid Scoreboard 2017, http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html), (25 July 2018).

4 R&R Guidelines 2014, point 18.

5 Ibid; point 8.

6 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390 (15 July 2018).

granted in some exceptions and under specific criteria.[7] Once the undertaking and the State have verified that the given situation appears to fall under the scope of allowed exceptions and criteria, the procedure may start leading to eventual granting of state aid. The procedure as well as the substance of the state aid aim and its expenditure is convened under the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulties (hereinafter: R&R Guidelines 2014). Introduced in 2014 as part of the overall State aid modernization process,[8] R&R Guidelines 2014 aim at ensuring that public expenditure in such cases is used properly to restructure the undertaking in difficulty, that it is effective but also to represent *an investment for future, based on a return on investment principle.*[9] The R&R Guidelines 2014 set forth the baseline of how to present the rescue and restructuring case of the undertaking in difficulty; to consider all elements, outline the expenditure over the course of the rescue and restructuring process, to account for all debts, prepare a sound restructuring plan, including the financial plan and the role of the stakeholders as well as the State. Moreover, key concepts,[10] such as burden sharing, own contribution, measures to limit distortions of competition and behavioural measures need to be encompassed to make sure that viability is ensured and return to market smoothly transitioned. Burden sharing implies that the undertaking in difficulty must account for its losses and debt as well as secure that the State participates in future profits once the restructuring is completed.[11] Own contribution to restructuring cost, free of State aid, must be secured by the undertaking itself, a group to which it belongs or a new investor, in form of e.g. debt write-off or a loan[12] to match the State aid granted in an equal share of 50:50.

7 Ibid, Article 107, paras 2. and 3.

8 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU State aid modernisation (SAM), COM(2012) 209 final, 8.5.2012 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2012:0209:FIN (25 July 2018).

9 Obradović Mazal, T. and Butorac Malnar, V., The Discretionary Power of Competent Authorities in Applying State Aid Rules on Rescue and Restructuring, in: Potocan, V., Kalinic, P., Vuletic, A. (eds.), 26th International Scientific Conference on Economic and Social Development - Building Resilient Society, Conference Proceedings, Varaždin, 2017, p. 599-607.

10 Other key issues of the modernization process looking through the last decade of state aid reform, the modernization process and its outcomes can be found in Herwig, H. and Micheau, C., State Aid Law of the European Union, Oxford University Press, 2016, p. 10 et seq.

11 R&R Guidelines 2014, - point 66. „Adequate burden sharing will normally mean that incumbent shareholders and, where necessary, subordinated creditors must absorb losses in full. Subordinated creditors should contribute to the absorption of losses either via conversion into equity or write-down of the principal of the relevant instruments. Therefore, State intervention should only take place after losses have been fully accounted for and attributed to the existing shareholders and subordinated debt holders. In any case, cash outflows from the beneficiary to holders of equity or subordinated debt should be prevented during the restructuring period to the extent legally possible, unless that would disproportionately affect those that have injected fresh equity.“ point 67. „Adequate burden sharing will also mean that any State aid that enhances the beneficiary's equity position should be granted on terms that afford the State a reasonable share of future gains in value of the beneficiary, in view of the amount of State equity injected in comparison with the remaining equity of the company after losses have been accounted for.“

12 R&R Guidelines 2014, - point 62. „A significant contribution to the restructuring costs is required from the own resources of the aid beneficiary, its shareholders or creditors or the business

Measures to limit distortion of competition are applied to restore the balance between the received State aid and current market position of the beneficiary and normally take the form of divestments and/or reduction of business activities.[13] The undertaking in difficulty using State aid to return to viability is also to refrain from such behaviour whilst the restructuring is in process that would enhance the fact that it is using State aid, advertising this fact as a market advantage or pursuing acquisitions instead of spending funds on activities outlined in the restructuring plan.[14] Since its adoption in 2014, the R&R Guidelines have received some attention by legal scholars such as Bacon,[15] Hofmann and Micheau,[16] Phedon.[17] Yet, an important issue to be tackled is the corporate governance culture in future rescued and/or restructured undertaking. In essence, what leads to such an extremely difficult business and financial situation besides the overall market trends, severe crises or some other sector-specific circumstance (e.g. shipbuilding) may also be an insufficient, ineffective, submissive corporate culture and below-standard, ill – managed corporate governance.

Departing from this, the author looks at corporate governance and corporate

group to which it belongs, or from new investors. Such own contribution should normally be comparable to the aid granted in terms of effects on the solvency or liquidity position of the beneficiary. For example, where the aid to be granted enhances the beneficiary's equity position, the own contribution should similarly include measures that are equity-enhancing, such as raising fresh equity from incumbent shareholders, the write-down of existing debt and capital notes or the conversion of existing debt to equity, or the raising of new external equity on market terms. The Commission will take account of the extent to which own contribution has a comparable effect to the aid granted when assessing the necessary extent of the measures to limit distortions of competition in accordance with point 90."

13 R&R Guidelines 2014 - point 78. „On the basis of an assessment in accordance with the criteria for calibration of measures to limit distortions of competition (set out in section 3.6.2.2), undertakings benefiting from restructuring aid may be required to divest assets or reduce capacity or market presence. Such measures should take place in particular in the market or markets where the undertaking will have a significant market position after restructuring, in particular those where there is significant excess capacity. Divestments to limit distortions of competition should take place without undue delay, taking into account the type of asset being divested and any obstacles to its disposal, and in any case within the duration of the restructuring plan. Divestments, write-offs and closure of loss-making activities which would at any rate be necessary to restore long-term viability will generally not be considered sufficient, in the light of the principles set out in section 3.6.2.2, to address distortions of competition."

14 R&R Guidelines 2014, - point 84. „The following behavioural measures must be applied in all cases, to avoid undermining the effects of structural measures, and should in principle be imposed for the duration of the restructuring plan: (a) Beneficiaries must be required to refrain from acquiring shares in any company during the restructuring period, except where indispensable to ensure the long-term viability of the beneficiary. This aims at ensuring that the aid is used to restore viability and not to fund investments or to expand the beneficiary's presence in existing or new markets. Upon notification, any such acquisitions may be authorised by the Commission as part of the restructuring plan; (b) Beneficiaries must be required to refrain from publicising State support as a competitive advantage when marketing their products and services."

15 Bacon, K., European union law of State aid, 3rd edition, Oxford University Press, 2017.

16 Herwig, H. and Micheau, C., State Aid Law of the European Union, Oxford University Press, 2016.

17 Phedon, N., State Aid uncovered: Critical Analysis of Developments in State aid, Lexxion, 2017.

culture as the contributing elements to the overall restructuring process; namely, the changes that the undertaking undergoes, hopefully successfully, hardly achieve the sustainability of effectiveness unless the approach, core values, respect to external and internal processes and standards are not fully embraced. The Commission has to some extent singled out corporate governance as one of the key performance indicators of the restructurings' effectiveness, which is understandable considering that an overall effect of a restructuring process is dependent upon all individual factors combined. The change of corporate culture is, however, not mentioned. Corporate governance and corporate culture in the context of restructuring aid and the expected viability is presented in more details in section III. The author thus explores corporate governance and corporate culture as potential additional Key Performance Indicators (hereinafter: KPIs) of measuring whether the restructuring has been conducted properly and, moreover and more importantly, whether the (new) corporate governance and corporate culture of the restored undertaking prevents the undertaking to lapse again into difficulty.[18] The author contends that the lack of mandatory introduction to impose restructuring of the existing corporate governance and corporate culture actually deprives the undertaking of the obligation to make sure, internally and by internal rules, more discipline is secured to avoid the repetition of internal factors that lead the undertaking into difficulty yet again. This said, the corporate governance and corporate culture as KPIs should not only be beneficial for the undertaking itself, but also for the State - which has transformed its role from a benefactor trying to "attain particular economic and social objectives"[19] to an investor likely to have direct returns of its investment. Thus, the consideration to have these two elements additionally introduced should be welcomed.[20]

2. STATE AID AS A TOOL TO OVERCOME DIFFICULTIES

2.1. Rescue and restructuring aid at hand

As mentioned above, the undertakings facing serious difficulties in maintaining liquidity and daily business operations due to a lack of capital and financing, having exhausted available market options to secure further liquid capital, may opt to address a public body (the state) to secure aid for either rescue or restructuring. The undertaking is in difficulty when "…without intervention by the State, it will almost certainly be condemned to going out of business in the short or medium

18 R&R Guidelines 2014, - point 52. „Long-term viability is achieved when an undertaking is able to provide an appropriate projected return on capital after having covered all its costs including depreciation and financial charges. The restructured undertaking should be able to compete in the marketplace on its own merits."

19 Bellamy&Child, European Union Law of Competition, 7th ed., Rose, V., Bailey, D. (eds.), Oxford University Press, pp. 1275, para 17.010.

20 More on State as an investor see Obradovic Mazal, T., Butorac Malnar, V., Burden sharing principle in rescue and restructuring – no pain, no gain, 18th International Scientific Conference on Economic and Social Development – "Building Resilient Society", Book of proceedings, Zagreb, 9-10 December 2016, p. 705-716.

term. Therefore, an undertaking is considered to be in difficulty if at least one of the following circumstances occurs:

(a) In the case of a limited liability company, where more than half of its subscribed share capital has disappeared as a result of accumulated losses. This is the case when deduction of accumulated losses from reserves (and all other elements generally considered as part of the own funds of the company) leads to a negative cumulative amount that exceeds half of the subscribed share capital.

(b) In the case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its capital as shown in the company accounts has disappeared as a result of accumulated losses.

(c) Where the undertaking is subject to collective insolvency proceedings or fulfils the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors.

