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The instructions for the authors and more detailed information on submitting, classification and reviews of the papers are available at http://www.efzg.unizg.hr/iele.

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CONTENTS

EDITORIAL

Dear readers,

We are glad to introduce you to the June 2015 issue of INTEREULAWEAST – Journal for the International and European Law, Economics and Market Integrations. This issue is specific in two aspects.

First, the most of the papers contained therein were written by the authors who do not participate in the project, which fact is indicating that the Journal is progressively being recognized by the wider scope of researches and professionals as an appropriate medium for sharing ideas and results of scientific research with the interested public.

Second, the topics are not only legal but also from the field of economics, thus giving the Journal interdisciplinary note as was desire of the editors at the time the idea of the Journal was born.

Two of the papers in the current issue are dealing with the reflections of EU law and policies to the national legal systems of Croatia and Slovenia, analyzing the national legal frameworks and their readiness to implement EU solutions. One paper analyzes the core topic of the European company law – Societas Privata Europea while the other is dealing with the current issue of the corporate governance – gender equality on corporate boards. The last paper gives the analysis of the CSR reports of the food retailers in Europe.

Besides the given scientific papers, the current issue of the Journal also contains the review of the conference: "20 Years of Application of the Companies Act in the Interdisciplinary Context" which took place in January as a part of Zagreb Tempus Centre activities. The conference covered wide range of issues related to the application of the Croatian Companies Act not only as a basic legal framework for the businesses organization but also as one of the most successful instruments for the implementation of EU law in Croatia.

On this occasion we would like to announce that National University "Odessa Law Academy" in Ukraine will host the series of lectures on European Company Law by the EU experts in November within the INTEREULAWEAST Tempus project. Therefore it is likely that December issue of the Journal will be dedicated to the European Company Law issues. Having in mind the above mentioned we would like to invite all the interested authors to submit their

papers that are analyzing the current issues of the European Company Law. For more information on November event at the National University "Odessa Law Academy" please follow the upcoming announcements on the INTERE-ULAWEAST Project official website - http://iele.weebly.com.

Hana Horak, Editor-in-Chief

Zagreb, June 2015.

Preliminary Communication
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GENDER EQUALITY ON CORPORATE BOARDS: TOWARDS A MORE INCLUSIVE AND RESPONSIBLE SOCIETY EMPIRICAL EVIDENCE FROM CROATIA

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Marina Lovrinčević [**]
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ABSTRACT

Gender diversity issues are receiving great attention worldwide. Empirical evidence suggests that stronger women representation on boards is positively related to financial performance. Across Europe, initiatives for greater women representation on boards are undertaken. They vary from one country to another and include proposals in national codes, voluntary initiatives, demands for disclosure of nomination policies and legal quotas for women on company boards. Recent data show that women account for an average of 18.6% of the members of boards in the EU 28 member states. Results of the empirical study we provide show that women representation on Croatian companies' boards is just below European average and that the progress in ten years period has been fairly poor. Still, in Croatia doesn't exist strong social support nor legislative that would improve gender balance in supervisory and management boards.

KEYWORDS: gender equality, boards, Croatian companies

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1. INTRODUCTION

One of the emerging issues in corporate governance on the global level is related to gender inequality that can be observed on boards worldwide. Demands for stronger women representation on boards are motivated by equal opportunity and inclusion activism on one hand, but also by the arguments that wider board diversity will contribute to more effective and efficient boards via providing different perspectives, experience, knowledge and skills.

Reasons for stronger women representation are, among others, economic in nature. Empirical evidence suggests that stronger women representation on boards is positively associated to financial performance.[1]

Gender diversity is in accordance with consumer base of most of the companies. It is related to less unethical behavior, better reputation and perception of the company as being more socially responsible.[2] Moreover, gender diversity is associated to higher level of innovativeness and proportion of women in governing bodies is predictor of reduced level of conflicts and stronger focus on board performance and quality.[3]

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[1] Boards with stronger women representation have 10% higher ROE, 48% higher EBIT and 1.7 times higher stock price growth in comparison to Stoxx Europe 600 for 89 European-listed companies. McKinsey & Company (2007) Women Matter: A Corporate Performance Driver cited in Catalyst (2013) Why Diversity Matters, Catalyst Information Centre, available at http://www.catalyst.org/knowledge/why-diversity-matters (12.02.2015.)

[2] A panel at a World Economic Forum in Davos put the question: "Would the world be in this financial mess if it had been Lehman Sisters?" Many participants believed that the answer was no, referring to the findings suggesting women were more prudent and less ego driven then men in financial management contexts. See Rhode, D. L. and Packel, A. K. (2014) Diversity on corporate boards: How much difference does difference make?, Delaware Journal of Corporate Law, Vol. 39, p. 394. On the other hand, Dobbin and Jung in their 2007 study suggest that gender diversity may be influencing corporate governance not by shaping efficacy or monitoring capabilities of boards themselves, but by activating bias on the part of institutional investors who now control 80% of the shares of America's leading companies. They show that boards are attentive to the demands of institutional investors for greater board diversity. Second, they show that investor decision making is influenced by gender bias, and that the typical investor will reduce holdings in firms that appoint female directors. Finally, they show that accountability apprehension will mediate this process, such that visible blockholding institutional fund managers and public pension fund managers (who as a group pressed for board diversity) will be less likely to act on gender bias. See Dobbin, F. and Jung, J. (2011) Corporate board gender diversity and stock performance: The competence gap or institutional investor bias?, North Carolina Law Review, Vol. 89, pp. 809-838

[3] Other forms of diversity based on race, board member background, LGBT identity and nationality are also found to be positively associated to financial performance. See Catalyst (2013) Why Diversity Matters, Catalyst Information Centre, available at http://www.catalyst.org/knowledge/why-diversity-matters (12.02.2015.)

2. A CALL FOR GENDER EQUALITY ON CORPORATE BOARDS

In United States, close to three-quarters of members of corporate boards of the largest American companies are white men. According to the most recent data, women hold only 16.9% of the seats on Fortune 500 boards. Women occupy 14.8% of Fortune 501-1000 board seats and only 11.9% of board seats in Rusell 3000 companies.[4]

Initiatives for greater women participation in corporate governance structures vary from one country to another and include different measures from proposals in national codes, voluntary initiatives, demands for disclosure of nomination policies to legal quotas for women on company boards. Across Europe, quotas for female membership on corporate boards have been generating interest, and in a few countries, these quotas have been passed. Norway was the first country to introduce gender quotas in 2005 requiring at least 40% of public limited company board members to be women (for boards having more than 9 members). After these targets became mandatory, companies had to comply by 2008. For companies not following these instructions, monetary sanctions and even shutting the business down were applicable.[5]

Likewise, in Spain most of the improvement in women's representation on board occurred between 2005 and 2006 when a recommendation concerning gender representation at board level was introduced in a new code of governance and when Equality Act that established a gender quota was enacted in 2007 requiring a minimum of 40% representation for both genders in listed companies (employing more than 250 employees).[6] Quotas have been introduced in France and Belgium in 2011.

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[4] Rhode, D. L. and Packel, A. K. (2014) Diversity on corporate boards: How much difference does difference make?, Delaware Journal of Corporate Law, Vol. 39, p. 379. Rhode and Packel notice that in United States support for diversity has grown in principle, but progress has lagged in practice (sixteen countries now require quotas to increase women's representation on boards, and many more have voluntary quotas in corporate governance codes).

[5] Even though all publicly listed firms now in operation comply with the quotas for board membership, the number of female CEOs in Norway remains fairly stable. This result has come about because many of the most qualified women, known as the "Golden Skirts" now sit on several boards, leading to a smaller than predicted increase in the overall number of women on corporate boards nationwide. See in Sweigart, A. (2012) Women on Board for Change: The Norway Model of Boardroom Quotas As a Tool For Progress in the United States and Canada, Northwestern Journal of International Law & Business, Volume 32, Issue 4, available at http://scholarlycommons.law.northwestern.edu/njilb/vol32/iss4/6 (30.04.2015)

[6] Fagan, C. and Gonzalez Menendez, M. C. (2012) Conclusion, pp. 245-258 in Fagan, C., Gonzalez Menendez, M. C. and Gomez Anson, S. Women on Corporate Boards and in Top Management: European Trends and Policy, Palgrave MacMillan, UK

In November 2012, European Commission adopted a Proposal of Directive of the European Parliament and of the Council on improving gender balance among non-executive directors of companies listed on stock exchanges and related measures.[7] European Commission appealed to all listed companies having less than 40% of the under-represented sex non-executive directors to assure representation of at least 40% aiming at gender equality. By 2020, gender equality (50% representation) should be reached by active implementation of selection and appointment procedures for non-executive directors (one-tier system) and for supervisory board members (two-tier system).

In November 2013, European Parliament has voted with an overwhelming majority to back the European Commission's proposed law to improve the gender balance in Europe's company boardrooms. Even though consensus has been reached on the necessity of improving gender balance, still there is a high level of disagreement on how this should be achieved. [8]

Recent data provided by European Commission show that women account for an average of 18.6% of the members of boards in EU 28 member states (that is an increase of 0.8% in comparison to 2013). The smallest proportion of women on boards is in the Mediterranean countries such as Malta (2.7%), Portugal (8.7%), Spain (16.2%) and that proportion is enlarging as we geographically move toward northern European countries. In Latvia, for example, representation of women accounts for 31.4%, in Sweden 27.1%, in Finland 28.6%. In France, even it has basic characteristics of Mediterranean country, women representation accounts for 30.4%.[9] The largest proportion of women on boards is in Norway, two fifths, which is in accordance with law.

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[7] Proposal of Directive of the European Parliament and of the Council on improving gender balance among non-executive directors of companies listed on stock exchanges and related measures, Bruxelles, European Commission. Available at http://ec.europa.eu/justice/gender-equality/files/womenonboards/directive_quotas_en.pdf (02.02.2015)

[8] Many national delegations strongly support the proposed Directive while other delegations remain opposed. Those delegations have stressed that Directive fails to respect the principle of subsidiarity and principle of proportionality as well. As to prevent further negotiation stagnation, the opposed delegations have proposed a package of measures. Mandatory measures would be implemented in disclosure segment only (making room for "comply-or-explain" rule). Also, longer period for adjustment has been proposed and companies should have a right to choose between objectives of at least 40% representation of the under-represented sex on non-executive positions or at least 33% representation of the under-represented sex on all of the director positions (both executive and non-executive). See in ecoDa (2014) EU Updates-April 2014 (Board's diversity/Policy), Brussels, European Confederation of Directors' Associations

[9] European Commission (2014) Gender Balance on Corporate Boards: Europe is Cracking the Glass Ceiling. Available at http://ec.europa.eu/justice/gender-equality/files/womenonboards/wob-factsheet_2014_en.pdf (07.02.2015)

There is an evident trend of growth in numbers; for the last five years, the number of women on boards has increased for about 70%.[10] Recent evidence shows that proportion of women on supervisory boards in Croatian companies, unfortunately, doesn't follow these trends. Women on boards in Croatia account for 15.3%.[11]

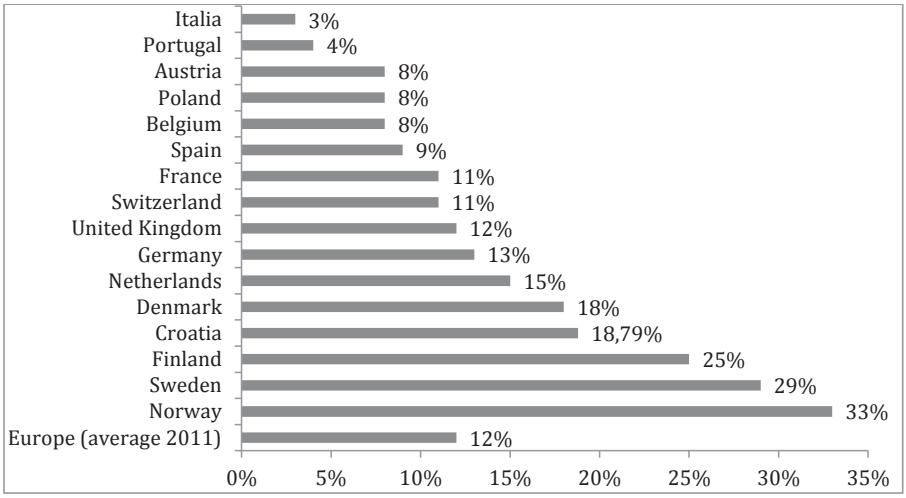
Results show that more than half of the respondents holding highest decision-making positions in European companies are facing problems regarding nomination of women members. Only 13% of male respondents support gender quotas implementation while 41% of female respondents support gender quotas.[12] The percentage of new coming female board members and CEOs is increasing but still shows very slow progress.[13]

[10] Heidrick & Struggles (2014) Towards Dynamic Governance, 2014 European Corporate Governance Report. Available at http://heidrick.com/ff/media/Publications%20and%20Reports/European-Corporate-Governance-Report-2014-Towards-Dynamic-Governance.pdf (03.02.2015)

[11] Research that has been conducted in Croatia show that in 2011 the proportion of women on boards was just above European average (18.76%). See in Tipurić, D. and Mešin, M. (2011) Promjene vrhovnog menadžmenta u hrvatskim poduzećima in Tipurić, D. (Ed.) Promjene vrhovnog menadžmenta i korporativno upravljanje, Sinergija, Zagreb, pp. 71-99. Most recent data provided by European Commission suggest that Croatia is bellow EU 28 member states average regarding proportion of women on boards. See European Commission (2014) Gender Balance on Corporate Boards: Europe is Cracking the Glass Ceiling. Available at http://ec.europa.eu/justice/gender-equality/files/womenonboards/wob-factsheet_2014_en.pdf (07.02.2015)

[12] Heidrick & Struggles (2014) op. cit., p. 7

[13] On the global level, 3.6% of all incoming CEOs are women (decrease of 1.5% in comparison to 2012). Still, this is significantly higher than 2.1% representing average for period 2004-2008. For the last ten years the number of incoming female CEOs is increasing. From 2004, the number of incoming female CEOs is greater for about 65% than the number of outgoing female CEOs. See Favaro, K., Karlsson, P. O. and Neilson, G. L. (2014) The 2013 Chief Executive Study-CEO Turnover in 2013. Available at http://www.strategy-business.com/article/00254?pg=all#ceo_turnover (07.02.2015)



Graph 1: Proportion of women on boards[14]

Not surprisingly, companies in Norway have the biggest proportion of women on boards; on average, one third of all board members are female. The rest of the Scandinavian countries are above European average when it comes to representation of women on boards. Croatia is still significantly better than European average (proportion of female members on supervisory boards) and way ahead of the culturally similar, Mediterranean countries like Italy and Portugal.

In sum, across Europe there is a little but visible step forward in increasing representation of women on boards mainly through legislation and regulation. In the United States, resistance to quotas builds on longstanding concerns about any departure from meritocratic principles.[15] Comply-or-explain should be more appropriate approach according to advocates of gender diversity.

Besides issues of representation, another inequality persists: female board members are still underpaid for the same job as their male counterparts. Women on top management positions still receive on average 30%-45% less than their counterparts (in terms of total compensation) and the greatest proportion

[14] Deloitte (2011) Women in the boardroom: A global perspective. Available at http://www.deloitte.com/assets/Dcom-Tanzania/Local%20Assets/Documents/Deloitte%20Article_Women%20in%20the%20boardroom.pdf (10. 04.2012)

[15] According to Rhode and Packel, Facebook CEO Mark Zuckerberg typifies this view. When asked in 2011 why his five-member board had no women, he responded: "I'm going to find people who are helpful, and I don't particularly care what gender they are… I'm not filling the board with check boxes." Rhode, D. L. and Packel, A. K. (2014) Diversity on corporate boards: How much difference does difference make?, Delaware Journal of Corporate Law, Vol. 39, p. 416

of their total compensation package accounts for base salary while the proportion of payouts from long-term incentive plans is significantly smaller.[16]

In Europe, there is still evident gender pay gap. Male non-executive directors received 9% higher total compensation then female non-executive directors in 2013 (the only exception are female board presidents). Notable progress is evident in Italy where the gap has been reduced to 4% (in 2013 this gap accounted for 22%) and Netherlands where pay gap has been reduced to 2% (from 8%). On the other hand, gender pay gap is expanding in Germany (22%), Austria (18%) while the pay median in Norway is the same for both genders. [17]

3. EMPIRICAL EVIDENCE FROM CROATIA

In 2014, a team of researchers, members of the South East Europe Corporate Governance Academic Network[18] (SEECGAN) has developed an innovative instrument in order to capture the quality of corporate governance in listed companies in region. Since each country has its context specificities, the intention was to develop a unique measurement instrument that will deliver comparable results. SEECGAN index covers seven relevant areas of corporate governance: (1) structure and governance of boards, (2) shareholder's rights, (3) transparency and disclosure of information, (4) audit and internal control, (5) compensation/remuneration, (6) corporate risk management and (7) corporate social responsibility.[19] From June to October 2014, Croatian team collected 32 valid questioners (out of 162) from companies listed at Zagreb Stock Exchange regulated market. Almost half of the companies from the sample (15) employ more than 1000 employees and 11 companies employ between 250 and 1000 employees. Only 6 companies from the sample are small and medium sized (employ up to 250 employees). On average, companies from the sample employ 1967 employees. In 2013, 22 companies from the sample have reported operating profit (69.7%) while 10 companies reported operating loss (31.3%).

[16] Part of these observed differences can be explained by the size of female managed companies. See Mohan, J. and Ruggiero, J. (2007) Influence of firm performance and gender on CEO compensation, Applied Economics, 39 (7-9), pp. 1107-1113; Albanesi, S. and Olivetti, C. (2006) Gender and Dynamic Agency: Theory and Evidence on the Compensation of Female Top Executives. Available at http://people.bu.edu/olivetti/papers/execomp_draft1.pdf (25.02.2015)

[17] HayGroup (2014) Non-executive directors in Europe 2014: Painting a picture of pay practices, structures and diversity of leading European companies. Available at http://haygroup.com/ff/media/files/resources/documents/hg%20ned%20report%202014.ashx (07.02.2014)

[18] Complete list of researchers from Croatia, Slovenia, Bosnia and Herzegovina, Serbia, Montenegro and Macedonia is available at http://www.ciru.hr/index.php/seecgan/ (30.04.2015)

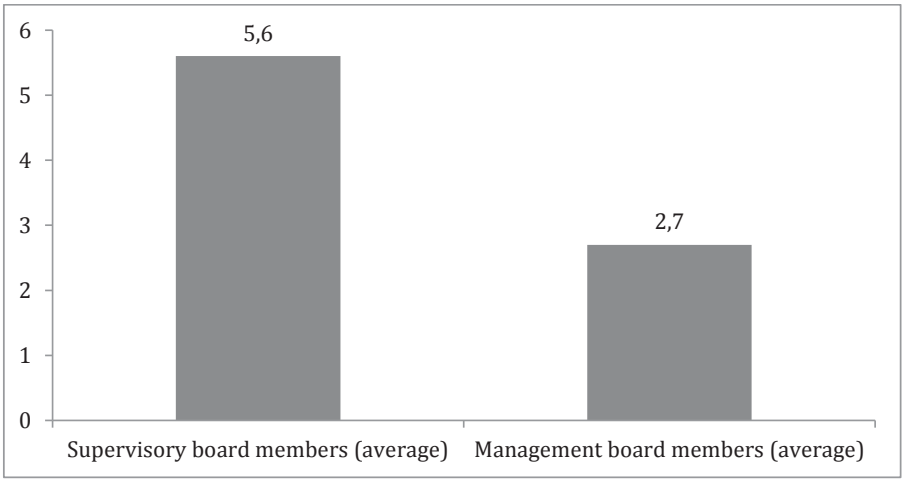
[19] See complete report Tipurić, D. et al. (2015) Korporativno upravljanje u Hrvatskoj: Ocjena kvalitete korporativnog upravljanja hrvatskih dioničkih društava SEECGAN metodologijom, CIRU, Zagreb

Shares of 15 companies from the sample were included in the official share index of the Zagreb Stock Exchange-Crobex (on 31st December 2014).

According to ownership structure data provided by Central Depository & Clearing Company Inc. (on 31st December 2014), for total of 34 shares issued by 32 issuers from the sample (2 issuers have ordinary and preference shares listed), average share of the largest shareholder accounts for 40.46% (or 41.85% calculated only by the ordinary shares). High level of ownership concentration is one of the key features of closed system of corporate governance such as on in the Republic of Croatia.

Under Croatian corporate law, public companies may operate either under one-tier or two-tier system. Out of 32 companies, only one company has one-tier board.

For companies operating under two-tier system, the average number of the supervisory board member is 5.61 while average number of management board members is 2.74. These results are similar to ones from the 2013 study, where the average number of the supervisory board members in Croatian listed companies was 5.62.[20] In the company operating under one-tier system, board has 10 male members, out of whom 2 are non-executive directors (president of the board and vice president).



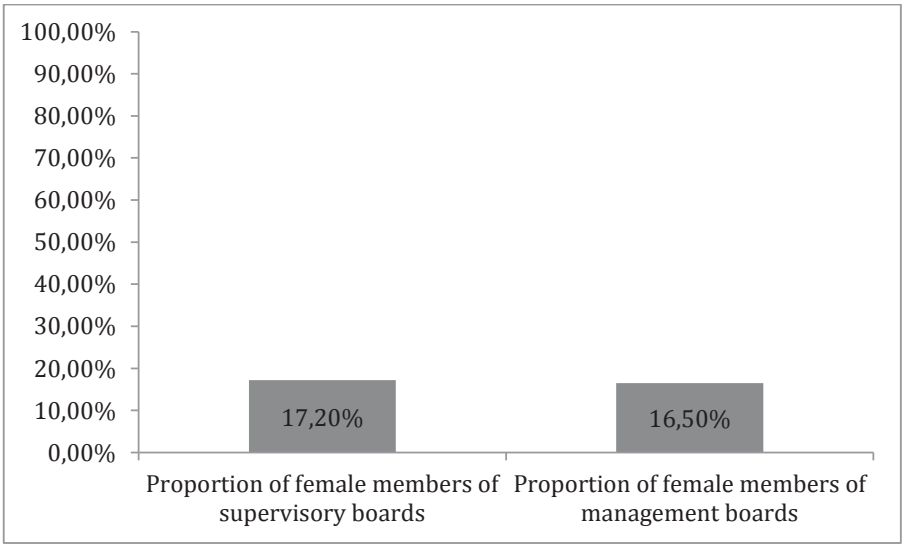
Graph 2: Average number of board members in Croatian public companies[21]

[20] Mešin, M. (2013) Povezanost djelotvornosti nadzornog odbora s poslovnom uspješnošću poduzeća, doktorska disertacija, Ekonomski fakultet Zagreb, Zagreb, p. 143

[21] Survey results. See complete report Tipurić, D. et al. (2015) Korporativno upravljanje u Hrvatskoj: Ocjena kvalitete korporativnog upravljanja hrvatskih dioničkih društava SEEC-GAN metodologijom, CIRU, Zagreb

Results of the study clearly indicate that 68.5% of the companies from the sample neglect minimum requirements of gender equality (authors of the SEECGAN index have reached consensus that under-represented sex should be represented by at least 30%).

