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Introduction

We are presenting to Readers the work which is a result of co-operation between Polish and Ukrainian specialists in jurisprudence. The texts which are presented in this monography are an example of pursuing a postulate of external and internal integration of jurisprudence. In our opinion, the theses presented in it have a chance of becoming an important voice in discussions on various forms of law violation and use of loopholes in law (law avoidance, abuse of law, tax avoidance etc). Undoubtedly, the theses also constitute an interesting view from the perspective of an analysis of the legal transformation process in the countries of Central and Eastern Europe (especially Poland and Ukraine).

The presented work is an episodic description of firstly, relationships between law and other fields of knowledge (especially economics), which is supported by broad empirical documentation. Secondly, the texts contained in the monography, indicate that an assertion about a systemic and autonomous character of law is a counterfactual assumption. This can be proven by possible ways of instrumentalization of law and use of law against many postulated in it values. So, it can be claimed that the joint thread which could link individual texts is a problem of an autonomous against instrumental character of law.

In the whole work, the Reader may find various methodological approaches in analyses of many problems tackled in jurisprudence. The Reader can notice that in a part of the work a theoretical approach prevails, aiming for exposure of the raised issues in the axiological and historical perspectives. In turn, in other works a dogmatic method prevails. To our minds, the strength of the whole work is exposure of legal changes in the economic dimension and illustration of made conclusions in a form of normative material.

Tomasz Bekrycht
Sergiy Glibko
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PART I

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The Ukrainian Technological Parks: from Establishment till Nowadays

Yuliya Atamanova, Victoriya Maloivan[*]

The transition of technological and social structures on information, electronic platform has changed the nature of communication, management and production worldwide. The sound inventions and updating traditional means of life and communication, consumption of goods and production require constant monitoring and updating of tasks by both business entities and state. The planning for the long term reduces the timeframe; what that required a five-year term for implementation, in modern conditions is carried out in two or maximum three years. Accordingly, the preservation of the competitiveness of the state and its producers requires a permanent and fast gaining and processing of information as to the recent results concerning the state and trends of the markets, continuous inner response with adapting their systems to changing challenges of the time.

The reorientation of the domestic economy to the innovative vector of development in which knowledge and information are the fundamental resource of economic growth has been actively discussed during the last two decades. Ukraine is purposefully making efforts to build a national innovation system (hereinafter – NIS), the elements of which determine the level of economic development of the state.

Historically, the domestic model of NIS cannot be characterized as "receptive", repeating the NIS model of a certain country or group of countries, though constantly having the foreign experience as an example. The NIS of Ukraine is formed mainly under the influence of political forces and financial

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situation, depending on which the revitalization of its subjects, or, conversely, slowing can be observed.

It is worth mentioning that the Ukrainian NIS does demonstrate a gradual complication: from science and manufacturers of innovative products in Ukraine a number of "connecting links" between them in the form of an innovative infrastructure have been created, i.e. a network of interrelated service structures, which constitute or ensure the basis for problem solving (Жилінська 2005). The park organizational structures (scientific, technological, and industrial), incubators of innovative business, innovation centers, venture funds etc. may be considered as such. They have been created with the aim of facilitating of organization of scientific researches, pilot projects, testing and serial production of the new products on markets, assisting in attraction of new customers and investors, and entering the new markets.

The technological parks, which have demonstrated the sound results in the sphere of science and production, foundation of which began in the year 1996 by the adoption of the order of the President of Ukraine "The Issues of Technological Parks and Innovative Structures of other Types Foundation" which was supplemented and elaborated in the Resolution of the Cabinet of Ministers of Ukraine "The Regulation on the Order of Foundation and Functioning of Technological Parks and Innovative Structures of other Types" № 549 dated 22.05.1996, are considered to be the subjects of innovative activity.

However, the real implementation of the technological parks model occurred only in the year 2000, when the first technological parks were created, was regulated by the Law of Ukraine "On the Special Regime of Innovative and Investment Activity of Technological Parks" dated 16.07.1999 № 991-XIV. It envisaged the establishment of three technological parks: "Semiconductor Technologies and Materials, Optoelectronics and Sensor Technology" (Kyiv), "Ye. O. Paton Electric Welding Institute of NAS of Ukraine" (Kyiv) as well as the «Institute for Single Crystals» (Kharkiv).

The lot of this law was complicated: after a number of amendments to the law № 2505-IV dated 25.03.2005 and some other legislative acts of Ukraine the special regime of technological parks innovative activity was in fact liquidated and only since the 1st of February its validity was resumed by the adoption of the amendments of the Law of Ukraine "On the Special Regime of Innovative Activity of Technological Parks".

Unlike the foreign industrial parks, which were designed for creating and attracting the innovative projects of new firms and companies, venture funds under the overall guidance of leading scientific institution, the founding of the first technology parks in Ukraine were carried out on the basis of leading research centers, having a high reputation in the scientific world, with attraction to realization of their projects of well-known enterprises, which have been reliable partners for them for a long time. Then some business structures obtained such

status, those which needed preferential terms of activities to produce products using new technologies, as well as ones which were interesting on the regional level in view of strengthening of economic and innovative development of the respective territory. Only since 2000 there have been registered 16 technological parks, among which industrial enterprises and even unions of enterprises.

The activity of technological parks is based on the number of basic principles, such as coordination of activity and cooperation between science, high school, state production sector, private companies, local and regional authorities; support of small science intensive business; concentration and use of risk capital (Милейко 2005).

Their combination represents the basic idea of the creation of technological parks – an integrated organization of high-tech industry and maximum assistance to the emergence and adoption of new technologies. However, the main thing is the careful attention that is to be paid to the concentration of all elements of the innovation process, and, preferably, the creative potential of people (Марченко 2007). That's why when establishing technological parks, as a general rule, the territorial approach is used – they are established on the basis of leading universities and in a certain territory unite under their leadership various scientific institutions, enterprises, marketing, servicing, information centres to ensure rapid implementation of research inventions and innovations. Such kind of specific concentration makes targeted support from the state, either directly, through budgetary financing, tax benefits, etc., or indirectly, through stimulating the participation of banks, corporations and other business representatives, easier. Besides, the localization facilitates governmental control over the observance by entities of the zone of the established regime, prevents the use of benefits by firms that have ties with zones, but not among the directly involved participants (Беляневич 2006).

The beginning of the European technological parks movement took place till the 70-ies of the XX century. Inspired by the America's experience, scientific institutions of Europe created the first scientific parks "Trinity College" in Cambridge (the Great Britain), "Laban-de-Neuve" in Belgium and "Sophia Antipolice" in Nice (France); on the territory of the later in 10 years after the establishment of the first technology park, 10 similar institutions were acting. In the 80-ies the technological parks occured in Canada, Singapore, Australia, Brazil and countries of the Asian Region, the so called "second generation of technological parks" (Краснокутська 2003). It should be mentioned that progressive character of the activity and current organization of scientific parks of India (Kerala), China (Hainan) and Japan (Tsukuba), which became equal with the leading innovation institutions of the world is also worth attention.

It should be mentioned that the efforts to establish the scientific structures of that kind were maid even in the USSR, particularly, academic towns (akademmistechka) can be actually considered as analogues to modern

technological parks. By the way, the first one was established in Novosibirsk, nearly at the same time as the "Park of High-Tech Industry" in Stanford. However, it should be mentioned, that the academic town couldn't claim to the world leadership in conditions of noncompetitive, planned economy of the USSR. It's demonstrative that the technological park of the Novosibirsk Academic Town still exists and is one of the leading ones in the Russian Federation.

Russia was the first to catch the idea of establishment of technological parks on its territory on the post-soviet area and it should be mentioned that it has implemented it extremely successfully, because currently it has the fifth place by the number of acting technology parks on its territory (approximately 70 of the same institutions are acting in its 35 regions) (Лазарев, Демещик 2004). However, the significant position belongs to the Tomsk Technological Park, which was founded in the year 1990 and is still operating, although not leading. The first technological park of Belarus was established in 1993 in Mogilev.

It should be pointed out, that despite of the effectiveness of the world technological parks experience that can be observed in the last 30–40 years, the national model of technological parks significantly differs from the foreign ones. The explanation is that there are different approaches in Ukrainian legislation for the determination of a technological park which contradict each other.

The legislation of Ukraine contains the following approaches to determine the technological park: a) innovative enterprise (Art. 1 of the Law of Ukraine "On Innovative Activity"); b) subjects of innovative infrastructure (Art. 1 of the Law of Ukraine "On Special Regime of Investment and Innovation Activity of Technological Parks"); c) special (free) economic zone (Art. 3 of the Law of Ukraine "On General Principles of Creation and Functioning of Special (Free) Economic Zones").

The definition of technological park as an innovative enterprise goes beyond the classical approach to understanding its legal nature, because the latter is considered to be the direct subject of innovative activity.[1] Such a statement is a result of legislative definition of it (the innovative enterprise is defined as

[1] The legal definition of the subjects of innovation activity is adopted by the Art. 5 of the Law of Ukraine "On Innovation Activity" which states that they can be either natural persons or legal entities of Ukraine, natural persons or legal entities of foreign countries, stateless persons, union of these persons who conduct the innovation activity in Ukraine and (or) engage material and intellectual values, by investing of their own or borrowed capital into the realization of innovation project in Ukraine. This approach was criticized in the scientific literature because the legislator interprets the definition of the subjects of innovation activity in a wide manner and include to them not only those who directly conduct the innovation activity to be targeted at the citation of innovational product, but also the subjects who execute investment or middle-person activity that has non-innovational character itself that makes impossible the union to provide the innovation activity. The author agrees with the expressed point of view and defines „the subjects of innovation activity" as those who execute the commercial activity the main result of which is creation of innovation product and its distribution, delivering of innovation services, use (application)

an enterprise (union of enterprises) that develops, produces and sells innovative products and (or) products or services, which in monetary terms exceeds 70 percent of its total volume of goods and (or) services) (Art. 1 of the Law of Ukraine "On Innovative Activity"). At the same time, the technological park as an element of innovative infrastructure is targeted to maintain the innovative activity, aimed at the use and commercialization of results of scientific research and development and determines the release to market of new competitive goods and services, using different kinds of instruments (organizational, technical and financial) according to the worldwide approach (Art. 1 of the Law of Ukraine "On Innovative Activity"). However, as it was noted, Ukraine has not fully embodied the classic technopark model, according to which the technological park performs infrastructure functions. The domestic technopark is implementing the stages of the innovation cycle from idea to its commercialization independently, on its own behalf, and therefore, belongs to the subjects of innovation activity.

The infrastructural approach to definition of a technological park is included into the Art. 1 of the Law of Ukraine "On Special Regime of Investment and Innovation Activity of Technological Parks" which states that a technological park aims to provide an organizational basis for the implementation of projects of the technological park and to provide industrial production of globally competitive products. However, this Law has not laid down a territorial basis for the organization and operation of technological parks, they are actually equal subjects of innovative activity that differs from others by the special regime of economic activity applied to their activities.

The definition of a technopark on a territorial basis can be given indirectly in connection with their assignment to the one of the functional types of special (free) economic zones (hereinafter – FEZ) (Art. 3 of the Law of Ukraine "On General Principles of Creation and Functioning of Special (Free) Economic Zones"), where the special legal regime of economic activity and the procedure for application and action of legislation of Ukraine operate. The preferential customs, monetary, tax and other conditions for economic activities of national and foreign legal entities are imposed on such kind of territory[2] (para 1 of the mentioned Law). It follows from the above-mentioned rule that the feature of

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of innovational technologies on the basis of innovations realization. The activity with the engagement of property and or money into the innovation projects is defined as infrastructure.

[2] We pay attention that the Art. 401 of the Commercial Code of Ukraine contains different FEZ definition, in particular, a FEZ is considered to be "the part of Ukrainian territory on which a special legal regime of commercial activity and special order of application of legislation of Ukraine are established. The preferential customs, tax, monetary and other conditions of entrepreneurship of national and foreign investors may be established on the FEZ territory". This definition seems to be better because of application in it the definition of commercial activity (not economic) regarding the activity to be executed on the FEZ territory, however, the article contains a justified limitation on non-commercial investment (because it is stated that the preferential regime may be valid only for the commercial activity of domestic and foreign investors).

the territorial organization of technopark within the framework of this approach is enshrined in law and, therefore, technological parks, which don't have designated territory, cannot be recognized as SEZ, what, in fact, is stated by some scientists (Федчук 2007).

With regard to these provisions, we'd like to mention that the first approach defines a technology park as a subject of innovation activities that develops, manufactures and sells innovative products and (or) products or services, that is a subject of innovative activity per se. The other two highlight the infrastructure approach to defining its nature, but the difference lies in the fact that the territorial principle of organization of activity of technoparks (as such, which the world practice of organization of technology parks is based on) is fixed only in the Law of Ukraine "On general principles of creation and functioning of special (free) economic zones").

At the same time the special Law of Ukraine "On Special Regime of Investment and Innovation Activity of Technological Parks", which establishes the rules for technological parks functioning in Ukraine, has stated and regulated their activity as the subjects of research and innovation. According to it the special features to characterize the organization of the activities of Ukrainian technoparks should include the following:

a) the subjective principle of organization (in contrast to the classical territorial one) – the vast majority of national industrial parks, established on the basis of high schools and scientific institutions that do not have separate office premises, and what is more the land especially designated for its needs, and just use the material and technical base of the institution in which they are established;

b) the self-realization of scientific and innovation activities – technological parks of our country are not aimed exclusively at promotion of scientific research and new developments by third parties or independently, but also at our own research and production forces to implement the innovative projects;

c) providing favorable conditions of activity only for realization of registered innovation projects, and not of the technopark in a whole;

d) the "self-sustaining" mechanism of financing of innovative projects of technological parks through special tax treatment.

In this context and for the purpose of comparison it is important to name those common features that are characteristic of American, European and Asian models of technological parks. In our point of view, they include:

a) territorial and organizational unity of all the subjects-participants of the technological park (technopolis) aimed at their unification on one "special" territory to facilitate the implementation of their research and production activity;

b) the concentration on this territory of knowledge, in particular by attracting the scientists to technological parks as founders and participants of legal entities established beyond of the high school, but in cooperation with it for conducting researches;

c) the state's interest in the activities of technological parks with the introduction of grant funding, benefits and incentives, the introduction of special operation modes (for example, the state financing in Belgium equals 100%) and establishment of the technological parks on their behalf, usually by the local agencies;

d) intensive investment in projects implemented in the framework of technological parks, first of all, venture "risky" fund.

Consequently, the Ukrainian legislation and the Ukrainian reality contain the opposite approaches to the technological park definition: if the basics for the infrastructure model of their foundation are regulated by the law, currently they are regulated only as subjects of innovational activity, that is according to the special Law of Ukraine "On Special Regime of Investment and Innovation Activity of Technological Parks".

According to the p. 1 of the Art. 1 of the Law of Ukraine "On Special Regime of Investment and Innovation Activity of Technological Parks" a technopark is defined as a legal entity or a group of legal entities (the participants of the technological parks) to act according to the agreement on joint activity without establishing a legal entity and without combining deposits with the aim of creation of the organizational principles for implementation of projects of technological parks for the production introducing science-intensive developments, high technologies and ensuring the industrial production of globally competitive products.

Such kind of normative definition of the technological park gives grounds to define two kinds of the technological parks:

(1) a technological park is considered to be an independent legal entity. Worth mentioning that the Law is lack of any notifications on any kind of organizational form of such kind of subject, its ownership, character of activity or specialization, that gives the opportunity for almost every commercial subject to be recognized as a technological park (of the commercial or non-commercial activity) that enjoys the rights of legal entity;

(2) a technopark status may be granted to a group of legal entities that have concluded among themselves and act in accordance with the agreement on joint activities without establishing a legal entity and without the merger of contributions for implementation of results of scientific research and production of competitive products. In this case, the technopark doesn't possess legal personality, but acts as a group of legal entities bound by contractual relations. In particular, the technological park "Tekstyl" (Kherson) which was created as a group of legal entities acting under agreement on joint activities is one of the examples. It is established on the basis of the Kherson National Technical University and directed its activity to the researches in the sphere of biotechnologies, development of the scientific principles and technologies of their application in the textile, chemical, food industry and agriculture.

Consequently, either legal entity, or the group of legal entities regulated by the agreement on joint activity can be considered as a technological park in Ukraine.

As it has been already mentioned, the technological parks, in fact, permanently conduct the activity on the scientific researches, further development of the results to the state of innovational product by the commitment of the technician and technological, engineer projecting, creation of the research samples, the development of trial batches, as well as establishing the production process of their implementation and/or production of innovative products. In other words, they systematically conduct not only scientific and scientific-technical but also directly innovative activity aimed at commercialization of research results through their active integration for more rapid acquisition of income. To sum it up, the meaning of the activity of the domestic technological park in terms of legal meaning is in the systematic, paid implementation of scientific, scientific-technical and innovative activities, thus, being the direct subjects of innovation activity.

However, there is a number of points of view in the literature that the main load for the technological parks structures is the activity on ensuring of the realization of the innovation process or creation of the conditions for combination of innovational supply and demand. In this situation, in the absence of direct scientific-research, scientific-technical or innovation activity such subject must actually be recognized as the subject of innovational infrastructure. However, it includes other commercial subjects in Ukraine, in particular, the innovation incubator, industrial park.

The realization of the innovation project may be supported not only by the forces of the technopark itself – the Law provides for an ability to establish the joint enterprise as well as to engage the subcontractors and product manufacturers. Despite the fact that the both mentioned groups of the participants of the technopark project are not included into the structure of the technological park itself, their legal status in innovation relationships as compared with the latter significantly differs.

The p. 5 of the Art. 1 of the Law of Ukraine "On Special Regime of Investment and Innovation Activity of Technological Parks" states that a joint enterprise is considered to be the one established for implementation of the technological park projects, one of the founders of which is the technological park itself or its participant, and the other ones are the residents or non-residents whose joint contribution equals no less than 50000 USD. As it follows from the legislative definition, an enterprise isn't included into the structure of the technological park, but 'is considered to be a legal entity'. However, despite the fact, that the established by the law special regime of innovational activity is implemented to the technological park, the preferential regime of such activity also 'extends to its joint enterprises' – they enjoy the right to use the targeted subsidies (Art. 7), to increase terms of the payments on export-import contracts,

that are conducted while completing technological parks projects, up to 150 calendar days (Art. 11).

It should be taken into consideration, that the Law does not actually determine the legal status for the second category of subjects that take part in the realization of the technological park project, the legal basis for their participation in the project isn't defined as well. The ability for usage of the co-founders' projects follows from the p. 6 of the Art. 1 of the Law, which defines the project of technological park. It follows from the contents of the Law that while performing the latter in respect of research, technical, technological, engineering design, production of pilot batches and industrial production of innovative products, as well as financial, personnel, marketing and commercial provision of manufacturing application of new goods and services 'subcontractors and product manufacturers' may also be involved.

In contrast to the joint enterprises the ability to 'use any kind of privileged conditions of the special regime of the technological park activity for such category of subjects isn't stated'. In our point of view, this legislative position is just enough and can be explained by many factors. Factually the relations between the technological park, on the one side, and the co-executors, on the other side, have the subordinate character. The implementation of the relevant work does not lead to gaining property rights to object of intellectual property by the latter and its implementation as innovation is not considered to be a direct interest. That's why the activity of subcontractors and product manufacturers is, rather, an ancillary part of the implementation of the innovation cycle.

Consequently,

the following two main groups may be named as the subjects to participate in the realization of the technological parks projects: (1) those who enjoy the special regime of innovation activity, – these include actually the technopark and its participants as well as the joint enterprises (the project executers); (2) those for who it is not valid i.e. the co-executers and producers.

The leading idea of the establishing and functioning of the technological parks is introduction of special regime for the innovation activity, which provides for state support for technological parks, their participants and joint enterprises activity stimulation while executing of the projects on the priority directions of the technological parks (p. 7 of the Art. 1 of the Law of Ukraine "On Special Regime of Investment and Innovation Activity of Technological Parks"). It is actually aimed at gaining the preferential conditions by the technological parks, their participants and joint enterprises for carrying out innovation activity they are engaged in.

The Commercial Code of Ukraine does not contain the common definition "of the special commercial regimes" providing for only its kinds (Section 8, Chapters 39–41), in particular: special (free) economic zones; concession; the exclusive (maritime) economic zone of Ukraine on the state border of Ukraine,

sanitary-protective and other protective zones, specially protected territories and objects; a special regime of economic activity in some sectors of the economy, the territories of priority development; the special regime of economic activity under conditions of emergency state, environmental emergency; a special regime of economic activity under conditions of the state of martial law.

Because of such legislative gaps it is appropriate to use the results of scientific and theoretical legal research of the concept of "special regime of economic activity". O.R. Zeldina defines it as a legal regime determining the order of organization and running of the commercial activity on a particular territory, in a concrete economy sector that differs from the common regime of economic activity provided for by the legislation, and is introduced by the state with the concrete aim to achieve a reasonable coincidence of public and private interests by establishing constraints and/or incentives for business entities (Зельдіна 2007). The author divides the special regimes of economic activity on the basis of conducted research into restrictive, incentive-restrictive and incentive ones, by including the special (free) economic zones in the incentive regimes, in the framework of which the special economic zones of scientific and technical character are singledent, to which the technological parks can be attributed, which act in the framework of the special regime of innovation activity according to the national legislation (Матвєєва 2011).

It is the author's opinion that it is true to assert that the special regime of innovation activity of technological parks in Ukraine is promotional in nature, since its legal means include the benefits and various kinds of support from the state. However, defining of the technological parks as the special (free) economic zones is controversial, even despite of the fact that this provision is envisaged by the Law of Ukraine "On general principles of creation and functioning of special (free) economic zones". Attributing technoparks to the list of types of FEZ can be grounds for defining them as part of the territory of Ukraine, as provided for in the article 1 of the above-mentioned Law and part 1 of the article 401 of the Commercial Code of Ukraine. However, the analysis of the organizational nature of the acting technological parks of the national model, where the territorial principle still hasn't been implemented, refutes this statement. That's why we suppose that it's important to single out a special regime for innovation activity in the framework of incentive special regimes, since, as we can conclude according to the analysis of their organizational nature, they cannot be attribute to any kind of the proposed by O.R. Zeldina special intensive regimes of economic activity.

The special regime of innovative activity is defined in Ukraine as a legal regime which includes state support for stimulating technological parks activity, their participants and joint enterprises while realizing of the priority directions projects of the technological parks (Art. 1 p. 7). We can distinguish the following features of the special regime of innovation activity of technological parks in Ukraine according to the definition: 1) the special mode is extended to the subjects

defined by the Law: technological parks, its participants and joint enterprises; 2) obtaining of the state support is possible only if the projects in the framework of priority directions of the technological parks are completed.

The Law states that stimulating of the innovation activity of technological parks is conducted in the following way: a) state financial support (direct state funding through the introduction of an annual budgetary program of support of activities of technological parks into the State budget of Ukraine) as well as b) targeted subsidies for technological parks projects (indirect state funding).

According to the p. 1 of the Art. 3 of the mentioned Law a special regime for the innovation activity is implemented on a 3-year term for the technological park and is valid during its projects execution. However, de facto, this regime does not extend to the entire activity of technoparks, their participants and joint enterprises – it only applies to specific conditions of execution of the registered technological park project. Consequently,

> the special regime is given not to innovation activity of the technological park and its executers in a whole, but only to the activity on realization of the appropriate innovation project, which underwent an expert examination and obtained the certificate of state registration. Factually it is not special regime of the innovation activity of the technological park that should be discussed, but the special regime of implementation of a particular innovational project.

The mentioned clause is confirmed by the norm of the p. 4 of the Art. 8 of the Law of Ukraine "On the Special Regime of Innovative and Investment Activity of Technological Parks" according to which the realization of the project of the technological park cannot be the reason for the tax rates reduction according to the principal activity of the executor of the technological park project. Besides, it is vividly illustrated by the procedure of obtaining the special regime of the innovation activity by the technological park stated by this Law. It includes three main stages. The first one involves the registration of the technological park itself by the central body of executive power for the science issues, which implies its inclusion in the list of technoparks, given in the preamble of the Law and obtaining of the certificate of state registration of the established form. On the second stage, the adoption of the priority directions for each technological park by the central body of executive power after the approval of the Presidium of the National Academy of Sciences of Ukraine takes place. The third stage includes the consideration, examination and state registration of projects of technological parks by the central body of executive power on issues of science, under proposal of the National Academy of Sciences of Ukraine, and in case of the positive results the technological park obtains a certificate of state registration of the technological park project.

It's worth paying attention that it is the 'certificate on state registration of the technological park to be the grounds for introduction of special regime of innovation activity' and opening of special accounts of the technological parks,

their participants and joint enterprises according to the p. 6 of the Art. 5 of the Law of Ukraine "On the Special Regime of Innovative and Investment Activity of Technological Parks", but not 'a certificate on state registration of a technological park'.

The use of the conditions of special regime during implementation of innovation projects of the technopark is limited to a 15-year period. However, the certificate on state registration of the technological park doesn't create the ground for implementation of the special mode and is valid during the period of project realization of the technological park but no longer than 5 years. It must be taken into consideration that the Law doesn't state 'the ability of the renewal of the certificate or obtaining the new one in case if the performance of the innovation project was not done in time, in other words, it exceeds a five-year term'. The occurrence of such a situation and its legal consequences, in our opinion, deserve attention of the legislator, which is conditioned by long-term period of the scientific studies conduction, as well as payback of the innovative project in whole, and, therefore, requires state understanding and support.

The preferential conditions of implementation of the project of technopark in the framework of the special regime of innovative activities become particularly important in the view of the absence of direct state funding – in fact, the Ukrainian technological parks are self-financing and only provided them with certain tax, amortization and other benefits. Almost everything obtained by scientists and producers in the frame of special regime of technological parks functioning is spent solely on scientific and technical activity, development of scientific-technological and experimental and industrial bases, the funding of scientific and technical projects, reconstruction and modernization of experimental and scientific-technological sectors, which makes it possible to talk about attributing of additional funds obtained as a result of the special regime of technological parks activity not to tax benefits but to reinvestment in the innovation and investment projects.

Such state of Ukrainian technological parks differs them from the other similar models of state support of the subjects of innovation activity in the world. In the Western practice issues of their functioning are solved mostly by either providing them with significant financial support on the part of the state (almost up to 100 percent in Belgium), or by their joint investment in cooperation with private institutions (in particular, in the USA). A significant source of funding for research activities in the countries – technological leaders are funds of foreign customers (5,8% in Canada and 7,7% in France, 17,8% in the UK). The largest absolute amounts of earnings from foreign customers are in the USA (15.3 billion dollars, or 4% of total spending on research and development in 2010), the UK (6.9 billion, or 18%), France (3.8 billion dollars, or 8%), Germany (3.4 billion dollars, or 4%), China (2.3 billion dollars, or 1%) (Гейць, Даниленко, Лібанова 2015).

The mechanism chosen by Ukraine allows to support, without the additional financial efforts, the important direction – conducting the researches of the world importance as well as implementation of their results into manufacturing of products competitive on the world market and essential to own use, which is especially important under conditions of instability of economic system and the budget deficit. As the practice of activities of technological parks has demonstrated, the favourable conditions for innovation allow us to attract extra-budgetary investments, own funds of enterprises, commercial structures, as well as those funds that under other circumstances would be spent on consumption, left in the shadow (Технопарки подают сигналы SOS).

Consequently, owing to introduction of the special legal regime of innovation activity of the technological parks the abilities for the subjects of commercial activity are created in order to concentrate intellectual and financial resources for scientific developments and practical implementation of them for self-needs even in the absence of state support in this process.

However, from the beginning of the year 2014, the innovation projects of the technological parks, in fact, are not registered and run, on the terms of the Law of Ukraine "On the Special Regime of Innovative and Investment Activity of Technological Parks". The only valid innovation project is the State Scientific Institution "Institute for Single Crystals" № 132 dated 08.01.2014, "The Development and Production of Import-Substituting and Export-Oriented New Generation Products: Road Marking, Car Repair Materials, Industrial Decorative and Protective Coating and Film Creation" which is supposed to be achieved by the fourth quarter of the year 2018. The other ones ended at least in December 2014 and didn't manage to obtain their proceeding in the following projects.

The provision of budget support for the implementation of projects of technological parks, as it was the last year, has not been provided for the current fiscal year, so the selection and the special regulation of the activities of these actors become meaningless and leads to carrying out of their innovative activities on common and equal terms with other commercial entities.

The ability of participation of venture capital in the realization of the technological parks projects doesn't give grounds to hope for positive changes in the aspect of their revitalization. The reason for close cooperation of science parks and venture capital funds abroad is the relative confidence of the latter in the marketability of investment projects and in the creation of favorable conditions for them on the part of the state. The cases of financing of domestic projects of scientific and technological parks by the venture capital and investment funds are extremely rare. The uncertainly of governmental support and unattractiveness of the scientific-technical development for the investors, especially, during the last years, still exist in Ukraine, that is strengthening by the political instability and hard economic situation for the population of Ukraine.

Current economic and legal status of the technological parks activity in Ukraine, in our opinion, requires a rethinking of the legal form of their establishment and the financial basis of their activity. They should adhere to and be grounded on the usage of information and communication technologies. The use of the latter ones allows to realize new territorial principle of the establishment of technological parks by its spreading, in particular, on «virtual space» of the Internet, in which space quasi-real subject institutions are being formed.

The concept of "enterprises virtualization" was founded at the beginning of the 90[ies] in the USA in the monograph of W. Davidow and M. Malone *The Virtual Corporations* (Davidow, Malone 1992). The virtual organization is considered to be the net, computer integrated organizational structure, that informationally consolidates different kind of resources (intellectual, human) of the participants of this organization. In fact, it is about the consolidation and cooperation of particular subjects of commercial activity or just natural persons in the virtual space to achieve common economic and/or social result. The attractiveness of this form of economic activity is to save funds for the maintenance of office premises, travel, procurement of working capital, and the like. It ensures speed of adoption and implementation of managerial and organizational decisions.

The transition of activity of the particular subjects of innovation infrastructure, in particular, the technological parks and business incubators, into the virtual space is considered to be a justified step from the point of view of effectiveness of their activity on all the stages of innovation process from the creation of a new idea to its commercialization because it helps to engage a wide range of interested persons in a quick and cheap way.

The first successful attempt to create a virtual technopark was implemented in 1996 when the Internet-incubator "Idealab" was founded. Currently, these quasi-subject entities are the effective tool of foreign trade activities, increasing the efficiency of innovation activity and commercialization of scientific developments.

The main task of virtual technological parks is ensuring the information exchange and coordination of innovation process in the framework of unlimited Internet space that brings together scientific and technical personnel, universities, innovative enterprises, investors, regardless of their location. It can be said that the "territorial" feature in the original real meaning is getting the new information and digital content.

It is worth taking into consideration, that the activity of the virtual technological park doesn't equal the activity of classic technological park. Firstly, this can be explained by the specifics of virtual technological park, which is concentrated in the field of information technologies. Secondly, compared to conventional technology, which are designed to implement the resource and logistical support for innovative activities, service (provider) function of a virtual technological park, is, first of all, to provide information services, should be considered as an information "cloud". The main function of such kind of

technological park is actually the exchange of information, searching the projects and their subcontractors.

The particular virtual technological park becomes a kind of information system of a lower order, along with a large number of effective virtual technological parks in the world that make up the information network of the highest order. In this context, one of the important and interesting issues is the connection of the virtual technological parks to the grid systems i.e. «abstract objects that connect individuals, organizations, and resources (if any) in a single administrative domain sharing of computational resources» (Foster, Kesselman, Tuecke 2001).

Within the computer grid-systems the real legally independent organizations with common scientific and practical interests voluntary unite their own computing power, databases, and resources for storage, at the same time each party reserves the right to control the use of their own resources, which is important in the context of the specifics of its development and solution of problems of scientific-technical character.

However, the domestic process of grid-system creation, as well as of virtual technological parks, is still in its infancy and, in fact, are out of legal regulation. The State Target Scientific and Technical Program of Introduction and Application of Grid-Technologies for 2009–2013 targeted at the creation of a national grid infrastructure and conditions for the broad introduction of grid-technologies was approved by the Resolution of the Cabinet of Ministers of Ukraine dated 23.09.2009 №1020 (Resolution of the Cabinet of Ministers of Ukraine №1020).

It should be mentioned, that there is an experience of national grid-clusters to join the European grid-infrastructures in Ukraine. In particular, the first one was the grid-cluster (2002) of the Kharkiv Institute of Physics and Technology of the National Academy of Sciences of Ukraine, which in cooperation with the Joint Institute for Nuclear Research (Dubna, the Russian Federation) and the European Centre for Nuclear Research (Geneva, Switzerland) is still supporting one of the main experiments of the Big Andron Collider.

It's obvious that the establishment of the virtual technological parks is a necessary and right step on the road of integration into the world economic, informational and scientific space. The virtual technological parks can be an effective alternative to existing organizational and legal forms of technoparks for Ukraine in the conditions of modern financial and political challenges, the activities of which in implementation of innovative projects is being minimized every year.

Despite the obvious attractiveness of the virtual technological parks creation, the issues of legal regulation of the organization of their activities in our country is at an early stage. The legislative foundations for their establishment, in particular, the laws "On Electronic Documents and Electronic Document Management", "On Digital Signature", "One-Commerce", the amendments to the range of legislative acts with the introduction of electronic form of document filing and information

exchange were adopted. However, there is a necessity of the content remaking of the special Law of Ukraine "On the Special Regime of Innovative and Investment Activity of Technological Parks". It should contain certain legal grounds for the creation of virtual technological parks, the legal status of the founders and participants, contractual relations among them, the order of management and rules for the information access, peculiarities of fulfillment of obligations to contractors during execution of projects, as well as the order of distribution of intellectual property rights on established in the framework of the technological park facilities and the like.

Consequently, the technological parks in Ukraine, as the most powerful element of the national innovation infrastructure, based on the progressive world experience of the creation of similar structures still do not possess the necessary characteristics, that has led to the formation of the non-classical technological park model. Its main features are: establishment of the technological parks out of the territorial principle of their organization and execution not innovational, but infrastructure activities.

The analysis of the targets and tasks as well as the subject of the technological park activity gives the reason to state that the mentioned subject executes the commercial activity, and, consequently, adheres to its features. The exclusions are considered to be the technological parks established by the group of legal entities on the basis of joint activities agreement without establishing the legal entity that cannot be recognized as the unite subject of commercial activity without the proper organizational ground.

In terms of qualitative changes in the world economy and the relevance of the study of innovation processes and organizational form of their proceeding, the technological parks, despite their importance for the development of the national innovation system, are operating in conditions of inconsistent state and normative regulation. The present «stagnation» in the sphere of their development in the legal field of Ukraine during the last two years actualizes the task of significant updating of organizational and legal models of their further functioning in the country and an introduction to the domestic legal sphere the grounds for their establishment and operation in the global information space.

In conclusion I would like to mention the point of view of O. Rozhen, which hasn't lost its relevance, that the technological parks are one of the main but not complete instruments for creation of innovation climate in the country – the broad and extensive innovation infrastructure must be established in addition to the technological park system, which includes business-incubators, regional innovation centers, innovation banks and others (Рожен 2006). That's why the results on increasing of the scientific and innovation level of the country with the help of technological parks activity in the national scale should not be waited for in the near future if there is no system unity and cooperation of all the elements of the national innovation system.

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Legal Regulation of Scientific Park Activity as a National Innovation System Subject

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Modern requirements for the development of the national innovation system (hereinafter – NIS) need to improve the legal regulation of scientific parks. After the adoption of the Laws of Ukraine "On the Scientific Park 'Kyivska Polytechnika'", "On Scientific Parks", the practice of the functioning of scientific parks demonstrates the need for changes in legislation regarding the organizational-legal form, tasks and functions of scientific parks (hereinafter – SPs). To conduct a legal analysis of organizational and legal forms, the activities of scientific parks as elements of NIS and the appropriate regulation of economic-legal legislation.

In science, the issue of the activity of scientific parks was studied by scientists of various branches of law, primarily in the aspect of proper organization of activities and the realization of the function of scientific parks provided by law. The following scientists from Ukraine and foreign states are: O. Bonkovsky, V. Chernyuk, Y.Y. Golovach, A.V. Zalisco, Yu.M. Macevitiy, K.V. Matusyak, S.G. Paraska, G.P. Petrishyn, I.Yu. Pidorycheva, A.A. Tarelin V.S. Shovkaliuk, G. Vuytsik-Carpats and others. At the same time, legal problems of the creation and management of scientific parks, which in most cases are the basis for the effective operation of the NPs, are insufficiently investigated.

According to the functional place in the innovation process with the participation of higher education institutions (hereinafter – HEIs) or scientific institutions, scientific parks are the most appropriate structure for supporting innovative activities and accomplishing tasks for the commercialization of scientific results. At the same time, the purpose of the creation and functions of scientific parks in the articles 3, 4 of the Law of Ukraine "On Scientific Parks"

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(On Scientific Parks 2009) in the current conditions restrict the development of the SPs themselves and their scientific, scientific and technical activities. According to Art. 3 of the Law of Ukraine "On Scientific Parks" a scientific park is created with the purpose of development of scientific and technical and innovation activity in a higher educational institution and/or a scientific institution, effective and rational potential, material and technical basis for commercialization of scientific research results and their implementation at the domestic and overseas markets.

Simultaneously, the special purpose of creation was determined for SP "Kyivska Polytechnika" in the Law of Ukraine "On the scientific park 'Kyivska Polytechnika'" (On the scientific park 'Kyivska Polytechnika' 2007). The purpose of its activity is not explicitly defined, however, according to the preamble of this law, it is indicated that its activity is aimed at intensifying the processes of development, production and introduction of high-tech products on the domestic and foreign markets, increasing the revenues of the state and local budgets by combining education, science and production as well as accelerating the innovative development of the Ukrainian economy. To form the characteristics of the SP, we shall define in the comparative aspect the concept of technological parks in Poland close to the scientific parks of Ukraine.

As noted in paragraph 15 of Art. 2 of the Law of Poland "On financial support for investments" of March 20, 2002, a technological park is a separate property along with a technical infrastructure, created to exchange knowledge and technologies between scientific units (in accordance with clause 9 of Article 2 of the Law of October 8, 2004 "On Principles of Financing Science") and entrepreneurs offered to entrepreneurs with the use of modern technologies, consulting services in the creation and development of enterprises, transfer of technology and transformation of research results into technology tech innovation, and creating opportunities for entrepreneurs to conduct business activities through the use of real estate and technical infrastructure based on contractual principles (Ustawa o finansowym wspieraniu inwestycji 2002).

Polish scientists identify the technology park/scientific park as a separate entity (jednostka – in Polish); aimed at developing entrepreneurship that uses modern technologies, in particular small and medium enterprises, on the basis of the use of separate properties and technical infrastructure on a contractual basis. Through its comprehensive support, technology parks offer entrepreneurs the advisory services in the field of development, technology transfer and transformation of research and development into technological innovation (Bąkowski, Mażewska 2014).

Thus, the main emphasis in the legal concept of a technological park is aimed at its creation and its form – a legal entity. According to the Law of Ukraine "On the special regime of innovation activity of technological parks", the technological park (technopark) is a legal entity or a group of legal entities (hereinafter – the participants of the technological parks), acting in accordance with the agreement

on joint activity without the creation of a legal entity and without merging the inputs in order to create organizational principles for implementation of technological parks projects. Among the technological parks projects are various implementations of scientific developments, high technologies and provision of industrial output of competitive product in the global market (On the Special Regym of Innovative Activity of Technology Parks 1999). Thus, for the legal model of the Polish Technopark in the legislation of Ukraine, the Ukrainian scientific park is more in line than the technological one. Therefore, in a further study, we will compare the scientific parks of Ukraine with technological in Poland and, above all, their functions. In order to determine the place of an SP in the innovation system, it is advisable to pay attention to the technological parks that are common in Poland, which in the theoretical sources are equal to scientific parks. Polish scientists believe that technology parks are increasingly viewed as an instrument of innovation policy and as an instrument of territorial competitiveness growth by:

1) promoting, spreading and introducing innovations;
2) support of technology transfer;
3) creating new technological enterprises;
4) developing employment opportunities for those who has the skills and qualifications to work in innovative enterprises.

On the other hand, the technology park is described as an innovative system operating in a limited area of the region as a "cluster" of knowledge of the enterprise, research institution, university, technology transfer and service infrastructure institution, capable of conducting fundamental and applied research, developing new technologies and products, exploitation of research results and transfer of technologies, dissemination of innovations through networks, creation of new high-tech enterprises (Matusiak, Bąkowski 2008). Such conclusions are also relevant for scientific parks, especially the SPs are mainly leading actors for the technology transfer system, and in Ukrainian legislation it is primarily such an innovative system that is supposed to be a model for the functioning of the SP. Regarding the activity of technological (scientific) parks, the following functions of parks in Poland are noted, including the example of Technopark Gliwice:

1) the active involvement of parks in the process of education, motivation and entrepreneurship among students, graduates and researchers as there is a lack of university education and their environment and often the parks are forced to create future human resources for innovation and entrepreneurship;
2) support and development of entrepreneurship, incubation of new technology companies and technology transfer of small and medium enterprises (hereinafter – SMEs);
3) cooperation with technological universities and scientific and technical institutions;
4) support of academic entrepreneurship;

5) cooperation with companies located in the park and its tenants. Thus, there are 23 enterprises located on Gliwice Technopark territory (Kosmol, Kotra 2013, 256–263).

However, in Poland, the Adam Mickiewicz University Foundation – Poznan Science and Technology Park, which is a non-profit organization, is the oldest scientific park. Its activities:

1) incubation of startups, including business courses at the university, business plan competition, trainings, investment search and investor forums;

2) technology advancement and promotion of innovation – technology search, information provision, consultancy, technology transfer, research and business cooperation, academic entrepreneurship;

3) research services for companies, contract research and "technological incubation";

4) provision of infrastructure – rent of equipped laboratories and office premises, creation of an innovative environmental environment;

5) as a separate line of activity, it may be possible to determine the fulfillment of the functions of the regional contact point of the EU Framework Programs and the Enterprise Europe Network (Adam Mickiewicz University Foundation).

Another example of determining the functions of technological parks:

1) support of entrepreneurial activity on the basis of new technological and organizational decisions, especially in the field of services;

2) consultations in the field of creation and registration of companies, business plans and sources of financing;

3) establishment of relations with other organizations at the regional, national and European level;

4) office rent, laboratory and industrial premises;

5) enhancing entrepreneurship in the educational environment;

6) support of transfer of technologies from universities and research institutions, as well as enterprises;

7) carrying out educational activities in the field of entrepreneurial activity, management and financing of technological enterprises, technology transfer (Wójcik-Karpacz, Mazurkiewicz 2015).

Thus, in conclusion, the described functions of the technological (scientific) parks in Poland make it possible to note that in the majority of their content these functions coincide with the functions of the scientific parks of Ukraine, which are enshrined in the Law of Ukraine "On Scientific Parks". But their realization in the activity of scientific parks of Ukraine is limited by imperfect regulation of the relevant relations in the laws related to the activities. V. Shovkaliuk also points out these problems, noting that the legal field is not very favorable for scientific parks, since in 2011–2016 there were implemented or continued the implementation of 42 projects of scientific parks, but none of projects was included in the register of projects which need state support.

In addition to studying the basic concepts of SPs and technological parks, it is important to analyze existing information on the activities of the SP in their official sites and informational sources of the SP, and their founders in order to establish the conformity of their activities with the functions set in Art. 4 of the Law of Ukraine "On Scientific Parks". The results can be summarized within the following NPs that include the specified functions:

1) the function of creating new types of innovative product, implementing measures for their commercialization, organization and provision of production of knowledge-intensive, competitive innovative products on the domestic and foreign markets, in most cases implemented through the support of innovative structures and the creation of subjects of innovation infrastructure. The implementation of this function is established in the 5th SPs: in the form of the participation of the SP in the activity of innovative clusters in Ukraine, in launching business incubators, as well as through other measures aimed at commercialization of the results of scientific activity;

2) the function of informative, methodological, legal and consulting support of the founders and partners of the scientific park, granting of patent and license assistance is realized in the 6th SP in the form of scientific consultations, development and substantiation of business plans of innovative projects, information and communication, technological, informational and methodological, legal, consulting support, provision of patent-license assistance, information and advisory support of a transfer, etc.;

3) the function of attracting students, graduates, post-graduate students, scientists and employees of a higher educational institution and/or a science institution to the development and implementation of projects of a scientific park;

4) implementation of the function of promoting development and support of small innovative entrepreneurship can be conditionally divided into 2 areas:

a) support of SMEs as a direction identified in the 1st SP;

b) support for innovative SMEs and entrepreneurship – in the 4th SP.

That is, the 5th SPs stated the connection between science and entrepreneurship.

As one of the options for the interaction of SMEs with universities and research institutions, there is an example of the experience of cooperation of the Ukrainian Scientific and Technological Center and IPMASH of the National Academy of Sciences of Ukraine. So, among the directions of interaction the establishment of small and medium-sized technological enterprises was declared on condition of the Ukrainian Science and Technology Center financing and if the technology of IPMASH is used (Мацевитый, Тарелин 2015). But there is no information on the actual implementation of such activities.

5) the function of organizing the training, retraining and professional development of specialists necessary for the development and implementation of projects of the scientific park is directly foreseen in 2 scientific parks in the

form of information and educational work and the creation of favorable starting conditions for scientists, postgraduates and teachers, as well as startup schools;

6) attraction and use of risk (venture capital) in its activity, support of knowledge-intensive production;

7) protection and representation of the interests of the founders and partners of the scientific park in state authorities and local self-government bodies, as well as in relations with other economic entities during the organization and implementation of projects of the scientific park within the limits specified by the constituent documents of the scientific park;

8) development of international and domestic cooperation in the field of scientific and technical and innovation activities, promotion of foreign investment attraction.

In the Law of Ukraine "On the Scientific Park 'Kyiv Polytechnika'" the first and fourth functions are not stated, instead 2 new functions are established:

– implementation of a full range of measures aimed at intensifying the processes of development, production and introduction of knowledge-intensive, competitive products on the domestic and foreign markets;

– coordination of scientific, innovative, industrial and commercial activities of the founders and partners of the scientific park.

The listed functions of scientific parks testify to the correspondence and necessity of assigning SPs to the subjects of NIS and its subsystem, to the elements of innovation infrastructure.

In addition to the analysis of the functions of the state of emergency, it is additionally necessary to take into account the place of the SP in the national innovation system, for which some normative legal acts we will be considered.

The concept of development of the national innovation system, approved by the Order of the Cabinet of Ministers of Ukraine of June 17, 2009 N 680-p defines the national innovation system as a set of legislative, structural and functional components (institutions) involved in the process of creating and applying scientific knowledge and technologies and determine the legal, economic, organizational and social conditions for ensuring the innovation process (Directive of the Cabinet of Ministers of Ukraine N 680-p). This normative act provides for the existence of a subsystem of the national innovation system, among the components of which particular attention should be paid to the following elements:

1) the generation of knowledge consisting of scientific institutions and organizations, regardless the form of ownership, which carry out scientific research and development and create new scientific knowledge and technologies, state scientific centers, academic and branch institutes, scientific subdivisions of higher educational establishments, scientific and design departments enterprises;

2) innovative infrastructure consisting of production-technological, financial, informational-analytical and expert-consulting components, as well as technopolises, technological and scientific parks, innovation centers and technology transfer

centers, business incubators and innovative structures of other types; information networks of scientific and technical information, expert-consulting and engineering firms, institutional and private investors.

In addition to the definition of NIS, in the Law of Ukraine "On Innovative Activity" (On Innovative Activity 2002) the innovation infrastructure is defined as a set of enterprises, organizations, institutions, their associations, associations of any form of ownership, providing services for the provision of innovation activities (financial, consulting, marketing, informational, communicative, legal, educational, etc.). According to Art. 6 of the Law of Ukraine "On Priority Areas of Innovative Activity in Ukraine" (On Priority Areas of Innovative Activity in Ukraine 2011), scientific parks relate to innovation infrastructure.

Thus, the SPs, as participants of the NIS or the innovative infrastructure, can perform the following functions, which indicate that the SP is an appropriate innovative structure to perform all functions of the infrastructure entity, namely:

1) carry out scientific research and development;
2) create new scientific knowledge and technologies;
3) realization of production-technological, financial, informational-analytical and expert-consulting activity;
4) implement marketing, informational, communicative, legal, educational and other functions.

The foregoing requires consideration of models of economic relations of the SP as a participant of the NIS. Some authors note that the Law of Ukraine "On Scientific Parks" does not contain a single and consistent concept regarding the legal nature of scientific parks and their place in the system of legal entities of private law, but the innovative nature of their activities testifies to the non-commercial legal nature in combination with their special distribution order from the commercialization of innovative revenue products (Заліско 2010). In addition, the very innovative nature of the research park determines its special legal capacity. The law does not specify the procedure for exercising such control over the activities of the scientific park. Obviously, the issue should be regulated in detail in the charter of such a legal entity (Заліско 2010).

The problem with the lack of a clear consolidation of the organizational-legal form of SP allows scientists to state that, based on Art. 9 of the Law "On Scientific Parks", the founders (participants) of the scientific park are deprived of the right to manage its activities, which contradicts to the Articles 10–11 of the Law, according to which the highest governing body of the scientific park is the general meeting of the founders of the scientific park (Заліско 2010). V. Chernyuk emphasizes that Art. 68 of the Law of Ukraine "On Higher Education" provides for the creation of legal entities to prove the results of scientific and scientific and technological activities of the HEI to the state of innovation product and its further introduction into production. These can be technological and scientific parks, business incubators, technology transfer centers, etc. (Чернюк 2016, 68–75). The

advantage is given to the creation of separate legal entities that perform different functions as participants in NIS or infrastructure, although, in our opinion, these functions can be performed by the SP.

Scientists in the field of construction generally do not share the types of innovative structures and believe that the scientific park, as a concept, generalizes scientific and technological and technological parks, which confirms the general interpretation of the concept of scientific parks (Петришин, Солан 2013, 239–247). Infrastructure role of SP is emphasized and it is noted that when SP is created, it is necessary to take into account not only the priority directions of innovation activity and the priority directions of the development of science and technology, but also the directions of socio-economic development of the regions at the site of the park, supported by S.G. Paraska, B.R. Lyubchik (Параска 2012, 245–249). Definitely, there is a confirmation. In the framework of the functioning of the scientific park in the Law of Ukraine "On Scientific Parks" in the Scientific Park "Uzhhorod National University", accents are formed regarding the links of the park as an innovative intermediary with the state authorities, local authorities, investment companies, venture and other funds, business, national and foreign companies, innovative business incubator and academic and educational departments of the University (Головач).