(d) In the case of an undertaking that is not an SME, where, for the past two years:

i. the undertaking's book debt to equity ratio has been greater than 7,5 and

ii. the undertaking's EBITDA interest coverage ratio has been below 1,0."[21]

The State, after the undertaking in difficulty unsuccessfully explored the market options or failed to find an appropriate strategic partner and /or investor, may agree to restore the viability of the undertaking in difficulty by granting restructuring aid. By doing so, the undertaking as well as the State need to adhere to requirements that primarily address the European Commission as to how to act when such a proposal is submitted for its consent. Yet, the reasoning and the decision-making process whether the Member State shall or shall not agree to embark on restructuring aid is entirely left to Member States.[22] Hence, the decision to agree to award the restructuring aid to an undertaking in difficulty is led by Article 107 of the TFEU[23] whereby aid granted "…through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market",[24] unless the aid falls under exceptions that are considered compatible with the internal market. By resorting to these types of aid, the firms in difficulties are essentially given another »go« at trying to sustain their difficulties, overcome them and continue operating at the level-playing field – with a price to pay. They also need to ensure their future actions mitigate the risk of competition being distorted by giving them unlawful market advantage over their competitors. The Commission has adopted the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty 20 years following the adoption of the original

21 Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Official Journal C 249, 31.07.2014.

22 R&R Guidelines 2014, - point 8. „It follows that undertakings should only be eligible for State aid when they have exhausted all market options and where such aid is necessary in order to achieve a well-defined objective of common interest."

23 OJ C 115, 9.5.2008, p. 91–92.

24 Loc. cit.

Guidelines of 1994, revised several times thereafter.[25] The emphasis of the title itself is on the non-financial sector due to the fact that the financial/banking sector is governed by a different set of rules as regards support to the financial institutions that may find themselves in difficulty.[26] To reiterate, the granting of aid that distorts or threatens to distort competition in the internal market is prohibited by the TFEU, unless it is a question of exceptions such as achieving objectives of common interest and assisting in levelling the functions of the market in specifically defined cases based on stringent criteria. Where the undertaking, due to difficulties in its financial and business operations, needs to exit the market, it should do so without burdening the Member State(s). Nonetheless, there have been a number of examples in the non-financial sector, where market existence of the undertakings was proven vital for the national and/or regional economy in terms of industry, know-how and level of employment, thus justifying the exception and in turn attempt to rescue and/or restructure the undertaking.[27] The R&R Guidelines set forth the conditions under

25 Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 368, 23.12.1994, p. 12) 25 July 2018; Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 283, 19.9.1997, p. 2) (25 July 2018); Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 288, 9.10.1999, p. 2) (25 July 2018); Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2) 25 July 2018; Commission Communication concerning the prolongation of the Community Guidelines on State aid for rescuing and Restructuring Firms in Difficulty (OJ C 156, 9.7.2009, p. 3) (25 July 2018); Commission communication concerning the prolongation of the application of the Community guidelines on State aid for rescuing and restructuring firms in difficulty of 1 October 2004 (OJ C 296, 2.10.2012, p. 3) (25 July 2018).

26 For financial sector and state support to financial sector see Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') Text with EEA relevance, OJ C 216, 30.7.2013, p. 1–15, 27.7.2018 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52013XC0730%2801%29 (27 July 2018).

27 See TFEU, Article 107.2 and 3. „2. The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.; 3. The following may be considered to be compatible with the internal market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission."

which State aid for rescuing and restructuring non-financial undertakings in difficulty may be considered compatible with the internal market to minimize its negative effects and the approach of the Commission when deciding whether or not to consent to State aid to be granted. The Guidelines address primarily the Commission: when approached by the Member State(s) to approve the intention to grant rescue and/or restructuring aid, the Guidelines set the procedure, criteria and requirements for the Commission to follow in addressing the Member State(s)' request. Naturally, the Member States follow that path as well which opens the issue of the very nature of the Guidelines.[28] The Guidelines also focus on providers of services of general economic interest (SGEI);[29] where the providers in difficulty fall under its scope, initially the assessment is carried out based on the Guidelines' principles taking into account the need to ensure the continuity of the service provision in line with Article 106(2) of the Treaty. The Guidelines foresee three variations of aid format: rescue aid,[30] restructuring aid[31] and temporary restructuring aid.[32] Rescue aid represents an urgent and temporary assistance of the public authority to keep an undertaking in difficulty in operations for a short period of time whilst preparing a thorough restructuring or liquidation plan. Thus, the undertaking is given time to consider its circumstances and make an appropriate decision as regards its business future (liquidation or restructuring). As regards the restructuring aid, it enables the undertaking to prepare such a plan that would enable it to "…restore the long-term viability of the beneficiary on the basis of a feasible, coherent and far-reaching restructuring plan, while at the same time allowing for adequate own contribution and burden sharing and limiting the potential distortions of competition."[33] Lastly, a temporary restructuring support - liquidity assistance designed to support the restructuring of an undertaking by providing the conditions needed for the beneficiary to design and implement appropriate action to restore its long-term viability. Temporary restructuring support may only be granted to SMEs and smaller State-owned undertakings.[34]

Compliance with the Internal Market needs to be secured and proven – in lieu to the principles of common interest that need to be verified, avoidance of serious social hardship that are certain to be caused by undertaking exiting the market. To that respect, the aid needs to be proportionate and limited to the minimum.[35] In case of

28 More on legal nature of soft law see Cini, M., From Soft Law to Hard Law?: Discretion and Rule-making in the Commission's State Aid Regime, Robert Schuman Centre for Advanced Studies, RSC No. 2000/35 at https://www.researchgate.net/publication/2395336_From_Soft_Law_to_Hard_Law_Discretion_and_Rule-making_in_the_Commission's_State_Aid_Regime (21 July 2018).

29 More on State aid and SGEI see Liszt, M., Čulinović-Herc, E., Certain Aspects of State Aid to Services of General Economic Interest, in: EU Competition and State Aid Rules- Public and Private Enforcement (Eds): Tomljenović, V., Bodiroga-Vukobrat, N., Butorac Malnar, V., Kunda, I. Springer 2017, str. 291-313.

30 R&R Guidelines 2014, point 26.

31 R&R Guidelines 2014, point 27.

32 R&R Guidelines 2014, point 28.

33 R&R Guidelines 2014, point 27.

34 R&R Guidelines 2014, point 32.

35 R&R Guidelines 2014, point 38 (e).

rescue aid, it should only represent the amount sufficient for the undertaking to get by whilst preparing a restructuring or liquidation plan as prescribed by the Guidelines.[36] The process becomes further difficult in case of restructuring aid: the amount of aid represents a minimum "investment" to enable the process of restructuring and must take all financial and operational circumstances into account – the existing financial resources of the recipient undertaking, its shareholders or its wider group of business. The undertaking is obliged to provide enough own contribution to the restructuring costs, completely free of state aid, amounting to minimum 50% of the total restructuring cost.[37]

From the point of view of the investor, the State has an interest to oversee the restructuring process via the corporate bodies under the company law to make sure its investment is protected by sound management decision and in consequence, its return on investment secured. Apart from the State's legitimate (and economic) interest to (over)see the implementation of the restructuring process in line with the restructuring plan and Commission's decision to approve the process, the author suggests it is in the undertaking's best interest to pursue, identify and target those corporate governance gaps, deficiencies and practices as well as to analyse its corporate culture not to allow the repetition of those relations, practices and policies that prevented the undertaking from reacting promptly to circumstances that had lead it to difficulties.

2.2. Restructuring plan – the "how" to ensure viability

When it comes to restructuring aid, it needs to be limited to the necessary and argued minimum "…on the basis of a feasible, coherent and far-reaching restructuring plan."[38] If the State is awarding aid in form of debt write off, capital or grants to the firm in difficulty, such a move may bring it into a more favourable position in the market and distort the position of its competitors. Thus, the restructuring plan must include a number of measures to mitigate that risk and make the firm adopt painful decisions in order to proceed further.[39] Therefore, all restructuring plans must, amongst others, contain own contribution to restructuring costs and, as introduced by R&R Guidelines 2014, the burden sharing principle. Own contribution may take different forms but what represents a common denominator is that it is normally as high as 50% of the total restructuring cost and its source is own (re)sources free of State aid. It is expected that the beneficiary of restructuring aid participates in the overall costs by its own finances, debt-to equity conversion or e.g. raising fresh equity. What is necessary is that the own contribution results neither from future profits nor from State aid to be received, but to be the result of present activities, significant and real. On the other

36 Timewise, rescue aid is limited to 6 months after the rescue aid measure has been authorised or, in the case of non-notified aid, not later than six months after disbursement of the first instalment to the beneficiary. After that time allocation, the Member States should demonstrate, e.g. that the rescue aid has been reimbursed, that the guarantee has been terminated or, *inter alia*, that the restructuring plan has been prepared for approval (p. 55(d)).

37 R&R Guidelines 2014, point 64.

38 R&R Guidelines 2014, point 27.

39 For details on content of a restructuring plans, see Annex II of the R&R Guidelines 2014.

hand, burden sharing assumes that the beneficiary has accounted for all the losses and is ready to, once the restructuring plan has been implemented fully and the firm has regained its viability, "return" the aid from the future profit to taxpayers or, as the R&R Guidelines 2014 define it, "… afford the State a reasonable share of future gains in value of the beneficiary, in view of the amount of State equity injected in comparison with the remaining equity of the company after losses have been accounted for..."[40] This way a balance is established between the State giving aid and the firm receiving it; both are in the process together and both have a vested interest to see the process succeed. To ease the process and enable that both the undertaking and the Member State are unanimously aware what needs to be submitted to the Commission, the R&R Guidelines 2014 offer an indicative content of what a restructuring plan needs to contain. The indicative content includes the description of the beneficiary, the description of the market or markets where the beneficiary operates, demonstration of the social hardship that the aid aims to prevent or the market failure that it aims to address, comparison with a credible alternative scenario not involving State aid, demonstrating how such objective or objectives would not be attained, or would be attained to a lesser degree, in the case of the alternative scenario. The content also includes, the description of the sources of the beneficiary's difficulties (including an assessment of the role of any flaws in the beneficiary's business model or corporate governance system in causing those difficulties and the extent to which the difficulties could have been avoided through appropriate and timely management action) and SWOT analysis, the description of possible plans to remedy the beneficiary's problems and comparison of those plans in terms of the amount of State aid required and the anticipated results of those plans, the description of the State intervention, full details of each State measure (including the form, amount and remuneration of each measure) and demonstration that the State aid instruments chosen are appropriate to the issues that they are intended to address. Further, the undertaking needs to provide, an outline of the process for implementing the preferred plan with a view to restoring the beneficiary's long-term viability within a reasonable timescale (in principle, not to exceed three years), including a timetable of actions and a calculation of the costs of each action, a business plan setting out financial projections for the next five years. Most importantly, the undertaking needs to demonstrate the return to long-term viability, demonstration of the return to viability under both a baseline and a pessimistic scenario, presentation and justification on the basis of a market survey of the assumptions used and sensitivity analysis, proposed own contribution and burden-sharing measures and proposed measures to limit distortions of competition.[41] The content is primarily built around the steps to be taken to return to viability, demonstrating precisely how as well as presenting means to bridge the circumstances that lead the undertaking to its worsened position, not implying the streamlines nor the substance of the "restructuring", leaving it up to the undertaking. Looking at the indicative content, the author observes that first half reflects on the past, including the identification of whether corporate governance system has contributed to undertaking's

40 R&R Guidelines 2014, point 67.
41 R&R Guidelines 2014.

ending up in difficulties. This is a correct step to take – to reflect whether internal as well as external rules, procedures and standards have been adhered to or the business decisions made recklessly and with an unusual amount of management's discretion, for instance. Yet, the author is of the opinion that the second half of the indicative content of restructuring plans should, if the corporate governance system was already highlighted as a potential past contributor to difficulties, contain a future reference to corporate governance as well as culture as significant contributors to the future viability of the undertaking, once having successfully completed a restructuring process. The question is why, if corporate governance is significant to the outline as an issue of the past, the same is not requested to be taken into mandatory account in future accordingly.