On average, there is only one female member on supervisory boards ($\bar{x}$=0,967) while there is a majority of companies (61.29%) without female supervisory board members. On 19 management boards there are no female members ($\bar{x}$ =0,452). The proportion of female members on management boards is 16.74% while the proportion of female members on supervisory boards is 17.26%.[22]



Graph 3: Proportion of female supervisory and management board members in Croatian public companies[23]

Earlier study, conducted in 2004, showed that women occupy only 14.6% of the seats in supervisory boards and 16.1% of the positions in management boards in Croatian public companies.[24]

[22] Means are calculated on the sample of 31 companies operating under two-tier system, since the only company operating under one-tier system has all male members.

[23] Survey results. See complete report Tipurić, D. et al. (2015) Korporativno upravljanje u Hrvatskoj: Ocjena kvalitete korporativnog upravljanja hrvatskih dioničkih društava SEEC-GAN metodologijom, CIRU, Zagreb

[24] Tipurić, D. (2006) Nadzorni odbor i korporativno upravljanje, Sinergija, Zagreb, p. 163

Still, in Croatia doesn't exist strong social support nor legislative that would improve gender balance in supervisory and management boards. Final target of 40% representation of the under-represented sex would be extremely difficult to reach in these circumstances.

In vast majority of Croatian public companies the awareness of gender equality issues doesn't exist. Problems of gender (in)equality obviously aren't priority in strategic management of managerial resources in Croatian companies despite numerous findings of gender and other forms of diversity positive effects on financial performance, organizational climate, innovativeness, organizational creativity, superior conflict management techniques and so forth.

4. CONCLUSION

Providing opportunities for women to participate in the decision-making processes in corporate governing bodies is *conditio sine qua non* of more inclusive and democratic corporate society. These opportunities are now days delivered through different measures that include proposals in national codes, voluntary initiatives, demands for disclosure of nomination policies and quotas for female members on boards.

While in the United States, debate on quota introduction is moving toward "comply-or-explain" solution (since quotas are undermining basic propositions of fair and equal opportunities according to proponents of the opposed view), in Europe, quotas are seen as legitimate means to improve women representation on company boards. Since introduced in Norway, in 2005, representation of female members on boards increased tremendously and today is stable at around one third. At the European Union level, efforts are visible. European Commission appealed to all listed companies having less than 40% of the under-represented sex non-executive directors to assure representation of at least 40% aiming at gender equality. By 2020, gender balance (50% representation of both sexes) should be reached by active implementation of selection and appointment procedures for non-executive directors (one-tier system) and supervisory boards (two-tier system).

Recent data provided by the European Commission show that women account for an average of 18.6% of the members of boards in EU 28 member states. The smallest proportion of women on boards is in the Mediterranean countries such as Malta, Portugal and Spain and that proportion is enlarging as we geographically move toward northern European countries.

We provide relevant data for Croatia and show that in 10 years period (comparing results for 2004 and 2014) no significant progress was made regarding

women representation on management and supervisory boards. Croatian public companies have to put stronger emphasis on gender equality issues not just for the cause of creating more fair and responsible society but for the cause of stimulating superior financial performance of Croatian companies through gender diversity.

LITERATURE:

1. Albanesi, S. and Olivetti, C. (2006) Gender and Dynamic Agency: Theory and Evidence on the Compensation of Female Top Executives. Available at http://people.bu.edu/olivetti/papers/execomp_draft1.pdf
2. Catalyst (2013) Why Diversity Matters, Catalyst Information Centre, available at http://www.catalyst.org/knowledge/why-diversity-matters
3. Deloitte (2011) Women in the boardroom: A global perspective. Available at http://www.deloitte.com/assets/Dcom-Tanzania/Local%20Assets/Documents/Deloitte%20Article_Women%20in%20the%20boardroom.pdf
4. Dobbin, F. and Jung, J. (2011) Corporate board gender diversity and stock performance: The competence gap or institutional investor bias?, North Carolina Law Review, Vol. 89, pp. 809-838
5. ecoDa (2014) EU Updates-April 2014 (Board's diversity/Policy), Brussels, European Confederation of Directors' Associations
6. European Commission (2012) Proposal of Directive of the European Parliament and of the Council on improving gender balance among non-executive directors of companies listed on stock exchanges and related measures, Bruxelles. Available at http://ec.europa.eu/justice/gender-equality/files/womenonboards/directive_quotas_en.pdf
7. European Commission (2014) Gender Balance on Corporate Boards: Europe is Cracking the Glass Ceiling. Available at http://ec.europa.eu/justice/gender-equality/files/womenonboards/wob-factsheet_2014_en.pdf
8. Fagan, C. and Gonzalez Menendez, M. C. (2012) Conclusion, pp. 245-258 in Fagan, C., Gonzalez Menendez, M. C. and Gomez Anson, S. Women on Corporate Boards and in Top Management: European Trends and Policy, Palgrave MacMillan, UK
9. Favaro, K., Karlsson, P. O. and Neilson, G. L. (2014) The 2013 Chief Executive Study-CEO Turnover in 2013. Available at http://www.strategy-business.com/article/00254?pg=all#ceo_turnover
10. HayGroup (2014) Non-executive directors in Europe 2014: Painting a picture of pay practices, structures and diversity of leading European companies. Available at http://haygroup.com/ff/media/files/resources/documents/hg%20ned%20report%202014.ashx

11. Heidrick & Struggles (2014) Towards Dynamic Governance 2014, European Corporate Governance Report. Available at http://heidrick.com/ff/media/Publications%20and%20Reports/European-Corporate-Governance-Report-2014-Towards-Dynamic-Governance.pdf

12. Mešin, M. (2013) Povezanost djelotvornosti nadzornog odbora s poslovnom uspješnošću poduzeća, doktorska disertacija, Ekonomski fakultet Zagreb, Zagreb

13. Mohan, J. and Ruggiero, J. (2007) Influence of firm performance and gender on CEO compensation, Applied Economics, 39 (7-9), pp. 1107-1113

14. Rhode, D. L. and Packel, A. K. (2014) Diversity on corporate boards: How much difference does difference make?, Delaware Journal of Corporate Law, Vol. 39, pp. 377-426

15. Sweigart, A. (2012) Women on Board for Change: The Norway Model of Boardroom Quotas As a Tool For Progress in the United States and Canada, Northwestern Journal of International Law & Business, Volume 32, Issue 4, pp. 81-105

16. Tipurić, D. (2006) Nadzorni odbor i korporativno upravljanje, Sinergija, Zagreb

17. Tipurić, D. and Mešin, M. (2011) Promjene vrhovnog menadžmenta u hrvatskim poduzećima, pp. 71-107 in Tipurić, D. (Ed.) Promjene vrhovnog menadžmenta I korporativno upravljanje, Sinergija, Zagreb

18. Tipurić, D. et al. (2015) Korporativno upravljanje u Hrvatskoj: Ocjena kvalitete korporativnog upravljanja hrvatskih dioničkih društava SEECGAN metodologijom, CIRU, Zagreb

Preliminary Communication
UDC347.23:349.6(497.4)

PROPERTY AND ENVIRONMENTAL PROTECTION - AN OVERVIEW OF THE SLOVENE LEGAL FRAMEWORK

Rajko Knez *

ABSTRACT

Property in the field of the environment can serve as an argument for better protection measures or as a reason to make protection measures difficult in case that the owner does not agree with the measures. In another words, the property can serve as a reason for and against the (state or private) environmental protection measures. It can also be used against authorities and against private persons, i.e. polluters, factories etc. This article explore different viewpoints on how the objection of property (a use of it, its protection, a protection of its value, etc.) can be used in different legal relationship, what kind of legal proceedings are possible in case of administrative law (public law remedies) and in private law (private law remedies).

KEY WORDS: property, environment, restitution integrum, actio popularis, compensation, environmental damage, command and control

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1. INTRODUCTION

The use of a property has not only civil law meaning and it is not limited only to things. This article aims to discuss how the private property in land/industry/buildings etc can serve as a protective shield against environmental regulatory restrictions of land-use, operations of industry, uses of buildings, etc. For instance, if an authority closes down a polluting factory its owner may claim undue intervention into his property. He may conceive the restriction as an expropriation (or in other vases as an indirect expropriation) and argue that the action was unlawful or at least triggering compensation. Other examples include the restriction of agriculture in Natura 2000-sites, or the introduction of energy efficiency requirements (isolation etc.) concerning existing buildings. And there might also be other examples where property is invoked as a reason for protection against insufficient or ineffective state's measures. By property we understand not the civil law notion (which tends to be somewhat narrow) but the notion used in the constitutional law (i.e. in the context of protection against intervention by state action).

2. OBJECTS OF "PROPERTY" AND USE OF WHICH IS BEING DEFENDED AGAINST ENVIRONMENTAL PROTECTION REGULATION

Regulatory regime of property is defined, in general, in the Constitution of the RS.[1] The approach used is not self-sufficient; namely, Art. 67 foresees that it is the legislator that defines what exactly the property is, how it is defined, how the property can be obtained and what the benefits, i.e. implied rights, of the property are. At the same time, mentioned provision defines that property is *limited by its commercial, social and ecological function*.[2] It is therefore for the legislator to define the actual contend of the "property" and this is not done by the Constitution itself.

According to private law rules, property can be obtained not only on real objects but also on rights, especially private law rights. On the other hand, there are objects that are excluded from property. This is especially true for things

[1] Constitution of the RS, Official Journal of the RS, Nr. 33-1409/1991I, RS 42-2341/1997, RS 66-3052/2000, RS 24-899/2003, RS 69-3092/2004, RS 69-3090/2004, RS 69-3088/2004, RS 68-2951/2006.

[2] Article 67, (Property): »The manner in which property is acquired and enjoyed shall be established by law so as to ensure its economic, social, and environmental function. The manner and conditions of inheritance shall be established by law. « For its commentary see also: L. Šturm, Komentar Ustave RS, Dopolnitev – A, FDEŠ, 2011, p. 963 – 1002.

that are defined as *public goods*, which might be natural public goods or constructed public goods. Natural resources, generally speaking, are not subjects of public rights; they are public goods, belonging to all, to the community, and the State administer and managing them.[3] But from the constitutional point of view, property comprehends also rights, market shares, etc. It is not only real things that are subject of a property, although real things, especially immovable are having some special rules (for instance that limitation in the use or ownership of the immovable is subject to compensation; Art. 69).

However, it is common that legal language refers only to rights, not to property in the above sense. For instance, certain official documents awarding an allowance to a person (like an environmental permit), will be treated as an *acquired* or *vested* right, although not as a property right. If somebody has a permit to build certain construction, that right cannot be used as a property that outweighs environmental protection measures.

Rights to use natural resources are, primarily, given to the state alone; namely, natural resources are public good as noted above.[4] However, the State authorities (and also local authorities) can award rights to exploit natural resources. Under Art 164 of the Environmental Protection Act (EPA) the state, or a municipality, may award, against payment, concessions to use or exploitation of natural assets to a legal or natural person when that person is qualified to exercise that concession. Concessions are awarded for a certain period of time but not more than 30 years. This is for instance true for concessions to exploit forests in Slovenia.

It was, until recently, a general trend to award concessions, also in cases where the state or municipality owned (public) company could have exploited the natural resource. This practice was followed also by the *Statute on Private-Public Partnerships*,[5] which make obligatory, under Art. 141, for all public companies to reorganize in two ways: they can be 100% owned by the state/municipalities or they can be organized as private companies. A substantial number of former public companies became private and they asked for concessions. This way the

[3] Therefore, if natural resources are part of certain spot, which is in private property, the owner is not entitled to use that natural resource without permission i.e. the concession, and this is part of the constitutional limitation of the property rights due to the ecological reasons.

[4] According to the Environmental Protection Act (EPA), a natural resource shall mean any component of the environment, which is subjected to economic exploitation / commercially exploited. This is a definition in Art. 3 of the EPA, Official Journal of the RS, 41-1694/2004, RS 17-629/2006, RS 20-745/2006, RS 49-2089/2006, RS 66-2856/2006, RS 33-1761/2007, RS 57-2416/2008, RS 70-3026/2008, RS 108-4888/2009, RS 48-2011/2012, RS 57-2415/2012, RS 92-3337/2013.

[5] Official Journal of the RS, No 127/2006.

State/municipalities lost certain control embodied to the public companies, but most important, public interest was exchanged for private one.

Private interest in using the natural resources is, as we are evidencing now in Slovenian practice, not welcomed; Court of Auditors of the RS is also very critical in its assessment to the concession's approach. The Court of Auditors estimates that approximately 16 mil EUR is lost every year due to the inefficiency of the system.[6] The system of concessions is therefore not found appropriate by the Court of Auditors. The concessions will end on 2016 and the court proposes to the legislator to adopt a new approach, i.e., a new, more efficient system that would enable more sustainable treatment of natural resources.

3. A PRIVATE PROPERTY AS A DEFENSE OF ENVIRONMENTAL PROTECTION

As a difference to the above, it is not only hard to get the property and what are conditions to get certain right that is linked to the environment, but also vice-versa; namely, can one's right be an obstacle for the enjoyment of the healthy environment?[7] There are, legally speaking, several possibilities to invoke private property for or also against environmental protection. In the private law enforcement, individual can rely on property as a defence against activities of other persons, might be neighbours or any third persons (like companies, i.e. factories, investors, also perhaps against activities of an army (like military exercises), also against actions of hunters; i.e. against everybody that is not included in the notion of the State. Actions can be legally based on provision of so called "neighbouring law" (like nuisance), or in *actio popularis*. The latter is well framed in the Civil (Code Article 133).

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[6] Report of the Court of Auditors of the RS, of 18 May 2012, Directing forests in Slovenia, Nr. 321-2/2010/93, available http://www.rs-rs.si/rsrs/rsrs.nsf/I/K38B07CAD3EAF5421C1257A000030F18C/$file/Gozd_SP09.pdf.

[7] It should be also mentioned that the sole property can similary poses obligations and responsibility in environmental matters. One can be responsible for (environmental) damage only because he owns the property. According to Art. 157.a of the Environmental Protection Act the owner of the property shall bear the costs for the restitution (restitutio integrum) of the land in question, in case the polluter cannot be find or cannot be identified. So far, the courts did not find this solution contrary to the Constitution of the RS or to Art. 8 of the ECHR or to the EU rules or even to the principle of proportionality. There are however different views on that among the scholars present. Compare R. Knez, Evropsko prekrškovno pravo (s ponazoritvijo na primeru vinjetnega sistema in nelegalno odloženih odpadkov). Pravosodni bilten, ISSN 1318-1459, 2013, Year 34, Nr. 1, p. 45-63.

It reads:

> *(1) Any person may request that another person dispose of a source of danger that threatens major damage to the former or an indeterminate number of persons and refrain from the activities from which the alarm or risk of damage derives, if the occurrence of alarm or damage cannot be prevented by appropriate measures.*
>
> *(2) At the request of an interested person the court shall order appropriate measures to prevent the occurrence of damage or alarm or to dispose of a source of danger to be taken at the expense of the possessor thereof should the latter fail to do so.*
>
> *(3) If damage arises during the performance of generally beneficial activities for which permission has been given by the relevant authority it shall only be possible to demand the reimbursement of damage that exceeds the customary (usual) boundaries.*
>
> *(4) Nevertheless, appropriate measures to prevent the occurrence of damage or to reduce damage may also be demanded in such a case.*

This action can be used also in those cases where the State issued permission for activities that are harmful to the environment and private property; in these cases, only measures that can prevent or reduce the damage are possible.[8] However, the action cannot be brought towards the state (administrative authorities) to change or to annul permissions, but only to private parties. Procedures against the State can be brought in different procedures, i.e. public law remedies. An owner, that can prove his property being affected by activities, harmful to the environment, and whereby the permission was issued, can claim, first in the administrative procedure and later on with a lawsuit at the administrative court to change or to annul the permission. It is not so rare that environmental NGOs are filing such actions, helping at the same time individual owner who is usually *one-shot player,* i.e. mostly not being in position to search for legal protection against the State measures at courts. NGOs are, on the other side, often parties (claimants) seeking state's measures to be changed. On the other side, it is a different approach against private investors, relaying only on civil law measures. Namely, state measures, general and individual, like permissions, are still those that in the first place, allow activities; no private action to stop activities would be successful, if State authorities

[8] Burden of proof is in Slovene law, in case of dangerous activities, where the strict liability applies, on the defendant. In case of the strict liability, Slovene law foresees the burden of proof in the sphere of the party being engaged in the dangerous activities. Taking together actio popularis and the reverse burden of proof, Slovene law makes for the plaintiff rather acceptable procedural position.

allow certain activities. It is therefore, first, necessary to change state's rules or measures.

Another, rather important feature in private law actions is also a standard of "*usual boundaries*"; only if damages exceed that boundary, the legal defence is possible. This "case-by-case" approach brings certain legal uncertainty and it can be a difficult task for the court to define it in particular cases.[9] For instance, is it bad odour because of the farm something that is within the limits of usual boundaries in rural areas.

Let us imagine the following case: A factory, situated near a town, has been operating for decades. People are slowly realizing that statistically the inhabitants in the city and in the vicinity do not live up to the average age and that the cancer is more frequently present among them, also frequently cause of the deaths. They have no direct proofs that the factory could be responsible, although it is rather clear that the soil around the factory is poisoned and that the heavy metals found in the vegetable could be linked to the factory. However, credible proofs are missing. Here are some immediate questions: What could be the obligation of the state? Could the inhabitants rely on the public remedies procedure? If the state wants to revoke the operation permit, could the factory claim any sort of property guarantee?

Let us discuss this case, starting from the point of view of public remedies, *ex ante* and *ex post*. The state shall check the procedure and the best available technics (BAT) in the factory. There are possibilities for the state authorities (inspectors) to investigate and to search for proofs. In case they find the necessary evidence, they can impose measures (*restitutio integrum*, ban the production). However, the state inspector will not demand the factory to compensate damages to individuals. That has to be claimed by individuals alone (private law remedies). Public remedies procedure will be essential for inhabitants, since it will be unlikely to obtain the necessary evidence themselves. Courts, under private law remedies procedures, are not bound by decision and by findings of the public authorities (executive authorities), but usually they follow them and take them into account.

If the State revokes the operation permit from the reason of noncompliance, there is no right for the operator arising out of the property guaranty. As explained, a permit cannot be used against mandatory provision on the environmental protection.[10] From this point of view, the permit will not be seen as a

[9] R. Knez, Odgovornost gospodarskih subjektov za obremenjevanje okolja v materialnem in mednarodnem zasebnem pravu, PFUM, Maribor, 1998, p. 26 – 30.

[10] The permits issued by the state, in general, do not exclude a holder of such a permit from the liability toward third persons. This is not the approach that Slovenia would accept. Even

property guarantee. The sole goal of the permit is to allow the factory to operate. However, even though the factory is in line with the permit, the damage might be caused. The State, although it issued the permit, is not responsible and the factory cannot rely on the permit and exclude itself from the obligation to compensate damage. However, if the operation permit is revoked from any ground which is in the sphere of the State and whereby the operator is not liable for the revocation, than the operator is entitled for compensation.

4. A PUBLIC MANAGEMENT OF NATURAL RESOURCES

Property is not always connected with the ownership. Especially in case of the environment and nature the ownership will not be the sole reason to constitute certain rights. Nature and the environment are not having the owner – although somebody can hold an ownership on certain plot that does not mean that also natural resources belongs to him. On a contrary – the owner of the plot is still obliged to get permits from the State to use or influence the natural resources. Namely, a according to Art. 5, 70 and 73 of the Slovenian Constitution the State is responsible to safeguard and administrate natural resources. Natural resources are public goods and there is no ownership. This is not exclusively defined in the Constitution of the RS nor in the statues, but the Constitution Court is clear on that issue.[11] Natural resource can be defined as such by a decision of the State/ municipalities or can be as such according its characteristics.[12]

Duties of the state in this respect are to adopt rules for proper safeguard of natural resources, to supervise and also, important, to act in cases of pollution, environmental strain, (possible) environmental damage, etc (preventive and curative actions) in case of inactivity of the polluter or in case the polluter is not known (so called subsidiary duty). These are all duties, mostly defined in the EPA.

The regulatory restrictions to use property are possible. The general rule is that restrictions, even those in the public interests, are to be compensated. Howev-

more, in certain cases (constructions) investors are not allowed to start with constructions, if the building permit is not final. That means that no court remedies are possible any more. The finality obtained in administrative process (within executive authorities) is not enough. If the investor would like to start with the constructions despite that, he will have to bear consequences in case the court will annul such state permit (Art. 3 of Construction Act, Zakon o graditvi objektov (Uradni list RS, št. 102/04 - uradno prečiščeno besedilo, 14/05 - popr., 92/05 - ZJC-B, 93/05 - ZVMS, 111/05 - odl. US, 126/07, 108/09, 61/10 - ZRud-1, 20/11 - odl. US, 57/12, 101/13 - ZDavNepr in 110/13).).

[11] Decision of the Constitutional Court of teh RS, No U-I-176/94-16, of 5.10.1995.

[12] Par. 11 of the above Constitutional Court judgment. Also civil courts are following this decision. See also Order of the Supreme Court Sklep II Ips 347/2005 of 16.3.2006.

er, in such cases the state would rather buy certain land for purposes of state interest (like for instance roads, motorways, etc.) or to expropriate (as an option of the last resort). In cases where infrastructure is needed and buying-off the land or the expropriation are not optional solutions, state or municipalities can agree with the owner to use the property (they conclude contracts on a use). It is also possible that courts define necessary restrictions of the property like inevitably allowance to use private property. The *Law on Property Act*[13] defines that appropriate reimbursement shall be paid to the owner.