A separate problem in regulating the activities of the SP is to consolidate the legal mechanism for organizing the activities of the SP in the management of the innovation process, which, in our opinion, should be more perfect than for limited liability companies (hereinafter – LLC). But even in comparison with the LLC, the existing regulation of the SP has its disadvantages, such as the lack of consolidation in the legal acts of the organizational and legal form (hereinafter – OLF) of the legal entity, which leads to other defects of legal regulation, which follow the uncertainty of the corporate nature of the SP. In addition, in scientific sources, attention is drawn to the imperfection of the definition of types of economic activity of the state of emergency as the basis for determining the type of entity (Заліско 2010), and, according to some features of such activity, its types refer to non-commercial economic activity, which may lead to the controversy of obtaining profits by SP in connection with violation of special legal capacity of such entities.

In order to determine the ways of using OLF of scientific parks in scientific, scientific and technical activities, foreign economic activities of HEI it is possible to determine three preferred directions of using the organizational legal form and functions of the SP:

1. The SP operates as an incubator, accelerator and finances SMEs, spin-offs of the company (or spin-out companies created for the implementation of innovative products in foreign markets). In this case, there is a simplification of the mechanism of technology transfer, because the SP turns out (or may come out) from the chain of technology transfer, created at the expense of budgetary

funds. This excludes the appropriate approval of the Ministry of Education and Science of Ukraine, accelerates the process of circulation of innovative products and simplifies the possibility of protecting intellectual property rights outside Ukraine.

2. Implementation of the SP function of the export-oriented transfer center technologies. But for this purpose it is necessary to attract own or foreign investments directly to the SP to form the corresponding portfolio of SP assets.

3. The SP operates as a parent company for all SMEs that are created by HEI or scientific institutions to improve joint and single "corporate" oversight of the HEI projects or scientific institutions, the accumulation of resources for scientific and scientific activities, the establishment of a common procedure for the commercialization of HEI technologies and scientific institutions. The use of such a legal mechanism can be most convenient for the targeted and project support of individual SMEs formed by HEI and research institutions.

The models of the location of the SP in the NIS are presented, and the issues of financial activity require a transparent structure of corporate relations for building confidence in the state of emergency which is absent in the laws that regulate their activities. The imperfection of the legal definition of the OLF SP, the inconsistency of its functions with the requirements of the OLF of business associations under the Civil and Commercial Codes of Ukraine, and the non-compliance with the principles of corporate governance require the introduction of amendments to the Ukrainian legislation and the clear attachment of both OLF and the functions of scientific parks.

Issues arise also in the determination of SP control bodies. According to Articles 10–12 of the Law of Ukraine "On Scientific Parks", the scientific park has the highest governing body of the scientific park and the executive branch of the management of the scientific park. Functions of the management bodies of the scientific park are determined by its statute. In Art. 11 of this Law is stated that the supreme body of the management of the scientific park is the general meeting of the founders of the scientific park, whose functions are determined by the statute of the scientific park. The highest governing body of the scientific park solves financial and other issues in accordance with the statute of the scientific park. The executive branch of the management of the scientific park solves the issue of ongoing activities in order to coordinate the activities of its founders and partners in implementing the projects of the scientific park. Additional information from open sources on the availability of SP control bodies was analyzed and found that only in the three SPs there is a scientific and technical council. At the same time, these SPs are formed by HEIs or scientific institutions that have a larger share in their authorized capital (Scientific Park "Odessa Polytechnic University", Scientific Park "Precarpathian University", Scientific park "Naukograd-Kharkiv", Scientific park "The sustainable use of natural resources and quality of life"). In connection with this, the proposal for the mandatory formation of scientific and

technical councils in scientific parks that exercise supervisory functions may be put forward.

In order to realize the above-mentioned functions of the SP in the field of innovation relations, it is indispensable to carry out targeted financing both SP, and other entities of the national innovation system, which may apply for funding through SP. In our view, it is advisable to experience the experience of some countries (e.g. Germany), whose legislation, in determining the participation in the organization of project financing of innovation activities, is divided among the entities that select projects, their assessment, and actors who are selected on the basis of project selection their funding (Лященко, Землянкін 2012). And in any case, prior to resolving the marked issue with regard to NP financing, there should be improvement of regulation in the legislation of activity, functions of the NP as an OPF and by types of scientific, scientific, technical and economic activities and within the competence of the activity of the NP as a subject of the NIC.

As for the prerequisites for state support of scientific parks, according to the Resolution of the Cabinet of Ministers of Ukraine "On approval of the procedure for state registration of projects of scientific parks, implementation of which requires state support" No. 1101 dated November 14, 2012 (Directive of the Cabinet of Ministers of Ukraine No. 1101), the research park projects are submitted to the executive body of the management of the scientific park with legal and/or individuals in accordance with the conditions of the tender for the implementation of the priority directions of the scientific park (hereinafter – the competition). In Ukraine, the research park projects, the implementation of which requires state support, are subject to state registration in the Ministry of Education and Science of Ukraine. The Regulations on conducting the competition are developed and approved by the executive body of the management of the scientific park. Such registration is expedient but, despite taking into account both public and private interests, does not ensure proper and effective financing of the activities of the SP.

One of the problems of economic-legal regulation is to determine the sources of formation of the property basis of activity of the SP, including the order of formation of the share capital of the SP. Share capital (hereinafter – SC) of scientific parks is one of the sources of its financing. And if the implementation of contributions by legal entities of private law does not cause significant legal issues, the implementation of contributions by budgetary institutions – HEI and research institutions is due to the limited types of contributions and the desire not to lose control of the SP. Also, when forming the SC, an entity of state or communal ownership carries out its activity on the basis of the right of economic management may transfer its property to the authorized capital of a scientific park only with the prior consent of the central executive body in whose sphere it is located.

The transfer to the SC of a scientific park of real estate, as well as air and sea vessels, inland navigation vessels and rolling stock of rail transport, which are on

the balance of state-owned business entities, is carried out subject to additional agreement with the State Property Fund of Ukraine.

Registered SPs in Ukraine are distributed by number as follows: by the size of the SC:

– more than 2 million UAH – 1;
– from 1 million UAH to 2 million UAH – 3;
– from 100 thousand UAH to 1 million UAH – 12;
– less than 100 thousand UAH – 5.

At the same time, it should be noted that most HEI maintain control over the management of the SP, and the distribution of SPs, depending on their share in the SC scientific parks, is carried out as follows:

– from 100% to 80% – 7;
– from 80% to 50% – 9;
– less than 50% – 5.

Thus, in Ukraine in fifteen SPs, the share of HEI in the authorized capital is more than 50% and in 2 SPs – the share of scientific institutions is more than 50%. With regard to cash contributions to the SC SP, their implementation is possible at the expense of legal entities of private law or individuals, but in most cases this is not done. Therefore, a situation arises when the main subjects that determine the purpose of the formation and scientific activity of SPs that correspond to the prior directions of innovation activity are HEI and/or scientific institutions. Taking this fact into account, 100% of the SC owned by the HEI or scientific institutions, may be accepted or transferred by the SP linked to that HEI or scientific institutions from their own proceeds to the SC of such SP. However, according to the Part 3 of Art. 13 of the Law "On Scientific Parks" HEI or scientific institution participate in the formation of the SC of the SP through the introduction of intangible assets that restrict the activities of the SP.

These requirements are established in accordance with clauses 10, 12, 14, part 3, of the Law "On Higher Education", which states that HEI may participate in the formation of the SC of the innovation structure, which includes the scientific park, through the introduction of intangible assets (property rights on objects of intellectual property rights). Such a provision is more thoroughly enshrined in Article 60 of the Law "On Scientific and Scientific-Technical Activity".

As for other property, without listing all possible ways of using real estate and movable property and cash, it should be noted that the funds received from the statutory activities can not be obtained from state and communal organizations or the scientific institutions, which are the most widespread in Ukraine be aimed at the formation of the authorized capital of the SP.

With the expansion in recent years of the rights of HEIs and scientific institutions in terms of disposal at their own expense, in our opinion, the restrictive norm remains in the third part of Art. 13 of the Law of Ukraine "On Scientific Parks", according to which HEI and scientific institutions take part in

the formation of the SC of the scientific park by introducing intangible assets (property rights to objects of intellectual property) without cash at the expense of their own income. These defects in fact do not allow to determine and find the proper place of the SP in the national innovation system. Article 81 of the Law of Ukraine "On Education" provides for the existence of public-private partnerships, including through the creation and/or joint financing and operation of innovative enterprises (innovation center, technopark, technopolis, innovative business incubator, etc.) on the basis of existing educational institutions. But such a use of public-private partnership for the creation of innovation structures does not correspond to the forms of public-private partnership provided for in Art. 5 of the Law of Ukraine "On Public-Private Partnership".

Establishing legal ways to eliminate contradictions with the formation of the material basis requires a more detailed consideration of the problem of determining the organizational and legal form of the scientific park and the study of the practice of creating an SP on the organizational and legal forms of management. When transparent OLFs of scientific parks are identified, the necessary preconditions are created to attract additional participants and investors. Thus, according to Art. 1 of the Law of Ukraine "On Scientific Parks": a scientific park – is a legal entity created on the initiative of a higher educational institution and/or a scientific institution by combining the contributions of founders for the organization, coordination, monitoring of the process of development and implementation of scientific park projects.

The scientific park is created and operates on the basis of the constituent agreement and the statute, the requirements of which are determined by the Law. The decision to create a scientific park is taken by its founders in agreement with the Ministry of Education and Science of Ukraine. But the Ministry of Education and Science of Ukraine does not have the right to determine the prevailing OLF. As a result, among the existing SPs in Ukraine are formed in the form of a limited liability company – 13 SPs, corporations – 3, "the other" – 5 SPs. From the point of view of choosing to be associated with the pooling of capital or the association of individuals, research parks are more in line with the capital pool, since, as the main argument, it may be noted that the main participants are HEI or SP, which can not have the function of the participants' union of entities. And practice confirms the optimal form of SP – a limited liability company.

Let's take a closer look on the structure of organizational and legal forms of some scientific parks. Practice shows that scientific parks can be created in the form of a corporation. The notion of "corporation" is contained in Art. 120 of the Commercial Code of Ukraine, according to which the corporation recognizes a contractual association formed on the basis of a combination of the industrial, scientific and commercial interests of the united enterprises, delegating them separate powers of centralized regulation of activities by each of the members of the association to the governing bodies of the corporation. That is, an

association of enterprises. An urgent example of a scientific park created in the form of a corporation is the Scientific Park "Kyiv Polytechnika" (Official site of the Unified State Register of Legal Entities, Individuals-Entrepreneurs and Public Associations). According to Art. 120 of the Commercial Code of Ukraine, the corporation is created as a result of the consolidation of solely enterprises. If you consider the composition of the founders of the Scientific Park "Kyiv Polytechnika", then you can see that it consists of 4 participants. One of the participants is the National Technical University of Ukraine "Kyiv Polytechnic Institute", whose share in the authorized capital is 13,7%, while the other ones are economic entities.

It is also not possible to cross another corporation – "Scientific park "Innovation and investment cluster of Ternopil" (Official site of the Unified State Register of Legal Entities, Individuals-Entrepreneurs and Public Associations), which was created in the form of a corporation. It is interesting that in the park, except for Ivan Puluj Ternopil National Technical University, Limited Liability Company Integral and the Limited Liability Company "Gas Equipment Plant "Alfa-GazpromKomplekt", also includes the Office for the Exploitation of the Property Complex of the Ternopil Regional Council.

Table N1. Scientific parks in the organizational and legal form of the corporation

№	Name of the SP	The share of HEI or SI of the main participant in the authorized capital	The share of other HEI, SI or public organizations	Share of business entities, individuals	Supervision Body of SP
1.	Corporation "Scientific Park "Kyivska Polytechnika"	National Technical University of Ukraine "Igor Sikorsky Kyiv Polytechnic Institute" 24%	–	76%	no information
2.	Corporation "Scientific park "Taras Shevchenko National University of Kyiv"	Taras Shevchenko National University of Kyiv 84,29%	15,71%	–	no information
3.	Corporation "Scientific park "Innovative-Investment Cluster of Ternopil Region"	Ternopil Ivan Puluj National Technical University 55%	–	45%	no information

Thus, the question is that not all SP corporations are enterprises. In this case, only if broad understanding of the enterprise is proceeded, it can be concluded that any legal entity may be a part of the corporation. But today there are no explanations in this legislation on this issue, which raises the question of the compliance of the subjects of the individual corporations with the norms of legislation.

The legal disadvantage of using OLF corporation is the very essence of such an association. In accordance with paragraph 3 of Article 120 of the Commercial Code of Ukraine, the corporation is divided by the powers of centralized regulation of the activities of each of the participants by the governing bodies of the corporation. Such formation of the corporation requires the appropriate permission of the Antimonopoly Committee of Ukraine on the basis of Article 8 (1) of the Law of Ukraine "On Protection of Economic Competition" in connection with the implementation of certain actions by creating a business entity, an association with the purpose or effect of which is the coordination of a competitive behavior between participants. Thus, the research park does not control its participants and only partners, among which may be participants on the basis of partnership agreements for the implementation of projects. And, what is important, the actual control over the results of the projects of the scientific park is carried out by the institution of higher education and science of Ukraine by receiving reports annually by February 1 of the following year in accordance with Article 16 of the Law of Ukraine "On Scientific Parks".

As another example, we propose to consider the scientific park "Naukograd-Kharkiv". Its organizational and legal form is defined as "other organizational and legal forms". The scientific composition of this scientific park consists of three scientific institutions: Academic scientific and educational complex "Resurs"; A.M.Podgornyi Institute of Mechanical Engineering of National Academy of Sciences of Ukraine; Scientific and Technical Concern "Institute of Mechanical Engineering" NAS of Ukraine. In this case it is seen that there are no enterprises in the structure of these scientific parks. The question appears whether this formation can have the status of a scientific park, unless its organizational-legal form is clearly defined. As for business entities, according to Art. 45 of the Commercial Code of Ukraine, entrepreneurship may be carried out in any organizational form provided by law.

Another research object is the scientific park of the Mykolaiv National Agrarian University "Agro Perspective" (Official site Scientific park of Mykolaiv National Agrarian University "AGROPERSPECTIVA"). It should be noted that it consists of: Mykolayiv National Agrarian University with a share in the authorized capital of 5%, Private Joint-Stock Company "Dobrobut", Limited Liability Company "Sonechne Svitlo-Mykolayiv". At the same time, it should be stated that the last two entities are not registered as scientific institutions and do not carry out research activities and innovations in their activities.

With regard to the widespread OLF of scientific parks – limited liability companies, for example, "Scientific park "Odessa Polytechnic University", created in the form of a limited liability company. It consists of: the scientific institution – the Odessa National Polytechnic University with a share in the SC of 51%, the charitable organization "Foundation "Science and Education XXI" and the company with foreign investments in the form of a limited liability company "Avers".

The presented options of creation of scientific parks in certain organizational and legal forms show the disadvantages of using such OLF as a corporation, and the lack of necessary elements for SP in the organizational and legal form of a limited liability company.

It can also be argued that the establishment of an SP as a subdivision of the HEI is inadmissible, as stipulated in Article 33, paragraph 6, of the Law of Ukraine "On Higher Education". Such an option with an SP – unit is not provided in the Law of Ukraine "On Scientific Parks", as opposed to foreign legislation.

In comparison with Polish innovation organizations, when considering the organizational and legal form of the SP, it is necessary to draw attention to the following opinion of Polish scholars. In Poland capital companies, whose activities are regulated by the Code of Commerce of Poland, can be classified as a joint-stock companies or a limited liability companies. Business associations are most suitable for realization of park projects due to the following features: accessibility for different enterprises, crisis resistance, ability to regenerate. Commercial law firms can determine the company's established structure to ensure a balance between the participants through the appropriate design (Matusiak, Bąkowski 2008).

Polish scientists divide management systems of the scientific parks as following:

Model I – University Scientific Park – Park is an integral part of the University.

Model II – an independent organization – a limited liability company.

Model III – corporate park – joint stock company.

Model IV – network park.

Attention is drawn to the availability of proposals for a university scientific park, which may be a separate administrative unit included in the university's administrative structure allowing a close cooperation with scientists conducting scientific work at the faculties and laboratories, as well as the creation of separate research laboratories and units of the park management service (Łobejko, Sosnowska 2015, 77–92).

Consequently, there is a need to improve the legislation of Ukraine in terms of determining the organizational and legal form of the scientific park and the subject structure of its participants. As an option, it would be advisable to foresee the right to be the founder (participant) of a scientific park – all business entities

– to legal entities that carry out scientific, scientific and technical activities, or are participants in innovative relations.

In the regional aspect functioning of SPs of Kharkiv and Kharkiv Region can be considered. In Kharkiv there are three scientific parks that are controlled by educational and scientific institutions:

1. Scientific park "Naukograd-Kharkiv": the total SC is 10.200.00 UAH, 98% of the SC belongs to the A.M. Podgornyi Institute of Mechanical Engineering National Academy of Sciences of Ukraine, organizational-legal form – other organizational-legal forms.
2. Scientific Park of the National Technical University "Kharkiv Polytechnic Institute": the total share capital is 81000.00 UAH, 50,62% of the share capital belongs to the National Technical University "Kharkiv Polytechnic Institute", the organizational-legal form is a limited liability company.
3. Scientific Park "Radioelectronics and Informatics": the total share capital is 81000.00 UAH, 93,4% of the share capital belongs to the Kharkov National University of Radio Electronics, and 6,6% – to the Scientific and Technical Center of the Academy of Sciences of Applied Radio Electronics, organizational and legal form – other organizational forms.
4. Scientific park "FED", the size of the SC of which is 100000.00 UAH, is not controlled by HEI or scientific institutions. 50% of the authorized capital belongs to the state enterprise "Kharkiv aggregate design bureau", which, as it is determined by its scientific institution, can be considered the initiator or founder of SP. Organizational and legal form of SP "FED" – other organizational and legal forms.
5. The Scientific Park "Agrozoyovet" should be added to the list of SP in Kharkiv Region, the total SC of which is 2500000.00, 53% of the share capital belongs to the Kharkiv State Animal Veterinary Academy, the organizational-legal form – LLC.

By the number of scientific parks, Kharkiv and Kharkiv Region occupy the 2nd place in Ukraine after Kyiv.

But the listed benefits of scientific parks in Kharkiv and Kharkiv region did not lead to their inclusion in regional innovation structures, their involvement in innovative processes as subjects of regional infrastructure.

Taking into account the foregoing, it is possible to draw the following conclusions. Regarding to the functions of scientific parks and their place in the NIS, with the most common systems of public financing of innovation activities such as institutional, project, individual, research parks can play a role in any funding system (both state and non-state). The Draft Law of Ukraine "On Support and Development of Innovation Activities" No 3796 provides the development of Ukraine's innovation infrastructure, which includes scientific parks. At the same time, outside the boundaries of this Draft Law, the definition of the place of scientific parks in the system of measures of state support to innovation

actors remains. According to their organizational and legal features, functional capabilities, available grounds for creating transparent, science-intensive expert activity, scientific parks can serve other subjects of innovation infrastructure: business incubators, scientific and technological centers, technology transfer centers, centers for collective access to scientific equipment, etc.

In the Law of Ukraine "On Scientific Parks" it is necessary to specify in the purpose of creation, functions, tasks the place of scientific parks for the development of science in the HEIs and scientific institutions, with the definition of the system communication of scientific and scientific and technical activities of these subjects. All functions of the scientific parks, enshrined in the Law of Ukraine "On Scientific Parks", must correspond to the directions of scientific, scientific and technical activities in accordance with the Law of Ukraine "On scientific and scientific and technical activity" and, in the long term, the task assigned to subjects of the national innovation system in Draft Law of Ukraine "On Support and Development of Innovative Activity".

Regarding the organizational and legal form, the most appropriate to the functions of scientific parks is a limited liability company, or joint stock company, which will enable compliance with corporate governance standards and implement all possible functions related to participation in the innovation process, including receiving funding and investments from relevant foreign financial institutions, and SP participants take part in the management.

Regarding the management of scientific parks, it is important to consolidate the provision in the Law of Ukraine "On Scientific Parks" about the necessity of creating a transparent system of corporate management of scientific parks, first of all through the increase of the role of academic councils of founders – ZVO or scientific institutions, the establishment and designation of supervisory scientific and technical councils and formation of additional expert bodies for the performance of functions related to public relations in the national innovation system.

As for the location of scientific parks in regional economic systems or regional innovation infrastructures, the Law of Ukraine "On Scientific Parks" and the Draft Law of Ukraine "On Support and Development of Innovation Activities" need to determine the place of scientific parks not only as objects of state support, but also as infrastructural subjects of the national innovation system, which take part in the appropriate mechanisms for the support and development of innovation activities. At the local level it is necessary: to foresee the possibility of combining the functions of other infrastructure subjects in the research parks and the use of such a systemic approach, first of all, in the formation of regional programs supporting innovative activity and regional innovation systems, providing for the mandatory participation of scientific parks in such processes. Also, all the functions of the scientific park, enshrined in the Law of Ukraine "On Scientific Parks", must correspond to the directions of scientific, scientific and technical

activities in accordance with the Law of Ukraine "On scientific and scientific and technical activity" and the perspective tasks assigned to subjects of the national innovation system in Draft Law of Ukraine "On Support and Development of Innovative Activity".

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Innovation Centres in Poland: Legal and Economic Aspects

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1. Innovation centres: the notion

There is no uniform definition of innovation centres (also referred to as the Centres for Innovation and Entrepreneurship, hereinafter the CIE, or business environment institutions, hereinafter referred to as "BEI") in economic sciences. Some call them 'service providers who support business operators' (http://monitoruj.podkarpackie.pl/1.5-instytucje-otoczenia-biznesu.html). A. Bąkowski and M. Mażewska see them as "partners to public and private sectors whose major role is to meet the needs of their key customers: entrepreneurs involved in the development of innovative business (and in enhancing the propensity to innovation when it comes to products, processes, marketing, management and organisation), promoting experiments, technology transfer, knowledge commercialisation, and boosting the competitiveness (including competitiveness based on improved productivity as a result of new technologies and know-how). Due to their non-commercial nature (profit maximisation is not their primary goal) and statutory approach to entrepreneurship and innovation they act as service providers and make up a national support network, which assists the development dynamics at the level of individual businesses" (Bąkowski, Mażewska 2011, 8). K.B. Matusiak claims that an innovation centre "is the term used to prioritise units that actively support entrepreneurship and innovation. Function-wise their operations, independently of organisational and legal format, focus on: the dissemination of knowledge and skills through advisory services, training and information; help in the transfer and commercialisation of new technologies; financial support (*seed* and *start-up funds*); assisting students, graduates, Ph.D. students, and research

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workers in starting new spill-over businesses around research centres and universities; advisory and technical assistance to start ups, offering them business space; developing clusters of enterprises and animating innovative environment by combining business services and other forms of assistance to companies within a specific properly developed territory" (Matusiak 2011, 181).

2. Innovation centres: typology

To narrow this very broad interpretation of BEIs we have classified them into three groups: centres for entrepreneurship, innovation centres and non-bank financial institutions (or simply "financial institutions"). Centres for entrepreneurship are institutions, which deal with the promotion and incubation of entrepreneurship leading to the establishing of new businesses and creating new jobs, offer services that assist small businesses and animate the development of peripheral regions or areas suffering from structural crisis. This group comprises the following entrepreneurship centres: training and advisory centres, centres for entrepreneurship, business centres, pre-incubators, and entrepreneurship/ business incubators. Innovation centres are organisations, which also promote and incubate entrepreneurship, but they focus on innovative businesses. Within the group we may distinguish: parks (technology, science, science and technology, industrial and technology parks and techno-parks), technology incubators, technology transfer centres, university business incubators, and innovation centres. Non-bank financial institutions distribute returnable and non-returnable financial instruments funded from the EU funds and private resources. In this group we may find the following financial institutions: regional and local loan funds, credit guarantee funds, seed capital funds, and business angel networks (Mażewska 2014, 8–9). Based on data collected for 2014 in Poland there are in total ca. 681 innovation and entrepreneurship centres, including 42 technology parks, 24 technology incubators, 46 incubators of entrepreneurship, 24 university business incubators, 42 technology transfer centres, 47 innovation centres, 103 seed capital funds, 7 business angel networks, 81 loan funds, 58 credit guarantee funds, and 207 training and advisory centres (Bąkowski, Mażewska 2011).

3. Innovation centres: legal aspects

Further consideration on business environment institutions suggests that from the legal point of view their classification based on the legal structure is crucial. Studies conducted by the Polish Agency for Enterprise Development show that the majority of BEIs are commercial companies (ca. 42%). There are also

foundations[1] (ca. 19%), associations (ca. 14%), organisational units at universities (ca. 11%), budget entities (ca. 6%) (Bąkowski, Mażewska 2011). Before we proceed to discuss each legal structure separately, we need to categorise the above notions in the light of legal science. The above described structures have one thing in common: they are designed to develop innovative entrepreneurship, which is not a legal term and has already been discussed at the beginning of the paper. In principle, the Polish law includes no provision that would restrict the catalogue of legal structures for organisations that support innovation. Therefore, business environment institutions are so diverse. On the one hand, there are commercial companies, i.e., private law structures, which pursue business operations while on the other hand, there are associations, typical manifestations of the right enjoyed in democratic countries to establish non-profit organisations or budget entities, a notion recognised in financial law, which belong to the public finance sector and must obey strict rules when making outlays. Because of this diversity, we propose to bring all of them under the same umbrella and, using civil law terminology, refer to them collectively as organisational units.

The notion of an organisational unit is not a legal term under the Polish law. Z. Świderski defines it as a specific organisation with separate, independent structure, i.e. a real social phenomenon, not just a legal construct. Organisational units need to be established as separate bodies with specific organisational structures, usually having their own assets, and, first and foremost, to accomplish a certain goal identified by its founders (Świderski 2014). The author distinguishes four types of organisational units: legal persons, meaning organisational units, who acquire legal personality under specific legal regulations (1), the so called unincorporated entities, which include organisational units that are not legal persons but which acquire legal capacity under the Polish law (2), organisational units that do not enjoy legal capacity but which carry a specific legal meaning (3), and organisational units, which have no interpretation in law (4).

3.1. Commercial companies

To discuss individual formats of organisational units, which operate as innovation centres we need to start with the most numerous group: commercial companies. The principal source of law that regulates the issues pertaining to the realm of commercial companies is the c.c.c. Although the Code does not offer any definition of a commercial company, it makes some distinctions that help introduce a certain typology. According to A. Szajkowski and M. Tarska, the term commercial company means, in the first place, a lasting legal relationship, which arises from articles of association (articles of incorporation) as well as an organisational unit with legal personality, incorporated as an organisation of

[1] Foundations mean foundations of private law.

shareholders, who have come together to accomplish a common goal by making their contributions and working together in other forms (Szajkowski, Tarska 2015, 22). When drafting the Code of Commercial Companies the legislator wished to exhaustively regulate the issue of commercial companies and that is why Art. 1 § 2 c.c.c. includes a closed catalogue of all companies recognised by the Polish law (Zedler 2015, 27–28). Under this provision, the list of commercial companies comprises: a general partnership, a professional partnership, a limited partnership, a limited joint-stock partnership, a limited liability company, and a joint-stock company. Pursuant to Art. 4 § 1 para. 1–2 c.c.c., these companies have been divided into two groups: partnerships and corporations. Partnerships include: a general partnership, a professional partnership, a limited partnership, and a limited joint-stock partnership. Moreover, pursuant to Art. 8 para. 1 c.c.c., all partnerships are unincorporated entities, meaning they may, on their own behalf, acquire rights, including property rights and other rights in rem, undertake obligations, as well as sue and be sued. Corporations are either limited liability companies or joint stock companies. Under Art. 12 c.c.c., both companies are legal persons. Corporations are the most preferred legal format chosen by innovation and entrepreneurship centres. That is surely due to the advantages they offer. Without going more into too much detail, suffice it to say that in these companies, shareholders' personal assets are protected as business debts and liabilities are covered with company's assets and they pay a linear corporate income tax at an objectively low rate of 19% (in principle).

3.2. Foundations

Like the Code of Commercial Companies, the principal legal act that regulates the aspects pertaining to foundations; a.f. does not offer any definition of the term "foundation". We will discuss a foundation as a legal construct further in this paper focusing at this point only on its definition and legal personality. Summing up the already accumulated definition-related considerations available in the doctrine and in the jurisprudence, P. Suski refers to foundations set up under private law system as founded legal persons (see Art. 7 para. 2 a.f.), incorporated through the declaration of will of its founder, who allocates the specially designated assets to be used to accomplish a specific and lasting social goal that the foundation strives to achieve (Suski 2011, 354–355).

3.3. Associations

In contrast to the already examined legal structures, an association has got its definition in law. Art. 2 l.a. reads that an association is a voluntary, self-governed and lasting non-profit construct. Besides, pursuant to Art. 17 para. 1 l.a., an association

has got legal personality. The above implies that an association is a union, which must exhibit 4 following attributes: voluntariness, self-governance, continuity and non-profit goals. Voluntariness means that there is no legal pressure upon the establishing, membership, setting up, joining or withdrawing from associations. Self-governance links with independence from external entities and freedom to take decisions as to the scope of its activities. Continuity of associations means they operate independently of who their members are. Hence, continuity refers to goals, not persons. Final element in the definition is the non-profit nature of this legal structure. It means, associations may not produce any material advantage as any surplus of revenue over costs which must be used for statutory goals, not distributed amongst its members (Hadrowicz 2016, 31–41).

3.4. Organisational units at universities

Pursuant to Art. 2 para. 1 subpara. 29 l.h.e. OUU means a faculty or another organisational unit at a university specified in the Statutes, which offers at least one undergraduate/graduate programme, PhD studies or research in at least one discipline. The above shows that the unit must meet two conditions: it must be specified in the Statutes of the university (1) and it must offer one programme, PhD studies or research in at least one discipline (2). We also need to note that the term "organisational unit" under civil law is different from the same notion used in the Law on Higher Education. Organisational unit in the meaning of the latter is a name adopted to facilitate the identification of faculties and units set up by higher educational institutions. Nevertheless, both universities and their OUU are legal persons in the light of Art. 12 in relation with Art. 84 l.h.e.

3.5. Budget entities

The notion of budget entities originates from financial law. Examples of budget entities include, inter alia, courts and tax offices. These notions have their non-financial definitions in other branches of law, yet despite that, they are referred to as budget entities. They are the oldest and the most numerous representatives of the public sector. Budget entities, this time without legal personality, may also form part of the sector of public finances. When performing their economic and legal functions they avail themselves of the legal personality of the State Treasury (*statio fisci*) or of a territorial self-government unit (*statio municipi*). In financial law, budget entities are treated as independent operators, as the legislator has entrusted them with a wide variety of rights and obligations in the field of finance and, as such, they may be considered unincorporated entities (*inter alia*, Augustyniak-Górna 1979, 92). Pursuant to Art. 11 p.f.a., budget entities are organisational units in the public finance sector, which have no legal personality,

cover their expenses directly from the budget and transfer their income directly to the state budget or to the budget of a specific territorial self-government unit. Budget entities operate based on the Statutes that specify their name, address and domain. We need to bear in mind that budget entities make up the public finance sector (Art. 9 para. 1 p.f.a.) and must comply with some specific norms. Any operator within the public finance sector must meet the following three criteria: it must be established by the State or a territorial self-government unit; it must be receiving public funds for its principal activities; and its principal activities may not be profit-oriented (Ruśkowski 2014, 86–89). On top of that, universities (which establish the above discussed organisational units at universities) also form part of a broadly understood public finance sector (Art. 9 para. 11 p.f.a.) and must meet these three criteria. However, we must remember that budget entities are not public universities.

Summing up the above considerations on legal forms of business environment institutions, we need to stress that their legal formats are diverse, and it is not easy to identify their common features. However, it is worth noting that a clear majority of business environment institutions (72%) are private legal persons (companies, foundations and associations). It testifies to the higher propensity of enterprises, in particular from the private sector, to invest and develop innovative business. Public legal persons and unincorporated entities (OUU, budget entities) are a minority among business environment institutions in Poland (Bąkowski, Mażewska 2011).

4. Foundations as a legal form of an innovation centre

As further in the paper we explore one concrete legal form adopted by the BEIs, a foundation – using the Foundation for Promotion of Entrepreneurship based in Lodz as an example – it seems justified to examine the idea of a foundation at greater length.

4.1 Types of foundations

Foundations may be divided into categories based on a series of criteria. The first criterion relates to their legal format, i.e. under what legal system they have been established: are they private law foundations (established as a result of legal act under the provisions of private law) or public law foundations (established under an act of law or an administrative act).[2] Secondly, we can divide them into

[2] An example of a public law foundation is, e.g., Zakład Narodowy im. Ossolińskich, the so called "Ossolineum" – institute of science and culture.

private and public foundations. The first ones serve private interests of a specific narrow group (e.g. a family). Public foundations are established to accomplish public goals, they are to deliver public good to unspecified number of people. Thirdly, foundations can also be divided into independent and dependent ones. Independent foundations have legal personality while dependent ones are legal constructs whereby separate assets are allocated for specific purposes, while the rights to these assets are entrusted with a specific entity.[3] Fourthly, there are foundations, which are public benefit organisations within the meaning of the a.p.b.v.w. and foundations which are not such organisations. As specified in Art. 3 para. 1 a.p.b.v.w., a public benefit organisation is an organisation, which acts for the advantage of the community in public tasks listed in Art. 4 a.p.b.v.w., such as, *inter alia*, acting for professional and social integration and reintegration of people threatened with social exclusion, charitable actions or support to economic development including entrepreneurship. Fifthly, there are foundations, which may conduct economic activities and foundations, which may not do it. The division results from Art. 5 a.f., under which the possibility to pursue economic activities must be provided for in the statutes of the foundation. Moreover, economic activities may be conducted only to the extent, to which they serve the accomplishment of the goals of the foundation laid down in Art. 1 a.f. It is also worth stressing that foundations may not have economic operations as their principal goal. Economic activity must be subsidiary in relation to statutory activities. In practice, maintaining adequate proportions may turn out to be uneasy, on the one hand, and very much assessment-biased (I CKN 1568/99, Marczuk-Pieńkowska 2017). Finally, foundations can be divided depending on who founded them. There may be secular and church foundations. The first ones are established by people not related to religion or church organisations while church foundations are established by churches or church legal persons (Suski 2011, 356–370).

4.2. Characteristic of foundation: the case of the foundation for the promotion of entrepreneurship in Lodz

Foundation for Promotion of Entrepreneurship in Lodz is a private law foundation, a public, independent, secular foundation, a public benefit organisation, which pursues economic activity. Its main constituting legal act is the Act on Foundations. The Act comprises 20 articles, which regulate all material issues, such as, *inter alia*, the establishing of a foundation, its statutes, a registration procedure, assets, and surveillance over foundations.

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[3] In accordance with the doctrine, in this case such an arrangement may not be considered a *sensu stricto* foundation as foundations have legal personality. A dependent foundation, despite its name, is in fact an effect of a donation or will with conditions (Cioch 1990, 23–24).

Art. 2 a.f. specifies that foundations may be established by private individuals independently of their nationality and domicile or by legal persons based in Poland or abroad. These subjects are referred to as the "founders" although, we need to bear in mind that foundations may be established by one founder only. On top of that, a foundation should be based within the territory of the Republic of Poland. The above means that foundations may be established by practically any private individual and legal person, but the new structure must be based in Poland. Founders who wish to establish a foundation must meet three requirements: draw an act establishing the foundation, adopt its statutes, and register it with the National Court Register.

The founding act is a declaration of will, drawn up as a notary act or as a will that establishes a foundation and specifies its goals and assets allocated for their accomplishment (Art. 3 para. 1 and 2 a.f.). In civil law, the founding act is considered a legal act that involves liabilities concluded under a condition precedent. The founder obliges himself to transfer the ownership of assets to the newly established organisational structure, which is to become a legal person. Until that very moment, the liability of the founder remains suspended (Grzybowski 1985, 491–495). The goals of the foundation are enumerated in an open catalogue (exemplary) in Art. 1 a.f., which mentions, *inter alia*, the accomplishment of goals in line with the interests of the Republic of Poland, goals that are socially or economically beneficial, in particular healthcare, development of economy and science, education and upbringing, culture and arts, social welfare, environmental protection, and protection of monuments. Assets are listed in Art. 3 para. 3 a.f. and they include money, securities, as well as movables and immovable property donated to the foundation.

Foundations, unlike other legal persons (e.g. corporations), do not have a body authorised to adopt statutes. The latter are adopted only by the founder or a private individual/a legal person authorised by them. Statutes inform about the name of the foundation, its domicile, assets, goals, principles, form, and the scope of its operations, membership, the board, its organisation, the way it is established, rights and obligations of the board and its members. Statutes may include other provisions, e.g. regulations concerning economic operations pursued by the foundations (Art. 5 a.f.).

After the founding act has been drawn up and the statues have been adopted, the foundation must be entered into the Court Register. Following the appropriate civil procedure set out in Part VI, Book 2 of the Code of Civil Procedure, referred to as the "registration procedure", the Court enters the foundation into the National Court Register (more precisely, the register of associations, other social and professional organisations, foundations and independent public healthcare centres) examining*, inter alia,* foundation's goals and statutes, as well as their compliance with the law. After being entered into the register, the foundation acquires legal personality (Art. 7 a.f.).

5. Summary

The above demonstrates that foundations may be centres of innovation and entrepreneurship. For an organisational unit being recognised as such a centre depends on the activities it pursues: support for economic operations.[4] Such a profile remains within the scope of one of the goals of the foundation listed in Art. 1 a.f. and makes part of the fulfilment of the goal consistent with primary interests of the Republic of Poland, the socially and economically beneficial goal and the goal that assists in the development of economy or science. That is why, the Foundation for Promotion of Entrepreneurship in Lodz – although its statutory goal is to contribute to the economic growth of the country and in particular of the Lodz region by initiating and supporting, materially and intellectually, training courses, which contribute to the improvement of knowledge and boosting the entrepreneurial spirit – can be considered a business environment institution.

Foundation for Promotion of Entrepreneurship (FPE) is a non-profit foundation (NGO) established in 1990. The founders were:

- the University of Lodz, the biggest HEI in the region,
- Prof. Jerzy Dietl, former Senator of the Republic of Poland,
- the Lodz Chamber of Industry and Commerce and
- the Lodz Economic Society.

The mission of FPE is to contribute to the economic growth of the country and especially of the Lodzkie Region by developing the spirit of entrepreneurship, integrating business community and by offering education and advice (training courses, seminars, advisory and information services). Over 35,000 people have been trained so far. FPE is a partner of the National SME Services Network (KSU) and the National Innovation Network (KSI). Since 2002 FPE is certificated for Quality Management System according to ISO 9001: 2009 in the field of training, advisory, information services and innovation. In 2004 FPE obtained a status of a public benefit organization.

FPE has also acted as partner and coordinator in many international and EU-funded projects in the fields of mobility, education, human resources development, corporate social responsibility.

In 2008 FPE joined the Enterprise Europe Network as the only centre in the Lodzkie region.

Legal and organizational structure:

- the assembly of founders
- the supervisory council

the Board of the Foundation (consists of two people, experienced managers and former academic teachers, holding the title of PhD in Economics, who have been working in FPE since 1995).

[4] For more see the beginning of the paper.

LIST OF ABBREVIATIONS

l.a. – Law on Associations Act of 7 April 1989 (Dz.U. of 2015, 1393 consolidated text as amended).

c.c.c. – the Code of Commercial Companies Act of 15 September 2000 (Dz.U. of 2017, 1578 consolidated text as amended).

l.h.e. – Law on Higher Education Act of 27 July 2005 (Dz.U. of 2016, 40 consolidated text as amended).

OUU – organisational unit at a university.

p.f.a. – Public Finance Act of 27 August 2009 (Dz.U. of 2016, 1870 consolidated text as amended).

a.f. – Foundations Act of 6 April 1984 (Dz.U. of 2016, 40 consolidated text as amended).

a.p.b.v.w. – Public Benefit and Voluntary Work Act of 24 April 2003 (Dz.U. of 2003, 96.874 as amended).

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Innovations and Economic Security of Ukraine (Experience of the Theory and Practice of Legal Securement)

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Exploring issues of legal support for the economic security of the state it is necessary to elaborate on the innovative component of the modern paradigm for managing economic processes in Ukraine. Having proclaimed innovative way of development of the industrial sector, in fact, Ukraine turned into one of the most promising, taking into account its national scientific and technological potential, subject of global innovation and investment space. The scientific traditions, the heritage of scientific schools and a large number of research institutes and centers located on the territory of the country provide an opportunity to educate the bearer of intellectual capital. Provided that there is an adequate funding and state support, including the creation of economic and legal support, a powerful intellectual elite will provide an opportunity to implement the necessary programs for updating fixed assets and launch modern production of high technology competitive products. The importance of innovation in the context of economic security is explained by the fact that mainly through their implementation the quick solution of a problem of overcoming the economic or financial crisis is possible. Restructuring industrial relations, reorientation of the industrial sector and also the transformation of Ukraine into the export of innovative technologies will significantly improve the competitiveness of the economy as a whole, which, in turn, will lead to the stabilization of the domestic markets due to the inflow of foreign capital not only as an investment but also as export earnings. However, in order to turn an innovative economy into the stabilizing factor for economic development, effective mechanisms of economic and legal state regulation should

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be developed in this area. There must be theoretical and methodological analysis for understanding the nature of their effective implementation.

Exploring the nature of innovation, we should note two key aspects:

– firstly, scientists today, both domestic and foreign, have not come to a consensus about the nature of innovation and research and have not developed a single definition that would reflecting all aspects of this phenomenon;

– secondly, innovation should be viewed in two dimensions: legal and economic, and it is a synthesis of these two components that reveals the essence and significance of innovations and innovative relationship to the economic system.

Moreover, nowadays, there is no single point of view as to the nature of innovation whether it is a process or phenomenon, and how they are connected.

So, O.M. Sumets believes that, on the one hand, innovation is the socio-economic engineering process which using the practical application of ideas and inventions in order to create products and technologies with better qualities, which appearance on the market may bring extra profit. On the other hand, innovation is defined as using of new ideas, products, services, materials, technology by industry immediately after opening or creating the invention to improve products, methods of production and distribution (Сумець 2012, 122–124).

A similar view is shared by A.A. Shevchenko, who notes that innovation is a breakthrough in the field of technology or production. Novation isn't just a "discovery" or "invention", it must be of applied nature applied. It aims to improve performance and tend to get additional income as a result of the implementation and the creation of new "best in quality ideas and technologies". On the other hand, innovations cover the whole range of activities from research and development to marketing (Шевченко 2012, 245–247).

Taking into account the above mentioned points of view we should agree on the primary purpose of innovation which is a qualitative transformation of industrial production and manufacturing of new products or improvement of the production process of existing products, where the main place is given to the criterion of efficiency. The researchers do not pay attention to the economic component of innovation, pointing out only quality technological changes without creating the added value.

An interesting perspective on the problem of interpretation of innovation has P.P. Mykytyuk who offers not to define it as a science or technology, but as a new value. The measure of innovation is its impact on the environment (Микитюк 2006, 134).

A researcher takes as the basis novelty brought by innovation to society as a whole and the economy in particular. And the value of innovation is not understood only in the form of value terms, but rather as a real effect (socio-economic, scientific-technical) which an innovative product brings in public relations. In terms of state regulation of the economy this definition is not

entirely satisfactory, but this vision allows to reassess any intellectual and scientific activities in the context of sustainable use in the economy. In other words, the economic content can be contained in any object, considered to be an innovation, and the main purpose of both a separate business entity, which create the innovation, and the state on the whole in general is to uncover this content. Through the understanding of innovation as a value, in the future its perception as a value will also be formed.

The economic meaning and importance of innovation in the industrial production and management of enterprises are explored by N.B. Petrova, N.Y. Muschynska, L.G. Chekanova. They point out that innovation isn't only the ultimate method, principle, a new order, an invention, a new product, process, qualitatively different from previous counterpart, but is the result of intellectual activity, complete research and development (Петрова 2009, 199–200).

Thus, if we consider the activities of the enterprise as a set of various functional areas, one of them is the intellectual activity of personnel in the form of scientific developments. In this case it is suitable to use the definition of innovation proposed by S.M. Illiashenko:

> Innovation is the end result of which is aimed at the creation and use of innovations embodied in the form of improved or new products (goods or services), production technologies, management practices at all stages of production and marketing of products that contribute to the development and improvement of economic efficiency of production and consumption or providing social or other effects (Ілляшенко 2010, 101–103).

American researchers H. Bats, B. Brindly and S. Williams understand innovation as any new approach to the design, production or distribution of goods, enabling the innovator and his company to gain competitive advantage over competitors (Бизнес. Толковый словарь 1998, 215–216). That is, they purposefully add more economic color to the socio-technical process of development of scientific thought, the end result of which is the emergence of a new technology or product. Actually, in terms of economy, the process and result are equally important. The first is impossible without financing and here connection of innovations with investments, capital markets and currency relations is manifested, that has a direct impact on the economic security of the country. The second which is a result of an innovative product, automatically becomes the subject of exports and an additional means of improving the competitiveness of the economy.

World economic thought considers that the phenomenon of innovation is closely linked with investments, that it is a synthesis of the two components of economic development of the enterprise: innovations and funding for their implementation. In fact, the Western economic paradigm sees the innovation as the only possible way for development of the manufacturing sector, since otherwise

qualitative transformation of the economies is impossible. Consequently, there is a close relationship between innovation and economic security, on the stability of which an appropriate level of competitiveness of the economy and trends of market processes depend.

Actually, J.A. Shumpeter who developed one of the classic definitions of innovation came to the same conclusion. Thus, he believes that innovation is a pioneer work that the technology used in the production and management of some economic unit. Innovation is one of the main drivers of profit generators. Most often innovation is generated by research and experimental design developments and changes in market prospects (Шумпетер 2007, 12).

In fact, J.A. Shumpeter linked innovation with the market processes by transferring it from the purely scientific and technical category to the economic one. Later it gave impetus to the development of new economic concepts and theories, which resulted in the emergence of so-called innovative development.

L.Y. Kurbetdinova in her studies came to the same conclusion and links the research component of the innovation process with the economic value of its final result: "innovation is the process of bringing ideas of scientific or technical invention to the stage of practical use, guaranteeing income and the related process of feasibility and other changes in the social environment" (Курбетдінова 2011, 33–35).

P.S. Hariv considers innovation as a product of innovative process and defines it as a result of innovation, displayed in the form of scientific, technical, organizational or social and economic innovations, which may be obtained at any stage of the innovation process (Харів 2003, 135–136).

If we consider innovation as the product, in terms of issues of this work, we can find a direct link with the balance of commodity markets. Economic security is a multidimension phenomen on and commodity security takes one of the leading places, as the product is the most important element of economic relations. As the product, an innovative product can significantly influence the situation on the commodity market in case of weakening or reducing the supply of domestic product. Due to its unique characteristics it can revive trade turnover and expand the scope of consumer demand, and even replace a group of products which are already on the market, but for which there is stagnation of demand. In addition, it should be understood that the significance of marketable security increases in the context of protection of domestic producers. The innovative product which was created in Ukraine might affect foreign trade balance of the country and, therefore, can be considered as a stabilization tool towards ensuring economic security.

In general, it should be noted that in recent years the reassessment of theoretical and methodological innovation, expansion of its substantial workload, development of new economic and legal categories, including more updated "innovation process", have been taking place.

In the context of economic security, understanding of innovation in terms of state regulation of economic processes becomes especially important. So S.M. Chystov, A.Y. Nikiforov, T.F. Kutsenko offer to understand innovation as the end result of the introduction of STP (scientific and technical progress) in order to obtain economic, social, environmental, scientific, technical or other effect. Innovations are implemented in the form of new technologies and types of products, organizational, technical and socio-economic decisions of manufacturing, financial, commercial and other nature (Чистов 2000, 261–262). It should be stressed that if at the microeconomic level, innovation is seen as the end result of an innovative activity of enterprise embodied in the form of a specific product, then at the macro level, that is at the level of state, innovations are seen as an additional element of economic potential at the expense of which the level of competitiveness of the economy can be increased.

Summing up the stated above, we conclude that the economic content of innovations can be revealed through the material form of the final product of innovative activities businesses, which is able to directly affect the level of an enterprise profitability due to its own competitive qualities. At the level of state economic policy the essence of innovation is in the ability to change quality of production processes, as well as in the potential contained in innovations that can be used at the later stages of economic development. In the context of economic security the focus should be on the potential of innovation, that can be revealed during their introduction into production processesn or when entering the market as a separate product. Those competitive characteristics inherent in certain products can qualitatively change economic processes in the commodity markets by changing the priority of commodity turnover between different countries. In the process of stabilization of the national economy and its getting over crisis, it manifest itself in the increase of export earnings from the sale of high-tech innovation, and, hence, competitive (because of their uniqueness) products. Moreover, it is innovations that ensure the stability of investment income in the economy and, hence, the stability of the monetary and financial sector. However, one should remember that to align the country's economy and turning it into a really powerful sector of social reproduction, it is necessary to create such economic conditions under which innovations simultaneously would be both the potential for attracting investment, and turn into an export product.

As to the legal sense of legal innovation and their place in the legislative field, attention should be paid primarily to the fact that, as the end result of scientific and technical activity, innovation is only the product, the legal essence of which is revealed through the category of things.

Since innovation is closely related to such legal category as an innovation activity that is treated differently in legal science, but it is based on understanding of innovation as a complex sequential process from the rise of ideas (intangible component of innovation) to its concrete implementation and subsequent use

(material component). Actually, it substantiates the views as to the possibility and necessity to divide innovation into "soft" and "material". The former is governed primarily by the law on intellectual property and the latter by both intellectual property law, and economic, as well as civil law. Although using of such characteristics to describe the components of the innovation process is relative and is explained only by the peculiarities of each.

Instead Ukrainian legislator does not divine or identify these components of innovation. Thus, for example in Art. 1 of the Law of Ukraine "On innovation activity" it is defined as an activity aimed at using and commercializing the results of research and development and causes the release of new competitive products and services (Law of Ukraine. On innovation № 40-IV).

It is interesting that similar, but not authentic definition of innovation is contained in the Law of Ukraine "On investment activity" which in Art. 3 states that innovation activity is a set of measures aimed at the creation, implementation, dissemination and implementation of innovation under the Law of Ukraine "On innovation activity" with the purpose obtaining commercial and (or) social impact, carried out through the implementation of investments in the objects of innovation (Law of Ukraine. On investment activity № 1560-XII).