3. RESTRUCTURING (AND) CORPORATE GOVERNANCE AND CORPORATE CULTURE

3.1. Turning around "how things are done"

On the premises that restructuring aid prevails, the undertakings in difficulty seek to pursue further business operations in a somewhat different shape and size, diversifying portfolio and with the notion that for a decade post the restructuring, they are not eligible for new state aid. In other words, the restructuring process, based on a comprehensive restructuring plan to return to viability needs to reflect all actions to sustainably achieve that target. Hence, the R&R Guidelines suggest, for guiding purposes, the minimum content that restructuring plans need to encompass. Prior to looking at these elements closely, the consultancy practises in restructuring business suggest that turnaround strategies[42] of underperforming undertakings may take different streamlines.

The objective(s) of turnaround strategies is to have the undertaking perform efficiently, effectively with a sound management and financial indicators. For instance, financial streamline serves to protect share/stakeholders' position, arrange appropriate debt restructuring, development of contingency plans, assessing short-term liquidity requirements, developing cash-flow forecast of the company. It includes (radical) cost-cutting measures, reductions in overheads and headcount reductions leading to redundancies. Operational turnaround focuses, along with the financial restructuring, on improving productivity in the long run, making systems and processes perform better, getting more out of the processes and people, managing projects more

42 For overall approach to turnaround strategies and different approaches see e.g. Lohrke, F. T., Bedeian, A. G. and Palmer, T. B., The Role of Top Management Teams in Formulating and Implementing Turnaround Strategies: A Review and Research Agenda. International Journal of Management Reviews Vol. 5-6, No. 2, pp. 63-90, June 2004. Available at SSRN: https://ssrn.com/abstract=608489 (27 August 2018). In terms of consultancy practice, more on turnaround strategies and models can be found at, e.g. https://home.kpmg.com/ie/en/home/services/advisory/restructuring/corporate-restructuring.html (10 August 2018), https://www.mckinsey.com/business-functions/organization/our-insights/five-fifty-the-t-word (10 August 2018).

efficiently, structuring team work better to get more with less (during and after the financial restructuring against the background of cash-flow challenges, stakeholders' and creditors' pressure) to achieve tangible results in the long run. Technical/ technological restructuring is focused on achieving better performance along with cost cutting with a simultaneous investment into new technologies, updates, the modernization of technical approaches and standards in the given business sector. Legal restructuring follows the executive decision to merge, dissolve, abandon, reregister or diversify the portfolio of the undertaking, specifically if the undertaking represents a larger group or has different business operations. Thus, the legal restructuring, following the business strategy of returning to viability, ensures that the undertaking has implemented the actions in terms of internal (re)organization of the production portfolio. Human (resources) turnaround looks at cutting cost, but not only; it looks at overheads and at the available talent that may respond to challenge of future business strategy and be mobilized to sustain the change. Eventually, with the technical and technological restructuring, introducing modernization of technology used in the line of business, the undertaking inevitably weights the redundancy plan as one of the contributing elements to returning to viability. It is the human resources management in future circumstances that is the key element to overall restructuring in the context of corporate governance and corporate culture. In the author's opinion, the latter element is where restructuring and viability meet. None can be executed nor implemented without psychological twist and different approach of (future) bodies of the undertaking but also all the employees, embracing new corporate culture of different kind and different approach to how business is done and reported on to undertaking's bodies and interested public (such as e.g. regulatory agencies). The undertaking ready and eligible to take the restructuring aid is, as mentioned earlier, bound to deliver a comprehensive restructuring plan that objectively outlines measures to take in order to return to viability.

Neither the guiding, illustrative content nor the body of R&R Guidelines 2014 foresee or detect the need to change within. Apart from objective, *force majeure*, outside circumstances that the undertaking could not have prevented from influencing its operations, we should allow for circumstances where the management, culture and corporate governance were insufficient to detect early on and prevent liquidity gap, risk enhancement and eventually, inability to be further credited. The Ex-post study,[43] commissioned by the Commission – DG Competition showed that 18 out of 60 undertakings participating in the survey indicated internal reasons that lead to difficulty on account of poor management and internal structure problems.[44] In the aftermath of the restructuring process, some firms partaking in the study reported a substantial behavioural change in management and strategy. Although this was not explicitly mentioned in the restructuring plan, it has been vital for the survival of the company. Actively studying the market and searching for opportunities has resulted in

43 Ex-post evaluation of the impact of restructuring aid decisions on the viability of aided (non-financial) firms, 2016, https://publications.europa.eu/en/publication-detail/-/publication/3f86b7cd-f196-11e5-8529-01aa75ed71a1/language-en (25 July 2018).

44 Ibid., p. 24.

more diversification and a more flexible attitude. This, in turn, has helped to transform the company back into a viable business.[45]

Change management that looks into financial, operational, technical and otherwise restructuring, can rarely be performed streamlined by the same approaches, values and communication that failed to detect and overcome critical circumstances. Hence, the way an undertaking was governed in the framework of corporate culture needs to be targeted as well. State aid, coming from public resources and being granted after a stringent process by the Commission, calls for not only governance, but culture change as well.

The opportunity to go beyond and further than the illustrative content of the restructuring plan by the R&R Guidelines may be anchored, for instance, in point 9, whereby "the moral hazard" is highlighted as a problem created by State aid itself. Receiving State aid and not adhering fully to commitments undertaken by restructuring plans may result in *"Undertakings anticipating that they are likely to be rescued when they run into difficulty may embark upon excessively risky and unsustainable business strategies."*[46]

Though equally applicable to privately and publicly owned companies, one may reason that, in the event of public companies, the corporate culture would reflect upon the ownership as a safety cushion whereby, the daily operations, business strategy, the main logic to operate sustainably and with profit is actually the responsibility of the State rather than the outcome of a sound corporate governance and management responsibility. To that sense, the R&R Guidelines prevent the recipient of State aid from those behavioural deviations that would lead to misuse of granted aid, making sure that aid is *"... used only to finance the restoration of long-term viability and that it is not abused to prolong serious and persistent market structure distortions or to shield the beneficiary from healthy competition."*[47]

However, the behavioural measures do not aim at the overall corporate culture and governance but are limited to specific behaviour to be mandatory excluded during the restructuring process.[48]

3.2. The corporate governance and corporate culture interplay

The corporate culture is the entirety of "how things here are done" – the culture of the undertaking is a total of all relationships of a company. Thus, identifying of

45 Ibid., p. 83.

46 R&R Guidelines 2014, point 83.

47 Loc. cit.

48 R&R Guidelines 2014 - point 84 „The following behavioural measures must be applied in all cases, to avoid undermining the effects of structural measures, and should in principle be imposed for the duration of the restructuring plan:(a) Beneficiaries must be required to refrain from acquiring shares in any company during the restructuring period, except where indispensable to ensure the long-term viability of the beneficiary. This aims at ensuring that the aid is used to restore viability and not to fund investments or to expand the beneficiary's presence in existing or new markets. Upon notification, any such acquisitions may be authorised by the Commission as part of the restructuring plan; (b) Beneficiaries must be required to refrain from publicising State support as a competitive advantage when marketing their products and services."

all the stakeholders and employees with the undertaking and how precisely they all identify (themselves with) the corporate culture, defines it. Ogorec and Skendrović, when addressing the corporate identity and its meaning state that the "Identity of organisation, respect of corporation as an institution and subsequently affirmative relationship towards work and the work of colleagues is something that is, from the aspect of managing large systems, of enormous importance but often lacking in corporate practice. Treatment of subordinated, superiors and colleagues as primarily persons that occupy a specific working place first rather than as human beings, deteriorates the company's image (it becomes faceless), has a negative effect on work atmosphere and, in the end, leads to interpersonal problems that result in diminished effectiveness of particular department or the undertaking as a whole, problems in daily leadership and management thus increasing "non-productive space" in the work process."[49]

Corporate culture represents recognizable written but also unique personality of the undertaking and the individuals representing it, being its integral elements. The culture of the undertaking is reflected upon its symbols, what the undertaking is and represents, the level of employee's care, securing and updating internal procedures, compliance, transparency, understanding of expectations by the entire workforce, the sense of belonging to the undertaking, understanding the informal/unwritten rules, communication. Different factors prevail in defining the corporate culture whether it is by every individual, ratio of sexes, clients, buyers, type of business, location/seat of the undertaking, mission, vision and values, management of undertaking, communication between the management as well as the management communication towards the employees.[50] To define an undertaking's corporate culture, several key issues are to be verified beforehand:

- Management as the source of the corporate culture,
- Roles of all the stakeholders: owners, shareholders, corporate governance bodies, key functions, employees,
- Business orientation: further growth and development,
- Corporate social responsibility,
- Labour relations and respect of the labour legislation,
- General corporate working climate as well as the presence and influence (positive and negative) of the micro-climates,
- Architecture of the space: open plan, competitive, collaborative or hierarchical,
- Communication of internal and external character,
- Support infrastructure to employees,
- Client/buyer relations.