On the other hand, certain valuable natural resources can be specially protected. *Law on Nature conservation*[14] defines specially protected areas (SPA), besides Natura 2000 protected areas, which are subject to a special regime, whereby the use of private property can be restricted. In these cases the owners are not entitled to the compensation, but the whole area would usually gain public economic help for different purposes. That way the regulatory restrictions would be outweighed by the State financial investment in these areas.

In the cases, defines under the law, also expropriations are possible. The expropriation is regulated in the Spatial Management Act.[15] It is possible, according to Art. 93, to expropriate the owner also in the cases of public commercial infrastructure. That means that for instance in the case of renewable energy infrastructure that condition would be fulfilled. It would be enough that there are official plans for the public infrastructure, in the level of the state or local spatial plans. Once such plans are adopted, the public interest is to be presumed. There is also a special act for infrastructure of national importance.[16] This act is even stricter for the owner and favours the investments in infrastructures. It defines in Art. 47: "When within 30 days following upon presenting the offer for the sale of real estate or for the acquisition of rights over real estate the Investor does not succeede to conclude an Agreement, upon the proposal of the Investor the State shall immediately file a proposal for expropriation or for the restriction of the rights of ownership." This rule is applicable for different infrastructure: roads, railways, transports terminals, air transport terminals, border crossing, water infrastructure etc. The important is only that the project is part of infrastructure and that is included in the spatial acts in the State level.

[13] Official Journal of the RS, Nr. 87-4360/2002, RS 91-3303/2013, RS 17-540/2014.

[14] Official Journal of the RS, Nr. 56-2655/1999, RS 31-1/2000, RS 119-5832/2002, RS 41-1693/2004, RS 61-2567/2006, RS 32-1223/2008, RS 8-254/2010.

[15] Official Journal of the RS, Nr. 110/02, 8/03 - popr., 58/03 - ZZK-1, 33/07 - ZPNačrt, 108/09 - ZGO-1C and 80/10 - ZUPUDPP).

[16] The Act Regarding the Siting of Spatial Arrangements of National Significance in Physical Space (ZUPUDPP), Official Journal of the RS, No

The procedure for the expropriation can be initiated by the state or by the local communities (municipalities). Authority, competent to decide in the expropriation matters, is the Ministry for the environment and its administrative units. The decision of the Ministry is final but can be a subject of a court's supervision, i.e. in a dispute at the Administrative court.

Slovene legal system used to have a different approach, where courts were competent to hear such cases.

It has now been several years since this is not in the competence of courts but of the executive authorities. Courts are only competent in cases where either party would like to annul the final decision by executive authorities.

Expropriation caused by EU legal acts or their implementation is not really the case in Slovenian legal order. But the approach would be the same; the EU rules enter the national legal order also due to Slovene Constitution (Art. 3a): "Legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organisations." The EU has no rule in this respect.

It is true that the EU can be responsible for the damage caused, but EU does not demand expropriations. It might be that the EU rules have an effect to property rights and their limitation, but this does not mean that the EU is responsible. If the Member States adopts rules that limit property rights, case will be dealt as noted above, according to Art. 15 of the Slovene Constitution – principle of proportionality and weighting of the interest of two rights that coincide.

5. A SUBSIDIZATION OF A BENEFICIAL USE OF NATURAL RESOURCES

Another important issue, closely connected with the rights in the broader sense, is also a right to be subsidized in environmental matters. Subsidization itself is a subject of a decision of the State (Agency for Energy in case of feed-in-tariff), but this itself is not a reason for not defining it as a right. Subsidization is usually possible only based on the transparent procedure and therefore it is open to the competition. Once awarded, it can be also changed.

In case of green energy in Slovenia the approach is different. The Government is entitled to adopt rules – who, which facility is entitled to the subsidy and how much subsidy are given.[17] This is exactly so in case of feed in tariffs. The

[17] Regulation on supports for the electricity generated from renewable energy sources, Official Journal of the RS, No 37/09, 53/09, 68/09, 76/09, 17/10, 94/10, 43/11, 105/11, 43/12, 90/12 and 17/14 - EZ-1).

Energy Act[18] empowers the Government to regulate the level of subsidization each year. It is therefore up to the Government to increase/decrease not only level of the subsidization but also criteria which project can compete/be subsidized, etc. It cannot, therefore, be said that subsidization is construed as a property right in Slovenian legal system in absolute term. It is true that facility, which fulfils the requirement, can apply for subsidy, but the Government can easily change the requirements.

6. VESTED RIGHTS AND COMPENSATION FOR REASONS OF ENVIRONMENTAL PROTECTION

According to the law, vested rights shall be respected; Constitution of the RS prohibits retroactive effects.[19] It is also defined in the Constitution of the RS, that ownership rights to real estate may be revoked or limited in the public interest with the provision of compensation in kind or monetary compensation under conditions established by law.[20] This is, however, only a special provision in case of immovable. Generally speaking, this is not the approach also for other rights. For instance the Slovene Constitutional court adopted a different solution in the case of social rights. Because Slovenia was facing the financial crises, Slovenian Government decided to balance the public expenses with the public incomes. A special statute was adopted for this reason[21] and its rules touch upon quite a number of social rights. In addition, mandatory retirement, social financial transfers etc. The Constitutional court decided that severe economic financial circumstances in the country justify restrictions of vested rights.[22] The Court added that restrictions shall be proportional and that there should be certain time limit for adoption to the restricted vested right.

The same is also true for subsidising green electricity. In 2014, the new Energy Act[23] was adopted and that law gives power to the Government to change the level for subsidies for green electricity in accordance with the circumstances on the market, public, finances, etc. This is not done in a clear way, but rather

[18] Official Journal of the RS, No 17/2014, of 7. 3. 2014.

[19] Art. 155.

[20] Art. 69.

[21] Fiscal Balance Act, Official Journal of the RS, Nr. 40/12, 96/12 - ZPIZ-2, 104/12 - ZIPRS1314, 105/12, 25/13 - odl. US, 46/13 - ZIPRS1314-A, 56/13 - ZŠtip-1, 63/13 - ZOsn-I, 63/13 - ZJAKRS-A, 99/13 - ZUPJS-C, 99/13 - ZSVarPre-C, 101/13 - ZIPRS1415 in 101/13 - ZDavNepr)

[22] U-I-13/13, of 14.11.2013.

[23] Official journal of the RS, Nr. 17/14.

only with the fact that subsidization is subject of the rules adopted by the Government, not by the legislator.

In the field of the environment, things are no different. Only in the cases where rights to immovable are concerned one can expect compensation. In other cases, it is necessary to outweigh the right, which is at stake with other right (principle of proportionality). A decision of the Constitutional Court[24] is one such example: "A prescription issued by a municipality and regulating the navigation on the waterways within the territory of this municipality on the basis of the law and comprising certain local and other limitations of the usage of water as an asset in common use is not in conflict with the law. In regulating the navigation, a municipality is authorized to prescribe, apart from the conditions stipulated by the law, also other conditions which safeguard human life and the environment." This clearly indicates that limitation of rights due to the environmental reasons are possible, but it is necessary to take into account the nature of the right that is reason for limitation of the property and other rights and also that the principle of proportionality is respected.

7. COMPENSATION FOR ENVIRONMENTAL DETERIORATIONS OF PRIVATE PROPERTY

Damage to the private property is not the same as damage to the environment. Environmental damage has basically no owner, it is damage caused to the environment itself, and pecuniary compensation is meaningless. Therefore the environmental damage shall not occur in the first place (hence the emphasis is given to preventive measures) and if it occurs, the main action will be headed towards restitution (*restitution integrum*). These are main features that distinguishe environmental damage from the private property damage or so called traditional damage. The later one is caused to the property of an individual and the word is not about the environment. It might be, of course, the environment that is damaged, but this is already covered by the environmental damage.[25]

[24] U-I-3/92 of 17/9-1992.

[25] According to the Directive 2004/35 the environmental damage is defined as:
(a) damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I;
Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of Directive 92/43/EEC or Article 9 of Directive 79/409/EEC or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation.

Let imagine a case for better understanding: *A communal waste disposal site is located not far away from a place with approx. 150 individual houses. Inhabitants assert that they smell bad odour and they would like to sell their property, but, of course, there are no potential buyers. Their property is almost worthless. The waste disposal site is equipped with the necessary permits.*

Are the inhabitants in the neighbourhood entitled to compensation (perhaps to annual revenue)? Do they have to call for withdrawal of the operation licence in the first place?

There are legal remedies under public and private interest that are applicable to this case. In case of harm caused to inhabitants, they can, within private law remedies, use *actio popularis*[26] and claim that the operator improve a waste disposal site with necessary measures in order to reduce the bad odour. They are also entitled to damages. *Actio popularis* makes possible to anybody to start procedure against the person (operator) responsible for the danger that threat. It is further on up to the rules of the civil responsibility, if the inhabitants will have to prove cause and produce evidences; if the activity can be regarded dangerous, strict liability system will apply. It will be up to the operator to exclude himself of the liability, meaning that he will have to produce evidences, and not the plaintiffs (inhabitants). In case of fault-based liability this will be, on contrary, a duty of the plaintiffs. Most likely, due to the nature of the activity of the dumping site, the strict based liability will be used in the case.

If it is the state the one who issued licence for the disposal site and the smell is inappropriate (there is no smell limits set in Slovenian legal order; and the case can be regarded as "a-normal"[27]), the inhabitants can claim precautionary

(b) water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters
concerned, with the exception of adverse effects where Article 4(7) of that Directive applies;
(c) land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms;

[26] Art. 133 of the Slovene Obligation Code. For its commentary see: D. Jadek – Pensa in M. Juhart, N. Plavšak, (eds): Obligacijski zakonik s komentarjem, Splošni del, GV Založba, prva knjiga, Ljubljana 2003, p. 760.

[27] This is a question of a standard of "usual boundaries" – in other words, what is normally accepted and, what is not. As noted above this is not an easy task of the court. Due to the difficulties to foresee the reaction of the court (legal foreseeability), plaintiffs are not always keen to bring an action. See also M. Krisper Kramberger, Pravni režim dobrin v splošni rabi, Pravnik - revija za pravno teorijo in prakso, letnik 45, št. 8-10/1990, p. 315.

measures (the measures that will reduce the smell); but they cannot claim shut-down of the site. The fact that property worth less is also a reason for compensation. Withdrawal of the licence is not condition precedent for compensation, but it is of substantial help, since one of the conditions for the compensation is also a proof of violation of the law. If the licence remains valid, it is necessary to prove its violation or noncompliance.

With respect to legal remedies in public interest, inhabitants can give notice of the problem at stake to State inspectorate. This body has a duty to commence the procedure if public health issue is at stake (i.e. if there is no pure private relationship). The inspector can order the facility to close or to take a repair measures. Inhabitants are not party to this procedure, but are witnesses. If they want to claim compensation, they have to initiate a parallel procedure or wait until the administrative procedure is finished; and then use the decision of this procedure to prove liability of the operator.

Constitutional remedies are possible once the regular courts procedures (administrative or private) are final.

8. CONCLUSIONS

In environmental matters, especially in environmental administrative law, a command-and-control approach is usually the one, which public authorities apply to regulate activities and to safeguard the environment and nature. Since these rules are mandatory in the nature and since they impose limitations, might be that they affect also the property of an individual or a company, factory, etc. Because mandatory administrative rules are widely accepted and the command-and-control approach is widely used, state measures have to be carefully imposed in order not to improperly limit the property. However, there is also another side: the property can also be used, not only for the environmental protection measures but also against them. The latter case might happen if measures of state authorities are not sufficient to safeguard the environment. Objections to safeguard property can also be headed towards other legal or natural persons. As we can see from the article, these different circumstances are also requesting different answers. There is not only one answer how to handle relationship between environmental protection and property.

LITERATURE:

1. D. Jadek – Pensa in M. Juhart, N. Plavšak, (eds): Obligacijski zakonik s komentarjem, Splošni del, GV Založba, prva knjiga, Ljubljana 2003.
2. J. Holder, M. Lee, Environmental Protection, Law and Policy, Second Edition, Text and Materials, Oxford, 2007.
3. L. Šturm, Komentar Ustave RS, Dopolnitev – A, Fakulteta za državne in evropske študije, Kranj 2011.
4. M. Krisper Kramberger, Pravni režim dobrin v splošni rabi, Pravnik - revija za pravno teorijo in prakso, letnik 45, št. 8-10/1990.
5. M. Juhart: Okoljska odgovornost – med javnim in zasebnim pravom, v: Zbornik znanstvenih razprav Pravne fakultete v Ljubljani. LXVIII/2008, str. 107–127.
6. N. de Sadeleer, Environmental Principles – From political slogans to legal rules, Oxford University Press, Oxford 2005.
7. R. Knez, Evropsko prekrškovno pravo (s ponazoritvijo na primeru vinjetnega sistema in nelegalno odloženih odpadkov). Pravosodni bilten, ISSN 1318-1459, 2013, Year 34, Nr. 1, p. 45-63.
8. R. Knez, Odgovornost gospodarskih subjektov za obremenjevanje okolja v materialnem in mednarodnem zasebnem pravu, PFUM, Maribor, 1998.
9. S. Pličanič et al, Zakon o varstvu okolja s komentarjem, Založba IJU, Ljubljana, 2010.
10. S. Pličanič., Pravnosistemski vidiki urejanja prostora, Podjetje in delo, številka 7/2003, stran 1581-1588
11. S. Pličanič., Temelji ekološkega prava, CZ, Ljubljana 2003.

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THE EUROPEAN PRIVATE COMPANY – DREAM BIG BUT CAUTIOUSLY?

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ABSTRACT

The recent financial crisis has revealed the importance for the companies to operate in a flexible legal environment allowing for fast adaptation to changing market circumstances. Therefore, being aware of the problems resulting from diversity of company laws, it is pertinent to create a European company form designed specifically for SMEs. The EPC would offer the flexibility expected from a genuine European form, by the possibility to be created in the State of their choice and to transfer the registered office and real seat to another State without particular difficulties.

Why, then, there are still so many hesitations that effectively block the final implementation? There is no time for 'balanced' approaches which only give the impression of a compromise but in fact result in the slowing down of necessary company law changes. Focusing too much on the national legal framework in which business is carried out in the EU, exposes companies to the application of the wide diversity of national laws and company regimes. Should we stay behind, making short-term decisions favoring mainly national companies and do not paying sufficient attention to the idea of European integration, it will result in decrease of the entrepreneurship and international competitiveness of companies.

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1. INTRODUCTION

The recent financial crisis has highlighted some imperfections in the field of company law and brought about a lot of vivid discussions concerning legal as well as financial reforms, questions about additional securities and other possible methods to resolve the economic recession and turn towards prosperity. Furthermore, it has revealed the importance for the companies to operate in a flexible legal environment allowing for fast adaptation to changing market circumstances in order to survive and to thrive in other business directions.

There has already been conducted a lot of research on who has been impacted by the downturn to the highest extent. They all have a common punch line – these were small and medium-sized enterprises (hereafter: SMEs) which react most sensitively to changes in the value of the currency, fluctuations in the economic growth, and as a result also in the rate of the employment. In this context, it would seem natural to look in the first instance for facilities and enhancing economic factors for SMEs. Each well-used chance to overcome the crisis means not only a regular income to the state budget, but also the stability of the employment. Therefore, the European Private Company (hereafter: EPC) proposal seems to suit just perfectly to solve the most fundamental problems of SME clearly outlined in times of financial crisis. I believe that Europe still has a chance to grow up to be truly a community and such an instrument as EPC would fit into the idea of an internal market based on the lack of formal barriers in conducting business activities, but also on trust - the common to all the member states.

In recent years there have been significant changes with respect to the companies' reorganizations such as the European Company Statute or the Cross-border Merger Directive that proved the high demand for simplified and enhanced corporate mobility within the EU.[1] These, however, focus their main interest almost entirely with large companies, whereas many research point out that these are in fact small and medium-sized enterprises that play a fundamental role in the European economy, where they account for more than 90 % of all firms, a fact that is repeatedly acknowledged in various EU documents.[2] To-

[1] T. Baums "Aktualle Entwicklungen im Europäischen Gesellschaftsrecht" *AG*, 2007, p. 57; S. Grundmann „General Principles of Private Law and Ius Commune Modernum as Applicable Law?" *Festschrift for Buxbaum,* 2000, p.216.

[2] Commission Staff Working Document: Impact assessment on the Directive on the cross-border transfer of registered office, Brussels 12/12/2007 (SEC(2007)1707), 13; see also K.Eckstein "Grenzüberschreitende Verschmelzung von kleinen und mittleren Unternehmen. Eine Untersuchung auf der Grundlage der aktuellen Gesetzesentwicklung in Deutschland" Wirtschaftsrecht Band I, Berlin, 2009.

day, creating a European Company requires the participation of national companies from at least two Member States and a minimum capital of €120,000. But many small companies do not have such a large sum of money. Therefore, there exists clearly a need for creating an instrument that would simplify the legal framework for SMEs with a view to facilitating their trading within the internal market, enabling companies from different States to pool their resources and giving a European scale from the outset.[3] Therefore, thanks to the EPC Regulation, those dealing with the EPC would no longer have to worry about the substantial differences that exist between various national forms of private companies.[4]

2. HISTORY

The beginning of the idea for greater mobility for SMEs can be sought in the voices of the internal market players such as a private initiative of business and academics who first raised the specific need for a European legal form of private company, to facilitate small and medium-sized enterprises.[5] The private initiative has resulted in a detailed proposal for the EPC complementary to the national forms of private companies in member states. As a consequence, in 2008, the Commission submitted the proposal for a Council Regulation on the statute for a European Private Company[6] as a response to the relevant European Parliament resolution[7].

The EPC Statute was identified as a medium-term measure of the Commission's Action Plan on Modernizing Company Law and Enhancing Corporate Governance in the EU. Afterwards, the Commission presented the review of the "Small Business Act for Europe" – a set of legislative and non-legislative

[3] J. Barneveld "Legal Capital and Creditor Protection: Some Comparative Remarks" in D.F.M.M. Zaman, et al. (eds.) *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, Antwerp, Intersentia 2009, p. 81-102.Dół formularza

[4] R. Drury "The European Private Company" *EBOR* 9, 2008, p. 126. ; H. – W. Neye „Die Europäische Privatgesellschaft: Uniformes Recht ogne Harmonisierungsgrundlage?" in P. Kindler, J. Koch, P. Ulmer, M. Winter (eds) *Festschrift für Uwe Hüffer*, 2009, p. 717 – 718;

[5] [5] P. Hommelhoff, C. Teichmann "Die SPE vor dem Gipfelsturm. Zum Kompromissvorschlag der schwedischen EU – Ratspräsidentschaft"*GmbHR*, 2010, p. 337; Report of the high level group of the Company Law experts on a modern regulatory framework for Company Law in Europe ("Winter Report"), Brussels, 4 November 2002, p.113.

[6] Proposal for a Council regulation of 27 June 2008 on the Statute for a European private company COM (2008) 396/3.

[7] European Parliament resolution of 1 February 2007 with recommendations to the Commission on the European private company statute 2006/2013(INI).

initiatives established in order to create a level playing field for SMEs and improving the legal and administrative environment throughout the EU.[8] In this document, the EPC is considered as one of the key initiatives. Therefore, the Commission emphasized the importance of the EPC for the EU and urged the member states to adopt the regulation in question without delay.[9] Similar approach presents the European Parliament, in particular in its most recent resolution on the Single market for Enterprises and Growth, where the need to adopt the Statute for the European Private Company is emphasized in order to "facilitate the establishment and cross-border operation of small and medium sized enterprises in the Single Market".[10] Unfortunately, the most recent public debate held by the Council on the compromise text of the EPC "failed to secure the unanimity required for the proposal to be approved".[11]

Currently, it seems that the Parliament is no longer entitled to make amendments in the approval procedure. However, the practice shows that what has been achieved in negotiations within the EU institutions can hardly be easily overthrown. It is now in the Commission's hands to amend its original proposal in a way acceptable both to the Parliament and to the Council. So far, in the most recent Commission's communication, it is stated that since the 2012 pub-

[8] Commission Communication 'Think Small First' – A 'Small Business Act' for Europe COM (2008) 394 final, 25.6.2008; Fischer zu Cramburg "EU – Kommission stelt 'Small Business Act' mit einem Statut für die Europäische Privatgesellschaft (SPE) vor" *NZG*, 2008, p. 546.

[9] The review of the Communication – 23 February 2011, COM (2011)78 final

[10] European Parliament resolution of 6 April 2011 on a Single Market for Enterprises and Growth (2010/2277(INI)); P7_TA-PROV(2011)0146.

[11] 2008/0130(NLE) – 30/05/2011 Debate in Council; Revised Presidency compromise proposal for a Council Regulation for a European Private Company, Annex to Addendum 1 16115/09 Brussels 27 November 2009; This procedure was changed with the entry into force on 1 December 2009 of the TFEU. Before that the legislative procedure ended with the lack of unanimity in the Council. Initially, the Proposal was supposed to be approved under the consultation procedure according to which the work was shared between the Commission and the Council: the Commission submits proposals and the Council makes the decisions. Before any decision was taken by the Council, however, various stages must have been completed which also involved *i.a.* the European Parliament. The Parliament might accept or reject the proposal or propose amendments. The Council was not legally obliged to take account of the opinions or amendments emanating from Parliament. These opinions were nevertheless of considerable political importance, At the current state of law, the Proposal for the Statute of the EPC is one of the many that fall under Annex 4 of the Communication from the Commission to the European Parliament and the Council on the Consequences of the entry into force of the Lisbon Treaty for ongoing inter-institutional decision-making procedures. As a consequence, the consultation procedure under art. 308 EC prescribed for the adoption of the Statute for the EPC is substituted by the approval procedure according to art. 352 TFEU. According to this legislative procedure, now consent of the European Parliament is required.

lic consultation demonstrated stakeholders' hesitation as to the proposal, the Commission will continue to explore means to improve the regulatory framework in order to facilitate SMEs' cross border activities. In the same vein, it is worth mentioning that although the Reflection Group in its response to the Commission's Action Plan continues to support the EPC, at the same time it shares the view that the continued legislative opposition necessitate analyzes of alternatives for SMEs.