It is interesting that the legislator differentiates not only between the concepts of "innovation" and "innovative product", but also "innovative products". Thus, the innovation is defined as newly created (applied) and (or) improved competitive technologies, products or services as well as organizational and technical solutions of industrial, administrative, commercial or other nature, which significantly improve the structure and quality of production and (or) social sphere. Legislator understands innovative product result of research and (or) research engineering experimental development that meets the requirements established by the Law. And innovative products are defined as new competitive products or services that meet the requirements established by law (Law of Ukraine. On innovation № 40-IV).

In general, it should be noted that the establishment of an innovative model of national economy will ensure its competitiveness and access to the path of sustainable development. Therefore, the transition to this model is gradually becoming an imperative of public policy, manifested primarily in the development of effective legal regulation of relations in the field of innovation. The current regulatory framework (laws, presidential decrees, by-laws in the form of government regulations, orders of the central executive bodies, etc.) regarding science, technology and innovation amounts to nearly 200 documents. National legislation in particular, includes innovative provisions of the Constitution of Ukraine, the Commercial Code, the Law of Ukraine "On innovation activity", the Law of Ukraine "On priority directions of innovative activity in Ukraine", the Law of Ukraine "On investment activity", the Law of Ukraine "On Scientific and Scientific technical activities", Law of Ukraine "On special regime of innovation

activity of technological parks" and other legal acts, which determine the legal, economic and organizational principles of state regulation of innovative activity in Ukraine, establish forms of stimulating of innovation processes by the state and aimed at innovative way of support the economic development of Ukraine (Кучерява 2016).

Initial legal prerequisites for state innovation policy are laid down in the Constitution of Ukraine. Art. 54 guarantees citizens freedom of scientific and technical and other kinds of creativity, protection of intellectual property, their copyrights. In the same article it is stipulated that the state promotes the development of science and the establishment of scientific relations of Ukraine with the world community. In addition to these legislative acts Conception of scientific, technical and innovative development of Ukraine adopted on the 13th of July 1999 by Verkhovna Rada of Ukraine should be specially noted. The concept includes the main purpose, priorities and principles of the state science and technology policy, accelerated innovation development, benchmarks of the structural formation of the scientific and technological potential and its resources. It defines principles of relations between the state and subjects of scientific and technological activities, based on priority need of state support for science, technology and innovation as a source of economic growth, a component of the national culture, education and the sphere of realization of the intellectual potential of citizens. The Concept will be valid stabilization of the economy and achievement of its continuous development (Кучерява 2016).

In the context of study of the relationship between economic security of the state and innovation processes the problem of determining of innovation policy and the means of its support is of special importance. And it can also be viewed in two dimensions, in terms of economic and legal sciences and science of public administration.

Thus, V.I. Zakharchenko, N.M. Korsikova, M.M. Merkulov offer to understand state innovation policy set of particular directions, forms and methods of the state as activity aimed at creating of interrelated mechanisms of institutional, resource provision of support and development of innovation activities, the formation of motivational factors to enhance innovation processes (Захарченко 2012, 35–39).

This interpretation can be found in the writings of L.I. Fedulova indicating that innovation policy as a complex system of measures which aim is to stimulate the development, maintenance, management, planning and control processes of innovation in science, technology and material production related to adequate actions in important areas of society that provide the necessary conditions to achieve current and future goals of the social component of state (Федулова 2008, 115).

P.P. Mykytyuk offers a simpler version "Innovation policy is a state influence on innovation through appropriate legal and economic mechanism" (Микитюк 2006, 129–131).

Analyzing the given definitions it should be noted that scientists suppose existence of two systems: the innovation processes management system in the form of public authorities, and, controlled system including the innovation processes or innovation relations. The combination of these two systems gives the opportunity to create and then introduce innovative products. This manifests the economic component of the state innovative policy, when the state acts as regulator and guarantor of ensuring transparency and stability of innovative development. It is also important because the innovation sector, as noted above, is closely associated with the investment and, therefore, the state also guarantees the rights of investors, which is one of the aspects of economic security.

But state innovation policy should be considered in the legal context as well. That is why it is appropriate to refer to researches of L.A. Shvayka, indicating that the state innovation policy is a set of legal, organizational, economic and other activities of the state aimed at creating appropriate conditions for innovation in the economy, stimulating introduction of innovation in production (Швайка 2006, 79–81).

The researcher purposefully placed the legal norms in the first place, since the determining factor for any relations in the society, including relations in the innovation sphere, is the legal field in which they occur. That is the task of the state is to create such a legal basis that would imply the existence of effective economic and legal mechanisms of regulation of innovative relations. The state acts as a guarantor and only the guarantor only and cannot administratively regulate any market processes.

The other researchers also underlines it. Thus, N.V. Krasnokutska notes that innovation policy should be understood as a set of principles and mutual economic, legal, organizational and social methods, for planning simulation, regulation and control of processes of innovation in science, technology and manufacturing sectors. The main task of the government is to determine the purpose of innovation policy, the basic principles of its implementation, as well as the mechanism for implementing the relevant measures (Краснокутська 2003, 78–81).

I.A. Silchenko determines state innovation policy as part of state regulation of the economy, associated with the consolidation of the structure-innovation, capital formational and institutional role in the economy, the formation of innovative industry sector and innovative businesses, reform of the social division of labor, the deepening of globalization trends (Сільченко 2010, 33–35).

It is interesting to note, that the authors divide the concept of innovation and scientific and technical as well as industrial fields. On the one hand, it gives grounds to claim that innovative relationship can exist independently, but on the other hand it makes some inconsistency in the theoretical and methodological apparatus of state regulation of the economy, since it appears that the innovative relationships can exist outside of manufacturing and science and technology.

Quite interesting position is expressed by Russian specialists S.A. Agarkov, Y.S. Kuznetsova, M.O. Gryaznova indicating that the state innovation policy is a part of social and economic policy, which expresses the state's attitude to innovation, defines goals, directions, forms of public authorities in the field of science, engineering and implementation of science and technology (Агарков 2011, 88–89).

Analyzing all the above-mentioned definitions, it should be noted that the state innovation policy is inherent part of economic policy, because of its closed connection with the processes of economic security of the state as aimed at creating stable conditions for development. At the same time it is aimed at development of economic and legal mechanisms that are able to keep the innovation sector from a possible imbalance. So, in fact, in the narrow sense the state innovation policy should be defined as a set of measures and tools used by the government to create conditions for sustainable economic development based on innovative approaches and focused on the development and implementation of innovative products and technologies. If we consider more widely, it should be noted that innovation policy a set of interrelated legal, economic, organizational and institutional framework of regulation of innovative processes in a way that best meets the needs of the economy and creates conditions for improving competitiveness and innovation. Moreover, it is important for creation of subsystems ensuring the implementation of this policy to occur in the following sequence:

– firstly, developing of legal framework that defines thorough principles of economic processes;

– secondly, building of economic ties between subjects of innovative relations;

– thirdly, developing a system of organizational support that is binding mechanisms and instruments to regulate specific aspects of innovative processes or relationships;

– and finally the definition of a set of institutions that provide such regulation.

A problem of methodological and terminological support of economic and legal sciences occupies an important place in the context of the ratio of innovation and value innovation sphere of economic security. The fact is that Ukraine is declaring an innovative way of economic development in general requires real measures for its implementation. Declaring certain development priorities, even at the level of legislation, needs to outlet the legal and institutional framework, but it is needed a single methodology and common approaches to the development of mechanisms for economic-legal regulation of relations in the sphere of economic security and innovative security.

Actually, the concept of innovative security, if to link innovations with economic security as two categories, that are adjacent in the same economic reality, is not found in the national legal framework. The national legislators more incline

to the usefulness of such legal structures as "national security in the field of science and technology" and "scientific and technical security". The term "innovative security" is used mainly at the microeconomic level and refers exclusively to undertakings. Moreover, the absence of a legal act regulating relations in the sphere of economic security of Ukraine, determines the classification of scientific and technical security as an issue of national security of Ukraine.

The question is: which of the two terms – "scientific and technological security" or "security innovation" – is the most successful in terms of the integration process, in which Ukraine participates, and in view of the need of complete comprehensive legal regulation in this sphere. Surely, scientific and technical component is prevalent for innovation as a legal category and as a phenomenon, but is not the only one. Therefore, when it comes to science and technology, it should be understood only as activities directed on creation of something new. When it comes to innovation, it should be understood not only as process of creating a new one, but also as process of further useful economically substantiated use. As it was found above, the use of terminology basis of "innovation" and its different options adds the necessary economic shade to the process of legal regulation.

But in terms of economic security there is a question. What is the meaning of "innovative relationship" and "innovation": economic or scientific and technical? Economic if it meant the possible risks associated with the inability to implement innovative projects in Ukraine and, consequently, the need for their exports abroad. Scientific and technical if it meant the risk of loss of national scientific capacity and export of not only of technology, but a real brain drain. The answer is not obvious.

For example, Y.V. Krasnoschokova, translating innovative security on a macroeconomic level, focuses exclusively on the loss of the state's own innovative potential mainly due to external negative effects: industrial espionage, theft of new technological developments and so on (Краснощокова 2011, 67–69).

M.A. Yohna and V.V. Stadnyk note that innovation is related to scientific and technological as universal and separate, and they do not structure the innovation and does not distinguish its components (Йохна 2005, 67–68).

The research of O.V. Pabat also deserves an attention where he presents the theoretical and methodological bases of research of influence factors on innovative economic security. That is the essence of economic security of Ukraine and innovative safety actually are considered as integral (Пабат 2012, 115–117). The value of the results of researches conducted by O.V. Pabat is in the fact that it's structured in the same way as law regulates relations regarding national security.

Thus, the analysis of the Law of Ukraine "On National Security of Ukraine" dated 19.06.2003 № 964-IV allows to see, though it's not directly in the text, that the legislator deliberately avoids the term "innovative security" using instead the legal structure "threat to national safety in the scientific and technological

sphere" and "areas of government policy on national security" (Law of Ukraine. National Security of Ukraine № 964-IV).

But it is inferred from it, that both threats and trend and include all components related to safety and innovation. In particular, national security threats proclaimed:

– growing scientific and technological gap between Ukraine and developed countries;

– ineffective innovation policy mechanisms to encourage innovation;

– low competitiveness;

– underdeveloped domestic market high-tech products and its lack of effective protection from foreign technical and technological expansion;

– reducing domestic demand for trained scientific and technical personnel for scientific, engineering, technological institutions and high-tech enterprises, low payment level for scientific and technical work, drop of its prestige, inadequate mechanisms to protect intellectual property rights;

– scholars, professionals, skilled labor that went abroad from Ukraine (Law of Ukraine. National Security of Ukraine № 964-IV).

At the same time, the directions of state policy on national security in the sphere of innovations include:

– strengthening of state support of priority areas of science and technology as the basis for the creation of high technologies and providing economic transition to an innovative development model, an effective system of innovation in Ukraine;

– gradual increase in public spending on the development of education and science, creating conditions for broad involvement in scientific and technical sphere of extra-budgetary allocations;

– creation of economic and political conditions to improve the social status of scientific and technical intelligentsia;

– the necessary conditions for the implementation of intellectual property rights;

– ensure an adequate level of security of operation of industrial, agricultural and military installations, facilities and utilities (Law of Ukraine. National Security of Ukraine № 964-IV).

Innovation activity and innovation process safety and sustainability of their development occupy an important place among the principles of domestic policy in the economic sphere, defined by the Law of Ukraine "On principles of internal and foreign policy" (Law of Ukraine. On domestic and foreign policy № 2411-VI) and which in particular include:

– intensification of investment and innovation, particularly by raising funds and public enterprises, establishment of an effective system of insurance of investment risks stimulation of investment in the economy by population, providing innovative component of investment;

– introducing economic incentives to encourage the modernization of the national production, direction of investments in advanced technologies, the formation of the national innovation infrastructure and government programs of industrial upgrading.

S.I. Pyrozhkov, I. Sukhorukov, S.L. Vorobyov, T.P. Krushelnytska actively explore innovative security of state and prove the feasibility of using of such category. They have not developed their own understanding of this definition, but offer Indicator of innovative security, which is calculated as the ratio of funding for STD from all sources (VF) to GDP (GDP) for the corresponding period (Пирожков 2003, 131–133).

$$I=VF/GDP*100$$

In other words researchers propose to measure the level of innovation of security indicatively in order to adequately and promptly respond to potential negative trends in the economy and, hence, the emergence at-risk in relation to the state's economic security factors. Indicator innovative security is a step far beyond the existing legal provision of economic policy and, indeed, beyond the existing paradigm of state regulation of innovative processes. Though the opportunity to assess the real state of innovative relations is needed of and meets the latest international trends. Moreover, considering the fact that the innovation sector is closely linked to the investment, practical use of the proposed index becomes even more important and appropriate.

This approach deserves attention because of its practical applicability, though with rather questionable results, as in Ukraine today is not possible to determine objectively funding NTR as the excess of the shadow economy, the existence of schemes artificially reducing the tax base, unclear legislation in the context of determining NTR – all this greatly distorts the real data, and, therefore, cannot be taken as a starting point for the development of public management measures in the regulation of safety innovation.

It is worth to note researchers of A.I. Sukhorukov and O. Oleynikov that attempt to link such categories as "innovative safety" and "scientific and technological potential". The researchers propose to consider them together exclusively and solely in the context of innovation policy, as this approach is the most appropriate in terms of integration processes of Ukraine (Сухоруков).

But it was L.S. Shevchenko and A. Levkovets who researched thoroughly than others the issues of development of the theoretical and methodological apparatus of economic and legal support of innovative security and its place in the economic security. They offered a comprehensive definition of security innovation, which refers to the sustainable process of creating, use and dissemination of new knowledge and technology based on a combination of scientific and technological potential and opportunities for international cooperation, and thus creating the

prerequisites for sustainable operation and development of the economic system. According to researchers the innovative safety involves the ability of the economic system (Шевченко 2009, 35–36):

– firstly, to ensure sustainable development through innovative transformation;

– secondly, to function in the worst condition using of their own intellectual and technical resources (satisfaction of basic needs, the ability of the system to self-repnoduction and self-development);

– thirdly, to generate, implement and accept innovations, providing a critical mass of quality changes in the economy (Левковець 2012).

Thus, we can conclude that today scientists have reached a certain unity in the context of the impact of innovation, innovative processes and innovative relationship to the economic security of the country and the need to distinguish separate element - an innovative security. Regarding the impact of innovations and their relationship with economic security, it is manifested in the following aspects:

– as a new unique product, an innovative product is able to stabilize domestic commodity market of the country and obviously affects the process of added value producing, allowing to correct the foreign economic activity of the state;

– innovation is also potential target for attracting investments and at the same time a potential source of export earnings from the sale abroad that can affect both positively and negatively domestic monetary and financial stability and the stability of the economic system as a whole. The positive effect is manifested through additional opportunities to iron out trade balance by exporting innovation and negative due to excessive saturation of the economy by foreign investment resources invested in innovation;

– as a separate type of economic relations, innovative relationships both by themselves and through its final outcome (product innovation) can improve the stability of the economy as to negative external factors, because of its adaptability, allowing to quickly respond to changing global market conditions and focus on a particular industrial sector of advanced scientific and technological developments. However, it is possible only with the appropriate regulatory framework that is able to respond quickly to the needs of the economy;

– state innovation policyб owing to appropriate instruments for regulating relations, the object of which is innovation, and which themselves are part of economic relations, can be considered as potential (additional) stabilizer system of the industrial sector and the economy as a whole;

– innovation, more precisely innovation and scientific and technical research, is in the focus of foreign economic partners, who wing illegal, non-competitive methods tend to grab them to register as a ultimate product with extremely high added value, that significantly raise their level of competitiveness. Opposition to such methods of economic struggle of competitors is perhaps the most important task of public safety innovation.

All of the above necessitates the development and adoption of a separate legal act regulating relations in the sphere of innovative security. It is considered as the most acceptable to adopt appropriate law that would establish the fundamental principles of state regulation of innovative security or respective strategies or state programs outlining further prospects for developing relations in this field, both in economic and in the economic and legal context.

Studies show that today the legal regulation of economic security in Ukraine does not comply with international standards or current socio-economic trends characterizing the global economy. The experience of 2008–2010, it primarily about preventing the spread of negative effects of the global financial crisis on the domestic economy, demonstrates the effectiveness of administrative management in the short term. Such opportunistic intervention enables to achieve the desired balance of economic processes, but does not provide opportunities for strategic development in the future.

Moreover, mandatory means of state regulation of economic processes and particularly innovative relations is not acceptable in the context of market processes. Ukraine, as a young developing country, is trying to attract the attention of foreign investors to own industrial sector and, hence, the legislation should meet the requirements put forward by those investors [world economic community].

In this context an antagonism of two Ukraine's aspirations may occur: to protect national interests and national security and attract foreign investors to spur economic development. Assuming that the interests of national security prevail over all other social and economic interests, including the interests of the owners of the means of production, we come to a conclusion as to the need to develop the Law of Ukraine "On Innovation security" providing strict mandatory regulations of innovation and investment relations in the industrial sector in the event of crisis or increasing risks of its occurrence.

In this case, this legislative act can be classified as anti-crisis laws, which are inherent to many countries, predominantly to highly developed ones. The purpose of such laws is to stabilize at first domestic economic environment.

It is assumed that the Law of Ukraine "On Innovation security" creates the legal and institutional framework for sustainable development of innovative relations in the country and sustainable development of the industrial sector through innovation. This law is aimed at minimizing potential internal and external risks for the innovation economy and will provide a model of public-administrative influence to stabilize economic relations.

Section I of the Law of Ukraine "On Innovation Safety" will contain the basic principles and determine innovative aspects of security. Particular attention should be paid to the definition of innovative security facilities. Considering the started above features of the legal regime of innovation and legal meaning of innovative relationships and their economic importance, it should be noted

that it makes sense to consider as an object of innovation safety the totality of innovative relationships the purpose of which is to develop and implement a high-tech industrial production technology to enhance the competitiveness of domestic industry, capital renewals, create of new production lines of advanced technology products for all industries, creation of products with high added value. Such a complex object must be under constant monitoring of relevant state institutions, which would forecast the possibility of imbalance or interruption of innovation processes.

The importance and expediency of adopting a separate law of Ukraine "On Innovation security" is that innovation is very closely associated with investments, that is when there is a decline in innovation development, economy of the state will automatically wipe the required investment resources. Consequently there is a shortage of funds which enterprises often divide into several streams and try to cover at least part of temporary gaps in labour remuneration. If the process of renewal of production capacity suspends for various reasons, then its financing in the form of investments will be suspended as well, and therefore the company will require new sources of covering their expenses for payments to the budget, creditors, and the staff.

In this case industrial enterprise is forced to enter the domestic financial or foreign exchange market for search of temporary funds, which again entails two negative trends: increasing cost of the currency due to increased demand and reducing the cost of assets and decline in its solvency because of excessive involvement of loan capital.

Legally, these processes cannot be stopped because the free market is very sensitive to any mandatory methods of state regulation. But they might provide and develop scenarios and corresponding counter adaptive model of state regulation.

Turning to the legal definition of the object of public safety innovation, it should be noted that its existence implies the existence of relevant entities, which by virtue of competence and functional load provided by the Constitution of Ukraine and other normative acts of Ukraine include: President of Ukraine; Verkhovna Rada of Ukraine; Ministers' Cabinet of Ukraine; The National Security and Defense of Ukraine; ministries and other central executive authorities; National Bank of Ukraine; local state administrations and local authorities; public entities and other forms of ownership.

Interaction of the subject and the object, of the state innovative safety and providing of legal support for this process by means of economic law should take place on the following principles:

– priority of Ukraine's national interests which means that in case of worsening of global and national economic conditions, public authorities, while developing appropriate programs and responses program aimed at stabilization or protection of innovation relations, has to come primarily from the interests of the domestic industrial sector, domestic science and business entities-residents;

– rule of law which means that the regulation of innovation relations will take place solely within legally defined limits, even when it comes to crisis management, it should be in the amounts and directions, provided for by appropriate anti-crisis laws, and determine compensation mechanisms to resident and non-residents entities;

– priority of contractual means of dispute resolution which provides for the resolution of economic disputes arising from excessive use by authorities of mechanisms of imperative innovative sector stabilization and protection of national innovation sphere, in democratic way and in the established order, including by means of international arbitration institutions;

– timeliness of measures ensuring the security of innovation which means that any application, including discriminatory means of economic and legal regulation of innovative relations, is possible only if there are real threats to the national interests of Ukraine in the sphere of innovations. It should be also quite legitimately determined by the developed and legislative tools. That is, entities that are party to the innovative relationship should be aware in what cases and when the state can resort to the use of protective mechanisms of regulation. In this aspect the Institute of Social Responsibility may appear, which realizing the inevitability of the use of such methods by the state, should direct their own efforts to prevent a possible deterioration in the quality and sustainability of innovation processes, suspend implementation of innovative projects that might even eliminate the need for mandatory intervention by state. In other words, business should be the subject of a full innovative relationship that is not only trying to make a profit, but ensures the stability of its income, and thus the stability of innovative processes. Moreover, it is the business that must create such conditions for the protection of innovation that will prevent the wrongful appropriation by their competitors;

– the adequacy of measure ensuring innovative security, which lies in that the state trying to stabilize innovation processes and minimize the risks associated with the fall in investment innovation sector, should apply only those measures that for by provided anti-crisis legislation, and in the amounts and during the time which is sufficient to return to balance. In other words, the state should not abuse crisis to by means of mandatory regulation to create benefits for businesses owned lobbying by certain political elites;

– clear separation of powers and interaction of public authorities in providing innovative security, so that aggregate of subject ensuring innovative security will really function as a single mechanism, as a single complex system in order to return to the desired state of innovation processes and eliminate possible negative consequences of different kinds of economic risks. This principle is more evident in the establishment of transparent relations between the authorities and determining the sequence of their involvement in the solution of certain issues in the context of economic security;

– using of international systems in the national economic interests of Ukraine in the innovative field that is in terms of integration and globalization, Ukraine in addition to national legislation promptly and adequately implement into the national legal system the best achievements of world and European legal thought in order toenhance the protection of national economic interests in the sphere of innovations. We are talking about the widespread use of the opportunities to stabilize the economic system and innovative processes that it received as a result of joining the WTO and other international organizations as well as the means and instruments provided for by international declarations and treaties ratified by the Verkhovna Rada of Ukraine.

Thus, the system of economic principles of legal regulation of relations in the sphere of innovative security should create the necessary legal foundations for the further "pressure" of state on business to stabilize innovation processes, reduce the shadow economy and set up efficient innovation and investment relations. But for all that this "pressure" must be legitimate, and its time limits defined period only by the economic stabilization situation in the country.

It should be noted that some of mentioned measures are discriminatory against entities that are parties to the innovative relations. However, in the fact that they exist and embodied in legislation there is nothing that could cause indignation or dissatisfaction of the global economic community, as the practice of their implementation in the process of government regulation is very common and, more over fixed in the system of international instruments GATT / WTO. Actually Section II of the Law of Ukraine "On Innovation security" the title of which is proposed to word as follows: "Means of ensuring of innovative security" and must include a list of instruments of state regulation of innovative relationships and relationships related to the introduction of innovations in the industrial production, including tools of discriminatory nature.

It makes sense to divide them into stimulating and stabilizing, that means to create a system of preventive public-management measures that will help respond to the emergence of economic risks in the sphere of innovations, as well as a and system of administrative remedies of mandatory legal regulations that apply after the effect of the occurrence of these risks catalyzes other negative economic trends. As the legislative regulation of any process does not allow to elaborate particular procedural aspects including those to the functioning of the system of ensuring of the state innovation security, so in future attention should be paid to the development of the appropriate stabilization anti-crisis program, which will focus on the implementation of the law.

Among the incentives should be the following:

– strengthening of state support of priority areas of science and technology, as well as increasing public funding of priority innovation projects;

– incentives for innovation in the field of extra-budgetary allocations by implementing the most favorable tax regime;

– strengthening of state control over the most significant innovation and investment projects to prevent interruption of funding of implementation of innovative projects in the most priority sectors (aviation, space, petrochemical, metallurgy, automobile industry, defense industry, production of computer and electronic technology and communications);

– development of new and improvement of the efficiency of existing economic and legal mechanisms of regulation of relations in the field of intellectual property, the strengthening of protective mechanisms in the field of copyright;

– export promotion of technology and innovation, transformation of Ukraine to exporter of innovative products.

Among stabilization measures it is worth to emphasize the following:

– preferential credits granting from public funds to finance innovative projects in the domestic state-owned enterprises, to accelerate the pace of renewal of fixed assets;

– introduction of state guarantees for the protection of domestic enterprises in which investment projects are implemented in the case of reducing of financing by foreign partners;

– imposing of economic sanctions on particular investors in case of violation of conditions of innovative projects financing;

– raising tariffs on imported goods, analogues of which are produced in Ukraine in the framework of innovative projects;

– compulsory insurance of innovation project and reducing of funding for the most risky venture projects;

– temporary setting of preferential tax regimes with subsequent transfer of uncollected tax payments for periods of industrial application of innovation.

Thus, one can see that stabilization measures are of higher imperative nature and provide direct state participation in rebalancing of the development of innovative relations. Straight but not total, participation of the state makes it possible to create artificial favorable conditions for the development of national innovation projects for a fixed period.

The logical continuation of the mentioned above means of the economic and legal regulation of relations in the sphere of innovation, should become the determination of the limits of their application. Especially it applies to measures having stabilizing character.

Therefore, section III of the proposed law should be devoted to the method of evaluation of economic risks in the innovation sphere. This methodology should include not only the probability of undesirable results, but also the possible economic consequences. It is economic indicators that can enable to assess the threats to innovation and depth of the negative consequences for the economy as a whole.

In section IV “Compensation Mechanism” of the proposed Law government guarantees to investors who finance the implementation of innovative projects

should be provided if administrative tools for regulation of economic processes are used as well as state guarantees to business entities and research institutes, establishment, centers that finance and immediately carry out fundamental and applied research and implement innovative projects at their own expense. Among these guarantees must be assigned:

– extension of the duration contract of innovative projects investment;

– extension of the term of innovative projects funding by reducing the amount of payments while maintaining their frequency;

– introduction of additional tax and customs exemptions and additional preferential regimes of investment;

– compensation of losses incurred by the state during the use of administrative measures to ensure economic security or partial compensation for lost profits.

Thus, in the legislation readiness of the authorities to protect national economic interests of Ukraine in innovation will be declared and at the same time compensatory mechanisms will be introduced that will make it possible to maintain the necessary level of investment attractiveness of the state, even in the period of enforcement of anti-crisis legislation.

Adopting appropriate statutory act, Ukraine will not only proclaim the importance of innovation areas for further sustainable development of the economy as a whole, but also will create the proper economic and legal framework for the implementation of innovative relationships that will help protect both the national interests of the country and make government economic and innovation policy more or less predictable when crisis intensifies.

At same time, one should understand that the existence of the Law of Ukraine "On Innovation security" unable to work over all aspects of innovation relations systematically and in detail. Therefore, an important place in their economic and legal support in the context of ensuring innovative safety programs and strategies of particular industries development occupy.

In this research it is logical to refer to the practice of many European countries in the development of innovative processes and stabilization of relations on application of innovations in the manufacturing sector, which is ensured through the development of specific programs. This practice is inherent in Ukraine as well, but Ukrainian government programs in their essence is a form of development strategies and is not effective in crisis management of economic processes. Overall, the current paradigm of state economic management in Ukraine has a strong situational in nature, allowing the government to respond quickly to market fluctuations, but such a reaction to a greater extent the meets interests of business elites represented and lobbied by government.

Programs are purely declarative: they define goals, objectives and areas of public administration in any sphere, but instead there are no concrete mechanisms for achieving them or solution. And it should be recalled that it is the level of

elaboration of economic and legal mechanisms that distinguishes the program from the legislative act.

Therefore, it is appropriate to consider issue related to the development and implementation of the Program of ensuring of innovative security of Ukraine, which will not have a specific time limits for implementation, will apply in case of need, namely in case of increase of the risk factors of economic environment and consist of two parts:

– first part is declarative which actually will duplicate the directions and objectives of government policy to ensure economic security and innovative security;

– second part is practical that will include specific stabilization mechanisms aimed at equalizing of the balance of innovative processes development, which must be applied only in case of external or internal economic risks catalyzing.

Thus, adopting of the stated above normative acts will not only elaborate the mechanisms of state regulation of relations in the sphere of innovative security, but also certain principles of state economic policy in the sphere of innovations will be formed. Therefore, one should pay attention to the following question: what kind of state strategy of innovative development of the economy must be applied in Ukraine. Analyzing the experience of the former Soviet Union and Western Europe there appears quite logical alternative choice between the so-called "catching up" and "breakthrough development". The answer is obvious – the first strategy is not acceptable for Ukraine as it is rather a dangerous scenario that supposes appropriate reorientation of entire economic sectors to the needs of innovative processes, the second is unattainable because of large amounts of SEECW.

In modern world catching up model loses stability of criteria of the society to which it aspires. The whole world is changing radically and many developed capitalist countries are in the transition process. Globalization as a new megatrend does not allow to modernizing countries, including Ukraine, just to adopt and to mimic existing structure of Western society which are also beginning changing themselves. In a globalized world to catch and to imitate means to condemn oneself to permanent backwardness and stagnation. Meanwhile, the model of catching up strategy is based on borrowing, which fragments are being currently implemented in our country, it is an objective necessity, since it will enable to catch up with developed countries, but to achieve the same level is no longer possible, since until we copy, they advance and thus gain remains (Скрыдлов 2011, 113–114).

In view of the stated above it should be noted that in Ukrainian condition the most appropriate would be use of synthesized type state of innovation policy under which ensure the sustainable development of innovation and investment relationship and the necessary level of innovation and economic security of state could be provided. On the whole, the analysis of the relationship of innovation

and systems of the state economic security ensuring leads to a conclusion on determining nature of the innovative development of the economy in the current economic conditions. This is because the innovation sphere is a kind of potential of the development of the industrial sector and the economy of Ukraine as a whole, the implementation of which depends solely on the position of power, and thus creation of the appropriate economic and legal support for realization of this potential is able to have a positive influence on stable and gradual development of all components of the government's economic policies, in the context of economic security of Ukraine as well.

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PART II

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The Concept of the Abuse of Law in the Case Law of the Court of Justice of the European Union as an Example of the Flexibility of Tax Law*

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1. Today a significant form to conceptualize law is not to recognize it as a system of norms, but rather from the perspective of the interpretive work of pluralistic law institutions (see e.g. Kirsch 2012). In the case of the latter theory, the relationship between law, i.e. progressive synthesis of the constitutional law of the Member States and the institutional structure (or infrastructure) of the European Union is from the very beginning taken into consideration in the sense that the more the synthesis progresses, the greater the centrifugal tendencies appear in the institutional structure and the more it gets complicated. This relationship is particularly intensively noticeable within the pervasive influence of the case law of the Court of Justice of the European Union on the activities of the supreme courts of the Member States (de Búrca 2012, 131ff).

In this context, it can be concluded that the adjudication with the use of *general principles* was presented by the CJEU as a particularly legitimized way of satisfying the principium of the rule of law of the applicable EU law because at its basis – according to the intention of the Court – there rests normative unity, and within the latter – *a harmonized axiological pluralism* of the EU law with the international law and the law of the Member States. Normative unity must therefore be understood here as deontologically interpreted *prohibitive weights* for the plurality of values, harmonized in such sense that they never exceed these prohibitive weights. As indicated by A. Kalisz and L. Leszczyński, in the EU

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law, when applying the criterion of the content, there can be identified four types of metanorms: the principles regarding political issues (e.g. the rule of law); the principles relating to the relationship between the EU law and the national law (principle of direct application and primacy principle); the principles concerning the rights and freedoms of the individual (e.g. a prohibition of discrimination); freedoms, that is, material and codified principles of the EU law, relating to its particular fields (Kalisz, Leszczyński 2005, 24–27).

The general principles of the EU law arise directly or by implication, not only from the constitutional regulations in force in the EU Member States, but also from the international agreements concluded by the Member States and – apparently in a secondary manner – from the founding treaties of the EU itself. In turn, they are 'extracted', formulated and perpetuated by the case law of the CJEU.[1] It should be noted in this place that the status of the general principles of law is granted only to those theses of jurisprudence which are at the same time sufficiently persistent, concern very significant issues for the EU and they are inferred from the content of the law of treaties. Seemingly, it is difficult to say – in respect of unwritten principles – that they apply directly or that they may fulfil the conditions of "*Van Gend and Loos* test"[2] as to the direct effect. In addition, it is worth noting that regardless of the direct effectiveness, the decision in respect of *von Colson*[3] also introduced the concept of indirect effectiveness of the directive. This rule, in turn, applies to a third stage, namely to the application of the provisions of national law adopted to implement the directive. According to it, the national courts should undertake their interpretation 'in the light of the wording and purpose' of the directive, which in itself does not produce a direct effect. Indeed, if the directive itself does have a direct effect, its objectives – in the field of the application of the national law – can be achieved virtually in such a manner.

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[1] A sufficient justification of the application of this principle seems to be the fact that it is common to the Member States and that it has been recognized by the Court. And vice versa – the differences and discrepancies between the national legal systems can hinder the recognition of the principle as 'common', which took place in the thesis adopted in *Hoechst* (decision of 21 September 1989, *Hoechst v. Commission*, 46/87 and 227/87, ECR 1989, p. 2859).

[2] As regards meeting the premises of '*Van Gend & Loos* test' related to the direct effect, the directives become unconditional (i.e., they become directly applicable) only after the expiry of the time limit prescribed for their implementation. When that deadline expires, in the event of a failure or improper implementation of the directive by the Member State, they assume vertical effectiveness. The latter was granted to the directives by the Court in its settled case-law, from which it is clear that a natural or legal person may rely directly on the provisions of the directive if and only if: a) there passed the said deadline for the implementation of the directive by the Member State; b) the provisions of the directive are unconditional and sufficiently precise for direct application.

[3] Judgment of 10 April 1984 on *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, 14/83, ECR 1984, p. 1891.

2. These general statements apply to deliberations relating to the concept of abuse of law, developed in the jurisprudence of the Court of Justice of the European Union. The term *abuse of law* was not alien even in the Roman law. Since ancient times, in specific cases, there arose a belief among the Romans that some of the ways of exercising one's powers are deemed as their *abuse*, so that – according to the ancient – there had to be taken remedial measures, including those of a legal nature. Therefore, in Gaius (G 1.53): *male enim nostro iure uti non debemus* (we should not use our *right* in a wrong way), in Constantine the Great (C.Th. 9.12.1 and C.9.14.1.1, year 319): *nec vero immoderate suo iure utatur* (and indeed one should not extravagantly exercise one's *right*), in Justinian (I. 1.8 and Par 1.8.2): *expedit enim rei publicae, ne quis re sua male utatur* (it is in the public interest so that no one wrongly used their goods) (see Longchamp de Berier 2005). It is pointed out contemporarily that the concept of *abuse of law* or *abuse of rights* stands for applying or using specific tools of law contrary to the purpose for which it was created, contrary to its intended purpose. L. Leszczyński aptly indicates that the approach to the abuse of rights can be diverse and broad because it can be considered in the context of understanding the law, from the point of view of legislative policy or ultimately from the perspective of the wording of the legal text (Leszczyński 2003, 26).

3. The adoption of the concept of abuse of law based on the tax law, however, requires certain contextualisation and updating the rules of interpretation and legal principles specific to this field of law and to the social relations that the tax law applies to. In the literature and jurisprudence, it is emphasized that the tax law in particular should be created in a precise manner and that the characteristic model of its creation should be the so-called autonomous model. In this model, the most important values are legality and legal security, including the guarantees of basic human rights. There dominates the argumentative procedure of discussing law and the idea of formal justice. As a result, in this approach the precise rather than textually open provisions should to the greatest extent form the basis of this field of law. Tax law should be most clear and certain area of law. It is worth noting that the representatives of this area of law very clearly manifest practical significance of the borders of the scope of interpretation. The latter relates particularly to the representatives of the science of tax law. Tax law, due to the fact of imposing certain financial obligations on the citizens and other entities, should have a closed nature to the greatest extent, so as not to facilitate the enlargement of these duties.

The consequence of the current socio-economic development and the occurring of philosophical and ethical changes is the growing role of the functional interpretation. The law is presented there as a fact of interpretation. This, in turn, raises a lot of doubts and fears, because the fact of referring in the process of interpretation to the general objectives may in a significant way modify the

meaning of the applicable norm, resulting from its linguistic understanding. This involves, in addition, the risk of granting to the entity undertaking the interpretation, excessive freedom, or even arbitrariness in the process of interpretation, which raises controversies, especially in those branches of law, in which the principle of the certainty of law is viewed as the fundamental one. It is worth noting that while there is rejected the idea that there exists any meaning of the text, which results from the features intrinsically associated with the text itself, this impression arises only because the text refers to the elements of the social and cultural context, repeatable to the interpretive community. This means that although the interpretation depends entirely on this context, it cannot be stated that it is subjective and arbitrary.

Classically, the issue of interpretive discretion in broad terms is associated with vague legal concepts and general clauses. The need to apply in the legal texts the vague terms means that the legislator, due to the law being enacted sometimes for a distant future, must oscillate between the Scylla of the legal certainty and the Charybdis of its flexibility. Vague legal concepts appear in all areas of law. Under the concept 'vague term' there will be understood the concept, the content and the scope of which is uncertain, it does not fix immediately and fully all the elements of the hypothesis and the disposal, as opposed to a specific concept, whose hypothesis and disposition determine, in a complete and reliable manner, all the elements of the state of facts.[4] As follows from the analysis of the structure of concepts, each abstract regulation is more or less vague and therefore requires a specification and interpretation. Interpretation and subsumption are also required in respect of 'specific' concepts, namely those filled with content, which is clear and distinguishable from other norms and legal institutions.

Applying in the legal texts vague, evaluative and typological concepts or general clauses is associated with "a growing scope of semantic openness of modern legal systems" (Morawski 2000, 157ff; Paroussis 1995, 91–108; Hart 1998, 171ff).[5] An imprecisely worded legal concept determines the entire set of

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[4] In the theory of the natural language it is stated that 'all or almost all, or some of the words are blurred or that all are definite in some respects, and in others – blurred' (Gizbert-Studnicki 1978, 54ff; Zieliński 2002, 163–171). The author points out, among other things, that 'the vagueness' and 'blurriness' are interrelated, but they apply to other aspects of the linguistic features. Accordingly, 'vagueness' refers to the meaning of phrases, and 'blurriness' – to their scope. M. Zieliński points out that since these two terms are related to each other, blurriness is sometimes treated 'as vagueness (in terms of the scope) differentiated next to (conceptual) vagueness'. Such a strict distinction between vague and blurred concepts is not necessary from the point of view of this article. Therefore, we will use a broad understanding of vague concepts, including also blurred concepts.

[5] Cf. the resolution of the Supreme Court of 6 May 1966, VI KZP 62/65: 'Any situation in which there occur differences of interpretation between the various judicial instances, is a symptom of the textual ambiguity. This ambiguity can be established by the properties of the language or result from other sources involving the need to subject certain provisions to interpretation'.

grammatically homogeneous languages. The expression "important reasons for termination" refers to a certain set of grammatically homogeneous languages, which nevertheless differ in meaning of this vague concept (in each language this concept has a clear but a different meaning).

Vague legal concepts are similar to general clauses, to mention only the clauses of 'socio-economic purpose of law' and 'the principles of social coexistence', which by virtue of their general and fundamental nature should be taken into account by the courts when adjudicating each case and, therefore, they soften the process of law application more than any other clauses, according to the assumption *summum ius summa iniuria*.[6]

The application of a specific legal regulation of the institution of a general clause leads to increasing or simply creating the freedom in the process of applying law, by reference to extra-juridical elements of the axiological environment. In contrast to the vague names (which refer to extra-linguistic sphere, which results from the nature of the language), general clauses are linguistic phrases of evaluative nature, referring to evaluative and generally targeted extra-juridical criteria, introducing a certain freedom for the entity applying law. Such freedom consists in determining the content of the clause only at the stage of the application of law, referring to the customs, individual evaluations or systemic assessments.

4. All the indicated observations apply to the concept of abuse of tax law developed based on the CJEU case law. Classically, the definition of the abuse of law is often equated with the definition of circumvention of the law. In the doctrine there nevertheless prevails the position that the concept of circumvention of the law is broader than the notion of the abuse of law. The acts committed *in fraudem legis* are always the acts contrary to law. However, in relation to the problems at issue it is emphasised in the literature that the essence of circumventing tax law is such a behaviour of the taxpayer which aims at a specific settlement of his or her property relations, different from the typical one in specific circumstances, and the only intended economic effect of such behaviour is to be more favourable tax and legal qualification of these property relations.

Abuse of law in this sense does not have a specific range, because one cannot create an exhaustive list of situations that should be covered by the norms preventing the circumvention of law. In other words, the concept in question belongs to the general clauses, which for obvious reasons, bring a certain freedom of interpretation regarding the eligibility of established facts relevant to the requirements of the settlement. From this perspective, both in case law and in the doctrine, there can be traced different positions in respect of how to evaluate within tax and legal effects such formation of civil law relations which leads to the avoidance or reduction of tax. There can be encountered the views that the civil

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[6] Cf. Constitutional Court's judgment of 17 October 2000, SK 5/99.

law contracts may not lead to the evasion of the tax obligation or to reduction of tax liabilities and to the limitation of the application of tax law.[7] On the other hand, there has been expressed the view that the provisions of the tax law do not contain norms prohibiting or requiring certain behaviour, but only norms specifying the consequences of behaviour based on this law.[8]

The analysis of the case law of the Court consistently reveals several converging elements as regards the notion of the abuse of law in the EU law. Starting from the context of the fundamental freedoms, the Court stated that an improper circumvention of the laws of a Member State using such freedoms is unacceptable.[9] This concept has also been adopted in other specific areas such as social security, where the Court held that no advantages may be achieved with the help of abuse or fraud.[10] In the field of the common agricultural policy, the Court found that the application of the relevant rules on export refund 'cannot be in any case extended to the abuse applied by the exporter'.[11] Within the common agricultural policy in a case involving the payment of compensatory amounts in relation to cheese imported into Germany from a third country, the Court also stated that 'if it could be shown that the importation and re-exportation of cheese were not made as business transactions bona fide, but only in order to unlawfully benefit from granting monetary compensatory amounts', the payment would not be due.[12] As for company law, the Court found, however, that there cannot be allowed a situation in which a shareholder invokes the provisions of the Community law in order to obtain improper benefits, contrary to the purposes of the relevant provision.[13] The Court's position was acknowledged in the *Centros* case, in which there was discussed the alleged abuse of the right of establishment. The Court maintained there that "the Member State will be authorized to take

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[7] The judgment of the Supreme Administrative Court of 7 November 1991, SA/Po 1198/91.

[8] The judgment of the Supreme Administrative Court of 29 May 2002, III SA 2602/00.

[9] Judgment in case 33/74 *Van Binsbergen*, Rec. p. 1299, paragraph 13; judgment in case C-148/91 *Veronica*, Rec. p. I-487, paragraph 12; judgment in case C-23/93 *TV10*, Rec. p. I4795, paragraph 21, on freedom to provide services; judgment in case 39/86 *Lair*, Rec. p. 3161, paragraph 43, concerning free movement of workers; judgment in case 229/83 *Leclerc*, Rec. p. 1, paragraph 27 concerning the free movement of goods. In the judgment in case C-115/78 *Knoors*, Rec. p. 399, paragraph 25, in the context of freedom of movement and freedom of establishment, the Court also acknowledged 'legitimate interest of the Member State in preventing when using measures created by the Treaty such situations in which some of its citizens tried to evade the application of their national regulations'.

[10] Judgment in case C-206/94 *Palletta,* Rec. pp. I-2357, paragraph 24.

[11] Judgment in case 125/76 *Cremer,* Rec. p. 1593, paragraph 21.

[12] Judgment in case C-8/92 *General Milk Products*, Rec. pp. I-779, paragraph 21. In relation to the common agricultural policy, see also the judgment in case 250/80 *Schumacher*, Rec. p. I-2465, paragraphs 16 and 18, where the Court adopted a typical teleological approach without having to rely on the doctrine of the abuse of law.

[13] See the judgment in case C-367/96 *Kefalas*, Rec. p. I-2843, paragraphs 20 and 28, and the judgment in case C-373/97 *Diamantis*, Rec. p. I-1705, paragraph 33.

measures designed to prevent the attempts of some of its citizens, by the semblance of the rights created by the Treaty, improper circumvention of the national rules or preventing individuals from improperly or fraudulently obtaining benefits from the provisions of the Community law".[14]

It follows from the above that the abuse of law was analysed by the Court in two contexts. Firstly, in the situations when the provisions of the EU law are misused to circumvent the national law. Secondly, in cases when the provisions of the EU law are abused to benefit from them in a manner contrary to their objectives.[15]

A more developed doctrine of the abuse in the Community law was presented by the Court in *Emsland Stärke* case,[16] in which it was addressed with a query whether an exporter could be denied the right to export refund, even though there are met the formal conditions for granting such refund in accordance with the relevant provisions of the Commission Regulation (EEC) No 2730/79 of 29 November 1979 laying down common detailed rules for applying the system of export refunds for agricultural products.[17] It follows from the facts of the case that the goods were subjected to feedback scheme, under which they were exported, admitted to trading in a third country and immediately re-imported unchanged into the Community by the same means of transport.

The Court found that the right to refund would be cancelled in case of abuse. In its judgment, the Court provided the test to determine whether such abuse occurs. The said test consisted, firstly, of 'a set of objective circumstances in which, despite formal observance of the conditions prescribed by Community legislation, the purpose of these provisions is not reached'[18], and secondly, of 'a subjective element constituting the intention to obtain an advantage from the Community rules by artificially creating the conditions laid down for its achievement'.[19]

A consistent pattern of the concept of abuse developed by the Court is based on whether the right claimed is consistent with the objectives of the legislation that formally constitutes its source. The person claiming the right is prohibited from invoking it only to the extent that it refers to the provision of the EU law that formally grants this right, to obtain "an improper advantage, explicitly contrary to the objective of this provision". On the contrary, when the right is exercised

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[14] Judgment in case C-212/97 *Centros*, Rec. p. I-2357, paragraph 24. See subsequently, in the context of the alleged abuse of the right of establishment, case C-167/01 *Inspire Art.*, Rec. p. I-10155, paragraph 136, and the judgment in case C-436/00 *X and Y*, Rec. p. I-10829, paragraphs 41 and 45.

[15] The opinion of Poiares Maduro in Halifax case, C-255/02, paragraph 63.

[16] Judgment in case C-110/99, Rec. p. I-11569.

[17] Official Journal of Laws of 1979, L 317, p. 1.

[18] Judgment in *Emsland* case, paragraph 52.

[19] Judgment in *Emsland* case, paragraph 53.

within the limits outlined by the objectives pursued by a particular Community provision, there is no abuse, but only legitimate exercise of the right.[20]

5. The idea that this notion is equally applicable in the sphere of VAT, is entirely consistent with the case law, which states that the fight against possible tax evasion, avoidance and abuse is an objective recognized and supported by the Sixth Directive[21] (Directive 112) and that the principle of the prohibition of abuse of rights and law results in the fact that there are prohibited entirely artificial structures, detached from the real economic events, created with the sole purpose of obtaining a tax advantage.[22]

There is no collision between the application of the principle of the interpretation of the EU law prohibiting the abuse in the context of the common VAT system, and the procedure provided for by Art. 27 of the Sixth Directive for the implementation by Member States of special measures *derogating from* the Sixth Directive to prevent certain types of tax evasion or avoidance.[23]

The main difficulties and objections in relation to the application of such a principle of interpretation in respect of the Sixth Directive (Directive 112) are associated with the development of the criteria by which it would function in this particular area. In this regard the principle of legal certainty and the protection of legitimate expectations[24] should be considered. Due to the principle of legal certainty and the protection of legitimate expectations, the scope of the principle of interpretation of the EU law prohibiting abuse of the VAT rules must be defined in such a way as not to affect legitimate trade. Such a potential and negative effect can also be prevented by such an understanding of the prohibition of abuse, according to which the right claimed by the taxpayer is disabled only when the economic activity performed by this taxpayer has no other objective justification than causing the creation of this law in respect of the tax authorities, and its recognition would be contrary to the purposes and consequences, aimed at by the relevant provisions of the common VAT system. Economic activity of this kind, even if it is not unlawful, deserves no protection from the Community principle of legal certainty and protection of legitimate expectations because its only likely purpose is to undermine the objectives of the legal system itself.[25]

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[20] The abovementioned opinion of Poiares Maduro in Halifax case, paragraph 68.

[21] ECJ judgment in *Halifax et al.*, paragraph 71 and the case-law cited therein.

[22] ECJ judgments: of 22 May 2008 in the case C-162/07 *Ampliscientifica et Amplifin*, ECR p. I-4019, paragraph 28; of 27 October 2011 in the case C-504/10 *Tanoarch*, so far not published in the ECR, paragraph 51; of 12 July 2012 in the case C-326/11 *J.J. Komen en Zonen Beheer Heerhugowaard*, so far not published in the ECR, paragraph 35, of 20 June 2013, C-653/11, Newey paragraph 45.

[23] The abovementioned opinion of Poiares Maduro in Halifax case, paragraph 80.

[24] The abovementioned opinion of Poiares Maduro in Halifax case, paragraph 82.

[25] The abovementioned opinion of Poiares Maduro in Halifax case, paragraph 82.

In the judgment issued in Halifax case, the Court laid down a two-part test that must be met to establish the existence of abuse. Firstly, it is required that the transactions concerned, notwithstanding the compliance with the formal conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing the Directive, resulted in the achievement of the financial gains which would be contrary to the objective pursued by those provisions. Secondly, it should be apparent also from the entire objective factors that the purpose of the objected transactions is to obtain a tax advantage.[26]

Both parts of the criterion mentioned above are inherently cumulative. Thus, to establish the existence of an abuse in respect of VAT, it is not enough to prove that a particular transaction results in a tax advantage or even that the transaction essentially aims to obtain such benefits, or that there is no other rational justification or explanation. A different conclusion would lead to a significant violation of the recognized freedom of the traders to reduce their tax liabilities.[27] It is therefore necessary to go one step further and establish that the effect of the transaction is a tax advantage which would be contrary to the purpose of the Sixth Directive (Directive 112) and the national legislation transposing it.[28]

Such standpoint was confirmed by the Court, which has already examined the issue of whether the Sixth Directive must be interpreted as meaning that abusive practices may occur when the tax advantage is the principal aim of particular transaction or transactions, or whether one may assume so only when obtaining such a tax advantage is the sole purpose of these actions, with the exclusion of other economic objectives.[29] The Court held that the Sixth Directive must be interpreted as meaning that the existence of an abusive practice may be determined when the tax advantage constitutes the principal aim of the particular transaction or transactions.[30] Thus, limiting the abuse of rights or law is effective when economic goals other than the tax advantage are completely marginal or irrelevant and do not represent other possible reasons for a particular action.