49 Ogorec, M. i Skendrović, K., Utjecaj vojnog modela vođenja na sustav korporativnog upravljanja, Polemos: časopis za interdisciplinarna istraživanja rata i mira, str. 78., Vol. XVII, No. 33-34, 2014., str. 71-88. (30 July 2018.).

50 For more on corporate culture see e.g. Kotter, J. P. and Heskett J. L., Corporate Culture and Performance, Simon and Schuster, 2008.

As Groysberg et al.[51] and Hickman and Silva[52] point out, corporate culture has its different types and styles and types. Of all the definitions of corporate cultures, the author has chosen the 6-element analysis model by Sikavica and Novak[53] that takes the following elements into consideration to define the type of corporate culture:

- Dominant culture/subculture,
- Strong/weak culture,
- Clear/unclear culture,
- Excellent/flawed culture,
- Stable/adaptable (open, flexible) culture,
- Participative/non-participative culture.

An inseparable concept in the context of communicating values and managing the undertaking is the governance of the undertaking. The Communication on European company law and corporate governance (hereinafter: the Action plan) determines corporate governance as "… the way a corporation polices itself. In short, it is a method of governing the company like a sovereign state, instating its own customs, policies and laws to its employees from the highest to the lowest levels."[54]

Corporate governance, simplified, represents a set of agreed rules and procedures by which the company is managed and controlled. Bloomfield, for instance, having analysed definitions of corporate governance over the last two decades, suggests two different(ial) definitions of corporate governance, from the ownership point of view.[55] Corporate governance of private companies "… is the governing structure and processes (procedural governance) in an organisation that exists to oversee the means by which limited resources are efficiently directed to competing purposes for the use of organisation and its stakeholders; including the maintenance of the organisation and its long-run sustainability (behavioural governance), set and measured against a framework of ethics (structural governance) and backed by regulation and laws (systemic governance)."[56] Bloomfield differentiates a corporate governance of public companies and defines it as "A series of principles, which are usually embodied in formal controls, in agencies which seek to redress market imperfections by acting for, on behalf of and with the express approval of the State, through all or some of the activities of policy-making, management, and regulation; mostly using resources without the intention of generating a profit and providing more or less appropriately-transparent information about the means of arriving at the allocation of resources

51 Groysberg, B., et al, The Leader's Guide to Corporate Culture, Harvard Business Review, January-February, 2018.

52 Hickman, C. R. and Silva, M. A., Managing Corporate Culture, Strategy, and Change in the New Age, Routledge, 2018.

53 Sikavica, P. i Novak, M., Poslovna organizacija, Informator, Zagreb, 1999, str. 593.

54 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, /*COM/2012/0740 final*/ (27 July 2018).

55 Bloomfield, S., Theory and Practice of Corporate Governance: An Integrated Approach, Cambridge University Press, 2013., p.19.

56 Loc. cit.

in the absence of a set of rational economic methods of achieving those ends."[57] Corporate governance defines the relationship between the bodies of the undertaking – the general assembly, the management board, supervisory board (dependant of the legal entity and applicable law).[58] Namely, it establishes and reflects how the undertaking is managed, how the crucial information is shared and streamlined and what the controlling mechanisms are. It is the result of the legislative framework – EU acquis and national legislation combined but it is the culture of the undertaking that directs the course of promoting either better governance (or not) for the benefit of the undertaking or a benefit in the short run, dependant of the undertaking's milestones.

3.3. The European Union way forward

In the aftermath of the financial crisis, the Commission launched its Green Paper on the EU corporate governance framework[59] (hereinafter: the 2011 Green Paper) to see how to overcome shortcomings detected "…in the application of the corporate governance codes when reporting on a 'comply or explain' basis"[60] and improve the effectiveness of the corporate governance across the board. In the context of undertakings in difficulties that consider or are going through restructuring using State aid, of all the components that the 2011 Green Paper took into consideration, the ones that raise interest are the risk management and the corporate governance reporting oversight by national authorities.[61]

In terms of risk management, the 2011 Green Paper correctly establishes that risk management cannot be developed on the premises that "one-size-fits-all" as undertakings are diverse, operate in different sectors and are facing different challenges. Yet, the overall improvement of risk management needs to be determined across the board, defining "early warning" operating procedures as well as the roles and responsibilities of all the stakeholders in the risk management process.[62]

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57 Loc. cit.

58 Wright, M., Siegel, D. S., Keasey, K. and Filatotchev, I., The Oxford Handbook of Corporate Governance, Oxford University Press, 2013, p.15.

59 COM(2011) 164 final at http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf, 5.4.2011 (1 August 2018).

60 Ibid, p. 18.

61 More on risk management and risk governance can be found in e.g. Aven, T. and Renn, O., Risk Management and Governance: Concepts, Guidelines and Applications Springer, 2010, p. 46-64.

62 COM(2011) 164 final, point 1.5. – „According to their specificities (field of activity, size, international exposure, complexity) they should develop an adequate risk culture and arrangements to manage them effectively. Some companies may face risks that significantly affect society as a whole: risks related to climate change, to the environment (e.g. the numerous dramatic oil spills witnessed in recent decades), health, safety, human rights, etc. Others operate critical infrastructure, the disruption or destruction of which could have major cross-border impacts. However, activities that might potentially generate such risks are subject to specific sectoral legislation and to monitoring by competent authorities. Thus, taking into account the diversity of situations, it does not seem possible to propose a 'one-size-fits-all' risk management model for all types of companies. It is, however, crucial that the board ensures a proper oversight of the risk management processes."

The author is of the opinion that it would seem justified and legitimate to expand the behavioural expectation onto the sound corporate governance as well as mandatory external third-party risk assessment to mitigate the possibility of recurring circumstances that lead to difficulties in the first place. Whereby the State grants State aid, the State is overly keen to protect its "investment" by enhanced oversight of undertaking going through a restructuring process, making sure that the corporate governance reporting is adhered to according to the standards. The reporting mechanism and above all, its content, is the next issue to consider for scrutiny by national authorities, *erga omnes*. However, considering that the State steps in to assist and invest into undertaking's return to viability with the taxpayers' money, the State has a vested interest to harden its grip over an undertaking in difficulty to present the content of corporate governance report in a concise manner and substance to present that risks are mitigated. Even though the 2011 Green Paper states that "The authorities should not, however, interfere with the content of the information disclosed or make business judgements on the solution chosen by the company.", nonetheless, from the point of burden-sharing principle under the R&R Guidelines and the mere fact that the State aid versus own contribution in the total restructuring cost is set at 50:50, with the prospect of the State participating in future gains of the undertaking, the author is of the opinion that additional attention payed to such undertaking should be secured. If for no other reason, then for the reason of precisely questioning business judgements, from the point of restructuring aid being granted and put into effect, to avoid again falling into difficulties on account of, apart from other contributing factor, ill-managed company, poor corporate culture and "relaxed" corporate governance. In addition, the author considers that it should be at least secured through undertaking's bodies whereby the State may insist, on account of equity share or via monitoring of the restructuring process, having its expert representative, besides the external monitoring tool as foreseen by the R&R Guidelines.

To that respect, the Action plan launched initiatives to be taken to modernise, besides the company law, the corporate governance framework – establishing three streamlines of actions: enhancing transparency, engaging stakeholders and supporting growth and competitiveness. The transparency is to be enhanced by increasing the quantity and quality of information provided on corporate governance of the undertakings. The shareholders are to be offered increased possibilities to take part in (defining) the corporate governance whereas the growth and competitiveness of the companies is to be supported by simplifying cross-border operations of European businesses.[63] The above streamlines recognized by the Commission in taking (then) future path additionally contribute to author's opinion that restructuring process of the undertakings in difficulty should take action in terms of "soft" measures such as governance and culture.

As regards transparency, the Action Plan emphasises the value of diversity of the board – the more diversity the more ideas and different views are accumulated and shared, and the more focus is secured onto the work of management, executive directors and other key stakeholders calling the decisions and developing business

63 2011 Green Paper, p. 14.

strategies.[64] Looking at the role of the supervisory board, the Commission finds that the supervisory board's role should be strengthened in terms of risk management, to receive reports of non-financial character that would provide an overall risk assessment perspective potentially threatening the undertaking. Hence, not only a broader picture but also risk projections along with a long(er) term business strategy would contribute to undertaking's firm adherence to restructuring principle, allowing the State – through corporate governance, to have a closer look and firm(er) grip over decisions influencing the course of its "investment".

Having mentioned the reporting – both financial and non-financial, the Commission established that the quality of the corporate governance reports[65] raised criticism; that relates to "comply or explain" principle whereby the undertaking would merely state not to have complied with a particular code yet without providing the comprehensive and sufficient explanation. From the perspective of the State as grantor of aid, during the e.g. 3-year restructuring process, comply or explain principle should require more scrutiny: the OECD corporate governance principles correctly observe that the "Public authorities should have effective enforcement and sanctioning powers to deter dishonest behavior and provide for sound corporate governance practices."[66]

However, the enhanced interest of the State in corporate governance and corporate culture of the undertaking on the receiving end of the State aid may have a double-edge sword effect; on one hand, making sure that the undertaking under restructuring adheres to and complies with corporate governance codes may, on the other hand, tempt the State into misusing its role of the misuse guardian, thus allowing itself to make steps otherwise not being able to make. As Enrico Perotti points out: "One of the greatest problems in state ownership, even when originally established for justifiable causes, is that it is most difficult to remove once established."[67] Similarly, Crnković, Požega and Karačić conclude that "The problem, on one hand, of corporate governance may emerge due to overly, mostly politically motivated, intervention of the state in the undertaking's business, whereas, on the other hand, the problems may emerge due to complete passive role of the state in managing the undertakings."[68] Similarly conclude Milhaupt and Pargendler when they state that, "Moreover, at least a level of informal observation, the quality of SOE governance appears to be quite closely correlated with the quality of political governance in a given country."[69]

64 2011 Green Paper, point 2.1.
In contrast, insufficient diversity could lead to a so-called group-think process, translating into less debate, fewer ideas and challenges in the boardroom and potentially less effective oversight of the management board or executive directors.