3. EPC WITH A TRULY EUROPEAN NATURE

It should not come as a surprise that the most characteristic feature of the EPC is to become a genuinely European company that would not be subject to the national company law of any of the member state.[12] This assumption is supposed to facilitate the international use of this legal form. Namely, running a business in the form of the EPC would not require the knowledge of various aspects of company laws from other member states.[13] In order to avoid the problematic issue applicable to the SE according to which in particular fields of law the references to national company laws are required, the EPC is intended to be governed only by the provisions of the Regulation and the provisions of the articles of association which would not be inconsistent therewith.[14] Nevertheless, the EPC would remain subject to the national rules of member states as far as accountancy law, tax law, penal law and bankruptcy law are concerned.[15]

In this sense it should be, however, noticed that many concepts in European company law as well as in private law in general are obviously embedded in

[12] J. Wagner "Europäischen Gesellschaftsformen" *Anwaltsblatt*, 2009, p. 409; H. Anzinger "Europäische Privatgesellschaft – vom Vollstatut zum tragfähigen Kompromiss, *BB*, 2009, p. 2607.

[13] The proposal of the Regulation does not restrict the manner in which an EPC may be created. An EPC may be set up ex nihilo, in accordance with the provisions of the Regulation. It may also be created by transforming or dividing an existing company or by the merger of existing companies. Any company form existing under national law may become an EPC, in accordance with the relevant provisions of national law. An SE or another EPC may also participate in the formation of an EPC.

[14] P. Hommelhoff "Die Europäische Privatgesellschaft (SPE): Auswirkungen auf die nationale GmbH" *GesRZ,* 2008, p. 343.

[15] C. Steinberger " Die Europäische Privatgesellschaft – Schaffung einer europaweiten Gesellschaftsform für kleine und mittlere Unternemhen im Binnenmarkt" *BB,* 2006, Supplement No. 7, p. 28; P. Hommelhoff " Die Europäische Privatgesellschaft – Diskissionsstand 2003 und Fortgang" *Festschrift für Peter Doralt*, Manz Wien, 2004, p. 201.

national concepts and legal traditions.[16] From this perspective it may be difficult for the EPC to run the business activities completely outside a national body of private law.[17] Without any doubt, a reference to national law in the form of the link to the jurisdiction of the EPC's incorporation will have to be made.[18] However, in my opinion, such a connection would be fully justified and as such does not have negative impact on the strong need for such a legal form. [19]

From the outset of discussion concerning the possible ways of the establishment of the EPC it was empathized that in principle the access to the EPC should be unrestricted. As a consequence, the requirement that companies from at least two member states are to be involved in the incorporation of the EPC is not suited for SMEs.[20] The proponents claim that only the unrestricted access to the EPC would indeed facilitate a full development of this form of a company within the EU and that the EPC should be available for every citizen of the Union.[21] Additionally, it is also noted that this form should be an improved alternative to national forms of private companies and if so, a process of convergence of national company laws is not excluded.

The initial proposal of the Commission did not make the establishment of the EPC subject to a cross-border requirement. It was explained that, in practice, entrepreneurs usually set up businesses in their states where they reside before expanding abroad. An initial cross-border requirement would, therefore, create significant burdens on the establishment of the EPC and unnecessarily minimize the potential of the instrument. Furthermore, since monitoring and enforcing of the requirement in question would be in fact unfeasible, it may appear that in practice, a cross-border requirement could easily be circumvented.[22]

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16 J. Bormann and D. König "Der Weg zur Europäischen Privatgesellschaft – Bestandsaufnahme und Ausblick" *RIW,* 2010, P. 112.

17 T. Bücker "Die Organisationverfassung der SPE" *ZHR* 173, 2009, p. 307; P. Hommelhoff and C. Teichmann "Bundesrat bremst Europa-GmbH: Erwiderung auf seine StellungNahme zum SPE-Verordungsvorschalg" *GmbHR*, 2009, p. 37.

18 W. Blomeyer "Auf dem Weg zur Europäischen Genossenschaft" *BB*, 2000, p. 1741; W. Blomeyer "Die Zukunf der Genossenschaft in der Europäischen Union an der Schwelle zum 21. Jahrhundert" *ZfgG* 50, 2000, p. 191.

19 H-J de Kluiver "(Re)Considering the SPE" *European Company Law,* 2008, Vol.5, Issue 3, p. 112.

20 C. Peters and P. Wüllrich "Gesellschaftsrechtliche Einigung Europas durch die Societas Privata Europaea (SPE)" *DB,* 2008, 2180; H. Wicke "Die Euro – GmbH im Wettbewerb der Rechtsordnungen" *GmbHR,* 2006, p. 359.

21 C. Peters and P. Wüllrich "'Borderless flexibility': the Societas Privata Europaea from a German Comparative Law Perspective" *Company Lawyer,* 30, 2009, p. 214.

22 R. Kiem "Erfahrungen und Reformbedarf bei der SE – Entwicklungsstand" *ZHR* 173, 2009, p. 163; S. Fischer "Brücken zur Europäische Privatgesellschaft" *ZeuP* 2004, p. 743.

There appeared a question, however, whether the proposal remains in accordance with the subsidiarity principle set down in art. 9 and 10 of the TFEU.[23] It is argued that in order to invoke the EU law some connection with a European Union is indispensable. The justification of this opinion could be found for instance in the established case-law of the ECJ, where the Court consistently maintains that a clear-cut cross-border activity is always requisite.[24] From this perspective, it would be enough to fulfill the requirement in question if the EPC conducts business activities in more than one member state. Furthermore, it could be also noticed that the possibility to establish the EPC ex nihilo would allow a national companies to apply that form irrespective of pursuing any trans-border activity. It was argued, that this could highly impact national company law since the EPC could be perceived as a tool to eliminate national legal forms of private companies.[25] The question that could be posed here may sound trivial, but why not give priority to a form that is more efficient from the point of view of economic, legal or administrative optimization? If this is a European form of business which better responds to the needs of the market and its participants, as opposed to national forms of companies – then it is logical to use the more efficient form. Otherwise, what kind of interest is more important that would be able to justify a less effective form?

The amendments proposed by the European Parliament to the proposed Regulation presumed that the EPC should have a cross-border component demonstrated by one of the following:

- a cross-border business intention or corporate object,
- an objective to be significantly active in more than one member state,
- establishments in different member states, or
- a parent company registered in another member state.

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[23] M. Martinek "Die Europäische Privatgesellschaft ohne verbindliche Mehrstaatlichkeit – Plädoyer für einen grenzüberschreitenden Bezug als Zulassungsvoraussetzung für die neue Societas Privata Europaea" in G. Hönn et all. (eds.) *Festschrift für Peter Kreutz*, Wolters Kluwer, 2009, p. 747.

[24] On the other hand please note that there could be parallel with ECJ ruling on art. 14 TFEU where the Court has held that recourse to that legal basis does not presuppose the existence of a specific cross-border dimension in every situation referred to by the measure founded on that basis. Se e.g. Joined Cases C – 465/00, C – 138/01 and C – 139/01 Österreichischer Rundfunk and Others[2003] ECR I – 4989; Olivier in A. G. Toth (ed.) "The Oxford Encyclopedia of European Community Law, Vol. 2, The Law of the Internal Market" *OUP,* 2005, p. 397.

[25] Statement of the Confederation of German Trade Unions to a proposal for a regulation of the Council on a Statute for a European Private Company (Deutscher Gewerkschaftsbund Bundesvorstand), 29 July 2008, p. 3.

Afterwards, this amendment has been confirmed by the Council in the Revised Presidency Compromise Proposal. It is also mentioned that some countries prefer not having a cross-border element requirement like Italy and Latvia; whereas France notices that the requirement should be more flexible.[26]

It clearly follows from the mentioned that the cross-border element would be useful, however, its formulation is far from simple since it encompasses additional obstacles for the SMEs that intend to establish the EPC. [27] It seems that the unequivocal cross-border component is required at a later stage when the EPC should demonstrate it within two years from the day of its creation. It is understandable that the suggested amendments intend to satisfy the subsidiary principle, but at the same time they decrease the attractiveness of the EPC.[28]

4. PROS AND CONS

A European legal form established on the strength of contractual freedom would allow SMEs to organize into a group of companies and to form joint European companies.[29] The vehicle of a common European nature would suit perfectly SMEs being active in several member states or intending to merge cross-border or SMEs that need a European structure to establish European joint ventures.[30] Additionally, the EPC enables also a group of companies to implement a uniform management in all their subsidiaries in different member

[26] Article 3, paragraph 3. An SPE shall have a cross-border component at the time of its registration, demonstrated by one of the following:
[(a)] an intention to do business in a member state other than the one in which the SPE is registered; or
[(b)] a cross-border business object set out in the articles of association of the SPE; or
[(c)] a branch or a subsidiary registered in a member state other than the one in which the SPE is registered; or
[(d)] a member or members being resident or registered in more than one member state or in a member state other than the one in which the SPE is registered.

[27] C. Teichmann and P. Limmer "Die Societas Privata Europaea (SPE) aus notarieller Sicht – eine Zwischenbilanz nach dem Votum des Europäischen Parlaments" *GmbHR,* 2009, p. 539.

[28] L. Cerioni "The European Private Company: Basic Legal Aspects and Some Open Issues on Its Tax Treatment, *European Taxation*, 2004, p. 547.

[29] R. Dammann and D. Weber-Ray "La société privée européenne: un outil novateur" *Bull. Joly Sociétés,* 2008, p. 811; R. Weber "Praxisfragen der Europäische Privagesellschaft" in VGR (ed.) *Gesellschaftsrecht in der Diskussion,* 2008 (Dr Otto Schmidt 2009), p. 88.

[30] P. Nazaruk "Koncepcja Europejskiej Spólki Prywatnej" *Prawo Spólek,* 2005, No 6, p.29.

states.[31] At last but not at least, the EPC once properly established could then freely transfer its seat abroad.

Eventually, the EPC should not be reserved to large business only. SMEs have limited resources to deal with linguistic, administrative and legal difficulties.[32] The EPC could change that; the common simple and flexible form of a company would facilitate the first step that should be taken when starting a business abroad.[33] As a result, the costs of creating and operating subsidiaries of in various member states would be very much reduced if their legal form could be the same in all member states. This uniform European standard would be advantageous mainly for companies originating from smaller states as well as from Eastern European countries and for states focused in particular on export (e.g. Germany).[34]

In contrast to the aforementioned, the opponents claim that this specific European form would be rarely used for business if the national companies are allowed to merge and transfer their seats across borders.[35] However, the 10th and the proposal of the 14th Directives do not provide an adequate framework for the EPC. Additionally, the EPC responds to the needs to overcome obstacles arising during formation or transformation of foreign companies (subsidiaries) rather than deal with the cross-border mergers or transfer of seat.[36] Nevertheless, these different areas could complement each other. For instance, the EPC rules could allow that the place of the registered office and the real seat diverges while the 14th Directive could leave this issue to the member states. In this way, the Directive contains the rules on the transfer of the registered seat while the member states decide if the registered office can be transferred alone (without the real seat) or whether the main place of business will have to follow the registered office.

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[31] A. Bottiau and M. Martinek "La future société privée européenne (Societas Privata Europaea), menace pour la GmbH" *Bull. Joly Sociétés,* 2009, p. 809.

[32] W. Niemeier „What kind of companies will a 'One-Euro EPC' generate?" in C. Teichmann, H. Hirte (eds.) *The European Private Company (SPE), ECFR – Special Volume*, 2012.

[33] Joëlle Simon – Lecture at the Conference on the European Private Company, Brussels 10 March 2008.

[34] W. Hadding and E. Kiessling " Die Europäische Privatesellschaft (Societas Privata Europaea - SPE)" *WM* 2009, p. 145.

[35] O. Vossius "Die Europäische Privatesellschaft – Societas Eruopaea Privata (EPG/SEP)" *EWS,* 2007, p. 441;
J. Bormann, D. König "Der Weg zur Europäischen Privatgesellschaft - Bestandsaufnahme und Ausblick" *RIW*, 2010, *p.* 111-119

[36] A. Radwan "European Private Company and the Regulatory Landscape in the EU" *EBLR*, 2007, p. 770; A.F.M. Dorrestein and O.Uziahu-Santcross "The Societas Privata Europaea under the Magnifying Glass (Part 1)" *European Company Law*, December 2008, Vol.5, Issue 6, p. 279.

5. TRANSFER OF THE REGISTERED SEAT

Since the establishment of a company form with common features throughout the EU could be better achieved at EU level than by the member states alone, the EU may adopt measures, in accordance with the principle of subsidiarity laid down in art. 9 and 10 of the TFEU. [37] Even if all member states committed to make their national company laws more business-friendly, SMEs would still face a patchwork of many national set of rules. By offering SMEs a corporate vehicle that is uniform throughout the EU, the EPC constitutes the most effective means of achieving the objective set out above.[38]

It comes as no surprise that the EPC must have its registered office, central administration or principal place of business in the EU. [39] Based on the Proposal, if the central administration is located in a member state other than that in which the EPC has its registered office, the EPC should lodge in the register of the member state where the central administration is located *inter alia* the name of the EPC and the address of its registered office or the amount of the share capital. This is one of the typical solutions used by the theory of incorporation. If so, it would provide the EPC with more flexible regime than that applicable to companies originating from the States applying the real seat theory. One of the consequences is that the EPC may transfer its registered office to another member state.[40]

The procedure of the transfer is patterned on the provisions on the transfer of the registered office in the SE Regulation. Consequently, similarly to the SE, the transfer of the registered office of the EPC must not result in the winding-up of the EPC or in any interruption or loss of its legal personality or affect any right or obligation under any contract entered before the transfer. As far as judicial or administrative proceedings are concerned, the EPC should be considered as having its registered office in the home member state to all the proceedings commenced before the transfer of the registered office.

In this light, it is puzzling that the proposal of the EPC does not impose rules on the transfer of real seat, when at the same time it clearly separates the registered office from the real seat. It is even more surprising if we take into

[37] M. Brems and K. Cannivé "Die Europäische Privatgesellschaft (SPE) als Baustein des internationalen Konzerns" *Der Konzern* 2008, p. 639.

[38] P. Hommelhoff "The European Private Company Before its Pending Legislative Birth" *German Law Journal,* 2008, Vol. 9, No. 6, p.802.

[39] C. Teichmann "The European Private Company" *European Company Law,* 2004, p. 162 – 165.

[40] J. Schmidt „Der Vorschlag für eine Verordnung über die europäische Privatgesellschaft (SPE) – eine europäische Rechtsform speziell für KMU" *EWS*, 2008, p. 455 – 456.

account that the ECJ in the cases *Centros, Überseering, Inspire Art, Sevic, National Grid Inuds* or *Vale* has already facilitated the cross-border movement of companies.[41] In fact, they strengthen the capacity of the EPC in so far as its registered office does not have to correspond to the location of its real seat. On the other hand, it may no longer be necessary for the EPC to have the real seat and registered office located in different member states, if there is a common set of rules governing the EPC. One could argue that the SMEs could expect to be recognized while transferring its seat abroad solely base on the aforementioned ECJ case-law. Unfortunately, this in practice usually requires judicial action that is costly and time consuming. In this light, it could effectively compete with the obligation for the member state to automatically recognize the legal personality of the EPC moving its head office abroad based on the provisions of the Regulation on the EPC. At the same time, the issues that are not addressed by the proposed Regulation should be governed by the law applicable to private limited-liability companies in the member state in which the EPC has its registered office.

Unfortunately, the Council responded negatively to the Commission's proposal and suggested simply that the EPC should have its registered office and central administration in the EU without creating a more specific rule. However, in the second paragraph of the proposed article 7, it is added that for transitional period of 2 years from the date of the application of the EPC regulation, EPC shall have its registered office and central administration in the same member state and then national law shall apply.[42] It has to be emphasized that from the point of view of enhancement of flexibility on the internal market, the amendments proposed by the Council are an unacceptable step backwards. It in fact turns the EPC into a national form, creating 27 different legal regimes, that is contrary to the intention of the Regulation. It would be highly recommended to keep the initial proposal as the newest step in favor of the incorporation theory, in particular if we take into account the recent case law the ECJ in which it ruled that the transfer of the real seat of a company originating in a member state applying the incorporation theory is possible and cannot be impeded by the host member state. This together with the EPC and its possibility to locate its registered office and central administration in different member states would significantly facilitate the transfer of seat.

[41] W. Meilicke "Kurzkommentar zu EuGH vom 30.09.2003 Rs. C – 167/01 – Inspire Art" *GmbHR,* 2003, p. 1260.

[42] During the debates on this provision, Estonia and the Netherlands declared that they would prefer a longer transitional period. Austria claimed that instead of this provision they would only want the obligation to have both the registered office and the central administration or principal place of business in the same member state, which could be then reviewed after 5 years.

6. CONCLUSIONS

Focusing too much on the national legal framework in which business is carried out in the EU exposes companies to the application of the wide diversity of national laws and company regimes. Should we stay behind, make short-term decisions favoring mainly national companies and do not pay sufficient attention to the idea of European integration, the pace of the European integration will be reduced. Furthermore, the precipice between the European Union and the USA as well as APEC will increase. As a consequence, due to the weakness of the economic growth there will be the decrease of the entrepreneurship and international competitiveness of companies.

Therefore, being aware of the problems faced as a result of the diversity of company laws, it is pertinent to create a European company form designed specifically for SMEs.[43]The legal form should be as uniform as possible throughout the European Union, with issues which would lack substantive convergence left to the contractual freedom of the founders.[44] The EPC would offer the flexibility expected from a genuine European corporate form, by the possibility to be created in the state of their choice and, where appropriate, to transfer its registered office and real seat to another state without particular difficulties.[45] In accordance with the initial proposal of the Commission, the EPC Regulation expressly applies the theory of incorporation – "An EPC shall not be under any obligation to have its central administration in the Member State in which it has its registered office." states the second paragraph of article 7.

From my point of view, it would be most beneficial if the initial approach is retained, because the incorporation principle suits better the internal market needs than the real seat principle. If this solution would not be feasible for the political reason, it would then be obviously better to leave the issue to the national law than to prohibit the divergence of the location of the registered office and the real seat. This is because a couple of member states already allow for such a divergence and the suggested interdictory condition would be a step backwards for their company law limiting the attractiveness of the EPC as an alternative for their national company forms.[46] One can find in the

[43] H. Krejci „Zehn Fragen zum Kommissionsvorschlag für eine Societas Privata Europaea (SPE)" Österreichische Notariatszeitung, 2008, p. 362 – 367.

[44] J. Basedow "Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts" *RabelsZ* Bd. 75, 2011, p. 32 – 59.

[45] T. Bücker "Die Organisationsverfassunger SPE" *ZHR* 173, 2009, p. 281 – 308; Feasibility Study of a European Statute for SMEs, Contract letter No FIF 20030950.

[46] H. Fleischer „Supranationale Gesellschaftsformen in der Europäischen Union. Prolegomena zu einer Theorie supranationaler Verbandsformen" 174 *ZHR*, 2010, p. 385 – 428. Dół formularza

Proposal that the member states should ensure that the provisions adopted in relation to the EPC Regulation do not result in disproportionate restrictions in the rules applicable to the EPC or in discriminatory treatment of the EPC as compared with private limited-liability companies governed by national law. On that ground, if the requirement that the registered office and the central administration must be located in the same member state is maintained, it may happen that the EPC comes across more obstacles to the freedom of establishment if it decides to transfer its real seat to another member state (with the retention of the registered office in its state of origin) than national companies originated from the state accepting the divergence in question – usually applying the incorporation theory.[47]

The economic crisis has already confirmed that to some of the rules of national company law must be given a second thought.[48] This concerns in particular the rules which limit the flexibility of companies' reincorporation and adaptation to the rapidly changing market conditions.[49] I believe it is better for a member state to surrender some revenue and influence on an emigrating company than lose that as a result of bankruptcy proceedings of that company. It is very well known that the company's bankruptcy impacts the economy of the state much deeper than just a loss of revenue for that state. This encompasses also redundancies, possible insolvencies of that company's creditors as well as an overall negative impact on the economy of that state.

Why, then, there are still so many hesitations, and the voices of opposition acting in order to effectively block the final implementation? In my opinion, the answer to that intriguing question is surprisingly simple: Europe may not be ready for this – for being the community of rights as well as community of obligations. Most recent example of Greece fits into this picture perfectly - most of us are willing to accept the offered facilities and support but we are not ready to bear the responsibility which is immanently assigned to that. Are we ready for a shared responsibility for the sake of economic growth and general welfare mainly perceived by SMEs? Is really the Greek's bankruptcy necessary in order to ascertain that in the long – term perspective the common solutions have a huge potential for boosting the economic development and the rising standard of living for EU citizens?

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47 P. Hommelhoff , C. Teichmann "Auf dem Weg zur Europäischen Pruvatgesellschaft (SPE) " *DStR,* 2008, s.925; "Société Privée Européenne: une société de partenaires" Counseil National du Patronat Francais, Chambre de Commerce et d'Industrie de Paris, 1998, p.9.

48 "Sign of crisis" Nordea Bank – Economic Outlook, August 2011; "Ways of coping as the crisis mutates" Economic Research – Credit Agricole; Quarterly no. 135 – 1st quarter 2012.

49 S. van den Braak "The European Private Company, Its Shareholders and Its Creditors" *Utrecht Law Review* 6, 2010, p. 1.

Therefore, in my view, there is no time and place for 'balanced' approaches which only give the impression of a compromise but in fact result in the slowing down of positive and necessary company law changes. In this sense, I think that the suggested balanced compromise, which intends to find a solution acceptable to all member states, is not satisfactory. Namely, it is suggested that the registered office and the real seat of the EPC should be in the EU based on the applicable national law. This does not give the necessary impetus for the European company law amendments. The preparatory works of the EPC Regulation are the perfect opportunity to discuss pros and cons of the problem of the location and determination of the company's seat.[50] To be more precise, the discussion should encompass the advantages and disadvantages, but also benefits and costs for the internal market (and not only for the particular member state) of the application of the real seat theory and the incorporation theory in order to find most beneficial solution.

LITERATURE:

1. H. Anzinger "Europäische Privatgesellschaft – vom Vollstatut zum tragfähigen Kompromiss, *BB*, 2009, p. 2607.
2. J. Barneveld "Legal Capital and Creditor Protection: Some Comparative Remarks" in D.F.M.M. Zaman, et al. (eds.) *The European Private Company (SPE). A Critical Analysis of the EU Draft Statute*, Antwerp, Intersentia 2009.Dół formularza
3. J. Basedow "Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts" *RabelsZ* Bd. 75, 2011.
4. T. Baums "Aktualle Entwicklungen im Europäischen Gesellschaftsrecht" *AG*, 2007.
5. W. Blomeyer "Auf dem Weg zur Europäischen Genossenschaft" *BB*, 2000.
6. W. Blomeyer "Die Zukunf der Genossenschaft in der Europäischen Union an der Schwelle zum 21. Jahrhundert" *ZfgG* 50, 2000.
7. J. Bormann, D. König "Der Weg zur Europäischen Privatgesellschaft - Bestandsaufnahme und Ausblick" *RIW*, 2010.
8. Bottiau and M. Martinek "La future société privée européenne (Societas Privata Europaea), menace pour la GmbH" *Bull. Joly Sociétés,* 2009
9. S. van den Braak "The European Private Company, Its Shareholders and Its Creditors" *Utrecht Law Review* 6, 2010.