It can be seen from the case law of the Court that the determination of whether the case fulfils the relevant criteria of the practice deemed as abuse is vested in the national court, in accordance with the rules of evidence of national law, insofar as this does not impede the effectiveness of the European Union law. However, the Court ruling in a preliminary ruling, may, if necessary, provide guidance which helps the national court in its interpretation.[31]

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[26] The judgment in Halifax case, paragraphs 74, 75; the opinion of Ján Mazák to the case C-103/09, Weald Leasing Limited, paragraph 12.

[27] The judgment in Halifax case, paragraph 73; the opinion of Ján Mazák to the case C-103/09, Weald Leasing Limited, paragraph 13.

[28] The opinion of Ján Mazák to the case C-103/09, Weald Leasing Limited, paragraph 13.

[29] ECJ judgment C-425/06, Part Service, ECLI:EU:C:2008:108.

[30] ECJ judgment C-425/06, Part Service, paragraph 45.

[31] ECJ judgment in Halifax case, paragraphs 76, 77 and case-law cited therein; ECJ judgment of 3 September 2014, GMAC UK, C-589/12, ECLI:EU:C:2014:2131, paragraph 46.

To assess whether certain actions can be considered to constitute an abusive practice, the national court must firstly examine whether the intended effect is a tax advantage the provision of which would be contrary to one or more of the directives, and, secondly, whether it constituted a fundamental objective of the adopted contractual solution.

As for the first criterion, the national court may, for example, take into account the fact that the expected effect is to obtain a tax advantage related to the exemption. Such an outcome seems to be contrary to the purpose of Art. 11-part A paragraph 1 of the Sixth Directive, i.e. imposing tax liability on everything which constitutes the consideration that has been or is to be received from the customer.[32] With regard to the second criterion, the national court may take into account purely artificial nature of the activities, as well as the bonds of legal, economic or personal character between the respective parties, which can show that a tax advantage is the principal aim of these activities, regardless of the existence of any possible economic goals, resulting, for example, from marketing, organizational and guarantee reasons.[33]

In other words, the national courts will have to determine whether a particular activity could be seen as having an autonomous economic justification unrelated to the mere purpose of avoiding or deferring the payment of VAT.[34]

The Court held in this regard that taxpayers are entitled, in principle, to freedom to choose the organizational structures and the manner of undertaking the actions they consider the best suited to the needs of their business and for the purpose of reducing their tax burden. The Court stated in this regard that in the situation where the taxpayer has the choice between two activities, s/he is entitled to choose to structure his/her business so as to limit his/her tax liability.[35]

The Court held that the choice granted to the trader between the activities exempt from tax and taxable transactions may be based on several factors, in particular the tax considerations relating to the VAT system.[36]

In particular, the Court ruled that

the principle of prohibiting abusive practices does not preclude the entitlement to VAT deduction, referred to in Art. 17 paragraph 3 point a) of the Sixth Directive when, in a situation such as that in the main proceedings, one company, established in a Member State, decides to undertake, through its subsidiary established in another Member State, activities in respect of the leasing of goods for the benefit of the company which is a third party, established in the said first Member State, in order to avoid a situation in which VAT would burden the fees being the remuneration for the

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[32] ECJ judgment, C-425/06, Part Service, paragraph 59 and 60.

[33] Judgment in *Halifax et al*., paragraph 81; in the case Part Service, paragraph 62.

[34] The abovementioned opinion of Poiares Maduro in Halifax case, paragraph 96.

[35] ECJ judgments: in *Halifax et al*., paragraph 73; of 22 December 2010, on *RBS Deutschland Holding*, C-277/08, ECR p. I-13805, paragraph 54.

[36] Judgment of 9 October 2001, in the case C-108/99 *Cantor Fitzgerald International*, Rec. p. I-7257, paragraph 33; judgment in *RBS Deutschland Holding*, paragraph 54.

performance of these activities, whereas these activities are classified in the first Member State as a provision of the services in the scope of rental rendered in the second Member State, while in the second Member State – as the supply of goods undertaken in the first Member State.[37]

Thus, the practice of the abuse of tax law does not take place in the case of reducing the tax burden that takes place using the elements of a given tax (relief, tax exemption, deductions, etc.). Indeed, if the existing law provides the taxpayer with the opportunity to choose from a few legal structures to achieve the intended economic purpose, each of which will have a different tax dimension, then the choice of the most favourable solution from the tax perspective cannot be regarded as an abuse of law.

A ban on the abuse as the principle of interpretation is no longer relevant where the economic activity carried out may have some other explanation than obtaining tax benefit from tax authorities. In such circumstances, the interpretation of a legal provision which refuses to grant that advantage based on an unwritten general principle would mean leaving to tax authorities overly broad discretion in the context of deciding which of the purposes of a given transaction should be considered predominant. This would result in a high degree of uncertainty regarding the legitimate choices made by entrepreneurs and would undermine economic activity, which undoubtedly, deserves protection, provided it is at least to some extent justified by the usual economic objectives.[38]

Regarding the value added tax, the principle of the abuse of rights or law exists as a principle of interpretation.[39]

The extent to which this principle is designed as a general principle of interpretation, it does not require an explicit legislative regulation in the EU legislation to be applicable to the provisions of the Sixth Directive. A mere absence in the directive of the provision clearly establishing the principle of interpretation, according to which abuse would be prohibited – and the same may apply, for example, to the principles of legal certainty or protection of legitimate expectations – cannot constitute the basis of inferring that the legislature intended the EU to exclude this rule from the Sixth Directive (Directive 112). On the contrary, even if the directive indeed included the provision expressly providing for this principle, it could be a mere declaration or codification of an existing general principle.[40]

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[37] Judgment in *RBS Deutschland Holding*.

[38] The abovementioned opinion of Poiares Maduro in Halifax case, paragraph 89.

[39] The abovementioned opinion of Poiares Maduro in Halifax case, paragraph 91.

[40] The abovementioned opinion of Poiares Maduro in Halifax case, paragraph 75; also the view expressed in paragraph 80 of Advocate General S. Alber in *Emsland* that article 4 paragraph 3 of Regulation No 2988/95 on the protection of the financial interests of the European Communities 'does not create a new legal principle but merely codifies a general legal principle already existing in the Community law'. Therefore, in that case the application of such principle of prohibition of abuse did not depend on the subsequent entry into force of Regulation No 2988/95.

In such cases, however, where the actions are justified by a combination of tax and non-tax reasons, further restrictions could be introduced in respect of claims arising from the activities which, in particular areas, usually aim at obtaining tax benefits. However, it will require the adoption of appropriate national legislative measures. The mere interpretation is not enough here. Such measures could include more general rules against abuses, of the kind adopted in some Member States, which apply, among others, to VAT, and which may differ from the VAT related interpretive principle of the prohibition of abuse in the EU law in their scope, modus operandi or effects.[41]

The case-law of the Court provides also the information of the measures that need to be taken after finding abuses. In the judgment in Halifax case, the Court held that in the absence of clear and unequivocal legal basis, finding the existence of abuse cannot lead to sanctions.[42] The transactions which constitute an abuse should rather be redefined in such a way as to recreate the situation that would have existed if not for the transactions constituting the said abuse.[43]

The Court also pointed out what measures can be used by the state to verify whether in the analysed case we deal with abuse. It stated, inter alia, that the tax authority may use evidence from the parallel and unfinished criminal proceedings, provided that the latter is allowed by the national law, there was ensured the principle of proportionality (such a measure is necessary to ensure the collection of taxes and avoidance of fraud), and the taxpayer had the opportunity to raise the opinion on this evidence.[44]

6. At this point it is worth referring to the Court's position in respect of the application of the principle of abuse of rights and law to direct taxes, although it should be firstly recalled that although direct taxation falls within the competence of the Member States, they must exercise their powers in accordance with the law of the EU.[45]

The Court has repeatedly held that, in principle, Member States may justify the adoption of measures relating to direct taxation, which would otherwise be regarded as discriminatory on grounds of fraud prevention. This is most apparent in the judgment in *Marks & Spencer*, in which the Court held that in principle

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[41] The abovementioned opinion of Poiares Maduro in Halifax case, paragraph 90.

[42] The judgment in Halifax case, paragraph 93; the opinion of Ján Mazák to case C-103/09, Weald Leasing Limited, paragraph 11.

[43] The judgment in Halifax case, paragraph 94; the opinion of Ján Mazák to case C-103/09, Weald Leasing Limited, paragraph 11.

[44] ECJ judgment of 17 December 2015, *C-419/14, WebMindl Licences Kft*, ECLI:EU:C:2015:832.

[45] In particular, the judgments of 8 March 2001 in Joined Cases C-397/98 and C-410/98 *Metallgesellschaft et al.*, Rec. p. I-1727, paragraph 37; of 13 December 2005 in case C-446/03 *Marks & Spencer*, ECR, p. I-0837 I, paragraph 29, and of 12 December 2006 in the case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation*, ECR, p. I-11673, paragraph 36.

a national rule restricting the deduction of foreign losses can be justified by the risk of tax evasion, and in particular the risk that the transfer of losses within a group of companies will take place to the companies established in the Member States which apply the highest rates of taxation, in which, as a result, the tax value of the losses will be the highest.[46] The acknowledgement of this kind of reasoning is also clear from the judgments in *Lankhorst-Hohorst*, in the case *X and Y*, and *ICI*, as well as in *Leur-Bloem* (on the takeover bids directive), in *Halifax et al.* (on indirect taxation) and numerous other judgments not related to taxation.[47]

Such a position of the Court can be justified by the following considerations. As a rule, the fact of organising by taxpayers their (cross-border) tax business in a manner most favourable to them is entirely legitimate and indeed fundamental to the concept of the internal market. However, this is permissible only in so far as such structures are authentic, namely they are not entirely artificial creations serving the purpose of abuse and circumvention of national tax law. For example, the mere fact that a resident company establishes a secondary establishment in another Member State cannot form the basis of a general presumption that this was a fraud or tax evasion, even when this Member State has a relatively low level of taxation (or the legal regime under the definition of 'harmful tax measures' within the meaning of the code of conduct for business taxation). Similarly, the fact that a resident company receives a loan from an associated company established in another Member State cannot justify a general presumption of abuse and thus justify a measure which compromises the exercise of fundamental freedoms guaranteed by the Treaty.[48]

A national measure restricting the freedom of establishment may therefore be justified where it specifically targets at wholly artificial arrangements designed to circumvent the legislation of a Member State.[49] The restriction on the freedom of economic activity can be justified exclusively on the ground of preventing abusive practices, and the specific objective of such a restriction must prevent

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[46] Judgment in *Marks & Spencer*, paragraphs 49 and 50.

[47] ECJ judgment of 17 July 1997, case C-28/95 *Leur-Bloem*, Rec. p. I-4161; judgment of 21 February 2006, case C-255/02 *Halifax et al.*, ECR, p. I-1609. See also the judgment of 12 May 1998, case C-367/96 *Kefalas et al.*, Rec. p. I-2843 and the judgment of 14 December 2000, case C-110/99 *Emsland Stärke*, Rec. p. I-11569.

[48] ECJ judgment of 13 March 2007, case C-524/04 *Test Claimants in the Thin Cap Group Litigation*, ECLI:EU:C:2007:161, paragraph 73; (see a similar judgment of 26 September 2000, case C-478/98 *Commission v Belgium*, Rec. p. I-7587, paragraph 45, the abovementioned judgment in *X and Y*, paragraph 62, the judgment of 4 March 2004, case C-334/02 *Commission v France*, Rec. p. I-2229, paragraph 27 and the abovementioned judgment in *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 50).

[49] Judgment in *Test Claimants in the Thin Cap Group Litigation*, paragraph 72; see similar judgment of 16 July 1998 in the case C-264/96 ICI, Rec. p. I-4695, paragraph 26; judgments: in cases *Lankhorst-Hohorst*, paragraph 37, in the case *Marks & Spencer*, paragraph 57 and in the case *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 51.

the conduct involving the creation of wholly artificial arrangements which do not reflect economic reality in order to avoid the tax due on the profits generated by activities in the national territory.[50]

National regulations which are based on the analysis of objective and verifiable elements in order to determine whether a given transaction represents a purely artificial arrangement solely for tax purposes, should be regarded as not going beyond what is necessary to prevent abusive practices where firstly, in every case where one cannot rule out the existence of such a structure, the taxpayer has the opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial reasons due to which the transaction was concluded;[51] and secondly, in order for such rules to be consistent with the principle of proportionality, it is essential that if as a result of the verification of such evidence it turns out that the conclusion of the transaction represents a purely artificial arrangement, not justified by the actual business considerations, the change of the qualification of the interest paid as distributed profits, was limited to the part of the interest that exceeds the interest that would be determined in the absence of a special relationship between the parties or between the parties and a third party.[52]

The Court therefore held that

> Art. 43 EC opposes the legislation of a Member State which limits the possibility of deducting by a resident company for tax purposes the interest paid on the loan received from a direct or an indirect parent company, established in another Member State or from a company established in another Member State, which is controlled by such a parent company, without simultaneously subjecting to such a limitation the resident company which has received a loan from the company which is also a resident, unless firstly, those provisions provide for the analysis of objective and verifiable elements, which allow determining the existence of purely artificial structure used exclusively for tax purposes, providing the possibility for the taxpayer, when required and without being subject to undue administrative constraints to submit the evidence of the commercial reasons which underlie a particular transaction and secondly, these rules in case of the existence of such a structure, qualify the interest as distribution only to the extent in which they exceed the interest that would be determined under conditions of full competition.[53]

Such a position was confirmed by the Court when it was addressed with a direct question whether, in the field of harmonized taxes, this position may apply to non-harmonized taxes, such as direct taxes. The Court reformulated it as a question whether 'there does not exist the interest of Community significance in cases such as the present one, involving cross-border business operations in

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[50] Judgment in *Test Claimants in the Thin Cap Group Litigation*, paragraph 74 and the case-law cited therein.

[51] Judgment in *Test Claimants in the Thin Cap Group Litigation*, paragraph 82.

[52] Judgment in *Test Claimants in the Thin Cap Group Litigation*, paragraph 83.

[53] Judgment in *Test Claimants in the Thin Cap Group Litigation*, paragraph 92.

which the recourse to legal forms not corresponding to the authentic economic transactions might constitute an abuse of the fundamental freedoms enshrined in the EC Treaty, mainly free movement of capital'[54].

The Court took the view that in the EU law there is no general principle, from which there would follow the obligation of the Member States to fight abusive practices in the field of direct taxation and which would prevent the application of a provision such as the provision at issue in the main proceedings at the national court, where the taxable operation results from such practices and the EU law is not an option.[55]

7. In the EU law there is the concept of abuse of rights or law, which has been developed in the case law of the Court and in the meantime acquired a relatively clear content. It was established in the area of the fundamental freedoms and was transferred by the Court on the ground of tax law and developed in relation to specific legal institutions. In simple terms, this concept can be described as the principle of the prohibition of abusive behaviour, according to which 'the subjects of law are unable to rely on the norms of the EU law for the purposes constituting abuse or fraud'. In the Court's opinion, finding an abuse involves, on the one hand, the determination on the basis of an overall assessment of all the objective circumstances of the case, that despite fulfilling all the conditions stipulated by law, the purpose of a particular legal regulation has not been achieved, and on the other hand – the existence of a subjective element, namely the intention to benefit from the legal regulation by artificially creating the conditions required to obtain this benefit.

Undoubtedly, open criteria such as the 'abuse of rights or law' influence the manner of determining the content of the objective, but at the same time they are involved in reading (reconstructing) the normative basis for the settlement, both by fulfilling the role of verifying the result of the interpretation achieved by other methods of interpretation, and possibly – a corrective function. In other words, with such a method of accounting for the essence of the reference, it is necessary to consider the axiological context, and in part, also a factual context – in the process of justifying the validity of the norms underlying the decision. As indicated accurately by L. Leszczyński, the concept of the abuse of rights or law also reinforces the awareness of the importance of various systemic contexts, which can manifest itself in the relationship between the structure of the abuse of rights or law and the criteria expressed in it and the principles of law (Leszczyński 2003, 33ff). This refers to the establishment of the relationship of content between the legal principles and the evaluative criteria contained in the concept of the abuse of rights or law. To this end, it will be necessary to consider not only strictly

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[54] ECJ judgment of 29 March 2012, C-417/10-3M Italia, ECLI:EU:C:2012:184, paragraph 9.

[55] Judgment in the case *3M Italia*, ECLI:EU:C:2012:184, paragraph 32.

legal and factual arguments, namely related to the purpose of a particular activity, but also the equitable arguments. Without a doubt, the interpretation of extra-legal references, such as the analysed 'abuse of law' should be placed in the axiology specified by the principles of law. On the one hand, therefore, it is to respect the principle of legal certainty and, on the other hand, to consider the elements of the legal culture and the state of legal practice, by making law more flexible and by allowing its contextualization and up-dating, which will allow to keep up with the constantly changing economic and social relations.

It becomes important in this context to determine the argumentative and interpretive power of the axiological components found in the general reference clauses, which can be transformed from the rules verifying and corrective the effect of the linguistic interpretation into the fundamental rules, applied equally to the linguistic or systemic rules. The reference to the functional directives as a part of each process of interpretation, especially when it comes to overcoming language boundaries of interpretation and referring to a different meaning than that which is included in the current linguistic meanings, requires a very meticulous reconstruction of certain values and a clear formulation of a functional directive of interpretation referring to the latter. In practical terms, the least desirable situation would be, if the justification of the decision included such an accumulation of various evaluating statements that it would be extremely difficult to identify the axiological assumptions and values underlying such assessments. In addition, these negative effects would be exacerbated if this exaggerated axiologization included arguments of ideological or political character.

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Polish Tax Treaty Policy and Practice – Recent Trends and Developments – Selected Issues

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1. Introduction: types of bilateral tax treaties in Polish treaty policy and practice

Bilateral treaties dealing with tax matters may be classified into two main groups: double tax conventions (hereinafter – DTCs) and tax cooperation agreements (hereinafter – TCAs). DTCs are aimed at the elimination of double taxation in juridical sense with respect to income and capital taxes since they contain norms allocating taxing rights between the two contracting states mostly with respect to income / or certain types of income and capital. They usually also contain norms preventing from tax evasion. Contrary, TCAs deal purely with issues related to legal instruments enabling bilateral cooperation between the contracting states such as: dispute resolution mechanism, exchange of information in tax matters and assistance in collection of taxes. They do not deal with the allocation of taxing rights between the contracting states.

Both types of bilateral tax treaties are present in Polish tax treaty practice. Tax treaties concluded by Poland have a long-standing history going back to the 1930s when the first DTCs with respect to elimination of double taxation of inheritance were concluded with Austria, Czechoslovakia, Hungary and Free City of Gdansk (Mączyński 2015, 24). However, as of today, the Polish tax treaty network covers 87 comprehensive DTCs, based on both: the OECD Model Convention on Income

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and Capital (hereinafter – the OECD Model) and on the UN Model Double Taxation Convention between Developed and Developing Countries (hereinafter – the UN Model) regarding taxes on income and capital (Kukulski 2015a, 355–367; United Nations Model Double Taxation Convention between Developed and Developing Countries 2013, 5–37). These types of tax treaties have the widest personal and objective scope because they apply to persons – individuals and other corporate bodies and cover both taxes on income and taxes on capital. Poland has started to conclude its first comprehensive tax treaties in the early 1970 and 1980.

Besides, Poland has recently concluded 3 tax treaties for the avoidance of double taxation with respect to certain types of income of individuals (DTCs with Guernsey, Jersey and Isle of Man), 3 tax treaties for the avoidance of double taxation with respect to enterprises operating ships or aircrafts in international traffic DTCs with Guernsey, Jersey and Isle of Man). The personal and objective scope of these agreements is limited as compared to comprehensive tax treaties, so they can be regarded as a sub-type of the comprehensive DTCs. (Kukulski 2014a, 17–43; Kukulski 2014b, 7–22). Moreover, Poland is nowadays a party to 3 tax treaties with respect to the elimination of double taxation with respect to inheritance and gift taxes. These are the oldest DTCs dealing with tax matters in Polish tax treaty practice still in force (Mączyński 2015, 24). DTCs on the elimination of double taxation with respect to inheritance and gift taxes are rare in Polish treaty practice. Same trends are observed in tax treaty practice of other OECD Member States (Lang 2013, 158).

The principal objective of a tax treaty, regardless to whom or to what kind of taxes it is applicable, is the avoidance of double taxation in juridical sense by allocating the taxing rights between the contracting states regarding persons and taxes covered by the treaty (Hamaekers, Holmes, Głuchowski, Kardach, Nykiel 2006, 153–170). Accordingly, most of the provisions of a tax treaty deal with this issue. In addition, provisions of a tax treaty typically include a non-discrimination clause, a mechanism for the resolution of cross-border tax disputes (mutual agreement procedure) and provision on exchange of information in tax matters. All the above-mentioned instruments enable cooperation in tax matters between the two contracting states. (Mączyński 2009, 249).

Tax cooperation agreements present in Polish treaty practice include: treaties on taxation of savings income in the form of interest payments and treaties on the exchange of information in tax matters (TIEAs). Both types of such agreements are relatively new in Polish tax treaty practice. Bilateral agreements on taxation of savings income in the form of interest payments provide measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments (Nawrot 2014, 61–68). Poland has signed 11 bilateral agreements of this type with Anguilla, Aruba, British Virgin Islands, Cayman Islands, Dutch Antilles, Guernsey, Isle of Man, Jersey, Montserrat, San Marino and Turks and Caicos. Also, bilateral agreements on the exchange of

information in tax matters (TIEAs) can be regarded as the new trend in Polish treaty practice. Poland has signed 14 bilateral TIEAs, based on the OECD Model Agreement on Exchange of Information on Tax Matters, with tax jurisdictions previously considered as applying the so called "harmful tax competition": Andorra, Bahamas, Belize, Bermudas, British Virgin Islands, Cayman Islands, Dominica, Gibraltar, Grenada, Guernsey, Isle of Man, Jersey, Liberia and San Marino. Moreover, on 7 October 2014 Poland signed and ratified the FATCA Agreement with the United States.

2. Tax policy and practice considerations regarding the comprehensive DTCs concluded by Poland

Poland started to conclude its first DTCs in 1970 and 1980 with the following countries: Austria, Belgium, Canada, China, Denmark, Finland, France, Greece, India, Italy, Japan, Malaysia, the Netherlands, Norway, Pakistan, Spain, Sri Lanka, Thailand, the United Kingdom, the United States and Yugoslavia. Most of the above-mentioned DTCs were replaced or are to be replaced soon by the new tax treaties, except treaties with China, France, Greece, Italy, Japan, Pakistan, Spain, and Thailand. In case of the treaty with India, the profound changes to the treaty in force were introduced by the amending protocol signed on 29 October 2013. The very first DTCs in the Polish treaty practice followed the initial versions of the OECD MC of 1963 and 1977 and were in most cases not in favor of Polish fiscal interests i.e. when taxation of income on passive investments or methods for the elimination of double taxation are concerned, except DTCs with China, India, Pakistan and Sri Lanka which follow the 1980 UN MC recommendations (Kukulski 2015d, 23–35). The analysis of the solutions adopted in DTCs concluded in the first earliest of the Polish tax treaty practice, leads to the conclusion that the country's negotiators were unaware of fiscal consequences of the proper allocation of taxing rights between the contracting states, selection of methods avoiding double taxation and practical importance of instruments enabling the bilateral cooperation in tax matters. Lack of experience in this matter is still visible in 1970s and 1980s tax treaties still in force.

Due to the political and economic transformation initiated in the late 1980s and early 1990s Poland concluded the vast majority of its comprehensive DTCs with the following countries: Albania, Algeria, Australia, Belarus, Bulgaria, Croatia, Cyprus, Czech Republic, Egypt, Estonia, Indonesia, Ireland, Israel, Hungary, Kazakhstan, Kuwait, Latvia, Lithuania, Luxembourg, Malta, Morocco, Moldova, Philippines, Portugal, Romania, Russian Federation, Singapore, Slovakia, Slovenia, South Africa, South Korea, Switzerland, Tunisia, Turkey, Ukraine, United Arab Emirates, Uruguay, Uzbekistan, Vietnam, Zambia and Zimbabwe. Most of them

are still in force, except treaties with the Czech Republic and Singapore, some of them were renegotiated in recent years via amending protocols, i.e. DTC with Cyprus, Hungary, Luxembourg, Malta, Slovakia, South Korea, Switzerland and United Arab Emirates. The impact of the OECD Model and the Commentary to the OECD Model is clearly visible also in that period of development of the Polish tax treaty practice. However, the UN Model recommendations also influenced some DTCs concluded before Poland joined the OECD. So, no drastic change in the tax treaty policy attitude can be observed in this respect (Kukulski 2015b, 101–112). However, after political and economic transformation started, the role and practical importance of DTCs has significantly increased as compared to the period before 31 December 1989 which might be regarded as a symbolic starting point of transformation of the centrally-planned economy into free market economy in Poland. The application of DTCs by tax authorities, courts, tax planning practices involving particular tax jurisdictions and questions raised about their interpretation resulted in the further developments of Polish tax treaty practice in next decades.

On 22 November 1996 Poland joined the OECD and since then has systematically continued to expand its tax treaty network by concluding new DTCs or by changing the existing ones via amending protocols. After its admission to the OECD, Poland signed 38 DTCs with: Armenia, Austria, Azerbaijan, Bangladesh, Belgium, Bosnia and Herzegovina, Canada, Chile, Czech Republic, Denmark, Ethiopia, Federal Republic of Yugoslavia (Serbia and Montenegro), FYR of Macedonia, Finland, Ethiopia, Georgia, Germany, Iran, Island, Jordan, Kirgizstan, Lebanon, Malaysia, Mexico, Mongolia, the Netherlands, New Zeeland, Nigeria, Norway, Qatar, Saudi Arabia, Sri Lanka, Sweden, Syria, Taiwan, Tajikistan, the United Kingdom and the United States (Fiszer 2017, B4). Poland has also renegotiated some DTCs in force, particularly with the country's important treaty partners and introduced in some cases significant changes reflecting Poland's tax treaty policy developments aimed i.e. on elimination of tax planning practices via amending protocols. These include DTCs with the following countries: Austria, Belgium, Cyprus, Denmark, Hungary, India, Iran, Island, Luxembourg, Malta, Norway, Slovakia, South Korea, Switzerland and United Arab Emirates. The recent developments of the Polish tax treaty practice will to be discussed in the subsequent subparagraphs.

3. The influence of the OECD and the UN Models on the Polish tax treaty policy and practice

The Polish DTCs with the OECD Member States, concluded or not, before Poland joined the OECD in 1996, follow or prioritize the OECD Model and Commentary thereon. This is also true in case of DTCs concluded with non-OECD

Member States (Kukulski 2015a, 315–318). However, despite its membership in the OECD, Poland follows some of the UN Model's recommendations in DTCs with many OECD and non-OECD Member States. In other words, the impact of the UN Model is also clearly visible in the Polish tax treaty practice since Poland is still an importer of capital and new technologies.[1] Similar trends were observed in the tax treaty practice of some of the other OECD Member Stares (Wijnen, Magenta 1997, 574–585; Wijnen, de Goede, Alessi 2012, 27–38; Wijnen, de Goede 2014, 118–145).

The following provisions characteristic only for the UN Model are regularly present in the Polish tax treaty practice: 1) Article 12 § 1 and § 2 – providing shared taxation right to both contracting states with respect to royalties, 2) Article 12 § 3 – widening the scope of the definition of 'royalties' on payments of any kind received as consideration for the use of, or the right to use films or tapes used for radio and TV broadcasting, and on payments of any kind received as consideration for the use of, or the right to use industrial, commercial and scientific equipment (leasing of equipment), 3) Article 14 § 1 letter (a) – containing the so called 'fixed base rule' – attributing the right to tax of income on independent provisional services to the source state, 4) Article 13 § 4 – providing a special anti-avoidance provision called 'the immovable property clause' under which a contracting state is allowed to tax realized gains on the alienation of shares of the capital stock of a company, or of interest in a partnership, trust or estate, deriving more than 50% of their value directly or indirectly from such immovable property situated in that state (Wijnen 1998, 135–143; Yaffar, Lennard 2012a, 624–627). Moreover, DTCs concluded by Poland contain also some elements regarding the concept of the permanent establishment (hereinafter – P.E.) typical to the UN Model exclusively. These include in particular: 1) Article 5 § 3 letter (a) – providing the existence of the P.E. also in case of the supervisory activities in connection with a building site, a construction or installation project performed by a foreign enterprise irrespective of whether they are performed by the main contractor or subcontractor, and 2) Article 14 § 1 letter (b) – allowing the source-state taxation of professionals under length of stay criterion, exceeding in aggregate 183 days in the fiscal year.

Some of the UN Model provisions are rarely present in DTCs concluded by Poland. However, also in that case, the impact of the UN Model should be regarded also as significant. For example: 1) Article 18A § 2 and Article 18B § 3 – dealing with shared or exclusive right to tax attributed to the source state of pensions

[1] The UN Model has a significant, comparable to the OECD Model, impact on tax treaty practice of non-OECD Member States, including BRICS countries (Kukulski 2015d, 23–35; Luyo Acosta 2015, 149–153; Yang, Ping Song 2011, 254–267) and also on DTCs concluded by some other OECD Member States i.e. Turkey importing, like Poland, capital and new technologies mostly and exporting goods, some services and labour to its tax treaty partners (Üzeltürk 2011, 436–448).

and other similar remunerations made under the public scheme which is a part of the social security system of that state, 2) Article 5 § 3 letter (b) – stretching the P.E. status also to the furnishing of services, including consultancy services by a foreign enterprise through employees or other personnel engaged by that enterprise for such a purpose, but only if activities of that nature continue within a contracting state for a period or periods aggregating more than 183 days within any 12-month period, and 3) Article 5 § 3 letter (a) – shortening the 12 months threshold up to 6 months after which a building site, construction, assembly or installation project or supervisory activities performed in connection therewith, constitute a P.E. located in the other contracting state (Kukulski 2015b, 111–112). Solutions adopted by DTCs concluded by Poland are far from being unique in this field. The same tendencies were observed in tax treaty practice of some other OECD and non-OECD Member States (Wijnen, de Goede 2014, 142–146).

4. Main trends and recent developments in Polish tax treaty policy and practice

Poland's experience as a tax treaty negotiator is long-standing, rich and diversified. As noted, in building up its own tax treaty network, Poland has generally followed the OECD Model and mirrored articles contained therein which is a typical approach for the OECD Member State. Despite this, some articles of the UN Model have also been included in Polish tax treaties, with both the OECD and non-OECD Member States. Generally, this approach is still valid. Recently signed DTCs with Bosnia and Herzegovina, Ethiopia, Sri Lanka and Taiwan are the examples. However, new trends might be observed and pointed out in the current Polish tax treaty practice and the tax treaty policy. First, Poland starts to adjust its tax treaties to the latest developments of the international tax law, i.e. updates of the OECD Model Convention and Commentary thereon, the OECD/G20 BEPS Actions. This trend includes *inter alia* the implementation of the modern instruments developed by the OECD aimed at preventing tax treaty abuse, harmful tax competition practices and treaty shopping practices as well as modern instruments regulating the bilateral cooperation in tax matters, mechanisms for the resolution of cross-border tax disputes and also administrative assistance in tax matters (Nawrot 2014, 30–61). Moreover, Poland pays more attention on designing distributive rules adopted in tax treaties with the most important – from the perspective of Polish fiscal interests – tax treaty partners. The growing number of amending protocols recently signed by Poland to the tax treaties in force concluded with the countries with which Poland has developed bilateral economic relations is the finest example of this tax treaty policy attitude. Moreover, Poland as the

OECD Member State, is committed to implement the OECD/G20 BEPS Actions which will have a strong impact on the future tax treaty policy and practice. This includes *inter alia* the multilateral instrument developed by the OECD/G20 to enable countries that wish to implement measures designed during the work on BEPS and to amend bilateral tax treaties. This multilateral tax treaty transposing results from the OECD/G20 BEPS Project into more than 2000 tax treaties worldwide, including DTCs concluded by Poland, is going to be signed in June 2017.[2]

4.1. Entitlement to tax treaty benefits from the Polish tax treaty policy and practice perspective

4.1.1. Pension funds, investment funds, charitable organizations and other entities exempt from tax under domestic tax law provisions as persons covered by tax treaties concluded by Poland

In general, tax treaties, including primarily the comprehensive DTCs, are bilateral instruments designed for elimination of double taxation with respect to persons who are considered residents of one or both contracting states. To be considered a resident taxpayer, a person must be covered by a tax treaty, in other words, such a person must be 'liable to tax' in a contracting state under its domestic tax law. This requirement must also be fulfilled with respect to entities which are exempt from tax, i.e. pension funds, investment funds, charitable organizations and other entities. Under domestic tax law provisions, entities exempt from corporate income tax (hereinafter – CIT) such as: State Treasury, National Bank of Poland, budgetary units, units of local government, investment funds, pension funds and charitable organizations located in the EEA and others listed in Art. 6 of the CIT Act are considered entities subject to CIT (Nykiel 2002, 14–15). The term 'subject to tax' includes persons who under the tax law in force are liable to tax. From the Polish legal and tax treaty policy perspective such pension funds, investment funds and charitable organizations are liable to tax in principle, even though they are exempt from tax under a specific condition set by provisions of domestic law. Therefore, such entities have access to the tax treaty benefits (Nykiel 2002, 16–19). Contrary, since 1st January 2014 partnerships incorporated and registered in Poland, except limited joint-stock partnership (*spółka komandytowo-akcyjna*), which are not CIT-payers, due to the fiscal transparency of Polish CIT-regime in force, have not been considered 'liable to tax' and therefore excluded from tax treaty benefits.

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[2] The text of the Multilateral Convention to implement tax treaty related measures to prevent base erosion and profit shifting is available at: http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf (access: 26.01.2017).

4.1.2. Dual-resident companies in DTCs concluded by Poland

Polish tax treaty policy and practice follow the current version of Article 4 § 3 of the OECD Model and the Commentary thereon with respect to a tie-breaker rule in case of dual resident companies. It means that if such a company is considered a resident taxpayer in both contracting states, its place of effective management is decisive: the company is deemed to be a resident only of the state in which its place of effective management is situated. However, lately, this tie-breaker rule for dual-resident companies has been challenged by the OECD/G20 in BEPS Action Project and will be replaced by the new rule based on the mutual agreement procedure criterion (hereafter – MAP) (OECD/G20 Base Erosion and Profit Shifting Project, Final Report, 2015, 9–11). The new OECD/G20 approach has been criticized by some scholars because it might produce problematic results in cases where there is no possibility for the contracting states to reach an agreement *via dispute* mechanism provided by a tax treaty (Schelling 2015, 217). In such situations there is a huge risk of unresolved double taxation.

There are a few deviations from the current version of Article 4 § 3 of the OECD Model in that area in Polish tax treaty practice (Biegalski, Morawski 2010, 306–307). Moreover, some DTCs concluded by Poland, (i.e. DTCs with Armenia, Azerbaijan, Chile, Latvia, Lithuania, Macedonia, Vietnam and the 1974 DTC with the U.S.) use different tie-breaker rules than recommended by the OECD Model. Some DTCs contain a two-step test, (i.e. DTCs with China, Israel, Jordan, Kuwait, Philippines, Singapore, Slovakia, South Korea and Turkey) where at first 'place of effective management' of a company is decisive, but if a company has the place of effective management in one of the Contracting States and the head office of its business in the other Contracting State (or in neither of them), then the competent authorities of both Contracting States will settle the question by MAP. The MAP as the criterion breaking ties between a company and one of the contracting state is provided only in a few DTCs concluded by Poland, i.e. DTCs with Canada, Finland Indonesia, Kazakhstan, the Netherlands – in case of pension funds only, and Thailand. So, the approach of the Polish tax treaty policy and practice with respect to dual-resident companies remains unchanged.

4.1.3. Tax treaty anti-abuse provisions in DTCs concluded by Poland

In October 2015 the OECD/G20 have published the Final Report concerning the Action 6 of the BEPS Plan aimed at the prevention from the granting of tax treaty benefits in inappropriate circumstances.[3] The 2015 Final report identifies tax treaty abuse practices, and in particular treaty shopping, as one of the most important

[3] See: the OECD/G20 Base Erosion and Profit Shifting (BEPS). Preventing the Granting of Treaty Benefits in Inappropriate Circumstances. Action 6 – 2015 Final Report, available at: http://www.oecd.org/tax/beps-2015-final-reports.htm (access: 26.01.2017).

sources of BEPS. According to the OECD/ G20 considerations, taxpayers engaged in treaty shopping and other treaty abuse practices undermine tax sovereignty by claiming tax treaty benefits (i.e. elimination of double taxation in juridical sense) in situations where these benefits were not intended to be granted, thereby depriving countries of tax revenues (Saint-Amans, Russo 2016, 238–239). Treaty shopping practices typically involve persons who are residents of third countries attempting to access the benefits of the treaty concluded between two contracting states (Vega Borrego 2005, 54–69; Panayi 2007, 36; De Broe 2008, 5–20). Treaty abuse strategies have, however, a widest context and cover also aggressive tax planning practices and cases of double non-taxation. The OECD/G20 recognizes that existing anti-abuse rules in tax treaties are nowadays not sufficient to address tax avoidance strategies and therefore the OECD/G20 recommend on the tax treaty level to adopt the following provisions preventing the granting of tax treaty benefits in inappropriate circumstances: 1) introduction a general anti-avoidance rule limiting treaty-abuse practices based on principle purpose of transaction or agreement rule (hereinafter – PPT-rule), 2) introduction of a limitation-on-benefits clause (hereafter – LOB-clause) denying tax treaty benefits in treaty shopping situations, and 3) sealing the already existing in tax treaties specific anti-avoidance provisions, i.e. beneficial ownership clause, immovable property clause, switch-over clause, exit/departure tax clause etc. (Quanfang 2015, 140; Wilk 2015, 304–306). Moreover, the OECD/G20 recommend a clear statement that the states that enter into a tax treaty intend to avoid creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements that will be included in tax treaty.

Provisions preventing the granting of treaty benefits in inappropriate circumstances, such as the PPT-rules and/or LOB-clauses, are rare and relatively new in the Polish tax treaty policy and practice. In Poland, the preferred approach to prevent treaty abuse, including treaty shopping, is the adoption of a general anti-avoidance rule (hereafter – GAAR) in the form of a PPT-rule which is considered as a minimal standard of protection. Poland has agreed on PPT-rules with several states (i.e. Belgium, Bosnia and Herzegovina, Ethiopia, India, Saudi Arabia, Slovakia, South Korea, United Arab Emirates and in recently signed DTC with Taiwan). The Polish approach adopted in tax treaties using the GAAR in the form of PPT-rule has one further advantage: it generally avoids issues arising in the context of treaty overridden through domestic anti-avoidance rules. It is worth mentioning that Poland introduced a domestic GAAR in July 2016, absent for almost twenty years since the Constitutional Court in case K 4/03 of the of 11 May 2004 found the previous GAAR which did not meet the constitutional standards of decent legislation and infringed the principle of legal certainty under the scope of democratic rule of law (Art. 2 of the Constitution of the Republic of Poland).

The LOB-clauses are rare in Polish tax treaty practice. Such a clause is present in the new Polish-U.S. tax treaty, signed in 2013. However, the treaty has not been ratified by the US Senate yet, so the treaty signed by Poland with the US in 1974 with no LOB clause is applicable. Moreover, the simplified version of the LOB-clause exists in DTC with Israel. A unique solution was adopted in the tax treaty with Sweden which excludes certain categories of resident companies from the treaty benefits on the basis of business activity or functions performed, i.e. banking, shipping, financing or insurance or from being the headquarters, coordination center or similar entity providing administrative services or other support to a group of companies.

Some specific anti-avoidance provisions, such as beneficial ownership clauses have been for many decades present in the Polish tax treaty policy and practice and constitute its constant feature. Similarly, the immovable property clause as recommended in Art. 13(4) OECD Model is widespread in DTCs concluded by Poland, mostly with the OECD MS (Kukulski 2015a, 343–347). Contrary to anti-avoidance clauses based on Article 13(4) UN Model extending the scope of application of immovable property clause also on gains from the alienation of interests in real property partnerships, trusts and estates, as well as Art. 13 § 5 of the UN Model granting the source state right to tax gains from alienation of other shares than real property shares, are present in single tax treaties concluded by Poland. Similar approach is characteristic for the Polish tax treaty policy and practice with respect to switch-over clauses, based on recommendations provided by Art. 23A § 4 of the OECD Model which start to appear in DTCs recently concluded or amended by Poland (i.e. DTCs with Luxembourg and Slovakia). Also, only a few DTCs concluded by Poland, (i.e. with Austria, Canada, Denmark, Germany and the Netherlands), contain a specific measure against tax avoidance related to emigration and with the so called 'exit/departure tax'. So far, Poland has not taxed unrealized capital gains of taxpayers moving their assets or their tax residence out of Poland, so such rules serve only to protect fiscal interests of Poland's tax treaty partners. However, due to the obligation of implementation of the Council Directive (EU) 2016/1164 of 12 July 2016 lying down rules against tax avoidance practices that directly affect the functioning of the internal market, such rules will appear in Polish domestic tax law no later than in 2020.

4.2. Dispute resolution mechanism – arbitration clause – and administrative assistance in tax matters in DTCs concluded by Poland

DTCs concluded by Poland do not contain an arbitration clause, recommended by the Article 25 § 5 of the OECD Model and/or by the Article 25B § 5 of the UN Model, in the provision on the MAP. Constant lack of this modern and efficient dispute resolution instrument, regarded nowadays as a minimum standard of

bilateral cooperation in tax matters, is still clearly visible in the Polish tax treaty polity and practice. It is one of its greatest scarcity. Poland has mandatory and binding arbitration in force with only 2 tax treaty partners, i.e. the Netherlands and Switzerland (Kukulski 2015, I, 317). Following the OECD Model, the treaty with the Netherlands, provides that the competent authorities have two years to reach an agreement to resolve a case before it is submitted to arbitration, while DTC with Switzerland is based on the UN Model's Article 25B § 5 and extends the time limit up to 3 years. The reason why some countries prefer to prolong the arbitration for an additional year seems to result from the complexity of cases to be solved, i.e. transfer pricing disputes which require detailed and time-consuming technical analysis by the competent authorities (Schelling 2015, 220). However, due to the OECD/G20 work under BEPS Action 14: Making Dispute Mechanism More Effective, one will expect that the arbitration clause will appear more frequently in DTCs concluded or amended via the amending protocols by Poland. This trend deserves positive evaluation.

Like the other OECD MS, Poland has changed its tax treaty policy and practice and started to include the provisions of Article 26 § 5 of the OECD Model, as amended in 2005, providing the overriding of the banking secrecy clause while exchanging information in tax matters. Similar recommendations in that respect were introduced to the updated in 2011 UN Model (Bethel 2012, 618–623; Yaffar, Lenard 2012b, 590–597). The Polish tax treaty policy and practice is now in line with the OECD Model and the Commentary thereon. The overriding of the banking secrecy clause is present in 24 DTCs recently concluded by Poland or changed by the amending protocols (28,6% of the whole number of DTCs concluded by Poland). These include DTCs with: Belgium, Bosnia & Herzegovina, Canada, Cyprus, Czech Rep., Denmark, Ethiopia, Finland, India, Island, Luxembourg, Malaysia, Malta, New Zeeland, Norway, Singapore, Slovakia, South Korea, Sri Lanka, Sweden, Switzerland, the United Kingdom, the United Arab Emirates (the UAE) and the United States. It is an upward trend in recent Polish tax treaty practice. Moreover, tax treaties recently concluded, changed by the amending protocols by Poland start to include a clause dealing with the assistance in collection of taxes, as recommended in Article 27 of the OECD Model and in updated in 2011 Article 27 of the UN Model.

5. Trends and developments of Polish policy and practice regarding tax cooperation agreements

As mentioned above, all comprehensive DTCs concluded by Poland contain provisions providing for exchange of information in tax matters on request which are in line with the OECD standard set by the current wording of the Article 26 of the OECD Model. They assure a minimum level of bilateral tax cooperation

with competent tax authorities of all Poland's economically important partner jurisdictions. Poland has taken active steps to update its tax treaty network with countries with which it is exchanging information upon request by signing new agreements and amending protocols to the existing agreements (Kukulski 2015c, 39–62).

Poland has signed 14 bilateral TIEAs, based on the OECD Model Agreement on Exchange of Information on Tax Matters, with tax jurisdictions previously considered as applying the so called 'harmful tax competition': Andorra, Bahamas, Belize, Bermuda, British Virgin Islands, Cayman Islands, Dominica, Gibraltar, Grenada, Guernsey, Isle of Man, Jersey, Liberia and San Marino. Moreover, on 7 October 2014 Poland signed and ratified the FATCA Agreement with the United States. The TIEAs concluded by Poland are based on the OECD Model Agreement on Exchange of Information in Tax Matters.[4]

Poland is a party to the 1988 Multilateral Convention on Mutual Administrative Assistance in Tax Matters, as amended by the 2010 Protocol, and followed up by signing, on 29 October 2014, the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (hereafter – MCAA).[5] Poland was one of the signatories of the MCAA and the first intended information exchange date in Poland is going to be September 2017.[6] The MCAA is a multilateral, effective instrument providing rules for tax information exchange and allowing the automatic information exchange as provided by the Common Reporting Standard (CRS) developed by the OECD/G20 in result of the BEPS Project. Poland is in contact with several tax jurisdictions with the intention to conclude bilateral memoranda on the introduction of automatic information exchange in tax matters, using as a legal basis the multilateral instrument.

6. Conclusions

In the last five years the number of bilateral tax treaties concluded by Poland has rapidly expanded. Comprehensive DTCs, based on the OECD and the UN Models, and DTCs with respect to elimination of double taxation of inheritance are no longer tax treaties in the Polish tax treaty practice. New types of tax treaties have appeared, previously unknown for the Polish tax treaty practice,

[4] The text of the OECD Model Agreement on Exchange of Information in Tax Matters, available at: http://www.oecd.org/ctp/harmful/2082215.pdf (access: 26.01.2017).

[5] The text of the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information, available at: http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/ (access: 26.01.2017).

[6] See the list of MCAA's signatories and intended first information exchange dates at: http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/MCAA-Signatories.pdf (access: 26.01.2017).

such as: tax cooperation agreement and tax treaties for the avoidance of double taxation with respect to certain types of income of individuals and tax treaties for the avoidance of double taxation with respect to enterprises operating ships or aircrafts in international traffic.

However, the recent Polish tax treaty policy and practice are primarily focused on improvement of the existing tax treaty network with all Poland's economically important partner jurisdictions. The number of amending protocols signed in the last five years changing tax treaty provisions curial from Polish fiscal interest is impressive. This approach in the first-place secures government revenues, but secondly underpins the unimpeded flow of capital and investments between Poland and its tax treaty partners and enhances also certainty and predictability in avoidance of double taxation in juridical sense. An important area of the contemporary Polish tax treaty policy and practice is nowadays the implementation of the OECD's and G20 recent developments in international tax law. Poland's tax treaty policy and practice are currently undergoing some readjustment to achieve alignment with the BEPS Action Project in order to combat base erosion and profit shifting practices firstly by transparency and exchange of information, and secondly by adoption modern tax treaty instruments against treaty abuse.

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Methods to Prevent Tax Evasion and Tax Avoidance in the Polish Tax System with Respect to Incomes Taxes

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1. Introductory remarks

Tax avoidance is a common practice which is present not only in the Polish economic system. It appears that a scale of this phenomenon disclosed recently in Poland is dangerous. This is at least shown by materials collected by the Polish Supreme Audit Office [*Najwyższa Izba Kontroli*][1] but also by the documents of the European Commission in which attention is paid to the scale of the tax avoidance practised by big holding groups (in terms of only CIT) resulting in erosion of the tax base, including also the practice of transfering income beyond the Polish tax system (Gajewski 2015, 17).

It certainly has adverse effects on the state budget but also leads to violation of free competition principles. Because there is no doubt that the entity which does not pay a tax operates in much more beneficial economic circumstances than the entrepreneur who loyally discharges their duty to pay a tax on income actually earned in Poland.

On the other hand, not every form of the taxpayer's activity whose effect is a limitation of the tax liability should be *a priori* disqualified. The problem is that it is necessary to establish a border where the taxpayer's activities which are normal in business finish, aiming to rationalise their costs from artificial or even fraudulent activities. So, the point is to separate practices which are reasonable from an economic point of view (even if it leads to a reduction in tax liability) from the ones in which the taxpayer avoids taxation by applying mechanisms

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[1] It is about the result of the audit performed in tax inspection offices and tax offices.

identified as circumvention of law or abuse of law or by directly violating the binding law through tax evasion.

When fixing the mentioned border it is necessary to take into consideration the taxpayer's right to optimise tax burdens, right to freely create contractual relations (Gomułowicz, Małecki 2011, 226) and the principle *in dubio tributario*[2] expressed in Art. 2a of the Tax Ordinance Act.

In the Polish literature the following terms have appeared:

– 'lawful tax avoidance' (e.g. right to take advantage of tax reliefs and exemptions prescribed by the law, right to choose a flat-rate income tax or to choose an organisational and legal form of operation which is beneficial from the tax point of view) and

– 'illegal tax evasion' (Karwat 2003, 143), sometimes also called the aggressive evasion.

In practice, the illegal tax evasion can mean either the circumvention of law or its abuse. An extreme form of the tax avoidance is formed by activities of the tax evasion.

2. Tax evasion

Tax evasion is an effect of the activity which is directly against the law, connected with a fraud or consciously misrepresenting the tax authorities which results in an unlawful reduction in or total exclusion from tax liability.

In income tax practice, these activities most frequently mean that transactions are not registered, or their value is reduced. A large number of cases subject to the administrative courts' assessment concern situations in which in order to account for tax-deductible expenses or to recover VAT, taxpayers use fictitious invoices (the entity that is indicated on the invoice as a seller of services or goods does not exist or though it exists the invoices made out by it do not, in fact, give evidence of the transaction described in them). Some cases even disclose, as can be said, an 'institutionalised' practice of fictitious turnover of invoices, created and organised by specialised groups of people who 'produce' documents[3] which are even customised to fulfil the taxpayer's order[4].