65 2011 Green Paper, point 2.2: produced by listed companies.

66 OECD (2015), G20/OECD Principles of Corporate Governance, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264236882-en (16 August 2018).

67 Perotti, E., State Ownership: A Residual Role?, University of Amsterdam, World Bank Policy Research Working Paper 3407, September 2004, p. 12 (16 August 2018).

68 Crnković, B. i drugi, Izazovi korporativnog upravljanja u državnim poduzećima – hrvatske perspektive, str. 279-292, Ekonomski vjesnik: Review of Contemporary Entrepreneurship, Business, and Economic Issues, Vol. XXIV No. 2 Prosinac 2011, str. 283 (30 August 2018).

69 Milhaupt, C. J. and Pargendler, M., Governance Challenges of Listed State Owned Enterprises around the World: National Experiences and a Framework for Reform, ECGI Law Working

Assuming the role of an ordinary share/equity holder leaves the State a passive role whereby a corporate culture of the undertaking develops into a self-sufficient organism accountable to the State to a minimum required standard. OECD corporate governance for state-owned enterprises lay out the role of the State as an owner, amongst others, to act as an informed and active owner, exercising its ownership rights according to the legal structure of each enterprise. This involves *inter alia*, in the context of close monitoring and influencing the course of the business strategy of the undertaking in difficulty, "Setting and monitoring the implementation of broad mandates and objectives for SOEs, including financial targets, capital structure objectives and risk tolerance levels…"[70] as well as "Setting up reporting systems that allow the ownership entity to regularly monitor, audit and assess SOE performance, and oversee and monitor their compliance with applicable corporate governance standards…."[71]

The middle of the two ends lies built around exhaustion of rights arising from the burden – sharing principle where "any State aid that enhances the beneficiary's equity position should be granted on terms that afford the State a reasonable share of future gains in value of the beneficiary, in view of the amount of State equity injected in comparison with the remaining equity of the company after losses have been accounted for."[72] The middle, in the author's view, should be legislated in the illustrative content of the restructuring plan, annexed to the R&R Guidelines to have undertaking in difficulty, under the restructuring process, mandatory audit its corporate culture, corporate governance code and content of its reports.

4. DOES STATE AID HELP MOTIVATE THE CHANGE WITHIN?

Directorate-General for Competition (hereinafter: DG Competition) commissioned the study to examine the effects of granted aid through restructuring plans and evaluate the EC's ex-ante assessment of restructuring plans submitted by the Member States. Twelve evaluation questions were defined by the Commission, categorized through descriptive questions, effectiveness questions and efficiency questions. Namely, "Particular focus is given to investigating whether support was provided only in the context of a restructuring plan that was likely to return the firms to long-term viability within a reasonable period of time." Details of the report, methodology, questions as well as findings can be found in the aforementioned Ex-post study of the impact of restructuring aid decisions on the viability of aided (non-financial) firms.[73] This is not the only interview-based and data analytical study on the

Paper N° 352/2017, April 2017, p. 59 (30 August 2018).

70 OECD (2015), OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition, OECD Publishing, Paris, http://dx.doi.org/10.1787/9789264244160-en, p.19 (16 August 2018).

71 Loc. cit.

72 R&R Guidelines 2014, point 67.

73 Ex-post evaluation of the impact of restructuring aid decisions on the viability of aided (non-financial) firms, 2016, https://publications.europa.eu/en/publication-detail/-/publication/3f86b7cd-f196-11e5-8529-01aa75ed71a1/language-en, (25.7. 2018).

effectiveness of State aid. Some legal and economics scholars have so far looked into the effectiveness of restructuring by State aid such as Nulsch (2014)[74] or Glowicka.[75] The undertakings that participated in the study,[76] identified reasons and circumstances that lead them to difficulties; amongst the ones such as economic and financial crises, failure of contracts, market decline etc., the companies identified "…poor management and problems associated with structure, human resources and strategy…"[77]

From the aspect of corporate governance and corporate culture that contribute (or not) to the overall success of the restructuring process of an undertaking in difficulty, the "effectiveness" evaluation (Question 9) – "Are there common features to the restructuring measures that impact the outcome in terms of viability? What conditions on the delivery of restructuring aid seem most effective in ensuring the viability of the aided undertakings?" offered the feedback that "… the financial restructuring and the strengthening of the efficiency of the (internal) organisation are assessed to be the key measures in order to ensure the future survivability. There should be a balanced mix of measures with predictable outcomes and more desired outcomes (e.g. behavioural change, winning more work) is important."[78] Additionally, the findings of the study pointed at the non-tangible factors such as overall "forward looking atmosphere"[79], a psychological moment to turnaround internally. For instance, the study showed that "forward looking atmosphere" also "…had a positive impact on the behavioural change which was needed in the companies … Also the (urgent) need to restructure the company forces the management to reformulate their mission and strategy and rethink the strengths and weaknesses of the company, which can result in a 'new start' for the company and its employees."[80]

The study offers numerous recommendations based on the survey and feedback provided by the companies. In the context of corporate governance as well as corporate culture, the author selected a few relevant for the subject such as that the restructuring plans should have carefully formulated KPIs that should be accurately monitored over the restructuring period and beyond which can help provide crucial insights to explain

74 Nulsch, N., Is Subsidizing Companies in Difficulties an Optimal Policy? An Empirical Study on the Effectiveness of State Aid in the European Union, IWH Discussion Papers, No. 9/2014, Leibniz-Institut für Wirtschaftsforschung Halle (IWH), Halle (Saale), available at: http://hdl.handle.net/10419/9874 (25 July 2018).

75 Glowicka, E., State Aid and Competition Policy: The Case of Bailouts in the European Union (Dissertation), available at https://edoc.hu-berlin.de/bitstream/handle/18452/16450/glowicka.pdf?sequence=1&isAllowed=y (25.7.2018).

76 60 companies were included in the study. „The objective was to provide an overview of the positive (compatible aid) restructuring decisions concerning individual firms in difficulty, adopted between 1 January 2000 and 31 December 2012, with the exclusion of the following categories according to the ToR:
• Aid granted to financial institutions; • Aid granted to firms active in the agriculture or fisheries sectors; • Aid granted to firms in the former German Democratic Republic in connection with the reunification of Germany; and • Aid granted to firms in the steel sector in connection with the accession of new Member States."

77 Ex-post Study, p.24.

78 Ex-post Study, p.viii.

79 Ex-post Study, p. 82.

80 Loc. cit.

the effect of the restructuring aid on company performance (Evaluation Question 4 and 6)[81]. Corporate governance and corporate culture could be actually broken down per ponders to be measured via individual KPIs (reporting mechanism, transparency, feedback of stakeholders/shareholders, satisfaction employees' feedback etc.). The fact that the content, overall speaking, is of concern and central in the feedback during the study shows that it seeks further looking into. The feedback reflected that a more concrete template or protocol to complement the indicative model restructuring plan in the R&R 2014 Guidelines should be required to allow the EC in effective and efficient decision making (Evaluation Question 11 and 12).[82] Tying management behaviour to the proven quality of corporate governance as well as improved and conscientious corporate culture to minimize (at least from that perspective) the possibility of discretionary, ill-managed, poor-cultured bodies to fall into difficulties again.

This feedback may possibly push the Commission to consider corporate governance and corporate culture as mandatory elements of restructuring plans in future, when the opportunity arises to revise the present Guidelines; precisely, the corporate culture is that invisible yet strong influence; "The attempt to revitalise and restructure the company may result in new ideas and a new positive vibe."[83]

5. CONCLUSION

The decision to restructure using State aid is a bilateral decision: of the undertaking in difficulty and the State. Both sides agree and should be made aware that restructuring using State aid comes with a price. Using public money to return to viability at least means having the State participate in future gains and to do so, keep the State properly informed within the legal framework and corporate governance code of the undertaking; having its representative in the Supervisory Board allows the State to have prompt information at minimum. Irrespective of what precisely lead the undertaking to difficulty, two facts remain: that it is indeed in difficulty beyond repair using market tools and that the public money is used to overcome the difficulty. It is a legitimate expectation of the public to see and track the return of the undertaking to its viability in a changed internal and external environment. It is legitimate to expect that the business decision-making process, the flow of information, the culture of the undertaking are taking a positive course. Hence, the author sees the restructuring process as an opportunity to change within and to abandon ill-proven practices. There is sufficient time to (re)consider corporate governance and audit of corporate culture as elements of restructuring process and to add them as *pro futuro* elements, to prevent the undertaking on the receiving end of State aid to lapse again on account of these two issues. The Commission's adding corporate governance and corporate culture as elements of restructuring plans may only be in both the State's and undertaking's best interest to pursue, identify and target those corporate governance gaps, deficiencies and practices as well as to analyse its corporate culture not to allow the repetition of

81 Ex post Study p. 96.
82 Ex post Study p. 100.
83 Ex post Study p. 98.

those relations, practices and policies that prevented the undertaking from reacting promptly to circumstances that had lead it to difficulties.

The author is of the opinion that it would seem justified and legitimate to expand the behavioural expectation onto the sound corporate governance as well as mandatory external third-party risk assessment to mitigate that possibility.