[50] D. Kornack "The European Private Company – Entering the Scene or Lost in Discussion?" *German Law Journal* 10, 2009, p. 1321.

10. M. Brems and K. Cannivé "Die Europäische Privatgesellschaft (SPE) als Baustein des internationalen Konzerns" *Der Konzern* 2008.

11. T. Bücker "Die Organisationverfassung der SPE" *ZHR* 173, 2009.

12. L. Cerioni "The European Private Company: Basic Legal Aspects and Some Open Issues on Its Tax Treatment, *European Taxation*, 2004

13. R. Dammann and D. Weber-Ray "La société privée européenne: un outil novateur" *Bull. Joly Sociétés,* 2008.

14. A.F.M. Dorrestein and O.Uziahu-Santcross "The Societas Privata Europaea under the Magnifying Glass (Part 1)" *European Company Law*, December 2008, Vol.5, Issue 6.

15. R. Drury "The European Private Company" *EBOR* 9, 2008.

16. K.Eckstein "Grenzüberschreitende Verschmelzung von kleinen und mittleren Unternehmen. Eine Untersuchung auf der Grundlage der aktuellen Gesetzesentwicklung in Deutschland" Wirtschaftsrecht Band I, Berlin, 2009.

17. S. Fischer "Brücken zur Europäische Privatgesellschaft" *ZeuP* 2004.

18. Fischer zu Cramburg "EU – Kommission stelt 'Small Business Act' mit einem Statut für die Europäische Privatgesellschaft (SPE) vor" *NZG*, 2008

19. H. Fleischer „Supranationale Gesellschaftsformen in der Europäischen Union. Prolegomena zu einer Theorie supranationaler Verbandsformen" 174 *ZHR*, 2010. Dół formularza

20. S. Grundmann „General Principles of Private Law and Ius Commune Modernum as Applicable Law?" *Festschrift for Buxbaum,* 2000.

21. W. Hadding and E. Kiessling " Die Europäische Privatesellschaft (Societas Privata Europaea - SPE)" *WM* 2009.

22. P. Hommelhoff, C. Teichmann "Auf dem Weg zur Europäischen Pruvatgesellschaft (SPE) " *DStR,* 2008.

23. P. Hommelhoff "Die Europäische Privatgesellschaft (SPE): Auswirkungen auf die nationale GmbH" *GesRZ,* 2008.

24. P. Hommelhoff "Die Europäische Privatgesellschaft – Diskissionsstand 2003 und Fortgang" *Festschrift für Peter Doralt*, Manz Wien, 2004.

25. P. Hommelhoff, C. Teichmann "Bundesrat bremst Europa-GmbH: Erwiderung auf seine StellungNahme zum SPE-Verordungsvorschalg" *GmbHR*, 2009.

26. P. Hommelhoff, C. Teichmann "Die SPE vor dem Gipfelsturm. Zum Kompromissvorschlag der schwedischen EU – Ratspräsidentschaft"*GmbHR*, 2010.

27. P. Hommelhoff "The European Private Company Before its Pending Legislative Birth" *German Law Journal,* 2008, Vol. 9, No. 6.

28. R. Kiem "Erfahrungen und Reformbedarf bei der SE – Entwicklungsstand" *ZHR* 173, 2009.

29. H-J de Kluiver "(Re)Considering the SPE" *European Company Law,* 2008, Vol.5, Issue 3.

30. D. Kornack "The European Private Company – Entering the Scene or Lost in Discussion?" *German Law Journal* 10, 2009.

31. H. Krejci „Zehn Fragen zum Kommissionsvorschlag für eine Societas Privata Europaea (SPE)" Österreichische Notariatszeitung, 2008.

32. M. Martinek "Die Europäische Privatgesellschaft ohne verbindliche Mehrstaatlichkeit – Plädoyer für einen grenzüberschreitenden Bezug als Zulassungsvoraussetzung für die neue Societas Privata Europaea" in G. Hönn et all. (eds.) *Festschrift für Peter Kreutz*, Wolters Kluwer, 2009.

33. W. Meilicke "Kurzkommentar zu EuGH vom 30.09.2003 Rs. C – 167/01 – Inspire Art" *GmbHR,* 2003.

34. P. Nazaruk "Koncepcja Europejskiej Spółki Prywatnej" *Prawo Spółek,* 2005, No 6.

35. H. – W. Neye „Die Europäische Privatgesellschaft: Uniformes Recht ogne Harmonisierungsgrundlage?" in P. Kindler, J. Koch, P. Ulmer, M. Winter (eds) *Festschrift für Uwe Hüffer*, 2009.

36. W. Niemeier „What kind of companies will a 'One-Euro EPC' generate?" in C. Teichmann, H. Hirte (eds.) *The European Private Company (SPE), ECFR – Special Volume*, 2012.

37. C. Peters and P. Wüllrich "'Borderless flexibility': the Societas Privata Europaea from a German Comparative Law Perspective" *Company Lawyer,* 30, 2009.

38. C. Peters and P. Wüllrich "Gesellschaftsrechtliche Einigung Europas durch die Societas Privata Europaea (SPE)" *DB,* 2008.

A. Radwan "European Private Company and the Regulatory Landscape in the EU" *EBLR*, 2007.

39. J. Schmidt „Der Vorschlag für eine Verordnung über die europäische Privatgesellschaft (SPE) – eine europäische Rechtsform speziell für KMU" *EWS*, 2008.

40. J. Simon – Lecture at the Conference on the European Private Company, Brussels 10 March 2008.

41. C. Steinberger " Die Europäische Privatgesellschaft – Schaffung einer europaweiten Gesellschaftsform für kleine und mittlere Unternemhen im Binnenmarkt" *BB,* 2006, Supplement No. 7.

42. C. Teichmann and P. Limmer "Die Societas Privata Europaea (SPE) aus notarieller Sicht – eine Zwischenbilanz nach dem Votum des Europäischen Parlaments" *GmbHR,* 2009.

43. C. Teichmann "The European Private Company" *European Company Law,* 2004.

A. G. Toth (ed.) "The Oxford Encyclopedia of European Community Law, Vol. 2, The Law of the Internal Market" *OUP,* 2005.

44. R. Weber "Praxisfragen der Europäische Privagesellschaft" in VGR (ed.) *Gesellschaftsrecht in der Diskussion,* 2008.

45. J. Wagner "Europäischen Gesellschaftsformen" *Anwaltsblatt*, 2009.

46. H. Wicke "Die Euro – GmbH im Wettbewerb der Rechtsordnungen" *GmbHR,* 2006.

47. O. Vossius "Die Europäische Privatesellschaft – Societas Eruopaea Privata (EPG/SEP)" *EWS,* 2007.

THE EUROPEAN UNION DOCUMENTS

1. Report of the high level group of the Company Law experts on a modern regulatory framework for Company Law in Europe ("Winter Report"), Brussels, 4 November 2002.
2. European Parliament resolution of 1 February 2007 with recommendations to the Commission on the European private company statute 2006/2013(INI).
3. Commission Staff Working Document: Impact assessment on the Directive on the cross-border transfer of registered office, Brussels 12/12/2007 (SEC(2007)1707)
4. Commission Communication 'Think Small First' – A 'Small Business Act' for Europe COM (2008) 394 final, 25.6.2008.
5. Proposal for a Council regulation of 27 June 2008 on the Statute for a European private company COM (2008) 396/3.
6. The review of the Communication – 23 February 2011, COM (2011)78 final
7. European Parliament resolution of 6 April 2011 on a Single Market for Enterprises and Growth (2010/2277(INI)); P7_TA-PROV(2011)0146.
8. 2008/0130(NLE) – 30/05/2011 Debate in Council; Revised Presidency compromise proposal for a Council Regulation for a European Private Company, Annex to Addendum 1 16115/09 Brussels 27 November 2009;
9. Feasibility Study of a European Statute for SMEs, Contract letter No FIF 20030950.

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EXPLORATIVE ANALYSIS OF CORPORATE SOCIAL RESPONSIBILITY REPORTING: THE CASE OF LEADING EUROPEAN FOOD RETAILERS

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ABSTRACT

The purpose of this paper is to give an insight into the corporate social responsibility (CSR) activities reported in CSR reports published on the web sites of the leading European food retailers. Paper explains the importance of the CSR, followed by the latest state-of-art on the CSR issues reported by food retailers, with special emphasis and focus on international, leading European food retailers. The findings of explorative analysis of corporate social responsibility reporting of the leading European food retailers reveal their dedication to CSR issues and consideration of their own activities. However, based on the previous style of reporting activities, we observe the positive shift from focal company view to the holistic view of the entire supply chain and consequentially, sustainable supply chain perspective. This observation confirms that leading food retailers are power holders and trend-setters in the CSR issues.

KEYWORDS: corporate social responsibility, corporate social responsibility reporting, leading European food retailers, explorative analysis

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1. INTRODUCTION

The future of any company in today's society depends on how it is perceived by key stakeholders such as investors, customers, consumers, employees and members of the community in which the company operates. The interest in corporate social responsibility (CSR) reflects a deeper change in the relationship between the company and its stakeholders. CSR is becoming ever more important, as it is evident by the fact that most leading public companies include a specific statement on their CSR policy within their annual reports.[1] As the stakeholders want to know more about companies and their operations, companies must therefore nurture relationships with stakeholders and know how to strategically manage and communicate their business activities. Reporting is one of the measures used by companies, and in the light of reporting, it is important to know how to report consistently on CSR activities.[2] In a study of reporting on CSR conducted on 4 100 companies worldwide[3], some global trends in reporting are identified, among others:[4] exceptional growth in reporting on emerging markets, narrowing the gap between the leading and the lagging sector industries, information on CSR in the annual accounts are becoming standard practice and the use of the Global Reporting Initiative (GRI)[5] guidelines is nearly universal.

The remainder of the paper is organized as follows. In the next section, we describe CSR and the emergence of the CSR reporting in the food retailing, with focus on the actual state-of-art of CSR and CSR reporting of the leading, inter-

[1] Bowd, R., Bowd, L., Harris, P., Communicating corporate social responsibility: an exploratory case study of a major UK retail centre, Journal of Public Affairs, Vol. 6 (2) 2006., p. 147.

[2] Thomsen, A. E. N. C., Reporting CSR – what and how to say it?, Corporate Communications: An International Journal, Vol. 12 (1) 2007, p. 39.

[3] 100 leading companies from 41 countries, categorized into four geographic entities and America (Brazil, Chile, Colombia, Mexico, US, Canada); Asia/Pacific (Australia, New Zealand, Indonesia, India, China, Japan, Malaysia, Taiwan, Singapore, South Korea, Kazakhstan); Europe (Belgium, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Spain, Sweden, Switzerland, United Kingdom) and Middle East/Africa (Angola, Israel Nigeria, South Africa, United Arab Emirates)

[4] KPMG (2014) The KPMG Survey of Corporate Responsibility Reporting 2013, available at <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/corporate-responsibility/Documents/kpmg-survey-of-corporate-responsibility-reporting-2013.pdf>, last accessed on 15/05/2015.

[5] GRI Sustainability Reporting Guidelines, formerly known as GRI guidelines offer reporting principles, standard disclosures and an implementation manual for the preparation of sustainability reports by organizations, regardless of their size, sector or location., available at: < https://www.globalreporting.org/reporting/g4/Pages/default.asp>, last accessed on 15/05/2015.

national food retailers, with UK market leading the way. We then describe the exploratory research which was conducted by analyzing CSR reports posted on the web pages of the leading European food retailers (based on the Deloitte[6] frame of reference). Based on the theoretical and explorative analysis, we form the concluding remarks.

2. CORPORATE SOCIAL RESPONSIBILITY IN FOOD RETAILING

All sectors of the economy are affected by the increased demand due to CSR. However, depending on the characteristics of the industry, the pressure on companies to adopt this concept is different. Although there are sectors of the economy such as mining, for example, which has a stronger impact on the environment, there is probably no other sector as food sector, that is so dependent on natural resources and yet has a large and diverse impacts on the environment. In the context of CSR, food sector is faced with specific challenges especially for three reasons. First, the food sector has a big impact and greatly depends on the natural, human and physical resources. Furthermore, since the food covers basic human needs, people have very strong opinions about what they eat, so that leads to the complex issues in the food sector for the production of raw materials, environmental and social conditions along the entire value chain, as well as the quality of health and product safety. Third, the food chain has a unique and multifaceted structure. Since small and large enterprises differ in their approach to CSR, this implies potential conflicts regarding CSR involvement in the food supply chain[7]. As the food products are closely related to human health, it is not surprising that the consumer sensitivity to food products is from day to day increasing. Therefore, CSR can help retailers to respond to the ever growing interest of the consumers in business operations.

According to the summative content analysis, sustainability seems to be more important in other sectors than in retail as retail is the sector with fewest sustainability considerations.[8] However, CSR retail research stream covers specific aspects of sustainability; such as sustainability/sustainable, environment/

[6] Deloitte, Global powers of Retailing 2015: Embracing innovation, available at: <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Consumer-Business/gx-cb-global-powers-of-retailing.pdf>, last accessed on 15/05/2015.

[7] Hartman, M., Corporate social responsibility in the food sector, European Review of Agricultural Economics, Vol. 38(3) 2011., p. 298.

[8] Wiese, A., Kellner, J., Lietke, B., Toporowski, W., Zielke, S., Sustainability in Retailing – a Summative Content Analysis, International Journal of Retail & Distribution Management, Vol. 40 (4) 2012, pp. 318-335.

environmental, carbon footprint/CO2, CSR/corporate social responsibility, fair trade, eco-friendly, green, eco-marketing and organic. Taking into account the spike in sustainability mentioned in recent past, it might well be one of the most promising research themes currently pursued. This view is also supported by *Carter & Easton*[9], who suggest that it is necessary to focus on the individual industries in future research.

Research papers which cover the scope of CSR in food retail research have been published recently (from 2000 onwards), by *Spence & Bourlakis*[10], *Piacentini & MacFadyen*[11], *Manning*[12], *Renko, Rašić & Knežević*[13], *Sutić, Lazibat & Baković*[14]. However, taking into consideration leading European food retailers, dominating research stream in this area is set by *Jones, Comfort & Hillier*, who mainly focus on UK food retail market and different perspectives of CSR in UK food retailing; such as assessment of the employment of assurance in the CSR/sustainability reports[15], CSR as means of in-store marketing and communication[16], CSR within food stores[17], environmentally friendly product assortment[18], etc.Over the past few decades grocery retailing is be-

[9] Carter, C.R., Easton, P.L., Sustainable supply chain management: evolution and future directions, International Journal of Physical Distribution & Logistics Management, Vol. 41 (1) 2011, pp. 46-62.

[10] Spence, L., Bourlakis, M., The evolution from corporate social responsibility to supply chain responsibility: the case of Waitrose, Supply Chain Management: An International Journal, Vol. 14 (4), 2009, pp. 291-302.

[11] Piacentini, M.L., MacFadyen, D. E., Corporate social responsibility in food retailing, International Journal of Retail & Distribution Management, Vol. 28 (11), 2000, pp. 459-469.

[12] Manning, L., Corporate and consumer social responsibility in the food supply chain, British Food Journal, Vol. 115 (1), 2013, pp. 9-29.

[13] Renko, S., Rašić, S., Knežević, B., Corporate Social Responsibility in Croatian Retailing, Managerial and Entrepreneurial Developments in the Mediterranean Area, EuroMed Press, 2009, pp. 1346-1358.

[14] Sutić, I., Lazibat, T., Baković, T., Corporate Social Responsibility – Analysis of the leading food retailers in Croatia, Trade Perspectives 2012: Trade in the Context of Sustainable Development, Faculty of Economics and Business Zagreb, 2012, pp. 109-124.

[15] Jones, P., Hillier, D., Comfort, D., Assurance of the leading UK food retailers' corporate social responsibility/sustainability reports, Corporate Governance, Vol. 14 (1), 2014, pp. 130-138.

[16] Jones, P., Comfort, D., Hillier, D., Corporate social responsibility as a means of marketing to and communicating with customers within stores: A case study of UK food retailers, Management Research News, Vol. 28 (10), 2005, pp. 47-56.

[17] Jones, P., Comfort, D., Hillier, D., Marketing and corporate social responsibility within food stores, British Food Journal, Vol. 109 (8), 2007, pp. 582-593.

[18] Jones, P., Comfort, D., Hillier, D., Healthy eating and the UK's major food retailers: a case study in corporate social responsibility, British Food Journal, Vol. 108 (10), 2006, pp. 838-848.

coming more concentrated, which reflects a decrease in sales of food products of small independent retailers and increased market share of large retailers of food products. The market concentration is undeniably affected by the growth of power of large grocery retailers and it is one of the key concepts and trends that marked the European retail industry in the past two decades.[19]

Retailers use reports on CSR as a major tool for communicating its commitment and sustainable development achievements.[20] *Jones*, *Comfort & Hillier* were analyzing reports of the Britain's biggest retailers within the *TOP 20 list.* Reports were analyzed with special attention to the so-called *'three pillars of sustainability'*; the environment, the society and the responsibility of retailers, to determine which of these areas are parts of the information included in the CSR reports. Information on the environment and society were easily identified, given that most retailers use the term *'environment'* and *'society'* as the titles of sections in which the overview of activities from these areas is given. Here retailers usually state awareness of the impact of their business on society and the environment. *Jones*, *Comfort* & *Hillier* note several topics that retailers are most focused on, such as, for example: *water consumption*, *waste reduction*, *recycling*, *genetically modified food* in the area of *'environment'*, and *being a 'good neighbor' in the communities in which they operate*, *the health and safety of employees*, as well as *participation in charitable initiatives* in the field of *'society'*. However, the identification of the economic impacts associated with sustainability is much harder to identify. For example, the *'ethical trading'* and *'market operations'* are indicators of commitment to the economic dimension of sustainability, but few retailers use this approach in order to describe the economic impact of their operations. Its economic contribution, large retailers mainly see through employment or wages of their employees, dividends paid to shareholders, retained earnings as the basis for future growth, and taxes paid by the government. Although food retailing is dominated by small numbers of national retailers (due to the high concentration), there is an increase and shift in supplying food from local producers and engaging in short food supply chains. Authors conclude that British retailers recognize the impact of their operations on the environment, economy and society, and some have already developed *KPI's*[21] in order to measure their

[19] Knežević, B., Knego, N., Delić, M., The retail concentration and changes of the grocery retail structure, InterEULawEast-Journal for International and European Law, Economics and Market Integrations, Vol. 1 (2), 2014, p. 38.

[20] Jones, P., Comfort, D., Hillier, D., Corporate social responsibility and the UK's top ten retailers, International Journal of Retailing & Distribution Management, Vol. 33 (12), 2005, pp. 882-892.

[21] Key Performance Indicators

performance, monitor progress and compare the performance with industry standards and governments objectives. Yet, it seems that it is more business then sustainability driven.Further on, in the research on sustainability and the UK's leading retailers, *Jones*, *Hillier & Comfort*[22] were using data available on the UK's top ten retailers' companies website regarding CSR and pillars, such as *the environment*, *the market*, *the workplace*, *and the community*. Research results indicate that each of the retailers has his own approach towards the CSR and that there are significant differences in the nature and scope of the reporting process, although there are some common points in reporting on issues such as the *environment*, *commitment to customers*, *employees* and the *community* in which retailers operate. All retailers believe that the long-term economic viability is in the interest of all stakeholders and that the integration of CSR in their everyday operations is important and will ensure them the long-term growth, financial security for stakeholders and maintenance or even improvement of their market position.

Jones, Comfort & Hillier[23] using the case study methodology conducted research on the ways in which the UK's leading food retailers promote healthy food products as part of its commitment to CSR and also how those activities are promoted in retail stores. Research results indicate that there are a significant differences among leading food retailers to the extent they communicate *'healthy eating'*, although the extent of this communication is not always identical to the one which is communicated in the store.

3. REPORTING CORPORATE SOCIAL RESPONSIBILITY AMONG LEADING EUROPEAN FOOD RETAILERS

In the light of prevailing CSR studies in the UK market, the aim of the explorative research was to identify how leading European food retailers[24] are reporting their CSR. The European region, which is in the focus of this analysis, with 90 companies, accounted for the largest share of the world's Top 250 retailers in 2013.[25] European retailers (*Table 1*) are, by far, the most globally

[22] Jones, P., Hillier, D., Comfort, D., In the Public Eye: Sustainability and the UK's Leading Retailers, Journal of Public Affairs, Vol 13 (1) 2013, pp. 33-40.

[23] Jones, P., Comfort, D., Hillier, D., Marketing and corporate social responsibility within food stores, British Food Journal, Vol 109 (8), 2007, pp. 582-593.

[24] according to: Deloitte, Global powers of Retailing 2015: Embracing innovation, available at <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Consumer-Business/gx-cb-global-powers-of-retailing.pdf>

[25] Deloitte, Global powers of Retailing 2015: Embracing innovation, available at <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Consumer-Business/gx-cb-global-powers-of-retailing.pdf>, p. 28, last accessed on 15/05/2015.

active – especially those based in Germany and France where revenue from foreign operations exceeds 40 percent.[26] *Carrefour* slipped into the top spot as Europe's largest retailer in 2013, marginally ahead of *Schwarz* and *Tesco*. *Schwarz* moved to the second place from third in 2012. *Tesco*, which had been the top-ranked retailer in 2012, fell to number three.