It must be noted that, as it results from consistent judicial decisions, in case of income taxes, the taxpayer incurs negative fiscal consequences even if it has not been them to have committed a tax fraud but their contractor. To derive certain

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[2] Under Art. 2a of the Tax Ordinance Act: 'Doubts concerning the contents of the tax law provisions that cannot be removed are resolved to the benefit of the taxpayer'.

[3] Invoices, agreements, analyses, minutes etc.

[4] Such practice was noticed in the judgment of the Supreme Administrative Court of 1 Dec.2016, file no II FSK 3287/14 and II FSK 2356/15.

tax effects, it is important that the invoices used by them have not reflected real economic operations. Unlike similar operations in terms of VAT, in case of determining a liability with respect to the income tax, a criterion of the so-called 'good faith' has no decisive importance[5]. Such an example fitting into the existing judicial decisions is the judgement of the Supreme Administrative Court [*Naczelny Sąd Administracyjny*] of 9 December 2015, file no II FSK 2702/12,[6] in which the following thesis can be noticed:

> In terms of Art. 15(1) of the corporate income tax act it is not important if the taxpayer culpably (e.g. as result of carelessness about own business interests or being completely aware) or not accounts for tax-deductible expenses basing on fraudulent, fictitious invoices. The only important fact is that the invoices do not reflect actual transactions. The cost that is incorrectly evidenced cannot be accounted for.

In cases concerning fictitious invoices, the issue of a scope of the obligation imposed on tax authorities becomes especially important to show that documents are unreliable, especially if the taxpayers are content only with a claim that the documents confirm a real transaction.

There is a separate issue to decide if it is correct to attribute negative tax consequences to a given taxpayer when they are only a result of misleading them by an unreliable contractor.

The above problems are mentioned in the judgment of the Supreme Administrative Court of 7 December 2016, file no II FSK 3205/14. In the judgment, the court of cassation emphasised that:

> The taxpayer functioning in professional business operations is under an obligation to maintain a revenue and expense ledger or accounting books meeting higher standards of due diligence. It concerns among others proper evidence of business operations important to establish a tax base and this (in case of tax deductible expenses) in the way that will make it possible for the tax authorities to verify if the transaction has been performed by a given contractor and if a payment has been made (or the transaction has been settled in a different way).

In the NSA's opinion, the entrepreneur should exercise due diligence when choosing a party to a commercial contract especially in transactions of a high value and 'effects of failures of due diligence cannot be transferred to the State Treasury'. It seems that basic tasks of such a prudent entrepreneur should cover

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[5] *Inter alia* in the judgment of 30 September 2016, file no 280/15 the Supreme Administrative Court indicated that in the case when the tax (VAT) results only from the invoice which does not evidence the real event resulting in the tax liability on the part of its issuer, such an invoice does not entitle to deduct the tax included in it, except for the situation when the taxpayer is protected by the so-called good faith (commercial due diligence).

[6] All the judgments of the Supreme Administrative Court (abbr. NSA) invoked in this article are published on the website of the Central Base of Judgments of the Administrative Courts: www.orzeczenia.nsa.gov.pl.

(especially in case of high-value transactions): verifying if the contractor has met the registration duties[7] prescribed by the binding law, checking the place of the registered office and checking if they have any technical and employees' support that would facilitate performance of the agreed task, investigation of reputation and checking if they have a bank account[8] etc. Admittedly, in the present legal circumstances there are no statutory solutions that force entrepreneurs to settle some transactions by means of a bank account, however undoubtedly, standards of modern economy do not cover making a payment or accepting a payment in cash[9] in case of high-value operations. However, whether and to whom the taxpayer has paid for delivered goods is one of the most important facts that demands confirmation in the pending tax proceedings. In judicial decisions and literature, it is accepted that the burden of presenting these facts is vested in the taxpayer[10] (Hanusz 2004, 126–127). The taxpayer's doubts should also arise when there are no express or understandable reasons for offering goods to them at the prices which are significantly lower than the market prices.

In the mentioned judgment of 7 December 2016, the Supreme Administrative Court also indicated at a way of compensating harm that the taxpayer could incur because of negative tax consequences being a result of intended misrepresentation made by an unreliable contractor. In this judgment, the court held that

> If […] the taxpayer's funds were reduced as a result of only a culpable activity of their contractor (e.g. by excluding a possibility of classifying as tax-deductible expenses the amounts indicated on the invoices made out by this contractor), the value of such reduction can alternatively

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[7] Entry in the Central Registration and Information on Business or in the National Court Register (requirement resulting from Art. 14(1) of the Economic Activity Freedom Act of 2 July 2004, Official Journal of 2015, item 584 as amended), registration for tax purposes with the competent tax office.

[8] Quite often a fictitious transaction is connected with the activity of the person who though has fulfilled the obligation of registration but their premises are located in a private flat, are often changed, the entrepreneur does not employ employees and has no technical support or experience that is necessary to perform the agreed task.

[9] Such a requirement existed when the Economic Activity Act of 19 Nov. 1999 was binding, OJ no 101, item 1187 as amended. Under Art. 13(1) of the act 'The entrepreneur is obliged to make or accept payments by means of the entrepreneur's bank account in every case when a party to a transaction is another entrepreneur, and a one-off value of the receivables or liabilities exceeds the equivalent of EUR 3,000 or the equivalent of EUR1,000 when the sum of the values of the receivables and liabilities created in the previous month exceeds EUR 10,000 converted into PLN according to the average exchange rate of foreign currencies announced by the National Bank of Poland on the last day of the month preceding the month in which financial operations are made'.

[10] In the judgment of 11 January 2017, file no II FSK 3863/14, the NSA held *inter alia* that the burden of presenting evidence to show for the benefit of which entities the taxpayer incurred expenditure and how big it was, falls on the taxpayer.

be identified with harm in terms of civil law. In such a case the taxpayer would keep a right to demand a remedy for the harm caused by the contractor (Art. 415 of the [Polish] civil code[11]) in terms of a cause-effect relation within the meaning of Art. 361 § 1 of the [Polish] civil code.[12]

3. Tax avoidance

The issues of the tax avoidance have given rise to a lot of controversy in the judicature and literature (Stanik, Winiarski 2011). This issue is related to the concept of 'circumvention of law' and 'abuse of law'. In practice, both the concepts are sometimes identified with each other. Quite often they are used interchangeably. In the literature, these two categories are clearly distinguished, emphasising that a scope of the concept of the circumvention of law is broader than the concept of the law abuse (Grzybowski 1974, 512). It means that every phenomenon of the law circumvention must be related to its abuse.

In judicial decisions, the circumvention of the tax law is associated with violation of a private and legal construction whose application leads to fruition of the actual state of affairs with which the tax law does not connect the tax liability.[13] In the literature, the circumvention of the tax law is understood as the taxpayer's choice of such an activity which in its content differs from the activities undertaken in normal circumstances. Not is the choice itself so much reprehensible as its purpose which is tax evasion (Kosikowski 2006, 5). In practice, the law circumvention most frequently means a formal configuration of an act in law in such a way that it produces beneficial tax results while in fact, this act has a completely different legal character and economic results obtained from it, in principle, are subject to taxation (or to higher taxation) (Winiarski 2015, 106).

The law abuse should be understood as the abuse of the legal right, of certain freedom legally protected, an entitlement or competence. The law abuse can be understood as an exercise of the granted right, however, in a way against its economic, financial or social purpose (Gomułowicz, Małecki 2004, 183). In the context of civil law in such a case the invoking of the legal right does not constitute its exercise and its abuse is not socially approved of and that is why, it is not subject to protection.[14]

Until a general clause to prevent tax avoidance was introduced into the Tax Ordinance Act, the Polish tax law had been missing regulations allowing neglection of tax effects of the taxpayer's activities having features only of the law abuse within the meaning presented above.

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[11] Art. 415 of the civil code: 'This person that caused harm to the other is obliged to remedy it'.

[12] Art. 361 § 1 of the civil code: 'The person obliged to remedy the harm incurs liability only for ordinary consequences of action or omission from which the harm came'.

[13] NSA judgment of 31 January 2013, file no. FSK 1129/11.

[14] Judgment of the Court of Appeal in Kraków of 27 March 2015, file no I Aca 84/15.

4. General clause against tax avoidance

On 15 July 2016, the Tax Ordinance Act[15] was supplemented by Section IIIa entitled 'Tax avoidance prevention'[16] introducing into the Polish legal order a general clause against tax avoidance as well as a special procedure related to its application.

In Art. 119a § 1 *in initio* of the O.p. a concept of the tax avoidance was defined. It is: 'An activity performed mainly to achieve a tax benefit, in given circumstances against the subject and purpose of the provision of the tax law […]'. According to the further provisions of the mentioned regulation, such an activity 'does not result in achievement of the tax benefit if a way of action has been artificial'.

In light of the mentioned provision it is possible not to take into account a tax benefit obtained by the taxpayer only if the following factors jointly occur:

– the performed activity mainly aims to obtain a tax benefit;
– such a benefit, in given circumstances, remains in opposition to the purpose of the provision of the tax law;
– a way of action has been artificial.

The competent state authority (the minister of finance) has obtained an instrument that makes it possible for tax needs to construct factual circumstances which would exist if the artificial structure had not been created.

In this case, the authority should indicate the activity which in given circumstances would be appropriate, that is such one whose subject in given circumstances could perform if they acted reasonably being guided by the lawful purposes, other than obtaining a tax benefit against the subject matter and purpose of the provision of the tax law (Art. 119a § 3 of the Tax Ordinance Act).

The activity is treated as undertaken 'mainly to obtain a tax benefit' when other economic or business purposes of the activity indicated by the taxpayer should be treated as unimportant (Art. 119d of the Tax Ordinance Act).

While the tax benefit is:

1) failure in creation of tax liability, deference of tax liability or reduction in its volume or creation of or overestimation of a tax loss;
2) creation of an overpayment or of a right to a tax refund or overestimation of the amount of the overpayment or of the tax refund (Art. 119e of the Tax Ordinance Act).

The clause was passed half a year ago, however, up to now no proceedings have been instigated related to its use. So, it is impossible now to discuss the practice of its application.

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[15] The Tax Ordinance Act of 29 August 1997, i.e. OJ of 2015, item 613 as amended, hereinafter referred to as 'O.p.'.

[16] Art.119a–119zf added by Art. 1 p. 6 of the act on amendment to the Tax Ordinance Act and some other acts of 13 May 2016 (OJ of 2016, item 846).

However, there are no doubts that finding whether the conditions mentioned in Art. 119a § 1 of the Tax Ordinance Act with respect to the application of the clause have been satisfied will require in most cases reference to the business bases of the performed operations. It must be here noted that so far Polish administrative courts have rather not dealt with the issue of economic conditions of the transactions which cause some tax effects.

However, it seems that in the framework of such an analysis, structures created by taxpayers leading to minimization of tax burdens should also be evaluated on at least a few levels allowing among others to establish:

1) whether individual actions (causing even immediate tax reduction) create a real perspective of an increase of the taxpayer's economic activity which in future should cause an increase in fiscal burdens;

2) whether the taxpayer's conduct collides with a broadly understood interest of the state (this is not the point of only current budgetary receipts but also of other parameters, such as employment, investment, internal security etc.);

3) whether the discussed taxpayer's activity leads to violation of the competition rules on the market.[17]

In the media, there has been and there still is a discussion if the clause in question will be abused in tax practice. There are even fears that it is going to be 'a razor in hands of a blind monkey'. The fears, however, seem to be exaggerated.

The analysis of the particular regulations in section IIIa of the O.p. allows a conclusion that in the present legal order the clause against tax avoidance will not be a tool applied too frequently.

This is indicated by both the statutory definition of the minimum threshold of the tax benefits obtained by the taxpayer because of applying a mechanism identified as tax avoidance within the meaning of Art. 119a § 1 of the O.p.[18] (PLN 100,000) and mainly by establishing the only competence of the minister of finance to conduct tax proceedings while applying the clause.[19]

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[17] In light of Art.119d of the O.p. 'The activity is accepted as undertaken mainly to achieve a tax benefit, when other economic or business activities indicated by the taxpayer should be treated to be of little importance'. Neglecting the fact of rather incomprehensible use, in the mentioned provision, of terms having similar language meaning ('economic and business objects') it must be noticed that the entrepreneur may seek to achieve a long-term economic objective through decisions which are apparently irrational but in the long-term arrangement it may help fight off effectively competition on a given market. If this kind of activity leads to violation of free competition rules it seems purposeful to consider extension of a possibility to apply the clause also to such cases.

[18] Under Art.119b § 1 p. 1 of the O.p., the provision of Art. 119a is not applied if the tax benefit or sum of the tax benefits acquired by the entity by way of activities does not exceed in the settlement period PLN 100,000, and in case of taxes which are settled periodically – if the tax benefit by way of activities does not exceed PLN 100,000.

[19] Cf. Art. 119g § 1 of the O.p.

One should not expect fast initiation of the first proceedings related to the application of Art. 119a of the O.p.

The introduction of the provisions of section IIIa of the O.p. within the tax year (15 July 2016) arouses doubts with respect to its compatibility with the standards of the Polish Constitution. It is possible to conclude here that the first proceedings connected with the application of the clause will be instigated – somewhat with caution, only in 2018 with reference to tax benefits obtained in 2017.[20]

One should remember that the first attempt in the Polish tax law to regulate a general clause preventing the tax avoidance (Art. 24b § 1 introduced into the Tax Ordinance Act on 1 January 2003) was questioned by the Constitutional Tribunal after a short period of its application. In the judgment of 11 May 2004, case file K 4/03, the Constitutional Court held that Art. 24b § 1 of the tax law was against Art. 2 in relation to Art. 217 of the Constitution of the Polish Republic.

The clause against the tax avoidance regulated in Art. 119a of the Tax Ordinance Act does not apply to the value added tax[21] and to fees and non-taxable budget receivables[22]. In case of VAT, the tax authorities and administrative courts use (effectively in any case) the EU concept of the law abuse developed in the EU provisions.

In many judgments, the EU Tribunal of Justice was expressly against the taxpayer's right to deduct the tax from the added value if the transactions from which the right results constitute its abuse.[23] Furthermore, Art. 88 (3a) p. 4 of the value added tax act directly stipulates a possibility to invoke Art. 58 and 83 of the [*Polish*] civil code.[24]

It must be noted that in light of Art. 119b § 1 p. 5 of the Tax Ordinance Act the provision of Art. 119a is not applied if the application of other provisions of the tax law allows prevention of the tax avoidance.

All this leads to a conclusion that in the tax practice to prevent the tax avoidance other forms than the clause preventing the tax avoidance and the tax evasion will still be most frequently applied.

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[20] E.g. in case of income taxes settled for annual periods.

[21] Hereinafter the value added tax is called VAT.

[22] Art. 119b § 1 p. 4 of the O.p.

[23] Cf. *inter alia* the judgment of the EU Tribunal of Justice of 21 February 2006, C-255/02 in the case of Halifax plc. et seq.

[24] Under this provision invoices and custom documents do not constitute a reason for decrease in due tax and return of tax difference or tax refund calculated in the case when they confirm activities that provisions of Art. 58 and 83 of the civil code apply to them – in the part concerning these activities.

5. Other forms preventing the tax avoidance than the general clause

The administrative courts encounter various practices which fit into activities aiming at the aggressive tax optimisation.

It is symptomatic that knowledge about patterns of these practices could be derived until recently not so much from the documents collected by the authorities in the process of the tax administrative proceedings (i.e. aiming to establish a correct value of the tax liability) but more frequently when analysing descriptions of facts contained in enquiries about individual interpretation of the tax law concerning future events.[25] The constructions described in such enquiries often reflect projects of very complex operations which sometimes are divided into partial transactions covered by various interpretation enquiries, including those submitted by various entities or to different interpretation authorities (quite often with the same address of petitioners or of an attorney-in-fact). This practice is most frequently connected with:

1) taking advantage of entities registered in the countries applying lower tax rates;

2) transactions made through the closed-end investment funds registered in the country;

3) transactions made by setting up partnerships for this purpose (not subject to CIT), which are later subject to many stages of transformation processes.

A question here arises what instruments the tax authorities had had at their disposal before 15 July 2016 that had offered a possibility to prevent the activities that could be qualified as the ones circumventing the law or abusing it. The judicial decisions of the administrative courts show that effects of the activities having features of the tax avoidance were challenged (at least there were attempts to identify them) through the application of instruments connected with the use of:

1) general principles concerning the settlement of tax-deductible expenses (Art. 15(1) of the CIT act[26] and Art. 22(1) of the PIT act);[27]

2) other provisions of the tax law, both substantive and procedural ones (including those included in international agreements binding upon Poland)

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[25] According Art. 14b et seq. of the O.p.

[26] CIT act – the corporate income tax act of 15 February 1992 (OJ of 2014, item 851 as amended); PIT act – the personal income tax act of 26 July 1991 (OJ of 2012, item 361 as amended).

[27] These provisions are of basic importance when deciding about the subject taxed by the income tax i.e income. The income in principle is a surplus of revenue over costs of earning it. However, under Art. 22(1) of the PIT Act and Art. 15(1) of the CIT act the cost of earning income [*tax-deductible expense*] is the cost incurred to obtain the income or to retain or secure the source of income (with exceptions prescribed by the statute).

making the creation of the tax effects beneficial for the taxpayer dependant on satisfying some conditions;

3) institutions regulated in Art. 199a § 1 and 2 of the Tax Ordinance Act (to some extent the provisions regulate the issue of the law circumvention);[28]

4) provisions concerning transfer prices regulating effects of shifting profit to related entities, included among others in Art. 25 of the PIT act, Art.11 of the CIT act or in Art. 32 of the value added tax act;[29]

5) provisions regulating taxation of controlled foreign corporations (CFC) i.e. Art. 24a of the CIT act and Art. 30f of the PIT act.

Until the end of 2018, Poland is supposed to introduce amendments to the provisions regulating a limit of deducting interest on loans taken out from related entities (the issue of the so-called thin capitalisation). The limit will be subject to the earned income unlike now when it is linked to a volume of a lender's share in the authorised share capital in the company. At last, until 2019 Poland is supposed to introduce a tax on the capital exit to another country.

Further, some examples of using mechanisms unrelated to the application of the general clause against the tax avoidance will be indicated.

5.1. General principles concerning settlement of tax-deductible expenses

Art. 15(1) of the CIT act and Art. 22(1) of the PIT act contain similar legislative solutions concerning the taxpayer's possibility to account for tax-deductible expenses incurred to earn income, to obtain security or to maintain an income source.

The regulations, in fact, should constitute an initial point in considerations whether specific values may generally be recognised as tax-deductible expenses. The exclusion of the evaluated expenditure from the cost category within the meaning of the mentioned provisions exempts the tax authorities from a duty to conduct often strenuous and time-consuming activities connected with the application of e.g. the regulations concerning transfer prices. Here, a good example concerns still topical theses included in the final judgment of the Regional Administrative Court [*Wojewódzki Sąd Administracyjny*] in Gliwice of 23 April 2004, file case ISA/GL 872/03. The Court held that

> in light of the contents of Art. 15(1) sentence 1 of the CIT act, the analysis of transfer prices inside the group gives rise to two issues allowing an evaluation if the expenditure made remained in a rational relation to the economic activity (the income source) conducted by the taxpayer

[28] Under Art. 199a § 2 of the O.p.: 'When deciding about the contents of the act in law the tax authority takes into account a consistent intention of the parties and the objective of the activities, and not only the exact wording of declarations of will submitted by the parties' While in light of Art. 199a § 2 of the O.p. ' if under false pretences of one act in law another act in law was made, the tax effects will be derived from the hidden act in law'.

[29] Act of 11 March 2004, OJ of 2011, no 177, item 1054 as amended.

and in consequence if it could be treated as the tax-deductible expense. The first one concerns an answer to the question if services have, in fact, been rendered inside the group or if the payment is a result of a decision made in the group not having a direct economic context. The second one concerns peculiar economic rationality of the activity, connected with the payment of the transfer price (if this activity has taken place) as well as the rationality of the amount of the agreed price. The management services rendered to their own company by a member which apart from a dividend constitute an additional income source, cannot be accepted for the tax purposes as the activities undertaken by a member to normally exercise rights resulting from the holding of shares or stock.

In consequence, the Regional Administrative Court in Gliwice held that 'the fact that the tax authorities questioned a connection of the activities/events, indicated by the petitioner, with the management agreement, made determining the taxpayer's income through estimation unnecessary-pursuant to Art. 11(1) p. 3 in relation to (2) of the CIT act'.

5.2 Necessity to meet resulting conditions and other provisions

There are also such patterns of activity within which in economic operations performed in the country an entity registered in the so-called tax haven participates. The condition to obtain a tax effect beneficial for the taxpayer is to establish a place of actual location of the management board of the company basing on a bilateral agreement.

An illustration of this example was an interpretation case of an off-shore company with the registered office in the United Arab Emirates. Its business activity, despite no branch, plant, office, factory or a warehouse in Poland relates to the area of this country. This company is registered in Poland as an active taxpayer of VAT, but the sale of its goods is made through distributors and other entities under agreements for services. According to the company, it is not subject in Poland to a limited tax liability by way of sales (Art. 3(2) of the CIT act). In its opinion, the location of the management board of the company in the United Arab Emirates is of critical importance. The company is managed by the board consisting of members partly living in Poland (occasionally taking part in the management board meetings in the United Arab Emirates, and in some cases voting electronically).

The Supreme Administrative Court expressed its opinion on it in the judgment of 18 November 2016, file no II FSK 2822/14 indicating how one should understand the term used in Art. 4(4) of the agreement between the Government of the Republic of Poland and the Government of the United Arab Emirates on avoidance of double taxation in respect of income tax[30], i.e: 'a place of actual

[30] The agreement made in Abu Zabi on 31 January 1993 (OJ of 1994, no 81, item 373 as amended).

management board'. In the judgment of 18 November 2016, file no FSK 2822/14 the Supreme Administrative Court held that:

> 1. The place of actual company's board of management within the meaning of the agreement in question is the place where there is the actual management of the entity, decisions are made in cases of key importance for the entity so, of importance for this entity from the economic as well as functional points of view. 2. Declaration made by the petitioner that the company was registered on the territory of the United Arab Emirates, where it had its registered office, where it would be periodically visited by members of the board living both in the United Arab Emirates and Poland is not sufficient to accept that under the agreement the petitioner would be a tax resident in the United Arab Emirates, so in Poland under Art. 3(2) of the CIT act would not be subject to the limited tax liability.

5.3. An opportunity to take advantage of provisions in Art. 199a § 1 and § 2 of the Tax Ordinance Act

The provisions contained in Art. 199a, especially § 1 and § 2 of the Tax Ordinance Act constitute another instrument that makes possible for the tax authorities to prevent phenomena of the tax avoidance.

Art. 199a § 1 of the O.p. concerns the contents of an act in law and § 2 tax concerns effects in case of semblance of the act in law. Under Art. 199a § 1 of the O.p., while establishing the contents of the act in law the tax authorities are under an obligation to investigate consistent intent of the parties and a purpose of the act and not only the exact wording of declarations of will submitted by the parties to the act in law. By its content, the provision relates to the regulation of Art. 65 § 2 of the [*Polish*] civil code (but not altogether). Though Art. 199a § 1 (like Art. 199a § 2) does not entitle the tax authorities to ignore in the context of the tax law consequences resulting from the important and effective acts in law which have been made to evade taxation, this, however, constitutes a basis to derive tax effects from the act in law actually conducted, and not the act just called in a different way by the parties.

The NSA's judgment of 19 Oct. 2016, case file II FSK 1969/16 offers an example of applying Art. 199a § 1 of the Tax Ordinance Act.

The facts of the considered case (it is also about individual interpretation) offered a pattern of the aggressive tax optimisation (which is also directly noticed by the NSA) from which it results that (-) the company acquired bonds for PLN 100,000,000 of a Singapore entity, issued by this entity. The bonds were subject to fixed monthly interest and redemption after 20 years; (-) in consequence of the bond purchase, the Company received in two subsequent months PLN 604,500 as interest on the bonds calculated at the fixed interest rate; (-) as a result of a bond option exercised by the issuer to buy them back in the third month, the Company's account was credited with the amount of PLN 76,078,948.30 described as the **'earlier payment of interest for the whole period'**; (-) in the

subsequent month the Company received PLN 21,836,035 by way of redemption of the bonds by the issuer.

According to the Company, the whole amount of PLN 76,078,948.30 constitutes interest, discussed in Art. 11(5) of the Polish and Singapore agreement (free of tax), while the taxable income is PLN 21,836,035 by way of a bond redemption. As a result, with the taxable income of PLN 21,836,035, the Company holds an opinion that the tax-deductible expense is PLN 100 million. The dispute concerned how to classify the amount of PLN 76,078,948.30; as interest as the company claims (free of tax under Art. 11(5) of the Polish-Singapore agreement), or as the capital return (the view of the interpreting body, finally approved of by the courts of both instances). In the mentioned judgment of 19 October 2016, file no II FSK 1969/16, the NSA held that:

> Though provisions regulating prevention of the tax avoidance (Section IIIa, Art. 119a and seq.) were introduced into the Tax Ordinance Act only on 15 July 2016 (by Art. 1 p. 6 of 13 May 2016, O J, item 846), in the legal order binding before this date the tax authorities could redefine a kind of the act in law in relation to the act indicated by the taxpayer if a different character of such an operation resulted from its contents, the parties' intention and the purpose. Such possibilities were provided and are still provided by Art. 199a § 1 of the Tax Ordinance Act.

In turn, an analysis of the contents of Art. 199a § 2 of the O.p. leads to a conclusion that this provision may be applied only in case of the apparent act in law, and not in the case of the act made only to obtain the intended tax effect but without qualities of semblance.

So, if in light of the mentioned provision the circumvention of tax law should be identified with the apparent activities aiming only to lend colour to the transaction (Materowska 2010, 76)[31] which is beneficial because of the tax, insofar all other activities, the only and basic aim of which is a tax benefit remain beyond the range of so perceived concept of the law circumvention.

5.4. Transfer prices and a possibility to evaluate income

The tax authority's possibilities also extend to a control of taxpayers' actions which relate to the application of the so-called transfer prices, also called transaction prices, applied between entities which are related within the meaning of the provisions of the tax law concerning the personal income tax, corporate income tax and the value added tax (Art. 3 p. 10 of the O.p.).

Assumedly, these regulations were supposed to constitute a legal basis entitling the tax authority to determine through estimation income of a given

[31] E.g. sb. concluded a fictitious agreement while in fact activities arising from it have not been undertaken at all or forerunners of these activities have only been performed to hide activities of another contents.

entity and the tax due resulting from the income in relation to the rendered service to the equity linked entity if because of this link the service was rendered in the conditions which were more beneficial and different from the conditions generally applicable in time and place of the service rendered, the consequence of which was not showing income or showing income lower than that expected if the conditions of the services were not different from the conditions generally applicable in the time and place of the service rendered.[32] So, it is about securing the interest of the tax creditor (the State Treasury) against the practice of the taxpayers in a form of applying in mutual transactions prices different from the market prices just to obtain a beneficial tax result for themselves (Stanik, Winiarski 2010, 39).

In the judgment line of the NSA formed in recent times it is emphasised that categorical articulation contained in the provisions concerning transfer prices, determine a necessity of their application in all the cases of the links between companies mentioned in the act and of fixing prices different from the market prices (certainly if other conditions mentioned in the act are met).

An example of such resolutions is among others the judgment of the NSA of 3 March 2016, file no FSK 357/13 in which it was claimed that:

> Resigning from a certain benefit because of entering into transactions with related entities as a result of which there are fixed conditions different from the conditions that independent entities would fix together, the taxpayer must reckon with a necessity of estimating income of a given tax year. Art. 11(1) in fine of the CIT act categorically imposes in such a case determination of income of a given entity and the tax due without considering conditions resulting from the relation. So, in such a case settling the income by the same virtue in later tax years is without importance.

5.5. Taxation of controlled foreign Corporations (CFC)

Also, the provisions about the controlled foreign corporation i.e. Art. 24a of the CIT act and Art. 30f of the PIT act can be treated as legislative solutions to limit effects of the tax avoidance. The regulations of similar contents were introduced in both the tax acts on 1 January 2015.[33] Taking into considerations the short period in which these provisions have been binding, their application has not been discussed so far in the judicature of the NSA and in relatively few judgments of the regional administrative courts.

The provisions generally aim to fight with

perceived as a tax abuse the transfer of income within a tax group to a jurisdiction where they may be subject to more beneficial taxation or may not be taxed at all (tax haven). The issue of

[32] Reading of Art. 11 of the corporate income tax act and Art. 25 of the personal income tax act directly leads to such conclusions.

[33] Art. 24a of the CIT act added by Art. 1 p. 22, and Art. 30f of the PIT act added by Art. 2 p. 24 of the act on amendment to the corporate income tax act, the personal income tax act and some other acts (OJ, item 1328).

the solution of CFC leads to an obligation to consider in a taxation base of a domestic resident (individual or a CIT payer) the income of the controlled foreign entities with the registered office in the country with lower taxation level than the tax which is binding in the country where the dominant entity resides.[34]

Income of the controlled foreign corporations, obtained by the taxpayer covered in Poland by an unlimited tax obligation are subject in Poland to the tax of 19% of the taxation base (Art. 24a(1) of the CIT act and Art. 30f(1) of the PIT act). For 2015 (the first year when CFC tax became binding) Polish taxpayers submitted 125 tax returns in total concerning taxation of the controlled foreign corporations (Szulc 2017).

So the scale of the discussed phenomenon does not seem especially big, certainly taking into consideration cases declared by the taxpayers themselves.

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[34] Cf. The final judgment of Regional Administrative Court in Warsaw of 15 September 2016, file no III SA/Wa 2203/15.

PART III

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Boosting Digitising Industry in the EU and Ukraine

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The Internet has blown up technological barriers and has opened doors to the digital economy. By using e-business, the entrepreneurship world is gradually developing globalization processes. The basis of virtual forms of economic activity in the form of Internet technologies and Internet network as an environment for fulfilling entrepreneurship efforts is boundless, and lack of incoming borders creates even more competition.

Today the process of economy infrastructure virtualization is not only a replacement of real market institutions by their simulation, including by means of computer technologies, but also conducting business activities mainly in the Internet network: establishing of virtual organizations, concluding of electronic contracts, promoting products and services on the web, submitting electronic declarations, and even use of cryptocurrency. New technologies are changing supply-and-demand. Ultimate goods consumers' influence on economic activities of companies is tangibly increasing, forcing them to adapt to consumers' needs in all areas – from design and market to methods of goods delivery. Those entities will benefit which possess a unique platform that unites many people, but not just any basic asset. For instance, Uber does not own its own fleet of taxis, Facebook itself does not produce its own content, and the world's largest online store Alibaba doesn't have its own products.

Ukraine wants to move towards digital informational economy, and although it still has to go a considerable way towards achieving this goal, information

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technologies have already become vital in many areas. Ukrainian entities do not just use computers and software, but even order creation of individual software products.

There are nominally almost all of the innovation institutions in Ukraine (venture capital funds, business incubators, technology transfer centers, technological and scientific parks, technological clusters, etc.), but their activities do not meet modern requirements; transition to an innovative economy is going on very slowly. The main problem is a lack of a clear strategy of high-tech industries development on a state level, which determines state priorities in the field and serves as a signal to businesses and investors.

Modern infrastructure is a fundamental element in building economy of knowledge, highly competitive digital economy and thus high-tech manufacturing. Information and communication infrastructure is the determining factor for speeding up economic development. State attitude to information and communication technologies (hereinafter – ICT) on a secondary basis during 2000–2014 has resulted in the transformation of Ukraine into one of the least technologically advanced countries in Europe. According to the study results, Ukraine is increasing its lagging behind the developed countries in the matter of development of information society. The introduction of modern communication technologies is being presented with a significant delay, there is a phenomenon of a digital gap in Ukraine and there is no consolidated government ICT strategy. This causes a slow pace of information, knowledge, experience and technology exchange.

There is still no state strategy for the ICT Digital Agenda development for Ukraine, which could play a role of a comprehensive policy paper needed for a dynamic ICT development in Ukraine.

National economy infrastructure virtualization is a new round and a manifestation of rationality of the businesses which by means of modern technologies found a way to reduce operational and transaction costs, overcome market entry barriers created by unfair competition, speed up a capital turnover, and reduce initial capital requirements. It is the fact that has made it possible for small and medium businesses of different countries to become an engine of a new economy, which has to be considered by Ukraine when determining its state policy directions. Virtualization should be seen as a characteristic of the present stage of economic development because it covers all the key components of modern models. In the area of state regulation, it is evident in the process of e-government creation, ensuring of state purchase transparency through the mechanisms of information transparency. In the market self-regulation area it is e-commerce, optimization of contractual obligations and improvement of contracting procedures through the use of electronic signatures, the emergence of virtual markets. Virtualization also covers property relations including electronic money, intellectual property, electronic title registration and virtual data banks. There is transnational corporatization, virtualization of corporate

structures, an opportunity to enter economic space of other countries, bypassing their borders, development of outsourcing, outstaffing, electronic payments, electronic accounting in the area. There is also a possibility of implementing more flexible and alternative strategies to enter a market. New services of virtual security, Internet security, satellite observation systems and others are emerging in the security sphere. Analyzing the process of stock market virtualization, particular attention should be paid to its tools, by which its virtualization is being provided, namely: payment systems, financial instruments, and electronic trade. It is their transformation in the process of rapid spread and development of information and communication technologies that enables access to stock markets in real time from anywhere in the world; and enables almost immediate purchase and sale transactions of any amount of securities.

The global Internet network has become the most dynamic area of human relations. At first it was used only as a means for communication of information. Today it acquires general features of a new form of human communication in a wide range of ways: from personal communication, announcement about events in both private and public life, and direct communication opportunities to conclusion of contracts in electronic form, conducting economic activities in cyberspace (e-commerce), transferring functions of public administration performance into information form through the implementation of "e-government".

For the first time the concept of the fourth industrial revolution industry digitalization or "Industry 4.0" was formulated at the Hanover Exhibition in 2011, being defined as an implementation of "cyber-physical systems" into factory processes. It is assumed that these systems will be combined into a single network, will be connected to each other in real time, will be self-installed and learn new behavior models. Such networks will be able to build up production process with fewer errors, interact with produced goods and, if necessary, adapt themselves to new customer needs. For example, in a production process, a product will be able to determine the equipment that is able to produce it by itself. And it will all happen in a fully autonomous mode without human intervention.

The digital revolution that has been occurring since the middle of the last century, characterized by a fusion of technologies that is blurring the lines between the physical, digital, and biological spheres.

The Digital Transformation of Industries project, launched by the World Economic Forum in 2015, is a multi-year engagement with the aim to analyze the impact of digital technologies on business and society, to understand better digital transformation opportunities and risks in industries and their related sectors, and provide insights and tools required for business model changes. In 2015–2016, the project focused on six industries: Logistics, Media, Consumer Goods, Electricity, Automotive, and Health. It also explored four cross-industry themes: Digital Consumption, Digital Enterprise, Societal Implications, and Platform Governance (The World Economic Forum 2016).

In 2016–2017, the project will focus on further 8 industries: Chemicals, Mining and Metals, Oil and Gas, Insurance, Aviation and Hospitality, Professional Services, Telecoms, and Retail. The cross-industry topics are Platform Governance, Impact of Policy and Regulation, Societal Implications, and Impact of Emerging Technologies.

The goal of the project is to generate insights into how digital technologies are changing individual industries, how they blur the lines between industries, and the impact of these transformations on the wider society. It will assist incumbents in successfully transitioning from analogue to digital, and new entrants in identifying new market opportunities and competitive advantages enabled by digital (Digital Transformation of Industries).

The Governance on the Internet project is a multi-year engagement with the main objective of considering the new governance mechanisms needed to adapt to the increasingly global nature of the internet while maintaining the cultural norms and values of certain regions and nations. In 2015, the project was divided into two major workstreams: (1) drafting an overview report about various forms of internet fragmentation and (2) developing of national digital strategies. In 2016, the project will be divided into further areas of work:

- Digital Trade (co-led with Trade Global Challenge Team);
- Internet Fragmentation and Interoperability;
- Country Digital Strategies;
- Internet Monitor, and
- Government 4.0 ("Governance on the Internet").

The first country on the "Industry 4.0" way was Germany, which has started to invest 40 billion Euros per year in new Internet infrastructure and in creation of global standards within the developed "high-tech strategy". Similar programs were implemented in other developed countries inter alia China, South Korea, and the US, where in 2014, a non-profit consortium Industrial Internet was founded. Among the founders of the consortium there are such corporations as General Electric, AT&T, IBM and Intel.

According to researches conducted specifically for the World Economic Forum in Davos, the key drivers of changes will be cloud technologies, development of Big Data collecting and analyzing methods, crowdsourcing, sharing economics and biotechnology. Among other experts' predictions, "smart" clothing that is connected to the Internet, driverless vehicles, and medicine based on 3D-printing hold leading position.

A Digital Trade workstream in cooperation with the Global Challenge Initiative on International Trade and Investment will define and build a coalition of governments, companies, and experts behind a package of policies that optimally facilitate digitally-enabled trade in goods and services. Such a package could form the basis for a plurilateral agreement among like-minded countries or be added to existing bilateral and regional free trade agreements. The digital

trade topic encompasses not only commerce in products and services delivered via the internet but also the cross-border transfer of data vital to the functioning of global and regional value chains. US digital exports are now estimated to be close to $500 billion a year with Europe as its main market. The Trans-Pacific Partnership (TPP) trade deal agreed in October 2015 between 12 countries including the U.S., Canada, Mexico, Japan, Australia, Malaysia and Singapore covers 36% of global GDP.

One of the defining characteristics of the digital revolution is the plummeting cost of advanced technologies. Cheaper and better technology is creating a more connected world: there are 8 billion devices connected to the internet today; by 2030 it is forecast that there will be 1 trillion. The "combinatorial" effects of technologies, such as mobile, cloud, sensors, analytics and the Internet of Things, are accelerating progress exponentially.

Incumbents will need to transform themselves into digital enterprises to thrive, and this transformation will need to be far more profound than merely investing in the latest digital technologies. Companies will need to search for new business models, fundamentally rethink their operating models, revamp how they attract and foster digital talent, and consider afresh how they measure the success of their business.

Digital Transformation Initiative (DTI) research supports collaboration between the public and private sectors focused on ensuring that digitization unlocks new levels of prosperity for both industry and society.

Digitalization is affecting the Professional Services industry both internally and externally. How digital disrupts other industries will impact the clients of Professional Services firms, which, in turn, will have to adapt their offerings accordingly. Transforming business models to meeting client expectations, pre-empting disruptive competition, and creating the right system of partners will become a source of competitive advantage for these firms. Within the industry, Professional Services companies have an unprecedented opportunity to harness the power of artificial intelligence to augment people's ability to «do», «think» and «learn». By automating routine tasks, technology is freeing people to focus on solving higher-order problems. Technology makes it more important than ever before for companies to be agile – and makes it easier than ever for them to achieve that agility. Technologies such as platforms and machine learning provide organizations with the tools to be ever more responsive. Companies that can anticipate change and react faster than competitors will be able to stay ahead of the curve. Clearly, digitalization will be a source of transformational change for Professional Services, but are we comfortable leaving machines to make ethical and moral decisions? How can the industry and government address a rising skills gap? How can society mitigate the impact of possible technological unemployment from increased automation? And, how can it ensure that the benefits of digitalization are shared equitably?

Over the next decade, digitization has the power to enable countries to kick-start GDP growth, job creation, and innovation. We are already seeing the profound impact that digitization can have on countries that embrace it as a core driver of their economic strategies.

In India, for example, Prime Minister Narendra Modi is implementing a strategy that is transforming India into a technology powerhouse and setting the stage for a digital future. In France, the government has invested in an extensive national digital plan that is expected to create 1.1 million jobs over the next 3–5 years and contribute $101 billion to GDP over the next decade (The World Economic Forum). While other countries are embracing robust digital strategies, Ukraine is falling behind.

During the years of independence of Ukraine, various governments and local authorities took measures as to the establishment of different information systems of national or local scale to provide administrative services in an electronic form. Providing of these services includes online interaction between citizens and the body which provides the service through certain information system interfaces using mechanisms of electronic identification and authentication that should be based on the principles of security and confidence in the identity of either side of this interaction (Потія, Козлова 2015). The European Action Plan for Electronic Governance for 2011–2015 stipulates that in order to get many services it is important to identify and establish individuals and entities, who are provided with the respective services. Electronic identification technologies and services of identification are very important for the security of electronic transactions (in both public and private sector). Today, the most common way is to use password authentication, but the need to develop more secure solutions that will protect privacy is obvious. It is necessary to establish a more effective administrative cooperation for the development and launch of online public services, which will also include practical solutions concerning electronic personality identification and authentication.

Creating such system in Ukraine is also urgent in view of the vectors of political and economic integration into the European Union, and on account of the increasing penetration of information technologies into people's lives, digitization of society and national economy infrastructure.

The Resolution of the Cabinet of Ministers of Ukraine "Some aspects of determining medium-term priorities for innovation activity on a national level for 2017–2021" № 1056 of December 28, 2016 among innovation priorities identified the following: the development of information and telecommunications infrastructure, the introduction of advanced information technologies, including grid- and cloud technology, computer training systems, e-business; development of predictive modeling to solve problems in economy fields; state defense; management of complex objects in ecology, biology and medicine; education; robotics and complex technological systems; introduction of new technologies

of information protection in general-purpose telecommunication and information systems; technology development for long-term storage and management of Big Data; development and standardization of communication technologies of the fifth generation – 5G-technology; development and application of the Internet of Things (Resolution of the Cabinet of Ministers of Ukraine № 1056).

One way to ensure the effectiveness of the elements of innovation infrastructure is its formation by using modern tools of the digital economy (e-economy), namely through a virtual infrastructure. In a general sense, "virtual innovation infrastructure" should be understood as a new form of economic and organizational activities of a national innovation system, which provides the performance of individual stages of innovative activity in the virtual space through e-economy tools and ICT widespread use.

In order to implement priorities of innovation activities it can be suggested to create the following types of virtual elements of innovation infrastructure: (1) virtual technology park, whose work on the commercialization of innovations with the use of ICTs can be organized without its physical location in a particular area by recruiting experts, research, production and technological capacity to address specific problems of innovation activity by means of telecommunications; (2) e-learning centers and e-learning portal for a large company to train employees in the innovation field; (3) consulting and information centers, which help developers get information from a patent agent with the development of an innovative project business plan; (4) specialized centers for collective use of virtual instruments and programs, scientific equipment; (5) certification centers which render assistance in certification of innovations in accordance with the requirements of ISO 9000:2015 and ISO 9001:2015 (companies which have been certified in accordance with the previous version of ISO 9001: 2009 can make the transition to a new version of ISO 9001:2015 in the time of routine supervisory audit or recertification during 3 years transition period until 15 September 2018); (6) thematic portals and databases, including geographic information system, for financial and venture capital organizations, local executive authorities and local self-government bodies, recruitment centers using B2E class information systems (business to employment) for the selection of specialists in the sphere of innovations; (7) social networks of individual innovation developers to conduct electronic data exchange; (8) audit centers of innovation activities; (9) e-business systems (e-commerce): B2B class systems (business to business) for interaction between entities of a region during joint implementation of stages of innovation with the help of virtual trading platforms; auctions; exchanges; portals to find partners to commercialize innovations; B2C class systems (business to consume) to support business processes of innovation implementation; C2B class systems (consumers to business) and C2C (consumers interaction), enabling individual innovation developers to search for enterprises for implementation and realization of their ideas, which are essentially technology transfer networks; (10) virtual

community, as a union of innovation activities subjects in order to work in a virtual space on the same innovation project; (11) virtual conference center; (12) virtual incubator, which provides training and introduction to the market of virtual enterprises (Internet companies); (13) local computing networks in a region, implementing systems of Intranet and Extranet types, regional and global computing networks.

Thus, the Digital Transformation Initiative offers a unique perspective on the digital technologies impact on the economy and society as a whole over the next decade. Ukraine must start to rebuild the system of education and training to modernize its economy infrastructure to create new jobs, and develop new progressive tax legislation.

In July 2013, the European Commission announced its intention introduce e-Invoicing in the public sector of economy in order to enhance efficiency of interoperability of national systems of electronic documents flow. Development of a unified European standard (Directive 2014/55/EU of the European Parliament and of the Council of 16 April 2014 on electronic invoicing in public procurement) for e-Invoicing systems is a key moment in the process of creating a really effective united digital space. However, to achieve the goals set in this Directive there is a need for urgent action, both at the European level and at the level of individual countries to eliminate barriers to the deployment of an integrated electronic document management system in the EU. It is important to understand the scope of this Directive, as it is not limited to a public sector, it should be seen as a universal initiative addressed to organizations of both private and commercial sectors.

As a result the Law of Ukraine "On Amendments to Some Laws of Ukraine on elimination of administrative barriers for export of services" № 1724-VIII was adopted on 3 November 2016 in Ukraine. It provides that in case of services exports (excluding transport) foreign trade agreement (contract) may be concluded by accepting a public offer for agreement (an offer) or by electronic messaging or by other means, for instance by means of billing (invoice), including in electronic form, for services rendered.

New European data protection regulation aims to develop standards of activities and to provide opportunities for enterprises' growth by simplifying work with different legal rules. However, the proposed reform would expand the area of responsibility and accountability of companies in the issue of processing data of customers and clients, as opposed to current methods of document management and data protection.

Today, "cloud computing" with the help of Internet resources provides the most significant impact on the growth of business and commercial activity in Europe. "Cloud computing" may as well change the ways and methods by which information technologies create economic value for entire countries, cities, industries and businesses.

However, companies, which want to "reach for the clouds", are awaited by many difficulties. In Europe, there are different kinds of laws regulating storage and distribution of business information, both within individual countries and within the Union. Thus, companies face difficulties when trying to create a single cloud for all European Union countries where they operate. The reason is that legislation prohibits certain types of data storage beyond national borders.

Despite the fact that in 2016 the Verkhovna Rada of Ukraine has registered a draft law № 4302 concerning cloud computing, and it has been brought into accordance with the recommendations made during the expert discussions; translated into English and presented to representatives of the European Community for analysis, it is more and more difficult for Ukrainian providers of cloud computing to work because of significant gaps in the regulation of this sphere.

Thus, the largest provider's (De Novo) work may be blocked because of tax authorities' claims as to putting on its balance thousands of Microsoft licenses. But in the modern world cloud providers do not buy software, instead, they rent it.

It should be emphasized that there are many start-ups that work in accordance with a model of Software-as-a-Service (SaaS, where software is not sold as a commodity but as a service). They also do not own the software license but use someone else's software in their products and solutions. Therefore, the fear of becoming a primary object of such audits and claims by the state fiscal service will deter investors from forming an ecosystem of cloud services in Ukraine.

Existing Smart City in Ukraine initiatives promoting connectivity in Lviv is encouraging. But, to close the digital divide, a more comprehensive national digital strategy is needed, one that emphasizes digital infrastructure investment, rather than just physical infrastructure investment as it was the past. Only with broad access can technology continue to fulfill its potential as one of the great economic equalizers. An effective Ukraine digitization plan must also support start-ups. Young companies represent the future of job creation – they are the primary source of new jobs in the Ukraine – and technological disruption. Yet start-ups are on the decline.

To boost innovation and job creation, we need to reverse this trend, injecting more fuel into the Ukraine economy's start-up engine. This will require businesses and government to work together to create an environment that encourages entrepreneurs to bring their visions to life. A combination of legislation, such as tax benefits for early-stage companies, and corporate/venture capital investments that provide financial backing and mentorship opportunities to start-ups, will be vital for sustaining this ecosystem.

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Legal Relations between Participants in a Technology Transfer Network

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New technologies are the major factors in shaping competitive advantages and development not only of individual companies but also of modern countries in general. Legislation in the sphere of innovation in the developed countries (the US, the EU member states, Japan, etc.) is traditionally seen as a means of implementing policy documents (strategies, plans of science and innovation development) (Гейця 2015, 236), which set out general guidelines and strategic priorities of a state for a particular period. Thus, in the US National Security Strategy (2015) it is stated that the model of American leadership is based on a totality of economic and technological advantages. Respectively scientific and technological progress strengthens the US leading positions, provides advantages in the military sphere, in economy and in improvement of people's lives. The Strategy specifically emphasizes that maintaining such a state requires a substantial increase in funding for applied and basic research, maintaining an innovative approach to the organization of higher education to promote liberalization of exports of innovative services, innovative technologies and products (National Security Strategy 2015).

The main efforts of the European Union are aimed at stimulating innovation and enhance economic diversity of the Member States' economy. The ultimate result of these efforts was the preparation of solutions and strategies that were

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adopted at forums in Lisbon (2000) and Gothenburg (2001). According to the Lisbon strategy – the plan of the EU economy development for a period of 2000–2010 (Communications from the Commission Europe 2020) – member states had to submit national reform programs for innovation, economic growth and employment as well as reports on actual progress. Implementation of these programs was supposed to provide transformation of the EU into "the most competitive, dynamic and knowledge-based economy in the world, capable of sustainable economic growth, with the availability of better jobs and great social cohesion" (Гейця 2015, 240). Within ten years, set aside for the implementation of the Lisbon strategy, the states have accepted and generally successfully implemented the respective programs, including: the Strategy of Germany in the field of high technology ("High-Tech Strategy"), 2006; German internationalization strategy (aimed at attracting researchers, students and foreign investment, focusing them on R&D), 2008; "The Program of investment in science and technology innovation for 2004–2014" (Long term global economic), 2004 and "The Program of investment in science and technology innovation for 2004–2014" (Science and innovation investment framework), 2004 of Great Britain; Irish National Development Plan 2007–2013 and Strategy on science, technology and innovation aspects 2006–2013; Danish Strategy of national development in terms of globalization, 2006, and the National Program on the innovation development ("Innovation Denmark 2007–2010"), 2007; the framework programs on the development of scientific and technological research of Belgium; the Operational Program "Innovative Economy" of Poland for 2007–2013; Spanish National Plan on scientific research, development and technological innovation for 2008–2011; Luxembourg Program "Competitiveness and Employment 2007–2013", 2007; the National policy of Czech Republic in the field of research, development and innovation for 2009–2015; the National Strategy in the field of science, technology and innovation 2020 of Austria; the National Innovation Strategy 2007–2011 of Finland and the National Plan "Internationalization of education, science, research and innovation 2010–2015", etc. (Innovation policy of foreign countries: conceptions, strategies, priorities, 340–437). At the level of these national programs and strategies a list of major innovative industries and sectors (usually nanotechnology, information and communication technology, biotechnology, pharmaceuticals, renewable energy, etc.) as well as the main approaches to the regulation of relations in the sphere of innovations and particularly technology transfer is defined. It should be noted that the list of innovative industries and sectors of the advanced countries, including Germany, Great Britain, Sweden and other countries is much wider (e.g. intelligent control systems, space, lightweight construction materials, plastic electronics and high-tech environmental services, etc.).