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Sažetak

SMJERNICE EU O DRŽAVNIM POTPORAMA ZA SANACIJU I RESTRUKTURIRANJE - PRILIKA ZA RESTRUKTURIRANJE KORPORATIVNOG UPRAVLJANJA I KORPORATIVNE KULTURE

Poduzetnici u poteškoćama, nakon što su iscrpili sve tržišne opcije, mogu se podvrgnuti državnim potporama kako bi spasili odnosno restrukturirali svoje poslovanje u cilju vraćanja održivosti. U posezanju za ovom mogućnošću, autorica pobliže ispituje mogućnost takvog poduzetnika da provede promjene iznutra kako bi napustio onu praksu koja je možebitno bila jedan od korijena manjkova koji su doveli do poteškoća. Stroga pravila spašavanja i restrukturiranja poduzetnika u poteškoćama pružaju priliku za davanje druge šanse u obnovi svog poslovanja, sagledavanje dugovanja, analizu potrebnih koraka i potencijalni novi rast. No, cjelokupno restrukturiranje kao druga šansa koju daje državna potpora te uloga države, ne predstavljaju *carte blanche* za nastavak stare prakse i pristupa koji će se ponoviti s novcem poreznih obveznika. Restrukturiranje bi trebalo analizirati cjelinu, obuhvatiti internu analizu pri čemu se korporativna kultura i upravljanje također podvrgavaju promjenama. Autorica vjeruje da postoji prostor za razmišljanje o korporativnom upravljanju i analizi korporativne kulture kao elementima procesa restrukturiranja i planova restrukturiranja kako bi se spriječilo poduzetnika koji prima državnu potporu, da ponovno posrne. Dobivanje druge šanse, primjenom onih ponašanja koji su doveli poduzetnika u poteškoće, nije jamstvo uspješnog restrukturiranja i povratka održivosti već, uistinu, može predstavljati subjektivnu opasnost ostvarenju objektivno postavljenih ciljeva. Stoga, autorica istražuje ne bi li neopipljivi elementi poput korporativnog upravljanja i promjene korporativne kulture bili prepoznati kao obvezni elementi procesa restrukturiranja. Autorica ne zahvaća dubinski korporativno upravljanje i korporativnu kulturu već ih sagledava kao dobrodošle faktore doprinosa željenom cilju potpore za restrukturiranje – uspješan povratak održivosti korištenjem državne potpore.

Ključne riječi: *poduzetnik u poteškoćama; potpora za restrukturiranje; korporativna kultura; korporativno upravljanje.*

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Zussamenfassung

EU-LEITLINIEN FÜR STAATLICHE BEIHILFEN ZUR RETTUNG UND UMSTRUKTURIERUNG VON UNTERNEHMEN IN SCHWIERIGKEITEN: EINE GELEGENHEIT FÜR UMSTRUKTURIERUNG DER UNTERNEHMENSFÜHRUNG UND UNTERNEHMENSKULTUR

Unternehmen in Schwierigkeiten können nach Erschöpfung aller Marktmöglichkeiten auf staatliche Beihilfen zur Rettung und Umstrukturierung von Unternehmen in Schwierigkeiten zurückgreifen, um die Rentabilität wiederzuerlangen. In diesem Beitrag befasst man sich detaillierter mit der Möglichkeit der Veränderung innerhalb des Unternehmens, beispielsweise mit der Möglichkeit der Beseitigung von Verhaltensweisen, welche wenigstens eine der Wurzeln der Mängel darstellen, die diese Schwierigkeiten verursacht haben. Die strengen Regeln der Rettung und Umstrukturierung von Unternehmen in Schwierigkeiten geben ihnen eine zweite Chance, ihre Rentabilität wiederherzustellen, sich die Schulden anzuschauen und die notwendigen Maßnahmen sowie auch potentiellen Wachstum zu analysieren. Aber die ganze Umstrukturierung als die vom Staat gegebene zweite Chance und die Rolle des Staates stellen keine Carte blanche für die Fortsetzung mit der alten Praxis und dem Ansatz dar, welche sich auf das Geld der Steuerpflichtigen stützen werden. Die Umstrukturierung sollte die Ganzheit analysieren und eine interne Unternehmensanalyse darstellen, bei welcher sowohl die Unternehmenskultur als auch die Unternehmensführung verändert werden. In diesem Beitrag vertritt man die Ansicht, dass es Raum für Überlegungen gibt, die Unternehmensführung und die Analyse der Unternehmenskultur als Elemente des Umstrukturierungsprozesses und –planes anzusehen, um zu verhindern, dass das Beihilfe empfangende Unternehmen wieder stolpert. Falls das Unternehmen bei der zweiten Chance die Verhaltensweisen, dank welchen es in Schwierigkeiten geraten ist, wiederholt, kann erfolgreiche Umstrukturierung und Wiedererlangung der Rentabilität nicht gewährleistet werden, sondern eher eine subjektive Gefahr für die Erreichung objektiver Ziele darstellen. Deshalb wird in diesem Beitrag untersucht, ob immaterielle Elemente wie Unternehmensführung und Änderung der Unternehmenskultur als obligatorische Elemente des Umstrukturierungsprozesses anerkannt werden können. Dabei werden die Unternehmensführung und –kultur nicht detaillierter bearbeitet, sondern nur als willkommene Beiträge zur erfolgreichen Wiedererlangung der Rentabilität durch die staatliche Beihilfe, dem gewünschten Ziel der Umstrukturierungsbeihilfe, angesehen.

Schlüsselwörter: *Unternehmen in Schwierigkeite; Umstrukturierungsbeihilfe, Unternehmenskultur; Unternehmensführung.*

Riassunto

LINEE GUIDA DELL'UE SUGLI AIUTI DI STATO PER IL RISANAMENTO E LA RISTRUTTURAZIONE – UN'OCCASIONE PER LA RISTRUTTURAZIONE DELLA *CORPORATE GOVERNANCE* E DELLA CULTURA AZIENDALE

Gli imprenditori in difficoltà, dopo avere esaurito tutte le opzioni del mercato, possono sottoporsi agli aiuti di stato al fine di salvare ovvero di ristrutturare la propria attività con l'intento di ripristinarne la sostenibilità. Nel cogliere tale possibilità, l'autrice indaga nel dettaglio circa la possibilità di tale imprenditore di portare a termine tale cambiamento dall'interno, al fine di abbandonare quella prassi che probabilmente rappresentava una delle radici delle lacune che hanno portato alle difficoltà. Le rigorose regole per il salvataggio e la ristrutturazione dell'imprenditore in difficoltà offrono l'opportunità per dare una seconda chance nel rinnovamento dell'attività, nella valutazione dei debiti, nell'analisi dei passi necessari e nella potenziale nuova crescita. Tuttavia, l'intera ristrutturazione quale seconda opportunità concessa dagli aiuti di stato, come anche il ruolo dello Stato, non danno carta bianca per il proseguimento della vecchia prassi ed approccio che si ripeterebbero con il denaro dei contribuenti. La ristrutturazione andrebbe analizzata nell'intero, ricomprendendo l'analisi interna e con ciò la cultura aziendale e la corporate governance andrebbero altresì soggette a cambiamenti. L'autrice crede che esista spazio per ripensare alla corporate governance e per l'analisi della cultura aziendale quali elementi del processo di ristrutturazione e dei piani di ristrutturazione al fine di evitare che l'imprenditore, che si avvalga degli aiuti di stato, vada nuovamente in crisi. Ricevere una seconda opportunità, mettendo in essere quei comportamenti che hanno trascinato l'imprenditore nelle difficoltà, non rappresenta la garanzia di una buona ristrutturazione e di recupero della sostenibilità, ma può rappresentare un pericolo soggettivo nella realizzazione dei fini postisi. Pertanto, l'autrice valuta se degli elementi impalpabili quali la corporate governance e la cultura aziendale non debbano divenire elementi obbligatori del processo di ristrutturazione. L'autrice non entra in profondità nella corporate governance e nella cultura aziendale, bensì li osserva quali fattori ben accetti nell'apporto al raggiungimento del fine del sostegno alla ristrutturazione – un ritorno di successo alla sostenibilità mediante l'uso degli aiuti di stato.

Parole chiave: *imprenditore in difficoltà; aiuto per la ristrutturazione; cultura aziendale; corporate governance.*

ENCOURAGING THE GROWTH OF SKILLS AND INNOVATION IN THE NETHERLANDS

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Summary

This paper describes an example of best practice in the Netherlands with respect to promoting the innovation of enterprises. This policy consists of promoting cooperation between knowledge centres (including universities) and enterprises, enabling the enterprises and start-ups to be located in the neighbourhood of knowledge centres and assisting them in obtaining the required permits, and, if necessary, grant subsidies. This policy has proved to be very successful. Developing a training policy for all sectors of economy, on the other hand, is more difficult. This becomes even more difficult if employers and employees have opposite interests, especially if employers fear that the newly trained worker will leave their job after acquiring the new qualification or if the worker has to reimburse the subsidy. Therefore, the establishment of training funds, made available for all employers and workers who want to qualify for another job, can contribute to the growth of skills.

Keywords: *innovations; the Netherlands; training policy; growth of skills; workers.*

1. INTRODUCTION

Encouraging the growth of skills and innovation is not an easy task, since creativity and innovation are primarily bottom-up processes. Individuals and enterprises are the ones that have to find the areas and methods for new products, ideas or production processes.

Still, the government and social partners can have a stimulating role in this regard, mainly by creating a framework and climate that is beneficial for innovation.

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This paper depicts the way in which the Netherlands has stimulated innovation in the past decade. It is a process that is not perfect and can still be improved, but the experiences in this country may serve as a best practice example.

The paper first describes some good practices of how innovation is stimulated and the role of public authorities in this stimulation (section 2). Section 3, on the other hand, deals with the organisation of the labour market.

2. ENCOURAGING INNOVATION BY CREATING INNOVATIVE NETWORK AREAS

First of all, it needs to be pointed out that the government has since the 1980s *not* been subsidizing declining industries. The reason was that at the time there were some bad experiences, when ship manufacturers or airplane factories (Fokker) received very large subsidies, but still did not survive. As a result, the Netherlands lost important industries, including car and airplane manufacturing, shipbuilding and textile. These restructurings of large economic sectors were, of course, very painful as they resulted in many people suffering from job losses. Based on these experiences, it was concluded that supporting declining industries costs large amounts of money, which will never save those industries. Instead, a good safety net, in the form of unemployment benefit schemes, provided for an income for the redundant workers.

Nowadays such subsidizing may also cause problems under the EU State aid rules, but the Netherlands realized already the pitfalls of subsidizing declining industries long before such rules began to have impact. Another instrument to soften the effects of the crisis was introduced during the economic crisis of 2008 was a short-term scheme that enabled firms to keep workers employed, since, if they are dismissed and later new workers have to be recruited, a lot of valuable expertise could be lost. But apart from these examples, in such temporary crises no subsidy scheme is available.

For some industries that were outsourced to low-wage countries (such as textile), the Netherlands has developed new technologies for making high tech materials or more sustainable production processes, e.g. more sustainable or lighter clothes, carpets or curtains, or fireproof or waterproof materials. Therefore, we can claim that in fact we witness here a shift from mass production to innovation in the sense of high-tech creativity.