Table 1. Leading European food retailers

Rank	Company	Country of origin	Number of countries in which they operate	2013 retail revenue (US$ mil)	2013 retail revenue growth
1	Carrefour S.A.	France	33	$98,688	-2.4%
2	Schwarz Unternehmens Treuhand KG	Germany	26	$98,662[e]	9.5%
3	Tesco PLC	U.K.	13	$98,631	-2.0%
4	Metro Ag[1]	Germany	32	$86,393 [e]	-2.5%
5	Aldi Einkauf GmbH	Germany	17	$81,090 [e]	4.7%
6	Casino Guichard-Perrachon S.A.	France	29	$63,468**	15.1%
7	Groupe Auchan SA	France	13	$62,444	2.4%
8	Edeka Zentrale AG & Co. KG	Germany	1	$59,704**	3.3%
9	Rewe Combine	Germany	11	$51,109**	1.0%
10	Centres Distributeurs E. Leclerc	France	7	$47,671 [e**]	4.1%

Notes:

[1] Metro changed its fiscal year from end December to end of September. Fiscal 2013 revenue reported here includes the 9 months ended 30 September plus the 3 months ended 31 December;

e=estimate;

*** revenue includes wholesale and retail sales*

Source: Deloitte (2015), p. 30

In order to obtain an initial state of the extent to which leading European food retailers report on the CSR issues, the leading European food retailers, ranked by region (Europe) were selected for study. All companies state that

[26] Deloitte, Global powers of Retailing 2015: Embracing innovation, available at <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Consumer-Business/gx-cb-global-powers-of-retailing.pdf>, p. 29, last accessed on 15/05/2015.

CSR is part of their strategic orientation and that it is integrated into their business activities. Further on, all European retailers are aware of their role in the community in which they operate and report various forms of the responsible business activities in which they want to encourage the development of the society. In order to do so, retailers issue comprehensive annual reports to inform stakeholders on all activities undertaken and the progress made in comparison with previous periods, in the areas of CSR that are considered relevant and through which they achieve the mission and vision of the company. Below is a brief overview of statements and activities of leading European food retailers: *Carrefour S.A., Schwarz Unternehmens Treuhand KG, Tesco PLC, Metro AG, Aldi Einkauf GmbH, Casino Guichard-Perrachon S.A., Groupe Auchan SA, Edeka Zentrale AG & Co. KG, Rewe Combine* as stated in their CSR reports. *Centres Distributeurs E. Leclerc* was omitted from study due to the language barrier.

CARREFOUR S.A. is the leading retailer in Europe and the second-largest retailer in the world, employing more than 380.000 people in more than 10.800 stores in 34 countries, which generates more than 53% of its sales outside France.[27] *Carrefour* has submitted a comprehensive annual report *Working for you*[28] on its activities in the areas of CSR that have permeated through four sections: *Our stores*, *Our products*, *Our employees* & *Our performance*. Through the first section, the Group commits to reduce the environmental impact of the retail business. Company emphasizes significant importance that they give to the introduction and implementation of initiatives that help to protect the environment and combat the climate changes, with the tendency to develop stores that use less energy, water, and generate less waste and carbon dioxide emissions. To achieve this objective, the Group designs stores that save energy, experiments with new technologies, shares best practices with other retail players and aims to enhance awareness of employees and customers toward the more sustainable consumption. In the area of product as its priorities Group states quality assurance of products, increase in supply, promotion of sustainable sourcing, guarantees the best price, and encourages local production. The Group points out that in addition they help their suppliers to align their operations with the sustainable development. Also, they are emphasizing, that for many years they are trying to optimize the global strategy of responsible sourcing in order to reduce their impact on the ecosystem and the biodiversity, and increase the economic viability of their business.

Regardless in which part of the world Group operates, the Group and its em-

[27] < http://www.carrefour.com/content/presentation-group-0>, last accessed on 15/05/2015.

[28] <http://www.carrefour.com/sites/default/files/ESSENTIEL_CARREFOUR_GB_BD.pdf>, last accessed on 15/05/2015.

ployees are committed to solidarity and CSR in the local communities. The Group's priority is to develop the retail spirit and sense of initiative of its people; to guarantee the transfer of knowledge and to prepare the future management; to encourage and develop a sense for fair and responsible trade; to enable stores to the satisfaction of its employees, and to encourage the professional development of its employees. The last part of the report comprises the financial review, and the review and comparison with the activities of the previous years in the field of CSR, as well as the changes that the Group has achieved in the aforementioned categories (products, human resources, environment) in which the Group has focused on carrying out their socially responsible policies.

SCHWARZ UNTERNEHMENS TREUHAND AG (*Lidl* and *Kaufland*) do not publish the public statements on sustainable development nor the CSR. However, on the group members' website, there is a section in which the companies state their responsibilities, particularly in the area of community involvement. Summarized annual review and CSR assessment are not published online.

TESCO PLC is British retailer with over 500.000 employees, serving millions of customers a week in their stores and online.[29] In the report on CSR called *'Tesco-what matters now: using our scale for good'* company emphasizes its role in society as an extension to the main purpose of the business. Report elaborates three main ambitions of the company which are related to *the creation of opportunities*, *the improvement of health* and *to the reduction of food waste*. In addition, the main areas in which the company is focused on are the implementation of the CSR in responsible trade, which is reflected in product safety and quality, fair and accurate price, data protection, followed by the reduction of environmental impact through energy management system, as well as being a good employer. The foundations of CSR are helping the local community by supporting various charities and collecting food for those in need. The report contains also information about *Tesco's* performance metrics, the activities and changes that they have achieved, and performance indicators[30].

METRO AG, German retailer, states its commitment to the CSR in the *Corporate Responsibility Report 2013/14*[31] of 64 pages, in which company emphasizes *METRO GROUP's* sustainability vision – *'We offer quality of life'*. Main spheres of action are seen in the whole of the supply chain - from *procurement, production and processing*, *transport, warehousing and stores*,

[29] <http://www.tescoplc.com/index.asp?pageid=71>, last accessed on 15/05/2015.

[30] <http://www.tescoplc.com/index.asp?pageid=71>, last accessed on 15/05/2015.

[31] <http://reports.metrogroup.de/2013-2014/corporate-responsibility-report/servicepages/downloads/files/entire_metrogroup_crr14.pdf>, last accessed on 15/05/2015.

customer, *waste disposal,* to the *social commitment*. The report is prepared in accordance with the guidelines of the *Global Reporting Initiative (Gri G3.1).* They state that they were making important progress on the sustainability front in the financial year 2013/14, which was also confirmed in 2014, when Metro GROUP was listed on the *Dow Jones Sustainability World* and *Europe Indices (DJSI)* as well as the *FTSE4Good Global and Europe Indices*. Within these areas, the company states management approach as well as different projects and concrete measures to be used, if necessary, to check and adjust its performance.

In the area of supply chain management, focus is placed on accountability along the entire supply chain - starting from the raw materials and the selection of farmers and manufacturers, followed by transport and storage, through to the distribution to final consumers. In addition, special attention is placed on ensuring satisfactory working conditions of employees and collaboration with suppliers. The measures and projects undertaken in the supply chain framework relate to sustainable procurement, fair working conditions, effective sales structure, transparency in the supply chain, legislative support, responsible consumption and sustainable textiles.

ALDI – similar like with members of the *Schwarz group*, annual report on CSR from this discount retailer is not available on the company's web page. However, the English subsidiary has published on its web page *Corporate Responsibility*[32] declaration. With the introduction of the *Corporate Responsibility Policy (CR Policy[33]),* with the statement *'Responsibility is our response'*, company has made responsibility an integral part of its corporate decision making process. The *CR Policy* is a set of activities directed towards *consumers*, *suppliers*, *resources for products*, *operations* and *people*.

CASINO GUICHARD-PERRACHON S.A., a long-standing player in the French retail market has motto *'Nourishing a world of diversity'*. From the last available *Annual and corporate social responsibility performance report*[34], it is evident that *Casino Group's* CSR policy is structured around five major themes; *committed employer*, *responsible retailer*, *trusted partner*, *engaged local corporate citizen* and a Group that is *environmentally proactive*. The Group has been selected for inclusion in the *Dow Jones Sustainability Index (DJSI) World* and *Europe*, two of the benchmark indices with regard to

[32] <https://corporate.aldi.co.uk/en/responsibility/corporate-responsibility/>, last accessed on 15/05/2015.

[33] <https://corporate.aldi.co.uk/fileadmin/fm-dam/Corporate_Responsibility/Landing_Page/ALDI_CR_Policy.pdf>, last accessed on 15/05/2015.

[34] <http://www.groupe-casino.fr/IMG/pdf/RA2013-EN.pdf>, last accessed on 15/05/2015.

CSR. This distinction is a strong acknowledgement of the Group's CSR policy, which has also been recognized through the inclusion in other indices as well, such as: *FTSE4Good*, *Vigeo Eurozone 120*, *EPCI* and *Ethibel*. However, after detailed analysis of the report, it can be concluded that the retailer puts emphasis on key CSR performance indicators, among which the reduction of greenhouse-gas emissions and the promotion of responsible consumption are in main focus of the report, just after the committed employer. In their report, the Group states objectives, scope, target dates, status and principal accomplishments.

GROUPE AUCHAN S.A., a French retailer, states its CSR activities in *The Responsible Discounter*[35] report, with which they declare their responsible discount' approach. This approach is focused towards the strategy, consumption, internationalization, innovation, stakes and finance. Special part of the report is dedicated to the explanation of the CSR methodology. In 2011 the Group became the member of the *Global Compact.* In their report, they emphasize the sharing of the CSR information as a company priority, by developing responsible product ranges, encouraging supply traceability and helping customers to eat healthier, and offering more and more eco-friendly products. They combine environmental levers together with discount retailing, through the usage of green energy, efficient usage of raw materials, eco-friendliness of the in-store and around the store.

EDEKA ZENTRALE AG & CO. KG, a German retailer publishes its CSR report as part of its financial report. As food retailer they consider that it is of utmost importance to advocate for sustainable food production along the entire value chain. In order to be able to follow this process, the cooperation with the *WWF*[36] was established. WWF suggest ideas and regulates intervals, as well as they examine the progress in a separate progress report. Environmental liability of the company not only covers the product assortment, but also the environmental impact of in-store and warehouse activities, as well as other logistics processes at all supply chain level. The primary focus is put on the reduction of power consumption, usage of natural refrigerants, raw materials as well as low-energy construction methods. Social engagement of the company can be seen through nutrition consultation and help in different social initiatives.

REWE GROUP is one of the leading trade and tourism groups not only in Germany, but in Europe as well. With the number of 330.000 employees,

[35] <http://www.lebensmittelzeitung.net/unternehmen/pages/pdfs/1/2221-gb.pdf>, last accessed on 15/05/2015.

[36] World Wide Found for Nature

working in 12 European countries, in 15.000 stores last year they have generated a turnover of more than 51 billion Euros.[37] They are an award winning company for their commitment to sustainability (*a role model supermarket*, *CSR Award for PRO Planet*, *2014-ECR Award*). The four sustainability pillars of the Rewe Group are *green products*; *employees*; *energy*, *climate and the environment* and *social involvement*[38]. Each of these pillars is elaborated on into more details on the company's web page with the focus on sustainable products, encouraging satisfaction, motivation and productivity of their employees, explaining activities for protection of the environment, supporting and sponsoring charitable products.

4. CONCLUSION

Due to the growing stakeholder pressures, retailers communicate more and more not only through their internal CSR practices, but also the external ones, through the whole of the supply chain as well. The aim of this research was to explore the ways in which the leading European food retailers consider and communicate CSR. Based on the literature review, as well as on the explorative analysis of their CSR and annual reports, it could be concluded that the retailers focus more and more on the whole chain of values, as well as measuring their performance and adjusting it according to the targets set for specific supply chain activities. In the future we can expect even bigger focus on the performance measures in the CSR reporting, with even more significant shift from the company (retail) to the whole food supply chain.

LITERATURE

ARTICLES

1. Bowd, R., Bowd, L., Harris, P., Communicating corporate social responsibility: an exploratory case study of a major UK retail centre, Journal of Public Affairs, Vol. 6 (2) 2006., pp. 147-155.
2. Carter, C.R., Easton, P.L., Sustainable supply chain management: evolution and future directions, International Journal of Physical Distribution & Logistics Management, Vol. 41 (1) 2011., pp. 46-62.
3. Hartman, M., Corporate social responsibility in the food sector, European Review of Agricultural Economics, Vol. 38(3) 2011., p. 297-324.

[37] <http://www.rewe-group.com/en/unternehmen>, last accessed on 15/05/2015.

[38] <http://www.rewe-group.com/en/nachhaltigkeit>, last accessed on 15/05/2015.

4. Jones, P., Comfort, D., Hillier, D., Corporate social responsibility and the UK's top ten retailers, International Journal of Retailing & Distribution Management, Vol. 33 (12), 2005, pp. 882-892.
5. Jones, P., Comfort, D., Hillier, D., Corporate social responsibility as a means of marketing to and communicating with customers within stores: A case study of UK food retailers, Management Research News, Vol. 28 (10), 2005., pp. 47-56.
6. Jones, P., Comfort, D., Hillier, D., Healthy eating and the UK's major food retailers: a case study in corporate social responsibility, British Food Journal, Vol. 108 (10), 2006, pp. 838-848.
7. Jones, P., Comfort, D., Hillier, D., Marketing and corporate social responsibility within food stores, British Food Journal, Vol. 109 (8), 2007., pp. 582-593.
8. Jones, P., Hillier, D., Comfort, D., Assurance of the leading UK food retailers' corporate social responsibility/sustainability reports, Corporate Governance, Vol. 14 (1), 2014, pp. 130-138.
9. Jones, P., Hillier, D., Comfort, D., In the Public Eye: Sustainability and the UK's Leading Retailers, Journal of Public Affairs, Vol. 13 (1) 2013, pp. 33-40.
10. Knežević, B., Knego, N., Delić, M., The retail concentration and changes of the grocery retail structure, InterEULawEast-Journal for International and European Law, Economics and Market Integrations, Vol. 1 (2), 2014., p. 37-51.
11. Manning, L., Corporate and consumer social responsibility in the food supply chain, British Food Journal, Vol. 115 (1), 2013, pp. 9-29.
12. Piacentini, M.L., MacFadyen, D. E., Corporate social responsibility in food retailing, International Journal of Retail & Distribution Management, Vol. 28 (11), 2000., pp. 459-469.
13. Renko, S., Rašić, S., Knežević, B., Corporate Social Responsibility in Croatian Retailing, Managerial and Entrepreneurial Developments in the Mediterranean Area, EuroMed Press, 2009, pp. 1346-1358.
14. Spence, L., Bourlakis, M., The evolution from corporate social responsibility to supply chain responsibility: the case of Waitrose, Supply Chain Management: An International Journal, Vol. 14 (4), 2009, pp. 291-302.
15. Sutić, I., Lazibat, T., Baković, T., Corporate Social Responsibility – Analysis of the leading food retailers in Croatia, Trade Perspectives 2012: Trade in the Context of Sustainable Development, Faculty of Economics and Business Zagreb, 2012, pp. 109-124.
16. Thomsen, A. E. N. C., Reporting CSR – what and how to say it?, Corporate Communications: An International Journal, Vol. 12 (1) 2007, pp. 25-40.
17. Wiese, A., Kellner, J., Lietke, B., Toporowski, W., Zielke, S., Sustainability in Retailing – a Summative Content Analysis, International Journal of Retail & Distribution Management, Vol. 40 (4) 2012, pp. 318-335.

INTERNET SOURCES

1. <http://www.carrefour.com/content/presentation-group-0>,
2. <http://reports.metrogroup.de/2013-2014/corporate-responsibility-report/service-pages/downloads/files/entire_metrogroup_crr14.pdf>,
3. <http://www.carrefour.com/sites/default/files/ESSENTIEL_CARREFOUR_GB_BD.pdf>,
4. <http://www.groupe-casino.fr/IMG/pdf/RA2013-EN.pdf>,
5. <http://www.lebensmittelzeitung.net/unternehmen/pages/pdfs/1/2221-gb.pdf>,
6. <http://www.rewe-group.com/en/nachhaltigkeit>,
7. <http://www.rewe-group.com/en/unternehmen>,
8. <http://www.tescoplc.com/index.asp?pageid=71>,
9. <https://corporate.aldi.co.uk/en/responsibility/corporate-responsibility/>,
10. <https://corporate.aldi.co.uk/fileadmin/fm-dam/Corporate_Responsibility/Landing_Page/ALDI_CR_Policy.pdf>,
11. Deloitte, Global powers of Retailing 2015: Embracing innovation, available at <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Consumer-Business/gx-cb-global-powers-of-retailing.pdf>,
12. GRI Sustainability Reporting Guidelines, available at < https://www.globalreporting.org/reporting/g4/Pages/default.asp>,
13. KPMG (2014), The KPMG Survey of Corporate Responsibility Reporting 2013, available at <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/corporate-responsibility/Documents/kpmg-survey-of-corporate-responsibility-reporting-2013.pdf>,

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EU PUBLIC PROCUREMENT REFORM AND ITS REFLECTIONS IN SOUTH-EASTERN EUROPE: IS CROATIA READY?

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ABSTRACT

The 2014 reform of the European Union procurement directives represents a significant, resounding leap towards an upgraded public spending sector. After a decade of successful implementation, the previous directives were modernized in an attempt to enhance efficiency and transparency in procurement procedures. As all other EU member states, Croatia is obligated to implement the directives in the prescribed implementation deadline, which is approaching swiftly. However, despite such a deadline, Croatia is only just turning its attention to the necessary harmonization. Statistical data and case studies show numerous shortcomings in the current system of Croatian public spending, and indicate that there may not be enough time to rectify them. Historical tendencies demonstrate that Croatia nurtures a tradition of harmonization devoid of side activities to ensure successful implementation and harmonization often occurs solely on paper. With this in mind, this paper represents, other than an introduction of the latest changes in EU public procurement and the events which lead to them, it highlights the most significant defects of the Croatian public procurement and strive to identify why it could prove difficult to correct solely by implementing the new directives to the Croatian law.

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1. INTRODUCTION

Public spending in the European Union ("**EU**") is one of the key ingredients of its unified market policy - approximately a fifth of all goods, works and services in the EU is procured in that manner.[1] The global economic crisis made it obvious that the sector needed to become more efficient and transparent through the stronger regulation.[2] Notable effort was put in identifying and addressing the changes which were most necessary and, in 2014, two new directives, the public procurement and the concessions directive, were introduced. Numerous changes were put forward with the aim of facilitating participation in procurement procedures for both the contracting authorities and tenderers, while the final implementation deadline (for the majority of amendments) has been set for April 2016.[3] In this paper, we address the most important changes occurring within the general procurement framework (utilities and concessions excluded) and the difficulties we believe Croatia will face in their implementation. As the newest member-state and a country whose legal order is often spoken as one of the most harmonized in the EU, Croatia firmly nurtures the tradition of literal implementation. Unfortunately, research has shown that everyday business reality rarely corresponds with this level of harmonization. It is for this purpose that the chapters below focus mainly on the negative sides of Croatian public procurement, exposing its weak spots in legal security, transparency and efficiency. Also, it should be noted that implementation in Croatia is often conducted without any research, preparation and/or coordination with relevant addressees. In respect to the latest procurement changes, information gathered shows that the reform has not echoed in Croatia as it has in other EU countries[4] and that little or no research or education has commenced with the purpose of bringing the 2014 changes closer to the business community. How severely will this impact Croatia's ability to successfully implement the 2014 procurement directives?

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1 European Commission's Single Market Scoreboard, Public Procurement section; http://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm, last accessed on 15/5/2015.

2 Communication from the Commission: EUROPE 2020 - A strategy for smart, sustainable and inclusive growth COM(2010) 2020, p. 8.

3 See Article 90 of the 2014 Directive (as subsequently defined), Article 106 of the 2014 Utilities Directive (as subsequently defined) and Article 51 of the Concessions Directive (as subsequently defined).

4 See the Comparative survey on the transposition of the new EU public procurement package on http://www.publicprocurementnetwork.org/docs/ItalianPresidency/documento%206.pdf, last accessed on 15/5/2015.

2. THE DECADE OF EVOLUTION

The changes occurring in public procurement can be traced back as far as 2010, with EU's new political strategy - Europe 2020[5], adopted by the European Commission ("**Commission**"). The global financial crisis made it clear that economic growth would not be possible without serious amendments to the applicable regulatory frame, including extensive legal reform of the 2004 procurement Directives[6]. Seven flagship models were designed to ensure economic prosperity - the modernization of public procurement was to be part of the Economic Innovation and the Resource-efficient Europe flagships[7]. The Commission initiated a large scale public debate in January 2011 and collected the received replies in a Green Paper[8]. It was clear that numerous changes were to be made in order to achieve the above stated EUROPE 2020 goals, as well as to meet the business community's requests.[9] Furthermore, a comprehensive research was conducted regarding the overall effect of the 2004 Directives[10], upon which the Commission was due to present its legislative proposals for the implementation of key actions.[11] The formal proposal, though, was preceded by the Single Market Act[12], in which the Commission emphasized its view on public procurement being the twelfth lever of economic growth. The

5 Communication from the Commission as of 3 March 2010 - COM(2010) 2020.

6 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

7 Communication from the Commission of 3 March 2010 - COM(2010) 2020, p. 13, 16, 17 and 18. See also Council Recommendation 2010/410/EU on broad guidelines for the economic policies of the Member States and of the Union.

8 Green Paper on the modernization of EU public procurement policy - Towards a more efficient European Procurement Market, COM(2011) 15.

9 A synthesis document containing all the collected questions is available on the webpage of the Commission http://ec.europa.eu/internal_market/consultations/2011/public_procurement_en.htm, last accessed on 15/5/2015.

10 Commission staff working paper - Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation SEC(2011) 853.

11 For a more comprehensive approach on the proposed changes, see Kynoch, Alex, Ware, Peter, Public Procurement Reform: Impact on Contracting Authorities and Tenderers, Credit Control, vol. 34, Issue 3, 2013, p. 13.

12 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the committee of the regions Single Market Act - Twelve levers to boost growth and strengthen confidence – "Working together to create new growth" COM(2011) 206/4.

Proposal[13] itself was issued in December 2011, announcing the change that was to occur in EU public procurement and its two main objectives - first and foremost, the efficiency of public spending had to be increased in light of the global economic crisis and, secondly, the social role of public procurement had to be fulfilled through various social policies.[14] Finally, in February 2014, EU's new procurement mechanisms were introduced - Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ("**2014 Directive**") and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ("**2014 Utilities Directive**").[15]

3. WHAT HAS CHANGED?

The 2014 Directives are, perhaps, one of the most significant changes that have occurred in a large EU regulated sector in recent times. Due to the large number of introduced changes, we will limit our scope to the changes occurring within the general procurement regime of the 2014 Directive, without addressing changes from the utilities and concessions sector.[16]

The 2014 Directive consists of four major sections - its recitals, its contents list, it material provisions divided into subsections and its annexes containing lists and forms which are to facilitate its implementation. The majority of its provisions are mandatory and the 2014 Directive is to be implemented by 18th April 2016, while implementation of some provisions can be postponed until 2018. The 138 recitals of the 2014 Directive show the evolution of public procurement, the reasons behind the adopted changes and the most important sections of the 2014 Directive, but they are also an excellent reminder of the scope

[13] Proposal for a Directive of the European Parliament and of the Council on public procurement, COM(2011) 896 ("**Proposal**").