In Ukraine, as in the most CIS countries, boost of innovative development is provided not by adopting policy documents (strategies, concepts, doctrines,

programs), but by legislation. Thus, in the Sustainable Development Strategy "Ukraine – 2020" the following objective was declared: Ukraine has to become a country with a strong economy and advanced innovations (President Decree. Strategy of sustainable Development "Ukraine – 2020" № 5/2015). However, unfortunately, the Strategy doesn't contain instructions on ways to achieve this goal. It is only indicated a need to reform protection of economic competition.

As stated by the authors of the national report "Innovative Ukraine 2020", in the absence of policy documents as for the long-term innovation development of economy, progressive provisions enshrined in legislation, initiated by the Ministry of Education and Science of Ukraine or by scientific community, are either nullified in the process of the approval or their essential norms are eventually cancelled as time goes by. Thus, despite the adoption of the Law of Ukraine "On Innovation Activity" (2002) and the Law "On State Regulation of Technology Transfer" (2006), the rules of laws related to financial support of innovation and technology transfer were suspended by further acts (Гейця 2015, 236–239). Although analysis of legislation and government activities in innovation over the past twenty years has frequently been a subject of review during parliamentary hearings, hearings in the Verkhovna Rada of Ukraine Committee on Science and Education, as well as meetings of the National Security Council of Ukraine (Resolution of Verhovna Rada of Ukraine "On the conception of science and technological and innovative development" № 916-XIV; Resolution of Verhovna Rada of Ukraine "On adherence to legislation on development of science and technological potential" № 1786-IV; Resolution of Verhovna Rada of Ukraine "National innovative system of Ukraine: problems of formation and implementation" № 1244-V; Resolution of Verhovna Rada of Ukraine. "Strategy of innovative development of Ukraine for 2010–2020" № 2632-VI; Resolution of Verhovna Rada of Ukraine "On the state and legislative framework of science and scientific" № 182-VIII), real progress in addressing these issues still cannot be achieved.

The efficiency and competitiveness of the economy, according to Michael Porter, is defined by science, technology, engineering and manufacturing, which at different stages of economic development will be different (Портер 1993, 345). At the present stage of development in the leading countries of the world an innovative type of development that is based on regular and systematic innovations aimed at significantly improving all aspects of the economic system, on periodic forces "regrouping", caused by the logic of scientific progress, goals and objectives of the system, the ability to use certain resource factors to create innovative products and competitive advantages, is being realized (Йохна 2005, 155–156). Developed countries by using technology transfer are seeking to change both their positions and structure of their presence in the international market. For countries in transition, which include Ukraine, development of technology transfer can be a step towards restructuring the economy, a way to increase export revenues to the state budget (Косенко 2004,

345–346). But in general, "innovation growth is no longer solely a prerogative of countries with high income; technology gap between rich and poor countries is declining" – this thesis is especially emphasized at in the report of the World Intellectual Property Organization "The Changing Face of Innovation" (World Intellectual Property Report 2011). This result became possible because of the rapid mechanisms of formation of technology transfer to countries beyond the core of technological leaders (Хаустов 2012, 29–30).

Globalization of technological development naturally leads to aggravation of companies' competition, forcing enterprises of different countries to orientate in the process of production towards the world's best technical solutions, adapting them to the needs of local markets. This creates incentives for trading technology and deepening international scientific and technical cooperation. Under these conditions, technology transfer appears to be an instrument that can extend the best technology and information for practical application of the achieved fundamental knowledge. Conversely, the lack of technology transfer in a country as a system leads to selling the received newest technologies abroad for nothing. This is one of the reasons for the shortfall in foreign investment, it also prevents domestic producers from gaining experience of international cooperation.

One of the main criteria for the innovation economy is technology transfer functioning. Today it becomes increasingly apparent that it is not enough to just create innovative technology, because without its further implementation in the production or its mass use it loses its innovative features. We agree with T. Fedosova, who notes that the real goods on the market are not even the technology development itself, but a technology package that includes besides development a number of additional elements. First of all, it is the stage of the development of so-called engineering services, providing technical assistance in the implementation of the development and operation of equipment, assistance to industrial companies to reduce their costs for maintenance and repair of new equipment. An important element of a technological package is the ability to adapt development to features of its usage by specific customers and to local conditions (Федосова 2011, 16).

The main problem for scientists is the commercialization of an intellectual product created by them, results of research and scientific and technological developments of intellectual property (Лукомский 1999), since otherwise the development of is innovation sphere impossible. It is no coincidence that the US National Security Strategy emphasizes the need to let national laboratory operate on a commercial basis (National Security Strategy, February 2015).

At the present stage of the world economy development technology transfer is the basic foundation of recovery and rapid growth of national economies. It provides a number of businesses with strategic opportunities for the development of internal market, embedding advanced achievements of the international infrastructure, etc. (Теребова 2011, 102–103). Technology transfer involves

interaction between two or more partners, where at least one of them passes through its technology know-how, patents and other technical assistance to another partner who wants to implement and use the technology for a particular purpose. V.K. Khaustov correctly notes that this definition is not interpreted as a commercial technology transfer phenomenon, because it can serve as an increasing amount of knowledge/know-how of one of the parties without any financial agreement (Хаустов 2012, 31–33). By the way a similar conclusion is made by a number of other authors (Титов 2000; Ляшенко 2010, 10–11). Thus, according to Y.P. Zaramenskih, technology transfer and commercialization of technology should be considered as two independent processes of innovation, since they can occur both sequentially and independently from one another (Зараменский 2013, 48). However, as stressed by V.K. Khaustov, technology transfer basic rule is that both sides should mutually benefit from it. A technology receiver, for example, may acquire a know-how and gain technological advantage over its competitors, but an owner of a technology gets financial benefit from cooperation and an opportunity to develop other technological solutions to improve competitiveness, reduce costs, increase profits (Хаустов 2012, 25; Лукша 2006, 89).

Transfer significantly increases the development commercialization potential. Commercialization of developments is aimed at getting business results and begins with discovery of prospects of a new development commercial use, and ends with implementation of a development (technology, goods or services obtained with the help of it) in the market and obtaining commercial effect (Федосова 2011, 16–17).

S. Terebova and L. Volkov noted that in practice, developers and owners of new technologies face a challenge of finding buyers for their developments or partners to create production facilities. There is another side of the problem: if a company plans to achieve a competitive advantage by improving its work technology, there appears a question of where to find information about technologies that may allow business efficiency increase. To solve these problems intermediary organizations are created on the innovation market that may have different forms of organization: networks (centres) of technology transfer (innovation centres), business innovation centres, development agencies and others. Their main function is to provide participants of innovative processes with all necessary services to realize their potential and innovative capabilities in accordance with the principle of "one window" (Теребова 2011, 102). It should be noted that under current conditions the practice of technology transfer through specialized centres is quite common in the world.

Technology transfer networks (innovation networks) are professional associations of infrastructure organizations, activities and services of which are related to commercialization and technology transfer, creation and management of innovation start-up companies, innovative development (Лукша 2006, 66). There

are a lot of centres that occur at universities and research institutions. However, there are models of independent centres that are not legally related to a particular education or research institution. Such centres usually operate on the principle of a network construction.

Effectiveness of a technology transfer network (hereinafter – TTN) is largely caused by participation of commercialization centres (hereinafter – CC) in its activities. Close cooperation between innovation networks and centres of commercialization is mutually beneficial. Thus, CC participation in innovative networks is conditioned, firstly, by services of the CC, provision of which may be effectively achieved through interaction and cooperation with other infrastructure organizations or those located in other regions (countries), or which have other thematic specialization; secondly, by the need of staff training, acquiring new skills and competencies, studying examples of "the best practice". On the other hand, participation in CC innovation networks allows the latter, firstly, to produce and maintain high standards of its services; secondly, to significantly increase opportunities for finding partners for projects; thirdly, to be involved in formation and implementation of innovation policies at regional and international levels (Лукша 2006, 71).

In recent decades the United States, the EU Member States and other developed countries have gained experience in the field of technology transfer through specialized centres. In the European Union there are a lot of innovation networks that use different models of organization of their activity, management, financing. These are mainly the following networks:

– the European Network of Business Innovation Centres (The European BIC Network), which brings together more than 160 business innovation centres and similar institutions (incubators, innovation centres and business centres), which are located in 21 countries, and 70 associate members. This network provides its members with services in the following areas: strategic lobbying and promotion of network members; thematic networks and projects of the European Commission; networks support and coordination; technical assistance and quality increase;

– the Innovation Relay Centres Network which includes 71 regional Innovation relay centres from 33 countries;

– the Innovative Regions in Europe Network which brings together about 235 regions of the European Union and associated countries. The network provides member regions with access to new tools, mechanisms of innovative development, training opportunities in implementing innovative policies to improve the innovative and competitive potential of companies in the region;

– the European Association for the Transfer of Technologies, Innovation and Industrial Information which unites 220 members from 30 countries;

– the Association of European Science & Technology Transfer Professionals – ASTP – which consists of 500 members from 35 countries.

Ukraine, like most of the former Soviet Union countries, is now at the initial stage of formation of effective innovation infrastructure.

Ukraine since declaration of independence has made several attempts to organize an effective network of TT. The most successful among the completed projects is considered to be Ukrainian integrated system of technology transfer (UISTT), the structure of which includes seven regional and branch centres and 17 technology transfer centres of research institutions and universities. This network was created by the decision of the State Agency of Science, Innovation and Information of Ukraine. It aims to provide savings and implementation of operational information exchange between developers and consumers of innovation products. UISTT goal is to ensure functioning of channels of transfer for the promotion of information technology, high technology products and services to domestic and foreign markets, as well as costs reduction for technology developers when seeking for customers and partners, legal protection of technologies authors' intellectual property rights (Regulations of Ukrainian integrated technology transfer system work).

When analysing TT networks that are currently operating in the world, it should be noted that the purpose of their creation is similar and lies in forming an effective tool aimed at supporting a comprehensive and systematic process of technology transfer, expansion of regional, interregional and international interaction between innovative activity subjects and TT and promoting innovative technologies and high-tech products in domestic and foreign markets.

Certain tasks are inherent to each of the technology transfer networks and are usually defined in statutes. Among them we should single out those that occur most often:

– to identify technology needs and available technological developments in scientific organizations;

– to establish and maintain databases serving customers of technology transfer;

– to assist business innovation subjects in the development and promotion of innovative and investment projects (Regulations of Ukrainian integrated technology transfer system work);

– to promote transnational transfer of technologies and knowledge, whatever their origin is, in accordance with the needs of the local industrial, economic and social fabric (Peñataro 2004);

– to create a common database of technology requests and offers;

– to ensure public access to information on technology and other intellectual property having commercial value;

– to search for partners for international innovation projects, including joint participation in projects (Regulations of Russian technology transfer network's work).

As for the process of technology transfer we suggest to use a scheme that is used in the Enterprise Europe Network (EEN) as a basis which consists of the following steps:

- involvement of innovative companies;
- detection of technology requests and offers;
- evaluation of technology requests and proposals;
- financing innovation;
- transnational technology transfer – finding partners;
- transnational technology transfer – negotiation (Лукша 2006).

From the above steps that constitute the entire system of the TT it follows that the key element, without which TT is impossible, is the innovation infrastructure subjects or members of a network. Without presence of such subjects a network's functioning, as an element of any modern innovation system, is impossible.

A modern TT network is built on compliance with the following requirements (Лисенко 2010, 123–124): voluntariness of TT participants; unity of formats; a clear division of roles and tasks between subjects of a network; focus on professional subjects of technology transfer; accuracy of information. Let us consider in detail the substance of these principles.

The principle of voluntariness. It assumes that each network subject knowingly and voluntarily agrees to actions undertaken within the framework of a network. Thus, taking part in the TT is only possible for companies interested in further commercialization of innovative projects. Consent of a company to join technology transfer (obtaining a status of a network's participant) must be conscious and voluntary.

The principle of unity of formats. Technological information used by members of a national technology transfer network for an exchange between each other is provided in a single format (Хаустов 2012, 27). The mentioned principle involves identifying common goals, common structures, common strategies, common format of technological profiles and procedures. Failure to follow this principle of effective interaction of a network is problematic, because a network is a complex mechanism with many subjects, each of which performs its tasks, and all of them are united in a single system, wich functionality is directly dependent on the coherence of all the subjects.

The principle of a clear division of roles and tasks between network's subjects to some extent helps accelerate the commercialization of innovation and optimization of the TT process by creating a single "network body".

The principle of network's construction on terms of involvement of professional participants in technology transfer. According to the requirements of the principle there is a procedure of applicants' certification and conducting specialized seminars to explain the specifics of the network and improve the mechanism of cooperation between the participants prior to obtaining a participant status.

Accuracy of information. This principle requires that members of a network or a coordinator, to whom the authority to fill the site of a network was delegated to, put only reliable information. In order to prevent placement of false information all potential participants are required to pass a special technological audit. This requirement applies to both direct organizations wishing to obtain a status of network members, and individuals who wish to implement their own innovative project by presenting information about it on a network's site.

As for the final stage of technology transfer, a TT network is largely an assistant and an intermediary, unless network staff has special training in conducting business negotiations and contracts. One of the main objectives of a TT network is to promote performance talks by organizing meetings, providing space, information exchange, and customer support throughout the process.

It is possible to obtain a TT network participant status in different ways:

1) organization or institution which wishes to become a member or members of a network, submits a registration form or application and sends it to a network coordinator along with a package of all the necessary documents, then the coordinator makes a decision whether to accept or reject the application. In the case of acceptance of the application the coordinator shall send such documents as a draft agreement on membership and certification program in the network. Then the applicant must pass the certification process, which is provided by the network's founding documents. In the course of certification authorized representative of the applicant in the framework of certification seminars for the preparation of technology profiles of calls and proposals (TC/TP) master the methodology and tools of the network, work skills for e-platform that later on enable them to serve as technical managers (brokers). After the certification process the applicant is given the network participant certificate, an agreement on membership is signed and the access to the electronic platform is provided. After signing the contract and getting access to electronic platforms the applicant officially becomes a party to the network (Regulations of Ukrainian integrated technology transfer system work).

2) The second method of obtaining a status of a network participant is almost identical to the first one except for one important detail: before becoming a network participant the applicant must make a payment or pay a membership fee. Such a payment or fee may be either on one-time or on an annual or quarterly basis.

Analysis of founding documents of the TT networks, EIRMA statute (Statute And Internal Regulations), AUTM charter (Association Of University Technology Managers), Stowarzyszenia "Licensing Executives Society Poland" statute (Stowarzyszenie "Licensing Executives Society Poland"), UISTT Regulations (Regulations of Ukrainian integrated technology transfer system work), RTTN Regulations (Regulations of Russian technology transfer network's work), leads to the conclusion that the first method of obtaining a status of a network participant

is inherent to most of the post-Soviet states, while the second one is more common in European countries.

As for applicants' certification, it should be considered as a process of reviewing of compliance of organization and its activities with certain criteria, fulfilment of which, in a network members opinion, is necessary to maintain the quality of services provided by a network. The procedure of certification is not a mechanism to select potential members/partners of a network, but is aimed only at estimating reliability of an organization as a potential member of a network. Certification procedure helps to determine what action should be taken to improve professional level of an applicant in the TT sphere.

The main criteria to be met by applicants include the following: experience in the TT sphere; determination of activities related to the TT as one of the priorities of an organization; qualified personnel; developed customer base (scientific organizations, universities, small and medium enterprises) and geographic coverage (city, region, etc.); willingness and ability of organizations to accompany customer contacts after expressing interest in TC/TP; experience of international scientific and technical cooperation; experience of technology audit in companies – clients of an organization; readiness of an organization to allocate (find by itself) resources for a project, including training of its staff; business reputation.

After obtaining a status of a network's participant an organization (institution) is endowed with a certain range of rights and responsibilities. The following activity of a network's participant is connected with legal relations within and beyond the network.

The internal relations include:

– filling in the TC/TP database content;
– publishing information about innovative projects;
– monitoring appeals and checking internal mail;
– participation in conferences organized by the network;
– delegation of employees (brokers) to participate in thematic working groups;
– participation in brokerage "events";
– conducting workshops for the network's members;
– organization of technological missions.

Let us analyse certain relations in detail.

Conferences of a network's members are one of the most important ways to ensure communication between specialists in TT. Such measures may form a common vision (policy) of a situation of the problems in technology transfer sphere and at the same time the structure of general conferences plays an important role as well. Thus, conference program should include both sessions during which a discussion of general issues of cooperation within the network take place, and time for business communication (presentations of technologies and development of individual negotiations, etc.). It should be emphasized that exists a possibility

to communicate in an informal atmosphere during conferences as well as to invite partners and customers to themed sessions of the conference. As the experience of conferences shows during their work:

- about 30% of all decisions concerning projects regarding new forms of cooperation between centres are taken;
- 50% of ideas and proposals are generated;
- new contacts, which then provide up to 10% of success stories on technology transfer, are established (Лукша 2006, 33).

Thematic workgroups are associations of professionals, whose activities are focused on specific technology content sectors (e.g. biotechnology, aerospace, new materials, food, etc.). They include specialists who analyse what interesting things are happening in the technological area which is of interest to them. As they represent interests of their clients (companies, research institutions), they establish direct contacts with specialists who directly face or solve certain technological problems (Лукша 2006, 41). Participation in thematic workgroups allows technology brokers to more effectively monitor emerging TC/TP and offer their services to customers for their solution.

Brokerage events are specialized events, during which meetings between the TTC are organized. The purpose of these measures is to provide technology brokers with forums for the presentation of the proposed technologies and/or technological requests. During such congresses face to face meetings between companies and research organizations who are the customers of TTC are also organized (Лукша 2006, 37).

Holding of "brokerage events" is preceded by serious preparatory work: based on a subject or a list of potential participants of the "event", technology brokers form a package of offers/requests, which they will present during the events, and invite customers. They then inform other members of a brokerage event.

In case of prior mutual interest parties agree on the time of negotiations/ presentation. Typically, a technology broker, who comes to this event, has a 70–80% agreed program of meetings (which means that he will only be able to devote a quarter of the time to conduct "unscheduled meeting").

Brokerage events are mainly organized at trade exhibitions or conferences. In addition prospective clients are offered an extra incentive in the form of free access to a fair. This expands possibilities for unscheduled meetings with companies participating in the event, during the days of the event. An event efficiency increases if information on companies involved in the "event" is included into a catalogue of the exhibition/fair.

The maintenance of high standards and quality of service is impossible without constant TT centre staff training. Network collaboration enables network members to share new methods of work and best practices (benchmarking) (Лукша 2006, 29). For this purpose special training workshops/master classes are organized. As general rules, only representatives of organizations

– members of a network can participate in such seminars. A choice of topics for study is based on preliminary analysis of professional issues faced by members of a network (e.g. "customer service organization", "providing legal protection of intellectual property", "methods of technological developments' market potential analysis", etc.)

Technological missions are a form of networking, which directly involves centres customers. A technological mission should be regarded as a prepared visit of representatives of companies/academic organizations to another region (country) to present their capabilities and find potential partners (Лукша 2006, 35).

Technological missions quite often are timed to specific measures, such as a conference, a fair, a brokerage event. Moreover for each mission participant (or a group) an individual program of meetings and visits is developed. Meetings are organized in "host" organizations – companies, research institutes, as rule.

The main problem that arises during the planning process is the logistics of transportation of companies to different places of a city or a region (during all brokerage events all meetings take place in one location, and therefore there are no problems with transportation). Advantages of such missions are that they are extremely targeted, thus provide companies with an excellent opportunity to immediately start discussing technology transfer.

Typically technological missions are conducted with participation of companies from two regions. Usually, they are attended by no more than 8 companies, each of which holds about 6 meetings. As a result, load on the receiving side is much less than during brokerage events. The duration of the mission is typically less than 2 days.

External legal relations that arise between participants in a network's may include:

– Promoting Technology (search for a partner or investor);
– Submitting requests and demands on an electronic platform;
– Conducting technological audit of an enterprise;
– Technology audit;
– Technology search;
– Preparation and maintenance of agreements;
– Support and promotion of requests and proposals;
– Organizing and conducting meetings of interested parties.

Let us consider some of them in more details.

The key objective of promoting technologies is to find a strategic partner or investor, who is ready to become a co-owner of the business innovation. Partnership with a strategic partner/investor may bring an owner of a technology the following benefits:

• An investor/partner can provide financial resources to commercialize the technology;

- A partner can provide highly skilled services and conduct management projects throughout the cycle of technology commercialization;
- A partner can provide industry and market knowledge, in which commercialization of technologies can be realized;
- Access to distribution channels in overseas markets;
- Market recognition of an investor's brand and its reputation;
- Potential savings from production scale increase in supplying, production sales;
- Involving experienced professionals in the project;
- Unique equipment;
- Expanding the range of high products (Методическая поддержка центров коммерциализации технологий 2006, 243).

When searching for a partner/investor developers or innovative companies should clearly understand what they need. The TT network participants provide their services both in identifying the content of a developer's needs and in a very direct search of partners/investors.

Each participant of a TT network should assist customers in filling technology profiles on an electronic platform, namely TC/TP. Each member of the network has the necessary knowledge, received during certification. There is a number of recommendations concerning validity of profiles, but none of them is binding, because each profile description is actually unique and requires to use different areas of knowledge and styles of speech.

Technology formation requests and offers (TC/TP) is the basic task of each TT network. TC/TP are estimated by technology scanning and scanning of novelty. Some networks may provide financial assistance to certain aspects of innovation project preparation, but provision innovative financing is a very specific area and therefore is unlikely for networks, as they operate not for profit, but for self-financing. Hence to get full investment of innovative project it is needed to establish communication between developers and specialized organizations such as venture capital funds, business-angels, the stock market and banks.

A TT network not only helps to find partners, but also provides support during negotiation of the terms of a contract. It may involve a third party with the necessary qualifications. This support includes:

- drafting confidentiality agreements;
- organization of the first meeting, if necessary with the assistance of an interpreter;
- organization of visits to partners;
- providing examples of agreements on technology transfer (Методическая поддержка центров коммерциализации технологий 2006, 126).

Some of the TTN participants are not able to conduct a comprehensive assessment of yet unknown technology in the entirely new industries. They immediately turn to professionals who can estimate value of different types of

transactions, and thereby ensure that the paid or received money for a technology is fair. This support makes negotiation on licensing agreements more effective, and may help identify financial targets for the technology transfer.

Summarizing the study conducted, it should be noted that the existence of TTN allows to accelerate and simplify the process of technology transfer. The study has highlighted and revealed the five principles of construction of any modern TT: voluntariness, unity, a clear division of roles, focus on professional subjects, and accuracy of information. Two ways of getting a TTN status in post-Soviet countries and Europe are indentified in the study. It has been found which relations are characteristic for TTN participants both between the parties within the network and with clients outside of it.

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Regulation of Development of the Grid-Technologies and Derived Innovative Technologies: the EU experience for Ukraine

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IT sector is a classic example of a situation where social and economic relations are developing very dynamically, that is why regulation of relations connected with the use of computer technology often lags behind the practice of regulation of relations in the market. The European Union by means of legislative regulation is trying to direct effective use of innovative computer technology into the flow of global joint achievement of socio-economic benefits, what makes some of the features of European regulation of innovative computer technology very useful for Ukraine and thus requires a separate research. Moreover, in accordance with Art. 56 of the Association Agreement with the EU, Ukraine has committed itself to taking measures on convergence of technical regulation, standards and conformity assessment in accordance with the EU acquis communautaire within adapting national legal system to European standards (Association Agreement 2014).

Unfortunately, regulation of Grid-technologies and the latest rescue for the European economies derivatives from Grid-technologies has not been studied yet by lawyers. At the same time, Ukrainian economists have already paid attention to the significance of Big Data at the European level. For instance, A. Gritsenko in the national report "Innovative Ukraine 2020" highlighted that the Grid-technologies

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had already been implemented from the Big Data in Ukraine and the Grid-infrastructure of academic type had also been created (Інноваційна Україна 2015). Some aspects of the matter in terms of peculiarities of Grid and cloud technologies influence on the economy have also been examined by M.O. Kizim, I.Y. Matiushenko, I.V. Shostak (Кизим, Матюшенко, Шостак 2012). It might have happened either to a lack of information concerning a common origin of new technologies from Grid-technologies or because lawyers, who are involved in the IT field, are primarily focusing on practical but not scientific activity, what actually makes this study more important.

Grid-technologies are complex objects of intellectual property rights, which from different views may be regarded as objects of innovative relationships at different stages of development and implementation. Grid-technology is related to the Information and telecommunication technology group. Considering the legal nature of Grid-technologies, they are covered by the information technology regulation as complex objects of intellectual property of the European Union. Legislative acts of this group include such acts as the EU Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (Directive 2001/29/EC), Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to and interconnection of electronic communications networks and associated facilities (Directive 2002/19/EC), a Framework Directive 2002/20/EC on the authorization of electronic communications networks and services of 7 March 2002 (Directive 2002/20/EC), a Framework Directive 2002/21/EC (amended by Directive 2009/140/EC of 25 November 2009) on a common regulatory framework for electronic communications networks and services of 7 March 2002 (Directive 2002/21/EC), Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services of 7 March 2002 (Directive 2002/22/EC), Directive 26/2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market of 26 February 2014 (Directive 2014/26/EC) and others. The key role of the four main directives, adopted on 7 March 2002, in the development of the EU digital market was recognized by Ukraine. In order to harmonize the legislation of Ukraine and the EU, the implementation of the provisions of the four directives by December 2017 (Directive of the Cabinet of Ministers of Ukraine, № 847-r) have been provided by the Cabinet of Ministers of Ukraine in the directive № 847-r of 17 September 2014.

As for the EU legal regulation, which includes special norms aimed at regulating relations connected with Grid-technologies, in the EU legal system these relations are partly regulated by legal norms of different legislative acts. These legislative acts include: the Council Decision of 30 September 2002 adopting a specific program for research, technological development and demonstration: "Integrating and strengthening the European Research Area" (2002–2006)

(Council Decision 002/834/EC), the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – ICT infrastructures for e-science (COM 2009/0108 final), the Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – Making a reality of the European research Area: Guidelines for EU research activities (2002–2006) (COM 2000/0612 final), the Decision No 1513/2002/EC of the European Parliament and of the Council of 27 June 2002 concerning the sixth framework program of the European Community for research, technological development and demonstration activities, contributing to the creation of the European research Area and to innovation (2002 to 2006) (Decision 1513/2002/EC).

Such official documents, as the Commission staff working document European research area facts and figures 2014 Accompanying the document communication from the Commission to the Council and the European Parliament European Research Area Progress Report 2014 (Commission SWD/2014/0280 final), Proposal for a Council Regulation on the Community legal framework for a European Research Infrastructure (ERI) {SEC(2008) 2278} {SEC(2008) 2279} (COM/2008/0467 final – CNS 2008/0148) also have really significant influence on relations connected with Grid-technologies. Of course, no staff working document, no proposal have mandatory legal force as they do not contain legal norms.

The Council Decision 2002/834/EC of 30 September 2002 adopting a specific program for research, technological development and demonstration: "Integrating and strengthening the European Research Area" (2002–2006) includes promising new research directions: "Research will focus on new computational models, including computing and information GRIDs, peer-to-peer technologies and the associated middleware to make use of large scale highly distributed computing and storage resources and to develop scalable, dependable and secure platforms. It will include novel collaborative tools and programming methods supporting interoperability of applications and new generations of simulation, visualization and datamining tools" (Council Decision 2002/834/EC).

Unfortunately, in Ukraine such research areas came into focus only in 2006 thanks to the initiatives of NAS of Ukraine, when the Presidium adopted an academic concept of the introduction of Grid-technologies in Ukraine by its directive "On adoption of Grid-technologies implementation and creation of clusters program concept" of 25.04.2006 № 249 (Directive of Presidium of NAS № 249) that has created organizational and technical premises and revived society's interest in the development of Grid-technologies in Ukraine. The State target scientific and technical program of implementation and application of Grid technologies for 2009–2013 (Resolution of the Cabinet of Ministers of Ukraine № 1020) was already adopted by the Cabinet Resolution № 1020 of

23 September 2009, due to the implementation of which Ukrainian National Grid (UNG) was created.

In general in Ukraine the priority research areas are classified into strategic and medium-term priority areas, which are respectively determined on a level of Ukrainian laws and on a level of the Cabinet of Ministers of Ukraine regulations. So Art. 4 of the Law of Ukraine "On innovation activity priorities in Ukraine" provides for: "the development of modern information, communication technologies, robotics" (On innovation activity priorities in Ukraine, 2011) as a strategic direction for 2011–2021. To implement this law Resolution № 294 "Certain aspects of defining medium term priority directions of innovation activity on the national level" was adopted by the Cabinet of Ministers of Ukraine of 12 March 2012, which sets the medium-term priorities of innovation activities within the strategic ones. Thus, "The introduction of new sections of Grid-technologies and Cloud computing" (Resolution of Cabinet of Ministers of Ukraine № 294) was enshrined as a medium-term priorities among the strategic directions. On termination of the validity of the Cabinet of Ministers of Ukraine Resolution № 294, Government adopted a new Resolution of 28 December 2016 № 1056, which identified new medium-term priority areas for 2017–2021. This time in the section dedicated to the development of modern information, communication technologies, and robotics, the medium priority status was also given to Grid-technologies: "The development of information and telecommunication infrastructure, introduction of new information technologies, especially grid and cloud ones, computer training systems, e-business" (Resolution of Cabinet of Ministers of Ukraine № 1056).

Thus, despite the introduction of strategic and medium-term priorities in Ukraine, the national legislator is late for at least 7 years. Moreover, it should be noted, that even after the expiry of the state target scientific and technical program, President of NAS of Ukraine Boris Paton reported that the objectives of the program "despite extremely inadequate funding were mainly fulfilled" (Presidium of NAS of Ukraine considered), but this very phrase highlights the fact that the program was not fully performed. Consequently, new target research program "Grid infrastructure and Grid technology for scientific and practical applications" was adopted by Resolution of the Presidium of NAS of Ukraine dated 11 December 2013 № 164 (Resolution of Presidium of NAS of Ukraine № 164). Furthermore, the legislator understands the importance and priority of Grid-technologies for national science and economy, as starting from 2009 and yet to 2021 it pays considerable attention to legislative stimulation of Grid-technologies research.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – ICT infrastructures for e-science (COM 2009/0108 final) in 2009 states the fact of being of European society on the threshold of the modern

renaissance in science: "The systematisation of knowledge supported by observation and experimentation was the distinguishing factor of the scientific revolution in the Renaissance. By scaling experimentation to unprecedented levels to tackle the very small, the very big and the very complex, we are on the verge of a new scientific renaissance" (COM 2009/0108 final).

Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – Making a reality of The European Research Area: Guidelines for EU research activities (2002–2006) (COM 2000/0612 final) was provided towards the development of research, innovation, start-UPS and small and medium enterprises "Strengthening technological innovation capacities in the EU, in particular by supporting research for and in SMEs, dissemination, transfer and take-up of knowledge and technologies, exploitation of research results and setting-up of technology businesses" (COM 2000/0612 final).

Paragraph 3.5.2 of the Commission staff working document European research area facts and figures 2014 Accompanying the document communication from the Commission to the Council and the European Parliament European Research Area Progress Report 2014 (SWD/2014/0280 final), dedicated to public electronic infrastructures (e-infrastructures) policy and related to them digital research service, provides: "strong support from the European Commission in order to make possible a world-class science, based on high performance computing, Wi-Fi infrastructure and Grid-infrastructure, which integrate national initiatives. – Extra efforts are required to ensure federal identifiers" (SWD/2014/0280 final). Therefore it is emphasized that by using Grid technologies it is possible to build world-class science, and it is a fair value.

However, none of the legislators (European legislators are not an exception either) in the case of regulating relations related to technological progress, can get ahead of the natural course of development and spread of technology. After the invention of network Grid technologies and because of them being highly demanded by many researchers in various fields, scientists have begun to cooperate to expand their own Grid networks. At the European level there was a European Grid Infrastructure (EGI), which is now one of the most important providers of IT resources for science. "Driven by the needs of the scientific community, it provides sharing of processing power for scientific purposes between Member States. EGI brings together national grid infrastructures (NGI) that manage Grid infrastructures at a national level. In 2013 EGI gave 3.7 billion computations of basic hours (kSI2K), bringing together 53 countries with more than 300 resource centers and approximately 430,000 cores" (SWD/2014/0280 final).

Ukrainian legislator has used the Proposal for a Council Regulation on the Community legal framework for a European Research Infrastructure (ERI) {SEC (2008) 2278} {SEC (2008) 2279} (COM/2008/0467 final – CNS 2008/0148) and has directly borrowed, which means it has applied literally the reception

of the provisions of the given European proposals, the definition of research infrastructure in paragraph 9 of Art. 1 of the Law of Ukraine "On scientific and technical activity" (On scientific and technical activity, 2015). It is stated in the law that research infrastructure refers to facilities, resources and related services that are used by the scientific community to conduct top-level research in their respective fields. This definition covers: major scientific equipment or sets of instruments; knowledge-based resources such as collections, archives or structured scientific information; enabling ICT-based infrastructures such as Grid, computing, software and communications; any other entity of a unique nature essential" (COM/2008/0467 final – CNS 2008/0148). But in the Ukrainian Law word "computing" was translated wrong as "computers", while "computing" means the process of calculation using many computers, united into a Grid-network. It may seem that this is a small mistake, but it distorts the understanding of this aspect of research infrastructure by Ukrainian society. On the one hand, this is the easiest and even, in our opinion, rather primitive method of implementation, but on the other hand it provides a realization of the axiomatic objectives in any science and law – unity of key terminology throughout Europe. More precisely, it would provide, if only accurate translations were inserted in laws.

In the second decade of the twenty-first century in the leading European and North American countries technologies derived from Grid, including cloud computing, Smart Grid and the Internet of Things (ICT), are used more actively and by a wider range of actors. These technologies are considered in the European Union as key technologies of today, creating infrastructure for economic development of data management in accordance with paragraph. 4.2.2 of Final Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions of 2 July 2014 "Towards a thriving data-driven economy" (COM (2014) 442 final). Accordingly, the regulation in these states is also primarily directed at these specialized derivative technologies.

The European Union now has European strategy for cloud computing, which is called the Final Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions of 27 September 2012 "Unleashing the Potential of Cloud Computing in Europe" (COM (2012) 529 final). There are three key specific actions provided for by Art. 3.2 of the Strategy aimed at establishing trust in cloud technologies among the European community: 1. "Cutting through the Jungle of Standards; 2. Safe and Fair Contract Terms and Conditions; 3. Establishing a European Cloud Partnership to drive innovation and growth from the public sector" (COM (2012) 529 final). Addressing these issues, the European Commission has made activities in the field of cloud computing its main ones.

This partnership is led by a Governing Council (Establishing a Trusted Cloud Europe, 2014) set up to define the features of cloud technologies and make

appropriate proposals for necessary and proportionate regulation, stimulating the development of these technologies in Europe. In the final report of the Governing Council of 18 March 2014 the following proposal was substantiated: to create a reliable cloud of Europe as a system of relations in which the private sector and public authorities and European society in general could put their trust in and make good use of cloud technologies.

Vice President Krouz Nele believes: "Cloud computing is a changer of a game for our economy. Without the EU action, we will stay stuck in national fortresses and miss billions of economic benefits. We need to achieve critical mass and a single set of rules across Europe" (Digital Agenda, 2012).

The results of the study "have demonstrated consistent support of a Secure cloud vision of Europe based on the rapid adoption of the general regulation of data protection in Europe and ensuring effective mechanisms of European "data sovereignty" in the cloud" (COM (2014) 442 final).

Smart Grid is probably the most popular derivative of Grid technology, which is essential for the development of advanced countries of the western hemisphere, and influences regulation of relations connected with this technology. Thus, in the EU Regulation № 1291/2013, which introduces the research program "Horizon 2020", the research area Smart Grid remains one of the priorities, proven by the increasing of funding for research of "smart networks" according to the Art. 3.1 of the Regulation (Regulation (EU) No 1291/2013).

Taking into account the definition stated in the recommendations of the International Telecommunication Union ITU-T Y.2060, the Internet of things (IoT) – is "a global infrastructure for the Information Society, which gives an opportunity of providing more sophisticated services by combining things (physical and virtual) with each other on the bases of existing and developing functionally compatible information and communication technologies" (Recommendation ITU-T Y.2060 (06/2012)). The Internet of things is considered by the European Commission as one of the key technologies for economy of managing data development, that is why the European Commission promises that "a number of major projects will be funded in order to solve arising questions of accessibility, quality and compatibility, relating to data obtained with the help of intelligent connected objects and other Internet of things technologies" (COM (2014) 442 final).

According to some predictions, "by 2020 the proportion of the information produced by the "Internet of Things" will increase up to 40%" (Великі перспективи індустрії Big Data). This means that the development of this technology goes naturally and very rapidly. Consequently, it may simplify lives of people resulting from connecting of almost all of the existing devices and household appliances to the network and may also have the negative results in case of cyber security risks. In particular, hackers have learned to combine things connected to the Internet appliances and most popular IP cameras and DVRs in

botnets, which can carry Ddos-attacks on more interesting networks and objects (Ксендзик). In order to avoid such risks in October 2016 the Commission proposed to introduce state-level certification for all devices connected to the Internet of Things which is similar to the European system of energy goods labeling, which has already been obligatory for cars, home appliances and electric lamps since 1992 (Еврокомиссия может начать). The Deputy European Commissioner for the digital economy and society Thibaut Kleiner considers the certification on a level of each member state a crucial measure for protecting against Ddos-hacking, because "control is needed not only for those devices that, for example, can be protected from hacker attacks using chips, but also for the networks which they are connected to, as well as for cloud storages" (Интернет вещей в Европе будут регулировать).

The development of Data-driven economy is considered to be a trend of a high importance in the western hemisphere, which is stressed in the concept of Big Data. This can be achieved through the use of so-called data management innovations. "The term "Data-driven innovation" (DDI) refers to the ability of businesses and publicsector bodies to use the information on improving data analysis for developing improved services and products that facilitate the daily life of individuals and organizations, including SMEs" (Data-Driven Innovation 2013).

The following facts indicate the interest of government circles and a private sector of the United States in commercialization of the technology mentioned above: "In 2012, the White House allocated $200 million so that various US agencies could organize competitions on introducing the Big Data technologies in life. If in 2009 the US venture funds invested only $1.1 billion in the industry, in 2012 – it was $4.5 billion" (Великі перспективи індустрії Big Data). What is more Barack Obama's victory in the elections of the 44th US President in 2012 and Donald Trump's victory in elections in 2016 (Will a British big data company win Trump the U.S. election?) became known all over the world successful example of Big Data use. The US National Security Agency is also using methods of Big Data: "there is a huge data center built in Utah in which analysts are using Big Data to analyze data collected by the NSA about users in the Internet" (Золотніков, Бондарев 2016). This high level of reliance of leading politicians and law enforcement bodies of one of the most world's powerful countries and the success in practical usage of Big Data shows the obvious efficiency and enormous potential of this technology.

In particular an action plan on the implementation of data management of the economy was provided with the final report of the European Commission to the European Parliament, the Council of Europe, the European Economic and Social Committee and the Committee of the Regions of the European Union "Towards a thriving data-driven economy" dated 2 July 2014. A part of the plan is to create an incubator of open data within a scientific program "Horizon 2020", which will help small to medium-sized enterprises (hereinafter – SMEs) "create

a supply chain based on data, will contribute to the development of open and fair terms of access to information resources, will facilitate access to cloud computing, will strengthen ties with local data incubators across Europe and will help SMEs get legal advice" (COM (2014) 442 final).

In general, the term "Big Data" was introduced into scientific circulation by an editor of a popular science magazine "Nature" Clifford Lynch, who brought together different materials about an explosure in the volume and variety of data in the world. On the basis of Lynch's research a special issue of this magazine was published in September 2008. In the 455th issue Lynch has covered the phenomenon of large data and suggested to use this term similarly to the English-speaking business environment metaphoric expressions of "big oil" and "big red" (Lynch 2008).

There are different points of view in understanding the nature and definitions of the Big Data. For example, some sources connect the understanding of this concept directly to a large volume of data from 100 GB to hundreds of exabytes (Big Data от А до Я. Часть 1). Another important characteristic of the Big Data is an inability of processing data in traditional ways because of its huge amount. However, the Big Data term is not officially restricted to a specific minimum or maximum index as it is simply used for the data measured in terabytes, petabytes and even exabytes (Rouse 2016). Eventually data volume itself has stopped to impress because, as an analyst of Gartner Hype Cycle Company said in 2015, "Today all data is large" (Шельпук 2016).

The second meaning of Big Data is a process of rapid increase of data and its complexity. Indeed, it is an objective process of modern reality evidenced by the fact that in 2013 Google search engine was already handling 24 PB (petabytes) of data daily (Великі перспективи індустрії Big Data). And legal regulation of any sphere of relations should not ignore objective phenomena and processes.

The third meaning applied to the term Big Data are non-traditional approaches, methods and techniques used to handle large structured and unstructured data (e.g. these are the "massive-parallel data processing tools by systems of the NoSQL category, by MapReduce algorithms, or by Hadoop project software framework") (Великі дані: матеріал з Вікіпедії). The result of such data processing is presented in the form that is easily perceived by man, and thus can be effectively used in the modern natural flow of information.

The difference between Grid technologies and the Big Data lies in process of performing computing tasks distributed between different computers connected in a Grid-network, since during such processes failures are possible, while the Big Data programs avoid such problems due to their ability to duplicate "calculations in different parts of a vast network, which is why failure of one of its elements will not affect the final result" (Великі перспективи індустрії Big Data).

Taken into consideration peculiarity of their orientation, the Big Data, as well as Grid-like technology, primarily concerns a special range of actors as a rule large

corporations doing business in the market of information and telecommunication services. This conclusion is confirmed by a well-known axiom: "The Big Data is for machines, small details are for people" (Rouse 2016).

Thus, the European Union regarded research and development of Grid-technologies as its priority in the first decade of the XXI century. And now the support of development and adjustment of using derivatives of Grid innovative technologies is regarded as the main direction and goal of their executive bodies' activity. In particular, the European Commission provides special collegial bodies examining features of various technologies in details, opportunities and socio-economic impact, which may result in an active harmonic use of such technologies. Based on the results of the bodies' reports regulatory acts and strategies meeting markets and society needs are developed and adopted. The aim of the above-mentioned acts and strategies is to encourage the development of innovative relations combined with the use of the derivatives of Grid technologies. This experience is necessary for Ukraine, since the introduction of key approaches and key activities, related to the development of technologies researched, will facilitate adaptation of Ukrainian legislation to the EU acquis communautaire. Ukraine is already making a series of legislative changes in this area.

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Economic and Legal Issues of Establishing and Functioning of Agro-logistics Clusters in the Sphere of Agricultural Retail

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The Verkhovna Rada of Ukraine ratified Association Agreement between the European Union and the European Atomic Energy Community and their member states, for the one part, and Ukraine, for the other part, on September 16, 2014 (Law of Ukraine. Ratification of the Association Agreement № 1678-VII), which Art. 403 provides that the Parties shall cooperate to promote agricultural and rural development, in particular through gradual approximation of policies and legislation. Such kind of cooperation shall cover, inter alia, improvement of the competitiveness of the agricultural sector and the efficiency and transparency of the markets as well as conditions for investment (Art. 404). The research of economic and legal issues of the wholesale trade has significant meaning, in particular in the sphere of establishment and functioning of agro-logistics clusters on the basis of agricultural markets. The mentioned above markets are functioning successfully in almost all member states of the European Union.

The fulfillment of the EU project "SME Support Services in Priority Regions" contributed to the tasks of cooperation in the conditions of globalization and clusters development (business networks). As it is mentioned in the EU Cluster Development Handbook (Посібник з кластерного розвитку 2006), in the regions of Ukraine, there are structures, considering themselves as clusters, there are also preconditions for the foundation of new clusters. What is a cluster?

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A cluster is a voluntary partnership of goods and services producers with suppliers and other institutions according to the geographic criterion, aimed at gaining of individual and gross profit based on complex satisfaction of its producing requirements and customer's need. The clusters ensure the way to the financial freedom through the synergy of association for the optimal enjoyment of each participant advantages. It is considered that during the period of transformational changes clusters are the most optimal way of effective interactions between agricultural producers (Вишневська, Наумова 2013, 31).

There are a lot of examples of cluster movement in Ukraine (Развитие эффективной рыночной экономики в регионах 2007), however, their major disadvantage is improper level of usage of system features of clusters creation, and, consequently, lack of infrastructure realization as a subsystem ensuring their evolvement. It is establishment of new economic systems based on the cluster analysis that is useful and effective direction widening a range of analytical methods of territorial development research.

Clusters are such kind of business associations in different areas, which do not compose a single structure, but cooperate, competing at the same time in the framework of the common development strategy (Соколовська 2007, 242). It ensures cooperation of different resources, in particular, financial, to create goods and services competitive on the internal and external markets.

V.V. Bakun defines a cluster as a competitive organizational form of territorial and hierarchical model of production with different levels of localizations that helps to reach the highest level of commercial and social effect through the minimization of loses in comparably similar areas (Бакун 2011, 53–55).

The issue of theory and practice of clusters foundation and functioning, in particular, in the agricultural sphere, has been researched by many scientists in the area of economic science (Портер 2001, 144–146; Степаненко 2011, 163–165; Третьяк 2006; Хухрін 2008, 32). However, the legislation ensuring establishment of cluster formations in Ukraine, in particular in agricultural sphere, factually doesn't exist. The Commercial Code of Ukraine dated 16.01.2003, № 436-IV (Law of Ukraine. The Commercial Code of Ukraine № 436-IV) neither gives determination of a cluster, nor includes the legislative regulation of their functioning.

There was a time when different state agencies developed separate legislative acts concerning the principles of state policy of economy clusterisation, among which are: the National Strategy of Formation and Development of Transborder Clusters (The Ministry of Regional Development, Construction, and Public Utilities Communal Living of Ukraine, 2009) (Establishment and Development of Transborder Clusters 2009), the Concept of Clusters Establishment (the Ministry of Economy of Ukraine, 2010). However, none of these acts were adopted.

There is a lack of legal regulation of agricultural clusters establishment in the normative acts regulating national state policy (Law of Ukraine. Principles of

State Agrarian Policy № 2982-IV; Law of Ukraine. Development of Ukrainian Village № 1158; Law of Ukraine. Concept of Development of Village Areas № 995; Law of Ukraine. Agrarian Sector of Economy till 2020 № 1437). It was determined only in the Draft Law of Ukraine 'On Agriculture', which was published on the official web-site of the Ministry of Agrarian Policy and Food, that intercommercial organizational and managerial units can be created in the sphere of agriculture in the form of self-governed business associations of the cooperative management and cluster regional cooperation in the form of companies, associations, consortia. The law hasn't been adopted yet.

Taking into consideration either lack of legislative regulation of the basic principles of cluster entities operation or organizationally-legal form of a cluster, including agricultural, the majority of existing clusters, as it is said in the specialized literature, are established in the form of civil associations. However, the cluster's participants are not deprived of the right to make different deals, with the help of which their interaction, rights and obligations can be established. Conserning cooperation with state agencies, the same instrument of public law partnership can be used as in a wide range of countries (Кузьо 2015).

The appearance of clusters, created according to the regional specialization, contributed to the growth of ability of the competitiveness either of the separate regions or Europe in a whole. Application of the mechanism of adaptation of different models of clusters to Ukraine will give the opportunity to create conditions for effective cooperation of three sectors (Білик 2006, 205–206) – government, business and market infrastructure, giving special meaning to the economy of knowledge.

European quality of life standards that can be implemented in Ukraine, have different speed of transformation, that's why different priorities of development should be chosen for different territories paying attention to current state of markets.

An effective example of agricultural cluster (North-Eastern Agricultural Cluster) in Poland is considered to be North-Eastern Agricultural Cluster that is, first of all, established for farmers with coordination centre in Bialystok. However, the farmers are not the only ones who can join the association, there are other persons interested in cooperation: natural persons, enterprises, and even governmental agencies. The cluster membership is voluntary and totally free. The main aim of its functioning is strengthening of agricultural region and its transformation into leading region of Europe. Such target is achieved through lower production costs and retail of goods and services, getting the vast production volumes, increasing of profits through the complex character of proposals etc.

The clusterisation is taking place also in other states of Eastern Europe. In the states of the so-called Vysegrad Group it is supported by the special program (Program gospodarczy integrujący państwa grupy wyszehradzkiej 2016). Also, other countries, including Ukraine, are engaged.

There are examples of either national or trans-border agricultural clusters in Ukraine: the project of organic agricultural production cluster is being conducted; the Ukrainian-Romanian "First Agricultural Cluster" on the cultivation of fruit production and development of horticulture was established in Chernivtsi region; regional innovative agro-industrial cluster "Agroinnovations" is functioning in Rivne. The cluster "Natural Milk" established by 7 agricultural enterprises of Rivne, Ternopil and Lviv regions is also functioning in Rivne (Кузьо 2015).

According to the EU Sustainable Regional Development Project in 2016 the food processing cluster was established in Vinnitsa region, which activity maintains farmers' functioning in the framework of cooperative units, building of partnership relations between producers and processors of agricultural products (Development of Agricultural Clusters) (Собкевич 2016). Some scientists point out that cooperative-cluster model of development is the most spread one in Ukraine (Стельмащук 2015, 7–9).

Currently the development of agricultural clusters is acknowledged as one of the most important directions in the development strategies of many national regions, in particular, Kharkiv, Sumy, Dnipro, Zakarpatski, Volynski, Kherson, Chernihiv, Chernivtsi regions and others (Собкевич 2016).

The main feature of the agricultural (industrial-agricultural) clusters is engagement of the aggregate of economy sectors with the high level of their aggregation. Since there is a lack of the single model of establishment and functioning of clusters, special researches on clusters establishment with application of the components of factor and matrix analysis based on assessment of intensity of ties between members of the cluster, are being done in the USA. Similarly to building cluster, agricultural one is featured by latency which should be considered when managing it.

The initial conceptual position of the model of clusters formation is to minimize costs with simultaneous increase integration ties, and the lack of necessity of creation of new organizational entities.

In order to harmonize all organizational issues that will allow reducing the costs and increasing the confidence of the participants it is of high importance to find out the initiator of facilitator of the cluster formation process. It is crucial in this process to search information agencies and the financial centres (Внукова 2009, 60–65) as effective components for creation of the corresponding clustered network.