Such innovations depend on the creativity of persons or groups of persons and cannot be organized in economies based on central planning.

However, in the past decades there have been interesting experiences supporting innovation.

One of the brightest examples is that of Eindhoven, a city in the south of the Netherlands. It all started after the bankruptcy of DAF, an automobile manufacturer, and the reorganisation of the Philips company in the 1990s, when many jobs were lost and the region was on the verge of collapse and there was a fear of mass unemployment.

The former mayor of Eindhoven, the president of the board of Eindhoven University and the president of the Chamber of Commerce organized a cooperation of

public authorities, research institutions and enterprises, and attracted investments to Eindhoven. This led to the establishment of the Brainport Foundation, an organisation that continues to stimulate cooperation and facilitates transition from a declining industry and mass unemployment to an international high-tech centre in a global network.

As a result, Brainport has become a top technology region supporting innovation, in which the regional authorities support cooperation of the large Philips company, the Eindhoven technical University and start-ups.[1] Thus campuses for the development of transport devices were created, where state of the art technological (testing) facilities and flexible housing concepts are provided. Enterprises, education and research institutions are thus located together and their cooperation is encouraged.

This transition from a manufacturing industry to a network of research and knowledge is a clear example of how innovation can take place and help declining regions to survive. It also shows that it were the public authorities that took the initiative to encourage the network of the relevant stakeholders and that a combination of research institutions (universities) and enterprises is a fruitful one.

In order to stimulate the cooperation of these stakeholders, innovative enterprises are situated close to each other, for instance on the university campus or at the technical university. Sometimes they are placed in a special building containing a considerable number of innovative enterprises. Innovation can further be promoted by facilitating the process of obtaining the permits for production, extension of the building, etc.

This approach is now also followed in other cities, where a campus or science park is designated for innovative enterprises and institutions, such as food technology and mobility solutions. A great number of researchers, developers and entrepreneurs work in hundreds of companies and institutions to develop new products on this campus and such cooperation indeed creates synergy and has an added value.

Furthermore, Dutch universities have taken the initiative to develop science parks, which allow enterprises to be in the vicinity of both each other and the creative institute. Such concentrated area of innovative enterprises allows, for instance, also researchers of the university and students and graduates of the university to try out and develop products. Such cooperation can become a start-up and later even be a company making profits.[2] Important challenges for these innovative areas are to create more sustainable products, to reduce waste and consumption of energy or to develop an efficient agriculture. All these questions require intensive and creative research.

This is, of course, not the only way to promote innovation, but a very successful one.

These examples, however, cannot be simply copied. Still, the idea of connecting research institutions and companies and allowing new companies to develop in the vicinity of these institutions and encourage cross-fertilisation is not unique.

The second way in which innovation can be promoted by the government is

1 Called Brainport, www.brainport.nl.

2 Some multinationals like Unilever decided recently to move their research and development centre to such a campus, https://www.unilever.nl/news/persberichten/2016/unilever-intends-to-build-a-global-foods-innovation-centre-in-wageningen-the-netherlands.html.

by linking applied research institutions to companies, in particular to the small and middle-size companies. After all, large companies often already have their own research units, but the smaller ones have more difficulties with accessing research.

Research institutions are therefore encouraged and subsidised in order to help companies innovating their products or production processes; small and medium-sized companies can also be encouraged to develop products based on the findings of technological institutions.

A recent report suggests that research institutions are often too expensive for small and medium-sized enterprises;[3] the report proposed to the government to adopt a financial scheme which would make it more attractive for small and medium-sized companies to cooperate with technological institutions. The institutions should also become more proactive in order for them to be able to identify in which way they can support innovative activities in small and medium-sized companies.

The report also advises the technological institutions to connect with other innovative institutions, such as the innovative campus we discussed above. The commission added that the government has a role in this: it should clearly define the innovation and knowledge agenda for institutions (and facilitate this by sufficient means) so that the institutions can respond to developing needs of society.

3. THE ORGANIZATION OF LABOUR MARKET AND ENCOURAGING INNOVATION AND THE GROWTH OF SKILLS

3.1. A general policy for life-long learning?

The starting point in the skills and qualification policy is that young persons should acquire the so-called basic qualification, i.e. a diploma of secondary education. If a person does not have such basic qualification and leaves school, s/he does not qualify for social assistance.

It is a challenge to make education attractive also for pupils who do not like to study; having a good combination of practical work and theory in school is one of the approaches that might improve the situation. This is important since improving skills is most often possible only if persons have a basic qualification.

About 7 years ago a provision was inserted into the Civil Code (Article3 7:611a BW), that obliges employers to allow employees attend training that is necessary for performing their job and, as far as can reasonably be asked from the employer, for the continuation of the contract of employment if the function of the employee is cancelled or when he will no longer be able to perform his work. In theory, the employee can also be asked to participate in the training, since s/he has the statutory obligation to behave as a good employee, which sometimes might entail training.

However, forcing a person to attend training that s/he does not want to is often not very fruitful.

Therefore, it is more relevant whether there are instruments to make the attendance of training attractive so that it becomes part of one's working career.

3 Commissie Schaaf, *Evaluatieonderzoek organisaties voor toegepast onderzoek (TO2)*, 2017.

There is still no general all-encompassing training policy in the Netherlands. Attempts have been made by social partners, i.e. employers' and employees' organisations, to agree in collective agreements on the establishment of training funds. Employers contribute to these funds and enterprises can receive a contribution for training employees from the fund.

However, training has not yet been included in the structure of working life.

Based on recent figures of the *Sociaal-Cultureel Planbureau*[4] (an agency studying developments in society) it appeared that 24% of the employers are of the view that employees should attend work-related training and courses as far as possible outside their working hours-. About one-third of the employers (36%) argue that employees must decide themselves whether they need courses or training.

From this we can conclude that employers are often not eager to allow workers to attend training and workers are not always interested in attending training, certainly not in their spare time. Employers fear that a worker will leave the job after s/he receives a new qualification, which would mean that the employer concerned has in fact invested in this employee for the benefit of another employer.

The training funds established by collective agreements are not generous enough to solve this problem. Employers often require reimbursement of study costs from the employee if the worker leaves the firm within a certain period. This may discourage employees to attend training.

The figures of the *Sociaal-cultureel planbureau* suggest that in 2016 in about twenty per cent of the organisations one or more employees requested a study leave, which means that this ambition to study is present in a rather small part of the economy. In these companies employers usually allow their employees to study either fully or partially. The possibilities for such study leave vary depending on the sector. Circa ninety per cent of the organisations in public and educational sectors offer these possibilities; in the transport and other service sectors the percentage is smaller (circa sixty-five per cent). There are also important differences in the share of workers that make use of training: in the sectors of industry, construction, trade and cafés/hotels/restaurants the employees asked for a study leave only in about twelve percent of the organisations. In the public sector (sixty-three per cent) and education (fifty per cent) this occurred more often. It also seems that n larger organisations employees tend to use this opportunity more frequently than in the smaller ones.

One-third of the organisations offering training for their employees make use of subsidy schemes, hence, part of their training costs is reimbursed. Larger organisations, however, tend to use these subsidies more often than the smaller ones.

Seventeen per cent of the companies make use of training funds, such as the ones established by collective employment agreements, in particular in the construction sector and industry. Public funds (ten per cent) and fiscal measures (five per cent) are also used for funding training.

Therefore, we can conclude that there are training and education opportunities, but they are used mostly by the employees in large organisations. Moreover, the training opportunities are unevenly distributed over the sectors, hence, in some sectors

4 https://digitaal.scp.nl/arbeidsmarktinkaart-werkgevers2017/scholing-van-werknemers

the training possibilities are rather low. It seems that subsidies and funds, although helpful, do not always represent a decisive factor, since a considerable number of enterprises do not make use of them.

Given the need for employable and flexible workers, the situation is not satisfactory. Indeed, as we have seen in section 2 of this paper, there are some very innovative sectors in the Netherlands, but there are also many areas where employees should undergo training in order to keep up with the new developments.

3.2. A policy to put more pressure on employers to support lifelong learning

It can happen that persons have been doing the same work for a long time and have not (really) developed their skills; as a result, their labour market position can have deteriorated, which can be very problematic when they lose their job and thus encounter difficulties with finding a new one. Therefore, the passivity in this area which is reflected in the unemployment figures, might represent another perspective from which to look at the issue of innovation and promoting the acquisition of new skills.

Several proposals have been made to make employers more responsible for maintaining employability of their workers. For instance, in the report *Naar een toekomst die werkt*, (*Towards a future that works*) it was proposed that all employees acquire an individual 'work budget', to which the employer pays contributions, but which can also be improved through additional means. The budget can be used to train the employee concerned and thus help him or her maintain his or her 'employability'. This budget can also be used to finance training or work experience during the transitional period, i.e. the period when an employee has been given notice and has to look for another job. During this period he or she can, without having to work, attend training or traineeship in order to prepare himself or herself for a new job. In such ideal situation a person can easily transfer from one job to another.

However, the proposal was not adopted. The new Dismissal Act (*Wet werk en zekerheid*), which was adopted in 2015, only faintly reflects the proposal of the report. According to the new rules the worker receives the so-called transitional payment in case of dismissal, which is basically a dismissal payment. However, the employer can deduct the costs spent on the training of this employee for the purpose of finding another job .

Since the law was implemented only recently, we do not know yet what the effects of these rules are and whether and how the rules work out in practice.

The Government has also recently proposed to allow the employer to deduct the expenses for his/her own training from the transitional payment. It is not known yet what the effects of this will be. Therefore, a dilemma arises whether such proposal will make training more attractive and for whom. The possibility of deducting the costs will encourage the employer to organize training, but it will discourage the employee to attend it considering the lower dismissal payment.

3.3. Promoting flexibility for the purpose of adapting to innovation

Innovative firms (such as start-ups) often need a certain degree of flexibility if they employ workers. After all, they do not know whether their enterprise or idea will become successful.