[14] For more detail, please see page 2 of the Proposal.

[15] The 2014 Utilities Directive and 2014 Directive to be jointly referred to as „**the 2014 Directives**". Also, it should be mentioned that a new Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts ("**Concessions Directive**") was entered into, governing wholly for the first time the field of concessions on a EU level.

[16] For more information on changes occurring in these areas, please see http://ec.europa.eu/growth/single-market/public-procurement/modernising-rules/reform-proposals/index_en.htm, last accessed on 15/5/2015.

of the 2014 changes.[17] With respect to the material provisions, a significant amount of changes has been introduced in order to facilitate the procedure in whole, but numerous provisions address issues specific to either side of the procurement procedure.[18] Therefore, for the sake of clarity, changes in material provisions are diverged with respect to whom they are addressed.

With respect to contracting authorities, the most significant changes are apparent in the increasing number of procedures available, allowing for greater flexibility and cooperation between contracting authorities and tenderers. The two main types envisaged by the 2014 Directive are the open and the restricted procedure, while competitive procedure with negotiation, competitive dialogue and innovation partnership are also available.[19] The former negotiated procedure with prior publication has been replaced by the somewhat altered "competitive procedure with negotiation"[20]. Innovation partnership, on the other hand, is a completely new procedure, made available for "where a need for the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market."[21] With respect to all procedures, the 2014 Directive shows a significant trend toward shortening the deadlines available to tenderers in order to submit their bids and participate in the procedure. Furthermore, contracting authorities are authorized to exclude certain types of contracts or certain products or services from public procurement, for instance, public contracts between entities within the public sector or "in-house" contracts.[22] Namely, provided certain conditions under the 2014 Directive are met[23], a contract awarded by a contracting authority

[17] The introduction of recitals showcasing the documents' provisions below could be considered not only welcomed in light of the document's length and size, but also mandatory. For more information, please see Klimas, T. and Vaičiukaitė, J. The law of recitals in European community legislation, ILSA Journal of International & Comparative Law, vol. 15, 2008; available on http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159604, last accessed on 8/5/2015.

[18] For a detailed insight into the changes in the 2014 Directives in the context of EU public contract law, see Caranta, Roberto, The changes to the public contract directives and the story they tell about how EU law works, Common Market Law Review, vol. 52, 2015, p. 391–460.

[19] The different types of procedures are governed by Chapter I of the 2014 Directive.

[20] See recital nos. 42 - 45 and Article 29 of the 2014 Directive.

[21] Recital no. 49 of the 2014 Directive.

[22] Article 12 of the 2014 Directive.

[23] „a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments; (b) more than 80 % of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and (c) there is no direct private capital participation in the controlled legal person

will fall outside the scope of the 2014 Directive and enable contracting authorities to be exempt from public procurement rules.[24] Certain services have been excluded from the scope of the 2014 Directive[25] such as, for instance, legal services which are "provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules"[26]. Apart from the aforesaid, contracting authorities have been given other various possibilities which extend their authority in procurement procedures - wider powers when excluding bidders due to previous transgressions (Article 57), specifying labels when initiating procedures (Article 43), allowing for previous involvement of candidates and tenderers (Article 42) etc.

In respect of tenderers, the most significant change is the introduction of the European Single Procurement Document ("**ESPD**") and the alleviation of the burden of proof. The ESPD is a standardized form which allows tenderers to confirms simply, clearly and without further cost, that they fulfill conditions necessary to participate in the tender and that none of the exclusion grounds exist in relation to them.[27] It is, also, the intended purpose of this document to

with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person."

[24] This provision stems from the practice of the Court of Justice of the European Union, from case C-107/98 Teckal Srl v Comune di Viano [1999] ECR I-8121. It is a procedure in which rules for determining what constitutes an in-house contract were determined and a two stages functional test was formed (see paragraph 50 of the judgment). The purpose of the test is to determine whether the contract has been entered into by a contracting authority and a person separate from that authority as well as whether that person „carries out the essential part of its activities with the controlling local authority or authorities." See more in Bovis, Christopher H., The challenges of public procurement reform in the single market of the European Union, ERA Forum, vol. 14, Issue 1, 2013, p. 35-57, and Bovis, Christopher H., Regulatory Trends in Public Procurement at the EU Level, EPPPL, vol. 4, 2012, p. 221-227

[25] For details on special regime services in light of the 2014 Directives, see Loboja, Ante, Usluge u posebnom režimu javne nabave s osvrtom na novo uređenje prema novim direktivama EU, Financije pravo i porezi, vol. 11/14, 2014, p. 135-142.

[26] Recital no. 25 of the 2014 Directive.

[27] More specifically, according to Article 59 of the 2014 Directive, that they fulfill the following conditions:
„(a) it is not in one of the situations referred to in Article 57 in which economic operators shall or may be excluded;
(b) it meets the relevant selection criteria that have been set out pursuant to Article 58;
(c) where applicable, it fulfills the objective rules and criteria that have been set out pursuant to Article 65.
Where the economic operator relies on the capacities of other entities pursuant to Article 63, the ESPD shall also contain the information referred to in the first subparagraph of this paragraph in respect of such entities."

identify national authorities competent for issuing the necessary documents, should they subsequently be requested by the contracting authority.[28] Although this will not release tenderers from proving their worth entirely (taking into account the power of the contracting authorities to, subsequently, request delivery of supporting documentation) it is a monumental shift in responsibility, cost and length of procedure. The Commission seems to be aware of this and "shall review the practical application of the ESPD taking into account the technical development of databases in the Member States and report thereon to the European Parliament and the Council by 18 April 2017."[29] Tenderers' life has also been made easy by two additional changes which will enable the "sharing of the load". First, the rules on subcontracting have been clarified - tenderers will have more possibilities to use subcontractors, but will need to clearly specify which sections of the contract-awarded they will not be partaking in. Payments can be made directly by the contracting authority to the subcontractor, but the subcontractor may also be requested to provide proof of their ability to conduct the works/services or deliver the goods requested, or can even be made jointly liable with the chosen tenderer.[30] Secondly, the modification of contracts and framework agreements during their term has been facilitated and simplified, following certain conditions. These provisions enable tenderers to modify the contract without having a new procurement procedure, but transparency must be obeyed by publicizing the modification. [31] This represents a significant step forward in respect of the increasing legal security and efficiency in the procurement procedures.

4. MEANWHILE, IN CROATIA

Directives are, as is common knowledge in our time, mechanisms of harmonization, and not unification.[32] Member states are, to the extent of not acting contrary to the goals set out in directives, allowed to implement them as they see fit, adapting them to their needs. Croatia is, unfortunately, a novice in EU implementation, despite the decade spent in pending membership with the

[28] In connection to this and in order to make the ESPD viable, the e-Certis data base is to be updated regularly with the relevant national authorities. For further detail please see Article 61 of the 2014 Directive and the e-Certis website http://ec.europa.eu/markt/ecertis/login.do, last accessed on 10/5/2015.

[29] Article 59, paragraph 3 of the 2014 Directive.

[30] See recital no. 105 and Article 71 of the 2014 Directive.

[31] Article 72 of 2014 Directive.

[32] Article 288 of the consolidated version of the Treaty on the Functioning of the European Union.

EU's watchful eye hovering over it.[33] Croatian legislators take pride in implementing EU directives literally, rendering the implemented changes seldom applicable in real life due to being either too advanced or too incoherent in respect of the remainder of the legal system. Implementation cannot be both a cause and a purpose to itself - it is no different with the 2014 Directives. The Croatian Government plans to introduce amendments to the Croatian Public Procurement Act ("**PPA**") in the third quarter of 2015[34]. If amendments to the PPA are to occur when planned, status research and impact assessments should have been well on their way, particularly due to the fact that the Croatian public procurement sector cannot be deemed as advanced as the majority of EU member states implementing the changes. This lack of preparation, paired with the currently existing discrepancies between the proposed changes and the inherent shortcomings of the Croatian public procurement sector, could render successful implementation difficult.

4.1. HISTORICAL TENDENCIES

It is noteworthy to say that, while Europe was getting ready for the 2004 public procurement reform, Croatia was just setting up its public spending framework. Namely, although Croatia has regulated its public procurements since 1995[35], it caught on with modern tendencies only upon initiating negotiations with the EU and the World Trade Organization ("**WTO**"). Under the Act on confirming the protocol on the accession of the Republic of Croatia to the Marrakesh Agreement Establishing the World Trade Organization[36] Croatia became a party of the WTO and, thereby, undertook to coordinate its public procurement rules with those of the WTO. Additionally, in 2001, the Act on

[33] See http://ec.europa.eu/enlargement/countries/detailed-country-information/croatia/index_en.htm.

[34] As stated in the Plan of harmonization of the legislation of the Republic of Croatia with the acquis communautaire of the European Union for 2015, full text available on http://narodne-novine.nn.hr/clanci/sluzbeni/2015_03_25_518.html, last accessed on 8/5/2015. Please note that the Government's plan does not foresee reasons for amendments; however unofficial information confirms that the changes will come as a consequence of the EU public procurement reform.

[35] Early on, Croatia regulated its public procurement by regulations. Thus, the first Regulation on the procurement of goods and services and assigning works was entered into in 1995 (Official Gazette no. 13/95), while two other regulations under the same name followed (Official Gazette nos. 25/96 and 33/97). The first piece of legislation with the power of an act was entered into on 1997 - the Act on the procurement of goods and services and assigning works (Official Gazette no. 117/01).

[36] NN no. 13/00; international agreements section.

confirming the Stabilization and Association Agreement between the Republic of Croatia, of the one part, and the European communities and their member states, of the other part[37] was entered into and Croatia's road to EU membership had officially begun. Under the Stabilization and Association Agreement ("**SAA**"), it was concluded that public procurement rules were in pressing need for harmonization with EU legislation.[38] To facilitate competition and develop its public procurement rules under controlled market conditions, Croatian companies were immediately permitted to participate in EU tenders, while EU based entities would not be allowed to participate in Croatian tenders for a period of, at the latest, three years after the SAA is ratified.[39] Following these efforts and EU based solutions, the first PPA was published in 2001[40], as a more than welcomed upgrade to the Act on procurement of goods, services and assignment of works.[41]. Croatia's membership in the EU shined a much needed light - public procurement was beginning to show as an area with undermined strength and possibilities. The PPA has been since then amended several times - in 2005, 2007, 2008, 2011, 2013 and 2014[42]. The amendments from 2007 and 2011 were introduced as new acts, while other changes were presented as amendments to the relevant versions of PPA. Croatia's pending EU membership made the 2004 Directives a mold according to which relevant versions of the Act were formed[43], but only the 2011 PPA[44] was formally declared to be aligned with applicable EU directives.[45]. As part of Chapter 23,

37 NN no. 14/01; international agreements section.

38 For more detail, please see Article 72 of the SAA.

39 Ibid.

40 NN no. 117/2001.

41 See Parać, Gordana, Postupak nabave robe, usluga i ustupanje radova; Pravo i porezi, vol. 4, 2002, p. 75.

42 NN no. 117/2001, NN no. 92/05, NN no. 110/07, NN no. 125/08, NN no. 90/11, NN nos. 83/13, 143/13, NN no. 13/14.

43 See Brkić, Karmen, Postupci javnih nabava prema direktivama EU-a, Financije i porezi, vol. 5, 2007, p. 115-119.

44 The 2011 PPA entered into force on 1st January 2012, except some of its provisions which entered into force when Croatia acceded to the EU. See Palčić, Ivan, Javna nabava i pristupanje RH Europskoj uniji, Financije, pravo i porezi, vol. 7/13, 2013, p. 175-180.

45 Article 1 paragraph 5 of the 2011 PPA states that the PPA should be considered harmonized with the following EU directives: both 2004 Directives, Directive 2005/75/EC of the European Parliament and of the Council of 16 November 2005 correcting Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Commission Directive 2005/51/EC of 7 September 2005 amending Annex XX to Directive 2004/17/EC and Annex VIII to Directive 2004/18/EC of the European Parliament and the Council on public procurement, Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives

Judiciary and fundamental rights, harmonizing public procurements played a significant role in combating large-scale corruption and ensuring interagency cooperation in Croatia.[46] As a business sector, public procurement was one of the areas which most lacked transparency and was generally considered as a failure. Consequently, the numerous amendments to the PPA mentioned above should be regarded as continuous efforts made in ensuring that the existing faults are, in part or in whole, remedied.[47] However, despite such efforts, an entirely integrated and harmonized system has not yet been produced. As stated in the Commission's reports in the final stages of Croatia's EU accession, "Further efforts are required", particularly in certain areas - implementation at a local level, and legal remedies.[48] How will this need for further efforts collide with Croatia's obligation to implement the 2014 Directives by April 2016?

4.2. CROATIA VS. 2014 DIRECTIVE

On an EU level, the 2014 changes are the product of thorough reflection, research and consultation and are introduced after almost a decade of the previous system's successful application. In Croatia, on the other hand, changes to be introduced by implementing the 2014 Directive will be the result of obligatory harmonization with a system which is significantly more advanced and complex. Can we expect successful implementation if the 2014 Directive is to be copied into an incoherent, nontransparent system still not entirely rid of corruption? The information shown below indicates a strong contrast between

89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, and articles 2, 12 and 13 of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security, and amending Directives 2004/17/EC and 2004/18/EC.

[46] For more details, please see The Chapter 23 Report issued by the Croatian Government on 12th May 2011, available on http://www.mvep.hr/custompages/static/hrv/files/pregovori/5/p23.pdf, last accessed on 9/5/2015.

[47] See Ljubanović, Boris and Britvić-Vetma, Bosiljka, Hrvatsko pravo javne nabave - usklađenost s pravom Europske unije, Zbornik radova Pravnog fakulteta u Splitu, vol. 48, 2011, p. 407 - 417.

[48] See the Commission Staff Working Paper Croatia 2011 Progress Report, SEC(2011) 1200 on http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/hr_rapport_2011_en.pdf, last accessed on 12/5/2015 and Communication from the Commission to the European Parliament and the Council on the Main Findings of the Comprehensive Monitoring Report on Croatia's state of preparedness for EU membership, COM(2012) 601, Brussels, on http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/hr_rapport_2012_en.pdf, last accessed on 12/5/2015.

the expected changes and the current state of play in Croatia, and raises questions as to whether and to what extent Croatia is (not) ready for the changes.[49]

Primarily, certain shortcomings could be detected in connection to the current state of Croatian economy. One of the major roles of the 2014 Directive changes is the strengthening of the role of SMEs[50], meritorious for the EU member states' economic drive. In Croatia, according to the unified EU definition of SMEs[51], more than 92% of SMEs are micro enterprises, while only the remaining 8% are small and medium enterprises[52]. SMEs are responsible for 50.6 of the country's GDP and employ 68.83% of the total workforce.[53] Since this puts Croatia significantly below the European average[54], a wide consensus exists that SMEs should be aided with their increasing importance in the nation's economy. However, most recent documents concerning SME development in Croatia do not consider public procurement as a leaver of growth. The 2013-2020 SMEs development strategy of the Ministry of entrepreneurship mentions procurement procedures only in the context of "aiding the Ministries and public entities in enforcing public procurement procedures which would facilitate competition for such contracts to SMEs"[55], without any further elaboration. The 2013 Report on small and medium enterprises of the Centre for the development policy of small and medium enterprises and entrepreneurship fails to mention possible difficulties SMEs face in public procurement procedures at all, leaving no place for recommendations on future developments,

[49] Please note that a wide variety of experiences show that there are currently more than several shortcomings to the Croatian procurement system. However, due to limitations in available statistic data and published case studies, this paper has deliberately been limited to only those shortcomings which could have been presented through verifiable, publicly available data.

[50] See recital 78 of the 2014 Directive.

[51] SMEs are considered to be enterprises which employ fewer than 250 persons and have an annual turnover not exceeding 50 million euro, and/or an annual balance sheet total not exceeding 43 million euro. For more detail see Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (2003/361/EC).

[52] To be exact, 92.2% are micro enterprises, 6.3% are small and 1.2% are medium enterprises. See Strategy of small and medium entrepreneurship development 2013–2010 of the Ministry of entrepreneurship on http://www.minpo.hr/UserDocsImages/STRATEGIJA_PRESS.pdf; last accessed on 10/5/2015.

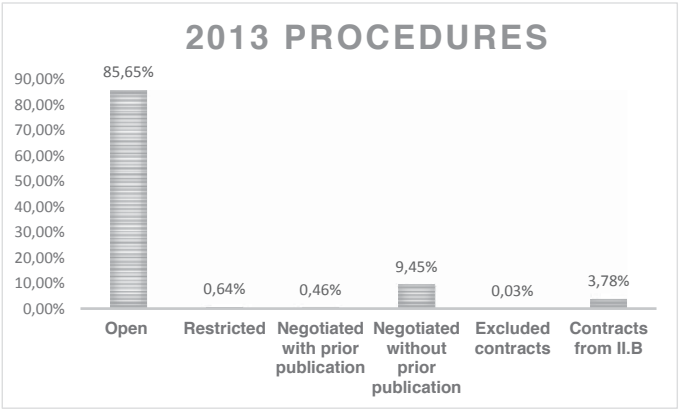
[53] Ibid.

[54] See the Commission's 2014 Annual Report on European SMEs on http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/supporting-documents/2014/annual-report-smes-2014_en.pdf, last accessed on 10/5/2015.

[55] Page 26, Strategy of small and medium entrepreneurship development 2013 – 2010 of the Ministry of entrepreneurship, available on http://www.minpo.hr/UserDocsImages/Strategy-HR-Final.pdf, last accessed on 10/5/2015.

particularly in light of the 2014 Directives.[56] This hardly constitutes a welcome for the 2016 changes to be integrated in the PPA.

But, perhaps the best example of existing discrepancies between the Croatian and EU public procurement law could be the changes to be introduced regarding different procurement procedures. As seen above, the 2014 Directive provides that, apart from the open and restricted procedure, three other types of procedures will be made available.[57] This broadening of the contracting authorities' liberty to choose an adequate procedure should be regarded as an entirely positive step, an almost necessary diversification. But, what about its possible effects in Croatia? Croatian contracting authorities have, up to now, also enjoyed the option of choosing from several different procedures.[58] However, the mere possibility of selecting from different procedures does not mean that the contracting authorities took to these options. The statistical information[59] available from the Ministry of Economy's Directorate for the public procurement system tells a different story.



It is obvious - in Croatia, an overwhelming majority of open procedures take place.[60] Why is this case? Unfortunately, formal statistical data were never

[56] http://www.cepor.hr/Izvjesce%20o%20malim%20i%20srednjim%20poduzecima%202013_CEPOR.pdf, last accessed on 10/5/2015.

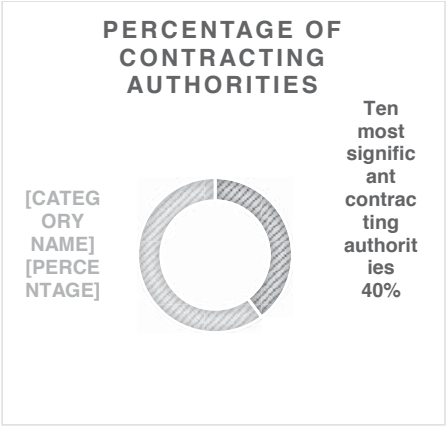
[57] The different types of procedures are governed by Chapter I of the 2014 Directive.

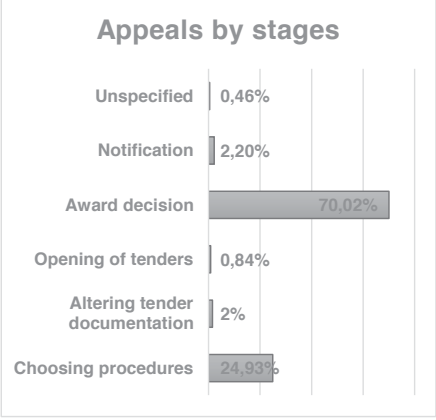
[58] Generally, under Article 25 of the PPA, the open and restricted procedure were available, as well as the negotiated procedure either with or without prior publication and the competitive dialogue.

[59] See webpage of Directorate for the public procurement system http://www.javnanabava.hr/default.aspx?id=3425; last accessed on 10/5/2015.

[60] With minimal deviations ranging up to one percentile, statistic data is almost identical for 2011 and 2012 as well.

collected, so we are left to speculate, at least to a certain extent. Experiences show that, since only the open procedure can be applied without fulfilling additional conditions under the PPA[61], this is an easier and least risky option for contracting authorities, which are reluctant to risk the procedure failing at the very beginning. This is particularly applicable to the top ten contracting authorities (responsible for nearly 40% of total procurement procedures in Croatia[62]), which are highly likely to often choose open procedures and stick to them. Furthermore, and as seen below from the 2013[63] statistic data of the State Commission for Supervision of Public Procurement Procedures ("**State Commission**")[64], the decision on the choice of procedure has the second highest appeal rate. Since tenderers either appeal against the choice of procedure (or the award decision, as the ranking first), or hardly appeal at all, choosing an open procedure seems prudent.





Regardless the reasons behind it, open procedures are publicly and strongly preferred in Croatia. Having this in mind, the EU's efforts in the 2014 Directive on broadening the number of available procedures should be welcomed, but it should not be expected that Croatia will partake in the diversification with large numbers. A similar conclusion can be drawn for framework agreements (accounting for less than 20% of procurement procedures on a national

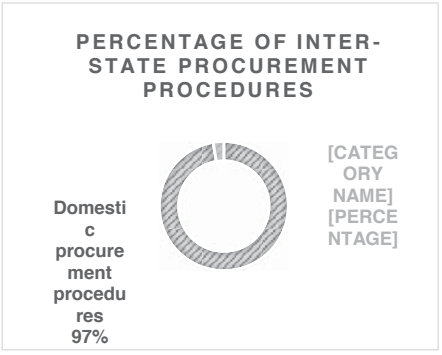
[61] Article 25 of the PPA.