The agricultural sector is an important strategic sector of Ukrainian economy, that provides food security and about 60% of the population consumption fund, and its products account for a considerable share in commodity structure of export. According to the results of 2014 export of agricultural products estimated at 16.7 billion dollars in comparison with 15.2 billion from metallurgy. The difference became more significant in 2015 – 14.6 billion dollars of agro-export against 9.5 billion dollars from metallurgy. The part of agrarian sector in common export

structure from Ukraine increased to 31% in 2014 and to 38% in 2015 in comparison to 19% in 2011 (Дзвінка 2016). Export of agricultural products from Ukraine to the European Union countries in January-May 2016 increased as compared to the same period of 2015 to 24% and estimated at about 1.8 billion dollars when gross yearly export of agricultural production estimated at 5.7 billion dollars.

According to the State Statistics Service of Ukraine (Офіційний веб-сайт Державної служби статистики України) more than 56 thousand agricultural enterprises are involved in the sphere of agriculture, most of which are farm enterprises (more than 43 thousands). Also production of agricultural products is carried out by the agricultural limited liability companies, agricultural joint stock companies, agricultural production and service cooperatives, and other private agricultural enterprises. The legal basis for their activity includes rules of the Civil Code of Ukraine dated 16.01.2003, № 435-IV (Law of Ukraine. The Civil Code of Ukraine: №. 435-IV), Commercial Code of Ukraine dated 16.01.2003, № 436-IV (Law of Ukraine. Economic Code of Ukraine №. 436-IV), Laws of Ukraine "On Farm Enterprise" dated 19.06.2003, № 973-IV (Laws of Ukraine. On Farm Enterprise № 973-IV), "On Business Associations" dated 19.09.1991, № 1576-XII (Law of Ukraine. On Business Associations № 1576-XII), "On Companies" dated 17.09.2008, № 514-VI (Law of Ukraine. On Companies 514-VI), "On Agricultural Cooperation" dated 17.07.1997, № 469/97-BP (Law of Ukraine. On Agricultural Cooperation № 469/97-BP) (including amendments of the Law of Ukraine "On Amendments" to the Law of Ukraine "On Agricultural Cooperation" dated 20.11.2012, № 5495-VI) (Law of Ukraine. On Agricultural Cooperation № 5495-VI), "On Cooperation" dated 10.07.2003, № 1087-IV (Law of Ukarine. On Cooperation № 1087-IV) and others. One of the advantages of the farm enterprises is the right of the founder to determine share capital of such kind of enterprise (except farm company, which minimal share capital equals 1250 minimal salaries according to the p. 1 Art. 14 of the Law of Ukraine "On Companies" dated 17.07.1997, № 469/97-BP) (Law of Ukraine. On Companies № 469/97-BP), that doesn't hinder business initiative of natural persons to establish such entities. A range of private entrepreneurs are functioning in the sphere of agriculture, including those, who are engaged in farming without establishment of legal entity.

The main feature of agricultural enterprises is the season nature of agricultural production, which significantly affects the redistribution of financial resources during the year. In this regard, the smooth operation of such enterprises can be provided primarily through expanding of their activities, in particular, logistic services, including participation in the agro-logistics cluster.

The main idea of the concept of establishment of the agro-logistics cluster is the formation and development of agriculture and processing of agricultural products as an important tool of implementing the state regional policy aimed at improving the quality of citizen life, ensuring the competitiveness and implementation of innovative investment model of development of agrarian sector of the region.

To enable better interaction of all participants of agro-market the agro-logistics cluster is desirable. Such cluster will attract a large number of private entrepreneurs involved in agro-production and small and medium-sized agricultural enterprises, that are the closest to the consumer, for the most efficient use of market sales of agricultural products.

Building partnerships between the public and the private sector is important, since the private sector has insufficient capacity to self-finance investments in the development of agricultural market infrastructure, an important element of which is a wholesale market of agricultural products without governmental support.

The strategy of development of any kind of agro-logistics cluster should include issues of taxation and regulatory support, clearly define the function of the agricultural wholesale market in the regional agricultural infrastructure. In addition to supporting the domestic producers it is essential to improve market infrastructure and to simplify the access of agricultural producers to the consumer market. This will ensure transparency and predictability of the price of food with the participation of the exchange mechanisms.

The expected results of agro-logistics cluster development will be the following: a) creating of thousands of additional work places either directly for the participants of agricultural wholesale markets or for their partners; b) total satisfaction of the needs of consumers in the quality and safety of agricultural products; c) the increase in money contributions to state and local budgets; d) improving the competitiveness of national agricultural products and creating of a transparent and effective competitive environment on the agrarian market; e) stabilization of a price situation in the agricultural market; f) improving of ecological situation in the regions, where the agricultural wholesale markets are operating, etc (Алейнікова 2010).

The leading idea of all agricultural wholesale markets is to create a base, where demand can meet supply; where a large number of companies collected in one place, face the same conditions for the rental of retail space and with the same initial conditions of competition respectively. It is the agricultural wholesale market that is able to act as a potential nucleus of the agro-logistics cluster.

The legal basis of organization and operation of agricultural wholesale market in Ukraine, rules regulating relations in this sphere, protection of rights and legitimate interests of agricultural producers engaged in the wholesale of agricultural products of their own production are provided for by the Law of Ukraine «On the Agricultural Wholesale Markets» dated 25.06.2009, № 1561-VI (Law of Ukraine. On the Agricultural Wholesale Markets № 1561-VI). The wholesale market in this legal act is characterized in terms of institutional approach.

According to the para 5 p. 1 Art. 1 of this Law, the agricultural wholesale market is defined as a legal entity, the subject of activity of which is providing services on engaging in agricultural wholesale and which, in the prescribed manner, was

granted the status of a wholesale market. Consequently, the agricultural wholesale market is not a specific legal form of the legal entity. It can be considered as any legal entity specialized in providing services engaged in agricultural wholesale after obtaining the status of such kind of a market. In other words, the wholesale is considered to be only the element of legal entity specialization on services provision, that ensures the introduction of the wholesale trade in these products after obtaining of the status of the agricultural wholesale market (Уркевич 2010, 116–118).

According to the Art. 4 of the Law of Ukraine «On the Agricultural Wholesale Markets» dated 25.06.2009, № 1561-VI (Law of Ukraine. On the Agricultural Wholesale Markets № 1561-VI) the status of a wholesale agricultural market is granted by the central body of executive power on implementing the state agrarian policy, policy in the field of agriculture (i.e. the Ministry of Agrarian Policy and Food of Ukraine, hereinafter – the Ministry of Agrarian Policy), on a competitive basis.

Legal entity that has the intention to acquire the status of the pending wholesale market, submits to the Ministry of Agrarian Policy the following documents: a) application for obtaining the status of the agricultural wholesale market; b) the project (business plan) of the organization of activities of the legal entity in the status of such a market; c) copies of constituent documents; d) draft Rules of wholesale agricultural market; e) documented data of founders (participants) of the legal entity.

The procedure for acquiring legal entity status by the agricultural wholesale market was approved by regulation of the Cabinet of Ministers of Ukraine dated 11.02.2010 p. № 141 (Resolution of the Cabinet of Ministers of Ukraine. Market of Agricultural Products № 141) stating that the corresponding contest is held by the commission on the issues of granting legal entity status to the agricultural wholesale market, which is formed by the Ministry of Agrarian Policy. The Ministry publishes information about the competition in its printed media and posts on its web-page not later than 30 calendar days prior to the competition announcement, where the following is included: a) the date of the contest; b) deadline for acceptance of documents for participation in the contest; c) the name of the organization, its mode of operation and the address for the documents submission for participation in the contest; d) place, date and time of the commission meeting; e) phone number (email address or web site) on the issues of the contest.

The deadline for the submission of documents for participation in the competition by the legal entity which intends to acquire the status of agricultural wholesale market is determined by the Ministry of Agrarian Policy, however, it may not be less than 10 calendar days from the date of placement of announcement posting.

The applicants who were declared bankrupt or against whom bankruptcy proceedings were started are not allowed to participate in the contest (excluding those for subject to the procedure of financial recovery), or who are in the process of dissolution as business entity; submitted the documents for consideration with lack of some, or contain false information.

The documents filed by the applicant are considered by the commission of the Ministry of Agrarian Policy within 30 calendar days from the date of receipt. The winners are determined by the criteria established by the Ministry, taking into account: a) the economic feasibility of placing the infrastructure of the agricultural wholesale market on the relevant territory; b) the results of the analysis of the project (business plan) of the organization of activities of the legal entity in a status of such a wholesale market and mechanisms of its implementation; c) financial feasibility of the cost and time of the project implementation (business plan) of the organization of activities of the legal entity as the agricultural wholesale market.

On the basis of the decision of the commission, the Ministry of Agrarian Policy issues an order to grant status of the wholesale market of agricultural products to the winner of the competition, while other applicants receive a reasoned refusal. The winner is given a certificate of assignment to the legal entity of the status of the wholesale market of agricultural products. As it is reasonably stated in the legal literature, the approved form of certificate of the agricultural wholesale market is imperfect, in particular, it is not specified within which administrative-territorial unit a particular legal entity is granted the status of on agricultural wholesale market (Бова 2013, 56–58).

Art. 5 of the Law of Ukraine «On the Agricultural Wholesale Markets» dated 25.06.2009, № 1561-VI (Law of Ukraine. On the Agricultural Wholesale Markets № 1561-VI) defines the subject structure of the agricultural wholesale market, which is important for the formation of the agro-logistics cluster. So, the operators of agricultural wholesale markets are considered to be: a) customers (legal and natural persons who buy the party (or parties) of agricultural products for their subsequent sale to the ultimate consumer through the retail trade or for industrial or other purposes, as well as their authorized persons); b) the sellers (legal entities and natural persons, who own agricultural products and sell to customers the party (or parties) of agricultural products, and their authorized persons); c) the association of sellers and/or buyers; d) other legal and natural persons who perform work and/or provide services (banking, finance, legal, consulting, insurance, advertising, and the like) necessary for the functioning of agricultural wholesale markets. It is clear that as sellers of agricultural products must act primarily agricultural producers of various types and legal forms (either private entrepreneurs, or agricultural enterprises), which will be part of the agro-logistics cluster. The relationships between the mentioned entities and other operators of the agricultural wholesale markets of products are of a contractual nature, unless other is provided for by law.

It is obvious that in the respective contractual relations with buyers and sellers of agricultural products and other operators an agricultural wholesale market is involved itself. In this case, the latter is a separate legal entity that can be regarded as a managing company of the relevant agro-logistics cluster. Position of the managing company in this market should depend on those components defined directly by it, including: price and quality of certain products, marketing approaches, efficiency of company's employees etc.

The hierarchical structure of the mentioned potential agro-logistics cluster is built using the method of structuring the elements of a system. The presence of the reachability matrix allows to distribute all the elements of the system (potential cluster members) according to the levels of the hierarchy. These are private agricultural enterprises to occupying a prominent place in the hierarchical system of relations between the potential participants of agro-logistics cluster, because their work connects either the agricultural component, or the provision of logistics services. Other enterprises, research centers of both agricultural sector and ones of the transport or logistics, can be involved in the agro-logistics cluster.

The applied technology of identification of the potential cluster structure allows to set the core of the cluster (the agricultural wholesale market), as well as the largest integration ties between the participants according to the hierarchy level that enhances capabilities for effective work of such forming.

Public relations on the infrastructure placement of the agricultural wholesale markets gained a special legal regulation in Ukrainian legislation. The system of service structures, constructions, buildings, systems, networks, lines, services, warehouses, storages, halls, sites, pavilions, equipment, transport, access roads and internal paths, means included in the project (business plan) of the organization of activities of the legal entity that possesses a status of the agricultural wholesale market are defined as such infrastructure. According to the Art. 12 of the Law of Ukraine «On the Agricultural Wholesale Markets» dated 25.06.2009, № 1561-VI (Law of Ukraine. On the Agricultural Wholesale Markets № 1561-VI) the places of the infrastructure of the agricultural wholesale markets location are determined by the Ministry of Agrarian Policy on the basis of the documents submitted by the legal entities, who have the intention to acquire the status of a agricultural wholesale market, taking into consideration the feasibility of the establishment of such wholesale markets in the appropriate territory. It is clear that for the placement of market infrastructure the relevant land is used.

The legal principles of the land exploitation are defined by the Land Code of Ukraine dated 25.10.2001, № 2768-III (Law of Ukraine. Land Code of Ukraine № 2768-III), according to the p. 1 Art. 22 of which an agricultural land is considered to be a land provided for agricultural production, implementation of agricultural research and training activities, placing of relevant production

infrastructure, including infrastructure of the agricultural wholesale markets, or used for such purposes.

As I.O. Progliada claims, the legal regime of land allocated for the infrastructure of the agricultural wholesale markets is characterized by the following features:

– these land plots belong to agricultural lands;

– they can be in state, municipal or private ownership, be granted for permanent use or for rent;

– when transferring the land plot for use or in the ownership, the decision of the Ministry of Agriculture regarding the location of infrastructure of the agricultural wholesale market should be taken into account;

– these lands are not subject to sale on competitive basis (land auctions), but are purchased in a simplified manner;

– they can be taken out of permanent use of others;

– in case of such withdrawal the compensation of losses of agricultural and forestry production is not possible (Прогляда 2013, 122–125).

Generally agreeing with the above-mentioned provisions the own views as to the qualifying of land under infrastructure of wholesale markets under consideration to the agricultural land should be expressed. Taking into consideration their functional purpose regarding the placement on such land of a certain number of real estate of agricultural products wholesale trade organizations access haul roads and local routes, and other networks and communications, it is obvious that such land is not related to the direct production of agricultural products. In the course of their exploitation of the considering wholesale markets not only use the unique natural ability of the agricultural land – fertility of its soil is not used; and they serve only as territorial basis for trading activities.

Consequently, the wholesale markets lands fall under the features of industrial lands of the land fund of Ukraine, which under the p. 1 Art. 66 of the Land Code of Ukraine dated 25.10.2001, № 2768-III (Law of Ukraine. Land Code of Ukraine № 2768-III) include the lands allocated for placing and exploitation of basic, subsidiary and auxiliary buildings and structures of industrial, mining, transport and other enterprises, their driveways, engineering networks, administrative buildings, other buildings. Taking into consideration the above-mentioned facts, the respective provisions of the land legislation of Ukraine on agricultural wholesale markets lands are subject to alteration.

The conducted analysis of the clustarisation has shown that there are conditions in Ukraine for the creation of clusters in the agricultural sector. There is an interest in development of agricultural trade on the part of foreign investors and state agencies. The implementation of such projects will strengthen the position of domestic agricultural producers on domestic and foreign markets, will enhance their competitiveness and the saturation of the commodity and the consumer market with domestic origin agricultural products of high quality.

The above mentioned has been fully confirmed by the practice of the functioning of agricultural wholesale markets in some regions of Ukraine, particularly in Lviv ("Shuvar" market), Kyiv ("Capital" market), Zaporizhzhia ("Agrobusiness" market), Odessa ("Hectare" market), Kharkiv ("Leleka" market), Rivne ("Shelen" market), Nikolayev ("Mykolaiivskyi") (Wholesale Markets are functioning in 10 Regions 2014).

The Ukrainian legislation contains provision on state support of agricultural wholesale market building. According to the Art. 13 of the Law of Ukraine "On Ukrainian Agriculture Support" dated 24.06.2004, № 1877-IV (Law of Ukraine. On Ukrainian Agriculture Support № 1877-IV) the financial support for the construction of agricultural wholesale markets is provided, that is performed in the mode of credit subsidies of the part of the fees (interest) for use of loans granted by banks in national and foreign currency. This credit subsidy is granted in the form of long-term loans attracted, in particular, for the construction and reconstruction of production facilities (including agricultural wholesale markets, warehouses for the storage of grain, vegetables and fruits) (with the term of 36 calendar months, but within 84 calendar months).

Rules for granting of such credit subsidy are determined by the regulation of the Cabinet of Ministers of Ukraine "On approval of the Procedure of Usage of Funds to Be Envisaged in the State Budget for Financial Support in Agriculture by Easing of Credits", dated 29.04.2015, №. 300 (Regulation of the Cabinet of Ministers of Ukraine. Agro-Industrial Complex by Reducing Lending №. 300).

It's prescribed by the p. 4 of the Procedure that the interest under those loans are reimbursed to be aimed the procurement of fuel and lubricants, seeds, fertilizers, means of plant protection, fodder, raw materials and ingredients for feed production, veterinary drugs, young farm animals and birds, equipment for livestock farms and complexes, spare parts for repair of agricultural and irrigation machinery and equipment, energy, and payment for services related to the repair of agricultural and irrigation equipment, works (services) on preparation and processing of soil, seeding, protection of plants from diseases and pests, fertilizing, harvesting. From the mentioned above it is seen that currently the Ukrainian government does not include the provision of credit subsidies for the construction and renovation of agricultural wholesale markets on a subordinate level, but it actually makes it impossible to implement the earlier prescriptions of the law of Ukraine "On State Support of Agriculture of Ukraine" dated 24.06.2004 No. 1877-IV (Law of Ukraine. On State Support of Agriculture of Ukraine № 1877-IV) about the financial support structures of such markets.

To revitalize the process of creating wholesale agricultural markets in Ukraine it is essential to use the mechanism of public-private partnerships, the legal basis of which is determined by the Law of Ukraine "On State-Private Partnership" dated 01.07.2010, No. 2404-VI (Law of Ukraine. On State-Private Partnership №. 2404-VI). A public-private partnership is defined

as cooperation between the government of Ukraine, territorial communities represented by their respective state agencies and local self-governmental bodies (public partners) and legal entities (except state and municipal enterprises) or entrepreneurs (private partners) and is based on the contract concluded in the order established by legislative acts, and meets the criteria for public-private partnership.

The possible kinds of the partnership regulated by the p. 1 and 4 of the mentioned Law are applied in the following spheres: a) prospecting, exploration of mineral deposits and their extraction, in addition to this, based on terms of agreements on production section; b) the production, transportation and heat supply and distribution and supply of natural gas; c) the construction and/or operation of highways, roads, railways, runways at airfields, bridges, travel viaducts, tunnels and subways, sea and river ports and their infrastructure; d) engineering; e) collection, purification and distribution of water; f) health; tourism, leisure, recreation, culture and sports; g) the maintenance of irrigation and drainage systems; h) waste management, in addition to collection and transport; i) the production, distribution and supply of electrical energy; j) property management; k) the provision of social services, administering of social establishment, the institution; l) the production and introduction of energy saving technologies, construction and renovation of houses fully or partially destroyed as a result of military actions on the territory of the antiterrorist operation; m) establishment of modular homes and the construction of temporary housing for internally displaced persons; n) educational services and services in the health sector; o) the management of monuments and cultural heritage. At the same time according to the decision of the public partner, the public-private partnership can be applied in other areas besides economic activities, which, in accordance with the law, are allowed to carry out exclusively through state enterprises, institutions and organizations.

From the above mentioned it is clear that among the listed applications of public-private partnership the establishment and functioning of agricultural wholesale markets are not mentioned, that doesn't stimulate the process of their organization. As it is pointed out by the researchers, the mechanism of state-private partnership can be applied for the creation of agricultural wholesale markets: the government can assist in the arrangement of the wholesale agricultural market on the basis of an agreement on joint activities by the provision of land for infrastructure placing, providing it with an appropriate status, preferential taxation, while the construction of the market infrastructure and organization of its work can be carried out by the private investor (Прогляда 2014).

It is possible to agree with such a sensible proposal, and the relevant changes regarding this should be implemented to the Law of Ukraine "On Public-Private partnership" dated 01.07.2010, No. 2404-VI (Law of Ukraine.

On Public-Private partnership № 2404-VI), which will reflect changes in state agricultural policy regarding clustering. After all, the state policy of support of development of agrarian clusters, as confirmed in special studies, should contribute to the modernization of industry, increase of efficiency of agrarian business and social development of the regions.

To ensure the smooth operation of an agro-logistics cluster, making a profit from its operation and simultaneous business development of the participants, it is recommended to involve in the economic activities of the cluster and its members (agricultural enterprises) borrowed funds through the mechanism of an overdraft, which is effectively used in the EU for accelerating the turnover of funds in the network structures with a large number of transactions.

Its advantage is the timely funding of both current and unforeseen expenses, including the replenishment of working capital, which adds to the stability of functioning of the agro-logistics cluster, which has significant risks for timely payments. Advantages of the overdraft are automatic debt repayment at the expense of current revenues, the speed and timeliness of payments. Banking institutions offer favorable terms of the overdraft with certain preferential terms.

Participants of the agro-logistics cluster may use the overdraft facility as a reserve for executing urgent payments. An agro-logistics cluster can not only significantly enhance its financial capacity but also improve payment discipline and reputation by using the overdraft.

An alternative to overdraft can be a financial instrument such as factoring which is, for example, successfully used in the operation of the North-Eastern Agricultural Cluster in Poland (Membership – the North-Eastern Agricultural Cluster). The credit unions, that may credit the agricultural business of farmers and other participants of such association, can be the successful option to raise capital for the operation of agro-logistics cluster.

Summing up the economic and legal problems of establishment and functioning of agro-logistics clusters in the field of the agricultural wholesale trade, we claim that the formation of this cluster is the best option for the development and implementation of effective mechanism for the selling of agricultural products, processing of products by the agricultural producers of various types and legal forms, to ensure access of private entrepreneurs producing agricultural products, small and medium-sized agricultural enterprises to the civilized channels of its sales in agricultural wholesale markets, improve their quality and safety and decrease of prices of such products.

The agro-logistics cluster in the field of agricultural wholesale trade is not a special legal form of legal entity. This is a competitive organizational form of agricultural production and marketing of agricultural products, established according to the territorial and hierarchical model. The core of the considered cluster should be the agricultural wholesale market.

State agricultural policy of Ukraine needs amendments in the sphere of support of the development of the agro-logistics which include the following measures:

a) the formation of the regulatory framework of the cluster organization for the development of agricultural and rural areas (through determination of a legal framework for the establishment and operation of agro-logistics clusters, introducing the appropriate changes in the law regarding the functioning of agricultural wholesale markets),

b) enhancing the effectiveness of cooperation in the system "region – science – production" for the development of agro-logistics clusters;

c) spreading of credit subsidies regime in the framework of the financial support of business entities of agro-industrial complex provided for by the Law of Ukraine "On State Support of Agriculture of Ukraine" for the construction and renovation of agricultural wholesale markets;

d) the implementation of public-private partnership mechanism by the establishment and functioning of agro-logistics clusters, agricultural wholesale markets, including through of adoption of appropriate amendments to the Law of Ukraine "On State-Private partnership".

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PART IV

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The Position of the Transcendental Philosophy in the Legal Thinking*

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1. Introduction

The history of philosophy shows that the reflection on the reality still remains in a dialectical conflict between the thesis that we are able to know the basic elements that constitute the said reality and nihilism, namely the thesis about the hopelessness of such search and about the loss of hope for its discovery. This observation also applies to that part of reality that we call law and it is included in the questions about the existence of the universal structures of this category of being and about the possibility of their objective cognition, or at least such cognition of law (as the ontological category) that provides us with the knowledge which would in a universally satisfactory manner indicate the basis of its existence, which would be in turn treated as an ultimate argument in favour of its observance. Jürgen Habermas assumes that culture is assigned with the specific task related to the fact that in societies organised in states there arises the need for the legitimation of law and the need for a justification of why a given political order merits recognition (Habermas 1987, Vol. 2, 188). However, the high degree of complexity of the social structures makes this task intellectually challenging, and yet – as defined by Habermas – "worldviews have to become ideologically efficacious" (Habermas 1987, Vol. 2, 188).

Similar issues are raised by Ronald Dworkin in *Law's Empire*, namely that jurisprudence entails the need for such reflection which has to touch upon the issues of the highest level of generality, i.e. that every conception of law must provide a general justification for the use of violence by the state and the justification for the legitimisation of power, legitimisation of law and the reasons for its observance (Dworkin 1986, 190–192).

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* Some fragments of this text were published in my book (Bekrycht 2015).

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2. External validity of law

The problem of the legitimacy of law is presented in the literature as the justification for the external validity of law, or as a justification for the absolute validity. "First of all, two different meaning contents of the concept «formal validity» – as stated by Aulis Arnio in *The Rational as Reasonable* – must clearly be kept separate from each other. Let us call them *internal* and *external* validity of legal order. The first one of these concepts refers to the validity «inside» the system, whereas the external validity tells something about the validity of the system itself" (Arnio 1987, 34).

Therefore, the literature differentiates between two concepts of legal validity:

1. Internal, relative or a systemic validity. In this sense, the concept of law is associated with the concept of a particular legal norm and the question is asked of whether the latter is valid. The issue of internal validity is resolved within a given legal system or legal order. Yet, from the point of view of the methodology, the concept of the internal validity can be subject to the objection of a vicious circle, because the legal norm is valid if it meets the algorithm of validity in the legal system and in the legal order, and a given system can be regarded as a legal system if its norms apply according to this algorithm. In other words, the lawyer who deliberates whether a given norm is valid typically reaches for the text (the legal system) and the latter is valid on the basis of the norms contained therein. The concept of the internal validity is thus strictly dogmatic, because when asking about the basis of the validity of the norm in the system, we refer to the legal act of a higher order, namely to the relationship of competence, which ultimately leads us to the Constitution as the source of the validity of a given legal system and the legal order. Then, when asking about the validity of the Constitution we must conclude that, given the rules of the legal system, it applies under itself. In order to break the vicious circle, we must go back to the reasons which must have their source outside the legal system. However, the concept of the internal validity as dogmatic, namely treating the existence of law without reflection, is sufficient for lawyers for practical reasons, because they do not have to raise philosophical issues in relation to the questions of the existence of law and the justification of its existence, which in turn is of interest to philosophers and philosophers of law in the analysis of the concept of the external validity.

2. External or absolute validity answers the question of the basis of the validity of law itself. In other words, its subject is the justification of the existence of law. At this point our reflections need to go beyond a given system and a given legal order. Hence, we are forced to seek the answers in the very essence of being (Peczenik 1975, 4; Opałek, Wróblewski 1969, 114–128; Stelmach 1989, 315–327; Rojek 2006, 147–157).

The issue of the external justification is of utmost importance from the practical (social) point of view. Experience shows that only those systems of social organization can be regarded as permanent which have an internal acceptance for their existing rules, understood not only as the content of law here and now, but also as formal rules – something along the lines of Fuller's inner morality of law (Fuller 1964, 33–94). The argument of power and of the likelihood of the punishment or pain is indeed a weak social bond.

However, it appears that this task is not easy, and the answer to the questions about the issues of epistemology and ontology of law as well as of its reasons can be hardly regarded as unambiguous. This issue is neither raised often in the jurisprudential and philosophical literature. The literature indicates that the ultimate principle of the existence of law could be rated under the concept of a regulative idea, namely a peculiar guiding standard which escapes any final determinations or descriptions.

The question about the conditions of the existence of law is referred by me as a transcendental question, namely such that searches for something universal, permanent and which justifies law, irrespective of adopting this justification as the actual argument of the existing social order. The content of this question always remains the same, what changes is only the answer to this question, depending on the area of research.

3. Transcendentalism as the epistemological problem of subjectivity and intersubjectivity

The idea of the transcendental question is naturally regarded as having its source in the philosophy of Kant, and even Descartes. However, as a result of a number of philosophical concepts and the transcendental philosophy practiced by the most eminent philosophers, it became an uneven mainstream. There are two trends in the literature that have developed the concept of transcendental method, and thus the content of the concept of transcendentalism.

The first is by far most predominant and historically earlier. It is the trend that can be called epistemological since it asks about the possibility of cognition, namely how cognition is possible. It was initiated by Immanuel Kant as an original research program for the analysis of subjective conditions of the entire subjective cognition. There are two characteristic areas that can be differentiated in the epistemological mainstream of transcendental philosophy: the transcendental subjectivity and the transcendental intersubjectivity. The former is typically oriented at the subject as the individual media for cognitive relations. It can be stated that the transcendental philosophy has therefore become the theory of consciousness, and its priority area constitutes the very subject itself (Ego), thus developing the concept of transcendental idealism. However, all philosophical

concepts which attribute the subject with the role of constituting any sense, encounter the problem of constituting objectivity understood as intersubjective reliability of knowledge, and thus as any communication between the entities. There arises an almost burning issue of explaining intersubjectivity and justifying the constitution of its meaning. If the only being which exists as the one in which you cannot reasonably doubt is your own self, or self-consciousness, it is very difficult to constitute another entity that would have ontically the same meaning in this constitution as its constitutive self-consciousness, and thus it is difficult to build a shared world of entities that – generally speaking – would have one truth. What therefore comes as a great challenge for philosophy is the issue of the possibility of creating shared knowledge and providing the criteria for its verifiability, since the terms such as reliability and verifiability are meaningful only with intersubjectivity, understood as something objective, which in turn is closely related to communicability, though, it is also highly problematic, as shown by the philosophical efforts aimed at developing the definition of truth or analysing the problem of referring words to things, namely the issue of the meaning and designation. There must, therefore, appear something that will exceed the individual minds and will allow objectifying them, thus providing the possibility of a universal cognition of truth as something objective. That "something" in philosophy is the idea of justifying the existence of ontically independent subjects of cognition. This idea may be briefly referred to as the idea of justifying intersubjectivity. It is aptly put by Frederick Copleston who states that the idealistic philosopher must make an additional step when recreating the process of unconscious activity that constitutes the world, namely he needs to proceed further and recognize that world creation cannot be attributed to individual self, because in such a case one cannot avoid solipsism. Solipsism, in turn, can be hardly taken seriously. "Idealism is thus compelled – as F. Copleston writes – to go behind the finite subject to a supra-individual intelligence, an absolute subject" (Copleston 1994, 4); hence the idea of non-empirical, transcendental Ego.

The epistemological trend in transcendental philosophy in the field of subjectivity (transcendental idealism) is represented by the philosophy of Kant, Fichte, Hegel, Husserl (the area of the justifications of a pure subject – transcendental Ego), while the area of the justification of intersubjectivity is mainly represented by Fichte, Hegel, Husserl, Reinach, Apel, Habermas.

4. Transcendental arguments

The second trend which can be differentiated in transcendentalism is antiscepticism which I refer to as metaphysical. The applied method here is the transcendental one in the form of the so-called transcendental arguments,

aimed, on the one hand, to defend against scepticism[1] and, on the other hand, to indicate the basis of the validity of given object areas, such as empirical objects, morals, law, literary or musical work, feelings, mathematics and logic, etc. This trend "explores the world of justifications, explanations or legitimation; it determines everything we exceed or what we go beyond" (Szulakiewicz 2002, 18). It also originates from the assumptions of Kantian transcendentalism, but the object of its interest and the main purpose of philosophical reflection is not to examine cognitive structure, but to formulate the existential judgments, justifying the existence of some form of reality independent of the subject. This trend therefore assumes that metaphysics is possible and coexists in the frames of the transcendental philosophy. In other words, this trend in transcendental philosophy – which I refer to as metaphysical – does not deny the opposition of the subject and the object of cognition, treating the object as an independent, autonomous and external being, and it as it recovers the actual "reality" for the philosophy as a traditional subject of metaphysics. This issue can also be perceived in such a way that the metaphysical trend does not draw antirealistic conclusions (or does not want to draw such conclusions) from the Kantian transcendental method and its research results. The fact that we assume the existence of some *a priori* forms of intuition and pure concepts of the intellect does not mean yet that we need to take the side of idealism. In particular, the Anglo-Saxon literature has a considerable contribution to the development of this kind of transcendental argumentation and to the development of the concept of transcendental argument.

The literature of the subject provides different patterns which could match the structure of the transcendental argument, for example, that traditionally conceived transcendental arguments are determined by connecting them to some kind of statement, "namely that ***X*** is a necessary condition for the possibility of ***Y*** – where then, given that ***Y*** is the case, it logically follows that ***X*** must be the case, too" (Stern, 1), or there must exist some Y if there is some X for which Y is a prerequisite (Judycki, 19); or

1. This is experience
2. A prerequisite condition for the possibility of experience is the truth of S
3. Therefore, S (Leszczyński 2010, 57).

When arguing against idealism in favour of the existence of reality (objectivity) of the external world in the form independent of consciousness, it is assumed

[1] Generally speaking, refutation of the skepticism is one of the most important tasks of philosophy and it is as old as philosophy itself. The first trend which was called transcendental is also antisceptical, but the key point of deliberations and analysis in it is the role and position of subject itself in epistemic process, not metaphysical thesis and conclusions concerning this process. Therefore, I differentiated these two trends in transcendentalism.

that if we experience objects in space and time order, certain general features of a given object are indicated and considered and then these considerations provide the basis for the inferences about certain principles concerning prerequisite conditions of the existence of this object, e.g. language contains the names of colours and some experience is definable only by a reference to some objects, and thus there exist coloured objects (Chisholm 1991, 30). What can be rated among the traditional justifications undertaken in the scheme of the concept of the transcendental argument in favour of the existence of reality are those which have been presented in the modern Anglo-Saxon literature mainly by Peter F. Strawson, Hilary Putnam, Donald Davidson, John R. Searle, Barry Stroud, Robert Stern.

5. Justifying the law as transcendental thinking

If we now look at the issue of jurisprudence which has undertaken the problem of justifying the external validity of law, it can be confidently concluded that it fits in the line of the transcendental thinking. The justification of law is perceived as the ultimate basis for its existence. From this point of view, the transcendental philosophy of law has four traditions. We can generally talk about the four transcendental arguments that aimed at justifying law in the jurisprudential literature.

1. Theistic tradition.
2. The tradition of natural law.
3. The tradition of the so-called linguistic turn in the philosophy.
4. The contemporary naturalist tradition.

Ad. 1. The first justifies law on the basis of transcendence. Thus, the transcendental argument refers strictly to transcendence. The transcendent being in the theistic tradition is God – God as the ideal legislator. Western philosophy offers three conceptions based on the transcendental argument in the form of transcendence of God: early Christian conception, the conception of St. Augustine. Thomism with its developed system of the hierarchy of laws constitutes the classical doctrine (*lex aeterna, lex naturalis, lex humana*).

Ad. 2. Another tradition can be seen in two ways. Firstly, it can be perceived as a transcendence one, if the justification of law is sought in the concept of nature, understood as the totality of being that man is a part of, and he is subject to its normativity. Secondly, it can be viewed as the immanent argumentation, purely transcendental, referring to reason, not treated substantially, but as transcendental Ego who also creates intersubjective relations.

In the first version we can encounter a multiplicity of natural law doctrines of the ancient philosophy (Sophists, Aristotle, the Stoics), where the natural

law is treated as the objective duty of the states of affairs, whose source is the nature understood as the totality of being (the universe). This standpoint also embraces such doctrines as those of Grotius, Pufendorf, Hobbes, Rousseau, and – contemporarily – Finnis.

The second version offers a peculiar turn towards the exploration of the basis of natural law in the subject. The first philosopher who sought the source of natural law in the subject was Wolff. Then, in Kant one can observe a clear separation of the subject from empirically understood nature – the source of law here is transcendentally understood reason. This version of natural law conception – whose source was the transcendental Ego – was followed by Fichte and Hegel. In the theory and philosophy of law this trend constituted the basis for developing the concept of the basic norm (*Grundnorm*) by Hans Kelsen and for the justification of law – the basic norm is one of the main arguments of the transcendental nature in the philosophy of law. This is the foundation for the existence of law, which – according to the logic of the transcendental argumentation – no longer requires justification itself.

Ad. 3. The third tradition of the justification of law is the trend in the philosophy of language and the justification of law in the frames of broadly understood speech act theory and the theory of communicative action. This tradition is connected with the so-called linguistic turn in philosophy. What is of utmost importance here for the conception of the justification of the external validity of law are the conceptions of the justification of law developed in the phenomenology of law by Adolf Reinach, who demonstrates a group of social acts – *soziale Akte*, then known as speech acts, which must be performed by the subject of law to provide the source of the existence of law. The acts which constitute the ontological foundation of law include the promise – *Versprechen* and the act of lawmaking – *Bestimmungsakt*. In other words, the transcendental argument to justify law is the sphere of linguistic (speech) acts (Reinach 1989, 169–175 and 252–271). Another transcendental project of justifying intersubjectivity as a prerequisite for the existence of positive law is the concept of communicative reason by means of which its creator – Jürgen Habermas – develops the theory of communicative action (Habermas 1987. Vol. 1, 293–308). As in Reinach, the source of law here is *a priori* communicative situation. This trend of justifying law also includes the standpoint presented by Robert Alexy in *Theorie der juristischen Argumentation* where the author points to the transcendental nature of the rules of practical discourse (Alexy 1987, 234).

Ad. 4. The fourth tradition is associated with the concept of evolutionary philosophy of law, which perceives positive law as a form of biological adaptation through evolution. Naturalistic perspective can thus be regarded as a transcendental argument, if it is intended to demonstrate the ultimate bases for the existence of a given ontological category – for us it is law. Ontological thesis of the theory of evolution in respect of law provides that the latter is considered as a being

based on the social practices of cooperation. The latter, in turn, are perceived as the product of biological evolution. Thus, the ultimate foundation of the existence of law, namely the transcendental argument to justify law, is a genetic disposition to cooperate, which is viewed as a product of biological evolution. Justifying reason here is the argument described by R. Dawkins in Chapter 12 of *The Selfish Gene* (Dawkins 1989, 202–233). It is a combination of a logical argument with the theory of a stable evolution. Citing R. Axelrod's and W.D. Hamilton's research on game theory, Dawkins points out –– that the entire biological world takes part in the endless game of the 'iterated prisoner's dilemma'. The best strategy in terms of evolution is the so-called tit for tat strategy. Under the latter the agents always 'cooperate' instead of 'retaliate' and, in cases of 'retaliation', it is always better to be 'generous', namely quick to forgive and 'cooperate' rather than go to the strategy of 'a permanent retaliation' which ultimately leads the actors to a far worse situation in the population. The argument at issue, however, has a real rather than normative dimension, both in terms of logic and biology. It cannot serve as the basis for inferring a necessary 'ought' but it can only provide the rational (logical and biological) justification for its adoption. In other words, there is no need of cooperating, but only a conclusion that it is better to cooperate than not. The same thesis Wojciech Załuski supports in *Evolutionary Theory and Legal Philosophy*. He argues that the best justification for existence of law is based on the so called Darwinian model and from evolutionary theory point of view the law is an emergent entity directly supervening on social practices of cooperation and indirectly – or ultimately – on human evolved cooperative dispositions (Załuski 2009, 60–78).

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Effectiveness of Interpretation in the Context of Polish Theories of Legal Interpretation

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Introduction

There are numerous interpretations of the notion of the effectiveness of statutory interpretation which depend particularly on the adopted research perspective. For instance, representatives of economic analysis of law will be prone to regard the issue in the context of a more general question of social costs of law (see e.g. Ehrlich, Posner 1974, 3). In this approach, the effectiveness of interpretation of law relates to the assessment of economic implications engendered by an interpretative decision, especially one whose character exceeds the narrow definition of the application of law (i.e. is connected with judicial law-making). The notion of the effective interpretation of law will be understood differently by a law dogmatist. E.g. for a representative of the doctrine of EU law, the fundamental connotation will be the principle of effective interpretation understood as a kind of interpretative meta-directive which makes the provisions of EU law into an effective and useful (*effet utile*) instrument of impacting social and economic environment in accordance with the objectives adopted in the Treatises (see e.g. Prechal 2007, 38ff). On the other hand, in the field of tax law, effective interpretation of law means interpretation whose result will lead to a tax incidence adequate to activities conducted by a taxpayer exercising economically rational behaviour (Brzeziński 2010, 468ff). Yet, another perspective on the issue in question can be provided by the general theory of law. Apart from effectiveness understood as a kind of correspondence between statutory interpretation and consequences of the decision to apply law (Płeszka 1996), in this perspective the effectiveness of the interpretation process may be associated with its conclusiveness. This last issue will be the central problem of this study.

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Three approaches to the problem of the effectiveness of interpretation

Conclusiveness of the legal interpretation may be understood variously, depending on the degree of generalisation of the discussion. In this respect, *prima facie* three levels of theoretical analysis of the issue of the effective interpretation of law emerge. Firstly, the issue can be considered in relation to the resolution of a particular interpretative case, i.e. on the level of a single interpretative decision. In this approach, which we will call "decisive", what comes into the foreground is the question of closing the argumentation process, i.e. the concept of justification which allows the exhaustion of interpretative arguments that determine the decision made in a given case and thus the avoidance of a kind of hermeneutic spiral. In brief, in the perspective of justifying a particular interpretative decision, the nature of the effectiveness of interpretation is pragmatic and indicates certain economy of practical argumentation. In the normative aspect, it is expressed in a postulate of reduction of complexity (Luhmann 1985, 47ff) that on the grounds of jurisprudence takes the form of an interpretative rule according to which the court should not argue for particular interpretation of law in a situation where it is beyond doubt for the relevant case, as such an attitude would lead to "the paralysis of action of institutions that apply law and they would be forced to waste their time and cite in their justifications common interpretative banalities" (Morawski 2010, 54).

The second level of analysis emerges from the notion of interpretative discourse. In this perspective, the question of closing the legal argumentation also has fundamental significance, only it is considered based not on a particular case of interpretation (justification of a legal decision), but in the context of the possibility of formulating an effective method of finishing interpretative disputes occurring particularly in judicature. It involves primarily identifying a concept of statutory interpretation that would enable relatively stable understanding of legal texts by legal, and especially judicial interpretative community. Therefore, such a discursive approach emphasises the ossification caused by judicial interpretation of law, while its effectiveness is expressed mainly in the form of established, or universally accepted interpretation of a given type of cases (the problem of lines of precedents). In other words, the effectiveness of interpretation here is precedential, and understood as the ability to establish particular interpretative attitudes and thus to realize the value of the certainty of law.

Finally, the third level refers to interpretation of law regarded as an element of social communication, and as such to law as the product (one of the forms) of culture.[1] In this perspective – similarly to the level of interpretative discourse

[1] An example of a philosophical and legal concept whose starting point is the approach to law as a cultural item is Carlos Cossio's egological theory of law (see Cossio 2014).

– the notion of the effective interpretation puts emphasis on the question of the acceptability of particular methods of interpreting legal texts. The criterion of effectiveness does not, however, require reaching the consensus in legal discourse, i.e. a certain state of institutional stability of interpretation, although of course it is not unimportant. The measure of the effectiveness of interpretation is primarily the acceptability (relatively defeasibility) of interpretative discourse in the public space, i.e. as the regulator of social relations. Ultimately, the key to this perspective, which we can call 'cultural', is the legitimacy of legal statutory interpretation, which makes it an issue existing at the intersection of the theory of law and politics.[2]

It is not difficult to notice that research perspectives indicated above take into account audiences of legal argumentation that are varied with respect to their degree of universalization (see Perelman, Olbrechts-Tyteca 1991). The cultural perspective has, of course, the most general character. It focuses on social reception (legitimacy) of the interpretative practice. This one will be discussed further. However, it should be noted that the methodological proposition presented above has the markings of typology, i.e. a kind of feedback occurs at each level of reflection. It is not necessary to explain in detail that the decision to apply law is strongly influenced by the interpretative method of the court (ruling body), and it, in turn, constitutes a component of the legal culture of society.[3] So, in fact, when selecting one of the proposed perspectives, one cannot fully distance oneself from the remaining levels of deliberation.

Two paradigms of interpretation of law

It would be convenient to consider the issue of the effectiveness of statutory interpretation from the cultural perspective against the background of the dispute continuing between the two main Polish theories of interpretation of law: the concepts of clarificative and derivational interpretation. Among numerous theoretical propositions, these two exerted the strongest influence on Polish jurisprudence as well as legal practice (Stawecki 2015, 133–137), and only these two contend for the title of the leader in their domain (Zajęcki 2014, 270–272).

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[2] As William Lucy (2002, 208ff) indicates, rationality and legitimacy are two categories to which the entire theoretical and axiological context of adjudication can be reduced. The former is more characteristic for the language of the theory of law, the latter for the language of the theory of politics.

[3] Justification of a single decision can be analysed at multiple levels, starting from its logical structure (relationship between the premise and conclusion), i.e. in its internal aspect, as well as in the external one, including philosophical presuppositions and world outlook of the interpreter (see Wróblewski 1971, 412–414; Alexy 2011, 221–286).

The former, clarificative interpretation of law, was devised in the 1950s by Jerzy Wróblewski.[4] This descriptive theory was based on the analysis of Polish legal practice, in particular on the methods and techniques of legal interpretation applied by judges of the Polish Supreme Court. The clarificative theory of interpretation has dominated Polish legal culture for a long time and is still frequently used by Polish lawyers. The second most important Polish theory of legal interpretation was introduced by Maciej Zieliński in the 1970s. It is called the derivational theory of juristic interpretation. Zieliński's normative theory is mainly based on the linguistic and logical analysis of the characteristic features of Polish legislative texts, and (additionally) on the examination of the judicial decisions of Polish courts and the accomplishments of Polish legal doctrine. After Wróblewski's death, the derivational theory of juristic interpretation gained momentum and today it is increasingly used by the Polish judiciary.

Even though both theories of interpretation are based on the very same paradigm of legal positivism and refer to the juristic interpretation of legal texts, they are contradictory in many respects. Undoubtedly, the choice between two fundamental meta-principles of legal interpretation is at the centre of the controversy. In Wróblewski's clarificative theory, one of the main directives of juristic interpretation is the *clara non sunt interpretanda* principle. Wróblewski introduced a distinction between the 'situation of interpretation' and the 'situation of isomorphy'. The *clara non sunt interpretanda* principle concerns the second of the abovementioned. In short, the basic function of this principle is to express the idea of the direct understanding of legal texts, which takes place when the so-called operative interpretation of positive law is not necessary because the law-applying authority has no reasonable doubts regarding the meaning and the scope of application of a given legal norm that is to be applied in a legal case. On the other hand, in Zieliński's derivational theory of juristic interpretation, the *omnia sunt interpretanda* principle comes to the fore, which means that every legal provision must be interpreted. In short, the basic idea is to exclude the possibility of the direct understanding of legal texts by claiming that the interpretation of legal provisions is always necessary, against the principle of *clara non sunt interpretanda*.

The controversy over the adequacy of the two opposite meta-principles of legal interpretation began in the last decade of the 20th century and is still intense in Poland. Further discussion will concentrate on this aspect of the dispute, somewhat separately from the remaining elements of clarificative and derivational concepts of statutory interpretation. This is acceptable, as the mentioned earlier interpretative principles are usually considered almost independent from their theoretical foundations, i.e. though they stem from different schools of statutory interpretation. At the same time, it is worth noticing, as Andrzej Grabowski (2015, 77)

[4] See e.g. his major work (Wróblewski 1992).

points out, that the basic problem that underlies the Polish controversy is not parochial, but universal. Without the necessity to continue this train of thought, it suffices to indicate the example of the *acte clair* doctrine developed within the judicature of the Court of Justice of the European Union.

In the debate, many specific arguments (epistemological, ethical, pragmatic, historical, empirical etc.) were formulated and it is arguably an open question as to which principle will be victorious and will influence Polish legal practice in the future. My intention is not the reconstruction of all these arguments which has been done in the Polish literature several times (see e.g. Grabowski 2015, 78–90). For further discussion, we need only take into account the fact that in the centre of this dispute, the category of the direct understanding of the legal text exists, which evoked much controversy, especially in the epistemological perspective. Direct understanding (isomorphy) is used, among others, for ethical arguments that interest us, as we can discern in them the ideological grounds of the mentioned dispute, i.e. they concentrate on the mentioned earlier question of the scope and legitimacy of courts' power (their interpretative actions). More recent interpretations of the *clara non sunt interpretanda* principle, which take no account of the analytical concept of the literal (plain) meaning, are not free from accusations of this type, either.[5] Let us recall in brief ethical arguments presented within the opposing positions.

Zieliński claims, among others, that the use of the *clara non sunt interpretanda* principle allows the law-applying authority to prevent the interpretive dispute and to justify its legal interpretive decision by *ratione imperii*, instead of by *imperio rationis*. In consequence the appeal to the abovementioned interpretative directive can deteriorate the situation of a citizen because it can justify the limitation of human rights caused by the absence of legal interpretation. According to counter-arguments raised by Marek Zirk-Sadowski and Krzysztof Płeszka, this principle, in effect, defends the citizens against the 'linguistic violence' of the judges (law-applying organs). The *omnia sunt interpretanda* principle expands the power of the judges by increasing the possibility of the application of various interpretive techniques (especially extralinguistic ones), which the citizens simply do not know. This means that a citizen can be surprised by the meaning of legal provision derived by court, which application of the *clara non sunt interpretanda* principle precludes, as it obligates the judge to provide a direct justification for any deviation from the ethnical linguistic meaning of legal terms (report see Grabowski 2015, 82ff).

Although Wróblewski (1987, 64) himself indicated that the criticism of the *clara non sunt interpretanda* principle carried out by Zieliński expresses ideological bias instead of describing the statutory interpretation practice, it was only Marek Zirk-Sadowski (2006, 71) who proposed that such a dispute concerning

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[5] Some of them rely on Popper's distinction between the context of justification and context of discovery (Grzybowski 2012, 9), others refer to the institutional approach in law (Zirk-Sadowski 2012, 157).

competing meta-directives of interpretation of law, takes the form of a discussion about the political morality of the judge and the doctrine of the separation of powers, and not a discussion within the scope of ordinary professional ethics. It turns out that the an authoritative character of judicial statutory interpretation may manifest itself precisely by the application of the *omnia sunt interpretanda* principle. Interpretation of law may thwart the actions of the legislative power because the judges' power is in fact the power over the meaning of the legal text.

The presented point of view, which is an attempt to cross the border between law and jurisprudence on the one hand, and between the theoretical view and ideology of law on the other, typical for Zirk-Sadowski (1998), draws attention to the connections of interpretative principles indicated above with a particular vision of law and political order accepted in the public space. The author emphasised this relationship also in his subsequent work, inferring that independently from the controversies over the linguistic sense of the *clara non sunt interpretanda* principle, it has to be noted that formerly (in particular in the 1950s) it was able to play a positive role in limiting the temptations of the totalitarian system, by emphasizing the role of the certainty of legal text. The minimizing of the role of interpretation in the process of law application – as it seems – can be an element of the protection of citizens against the excessive role of political and ideological factors in the understanding and application of the law. In other words, in author's assessment, putting emphasis on linguistic aspects of this principle was not accidental at that time. Its clarificative nature allowed to offer moderate resistance to legal voluntarism of that time. The direct understanding of the legal text constituted a weapon against authorities' abuse of competences through flexible and functional application of legal regulations. Meanwhile, the currently increasing popularity of the *omnia sunt interpretanda* principle may derive from the growing autonomy of courts in relation to the legislative power. As it has been described in the literature multiple times, contemporary judges are becoming active as participants of the process of exercising power, repealing the old formula that limited their role to being 'the *mouth* that pronounces the words of the *law*'. In this situation, connecting the *omnia sunt interpretanda* principle with interpretation of law based on a heuristic model of the justification of the interpretative decision may be a significant factor preventing the upset of the balance of powers (Zieliński, Zirk-Sadowski 2011, 105).