The Netherlands does not exempt particular firms, such as highly innovative firms, from the obligations imposed by labour law. As a matter of fact, there are no special rules in labour law with respect to innovation. As a result, enterprises have to seek a solution within the framework of the existing labour law rules.

In the Netherlands the relation between permanent and fixed-term employment contracts is very heatedly debated.

Permanent contracts provide good protection against dismissal, since the employer has to ask for permission from the competent body, hence, the *Uitvoeringsinstituut werknemersverzekeringen* (Administration of employees insurance schemes), in order to give notice. For this purpose, the employer must have a file with all the relevant information on the state of affairs and prospects of the company. For this reason, it is more convenient for the employer to conclude fixed-term contracts if he/she is uncertain about his/her permanent need for workers.

The government, however, wants to reduce the number of persons who have a fixed-term contract, since the position of persons who work for a long time based on a series of such contracts is not attractive: these workers are not certain of their future and thus cannot easily buy a house and settle; employers will not invest in their development.

For this purpose the rules on the extension of contracts for a definite period were modified in 2015 by the *Wet werk en zekerheid* (Act on work and security). Before this modification it was possible to renew a contract three times before it became a contract for an indefinite period; alternatively, it was possible to extend a contract unless the total length exceeded 36 months. As a result, persons could have remained in an uncertain position for a long time. The new rules stipulate that contracts can be extended only twice (instead of three times); moreover, the extension period cannot exceed 24 months (instead of 36 months), otherwise it ex lege becomes a contract for an indefinite period.

The idea behind this new law is that workers are given a contract for an indefinite period sooner. Still, one can increase the extension period through collective agreements, although these possibilities, which were unlimited under the old rules, are now restricted. It now stipulates that the period of 24 months can be extended to 48 months and that the number of concluded fixed-term contracts may amount to six if the intrinsic nature of the work requires such extension.

This new law makes it more difficult to recruit persons on a temporary basis, unless it could be argued that the innovative character of the work intrinsically requires the possibility of having workers on a fixed term contract. This is possible to arrange only though a collective agreement, thus calling for the approval of both the trade unions and the employers in the sector concerned. Naturally, this represents an uncertain and difficult path.

The newest development (2018) proposes to return to the old rules, thus

reopening the possibility of the chain of three employment contracts or increasing the extension period to more than three years.

An alternative for persons working on a flexible employment contract is hiring them as self-employed, with the latter option increasing considerably in the past ten years. Making use of these workers has important advantages for employers, since the Dismissal Act does not apply to them and in case of sickness employers do not have to continue to pay them. Social security contributions do not have to be paid for them either, since these contributions are due for employees only. For workers it may (seem to) be attractive to work as self-employed since they have a considerably higher net income than the employees, whose social security contributions are deducted from their wage. Of course, recruiting self-employed persons to do work in an organization, where their work closely resembles the one performed by employees, is risky for the employer, since it may happen that the tax authority will consider the person as a worker and then still claim contributions retroactively. On the other hand, this enables start-ups, in which each of the participants works as a self-employed person and has the real status of a self-employed, i.e. with their own responsibilities, to share management and profit.

A change that was also made in 2015 is that the non-competition clause is no longer allowed in a fixed-term contract, unless it appears from the arguments given by the employer in writing that the clause is necessary due to the increasing interests of the company. It remains unclear how this will be reflected in practice, but in any case the judge can test the arguments given by the employer and the burden of proof remains with the employer.

The idea behind this new rule is that the non-competition clause is no longer regarded as justified if a person is given a contract for a definite period only. Although it does not explicitly promote innovation, it is sometimes claimed that competition clauses hinder innovation and that a change in the existing legislation can therefore contribute to innovation. However, since this applies only to short-term contracts, it is unlikely that this change will have any (measurable) effect.

Although the government prefers that the first fixed-term contract does not last too long and that, if a longer employment relationship is necessary, this be realized through the contract for a permanent period, the rules don't prohibit a long-term contract and some companies now experiment with contracts for a five-year period.[5] The training component is closely related to this, since it should help the employee to find a job elsewhere after this period. This will, naturally, be further regulated in the collective agreement of the company concerned.

Such a contract still creates a long period of uncertainty, as the worker is not given a permanent position, and the contract could thus be seen as contrary to the objectives of the Act. However, the fact that a company undertakes many innovative activities and is thus uncertain about how many workers and which expertise it needs, will be very relevant and challenged by the court.

Whether such long fixed-term contracts are socially and morally acceptable depends to a large extent on the question whether the training and employability

5 For instance the supermarket company Ahold and KLM.

measures are actually taken.

Another issue related to flexibility is whether an employee can be asked to do different work than s/he used to do or at different locations and times. Countries can have quite different systems in this regard. In the Netherlands, for instance, an employee can, on the basis of the good employee standard laid down in the Civil Code, be asked to be flexible when the work requires. However, the employer also must behave as a good employer. This means that, at the end of the day, it is a matter of negotiation. If an employee has good reasons against the change or if s/he offers a good alternative, the employer has to take these into account. This creates a situation in which workers are quite flexible to adjust to a new set of circumstances. In this paper the opinion is represented that major problems in not taking this path lie in the lack of skills to do the new job.

4. CONCLUSIONS

Promoting innovation and the growth of skills is an issue that is not easy to organize and for which to make a long-term planning.

The Netherlands ranks quite high among the countries with a good innovation climate, but this can very much be attributed to institutions and areas aimed at and organized for the purpose of innovation. The cross-fertilization areas discussed in this paper can be very helpful in this regard. It is remarkable that public authorities have an important role in stimulating and facilitating these initiatives for co-operation.

Nevertheless, it is difficult to adopt a training policy for all sectors of the economy. Encouraging employers, facilitating training by funds and subsidies, and creating a climate in which it is normal for employees to participate in the training can help, but it cannot automatically create to a general training climate.

When employers and employees have opposite interests this becomes even more difficult, especially if employers fear that the newly trained worker will leave them after acquiring the new qualification or if the worker has to reimburse the subsidy. Therefore, the establishment of training funds, made available for all employers and workers who want to requalify for another job, can contribute to the growth of skills.

Frans Pennings*

Sažetak

POTICANJE RAZVIJANJA VJEŠTINA I INOVACIJA U NIZOZEMSKOJ

Autor u radu prikazuje poduzetničku praksu promicanja inovacija u Nizozemskoj. Ova se politika sastoji u unaprjeđenju suradnje između centara znanja (uključujući i sveučilišta) i poduzeća omogućavanjem smještanja poduzeća i *start-upova* u susjedstvu centara znanja te izdavanje potrebnih dozvola i, ako je to nužno, određenih potpora. Takva se politika pokazala iznimno uspješnom. No, čini se da je razvijanje politika obrazovanja za sve sektore ekonomije puno teže. Kada poslodavci i radnici imaju suprotne interese to postaje još teže, posebice ako se poslodavci boje da bi ih radnik koji je stekao neko obrazovanje mogao napustiti ubrzo nakon stjecanja novih kvalifikacija ili ako radnik mora poslodavcu platiti troškove obrazovanja. Zbog toga stvaranje fondova za obrazovanje koje bi mogli koristiti svi poslodavci i radnici, koji se žele prekvalificirati za obavljanje drugih poslova, može pridonijeti rastu vještina.

Ključne riječi: *inovacije; Nizozemska; politika obrazovanja; rast vještina; radnici.*

Zusammenfassung

STÄRKUNG DER KOMPETENZEN UND INNOVATION IN DEN NIEDERLANDEN

Dieser Beitrag beschreibt ein Beispiel für bewährte Verfahren in den Niederlanden bezüglich der Förderung der Innovation von Unternehmen. Diesbezüglich fördert die niederländische Politik die Zusammenarbeit zwischen Wissenszentren (einschließlich der Universitäten) und Unternehmen, ermöglicht, dass die Unternehmen und Startups in der Nähe von Wissenszentren ihren Sitz haben, hilft bei der Erhaltung von Genehmigungen, und, falls erforderlich, gewährt Zuschüsse. Solche Politik hat sich als erfolgreich erwiesen. Die Entwicklung der Politik der beruflichen Bildung für alle Wirtschaftssektoren ist andererseits schwieriger zu erreichen. Dies kann noch schwieriger werden, falls Arbeitgeber und Arbeitnehmer gegensätzliche Interessen haben, insbesondere falls Arbeitgeber Angst davor haben, dass der neulich ausgebildete Arbeitnehmer nach der Erhaltung seiner Qualifikation seinen Arbeitsvertrag kündigen

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wird, oder falls der Arbeitnehmer den Zuschuss erstatten muss. Deshalb kann die Gründung von Ausbildungsfonds, welche sowohl für Arbeitgeber als auch für Arbeitnehmer, welche die Qualifikation für eine neue Stelle suchen, der Stärkung von Kompetenzen beitragen.

Schlüsselwörter: *Innovationen; die Niederlande; Ausbildungspolitik; Stärkung von Kompetenzen; Arbeitnehmer.*

Riassunto

L'INCENTIVO ALL'INCREMENTO DI COMPETENZE ED INNOVAZIONE NEI PAESI BASSI

Il presente lavoro illustra la *best practice* nei Paesi Bassi con riferimento alla promozione dell'innovazione imprenditoriale. Tale politica riguarda la promozione della cooperazione tra i centri del sapere (incluse le università) e le imprese, cercando di situare le imprese e le start-up nelle vicinanze dei centri del sapere, assistendoli nelle attività volte all'ottenimento dei permessi richiesti e, ove necessario, con sovvenzioni. Tale politica risulta raccogliere molti successi. Lo sviluppo di una politica di formazione per tutti i settori dell'economia, d'altra parte appare più difficile. Ciò diviene ancora più complesso se i lavoratori ed i datori di lavoro hanno interessi contrapposti; in particolare, se i datori di lavoro temono che il lavoratore così formato possa poi lasciare il lavoro dopo avere acquisito nuove qualifiche oppure se il lavoratore debba rimborsare la sovvenzione. Pertanto, l'istituzione di fondi per la formazione, accessibile a tutti i datori di lavoro ed ai lavoratori, che vogliano qualificarsi per un altro impiego, può contribuire all'incremento di competenze.

Parole chiave: *innovazione; Paesi Bassi; politica di formazione; incremento di competenze; lavoratori.*

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