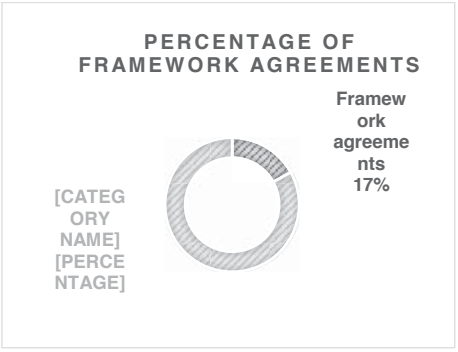
[62] For more detail, please see the Directory for the public procurement system's report for the year 2013, p. 27. The top ten contracting authorities are HŽ Infrastruktura d.o.o., Zagrebački holding d.o.o., Hrvatske autoceste d.o.o., Grad Zagreb, HEP d.d., HEP - ODS d.o.o., Hrvatske ceste d.o.o., INA – Industrija nafte d.d., HEP – Proizvodnja and Jadrolinija. Together, they amount to 39.75% of the total public procurements in Croatia.

[63] Statistical data for the year 2014 are still not available.

[64] The State Commission is the central authority for the control of public procurement procedures in Croatia.

level[65]) and inter-state procurements as well. Inter-state procurement, particularly addressed in the 2014 Directives[66], accounted for only 2.63% of the 2013 contracts, a total of 169 contracts.[67] We assume that the state of the Croatian public procurement sector or the state of its economy in general, could have repealed the majority of foreign investors; so we should not hope for these numbers to change, if the current state does not change.





Furthermore, recent developments in Croatian public procurement seems to lead away, and not toward the main objectives of the 2014 Directive - reducing costs of procurement procedures and ensuring transparency and efficiency.[68] Different procedural safeguards in the appellate stage, inherent to procurement procedures as a whole, have been challenged before the Croatian Constitutional court in order to determine their unconstitutionality and inapplicability.[69]

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65 2013 Report of the Directory for the public procurement system, page 34.

66 See recitals 55 and 73 of the 2014 Directive.

67 2013 Report of the Directory for the public procurement system, page 45.

68 This, in our opinion, can be seen from both numerous recitals, as well as material provisions of the 2014 Directive. See, for example, the transparency requests from recitals no. 45, 52, 58, 29, 61, 68, 73, 90, 105, 110 and Section 2 – Publication and transparency, as well as efficiency requests from Article 67, 83 and 86 in the 2014 Directive.

69 Remedies in procurement procedures are governed by a separate mechanism – Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improve the effectiveness of review procedures concerning the award of public contracts (so called Remedies Directive). However, due to the inherent connection between remedies and the general system of public procurement as governed by the 2014 Directives, and due to the upcoming changes in the Remedies directive as a result of the 2014 reform (the Commission launched a Consultation on Remedies in Public Procurement on 24/4//2014, see http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8244&lang=en&title=Consultation-on-Remedies-in-Public%20Procurement, last accessed on 14/5/2015), they have been addressed in this paper as well.

The first case regards the right of the parties to review the received bids and pertaining documentation in order to draft the appeal. Namely, until recently, Croatian tenderers were precluded to copy or in any other way duplicate documents from other bids which they had reviewed for the purpose of submitting an appeal, except by hand.[70] Since the provision made appeal drafting an almost impossible procedure, a claim was brought before the Constitutional court arguing that the provision impairs transparency and, practically, rids the parties of the right to legal remedy. This was accepted by the Constitutional court, which concluded that the limitation is contrary to the provisions of the Administrative Procedure Act as the underlying act governing the appellate procedure. Also, such a strong limitation was found to have lacked any real explanation as to why it had been placed in the PPA in the first place. Additionally, the court took into account the importance of relevant technical data, specifications and other similar documents in procurement procedures, and the extremely short appellate deadlines. Consequently, the provision was declared as disproportionate, without legitimate cause and unconstitutional in nature; therefore it was repealed.[71] Furthermore, latest regulatory changes also prove that Croatia is still far from a comprehensive legislative procurement framework. Public procurement procedures cost a fair amount of money for the parties involved - particularly tenderers, which face high costs when putting together their bids, as well as when filing for legal protection. Unfortunately, for Croatian tenderers, appeals are an everyday occurrence - in 2013, a total of 22025 procedures were initiated, whereas a total of 2135 appeals were received by the State Commission. This indicates that every tenth procedure is appealed against, at least in one stage.[72] In any event, to successfully submit an appeal, the appellant must pay a submission fee amounting between HRK 10,000 and 100,000 (i.e. approx. between EUR 1,400 and 14,000), depending on the procurement value.[73] The higher the value of the procurement, the higher the value of the fee, meant to be paid in order to discourage appeals submitted for purposes other than procedural safeguards. The same formula was applied when calculating attorneys' costs in the appellate procedure, all in accordance with the Croatian Bar Association's Tariff. However, since Croatia has adopted the "loser pays" principle, and since high procurement values lead to significant attorneys' costs, public contracting authorities were

[70] Articles 102, paragraph 3 and 165 paragraph 3 of the PPA, now repealed by case U-I-1678/2013 [19/12/2013], Constitutional court of the Republic of Croatia, NN no. 13/2014.

[71] Ibid.

[72] See p. 21 of the 2013 State Commission report.

[73] The average value of procurement contracts in 2013 is somewhere along the lines of HRK 1,220,309 (EUR cca 160,566), placing the majority of contracts in the highest submissions fee rank. See p. 11 of the Directorate's 2013 repot.

in danger of significant monetary liability.[74] In order to minimize the chances of that happening, the high submission fee was kept, but the attorneys' costs were lowered. In 2014, the Act on the State Commission for the control of public procurement procedures[75] governing the structure, organization and competencies of the State Commission was amended in one article (Article 3, paragraph 3). The appellate stages of procurement procedures were legally prescribed as "inestimable", disabling attorneys from charging anything more than HRK 500 (approx. EUR 65) for representation of their client throughout the appellate procedure, irrespective of the value of the procurement at hand. In this manner, tenderers were degraded by law in their ability to protect their rights in the appellate procedure or to be fully reimbursed for the costs they incurred. As the provision directly discriminates and infringes the right to equal treatment (as well as the right to legal security, taking into account the manner in which it was introduced), the provision's constitutionality was challenged early on in 2015; the decision of the Constitutional court is expected in the course of this year. However, despite the unquestionably positive effect of the Constitutional court's interventions, they remain a subsequent reaction initiated by private individuals. The current stage of development in the procurement sector should allow for identifying its weak sports beforehand and preventing rights' infringement from occurring, instead of remedying them.

Finally, it should be noted that the data and examples above portray only a limited section of the actual situation in Croatia, one which could have been derived from available statistical data and published case studies. The data is not wholesome and does not do Croatia's procurement system justice when it comes to its qualities, but such was not this paper's purpose. Its purpose was to show a significantly negative trend in the procurement sector, leading away from the modern European solutions and to the conclusion that Croatia is deeply unprepared for a procurement system to be introduced early on in 2016.

5. CONCLUSION

The public procurement sector is one of the most important pillars of economic stability. In light of the global financial crisis and the increasing worth of goods, works and services procured via such procedures, it was more than obvious that the sector needed regulatory enhancement. In 2014, after a wide public debate and significant research, three new directives governing the field

[74] In 2013, a total of HRK 6,5 million (EUR cca 855,263) was awarded in costs. However, filed appeals requested for more than HRK 24 million to be awarded. See p. 58 of the 2013 State Commission report.

[75] NN nos. 18/2013, 127/2013, 74/2014.

entered into force. Member states of the EU, Croatia included, have until April 2016 at the latest to implement these directives and little can be done about the proximity of this upcoming deadline. Croatia, however, as a member state which has been implementing EU law for the least amount of time, seems to be utterly unprepared for the solutions of the 2014 procurement reform. Sectors which are to experience most changes upon implementation are precisely those which, currently, fall short of the benchmark according to available statistical data. This necessarily leads to the conclusion that Croatia will most likely not be ready for full implementation by early on next year, if certain matters are not addressed immediately. The Government, as well as competent Ministries, who have already set a date for the legislative changes in the relevant act to occur, should begin conducting research or initiate public debate in respect of the upcoming legislative changes and their likely impact on the future of Croatia's public procurement. When aiming for successful change, it seems this would be a good place to start.

LITERATURE:

1. 2011, 2012 and 2013 Report of the Directory for the public procurement system
2. 2011, 2012 and 2013 Report of the State Commission for the Control of Public Procurement Procedures
3. Bovis, Christopher H., The challenges of public procurement reform in the single market of the European Union, ERA Forum, vol. 14, Issue 1, 2013
4. Bovis, Christopher H., Regulatory Trends in Public Procurement at the EU Level, EPPPL vol. 4, 2012
5. Brkić, Karmen, Postupci javnih nabava prema direktivama EU-a, Financije i porezi, vol. 5, 2007
6. Caranta, Roberto, The changes to the public contract directives and the story they tell about how EU law works, Common Market Law Review, vol. 52, 2015
7. Case C-107/98 Teckal Srl v Comune di Viano [1999] ECR I-8121
8. Case U-I-1678/2013 [19/12/2013], Constitutional court of the Republic of Croatia
9. Communication from the Commission: EUROPE 2020 - A strategy for smart, sustainable and inclusive growth COM(2010) 2020, Brussels, 3/3/2010
10. Communication from the Commission as of 3 March 2010 - COM(2010) 2020
11. Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the committee of the regions Single Market Act - Twelve levers to boost growth and strengthen confidence – "Working together to create new growth" COM(2011) 206/4

12. Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (2003/361/EC)

13. Council Recommendation 2010/410/EU of 13 July 2010 on broad guidelines for the economic policies of the Member States and of the Union

14. Commission staff working paper - Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation SEC(2011) 853

15. Green Paper on the modernization of EU public procurement policy - Towards a more efficient European Procurement Market, COM(2011) 15

16. Klimas, T. and Vaičiukaitė, J. The law of recitals in European community legislation, ILSA Journal of International & Comparative Law, vol. 15, 2008

17. Kynoch, Alex and Ware, Peter, Public Procurement Reform: Impact on Contracting Authorities and Tenderers, Credit Control, vol. 34, Issue 3, 2013

18. Loboja, Ante, Usluge u posebnom režimu javne nabave s osvrtom na novo uređenje prema novim direktivama EU, Financije pravo i porezi, vol. 11, 2014

19. Ljubanović, Boris and Britvić-Vetma, Bosiljka, Hrvatsko pravo javne nabave - usklađenost s pravom Europske unije, Zbornik radova Pravnog fakulteta u Splitu, vol. 48, 2011

20. Palčić, Ivan, Javna nabava i pristupanje RH Europskoj uniji, Financije, pravo i porezi, vol. 7, 2013

21. Parać, Gordana, Postupak nabave robe, usluga i ustupanje radova, Pravo i porezi, vol. 4, 2002

22. Proposal for a Directive of the European Parliament and of the Council on public procurement, COM(2011) 896

23. http://www.cepor.hr/Izvjesce%20o%20malim%20i%20srednjim%20poduzecima%202013_CEPOR.pdf

24. http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/hr_rapport_2011_en.pdf

25. http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/hr_rapport_2012_en.pdf

26. http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/supporting-documents/2014/annual-report-smes-2014_en.pdf

27. http://ec.europa.eu/markt/ecertis/login.do

28. http://ec.europa.eu/internal_market/consultations/2011/public_procurement_en.htm

29. http://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm

30. http://ec.europa.eu/enlargement/countries/detailed-country-information/croatia/index_en.htm.
31. http://ec.europa.eu/growth/single-market/public-procurement/modernising-rules/reform-proposals/index_en.htm
32. http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8244&lang=en&title=Consultation-on-Remedies-in-Public-Procurement
33. http://www.javnanabava.hr/default.aspx?id=3425
34. http://www.minpo.hr/UserDocsImages/Strategy-HR-Final.pdf
35. http://www.mvep.hr/custompages/static/hrv/files/pregovori/5/p23.pdf
36. http://narodne-novine.nn.hr/clanci/sluzbeni/2015_03_25_518.html
37. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159604
38. http://www.publicprocurementnetwork.org/docs/ItalianPresidency/documento%206.pdf

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THE CONFERENCE REVIEW: 20 YEARS OF APPLICATION OF THE COMPANIES ACT IN THE INTERDISCIPLINARY CONTEXT

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In January 2015 Croatian practitioners and members of the academic community celebrated twentieth anniversary of the application of the Companies Act. On this occasion, the Department of Law at the Faculty of Economics and Business in Zagreb contributed to this important anniversary by organizing the scientific conference "20 years of application of the Companies Act in the interdisciplinary context" on 29th of January 2015. The event was funded through the University of Zagreb tender for the allocation of funds for 2014 to finance research activities (support by area) as part of scientific research entitled "The right of the internal market of the EU in business practice" led by Professor Hana Horak, and with the support of the European Commission within the Tempus project 544117-TEMPUS-1-2013-1-HR-TEMPUS-JPCR *European and International Law Master Program Development in Eastern Europe*. The conference gathered around fifty participants, mostly attorneys, apprentices at law, judges of the commercial courts, members of business and academic community and students of law and economics.

The welcome speech was given by Professor Nataša Erjavec, Vice Dean of the Faculty Economics and Business in Zagreb. She pointed out that Faculty of Economics and Business in Zagreb has been developing the interdisciplinary approach in the economic education of young people in order to prepare them for contemporary labour market, which does not recognize vertical restraints. Subsequently, she referred to the significance of the Companies Act and stressed the importance of the legal education for the future economists.

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In her opening address Professor Hana Horak, the Head of the Department of Law, stressed that Croatian company law has been a part of European law since the very beginnings, as a result of choosing the German law as a legal model. The time has proven that Companies Act is a good legislation. The initial lack of case law has been compensated by the dedicated work of judges and lawyers. The amendments to Companies Act were the result of a desire for continuous improvement of the legal framework.

Emphasizing the modified socio-economic context after the Croatian accession to the EU, Professor Horak stressed that the legal regime of the EU doesn't recognize strict legal dualism of the national law in relation to the EU law. The solution of complex problems of the contemporary business operations requires an interdisciplinary approach in order to deal with problems. The substance of co-operation between the legal profession and other related fields is creation and implementation of such concepts that will anticipate suggestions of possible practical solutions.

The first part of the Conference focused on the legal issues and the presentations were given by Nevenka Marković, Judge of the High Commercial Court of the Republic of Croatia, Željka Bregeš, Judge-President of the Companies Registry of the Commercial Court in Zagreb, Zoran Vukić, a lawyer and Vice President of the Croatian Bar Association and Professor Hana Horak along with Kristijan Poljanec, Teaching and Research Assistant, both from the Department of Law at the Faculty of Economics and Business, University of Zagreb.

Judge Nevenka Marković presented her subject matter "Termination of the company without liquidation". She introduced to audience the substantive legal framework for the termination of the company and the rules on procedure for termination of the companies. Several obscurities that judges have encountered in their practice were pointed out, such as inconsistent usage of the legal terminology and definitions, undefined obstacles for termination without liquidation and uncertainties in computation of the terms, lack of legal clarity about the legal consequences of terminating companies when the bankruptcy procedure or liquidation of the company is running simultaneously. In this sense, it was emphasized that there is a need to improve the legal framework in this area in order to overcome the existing doubts.

In the presentation "Novelties in the court registry, with a special emphasis on cross-border mergers and acquisitions", Judge Željka Bregeš referred to the practical difficulties of cross-border mergers and acquisitions when such transactions have to be entered in the court registry on the basis of national regulations adopted in order to implement Directive 2005/56/ EC of the European Parliament and of the Council on cross-border mergers and acquisitions of limited liability companies. Diverse competence of the bodies involved at the various stages of

the proceedings in the EU Member States, and difficulties related to the fulfillment of an obligation to take certain procedural actions - such as the drawing up, delivery and publication of draft terms of merger and consolidation - are only few of the issues that legal practitioners face nowadays.

Lawyer Zoran Vukić presented the topic "The effects of the Companies Act on the status of the legal profession". He pointed out the legal implications of the Companies Act on doing business for law firms in Croatia. Through the elaboration on legal forms of the law companies, their firms, capital, formation, economic activities, boards, acquisition of treasury shares, the termination of law firms and liability issues, Zoran Vukić presented the existing legal framework for the lawyers' profession in the form of a company and statistical trends on the establishment, bankruptcy, liquidation and termination of law companies. In addition to the analysis of the Croatian legal framework, Zoran Vukić gave a comparative overview of the legal framework for the law companies in Austria, Italy, Germany, England and Wales.

In their joint discourse "The divergences in laws on mergers and acquisitions in the internal market of the EU as an obstacle to freedom of establishment", Professor Hana Horak and Assistant Kristijan Poljanec gave an overview of development of the law on mergers and acquisitions in the EU. The problem of non-compliance of national mergers and acquisitions laws are recognized as an obstacle to the achievement of freedom of establishment. It was stressed that national laws are not providing adequate solutions and thus the practical problems should be dealt by adapting the concept, that would be based upon the direct application of EU law and the case law of the Court of Justice, since the constitutional ground for such approach has been set after 2010 amendments to the Constitution of the Republic of Croatia.

After the session on legal topics, the conference proceeded with a series of lectures, given by representatives of the academic community in fields of economics: Professor Darko Tipurić, Department of Organization and Management at Faculty of Economics and Business, University of Zagreb, Professor Boris Tušek, Department of Accounting, Faculty of Economics and Business, University of Zagreb, and Associate Professor Sanja Sever Mališ, Department of Accounting, Faculty of Economics and Business, University of Zagreb.

Professor Darko Tipurić introduced his paper "The status of the management in the two-tier and single-tier models of corporate governance - some problems and issues" outlining the context in which the corporate governance has been developed. The exposure thoroughly scrutinized the characteristics of two-tier, single-tier and mixed models of corporate governance. Particular emphasis was given to possibility of introducing one-tier model of corporate governance, which was brought in the Croatian legal system by the 2007 amend-

ments to the Companies Act. In that respect, the initial practical experiences were presented. The problem of the board efficiency and its role in creation of the value and participation in strategic actions as well as the quality of corporate governance ranking in South Eastern Europe are among the issues on which the speech put emphasis.

The topic "The establishment and operation of audit committees in Croatia" was presented by Professor Boris Tušek. He gave an exhaustive overview of the legislative framework for the operation of audit committees and of his own experiences and issues that he encountered in practice. Particular emphasis was placed on the role of audit committees in the monitoring of financial reporting. Through the exposition he pointed out that experiences in the operation of audit committees in Croatia are overall positive. However, the problems remain present when it comes to the conduct of the board members, especially regarding the procedures in running the company as well when it comes to the non-compliance of the Croatian legal framework with the requirements of modern auditing and the area of operation of audit committees.

Associate Professor Sanja Sever Mališ presented topic "Determinants of the quality of auditing the financial reports." After introduction to the primary role and objectives of the auditing and the role of auditors in ensuring the quality of financial reporting, her presentation focused on the crisis of audit profession as a consequence of determined imperfections in the performance of statutory audits. The changes in the legal framework of the EU in the field of auditing aim to establish the independence of auditors and proclaim need for public supervision of the audit profession. It was concluded that changes to the legal framework should contribute to effective market-audit services in the EU, and better financial reporting should contribute to the protection of interests of the stakeholders.

In the last session, presentations were given by Associate Professor Kosjenka Dumančić, Department of Law, Faculty of Economics and Business, University of Zagreb, Tina Jakupak, Judge of the Commercial Court Zagreb, and Zvonimir Šafranko and Dominik Vuletić, both teaching and research assistants from the Department of Law, Faculty of Economics and Business, University of Zagreb.

Associate Professor Kosjenka Dumančić presented the topic "*Societas Europaea* - Czech experiences and Croatian possibilities" prepared jointly with Professor Hana Horak. Associate Professor Kosjenka Dumančić gave an overview of the legal framework for the establishment, operation and cross-border transfer of the seat of the European Company (*Societas Europaea*) as a type of supra-national legal entity. Furthermore, she referred to the issues of workers participation in decision making process, structure of companies' bodies and

models of corporate governance. The presentation ended with the conclusion, that business operations through *Societas Europea* have been recognized as preferable form of operation on the EU Internal Market. This fact was persuasively proved by the experience of the Czech Republic as a member state, in which most of the European Companies were established.

Judge Tina Jakupak reviewed the system of the shareholders rights in the EU and Croatia in her treatise entitled "The exercise of shareholders rights in the Republic of Croatia and the EU." After pointing out some of disadvantages which are mainly related to the poor participation of shareholders at general meetings and the lack of transparency, she stressed the main objectives of the Proposal for a Directive of the European Parliament and of the Council amending Directive 2007/36/EC regarding the encouragement of long-term shareholder engagement and Directive 2013/34/EU regarding certain elements of the corporate governance statement. Judge Jakupak referred to some of the topical issues such as preventing the conflicts of interest while proposing the members of management and supervisory boards in the companies where the shares belongs to Republic of Croatia as well as whether the free movement of capital is violated by the membership of the state officials in supervisory boards.

Assistant Zvonimir Šafranko presented the topic "The role of the legal institute of sole traders in Croatian law and practice". The central issue of the subject was weather the legal institute of sole trader is justified as such in respect of the business forms available in Croatia. After the analysis of the legal term of sole trader and its characteristics, its comparison with the traditional concept of craftsmen business and analysis of the available data from the company registry, the thesis that a sole trader as such is practically pointless, legal institute in both regulatory and practical aspect, seems to be confirmed. Furthermore, some proposals of possible solutions that should go in the direction of alignment of the Companies Act with the other regulations or a complete abandonment of the legal institute of a sole trader as such were given.

In his exposure "Simple limited liability company - the first experiences" Assistant Dominik Vuletić started from the factors that urged the development of simple limited liability company. It was said that the origins of such form of business incorporation could be find in the case-law of the EU, which has been introduced later on in national legislation of EU Member States. After overview of the basic regulatory framework, Dominik Vuletić gave available statistical data that are reflecting the first experiences in the establishment of a new sub-form of private limited liability company in the Republic of Croatia. He concluded that the liberalization of the companies' formation in the Republic of Croatia, with respect to the introduction of the simple limited liability

company, proved to be one of the most significant novelties to the Companies Act since its adoption.

After all expositions were given, participants took part in the discussion. The conference became a place for exchange of experiences among practitioners and members of academia, which gave an opportunity to discuss the current issues of application of law of the Republic of Croatia in interdisciplinary context. During the discussion several new questions were set and some new directions considering the future of Croatian company law in the Euro-integration context occurred.

Finally, the efforts of the organizers should be commended and express the support for further work in promotion of the interdisciplinary approach to topics of interest for the general audience. On this occasion, authors would like to refer to the conference proceedings published by the Faculty of Economics and Business, University of Zagreb, available at http://web.efzg.hr/dok/KID//Zbornik%20trg.%20drustva.pdf.