A. Grabowski (2015, 84) presents a slightly different point of view. According to this author, to evaluate the moral value of both principles, we must to distinguish between two historical contexts. In the *Unrechtsstaat*, no matter whether it is a totalitarian or an authoritarian state, these principles can be equally used for the iniquitous manipulation of the results of legal interpretation for political or ideological reasons. And arguably, it would be highly naive to presume that the selection of one of them would bring about some progress in the administration of justice. However, the situation changes if we consider the role of these principles

in the law-governed state (*Rechtsstaat*). In such a context, it can be presumed that the *clara non sunt interpretanda* principle is more favourable for the doctrine of judicial passivism, whereas the *omnia sunt interpretanda* principle mutually reinforces the doctrine of judicial activism. Thus, it seems that the moral evaluation of these principles depends on whether we prefer the active or the passive role of judges in the application of law. Generally speaking, our moral evaluation of both principles can be based on the most general assessment of the degree of people's confidence in public authorities. If we have more trust in the law-maker (legislator), then we should prefer the *clara non sunt interpretanda* principle because it will limit judicial activism. And if we trust more the judiciary, the principle of *omnia sunt interpretanda* appears to be morally better since it promotes judicial activism.

Despite noticeable differences, the common denominator of the positions presented above remains the connection of *clara non sunt interpretanda* and *omnia sunt interpretanda* principles with a particular vision of the judge's power, especially in relation to the legislative power. In the philosophical perspective, in Zirk-Sadowski's and Grabowski's comments we can detect echoes of Zygmunt Bauman's (1987) famous metaphor of the era of legislators and the era of interpreters. In this metaphor, the *claritas* doctrine, especially in its initial, linguistic view, would correspond to the choice of a 'bound image of the interpreter' who 'cedes' the entire responsibility for the contents of law to the legislator. Meanwhile, the interpretative opening of the courts envisaged by the *omnia sunt interpretanda* principle enables them to stop being only passive reconstructors of the vision of society imposed by the remaining powers (especially the legislative) and become active actors (interpreters) of the social life. By abandoning the Montesquieu's paradigm of adjudication, judges adopt the role of users of the institutional structure who are required to make interpretative choices. The choice of *omnia sunt interpretanda* indicates therefore the increase in the significance of the judge's role, which *nota bene* generates a serious problem of the legitimacy of judge's actions. The judge's power over the meaning contained in the legal text becomes, as it was observed, a discreet power over legislation, and as a result, also to a certain extent – over society (see e.g. Eriksen 2006). Thus, the systemic context, and particularly political and ideological premises outlining the role of the third power, are not neutral to the acceptance of the *clara non sunt interpretanda* or *omnia sunt interpretanda* principle.

Models of the legal culture

Let us now try to identify the types of the legal culture corresponding, in the model approach, to the visions of the judicial power indicated above, and as a result – to the respective principles of interpretation. In this respect, it would be useful to draw on the so-called "developmental" theories of law which in

certain approximation describe also systemic changes that occurred in Polish legal culture after 1989. One of the most renowned notions in this regard was formulated by Phillipe Nonet and Philip Selznick (1978). Their theory envisages the evolution of society, the political power and law. Society transforms from a state in which it is an aggregate of individuals subject to various influences of the political power into society comprised of subjects for whom law constitutes an institution that enables the realization of goals and ideals and guarantees the order of mutual influences. The authors indicated three model types of law: repressive, autonomous and responsive.

To put it very simple, repressive law could be regarded as an idealization which assumes dependence of an individual and society on the political power. The repressive type of law is characterised by voluntarism of legal decisions, i.e. complete subordination to political powers – both at the level of creation and application of law. The disappearance of the 'pure power has an emancipative effect in the form of autonomous law which has its 'equivalent' in the notions of the *Rechtsstaat* and the *rule of law*. The essence of the autonomy of law is the interdiction to abuse it as the means to gain immediate, short-term political goals. Obligation is controlled and limited by law, 'official' morality no longer applies, legal rules are general, and they bind ruling and being ruled in equal measure, and there is a 'test of lawfulness' for acts of creation and application of law. Making law in a manner of speaking independent from the political power and simultaneous legal limitation of power also creates conditions for building an 'institutional system of arrangements' characteristic for the idealizing type of responsive law. The responsive system is oriented on exerting adaptational and varied influence on social reality. Law is 'open' to social needs and aims, obligation is replaced by self-limiting commitments, morality is civic and assumes cooperation within society.[6] Therefore, legal principles are 'open'; they often take a form of general clauses and are subject to rules of law, while the justification of legal decisions (creating and applying law) is purposeful. Responsive law assumes the need to reshape democracy based on a majority mechanism of parliamentary democracy which is to be replaced by negotiation and consensus as fundamental manners of reaching optimal decisions within the political system.

It is easily noticeable that in each of the mentioned above types of the legal culture, the judiciary has a different role to fulfil – from a passive executor of instructions received from political powers to full-blooded participant of the public debate on law and fundamental principles and the axiology of civic society. Leaving aside the legal opportunism, or perhaps even nihilism that accompanies

[6] One may recognize some parallels between this thought and the conceptions of famous Polish legal philosopher Leon Petrażycki (1985, 165) who claimed that law pursues common goodness ('ideal of love') which means it drives to abolish itself. In other words, (future) civilization progress relates to gradual transformation of law into morality.

repressive forms of the legal system, we should note that autonomous law adopts a rather conservative concept of the judicial power, corresponding to the *claritas* doctrine. Meanwhile, in the responsive legal culture, courts are expected to be actively involved in a social discourse, which is facilitated by a kind of interpretative opening related to the *omnia sunt interpretanda* principle. Because, while in autonomous law the resolution of deeply divisive questions stemming from an unavoidable conflict of incommensurable values (value-pluralism) falls mainly on the legislator using particular legislative solutions, in the responsive system, by using legal principles and general clauses, the legislator creates only a general framework for conflict-of-law decisions in this respect, which are subject to courts' jurisdiction. A vision of society drawn in the most general manner in the acts of a constitutional scope, in relation to numerous detailed issues becomes the subject of negotiations and decisions oriented on the reconciliation of divergent interests, both of individuals and entire social groups. Its distinctive concept of adjudication assumes a kind of 'rule of judges' (Davis 1987, 559ff). Judicature becomes open to negotiation between various spheres of social prescriptivism, thus responding to the needs related to the coordination of many coexisting normative systems (also legal ones) articulated in the idea of *governance* (Lobel 2004, 89).

The effectiveness of statutory interpretation as its suitability to the legal culture

In view of the foregoing, we could venture a statement that interpretative principles competing in Polish legal culture should not be so radically contrasted with one another, because their usefulness in the interpretative discourse is gradable. In this respect, it is the suitability to a particular cultural context, including particularly the foundations of the political system that establish social expectations towards the judicial power, that tips the scales. Depending on the type of the legal culture, each of the competing meta-principles can fulfil the function of legitimizing or quite the opposite – delegitimizing the practice of interpretation of law, which of course translates into the effectiveness of the interpretative activity of courts.

It would seem that the interpretative claim related to the *omnia sunt interpretanda* principle is the stronger, the closer it gets to the responsive legal system and the related increase in the importance of the judicial power. Until recently, a good example in this respect was provided by integration processes in Europe, which lately have become somewhat hampered. The harmonization of legal cultures, and particularly their axiological foundations, took place not only at the level of the legal text, but also through a legal discourse, expressed

particularly in the dialogue of national and international court jurisdictions (Zirk-Sadowski 1997, 2).[7]

However, in specific conditions a hermeneutical shift characteristic for the foregoing principal rule of the derivative conception of statutory interpretation (Zieliński, Zirk-Sadowski 2011, 110) may turn out to be counterproductive. On the practical level (*techne*), hermeneutics easily degenerates to the 'theory' of text manipulation, or rather manipulation of legal discourse topoi, which makes interpretation of law susceptible to the interpreter's abuse (Kozak 1999, 275, 277). As a result, the *omnia sunt interpretanda* principle which of its essence weakens the conclusiveness of the interpretation process, in the circumstances of an unresponsive legal culture may even paralyse the interpretation practice, and coincidentally cause interpretation decisions to be perceived as made with the abuse of competence.

A certain touchstone of the abovementioned thesis can be the recent constitutional crisis in Poland which showed that the optimism of the doctrine concerning the argumentative opening of the courts was premature. It was revealed that the vision of a strong judicial power, particularly in its horizontal aspect i.e. in relation to the remaining branches of power, evokes their strong opposition as well as the opposition of a part of society. At the same time, representatives of the dominant political power themselves on numerous occasions presented surprising positions about the interpretation of constitutional provisions, which until then profited from the *lex clara est* status. Consequently, doubts emerge whether Polish legal culture was ready for the derivative conception (a kind of omnipotence) in statutory interpretation. Naturally, we cannot disregard the political context of the evoked events, but there should be no doubt that new interpretations of the legal text gain strong support from the *omnia sunt interpretanda* principle, especially when it functions independently of its theoretical background (Zirk-Sadowski 2012, 25). Such a 'dynamic' approach to the interpretation of the Constitution would be difficult to accept on the grounds of Wróblewski's theoretical propositions. Especially, the institutional view of the

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[7] As Marek Safjan (2010, 108ff) indicates in this context, 'a statement *omnia sunt interpretanda*, expressed in opposition to the classical (and still frequently invoked) maxim *clara non sunt interpretanda*, implies a radical, even revolutionary, change in the sphere of semantic interpretation. Concepts, legal constructions, legal institutions, principles and values, expressed by the law, are losing their stable, uniform semantic sense nowadays to much more flexible and dynamic conceptions. These latter are not only influenced by the context of the closed, highly formalized realm of «jurisprudence of concepts» but also determined by phenomena from «the outside» of the system – taking place in the sphere of actual social, economic and political changes, on a local and domestic, as well on an international and supranational levels. This evolution of the context, in which legal mechanisms are functioning, is imposing changes in the sphere of semantics just as expectations regarding the particular role of legal institutions motivate a search for their new meanings'.

clara non sunt interpretanda principle that assumes that the clarity of the legal text can stem from its 'interpretation history' (Fish 1989, 513) would constitute a particular obstacle in this regard.

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Undoubtedly, we still must wait for a definitive answer to the questions stated above. But the foregoing discussion seems to reveal an important feature of interpretation, namely the fact that its effectiveness, understood in the broadest of terms as the ability to regulate social relations, is a product of the conclusiveness of a given interpretation paradigm and the cultural context in which it is grounded. In the meantime, it is possible that interpretation directives, which themselves constitute specific cultural artefacts, are not fully compatible with ideological premises of the legal and political culture of a given society, constituting in a way a counter-productive element of this culture. It would seem that the development of the legal culture does not have to proceed evenly, therefore the accepted methods of interpretation may not harmonize with expectations of lawyers in the public space. An interpretative directive that creates certain possibilities (adaptational, guarantees, etc.) in one type of the legal culture can be harmful to the interpretative discourse in a different legal system, undermining the result of interpretation and the authority of the governing body that cites this interpretation.

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Key Procedural Principles of Polish Criminal Proceedings

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The Polish model of the law of criminal proceedings is based on the system of key procedural principles which have evolved over several decades, and subsequent Codes of criminal procedure which have been in effect. The first Polish Code was a directive/order of the President of the Republic of Poland of 19th March 1928[1], the second one was the statute of 19th April 1969.[2] Currently, the Code of criminal procedure of 6th June 1997[3] is binding. It came into force on 1st September 1998.

The subject matter of criminal proceedings is the problem of legal responsibility of the defendant for a prohibited act (Grzegorczyk, Tylman 2014, 48–49). The purposes of this Code are established in Art. 2, and accordingly the provisions of the Code of criminal procedure aim at establishing such proceedings which will allow the detection of the perpetrator and that he/she will be held criminally responsible, but the innocent person will not, thanks to the proper application of measures provided for in criminal law and disclosure of the circumstances which favoured the commission of the offence. The tasks of criminal proceedings will be fulfilled not only in combating the offences, but also in preventing them, as well as consolidating the rule of law and the principles of community life. Legally protected interests of the injured person will be secured, and his/her dignity will be respected, and also the passing of a judgment in a lawsuit will be within reasonable time. The basis for any kind of ruling should be the true establishment of facts.

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[1] Dz.U. (Official Journal of Laws) No. 33, item 313.

[2] Dz.U. No. 13, item 96 as amended.

[3] Consolidated text: Dz.U. of 2016, item 1749 as amended.

The criminal proceedings are divided into procedural stages. The first one is preliminary proceedings, which take the form of either an investigation or an enquiry. They are instituted when there is a reasonable suspicion that an offence was committed. Preliminary proceedings consist of two phases: *in rem* (against a thing) and *ad personam* (against a definite person if he/she is determined). This phase starts with the presentation of charges. The person against whom evidence justifying the charges was gathered is called the suspected person. After the presentation of the charges he/she becomes a suspect.

The main procedural stage is a court trial. It is initiated by the authorised prosecutor who submits an indictment or a motion on conditional discontinuance of criminal proceedings, which is a probationary (assuming the perpetrator undergoes a test) institution of substantive criminal law. The person against whom the charges were brought to court is a defendant *sensu stricto.* The term defendant *sensu largo* is used to describe a defendant *sensu stricto* and the suspect in preliminary proceedings (Grzegorczyk, Tylman 2014, 319–321).

Criminal proceedings consist of two instances. A measure which revokes the judgment is an appeal, whereas against a court decision or regulation a complaint can be filed. The Code of criminal procedure also provides for extraordinary measures of appeal against legally valid judgments such as cassation and instituting a trial *de novo.*

Procedural principles are of fundamental importance for the model of criminal proceedings. They determine the proper course of proceedings, rights and obligations of the parties to criminal proceedings, the ways of achieving the aims of the trial. The issue which is also important is a system of guarantees functioning in a criminal trial. On the one hand, these are the guarantees of the judiciary who are to assure the proper mode of criminal proceedings, on the other hand, these are the guarantees of the parties, which define the acceptable interference into the sphere of their rights and freedoms. The system of procedural guarantees relates to the system of principles legally binding on the criminal trial. In numerous judgments of the Supreme Court or Constitutional Tribunal this extremely important aspect is stressed in the application of law. It can also be noticed in the judgments of common courts, which proves not only theoretical but also practical significance of procedural principles.

The sources of procedural principles are in the Code of criminal procedure, the Constitution of the Republic of Poland of 2nd April 1997[4] as well as in acts of international law, such as the Convention on Human Rights and Fundamental Freedoms[5] or International Covenant on Civil and Political Rights.[6]

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[4] Dz.U. of 1997 No 78, item 483 as amended.

[5] International treaty ratified by Poland. Dz.U. of 1993 No 61, item 284 as amended.

[6] International treaty ratified by Poland. Dz.U. of 1977 No 38, item 167.

Procedural principles may be defined in an abstract and a concrete context, in other words such as is binding in a particular legal order. Procedural principles in an abstract context may be characterised as an indication of the probable direction of resolution of an essential procedural issue in a statute, a general idea of resolution of a key legal issue in a trial. Whereas, procedural principles in a specific context are abstract principles in such a form as they were accepted and established in a particular procedural system (Buchała, Waltoś 1975, 282–283; Cieślak 1984, 195–199; Grzegorczyk, Tylman 2014, 77–79). In the studies of criminal procedural law, a debate has been conducted for years about the number of procedural principles, defining the criteria for distinguishing them and their mutual relationship.

Several procedural principles have a defined character, which means that they are regulated by a specific provision of the Code of criminal procedure. Whereas, part of them are undefined, which means they are derived from many provisions by way of interpretation. However, all principles can be described as codified, so resulting from the content of the Code of criminal procedure (Grzegorczyk, Tylman 2014, 77–79).

Among procedural principles some are distinguished in a special way and they are referred to as key principles of criminal proceedings. These are the principles which refer only to criminal proceedings, they are conclusive for significant issues of criminal proceedings and applicable to any typical situation in the proceedings (Dudka, Paluszkiewicz 2017, 160).

The key principle, which in the Polish system of criminal procedural law has a special, utmost importance, is the principle of the material/substantive truth, sometimes also called the objective truth (Śliwiński 1961, 73–75). According to its assumptions the basis of any judgments should be the true establishment of facts, which means that they must be proved. This proof must conform to two conditions: the evidence has to be objectively convincing, so that it provides such a high degree of probability that a normally reasoning person should be convinced about the truth of the fact established. The second condition, subjective, means that there must be a full conviction of the organ passing a judgment that a particular establishment of fact is true (Cieślak 1984, 325).

A crucial principle of a guarantee character is the principle of the presumption of innocence, according to which the defendant is presumed innocent until his guilt is proved by a legally valid judgment. This presumption has a legal character, and only a court can reverse it. Different ways of perception of this principle are indicated. A subjective approach provides that the presumption of innocence is based on the conviction of the people who constitute procedural organs that the defendant is innocent (Cieślak 1984, 355–357). This concept does not seem to be real as it assumes a particular way of reasoning. However, an objective approach is worth accepting, because according to it the presumption of innocence is a legal norm. This necessitates the treatment of the defendant as

innocent, irrespective of personal views of the people acting in the character of procedural organs (Hofmański 1987, 27; Grzegorczyk, Tylman 2014, 136). This principle is of fundamental importance for the defendant, creating a guarantee of his/her status until the implementation of the judgment.

Another key procedural principle, which is perceived to be closely connected with the principle of the presumption of innocence (Hofmański, Waltoś 2016, 250; Kruszyński 1983, 81; Marszał 1997, 255), is the *in dubio pro reo* principle. It provides that doubts which cannot be eliminated have to be resolved in favour of the defendant. This principle means that in favour of the defendant such doubts are resolved which cannot be eliminated with the use of evidence available and admissible by the law. Consequently, it cannot be interpreted as the entitlement of the procedural organs to abandon proving the evidence which is within their reach (Grzegorczyk 2014, 62).

The adoption of the principle of the material truth, the principle of the presumption of innocence and *in dubio pro reo* give rise to consequences, among other things, in reference to the sentence of acquittal which can be passed in two situations. First of all, when the innocence of the defendant is proved that fulfils the requirements of the principle of the material truth. In the second situation, the acquittal sentence may be passed when the presumption of innocence has not been refuted, and in accordance with *in dubio pro reo* principle all doubts will be resolved in favour of the defendant. In such a situation, the court acquits the defendant not because it determines without any doubt the innocence of the defendant, but because of the necessity to use the presumption of innocence. However, the sentence convicting the defendant always has to fulfil the requirements of the principle of the material truth and refute the presumption of innocence (Grzegorczyk, Tylman 2014, 84).

A crucial principle of the law of evidence is the principle of the burden of proof (*onus probandi),* the consequence of which is charging the author who is proving the thesis with the consequence of not proving it (Cieślak 1955, 152). The burden of proof in criminal proceedings is on the prosecutor whose task is to refute the presumption of innocence. The defendant does not have to prove his or her innocence (Grzegorczyk, Tylman 2014, 143).

One of the most important procedural principles, having a guarantee character, is the principle of the right to defence. It can be perceived from a material perspective, connected with the possibility to refuse charges, and a formal perspective, as the right to have a legal counsel (Grzegorczyk 2014, 66–74; Hofmański, Sadzik, Zgryzek 2007, 57). The Code permits appointing not more than three counsels who may undertake effective action only in favour of the defendant. Within the framework of the right to defence, it is worth mentioning a few most important rights of the defendant, such as the right to provide evidence, the right to refuse to provide evidence and to refuse answering the questions. The defendant can use the rights freely without exposing himself or herself to detrimental legal effects.

The defendant has the right to submit motions, of evidential character as well, to appeal against a decision, ask questions to testifying persons, express himself/herself during a trial in reference to any particular evidential action, the right to speak at the closure of the proceedings before the court adjourns to deliberate the judgment.

In certain situations the right to defence, from formal perspective, changes into the obligation to have a legal counsel, if certain circumstances provided for in the statute take place, such as: when the defendant has not reached the age of 18, is deaf, mute or blind, when there is a reasonable doubt about his/her capacity to recognise the significance of the act or when his/her capacity to guide his/her conduct was excluded or limited at the time of committing the offence, but also when there is a reasonable doubt that his/her mental condition of health allows him/her to participate in the proceedings and conduct the defence independently and sensibly. Moreover, the defendant needs the legal counsel as well, when the court rules that it is essential due to other circumstances impeding the defence. In such situations the participation of the legal counsel is obligatory during the trial proceedings and such sessions when the presence of the defendant is obligatory. The absence of the legal counsel results in revoking the judgment.

A crucial value of the criminal proceedings is impartiality of the organs conducting the proceedings. In relation to the above, the principle of objectivity is in force, and according to it the authorities conducting proceedings are bound to be objective in their approach to the case and the parties to the case, and they are impartial and free from bias and personal attitude (Cieślak 1984, 318). The organs conducting criminal proceedings are, at the same time, obliged to examine and take into consideration circumstances both against and in favour of the defendant. The institution of excluding the judge exists to satisfy the need for objectivity. The Code provides for two such instances. The first one, the so called *iudex inhabilis*, is a finite catalogue of circumstances which, when they appear, result in an absolute order to exclude the judge to whom they are pertaining (Grajewski, Paprzycki, Płachta 2003, 159–165; Świecki 2017, 241–261). The second instance of excluding the judge is *iudex suspectus,* which means excluding the judge on a motion of one of the parties if there is a reasonable doubt about the impartiality of the judge. Such motion can be lodged until the opening of the court proceedings, i.e. the reading of the indictment by the prosecutor during the first instance hearing. The motion lodged after this date can be the ground for exclusion, as long as justified circumstances leading to it happened or became known to the party after the opening of the court proceedings (Grajewski, Paprzycki, Płachta 2003, 165–167; Świecki 2017, 261–274).

The rules on excluding the judge are appropriately applicable to a public prosecutor, a prosecutor, other persons responsible and supervising the preliminary proceedings, as well as an expert witness, an interpreter, a recording clerk,

a shorthand typist, a probation officer. The necessity to remain objective refers to the prosecutor as well, who in jurisdictional proceedings takes the role of a public prosecutor, and in this way becomes a party to the proceedings. Thus, he/she as the only party to the proceedings has the power to institute appeal measures both against and in favour of the defendant.

The key principle which refers to initiating and conducting criminal proceedings is the principle of legalism. It assumes that proceedings can be conducted if they are legally admissible and, in fact, justified. When these two conditions are fulfilled, in cases prosecuted ex officio (public claims) the organs of preparatory proceedings are entitled to instigate and conduct the proceedings, then the public prosecutor is obliged to institute and support the indictment in court. It means the obligation to proceed if the case fulfils positively all conditions of admissibility of criminal proceedings (prerequisites for court proceedings), and there are no negative prerequisites for court proceedings and the factual basis for the case exists (Tylman 1965, 117).

As pointed out in the introduction, court proceedings are instigated by an entitled prosecutor or another entitled subject who brings an indictment (Murzynowski 1994, 167). It defines the sphere of the principle of accusatorial procedure, according to which the court cannot start action ex officio, because a formal accusation of another subject is necessary. In principle, this subject is a prosecutor acting as a public prosecutor. Whereas, in situations provided for in the provisions, special powers of the public prosecutor are conferred on e.g. Forest Guard, Trade Inspection or State Sanitary Inspection. The indictment defines the subjective and objective framework of court proceedings. Effective indictment creates the state of the pendency of the litigation in court (*lis pendens)*. However, the public prosecutor may withdraw the indictment until the beginning of the trial during the first instance hearing. During the trial before the court of first instance such withdrawal is admissible only upon the consent of the defendant. Bringing an indictment against the same person for the same offence twice is inadmissible. Expressing the consent causes the discontinuance of the lawsuit by court, but the lack of the consent may result from the intent of the defendant to bring the trial to an end with the court passing the sentence of acquittal. In this way, it depends on the wish of the defendant whether the trial will be continued if the public prosecutor withdraws the indictment.

The issue of the model of criminal proceedings also answers the question about the way of conducting the proceedings. In Polish criminal trial the principle of contradictoriness applies, but with some exceptions in favour of the investigative system. The principle of contradictoriness assumes that the trial is a dispute of equal subjects in front of an impartial arbitrator (Grzegorczyk, Tylman 2014, 111). The axis of the dispute revolves between the prosecutor and the defendant. However, it should be pointed out that evidence may be submitted by the court *ex officio*. It is related to the necessity of applying the principle of the substantive/

material truth. The organs conducting the criminal proceedings may be actively involved in the evidentiary sphere, if they determine there is such a need, and that evidentiary action will bring them closer to the settlement. It is essential that we can talk about the contradictoriness of the court proceedings, with the exceptions in favour of the investigative system. However, in the preliminary proceedings the investigative system dominates, which is natural due to the character and objectives of this stage of criminal proceedings. Some elements of contradictoriness might be found here though, for example the parties to the inquiry or investigation have the evidentiary initiative and the right to participate in the action brought on their motion, if they wish so. The equality of parties to a criminal trial is connected with contradictoriness and is very often treated as the principle of equality or sometimes called the equality of arms (Waltoś 2008, 283–285), according to which the parties who are involved in the dispute have equal status.

The principle of directness is a key procedural principle connected with establishing a model of criminal proceedings, referring to the way evidence is determined during the first instance hearing. It is based on three directives. First of all, the evidence should be revealed in the course of the trial. Moreover, the court should directly assess the sources of the evidence and the evidence, and finally priority is given to primary evidence over secondary evidence (Murzynowski 1994, 311). The essence of this principle assumes that the judges who will pass the judgment should base it on their own observations made directly during a trial, without any indirect links.

It is important to mention here that there are regulations which provide for the admissibility of indirect evidence, for example the evidence read from the minutes of the court session, when it is impossible to assess the evidence directly, or, for example, in a situation when the defendant or the witness present explanations or testify differently than during the preliminary proceedings, or refuse to testify or give evidence altogether. These are the examples of situations in which the court may use the minutes of the court session or investigation and read them during the trial, thus enabling the person who is examined to take a stance on their content.

On the other hand, it is necessary to raise the problem of many resolutions provided for in the Code of 1997, which assume limitation of directness in the examination of the case. As for example, in connection with the institution of consensus-based resolution of criminal matter, such as conviction without hearing or voluntary submission to punishment. The first one provides that on the prosecutor's motion a judgment reached with the approval of the defendant is passed. This motion may be opposed by the injured party. The second one refers to the possibility of submitting a motion for conviction by the defendant himself. This motion may be opposed by both the prosecutor and the injured party. Conditional discontinuance of the criminal proceedings may be examined

during the trial as well. The scope of passing judgments by the court during the trial has increased, and basically passing a judgment based on the files from preliminary proceedings show a wider range of exceptions to the principle of directness provided for by the legislator.

The key procedural principle which defines the way of establishing the facts in the criminal proceedings is the principle of the free evaluation of evidence, according to which the organs conducting proceedings form their convictions based on the establishment of the evidence, free evaluation of it and taking into account the principles of proper reasoning, indications of knowledge and life experience. The evidence does not have a formal particularly attributed to it value. In each case it must undergo free evaluation based on the criteria referred to above, but not freely/randomly (Grzegorczyk 2014, 27–28). When passing the judgment, the court must show which evidence was the basis for the judgment and which circumstances were proved, and which were not and why.

Numerous normative changes introduced by the legislator are connected with the determination to simplify and speed up the criminal proceedings. These changes are, among others, related to the principle of concentration, which provides that criminal proceedings constitute a coherent and consistent course of actions conducted without unnecessary breaks and restraints aiming at the complete explanation of the circumstances of the case and concentration of the evidence on the subject of the case in such a way that it leads to the judgment properly fulfilling the criminal substantive law (Cieślak 1984, 340, 342). This principle was once connected with the continuity of the hearing and that it must be interruptible (Śliwiński 1948, 135). Currently, it applies to the whole criminal proceedings and all its stages (Grajewski, Papke-Olszauksas, Steinborn, Wożniewski 2007, 101). There are several indications of concentration in the Code, e.g. dates of investigation and inquiry, recess and adjournment of the case, adjournment of passing the judgment, possibility of suspending the proceedings. Special modes of criminal proceedings are also admissible, they are characterised by deformalised and speeded up approach, e.g. in speeded up proceedings or proceedings by writ.

An essential element of the first instance hearing is the unchangeability of the panel of judges. It means that the sentence is passed by persons who participated all the time in the proceedings and thus possess full knowledge of the action taken in the course of the proceedings. Failure to respect this requirement results in the reversal of the judgment by the court of appeal. Unchangeability of the panel of judges is linked with concentration, directness, but may also be treated as a separate procedural principle.

The question that can be posed in relation to the accessibility of criminal proceedings refers to its openness. It can be looked at from the inside and outside perspective. Inside openness is directed at the participants of the trial, but outside

openness at the audience, or broadly speaking at the public (Siewierski, Tylman, Olszewski 1974, 43).

The scope of openness of the proceedings depends on the procedural stages. During preliminary proceedings, the parties have limited access to the files. It is due to the character of this stage, the aim of which is to determine if a prohibited act was committed and if it amounts to the offence, detection and if necessary arrest of the perpetrator, collection of the personal data connected with the perpetrator, or conducting the so-called community interview. Moreover, all the circumstances of the case are explained, the injured persons recognised and the range of damage determined, but also collection, protection and preservation of the evidence for the court takes place. Only when there are grounds to close the investigation or enquiry, the case files can be made available to the suspect or on his/her motion to the legal counsel. However, as a rule, the parties have unlimited access to case files.

In reference to outside openness, during the preliminary stage it is limited to information disclosed by the representatives of the prosecution or police. During jurisdictional proceedings everybody may participate as the audience in the first instance hearing. Moreover, the information about the proceedings can be registered by media, within the rules defined by the court. Outside openness of the first instance hearing is also manifested, apart from the right of audience participation, by opening the court proceedings which take place when the indictment is read by the prosecutor. Limitations to openness of the trial may take place if e.g. it would lead to public nuisance, offend public decency or morality, or infringe an important private interest. In this stage, of course, information on criminal proceedings may be made available by the court's spokesmen.

With regard to the forms of documentation of action taken, a question is raised if there is any or which principle applies to these issues. It is considered that criminal trial is oral, but documented (Grzegorczyk, Tylman 2014, 157). A lot of actions during a trial are oral, but the Code provides for their recording. The basic form of documentation of the course of the trial is writing the minutes. A stenographic record may also be made, but it has to be translated into Polish by the shorthand typist, who, then, includes information which system he/she used. The stenographic record is an appendix to the minutes and does not replace them. Similarly, when the course of action is recorded by a device registering pictures or sounds, such recording becomes an appendix to the minutes as well.

Summing up, the key procedural principles constitute the basic legal norms describing the features of the proceedings, pointing to what, within the large scope of regulations, is more important and general rather than less important details (Cieślak 1984, 194; Grzegorczyk, Tylman 2014, 76). They establish the system which shows the model of the criminal proceedings. A few key principles have

been presented in this text with full awareness that other authors show these issues differently, because all the time a debate continues on the catalogue of principles, the criteria for distinguishing them and their mutual relationship. These issues are even more the subject of interest, as the Polish criminal proceedings undergo frequent and numerous changes which result in the necessity to study all the time the issues of principles, their shape and importance.

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Significance of Personality Disorder With Respect to Sanity

Anna Lisowska[*]

1. Introduction

Sanity constitutes one of the most important issues discussed in the range of the general part of substantive criminal law. Like in the previous years, nowadays the legal provisions regulating it arouse a lot of doubts and controversy. This state of affairs may result from specificity of the sanity issue which directly exceeds the field of legal sciences linking it with the issues in the range of psychiatric, psychological or medical sciences. Furthermore, despite a similar character of the main functions of criminal law in particular countries there are different legal regulations referring to it. On the one hand, it causes grater confusion concerning the issue of sanity, on the other hand, it forces to conduct a deeper analysis of considerations in the discussed range. Undoubtedly, undertaking careful meditation on the sanity issue taking at the same time into account both legal as well as psychiatric or psychological issues constituting it, provides an opportunity to create adequate legal regulations and by the same token to issue fair resolutions. Otherwise, it could lead to violation of the basic human rights and freedoms arising not only from the Constitution of the Republic of Poland but also from the Universal Declaration of Human Rights or from the Charter of Fundamental Rights.

Under Art. 31 § 1 of the [*Polish*] criminal code, insanity can be caused by mental illness, mental impairment or another disruption of mental activities. Personality disorders have an interesting position among sources causing, to a significant extent, exclusion or limitation of ability to recognise importance of the nature of one's act or to control conduct. In psychiatric and psychological

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sciences, especially in the field of clinical psychology they are accepted as one of the typical disorders that have influence on a quality of an individual's life and their functioning in the society. They have their position both in the Diagnostic and Statistical Manual of Mental Disorders DSM-5 as well as in the International Statistical Classification of Diseases and Related Health Problems ICD-10. In the legal sciences, personality disorders are treated mostly as a premise limiting capacity to recognise importance of the nature of one's act or to control conduct. In my opinion, it is necessary to think over if this approach is correct. I think that issues of perpetrators of forbidden acts suffering from personality disorders have not been sufficiently investigated, which may be caused by a fear to undertake a broader analysis of the mentioned issue. The mentioned wrong-doers cause a lot of difficulties to the state and the society. It results mainly from low effectivity of therapeutic influence on the mentioned people as well as from their functioning in the society that is not adapted to recognised and commonly accepted legal, social or moral norms desired in given culture. However, I hold the opinion that adversities encountered when solving a problem should not influence its partial solution.

2. Personality disorders as a reason for behaviours that violate basic community life principles

The fact that personality disorders are strictly connected with an individual's behaviour does not commonly arouse any doubt. For ages, psychologists have justified a variety of human behaviours by personal factors (Cierpiałkowska 2015, 307). The first concepts of temper were created by Hippocrates in the ancient times (Cierpiałkowska 2015, 307). With respect to the discussed issues, the first concepts of personality created in relation to the beginnings of the psychoanalysis and Freud's idea of eroticism and anal expulsiveness also deserve special attention (Cierpiałkowska 2015, 307). J. Charcot and P. Janet, two French psychiatrists contributed to psychological sciences of the 19th century by introducing the term of 'personality (Cierpiałkowska 2015, 307). Personality disorder is defined as '… the condition consisting in chronic, holistic, rigid and non-adaptable pattern of thinking, emotions and social relations or control over impulses' (Zimbardo, Johnson, McCann 2015, 44). They are also determined as profoundly strengthened forms of the individual's actions showing their rigid and inadequate response to occurring events (Augustynek 2015, 21). They relate to both the individual's psychic as well as to their relations with other people (Augustynek 2015, 21). In the field of psychiatry there is a distinction between 'organic personality disorders' and 'incorrect personality' (Bilikiewicz 2011, 149). The first one is also called in literature an encephalopathic personality, a set of organic personality

disorders, a set of psycho-organic local impairment of the mind, a psycho-organic and a characteropathic syndrome (Bilikiewicz 2011, 149). In the past, the incorrect personality was called psychopathy (Bilikiewicz 2011, 149). Now, it is called dissocial personality (Bilikiewicz 2011, 149). In literature, it is claimed that personality disorders may concern 3 to 5% of population (Augustynek 2015, 21). This is, however, statistical data which is subject to quick changes when more analyses and more thorough analyses are conducted and when taking into consideration different evaluation criteria. Because of the above, under other source data coming from epidemiological examinations it is necessary to accept that peculiar personality disorders may concern even 18% of the living population (Jakubik 2011, 559). It seems impossible to resolve which of the mentioned results more thoroughly reflect the real scale of the problem. However, it is necessary to agree with the statement that irrespectively of the number of people suffering from the personality disorder their ailment constitutes a big problem not only for themselves but also for the real world around.

The origin of personality disorder is considered from both the biological as well as psychological point of view (Cierpiałkowska 2015, 316). In the field of psychological sciences three theories with respect to personality disorders are most frequently mentioned. These are: psychoanalytical concepts, cognitive-behavioural, biosocial and interpersonal concepts (Cierpiałkowska 2015, 317). It is important that each of them emphasises a role of neurobiological factors and their impact on the function of the environmental incentives in creation of personality disorders (Cierpiałkowska 2015, 317).

In the Diagnostic and Statistical Manual of Mental Disorders DSM-5 three main clusters of personality disorders have been distinguished next to which a group of other personality disorders has been separated (Diagnostic and Statistical Manual of Mental Disorders DSM-5 2015, 312–320). The first one is cluster A personality disorder, cluster B personality disorder and cluster C personality disorder (Diagnostic and Statistical Manual of Mental Disorders DSM-5 2015, 312–320). In disorders of personality of A type, one may mention: paranoid personality disorder, schizoid personality disorder and also schizotypal personality disorder (Diagnostic and Statistical Manual of Mental Disorders DSM-5 2015, 312–314). They are mainly characterised by oddity and eccentricity (Cierpiałkowska 2015, 311). According to the statistical data paranoid personality disorder concerns 0.5% to 2.5%, schizotypal disorder – 3% and schizoid disorder – 0.1%–2.5% people (Cierpiałkowska 2015, 311). Modern research shows that disorders of personality A concern more often men than women (Cierpiałkowska 2015, 311). Antisocial personality disorder, borderline personality disorder, histronic personality disorder, narcissistic personality disorder are anomalies with respect to totality of the individual's personality creating cluster B (Diagnostic and Statistical Manual of Mental Disorders DSM-5 2015, 314–317). This group of the personality disorders is characterised by drama, emotionality and ignorance of consequences

(Cierpiałkowska 2015, 311). The first of them constitutes from 1% to 3% of the cases and more often concerns men than women, the second one concerns 2% of all the personality disorders and is more popular with women (Cierpiałkowska 2015, 311). Histronic personality disorder refers to 2–3% of the cases and is dominant among women (Cierpiałkowska 2015, 311). The last of them concerns fewer than 1% of the cases and in 50–75% of the cases concerns men (Cierpiałkowska 2015, 311). Personality disorders of type C cover: avoidant personality disorder, dependent personality disorder and also obsessive-compulsive personality disorder (Diagnostic and Statistical Manual of Mental Disorders DSM-5 2015, 317–319). Tension, fear and dismay are elements characteristic of this type of the disorders (Cierpiałkowska 2015, 311). The dependent personality disorder more often occurs in women than men unlike the avoidant personality disorder and the obsessive-compulsive personality disorder and it constitutes 2–4% of all the cases of the discussed type (Cierpiałkowska 2015, 311). A comparison of the personality disorder contained in the Classification of Mental Disorders and Conduct Disorders in ICD-10 is somewhat different. Like in the Diagnostic and Statistical Manual of Mental Disorders DSM-5, also here personality disorders have been divided into 3 groups (Cierpiałkowska 2015, 309). They are specific personality disorders, mixed personality disorders and others and also permanent changes in personality which do not result from deficiency or disease of the mind **(**International Statistical Classification of Diseases and Related Health Problems ICD-10 2012, 238–240**)**.

Personality disorders are accepted in psychiatry and clinical psychology as one of the most intricate and multifaceted issues, with many controversial clusters (Jakubik 2011, 539). They are related to underdevelopment of cognitive structures and anomalies in the range of temperamental variables (Jakubik 2011, 551). Human personality is strictly connected with regulatory and integral mechanisms, going at two fundamental stages of organisation (Jakubik 2011, 551). They contain a level of appetitive and emotional structures and a level of cognitive structures (Jakubik 2011, 551). Correct development of personality leads to subordination of appetitive and emotional structures to those cognitive ones, which differs it from the dysfunctional personality (Jakubik 2011, 551). The functional advantage of the appetitive and functional structures over the cognitive structures in individuals with the dysfunctional personality results from the low level of cognitive configuration development (Jakubik 2011, 551). It leads to aggressive conduct, appetitive and emotional one (Jakubik 2011, 551). Such, undoubtedly, influences an ability of the individual to control their own behaviour.

Irrespectively of the accepted system of classification all the mentioned disorders of the personality determine, to the smaller or greater extent, actions undertaken by the person whom they concern. Anti-social disorder, occurring in the Classification of Mental Disorders and Conduct disorders in ICD-10 also as the dissocial disorder seems to be most important with respect to the topic

of the article. It is manifested in a permanent trend to undertake behaviours which are irresponsible and oppressive towards other people (Zimbardo, Johnson, McCann 2015, 45). Individuals representing this kind of incorrect personality are perceived by the community as bad people, consciously and voluntarily harming others. Causing pain and suffering to others is recognised by the society as a source of satisfaction and a feeling of accomplishment. The cultivation of the dissocial personality can be noticed already in childhood, in behaviours such as disturbing during lessons, participating in fights or escaping from home (Zimbardo, Johnson, McCann 2015, 45). It is believed that disorders of controlling behaviour and oppositional and rebellious disorders occurring in childhood or adolescence usually precede the creation of incorrect personality (Cierpiałkowska 2015, 313). As the time passes the undesirable conduct in youth can strengthen and take a form of actions full of cruelty (Zimbardo, Jahnson, McCann 2015, 45). Failure to consider feelings and needs of other people and failure to feel guilty are additional features determining anti-social personality (Augustynek 2015, 24). Low tolerance to frustration, inclination towards aggression and violence of undertaken actions constantly accompany the discussed nosological individual (Cierpiałkowska 2015, 313). The most frequently mentioned elements describing the dissocial personality cover among others: permanent lack of capacity to create emotional relationships with other people, an instrumental attitude to sexual life such as adequate treatment of the partner, neglecting norms, rules and social obligations, undertaking rooted improper social behaviours, lack of capacity to foresee consequences of the actions undertaken, no fear, failure to distinguish the border between the reality and fiction, the truth and a lie, desire to satisfy immediately own wishes and needs, trend to self-harming (Jakubik 2011, 560–561). Comparison of the mentioned features forming the individual's personality contributes to their undertaking immoral activities, unacceptable socially, violating the accepted and compulsory in a given cultural community norms in a form of e.g. mistreatment of animals, setting fires, chronically lying or stealing (Zimbardo, Johnson, McCann 2015, 45). The mentioned wrongs are some of a few ones committed by people with anti-social personality disorder. Psychopaths or sociopaths are individuals rated to a group of people with dissocial personality. They are most frequently perpetrators of the most brutal murders or other felonies (Zimbardo, Johnson, McCann 2015, 45). It is important that the people with anti-social personality disorder not always do not abide by legal norms. It occurs that they use the features that make up their incorrect personality to accomplish often reputable and socially approved targets such as: setting up prosperous business, making big money, coming to prominence in a professional carrier but they make it above all and at any price (Zimbardo, Johnson, McCann 2015, 46).

The high risk at undertaking behaviour which is against law may also be taken by a man with the type of impulsive personality, emotionally unstable. Here, one can distinguish explosive and aggressive personality (Jakubik 2011, 561).

Failure to cool out, impulsivity, emotional instability are basic terms referring to the discussed type of personality (Cierpiałkowska 2015, 313). Frequent explosions of anger, hatred, aggression both verbal and physical one, appetitive conduct or constituting threat to oneself or the community with failure in ability to foresee their consequences are typical features making up the emotionally unstable personality of the mentioned type (Jakubik 2011, 561). They increase a probability to commit unlawful acts.

The behaviour that is contrary to the binding legal norms may also relate to incorrect habits and disorders to control oneself. Pyromania i.e. pathologically setting fire or kleptomania which constitutes pathological thefts are some of them (Cierpiałkowska 2015, 313). It is difficult to explain them more thoroughly by something else than presence of conduct disorder, anti-social personality disorder or experiencing maniac episode (Diagnostic and Statistical Manual of Mental Disorders from DSM-5, 216–217).

Discussing the issues of personality disorders with reference to legal sciences, in particular to the issue of sanity it is necessary to take into account that all of them may affect such behaviour of the individual. A negative evaluation of the person's conduct should be preceded by finding if there is possibly personality disorder or another dysfunction of the mental health and their cause-effect relation. The application of the mentioned rules would allow honest and correct evaluation of the reality.

3. Personality disorders as a premise excluding or limiting capacity to recognise the nature of one's act or control one's conduct

Becoming familiar with the origin and influence of personality disorders on the individual's life and by the same token on decisions made by them we can easily notice an important relation to what is called in the legal sciences, sanity. Insanity is defined as lack of capacity to recognise the nature of one's act or to control one's conduct by a perpetrator of a forbidden act at the moment of committing it (Gabrysiak-Namysłowska 2011, 117–118). Under the binding legal provisions such state of affairs is caused by a mental disease, mental impairment or another disruption of the mental function (Act of 6 June 1997 Criminal Code Art. 31 § 1). Its occurrence makes impossible to attribute guilt to the perpetrator of the forbidden act or hold them criminally liable (Daniluk 2011, 226). Structure of insanity within the scope of adopted legal regulations is based on a mix method, psychiatric and psychological one (Paprzycki 2013, 519). So, it concentrates on both biological reasons and psychological effects in a form of lack of capacity to recognise the nature of an act or to control own conduct (Paprzycki 2013, 519). Personality disorders are counted among other disruption of mental functions

that could affect sanity of a perpetrator of a forbidden act (Paprzycki 2013, 529). Literature provides information that a big number of people violating law suffer from personality disorders (Gierkowski, Paprzycki 2013, 121). That is why, they constitute one of the key subjects of psychiatric or psychological research undertaken to provide expertise for courts (Gierkowski, Paprzycki 2013, 121).

The psychiatric and psychological literature discussing issues of development of incorrect personality indicates its significant connection with commonly unacceptable behaviour of the individual it concerns. Theories and research on personality disorders known to the modern science can be classified according to fundamental theoretical ideas into: constitutional typological theories, dynamic theories, theories of personality qualities and systemic theories (Jakubik 2011, 539). As the name indicates at grassroots of the last ones there is a system understood as… 'a collection of elements and mutually occurring between them relations and feedbacks forming a totality able to function' (Jakubik 2011, 547). According to the discussed concept efficiency to manage every system is dependent on a level of development of its composition and proper provision of incentives from the outside environment (Jakubik 2011, 549). Underdevelopment of regulating and integral mechanisms of the system is one of the more important symptoms indicating disorders of the individual's personality which is manifested among others by dominance of reactive over purposeful behaviours occurring especially in the circumstances that are perceived by the individual as difficult, threatening and dangerous. It is also manifested by low level of efficiency in pursuing tasks or meeting challenges, high determination of experienced emotions on intentional conduct (Jakubik 2011, 549). Impaired development of cognitive structures strictly connected with the personality disorders contributes to:

> ... instability, rigidity (inability to reorganise when receiving new information, inflexibility (lack of openness to new information) and a low level of complexity of structures, small number of elements and relation between them (poor information contents), advantage of mono-specific and multi-specific levels over a level of hierarchical organisation of information, disorders in functioning the hierarchical level influenced by emotional agitation (increase in activation) especially negative emotions, a narrow range of cognitive representation of the community and a low level of its structuring, instability of cognitive representation of own self, the outside world and relation me-not-me [...] uniform and narrow system of norms and values, failure to produce proper strategies to process information and to programme conduct' (Jakubik 2011, 551–552).

Undoubtedly, it is necessary to agree with the opinion that underdevelopment of the cognitive functions influences reception and perception of the surrounding reality. For this reason, truthfulness of the conviction commonly existing in the society seems doubtful that perpetrators of forbidden acts with antisocial personality often determined as psychopaths should be stigmatized because of their awareness of doing evil. If it seems to be adequate to claim that a person that disposes of a limited system of norms and values and that does not dispose

of formed correct strategies of adapting incentives and planning own behaviour, is s/he aware of acts undertaken? In the discussed issues it is not about justifying behaviours performed by the perpetrators with incorrectly created personality but about finding their reason. It would really be unfair to evaluate a person through activities that they had no influence on. It is improper to condemn the individual for determined conduct being manifestation of personality disorders, they experience. It is impossible to accept as correct to hold somebody guilty for their disease or disorders especially that they are intrinsically a sufficient ailment.

The Diagnostic and Statistical Manual of Mental Disorders DSM-5 provides that personality disorders are a fixed form of conduct, reception and experiencing emotions diverging from the one accepted by a given community which concerns at least two of the areas such as: self-perception, perception of others, the world, showing emotions, interpersonal relations and supervision of impulses (Diagnostic and Statistical Manual of Mental Disorders from DSM-5, 311). All the mentioned areas affect not only capacity to recognise the nature of an act but also predispositions to control one's own conduct. Failure in producing a skill to control some appearing impulses to act or inability to control own emotions directly influences human conduct. In case of individuals suffering from personality disorders, they result from incorrect development of structures responsible for them. Capacity to recognise the nature of an act, contemporarily described in psychology as decisional processes is strictly connected with its recognition both legally and morally and with occurring motivation (Paprzycki 2013, 542). Inspiration to act depends on many factors, among which the most important ones are just personality mechanisms (Paprzycki 2013, 542). Correctness of their performance depends on undisturbed process of personality development leading to its correct development. Mechanisms of self-control also play an important role in guiding one's conduct. Grown-up personality, optimally shaped, disposes of remedial sequences that make possible an analysis and development of required difficult solutions, complicated and complex problem tasks or situations (Paprzycki 2013, 515). Personality disordered relates to irregularities in the scope of personality mechanisms as well as self-control mechanisms strictly influencing capacity to control conduct.

4. Conclusion

Under the arguments mentioned in the article personality disorders affect conduct undertaken by a human being. Irrespectively of the fact whether they have organic reasons resulting from for example injury of the brain, or they are counted among the so-called incorrect personality they disorganise a way of the individual's functioning at many levels. They influence capacity to understand the actions undertaken by them and to control their conduct. Because of this, they

often constitute one of the important subjects of evaluation made in the scope of providing expertise for court.

Contemporarily, despite the development of psychiatry and clinical psychology as well as knowledge in the range of personality disorders, people suffering from them are treated just as bad people. The fact that the society has no elementary knowledge concerning incorrectly formed personality causes incomprehension of the people in which it occurs and condemnation of acts which are frequently independent of them. The outlined attitude does not liquidate a problem of people with personality disorders undertaking actions against the society's expectations. To cap it all off, it may lead to the deeper strengthening of a conviction about humans with personality improperly developed consciously doing evil. A change to incorrectly formed human personality seems to be a difficult task, however, contemporarily there are known methods of influencing such people. The methods improve their functioning in the society so by the same token compliance with principles, rules and legal provisions. Condemning a person committing a forbidden act it would be reasonable to make earlier sure that the person does not suffer from any personality disorder influencing their conduct. Only such practice will allow a fair evaluation of the individual's conduct.

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